Case No. 81758

IN THE
SUPREME COURT OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

LAS VEGAS REVIEW-JOURNAL,
Appellant,

vs.

CITY OF HENDERSON,
Respondent.

Appeal from the Eighth Judicial District Court, Clark County, Nevada
Honorable Judge Trevor L. Atkin, Case No. A-16-747289-W

RESPONDENT'S ANSWERING BRIEF

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March 2, 2021

Docket 81758 Document 2021-06149

NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Respondent City of Henderson submits this Disclosure Statement:

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Because the City of Henderson is a political subdivision of the State of Nevada (a governmental party), no Disclosure Statement is required.

2. The law firm of Bailey❖Kennedy represented the City of Henderson in the underlying action and continues to represent them for the purposes of this Appeal.

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3. The City of Henderson is not using a pseudonym for the purposes of this Appeal.

DATED this 2nd day of March, 2021.

BAILEY❖KENNEDY

By: _/s/ Dennis L. Kennedy_____
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-and-

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I. STATEMENT OF ISSUES PRESENTED ON APPEAL

A. Whether the catalyst theory applies in a public records action when: (i) the governmental entity responding to a public records request complies with the Nevada Public Records Act; (ii) never denies the public records request; and (iii) a judgment is entered in favor of the governmental entity?

B. If the catalyst theory applies under the foregoing facts, whether: (i) the District Court properly limited its analysis of the catalyst theory to the disclosure of the Deliberative Process Documents; and (ii) the District Court properly determined that the Las Vegas Review-Journal was not a prevailing party?

II. STATEMENT OF THE CASE

This is the third appeal (the second regarding attorney's fees) arising out of Appellant Las Vegas Review-Journal's ("LVRJ") 70,000-page public records request to Henderson in October 2016. Henderson timely responded that the request would require extraordinary use of its personnel to complete and, as required by the Nevada Public Records Act ("NPRA"), provided a fee estimate to complete the production. (VIIIJA1399:13-16, 19-24[1]; VIIIJA1415.) Thereafter, Henderson attempted to meet and confer with LVRJ's counsel to discuss the possibility of narrowing the broadly worded search terms in its request with the goal of reducing the number of responsive documents, and thus

[1] For citations to the Joint Appendix, the number preceding "JA" refers to the applicable volume of the Appendix, while the number succeeding "JA" refers the applicable page number.

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decreasing or eliminating the extraordinary use fee. (VIIIJA1400:1-15.) LVRJ rebuffed these efforts. (VIIIJA1400:16-26.)

Instead, LVRJ hastily filed a Public Records Act Application and Petition for Writ of Mandamus against Henderson — despite the fact that Henderson never denied LVRJ's request. (IJA0001-00023.) LVRJ's Petition, however, which it later amended, was both legally and factually flawed resulting in the District Court denying each of LVRJ's claims for relief. (IJA0030-0168; VIIIJA1488-1490.) Subsequently — even though it had not prevailed on any of its claims for relief — LVRJ moved for attorney's fees and costs, which the District Court granted in part. (IIIJA0452-523; VIIIJA1519-1523.)

LVRJ appealed the District Court's decision on the merits of its claims, and both parties appealed the District Court's decision to award LVRJ a portion of its attorney's fees and costs. In the substantive appeal (the "Petition Appeal"), LVRJ lost on every issue decided by this Court, except for one. (VIIIJA1405-1413.) That issue — which this Court remanded back to the District Court for further analysis — pertained to the applicability of the deliberative process privilege to 11 out of the 9,000 responsive documents ("DPP Documents") Henderson had disclosed to LVRJ. (VIIIJA1412.) However, rather than waste additional taxpayer funds on costly litigation over

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11 documents, Henderson waived the deliberative process privilege and voluntarily produced the documents to LVRJ to avoid the nuisance and expense of further litigation. (VIIIJA1539-1540.)

Several months later, this Court entered an order in the second appeal (the "Fee Appeal"). (VIIIJA1525-1530.) The Court reversed the District Court's attorney's fee award and determined that LVRJ was not entitled to attorney's fees and costs because "LVRJ has not succeeded on any of the issues that it raised in filing the underlying action." (VIIIJA1527.) The Court also noted that because the issue regarding the 11 DPP Documents was being remanded, LVRJ could not be a prevailing party as to that issue either. (VIIIJA1529.)

Subsequently, this Court issued an opinion in *Las Vegas Metropolitan Police Department v. Center for Investigative Reporting, Inc.*, 136 Nev. 122, 460 P.3d 952 (2020) ("*CIR*"), approving the use of the catalyst theory in public records cases. Under the catalyst theory, a requester prevails and is entitled to attorney's fees and costs "when its public records suit causes the governmental agency to substantially change its behavior in the manner sought by the requester, even when the litigation does not result in a judicial decision on the merits." *Id.* at 128, 460 P.3d at 957.

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Even though Henderson had voluntarily disclosed the 11 DPP Documents months before this Court decided *CIR*, LVRJ filed another motion for attorney's fees and costs based on the catalyst theory and sought ***all*** of its fees and costs from the beginning of this case — as if this Court's prior orders were meaningless and all the issues LVRJ had previously lost had been wiped away. (VIJA1126-1148.) After considering this Court's orders in the Petition Appeal and the Fee Appeal, as well as the catalyst theory factors set forth in *CIR*, the District Court correctly concluded that LVRJ was not entitled to attorney's fees and costs. (IXJA1602-1607.) This third appeal ensued.

III. STATEMENT OF FACTS

A. LVRJ's Public Records Request.

On October 4, 2016, Henderson received a public records request from LVRJ (the "Request"). (IJA0012-0015.) Henderson performed a search for responsive records that returned nearly 10,000 electronic files consisting of almost 70,000 pages of documents. (IIJA0233; VIIIJA1399:19-24.) In compliance with the NPRA, within five business days of the Request, Henderson provided an initial response to LVRJ that the search generated an enormous universe of documents that would need to be reviewed for confidentiality and privilege before they could be disclosed ("Initial

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Response"). (IIJA0231; VIIIJA1405.) As required by NRS 239.055[2], Henderson provided LVRJ with a fee estimate to complete the Request. (IIJA0231.) Henderson also asked for a fee deposit to verify that LVRJ wanted to proceed with the Request and informed LVRJ that it would take three weeks to complete the review once the deposit was received. (*Id.*; *see also* VIIIJA1408-1409.)

The next day, October 12, 2016, LVRJ's attorney called Henderson and accused it of charging impermissible fees. (VIIIJA1400:1-6.) The parties discussed potentially narrowing the search terms to decrease the number of email hits and whether Henderson would be willing to lower its fee estimate. (VIIIJA1400:10-15.) Counsel for both parties resolved to go back to their clients to work on a solution. (*Id.*) LVRJ's attorney represented that she would call back on October 17, 2016, to discuss the matter further. (*Id.*)

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[2] NRS 239.055 was deleted from the NPRA during the 2019 legislative session. At the time of LVRJ's Request in 2016, however, NRS 239.055 provided, in pertinent part:

> [I]f a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee not to exceed 50 cents per page for such extraordinary use. Such a request must be made in writing, and upon receiving such a request, ***the governmental entity shall inform the requester, in writing, of the amount of the fee before preparing the requested information***.

(Emphasis added).

LVRJ's attorney never called Henderson on October 17, 2016. (VIIIJA1400:16.) After waiting a week with no contact, Henderson called LVRJ's attorney to discuss a resolution. (VIIIJA1400:17-20.) LVRJ's attorney was unavailable so Henderson asked for a return call. (*Id.*) LVRJ's attorney never returned Henderson's call. (VIIIJA1400:21-26.) Nor did she otherwise attempt to contact Henderson to discuss a resolution before filing suit. (*Id.*)

B. <u>LVRJ Prematurely Files a Public Records Act Application.</u>

After weeks of silence — and ignoring Henderson's efforts at resolution — LVRJ filed a Public Records Act Application and Petition for Writ of Mandamus (the "Petition") claiming that Henderson had refused to provide LVRJ the requested records. (*Id.*; *see also* IJA0001-0023.) This was false. (VIIIJA1400:1-26; IIJA0231.) The plain language of Henderson's Initial Response shows that Henderson never refused or denied LVRJ's Request. (*Id.*; *see also* VIIIJA1408-1409.)

Henderson was prepared and fully expected to review and provide copies of all responsive public records as soon as LVRJ confirmed that it wanted to proceed with its original, voluminous Request. (IIJA0231.) LVRJ never provided any such confirmation; instead, it accused Henderson of charging

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illegal fees, rebuffed Henderson's resolution efforts, and filed suit without warning. (VIIIJA1400:1-26.)

LVRJ's Petition asked the District Court to issue a writ of mandamus and injunctive relief to compel Henderson to give LVRJ access to the requested records, without paying any fees. (IJA0001-0023.) Surprised by the Petition, which Henderson learned about through an article in *The Las Vegas Review-Journal*, Henderson sent LVRJ's attorney a letter to set the record straight. (VIIIJA1534-1537.) Henderson's letter:

- Summarized its Initial Response;
- Expressed disappointment that LVRJ's attorney did not call Henderson on October 17, 2016 to discuss a resolution — as she represented she would — after the parties' telephone conversation on October 12, 2016;
- Informed LVRJ that, in anticipation of the October 17, 2016 telephone conference, Henderson was prepared to discuss "various ways to reduce the time and expense of producing the requested documents" to resolve LVRJ's concern about the fees. After LVRJ failed to call on October 17, 2016, Henderson called LVRJ's attorney to discuss those options but never received a return call;

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- Expressed disappointment in the Petition "given our past history of working together to resolve these types of requests and your (or LVRJ's) decision not to do so in this instance";
- Reminded LVRJ that Henderson never denied its public records Request;
- Reminded LVRJ that Henderson had allowed LVRJ in the past to review documents prior to a production to see whether it was interested in certain categories of documents that matched the search terms;
- Reminded LVRJ that "[Henderson] and LVRJ have been able to resolve issues relating to the cost of producing public records in the past, which has resulted in the LVRJ paying a minimal amount for public records over the past two years"; and
- Emphasized that while the parties disagreed over the fees associated with the Request, Henderson was "**not interested in litigation as a method of preventing the disclosure of the requested documents**."

(*Id.* (emphasis in original).)

Once Henderson was put on notice — via LVRJ's lawsuit — that LVRJ wanted the records, Henderson completed its review of the 70,000-page Request for privilege and confidentiality and arranged for an LVRJ reporter to

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inspect the nonprivileged documents on a computer at City Hall. (VIIIJA1401:9-15.) LVRJ's inspection took place over the span of several days. (VIIIJA1401:12-15.) Notably, after LVRJ completed its inspection, LVRJ did not ask Henderson for a single copy of any of the documents it reviewed. (*Id.*; *see also* VIIIJA1489:6-9 ("Following its inspection, LVRJ made no request for copies of the Prepared Documents . . . .").)

Henderson also provided LVRJ with a privilege log describing the 91 documents it withheld or redacted from the inspection due to confidentiality or privilege. (VIIIJA1401-1402:22-24, 1-5, 10-13; VIIIJA1440-1445.) Of the 91 documents identified on the privilege log, 78 were withheld or redacted based on the attorney-client privilege, two were withheld because they contained confidential health information, and 11 were the DPP Documents. (VIIIJA1440-1445.)

Around the time Henderson provided LVRJ with the privilege log, counsel for Henderson asked LVRJ's attorney to contact him if she had any questions or concerns regarding the privilege log so that the parties could discuss the issues and attempt to resolve them without having to involve the court. (VIIIJA1402:14-18.) LVRJ's attorney never contacted Henderson about the issues LVRJ would later raise in its amended petition. (VIIIJA1402:19-22.)

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C. LVRJ Files an Amended Petition, Which the District Court Denies.

On February 28, 2017, LVRJ filed an Amended Public Records Act Application and Petition for Writ of Mandamus ("Amended Petition") attacking the adequacy of the privilege log. (IJA0030-0168.) The Amended Petition requested the following: "(1) complete copies of all records that [Henderson] withheld and/or redacted as privileged, (2) injunctive relief prohibiting Henderson from enforcing its public records fee policies, (3) declaratory relief invalidating those municipal policies, and (4) declaratory relief limiting any fees for public records to no more than 50 cents per page." (*Id.*; *see also* VIIIJA1527-1528.)

On March 30, 2017, the Honorable J. Charles Thompson held a hearing on LVRJ's Amended Petition. (VIIIJA1462-1486.) At the hearing, LVRJ conceded that its reporter had already reviewed the non-confidential documents on a computer at City Hall. (VIIIJA1466:19-23.) Notwithstanding the three-day inspection, LVRJ informed the court (and Henderson) — for the first time — that it now wanted Henderson to provide copies of the inspected documents. (VIIIJA1465:18-1467:21.) The District Court probed LVRJ to see if it had

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asked Henderson for copies of the documents and LVRJ conceded that it had not:

> THE COURT: But when your reporter went to the City and reviewed them I guess online; is that right? Some computer or something?
>
> MS. SHELL: They had made a computer available specifically for just the review.
>
> THE COURT: ***And did your reporter ask for copies of any of the documents your reporter saw?***
>
> MS. SHELL: ***She did not*** because we still had this issue – or Ms. McLetchie may have an answer to that.
>
> THE COURT: I think that they'll give those to you or I thought that they would have.
>
> MR. KENNEDY: Just for the record, that's correct. No copies were requested or made.
>
> THE COURT: Okay.

(VIIIJA1466:19-1467:7 (emphasis added); *see also* VIIIJA1489:6-11.) The court then asked Henderson: "Are you – are you willing to give them a USB drive with all the documents?" (VIIIJA1469:8-9.) Henderson responded affirmatively. (VIIIJA1469:10.)

