Charles S. LiMandri, SBN 110841
Paul M. Jonna, SBN 265389
Teresa L. Mendoza, SBN 185820
Jeffrey M. Trissell, SBN 292480
FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, California 92067
Telephone: (858) 759-9948
Facsimile: (858) 759-9938

Attorneys for Defendants CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHY MILLER, an individual.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California, Plaintiff, v. CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHY MILLER, an individual, Defendants. EILEEN RODRIGUEZ-DEL RIO and MIREYA RODRIGUEZ-DEL RIO, Real Parties in Interest.	CASE NO.: BCV-17-102855 **IMAGED FILE** **DEFENDANTS CATHARINE MILLER'S AND TASTRIES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES** Reservation No. 30859 Date: June 5, 2018 Time: 8:30 a.m. Dept: 11 Judge: Hon. David R. Lampe Action Filed: December 13, 2017 Judgment Entered: May 1, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Cases:

California Cases:

TABLE OF AUTHORITIES—CONT.

California Cases—Cont.:

TABLE OF AUTHORITIES—CONT.

California Cases—Cont.:

TABLE OF AUTHORITIES—CONT.

Federal Cases:

California Statutes & Rules:

1. INTRODUCTION

Defendants Catharine Miller and Tastries hereby move this Court to award them their attorneys' fees under the Private Attorney General statute along with a contingency and pro bono multiplier. (Code of Civ. Proc. § 1021.5; see also Judgment (May 1, 2018), at 1 ["Defendants … are deemed the prevailing party"].). As laid out below, Defendants satisfy all the requirements of that statute, and thus fee-shifting of their attorneys' fees—even those incurred prior to this litigation commencing—is mandatory. Defendants' requested fee award is $438,669.

2. LEGAL STANDARD

2.1. Fee Shifting Under the Private Attorney General Statute

Under the Private Attorney General statute, the court must award fees to a prevailing party in any action (1) which has resulted in the enforcement of an important right affecting the public interest; (2) where a significant benefit has been conferred on a large class of persons; (3) where necessity of, and financial burden of, private enforcement supports an award of fees; and (4) where justice indicates that fees should not be paid out of the recovery. (See Code of Civ. Proc. § 1021.5.)[1] **If the four prongs are met, an award of attorneys' fees is mandatory "unless special circumstances would render such an award unjust."** (See *Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal.App.4th 1331, 1344 [quoting *Serrano v. Unruh* (1982) 32 Cal.3d 621, 633].) **"Good faith" is not such a "special circumstance."** (*Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 476 ["Appellants claim … that their own good faith is the sort of 'special circumstance' that renders the award of attorney's fees unjust in this case. We reject this argument"]; see also *Wilson v. San Luis Obispo County Democratic Cent. Com.* (2011) 192 Cal.App.4th 918, 926 ["That [a party] may have been acting in good faith is irrelevant."]; *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 162 ["[A]bsence of fault or misconduct cannot relieve [a party] of liability for fees under the statute."].)

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[1] The Court has wide discretion under the private attorney general statute to assign liability to co-defendants, and even non-party real parties in interest. (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 756-757; *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 161; *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 836-837.) Defendants, however, would oppose any attempt by the DFEH to shift liability for Defendants' attorneys' fees to the Rodriguez-Del Rios.

"[F]ees granted under the private attorney general theory are not intended to punish those who violate the law but rather to ensure that those who have acted to protect public interest will not be forced to shoulder the cost of litigation." (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 756-757 [imposing liability for fees on nonparties real parties in interest because of prime importance in making sure prevailing party is made whole].) As a result, it is an abuse of discretion to refuse to award fees when, even if the time spent "is excessive, it is not excessive by much." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 397.)

