Case No. C077743

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

JERALD GLAVIANO,

Plaintiff and Appellant,

v.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

Appeal from the October 16, 2014 Order After Hearing Granting in Part and Denying in Part Petition for Writ of Mandate and/or Motion for Attorney Fees of the Superior Court of California, County of Sacramento, Honorable Allen Sumner, Case No. 34-2013-80001662

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF DEFENDANT/RESPONDENT SACRAMENTO CITY UNIFIED SCHOOL DISTRICT

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF THE THIRD APPELLATE DISTRICT:

I.

INTRODUCTION

Pursuant to California Rules of Court, rule 8.200(c), the California School Boards Association's Education Legal Alliance ("Amicus") respectfully requests permission to file the accompanying Amicus Curiae Brief. Amicus will address the trial court's ruling from the perspective of the school districts' governing boards, which are charged with employing teachers and meeting their due process rights during dismissal proceedings while also ensuring students receive the public education to which they are entitled. Amicus wishes to be heard on the proper interpretation of Education Code section 44944 and its attorney fee-shifting provisions, the real world impacts of Appellant Glaviano's arguments, and the analysis of the trial court's ruling.

II.

INTERESTS OF THE AMICUS CURIAE

The California School Boards Association ("CSBA") is a California nonprofit corporation duly formed and validly existing under the laws of the State of California. With a membership base of nearly 1,000 educational agencies statewide, CSBA brings together administrators and governing boards from K-12 school districts and county offices of education to advocate for effective policies that advance the education and well-being of the state's more than 6 million school-age children. As a membership-driven association, CSBA provides policy resources and training to its members, and represents the statewide interests of public

education through legal, political, legislative, community and media advocacy.

As part of the CSBA, the Education Legal Alliance ("Alliance" or "ELA") is composed of nearly 740 CSBA members dedicated to addressing legal issues of statewide concern to school districts and county offices of education. The purpose of the Alliance, among other things, is to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. To that end, the Alliance's activities include joining in litigation as amicus curiae where, as here, the interests of public education are at stake.

This case involves legal issues of critical statewide importance and potentially significant adverse financial impact to all members of CSBA currently undergoing or contemplating teacher discipline and dismissal proceedings. Specifically, the question presented by this case is whether a teacher that has successfully defended against dismissal charges brought by a school district is entitled, under Education Code section 44944, to recover attorney fees based on the prevailing market hourly rates charged by similar attorneys in the same community ("lodestar"), or whether the teacher is limited to reimbursement of the reduced rate actually charged by the law firm to the teacher (or union paying on his behalf).

The trial court held that the proper measure of attorney fees to be awarded to a prevailing teacher under Education Code section 44944 is limited to reimbursement of actual fees *incurred*. Amicus supports the trial court's ruling and believes that not only is it a correct interpretation of Section 449944, it is also supported by sound public policy.

III.

THIS AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus has reviewed the briefs and is familiar with the questions involved in this case and the scope of their presentation. Amicus believes that its brief will assist the Court by addressing relevant points of law and arguments not discussed in the briefs of the parties and demonstrating that this case is a matter of general statewide importance affecting school districts and county offices of education across the state. Presentation of such legal argument is the very reason for affording amicus curiae status to interested and responsible parties such as the Alliance. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 fn. 14.)

IV.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the Court accept the accompanying Amicus Curiae Brief for filing in this case, and Amicus confirms that no party or counsel for any party in the proceeding authored the attached brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. (Cal. Rules of Court, Rule 8.200(c)(3).)

Dated: October 23, 2015

By: 

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, Rule 8.208)

Amicus Curiae California School Boards Association's Education Legal Alliance knows of no entity or person that must be listed under subsections (1) or (2) of Rule 8.208(e). (Cal. Rules of Court, Rule 8.208(e)(3).)

Dated: October 23, 2015

By: 

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PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE

COMES NOW Amicus Curiae, the California School Boards Association's Education Legal Alliance offers the following Proposed Amicus Curiae Brief in regard to the above captioned matter:

I.