LVRJ then pressed the District Court to issue an injunction and declaratory relief invalidating Henderson's public records fee policy for being

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"at odds with the NPRA." (VIIIJA1469:11-1470:25.) The District Court denied LVRJ's request as moot. (VIIIJA1488-1490.)

Therefore, the sole matter decided by the District Court pertained to LVRJ's request for mandamus relief to compel Henderson to provide LVRJ records that Henderson deemed confidential on its privilege log. (VIIIJA1489:16-18.) The District Court ruled that the privilege log was "timely, sufficient and in compliance with the requirements of the NPRA," and, thus, denied LVRJ's Amended Petition with respect to the withheld documents. (VIIIJA1489:18-21.) The Order concludes: "Based on the foregoing, LVRJ's request for a writ of mandamus, injunctive relief, and declaratory relief, and any remaining request for relief in the Amended Petition is hereby DENIED." (VIIIJA1490:2-4.)

D. Despite Its Unsuccessful Suit, LVRJ Moves for Attorney's Fees and Costs.

Despite failing on each of its claims for relief, LVRJ filed a Motion for Attorney's Fees and Costs ("Motion for Fees"). (IIIJA0452-0523.) LVRJ contended that it was a "prevailing party" because it "succeeded" in getting access to public records after initiating the lawsuit. (*Id.*) LVRJ requested

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attorney's fees in the amount of $30,931.50. (IIIJA0455:3-4) Henderson opposed the Motion for Fees. (IIIJA0526-0638.)

On August 3, 2017, the Honorable Mark B. Bailus, who had just been assigned to Department 18, relieving Judge Thompson, held a hearing on the motion. (VIIIJA1492-1517.) Judge Bailus determined that even though LVRJ did not succeed on any of the claims for relief in the Amended Petition, LVRJ was a prevailing party because it obtained copies of the records it requested after initiating this action. (VIIIJA1522:10-12.) The District Court concluded, after reviewing the *Brunzell* factors, that LVRJ was entitled to an award of attorney fees in the amount of $9,010.00 and costs in the amount of $902.84, for a total award of $9,912.84. (VIIIJA1522:15-1523:2.)

E. Appellate Proceedings.

LVRJ appealed the District Court's denial of the Amended Petition, and both parties appealed the District Court's award of attorney's fees. *See* Nevada Supreme Court Case No. 73287 ("Petition Appeal") and Case No. 75407 ("Fee Appeal").

In the Petition Appeal, this Court, sitting *en banc*, affirmed the District Court's order in Henderson's favor in all respects, except for one. (VIIIJA1405-1413.) Specifically, this Court:

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- Affirmed the District Court's determination that issues concerning Henderson's fees were moot, (VIIIJA1406-1407);
- Affirmed the District Court's determination that Henderson's Initial Response complied with the NPRA: "***Henderson's initial response complied with the plain language*** of NRS 239.0107(1)(c), because it gave notice within five business days that it would be unable to produce the records by the fifth business day as it needed to conduct a privilege review, demanded the fee amount, and gave a date the request would be completed once a deposit was received." (VIIIJA1408-1409 (emphasis added));
- Found that "***Henderson did not deny LVRJ's request***; rather, it stated that it needed more time to determine which portions of LVRJ's request it might need to deny in the future [due to confidentiality or privilege]," (VIIIJA1409 (emphasis added));
- Affirmed the District Court's determination that Henderson's privilege log complied with the NPRA with respect to 78 of the 91 documents withheld under the attorney-client privilege, (VIIIJA1411-1412); and
- Ruled that Henderson "did not waive its right to assert privileges in the records LVRJ requested by not providing a completed privilege log within five business days of LVRJ's request," (VIIIJA1409).

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This Court, however, reversed the District Court with respect to the 11 DPP Documents and remanded solely for the District Court to determine whether Henderson's interest in non-disclosure of the DPP Documents clearly outweighed the public's interest in access to the documents. (VIIIJA1412.) This Court made no finding as to the applicability of the deliberative process privilege to the DPP Documents; it merely remanded for findings on the record to support the applicability of the privilege. (*Id.*)

In the Fee Appeal, this Court ***reversed*** the District Court's award of attorney fees to LVRJ. (VIIIJA1525-1530.) This Court held that "the [D]istrict [C]ourt ***erred*** in concluding that, despite ***failing on the claims for relief*** as set forth in its writ petition, the LVRJ nevertheless prevailed in its public records action and was entitled to attorney fees under the NPRA." (VIIIJA1526 (emphasis added).) The Court explained that to qualify as a prevailing party in a public records action, the action ***must proceed to judgment on some significant issue***. (VIIIJA1527.)

This Court found that "[h]ere, as the [D]istrict [C]ourt recognized in its order, ***the LVRJ has not succeeded on any of the issues that it raised in filing the underlying action.***" (*Id.* (emphasis added).) With respect to the 11 DPP Documents, this Court ruled that "the LVRJ ***cannot be a 'prevailing party'*** as

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to that issue before the action has proceeded to a ***final judgment***." (VIIIJA1529 (emphasis added).) The Court reiterated that it did not order the production of the DPP Documents, but simply remanded for the [D]istrict [C]ourt to conduct further analysis. (*Id.*) With respect to all other issues in the case, however, this Court emphasized that "the LVRJ ***did not prevail*** in its underlying public records action and is not entitled to attorney fees . . . ." (*Id.* at fn.2 (emphasis added).)

F. In an Effort to End the Years-Long Litigation, Henderson Voluntarily Provided LVRJ Copies of the 11 DPP Documents.

After Henderson learned that it had prevailed on all the key issues in the Petition Appeal, and that the only remaining issue in the case pertained to the confidentiality of the 11 DPP Documents, it determined that continued litigation over 11 documents was not worth the additional time, effort and expense. (VIIJA1539:17-20.) Ultimately, on June 10, 2019, Henderson "sent an email to LVRJ's counsel stating that it did not make sense to continue expending . . . time and resources litigating [over] 11 documents" and "expressed interest in resolving the case by voluntarily giving LVRJ access to the 11 DPP Documents." (VIIIJA1539:21-25.)

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Henderson's decision to voluntarily disclose the DPP Documents took the following into consideration: First, the case had been remanded to a District Court department with a new judge who had replaced Judge Bailus and was unfamiliar with the case. (VIIIJA1539:26-1540:4.) Henderson did not want to spend additional time and resources briefing and arguing before a third judge who was not acquainted with the case. (VIIIJA1540:4-7)

Second, Henderson "had already spent over $80,000 on outside counsel fees over a two-and-a-half-year period litigating this case, including two separate appeals." (VIIIJA1540:8-9.) Henderson had expended significant amounts of time working with outside counsel on the case. (VIIIJA1540:9-10.) Henderson desired to stop spending taxpayer money and time litigating unnecessarily. (VIIIJA1540:10-11.)

Finally, "[w]ith all of the key issues having been resolved in [Henderson's] favor on appeal, there was little to be gained by continuing to litigate over 11 documents when the universe of documents that was originally at issue comprised . . . nearly 70,000 pages." (VIIIJA1540:12-16.) In sum, the litigation had become a nuisance for Henderson. (VIIIJA1540:16-17.) Accordingly, in July 2019, Henderson voluntarily disclosed copies of the 11

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DPP Documents to LVRJ to avoid further litigation. (VIIIJA1540:18-19; *see also* VIIIJA1532.)

G. LVRJ Files Another Motion for Attorney's Fees and Costs.

Unfortunately, instead of ending this costly and protracted litigation, LVRJ seized upon Henderson's waiver of the deliberative process privilege and used Henderson's voluntary disclosure as a basis to seek ***all*** of its fees and costs from the beginning of this case — as if this Court's prior orders were meaningless and all the issues LVRJ had previously lost had been wiped away. On February 6, 2020, LVRJ filed its Motion for Attorney's Fees and Costs. (VJA0731-0960.) On February 27, 2020, Henderson timely filed its Opposition. (VIJA0961-0979.) LVRJ's reply brief was originally due on March 12, 2020, but LVRJ requested two separate extensions of time (which Henderson granted) totaling 44 days to file its reply. (VIIIJA1543-1544; VIIIJA1546-1548.)

On April 2, 2020, after LVRJ should have already filed its reply brief, this Court issued a decision in *CIR* adopting the "catalyst theory." *See* 136 Nev. 122, 128, 460 P.3d 952, 957-58 (2020). Thereafter, the parties agreed to a new briefing schedule that would give them both the opportunity to address the *CIR* case. On May 11, 2020, LVRJ filed an amended motion for attorney's fees

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and costs ("Amended Fee Motion"). (VIJA1126-1148.) Henderson filed an opposition on June 1, 2020. (VIIIJA1363-1393.) LVRJ filed a reply on June 15, 2020. (VIIIJA1549-1571.)

On June 18, 2020, the District Court conducted a hearing on LVRJ's Amended Fee Motion, evaluating the five factors referenced in *CIR* to determine whether a requestor is a prevailing party in a public records action. (VIIIJA1574:11-1575:23.) On August 4, 2020, the District Court entered an order denying LVRJ's Amended Fee Motion. (IXJA1600-1607.) The order: (1) acknowledges and cites to this Court's orders in the Petition Appeal and the Fee Appeal; (2) identifies the five *CIR* factors and discusses each factor separately; (3) summarizes the parties' positions; and (4) distinguishes the facts of the *CIR* case from this case. (*Id.*) After considering the parties' extensive briefing, oral arguments, this Court's prior orders, and the *CIR* case, the District Court properly found that LVRJ is not a prevailing party and denied the Amended Fee Motion. (IXJA1606:18-22.)

H. Factual Assertions in LVRJ's Opening Brief That Are Misrepresented, Mischaracterized, or Already Settled by the Courts.

LVRJ's Opening Brief has taken liberties with the facts in an attempt to win-at-all-costs. Trying to portray itself as a "prevailing party," and to mold

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this case into a set of facts similar to those in *CIR*, LVRJ's Opening Brief is riddled with misrepresentations and/or mischaracterizations — many of which have no citation to the record. Beholden to revisionist history, LVRJ's Opening Brief also attempts to rehash facts and issues that the District Court or this Court have already decided. The table below presents a sampling of LVRJ's inaccurate and/or already-settled factual assertions and the undisputed record citations refuting those assertions.

LVRJ's Misrepresentations and/or Mischaracterizations of Key Facts	Undisputed Evidence Refuting LVRJ's Misrepresentations and/or Mischaracterizations
"Henderson ***Denies the Review-Journal's Request*** for Access to Public Records." (Opening Brief ("O.B.") at 8:2-3[3] (emphasis added).) "The Review-Journal sought judicial intervention in this case on November 29, 2016, after the City of Henderson ("Henderson") ***refused an October 4, 2016, public records request***." (*Id.* at 3:16-18 (emphasis added).) "Thus, the Review-Journal's decision to file suit seven weeks after ***Henderson denied its request*** and after the parties could not reconciled [sic]	The repeated notion that Henderson denied LVRJ's public records Request has been squarely addressed — and rejected — by this Court. In the Petition Appeal, this Court ruled that "***Henderson did not deny LVRJ's request***; rather, it stated that it needed more time to determine which portions of LVRJ's [R]equest it might need to deny in the future." (VIIIJA1409 (emphasis added).)

[3] Although LVRJ's Opening Brief is not on line-numbered pleading paper, Henderson has attempted to cite to specific page and line numbers in this Answering Brief for ease of reference.

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LVRJ's Misrepresentations and/or Mischaracterizations of Key Facts	Undisputed Evidence Refuting LVRJ's Misrepresentations and/or Mischaracterizations
their disagreements was reasonable." (*Id.* at 38:4-6 (emphasis added).	
"On November 29, 2016, after nearly ***two months of efforts to resolve this dispute failed***, the Review-Journal was forced to petition the [D]istrict [C]ourt to obtain access to the requested records without having to pay the fees demanded by Henderson." (O.B. at 9:7-10 (emphasis added).) LVRJ "made good faith efforts to resolve its disputes with Henderson prior to filing suit, including having ***multiple telephone conferences*** with counsel for the City of Henderson." (*Id.* at 38:1-3 (emphasis added).)	This is false. The parties had ***one telephone call*** before LVRJ filed suit. (VIIIJA1400:1-26.) During the call, LVRJ accused Henderson of charging impermissible fees; however, the parties, ultimately, resolved to go back to their clients to discuss a potential solution, including the possibility of narrowing the search terms. (VIIIJA1400:3-5, 10-14.) This was the only communication the parties had before LVRJ filed suit. (VIIIJA1400:21-26.) LVRJ's attorney never called Henderson to discuss a resolution. (VIIIJA1400:16, 21-22.) After waiting a week, counsel for Henderson called LVRJ's attorney and was told that she was not in the office. (VIIIJA1400:17-20.) Counsel for Henderson asked for a return phone call. (VIIIJA1400:20.) ***LVRJ's attorney never returned Henderson's phone call. Nor did she attempt to contact Henderson through other means to discuss a resolution.*** (VIIIJA1400:21-22.) ***After LVRJ filed suit***, the parties had additional telephone

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LVRJ's Misrepresentations and/or Mischaracterizations of Key Facts	Undisputed Evidence Refuting LVRJ's Misrepresentations and/or Mischaracterizations
	conferences where they arranged for the inspection of the records. (VIIIJA1401:9-11.) But, the assertion that LVRJ tried for months during multiple telephone conferences to reach a resolution before filing suit is not true. LVRJ made no attempts to reasonably settle the matter short of litigation.
"After the in-person inspection, Counsel for the Review-Journal asked for electronic copies of the limited records reviewed. Henderson refused this request." (O.B. at 10:12-14 (internal citations omitted).)	This is false. In fact, the District Court's order denying LVRJ's Amended Petition specifically found that "[***f]ollowing its inspection, LVRJ made no request for copies of the Prepared Documents*[.]" (VIIIJA1489:8-9 (emphasis added).)
"At the conclusion of the hearing, the [D]istrict [C]ourt ***directed*** Henderson to provide the Review-Journal with a 'USB drive with [the requested documents] on it.'" (O.B. at 11:2-4 (emphasis added).)	Incorrect. At the hearing, the District Court ***asked*** Henderson: "Are you—are you willing to give them a USB drive with all the documents?" (VIIIJA1469:8-9.) Henderson responded affirmatively. (VIIIJA1469:10.) Henderson was not "directed" or "ordered" to produce the already-inspected documents. The District Court's order denying LVRJ's Amended Petition confirms this: "[F]ollowing LVRJ's counsel's representations at the hearing that it

