Case No. S112862

IN THE

SUPREME COURT OF CALIFORNIA

ROBERT GRAHAM, TRUMAN C. TREKELL
AND DANIEL CRAIG HAWKINS,

Plaintiffs, Respondents

v.

DAIMLER CHRYSLER CORPORATION AND DAIMLER
CHRYSLER MOTORS CORPORATION,

Defendants, Appellants, Petitioners.

After a Decision by the Court of Appeal
Second Appellate District, Case No. B152928
Appeal from the Superior Court of Los Angeles County,
Civil No. BC21564

Amicus Curiae Brief of Washington Legal Foundation in Support of Petitioners Daimler Chrysler Corporation and Daimler Chrysler Motors Corporation

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I. INTRODUCTION

This case exemplifies fairness and justice gone awry. Plaintiffs' action, filed after state and county officials had begun investigating Defendants' conduct and while Defendants were preparing to respond to those investigations, sought individual compensatory damages for this same conduct under a breach of warranty theory, and was mooted and dismissed on demurrer 18 days after it was filed due to Defendants' offer to all consumers the relief that Plaintiffs sought. Nonetheless, based on the "catalyst theory," the trial court awarded Plaintiffs' counsel over $700,000 in attorneys' fees, more than 90% of which had been incurred in pursuing fees and was enhanced by a 2.25 multiplier.

The so-called "catalyst theory" of attorney fees awards—which has been recently rejected by the United States Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001)—is a judicially created doctrine that cannot be justified by statutory language, this Court's precedent, fundamental-fairness principals or public-policy contentions. Accordingly, this Court should reject adoption of the catalyst theory where a plaintiff has received no relief from the court whatsoever, and, instead, adopt a bright-line rule requiring a judicially sanctioned change in the legal

relationship between the parties before attorney's fees can be awarded to a "successful party."

Even if this Court were to allow a plaintiff to recover attorney's fees where there has been no determination of a defendant's wrongdoing, it should reject application of a multiplier to plaintiff's fees incurred in seeking fees. The contrary rule, which would allow enhancement of fees for fee-related work, is inconsistent with the fee-shifting statute's purposes, exacerbates the satellite litigation caused by the catalyst theory, dissuades plaintiffs from accepting reasonable settlement offers, and has the effect of punishing defendants for exercising their rights to dispute fee claims.

For all of these reasons, WLF urges this Court to reverse the Court of Appeal and vacate Plaintiffs' fee award.

II. STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the brief of Petitioners.

III. STATEMENT OF FACTS

In the marketing material for the limited-production Dakota R/T truck for the 1998 model year and for the first half of the 1999 model year, Defendants inadvertently and erroneously stated that the R/T was capable of towing 6,400 pounds, rather than the 2,000 pounds that it actually can tow. By early 1999, Defendants had discovered the marketing

error and had begun taking corrective action, and in May and June of 1999, Defendants undertook a direct-marketing campaign to notify R/T owners of marketing error, offered refunds on towing packages, and repurchased vehicles to satisfy owners who were displeased by the towing-capacity error.

On July 29, 1999, the District Attorney for the County of Santa Cruz contacted Defendants regarding the R/T marketing error, threatened legal action, and requested an explanation of the error before he decided what course to pursue. On August 10, 1999, the Attorney General of the State of California notified Defendants that it was joining Santa Cruz District Attorney's investigation of the matter.

Less that two weeks later, on August 23, 2003, Plaintiffs filed their lawsuit and contacted the *Detroit News* to publicize it. Plaintiffs' one-count complaint alleged that Defendants' breached their express warranty by mistakenly claiming in the R/T's marketing material and owner manuals that the R/T could tow 6,400 pounds when it could not. Plaintiffs acknowledged that they rushed to file and publicize their complaint because "there was a substantial risk that DaimlerChrysler would … make some classwide offer and then stonewall counsel's attempt to get paid." (App. 152.)

On September 10, 1999, after communications with the Santa Cruz District Attorney explaining the marketing error, Defendants sent a letter to all Dakota R/T buyers offering to repurchase their trucks or to replace them with new vehicles. Based on the undisputed fact that Defendants' actions provided more relief than Plaintiffs could have hoped to obtain by litigating, the trial court sustained Defendants' demurrer based on mootness, and dismissed the complaint without leave to amend.