INTRODUCTION

Teachers in California's K-2 public schools are entitled to comprehensive due process when their termination or suspension is sought by their employing school district. (Ed. Code, § 44930 *et seq.*) Among other rights, a teacher may request a hearing before a Commission on Professional Competence ("CPC"), which consists of one member selected by the employee, one by the school district, and an Administrative Law Judge appointed by the Office of Administrative Hearings. The CPC conducts the evidentiary hearing in accordance with rules prescribed under the Administrative Procedures Act (Gov. Code, § 11500 *et seq.*). The decision of the CPC is deemed the final decision of the governing board, and either party may appeal the CPC's decision to superior court. (Ed. Code, § 44945.) Significantly, if a teacher prevails before a CPC, Education Code section 44944, subdivision (f)(2), requires the school district to reimburse the employee for the costs of defending him or herself, including "reasonable attorney's fees incurred by the employee." [1]

[1] During the original dismissal proceedings before the CPC, the relevant statutory subdivision was codified as Education Code section 44944, subdivision (e)(2). Effective January 1, 2015, this provision was renumbered, and subdivision(e)(2) is now subdivision (f)(2). In this brief, Amicus cites to Education section 44944, subdivision (f)(2).

This case involves the proper measure of attorney fees to be awarded after a teacher prevails in challenging dismissal pursuant to Section 44944.[2] Plaintiff/Appellant Jerald Glaviano asserts that the court should have calculated his attorney fees using the "lodestar method," which involves multiplying the number of hours reasonably spent by an hourly rate, typically the market or prevailing rate charged by attorneys performing the same work in the same community. (See, e.g. *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579.) Defendant/Respondent Sacramento City Unified School District, pointing to Section 44944's language regarding "fees incurred," argues that recovery should be based on the reduced rate Plaintiff was actually charged. As a member of the California Teachers Association ("CTA"), Plaintiff was charged a discounted rate his attorneys offer CTA members through a Group Legal Services Program.

The trial court, in a detailed and well-reasoned order, held that Section 44944 limits recovery to attorney fees actually charged, and therefore Plaintiff's fee award must be calculated based on the rate he was in fact charged. (See Oct. 16, 2014 Order, p. 11.) After Plaintiff refused to disclose what that rate was, based on the claim that his firm's billing rates are privileged, the trial court properly denied Plaintiff's motion for attorney fees in its entirety as Plaintiff failed to carry its burden of documenting the fee request.

Amicus respectfully submits that this Court should affirm the trial court's decision for several important reasons. First, the trial court correctly interpreted and applied Section 44944(f)(2) as limiting recovery of attorney fees to fees incurred, meaning those actually paid by or charged to a prevailing teacher (or paid by his union on his behalf.) The trial court's decision is consistent with the plain language of the statute and

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[2] Unless otherwise noted, all code references are to the Education Code.

longstanding precedent. Second, public policy supports this decision because Section 44944(f)(2) is designed to reimburse an employee for the costs of the dismissal proceeding and because funds spent on attorney fees are funds not spend on educating students. Lastly, the trial court properly rejected Plaintiff's claim that his firm's billing rates are privileged because Plaintiff waived any claim of privilege by putting his law firm's fees and billing rates at issue.

For these reasons, and as set forth more fully herein, Amicus respectfully requests that this Court affirm the decision below in full.

II.

ARGUMENT

A. The Trial Court's Interpretation of Section 44944 Is Supported by Important Public Policies to Preserve Education Dollars by Limiting Attorney Fee Awards to Amounts "Incurred"

1. Overview of Fee-Shifting Statutes

Under California law, "each party to a lawsuit must pay its own attorney fees unless a contract or statute or other law authorizes a fee award." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237; see Code Civ. Proc., § 1021.) Thus, unless specifically provided by statute or agreement, attorney fees are not recoverable. (*K.I. v. Wagner* (2014) 225 Cal.App.4th 1412, 1420-21.) If a party seeking attorney fees is relying on a statutory authorization, a court has no discretion to award the fees unless the statutory criteria have been met as a matter of law. (*Ibid.*)

In construing a fee-shifting statute, the court's fundamental task is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 218.) First, the court examines the language of the statute, giving the words employed by the Legislature their usual and ordinary meaning. (*Kavanaugh*

v. West Sonoma County Union High School Dist. (2003) 29 Cal.4th 911, 919.) If the language is clear, no further statutory construction is necessary. (*Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1279, 62 Cal.Rptr.3d 284.) If, however, the statutory language leaves doubt about its meaning, the court may consider other evidence of legislative intent, such as the history and background of the statute. (*California School Employees Assn. v. Tustin Unified School Dist.* (2007) 148 Cal.App.4th 510, 517.) The court's limited role is to construe statutes, not rewrite them. (*California Teachers Assoc. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.)