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LVRJ's Misrepresentations and/or Mischaracterizations of Key Facts	Undisputed Evidence Refuting LVRJ's Misrepresentations and/or Mischaracterizations
	also wanted electronic copies of the Prepared Documents, [Henderson] ***agreed*** to provide electronic copies. [Henderson] has complied with its obligations under the Nevada Public Records Act." (VIIIJA1489:9-12 (emphasis added).)
"Henderson did not provide the requested records. Instead, on October 11, 2016, Henderson indicated that it was 'in [the] process of searching for and gathering responsive e-mails and other documents,' but estimated it would take approximately three weeks to fulfill the request. Importantly, ***Henderson stated it intended to withhold the documents*** until the Review-Journal paid $5,787.89 for what Henderson claimed was the "extraordinary use" of Henderson personnel to "review and read" the requested records, citing Nev. Rev. Stat. § 239.055, Henderson Municipal Code 2.47.085, and Henderson's Public Records Policy. (O.B. at 8:10-18 (emphasis added) (internal citations omitted).)	LVRJ not only mischaracterizes Henderson's Initial Response (*see* IJA0017), but also attempts to paint the response as improper even though this Court expressly concluded that Henderson's Initial Response complied with the NPRA: "We conclude that Henderson's initial response ***complied with the plain language of NRS 239.0107(1)(c)***" because it was timely, "demanded the fee amount", and "gave a date the request would be completed once a deposit was received." (VIIIJA1408-1409 (emphasis added).)
"Henderson had no interest prior to the filing of the petition in resolving the parties' disputes without litigation." (O.B. at 18:15-16.)	This false assertion is truly puzzling. First, as this Court has already held, Henderson's Initial Response complied with the NPRA, but LVRJ took umbrage with it

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LVRJ's Misrepresentations and/or Mischaracterizations of Key Facts	Undisputed Evidence Refuting LVRJ's Misrepresentations and/or Mischaracterizations
	anyway. (VIIJA1408-1409.) Second, during the parties' call, Henderson spoke to LVRJ's counsel about "potentially narrowing the search terms to decrease the number of email hits and whether [Henderson] would be willing to lower its fee estimate." (VIIJA1400:10-12.) At the conclusion of the call, the attorneys for both parties "resolved to go back to [their] respective clients to work on a solution" and agreed they would discuss the matter further on October 17, 2016, when LVRJ's attorney represented she would call back. (VIIIJA1400:12-14.) Third, after waiting a week with no call from LVRJ's attorney, Henderson attempted to contact LVRJ's attorney "to work out a resolution." (VIIIJA1400:17-19.) LVRJ's attorney never returned Henderson's call or otherwise attempted to contact Henderson. (VIIIJA1400:21-22.) Fourth, after LVRJ filed suit, Henderson sent LVRJ's attorney a letter in which it explained that before LVRJ filed suit, Henderson was prepared to discuss "various ways to reduce the time and expense of producing the requested documents" to resolve LVRJ's concern about fees, but

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LVRJ's Misrepresentations and/or Mischaracterizations of Key Facts	Undisputed Evidence Refuting LVRJ's Misrepresentations and/or Mischaracterizations
	LVRJ's attorney never contacted Henderson or returned Henderson's call. (VIIIJA1535.) The letter also expressed disappointment in LVRJ's rush to file suit "given our past history of working together to resolve these types of requests and your (or LVRJ's) decision not to do so in this instance." (*Id.*) LVRJ's revisionist history is entirely contradicted by the record.

IV. SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's order denying LVRJ's Amended Fee Motion for at least three reasons. First, under the law of the case doctrine, the District Court correctly declined to apply the catalyst theory to Henderson's disclosure of the roughly 70,000 pages of non-privileged documents. Specifically, the District Court acknowledged this Court's orders in the Petition Appeal and the Fee Appeal and correctly determined that, based on those orders, LVRJ was not a prevailing party on the issues that were already decided in those orders.

Second, while the District Court correctly concluded that LVRJ was not a prevailing party under the catalyst theory, it need not have ever considered the

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catalyst theory in denying LVRJ's Amended Fee Motion. This is because the catalyst theory does not apply when a party complies with the NPRA in responding to a public records request, never denies the request, and ultimately obtains a judgment in its favor. Thus, the Court should affirm the District Court's denial of LVRJ's Amended Fee Motion, but should do so on the separate basis that LVRJ was not a prevailing party under the "standard" prevailing party analysis, *i.e.*, because LVRJ had not obtained a judgment in its favor on any significant issue in the litigation.

Third, even though the catalyst theory was inapplicable to this case, the District Court correctly found that LVRJ was not a prevailing party under the catalyst theory as to the DPP Documents by utilizing the *CIR* factors. Simply stated, it was LVRJ's burden to demonstrate that the "threat of victory" posed by its lawsuit caused Henderson to disclose the DPP Documents, and it failed to do so. Each of the five *CIR* factors weighs heavily in Henderson's favor.

To the extent the Court determines that LVRJ is entitled attorney's fees and costs, it should only award an amount that is commensurate with LVRJ's "success" in obtaining the 11 DPP Documents. Despite losing on every issue decided by the Court in the Petition Appeal and Fee Appeal, LVRJ seeks all of its attorney's fees and costs from the inception of the case as if it had won on all

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of its claims for relief. Such a request is neither reasonable nor warranted under the law given the numerous, entirely separate, issues raised in this case that LVRJ lost and the fact that LVRJ failed on each of its claims for relief.

V. STANDARD OF REVIEW

"The decision whether to award attorney's fees is within the sound discretion of the district court." *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). Accordingly, this Court "review[s] decisions awarding or denying attorney fees for 'a manifest abuse of discretion.'" *Id.* "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Further, "[a]n abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015).

In *Logan v. Abe*, when discussing the *Brunzell* factors that a district court must consider in determining an award of attorney's fees, this Court explained that "[w]hile it is preferable for a district court to expressly analyze each factor relating to an award of attorney fees, express findings on each factor are not

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necessary for a district court to properly exercise its discretion." 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). "Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Id.* This same principle should apply when a district court is considering the *CIR* factors for the purpose of determining whether a public records requestor is a prevailing party under the catalyst theory. *See CIR*, 136 Nev. 122, 128, 460 P.3d 952, 957-58 (2020).

VI. ARGUMENT

A. The District Court Correctly Declined to Apply the Catalyst Theory to Henderson's Disclosure of the 70,000 Pages of Non-Privileged Documents.

The District Court correctly declined to apply the catalyst theory to Henderson's disclosure of the 70,000 pages of non-privileged documents in light of this Court's orders in the Petition Appeal and Fee Appeal, and the law of the case doctrine. (IXJA1605:6-14.)

"The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." *Hsu v. Cnty. of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007). The doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous

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lawsuit, of those decisions which are intended to put a particular matter to rest." *Id.* at 630, 173 P.3d at 728 (internal quotation omitted).

"The law of the case doctrine, therefore, serves important policy considerations, including judicial consistency, finality, and protection of the court's integrity." *Id.* Given these policy considerations, a court should only depart from a prior holding under "extraordinary circumstances" if it is "convinced that it is clearly erroneous and would work a manifest injustice." *Id.* at 630-31, 173 P.3d at 729-30 (internal quotation omitted).

In *Hsu*, the Court recognized that in some instances, "equitable considerations" may "justify a departure from the law of the case doctrine" and determined that "when controlling law . . . is substantively changed during the pendency of a remanded matter . . ., courts of this state may apply that change to do substantial justice." *Id.* at 629, 632, 173 P.3d at 728, 729-30. In other words, courts have discretion to apply the new law instead of following the law of the case if it is necessary to do substantial justice. This case does not present such an "extraordinary circumstance" and, therefore, the District Court correctly adhered to the law of the case and declined to apply the catalyst theory to Henderson's disclosure of the non-privileged documents.

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In the Petition Appeal, this Court: (1) affirmed the District Court's mootness determination regarding public records fees; (2) affirmed the District Court's determination that Henderson's Initial Response to LVRJ's Request complied with the NPRA; (3) found that "Henderson did not deny LVRJ's request"; (4) affirmed the District Court's determination that Henderson's privilege log complied with the NPRA with respect to the documents withheld under the attorney-client privilege; and (5) ruled that Henderson "did not waive its right to assert privileges in the records LVRJ requested by not providing a completed privilege log within five business days of LVRJ's request." (VIIIJA1405-1413.) This Court reversed the District Court on the singular issue of the 11 DPP Documents and remanded solely for the District Court to determine whether Henderson's interest in non-disclosure of the DPP Documents clearly outweighed the public's interest in access to the documents. (VIIIJA1412.)

While the case pertaining to the confidentiality of the 11 DPP Documents was pending in the District Court, this Court issued a ruling in the Fee Appeal reversing the District Court's partial award of attorney's fees to LVRJ. (VIIIJA1525-1530.) The Court explained:

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> [The LVRJ moved for attorney fees, which the [D]istrict [C]ourt granted in part, concluding that the LVRJ had prevailed in its action to obtain access to records from [Henderson] but awarding less than the amount LVRJ requested. . . . ***We conclude that the [D]istrict [C]ourt erred in concluding that, despite failing on the claims for relief as set forth in its writ petition, the LVRJ nevertheless prevailed in its public records action and was entitled to attorney fees under the NPRA***. Accordingly, we reverse the [D]istrict [C]ourt's partial award of attorney fees to the LVRJ.

(VIIIJA1526 (emphasis added).) This Court reiterated that "[t]o qualify as a prevailing party in a public records action, the requester must succeed[] on *any significant issue* in litigation which achieves some of the benefit sought in bringing suit." (VIIIJA1527 (emphasis in original) (internal quotation omitted).) The Court concluded: "Here, as the [D]istrict [C]ourt recognized in its order, ***the LVRJ has not succeeded on any of the issues that it raised in filing the underlying action***." (*Id.* (emphasis added).)

The Court explained that LVRJ had "failed on each of the[] objectives" it sought to achieve in filing its Amended Petition, with the exception of the DPP Documents, which "ha[d] not yet proceeded to judgment. (VIIIJA1528.) With respect to the DPP Documents, the Court concluded that "the LVRJ cannot be a 'prevailing party' as to that issue

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before the action has proceeded to a final judgment." (VIIIJA1529.) But as to the rest of the case, *i.e.*, all of the other issues previously decided in favor of Henderson in the Petition Appeal, LVRJ was not a prevailing party and, therefore, the Court reversed the District Court's partial award of attorney's fees and costs. (VIIIJA1526, JA1529 n.2 ("Because we conclude that the LVRJ did not prevail in its underlying public records action and is not entitled to attorney fees, we need not address the LVRJ's cross-appeal argument that the [D]istrict [C]ourt erred in awarding a reduced amount of attorney fees and costs.").)

Turning to the instant appeal, the District Court's order denying LVRJ's Amended Fee Motion acknowledged this Court's orders in the Petition Appeal and Fee Appeal and rightly concluded that "for the most part, the law of this case has already been established as it pertains to the LVRJ's NPRA records request and HENDERSON's response thereto." (IXJA1605:8-9.) The District Court determined that "with the exception of the 11 documents withheld by HENDERSON on its asserted deliberative process privilege, . . . 'the LVRJ has not succeeded on any of the issues that it raised in filing the underlying action,'" and correctly concluded that LVRJ did not prevail on any of the issues that had previously been decided in the Petition and Fee Appeals.

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(IXJA1605:9-14.) Accordingly, the District Court limited its catalyst theory analysis to the disclosure of the DPP Documents. (IXJA1605:13-14.)

LVRJ argues that "[t]he [D]istrict [C]ourt's decision to not consider Henderson's prior disclosure of records to [LVRJ] was premised on a misapprehension of this Court's decision in the Fee Appeal." (O.B. at 26:17-19.) But it is LVRJ that misapprehends the Court's decision in the Fee Appeal. Judge Bailus awarded LVRJ a portion of its fees and costs because LVRJ had prevailed by obtaining access to the non-privileged records after LVRJ filed suit. (VIIIJA1522:13-14.) This Court, however, expressly ***reversed*** Judge Bailus' fee award and held that LVRJ was not a prevailing party. (VIIIJA1526.) As this Court pointed out, LVRJ not only failed on each of its claims for relief in the Amended Petition, but also "has ***not succeeded on any of the issues*** that it raised in filing the underlying action." (VIIIJA1527 (emphasis added).) Accordingly, there was no basis for the District Court to go back and revisit any of the issues previously decided by this Court, including this Court's determination that LVRJ had failed to prevail on any of these issues. Therefore, the District Court correctly determined that LVRJ was not a prevailing party as to those issues and appropriately limited its prevailing party analysis to the DPP Documents. (IXJA1605:9-14.)

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B. The Catalyst Theory Does Not Apply Under the Facts and Circumstances of This Case.

