

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER**

**MINUTE ORDER**

DATE: 09/05/2014

TIME: 10:00:00 AM

DEPT: C25

JUDICIAL OFFICER PRESIDING: Robert D. Monarch

CLERK: SUSIE GARCIA

REPORTER/ERM:

BAILIFF/COURT ATTENDANT: Gloria C Melarkey

CASE NO: **30-2012-00591239-CU-WM-CJC** CASE INIT.DATE: 08/15/2012

CASE TITLE: **Daniel Walker as Trustee for the 1997 Walker Family Trust vs. City of San Clemente**

CASE CATEGORY: Civil - Unlimited      CASE TYPE: Writ of Mandate

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EVENT ID/DOCUMENT ID: 71994684

**EVENT TYPE:** Motion for Attorney Fees

MOVING PARTY: Daniel Walker as Trustee for the 1997 Walker Family Trust

CAUSAL DOCUMENT/DATE FILED: Motion for Attorney Fees, 07/23/2014

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**APPEARANCES**

Brad Malamud, from Brad Malamud, present for Petitioner,Appellant(s).

Madison S. Spach, Jr., from Spach, Capaldi & Waggaman, LLP, present for Petitioner,Appellant(s).

Robert O. Owen, from Rutan & Tucker, LLP, present for Respondent,Appellant(s).

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Tentative Ruling posted on the Internet and outside the courtroom.

In open court. Oral argument presented by defendant's counsel.

The tentative ruling was adopted as the final order of the Court as follows:

**GRANT PETITIONER'S MOTION FOR ATTORNEYS FEES AND COSTS**

Petitioners Daniel Walker, as trustee for the 1997 Walker Family Trust, and W. Justin McCarthy seek an order awarding them attorneys' fees under the common Fund Doctrine is granted in the amount of \$1.5 million consisting of Lodestar amount of \$370,861.50 and enhancement. In addition, Petitioners are awarded costs in the amount of \$6,215.64.

The common fund doctrine or the "the so-called 'common fund' exception to the American rule regarding the award of attorneys' fees (i.e., the rule set forth in section 1021 of our Code of Civil Procedure), [and] is grounded in 'the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or directly from the other parties enjoying the benefit.'" *Serrano v. Priest* (1977) 20 Cal. 3d 25, 35. **Here, the attorneys' fees are not awarded against the losing party but come out of the fund created by the litigation.** *Lealao v. Beneficial Calif., Inc.* (2000) 82 Cal. App. 4th 19, 27. This is because, "one who expends attorneys' fees in a winning suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." *Serrano v. Priest, supra*, 20 Cal. 3d at 35.

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Courts recognize two methods for calculating attorney fees in common fund cases. The first calculates attorney fees based on a percentage of the common benefit bestowed on the class. The second uses a "lodestar" as the basis-determined by multiplying the hours counsel reasonably expended by reasonable hourly rates-which may be enhanced by a multiplier. See *Lealao v. Beneficial Calif., Inc.* (2000) 82 Cal. App. 4th 19, 26. Although the first method has traditionally been applied in common fund cases, some courts, including the Fourth District, Division Three, have cast doubt on the continued validity of that approach in California. See, e.g., *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1809 (4th Dist., Div. 3 notes percentage method is of "questionable validity"). In *Lealao v. Beneficial Calif., supra*, in a case akin to a common fund case, the court approved use of the lodestar method (that is, calculation of fees based on number of hours) enhanced with an eye toward what fees would have been under a pure percentage-of-the-benefit calculation. *Lealao v. Beneficial Calif., supra*, 82 Cal. App. 4th at 40-53.

In the absence of California case law expressly sanctioning a specific percentage of a common fund as an attorneys' fees award, and in light of *Dunk v. Ford Motor Co.* questioning of the validity of such a method for fee calculation, the better way to determine the appropriate fee amount appears to be use of the lodestar method with a possible enhancement based on a percentage of the common fund. See *Serrano v. Priest, supra*, 20 Cal. 3d at 48 n. 23 ("starting pint of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended on the case"); *Lealao v. Beneficial Calif., described supra*, 82 Cal. App. 4th at 40-53.

Moving party to give notice.