According to one estimate, there are at least 234 different provisions for fee shifting awards in California. (Jineen T. Cuddy, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds* (1992) 24 Pacific L.J. 141, 180, fn 35.) These fee statutes are not created equally. Some statutes mandate fee-shifting on the idea that the person that caused the lawsuit should pay the costs (e.g. anti-SLAPP statute), other statutes fee-shift to vindicate important public rights, and still others are based on contractual allocation of loss and reciprocity (Civil Code §1717). As one scholar has opined,

> Statutory attorney fees provisions have two fixed characteristics. Each statute indicates both the threshold of success that a party must attain to recover attorney fees, and the amount of discretion the court has in awarding fees to a party meeting the threshold requirement. The degree of success required to recover attorney fees extends over a spectrum. At one end of the spectrum are statutes permitting recovery of attorney fees to a party who has achieved minimal success on the merits, such as obtaining a favorable judgment on an issue. At the other extreme are statutes allowing fee shifting only when a party has litigated in bad faith. The degree of a trial court's discretion in awarding attorney fees also extends over a spectrum, ranging from mandatory obligation to award attorney fees, to unbounded

> discretion in awarding attorney fees. (See generally, Michael Green, *From Here to Attorney Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 Cornell L.Rev. 207, 217-18 (1984).)

Accordingly, in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136, the California Supreme Court cautioned that the language of every attorney fee statute must be construed on its own merits. Here, the relevant statute governing Plaintiff's entitlement to attorney fees is Education Code section 44944(f)(2), which provides that if a teacher prevails in its hearing before the Commission on Professional Competence, the school district shall pay the expenses of the hearing, including "reasonable attorney's fees incurred by the employee." (Ed. Code, § 44944(f)(2).) Rather than confront this statutory language, Plaintiff spends much of his brief trying to analogize to other, unrelated statutes in vain efforts to show that he is entitled to fees based on the prevailing market rates, rather than the reduced billing rate his attorneys actually charged. As shown below, however, each of these statutes serves a different purpose and cannot be generalized into a single public policy. Education Code section 44944 serves the important state interest of minimizing administrative hearing costs whereas the fee-shifting statutes cited by Plaintiff serve other public policies and are not on point.

2. The Trial Court's Interpretation Is Supported by Important Public Policies to Minimize the Costs of Dismissal Proceedings and Preserve Education Funds

In this case, there can be no doubt that Section 44944 is a reimbursement statute. The purpose of Section 44944 is to "enable a teacher to protect his or her job and to 'make whole' the successful litigant." (*Russell v. Thermalito Union School Dist.* (1981) 115 Cal.App.3d 880, 883; *Board of Education v. Commission on Professional Competence* (1980) 102

Cal.App.3d 555, 564; see also *Bd. of Ed. of Sunnyvale Elementary School Dist. v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 562-563.) As the trial court recognized, applying *Russell* "to make someone whole generally means to put them in the same position they would have been in had the challenged action not been taken . . . not pay his law firm more than the firm charged." (RT 917.)

In reaching this result, the trial court considered not only the plain language of the statute, but also public policy implications and noted that the ultimate burden on taxpayers to pay for Plaintiff's fee warrants reduction to the amount actually incurred. Courts have long recognized that consideration of the ultimate burden on taxpayers to pay a fee award is appropriate when adjusting a claimant's fee recovery. (See, e.g. *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322.) In fact, in *Rey v. Madera Unified School District* (2012) 203 Cal.App.4th 1223, 1243, the court reasoned that because there was no evidence the district would receive extra revenues to pay an attorney fee award, "it was likely that any amount paid by the District would instead be cut from educational services that would otherwise be provided to the District's students."

Although there is no definitive study on the subject, by one estimate, the average cost of dismissal proceedings for a tenured teacher is approximately $200,000. (Michael Blacher, "*K-12 Teacher Termination Hearings: Are They Worth the Cost*?" CPER Journal No. 180 (October 2006), p. 16.)[3] Other news outlets have reported that dismissal proceedings can take "two to almost 10 years and cost $50,000 to $450,000 or more." (Nanette Asimov et al., "*Is this the end of teacher tenure in California*?"