The catalyst theory does not apply under the facts and circumstances of this case because Henderson's Initial Response complied with the NPRA, the Initial Response never denied LVRJ's Request, and Henderson obtained an order in its favor denying LVRJ's Amended Petition. While the District Court should not have used the catalyst theory in reaching its ultimate conclusion — denial of LVRJ's Amended Fee Motion — its decision was nonetheless correct, albeit on different grounds. The Court should affirm the District Court's denial of LVRJ's Amended Motion, but should do so on the separate basis that LVRJ was not a prevailing party because it had not obtained a judgment in its favor on any significant issue in the litigation.

A court may not award attorney fees unless it is authorized by statute, agreement, or rule. *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). Under the NPRA, "[i]f a governmental entity ***denies a public records request***, the requester may seek a court order compelling production." *CIR*, 136 Nev. at 123, 460 P.3d at 954; (emphasis added); NRS 239.011(1). If the requester prevails in the court action,

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the requester is entitled to attorney's fees and costs. *CIR*, 136 Nev. at 123, 460 P.3d at 954; NRS 239.011(2).

In *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, the Court explained that "[a] party prevails if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (internal quotation omitted). Over time, this Court has provided additional clarification for the term "prevailing party." In *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 373 P.3d 103 (2016), the Court explained that "[a] prevailing party must win on at least one of its claims." *Id.* at 422, 373 P.3d at 107. Further, in *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996), this Court held that "a party cannot be a 'prevailing party' where the action has not proceeded to judgment." *Id.* at 404, 915 P.2d at 256. Relying on *Dimick* in the Fee Appeal, this Court expressly held that "LVRJ cannot be a 'prevailing party' as to that issue [the confidentiality of the DPP Documents] before the action has proceeded to a final judgment." (VIIIJA1529.)

Recently in *CIR*, this Court approved the usage of the catalyst theory in certain public records cases to determine whether a requester prevailed in a public records action. Under the catalyst theory, a party is deemed to prevail,

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and thus may be entitled to attorney's fees, if a public records lawsuit causes a governmental body to "substantially change its behavior," even when the litigation does not result in a judgment on the merits. *CIR*, 136 Nev. 122, 128, 460 P.3d 952, 957 (2020). The policy reason supporting the catalyst theory is "the potential for government abuse in that an agency otherwise could ***deny access***, vigorously defend against a lawsuit, and then unilaterally disclose the documents sought at the ***eleventh hour to avoid the entry of a court order*** and the resulting award of attorney's fees." *Id.* at 127, 460 P.3d at 957 (emphasis added) (internal quotation omitted).

Thus, under NRS 239.011, and the foregoing policy rationale, a necessary precondition to the application of the catalyst theory is: (1) the ***denial of access to public records and/or noncompliance with the NPRA***; and (2) the eleventh-hour disclosure to avoid entry of a court order on the merits. In the absence of a denial of public records, a requester is not authorized to file an action under the NPRA and the policy justification for applying the catalyst theory is nonexistent. A requestor should not be rewarded with attorney's fees via the catalyst theory by rushing to file suit. Moreover, when there is no denial, who is to say a subsequent disclosure of documents was caused by the

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filing of a lawsuit, as opposed to the government providing the documents because they were not being withheld.

In addition, the catalyst theory contemplates a situation where the government improperly denies a public records request and/or violates the NPRA and then provides the records at the last minute to avoid entry of an adverse order that would entitle the requestor to seek attorney fees and costs. However, when a government complies with the NPRA, never denies the record request, and actually litigates and obtains a judgment in its favor, none of the policy justifications for utilizing the catalyst theory exist. That is precisely what happened in this case.

Here, this Court has already found that Henderson's Initial Response to LVRJ's Request complied with the NPRA. (VIIIJA1408.) In addition, this Court has already found that Henderson did not deny LVRJ's Request. (VIIIJA1409.) Finally, it is undisputed that the District Court entered an order in Henderson's favor denying LVRJ's Amended Petition. (VIIIJA1488-1490.) There was no last-minute disclosure out of fear that the court might rule against Henderson. Henderson defended itself in the District Court — and then again on appeal — and obtained orders in its favor in both venues.

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LVRJ contends that Henderson's Initial Response was a *de facto* denial of its public records Request because the Initial Response included a fee estimate that was thousands of dollars. (O.B. at 33:12-16.) This contention fails for at least three reasons. First, LVRJ's argument flatly contradicts this Court's findings in the Petition Appeal where the Court stated that Henderson's Initial Response complied with the NPRA and that Henderson did not deny LVRJ's Request. (VIIIJA1408-JA1409.) Importantly, when explaining its rationale, the Court specifically noted that the Initial Response "gave notice within five business days that it would be unable to produce the records by the fifth business day as it needed to conduct a privilege review, ***demanded the fee amount***, and gave a date the request would be completed ***once a deposit was received***." (VIIIJA1408 (emphasis added).) The Court expressly acknowledged the estimated fee in the Initial Response and correctly determined that it complied with the NPRA.

Second, LVRJ's argument that Henderson's Initial Response was a de facto denial is highly problematic because it would lead to an absurd result, *i.e.*, that complying with the requirements of the NPRA constitutes a denial of records. NRS 239.055, which has since been removed from the NPRA but existed in 2016, provided in pertinent part:

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> If a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, ***the governmental entity may***, in addition to any other fee authorized pursuant to this chapter, ***charge a fee not to exceed 50 cents per page for such extraordinary use***. Such a request must be made in writing, and upon receiving such a request, ***the governmental entity shall inform the requester, in writing, of the amount of the fee before preparing the requested information.***

(Emphasis added).

Here, Henderson reasonably concluded that the fulfillment of LVRJ's voluminous Request would require the extraordinary use of its personnel. Accordingly, as required by NRS 239.055, Henderson's Initial Response notified LVRJ, in writing, of the amount of the fee before preparing the requested Information. It would be absurd to conclude that Henderson's compliance with the NPRA is tantamount to a denial of public records.

Finally, LVRJ fails to recognize that the fee amount authorized by NRS 239.055 was tied to the size of a request. Extraordinary requests consisting of tens of thousands of pages, will require a substantial amount of time to prepare. As the number of pages and amount of time required increases, so does the fee. Here, the fee was calculated in accordance with NRS 239.055 based on the enormity of LVRJ's Request.

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Charging a fee that was expressly authorized under the NPRA cannot be deemed a denial of records. There is a significant difference between denying access to public records and informing a requestor about a fee associated with preparing a request. The former triggers the right to initiate a NPRA petition, the latter does not.[4]

Put simply, none of the factual hallmarks justifying the application of the catalyst theory are present in this case. Thus, the District Court should have denied LVRJ's amended motion for attorney's fees and costs using the general prevailing party standard, *i.e.*, "a party cannot be a 'prevailing party' where the action has not proceeded to judgment" in the requester's favor on some significant issue in litigation. (VIIIJA1527.) Because there is no judgment in LVRJ's favor on ***any*** issue, it is not a prevailing party and is not entitled to attorney's fees and costs. (VIIIJA1527.)

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[4] In 2019, the Legislature amended NRS 239.011 so that requesters can now file suit under the NPRA if the requester "believes that the fee charged by the governmental entity for providing the copy of the public book or record is excessive or improper." In 2016, however, at the time LVRJ filed suit, this provision did not exist. Requesters were only permitted to file suit if the request for records was denied.

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C. To the Extent the Catalyst Theory Applies, the District Court Properly Denied LVRJ's Amended Fee Motion Utilizing the *CIR* Factors.

To the extent the Court determines that the catalyst theory is applicable to this case, it should affirm the District Court's order denying LVRJ's Amended Fee Motion. To be deemed a prevailing party under the catalyst theory, the burden was on LVRJ to show that its lawsuit, *i.e.*, the threat of victory on the merits, caused Henderson to substantially change its position. LVRJ failed to carry its burden.

"Under the catalyst theory, a requester prevails when its public records suit causes the governmental agency to substantially change its behavior in the manner sought by the requester, even when the litigation does not result in a judicial decision on the merits." *CIR*, 136 Nev. 122, 128, 460 P.3d 952, 957 (2020) (*citing Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 148 (Cal. 2004)). However, courts have recognized that "[t]here may be a host of reasons why a governmental agency might voluntarily release[] information after the filing of a [public records] lawsuit, including reasons having nothing to do with the litigation." *Id.* (alterations in original) (internal quotation omitted). Indeed, "the mere fact that information sought was not released until after the lawsuit was instituted ***is insufficient*** to establish that the requester prevailed." *Id.*

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(emphasis added) (internal quotation omitted). "A requester seeking fees under NRS 239.011(2) has the burden of proving that the commencement of the litigation caused the disclosure." *Id.* at 128 n.5, 460 P.3 at 958 n.5.

In *CIR*, this Court identified five factors that courts should consider in determining whether to award attorney's fees under the catalyst theory: (1) "when the documents were released"; (2) "what actually triggered the documents' release"; (3) "whether the requester was entitled to the documents at an earlier time"; (4) "whether the litigation was frivolous, unreasonable or groundless"; and (5) "whether the requester reasonably attempted to settle the matter short of litigation by notifying the government agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time." *Id.* at 957-58. To prevail under the catalyst theory, "there must not only be a causal connection between the lawsuit and the relief obtained, but also a determination by the trial court that ***the relief obtained was required by law***." *Ellis v. J.P. Morgan Chase & Co.*, No. 12-CV-03897-YGR, 2016 WL 5815734, at *5 (N.D. Cal. Oct. 5, 2016) (*citing Graham*, 101 P.3d at 154) (emphasis added.). Moreover, courts must determine that a lawsuit's "result was ***achieved by threat of victory, not by dint of nuisance and threat of expense***." *Graham*, 101 P.3d at 154 (emphasis added) (internal quotation omitted).

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Here, Henderson made two disclosures of documents. The first occurred in December 2016 when Henderson allowed an LVRJ reporter to inspect the non-confidential documents on a computer at City Hall ("First Disclosure").[5] For the reasons stated above, the District Court properly excluded the First Disclosure from its catalyst theory analysis given this Court's orders in the Petition Appeal and Fee Appeal. But even if the District Court had considered the First Disclosure in its catalyst theory analysis, the result would be the same.

The second disclosure occurred when Henderson provided the 11 DPP Documents in July 2019 after Henderson prevailed in the Petition Appeal ("Second Disclosure"). Neither of these disclosures was prompted by LVRJ's "threat of victory." Perhaps the best evidence of this is the fact that Henderson litigated this public records action in both the District Court and the Supreme Court and prevailed in both venues. An analysis of the five *CIR* factors buttresses Henderson's position.

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[5] LVRJ contends that the first disclosure occurred in March 2017 when, at the hearing on its Amended Petition, Henderson agreed to provide copies of the documents to LVRJ. (O.B. at 27:17-29:8.) This is yet another example of LVRJ playing fast and loose with the facts. It is well-settled that in December 2016 — *several months before the March hearing* — Henderson provided access to the non-confidential documents on a computer at City Hall, which LVRJ's reporter inspected over the span of several days. (*See, e.g.*, VIIIJA1401:9-14; JA1489:6-9.)

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1. Factor 1: When the documents were released.

Henderson made the First Disclosure in December 2016, after it learned in a *Las Vegas Review Journal* news article that LVRJ had sued Henderson, claiming that Henderson had denied its public records request (which was not true). (VIIIJA1401:1-5, 9-14; VIIIJA1535.) Up to this point, Henderson did not even know that LVRJ still wanted the records because after initially calling to dispute the fee estimate for preparing the records it had refused to communicate with Henderson about the Request and had been silent for six weeks. (VIIIJA1400:1-26.) The lawsuit was particularly surprising because there was no denial of the records and Henderson had been trying to work with LVRJ on a way to reduce the fees for completing the Request. (VIIIJA1400:1-14, 26; VIIIJA1409.) Once Henderson became aware that LVRJ actually wanted the records (via the news article), it prepared the documents and arranged for LVRJ to inspect them at City Hall. (VIIIJA1401:9-14.) Why? It was not to avoid some adverse judgment; rather, it was to ensure access to the documents that Henderson was always willing to provide while the parties wrangled over the fees. (VIIIJA1535-1537.)

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The Second Disclosure occurred in July 2019, two-and-a-half years from when LVRJ filed suit, after Henderson had prevailed in the District Court, and on the heels of prevailing in the Petition Appeal.

LVRJ's Amended Fee Motion failed to demonstrate how the timing of these disclosures supported application of the catalyst theory. LVRJ simply maintained that because both disclosures occurred after it filed suit, it was entitled to fees. But, "the mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that the requester prevailed." *CIR*, 136 Nev. 122, 128, 460 P.3d 952, 957 (2020). Simply stated, LVRJ failed to show a causal nexus between the timing of each disclosure and the threat of victory from its lawsuit.

2. Factor 2: What actually triggered the documents' release.

LVRJ's Amended Fee Motion failed to establish what actually triggered the documents' release. Instead, it merely argued that Henderson never would have provided the records without the lawsuit, and, therefore, the lawsuit must have triggered the disclosures. (VIJA1136:18-25.) As set forth above, the Court has already held that this argument is not enough. *CIR*, 136 Nev. at 128, 460 P.3d at 957.

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(a) The First Disclosure.

Regarding the First Disclosure, Henderson allowed LVRJ's reporter to inspect the records: (i) because Henderson had never denied the Request and was always willing to disclose the non-confidential records under the NPRA once LVRJ confirmed that it wanted them, and (ii) so that LVRJ could determine which, if any, of the documents it actually wanted. The triggering event was Henderson finally ***receiving notice*** that LVRJ wanted the records after Henderson notified it of the estimated cost to fulfill the request. Again, that notice came via a *Las Vegas Review Journal* article reporting that LVRJ had sued Henderson for wrongfully denying its public records Request. (VIIIJA1400:22-26; VIIIJA1535.)

