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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHARLES P. WOOSLEY, et al., Plaintiffs and Appellants, v. STATE OF CALIFORNIA, et al., Defendants and Respondents.	B261454 (Los Angeles County Super. Ct. No. CA000499)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly Kendig, Judge. Affirmed in part, reversed in part, and remanded.

Patrick G. Woosley, in pro. per., for Plaintiff and Appellant Patrick G. Woosley.

Jones, Bell, Abbott, Fleming & Fitzgerald, Craig R. Bockman and Kevin K. Fitzgerald, for Plaintiff and Appellant Jones, Bell, Abbott, Fleming & Fitzgerald.

The Law Firm of John F. Busetti, John B. Murdock, for Plaintiff and Appellant the Law Firm of John F. Busetti.

The Gansinger Firm, James M. Gansinger and Eric L. Troff, for Plaintiff and Appellant the Gansinger Firm.

Xavier Becerra and Kamala D. Harris, Attorneys General, Diane S. Shaw, Senior Assistant Attorney General, Stephen Lew, Supervising Deputy Attorney General, Hutchison B. Meltzer, Deputy Attorney General, for Defendants and Respondents.

In this appeal, we again take up issues presented by litigation that has persevered for nearly 40 years. The underlying merits of the suit were resolved more than a dozen years ago, and the parties' disputes since then have turned to attorney fees. In 2007, the trial court awarded approximately $23 million in fees to plaintiffs' attorneys—the Gansinger Firm, the Busetti Firm, and Jones, Bell, Abbott, Fleming & Fitzgerald L.L.P. (Jones Bell)—as well as class plaintiff Patrick G. Woosley (Woosley),[1] who is also an attorney.[2] A prior panel of this division reversed the fee award after concluding the trial court made certain errors, including failing to consider plaintiffs' lack of success in the underlying suit. The case was assigned to a new judge, who held an evidentiary hearing on the issues we directed the court to address and independently examined the attorney billing records to identify unsuccessful and unnecessary work. We consider whether the court acted within the scope of its discretion and pursuant to our directions when it issued new fee awards—markedly less than the amounts originally awarded—based on its redetermination of the lodestar figures and multipliers.

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[1] Woosley changed his name in 1983.

[2] James Gansinger (Gansinger) and John Busetti (Busetti), who were both partners at Jones Bell until each left to start his own firm, acted as co-lead counsel until Busetti died in 1991. After Busetti's death, his wife and law partner Janice Feinstein (Feinstein) continued to work on the case through 1992. Gansinger has continued to serve as lead counsel until the present time, in association with various firms which we refer to collectively herein as "the Gansinger Firm." We refer to the three law firms and Woosley collectively as "Counsel."

I. BACKGROUND

A. 1978-1992[3]

1. Trial court proceedings on the merits

In 1976, Woosley, a California resident, bought a used car from a private party in North Carolina. (*Woosley*, *supra*, 3 Cal.4th at p. 766.) In order for Woosley to register the vehicle, the Department of Motor Vehicles (DMV) charged him a vehicle license fee of $427 and a use tax of $1,500. (*Id*. at p. 767.) At the time, the DMV calculated license fees and use taxes on vehicles purchased in California differently than those purchased out of state, resulting in higher assessments applied to vehicles purchased outside California.[4] (*Id*. at pp. 769, 773.) If Woosley had purchased the same vehicle from a California party, he would have been charged a license fee of $2 and a use tax of $6. (*Id*. at pp. 766-767.) The DMV, which collected use taxes on behalf of the State Board of Equalization (SBE), agreed with the SBE in late 1976 to stop calculating use taxes for vehicles differently depending on whether they were purchased in California or out of state. (*Id*. at p. 773.)

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[3] In summarizing the facts underlying the litigation during this period, we rely on our Supreme Court's opinion in *Woosley v. State of California* (1992) 3 Cal.4th 758 (*Woosley*).

[4] "[T]he DMV employed two different methods of defining market value for purposes of computing both vehicle license fees and use taxes: if the vehicle originally was purchased in California, the market value was the depreciated sticker price, excluding the cost of optional equipment; if originally purchased elsewhere, it was the actual purchase price." (*Id.* at p. 778.)

In 1978, Woosley filed a class action lawsuit against defendant and respondent State of California, acting through the DMV and SBE, asserting the DMV's tax and fee calculations based on a vehicle's place of purchase violated the state and federal constitutions. (*Woosley*, *supra*, 3 Cal.4th at pp. 766-767.) The ensuing litigation also presented the issue of whether the DMV's agreement with the SBE to stop differential treatment based on place of purchase was a regulation that required compliance with California's Administrative Procedure Act (APA). (*Id*. at p. 773.)

The trial court certified two classes, the first consisting of approximately 2.8 million people who had paid higher vehicle license fees and/or use taxes in California because they had purchased vehicles out of state, and the second comprising approximately 14 million people who had paid higher use taxes after the DMV and SBE changed the method of calculating such taxes. (*Woosley*, *supra*, 3 Cal.4th at p. 774.) In 1983, the trial court ultimately ruled the DMV's method of calculating vehicle license fees and use taxes violated state statutes and regulations, the commerce and equal protection clauses of the United States Constitution, and the equal protection clause of the California Constitution. (*Id.* at pp. 773-774.) The court also ruled that the 1976 change in the DMV's method for calculating the use tax was invalid because it had not been adopted in compliance with the APA. (*Id*. at p. 774.)

2. Trial court proceedings on attorney fees

Following the class action trial, Counsel sought attorney fees and costs. In support of their 1985 fee application, the Busetti Firm and the Gansinger Firm sought to introduce their

billing records into evidence. The trial judge at the time declined to admit the records and asked them to instead submit a summary of their time spent on the case. In response, counsel submitted a letter summarizing their respective hours and billing rates through 1985.

Based on the figures in the letter, the Gansinger Firm and Busetti Firm argued for a lodestar of $952,169.50 enhanced by a multiplier of 13, resulting in a total fee of $12,378,203.50. The court awarded them $12 million. Jones Bell sought $1,707,498, which also reflected a multiplier of 13. The court awarded the firm $1.7 million. Woosley sought $10,368,800 in attorney fees, but the court awarded him only $1 million "for services rendered as class representative." All fees were to be paid from the common fund recovered.

3. California Supreme Court decision

The state appealed the trial court judgment, and the dispute eventually came before our Supreme Court.[5] In 1992, the court held that the state's method of calculating vehicle license fees and use taxes violated the commerce clause of the United States Constitution. (*Woosley*, *supra*, 3 Cal.4th at p. 783.) In light of that holding, the Court declined to address the plaintiffs' equal protection arguments. (*Id.* at p. 783, fn. 16.)

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[5] Woosley appealed the decision not to award him attorney fees. In a 1990 decision, this court concluded Woosley's status as class representative did not preclude him from receiving attorney fees for legal services he provided to the class, and we directed the trial court, upon remand, to decide whether Woosley was entitled to such fees.

