

**FILED**  
San Francisco County Superior Court

FEB 13 2024

CLERK OF THE COURT  
BY: *Christina Green*  
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
DEPARTMENT 304

AMERICAN CATALOG MAILERS  
ASSOCIATION,  
  
Plaintiff,  
  
v.  
  
FRANCHISE TAX BOARD,  
  
Defendant.

Case No. CGC-22-601363

ORDER ON (1) DEFENDANT'S MOTION  
TO STRIKE AND TAX MEMORANDUM  
OF COSTS AND (2) PLAINTIFF'S MOTION  
FOR ATTORNEY FEES

Defendant's Motion to Strike and Tax Costs and Plaintiff's Motion for Attorney Fees were noticed for hearing on February 14, 2024. The Court circulated its tentative ruling in advance of the hearing granting and denying in part Defendant's motion to strike and costs and granting Plaintiff's motion for attorneys' fees. The parties having stipulated to the tentative ruling, it is hereby adopted.

**BACKGROUND**

On August 19, 2022, Plaintiff American Catalog Mailers Association ("ACMA") filed a Complaint for declaratory relief against Defendant Franchise Tax Board ("FTB"). ACMA alleged three causes of action in its Complaint. First, it sought a declaratory judgment under Government Code § 11350 declaring the Technical Advice Memorandum No. 2022-01 ("TAM") and FTB Publication 1050 ("Publication 1050") invalid because they contradict Public Law 86-272 ("P.L. 86-272") and the United States Constitution. (Compl. ¶¶ 42-47.) Second, it sought, under Government Code § 11350, "a judicial

1 declaration that the TAM and FTB 1050 are invalid” because the FTB failed to comply with the APA  
2 rulemaking process. (*Id.* ¶¶ 48-53.) Third, it sought declaratory judgment under Code of Civil Procedure  
3 § 1060 that the TAM and Publication 1050 are invalid or, in the alternative, to limit the application of the  
4 TAM and Publication 1050 prospectively. (*Id.* ¶¶ 54-59.)

5 On April 13, 2023, ACMA moved for summary judgment as to Count I of its Complaint, seeking  
6 a judicial declaration that the TAM and Publication 1050 are invalid because they contradict P.L. 86-272  
7 and the United States Constitution. (Aug. 24, 2023 Order, 4.) By order filed August 24, 2023, the Court  
8 denied that motion, finding that ACMA did not meet its burden on summary judgment to show that the  
9 TAM and Publication 1050 are facially invalid in their entirety. (*Id.* at 19-26.) In that order, the Court  
10 first rejected a series of procedural objections that the FTB raised to ACMA’s claims, including  
11 contentions that the action is barred by Article XIII, section 32 of the California Constitution, that ACMA  
12 lacked standing, and that the action was not ripe for adjudication. (*Id.* at 5-15.) The Court found that the  
13 TAM and Publication 1050 are generally applicable rules that interpret the FTB’s application of P.L. 86-  
14 272 to out-of-state businesses and, therefore, are regulations subject to the APA. (*Id.* at 15-18.) Although  
15 the FTB conceded that it had not complied with the APA’s notice and comment requirements, the Court  
16 was constrained to deny ACMA’s motion because ACMA did not move for summary adjudication as to  
17 Count 2 for a declaratory judgment that the TAM and Publication 1050 are underground regulations  
18 adopted in violation of the APA. (*Id.* at 18.)

19 On December 13, 2023, the Court granted ACMA’s Motion for Summary Adjudication on Count  
20 Two of its Complaint and dismissed the other two causes of action as moot. (Dec. 13, 2022 Order, 12.)  
21 On December 18, 2023, the Court entered a judgment in favor of ACMA, stating: (1) “The TAM and  
22 Publication 1050 are, accordingly, declared void and without force or effect, and their guidance may not  
23 be relied upon,” (2) “pursuant to Code of Civil Procedure Section 1032 and 1033.5, the ACMA is the  
24 prevailing party and is entitled to recover its costs from the FTB,” and (3) “any request for attorneys’ fees  
25 and/or expert witness fees as costs pursuant to Code of Civil Procedure Sections 1021.5 or 1038, or as  
26 otherwise authorized by law, will be addressed through a filed and noticed motion in this matter.” (Dec.  
27 18, 2022 Judgment, 1 (cleaned up).)  
28

1 On December 29, 2023, ACMA filed a memorandum of costs in the total amount of \$9,209.62,  
2 including \$3,087.55 in deposition costs, \$470.00 in court-ordered transcripts, and \$5,652.07 in fees for  
3 electronic filing or service. (Mem. of Costs, 1.) FTB now moves to strike ACMA’s costs in full or,  
4 alternatively, to tax costs in the amount of \$8,433.18. (Costs Motion, 2.) FTB raises two arguments in  
5 support of its motion: (1) ACMA was not a prevailing party within the meaning of section 1032, and (2)  
6 ACMA should only be allowed to recover the costs it incurred “in connection with its successful motion  
7 for summary adjudication.” (*Id.*) ACMA opposes the motion.