But the trial court retained jurisdiction of the case to allow Plaintiffs an opportunity to show that they were entitled to attorney's fees for filing the complaint. Plaintiffs claimed that their lawsuit was a catalyst for Defendants' remedial actions, pursued extensive discovery on the issue, and ultimately requested fees of approximately $1 million—the vast majority of which were incurred in their quest for fees. Despite overwhelming evidence showing that Plaintiffs' lawsuit had nothing to do with the corrective action Defendants took, the trial court concluded that Plaintiffs' lawsuit was a catalyst and awarded Plaintiffs a lodestar amount of over $350,000. The trial court then went even further, and enhanced $329,620 of the $351,678 lodestar—including fees that Plaintiffs' counsel incurred seeking attorney's fees—by 225%, for a total fee award of $762,830. Over 90% of the total award was for fees seeking fees.

IV. ARGUMENT

A. THIS COURT SHOULD REFUSE TO ADOPT THE CATALYST THEORY WHERE A FEE-SEEKING LITIGANT RECEIVES NO RELIEF FROM THE COURT WHATSOEVER

This Court should reject the radical expansion of the catalyst theory—to include attorney's-fee awards to litigants who have received no relief from the court—sought by Respondents. First and foremost, the catalyst theory does not comport with the logical interpretation of the plain language of the fee-shifting statute—California Code of Civil Procedure section 1021.5—at issue here. Second, this Court has never permitted an attorney's-fee award where the court did not grant the fee-seeking litigant *any* relief. Finally, the doctrine is fundamentally unfair and there are numerous policy reasons that counsel against its adoption.

1. The Catalyst Theory Does Not Comport With The Plain Language of Section 1021.5

The catalyst theory is essentially a judicial creation that has no mooring in the language of Section 1021.5. This statute states in relevant part:

> Upon a motion, a court may award attorneys' fees to a *successful party* against one or more opposing parties in any action which has *resulted* in *enforcement* of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (b) the necessity and financial

> burden of a private enforcement, or of the enforcement by one public entity against another public entity, are such as to make the award appropriate; and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

Cal. Code Civ. Proc. § 1021.5 (emphasis added). Focusing solely on what they claim is the "ordinary use" of the term "successful," Respondents ignore the import of the other words in the statute. Consideration of *all* of the words of the statute, taken as a whole, reveals that Section 1021.5 cannot logically be interpreted as Respondents desire. *See County of Fresno v. Magala County Water Dist.*, 100 Cal. App. 4th 937, 941 (2002) (courts must assume that "the Legislature intended that every word, phrase and provision in a statute have meaning and perform a useful function."). The statute's references to "party," "action" and "enforcement" make clear the plaintiff's "success" must be "enforcement" of an "important right" within the "action." This necessarily requires *an act by the court*. While success in the lawsuit may take many forms, e.g., preliminary injunction, consent decree, settlement, or judgment, it cannot seriously be argued that dismissal of plaintiff's complaint as moot at the pleading stage constitutes "success" as contemplated by Section 1021.5. Only under the most tortured interpretation of the statutory language can a plaintiff be described as enforcing an important right in an action where its complaint is dismissed as moot.

Further, Respondents' reliance on the alleged everyday meaning of term "successful" is unpersuasive. As Justice Scalia explained in *Buckhannon*,

> when "prevailing party" is used by the courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally—and to my knowledge, prior to enactment of the first of the statutes at issue here, invariably—meant the party that wins the suit or obtains a finding (or an admission) of liability.

Buckhannon, 532 U.S. at 615 (Scalia, J., concurring);[1] *see also Arnett v. Dal Cielo*, 14 Cal. 4th 4, 19 (1996).

The historic presumption against shifting responsibility for attorney's fees bolsters an interpretation of Section 1021.5 that requires a judicially-sanctioned change in the *legal* relationship between the parties. The general rule in American courts is that each party must bear its own attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Only when expressly mandated by the legislature are attorney's fees awarded to a party who prevails in the litigation. *See* Cal. Civ. Code § 1021 (attorney's fees must be "specifically provided for by statute" or agreement of the parties). A broad interpretation of fee-shifting statutes that deems "successful" or "prevailing" parties those that have

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[1] California courts have held that "successful party" is interchangeable with "prevailing party." *See Schmier v. Supreme Court*, 96 Cal. App. 4th 873, 877 (2002) ("As used in section 1021.5, 'successful' is synonymous with 'prevailing.'").

actually *lost* the lawsuit flies in the face of the historic presumption that each party pays its own fees. Fee-shifting statutes should be interpreted narrowly to avoid expansion beyond that expressly authorized by the legislature.