The plaintiffs' APA claim was less successful. The Court held that even if the 1976 agreement between the DMV and SBE should have been adopted in accordance with the APA, the failure to do so did not warrant any refund because the use taxes collected following the agencies' agreement were independently permitted by operative tax statutes. (*Woosley*, *supra*, 3 Cal.4th at p. 783.) The court further held Woosley's class claim was not authorized by statute, which meant that only Woosley himself and those who affirmatively filed valid claims for refunds were entitled to relief. (*Id.* at p. 788.)

In its remand instructions to the trial court, the Supreme Court stated: "Because our opinion will result in a substantial reduction in the amount of the judgment, the trial court shall reconsider the amount of its award of attorney fees to counsel for the class and the amount of its award to Woosley . . . ." (*Woosley*, *supra*, 3 Cal.4th at p. 795.)

B. 1993-2007[6]

1. Woosley files additional lawsuits

In the 1990's, Woosley filed additional lawsuits against the state to cover time periods not included in the initial lawsuit, resulting in the consolidation of cases and a newly defined class

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[6] In summarizing pertinent facts during this period, we draw from our opinion in *Woosley v. State of California* (April 16, 2010, B209890) [nonpub. opn.], which ultimately resulted in the fee awards now challenged in this appeal. (See Part I.C.1, *post.*) Our unpublished decision is part of the record on appeal.

(that was much smaller than the class as originally framed).[7] In the early 2000's, the trial court found the DMV had continued to violate the commerce clause and that additional Californians were entitled to relief. Further trial court proceedings, and the parties' work on the case, continued from 2001 through 2006 on issues relating to determining and notifying class members, as well as administering claims.

2. Trial court proceedings on attorney fees

In 2005, Counsel moved for attorney fees pursuant to Code of Civil Procedure section 1021.5,[8] which permits a court to award attorney fees under a private attorney general theory. In reviewing the motions, the court relied on certain reconstructed billing records for time periods as to which the original records had been lost or never maintained. Furthermore, in reviewing counsel's time up to 1985, the trial court appears to have relied on the prior trial judge's findings in the 1985 fee proceeding.[9]

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[7] The class was limited to those who had filed valid, timely claims for refunds of vehicle license fees. The court denied Woosley's motion to certify a class with respect to the state's discriminatory calculation of use taxes for lack of numerosity.

[8] Undesignated statutory references that follow are to the Code of Civil Procedure.

[9] The Gansinger Firm submitted a fee application on behalf of itself and the Busetti Firm. During the pendency of the proceedings, the Gansinger Firm and Jones Bell submitted detailed records supporting Gansinger's work through 1985. The Busetti Firm's detailed billing records through 1985 were produced to the state, but those records were apparently never submitted to the court. The Gansinger Firm filed a declaration

The law firms filed a joint motion for fees that sought an award based on a lodestar of $4,230,135 (including $80,010 for the fee motion itself) enhanced by a multiplier ranging from 5 to 6 (except with respect to the fee application, for which counsel sought a multiplier of 2 or 3). Woosley's fee motion asked the court to find his lodestar amount was $4,660,863 (including $61,920 for his fee application) and to apply a multiplier of 5 or 6.

The state opposed the attorney fees motions. Its expert, litigation-fee consultant Gary Greenfield (Greenfield), argued the court should reduce the lodestar amounts sought by Counsel by 50 percent to account for their work on the following unsuccessful issues: the APA use tax claim, the class administrative claim resolved against plaintiffs by the Supreme Court, post-1992 work on constitutional contentions other than the commerce clause argument, an unsuccessful petition for certiorari to the United States Supreme Court, and the creation of a refund plan that was ultimately nullified by our Supreme Court's decision. After making his proposed adjustments, Greenfield additionally advocated for a further 10 percent reduction to the hours of the Gansinger Firm and Busetti Firm for inadequate documentation, based on the missing and nonexistent records they reconstructed.

As to class representative Woosley, and in addition to the 50 percent deduction for lack of success, Greenfield proposed reducing his lodestar for the hours he spent in a dispute with

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from Feinstein, Busetti's wife and law partner, that stated she possessed detailed billing records for Busetti through 1985—but those records were not attached to the declaration. Thus, Busetti's work from 1978 to 1985 was documented solely by the 1985 letter summary the prior trial judge requested years earlier.

class counsel over class representation and for time spent traveling, working on other cases, and acting in pro per. After applying those deductions, Greenfield recommended Woosley's remaining hours be halved again for unreasonable, unnecessary, and inflated billing.

In an amended statement of decision issued in 2007, the trial court found section 1021.5 entitled Counsel to fees for their work over the previous 29 years. The court concluded the lawsuit vindicated the argument that the state's prior method of calculating license fees and use taxes violated the commerce clause. The court explained the suit conferred a significant benefit on the public by bringing "an end to a program of discrimination that directly impacted hundreds of thousands of California taxpayers every year for over 30 years; a scheme that the State has admitted cost California taxpayers over $1 billion by 1992."

As a result of the litigation, taxpayers who filed timely, valid claims received refunds, with interest, and a multitude of additional taxpayers benefited from changes the Legislature enacted.[10] The trial court found the necessity and financial burden of private enforcement by plaintiffs' lawsuit justified a fee award under section 1021.5 because Counsel had "expended

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[10] The lawsuit directly led to changes to the Revenue and Taxation Code in 1983 and 1991. The 1991 changes, which were referred to as the "Woosley fix," were intended to "eliminate any future liability with regards to the Woosley case," with the state estimating such liability to be "over $1 billion in use tax and $750 million in vehicle license fees." The Supreme Court concluded these amendments did not fully eliminate the discriminatory treatment. (*Woosley*, *supra*, 3 Cal.4th at pp. 770-771.)

millions of dollars in time-based charges and expenses to support the public benefit, while Plaintiff Woosley, as an individual, only [stood] to gain back approximately $500.00 in vehicle license fees he paid, plus interest." The court further found that a fee award under the private attorney general theory was in the interest of justice because it would be unfair to compensate Counsel from the "limited fund" generated by the litigation when the class of those that applied for and received a refund was "but a small fraction of the individuals, entities and society in general that have benefited from this litigation . . . ."

The court awarded more than $23 million in attorney fees and costs to class counsel and Woosley.[11] The awards included seven percent interest, applied to the lodestar before application of the multiplier, to account for the fact that the lodestar was based on historical billing rates for services rendered over the course of 29 years.

The court found the hours expended by class counsel were reasonable and necessary, declining to make any of the deductions proposed by the state. With respect to Woosley, however, the court determined "a good portion of [his] services were unnecessary and/or duplicative of the services rendered by other counsel, or not for the benefit of the class." On that basis, the court subtracted the following from Woosley's lodestar: 130.45 hours spent on disputes with class counsel, 58.90 hours spent on

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[11] Specifically, the court awarded $15,308,147 to the Gansinger Firm and Busetti Firm, $7,330,234 to Woosley, and $545,657 to Jones Bell. The award to the Gansinger Firm and Busetti Firm was apportioned so that the Gansinger Firm received $9,558,784 and the Busetti Firm received $5,748,364.

other cases, and 2,616.50 hours Woosley spent representing his personal interests as opposed to those of the class.