That same notice — with the same result — could have just as easily been accomplished via email or letter or by simply returning Henderson's telephone call to LVRJ's counsel. LVRJ also could have paid the fee deposit under protest, reserving the right to file a declaratory relief action challenging the fees later, and received the documents within weeks. LVRJ's own failure to communicate with Henderson, and its insistence that it receive 70,000 pages of documents ***for free*** were the only roadblocks to the fulfillment of its Request. In short, the lawsuit was unnecessary to obtain the records.

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LVRJ's Opening Brief selectively cites to Mr. Reid's December 5, 2016 letter in alleged support of its position that the First Disclosure came as a result of the lawsuit. (O.B. at 30:19-31:10.) LVRJ contends that the December 5th letter "made plain that Henderson was never going to produce the requested records to the Review-Journal without charging improper fees . . . ." (*Id.* at 31:3-5.) Importantly, however, LVRJ glosses over the fact that the December 5th letter was sent ***after*** LVRJ had filed suit. Thus, the notion that the letter purportedly demonstrated Henderson's resolve to charge "illegal fees", which justified the filing of the lawsuit, is revisionist history.

Further, there is nothing in the December 5th letter that shows Henderson "was never going to produce" the requested records without charging improper fees. (VIIIJA1534-1537.) To the contrary, the letter expressed disappointment that LVRJ's attorney did not call Henderson to discuss a resolution, as she represented she would; explained that Henderson was prepared to discuss "various ways to reduce the time and expense of producing the requested documents" to resolve LVRJ's concerns about the fees; lamented the filing of the lawsuit "given our past history of working together to resolve these types of requests and your (or LVRJ's) decision not to do so in this instance"; reminded LVRJ that Henderson had allowed LVRJ in the past to review documents prior

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to a production to see whether it was interested in certain categories of documents that matched the search terms; reminded LVRJ that "[Henderson] and LVRJ have been able to resolve issues relating to the cost of producing public records in the past, which has resulted in the LVRJ paying a minimal amount for public records over the past two years"; and emphasized that while the parties disagreed over the fees associated with the Request, Henderson was "**not interested in litigation as a method of preventing the disclosure of the requested documents**." (VIIIJA1535-1537 (emphasis in original).)

If anything, the December 5th letter shows that based on the parties' history of working together and Henderson's attempts to reach a resolution in this case, Henderson was willing to explore various options to reduce or eliminate the fee.

(b). **The Second Disclosure.**

With respect to the Second Disclosure, the following considerations triggered Henderson's decision to waive the deliberative process privilege: (a) the case had been remanded to a District Court department with a new judge, and Henderson did not want to spend more time and resources briefing and arguing over 11 documents before a judge who was unacquainted with the lengthy procedural history and issues involved in the case; (b) Henderson had

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already spent over $80,000 on outside counsel fees over a two-and-a-half-year period and did not want to continue spending money and time litigating this case; and (c) with all of the key issues having been resolved in Henderson's favor in the Petition Appeal, there was little to be gained by continuing to litigate over 11 documents when the universe of documents originally at issue totaled nearly 70,000 pages. (VIIIJA1539:26-1540:17.)

At the time of the Second Disclosure, the litigation had become a nuisance and a drain on taxpayer resources. (VIIIJA1540:16-17.) It was for these reasons that Henderson elected to waive the deliberative process privilege and disclose the DPP Documents. (VIIIJA1540:18-19.) In short, Henderson's Second Disclosure was not because of the "threat of victory" from LVRJ's lawsuit; rather, it was due to the "dint of nuisance and threat of [further] expense." *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 154 (Cal. 2004) (internal quotation omitted). Based on these facts, the District Court correctly denied LVRJ's request for fees.

3. Factor 3: Whether the requester was entitled to the documents at an earlier time.

LVRJ was not entitled to either the First Disclosure or the Second Disclosure at an earlier time. LVRJ was not entitled to the First Disclosure at

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an earlier time because, as this Court noted in the Petition Appeal and as Henderson's Initial Response made plain, Henderson needed more time to review the voluminous records for confidentiality. (VIIIJA1408-1409.) LVRJ disputed Henderson's fee and never advised Henderson that it wanted to proceed so Henderson did not immediately start its review. Therefore, any delay in receiving the records is a result of LVRJ's refusal to communicate with Henderson.

LVRJ was ***never entitled*** to the Second Disclosure. The 11 DPP Documents were properly withheld under the deliberative process privilege and identified on Henderson's privilege log. The District Court found that the privilege log was "timely, sufficient and in compliance with the requirements of the NPRA," and therefore denied LVRJ's request to compel Henderson to produce the documents identified on the privilege log. (VIIIJA1489:19-21.)

In the Petition Appeal, this Court did not disagree with the District Court's findings regarding the privilege log, but determined that the District Court should have performed the common law balancing test for the documents withheld under the deliberative process privilege and remanded for that purpose. (VIIIJA1409-1412.) Thus, no court has ever found that the DPP

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Documents were improperly withheld or should have been disclosed to LVRJ at an earlier time.

Henderson determined that instead of spending more time and taxpayer resources litigating over 11 documents before a new judge — *i.e.*, because of the dint of nuisance and threat of further expense — it would waive the privilege and disclose the DPP Documents. Thus, LVRJ has never been entitled to the DPP Documents.

4. Factor 4: Whether the litigation was frivolous, unreasonable, or groundless.

LVRJ's Amended Fee Motion glossed over this factor, ostensibly because it knew its lawsuit pushed the proverbial envelope from the get-go. LVRJ's Amended Fee Motion contended that its lawsuit was not "frivolous" because the parties disagreed over Henderson's ability to charge fees under the NPRA. (VIJA1137:15-23.) LVRJ recites these same arguments in its Opening Brief. (O.B. at 34:10-20.[6]) But just because the parties disagreed on Henderson's ability

[6] LVRJ argues that the District Court "found this factor in favor of the Review-Journal" because the District Court noted that the Nevada Supreme Court "had two opportunities to declare whether either the LVRJ's request or HENDERSON'S reason for nondisclosure was frivolous, unreasonable, or groundless'" but chose not to do so. (O.B. at 34:1-5.) This argument fails because at the time this Court issued its orders in the Petition Appeal and the Fee Appeal, it had not yet adopted the catalyst theory or the five *CIR* factors. Thus, there was no reason for this Court to comment on the frivolous,

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to charge fees does not mean that LVRJ's suit was appropriate under the NPRA. It was not. Nor does it mean that the lawsuit was reasonable or that the relief LVRJ sought was legally permissible. LVRJ omits the fact that a large portion of this case pertained to whether LVRJ's suit was proper under the NPRA, whether it could obtain declaratory and injunctive relief under the NPRA, and the unreasonable positions LVRJ had taken both before and after filing suit.

First, LVRJ's lawsuit was unreasonable and groundless because the NPRA only allows a requester to file suit if the government agency denies the request. NRS 239.011. Again, this Court has already found that Henderson did not deny the Request. (VIIIJA1409.) Because Henderson never denied LVRJ's request and timely complied with the NPRA, LVRJ was not entitled to file suit under NRS 239.011. LVRJ's rush to file suit was both unreasonable and groundless.

Second, LVRJ's lawsuit was unreasonable and groundless because it included claims for relief and remedies that are not available under the NPRA. It is well established that "[w]here a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of

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unreasonable or groundless nature of the suit. Interpreting this Court's silence as to the merit of LVRJ's suit does not equate to a stamp of approval.

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any other." *State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220, 225, 1879 WL 3482 (1879). "If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute." *Builders Ass'n of N. Nev. v. City of Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989); *see also Richardson Constr., Inc. v. Clark Cnty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 23 (2007) (refusing to "read any additional remedies into [a] statute" when the statute itself provided a remedy); *Stockmeier v. Nev. Dep't. of Corrections Psychological Review Panel*, 124 Nev. 313, 317-18, 183 P.3d 133, 136 (2008) (finding that "[b]ecause the statute's express provision of such remedies reflects the Legislature's intent to provide only those specified remedies, we decline to engraft any additional remedies therein.").

The only available remedy under NRS 239.011 for an alleged violation of the NPRA is an application to the district court for an order permitting the inspection or compelling the production of the denied records. Absent from NRS 239.011, or any other provision of the NPRA, is any mention of declaratory or injunctive relief. Yet, LVRJ's lawsuit sought to obtain declaratory relief invalidating Henderson's policy on collecting public records fees and injunctive relief prohibiting Henderson from charging fees that the

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NPRA expressly authorized. LVRJ's attempt to obtain remedies not authorized by the NPRA was unreasonable and groundless.

Third, a key component of LVRJ's lawsuit was the erroneous notion that Henderson somehow waived the right to claim confidentiality over any of the nearly 70,000 pages of documents because it did not provide its privilege log to LVRJ within five business days of receiving the Request. (VIIIJA1409.) LVRJ insisted that no matter how voluminous a public records request may be, a government must review and provide confidentiality designations within five business days or else waive confidentiality. The District Court and this Court both rejected LVRJ's untenable position. (VIIIJA1408; VIIIJA1489:16-21.) This Court stated: "it would be implausible to provide a privilege log for such requests that capture a large number of documents within five business days" and that "a governmental entity cannot tell a requester what is privileged, and thus what records will be denied . . . until it has had time to conduct the review." (VIIJA1409.)

Fourth, LVRJ challenged Henderson's designations of attorney-client privileged documents in Henderson's privilege log. LVRJ's challenge was meritless, and both the District Court and this Court found the attorney-client privilege designations were proper. (VIIIJA1489:16-21; VIIIJA1410-1412.)

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Finally, perhaps the greatest evidence of the unreasonable and groundless nature of LVRJ's lawsuit is the fact that it did not succeed on ***any*** issue decided by the District Court or this Court. (VIIIJA1405-1413; VIIIJA1525-1530.)

5. Factor 5: Whether the requester reasonably attempted to settle the matter short of litigation.

LVRJ's stance on this factor is best summed up by its oft-repeated refrain: "there is no meet and confer requirement in the NPRA." (*See, e.g.*, IIJA0300:21-22; VIJA1138:1-2.) Specifically, before the Supreme Court's recent *CIR* opinion, LVRJ maintained that it did not have to meet and confer to resolve NPRA disputes. *Id.* But now that courts are required to consider whether a requester reasonably attempted to settle the matter short of litigation, LVRJ attempts to (1) downplay the importance of this factor; and (2) engage in further revisionist history. Neither argument has merit.

LVRJ's Opening Brief argues that "this final factor of *CIR* is of the least probative value in NPRA matters, and thus should be accorded the least weight." (O.B. at 35:11-13.) Yet, it cites no legal authority supporting its proposition. Instead, it attempts to distinguish the statutory schemes at issue in *Mason v. City of Hoboken* (New Jersey's OPRA) and *Graham v. DaimlerChrsler Corp.* (California's Code of Civil Procedure) — two cases this

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Court relied on in *CIR* — from Nevada's statutory scheme in the NPRA. (*Id.* at 35:13-37:3.) LVRJ's argument misses the mark.

The requirement to reasonably attempt to settle the matter short of litigation is not a statute-specific requirement necessitating the parsing of different states' laws. Rather, it is a sound policy requirement designed to discourage lawsuits that are more opportunistic than authentic. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 154 (Cal. 2004); *see also*, *CIR*, 136 Nev. 122, 128, 460 P.3d 952, 957 (2020) ("To alleviate concerns that the catalyst theory will encourage requesters to litigate their requests in district court unnecessarily, the court should consider" the five *CIR* factors.) Thus, there is no basis to afford this factor less weight than the other factors. In fact, this Court considered the "reasonably attempted to settle" factor ***first*** in the *CIR* decision, which suggests its importance in the catalyst theory analysis, not its diminished value. *CIR*, 136 Nev. at 128-29, 460 P.3d at 958.

It is not surprising that LVRJ seeks to afford the fifth factor less weight given that it failed to engage in reasonable (or any) attempts to settle this matter short of litigation. But in an effort to win-at-all-costs, LVRJ's Opening Brief engages in blatant revisionist history. LVRJ claims that "after nearly two months of efforts to resolve the dispute failed, [LVRJ] was forced to petition

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the [D]istrict [C]ourt . . . ." (O.B. at 9:7-9.) LVRJ does not stop there. It also asserts that it had "multiple telephone conferences with counsel for [Henderson]" before filing suit. (*Id.* at 37:20-38:3.) These assertions are false. Notably, LVRJ does not provide a citation to the record that supports either of them.

LVRJ never reasonably attempted to settle this matter short of litigation. LVRJ's counsel spoke to Henderson ***one time*** before filing suit. (VIIIJA1400:1-26.) During that call, LVRJ accused Henderson of charging illegal fees but ultimately the parties resolved to go back to their clients to discuss a potential solution. (VIIIJA1400:1-14.) The parties never spoke after that. (VIIIJA1400:15-16, 21-22.) Henderson attempted to call LVRJ's attorney but was told that she was unavailable. (VIIIJA1400:17-20.) LVRJ's attorney never called Henderson back or attempted to contact Henderson through other means to discuss a resolution. (VIIIJA1400:21-22.) One telephone call accusing Henderson of charging impermissible fees and then ignoring Henderson is certainly not "two months of efforts to resolve this dispute." (O.B. at 9:7-8.) Nor was it a reasonable attempt to resolve the matter short of litigation.

