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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

AMERICANS FOR SAFE ACCESS et al., Plaintiffs and Respondents, v. COUNTY OF ALAMEDA et al., Defendants and Appellants.	A121390, A122619 (Alameda County Super. Ct. No. RG04-192053)

These consolidated cases consider how to determine the integrity of certain electronic voting machines under Elections Code section 15630.[1] In A121390, defendants County of Alameda and its Registrar of Voters, Dave MacDonald (County), appeal from a judgment entered on a grant of summary adjudication and from a permanent injunction, both in favor of plaintiffs Americans for Safe Access and three Berkeley voters (ASA). We affirm the judgment in part and reverse in part. We affirm the permanent injunction with the proviso that it is to be narrowly construed, as we explain below.

ASA sought and obtained a substantial award of attorney fees under the private attorney general statute (Code Civ. Proc., § 1021.5). In A122619, County appeals, claiming the award is excessive. We reverse the fee award in part, and remand for further proceedings.

[1] Subsequent statutory citations are to the Elections Code unless otherwise indicated.

I. FACTS AND PROCEDURAL BACKGROUND

A. The Judgment and Permanent Injunction (A121390)

The material facts are undisputed. We take them from the trial court's order granting ASA's motion for summary adjudication.

Measure R, a ballot measure of the City of Berkeley, was on the ballot for the election on November 2, 2004. Some of the ballots in that election were cast with Diebold Accuvote-TS direct-recorded electronic (DRE) voting machines. The Registrar of Voters (the Registrar) certified the election on November 30, 2004. Measure R did not pass.

On December 3, 2004, ASA requested a recount of the votes cast on Measure R. Section 15630, involving examination of ballots for recount purposes, provides, as pertinent here, that "All ballots, whether voted or not, *and any other relevant material,* may be examined as part of any recount if the voter . . . requesting the recount so requests." (Italics added.)

Pursuant to section 15630, ASA requested four categories of elections materials: (1) redundant vote data for the DRE machines; (2) chain of custody documentation and system access logs for the DRE system; (3) audit logs; and (4) logic and accuracy test results. The Registrar denied ASA's request for these materials, on the ground that he did not consider them relevant to the recount.

The Registrar conducted a hand recount of the paper ballots cast as provisional or absentee ballots. ASA declined his offer to recount the images of the ballots cast on the DRE machines. The recount, concluded on January 7, 2005, did not change the outcome of the election regarding Measure R.

ASA filed a petition for writ of mandate, complaint for declaratory and injunctive relief, and statement of contest, alleging that the four categories of materials were relevant to the recount. The pleading was subsequently amended. The first and second causes of action sought relief under the Elections Code, primarily section 15630, in mandate and declaratory relief, respectively. The third cause of action sought primarily injunctive relief under both the Elections Code and the California Constitution. The

fourth, fifth, and sixth causes of action sought relief on constitutional grounds, based on equal protection, due process, and the right to have one's vote counted, respectively.

County demurred to the pleading, and the trial court sustained the demurrer without leave to amend and dismissed the action.

ASA appealed. We reversed on the specific ground that ASA's allegations of relevance were sufficient to survive demurrer. We remanded for the limited purpose of the trial court's determination, "on evidentiary facts, whether the requested materials are in fact relevant." (*Americans for Safe Access et al. v. County of Alameda et al.* (Apr. 28, 2006, A111594) [nonpub. opn.] ("*Access I*").)

On remand, County moved for summary judgment on the ground that the materials were not relevant under section 15630. On April 12, 2007, the trial court denied County's motion on the ground that "the evidence offered in support of the motion is incomplete."

ASA moved for summary adjudication on the ground that the materials were relevant under the statute. ASA filed a separate statement of material facts, citing declarations of computer experts and other evidence, including evidence obtained during discovery. As the trial court noted, County did not file "an opposition separate statement, and therefore concede[s] that the material facts offered by [ASA] are not disputed." The trial court set forth those material facts as follows.

Credible experts established that the requested audit logs contained information about how the DRE machines functioned before, during, and after the election of November 2, 2004. This included information about system malfunction or error, and human access to the units and to the vote tally server. The requested redundant data contained copies of votes and information about votes cast electronically during the election, that could be compared to the vote tallies to confirm the accuracy of the electronically recorded votes. The requested chain of custody records contained information about human access to the DRE machines and the regulation of such access before, during and after the election. The requested logic and accuracy test reports

contained information about the proper functioning and preparation of the DRE machines used in the election.

