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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CARL OLSON et al., Plaintiffs and Appellants, v. AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, Defendant and Appellant.	B168730 (Los Angeles County Super. Ct. No. BC244326)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dunn, Judge. Modified and affirmed.

Law Office of Thomas K. Bourke, Thomas K. Bourke, Rizwan R. Ramji for Plaintiffs and Appellants.

Morrison & Foerster, Charles E. Patterson, John Sobieski, Howard B. Soloway, Phillip Bronson for Defendant and Appellant.

Plaintiffs Carl Olson and Mark Seidenberg sued defendant Automobile Club of Southern California (the Auto Club), a nonprofit mutual benefit corporation (Corp. Code,

§ 7110 et seq.),[1] primarily seeking various reforms in the Auto Club's election of its board of directors. Olson and Seidenberg obtained a judgment mandating some of the various election reforms sought and were awarded approximately $1.2 million in attorney fees and costs, including expert witness fees.

Olson and Seidenberg appeal, seeking yet more changes regarding the Auto Club's election procedures and other matters, as well as additional attorney fees and costs. The Auto Club cross-appeals, urging that the award of expert witness fees was not authorized, and that the Auto Club was the prevailing party on most of the more important issues and thus should be entitled to costs. We modify the judgment to eliminate the award of expert witness fees and to add appropriate attorney fees for work performed during 2003, but otherwise affirm the judgment.[2]

BACKGROUND AND PROCEDURAL SUMMARY

Introduction

Olson and Seidenberg, both members of the Auto Club, ran for a seat on its board of directors in the Auto Club's 2000 election, but they did not qualify as nominees. In the Auto Club's 2001 election, they did qualify as nominees, conducted their campaign, and lost the election.

The Auto Club engages in various lobbying activities in Sacramento relating to transportation and the interests of its vehicle-driving members. Olson and Seidenberg ran for seats on the board, apparently to have the Auto Club lobby their positions on certain issues (i.e., the DMV vehicle tax, and the so-called double taxation on gasoline and diesel

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[1] Unless otherwise indicated, all further statutory references are to the Corporations Code.

[2] We grant the motions for judicial notice filed by both parties. Thus, we have before us additional case law on attorney fees and various items pertinent to the legislative history of section 7110 et seq. and Code of Civil Procedure section 1021.5, the so-called private attorney general statute, which authorizes the award of attorney fees in a successful action affecting the public interest.

fuel via sales tax on top of excise tax), and to have the Auto Club investigate the high price of fuel by holding public hearings for its members.

The action underlying the present appeal challenges under various statutory provisions and case law the Auto Club's election procedures for its board of directors and asserts other related violations of rights. The case was tried without a jury over the course of approximately six weeks.

Summary of the pleadings

As framed by the first amended complaint, the case started out focusing exclusively on allegations of unfair and unreasonable election procedures for the Auto Club's board of directors. As time passed and extensive discovery ensued, allegations were added and theories of recovery expanded. The second amended complaint, containing extensive evidentiary facts and case citations, evolved into a broad attack on many aspects of the Auto Club's operations. The myriad items complained of included the Auto Club's procedures for electing its board of directors, corporate governance and accountability, perceived management failures, enforcement of statutory provisions regarding certain inspection rights, alleged misleading financial statements and accounting matters, the structure of the Auto Club and the Interinsurance Exchange (its affiliate insurance company), the alleged fraudulent concealment of the acquisition of Pleasant Holidays (a travel company), and alleged violations of the Auto Club's bylaws.

The second amended complaint

The second amended complaint had the following five causes of action: (1) alleged violations of common law rights, disregard for the judgment in prior litigation involving the Auto Club and its election procedures, and actions contrary to sections 7110-8910 by having election procedures that are unreasonable; (2) alleged denial of access to accounting books and records and minutes in violation of common law and sections 8310-8324 inspection rights; (3) alleged violations of the common law and sections 8215 and 8321 by failing to provide members their annual notice and providing misleading financial statements that lack appropriate detail; (4) alleged breach of the contract formed by the articles and bylaws of the Club; and (5) alleged violations of

Business and Professions Code section 17200 by illegal, unethical and fraudulent acts and practices, such as minimizing and avoiding the accountability of management to members, failing to disclose its ownership of Pleasant Holidays, maintaining unlawful inspection practices, and engaging in various acts and practices in violation of the Federal Trade Commission guidelines.

The relief sought by Olson and Seidenberg included declaratory relief, expansive injunctive relief, punitive damages and costs, emotional distress damages, and attorney fees. They sought attorney fees under sections 8323 and 8337, under the private attorney general statute (Code Civ. Proc., § 1021.5), and any other applicable statute or common law.

The Auto Club's cross-complaint

The Auto Club's cross-complaint alleged five causes of action seeking declaratory relief. The Auto Club sought declaratory relief establishing (1) that its election procedures comply with the provisions of the Corporations Code governing mutual benefit corporations; (2) that no annual meeting is required where the election is not contested; (3) that the Auto Club's nomination and election procedures must be deemed reasonable because they comply with statutory safe harbor provisions (§ 7420, subd.(b)); (4) that Business and Professions Code section 17200 et seq. (prohibiting, in part, any unfair or fraudulent business practice and any unfair or misleading advertising) is not applicable and cannot, consistent with freedom of speech, be constitutionally applied to contested elections in a nonprofit mutual benefit corporation; and (5) that the Auto Club's audited financial statements for calendar years 1999 and 2000 contain adequate detail and otherwise conform to generally accepted accounting principles.

Overview of the trial litigation

The trial lasted 24 days, and 30 witnesses testified. However, many of the salient facts were undisputed. For example, at the outset of trial the parties stipulated that 781 out of 931 exhibits could be admitted. What the parties disputed was the legal effect of the facts, which are in part summarized here and addressed more fully hereinafter in the context of the discussion of various issues raised on appeal.

Olson and Seidenberg sought to establish, in essence, that the Auto Club had self-perpetuating elections that both (1) violated standards imposed by case law and (2) were contrary to the statutory mandate that there be "reasonable nomination and election procedures given the nature, size and operations of the corporation." (§ 7520, subd. (a).) Much of the trial testimony related to complaints about and descriptions of the Auto Club's election process, including proxy procedures, notice by mailings and use of the Auto Club's Westways magazine, operation of the Auto Club's election and nominating committees, and the operation of its various bylaws.