8 On January 19, 2024, ACMA filed a motion for attorneys’ fees in the amount of “\$509,904.38,  
9 based on reasonable rates in the San Francisco legal market; in the alternative, the ACMA seeks a fee  
10 award of \$342,591.50, based on counsel’s actual billed rates.” (Fees Motion, 1.)<sup>1</sup> ACMA argues it is  
11 entitled to attorneys’ fees under Code of Civil Procedure section 1021.5 because the disposition of this  
12 case dealt with “important issues affecting a wide swath of out-of-state business,” “established that a trade  
13 association with affected members can challenge FTB regulations in Superior Court,” and obtained a  
14 declaration that “the specific FTB regulations challenged here were invalid.” (Fees Opening Brief, 1.)  
15 FTB opposes the motion on the following grounds: (1) “ACMA did not obtain the core relief it sought—  
16 let alone convey a public benefit,” (2) “the amounts attributable to ACMA’s motion for summary  
17 adjudication of its APA claim” should not be recoverable (3) “private enforcement was not required nor  
18 helpful,” (4) increased counsel rates are not justified, and (5) “ACMA’s request that significant fees be  
19 paid by a public agency is inconsistent with the goals of section 1021.5.” (Fees Opposition, 5-12.)

#### 20 LEGAL STANDARD

21 “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of  
22 right to recover costs in any action or proceeding.” (Code Civ. Proc. § 1032(b).)<sup>2</sup> “Prevailing party”  
23 includes “the party with a net monetary recovery.” (§ 1032(a)(4).) “If any party recovers other than  
24 monetary relief and in situations other than as specified, the ‘prevailing party’ shall be as determined by  
25 the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if  
26 allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted

27 <sup>1</sup> As noted below, the correct figure is \$332,891.50. (See footnote 8, *infra*.)

28 <sup>2</sup> All further statutory references are to the Code of Civil Procedure.

1 under Section 1034.” (§ 1032(a)(4).) When a case falls into subdivision (a)(4) of section 1032, the trial  
2 court determines the prevailing party by “comparing the relief sought with that obtained, along with  
3 parties’ litigation objectives as disclosed by their pleadings, briefs, and other such sources.” (*Friends of*  
4 *Spring Street v. Nevada City* (2019) 33 Cal.App.5th 1092, 1104 (cleaned up).) A party “will be  
5 considered a prevailing party when the lawsuit yields the primary relief sought in the case.” (*City of*  
6 *Santa Maria v. Adam* (2016) 248 Cal.App.4th 504, 516.)

7       Once the trial court determines the prevailing party under section 1032, section 1033.5 dictates  
8 what items “are allowable as costs” and what items are “not allowable as costs.” (§ 1033.5(a), (b).)  
9 Though claimed costs must be “reasonably necessary to the conduct of the litigation” and “reasonable in  
10 amount,” “if items on a memorandum of costs appear to be proper charges on their face, those items are  
11 prima facie evidence that the costs, expenses, and services are proper and necessarily incurred. The  
12 burden then shifts to the objecting party to show them to be unnecessary or unreasonable.” (*Doe v. Los*  
13 *Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 693; § 1033.5(c); see  
14 also *Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548.) “The losing party has the burden to present  
15 evidence and prove that the claimed costs are not recoverable.” (*Seever v. Copley Press, Inc.* (2006) 141  
16 Cal.App.4th 1550, 1557, disapproved on other grounds, *Segal v. ASICS America Corp.* (2022) 12 Cal.5th  
17 651, 668 fn. 5.)

18       “[S]ection 1021.5 authorizes an award of attorney fees to a ‘private attorney general,’ that is, a  
19 party who secures a significant benefit for many people by enforcing an important right affecting the  
20 public interest.” (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1020.) “Section  
21 1021.5 authorizes an award of fees when (1) the action has resulted in the enforcement of an important  
22 right affecting the public interest, (2) a significant benefit, whether pecuniary or nonpecuniary, has been  
23 conferred on the general public or a large class of persons, and (3) the necessity and financial burden of  
24 private enforcement are such as to make the award appropriate.” (*Id.* at 1026 (cleaned up).) The burden  
25 of proof to establish each of the elements of section 1021.5 is on the party seeking fees. (*Dept. of Water*  
26 *Resources Environmental Impact Cases* (2022) 79 Cal.App.5th 556, 573.) “When the statutory criteria  
27 have been met, fees must be awarded ‘unless special circumstances render such an award unjust.’”  
28

1 (*Friends of Spring Street*, 33 Cal.App.5th at 1107, quoting *Robinson v. City of Chowchilla* (2011) 202  
2 Cal.App.4th 382, 391.)

### 3 DISCUSSION

#### 4 **I. ACMA Is The Prevailing Party For Purposes Of Sections 1032 And 1021.5.**

5 The FTB contends that “ACMA is not entitled to recover its costs in this action because it is not a  
6 prevailing party.” (Costs Opening Brief, 5 (cleaned up).) The FTB also claims ACMA is not entitled to  
7 attorneys’ fees because it “is not a successful party because it did not achieve the relief sought—namely,  
8 clarification of its members’ tax liability.” (Fees Opposition, 7 (cleaned up).) The Court disagrees, and  
9 finds that ACMA is the prevailing party for purposes of both statutes.