Fee awards are properly made to a prevailing defendant. (See *In re Adoption of Joshua S.* (2008) 42 Cal.4th 945, 957 [Collecting cases: "attorney fees have been awarded to those defending against suits by public entities, or those purporting to represent the public, that seek to expand the government's power to curtail important public rights."]; *City of Fresno v. Press Communications, Inc.* (1994) 31 Cal.App.4th 32, 44 ["It became necessary for [defendants-]appellants to litigate this matter because the city brought an action to enjoin claimed violations of the ordinance. Appellants were compelled to assert their First Amendment rights in order to defend their right to engage in protected activity…. Appellants had little choice but to bear the cost of vindicating their rights as well as the rights of others whose protected activities are restricted by the terms of the unconstitutional ordinance."].)

"[A]wards [a]re properly made to attorneys employed by 'public interest' law firms." (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 682; see also *Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1332 ["Our Supreme Court has held that attorneys' fees may not be reduced because the prevailing plaintiffs are represented by public interest law firms, which do not charge their clients for their services."].) Pre-litigation fees are properly included in a fee award. (*Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1370 ["We note that by its terms section 1021.5 does not expressly prevent the award of pre-complaint attorney fees and that in other statutory contexts pre-complaint attorney fees have been permitted."].) Fees incurred in administrative proceedings are also properly included. (*Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1459 ["[T]he

appropriate inquiry to determine whether attorney's fees should be awarded by a court for services provided during administrative proceedings is whether they were useful and of a type ordinarily necessary to the vindication of the public interest litigated by the private party."]; *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1320 ["Da Silva and Edna could not have brought their lawsuit without exhausting administrative remedies. Under the circumstances, to say that administrative proceedings are not part of the 'action,' as that term is used in section 1021.5, would defeat the purpose of the statute and could discourage many lawsuits in the public interest."].)[2]

2.2. Application of Fee Multipliers

Attorneys' fees awards under the private attorney general statute are calculated using the "Lodestar" method. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322.) This means the award should first be determined using "the number of hours reasonably expended multiplied by the reasonable hourly rate." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The court should then apply a multiplier if appropriate. (*Id.* at 1134-1136, citing *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Factors that support a multiplier include: "the novelty and difficulty of the questions involved, and the skill displayed in presenting them"; "the contingent nature of the fee award"; and "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*, *supra*, 20 Cal.3d at 49.)

It is particularly important to apply a contingency multiplier because "[t]he 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; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Ketchum*, *supra*, 24 Cal.4th at 1138.) Multipliers are also

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[2] Defendants endeavored to limit the fees by avoiding travel from San Diego to Bakersfield when possible, but billing for travel time is generally reasonable and recoverable. (*Stratton v. Beck* (2017) 9 Cal.App.5th 483, 497 ["[I]t was reasonable for out-of-town counsel to bill for 3.4 hours of travel time to get to and from court"].)

particularly appropriate in public interest cases, and are designed to motivate private representation. To accomplish this objective, the fee award must be large enough "to entice counsel to undertake difficult public interest cases." (*San Bernardino Valley Audubon Society*, *supra*, 155 Cal.App.3d at 755.)

Normally, contingency multipliers are awarded to plaintiff's counsel. To arrive at the multiplier, the court reviews the final judgment, and withdraws from it the amount that would be awarded under a contingency contract—perhaps 20%, 25%, or 40%. (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 64.) If that amount exceeds the Lodestar amount, the court will award that amount even if it creates a very large multiplier. (See *Cotchett, Pitre & Mccarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1423 ["We reject UPC's argument that the contingency fee was unconscionable because it effectively applied a multiplier of more than seven times the lodestar based on CP & M's regular hourly rates."]; see also *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 897 ["[M]ultipliers can range from 2 to 4 or even higher".)