The Auto Club is a California nonprofit benefit corporation, governed by the Nonprofit Mutual Benefit Corporation Law (§ 7110 et seq.), with approximately 3.2 million voting members. The Auto Club controls its affiliated insurance company, Interinsurance Exchange, and its assets. Members of the Auto Club contribute over $2 billion annually in dues, fees and premiums; the Auto Club and the Interinsurance Exchange control over $4 billion in assets.

In 2001, the Auto Club held a contested election for four seats on its board of directors. Olson and Seidenberg (and two others, Peter Ford and Robin Westmiller) ran for election as petition-nominated members. The Auto Club mailed numerous proxy solicitation letters. As noted by Olson and Seidenberg, none of the proxy solicitation letters disclosed current financial statements, director compensation, proxy solicitation costs, or the existence of the Auto Club's new subsidiary (Pleasant Holidays). Candidate statements were contained only in a mailing to members of Westways magazine.

As indicated at the preliminary injunction and TRO hearings before Judge David Yaffe in the present case during the 2001 election and as the trial court herein observed,

the Auto Club used a type of general proxy, and a general proxy had been specifically prohibited by prior case law involving the Auto Club. That proxy form contained the name and picture of each Auto Club nominee and a place to vote only for them; the proxy contained a mere reference to the fact that members could later on vote for petition candidates in the Westways magazine. Since it did not provide members a place on the proxy form itself to vote for petition nominees, it constituted a prohibited general proxy.

The Auto Club then resolicited the members (including those who had returned the banned proxies) with new proxies that contained all eight names. The Auto Club also sent out a number of other targeted advocacy mailings, as well as a letter encouraging members to vote and enclosing a proxy (but no campaign materials for any candidates). This was sent after Westways magazine was mailed out with proxy and campaign materials for all the candidates.

Throughout the campaign, all candidates had the opportunity to solicit votes personally or by mail at the candidates' own expense. Petition candidates did not solicit by mail, though they did solicit in Auto Club offices after Judge Yaffe ruled that such solicitation was permissible so long as it did not disrupt business affairs. Olson and Seidenberg complained that the Auto Club had an unfair advantage by spending Auto Club funds on the election and should be precluded from doing so (though not specifically so precluded by statute), and that all the letters sent to Auto Club members should have included campaign materials from the petition candidates as well. Although the Auto Club had actually begun spending funds before the end of nominations, the Auto Club's board had passed a resolution ratifying the past spending as well as authorizing future spending. The board engaged in substantial campaign spending, but it was not wholly unchecked and was monitored during the course of the election campaign.

As to the requisite 30-day notice of meeting, evidence at trial established that the exclusive use of Westways magazine for the 30-day notice to all members was unreasonable in practice, as it simply did not generate a reasonable return of proxies, while direct mail did do so. Westways was not a frequently read magazine, though it was

the only means of communication used by the Auto Club which conveyed the biographical materials and campaign statements of all the candidates, including the petition nominees. The use of Westways mailings resulted in only a 1 percent return rate and, as found by the trial court, such poor performance of the Auto Club's publication rendered it ineffective and unreasonable as a means to reach members and communicate election materials to them.

Regarding the alleged ineligibility of three of the director candidates because they were over the age of 72 and thus allegedly violated Bylaw 23 (age determined when "declared elected"), all three challenged candidates were under 72 years of age on the day of the 2001 annual meeting at which the votes were counted. As further observed by the trial court, the biographical and campaign statements of the three challenged candidates were timely filed, with no evidence revealing any prohibition against making minor changes to such statements after they were filed. As to the one director candidate (Miller) who was challenged because his business consisted primarily of producing or selling gasoline or oil products, the evidence established that this was a only small part of his business. Also, other than owning leases that produce crude oil (leases used for a variety of purposes and products) there was no indication that the company in question was actually producing or selling any gasoline or oil products.

The Auto Club's Pleasant Holidays travel agency also was an issue and became the focus of discovery and inspection demands. Approximately two years before the first election in 2000, the Auto Club purchased an interest in Pleasant Holidays, a preferred travel provider that it had used for many years. The purchase was through a corporation the Auto Club formed called Pleasant Travel Holding Company, LLC (PTHC). Initially, the Interinsurance Exchange held a part interest in PTHC, and eventually the Auto Club bought out their interest and owned the majority interest. The evidence at trial revealed that the acquisition agreement contained a negotiated confidentiality clause under which the Auto Club promised not to disclose the fact that it had an interest in Pleasant Holidays for two years, except in public filings. The interest in Pleasant Holidays was noted in the Auto Club's audited financial statements, but only by the acronym PTHC, LLC.

The Auto Club declined to identify the nature of that entry in the financial statements to plaintiff Seidenberg, but by searching the internet he discovered the entry referred to the Pleasant Travel Holding Company and discovered its connection to the Auto Club. Seidenberg then contacted a travel magazine and made this information public. Thereafter, the Auto Club received some critical comment within the travel community and from some of its members, and the Attorney General's Office initiated an investigation (eventually concluding that no laws had been violated). Olson and Seidenberg viewed the PTHC situation as intentionally misleading Auto Club members and as an imprudent business transaction. The Auto Club viewed the disclosure as an act of disloyalty by a member and as contrary to the interests of the Auto Club.

By the time of the discovery phase of the present litigation, the matter of a trade secret was no longer an issue since the information had already been made public. Olson and Seidenberg, in their discovery and inspection demands, sought detailed records of the Pleasant Holidays transaction, including contractual and supporting documents detailing the acquisition transaction itself. Certain redacted material was turned over during discovery, and Auto Club minutes and financial information were limited to the issue of using different accounting treatments for PTHC and any discrepancy in the Auto Club's reporting of information to its members in summary financial statements published in Westways magazine. However, the court declined to compel disclosure of detailed accounting, contractual and financial records related to Pleasant Holidays that were only relevant in challenging the business judgment of management in making the acquisition.