#### 10 **A. ACMA Is The Prevailing Party Under Section 1032.**

11 This Court has already issued a judgment deciding that ACMA is the prevailing party in this  
12 action and is entitled to costs under section 1032. (Dec. 18, 2023 Judgment, 1.)<sup>3</sup> The FTB argues that  
13 this Court should not have determined ACMA to be the prevailing party under section 1032 because it did  
14 not obtain “the primary relief it sought in this lawsuit.” (Costs Opening Brief, 4.) The Court disagrees.

15 In situations where the plaintiff did not obtain a net monetary recovery, “the trial court determines  
16 whether the party succeeded at a practical level by realizing its litigation objectives and the action yielded  
17 the primary relief sought in the case.” (*Friends of Spring Street*, 33 Cal.App.5th at 1104 (cleaned up).)  
18 Here, the Court finds that ACMA achieved the primary relief sought in the case: a judicial declaration that  
19 TAM and Publication 1050 are invalid under the APA. The ACMA’s complaint is clear. From its very  
20 first paragraph, it seeks a declaration that the FTB’s publications are invalid. (See Compl. ¶ 1 [“This is an  
21 action by ACMA . . . to declare invalid Technical Advice Memorandum No. 2022-01 (the ‘TAM’), as  
22 well as the related guidance publication, FTB 1050, each published by the FTB.”].) All three causes of  
23 action seek declaratory relief that the TAM and Publication 1050 are invalid, albeit on different theories.  
24 (See Compl. ¶¶ 42-59, Prayer for Relief, 11-12].)<sup>4</sup>

25  
26  
27 <sup>3</sup> On December 29, 2023, the FTB filed a motion to vacate and modify the judgment, which is addressed  
28 in a separate order.

<sup>4</sup> The third cause of action seeks a declaratory judgment declaring the TAM and Publication 1050 invalid  
or, in the alternative, declaratory and injunctive relief limiting the application of those publications “to

1 Contrary to the FTB's contention, that ACMA did not succeed on each of its three causes of action  
2 does not preclude it from recovering its costs as a prevailing party. "Plaintiff's failure to succeed on all  
3 but one of several 'shotgun' causes of action has been held insufficient to deny a party fees and costs."  
4 (*Friends of Spring Street*, 33 Cal.App.5th at 1104 (cleaned up).) The FTB's characterization of ACMA's  
5 win as a "limited victory" is unpersuasive. The FTB ignores that the two other causes of action were  
6 dismissed only because the relief sought in those counts was moot in light of the Court's holding that the  
7 TAM and Publication 1050 are void. The success of the litigation cannot fairly be judged by the  
8 dismissal of those two other claims because the only reason they were dismissed was because ACMA had  
9 already achieved the primary goal of the litigation: to void the regulations. Under the FTB's view, a party  
10 would be successful only if it achieved a favorable result on every single paragraph in its complaint and  
11 every single theory of recovery. That is not the test. The ACMA achieved the primary relief it sought in  
12 this case because it sought to invalidate the regulations and achieved that goal.<sup>5</sup>

13 The FTB also contends that while the Court's judgment declares the TAM and Publication 1050  
14 invalid, that judgment "says nothing about whether the TAM and Publication 1050 are correct in  
15 substance. Void, in this context, does not necessarily mean wrong." (Costs Op. Br., 6; Costs Reply, 5-  
16 6.) FTB's argument is specious. The ACMA did not seek a declaration that the FTB's publications are  
17 "wrong"; it sought declaratory relief that they are invalid. Having achieved that primary relief, it  
18 prevailed for purposes of recovering costs.

19 FTB also argues that ACMA is not the prevailing party under the "catalyst theory." (Costs  
20 Opening Brief, 7.) FTB is confused. The catalyst theory does not apply here. The catalyst theory applies  
21 only "when litigation does not result in a judicial resolution if the defendant changes its behavior  
22 substantially because of, and in the manner sought by, the litigation." (*Graham v. DaimlerChrysler*  
23 *Corp.* (2004) 34 Cal.4th 553, 560.) Here, the litigation *did* result in a favorable judicial resolution: a  
24 judgment in ACMA's favor. In every case cited by FTB, the public interest plaintiffs were prevailing  
25

26 prospective periods only." (Compl. ¶ 59.)

27 <sup>5</sup> In contrast, in a case cited by the FTB, the court found that a plaintiff was not entitled to costs because  
28 the declaratory relief it achieved was only one part of one of its causes of action and "judged against the  
broad scope of plaintiff's complaint" it was a minimal victory. (*East Bay Mun. Utility Dist. v.*  
*Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1134 (cleaned up).)