In successful defense verdicts, this approach does not work, and courts simply choose what they believe are just multipliers. (See *Ketchum*, *supra*, 24 Cal.4th at 1129 [applying multiplier of 2.0 to contingent anti-SLAPP defense attorneys' fees award]; *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 488 [applying multiplier of 1.25 to contingent anti-SLAPP defense attorneys' fees award]; see also *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 283 [Attorneys' fees incurred for pro bono representation are recoverable as contingency fees: "[fee-shifting statutes] can and should be construed to permit recovery of attorney fees that are accrued by outside counsel representing a party on a … pro bono basis, where counsel has not waived the right to seek recovery of the attorney fees from third parties … but only from the client. After all, fees have accrued and resources have been expended by the attorneys."]; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 897 ["If petitioners were not the prevailing party, no attorney fees would be awarded. It would truly be pro bono at that point."] [alterations omitted].)

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3. THE PRIVATE ATTORNEY GENERAL STATUE APPLIES HERE

3.1. Enforcement of an important right affecting the public interest

"The determination that the public policy vindicated is one of constitutional stature … establishes the first of the three elements requisite to the award (i.e., the relative societal importance of the public policy vindicated)." (*Serrano*, *supra*, 20 Cal.3d at 47, fn. 18.) Free speech and freedom of religion are such constitutional rights, the vindication of which *necessarily* meet the first prong of the private attorney general statute. (*Press*, *supra*, 34 Cal.3d at 319; *Best*, *supra*, 193 Cal.App.3d at 1468.) Here, Defendants' constitutional free speech rights were vindicated by this Court's orders and judgment.

3.2. A significant benefit has been conferred on a large class of persons

When constitutional rights of prime importance are vindicated, the prong regarding providing a significant benefit to a large class of persons is also necessarily met.

> [T]his court does not agree with defendant that the benefits resulting from this litigation were not conferred on the general public or a large class of persons. There can be no doubt that vindication of the rights at stake in this litigation effectuated fundamental constitutional principles. Freedom of speech is a right which is at the fountainhead of all our liberties…. While these rights are by nature individual rights, their enforcement benefits society as a whole. Indeed, only by protecting each individual's free speech … rights will society's general interests in these rights be secured…. [A]ttorney fees [a]re proper under the private attorney general doctrine simply because of the magnitude and significance of the fundamental constitutional principles involved in th[e] litigation and the benefit that flow[s] to the general public in having such principles enforced…. Here, … the general public benefitted from the enforcement of fundamental constitutional rights—those embodied in the free speech … provisions of the … Constitution.

(*Press*, *supra*, 34 Cal.3d at 319 [citations, quotation marks, and ellipses omitted]; see also *Best*, *supra*, 193 Cal.App.3d at 1468 ["Since the case litigated the constitutional right to the accommodation of religious beliefs in the employment context, it conferred a benefit on the general public."].) Here, Defendants' free speech rights were vindicated by this Court's orders and judgment, thereby benefiting all persons.

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3.3. The necessity and financial burden of private enforcement warrants a fee award

This prong consists of two parts: whether private representation was necessary, and whether the burden of attorneys' fees warrants an award. With respect to the first part, defending against actions brought by the government necessarily requires private representation. (*County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 868 ["Since this suit was brought by a public entity (the County), the necessity of private rather than public enforcement is evident."]; *City of Fresno*, *supra*, 31 Cal.App.4th at 44 [In action by City of Fresno "Appellants had little choice but to bear the cost of vindicating their rights"].)

With respect to the second part, a court must look to the financial burden a plaintiff sought to impose on a defendant. Preliminary, nonpecuniary burdens are irrelevant. (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1225 ["[I]t is inherently problematic to forge a coherent doctrine around the notion that nonpecuniary interests may disqualify litigants from section 1021.5 fees."].) Similarly irrelevant is the fact that the attorneys' fees were incurred by a nonprofit law firm, not the defendant herself. (See *Folsom*, *supra*, 32 Cal.3d at 683.)