Regarding the Auto Club's financial statements and the Pleasant Holiday acquisition, an issue also arose as to whether the statements had sufficiently appropriate detail and consistency. The trial testimony established that the Auto Club and its accountants (KMPG) did not consolidate Pleasant Holidays in the Auto Club's financial statement for 1999, but did so in 2000, after the Auto Club became the majority owner. In 2000, however, the summary financial statement in Westways did not report the Pleasant Holidays company on a consolidated basis (consistent with the audited statement for that year); rather, it used an equity method of reporting. Such an equity method did

not show the actual assets and liabilities of Pleasant Holidays and was not apparent to the reader that a large acquisition had been made. Instead, just the equity remaining after netting out the assets and liabilities was shown. However, the statement of equity was accurate, and an expert witness (Dr. Gerald Searfoss, the accounting expert presented by Olson and Seidenberg) testified that he found no evidence of any intentional conduct by the Auto Club to mislead. Regarding whether the Auto Club should have consolidated the PTHC in 1999 in its audited financials, since the Auto Club then had a majority interest by virtue of its financial control of the Interinsurance Exchange, expert accounting opinions and professional judgments were split on the matter. And, as noted by the trial court, there was no evidence to suggest that investors were at risk or that any misleading statements caused any financial losses.

The judgment

Three months after trial, the court issued its tentative statement of decision addressing many issues, and it ordered fee applications submitted in 20 days (i.e., approximately six months before judgment would be entered). Olson and Seidenberg submitted their fee application for fees, expenses and costs incurred through November 3, 2002, but requested that the court "retain jurisdiction for supplemental awards" of any such fees and costs incurred after that date.

In March of 2003, the trial court issued its final 36-page statement of decision, and in May of 2003, approximately 11 months after trial, the court filed its judgment. The judgment, a 15-page document, addressed in a commendably comprehensive manner the numerous issues raised.

General terms of the judgment, and the validity of the 2001 election

The judgment under review provided for no monetary damages to be awarded to Olson and Seidenberg for any of their various claims. The declaratory relief afforded, however, was rendered applicable to all future contested elections of the Auto Club's board of directors.

Although the judgment found some flaws in the Auto Club's elections procedures, it declared valid the results of the Auto Club's 2001 election of its board of directors and

declined to declare as winners any of the petition-nominated candidates (Olson, Seidenberg, or either of the two others who ran).[3] The court indicated its analysis was governed by the statutory procedures for elections in California's Nonprofit Mutual Benefit Corporation Law (§ 7110, et seq.), and not by portions of prior case law that the Legislature did not adopt.

The judgment regarding flawed notice of meeting in the contested election

The judgment determined that the Auto Club's use of its Westways magazine as the sole method of communicating to members the 30-day notice of meeting in contested elections for the board of directors was "unreasonable in practical operation, given the size, nature and operations" of the Auto Club. The judgment then detailed the methods of notice acceptable in all future contested elections, requiring timely notice in Westways or any successor house publication, at an internet web site, and in mailings to all members, with the internet site to be mentioned in the magazine and mailings and to contain proxy and all campaign materials. Thus, the Auto Club's Bylaws 7 and 36 were deemed invalid to the extent they provided for notice of the regular meeting of members in a contested election to be given exclusively in Westways.

The judgment as to the use of proxies

Regarding the use of proxies in a contested election for the board of directors, the judgment prohibited any proxy that did not permit a member to appoint a proxy holder chosen by the member or to permit the member to instruct the proxy holder on how to vote. Also, no proxy shall be valid for more than one year, all proxies shall contain the names of all candidates, including petition candidates or challengers, and no advocacy or biographical information shall be printed or otherwise included on the front or back side

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[3] As noted by the court in its statement of decision, it declined to exercise its discretion (§ 7616, subd. (d) [court "may" order a new election]) because Olson and Seidenberg "did not come close to winning even in the proxy solicitation that included their biographical and campaign statements." The misconduct complained of did not actually affect the outcome of the election.

of the proxy form. The Auto Club shall allow proxy solicitation and campaign literature distribution, on behalf of board nominees, to occur in the public areas of the Auto Club's member services offices, so long as such conduct does not disrupt Auto Club operations or interfere with members' business.

The judgment as to campaign spending

Regarding campaign spending, the judgment held that, since the 2001 election of directors involved disputed issues, nonprofit mutual benefit corporations such as the Auto Club may spend money and resources on elections (including spending on campaigning for Auto Club nominees), so long as the expenditures are approved by the board. The Auto Club is not required to spend its money and resources supporting opposition nominees. Neither the Corporations Code nor case law limits the amount of money a nonprofit mutual benefit corporation may spend in supporting nominees for the board in a contested election involving issues, provided the expenditures are with proper "authorization of the board." (§ 7526.)

The resolution by the Auto Club's board (dated December 21, 2000), ratifying past and authorizing future spending and the use of its resources and employees for the 2001 election, was consistent with statutory requirements (§ 7526). Also, the amount spent by the Auto Club on campaign advocacy did not violate statutory fiduciary standards (§§ 7231, 7232), and no "contract or other transaction" occurred to which statutory conflict of interest constraints (§ 7233) would apply.

The judgment as to director eligibility and campaign biographies and statements

The judgment further determined that the three directors (Donn Miller, Gilbert Ray and Edward Carson) whose eligibility Olson and Seidenberg challenged were each eligible for election to the Auto Club's board in the 2001 election. The Auto Club's age limitation for directors (Bylaw 23) shall be applied on the date of the regular meeting of members for the election of directors; on that date Miller and Carson were both under the age of 72. The age limitation does not apply on the date of subsequent events, such as when the directors are declared elected or when their election is judicially confirmed.

Director Miller's relationship with a company, about which Olson and Seidenberg complained, did not render Miller ineligible for election as a director. This was so because neither Miller's business nor the company's business consisted "primarily" of producing or selling gasoline or oil products within the meaning of Bylaw 23.

Regarding the submission of biographical and campaign statements, the judgment found all such material was timely submitted by the Auto Club's nominating committee for the 2001 election. Also, the Auto Club's bylaws do not prohibit changes to such material after submission, and the changes made in the present case were minor and of no significance to the election. Thus, the Auto Club's nominating committee validly selected nominees (Edward Carson, Donn Miller, Joan Payden and Gilbert Ray) for the 2001 election to the board.