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An analysis of the facts in *CIR*, where the Court found that the requester was entitled to attorney's fees under the catalyst theory, presents a stark contrast from the facts here. In *CIR*, the requester submitted a public records request to the Las Vegas Metropolitan Police Department ("LVMPD"). *CIR*, 136 Nev. 122, 123, 460 P.3d 952, 954 (2020). After waiting one month with no response, the requester notified LVMPD that its failure to respond was not in compliance with the NPRA. *Id.* LVMPD responded that the request had been forwarded to a public information officer for follow-up. *Id.* Twelve days later, the requester reached out again to ascertain the status of the request but received no response. *Id.*

In March 2018, approximately three months after the initial request, the requester followed up for a third time, without success. *Id.* at 124, 460 P.3d at 954. About two weeks later, the requester's attorney sent a letter to LVMPD demanding a response within seven days. *Id.* LVMPD responded eight days later by producing a two-page report. *Id.* Concerned that LVMPD had not produced all responsive documents, the requester contacted LVMPD again and inquired whether it had withheld responsive documents and, if so, under what legal authority. *Id.* LVMPD responded that it had withheld documents due to confidentiality and cited various bases for withholding records. *Id.* Dissatisfied

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with LVMPD's response, the requester contacted LVMPD one final time disputing that the records were confidential and asked LVMPD to comply with its obligations under the NPRA. *Id.* at 124, 460 P.3d at 955. LVMPD refused to change its position and, consequently, the requester filed suit. *Id.*

During a hearing on the requester's petition, the district court indicated that LVMPD had not met its burden of demonstrating that all records in the investigative file were confidential and gave LVMPD two options: "produce the requested records with redactions or participate in an in-camera evidentiary hearing." *Id.* LVMPD opted for the evidentiary hearing, but before the scheduled hearing LVMPD and the requester reached an agreement whereby LVMPD agreed to produce roughly 1,400 responsive documents. *Id.* Under these facts, the Supreme Court applied the catalyst theory and found that the requester prevailed:

> CIR tried to resolve the matter short of litigation. CIR put LVMPD on notice of its grievances and gave LVMPD multiple opportunities to comply with the NPRA. At each juncture, LVMPD either failed to respond or claimed blanket confidentiality. It was not until CIR commenced litigation and the district court stated at a hearing that LVMPD did not meet its confidentiality burden that LVMPD finally changed its conduct.

Id. at 128-29, 460 P.3d at 958.

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In contrast to CIR's efforts to reasonably resolve its public records request short of litigation, LVRJ took the position that there is no meet and confer requirement under the NPRA and quickly filed suit. (O.B. at 37:15-18 (maintaining that "the NPRA does not require requesters to meet and confer with governmental entities prior to seeking judicial intervention to resolve a dispute regarding access").) While the NPRA may not contain a meet and confer requirement, ***the catalyst theory does***. Thus, a requester may file an NPRA action without engaging in the meet and confer process, but it is not entitled to attorney's fees under the catalyst theory if it fails to do so.

Because LVRJ cannot satisfy the test set forth in *CIR* for an award of fees and costs, the catalyst theory is inapplicable. The District Court's decision denying LVRJ's amended motion for attorney's fees and costs should be affirmed.

D. To the Extent the Court Determines LVRJ Is Entitled to Attorney's Fees and Costs, It Should Only Award an Amount Commensurate With LVRJ's "Success" Regarding the DPP Documents.

"In Nevada, the method upon which a reasonable fee is determined is subject to the discretion of the court, which is tempered only by reason and fairness." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124

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P.3d 530, 548-49 (2005) (internal quotation omitted). "[I]n determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a 'lodestar' amount or a contingency fee." *Id.* at 864, 124 P.3d at 549. "[W]hichever method is chosen as a starting point, however, the court must continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*, namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result." *Id.* at 865, 124 P.3d at 549.

The United States Supreme Court has directed courts to exclude time expended on unsuccessful claims from fee awards. *See Hensley v. Eckerhart*, 461 U.S. 424, 434–35 (1983) (explaining that "work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved") (internal citation omitted). Further, the overall success in a case is one of the most critical factors in awarding attorney's fees. *Id.* at 43 (holding that where a "plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount").

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To the extent the Court is inclined to award attorney's fees, the fees should be significantly reduced from the exorbitant $125,327 that LVRJ is requesting. First, LVRJ's "success" in this case is extremely limited. LVRJ raised numerous claims and issues in this case but did not succeed on any of them. (VIIIJA1405-1413; VIIIJA1525-1530.) Notwithstanding its lack of success in the District Court and both appeals, LVRJ is asking for ***all*** of its fees from the beginning of the case. It is unreasonable and unfair to require Henderson to pay for LVRJ's fees on the myriad issues that it lost – issues that are completely separate from Henderson's production of the 11 DPP Documents.

Second, the distinct issues the Supreme Court already decided are not so intertwined that they cannot be separated for attorney's fees purposes. For example, LVRJ did not succeed on its declaratory and injunctive relief claims in the District Court or this Court. (VIIIJA1406-1407; VIIIJA1528.). LVRJ also attacked the entirely separate issue of the adequacy of Henderson's Initial Response under the NPRA and the timeliness of the production of Henderson's privilege log. Once again, the Supreme Court ruled in favor of Henderson on these issues. (VIIIJA1408-1409.) LVRJ also argued that Henderson's privilege log was insufficient with respect to its descriptions and legal bases for redacting

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or withholding documents under the attorney-client privilege. Again, this Court rejected this argument. (VIIIJA1409-1412.)

The propriety of Henderson's policy concerning fees, the mootness issues, the adequacy of Henderson's Initial Response, the timeliness of Henderson's privilege log and the contents of the privilege log with respect to documents withheld under the attorney-client privilege are entirely separate from the issue of whether "the threat of victory" posed by LVRJ's lawsuit caused Henderson to disclose the DPP Documents. They are not intertwined at all. Accordingly, even if LVRJ were a prevailing party as to the DPP Documents under the catalyst theory (which it is not), it would not be entitled to fees and costs associated with other distinct issues on which this Court has already determined LVRJ did not prevail.

Third, while LVRJ raised numerous separate issues in this case, none of them were overly complex or intricate requiring special knowledge or skill justifying LVRJ's requested attorney's fees. In fact, most of the issues pertained to interpreting the NPRA. Moreover, this case involved a single plaintiff and a single defendant thus avoiding some of the inherent difficulties that can arise in multi-party litigation. No discovery was conducted. Put

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simply, the character of the work, nature of this case, and overall result do not justify attorney's fees in the amount of roughly $125,000.

Finally, LVRJ's requested fees are not reasonable. LVRJ's public records request in 2016, generated almost 70,000 pages. LVRJ's Amended Fee Motion was filed in response to Henderson's voluntary disclosure of *11 documents* that it had withheld under the deliberative process privilege. After years of litigation and two separate appeals, Henderson voluntarily disclosed the 11 DPP Documents to stop the drain on taxpayer resources. Now, despite losing on every issue concerning 99.9% of the documents requested, LVRJ seeks 100% of its fees and costs, including fees and costs for two unsuccessful appeals. By any measure, LVRJ's "success" in obtaining the DPP Documents must be significantly discounted in terms of fees and costs.

To the extent attorney's fees are granted, the award should be commensurate with the level of success LVRJ achieved in this case. Using the total number of files requested as a baseline (over 9,000), LVRJ's acquisition of the 11 DPP Documents constitutes 0.12% of the total files. Because LVRJ only succeeded with respect to 0.12% of the total number of documents requested, it should only be awarded 0.12% of its fees and costs, *i.e.*, 0.12% x $125,327.50 = $150.39.

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VII. CONCLUSION

Based on the foregoing, this Court should affirm the District Court's Order denying LVRJ's Amended Fee Motion.

DATED this 2nd day of March, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this RESPONDENT'S ANSWERING BRIEF complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in Times New Roman font 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 13,491 words.

Finally, I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Bailey❖Kennedy, and that on the 2nd day of March, 2021, service of the foregoing **RESPONDENT'S ANSWERING BRIEF** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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ADDENDUM

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United States District Court, N.D. California.

Diana ELLIS, et al., Plaintiffs,
v.
J.P. MORGAN CHASE & CO., et al.,
Defendants.

Case No.: 12-cv-03897-YGR
|
Signed 10/05/2016

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Order Denying Plaintiffs' Motion for Order of Entitlement to Catalyst Fee Award Under Cal. Code Civ. P. § 1021.5

Re: Dkt. No. 250

Yvonne Gonzalez Rogers, United States District Court Judge

***1** Now before the Court is a motion by plaintiffs Diana Ellis, James Schillinger, and Ronald Lazar seeking an order entitling them to a catalyst fee award of attorneys' fees under Cal. Code Civ. P. section 1021.5. (Dkt. No. 250.)[1] Defendants J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., and Chase Home Finance, LLC's (collectively, "Chase") oppose. Having carefully considered the papers submitted and the pleadings in this action, and for the reasons set forth below, the Court hereby **DENIES** plaintiffs' motion.

[1] The Court resolves the administrative motions to seal documents submitted in connection with the substantive motion through separate orders entered this date.

I. BACKGROUND

Chase has acted as a home mortgage loan servicer for millions of borrowers nationwide. In that capacity, Chase is responsible for providing certain services to protect the mortgage lenders' interests in the property securing the underlying loan. Among those services are property inspections, which Chase orders to inspect the property when a borrower goes into default.

A. The OCC Consent Order and National Mortgage Settlement

On April 13, 2011, Chase entered into a consent order with the Office of the Comptroller of the Currency ("OCC") to resolve an enforcement action OCC had taken against Chase and seven other mortgage servicers relating to their mortgage servicing and foreclosure operations. (Dkt. No. 259-22, the "OCC Consent Order.") The parties and the Court are familiar with the terms of the OCC Consent Order as the Court previously described it in detail in its order on Chase's first

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motion to dismiss. (*See* Dkt. No. 31 at 11–13.)

Relevant here, the OCC Consent Order required Chase to implement a compliance program to ensure that mortgage servicing and foreclosure operations complied with all legal requirements, OCC supervisory guidance, and requirements of the OCC Consent Order. The compliance program required Chase to adopt, *inter alia*:

> (a) appropriate written policies and procedures to conduct, oversee, and monitor mortgage servicing, Loss Mitigation, and foreclosure options;
>
> ....
>
> (h) process to ensure that all fees, expenses, and other charges imposed on the borrower are assessed in accordance with the terms of the underlying mortgage note, mortgage, or other customer authorization with respect to the imposition of fees, charges, and expenses, and in compliance with all applicable Legal Requirements and OCC supervisory guidance; [and]
>
> ....
>
> (k) measures to ensure that policies, procedures, and processes are updated on an ongoing basis as necessary to incorporate any changes in applicable Legal Requirements and OCC supervisory guidance.

(OCC Consent Order at 8–9.)

Approximately one year later, on March 12, 2012, Chase entered into a consent judgment, the National Mortgage Settlement, with the federal government, 49 States, and the District of Columbia. (Dkt. No. 259-24, the "NMS.") The entities filed a federal lawsuit arising out of the national mortgage crisis against Chase for violations of various state and federal laws in the servicing of home mortgage loans, including: unfair and deceptive acts and practices laws of the various States, the federal False Claims Act, and bankruptcy laws. (*Id.* at 2–3.) Pursuant to the NMS, Chase agreed to pay a monetary penalty of more than $1 billion. (*Id.* at 4.) Chase further committed to achieve certain servicing standards and reforms as part of the NMS. (*Id.* at 94–135.) The servicing standards imposed by the NMS concerned, *inter alia*, the frequency with which property inspection fees may be charged to a delinquent borrower and the circumstances under which Chase could charge delinquent borrowers for reasonable and appropriate default-related fees under the terms of their agreements. (*Id.* at 129–30.) The NMS further specified that servicer guidelines would govern Chase's charging behavior: "No property inspection fee shall be imposed on a borrower any more frequently than the timeframes allowed under GSE or HUD guidelines," subject to a limited exception. (*Id.* at 129.) A federal judge entered the NMS as a judgment of that court on April 4, 2012. (*Id.*)

***2** According to Deidre Slifko, a twenty-five year employee of Chase and executive director familiar with the relevant policies, Chase began work on its internally designated "PO10.60 policy" in 2011 in part to implement the OCC Consent Order requirements. (Dkt. No. 259-21, "Slifko Decl.," at ¶¶ 6–8.) The first version of the PO10.60 policy was implemented on August 12, 2011. (*Id.* at ¶ 8.) Chase continued to revise the PO10.60 policy on an ongoing basis through 2013. (*Id.*) On May 13, 2013, Chase made certain additions to the PO10.60 policy, version 49 of that document, which incorporated language from the NMS. (*Id.* ¶¶ 9–12.)

B. The Instant Litigation

In February 2012, the day after the NMS was announced, plaintiffs filed this lawsuit.[2] Their complaint contained allegations on behalf of a nationwide class challenging Chase's alleged assessment of delinquent borrowers for property inspections[3] Chase marked up from the cost it paid a third-party vendor for the service. (Dkt. No. 1 ¶ 2.) Plaintiffs included causes of action for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), conspiracy to violate RICO, fraud, and unjust enrichment. (*See id.*)

While the complaint included allegations of purportedly "unnecessary" fees, the gravamen of plaintiffs' original complaint was Chase's alleged mark-up profit hidden in the property inspection fee amounts assessed to borrowers.

[2] On February 10, 2012, plaintiffs asserted their claims against Chase as part of related case, *Bias v. Wells Fargo*, 12-cv-664-YGR. That case accused Chase as well as two other sets of bank defendants – CitiBank and Wells Fargo – of similar conduct in connection with servicing home mortgage loans. On July 13, 2012, the Court severed the defendant banks and directed plaintiffs to file their claims against Chase in a separate action. On July 24, 2012, plaintiffs filed this action against Chase only. (*See* Dkt. No. 1.)

[3] Plaintiffs' complaint and first amended complaint also alleged the same conduct with respect to Broker Price Opinions ("BPOs"). (*See* Dkt. Nos. 1, 97.) Plaintiffs have since dropped their claims concerning BPOs entirely and do not argue they were the catalyst for any change related to Chase's BPO policies.