Rather, a court must look to whether "the financial burden placed on [the attorneys] to defend this matter was out of proportion to [the defendant's] individual stake in the case." (*County of San Diego v. Lamb* (1998) 63 Cal.App.4th 845, 853 ["Indeed, County itself noted in its appellate brief that Catherine's legal fees would 'probably equal or exceed the amount of the support order.' Accordingly, Catherine is entitled to an award of attorney fees under Code of Civil Procedure section 1021.5."].)

The courts also look to the motivation of the defendant in choosing to defend, and not settle, the lawsuit:

> [T]he motivation for defending this lawsuit cannot reasonably be attributed exclusively to a desire by defendants to protect their own pocketbooks. This is not a garden variety damage suit. Just a few weeks after filing suit, plaintiffs moved for a preliminary injunction to prevent defendant Abalone Alliance from planning or conducting any future blockades of Diablo Canyon. If respondents had been interested solely in avoiding pecuniary loss, they could readily have agreed to an injunction. Instead, by vigorously resisting appellants' motion, they indicated that their goals were not merely financial.

> The file shows that defendants are antinuclear and environmental activists concerned with a political goal—"the termination of the Diablo Canyon facility as a nuclear power plant." Since defendants' goal in litigating this suit transcends their personal self-interests, the "financial burden" criterion is met.

(*County of San Luis Obispo*, *supra*, 178 Cal.App.3d at 868-869.)

Here, the DFEH itself has argued that Defendants had little financial interest in the outcome of this case:

> [T]he DFEH is not asking this Court to [impose an injunction] … that substantially burdens a religious belief or practice. Selling wedding cakes to same-sex couples is not the only manner in which Tastries may comply…. Tastries may choose to cease offering wedding cakes for sale to the general public. The fact that Miller's religious beliefs may motivate Tastries to choose the latter method of compliance does not mean the [proposed injunction] substantially burdens her beliefs, even if the latter method of compliance would require Tastries to restructure is business or repurpose its assets to maintain the same level of profits. Under the order proposed by the DFEH, the choice of how to comply with the Unruh Act is Tastries' decision. Tastries can choose to provide full and equal services, including wedding cake services, to all customers. Or it could choose to stop selling wedding cakes altogether yet continue selling a full component of pastries, cupcakes, cookies, pies, and acai bowls as well as continue providing its event rental services, as long as it does so on an equal basis.

(DFEH's Memorandum of Points and Authorities in support of Motion for a Preliminary Injunction (Jan. 10, 2018), at 10:7-11:1 [citations omitted].) To be sure, being forced to stop selling wedding cakes would have been financially problematic for Defendants, but it would have resulted in the loss of income—not the imposition of a debt—which as the DFEH correctly points out, Defendants could have sought to remediate via other means.

Further, as stated below, Defendants incurred approximately $250,000 in attorneys' fees vigorously opposing the DFEH's application for a preliminary injunction, and then bringing this action to a conclusion. If this litigation had continued, Defendants could have been forced to defend this case all the way through trial and then the inevitable appeal. Based on defense counsel's experience, the attorneys' fees to defend this case all the way through an appeal could have amounted to anywhere between $750,000 and $1,500,000. (LiMandri Decl., ¶3.) Such fees would

have far exceeded the financial worth to Defendants of defending their constitutional rights. From a financial and business perspective, Defendants would have been hard pressed not to simply agree to comply with the DFEH's demands. Nevertheless, Defendants opposed the preliminary injunction, and would have been personally motivated to continue defending this action to vindicate not only their constitutional rights, but those of all religious persons. (Miller Decl., ¶2.)