The judgment also provided, subject only to any applicable limitations stated elsewhere in the judgment, that the Auto Club, all nominees, and all members may engage in advocacy campaigning of their choice, both before and after publication of the 30-day notice of meeting. The Auto Club has no duty to disclose in its election or campaign communications or materials any information regarding the costs of the election, the compensation of directors and officers, the acquisition of Pleasant Holidays, or information regarding the Auto Club's performance. Since the federal Securities and Exchange Commission (SEC) rules and regulations do not apply to the Auto Club, it has no duty to disclose in its notice of meeting or in its campaign materials, including proxy statements, any SEC-type disclosure information. Nor is the Auto Club required to provide "equal space" or any space to nominees the Auto Club does not support in the Auto Club's advocacy campaign materials, including direct mail solicitations to its members, whether such materials are distributed before or after publication of the 30-day notice of meeting in Westways.

However, the judgment required that the Auto Club disclose to any member seeking nomination the fact that the directors of the Auto Club who are not officers are compensated for their service as members of the board of governors of the Interinsurance Exchange, or as members of the board of directors of ACSC Management Services, Inc.

The Auto Club must disclose this information to the member in question as soon as the Auto Club becomes aware that the member is seeking nomination either by petition or by the nominating committee. The Auto Club shall disclose the amount of compensation to which such director is entitled. And, during contested elections for the board of directors, upon request by any nominee, the Auto Club shall provide information concerning the number of votes tallied for each nominee, as provided by the firm tabulating proxies.

The judgment regarding the propriety of and procedures for the Auto Club's regular meeting of members and alleged breach of contract by violation of bylaws

As further found in the judgment, the Auto Club did not violate either the law or its bylaws by postponing the date of the 2001 regular meeting from March to April in order to accommodate its Westways publishing schedule. And the notice of its regular meeting need not include items of business requested by members, and its reference to the regular meeting as the "annual" meeting in the 2001 notice of meeting did not violate the Corporations Code or the Auto Club's bylaws. The reference in that notice of meeting to "candidates nominated by the Auto Club's nominating committee" and to "candidates nominated by petition," even if not technically consistent with the bylaws, was not an unreasonable election practice or otherwise prejudicial. Nor, for example, was it an unreasonable election practice to omit any statement showing the compensation nominees received from Management Services or the Interinsurance Exchange, or not to show the amounts the Auto Club spent supporting a candidate's election.

The judgment, however, set the deadline for the Auto Club to count all valid proxies in contested board elections, required the Auto Club to appoint an inspector of elections for any contested election and so advise all nominees, and required the Auto Club to make available at least 30 days in advance the agenda for each meeting of members. But, meetings need not be adjourned to count proxies or reconvened to certify the results, proxies need not be kept secret, no statute prohibits the use of the Auto Club's membership list to solicit votes, and directors do not have to be declared elected at meetings.

Regarding the validity of certain bylaw amendments, the judgment declared several challenged bylaw amendments (Bylaws 1, 2, 5-8, 23, 36 and 37) reasonable and lawful and not requiring member consent, as those amendments did not "[m]aterially and adversely" affect member voting rights (§ 7150, subd. (a)(1)) or restrict or expand member proxy rights (§ 7613, subd. (f)). For example, as cited in the judgment: Bylaw 8 permitted the Auto Club to designate the person who is the chairperson of its board of directors as a proxy holder by referring to the office that such person holds, rather than by that person's name; Bylaw 23 declared public officials ineligible for election as Auto Club directors and required that nominees for director be members for at least one year to be eligible for election; Bylaw 27 permitted members of the board to serve on the nominating committee; and Bylaw 37 provided that reasonable interpretations of the bylaws by the board are binding on the Auto Club and its members.

The judgment awarded no relief for the claimed breach of contract (the fourth cause of action) based on the alleged 25 violations of 15 of the Auto Club's bylaws. The court found that except to the extent other provisions of the judgment have interpreted certain bylaws, it would not interpret the bylaws because the alleged violations were "not based on the 'plain meaning' of those bylaws," and "the burdens of litigation exceed the interests at stake."

The judgment regarding requested inspection of minutes and of accounting books and records

The judgment awarded no relief to Olson and Seidenberg on the cause of action relating to inspection rights. The judgment declared that members of nonprofit mutual benefit corporations have no common law inspection rights, they do not have the same financial investment interests as the shareholders of a for-profit corporation, and that any inspection rights members have are not absolute and are defined and limited by section 8333. Accounting books and records and minutes of proceedings of the members, the board and its committees are open to inspection upon written demand at any reasonable time, but limited by statute to "a purpose reasonably related to such person's interests as a member." (§ 8333.) And, subject to the judicial enforcement of an inspection demand

(§ 8336), a club may in the exercise of reasonable business judgment concerning the best interests of the club redact documents to protect confidential and trade secret information from inspection.

The judgment denied Olson and Seidenberg inspection demands to the extent their demands extended beyond their interests as members. The judgment declared: "[They] made massive and repeated inspection demands probing deep into the minutiae of financial records and details of the management and administration of the Auto Club to which they were not entitled. These demands went far beyond anything contemplated by the Code for the interests of a member of a non-profit organization like the Club whose dues are only $44 a year, plus $20 initiation fee that is payable only in the first year. [The] inspection demands, therefore, did not constitute proper demands, and [Olson and Seidenberg] were not entitled to enforce those demands."

The judgment further explained: "In a nonprofit mutual benefit organization such as the [Auto] Club, no individual member or group of members can have a legitimate interest in inspecting all of the minutes and accounting records of the Club and all of its subsidiaries and all of their subsidiaries on every subject. Neither in [their] status as candidates for the Board of Directors, nor in their assumed role as 'watchdogs' over corporate governance, accountability and management, nor the Club's acquisition of a subsidiary [travel company] justified the massive inspection demands that [Olson and Seidenberg] submitted." Nor does the sheer speculation by Olson and Seidenberg concerning the possible future dissolution of the Auto Club and the Interinsurance Exchange, with the ensuing theoretical distribution of assets to members, warrant granting their extensive inspection demands.