Departure from the clear and logical interpretation of successful party is inappropriate and unwarranted. Section 1021.5 by its plain terms requires that there be a legal connection between the lawsuit and the defendant's conduct. "For individuals to recover fees, they must prevail in their status as parties, not in their role as agents of reform." *S-1 and S-2 v. State Bd. of Education*, 6 F. 3d 160, 170 (4th Cir. 1993) (Wilkinson, J., dissenting), *rev'd en banc and dissenting opinion adopted*, 21 F.3d 49 (4th Cir.).

2. This Court Has Never Held That The Catalyst Theory Applies When A Plaintiff Has Received No Relief From The Court Whatsoever

The decision of the Court of Appeal—to award attorney's fees to a plaintiff who receives *no relief from the court whatsoever*—is a extreme extension of the catalyst theory. *See Tipton-Washington v. City of Los Angeles*, 316 F.3d 1058, 1062 (9th Cir. 2003) ("California cases preceding *Buckhannon*, while containing dicta that endorses the catalyst theory for the award of prevailing party attorneys' fees, have involved

circumstances where there has been a judicially enforceable change in the legal relationship between the parties.").

While the plain language of Section 1021.5 alone establishes that this cannot be the rule, this Court's precedents have not interpreted fee-shifting provisions in this manner. As detailed in Petitioners' briefs, this Court has *never* held that a plaintiff may be awarded attorney's fees where the court fails to award the plaintiff any of its requested relief and there is no judicially-sanctioned change in the relationship between the parties. Therefore, allowing fees in these circumstances would require a significant extension of this Court's precedents.

3. The Catalyst Theory Is Fundamentally Unfair and Bad Public Policy

Not only is the catalyst theory inconsistent with the language of Section 1021.5 and unsupported by this Court's precedents, it is fundamentally unfair and bad public policy for numerous reasons, many of which were cited by the *Buckhannon* Court.

a. The Catalyst Theory Punishes Innocent Defendants

The most troubling aspect of the catalyst theory is that it allows the court to penalize a defendant absent *any* finding of *wrongdoing* by the defendant. In other words, the catalyst theory permits an award of attorney's fees against a defendant who has never been shown to have violated any law or breached any obligation to the plaintiff. Indeed, the

catalyst theory operates on the false *assumption* that the defendant has violated some right of the plaintiff's. It is simply fundamentally unfair to allow plaintiffs to use the power of the court system to force defendants to reimburse plaintiff's counsel for their fees when they have no determined legal obligation to fulfill the plaintiff's demands.

The risk that a court will require a completely law-abiding defendant to pay a plaintiff with a meritless claim is reason enough not to adopt the catalyst theory. This is especially true because even if the plaintiff's lawsuit is a "catalyst" for the defendants change in behavior as the defendant's reasons for voluntarily changing its behavior may have *nothing* to do with its culpability. It cannot be assumed that a voluntary change in behavior is a concession of guilt on the part of the defendant. For example, a defendant may voluntarily accede to the plaintiff's demands because of the cost of litigation, the public scrutiny the case may bring, or because the demands of litigation may be distracting the defendant from accomplishing other, more important, objectives, among other innocent reasons. However, in practice, the catalyst theory would allow the payment of attorney's fees in any case in which, after plaintiff's filing of a complaint, the defendant's action renders the plaintiff's case moot, regardless of whether the court has made any determination regarding the

merits of the plaintiff's claims. In such cases, it is fundamentally unfair to force a defendant to pay a plaintiff's attorney's fees.

Further, application of the catalyst theory often grants a windfall to plaintiff's counsel. A plaintiff with no valid claim and no entitlement to anything from the defendant, is nonetheless allowed to recover funds from the defendant. In these circumstances, the fee shifting statutes operate as they were never intended to, as a "relief Act for lawyers." *S-1 and S-2*, 6 F.3d at 172.

b. The Catalyst Theory Creates Wasteful Satellite Litigation

As many commentators, courts, and the United States Supreme Court have recognized, the catalyst theory repeatedly gives rise to massive, resource-sapping satellite litigation. *See Hensley vs. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation."). The catalyst theory requires that the court determine if there existed a causal connection between a lawsuit and the action of the defendant. *See, e.g., Foreman v. Dallas County*, 193 F. 3d 314, 323-24 (5th Cir. 1999). Causation in the law is the general concept that "there be some reasonable connection between the act . . . of the defendant and the damage which the plaintiff has suffered." W. Page Keeton, et al., Prosser & Keeton on the Law of Torts, § 41 at 263 (5th ed. 1984). "There is perhaps nothing in the entire field of the law which has called forth more

disagreement, or upon which the opinions are in such a welter of confusion." *Id.*; *cf. Californians for Responsible Toxics Mgmt. v. Kizer*, 211 Cal. App. 3d 961, 968 (1989) ("Obviously, it can be difficult to prove causation where as here plaintiff seeks to recover on a catalyst theory.").