1 parties because “the defendant change[d] its behavior substantially because of, and in the manner sought  
2 by, the litigation” (*id.*), even though the plaintiffs *did not* achieve a judgment in their favor.<sup>6</sup> Here, the  
3 relief ACMA sought in all three causes of action, to invalidate the TAM and Publication 1050, has been  
4 judicially granted. Therefore, ACMA is the prevailing party under section 1032.

5 **B. ACMA Is A Successful Party Under Section 1021.5.**

6 In opposition to ACMA’s attorneys’ fees motion, FTB takes a similar tack, contending that  
7 “ACMA is not a successful party because it did not achieve the relief it sought—namely, clarification of  
8 its members’ tax liability.” (Fees Opposition, 7.) The Court disagrees.

9 The term “successful party” in section 1021.5 is synonymous with “prevailing party” in section  
10 1032. (*Graham*, 34 Cal.4th at 571; *Save Our Heritage Organization v. City of San Diego* (2017) 11  
11 Cal.App.5th 154, 160.) The term “means the party to litigation that achieves its objectives.” (*Graham*, 34  
12 Cal.4th at 571.) “The party seeking attorney fees need not prevail on all of its claims alleged in order to  
13 qualify for an award.” (*RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175  
14 Cal.App.4th 7689, 782-783.) Rather, “a plaintiff is successful if it succeeds on any significant issue and  
15 achieves some benefit sought.” (*Friends of Spring Street*, 33 Cal.App.5th at 1108 (cleaned up).) “For the  
16 same reasons expressed *ante*, plaintiff was the ‘successful party’ for purposes of section 1021.5 in this  
17 action.” (*Id.* at 1108.)

18 Here, again, ACMA filed a complaint requesting solely declaratory relief, which the Court  
19 granted. FTB disregards ACMA’s clear success on the merits of the case, insisting that ACMA sought  
20 “clarification of its members’ tax liability,” “a substantive tax ruling,” a “continuing obligation on the  
21 FTB,” or “clarification of the income-tax liability of members at risk of illegal assessment.” (Fees  
22 Opposition, 7-9 (cleaned up).) FTB is incorrect. “Traditional (noncatalyst) success requires the claimant  
23 to prevail by obtaining a judicially recognized change in the relationship between the parties.”  
24

25 <sup>6</sup> E.g., *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 607 [defendant made policy  
26 changes which then mooted plaintiffs’ discrimination claim]; *Westside Community for Independent*  
27 *Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 352 [lawsuit resulted in a policy change but plaintiff never  
28 obtained any judgment on a discrimination claim]; *Mundy v. Neal* (2010) 186 Cal.App.4th 256, 258  
[plaintiff dismissed his civil rights suit after defendant accommodated his disability]; *Valenti v. City of*  
*San Diego* (2023) 94 Cal.App.5th 218, 223-244 [defendant produced documents in response to plaintiff’s  
Public Records Act request even though judgment was entered against the plaintiff].

1 (*Sweetwater Union High School Dist. v. Julian Union Elementary School Dist.* (2019) 36 Cal.App.5th  
2 970, 985, quoting *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608.) To show  
3 “success” under the statute, the moving party need only demonstrate it obtained “a favorable judicial  
4 decision, i.e., a judicially sanctioned or recognized change in the legal relationship between the parties.”  
5 (*Marine Forests Society v. California Coastal Com.* (2008) 160 Cal.App.4th 867, 877.) A judgment  
6 declaring the TAM and Publication 1050 void is both a favorable judicial decision and a recognized  
7 change in the legal relationship between the parties.

8 Accordingly, ACMA is the prevailing and successful party for purposes of both section 1032 and  
9 section 1021.5.

## 10 **II. ACMA Meets The Criteria For An Award Of Attorneys’ Fees Under Section 1021.5.**

11 Section 1021.5 authorizes an award of attorneys’ fees “to a successful party against one or more  
12 opposing parties in any action which has resulted in the enforcement of an important right affecting the  
13 public interest,” provided that three additional conditions are satisfied: “(a) a significant benefit, whether  
14 pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the  
15 necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and  
16 (c) such fees should not in the interest of justice be paid out of the recovery, if any.” (§ 1021.5.) “[T]he  
17 fundamental objective of the doctrine is to encourage suits enforcing important public policies by  
18 providing substantial attorney fees to successful litigants in such cases.” (*Graham*, 34 Cal.4th at 565.)  
19 The Court readily finds that ACMA meets each of the statutory criteria for an award of attorneys’ fees  
20 under Section 1021.5.