The judgment regarding the Auto Club's annual report and financial statements

The judgment awarded relief regarding each member's right to receive annual notice of the Auto Club's financial report, mandating as follows: "The Club shall publish the notice required by Corporations Code § 8321 in [*sic*] each year in *Westways*, or any successor house organ that is distributed to all members. The notice shall appear on the same page as any abbreviated financial presentation of the Club's financial statements in

Westways." However, the judgment awarded no other relief in this area, finding that the 2001 and 2002 notices pursuant to section 8321 satisfied statutory requirements. And there were no claims that any officers, directors, employees or agents of the Auto Club made any false statements relied upon by Olson and Seidenberg, and thus no statutory liability under section 8215.

Furthermore, the court found the Auto Club's 1999 and 2000 audited financial statements adequate and correct books of account, issued in appropriate detail and consistent with statutory (§ 8321) requirements. Regarding whether the financial status of Pleasant Holidays should have been consolidated in the Auto Club's 1999 audited financial statements, the court found it was a matter of professional accounting judgment. For the year 2000, both the Auto Club's audited and unaudited financial statements published in Westway*s* in 2001 correctly reported the figures relating to Pleasant Holidays. And there was no evidence the Auto Club intended to mislead members by reporting Pleasant Holidays using an equity accounting method for the year 2000 in Westways in 2001, instead of using a consolidated basis (as had been done in the prior year's audited financial statements).

Regarding the Interinsurance Exchange insurance company, which is an affiliate and not a subsidiary of the Auto Club, whether to consolidate the two entities for accounting purposes was a matter of professional accounting judgment. The decision whether to consolidate them was subject to reasonable differences of opinion, and the method used by the Auto Club was acceptable under generally accepted accounting principles.

The judgment as to alleged violations of statutes proscribing unfair competition (Bus. & Prof. Code, § 17200) or unfair and deceptive practices (Civ. Code, § 1770, subd. (a)(2) & (3)

The judgment awarded no relief for the claimed violation (in the fifth cause of action) of Business and Professions Code section 17200, proscribing "unfair competition," which is defined by the statute as including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading

advertising." The court found that Business and Professions Code section 17200 did not apply to elections in nonprofit mutual benefit corporations (such as the Auto Club's 2001 election), that the language in section 17200 provided no standards by which constitutionally protected speech and speech-related conduct could be regulated, and that the statute provided no basis for a narrowing construction that would permit its "unfairness" prong to be used to regulate speech and conduct (such as election campaign expenditures) protected by the First Amendment. Also, the Auto Club's use of the phrase "acts only as an agent" in connection with Pleasant Holidays was neither fraudulent nor misleading and did not violate Business and Professions Code section 17200.

Nor, as indicated by the judgment, did the Auto Club violate the Consumer Legal Remedies Act, Civil Code section 1770, subdivision (a)(2) and (3), which proscribes unfair methods of competition and unfair or deceptive practices intended to result in the sale of goods or services to a consumer, by misrepresenting the source of services or misrepresenting one entity's affiliation with another. And the judgment found no violation of Business and Professions Code section 17550.20, subdivision (d)(1), requiring the filing with the Attorney General's Office of a notice of transfer, sale or encumbrance of ownership of any interest in a seller of travel.

The judgment regarding issues raised in the Auto Club's cross-complaint

The judgment declared, in pertinent part, that the election procedures used by the Auto Club in connection with its 2001 election of directors were reasonable and complied with all applicable laws, except to the extent those election procedures were affected by and are deemed modified by the previously noted aspects of the judgment in favor of Olson and Seidenberg. The judgment further specified that under section 7522, where an election for the board is not contested, the Auto Club may declare as elected those directors who have been nominated and are qualified, without the necessity of holding a member meeting.

Moreover, the judgment deemed the Auto Club's election procedures for the 2001 election of its directors in compliance with all "safe harbor" provisions of section 7520, subdivision (b), except for the procedures regarding the giving of notice of meetings in

contested elections and the Auto Club's use of Westways magazine, as previously discussed in the aspect of the judgment in favor of Olson and Seidenberg. As also previously noted, because of concerns regarding constitutionally protected speech and speech-related conduct, Business and Professions Code section 17200, proscribing "unfair competition," does not apply to elections of directors in nonprofit mutual benefit corporations such as the Auto Club. Regarding the Auto Club's years 1999 and 2000 audited financial statements, they conformed to generally accepted accounting principles and contained appropriate detail as required by the Corporations Code.

The judgment as to attorney fees and costs

Finally, the judgment decreed that Olson and Seidenberg were the prevailing parties, within the meaning of Code of Civil Procedure section 1032, and were entitled, as previously determined by the court, to "recover their ordinary costs of suit and disbursements in the sum of $104,494.87." The judgment also declared Olson and Seidenberg successful parties, within the meaning of Code of Civil Procedure section 1021.5, and awarded them total "attorneys fees, including expert fees, of $1,171,552.50."

DISCUSSION

I. Origins of the Nonprofit Mutual Benefit Corporation Law: The Braude *cases*

It is necessary to view this litigation in the historical context of the three related prior cases involving the Auto Club and its procedures for election of its board of directors: *Braude v. Havenner* (1974) 38 Cal.App.3d 526 *(Braude I)*; *Braude v. Automobile Club of Southern Cal.* (1978) 78 Cal.App.3d 178 *(Braude II)*; and *Braude v. Automobile Club of Southern Cal.* (1986) 178 Cal.App.3d 994 *(Braude III)* (hereinafter collectively referred to as the *Braude* cases). After the Auto Club opposed a proposition on the ballot in 1970 that would have permitted the use of gasoline tax revenue for mass transit purposes, Marvin Braude unsuccessfully sought election to the Auto Club's board. Litigation ensued with broad attacks on the Auto Club's election procedures, which had the effect of unfairly perpetuating the directors in office without affording the members a

fair opportunity to vote for other candidates. The *Braude* cases resulted in various judicially mandated changes in the Auto Club's election procedures.