3.4. There is no recovery out of which fees can be paid

This prong is simply a recognition that, under the American rule, a prevailing party should use any recovery he received in the litigation to pay the fees of his attorneys—unless justice requires otherwise. (See Code of Civ. Proc. § 1021.5.) But a prevailing party only has to satisfy this prong if there is a monetary recovery. This prong simply does not apply to the prevailing defendant. (*Lyons*, *supra*, 136 Cal.App.4th at 1355 ["As Lyons obtained no monetary recovery, the 'interest of justice' provision of subdivision (c) is not relevant."]; see also *Samantha C. v. State Dept. of Developmental Services* (2012) 207 Cal.App.4th 71, 81 ["[A]ttorney fees should not in the interest of justice be paid out of the recovery, which was nonexistent."]; *Choi v. Orange County Great Park Corp.* (2009) 175 Cal.App.4th 524, 534 ["The final factor to be satisfied is that fees should not be paid out of the award to plaintiffs. Here plaintiffs did not seek monetary damages nor were any awarded [to them]. Thus there is no settlement out of which plaintiffs could pay the attorney fees."].)

4. DEFENDANTS' ATTORNEYS' FEES REQUEST IS REASONABLE

4.1. Defendants' Requested Rates Are Reasonable

As stated above, calculating the amount of a fee award begins by deciding the "lodestar," defined as the "number of hours reasonably expended multiplied by the reasonable hourly rate." (*Ketchum*, *supra*, 24 Cal.4th at 1134.) "California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award." (*Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1004-1005.) The reasonable hourly rate is that prevailing in the community for similar work. (*Id*. at 1004; *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002.) Normally, "[t]he reasonable market value of the attorney's services is the measure of a reasonable hourly rate." (*Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641, 651; see also *Children's Hosp. and Medical Center v. Bonta*

(2002) 97 Cal.App.4th 740, 783 [the reasonable attorney rate is determined by looking to "the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work."].) But the size of a law firm is irrelevant; small firms are entitled to request commercial rates charged by "corporate attorneys of equal caliber." (*U.S. v. City and County of San Francisco* (N.D. Cal. 1990) 748 F.Supp. 1416, 1431; *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 872-873 [rejecting argument that fee request based on survey of large firms was inappropriate].)

Generally, the rate should be based on prevailing market rates for attorneys working a specific practice area in the geographic area where the litigation occurred. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory Inc.* (2014) 226 Cal.App.4th 26, 71.) But where practical concerns require the retention of an attorney from a different geographic area, it is appropriate to use that geographic area to determine reasonable hourly rates. (See *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 700–701 ["Plaintiff presented no evidence that the San Francisco Bay Area was not an appropriate 'community,' where … counsel for both plaintiff and defendants were located in San Francisco."]; see also *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1096 ["In the present matter, the superior court based the award of attorney fees to the prevailing party, PLCM, on the number of hours expended by counsel multiplied by the prevailing market rate for comparable legal services in San Francisco, where counsel is located. No error appears."].)

This is particularly appropriate where the hourly rates for counsel's home forum exceed the rates of comparable attorneys where the litigation occurred, and the nature of the litigation is such that specialized non-local counsel are needed. (See *Horsford*, *supra*, 132 Cal.App.4th at 399 [abuse of discretion for trial court to not use rates for attorneys in counsel's home forum in discrimination case because "the public interest in the prosecution of meritorious civil rights cases requires that the financial incentives be adjusted to attract attorneys who are sufficient to the cause."]; see also *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2010) 190 Cal.App.4th 217, 249 [awarding San Francisco rates].)

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Here, defense counsel are located in northern San Diego County. They were retained because they could provide a completely pro bono defense, and because they had specialized experience in handling religious liberty cases. It is highly unlikely that Defendants could have found similar attorneys in Bakersfield. Surely, Bakersfield has many highly qualified civil litigators, but the number of pro bono religious liberty firms are small. Defendants are not aware of any in Bakersfield. Further, although there are a few religious liberty law firms in California, there are not a significant number with experience in the specific issues of this case—namely whether a wedding cake is speech. Defense counsel have precisely that experience and submitted an *amicus curiae* brief in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n* (2017) Supreme Court Case No. 16-111. Finally, looking beyond nonprofit law firms, it is unlikely that Defendants could have found counsel willing to work on a contingency basis. Defense contingency situations are rare, and this case presented legal difficulties which many counsel would have decided were insurmountable. (See LiMandri Decl., ¶4.)[3]

