

**Tentative**

On September 7, 2016, plaintiffs Dana Brancati and William Green filed a complaint against defendants Cachuma Village, LLC, and Anne “Nancy” Crawford-Hall, for breach of the warranty of habitability, fraud, constructive eviction, and “personal injuries and property damage,” based on mold growth inside the residence. Defendant Cachuma Village, LLC answered on November 28, 2016. It does not appear that Anne “Nancy” Crawford Hall was ever served, or ever appeared. Williams Green was dismissed as a plaintiff in an order filed on July 26, 2021.

As relevant for our purposes, Judge Staffel granted Cachuma Village’s motion in limine, excluding plaintiff’s expert from testifying about toxic mold, resulting in a judgment of dismissal. Plaintiff appealed; the Court of Appeal reversed in a lengthy published opinion, concluding the expert Dr. Simon should be allowed to testify. (*Brancati v. Cachuma Village LLC* (2023) 96 Cal.App.5th 499, 450 [“Because the medical expert was qualified and his opinion was based on facts and differential diagnosis, the trial erred in excluding the evidence. We reverse”].) The *Brancati* court concluded that “[c]osts on appeal are awarded to appellant” (Dana Brancati). (*Id.* at p. 515.) The California Supreme Court denied review. (*Brancati v. Cachuma Village, LLC*, S28693, petn. for rev. Jan. 31, 2024.) The remittitur was issued on February 7, 2024.

On February 7, 2024, attorney Mr. Wideman, representing plaintiff, filed a “Memorandum of Costs on Appeal” on standard Judicial Council forms, asking for a total of \$26,545.40 in costs on appeal, as follows: \$1,296.5 in filing fees; \$25.90 in fees for preparation of the original and copies of clerk’s transcript of appendix; \$135 in preparation of the reporter’s transcripts; \$161 for printing and copying briefs; \$27 for transmitting, filing, and serving of record, briefs, and other papers; and \$25,000 in attorney fees. Total for non-attorney fees are \$1,645.4. On February 22, 2024, defense counsel filed a motion to tax costs, asking the court to strike the filing fees of \$1,290, “since the filing fee for an appeal in California according to the Court’s fee schedule is \$775”; and by striking the entirety of the attorney’s fee request, as California Rules of Court rule 8.278 itself does not authorize attorney fees, and plaintiff cannot recover contractual attorney fees pursuant to Civil Code section 1717 until the end of the lawsuit, should it become the prevailing party. Defendant also asks the court to exercise its discretion under Civil Code section 1032, subdivision (a)(4) not to award attorney’s fees, “since this matter has not yet proceeded to trial on the merits.”

On February 26, 2024, Mr. Wideman filed an opposition to the motion to tax; he asks the court for leave to increase the amount of filing fees to \$1,369.5, as follows: \$775 paid to the Court of Appeal; \$100 paid to the superior court; an electronic filing charge of \$10.50; a total of

\$94.50 for “three filings in the Supreme Court and 6 filings in the Court of Appeal[] for a total of \$94.5”; an appearance fee of \$390 for “filing an Opposition to the Petition for Review filed by the Cachuma Village in the Supreme Court of \$390 . . . .” The new total request according to plaintiff is for \$1,618.40, an “increase of \$75” over the original request.<sup>1</sup> In the opposition Mr. Wideman expressly notes perfunctorily that he has “separately timely filed her Motion for Fees, which Motion is to be heard tat [*sic*] the same time as the Motion to Tax Costs[,]”making a claim for attorney’s fees under Code of Civil Procedure section 1021.5; he claims to incorporate that motion herein.