Information in the audit logs and chain of custody records could show unauthorized access and possible manipulation of the voting data. Information in the redundant data could show a discrepancy between the votes cast on the individual DRE machines and the vote tallies generated by the central server.

All of the data and documents requested by ASA contain information that would aid in confirming or casting doubt upon the accuracy of the votes cast on the DRE machines. Undisputed expert opinion states that in the absence of paper ballots, the requested information is the only way to assess the accuracy of electronically stored votes.[2]

Relying on excerpts from the deposition of the Registrar, the trial court found that County "concede[s] that, if the data requested by [ASA] showed discrepancies between what was recorded as the vote and what was actually tallied as the vote, such information would be 'of concern' to the accuracy of the vote."

Based on the foregoing, the trial court concluded the requested information was relevant under section 15630, and should have been disclosed to ASA. Also on April 12, 2007, the court granted summary adjudication on all of ASA's causes of action. The court granted summary adjudication on the first, second, and third causes of action "for [v]iolation of the Elections Code." The court granted summary adjudication on the fourth, fifth, and sixth causes of action, reaching and deciding ASA's constitutional claims.

Subsequently, on February 27, 2008, the court entered judgment for ASA on its combined petition and complaint.

The court also entered a permanent injunction that "in all future elections conducted in Alameda County, [County] shall produce for public examination relevant

[2] This expert opinion comes from the declarations of two computer experts, Jones and Bishop.

election materials of the following types, in connection with an election that is the subject of a recount, if any such materials are requested by a voter pursuant to [section] 15630:

"1. All audit logs

"2. All redundantly stored vote data

"3. Complete chain of custody information for all system components and for human access to stored data

"4. All logic and accuracy test reports[.]"

The court further decreed that County was "hereby ENJOINED from refusing to produce for public examination relevant election materials in the categories listed above as part of any future recount, in connection with an election that is the subject of a recount, if any such materials are requested by a voter pursuant to [section] 15630."

We shall affirm the trial court's grant of summary adjudication on the first three causes of action, based on the Elections Code, because we conclude that the trial court correctly determined the materials requested were relevant within the meaning of section 15630. We shall reverse the grant of summary judgment on the fourth, fifth, and sixth causes of action, but only on the ground that—having properly disposed of the issues between the parties on statutory grounds—the trial court should not have reached the constitutional issues raised by those causes of action. We shall affirm the permanent injunction, but with the key proviso that it is limited in scope to DRE machines—which County no longer uses.[3]

[3] It is undisputed that, in 2006—the year before the injunction issued—County switched from Diebold DRE machines to a system of paper ballots, which are read by an optical scanner. County retains one electronic touch screen voting machine, equipped with a voter-verified paper trail as now required by law, in each polling place for voters with disabilities who cannot mark a paper ballot. In the November 2006 election, these machines recorded only 0.82 percent of the vote.

B. Attorney Fees (A122619)

On April 25, 2008, ASA's counsel, the Santa Monica firm of Strumwasser & Woocher LLP (S&W), filed a motion for attorney fees under the private attorney general doctrine of Code of Civil Procedure section 1021.5 (section 1021.5). S&W argued that ASA was the prevailing party in the litigation, which is not disputed on appeal.

Attorney fees under section 1021.5 are computed as follows: first, the trial court determines the "lodestar," which is the number of hours reasonably expended by counsel multiplied by a reasonable hourly rate. The court then determines whether the lodestar should be enhanced or decreased by a "multiplier," based on factors such as the novelty and complexity of the litigation, the quality of the representation and its results, and whether counsel took the litigation on a contingency basis. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49 (*Serrano III*); *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833; see *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*).) The purpose of enhancing the lodestar by a positive multiplier is to "fix a fee at the fair market value for the particular action." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 (*Ketchum*).) Or in other words, to "take account of unique circumstances in the case." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1216.)

S&W requested a fee award of $1,055,255.26, claiming such an amount was reasonable given the novelty and complexity of the litigation, the fact that it spanned 40 months and included substantial briefing in this court, and the recalcitrant conduct of County which led to a sanction award.[4] S&W argued its hourly rates requested for its several attorneys were within the range of the rates charged by private attorneys of similar skill, reputation and experience. Based on those rates, S&W requested a lodestar of $519,207.38. Finally, S&W requested a multiplier of 2.0, primarily because the firm had accepted the case on a contingent fee basis.