The court applied a multiplier of 3 to the lodestar for the law firms. It concluded that multiplier was appropriate based on four factors: the novelty and complexity of issues litigated, the results achieved, the risks undertaken by counsel, and the litigation's impact on the firms' ability to pursue other employment. The court found "[t]he complexity of the issues and the skill displayed in this action in the presentation of the esoteric tax matters of constitutional dimension are clear from the nature of the case and the results . . . Counsel have obtained." The court described these results as an "exceptional success," and the court further found counsel had taken "great risks" that "justif[ied] a substantial enhancement of the lodestar" owing to the contingent nature of the litigation. Finally, the court found that because of the litigation's "complex intensity and vigorous opposition," Counsel had forgone other work that might have earned them substantial compensation.

The court applied a multiplier of 1.5 to Woosley's base lodestar figures. The court did so partly based on its conclusion that even after it deducted 2,805.85 hours from Woosley's lodestar, his records still reflected time that was not reasonable or necessary. The court noted that Woosley claimed more hours than all of the law firms combined, including "excessive hours that were unnecessarily expended in overdoing or overworking the case, duplicative of class counsel efforts." Furthermore, the trial court opined Woosley billed his time at a "high hourly rate for work that could have been undertaken by attorneys and/or paralegals at lower billing rates . . . ." Because it was "extremely difficult," given the duration of the litigation and the 13,000-plus

hours claimed by Woosley, "to determine with any exactitude the number [of] duplicative/overworked excessive hours[,]" the court decided to address the inefficiency by reducing Woosley's multiplier (as compared to the multiplier awarded to class counsel).

The state appealed, arguing the attorney fees awards were not justified under section 1021.5 and the amounts awarded were not reasonable. Woosley cross-appealed, arguing he was entitled to a higher lodestar and multiplier.

C. 2010-2014

1. Our 2010 decision reversing the attorney fees orders, including the instructions to the trial court on remand

In 2010, a panel of this division affirmed the trial court's determination that section 1021.5 entitled Counsel to attorney fees. This court also held that adequate billing records supported the awards. The 2010 opinion ultimately reversed the fee awards, however, after concluding the amounts were not reasonable because the record did not show the trial court "gave any consideration to the lack of success in this case." The lack of such consideration ran contrary to our Supreme Court's command that the trial court reassess attorney fees in light of its 1992 decision, which effectively reduced the 1985 judgment from $800 million to $2 million.

Our prior panel decision highlighted, in particular, certain unsuccessful efforts by Counsel that warranted further examination beyond that required because of the general reduction in the judgment amount produced by the Supreme Court's decision: "petitioning for certiorari to the United States

Supreme Court: Mr. Woosley (118.20 hours) and Mr. Gansinger (25 hours); arguing the merits of the equal protection claim: Mr. Woosley (206.10 hours) and Mr. Gansinger (104.30 hours); and time spent on a refund plan which included providing funds to an inappropriately defined class: Mr. Woosley (552.50 hours) and Mr. Gansinger (119.95 hours)." We also determined the trial court should have deducted additional time from Woosley's lodestar for duplicative and excessive work. Finally, we held prejudgment interest could not be applied to an award of attorney fees under section 1021.5.

This court instructed the trial court "to conduct a new hearing [on remand] and determine the appropriate amount of fees to award under . . . section 1021.5. In determining what is a reasonable fee award, the trial court is directed to: (1) consider and make any appropriate deductions from the lodestar figure of all counsel for the lack of success of the litigation for the period between 1978 and 1992 when the common fund was reduced from $800 million to $2 million, as well as any subsequent unsuccessful efforts by the class following and consistent with the Supreme Court's decision and instructions on remand in *Woosley v. State of California* (1992) 3 Cal.4th 758; (2) calculate and reduce from the lodestar figure any hours attributed to Charles Patrick Woosley as inefficient, unnecessary, or duplicative of class counsel's efforts; (3) reconsider whether Mr. Woosley is entitled to any multiplier or whether a negative multiplier is warranted due to his duplicative work; (4) reconsider the multiplier for class counsel and Mr. Woosley after due consideration is given to the lack of success of the litigation in light of the Supreme Court's 1992 decision; (5) reconsider the amount of costs awarded in light of this opinion; (6) deny interest

on the attorney fee award for the period of time prior to entry of the fee award; and (7) maintain the 2616.5 deduction of hours [*sic*] from Mr. Woosley's fee application which were found by the trial court to be duplicative and for his own personal benefit."

2. Proceedings on remand

a. evidentiary hearing

Upon remand, the case was assigned to a new judge, who held an evidentiary hearing to address the seven issues enumerated in this court's remand directions. Counsel presented the following evidence: live testimony of Gansinger, Woosley, and Craig Bockman (Bockman), an attorney with Jones Bell; declarations from Gansinger, Woosley, Bockman (another Jones Bell attorney), and Feinstein; supporting declarations from multiple experts;[12] and Counsel's billing records.[13]

In opposition, the state presented only Greenfield's 2006 declaration, which Counsel "cross-examined" with excerpts from Greenfield's deposition. Based on Greenfield's declaration, the state argued the court should either (1) reduce the lodestar amounts for all counsel at a ratio that matched the reduction in

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[12] The experts included a retired California Supreme Court justice, the author of a California treatise on attorney fees, a law professor at the University of Texas, a statistical analyst, and multiple tax and litigation attorneys.

[13] The law firms introduced the same billing records they had submitted in the prior fee proceeding, with the result being that no one submitted the Busetti Firm's detailed records for 1978-1985. As in the prior fee proceeding, the Gansinger Firm represented both itself and the Busetti Firm in the proceedings on remand from this court.

the 1985 judgment from $800 million to $2 million (i.e., multiply the lodestar by one-quarter of one percent) or (2) make the specific deductions to counsel's lodestar for lack of success identified in this court's prior opinion (e.g., the time spent on the refund plan), reduce the hours remaining by 50 percent to approximate time spent on unsuccessful issues, and further reduce the resulting lodestar by 10 percent as a "penalty" because of the extra time and work it took for the state to examine counsel's reconstructed time estimates. In addition, the state argued the court should deduct 8,294.08 of Woosley's hours for excessive or inappropriate time billed. The state did not itemize the particular time entries that it believed should be subtracted from Counsel's lodestar figures.

Regarding the substantial multiplier the trial court had previously applied, the state argued it should be reduced to account, at most, for the work Counsel did through 1992. The state reasoned that limitation was appropriate because the Supreme Court's decision that year effectively put an end to the contingent nature of the litigation. The state accordingly suggested the law firms receive a multiplier of 1.5, and the state proposed that Woosley receive a negative multiplier or no enhancement at all.