21 First, the Court finds that this action has resulted in the enforcement of an important right affecting  
22 the public interest. “[T]he ‘significant benefit’ that will justify an attorney fee award need not represent a  
23 ‘tangible’ asset or a ‘concrete’ gain but, in some cases, may be recognized simply from the effectuation of  
24 a fundamental constitutional or statutory policy. The benefit may be conceptual or doctrinal and need not  
25 be actual or concrete; further, the effectuation of a statutory or constitutional purpose may be sufficient.”  
26 (*RiverWatch*, 175 Cal.App.4th at 781 (cleaned up).) Here, ACMA’s lawsuit conferred a significant  
27 benefit on retailers and the public by furthering the important statutory purposes underlying the APA.  
28



1 (See, e.g., *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333 [APA furthers the  
2 goals of “bureaucratic responsiveness and public engagement in agency rulemaking”]; see also *Ligon v.*  
3 *State Personnel Bd.* (1981) 123 Cal.App.3d 583, 592 [in action successfully challenging agency policy as  
4 invalid because it was not formally adopted as a regulation pursuant to the APA, remanding to trial court  
5 to award fees pursuant to Section 1021.5 “since an important public right is implicated”].) As the  
6 Supreme Court has explained,

7       One purpose of the APA is to ensure that those persons or entities whom a regulation will affect  
8       have a voice in its creation, as well as notice of the law’s requirements so that they can conform  
9       their conduct accordingly. The legislature wisely perceived that the party subject to regulation is  
10      often in the best position, and has the greatest incentive, to inform the agency about possible  
11      unintended consequences of a proposed regulation. Moreover, public participation in the  
12      regulatory process directs the attention of agency policymakers to the public they serve, thus  
13      providing some security against bureaucratic tyranny.

14 (*Id.*, quoting *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568-569 (cleaned up).)

15 Despite FTB’s attempt to recharacterize ACMA’s objectives, a primary goal of this litigation was to  
16 obtain a judicial declaration that the TAM and Publication 1050 are underground regulations adopted in  
17 violation of the APA.

18       Second, this action conferred a significant benefit on the general public or a large class of persons  
19 because it invalidates a regulation regarding the application of P.L. 86-272 to numerous out-of-state  
20 businesses. FTB argues that “ACMA’s suit offers no significant benefit to potential taxpayers, internet  
21 retailers, or any other large class of persons” because the suit “failed to obtain a substantive tax ruling.”  
22 (Fees Opposition, 10.) However, “the fact that litigation enforces existing rights does not mean that a  
23 substantial benefit to the public cannot result. Attorney fees have consistently been awarded for the  
24 enforcement of well-defined, existing obligations.” (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311,  
25 318.) “The extent of the significant benefit need not be great, nor is it required that the class of persons  
26 benefited be readily ascertainable. Furthermore, evidence of the size of the population benefited by a  
27 private suit is not always required. The substantial benefit may be conceptual or doctrinal, and need not be  
28 actual and concrete, so long as the public is primarily benefited.” (*McCormick v. Public Employees’  
Retirement System* (2023) 90 Cal.App.5th 996, 1005 (cleaned up).)

Here, ACMA has enforced the well-defined, existing obligation to adopt generally applicable

1 regulations in compliance with the APA. Not only did the declaratory relief enforce the APA's  
2 requirements which benefit the public by increasing transparency in government rulemaking, but the  
3 impact of the relief was also to preclude the FTB from applying those regulations to out-of-state  
4 businesses, thus benefitting a substantial number of retailers. The Court finds that a substantial benefit to  
5 the public will be conferred by the TAM and Publication 1050 being declared invalid.

6 Third, this action required private enforcement and financial risk without any direct reward.  
7 "[T]he necessity and financial burden requirement really examines two issues: whether private  
8 enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing  
9 the successful party's attorneys." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214; see also  
10 *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 379 ["an attorney fee award under section  
11 1021.5 is proper unless the plaintiff's reasonably expected financial benefits exceed by a substantial  
12 margin the plaintiff's actual litigation costs."].) Here, ACMA shouldered the burden of litigation without  
13 any expectation of financial benefit.

14 Private enforcement is necessary where the action is directed at a government agency responsible  
15 for effectuating the right at issue. (*Samantha C. v. State Dept. of Developmental Services* (2012) 207  
16 Cal.App.4th 71, 81.) FTB claims that private enforcement was unnecessary because "any retailer that  
17 wishes to clarify the Board's application of Public Law 86-272 to its internet sales may and must still  
18 pursue a claim for a tax refund." (Fees Opposition, 10.) FTB's argument does not address the fact that  
19 private enforcement of the APA claim was still necessary because no other mechanism would have been  
20 appropriate. While a retailer may be required to bring a claim for a tax refund to FTB, that claim would  
21 not vindicate the taxpayer's right to noticed regulations of general applicability. It also would not  
22 necessarily declare any such regulation invalid as it did here. Thus, the necessity and financial burden of  
23 ACMA's private enforcement render an award appropriate.

24 The parties agree that the final element of section 1021.5 does not apply to this case, and the Court  
25 concurs because no monetary relief was sought. (Fees Opening Brief, 9; Fees Opposition, 11.)

26 Because all the elements are met, the Court finds that the ACMA is entitled to an award of  
27 reasonable attorneys' fees under section 1021.5.