The breakdown of the requested fee award is as follows:

[4] The trial court sanctioned County for "a pattern of withholding relevant evidence and failing to preserve evidence central to the allegations of this case." County did not challenge the sanctions order on appeal and has paid the sanctions.

Partner Woocher	12.5 hours @ $625/hr.	$7,812.50
Partner Strumwasser	7.1 hours @ $625/hr.	$4,437.50
Associate Luke	790.6 hours @ $490/hr.	$387,408.70
Associate Dudovitz	218.3 hours @ $490/hr.	$106,967.00
Associate Yang	19.2 hours @ $410/hr.	$7,872.00

Adding $1519.00 for the work of two junior associates and a technological analyst, plus $20,031.18 in costs, S&W reached its lodestar figure of $519,207.38. Applying the multiplier of 2.0, and adding on $16,840.50 which S&W admitted was not subject to the multiplier, S&W reached its total fee request of $1,055,255.26.

S&W emphasized that when it took on this litigation no court had interpreted section 15630. Furthermore, a few months prior to taking on this litigation, S&W had lost on demurrer in a similar lawsuit, raising similar arguments, filed in Riverside County. S&W also argued that when they filed this suit, "independent computer scientists had yet to definitively demonstrate—and the country had yet to realize—that vote data on [DRE machines] could be manipulated without detection."

S&W supported its motion with records of time spent on the case by its various attorneys, and also set forth in considerable detail the attorneys' qualifications in the field of election law. As we view the record, S&W was remarkably qualified to bring the lawsuit against County.

S&W partner Fredric Woocher declared that the hourly rates requested "are comparable to, if not lower than, the prevailing market rates charged by lawyers in both Northern and Southern California with education, skill, and experience comparable" to S&W lawyers.

Woocher further declared that one of the "principal reference points" in establishing the reasonableness of S&W's billing rates were "the rates regularly charged by other law firms in Los Angeles and the Bay Area against whom we most frequently litigate and with whom we compete in hiring." Woocher monitored those rates through discussions with colleagues in those firms and through published surveys of their rates. He personally confirmed the reasonableness of S&W's rates "with colleagues in several

Bay Area and Los Angeles law firms." He supported his declaration with fee surveys, which showed his fee request reasonable as compared to Bay Area and Los Angeles law firms doing complex civil litigation.

Attorney Michael Rubin, who has extensive experience in litigating attorney fee issues, supported S&W's motion with a declaration that, in his view, S&W's lodestar request and the 2.0 multiplier were reasonable. With regard to the lodestar, Rubin declared: "The rates requested by [S&W] . . . are substantially below the comparable market rate in the San Francisco Bay Area for attorneys with similar skill, experience, and reputation handling similarly complex civil litigation. . . . [I]t is not uncommon for senior attorneys at San Francisco commercial firms to bill their hourly-paying clients between $700-$900 per hour, or more, for their work in complex civil litigation." He also declared the fees requested for the associates were reasonable for lawyers of their experience.

County opposed the motion. County argued that S&W sought fees for work done in the Riverside County case, and for work not performed, arguments County abandons on appeal. County also argued that S&W's lodestar was excessive and that a multiplier was not warranted.

With regard to the lodestar, County argued in two pages that a "review by political law expert Robin B. Johansen," a partner in the firm now representing County on appeal, "concludes that [S&W's] billing rates are 'excessive.' " In her declaration supporting the opposition, Johansen stated she was a partner with 30 years' experience and charged $425 per hour. Her associate billed at $360 per hour. She considered S&W's rates excessive and her firm's rates "fair and competitive in the area of law in which we practice."

In a declaration supporting the reply to the opposition, Woocher stated that S&W "has a significant number of fee-paying clients who seek out our legal services and are perfectly willing to pay our standard commercial rates because of the quality of the legal services we provide. [S&W] and [its] individual attorneys . . . have developed a

reputation as being among the best and most successful election-law and constitutional attorneys in the state."