Mr. Wideman filed the “Motion for Fees” – as required by California Rules of Court, rule 3.1702 [all further references to a rule are to the California Rules of Court] and mandated by Rule 8.272 – on March 1, 2024. It was untimely (excluding the day of hearing per Code of Civil Procedure section 12, as it was only 13 court days before the hearing – it had to be 16 court days, including service). Mr. Wideman argues that prior to the published opinion in this matter, “no court had found that it was even proper for anyone to put in front of a jury any expert testimony that shows that mold ‘causes’ any ailments. [¶] That alone justifies Private Attorney General attorney fee recognition per Code of Civil Procedure section 1021.5” “The published appellate ruling (review denied) benefits all mold plaintiffs (present and future) who have previously had their experts disqualified and not allowed to testify as to mold causing illnesses,” based on prior opinions not antiquated.

Defendant filed opposition to the “Motion for Fees” on March 7, 2024. At no point does defendant object to the timing of plaintiff’s motion. Nor does defendant actually challenge Mr. Wideman’s request for new non-attorney fees costs of \$1,618.40. Instead, defendant contends plaintiff has failed to show that she is entitled to attorney fees under Code of Civil Procedures section 1021.5, as the motion “contains virtually no discussion or analysis of the [] factors” that justify attorney fees under this provision. Defendant insists that no public benefit has been conferred, and the opinion did not create new law, or overturn existing law. Indeed, defendant insists that Private Attorney General fees are inappropriate because plaintiff seeks only personal monetary recovery. Finally, defendant contends that the court should strike the attorney fees request because defendant “has supplied no supporting documentation, and the Motion contains no analysis at all regarding the work performed by Plaintiff’s counsel to supposedly justify a \$25,000 fee award, apart from a simple declaration from counsel staging that he spend approximately 60 hours on the appeal . . . .”

The court will first discuss the legal principles at play. It will then address plaintiff’s request for non-attorney fee costs, and then the propriety of the attorney’s fee request at this interim stage of the proceedings. The court will conclude with a summary of is conclusions.

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<sup>1</sup> This statement is incorrect. The amount for non-attorney fees on the “Memorandum of Costs on Appeal” is \$1,645.40 (\$1,296.5 + 25.90 + 135 + 161 + + 27). The total amount requested in the opposition is \$1,618.40, less than the amount requested in the Memorandum.

### *A) Legal Background*

The recovery of costs on appeal is governed by Rule 8.278, which provides that a “prevailing party” in the Court of Appeal in a civil case is entitled to costs on appeal. The prevailing party is the appellant if the court reverses the judgment in its entirety. (Rule 8.278(a)(2).) Rule 8.278(d) expressly details what costs are recoverable: filing fees, amounts paid for any portion of the record; costs to produce additional evidence on appeal; costs to notarize, serve, mail, and file briefs and other papers; costs to print and reproduce any brief, including any petition for rehearing or review, answer or reply; and costs to procure a surety bond. “Unless the court orders otherwise, an award of costs neither includes attorney’s fees on appeal not precludes a party from seeking them under [Rule] 3.1702.”

The procedure to be followed is expressly detailed in Rule 8.278(c). Within 40 days after issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under Rule 3.1700. Unless ordered otherwise by the appellate court, Rule 8.278(d) makes it clear that an award of costs neither includes attorney’s fees on appeal not precludes a party from seeking them under Rule 3.1702 [authorizing a post judgment request for attorney’s fees].) It is settled that as in trial court litigation, attorney fees on appeal are recoverable if authorized by contract, statute, or “law.” (Code of Civ. Proc., 1033.5(a)(10)(A), (B), (C)); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637; 764; *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater* (1985) 165 Cal.App.3d 378, 387 [statutory recovery]; *Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1111 [contract recovery].) A party challenging the costs memorandum may file a motion to tax costs. (Rule 8.278(c)(2).) Unless otherwise directed, the trial court may entertain a request for appellate attorney fees even without any direct order. (*Butler-Rupp v. Lordeaux* (2007) 154 Cal.App.4th 918, 924.) As one appellate court has put it, “Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees.” (*SASCO v. Rosendin Electric, Inc.* (2012) 207 Cal.App.4th 837, 849.) Appellate costs, unlike attorney fees, are generally recoverable on appeal before final disposition. (*Butler-Rupp, supra*, 154 Cal.App.4th at p. 927.)