[3] Available at http://www.lcwlegal.com/files/92132_K-12%20Teacher%20Termination%20Hearings.pdf (last accessed Oct. 10, 2015.)

SFGate, June 11, 2014.)[4] According to a 2010 LA Weekly report, from 2000 to 2010, the Los Angeles Unified School District spent $3.5 million in efforts to dismiss seven of the district's 33,000 employees for inadequate classroom performance. (Beth Barrett, "*LAUSD's Dance of the Lemons*," LA Weekly, Feb. 11, 2010.)[5] Of course, "every dollar a district spends on teacher dismissals is one less dollar available for basic educational programs and services that improve the performance of students." (Blacher, *supra*, CPER Journal No. 180 at p. 16.)

School district resources are finite and carefully budgeted. Thus, the prospect of incurring a financial loss of up to $450,000 in a single fiscal year is untenable for most districts. This is particularly true for the hundreds of small school districts that often do not have budgets sufficient to pay attorneys for the dismissal process, much less attorney fees that were not even charged. There are over 300 school districts with annual budgets of less than $5 million.[6] An unbudgeted loss of $450,000 is nearly 10% of the total budget for those districts. To put such a financial loss in context, education funding during the Great Recession dropped 12%.[7] Those unprecedented cuts to education caused significant layoffs and reductions in programs. Spending unbudgeted funds on teacher dismissals requires

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[4] Available at http://www.sfgate.com/education/article/Is-this-the-end-of-teacher-tenure-in-California-5542577.php (last accessed Oct. 10, 2015.)

[5] Available at http://www.laweekly.com/news/lausds-dance-of-the-lemons-2163764 (last accessed Oct. 10, 2015.)

[6] This information is based on 2013-14 "" data available from the California Department of Education. It is available online at http://www.cde.ca.gov/fg/ac/ac/. (Last accessed Oct. 23, 2015.)

[7] See California Budget and Policy Center (formerly California Budget Project), California's Public Schools have Experienced Deep Cuts in Funding Since 2007-08 (June 7, 2011) Available at http://calbudgetcenter.org/wp-content/uploads/110607_K12_Cuts_by_District.pdf. (as of Oct. 23, 2015) [noting a cut of $6.3 billion from $50.3 billion].

that those funds be pulled from other sources to which they were previously allocated, including employee salaries, student programs, maintenance of school facilities, and many other purposes central to the education process.

Based on these facts, Amicus contends that in interpreting Section 44944, the trial court properly took into account an important legislative goal in minimizing the costs of administrative hearings and reducing the burden on the taxpayers. This Court should affirm.

3. Plaintiff's Analogies to the Private Attorney General Statute and Contractual Fee-Shifting Provisions of Civil Code § 1717 Are Misplaced

Despite the foregoing, Plaintiff at pages 8 to 12 of the Opening Brief, cobbles together cases decided under a variety of different fee-shifting statutes unrelated to Education Code section 44944 in vain effort to argue that the "legislative purposes underlying traditional fee-shifting statutes" are best served by awarding fees based on the prevailing market rate, rather than fees actually charged or "incurred." These analogies fall flat.

a. Plaintiff's References to the Private Attorney General Statute Are Not on Point Because Plaintiff Has Not Vindicated an Important Public Right

Code of Civil Procedure section 1021.5 codifies the private attorney general doctrine adopted in *Serrano v. Priest* (1977) 20 Cal.3d 25. (See *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 317.) In order to award attorney fees under Section 1021.5, the court must find that the action (1) served to vindicate an important right affecting the public interest, (2) conferred a significant benefit on the general public or a large class of individuals, and (3) the necessity and financial burden of private enforcement renders the award appropriate. (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1044.)

"Because the public always has a significant interest in seeing that laws are enforced, it always derives some benefit when illegal private or public conduct is rectified. Nevertheless, the Legislature did not intend to authorize an award of fees under section 1021.5 in every lawsuit enforcing a constitutional or statutory right." (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635.) The statute specifically provides for an award only when the lawsuit has conferred "a significant benefit" on "the general public or a large class of persons." (*Woodland Hills Residents Ass'n, Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 939-940.) When the record indicates that the primary effect of a lawsuit was to advance or vindicate a plaintiff's personal economic interests, an award of fees under section 1021.5 is improper. (*Press v. Lucky Stores, Inc.*, *supra*, 34 Cal.3d at pp. 319–320, fn. 7.)