After oral argument, the trial court reduced the requested fee award, finding that $550 per hour was a reasonable rate for Woocher and Strumwasser, $425 per hour was reasonable for Luke, $375 per hour was reasonable for Dudovitz, and $275 per hour was reasonable for Yang. The court did not award fees for the "de minimis" work performed by the two junior associates and the technical analyst. The court reduced the lodestar by $21,855.85 because of unnecessary duplicate appearances and duplicative billing. The court found a 2.0 multiplier was appropriate "based upon the novelty and difficulty of the issues in the case, the skill with which they were presented, and the contingent risks involved in the litigation." The court merely recited these *Serrano III* factors without explanation.

With costs, the total fee award is $875,182.80.

II. DISCUSSION

A. The Judgment and Permanent Injunction (A121390)

1. The Judgment

Where, as here, an order granting summary adjudication determines all the issues between the parties, the order is appealable. The appeal from the order is construed to be an appeal from the final judgment. (*Belio v. Panorama Optics* (1995) 33 Cal.App.4th 1096, 1101; 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 278, pp. 731-733.) We review an order granting summary judgment or summary adjudication de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 498 (*Ramalingam*).)

The issue central to the grant of summary adjudication on statutory grounds, i.e., on the first three causes of action, is the issue of relevancy. The trial court determined that the four categories of requested materials are relevant to the recount requested in this case. We agree.

This issue is straightforward. Evidence Code section 210 defines relevant evidence as "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

It is factually undisputed that, in the absence of paper ballots, the only way to accurately determine the vote tally is to ensure that the vote tally of the DRE machines matches the votes actually cast. The requested materials are necessary for a determination that the DRE machines accurately recorded the votes cast and were not tampered with, for purposes of an accurate recount process. The materials are the only way to determine a discrepancy between votes cast and votes electronically recorded. Even the Registrar admits that such a discrepancy would be "of concern" to the accuracy of the vote tally.

Under Evidence Code section 210, the requested materials are clearly relevant. This conclusion renders moot County's complaint that the trial court relied on the arguably broader definition of relevancy in the discovery context, as set forth in *Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546. We note the trial court cited Evidence Code section 210 in its order granting ASA's motion. In any case, we review the trial court's ruling, not its rationale. (*Ramalingam, supra,* 151 Cal.App.4th at p. 498.)

County contends that the trial court ignores the plain meaning of the term "recount." County relies on *Keane v. Smith* (1971) 4 Cal.3d 932. That was an election contest case, not a recount case. (*Id.* at p. 934.) The court, in dictum, referred to a recount as "the mechanical act of tabulating votes." (*Id.* at p. 938.) The case clearly involved paper ballots (i*d.* at pp. 934-935), and we would assume a 1971 case, involving a 1970 election, predated electronic voting. In the absence of paper ballots, the tabulation of votes involves electronic data gathering processes—not a mechanical act.

County also suggests that ASA's position is an attempt to seek a forum on electronic voting per se, rather than a simple recounting of votes. The County points to other methods of determining whether a voting system is accurate, such as a court-ordered recount (§ 15640, subd. (a)(2) [ground for recount "[e]rrors or failures, whether electronic, mechanical or otherwise, in the safekeeping, handling, tallying, counting,

recording, or certification of the ballots or votes cast, sufficient to make it likely that the result of the election was affected . . . or sufficient to cast substantial doubt on the substantial accuracy of the results. . . ."]) or an election contest (§ 16100, subd. (f) [ground for contest "[t]hat there was an error in the vote-counting programs or summation of ballot counts"]). But these procedures involve different prerequisites, are more complex, and are inapplicable to what is required under section 15630. The fact that the Legislature has chosen to provide multiple layers of methods to determine an accurate vote count does not mean that, for any given election, the specific material requested by ASA becomes irrelevant to the determination of the accuracy under the count within the meaning of section 15630.

We thus conclude that the trial court correctly determined the materials requested were relevant within the meaning of section 15630.

Because the trial court properly disposed of the issues between the parties on statutory grounds, it should not have reached the constitutional issues raised by the fourth, fifth, and sixth causes of action. It is a well-settled rule that if statutory relief is adequate, it is unnecessary and inappropriate for a court to reach constitutional issues. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230-231.) Accordingly, we reverse the judgment with regard to the fourth, fifth, and sixth causes of action.

2. The Permanent Injunction

In 2006—the year before the injunction issued—County switched from Diebold DRE machines to a system of paper ballots, which are read by an optical scanner.