Plaintiff in his request is not relying on a contractual basis for attorney’s fees (per Code of Civil Procedure section 1717), but on Code of Civil Procedure section 1021.5, known as the Private Attorney General statute. There is good reason for this, as attorney’s fees under Civil Code section 1717 cannot be awarded on an interim bases until final disposition of the entire litigation – interim fees cannot be award. (*Butler-Rapp, supra*, at p. 928.)

Code of Civil Procedure section 1021.5 is an exception to the general rule that parties in a civil action pay their own attorney’s fees. (*Early v. Becerra* (2021) 60 Cal.App.5th 726, 735.) The statute “ ‘ “is aimed at encouraging litigants to pursue meritorious public interest litigation vindicating important rights and benefitting a broad swath of citizens, and it achieves this aim by compensating successful litigants with an award of attorney's fees [citations].” ’ ” (*Id.* at p. 736.)



(*County of Colusa v. California Wildlife Conservation Bd.* 2006) 145 Cal.App.4th 637, 649.) Or as noted by another court: “. . . [I]t is the objective of the *lawsuit* that is critical to recovering fees under section 1021.5, *not the success of an ancillary part of the action*. By its terms, section 1021.5 authorizes attorney fees if the *action* results in the enforcement of an important public right affecting the public interest. Likewise, the purpose of section 1021.5’s authorization of a fee award is to give a private citizen an incentive to bring lawsuits enforcing important public rights. [Citations.] To be sure, an individual may fulfill his or her role as a private attorney general in a variety of ways . . . . In all cases, however, whether a party has been successful is measured by a resolution of the *action*, not an ancillary part of the litigation.” (*Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 402, italics added; see also *Savaglio v. Wall-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 603 [“The measure of success qualifying a litigant for fees under the private attorney general statute is determined with regard to the impact and outcome of the underlying action”].) Where, however, the party “had a ‘personal financial stake’ in the litigation ‘sufficient to warrant [the] decision to incur significant attorney fees and costs in the vigorous prosecution [or defense]’ of the lawsuit, an award under [Code of Civil Procedure] section 1021.5 is inappropriate.” (*Millview County Water Dist. v. State Water Resources Control Bd.* (2016) 4 Cal.App.5th 759, 768-769; *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 201 disapproved of by *Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2021) 12 Cal.5th 493

Cases provide helpful examples of when a benefit is “secure” (a partial or significant success) for purposes of an interim award per Code of Civil Procedure section 1021.5. The term “successful party” as ordinarily understood means the party to the litigation that achieves its objectives. (*Hall v. Department of Motor Vehicles* (2018) 26 Cal.App.5th 182, 189.) In *Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725, a news photographer was arrested after filming an airline crash site that was under police investigation. He sued the city for violating his civil rights although his primary goal in the litigation was to advance his own economic interests by obtaining a damage award. (*Id.* at p. 738.) ) The *Leiserson* court determined that the plaintiff had been properly excluded from a disaster scene, but the case resulted in a published opinion that defined the rights of the press to be present at such scenes. (*Ibid.*) After the opinion became final, Leiserson sought interim attorney fees under section 1021.5, contending his action had resulted in enforcing an important right affecting the public interest and conferring significant benefits on the general public and news media by vindicating the media's right to disseminate information. (*Leiserson*, at p. 731.)