The Gansinger Firm argued the trial court should comply with our directions on remand by subtracting only 1994.2 hours from their and the Busetti Firm's lodestar and by reducing their multiplier from 3 to 2.5. Jones Bell contended that any reduction in its award for lack of success should be de minimis because it only worked on the case from 1977 to 1981, which meant it did not participate in any unsuccessful work following our Supreme Court's decision in 1992. Woosley argued that the substantial

success of the litigation, which resulted in tremendous savings for California taxpayers regardless of the size of the money paid out to refund claimants, counseled against any reduction in the lodestar or multiplier. Woosley also argued counsel should be compensated even for their unsuccessful efforts because those time expenditures were reasonable under the circumstances.

Regarding the inefficient and duplicative work he was alleged to have performed, Woosley contended the 2616.5 hours deducted in 2007 already accounted for any duplicative work; he proposed that 225 additional hours be deducted for any inefficiency. He further argued that because his duplicative hours were minimal and not unreasonable, there was no basis to penalize him further through a zero or negative multiplier.

Counsel all argued the court should take into account the long delay in being paid for their work. In lieu of pre-judgment interest, they proposed a five percent "percentage adjustment" to the lodestar (as per the Gansinger Firm and Woosley), a "substantial" multiplier (Jones Bell), a 230 percent lodestar adjustment (Woosley), or calculation of the award at current hourly rates (Woosley).

b. tentative statement of decision, and the motion to reopen

In August 2014, the court issued a tentative statement of decision that dramatically reduced the amount of fees previously awarded to Counsel.[14] The reduction to the Busetti Firm's award

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[14] The attorney fees awarded in the tentative decision were as follows: $1,859,295.09 to the Gansinger Firm, $151,368.75 to the Busetti Firm, $76,339.37 to Jones Bell, and $540,563.82 to Woosley.

was the largest: The trial court found the evidence of Busetti's 3,215.5 hours expended from 1978 to 1985 (i.e., the summary of hours previously submitted in letter form as requested by the initial trial judge) lacked sufficient detail for the court to determine what he worked on during that time. The court accordingly concluded it "was unable to consider any award of attorneys' fees for attorney Busetti" based on that period.

Two weeks later, the Gansinger Firm and Busetti's estate moved to reopen the evidence in order to submit the Busetti Firm's original time records for 1977-1985. They attached those records, most of which were handwritten and separately transcribed by Feinstein for ease of reading, to the motion. They averred there was good cause to reopen the evidence because the court's decision caught them by surprise, reopening the evidence would not prejudice the state, and they had acted diligently upon learning of the court's decision. The movants elaborated by explaining (1) previous trial judges had never requested the records in question, (2) the state had copies of the records since 2006 and had never challenged their adequacy or contents, and (3) the court never requested the records even though it opted to independently review counsel's time entries and knew the records were available.

c. final statement of decision

The court issued a final statement of decision consistent with, but expanding upon, its tentative decision. It awarded attorney fees in the amount of $1,770,427.19 to the Gansinger Firm, $181,350 to the Busetti Firm, $76,339.37 to Jones Bell, and $488,821.68 to Woosley.

The court denied the motion to reopen the evidence filed by the Gansinger Firm and Busetti's estate, concluding the failure to submit the Busetti Firm's detailed records for 1978-1985 was a "voluntary (if mistaken) choice" that could have been avoided by the exercise of "due diligence."

i. lodestar adjustments

To address our prior opinion's first remand directive, i.e., that the trial court consider reducing Counsel's lodestar hours for lack of success, the court independently examined the billing records submitted.[15] Based on its review, the court reduced the Gansinger Firm's hours by 1,298, the Busetti Firm's hours by 475,[16] Jones Bell's hours by 87.2, and Woosley's hours by 2,601.6.[17]

The court additionally deducted 8,365 hours from Woosley's lodestar for inefficient, duplicative, and otherwise unnecessary work. The court explained that Woosley, a tax attorney but not a litigator, billed thousands of hours on issues outside his expertise that were already within the province and time expenditures of

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[15] The court "determined that it was necessary for the court itself to review and analyze each recorded time entry in order to respond to the remand directions from 2010" because of the state's failure to specify which time entries it believed should be deducted and why.

[16] This deduction was separate from the 3,215.5 hours from 1978 to 1985 that the court did not consider at all.

[17] These lodestar figures do not include time spent on attorney fees applications, which the trial court addressed separately.

the law firms as class counsel. In addition, much of Woosley's work "should have been done by a paralegal or junior litigation attorney at a much lower rate." The court also found that Woosley attributed an excessive and unreasonable number of hours to internal and external communications—the equivalent of 19 work weeks from 1992 to 2006—and that his time should be further deducted for "undecipherable and inadequately-described time entries" that were "insufficient for the court to find . . . reasonable."[18] The court also deducted 559.95 hours from Woosley's lodestar for work performed by other attorneys he had hired to assist him. The court reasoned that Woosley was not entitled to collect legal fees for the work of third parties because he was not class counsel and that, in any event, the court could not determine whether the work performed by those attorneys was reasonable because Woosley did not describe it.

ii. multiplier adjustments

In addressing this court's fourth directive, to reconsider the multiplier (not just the lodestar) in light of counsel's lack of success, the court took the position it was obligated to consider the seven factors set forth in *Serrano v. Priest* (1977) 20 Cal.3d 25 (*Serrano III*), which it described as follows: "'(1) the novelty and difficulty of the questions involved, and the skill displayed in

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[18] The court found Woosley's time entries became more ambiguous over time and those after the Supreme Court's 1992 decision "were the least decipherable and most inadequate." The court reasoned that while it could have excluded all of Woosley's inadequately detailed time entries, it opted to deduct only a portion of them: 75 hours for 1977-1985, 481 hours for 1985-1992, and 3,115 hours for 1992-2006.

presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed; and (7) the fact that in the court's view the two law firms involved had approximately an equal share in the success of the litigation.' [*Serrano III*, *supra*, at p. 49]."

In contrast to the findings of the judge that presided over the litigation after our Supreme Court's decision, the court found the case "was [n]either [n]ovel nor [d]ifficult, nor was there an [e]xceptional [d]isplay of [s]kill by the [l]itigants." Specifically, the court found that the legal and factual issues presented by the calculation of the vehicle license fee and use tax were not particularly complex. The court also found that the results of the litigation, which entailed "reduction of the potential recovery in the case from $800 million to $2 million, the deletion of one class in its entirety, the further reduction of the remaining class (to include only Mr. Woosley), and the need to then certify a new class" did not manifest "exceptional skill." These findings, in the trial court's view, weighed against a positive multiplier.