1  
2 **III. ACMA Is Entitled To An Award Of Attorneys' Fees In The Amount of \$332,891.50.**

3 In fixing the amount of an award of reasonable attorneys' fees under section 1021.5, the Court  
4 applies the well-established lodestar method, which first requires the Court to determine the number of  
5 hours reasonably expended multiplied by the reasonable hourly rate. (*Yes In My Back Yard v. City of*  
6 *Culver City* (2023) 96 Cal.App.5th 1103, 1121-1122.) Next, the court engages in the multiplier analysis,  
7 and determines whether the lodestar figure should be augmented or diminished by one or more relevant  
8 factors. (*Id.* at 1122.) Here, ACMA seeks an award of fees based on its lodestar, without the application  
9 of a multiplier. (Fees Opening Brief, 9-15.) The Court addresses each of the elements of the lodestar in  
10 turn.

11 The Court finds that the number of hours for which ACMA seeks compensation is reasonable.  
12 ACMA shows that it is seeking to recover fees only for hours spent in connection with the merits issues  
13 on which it prevailed, including the Section 32 bar, standing, ripeness, and Count Two. (Fees Opening  
14 Brief, 13-14.) In particular, it shows that it has eliminated time entries for time spent on issues for which  
15 it does not seek recovery, including time spent opposing the FTB's petition for writ review of the order  
16 overruling its demurrer, time spent defending depositions of Crutchfield witnesses, experts, and time  
17 spent opposing the FTB's post-judgment motions. (Swetnam-Burland Decl. ¶ 19(c).) It has also reduced  
18 the number of hours associated with entries for work on ACMA's motion for summary judgment to 67%  
19 of the hours billed. (*Id.* ¶ 19(d).) It has also taken a number of steps to ensure that the time for which it  
20 seeks compensation was spent reasonably, including removing entries for time logged or billed by  
21 timekeepers who did not enter an appearance and entries for time counsel did not bill to the ACMA. (*Id.*  
22 ¶¶ 19(b), 20.)

23 The FTB does not assert that the number of hours for which ACMA seeks compensation is  
24 unreasonable,<sup>7</sup> but argues that "the award [should] be limited to the amounts attributable to ACMA's  
25 motion for summary adjudication of its APA claim" because it was successful only as to that claim. (Fees  
26 Opposition, 5.) The FTB's argument is inconsistent with binding case authority, which it fails to address,

27 <sup>7</sup> Nor could it. As ACMA shows persuasively, the FTB refused to enter into stipulations regarding  
28 uncontested facts, conducted multiple unnecessary depositions, and insisted on re-litigating meritless  
positions that the Court had already rejected.

1 regarding fee awards under section 1021.5 in cases in which the plaintiff achieved limited success.

2 “The party seeking attorney fees need not prevail on all its claims alleged in order to qualify for an  
3 award.” (*RiverWatch*, 175 Cal.App.4th at 782-783.) “Although fees are not reduced when a plaintiff  
4 prevails on only one of several factually related and closely intertwined claims, under state law as well as  
5 federal law, a reduced fee award is appropriate when a claimant achieves only limited success.” (*Chavez*  
6 *v. City of Los Angeles* (2010) 47 Cal.4th 970, 989.) “California courts applying section 1021.5 in cases of  
7 limited success have adopted a two-step inquiry set forth in *Hensley v. Eckerhart* (1983) 461 U.S. 424.”  
8 (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 382.) “The first step of the inquiry is to  
9 determine whether the prevailing party’s unsuccessful claims are related to its successful ones. If the  
10 different claims are based on different facts and legal theories, they are unrelated; if they involve a  
11 common core of facts or are based on related legal theories, they are related.” (*Id.*) “The second step of  
12 the *Hensley* inquiry is to determine whether the plaintiff achieved a level of success that makes the hours  
13 reasonably expended a satisfactory basis for making a fee award. In this step, the court will evaluate the  
14 significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on  
15 the litigation.” (*Id.* (cleaned up).)

16 Here, ACMA’s claims were all related. Each cause of action sought the same relief, and was  
17 based on a common core of facts or on related legal theories, as illustrated by the fact that success on one  
18 claim mooted the others. For the same reason, the Court finds ACMA achieved a level of success that  
19 makes the hours expended a reasonable basis for the award because it achieved the primary relief sought  
20 in its complaint. Thus, no reduction is warranted. (See *Environmental Protection Information Center v.*  
21 *Department of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 239 [full compensation may be  
22 appropriate where the plaintiff has obtained excellent results]; see also, e.g., *Gunther v. Alaska Airlines,*  
23 *Inc.* (2021) 72 Cal.App.5th 334, 360-361 [trial court acted within its discretion in not reducing prevailing  
24 party attorney fees for time spent on dismissed claims, where they arose out of the same core set of facts  
25 as successful claim].)