The court held as a matter of law that Leiserson was not a “successful” litigant within the meaning of Code of Civil Procedure section 1021.5. (*Leiserson*, *supra*, 202 Cal.App.3d at pp. 736.) The court acknowledged that the published opinion defined certain media rights, but it did not warrant private attorney general fees “considering the precise nature of the tort litigation Leiserson elected to pursue and his failure to prevail in any manner within his chosen context.” (*Id.* at p. 738.) The *Leiserson* court explained: “Although the procedural device by which a

plaintiff seeks to enforce an important right does not always determine entitlement to attorney's fees under section 1021.5 [citations], *the relief sought is probative of such entitlement*. Indeed, where only a litigant's personal economic interests are advanced by a lawsuit, fees may not be awarded since the litigation does not significantly benefit a large class of persons.” (*Ibid.*) The court noted that Leiserson “confined his tort action prayer to civil damages for himself, never requesting a declaration of the access rights of the press at disaster sites. . . . By tactical design, the litigation was not intended to promote the rights of the media by obtaining a judicial declaration of those rights. Rather, a review of Leiserson's damages complaint reveals his primary intent for pursuing the litigation was to advance his own personal economic interest.” (*Ibid.*) This court stated that given the focus of Leiserson's case, the ensuing published opinion was “simply fortuitous.” (*Ibid.*) In sum, Leiserson was not “successful” within the meaning of Code of Civil Procedure section 1021.5 because he had not achieved his primary litigation goal – a damage award, not a vindication of media rights., because the litigation achieved only incidental public benefits. (*Ibid.*)

In *Hall, supra*, 26 Cal.App.5th 182, when plaintiff refused to submit to a blood alcohol test, police seized his driver’s license, notified him that his license would be suspended or revoked by the DMV in 30 days, and advised him of is right to request a DMV hearing. At the DVM hearing, the DMV offered documentary evidence, including an “Officer’s Statement,” indicating on one hand that the defendant was arrested on “3-22-14,” while the reverse side of the form indicating the admonition police gave to defendant about the consequences of the failure to submit to blood alcohol test was dated “9-27-14.” The hearing officer overruled these objections, concluding the error was clerical, and sustained the revocation. After petitioner’s writ of mandate was filed with the superior court, the hearing officer was charged with conspiring with certain attorneys to accept bribes in exchange for unlawfully issuing temporary driver’s licenses to persons charged with driving under the influence. Petitioner amended his petition, raising not only the discrepancy allegation, but a claim that the DMV violated petitioner’s due process rights to a fair hearing because the hearing officer took bribes in other cases. The trial court granted the writ petition only on due process grounds, while rejecting the discrepancy claim. The DMV advised petitioner that he had been granted a de novo hearing; petitioner, however, appealed, claiming the trial court should have ordered the DMV to reinstate his driver’s license. In a published opinion (*Hall v. Superior Court* (2016) 3 Cal.App.5th 792), the appellate court agreed that the hearing officer who took bribes for nearly a decade did not meet constitutional standards of impartiality; still, the appellate court rejected the argument that a due process violation required reinstatement, and the trial court correctly ordered a new administrative hearing. The appellate court awarded costs to petitioner. (*Id.* at pp. 759-760.) The trial court ultimately denied petitioner’s requests for an interim fee award under Code of Civil Procedure section 1021.5, concluding petitioner had not been successful.

The *Hall* court affirmed the denial of the interim attorney fee request. “Under California law, a plaintiff may be deemed to have been successful under section 1021.5 by succeeding on any significant issue in the litigation which achieves some of the benefit plaintiff sought in bringing the suit. [Citation.]” One of the tests “established in the case law for determining whether a party was successful under section 1021.5 is the before-and-after test. Under this test, courts consider the situation immediately prior to the commencement of the suit and the situation after. (*People v. Investco Management & Development LLC* (2018) 22 Cal.App.5th 443, 458.) Before, Hall’s license was suspended for refusing to take a blood alcohol test. After the litigation, Hall’s license was suspended for refusing to take a blood alcohol test. The only relief – using the term in the broadest sense – that Hall achieved was a remand to the DMV.” (*Id.* at p. 191.) *Hall* conceded that due process is an important right – but “whether an important right is involved is distinct from whether Hall is or is not a ‘successful party.’ To obtain fees under section 1021.5, Hall must first establish he is a ‘successful party.’ He did not. (*Ibid.*) “Under California law, a plaintiff may be deemed to have been successful under section 1021.5 by succeeding on any significant issues in the litigation which achieves some of the benefit plaintiff sought in bringing the suit.” (*Hall*, *supra*, 26 Cal.App.5th at p. 189–190.) However, where the only relief of success from the appellate litigation “was a remand to the DMV to conduct another hearing,” petitioner was not “successful.” (*Id.* at p. 190.)