In August 2012, Chase moved to dismiss primarily on jurisdictional grounds in light of the OCC Consent Order and federal preemption under the National Bank Act. (Dkt. No. 6.) In addition, Chase moved on various pleading grounds. (*Id.*) On June 13, 2013, the Court issued an order granting Chase's motion to dismiss the RICO claims on pleading grounds but denying the motion with respect to the state law causes of action. (Dkt. No. 31.) The Court allowed plaintiffs' state law claims to proceed chiefly based upon plaintiffs' allegations that Chase fraudulently inflated the cost of inspection fees assessed to delinquent borrowers, *i.e.* the mark-up allegations. (*See id.* at 35–38.)

Plaintiffs now argue their lawsuit was the catalyst for the changes Chase made to its PO10.60 policy in May 2013. In plaintiffs' view, Chase changed its policy in May 2013 in response to the Court's order denying the CitiBank defendants' motion to dismiss similar claims in a related case on April 25, 2013. *See* Case No. 12-cv-3892-YGR, Docket Number 21 (April 25, 2013). Plaintiffs contend that the CitiBank order sent Chase a "clear signal" that its motion would also be denied. (Dkt. No. 264 at 5:1.) Notably, however, the CitiBank defendants moved only on pleading grounds and made no jurisdictional arguments.

Plaintiffs further contend that their lawsuit was the catalyst for Chase removing property inspection fee charges from borrowers' mortgage accounts. (Dkt. No. 250-1, "Pifko Decl.," ¶ 2.) They submit that their lawsuit motivated Chase to reclassify these fees at a higher rate than it had previously, reducing the amount of property inspection fees Chase sought from borrowers. More particularly, plaintiffs contend Chase reclassified these fees to moot plaintiffs' request for injunctive relief and restitution for the unlawful property inspection fee assessment practices.

***3** Based thereon, plaintiffs seek an order entitling them to attorneys' fees as a reward for forcing Chase to change its conduct to the benefit of all borrowers whose mortgages Chase services. Chase opposes, maintaining that it did not change its conduct in response to plaintiffs' lawsuit. Chase submits evidence tending to show it changed its practices to come into compliance with the OCC Consent Order and the NMS – not in response to this lawsuit.

II. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1021.5

A. Legislative History

Under the traditional American Rule, attorneys' fees are not ordinarily recoverable by a prevailing party in litigation. *See* *Alyeska Pipeline Svc. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *Graham v. DaimlerChrysler Corp.*, 34

Cal.4th 553, 565 (2004). Exceptions exist. Of course, parties can enter into agreements which provide for the award of attorneys' fees should a dispute arise. Legislative bodies can enact specific exceptions to the general rule to allow an award of attorneys' fees to prevailing parties under certain federal and state statutes. *See* *Serrano v. Priest ("Serrano III")*, 20 Cal.3d 25, 34 (1977). In the mid-Twentieth Century, California and federal courts alike fashioned a judicial exception to the America Rule known as the "private attorney general" doctrine. *Alyeska*, 240 U.S. at 267; *Woodland Hills Residents Ass'n v. City Council of Los Angeles*, 23 Cal.3d 917, 928 (1979).

In 1977, the United States Supreme Court held that federal courts did not have the equitable power to invoke the private attorney general doctrine on behalf of plaintiffs absent specific congressional authorization. *Alyeska*, 420 U.S. at 269 (federal courts "are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation. ...") Two years later, in *Serrano III*, California courts parted ways with the federal rule when the California Supreme Court held that the private attorney general doctrine was appropriately invoked, "[i]f as a result of the efforts of plaintiffs' attorneys rights created or protected by the State Constitution are protected to the benefit of a large number of people." 20 Cal.3d at 46. The rationale for upholding the private attorney general doctrine was explained by the California Supreme Court:

> In the complex society in which we live it frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts. Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative. Because the issues involved in such litigation are often extremely complex and their presentation time-consuming and costly, the availability of representation of such public interests by private attorneys acting *pro bono publico* is limited. Only through the appearance of "public interest" law firms funded by public and foundation monies, argue plaintiffs and amici, has it been possible to secure representation on any large scale. The firms in question, however, are not funded to the extent necessary for the representation of all such deserving interests, and as a result many worthy causes of this nature are without adequate representation under present circumstances. One solution, so the argument goes, within the equitable powers of the judiciary to provide, is the award of substantial attorneys fees to those public-interest litigants and their attorneys (whether private attorneys acting *pro bono publico* or members of "public interest" law firms) who are successful in such

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> cases, to the end that support may be provided for the representation of interests of similar character in future litigation.

***4** *Serrano III*, 20 Cal.3d at 44. The California Supreme Court declined to "address the question as to whether courts may award attorney fees under the 'private attorney general' theory, where the litigation at hand has vindicated a public policy having a statutory, as opposed to, a constitutional basis." *Id.* at 47.

Section 1021.5 of the California Code of Civil Procedure went into effect less than three months after *Serrano III*. *See Woodland Hills*, 23 Cal.3d at 925, n.1. Section 1021.5 provides the "explicit statutory authority for court-awarded attorney fees under a private attorney general theory" where the lawsuit "has resulted in the enforcement of an important right affecting the public interest regardless of its source – constitutional, statutory or other." *Id.* at 925 (quoting Cal. Code Civ. P. 1021.5) (internal quotations and emphasis omitted). Section 1021.5 recognizes that "privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." *Graham*, 34 Cal.4th at 565 (quoting *Maria P. v. Riles*, 43 Cal.3d 1281, 1288–89 (1987)). At the same time, compensation under the private attorney general doctrine is not always appropriate even where important public rights are at stake. Instead, whether plaintiffs are entitled to such an award turns on "a comparison of the litigant's private interests with the anticipated costs of suit." *Cal. Licensed Foresters Ass'n v. State Bd. of Forestry*, 30 Cal.App.4th 562, 570 (1994). This balance is necessary to effectuate the intent of Section 1021.5 "as a 'bounty' for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public." *Id.*

B. Requirements Under Section 1021.5

Pursuant to Section 1021.5 trial courts have discretion to award attorneys' fees to, *inter alia*:

> [1] a *successful* party against one or more opposing parties, [2] in any action which has resulted in the enforcement of an important right affecting the public interest, if [3] a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, [4] the necessity and financial burden of private enforcement...are such as to make the award appropriate....

Cal. Code Civ. P. § 1021.5 (emphasis supplied). With respect to the first factor, *i.e.* whether the moving party has been successful, formal judicial relief need not have been secured through the litigation. *Graham*, 34 Cal.4th at 565 (the California Supreme Court has "taken a broad, pragmatic view of what constitutes a 'successful party' "). Rather, in determining whether a plaintiff is a "successful party," the trial court "must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award under section 1021.5." *Id.* at 566 (internal quotations omitted). "The critical fact is the impact of the action, not the manner of its resolution." *Folsom v. Butte Cty. Ass'n of Gov'ts*, 32 Cal.3d 668, 686 (1982).

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***5** Relevant here, California recognizes the "catalyst theory" by which a plaintiff may be deemed successful within the meaning of Section 1021.5 "when it achieves its litigation objectives by means of defendant's 'voluntary' change in conduct in response to the litigation." *Graham*, 34 Cal.4th at 572. In affirming the catalyst theory, the California Supreme Court emphasized that the utility of the catalyst theory is to lessen the "considerable risk" of not being paid that public interest attorneys assume each time they take on a case. *Id.* at 574. The court also recognized a risk that the catalyst theory may encourage frivolous litigation. *Id.* at 575. The court therefore adopted a three-pronged test to balance these competing interests. *Id.* To be entitled to fees under Section 1021.5 under a catalyst theory, a plaintiff must show:

> (1) the lawsuit was a catalyst motivating defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense...; and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.

Tipton-Whittingham v. City of Los Angeles, 34 Cal.4th 604, 608 (2004) (citing *Graham, supra*). This test requires there must not only be a causal connection between the lawsuit and the relief obtained, but also a determination by the trial court that the relief obtained was required by law. *Graham*, 34 Cal.4th at 575. The trial court should review the pleadings and evidence "not only to determine the lawsuit's catalytic effect but also its merits." *Id.* at 576.

"To be a catalyst, the lawsuit must have been 'a substantial causal factor' contributing to Defendant's conduct, though the lawsuit need not be the only cause of Defendant's conduct." *Henderson v. J.M. Smucker Co.*, 2013 WL 3146774, at *4 (C.D. Cal. June 19, 2013) (quoting *Graham*, 34 Cal.4th at 573). Because "it can be difficult to prove causation" under a catalyst theory, California law allows an inference of causation where the change in the defendant's conduct occurs after the filing of the lawsuit. *Californians for Responsible Toxics Mgt. v. Kizer*, 211 Cal.App.3d 961, 968 (1989). "When action is taken by the defendant after plaintiff's lawsuit is filed the chronology of events may permit the inference that the two events are causally related." *Id.* To determine whether such an inference arises, a trial court should look to "(a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." *Hogar v. Community Dev. Comm. of the City of Escondido*, 157 Cal.App.4th 1358, 1366 (2008) (quoting *Folsom*, 32 Cal.3d at 685, n. 31).

If plaintiffs raise an inference of causation, the burden shifts to defendants to offer rebuttal evidence. *Kizer*, 211 Cal.App.3d at 968. The trial court then "weighs the credibility of the evidence, although remaining mindful that defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways." *MacDonald v. Ford Motor Co.*, 142 F. Supp. 3d 884, 891 (N.D. Cal. 2015) (internal quotations and citations omitted). An inference of causation "raised solely by the chronology of events" can be rebutted by credible evidence of the non-litigation genesis of the change in conduct. *Kizer*, 211 Cal.App.3d at 969.

Trial courts are entrusted with the responsibility to exercise their discretion in determining whether plaintiffs were a "successful party" notwithstanding their inability to secure a judicial victory. *See* *Graham*, 34 Cal.4th at 575. To be sure, "trial court judges close to and familiar with the litigation" are best suited to resolve competently whether a party has been successful.

Id. at 573.

III. ANALYSIS

***6** The parties dispute whether, under Section 1021.5, plaintiffs have made the threshold showing they are a "successful party."[4] Plaintiffs argue they should be considered successful under the catalyst theory because this litigation induced Chase to modify its property inspection policy and reverse property inspection fees at a higher rate. Plaintiffs rely on chronology to argue an inference should arise that this lawsuit was the catalyst causing Chase to change its behavior. Chase opposes, arguing it began working to draft its written property inspection policy PO10.60 in response to the OCC Consent Order and NMS, even before the filing of the lawsuit. Chase submits testimony that none of the changes for which plaintiffs take credit was made in response to the litigation. For the following reasons, the Court finds that even if plaintiffs were entitled to an inference of causation,[5] Chase has presented evidence sufficient to rebut an inference of causation as to both the May 2013 revisions to the PO10.60 policy and the property inspection fee reversals. The Court addresses the evidence of causation presented by the parties:

[4] The parties also dispute the remaining Section 1021.5 factors. In light of the Court's conclusion that plaintiffs have not shown they are a "successful" party, the Court declines to reach the remaining factors.

[5] For purposes of this analysis the Court will assume, without finding, plaintiffs raised an inference of causation based on chronology.

A. May 2013 Changes to the PO10.60 Policy

Relevant here, the May 2013 version of PO10.60 policy added two sets of provisions. First, the following language was added to the general "Policy Statement" section:

> Mortgage Banking may collect a default-related fee only if the fee is for reasonable and appropriate services actually rendered and one of the following conditions is met:
>
> > The fee is expressly or generally authorized by the loan instruments and is not prohibited by law or the [NMS]; The fee is permitted by law and is not prohibited by the loan instruments or the [NMS];
> >
> > The fee is not prohibited by law, the [NMS] or the loan instruments and is a reasonable fee for a specific service requested by the borrower; or
> >
> > The fee is collected only after a clear and conspicuous disclosure of the fee is made available to the borrower.

(Slifko Decl. ¶ 11.) Second, version 49 added language to the "Property Inspection" section, namely:

> > Property inspection fees must not be unnecessary or duplicative and must not be charged to a borrower more frequently than allowed under the Government Sponsored Enterprise (GSE) or HUD guidelines unless there are specific circumstances supporting the need for additional property inspections.

(*Id.* ¶ 12.)

Ms. Slifko avers that the above changes to the PO10.60 policy were not made in response to this

lawsuit. (*Id.* ¶¶ 11–12.) Indeed, the above language was taken nearly verbatim from the NMS itself. (*Id.*) Ms. Slifko has been in charge of changes to the policy since December 2011, and in that role, she is confident that she would know if any changes were made as a result of plaintiffs' action. (*Id.* ¶ 13.) However, she did not learn of this lawsuit until 2014. (*Id.*)

The Court finds no credible evidence that plaintiffs' lawsuit was a substantial factor motivating Chase to add the above language to the policy. The superficial chronology presented by plaintiffs in their opening motion deserves little credence. The Court takes particular issue with plaintiffs' bald assertion that they were "unaware of any information produced in discovery or otherwise to support the notion that Defendants' property inspection fee charging policies changed for reasons other than Plaintiffs' lawsuit." (Dkt. No. 250 at 11:3–5.) Plaintiffs surely were aware of the NMS, which contains language nearly identical to the language plaintiffs take credit for in the May 2013 version of the PO10.60 policy. For the reasons discussed herein, the two government enforcement actions and the resulting settlements (*i.e.* the NMS and OCC Consent Order) rebut any inference of causation that plaintiffs may have raised in their opening motion by ignoring the same.

***7** As the Court recognized in its order denying class certification, Chase created the PO10.60 policy in 2011 before the lawsuit was filed. As the timing suggests, Ms. Slifko avers that the policy was centralized in part to implement the requirements of the OCC Consent Order. Following the initial adoption of the policy in 2011, Chase regularly amended the PO10.60 policy both before and after plaintiffs filed this lawsuit. And Ms. Slifko, the person directly involved in and in charge of making changes to the policy, confirms that the May 2013 modifications were not triggered by plaintiffs' lawsuit, much less an order entered by this Court in a related case.