Braude I resulted in a remand and a second trial for the trial court to act "as a court of equity to compel [the Auto Club] to put into effect such new electoral process as the court may consider just and proper." (*Braude I, supra,* 38 Cal.App.3d at p. 534.) In the second appeal, the appellate court in *Braude II* generally approved of the trial court's remedies affecting the Auto Club's nominating and voting procedures, but nonetheless found that it had erred in forbidding all use of proxies by the Auto Club. (*Braude II, supra,* 78 Cal.App.3d at p. 186.) It thus once again reversed and remanded to the trial court, instructing it to "provide for a fair method of electing directors which includes the use of proxies." (*Id.* at pp. 186-187.) After a third trial, in *Braude III* the appellate court reversed and remanded as to attorney fees, but affirmed the trial court's finding that the Auto Club's bylaw permitting management to vote a general proxy in contested elections was unreasonable and invalid. (*Braude III, supra,* 178 Cal.App.3d at p. 1015.)

Of significance to the resolution of the present appeal, before the third *Braude* trial ensued, the Legislature had enacted in 1978 and had revised in 1979 the nonprofit corporations law, including the enactment of provisions affecting nonprofit mutual benefit corporations (sections 7110, et seq.), such as the Auto Club. As the court in *Braude III* aptly observed: "So far as the general provisions governing the election of directors is concerned, there is no doubt *Braude I* and *Braude II* had a substantial influence on the general principles adopted by the Legislature." (*Braude III, supra,* 178 Cal.App.3d at p. 1003.) "It appears, however, that the Legislature did not enact all of the guidelines contained in the *Braude* cases and that the comprehensive revisions of the law touched many areas not involved in [those cases]." (*Id.* at p. 1004.)

The Legislature's comprehensive treatment of the matter essentially preempts the common law. We acknowledge that the civil law of this state includes not only statutory provisions, but the common law as well. (Code Civ. Proc., §§ 1895, 1899; Civ. Code, § 22.2*; Rojo v. Kliger* (1990) 52 Cal.3d 65, 74.) However, the common law would govern only if the Legislature was silent or its treatment of an issue was "'incomplete or

partial.'" (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 815.) That is not the case here, where the nonprofit mutual benefit corporation law controls and establishes the law of this state or that subject in a comprehensive manner. (*Rojo v. Kliger, supra,* at p. 74.)

Accordingly, in reviewing the conduct of the Auto Club, a California nonprofit mutual benefit corporation, we are governed by the Nonprofit Mutual Benefit Corporation Law (sections 7110 et seq.), and guided only by the vestiges of the prior *Braude* cases that have been incorporated into the statutory scheme and thus are still good law. Those aspects of the *Braude* cases not incorporated into the statutory scheme are not applicable to the present case.

Nor, contrary to the assertions of Olson and Seidenberg, need we impose on the Auto Club as guidelines the various requirements applicable to for-profit Delaware corporations and SEC-regulated public companies, to the extent such requirements are not encompassed by California's comprehensive statutory scheme. Similarly, common law inspection and other rights are inapplicable, as the rights of Auto Club members are defined by the comprehensive statutory scheme. (Cf. *Mooney v. Bartenders Union Local No. 284* (1957) 48 Cal.2d 841, 843 [common law applies to unincorporated association where no applicable statutory scheme].)

II. The appeal by Olson and Seidenberg

Olson and Seidenberg complain principally about the inadequacy of the distribution of financial and other information in Auto Club elections, the trial court's restrictions and constraints on their inspections demands, the Auto Club's accounting procedures, and the Auto Club's nomination of directors and interpretation of certain bylaws. The gravamen of their complaint is that the trial court erred in those aspects of its judgment that found the Auto Club had no "duty to disclose in its election and/or campaign communications and materials information regarding the costs of the election, the compensation of directors and officers, the acquisition of Pleasant Holidays, or information relating to Club performance."

(A.) Issues pertaining to the distribution of financial information in elections

(1.) General statutory provisions ("safe harbor," etc.) and the asserted right to the distribution of financial information at elections

We are guided by the statutory scheme set forth in the Corporations Code. The Corporations Code requires the distribution of financial information before elections only as to for-profit corporations, and not as to nonprofit corporations such as the Auto Club. Generally, for-profit corporations must distribute a financial statement to all shareholders at least 15 days before the next annual meeting (§ 1501, subd. (a)), but there is no similar requirement for nonprofit corporations. Instead, nonprofit mutual benefit corporations must: (1) prepare a financial report within 120 days after the end of their fiscal year; (2) notify each member yearly of the right to receive a financial report; and (3) distribute that report to those members who request one. (§ 8321.) There is no requirement that the statement be prepared or distributed before an election, or even distributed to all members.

The Corporations Code also provides for "safe harbor" election procedures, applicable to nonprofit mutual benefit corporations, whereby election procedures that comply with sections 7521-7524 "shall be deemed reasonable." (§ 7520, subd. (b).) Sections 7521-7524, which Olson and Seidenberg ignore, do not require the distribution of any financial information in elections, and do not in any fashion require SEC-type proxy statements. Those provisions require, in pertinent part, as follows: (1) that members shall have a "reasonable opportunity" to choose among the nominees (§ 7522, subd. (b)); (2) that nominees shall have a "reasonable opportunity to solicit votes" (§ 7522, subd. (b)) and to communicate their qualifications and reasons for running to the members (§ 7522, subd. (c)); (3) that nominees shall have certain equal space rights in any published material soliciting votes (§ 7523); and (4) that the corporation shall mail any nominee's campaign communications at the nominee's expense (§ 7524). Compliance with the above "safe harbor" requirements means that the corporation's "*nomination and election procedures . . . shall be deemed reasonable.*" (§ 7520, subd. (b), italics added.)

Regarding the distribution of financial information in elections, Olson and Seidenberg focus on the requirement of the availability to the members of "reasonable nomination and election procedures given the nature, size and operations of the corporation." (§ 7520, subd. (a).). Although such general concepts of fairness may be reminiscent of the common law's fair and reasonable election procedures and the procedures adopted in the *Braude* cases, as previously discussed, neither the common law nor SEC-type disclosure requirements apply.