In *Urbaniak* plaintiff sued a physician, an insurance company, and two lawyers for monetary damages based on defendants’ dissemination of a medical report disclosing the plaintiff was HIV positive. One theory of recovery alleged by plaintiff was that the disclosure violated his state constitutional right to privacy. While the trial court granted defendants’ summary judgment motion, the Court of Appeal reversed as to the defendant physician, holding there was a viable claim that physician violated defendant’s state constitutional privacy right, and remanded. The trial court awarded interim fees pursuant to Code of Civil Procedure section 1021.5; in a second appeal, the appellate court reversed the interim fee award.

Relying on *Leiserson*, *supra*, it observed that plaintiff “confined his tort action to a prayer for civil damages. He did not request a declaration of privacy rights of other similarly situated people, nor did he seek injunctive relief to protect such rights. ‘ ‘ By tactical design, the litigation was not intended to promote the rights of [others] by obtaining a judicial declaration of those rights. . . . [I]n light of the narrow focus of [plaintiff’s] tort pleadings, it is clear our published opinion was simply fortuitous. (202 Cal.App.3d at p. 738). *Urbaniak* went on to note that while a trial court must determine that fees under section 1021.5 must vindicate an important right, and that the need not be accomplished by a final judgment, “there must be some causal connection between the lawsuit and a change in the defendant’s conduct, for example, where the action is a catalyst motivating defendants to provide the primary relief sought.” (*Id.* at p. 1842.) The court noted that “there is no such change indicated in the instant case.” (*Id.* at p. 1842, fn. 5.)<sup>2</sup> The

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<sup>2</sup> The *Urbaniak* court made this determination even though recognizing respondent’s claim that its previous published opinion “enhanced the privacy rights of AIDS victims.” (*Urbaniak*, *supra*, at p. 1843, fn. 5.) “Our

court reinforced the point as follows. “Additionally, noting in the way of relief was “secure” following issuance of our opinion reversing the entry of a summary judgment.[¶] Reversal of a summary judgment leaves the parties “ in a position no different from that they would have occupied if they had simply defeated the defendant’s motion . . . in the trial court.” [Citation.] . . . Merely reversing a summary judgment and remanding a matter for trial does not establish the showing necessary to support an award of attorney fees under section 1021.5. . . . “ (Id. at p. 1844; *Moore v. Liu* (1999) 69 Cal.App.4th 745, 754–755 [same].)

By contrast, in *La Mirada Avenue Neighborhood Assn of Hollywood v. City of Los Angeles*, *supra*, 22 Cal.App.5th 1149, the court observed that as long as the interim benefit is “complete regardless of subsequent proceedings,” a court may recognize that benefit by an award of attorney fees. (*Id.* at p. 1160.) That standard had been met when plaintiffs challenged through writ petitions a building project by Target Corporation (Target) as violative of the Los Angeles Municipal Code as well as the Station Neighborhood Area Plan (SNAP) rules, and variances granted by the Los Angeles City Council. The trial court partly granted and partly denied the petitions, and all parties appealed. While the appeals were pending, the City Council amended the SNAP to create new building rules; Target asked the appellate court to hold the pending appeals in abeyance and consolidate them with the anticipated appeals in the next round of litigation challenging the new SNAP amendments. In a published ruling, the appellate court dismissed the appeals as moot but left the judgment intact. (*La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, 588-592 (*La Mirada I*). After the *La Mirada I* appeal was dismissed, plaintiffs moved for attorney’s fees under section 1021.5. The trial court granted the request (i.e., as an interim award, given the litigation had not concluded). Target and the City appealed.