"Section 1021.5 is intended as a 'bounty' for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public." (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570 [economic interest of forester's association and its members was sufficient motivation for bringing action challenging emergency regulations and, thus, award of attorney fees under private attorney general theory exceeded trial court's discretion].) For example, in *Kistler v. Redwoods Community College District* (1993) 15 Cal.App.4th 1326, 1336–1337, school administrators sued a community college district, arguing that the district wrongfully deprived them of accrued vacation pay when it forced them to exhaust their accrued vacation balances prior to leaving their contractual position as administrators. Despite prevailing on their Labor Code claims, the court found that the plaintiffs were not entitled to attorney fees under section 1021.5, because they were not enforcing important public rights, but "simply seeking wages due them." (*Id.* at 1337.)

Courts have specifically held that the private attorney general provisions in Section 1021.5 do not apply to teacher dismissal proceedings. (*Roybal v. Governing Bd. of Salinas City Elementary School Dist.* (2008) 159 Cal.App.4th 1143, 1150.) *Roybal* held that school psychologists who prevailed in an action against a school district that laid them off in violation of their seniority rights did not vindicate an "important public right," as required for award of attorney fees under the private attorney general doctrine. As the court explained, "Realistically assessed, the gains achieved by petitioners were personal. . . .Any benefit to the public in the District's compliance with section 44955 in this case was incidental to the primary goal of the lawsuit, to obtain reinstatement and/or damages for petitioners." (*Id*. at p. 1150.)

Similarly, in this case, Plaintiff's success in this litigation certainly served his own, personal economic interests, but did not act to vindicate any public rights or advance the cause of some widespread, societal interest. Consequently, the policies underlying the private attorney general statute's fee-shifting provisions—to encourage highly qualified attorneys to pursue public policy cases and deter defendants from violating statutory rights—do not apply here and provide no basis for Plaintiff to claim prevailing market rates as opposed to actual incurred rates.

b. *PLCM* and the Fee-Shifting Provisions of Civil Code Section 1717 Are Not On Point

At pages 13 to 17 of the Opening Brief, Plaintiff cites to *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 for the proposition that the traditional lodestar method of prevailing market rates applies when a states permit an award of fees "incurred." Once again, Plaintiff is incorrect.

PLCM considered the meaning of Civil Code section 1717, which entitles the prevailing part in a contract dispute to reasonable fees if the

contract "provides that attorney's fees and costs, which are *incurred* to enforce that contract, shall be awarded either to one of the parties or to the prevailing party. . . ." (Emphasis added.) "The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610.) Thus, "when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits the party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Id*. at p. 611.) Significantly, the court held that Section 1717 authorizes a market rate fee award that may exceed the actual cost of representation.

In *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 11-12, the court noted that the Section 1717's fee-shifting provisions are ambiguous because the statute says a prevailing party is entitled to attorney fees and costs, "*which are incurred* to enforce that contract." (§ 1717, subd. (a), italics added.) Based on the underlying purpose of reciprocity of contract, the court felt "compelled" to "interpret section 1717 to provide a reciprocal remedy for a prevailing party who has not actually incurred legal fees, but whose attorneys have incurred costs and expenses in defending the prevailing party on the underlying agreement." (*Ibid*.) The court continued, "Had appellant (the landlord) prevailed in this action, respondent clearly would have been liable for attorney fees pursuant to the agreement's fees provision. [citation] Since respondent prevailed instead, he, too, may recover attorney fees pursuant to section 1717."

Based on the foregoing, Plaintiff's efforts to glean support for its position from *PLCM* and Civil Code section 1717 are untenable. Section 1717 allows for market based fees because of the reciprocity provisions

enshrined in the statute. However, these concerns are not present in Education Code section 44944. As previously noted, Section 44944 is a "make whole" statute. Unlike private attorney general where they are vindicating an important public right, or Section 1717 where the parties have contractually agreed to shift all costs, the statute at issue in this case is concerned about reimbursement only. Accordingly, the trial court correctly held that Plaintiff was limited to the actual fee charged by his attorneys.

