SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 12/15/2015 TIME: 04:35:00 PM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Juanita Cerda
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2015-00007420-CU-TT-CTL** CASE INIT.DATE: 03/04/2015
CASE TITLE: **Donna Tisdale vs San Diego Board of Supervisors [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on 12/11/15 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

After entertaining the arguments of counsel and taking the Motion for attorneys' fees under submission, the Court confirms its tentative ruling, except as set forth below.

The first paragraph is vacated and replaced with the following:

The Motion for attorneys' fees, as asserted by Petitioners BACKCOUNTRY AGAINST DUMPS and DONNA TISDALE ("Petitioners") is GRANTED IN PART. As discussed below, attorney fees are awarded in the total reasonable amount of $530,932.72. Code of Civ. Proc. § 1021.5. This amount is payable jointly and severally by Respondent SAN DIEGO COUNTY BOARD OF SUPERVISORS, and real parties in interest SOITEC SOLAR DEVELOPMENT LLC, RUGGED SOLAR and TIERRA DEL SOL SOLAR. The combined request for an award of litigation costs is DENIED. Costs are not recoverable under section 1021.5. See Benson v. Kwikset Corp. (2007) 152 Cal.App.4th 1254, 1283 ("Since [section 1021.5] does not mention costs, we conclude the Legislature intended Code of Civil Procedure section 1033.5, the general costs statute, to apply."). Ordinary costs will be addressed via the concurrent Motion to strike or tax costs.

Parts "E." and "F." are vacated and replaced with the following:

E. Multiplier

Petitioners seek an enhancement, or multiplier, for the court litigation only, not the time incurred on the administrative proceedings. This request is premised on the contingent risk of the litigation.

After establishing the lodestar, the Court next engages in the multiplier analysis, and determines whether the lodestar figure should be augmented or diminished by one or more relevant factors. Keep Our Mountains Quiet v. County of Santa Clara, supra at 737. These factors include: (1) the novelty and

difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys and (4) the contingent nature of the fee award. Id. The lodestar reflects the general local hourly rate for a fee-bearing case, but it does not include any compensation for contingent risk, extraordinary skill, or any other relevant factors a trial court may consider. Ketchum v. Moses (2001) 24 Cal.4th 1122, 1138. The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation. Id. This adjustment is intended to approximate market-level compensation for such services, which typically include a premium for the risk of nonpayment or delay in payment of attorney fees. Id. Of course, the trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case. Id. The party seeking a fee enhancement bears the burden of proof. Id. In each case, the trial court should consider whether, and to what extent, the attorney and client have been able to mitigate the risk of nonpayment, e.g., because the client has agreed to pay some portion of the lodestar amount regardless of outcome. Id. It should also consider the degree to which the relevant market already compensates for contingency risk, extraordinary skill, or other relevant factors. Id.

Paragraph 13 within the declaration of counsel Volker states: "At the time petitioners retained our firm to represent them in this Court, petitioners had no significant financial resources to fund the litigation. Indeed, during the entire 6-month period of litigation – from February through July 2015 – petitioners were only able to raise and pay to our firm about $4,600 in attorney fees. Because petitioners had no direct financial interest in the litigation, and lacked financial resources to pay our firm even at its highly discounted public interest rates, I understood that it was unlikely that we would ever [be] fully compensated for our services unless we won the case." On the other hand, the retainer agreement between the parties is not a contingent agreement, requires a $10,000 retainer and bills petitioners on a monthly basis at a discounted rate. This evidence demonstrates that counsel accepted some contingent risk, but Petitioners were also obligated to reimburse some of the fees incurred. Thus, only a partial multiplier of 42 percent (.42) is warranted.

The smaller multiplier originally set forth within the tentative ruling was premised, in part, on the lack of contingent risk associated with the fees incurred during the administrative proceedings. It is now proper to increase the multiplier because the fees incurred during the administrative proceedings has been "backed out" of the equation.

Finally, a smaller multiplier is also appropriately applied to the attorney fee award. The risk that an attorney takes in the underlying public interest litigation has two components: the risk of not being a "successful party," i.e., of not prevailing on the merits, and the risk of not establishing eligibility for an attorney fee award. Graham v. DaimlerChrysler Corp. (2004) 34 Cal.4th 553, 583. Generally speaking, by the time of the commencement of fee litigation in section 1021.5 cases, the first and perhaps most substantial component of risk, that of not being a successful party, has been eliminated. Id. What remains is the second component that Petitioners may not be able to establish eligibility for fees, and some enhancement for this risk may be justified. Id. "The fact that the risk of fee litigation is generally less than the risk of litigation on the merits of the suit justifies a lower attorney fee multiplier for the former, if one is given at all." Id. The opposition vigorously challenged any entitlement to a fee award. In short, this Motion was not filed without the risk that Petitioners would be denied any recovery for attorney fees whatsoever. Thus, a 21 percent (.21) multiplier of the fee award is warranted.

F. Conclusion

Given the analysis set forth above, the Court makes the following award:

$95,814.13: DPEIR Comments
$53,743.63: FPEIR Comments
$149,557.76: SUBTOTAL A

$47,827.00: Preliminary Review of Record and Preparation of Petition
$97,433.38: Preparation of Opening Trial Brief
$50,893.75: Review of Opposition and Preparation of Reply Trial Brief
$49,750.00: Preparation for Hearing, Attendance at Hearing, Post Hearing Procedures
$245,904.13: SUBTOTAL B
$103,279.73: 42% (.42) Multiplier on Subtotal B

$29,910.00: Attorney Fee Motion
$6,281.10: 21% (.21) Multiplier on Fees Related to Attorney Fee Motion

$530,932.72: TOTAL

IT IS SO ORDERED.

Judge Joel R. Wohlfeil