The court believed other *Serrano III* factors also weighed against a large multiplier, namely, that the award would be borne by taxpayers and that Counsel did not contribute equally to

the success of the litigation. On the other hand, the court found the contingent risk of the litigation strongly favored enhancement and the litigation's preclusion of other employment by Counsel weakly supported a multiplier increase to the lodestar amounts. The court deemed the other factors set forth in *Serrano III* irrelevant.

After considering *Serrano III*, the court focused more intently on a lack of success analysis. It concluded the reduction in the judgment and the failure to establish a common fund constituted a "significant" lack of success that weighed against a multiplier. The court stated that to the extent the *Serrano III* factors warranted enhancing the lodestar, counsel's lack of success meant any multiplier should be "limited." Based on its analysis, the court applied a multiplier of 1.25 to its lodestar calculations for the law firms.

The court declined to enhance Woosley's lodestar at all after considering his "excessive and unnecessary time logged" (remand issue three) in addition to its view of the overall lack of success. The court decided against applying a negative multiplier to Woosley's lodestar because it had already accounted for Woosley's improper time expenditures through specific deductions.

iii. other remand instructions

In light of this court's instruction to deny pre-judgment interest on the fee awards (remand issue six), Counsel argued they should be compensated for the delay in payment of attorney fees by other means, such as a "percentage adjustment" pursuant to *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 584 (*Graham*) or by calculation of the lodestar amounts at current

rather than historical billing rates. The trial court declined to adopt either proposal, reasoning the multiplier "already takes into account delay in payment" and that enhancing the award further on that basis would constitute double counting.

With respect to costs (remand issue five), the Gansinger Firm reached an agreement with the state on the amount it should be awarded and Jones Bell and the Busetti Firm sought no reimbursement. Thus, the court only considered Woosley's costs, which it reduced from $117,806.84 to $51,742.14 after excluding expert witness fees and amounts attributable to office overhead.

II. DISCUSSION

The trial court had an unenviable task: reconsidering an attorney fees award in an unfamiliar case that was litigated for more than 30 years. To fulfill its obligations on remand, the court held an evidentiary hearing that lasted more than a week and it pored over thousands of attorney time entries. Under the circumstances, and adhering to the abuse of discretion standard of review all parties concede is applicable, we conclude the bulk of the trial court's fee award must be affirmed. That is to say, with the exception of the trial court's denial of the Gansinger/Busetti motion to reopen and its consideration of a small category of fees, the trial court's ruling did not exceed the bounds of reason.

A. With Two Caveats We Shall Discuss, the Trial Court Did Not Abuse Its Discretion in Calculating the Attorney Fee Awards

"When a party is entitled to attorney fees under section 1021.5, the amount of the award is determined according to the

guidelines set forth by [our Supreme Court] in *Serrano III* . . . ." (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 (*Press*).) *Serrano III* endorsed the lodestar-multiplier method for determining such awards. A court applies the lodestar-multiplier method to calculate fees "'by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.' (Citation.)" (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 489 (*Laffitte*).)

The lodestar is intended to reflect the reasonable, necessary hours expended and may therefore diverge from the attorney's actual time records. (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1320.) An applicant for attorney fees bears the burden of proving he or she is entitled to them "and that the hours expended and the fees sought [are] reasonable." (*Save Our Uniquely Rural Community Environment v. County of San Bernardino* (2015) 235 Cal.App.4th 1179, 1184 (*Save Our Uniquely Rural*).) In reversing the trial court's 2007 awards, this court concluded the then-trial judge's lodestar calculations may not have been "reasonable" insofar as they included time spent on efforts that proved unsuccessful.

One who challenges a fee award shoulders the burden of showing the trial court abused its discretion. (*Laffite*, *supra*, 1 Cal.5th at p. 488 ["'Fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award' [citation]"].) We will not disturb the trial court's determination of

attorney fees unless we are convinced it was "'clearly wrong.'" (*Serrrano III, supra*, 20 Cal.3d at p. 49, citation omitted.)

1. The lodestar calculations were not an abuse of discretion

We directed the trial court to "consider and make any appropriate deductions from the lodestar figure of all counsel for the lack of success in the litigation for the period between 1978 and 1992" and for "any subsequent unsuccessful efforts." We further instructed the court to "calculate and reduce from" Woosley's lodestar time that was "inefficient, unnecessary, or duplicative of class counsel's efforts," and to "maintain the 2616.5 deduction of hours from Mr. Woosley's fee application which were found by the trial court to be duplicative and for his own personal benefit."

In determining attorney fee awards, the trial court has a duty to scrutinize fee applications. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 ["In referring to '*reasonable*' compensation, we indicated that trial courts must carefully review attorney documentation of hours expended"] (*Ketchum*).) After undertaking such scrutiny, the court has considerable latitude to accept or reject a fee applicant's claim. (See, e.g., *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 ["'trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony'"].) Here, the trial court calculated Counsel's lodestar figures by independently reviewing the time entries submitted. Counsel had the burden to establish the compensation they requested was reasonable, and the court was not limited to relying on the specific deductions sought by the state nor on the opinions of Counsel's experts.

(See, e.g., *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127 [court has independent right and duty to determine reasonable fees and is not bound by parties' positions].) We therefore reject the proposition that the court was prohibited from independently reviewing Counsel's billing records and that it became "an advocate for the state" in doing so.

We are likewise unconvinced the trial court was required to give Counsel prior notice of its intent to independently examine their billing records or of the specific time entries it found objectionable. Counsel carried the burden to establish their entitlement to fees and the state did not concede they were entitled to the amounts they sought. The court's deductions were based on categories of work that the state argued were not compensable. Thus, Counsel was not without notice that billings related to those categories would be carefully examined and subject to deduction.

Counsel suggest that under *Roos v. Honeywell International, Inc.* (2015) 241 Cal.App.4th 1472 (*Roos*), their billing records were "entitled to credence" because the state failed to present item-by-item objections. This misunderstands the thrust of *Roos*. That decision merely states that a court "could . . . accept . . . undisputed lodestar evidence" in determining an appropriate fee award, not that a court must accept such evidence. (*Id.* at p. 1495.) As stated above, the court may independently assess counsel's billing records without any obligation to rely on either party's characterization of the reasonableness of the compensation requested. Cases such as *Fox v. Vice* (2011) 563 U.S. 826, which indicate trial courts need not "achieve auditing perfection" in determining fee awards, do not prohibit trial courts from undertaking an independent

examination of billing records, especially when a court believes it necessary to comply with its obligations on remand from a higher court. (*Id*. at p. 838.)