In 2017, a San Diego court awarded a blended hourly rate of $500 for all attorneys on a case. (*Espejo v. Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 383.) In 2014, another court in San Diego approved hourly rates of $675 for partners, $500 for senior associates, and $350 for junior associates. (*Morey v. Louis Vuitton North America, Inc.* (S.D. Cal., Jan. 9, 2014, No. 11CV1517 WQH BLM) 2014 WL 109194, at *10.) Other cases provide similar rates. (See, e.g., *Carr v. Tadin, Inc.* (S.D. Cal. 2014) 51 F.Supp.3d 970, 980 [$650 for 19-year partner; $375 for third-year associate with prior legal experience; $350 for fourth-year associates; $335 for second-year associate; $200 for law clerks]; *Goglin v. BMW of North America, LLC* (2016) 4 Cal.App.5th 462, 470 [$575 per hour for partner]; *Blair v. CBE Group, Inc.* (S.D. Cal., Sept. 17, 2014, No. 13CV134-MMA WVG) 2014 WL 4658731, at *4 ["[C]ourts have approved the hourly rate of $500 for an attorney with 7 years of experience and $350 for an associate of 3 years of experience"].)

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[3] Using San Diego rates is also appropriate in light of the fact that, if the DFEH had been successful in this action, it would likely have sought Los Angeles rates. (See Gov. Code § 12974 ["In civil actions brought under this section, the court, in its discretion, may award to the department reasonable attorney's fees and costs, including expert witness fees, when it is the prevailing party for the purposes of the order granting temporary or preliminary relief."].)

To determine reasonable hourly rates for counsel, many courts also look to the *Laffey* Matrix. The *Laffey* Matrix was originally prepared using "a barrage of data" for litigation in Washington D.C. with the intent that it could be adjusted annually to take inflation into account. (*Laffey v. Northwest Airlines, Inc.* (D.D.C. 1983) 572 F.Supp. 354.) The Original *Laffey* Matrix, adjusted for inflation, is now published each year by the U.S. Attorney's Office for the District of Columbia. Subsequently, a case found that the *Laffey* Matrix was not accurately predicting attorney rates—not keeping up with them—and developed an Adjusted *Laffey* Matrix. (See *Save Our Cumberland Mountains, Inc. v. Hodel* (D.C. Cir. 1988) 857 F.2d 1516, 1525.) The Adjusted *Laffey* Matrix, adjusted for inflation, is now published by an independent group. Generally the Adjusted *Laffey* Matrix simply provides higher rates than the Original *Laffey* Matrix. (Compare Ex. 1 [Original *Laffey* Matrix, listing $602 as rate for most experienced attorney]; with Ex. 2, [Adjusted *Laffey* Matrix, listing $864 as rate for most experienced attorney].)

"When used in a given case, the *Laffey* Matrix is adjusted to the federal locality pay differentials for the relevant community for the relevant year." (*Ramirez v. Escondido Unified School District* (S.D. Cal., Apr. 17, 2014, No. 11CV1823 DMS (BGS)) 2014 WL 12675859, at *2.) However, since "[t]he locality pay adjustment for [San Diego] and the District of Columbia … is approximately the same … no adjustment to the *Laffey* Matrix is warranted." (See *id.*) Here, the differential is only -0.12%, and therefore "no adjustment to the *Laffey* Matrix is warranted." (See *id.*; see also Ex. 3, *Alternative Plan for 2017 Locality-Based Comparability Payments*.) The *Laffey* Matrix is designed to be calculated based on "years after law school graduation." (*Laffey v. Northwest Airlines, Inc.* (D.D.C. 1983) 572 F.Supp. 354, 371.) Generally, California courts have looked to the Adjusted *Laffey* Matrix as more in line with California rates. (See, e.g., *Kempf v. Barrett Business Services, Inc.* (N.D. Cal., Nov. 20, 2007, No. C-06-3161 SC) 2007 WL 4167016, at *5, aff'd (9th Cir. 2009) 336 Fed.Appx. 658 [using rates from Adjusted *Laffey* Matrix].)