The appellate court affirmed the interim fee award. A successful party is a party to the litigation that achieves its objectives. (*Id.* at p. 1157.) This definition is pragmatic and broad, and a final judgment need not be secured; indeed, the party need not succeed on all its claims. “The trial court did not abuse its discretion in concluding that plaintiffs were a successful party for two distinct but interlocking reasons. First, plaintiffs sought a writ that would ‘vacate and set aside’ the City Council’s grant of eight variances from the SNAP, and it did so as a way to vindicate their ‘interest in ensuring that the City’s decisions are in conformity with the requirements of the [municipal code].’ Plaintiffs achieved this objective when the trial court invalidated six of the eight variances for noncompliance with the municipal code. Second, plaintiffs’ lawsuit served as a catalyst that motivated the City—a defendant in this action—to amend the SNAP to create a new subarea F specifically to make the Project lawful under the municipal code. A party is successful when, as here, its lawsuit directly prompts a “legislative fix.” (See *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 314 [noting that the “impact” of a

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Supreme Court speaks of a lawsuit being a catalyst that motivates change or vindicates an important right ‘ ‘ by activating defendants to modify their behavior. ‘ ‘ (*Maria P. Riles* (1987) 43 Cal.3d 1281, 1292.) There is no such change indicated in the instant case.”



lawsuit “might include legislative changes ... or amendments in policy”].)” (*La Mirada*, supra, at p. 1157.)

As particularly relevant for our purposes, the appellate court rejected Target’s claim that there was no success because the validity of the new zoning law is pending and has yet to be finally adjudicated. “It is factually inaccurate because the stated objective of plaintiffs’ writ petitions, with respect to the SNAP variances, was to set aside and invalidate the eight variances initially granted by the City Council as well as to enjoin any further construction contingent upon their validity. At no point did plaintiffs allege that their writ petitions were aimed at stopping the Project forever more.” The contention was also legally untenable, opined the court, because “success for purposes of section 1021.5 does not require a showing that the successful party put the entire dispute to rest for once and all. To the contrary, section 1021.5 contemplates ‘interim attorney fee awards’ for successes conferring a significant benefit before the matter is finally litigated. [Citation.] As long as an interim benefit is ‘complete regardless of subsequent proceedings,’ a court may recognize that benefit by an award of attorney’s fees.” Petitioners were successful at least in part; indeed, “the judgments in this case are interim only against the backdrop of the broader litigation between the parties, which continues only because the City amended the zoning law and thereby prompted a new round of petitions challenging the Project under the new zoning law. That the City by amending the zoning law is just trying to “get it right,” as Target urges, is beside the point; the proper focus is on the “litigation objectives” of the prevailing plaintiff [citation], not the motives of the losing defendant.” (*La Mirada Avenue Neighborhood Assn. of Hollywood*, supra, 22 Cal.App.5th at pp. 1159–1160.)

## B) Merits

### 1) Non-Attorney Costs (Motion to Tax Costs)

The first issue involves the award of all costs requested that do not involve attorney’s fees. Plaintiff is entitled to those costs, and the only issue for the court is their amount. Plaintiff asks for \$1,645.40 in the “Memorandum of Costs on Appeal” form filed by plaintiff (a form signed under penalty of perjury), and then claims that it wants to “increase” the amount to \$1,618.40. Defendant has not filed a reply as of this writing,

The court will award Mr. Wideman what he asks for in his opposition (an amount actually less than the amount in the original Memorandum), at \$1,618.40, as no reply has been filed.

### 2) Attorney’s Fees

The request for interim attorney’s fees is the real issue before the court, as plaintiff asks for \$25,000. At no point in defendant’s opposition to plaintiff’s “Motion for Fees” does

defendant challenge the timeliness of plaintiff's motion, arguing only the merits of plaintiff's request for attorney's fees of \$25,000 pursuant to Code of Civil Procedure section 1021.5. While the motion is untimely, there seems to be no prejudice; the court will address its merits.