26 With respect to counsel’s hourly rate, ACMA offers two alternative approaches. First, it requests  
27 the Court to utilize market rates for the San Francisco Bay Area, which it calculates on the basis of the  
28

1 federal fees “matrix” as adjusted. (Fees Opening Brief, 12; Swetnam-Burland Decl. ¶¶ 11-18.) On that  
2 basis, counsel’s hourly rates would range from \$726 to \$852 per hour. (*Id.*) Alternatively, ACMA “asks  
3 the Court to use counsel’s actual billed rates to calculate the lodestar figure.” (Fees Opening Brief, 12.)  
4 Those ranges range from \$485 to \$695 per hour. (Fees Opening Brief, 14; Swetnam-Burland Decl. ¶ 24.)  
5 Multiplying the number of hours times these rates would result in an award of \$494,384.38 under the  
6 “matrix” rate and \$332,891.50 utilizing the actual billed rates. (*Id.*)<sup>8</sup> The FTB opposes ACMA’s request  
7 for “increased” rates, asserting that “the fair market value of the legal services ACMA’s counsel provided  
8 should be pegged to the markets [e.g., Maine and Sacramento, California] in which its counsel operated.”  
9 (Fees Opposition, 11-12.)

10 The FTB is again mistaken. “Generally, the lodestar figure is calculated using the reasonable rate  
11 for comparable legal services in *the local community* for noncontingent litigation of the same type,  
12 multiplied by the reasonable number of hours spent on the case.” (*Environmental Protection Information*  
13 *Center*, 190 Cal.App.4th at 248 (cleaned up).) The general rule is “[t]he relevant ‘community’ is that  
14 where the court is located.” (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226  
15 Cal.App.4th 26, 71 [trial court properly calculated fee award based on local hourly rates prevailing in San  
16 Mateo County, where litigation was filed, rather than lower rates charged in Sacramento, where counsel  
17 were based].) Moreover, “[t]he prevailing hourly rates apply regardless of whether the attorneys claiming  
18 fees charge[d] nothing for their services, charge[d] at below-market or discounted rates, represent[ed] the  
19 client on a straight contingent fee basis, or are in-house counsel.” (*Syers Properties III, Inc. v. Rankin*  
20 (2014) 226 Cal.App.4th 691, 701 (cleaned up).) Thus, “[t]here is no requirement that the reasonable  
21 market rate mirror the *actual* rate billed.” (*Id.* [trial court did not abuse its discretion by adopting rates  
22 based on adjusted Laffey Matrix based on prevailing rates in San Francisco Bay Area for services  
23 performed by attorneys and paralegals]; accord, *Pasternack v. McCullough* (2021) 65 Cal.App.5th 1050,  
24 1058 [“a trial court has discretion to award an hourly rate under the lodestar method that exceeds the rate  
25 that was actually incurred or paid”].) In contending that “an upward adjustment of the hourly fees” is  
26

27 <sup>8</sup> ACMA’s papers contain minor discrepancies in the amount of the award sought. (Compare Mot., 1 and  
28 Fees Opening Brief, 15 (\$342,591.50) with Fees Opening Brief, 14 and Swetnam-Burland Decl. ¶¶ 24, 26  
(\$332,891.50).) The latter figure appears to be accurate.

1 improper (Fees Opposition, 12), the FTB ignores this authority, and relies instead on an inapposite case  
2 involving the propriety of a multiplier, which is an upward adjustment of *the lodestar*, an entirely distinct  
3 issue. (See *Northwest Energetic Services, LLC v. California Franchise Tax Board* (2008) 159  
4 Cal.App.4th 841, 879-881.)<sup>9</sup>

5 The FTB's final argument is that "ACMA's request for significant legal fees in this action is  
6 inconsistent with the purpose of section 1021.5," and that the amount of ACMA's fee recovery should be  
7 limited to approximately \$125,000, because "the attorney fee award would not be paid out of a common  
8 fund or be borne by a private wrongdoer, but would ultimately fall upon the shoulders of California  
9 taxpayers." (Fees Opposition, 12-13, quoting *Northwest Energetic Services, LLC*, 159 Cal.App.4th at  
10 881.) Again, however, the FTB misstates the holding of *Northwest Energetic Services, LLC*, which was  
11 addressing the circumstances under which "an upward adjustment of the lodestar" would not be  
12 appropriate. ACMA is not seeking a multiplier. California courts recognize a "strong public policy"  
13 against awarding less than the market value of attorneys' fees "merely because the case was filed against  
14 a government agency." (*Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1332.)  
15 It follows that "a trial court is not permitted to use a public entity's status to negate a lodestar that would  
16 otherwise be appropriate." (*Id.* at 1331.) Indeed, in an appropriate case a court may grant a positive  
17 lodestar against a public agency. (See, e.g., *In Re Lugo* (2008) 164 Cal.App.4th 1522, 1546 [upholding  
18 multiplier of 1.5]); *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th  
19 359, 400-401 [where a "public entity chooses to defend its conduct through lengthy and complex  
20 litigation," it would be an abuse of discretion to "wholly negate the enhancement of a lodestar." (cleaned  
21 up)]; *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 476 ["The fact that the fee award must be paid from  
22 the limited budget of a party and that the financial burden will therefore fall upon the taxpayers does not  
23 constitute a special circumstance rendering the fee unjust." (cleaned up)].) The same logic applies to the  
24 FTB's argument that fees would go to private counsel, not the general public. Again, that is a factor that,

25  
26 <sup>9</sup> In *Northwest Energetic Services, LLC*, plaintiff, which had prevailed in an action against the FTB, filed  
27 a motion for attorneys' fees. Plaintiff's lodestar amounted to \$214,287.50, but the trial court adjusted that  
28 amount upward and awarded it \$3.5 million under section 1021.5 and the common fund doctrine, the  
equivalent of a multiplier of over 16. (159 Cal.App.4th at 850-851.) On appeal, the court held that the  
factors cited by the trial court did not warrant an upward adjustment of the lodestar, and remanded to the  
trial court to determine the appropriate amount of fees and costs to be awarded. (*Id.* at 879-883.)