Indeed, the contention that members of nonprofit organizations and shareholders in for-profit companies have analogous interests in corporate financial information is unpersuasive. The Legislature specifically rejected that analogy by requiring only corporations that are for-profit, and not nonprofit corporations, to distribute their financial information prior to elections. And, the trial court here aptly concluded that Auto Club memberships "are not securities or financial investments and are not analogous to shares of stock for a for-profit corporation."

As a practical matter, the Auto Club members' relatively small financial expenditure in the organization by way of dues (then $44 annually) and the nontransferable and expiring (but renewable) memberships do not entail a risk of capital that is in any way analogous to that of shareholders in a for-profit corporation. The members of the Auto Club join the organization mainly for its auto services and various discounts, and they have no expectation of any financial distributions. (§ 7411 [no distributions permitted "except upon dissolution," and no evidence of even the remote likelihood of such an event here].) The evidence at trial revealed that the Auto Club is not operated to maximize profits; its philosophy is to maximize member value and to provide the best quality of service at the lowest price. Members of the Auto Club judge its performance by the value of the services provided, and only five to ten members a year (out of the approximately 3.2 million members) request copies of the Auto Club's audited financial statements.

Accordingly, given the size and the nature of the Auto Club operations, the absence of its members having any special interest in its finances, and the provisions of

the existing statutory scheme, the Auto Club is not required to distribute SEC-type financial disclosure statements as if it were a for-profit corporation.

(2.) The Auto Club is not required to distribute all the specified financial information demanded

Specifically, Olson and Seidenberg contend that since the Auto Club had distributed financial information covering its 1999 results in the May/June 2000 issue of Westways, it had a duty to distribute its 2000 results, which were significantly higher in several major categories--and to distribute that information prior to the April 19, 2001, election. The trial court properly rejected this claim.

The 1999 results were not distributed in connection with the 2001 election and, in any event, the information about the 2000 results, as to which Olson and Seidenberg complained, would not have affected the election. This is because the differences between the 1999 and 2000 results reflected an *increase* in both net income and member equity, and thus would not likely have caused any adverse concerns among the Auto Club members.

The trial court also refused to order the production of *unlimited* minutes and financial statements regarding Pleasant Holidays (and other Auto Club subsidiaries). In its statement of decision, the trial court ordered the Auto Club "to turn over minutes and financial information carefully limited to the claim . . . that the accounting treatment of the PTHC, LLC was different in the audited financial statements and the summary financial statement published in Westways magazine (the audited financials used the consolidation method of accounting while the Westways unaudited summary used the equity method)." The trial court found this "limited inspection" was justified in the interests of the Auto Club members, since the documents produced by the Auto Club reflected "a discrepancy in what had been reported to the members in the Westways summary."

The focus by Olson and Seidenberg on their claim that Pleasant Holidays' revenues in 2000 were 37 percent of the Auto Club's total revenues and hence relevant to the Auto Club's performance is irrelevant because, as previously discussed, the statutory

scheme and the evidence concerning the members' interests do not require the *unlimited* disclosure of information. Olson and Seidenberg also assert that the trial court erred in finding that the Auto Club's "use of the phrase 'acts only as an agent' of Pleasant Holidays was neither fraudulent nor misleading and does not violate [Business and Professions Code section] 17200." This boilerplate phrase appeared at the bottom of tour advertisements and the like, and was used when the Auto Club sold tours for third party providers to limit its liability to that of a travel agent. Significantly, the phrase complained of was not made in connection with the election, and Olson and Seidenberg have not challenged in their opening brief the trial court's conclusion that Business and Professions Code section 17200 cannot be used to regulate election campaign speech.

Regarding information as to the costs of the election and the compensation of directors, the previously discussed safe harbor provision for reasonable election procedures (§ 7520, subd. (b)) does not require any report on election costs or officer and director compensation. Indeed, section 8322 expressly "[e]xclude[s] compensation of officers and directors" from the annual disclosure that nonprofit mutual benefit corporations must make concerning transactions with its officers and directors. (§ 8322, subd. (d)(1).)

Nor have Olson and Seidenberg cited any evidence that the Auto Club paid any compensation to its board nominees. In fact, the Auto Club did not compensate them; rather, they were compensated by the Interinsurance Exchange and the Management Services entities because of the risk that such directors incur in connection with the operation of an insurance company.

Regarding the costs of elections (i.e., the claim that the Auto Club did not disclose that in 2000 the incumbent board nominees benefited by having $317,000 to use as election expenses), there was no violation of the Auto Club's bylaws. Bylaw 7(a)(5), requires disclosure but only applies by its terms to "contracts or business transactions between the Club and each nominee." Nor have Olson and Seidenberg explained how such election expenses would constitute a proscribed business "transaction" in which the person had a "direct or indirect material financial interest." (§ 8322, subd. (d)(1).)

(B.) Issues pertaining to inspection demands

(1.) The scope of the inspection demands by Olson and Seidenberg

The trial court observed that Olson and Seidenberg "made massive and repeated inspection demands probing deep into the minutiae of financial records and details of the [Auto Club's] management and administration." The demand on March 7, 2001, supplemented by demands on March 14 and July 16, 2001, asked for (1) *all* of the board and board committee minutes of the Auto Club, all of its subsidiaries and affiliates, and all of their subsidiaries and affiliates (including 17 specified companies) on every subject, and (2) *all* of the accounting books and records of each of these organizations from at least January 1, 1998, on every transaction.[4] These demands included income tax returns, W-2 forms for officers and directors, invoices, time records, payroll records, receipts, purchase orders, contracts, bids, estimates, journal vouchers and payment approval forms.

We acknowledge that inspection is a preliminary step, and members need not prove wrongdoing, but need only establish a desire for reassurance the organization is properly managed. (See *Guthrie v. Harkness* (1905) 199 U.S. 148, 155.) However, the statutory scheme is designed to keep members' demands within reasonable limits. Section 8333 lists the documents members may inspect ("accounting books and records and minutes"), and specifies that the "written demand" must be "for a purpose reasonably related to such person's interests as a member." (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [predecessor statute, former § 3003, confined inspections to listed documents].)

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[4] We note that Olson and Seidenberg have not challenged the trial court's implicit determination that the right in section 8312 to inspect the records of subsidiaries (see § 5073) does not include the records of affiliates (see § 5031), such as the Interinsurance Exchange.