In this regard the court does not have to address all issues raised by defendant in opposition to effectively assess whether attorney's fees should be awarded pursuant to Code of Civil Procedure section 1021.5 on an interim basis. For example, it does not have to address whether the full \$25,000 has been justified, for two defects in plaintiff's request seem apparent – and fatal (individually or collectively).

First, one of the three requirements of a Code of Civil Procedure section 1021.5 fee request is that the “necessity and financial burden of private enforcement are such as to make the award appropriate.” (See, e.g., *Bui v. Nguyen* (2014) 230 Cal.App.4th 1357, 1365-1366.) This in turn involves two assessments – whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys.” (*Conservatorship of Whitely* (2010) 50 Cal.4th 1206, 1214.) It is the moving party's burden under Code of Civil Procedure section 1021.5 to establish each prerequisite to an award of attorney fees under section 1021.5 (*Bui, supra*, at p. 1366.)

Plaintiff has failed to meet this burden, for she fails to explain why the necessity and financial burden of private enforcement -- a key component of Code of Civil Procedure section 1021.5 analysis -- makes the interim award (or any award for that matter) appropriate. One need only look to the complaint to see that plaintiff has from the lawsuit's inception relied on a contractual attorney fee's provision as detailed in the lease agreement, as the latter is attached to the complaint; it clearly provides for attorney's fees pursuant to Civil Code section 1717. It is generally said that the financial burden criterion of Code of Civil Procedure section 1021.5 is satisfied when the cost of litigation is disproportionate to the plaintiff's individual stake in the matter. (E.g., *Baggett v. Gates* (1982) 32 Cal.3d 128, 142; *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941; *Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 994.) “An attorney fee award under section 1021.5 is proper unless the plaintiff's reasonably expected financial benefits exceed by a substantial margin the plaintiff's actual litigation costs.” (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 154.)

How can the cost of litigation be *disproportionate* to the plaintiff's individual stake in the matter when plaintiff can secure all reasonable attorney's fees if he or she is the prevailing party at the conclusion of the litigation? Or put another way: How can an attorney fee award under Code of Civil Procedure section 1021.5 be appropriate when the plaintiff's reasonably expected financial benefits do not exceed plaintiff's actual litigation costs, which will be fully recouped under Civil Code section 1717 as the prevailing party? The focus “is on plaintiff's incentive to litigate absent a statutory attorney fee award.” (*Collins, supra*, at p. 154.) The gravamen is on the plaintiff's incentive to litigate absent a statutory attorney fee award. “[S]ection 1021.5 is

intended to provide an incentive for private plaintiffs to bring public interest suits *when their personal stake in the outcome is insufficient to warrant incurring the costs of litigation.*’ ” (*Whitley, supra*, at p. 1221, emphasis added; *Collins, supra*, 205 Cal.App.4th at p. 154.) By virtue of Civil Code section 1717, plaintiff’s personal state in the action is more than *sufficient* – *it is not insufficient* – to warrant incurring the costs of litigation without resort to any reliance on section 1021.5. Notably, plaintiff has failed to cite to one case that allows attorney’s fees pursuant to Code of Civil Procedure section 1021.5 when the costs for advancing the causes of action in the operative pleading are actually covered by a contractual attorney’s fee provision, as is clearly the case here. And as noted above, it is settled that under Civil Code section 1717, plaintiff must wait until the matter is completely resolved before asking for fees as the prevailing party. Plaintiff’s failure to address this alone supports denial of the \$25,000 fee request.