1 at most, may weigh against an upward adjustment of the lodestar; it does not support the FTB's  
2 contention that the Court should arbitrarily reduce the amount of ACMA's reasonable lodestar.

3 All this said, the Court finds that ACMA's actual billed rates, rather than the higher "matrix" rates  
4 they seek, are reasonable in light of all of the circumstances, including the prevailing market rates in the  
5 San Francisco Bay Area for comparable litigation, the relatively straightforward nature of the issues  
6 raised in the litigation, and the quality of counsel's briefing.<sup>10</sup> Accordingly, the Court finds that ACMA's  
7 actual billed rates are appropriately utilized as the basis for the award. Thus, the Court denies ACMA's  
8 request for an award in the amount of \$509,904.38 and grants, in the alternative, the requested award in  
9 the amount of \$332,891.50.

10 **IV. ACMA's Costs Are Taxed In Part.**

11 **a. This Court Never Ordered Transcripts.**

12 FTB asserts that the Court never ordered any transcripts, and those costs should be taxed. (Costs  
13 Opening Brief, 9.) ACMA responds that "after the August 17, 2023, summary judgment hearing, the  
14 Court asked the parties to submit a transcript" off the record. (Costs Opposition, 7.) However, costs for  
15 transcripts are not allowable unless *ordered* by the court. (Code Civ. Proc. 1033.5(b)(5) (emphasis  
16 added).) While the Court informally requested the parties to supply it with a copy of the transcript if they  
17 ordered one, it did not order any transcripts. Therefore, the FTB's motion to tax costs for court-ordered  
18 transcripts is granted, and ACMA's costs are taxed in the amount of \$470.00.

19 **b. FTB Has Not Met Its Burden To Show Any Other Claimed Costs Are Unrecoverable.**

20 The FTB argues that "ACMA should not recover costs incurred in connection with its  
21 unsuccessful motion and dismissed cause[s] of action." (Costs Opening Brief, 8.) In its reply, the FTB  
22 argues that it should not have to pay "costs attributable to a motion that it defeated." (Costs Reply, 8.)  
23 The FTB cites no authority for the proposition that costs are allowable only if tied to a successful motion  
24 or cause of action. So long as the cost is reasonably necessary to the litigation, it is recoverable. (§  
25 1033.5(e).) Absent evidence to the contrary, the Court must accept the memorandum of costs filed by  
26 ACMA as prima facie evidence that the claimed costs were reasonably necessary. (*Doe*, 37 Cal.App.4th

27  
28 <sup>10</sup> While ACMA's counsel includes attorneys who specialize in federal and state taxation, the issues  
presented in the litigation did not require any particularly sophisticated level of expertise in tax law.

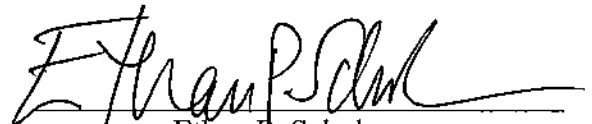
1 at 693.) In any event, the FTB defeated the motion for summary judgment not on its merits, but rather on  
2 procedural grounds (ACMA's failure to meet its burden). That motion ultimately served in part as the  
3 basis for ACMA winning the judgment in its favor. The balance of the FTB's motion to strike or tax  
4 costs is therefore denied.

5 **CONCLUSION**

6 For the foregoing reasons, Defendant's motion to strike or tax costs is granted as to Plaintiff's  
7 claim in the amount of \$470.00 for court-ordered transcripts, and is otherwise denied. Plaintiff's motion  
8 for an award of attorneys' fees pursuant to Section 1021.5 of the Code of Civil Procedure is granted in the  
9 amount of \$332,891.50.

10 IT IS SO ORDERED.

11  
12 Dated: February 13, 2024

13   
14 Ethan P. Schulman  
15 Judge of the Superior Court  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28




**CERTIFICATE OF ELECTRONIC SERVICE**  
(CCP 1010.6(6) & CRC 2.260(g))

I, Felicia Green, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On February 13, 2024, I electronically served ORDER ON (1) DEFENDANT'S MOTION TO STRIKE AND TAX MEMORANDUM OF COSTS AND (2) PLAINTIFF'S MOTION FOR ATTORNEY FEES via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: FEB 13 2024

Brandon E. Riley, Court Executive Officer

By:   
Felicia Green, Deputy Clerk