B. The Trial Court Correctly Interpreted Education Code Section 44944 as Limiting Attorney Fees to the Amounts Actually Charged to Plaintiff

Education Code section 44944(f)(2), which governs Plaintiff's entitlement to attorney fees, provides as follows:

> If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board of the school district shall pay the expenses of the hearing, including the cost of the administrative law judge, any costs incurred under paragraphs (2) and (3) of subdivision (e), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board of the school district and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the governing board of the school district and the member selected by the employee, and reasonable attorney's fees incurred by the employee. (§ 44944(f)(2); underscores added.)

Thus, the term "incurred" is used several times within Section 44944(f)(2). The first two references undoubtedly mean reimbursement of actual costs incurred for the administrative law judge and the CPC members selected by the school district and teacher. "Identical words used in different parts of the same act are intended to have the same meaning." (*People v. Roberge* (2003) 29 Cal.4th 979, 987.) "[I]t is generally

presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute." (*People v. Dillon* (1983) 34 Cal.3d 441, 468.) As *Dillon* noted, this rule of construction applies *a fortiori* where, as here, the same word is used several times in a single, compound sentence. (*Ibid*.) Hence, it is clear that the phrase "attorney's fees incurred by the employee" should be interpreted consistently with the rest of the statute and limit attorney fees to those actually charged by Plaintiff's attorneys. To hold otherwise would produce an incongruity in Section 44944, which Plaintiff fails to justify or explain.

As courts have long recognized when interpreting fee-shifting statutes, when the Legislature places attorney fees alongside other costs of suit, it reflects an intention that the statute is "make whole," i.e. for reimbursement only: "The fact that counsel fees are placed in the same category with other costs of suit expended by the parties would indicate that this provision of the Code was made for the protection and reimbursement of the parties, and then only after such costs and attorneys' fees had been paid, or at least incurred." (*Chavez v. Scully* (1923) 62 Cal.App. 6, 8.; see also *Russell, supra,* 115 Cal.App.3d at p. 883 [noting the purpose of Section 44944 is to "enable a teacher to protect his or her job and to 'make whole' the successful litigant."].) Consistent with these authorities, the Supreme Court in *Fontana Unified School District v. Burman*, supra 45 Cal.3d at pp. 224-25, interpreted Section 44944 as allowing a prevailing teacher to "demonstrate the greater amount of costs and fees *actually incurred*." (*Ibid*., emphasis added.)

Based on the foregoing, the trial court correctly determined that Plaintiff's fee award should only compensate or reimburse for those expenses that were incurred, not a theoretical rate that his attorneys for whatever reason chose not to charge. This Court should affirm.

1. Plaintiff May Recover Fees Whether or Not Personally Paid By Him; Russell and Lolley Did Not Decide the Proper Rate to Be Applied

In his opening brief, Plaintiff cites to *Russell*, *supra*, 115 Cal.App.3d at page 883 for the proposition that "nearly 35 years ago, this Court, construing the very statute at issue in this case, held that the term 'incurred' did not preclude a teacher from recovering reasonable attorneys' fees and expenses, even though the teacher's attorneys received their funding through the CTA's group legal services program, because 'to incur' does not mean to actually pay for but only to become liable for or subject to." (AOB, p. 15.) Plaintiff tries to use this as a springboard for arguing that he should recover attorney fees at market rates rather than at the actual rate incurred. Not so.

In *Russell*, *supra*, 115 Cal.App.3d. at pages 183-184, this Court held that a teacher was entitled to an award of attorney fees for representation before the Commission of Professional Competence, even though a teachers' association paid for the attorneys on its member's behalf. As the Court there explained,

> Normally, to effectively defend against a notice of intention to dismiss, legal counsel must be employed and the client must make provision to pay for the services rendered. One thereby incurs an obligation and is liable for its discharge. The ultimate source of funds utilized to pay the attorney for a successful aggrieved employee is immaterial. It is of no consequence whether the employee paid from his own available funds or his family, friends, benefactor, insurance company, or teachers' association came to his rescue. (*Id*. at 883.)