Thus, the permanent injunction involves only DRE machines, which are no longer in use. ASA's separate statement of material facts speaks only to DRE machines. The vast bulk of its evidence speaks only to DRE machines. While there are passing references in the expert declarations to alleged technical flaws with optical scanners, no issue regarding County's present voting system was framed in the summary adjudication proceedings. The court's order granting summary adjudication does not mention the current voting system; neither does the court's judgment or the permanent injunction.

Consequently, the permanent injunction only applies when County employs DRE machines to record votes. With that key proviso, we affirm the injunction.[5]

B. Attorney Fees (A122619)

County does not dispute that ASA is entitled to attorney fees, but only contests the amount. As we will explain further below, County contends the lodestar is too high for various reasons, and that the 2.0 multiplier is unwarranted. We affirm the fee award as to the lodestar, but reverse the award as to the multiplier and remand for further proceedings.

1. The Effect of a Partial Reversal

We first dispose of a preliminary argument made by County. County contends that because of our partial reversal of the judgment, we should remand for the trial court to reduce the fee award. County relies on cases where the prevailing party had so-called limited success, because of a reduction in damages on appeal or because of a failure to obtain all of the requested relief. (See, e.g., *Ventas Finance I, LLC v. Franchise Tax Bd.* (2008) 165 Cal.App.4th 1207, 1233-1235 [partial reversal on appeal reducing amount of tax refund]; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249-250 (*Sokolow*) [plaintiffs did not receive all the results they sought in their lawsuit].)

But our partial reversal means only that ASA prevailed on statutory grounds, which made it unnecessary for the trial court to reach the related constitutional issues. Under these circumstances, attorney fees should not be reduced on that basis. A party need not succeed on all possible theories if it achieves its sought-after results. (*Hogar Dulce Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1368-1369; *Sokolow, supra*, 213 Cal.App.3d at pp. 249-250; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303-1304.)

The permanent injunction presents a closer question, because we have ruled that it is limited in scope. But we have not reversed it. ASA obtained the result it sought in the

[5] Our narrow interpretation of the injunction renders moot County's various challenges to it, which center around the application of the injunction to the current system of paper ballots.

litigation: an injunction regarding the future use of DRE machines. Those machines cannot be used again; the injunction stands and ASA was successful.

Our disposition regarding the judgment and injunction does not ipso facto require a remand for consideration of reduction of attorney fees.

2. Standard of Review

We review an award of section 1021.5 attorney fees for abuse of discretion. We will not disturb such an award unless there is no reasonable basis for the trial court's ruling—i.e., that it is clearly wrong. (*PLCM, supra*, 22 Cal.4th at p. 1095; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 621 (*Ramos*).) But as we have observed, "discretion may not be exercised whimsically, and reversal is required where there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied." (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634 (*Flannery*).) While the trial judge is in the best position to determine the value of counsel's services, our review of the application of a lodestar multiplier to a fees award involves "more than an ordinary question of abuse of discretion" because "the fees award must be scrutinized for its compliance with all applicable standards. [Citation.]" (*Ramos, supra*, at p. 622.)

3. The Lodestar

The determination of the reasonable value of counsel's services in a given case (i.e., the lodestar) involves the trial court's " 'consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' " (*PLCM, supra*, 22 Cal.4th at p. 1096, quoting *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-624.) The reasonable hourly rate is that prevailing in "the community for similar work." (*PLCM, supra*, at p. 1095; see *Ketchum, supra*, 24 Cal.4th at p. 1132 ["the lodestar is the basic fee for comparable legal services in the community"].)

County makes three challenges to the trial court's lodestar award. First, County complains that the trial court refused its request for a statement of decision and otherwise

did not provide an adequate explanation of how it arrived at the hourly rates awarded. But a trial court is not required to issue a statement of decision with regard to an attorney fee award. (*Ketchum, supra,* 24 Cal.4th at p. 1140.) And a trial court is not required to give an explanation of its lodestar calculations—all that is required is that the fee appear reasonable from the record. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (*Wershba*).) On appeal, we must "infer all findings in favor of the prevailing parties." (*Ibid.*) There is ample evidence in the materials submitted to the trial court to show that the lodestar is reasonable and the court did not abuse its discretion. As noted, we can only reverse if the fee award is clearly wrong.[6]

Second, County contends that ASA failed to show it made good faith efforts to hire local counsel or that hiring local counsel was impracticable. County relies on two cases which appear to interpret *Ketchum* and *PLCM* to say that the "community" in which the market rate for fees is assessed is the *local* community. (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1242-1244; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 398-400.)