> Among other things, a "catalyst theory" hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that "will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct."

Buckhannon, 532 U.S. at 609-610 (quoting Brief for United States as *Amicus Curiae*). The difficulty in determining the defendant's "state of mind" and the "cause" of the defendant's voluntary behavior engenders complicated and protracted litigation on these issues.

The standards for resolving these causation and state of mind inquiries are vague and incoherent and not easily applied by the court, particularly when the court is trying to determine the state of mind of a large corporation (such as DCC) or a legislative body. How is a court to determine which of the myriad influences on a defendant "caused" the defendant to change its behavior? The catalyst theory requires that courts engage in rampant speculation, often based merely on the timing of the defendant's action (i.e., voluntary change in behavior after plaintiff filed its complaint). Indeed, here, how can it possibly be concluded that it was

Plaintiffs' lawsuit, and not the investigations by the California Attorney General and the Santa Clara County District Attorney (initiated *prior* to Plaintiffs' lawsuit) that "caused" DCC to offer repurchase of the Dakota vehicles.

In contrast, requiring a judicially-sanctioned change in the parties' relationship provides an easy-to-administer bright-line test for determining "successful party" status. The clarity of this rule will avoid the time-consuming and thorny "causation" and "state of mind" litigation spawned by the catalyst theory. "[R]efuge from such litigation lies in a clearly established rule for fee recovery and the catalyst theory-based approach to fee applications has left us utterly at sea." *S-1 and S-2,* 6 F.3d at 171 (Judge Wilkinson dissenting opinion later adopted by the en banc court rehearing).

c. The Catalyst Theory Discourages Voluntary Action

The catalyst theory will operate in many instances to discourage defendants—who know that they will be on the hook for a fee award to plaintiff's counsel—from voluntarily changing their behavior at any time.

> With its reliance on a simple chronology of events to show causation, catalyst theory empowers courts to award fees for any change in behavior that occurs after the filing of a lawsuit, whether or not the court could have ordered that change in conduct. In this way,

> catalyst theory serves to disable [defendants] who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorney's fees.

S-1 and S-2, 6 F.3d at 172. *See also Buckhannon*, 532 U.S. at 608 ("Petitioners discount the disincentive that the 'catalyst theory' may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal . . . . and the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct.").

Respondents' argument that defendants will have no incentive to change their behavior early in litigation absent the catalyst theory is simply illogical. Defendants are already heavily incentivized to settle meritorious cases during the early stages to avoid an adverse ruling as well as to minimize their own costs and attorney's fees. The catalyst theory, however, discourages defendants from changing their behavior to moot a case if the plaintiff's suit is unmeritorious; instead, a defendant is motivated to litigate the merits of the lawsuit to achieve a favorable ruling and avoid payment of plaintiff's counsel's attorney's fees. Thus, the catalyst theory prolongs and complicates litigation that often could have been resolved at an early stage.

d. The Catalyst Theory Encourages Meritless Or Marginal Lawsuits

Allowing a court to award attorney's fees to a plaintiff, even where the court has made no determination regarding the merits of the

plaintiff's case, will undoubtedly lead to the filing of mertiless or marginal lawsuits. As Justice Wilkinson has explained,

> [The] catalyst theory provides incentives for filing marginal, even frivolous, lawsuits. Any change in conduct by the defendant, for whatever reason, may offer a promising payout to attorneys who file a complaint, whether or not that complaint has any legal merit.

S-1 and S-2, 6 F. 3d at 172.

Further, the catalyst theory encourages plaintiff's lawyers to "create" lawsuits regarding matters that could be addressed without litigation, in the hope of receiving payment for fees. Under the catalyst theory, plaintiff's attorneys are disincentivized to make demands upon potential defendants prior to filing a lawsuit (which those defendants might well be inclined to meet) because if the defendants capitulate to their demands, plaintiff's counsel will not be guaranteed fee recovery. Instead, plaintiff's counsel will rush to the courthouse steps. This will prevent early resolution of suits, resulting in tremendous waste of societal and judicial resources.