Prior cases have also soundly rejected the argument, made by Counsel here, that the court was required to identify the particular time entries it found objectionable. We agree a requirement of that nature is unreasonable considering the volume of records the trial court reviewed. So long as a legal or factual basis for the court's fee determination is evident, we will not reverse its decision because it did not issue an item-by-item ruling. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101 ["When confronted with hundreds of pages of legal bills, trial courts are not required to identify each charge they find to be reasonable or unreasonable, necessary or unnecessary" so long as a reasonable basis for the award is "apparent on the face of the record"]; *Rebney v. Wells Fargo Bank, N.A.* (1991) 232 Cal.App.3d 1344, 1349 [court "was not required to explain which of counsel's hours were disallowed" and "the record need only show that the attorney fees were awarded according to the 'lodestar' or 'touchstone' approach"]; see also *Save Our Uniquely Rural*, *supra*, 235 Cal.App.4th at p. 1190 ["Because the record shows that the court acted for legitimate reasons, we cannot find an abuse of discretion simply because it failed to make its arithmetic transparent"].)

We see nothing in the record to discredit the court's representation that it determined the deductions by conducting a line-by-line review of all billing records submitted.[19] The court

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[19] Because the court determined the fee awards on the basis of its independent review and not by relying on Greenfield's

then provided, in summary, an explanation of why it deducted the hours it did—a deduction in an amount that was less than the overall deduction sought by the state. In considering the court's reasons for its deductions, we see no basis to upset its determinations as to what time was reasonable and necessary. This is not, for instance, a case like *Gorman v. Tassajara Development Corp.*, *supra*, 178 Cal.App.4th 44, where the court's lodestar reduction appeared "to have been snatched whimsically from thin air" and the court articulated no rationale for the reductions made. (*Id.* at p. 101.) We can discern the court's deductions were made in a good faith and reasonable effort to conform to our remand instructions that the lodestar figures be adjusted, as necessary, to account for lack of success and also, in the case of Woosley, inefficient, unnecessary, and duplicate time.[20]

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declaration, we reject the contention that the court erred when it overruled objections to Greenfield's declaration. While the court found Greenfield's opinions "to have merit," it declined to follow Greenfield's "broad brush" approach to deductions and instead relied on "its own entry-by-entry review" of Counsel's billing records.

[20] Our conclusion takes into account the state of the billing records the court was required to consider. Some of counsel's billing entries describe the work at a very general level, and the Gansinger Firm's reconstructed time estimates for July 1985 to October 1992 include essentially no detail at all. In light of the overall extent to which Counsel's efforts resulted in an lack of success, we cannot say the court's deductions for unsuccessful work (approximately 12 percent of Jones Bell's hours, 18 percent of the Gansinger Firm's hours, 41 percent of the Busetti Firm's

Counsel specifically contend the court should not have deducted the hours they expended briefing the class administrative claim because it was done at the request of the California Supreme Court. While this establishes the work was necessary, in the sense that it was done in response to a court order, it says nothing about whether or how the work contributed to the success of the litigation. Because the class administrative claim was ultimately a failure, the trial court was within its discretion to find work performed on that issue was not compensable.

The Gansinger Firm also takes specific issue with the trial court's subtraction of 948.75 hours for unsuccessful work, a reduction the firm believes to be without any evidentiary support. The contention is founded at least in part on the Gansinger Firm's erroneous belief that only work performed in connection with the APA use tax claim can be considered unsuccessful work warranting a reduction.[21] While our Supreme Court did reject plaintiffs' position on that issue, the Court also disapproved of the overall framing of the lawsuit in asserting class claims. (*Woosley*, *supra*, 3 Cal.4th at p. 788 ["[W]e hold that the class

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hours for 1985-1992, and 20 percent of Woosley's hours) exceeds the bounds of what is reasonable.

[21] In the Gansinger Firm's view, its "billing records . . . show that only 59.2 hours were billed to the unsuccessful APA use tax claim." That figure is not substantiated by the billing records themselves unless, as the firm unjustifiably appears to believe, any absence of meaningful detail in the records is necessarily understood to indicate work on matters unrelated to the APA use tax claim.

claim filed in the present case was not authorized by the statutes governing claims for refunds of vehicle license fees and use taxes. Accordingly, that claim is valid only as to Woosley in his individual capacity, and the class in the present class action properly may include only persons who timely filed valid claims for refunds"]; see also *Woosley v. State of California*, *supra*, B209890 ["[T]he trial court's . . . Statement of Decision does not reflect any consideration of the loss of the bulk of the original case. Furthermore, the record shows that a substantial amount of time was spent on the unsuccessful efforts relating to the use tax which had been reversed on appeal"].) That work undertaken as a result of the erroneous framing would also be subject to reduction as unsuccessful was not lost on the trial court, which referred in its statement of decision to "the deletion of one class in its entirety, the further reduction of the remaining class (to include only Mr. Woosley), and the need to then certify a new class" (comprising only those persons who filed valid, timely refunds). We accordingly do not agree that the reduction of 948.75 hours was entirely unsupported on the record before us and constitutes an abuse of discretion.

For his part, Woosley contends the court contravened the law of the case when it deducted 470.6 hours for his work on the petition for certiorari to the United States Supreme Court because this court's 2010 decision states Woosley spent 118.20 hours on that work. The court's determination is not error. (*People v. Barragan* (2004) 32 Cal.4th 236, 246 ["As its name suggests, the [law of the case] doctrine . . . does not apply to questions of fact"].)

2. The trial court did not exceed the scope of its task on remand nor abuse its discretion in determining the appropriate multipliers

a. the court did not exceed scope of remand

This court previously directed the trial court to "reconsider the multiplier for class counsel and Mr. Woosley after due consideration is given to the lack of success of the litigation in light of the Supreme Court's 1992 decision." Counsel contend that when this court directed the trial court to reconsider the multiplier for lack of success, we affirmed the prior judge's other findings with respect to the multiplier and that the court on remand was consequently prohibited from reassessing those findings or considering any factors other than lack of success.

We conclude the court complied with our directions.[22] The trial court "had the power to place its construction on the meaning, extent and limitations of the language of [our 2010] decision . . . ." (*Harris v. Hensley* (1931) 214 Cal. 420, 422; see also *Ducoing*, *supra*, 234 Cal.App.4th at p. 313 ["In interpreting the language of a judicial opinion, the appellate court looks to the wording of the dispositional language, construing these directions 'in conjunction with the opinion as a whole'"].) In instructing the court to "reconsider the multiplier . . . after due consideration is

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[22] We consider the trial court's implementation of the instructions in our 2010 decision de novo. (*Ducoing Management Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 313 (*Ducoing*); see also *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655 [upon receiving a remanded case following appeal, "[t]he trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void"].)

given to the lack of success of the litigation," we did not expressly or impliedly prohibit the court from fulfilling its overarching obligation: to compensate Counsel "for all hours reasonably spent" (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 624) and with reference to the lodestar figure and to the purpose of the private attorney general doctrine (*Press*, *supra*, 34 Cal.3d at pp. 322, 324). A decision as to whether a multiplier is appropriate necessarily requires a multi-factor, interdependent analysis. By directing the trial court to reassess the multiplier with specific emphasis on one such factor—Counsel's overall success or lack thereof—the 2010 panel opinion included no language that foreclosed consideration of other interrelated factors, nor did it relieve the court of its ultimate responsibility to ensure the resulting fee award was reasonable. Indeed, quite the contrary: the preface to our direction to consider lack of success (and the other issues we identified) makes clear that the court should do so "[i]n determining what is a reasonable fee award."