Plaintiffs cite *MacDonald*, 142 F. Supp. 3d at 891–94, for the proposition that they are entitled to an inference of causation unrebutted by Chase. In *MacDonald*, consumer plaintiffs sued defendant Ford Motor Company alleging certain vehicles were manufactured with a dangerous design defect and that Ford failed to warn customers. Approximately 14 months after plaintiffs sent their initial demand letter and filed suit, and approximately 5 months following the court's order denying Ford's motion to dismiss in part, Ford initiated a voluntary recall based on the precise safety concern plaintiffs raised in the litigation. *Id.* at 887–90. The voluntary recall mooted the majority of plaintiffs' claims and plaintiffs moved for attorneys' fees under Section 1021.5. *Id.* At the outset, the district court found that the chronology established an inference that the lawsuit prompted the voluntary recall. *Id.* at 891–92. In rebuttal, Ford submitted a declaration from Lilly, an employee who worked as an early warning data trend specialist in Ford's automotive safety office. Id. at 888. Lilly averred that he first became aware of the safety issue four years prior to the litigation, but took no action. *Id.* The month after the district court denied Ford's motion to dismiss, Lilly again looked into the issue after receiving a notice from a Canadian agency regarding the safety issue. *Id.* 888–89. Based upon this second investigation, Lilly determined that the safety issue was more prevalent than he previously thought and reported it to Ford's critical concern review group. *Id.* at 889. Four months later, the critical concern review group recommended a voluntary recall, which was approved that same month. *Id.* Ford did not identify or present any testimony from the persons who actually made the recall decision. *Id.* Based thereon, the district court found that Ford's evidence did not overcome the presumption that the lawsuit was a substantial factor in the recall decision for three general reasons: (1) it was unconvincing that the letter from the Canadian agency would prompt Lilly to re-analyze the issue when it had received numerous complaints previously; (2) "Ford's timeline relies too heavily on the power of coincidence" given that Ford knew of the defect since at least eight years before the litigation was filed; and (3) "there are significant holes in Ford's evidence as it pertains to the decision-making process behind the recall or as it pertains to the complaint in this case," including the names of the persons who made the decision.

Id. at 892–94.

MacDonald is readily distinguishable. As an initial matter, Ford mooted almost all claims by initiating the recall. Plaintiffs here fail to present evidence of even one claim mooted by the policy changes. This is likely because the draft policy was just that – a draft of a written policy. There is no evidence that memorialization of the language from the NMS in the May 2013 version changed any practice or conferred a benefit on the public. Moreover, Ford's rebuttal evidence was significantly weaker than that presented by Chase. Ford's lone non-litigation impetus was a single complaint from a Canadian authority even though Ford previously received many complaints prior to that letter. By contrast, Chase entered into the OCC Consent Order and the NMS before this lawsuit was filed and Chase began working on the changes mandated by thereby the year before plaintiffs brought this litigation. While Ford conveniently did not name the person(s) who made the recall decision, Chase submits the declaration of the Ms. Slifko who was in charge of the PO10.60 policy revisions at the time. She declares under oath that none of the changes, including the May 2013 changes, were made in response to this lawsuit. *MacDonald* thus highlights the strength of Chase's rebuttal evidence.

***8** In sum, plaintiffs have not shown that this litigation was a substantial motivating factor for Chase to implement changes to its property inspection policy in light of the OCC Consent Order, the NMS, and the uncontroverted declaration of Ms. Slifko.

B. Reversal of Property Inspection Fee Charges

Plaintiffs also assert that Chase reversed property inspection fees in response to this lawsuit filed in February 2012. Chase reversed more than three times the amount in property inspection fee charges[6] between February 2012 and March 2015 as compared to the period between January 2008 and February 2012. (Dkt. No. 259-2 ¶ 5.) Plaintiffs also focus on a spike of reversals in May 2013 to argue that Chase began reversing property inspection fees *en masse* when it became clear the Court would deny Chase's motion to dismiss. Again, even assuming this chronology raised an inference of causation, Chase presents evidence sufficient to rebut the inference.

[6] The figures used herein assume that all amounts reclassified with a certain code actually absolved homeowners of the responsibility to pay, *i.e.* that the amounts were in fact reversed to the benefit of the borrower. Chase opposed this notion and submits evidence that not all amounts reclassified with this code are property inspection fees and in many instances borrowers remain obligated to pay the amount even after it is reclassified.

Principally, the weight of the evidence does not support plaintiffs' theory that Chase reversed property inspection fees in response to their lawsuit. Jack Evans, a vice president in the property preservation department for Chase submitted a declaration averring that he is "not aware that Chase has refunded inspection charges, or reversed charges that were unpaid, in response to this lawsuit." (Dkt. No. 259-9 ¶ 6.) As with Ms. Slifko, Mr. Evans stated that in light of his position within Chase, he is "confident that [he] would know if such an expensive step had been made in response to the filing of this lawsuit." (*Id.*) And plaintiffs present no evidence tying the reversals to the relief they sought in this litigation. Said otherwise, there is no evidence that a borrower was relieved from paying a property inspection fee of the sort that plaintiffs claim is unlawful.

Plaintiffs emphasize that the amount reversed between February 2012 and March 2015 is more than three times the amount Chase reversed between January 2008 and February 2012. Yet the undisputed evidence shows that total inspection charges Chase assessed to borrowers during the two periods are similarly disproportionate. (*See* Dkt. No. 263-8 at 23.) The Court agrees with Chase that it is only logical to expect reversals to increase in 2012 in response to the rise in fee assessments. Certainly plaintiffs are not suggesting

that their lawsuit also caused Chase to increase the total amount charged to borrowers three fold, especially when plaintiffs argue their lawsuit was the catalyst for Chase to change its policy regarding when assessment is appropriate.

As to the spike in May 2013, undisputed evidence shows that the month with the single largest amount in reversals following February 2012 was actually July 2012. (Dkt. No. 263-8 at 23.) It is unsurprising that plaintiffs ignore the July 2012 numbers. Of course, reversals in July 2012 can be attributed no more to this litigation than to the NMS announced the day prior to plaintiffs filing their original complaint. Plaintiffs instead focus on the increase in May 2013 to correspond with the timing of the PO10.60 policy change and the Court's denial in part of the CitiBank defendants' motion to dismiss. But common sense dictates that Chase would not increase reversals in May 2013 as a result of the denial of another litigant's motion to dismiss when even more were reversed ten months prior in July 2012. As discussed above, the better explanation is that reversals generally increased with the parallel (albeit understandably lacking by about a month) increases in assessments.

***9** Further, the Court declines to award fees to counsel when the named plaintiffs have not received any benefit from the litigation. As the California Supreme Court noted while examining the meaning of a successful party, "in the context of section 1021.5, the term 'party' refers to a party to litigation." *Graham*, 34 Cal.4th at 570. Attorneys who have achieved no success for their own clients are not entitled to fees. In the normal course, Section 1021.5 authorizes fees where counsel has achieved a benefit not only for the named plaintiffs but also for the public at large through judgment, settlement, or acquiescence of the defendant. The catalyst theory has been affirmed so that a defendant must compensate the attorneys who have forced the change that mooted their clients' claims. Here, the reversal of fees did not moot plaintiffs' claims. The named plaintiffs have not been refunded for any of the property inspection fees Chase assessed against them. The Court will not label plaintiffs successful where they have not obtained any relief in the litigation.

The Court finds that plaintiffs have not shown they are successful parties as a result of the reversal of property inspection fee assessments that was ongoing since at least 2008.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** plaintiffs' motion for order entitling plaintiffs to a catalyst fee award under Cal. Code Civ. P. section 1021.5 (Dkt. No. 250).

This Order terminates Docket Number 250.

IT IS SO ORDERED.

Dated: October 5, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 5815734

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2.47.085 - City-wide fee schedule for public records and document services.

A. The records committee shall approve and update a city-wide fee schedule for public records and document services applicable to all city departments and divisions of the city in compliance with state and federal law and the policy goals of the city.

B. The city-wide fee schedule for public records and document services shall provide for a mechanism whereby city officials may waive some or all of a fee to provide copies of public records.

C. The city-wide fee schedule for public records and document services may contain a fee for the extraordinary use of personnel or technological resources pursuant to NRS 239.055 if the public records request will require more than ten hours of city personnel time to search for, compile, segregate, redact, remove, scan and/or reproduce records responsive to the records request, which hourly rate charged for the extraordinary use of personnel time shall not exceed $35.00 per hour. The total fee under this provision shall not exceed $0.50 per page contained in the records request.

D. The city-wide fee schedule for public records and document services shall be posted on the city website and in all other locations required by NRS chapter 239.

(Ord. No. 3450 , § 1, 10-17-2017)

West's Nevada Revised Statutes Annotated
Title 19. Miscellaneous Matters Related to Government and Public Affairs (Chapters 234-242)
Chapter 239. Public Records (Refs & Annos)
in General

N.R.S. 239.0107

239.0107. Requests for inspection or copying of public books or records: Actions by governmental entities

Effective: October 1, 2019

Currentness

1. Not later than the end of the fifth business day after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a written or oral request from a person to inspect, copy or receive a copy of the public book or record, a governmental entity shall do one of the following, as applicable:

(a) Except as otherwise provided in subsection 2, allow the person to inspect or copy the public book or record or, if the request is for the person to receive a copy of the public book or record, provide such a copy to the person.

(b) If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:

(1) Notice of the fact that it does not have legal custody or control of the public book or record; and

(2) The name and address of the governmental entity that has legal custody or control of the public book or record, if known.

(c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day after the date on which the person who has legal custody or control of the public book or record received the request:

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(1) Provide to the person, in writing, notice of the fact that it is unable to make the public book or record available by that date and the earliest date and time after which the governmental entity reasonably believes the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person. If the public book or record or the copy of the public book or record is not available to the person by that date and time, the governmental entity shall provide to the person, in writing, an explanation of the reason the public book or record is not available and a date and time after which the governmental entity reasonably believes the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person.

(2) Make a reasonable effort to assist the requester to focus the request in such a manner as to maximize the likelihood the requester will be able to inspect, copy or receive a copy of the public book or record as expeditiously as possible.

(d) If the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing:

(1) Notice of that fact; and

(2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

2. If a public book or record of a governmental entity is readily available for inspection or copying, the person who has legal custody or control of the public book or record shall allow a person who has submitted a request to inspect, copy or receive a copy of a public book or record as expeditiously as practicable.

Credits

Added by Laws 2007, c. 435, § 4. Amended by Laws 2013, c. 98, § 2; Laws 2019, c. 612, § 6, eff. Oct. 1, 2019.

Notes of Decisions (6)

N. R. S. 239.0107, NV ST 239.0107
Current through the end of both the 31st and 32nd Special Sessions (2020)

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West's Nevada Revised Statutes Annotated
Title 19. Miscellaneous Matters Related to Government and Public Affairs (Chapters 234-242)
Chapter 239. Public Records (Refs & Annos)
in General

N.R.S. 239.011

239.011. Application to court for order compelling disclosure of public book or record in legal custody or control of governmental entity for less than 30 years; priority; appeal

Effective: October 1, 2019

Currentness

1. If a request for inspection, copying or copies of a public book or record open to inspection and copying is denied or unreasonably delayed or if a person who requests a copy of a public book or record believes that the fee charged by the governmental entity for providing the copy of the public book or record is excessive or improper, the requester may apply to the district court in the county in which the book or record is located for an order:

(a) Permitting the requester to inspect or copy the book or record;

(b) Requiring the person who has legal custody or control of the public book or record to provide a copy to the requester; or

(c) Providing relief relating to the amount of the fee,

as applicable.

2. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, the requester is entitled to recover from the governmental entity that has legal custody or control of the record his or her costs and reasonable attorney's fees in the proceeding.

3. If the governmental entity appeals the decision of the district court and the decision is affirmed in whole or in part, the requester is entitled to recover from the governmental entity that has legal custody or control of the

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record his or her costs and reasonable attorney's fees for the appeal.

4. The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity.

Credits

Added by Laws 1993, p. 1230. Amended by Laws 1997, c. 497, § 8; Laws 2013, c. 98, § 3; Laws 2019, c. 612, § 7, eff. Oct. 1, 2019.

Notes of Decisions (13)

N. R. S. 239.011, NV ST 239.011
Current through the end of both the 31st and 32nd Special Sessions (2020)

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239.055. Additional fee when extraordinary use of personnel or..., NV ST 239.055

West's Nevada Revised Statutes Annotated
Title 19. Miscellaneous Matters Related to Government and Public Affairs (Chapters 234-242)
Chapter 239. Public Records (Refs & Annos)
Reproduction of Records

N.R.S. 239.055

239.055. Additional fee when extraordinary use of personnel or resources is required; limitation

Effective: October 1, 2013

Currentness

1. Except as otherwise provided in NRS 239.054 regarding information provided from a geographic information system, if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee not to exceed 50 cents per page for such extraordinary use. Such a request must be made in writing, and upon receiving such a request, the governmental entity shall inform the requester, in writing, of the amount of the fee before preparing the requested information. The fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources. The governmental entity shall not charge such a fee if the governmental entity is not required to make extraordinary use of its personnel or technological resources to fulfill additional requests for the same information.

2. As used in this section, "technological resources" means any information, information system or information service acquired, developed, operated, maintained or otherwise used by a governmental entity.

Credits

Added by Laws 1997, c. 497, § 3. Amended by Laws 2013, c. 98, § 4.5.

Notes of Decisions (2)

N. R. S. 239.055, NV ST 239.055
Current through the end of the 79th Regular Session (2017) of the Nevada Legislature subject to change from the reviser of the Legislative Counsel Bureau.

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