Indeed, this case is an example of the wasteful tag-along litigation to government inquiries or investigations that is encouraged by the catalyst theory. Instead of awaiting a satisfactory outcome without litigation, lawyers and their clients file suit as soon as any government investigation of a defendant is initiated. Here, both a county and state

government had initiated an investigation into DCC's marketing error. DCC was working diligently to remedy that error and to respond to the government investigations. Sensing a payday, Respondents' counsel rushed to file suit, rather than await DCC's response to these investigations.

There is no evidence, empirical or otherwise, that abolishing the catalyst theory will be impede the private enforcement of important rights, as Plaintiffs assert. Plaintiff's attorneys will still be awarded attorney's fees in the vast majority of successful public-interest lawsuits, where plaintiffs achieve some judicially sanctioned relief. Therefore, public-interest attorneys with valid claims will still be motivated to bring suit. Indeed, the only lawsuits discouraged by abolition of the catalyst theory are those that lack merit.

In sum, whatever societal benefits may be achieved by adoption of the catalyst theory, they are far outweighed by the fundamental unfairness of the doctrine:

> If [application of the catalyst theory] sometimes rewards the plaintiff with a phony claim (there is no way of knowing), the [failure to apply the catalyst theory] sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment. But it seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the extraordinary boon of attorney's fees to some plaintiffs who are no less "deserving" of them than others who receive them, and a

> rule that causes the law to be the very instrument of the wrong—exacting payment of attorney's fees to the extortionist.

532 U.S. at 618 (Scalia, J., concurring). Accordingly, this Court should decline to adopt the catalyst theory.

B. AT THE VERY LEAST, PLAINTIFFS' FEES SHOULD NOT BE ENHANCED FOR FEE-RELATED WORK

If this Court declines to overrule the "catalyst" theory and overturn Plaintiffs' entire award of attorney's fees, it should nonetheless reduce Plaintiffs' fees for fee-related work to the loadstar amount and adopt a categorical rule that fee enhancement for fee-related work is not allowed. More than 90% of the loadstar amount that the trial court calculated in this case was for hours that Plaintiffs' counsel billed after the complaint was dismissed as moot—and after any time Plaintiffs' counsel spent on this case possibly could have benefited Plaintiffs or the public at large. Despite the fact that once the complaint was dismissed as moot, the efforts of Plaintiffs' counsel were entirely to ensure their own payment—not to benefit the Plaintiffs or the public—the trial court enhanced that amount by a factor of 2.25. This result is contrary to public policy, and this Court should adopt a categorical rule that fee enhancement for fee-related work is not allowed.

Allowing fee enhancement for fee-related work would turn Section 1021.5 on its head by encouraging public-interest lawyers (and Plaintiffs' counsel in this case) to pursue endless fee-related litigation

instead of the "vindication of important public rights affecting the public interest." *Serrano v. Unruh*, 32 Cal. 3d 621, 632 (1982) (*Serrano IV*). In contrast, following the rule this Court laid down in *Serrano IV*—that prevailing parties under Section 1021.5 are ordinarily entitled to "all hours reasonably spent" for fee-related work, will ensure that prevailing parties under Section 1021.5 are fully compensated but not given incentive to litigate the fee endlessly.

The purpose of Section 1021.5 is to encourage "private actions to vindicate important rights affecting the public interest, without regard to material gain." *Serrano IV*, 32 Cal. 3d at 632. In particular, Section 1021.5 is intended to compensate counsel fully for undertaking such public-interest work. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001). Because lawyers who take public-interest cases on contingency risk not being paid if unsuccessful, this Court has held that a fee enhancement, or multiplier, for the litigation on the merits of such cases is sometimes needed to ensure that fee awards for such cases are fully compensatory for counsel. *Id.* ("The contingent fee compensates the lawyer not only for the legal services he renders, but for the loan of those services.") (quoting *Posner, Economic Analysis of Law*, 534, 567 (4th ed. 1992)). Such fee enhancement, however, is unnecessary when plaintiff's

attorneys are litigating their own interests—the right to fees. In that case, the attorney is "loaning" his own time to himself to pursue his own interest.