It appears this argument was not raised below, and these two cases were not cited to the trial court. In any case, these cases conflict with *PLCM*, which found no abuse of discretion by a Los Angeles County trial judge who used "the prevailing market rate for comparable legal services in San Francisco, where counsel is located." (*PLCM, supra,* 22 Cal.4th at p. 1096.)[7] And even if ASA needed to show it was impractical to hire local

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[6] County's reliance on *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140 (*Graciano*), and *Ramos* is misplaced. Neither case holds that a trial court is required to explain its lodestar fee award in all cases. *Graciano* involved a fee award that had no reasonable basis in the record. (*Graciano, supra,* at pp. 154-156.) *Ramos* involved a *multiplier*, not a lodestar, which the court found was an abuse of discretion absent a more detailed explanation. (*Ramos, supra,* 82 Cal.App.4th at pp. 625-626.) We will discuss further below the distinction in review between lodestars and multipliers.

[7] County argues that "where counsel is located" is dictum. But there is authority that we are bound by Supreme Court dicta. (*Hickman v. Mulder* (1976) 58 Cal.App.3d 900, 902; but see *Grange Debris Box & Wrecking Co. v. Superior Court* (1993) 16

counsel, the record shows that S&W was eminently qualified to represent ASA due to its expertise with DRE machines and its participation in litigation in Riverside County over the meaning of section 15630.

Third, County argues that the trial court improperly defined the "community" for purposes of determining prevailing market rates for attorney fees. County argues that the community should have been the East Bay. This argument appears to be raised for the first time on appeal. In any case, one of County's own experts compared S&W's fee request to rates charged by San Francisco or Bay Area attorneys. County can hardly now claim that the community should be limited to the East Bay. And, as we have just noted, *PLCM* analyzed a fee request in Los Angeles litigation based on the community of San Francisco, where counsel was based. And S&W presented ample evidence of the reasonableness of their rates in Los Angeles.

County also argues that the trial court should have defined the community as firms practicing election law statewide. Again, *PLCM* settles this argument against County.

Embedded in County's third argument, although not precisely articulated until the reply brief, is that the trial court should have considered only hourly rates charged by election law attorneys, either in the East Bay or statewide. County presents no clear authority for this strict subject matter limitation regarding the assessment of attorney fees. In any case, Woocher's initial declaration stated the fees were reasonable compared to those charged by firms with which S&W litigates and from which it recruits—presumably firms that do election law cases. His reply declaration states that clients, in a free market, willingly pay his rates due to the expertise of his firm in election law. Additionally, Rubin declared that S&W's fees were "substantially below the comparable market rate in the San Francisco Bay Area for attorneys with similar skill, experience, and reputation handling *similarly complex civil litigation*." (Italics added.)

Cal.App.4th 1349, 1358 overruled on unrelated grounds, *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 367 [to contra].) In any event, Supreme Court dicta are persuasive. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 492, p. 552.)

We conclude that the lodestar is reasonable.[8]

4. The Multiplier

A trial court may adjust a lodestar with a multiplier based on various factors, which include: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing lawsuits of the character here involved; [and] (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed. . . ." (*Serrano III, supra,* 20 Cal.3d at p. 49, footnote omitted.)[9]

"Multipliers can range from 2 to 4 or even higher." (*Wershba, supra*, 91 Cal.App.4th at p. 255.)

As noted above, the trial court awarded a 2.0 multiplier in this case "based on the novelty and difficulty of the issues in the case, the skill with which they were presented, and the contingent risks involved in the litigation." The court merely listed three *Serrano III* factors without explanation.

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[8] County also argues S&W should not receive fees comparable to those charged by large firms. County presents no authority for this argument. On the contrary, S&W presents authority that counsel's skill and expertise, not the size of the firm, is pertinent to the fee award. (See, e.g., *Bankston v. State of Ill.* (7th Cir. 1995) 60 F.3d 1249, 1256.)