That is not to say, of course, the trial court faced *no* constraints upon receiving the case on remand—its factual findings must still find adequate foundation in the record and its judgment based on such findings must be within the bounds of reason. As we will explain momentarily, the court's fee awards did not transgress either limitation. But the bottom line as to the issue at hand is that the trial court's consideration of factors other than lack of success was not "contrary to our clear directions on remand" nor did it "materially depart[ ] from our directions on remand." (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 981-982 [holding trial court exceeded remand order where court revisited underlying merits of case despite order directing new fact-finding as to amount of damages only].)

So long as it gave due consideration to lack of success as a factor (it did), and so long as its view of other relevant factors finds support in the record (it does), the trial court was acting within the scope of its authority.

Counsel's argument to the contrary, which rests on their assertion that the trial court contravened the law of the case doctrine, is unavailing. The law of the case doctrine only preserves determinations of law that were "necessary to the prior decision and . . . '"actually presented and determined by the court."' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 197.) Although our 2010 decision had occasion to enumerate the factors considered by the trial judge in his 2007 decision, the 2010 panel opinion did not specifically address any factor other than lack of success. We did not affirm the prior judge's findings as to other factors considered, and the trial court on remand from our 2010 decision was not prohibited from considering those same and other factors when determining the appropriate multiplier.

b. the court's multiplier analysis was not an abuse of discretion

A multiplier enhancement to the lodestar "is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138.) A multiplier may also be applied where the attorney has shown extraordinary skill, resulting in exceptional results. (*Ibid.*; *Graham*, *supra*, 34 Cal.4th at p. 582.) Courts are not obligated to apply a positive multiplier even where those factors are present, however. (*Ketchum*, *supra*, at p. 1138. ["Of course, the trial court is not *required* to include a fee enhancement to the basic lodestar figure

for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case"].) Indeed, courts have discretion even to apply a negative multiplier. (*Ibid.* ["To the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward . . ."]; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249 [fee award under section 1021.5 may be reduced where claimant achieves limited success].)

Here, the trial court determined the appropriateness and amount of a multiplier by considering Counsel's lack of success and by additionally reviewing other considerations to be sure the resulting award was, in its judgment, appropriate. Courts have substantial discretion to select the factors they deem relevant to their multiplier analysis. (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 40-41.) The *Serrano III* factors were specific to the facts of that case and are merely illustrative of what a court *may* consider when conducting a multiplier analysis. (*Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 834.) The trial court accordingly had greater latitude than it thought when it indicated it was *obligated* to consider the *Serrano III* factors. Nevertheless, the court considered only the factors it found relevant, and its reliance on *Serrano III* did not cause it to ignore any factors it should have otherwise included.

Counsel contend, however, that the question of whether multiple firms contributed equally to the success of a case is irrelevant to a multiplier analysis because it "bears no rational relationship to whether a multiplier should be awarded." As a general legal proposition, the point is not without force. Neither *Serrano III* nor its progeny address or explain this factor, and the only relevance we see in its application to a multiplier is in

determining whether different counsel should receive different enhancements because of unequal contributions to a case. That said, we do not believe the trial court relied on this factor to any significant degree. The court separately addressed the appropriate multiplier for each of the law firms and Woosley, stating which factors it relied on in coming to its decision. Because the court indicated its selection of the multiplier was primarily influenced by lack of success as a factor, we conclude the effect of Counsel's relative contributions to the litigation's success had at most a de minimis impact on the court's decision, which is insufficient to warrant reversal.

To the extent the trial court's findings diverged from prior determinations regarding the complexity of the litigation, the skill of counsel, and the results achieved, the court's findings find sufficient support in the record and were influenced by the court's consideration of lack of success. For example, while the case may have appeared novel and complex as originally framed and litigated, once the case was reconsidered with a focus solely on its successes, the court's determination that the case lacked complexity and did not require special skill by counsel was neither arbitrary nor unfounded. The trial court was directed to look at the areas where the plaintiffs failed to achieve their desired outcomes. The record supports the court's determination that the "results achieved" in the litigation were not stellar. Moreover, and contrary to Counsel's assertion, the trial court did not err by failing to expressly discuss the extent to which plaintiffs *did* succeed. That success was the necessary predicate of the fee award itself; and were it otherwise, the court would not have credited numerous hours as compensable work, nor is it likely the court would have applied a positive multiplier to boot.

The determination of an appropriate multiplier is not a matter of simple arithmetic. Under the circumstances, we cannot say that the court's application of a 1.25 multiplier to the law firms' lodestar, or a zero multiplier to Woosley's, was an abuse of discretion. Although this litigation began as a substantially sized demand for classwide relief in terms of the number of potential class members and the value of the relief sought, its ultimate resolution was significantly more modest. The class entitled to relief was limited to people who had filed timely, valid claims for refunds of vehicle license fees. Woosley himself was the only plaintiff entitled to recover overpayment of use taxes. When we consider the scale and scope of this case in its end state—limited to a commerce clause argument supporting recovery of overpaid vehicle license fees by people who filed timely claims—we conclude the trial court's fee award is not an abuse of discretion. The court undertook an extensive and thorough review, accounted for and complied with the directions on remand, utilized the lodestar-multiplier method, and produced a result that cannot be said to bear "no rational relationship to the skill, time and effort expended by plaintiffs' attorneys on this litigation." (*Press*, *supra*, 34 Cal.3d at p. 324 [abuse of discretion where court did not use lodestar method and awarded fee that was 185 times less than the requested amount]; see also *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1399 [multiplier of 1.25 not erroneous considering contingent risk, delay in payment, and presence of unique issues].)

The trial court also acted within its discretion and in accordance with our remand directions when it decided not to enhance Woosley's lodestar. As stated above, a court's decision to apply a multiplier is discretionary (*Ketchum*, *supra*, 24 Cal.4th at

p. 1138), and it may decline to apply a positive multiplier "when presented with an inflated, unreasonable fee request" (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1329). There is ample evidence that Woosley's request (even though presented in good faith) was just that.

Nor did the court err in declining to separately apply a percentage increase to the attorney fees it awarded to account for delay in Counsel's receipt of attorney fees. While *Graham*, *supra*, 34 Cal.4th at pages 583-584 supports the proposition that a court may make a "percentage adjustment" that is "quite small" to the lodestar as an "enhancement factor" to account for delay in payment, the trial court correctly stated it was not required to do so. The court stated that a multiplier "already compensates for delay in payment" and found Counsel had failed to meet their burden of proof to justify a further upward adjustment to compensate for delay.[23] This decision was within the bounds of reason. We cannot say that it would have been an abuse of discretion to apply a lesser positive multiplier than the 1.25 applied by the court, which it believed compensated for delay.