In *Serrano IV*, this Court elaborated on what it means to fully compensate lawyers in public-interest lawsuits and held that, in order to prevent attorney's-fees awards under Section 1021.5 from being "diluted or dissipated by lengthy, uncompensated proceedings to fix or defend a rightful fee claim," fees recoverable ordinarily should include compensation for hours reasonably spent to establish and defend the fee claim. *Serrano IV*, 32 Cal. 3d at 632, 639.

But, as this Court and others have recognized, ensuring that lawyers seeking fees for work under Section 1021.5 do not receive unearned windfalls is just as important as ensuring that they receive adequate compensation for work actually performed. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 644 (1998) ("As prevailing party, plaintiff was entitled only to 'reasonable attorney fees', not reasonable fees plus a windfall.") (citation omitted). In other words, fees under Section 1021.5 should be sufficient to encourage public-interest litigation, but not so massive as to lure putative public-interest attorneys into wasteful fee litigation that does nothing to advance the public interest. *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1173 (1998) ("the ultimate goal in California, as under federal law, still is to determine a

'reasonable' attorney fee, and not to encourage unnecessary litigation of claims that serve no public purpose").

In light of the importance of deterring wasteful fee litigation, this Court held in *Serrano IV* that a trial court may *reduce* attorney's fees for fee-related work where either the hours or the rate are excessive, or where other circumstances warrant. *Serrano IV*, 32 Cal. 3d 621, 639 fn. 28. But this Court did not authorize fee *enhancement* for fee-related work in *Serrano IV*, and it is easy to see why. The Court was concerned that protracted fee litigation, if uncompensated, "would permit the fee to vary with the nature of the opposition." *Id.* at 638. But just as not compensating plaintiffs for fee-related work in Section 1021.5 cases dilutes the fee award, enhancing fees for fee-related work improperly rewards plaintiff's lawyers for work that benefits only themselves. Awarding plaintiff's counsel only fees actually earned, as in *Serrano IV*, with possible reductions for inefficient or duplicative work, strikes the proper balance by neither diluting nor enhancing the fee earned in litigation on the merits of public-interest cases.[2]

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[2] Plaintiffs note that *Downey Cares v. Downy Community Development Comm'n*, 196 Cal. App. 3d 983 (1987) purports to allow fee enhancement for fee related work. But *Downey Cares* was decided based on a misreading of *Serrano IV*, which allows for fee *reduction* for inefficient or duplicative fee-related work, but not fee *enhancement*. This Court cited *Downey Cares* approvingly in *Ketchum*, 24 Cal. 4th at 1141, but the issue of fee enhancement for

So fee enhancement for fee-related work is not necessary to achieve the purpose of Section 1021.5—encouraging public-interest litigation. But allowing fee enhancement for fee-related work causes a number of problems: it exacerbates the satellite litigation that the catalyst theory causes, it further dissuades plaintiffs from accepting reasonable settlement offers, and it has the effect of punishing defendants for exercising their rights to dispute fees claimed.

The increased satellite litigation and decreased settlement of fee-related disputes that fee enhancement for fee-related work causes harm the public—both in its role as consumers and as the beneficiary of public-interest legal work. This case provides a stark example: more than 90% of the attorney's fees recovered were for time spent litigating the fee issue. Public-interest lawyers (and enterprising plaintiff's attorneys) have limited resources, and deprive the public of the benefit that Section 1021.5 was intended to confer on it when they waste those limited resources seeking inflated fees that only benefit themselves. Likewise, businesses such as DCC have limited resources that have to be allocated among competing priorities such as improving safety, keeping costs down for consumers, and defending litigation. When defendants such as DCC are forced to pay for

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fee-related before the right to fees has been determined was not before the Court. So this Court can overrule *Downey Cares* without disturbing any of its own precedent, and should do so given the policy considerations.

protracted fee litigation by attorneys seeking the windfall of enhanced fees for fee-related work, the resources they can devote to priorities such as safety and keeping costs down for consumers are necessarily diminished.

Because fee enhancement for fee-related work is against public policy, inconsistent with the reasoning of this Court's opinion in *Serrano IV*, and unnecessary to encourage public-interest lawsuits, this Court should hold that such fee enhancement is prohibited.

V. CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision below.

Dated: November 10, 2003

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

(CAL. RULES OF COURT 14(C)(1))

I, Jennifer F. Ziegaus, hereby certify that the total number of words in this Amicus Brief is approximately _____ as counted by the word-processing program used to generate this brief.

DATED: November ____, 2003

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Jennifer F. Ziegaus

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