[9] *Serrano III* listed a seventh factor not pertinent to this litigation: the comparative share of success of two law firms representing the prevailing party. (*Serrano III, supra,* 20 Cal.3d at p. 49.)

In *Ketchum, supra,* 24 Cal.4th at p. 1132, the court stated the *Serrano III* factors as only novelty and difficulty, skill, the foregoing of other work by the attorneys, and contingency, but gave no indication the remaining *Serrano III* factors were no longer valid.

County contends that the court abused its discretion by awarding the 2.0 multiplier for two reasons: the court did not give a sufficient explanation of its reasons, and such a multiplier was not appropriate under the *Serrano III* factors. We do not directly reach the County's second argument because we resolve this issue on the first.

While a court need not give an explanation of its fee award, reviewing courts have been more receptive to such explanations in the case of multipliers, as opposed to lodestars, presumably because they drastically enhance the award based on factors other than actual hours worked. Reviewing courts have shown concern over unexplained multipliers when it is insufficiently clear from the record whether the trial court followed the right standards and thus did not abuse its discretion.

For instance, in *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841 (*Northwest*), the court held that, based on the record before it, and in absence of any explanation of the trial court beyond the mere listing of *Serrano III* factors, there was no "persuasive justification for adjusting the lodestar upward." (*Id.* at p. 880.) The reviewing court noted the trial court relied on certain factors that required additional explanation, and also noted that two additional factors, that the enhanced fee award would be paid by a public agency and to a private law firm, militated against an enhanced lodestar. (*Id.* at pp. 880-881.) In the absence of sufficient explanation, the court reversed and remanded for reconsideration. (*Id.* at p. 882.)

Likewise, in *Ramos, supra*, 82 Cal.App.4th 615, the reviewing court reversed and remanded for reconsideration due to insufficient explanation of the factors relied upon for the multiplier. (*Id.* at pp. 625-627, 629-630.) The court was concerned about unexplained reliance on certain factors (*id.* at pp. 625-627), and concluded its review was frustrated by "the terse nature of the trial court's ruling," which "merely lists the enhancement factors used, without a more complete explanation of their applicability in this context. . . ." (*Id.* at p. 624.)

These cases may be distinguishable on their facts, but not on their principle. In the case of a terse order which merely lists factors without explanation, a reviewing court can

require further consideration if it is not clear from the record that the multiplier was a reasonable enhancement of the lodestar.

The trial court's lack of explanation of the multiplier, on this record with its distinct facts, frustrates our review. The three factors listed in the trial court's order require more explanation before we can conclude that the 2.0 multiplier was reasonable and not an abuse of discretion. Without explanation, they could militate for or against the multiplier. We note that S&W based its multiplier request almost entirely on the factor of contingency in a case in which it was awarded significant hourly fees of $500 and $425 per hour for work involving only the meaning of "relevant material."

Novelty and Difficulty of the Case. It is true that S&W embarked on what was probably a novel challenge to DRE machines under the then-uninterpreted section 15630. But when it accepted the present litigation it had already prepared for, and commenced, similar litigation in Riverside County. That litigation also involved the interpretation of what is "relevant" under the statute. And that litigation involved the same computer experts used in the present litigation. We also question whether the litigation was all that "difficult"—it was not, as County argues, a simple discovery dispute involving the meaning of "relevance," but the issues raised hardly seem of great difficulty. The case was largely resolved on summary adjudication, and did not go to a full trial.

Attorney Skill. *Ketchum* makes it clear that *Serrano III* factors should not be considered for a multiplier "to the extent they are already encompassed within the lodestar." (*Ketchum, supra,* 24 Cal.4th at p. 1138.) It is interesting that *Ketchum* refers to the skill factor as involving *exceptional* or *extraordinary* skill. (*Ibid.*) "The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of legal representation *are already encompassed in the lodestar*." (*Ibid.*, italics added.) "A more difficult legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate." (*Id.* at pp. 1138-1139.)

Ketchum then notes that the reasonable hourly rate is based on many factors, including the attorney's skill and reputation. The court concludes: "Thus, a trial court

should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable." (*Ketchum, supra,* 24 Cal.4th at p. 1139.)