Thus, *Russell* simply stands for the proposition that an award of attorney fees is not necessarily contingent upon an obligation to pay counsel. *Russell* does not require a court to award fees based on

prevailing, market rates. Likewise, in *Lolley v. Campbell* (2002) 28 Cal.4th 367, the Supreme Court held that an indigent employee who was represented without charge by the Labor Commissioner was entitled to recover attorney fees. There the court instructed,

> In practice it has been generally agreed that a party may 'incur' attorney fees even if the party is not personally obligated to pay such fees. 'A party's entitlement to fees is not affected by the fact that the attorneys for whom fees are being claimed were funded by governmental or charitable sources or agreed to represent the party without charge'. . . .'[A]ttorney fees are incurred by a litigant 'if they are incurred in his behalf, even though he does not pay them.' (*Lolley*, supra 28 Cal.4th at p. 373.)

No one disputes the general principle that a prevailing party under a fee shifting statute is entitled to attorney fees even if the party does not have a personal obligation to pay for such services out of his or her own assets. (*Lolley*, supra 28 Cal.4th at 373-374.) However, as the trial court correctly concluded, the fact that Plaintiff is entitled to recover attorney fees regardless of whether he actually pays the fees or they are paid by his union, is not an end to the analysis. Instead, the issue presented here is "What *rate* is to be used to calculate the fees? Specifically, should the fees awarded Glaviano reflect the reduced rate his attorneys charged him as a CTA member?" (See Tr. Court's Oct. 16, 2014 Order, p. 9.)

Amicus submits that the trial court framed the question right and answered it correctly by holding that Education Code section 44944 limits recovery to actual fees incurred.

C. The Trial Court Properly Denied the Attorney Fee Award on the Ground That Plaintiff Did Not Adequately Support His Claim

A final, independently-compelling reason to affirm the judgment is that Plaintiff failed to support its claim. The party seeking attorney fees bears the burden of proof to establish the fees incurred. (See Code Civ.

Proc., § 1033.5, subd. (c); *Andre v. City of West Sacramento (2001)* 92 Cal.App.4th 532.) As the moving party, Plaintiff bears the burden of " 'establishing entitlement to an award and documenting the appropriate hours expended and hourly rates . . . [t]he court may also properly reduce compensation on account of any failure to maintain appropriate time records.'" (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320 [quoting *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020.)

Amicus does not deny that a written fee agreement is considered a confidential communication within the meaning of the attorney-client privilege. (Bus. & Prof. Code, § 6149.) But, like all privileges, the attorney-client privilege may be waived when the subject of that privilege is put in issue by the party. Indeed, as the trial court noted, fee agreements (or at least the relevant payment terms) are regularly disclosed when the client asks the court to order attorney fees. (See, e.g. *Nightingale v. Hyundai Motor Company* (1994) 31 Cal.App.4th 99; *Rosenauer v. Scherer* (2001) 88 Cal.App.4th 260, 281; *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1367; *Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1258, fn. 13.)

Here, a plaintiff cannot, on the one hand, rely on its contingent fee agreement for the argument that his attorneys expected to get the full value of their services, and then on the other hand, refuse to disclose the fee agreement to the court. The trial court properly denied Plaintiff's fee request due to its failure to substantiate the fees incurred.

III.

CONCLUSION

Based on the foregoing, Amicus California School Boards Association's Education Legal Alliance respectfully requests that this Court affirm the trial court's order in its entirety.

Dated: October 23, 2015

Respectfully submitted,

By: 

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1))

The text of this brief consists of 4,836 words as counted by the Microsoft® Word 2010 word-processing program used to generate the brief.

Dated: October 23, 2015

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 12800 Center Court Drive, Suite 300. Cerritos, CA 90703.

On October 23, 2015, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF DEFENDANT/RESPONDENT SACRAMENTO CITY UNIFIED SCHOOL DISTRICT** on the interested parties in this action, by placing a true copy thereof enclosed in sealed envelope to the addressee as follows:

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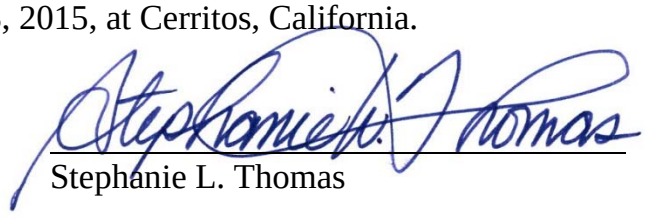
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 23, 2015, at Cerritos, California.



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