Defendants seek the following hourly rates: Charles S. LiMandri (CSL) ($675/hour); Paul M. Jonna (PMJ) ($500/hour); Teresa L. Mendoza (TLM) ($500/hour); Jeffrey M. Trissell (JMT) ($375/hour); Daniel J. Piedra (DJP) ($200/hour). The factual justification for these rates is laid out in the Declaration of Charles S. LiMandri, at paragraphs 4 through 16.

4.2. Defendants' Time Expended Was Reasonable

A successful party is entitled to "compensation for all hours reasonably spent." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639.) In California, there is a "high threshold for triggering decreases [in attorneys' fees] due to limited success[.]" (*Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F.3d 607, 612.) As the Supreme Court has stated, attorneys' fees should not be reduced simply because they were incurred with respect to failed motions:

> It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.

(*Hensley v. Eckerhart* (1983) 461 U.S. 424, 431.) Awarding all hours reasonably incurred is also particularly appropriate in contingency cases.

> [L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

(*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112.) Also, "[a] defendant 'cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.'" (*Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 114 [quoting *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 304].)

Unlike in federal court, California state courts require little documentation to establish an attorneys' fee award. This is because "[a] trial court may award fees solely on the basis of the experience and knowledge of the trial judge." (*East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742, 750.) As a result, "estimates of time spent prepared years after the work was

performed" is sufficient, and a prevailing party does not have to "submit itemized time records, estimates of time spent on discrete tasks, billings submitted to the client or records of payments made for work done." (*Id.*; see also *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375 ["The law is clear … that an award of attorney fees may be based on counsel's declarations, without production of detailed time records."] [quotation marks omitted].) "Because time records are not required under California law, there is no required level of detail that counsel must achieve. We do not want a trial court, in setting an attorney's fee, to become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief.… [G]enerating a complete line-by-line billing report … offers great detail, but tends to obscure the forest for the trees." (*Syers*, *supra*, 226 Cal.App.4th at 699 [citations, quotation marks, brackets, and parentheses omitted]; *Horsford*, *supra*, 132 Cal.App.4th at 397 ["[T]he verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous … We conclude the trial court abused its discretion in failing to use counsels' time records as the starting point"].)

Despite the fact that providing the Court and opposing counsel with defense counsel's timeslips is not required, Defendants have done so out of an abundance of caution. It is attached to the LiMandri declaration as Exhibit 4. That declaration also contains a summary of the events in this case, at paragraphs 20 through 31.

Defendants considered reviewing their timeslips and reducing or removing various entries on the basis that they may not have been necessarily incurred. Ultimately, however, Defendants determined that the case law supported Defendants requesting compensation for all of the time they actually incurred in light of the fact that Defendants were the first to obtain a favorable ruling on the argument that a baker engaged in speech when she designs and creates a wedding cake:

> Plaintiffs are the only parties to have obtained a liability finding on a FISA claim in this multi-district litigation concerning warrantless electronic surveillance. Plaintiffs had little reason to believe that they would recover anything at all when this case began. It is therefore unlikely that plaintiffs' attorneys, believing that they were probably working pro bono and trying to fit the case into a schedule that also included work for paying clients, spent more time than they felt was absolutely necessary to win the case.

(*In re National Security Agency Telecommunications Records Litigation* (N.D. Cal., Dec. 21, 2010, No. C 07-0109 VRW) 2010 WL 11475732, at *15.) Nevertheless, Defendants have agreed to effectively reduce their requested fee by 20%. This includes 10% for attorneys whose time is not being requested, and 10% for time spent interacting with the media. (LiMandri Decl., ¶¶18-19.) The total number of hours per attorney, and the total fee request sought, is laid out in the Exhibit 4 to the LiMandri declaration. The total attorneys' fees requested is $219,335.