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[23] The court's written ruling, read as a whole, indicates the court believed the multiplier it awarded included compensation for the delay in receipt of payment of fees.

B. The Trial Court Erred in Denying the Motion to Reopen and in Failing to Consider the Gansinger Firm's Work on the 1985 Fee Application

1. Denying the motion to reopen was an abuse of discretion

"A motion to reopen a case for further evidence can be granted only on a showing of good cause." (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793.) "Reopening is not a matter of a right but rests upon the sound discretion of the trial court. That discretion should not be overturned on appeal absent a clear showing of abuse." (*Ibid.*; accord, *Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208 (*Horning*); *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, 1052 & fn. 7 (*Rosenfeld*).) While the court's latitude over such motions is broad, it must exercise its discretion reasonably. (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 265.)

The Gansinger Firm and Busetti's estate showed good cause for reopening the evidence in order to submit the Busetti Firm's detailed billing records for 1978-1985. The Gansinger Firm's failure to introduce the Busetti Firm's 1978-1985 records in evidence was not a matter of trial tactics. At most, with a prior judge having refused the records and insisting on a summary instead, the absence of the detailed records underlying the summary was an inadvertent omission.[24] (Compare *Horning*,

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[24] In 2006, Gansinger stated in a declaration that all of the records supporting the 1985 letter summary had been submitted to the court. That was a mistake, as it turns out, because the Busetti Firm's records for 1978-1985 were never filed. (This court's prior decision made the same mistake; we stated "[t]he records for the 1978 through 1985 time period were . . . attached

supra, 130 Cal.App.4th at p. 209 [party made "knowing and voluntary tactical decision" not to present certain evidence after the court specifically asked about the existence of such evidence; *Rosenfeld*, *supra*, 191 Cal.App.3d at pp. 1052-1053 [party made "knowing and informed choice of trial tactics" not to introduce evidence].)

The lack of any apparent prejudice to the state is further reason why it was error to deny the motion to reopen for the purpose of admitting the billing records underlying the summary that was received in evidence. The trial judges who made the 1985 and 2007 fee determinations relied upon the Busetti Firm's summary of its hours for 1978-1985. The Busetti Firm produced its detailed records to the state in 2006, and we see no indication that the state challenged the 2007 fee award on the ground that the Busetti Firm failed to provide sufficient evidence of its work from 1978 to 1985.[25] With a copy of the relevant records in its possession for eight years and a summary of those records introduced in evidence, we fail to see any harm to the state that would have resulted from granting the motion. Of course, on the

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as an exhibit to Mr. Gansinger's supplemental declaration dated October 6, 2006.") During Gansinger's testimony in 2014, the court asked him for the "backup" data in support of the 1985 letter summary. Gansinger responded by submitting the same records he had submitted in 2006, which, as we now know, did not include Busetti's records for 1978-1985.

[25] When this court's 2010 decision held adequate records supported the 2007 fee awards, we addressed the state's challenges only to the missing and nonexistent records of Woosley and Gansinger.

other side of the equation, the consequences to Busetti's estate in denying the motion were severe, and unduly so.

It is true that the Gansinger Firm and Busetti's estate could have filed their motion to reopen more quickly, but the two-week period between the issuance of the tentative decision and the filing of the motion to reopen did not constitute a lack of diligence warranting denial. (Compare *Horning*, *supra*, 130 Cal.App.4th at p. 209 [party moved to reopen six months after close of evidence]; *Rosenfeld*, *supra*, 191 Cal.App.3d at pp. 1052-1053 [party moved to reopen nearly two months after statement of decision and five months after knowing the evidence at issue might be needed].) Considering the Busetti Firm's years of work on this case, the material effect of the evidence it sought to submit, and the movants' reasonable (even if unthinking) reliance on the conduct of the trial court in previous fee proceedings, it was an abuse of discretion to conclude granting the motion was not required in the interests of justice. (See, e.g., *In re Estate of Young* (2008) 160 Cal.App.4th 62, 68-69 [denial of motion to reopen after trial court ruled against movant for lack of evidence was abuse of discretion where movant's failure to present such evidence at the time "was not inappropriate" given the course of proceedings and the applicable statutory scheme]; *In re Estate of Horman* (1968) 265 Cal.App.2d 796, 805-809 [denial of motion to reopen was abuse of discretion where "additional evidence might well have, and probably would have, rendered a different result upon further hearing" and failure to present such evidence earlier was based on court conduct prejudicing movant]; *In re Fama's Estate* (1952) 112 Cal.App.2d 309, 313 [where evidence sought to be submitted after close of case was "material and might have compelled a decision the other

way," motion to reopen should have been granted "to permit justice to be done"].)

2. The 1985 fee application

The trial court awarded the Gansinger Firm fees for work in connection with its 2005 attorney fees motion. It concluded it had "no reason to disagree with the 228.6 hours that the previous trial judge found reasonable for the time attorney Gansinger spent in connection with the pending fee application." But the 228.6 hours the trial court considered related only to the Gansinger Firm's 2005 fee motion and did not include the time it spent on its 1985 application. On remand, the trial court should adjust the Gansinger Firm's lodestar figure, and resulting award, after considering its billing records in connection with the 1985 fee motion.

DISPOSITION

The orders of the superior court awarding attorney fees to the Gansinger Firm and the Busetti Firm are reversed. The trial court is directed to grant the motion to reopen made by the Gansinger Firm and the Estate of John F. Busetti and to receive in evidence the Busetti Firm's detailed billing records for 1978-1985. The trial court is to recalculate the attorney fees award for the Busetti Firm after conducting a modified lodestar analysis that accounts for those detailed billing records, but without any reconsideration of the other lodestar or multiplier determinations before us in this appeal. The trial court is further directed to recalculate the Gansinger Firm's attorney fees award, without change to the multiplier or its ruling on other time entries, to account for the firm's work on its 1985 fee application. These directions should be implemented expeditiously by the trial court to enable payment of fees owed as soon as practicable.

The orders under review are affirmed in all other respects. All parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

I concur:

KRIEGLER, J.

TURNER, P.J., Dissenting and Concurring

I would affirm the orders under review in their entirety. I do not believe it was an abuse of discretion to deny the motion to reopen. (*People v. Masters* (2016) 62 Cal.4th 1019, 1069; *People v. Homick* (2012) 55 Cal.4th 816, 881.) Further, the law firms have failed to demonstrate that there is a reasonable probability of a different result if the motion to reopen had been granted. (Cal. Const., art. VI, § 13; *People v. McNeal* (2009) 46 Cal.4th 1183, 1202-1203; *People v. Green* (1980) 27 Cal.3d 1, 44, overruled on another point in *People v. Martinez* (1999) 20 Cal.4th 225, 233-237, 239-241.) I otherwise entirely agree with my colleagues' trenchant and accurate analysis.

TURNER, P.J.