In any event, there exists a second basis to deny the request for \$25,000 even if the court assumes *arguendo* (without deciding) that the presence of an attorney fee’s provision per Civil Code section 1717 (as is the case here) alone does not preclude the possibility of a fee award per section 1021.5 under the circumstances. Plaintiff simply has not demonstrated that it “secured” a benefit contemplated by her litigation objectives as set out in the operative pleading as a condition precedent for an interim award. Like the plaintiffs in both *Leiserson* and *Urbaniak*, as detailed above, plaintiff confined her action to a prayer for civil damages (compensatory and punitive). As did the plaintiff in those two cases, plaintiff here did not request a declaration of rights or other similarly situated people, and did not seek injunctive relief. The litigation here was not intended to promote the rights of others. And as was true in both *Leiserson* and *Urbaniak*, the published opinion was simply fortuitous. Plaintiff’s litigation goal was monetary compensation – and that was not secured in any way. There really is no difference between the import of what happened here – in which the court clarified the law regarding the requirements for the admissibility of mold expert testimony – and the fact *Leiserson* involved a published opinion that defined the rights to be present at accident scenes; while *Urbaniak* involved the enhanced rights of AIDS patients. None of the published opinions (and the rulings therein) directly advanced the actual objectives of plaintiff’s litigation, which focused on monetary compensation. Plaintiff here (as the plaintiffs in these cases) has not “secured” a litigation objective.

Not insignificantly, the procedural posture of this case is very similar to the procedural posture in *Urbaniak*, to the extent plaintiff finds himself in the exact same position he would have been in had Judge Staffel granted the motion in limine, rather than denying it. Reversing the ruling on the motion in limine and remanding to the trial court is clearly similar to reversing a summary judgment motion and remanding for trial, as was the case in *Urbaniak*. One can simply substitute the terms “motion in limine” and motion to dismiss (what happened here) for the language used in *Urbaniak* -- reversing a summary judgment motion and remanding for trial; neither situation establishes the showing necessary to support an award of attorney fees under section 1021.5. *Hall* is the same – Hall’s license was suspended for refusing to take a blood

alcohol test, and after the litigation, Hall's license was still suspended. He was simply given a remand for a new DMV hearing. Plaintiff here is simply been given the same opportunity to prove that toxic mold caused her injuries after remand as before – nothing more, nothing less. And nothing in the appellate court opinion here (as was the case in *Urbaniak* and *Leiserson*) actually changed defendant's behavior. In fact, there is no causal connection between the lawsuit and any change in defendant's conduct, for example, where the action is a catalyst motivating defendant's to provide the primary relief lost. Indeed, that catalyst was present in *La Mirada Avenue, supra*, 22 Cal.App.5th 1149; it is conspicuously absent here.

Plaintiff's motion fails to address the import of this authority in any way. Plaintiff cites the standards for Code of Civil Procedure section 1021.5, without addressing application to interim awards – such as *Leiserson*, *Urbaniak*, *Hall*, and *La Mirada*, which frame the issues and govern the outcome. No one is saying that plaintiff cannot ask for fees should she win at trial. But it is simply premature, under the raiment of Code of Civil Procedure section 1021.5, to award interim fees at this time, under the circumstances before the court, under the governing authority at play.

In summary:

- As no reply has been filed by defendant, the court will award plaintiff non-attorney costs of \$1,618.40 as requested in plaintiff's opposition.
- The court denies the request to award interim attorney's fees of \$25,000 pursuant to Code of Civil Procedure section 1021.5, because 1) plaintiff has failed to address the impact of an attorney's fee provision in the lease agreement attached to the complaint pursuant to Civil Code section 1717; and/or (in any event) 2) plaintiff has failed to show it "secured" a benefit as discussed in *Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725, *Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1844, *Hall v. Department of Motor Vehicles* (2018) 26 Cal.App.5th 182, (and by contrast) *La Mirada Avenue Neighborhood Assn of Hollywood v. City of Los Angeles* (2018) 22 Cal.App.5th 1149. This case is similar *Urbaniak* in particular.
- Defendant is directed to provide a proposed order for signature.