4.3. A Multiplier Is Required

Defendants believe they are entitled to a multiplier of their attorneys' fees for three reasons. *First*, this case involved complex issues of law and defense counsel provided Defendants with excellent representation. Although the issue of whether a cake artist's first amendment rights permit her to decline to make a wedding cake for a same-sex wedding was an issue of first impression in California, in its briefing the DFEH cited numerous cases from other jurisdictions which held that the cake artist had no such right. Indeed, Defendants believe this is the first case nationwide in which a court correctly interpreted the first amendment rights of cake artists. Defense counsel also believe that their presentation of the issue in this case were exceptional. Exceptional representation is itself a basis for a multiplier. (See *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 84 [Adding $500,000 to award of $853,756; i.e., 1.6 multiplier]; *Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350, 1363 [1.5 multiplier].)

Second, a contingency multiplier is appropriate. Defense counsel represented defendants pro-bono with the understanding that defense counsel may seek to recover their fees. In such a situation, a contingency multiplier is required. (*Ketchum*, *supra*, 24 Cal.4th at 1129 [applying multiplier of 2.0 to contingent anti-SLAPP attorneys' fees award]; *Lunada*, *supra*, 230 Cal.App.4th at 488 [applying multiplier of 1.25 to contingent anti-SLAPP attorneys' fees award].) A multiplier in contingency cases is not discretionary, but intended to motivate attorneys with the prospect of a potential "bounty." (*Lyons*, *supra*, 136 Cal.App.4th at 1352 ["[T]he purpose of section 1021.5 is to encourage public interest litigation by offering the 'bounty' of a court-ordered fee."]; see also *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 10 ["[A] bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a

substantial margin the actual litigation costs."]; *In re State Water Resources Control Bd. Cases* (2008) 161 Cal.App.4th 304, 317 ["If … there is no public attorney general available to act, then the 'bounty that section 1021.5 provides *must* be available to any party, public or private, who takes on the responsibility of pursuing important public interest litigation"] [emphasis added].)

Third, the fact that Defendants were represented by a nonprofit law firm defending constitutional rights also makes a multiplier appropriate. (*In re Lugo* (2008) 164 Cal.App.4th 1522, 1546 [Applying 1.5 multiplier because "fees will be awarded for the benefit of a nonprofit organization and not the individual attorneys employed by that organization"]; see also *Edgerton*, *supra*, 83 Cal.App.4th at 1363 [Applying 1.5 multiplier because of "the importance of the … rights that were vindicated by the Injunction."].)

In light of the above case law, especially the difficulty of the issues involved, the contingent nature of the representation, and the public interest issues and nonprofit nature of defense counsel, Defendants request a multiplier of 2.0.

4.4. Defendants are Entitled to an Award of $438,669.

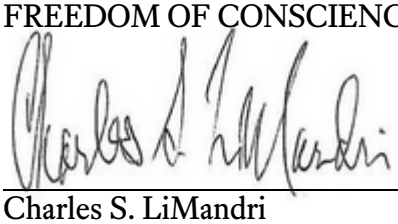
As stated above, Defendants seek reimbursement for $219,335 in attorneys' fees incurred, and a multiplier of 2.0. This would bring the total fee award to **$438,669.**

5. CONCLUSION

For all of the above-described reasons, Defendants respectfully request that the Court grant this motion and award them their attorneys' fees incurred in this litigation, as well as a multiplier bounty.

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

Dated: May 10, 2018 By: 

Charles S. LiMandri
Paul M. Jonna
Teresa L. Mendoza
Jeffrey M. Trissell
Attorneys for Defendants CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHY MILLER, an individual.