We are aware of the cases which only find double counting when skill is *explicitly* stated as a basis for the lodestar. (See, e.g., *Ramos, supra,* 82 Cal.App.4th at p. 626; *Flannery, supra,* 61 Cal.App.4th at p. 647.) But tough cases are won by skilled attorneys, not lucky ones. We do not understand the emphasis placed on whether the trial court *explicitly* mentioned attorney skill as a lodestar base. To us, skill is seldom not a basis for a lodestar award. In this case, it seems it may well have been.

S&W's motion was supported, in no small part, by a declaration spelling out, in considerable detail, its attorneys' specialized expertise in election law. It is difficult to conclude, without further explanation by the trial court or a finding of *extraordinary* skill to justify a multiplier on that ground, that skill was not already encompassed in the lodestar and thus the trial court was double counting. Further explanation, or such a finding, would assist our review.[10]

Contingency. This factor militates in favor of a multiplier, since counsel risks losing and getting no fee at all.[11] (See *Ketchum, supra,* 24 Cal.4th at p. 1138; see *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579-580 (*Graham*).) Indeed, " 'The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that

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[10] We are aware that *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43 notes the lack of authority requiring a court to make an exceptional skill finding. (*Id.* at p. 61.) We agree that a court may not be *required* to make a finding—but we believe that such a finding, if made, would assist review of a case resolved by summary judgment with a 2.0 multiplier.

[11] The contingency factor in this case is questionable. The directions in our opinion in *Access I* positioned the issues so that it was likely plaintiffs would prevail and consequently obtain attorney fees.

risk.' " (*Ketchum, supra,* at p. 1136, citing Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?* (1977) 126 U.Pa. L.Rev. 281, 324-325.)

Other *Serrano III* factors militate both for and against a multiplier. The fact that S&W was precluded from representing other clients because it took on this case militates in favor; the fact that the attorney fees go from a public agency to a private law firm militates against. (See *Northwest, supra,* 159 Cal.App.4th at pp. 880-881.)[12] A county in difficult financial times will have the burden of paying the fees resulting from any multiplier.

In sum, on this record, we cannot conduct meaningful informed review based on a terse order merely reciting factors. We will accordingly require the trial court's further reconsideration of the multiplier to determine if it is warranted under the circumstances of this case.

III. DISPOSITION

The judgment is affirmed with regard to the first, second, and third causes of action, and reversed as to the fourth, fifth, and sixth causes of action. The permanent injunction is affirmed, subject to the proviso that the permanent injunction only applies when County employs DRE machines to record votes.

With regard to the lodestar, the fee award is affirmed. With regard to the multiplier, the fee award is reversed and the cause is remanded for further proceedings on reconsideration of the multiplier. Those proceedings should culminate in an explanation of the trial court's ruling.

Each side shall bear its own costs on appeal.

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[12] ASA argues that County's vigorous and disputatious litigation strategy justifies the multiplier. There is some authority for this position, but the law seems less than clear. ASA quotes from *Graham, supra,* 34 Cal.4th at p. 583, for the proposition that a multiplier is appropriate when "defendant's opposition . . . creates extraordinary difficulties." But the ellipses in the quoted passage from *Graham* hide the words "to the fee motion." *Graham* does not stand for the proposition that opposition throughout the entire case, creating extraordinary difficulties, justifies a multiplier. (But see *Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350, 1363 [relying on *Kern River Public Access Com. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205, 1228-1229].)

_____
Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Graham, J.*

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

AMERICANS FOR SAFE ACCESS et al., Plaintiffs and Respondents, v. COUNTY OF ALAMEDA et al., Defendants and Appellants.	A121390, A122619 **ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION** (Alameda County Super. Ct. No. RG04-192053)

THE COURT:

The opinion in the above-entitled matter filed on May 22, 2009, was not certified for publication in the official reports. After the court's review of requests under California Rules of Court, rule 8.1120 and good cause established under Rule 8.1105, it is hereby ordered that the opinion should be partially published in the Official Reports.

_____ _____

Marchiano, P.J.

* Pursuant to California Rules of court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I.B. and II.B.

Trial Court Alameda County Superior Court

Trial Judge: Honorable Winifred Y. Smith

Counsel:

Remcho, Johansen & Purcell, Robin S. Johansen, James C. Harrison and Thomas A. Willis for Defendants and Appellant.

Strumwasser &Woocher, Gregory G. Luke, Fredric D. Woocher, Michael J. Strumwasser, Aimee Dudovitz and Aparna Sridhar for Plaintiffs and Respondents.