(2.) *Inspection demands as to Pleasant Holidays*

Even assuming arguendo that a court is required to pick through an improperly excessive demand list and find the few specific demands that should be granted, rather than denying the written request in its entirety (but see § 8336, which limits judicial enforcement to a "lawful" inspection demand), there is no merit even to the limited demands now complained of. For example, the Auto Club properly redacted certain information about Pleasant Holidays, as the purchase agreement between the two entities contained a confidentiality clause and entailed certain trade secrets. When the litigation herein reached the discovery stage, the identity of Pleasant Holidays was no longer confidential, and the trial court thus did not have to balance the interests in confidentiality against the interests in inspection. But, the court did find that the Auto Club had the right to make such redactions, subject to court review, and that the Auto Club believed it had legitimate reasons for its redactions.

Significantly, the trial court did not deny all inspection as to Pleasant Holidays. Rather, it ordered the Auto Club to turn over minutes and financial information "carefully limited" to the claim of certain errors in the accounting treatment of Pleasant Holidays. Olson and Seidenberg do not specifically allege any abuse of discretion by the trial court in so ruling. Nor did the trial court deny any appropriately tailored future inspection of subsidiary minutes and financial statements.

(3.) *No common law inspection rights applicable*

Regarding the claim that Auto Club members have common law inspection rights, sections 8330 to 8338 specify the terms, conditions, and limits for inspection and enforcement of nonprofit mutual benefit corporate records. The statutory scheme did the following: (1) confirmed some common law rights (e.g., the demand must be written and for a purpose reasonably related to the member's interests as a member); (2) expanded other rights (e.g., subsidiary records now may be inspected, contrary to the prior law in *Lisle v. Shipp* (1929) 96 Cal.App. 264); and (3) confined member inspections to the listed documents (which is less than that allowed by the common law's inclusive inspection of

all corporate books, records, and property, as indicated in *Hobbs v. Tom Reed Gold Min. Co.* (1913) 164 Cal. 497, 501-502).

Thus, to the extent the common law would govern where statutes are silent (see *Rojo v. Kliger, supra,* 52 Cal.3d at p. 74), the Corporations Code is plainly not silent on the issue of the requirements for inspection and the types of documents subject to inspection. The statutory scheme thus prevails to the exclusion of common law rights.

(C.) Issues pertaining to accounting matters

In essence, Olson and Seidenberg contend the trial court should have done as follows: (1) required consolidation of financials for the Auto Club and the Interinsurance Exchange for 1999 and 2000, and for the Auto Club and Pleasant Holidays for 1999; (2) required disclosure and resolution of the uncertainty about distribution of the Interinsurance Exchange's surplus if it ever dissolved; (3) required correction of the Auto Club's audited comprehensive income for 2000; and (4) not ruled that the audited and Westways 2000 reports for Pleasant Holidays were both correct. These claims are without merit.

The parties' expert witnesses disagreed on whether Generally Accepted Accounting Principles (GAAP) required the Auto Club to report its financial results on a consolidated basis that included the Interinsurance Exchange and Pleasant Holidays. The trial court found that this was a matter of accounting judgment, and that the method chosen by the Auto Club's auditors conformed with GAAP.

Olson and Seidenberg contend the trial court did not independently decide whether GAAP required consolidation. However, what the court determined was that consolidation was "a matter subject to reasonable differences of opinion among professional accountants . . . [and] [b]oth [methods] are apparently GAAP methods." The trial court reached the same conclusion on the consolidation of the Auto Club and Pleasant Holidays figures in 1999, observing that the expert witness presented by Olson and Seidenberg had conceded that the issue of consolidation "was a matter of professional judgment." And, on appeal they do not suggest that there was any lack of substantial evidence to support the decision that GAAP did not require consolidation.

Equally unavailing is the contention that the decisions concerning Pleasant Holidays' 2000 results were inconsistent. The Auto Club reported Pleasant Holidays' 2000 results on a consolidated basis in its audited financial statement, but used an equity basis in the condensed statement in the May/June 2001 Westways. After that issue of the magazine began printing, the Auto Club belatedly learned from its auditors that Pleasant Holidays' 2000 results should have been reported on a consolidated basis because in 2000 the Auto Club obtained a majority interest in Pleasant Holidays. Hence, the Auto Club at the time acted reasonably in using the equity method.

The trial court properly ruled that both the audited financial statement and the condensed statement in Westways "correctly reported the figures relating to Pleasant Holidays." Moreover, Olson and Seidenberg do not argue that the condensed statement in Westways is subject to GAAP, and the matter is arguably moot as they concede the Auto Club "subsequently complied" and did present Pleasant Holidays' 2000 and 2001 results on a consolidated basis in the May/June 2002 Westways.

As to the speculative contingent claim regarding the Interinsurance Exchange's surplus, the trial court did not err in failing to require disclosure and resolution of the uncertainty about distribution of the surplus if the entity were ever dissolved. As the trial court aptly stated, there was no evidence the Interinsurance Exchange was "likely to dissolve in the foreseeable future," it was "highly speculative" whether its surplus could be distributed to the Auto Club at such time, and there was no indication even that the Insurance Commissioner would permit such a distribution. Olson and Seidenberg do not specifically challenge these findings, or cite any authority that required the court to decide the theoretical question of how such assets would be distributed if the entity ever dissolved.

Regarding the claimed need for the correction of the Auto Club's audited comprehensive income for 2000, there was no violation of sections 8320 and 8321, which require "[a]dequate and correct books and records of account" and annual disclosure in "appropriate detail." What needed to be corrected were a typographical error and a

mislabeling of figures. The errors could be easily corrected using figures actually provided.

The figure for comprehensive income is a small part of the Auto Club's 19-page audited financial statement. The audited statement presented the two components of comprehensive income--net income ($18,515,000) and other comprehensive income (a loss of $6,781,000). The typographical error was that "other comprehensive income" was mislabeled "comprehensive income," and the two items were not totaled. However, the correct amount could be easily calculated by adding the two components. Anyone with a professional interest in the matter would look to see why there was a loss and would likely have noticed the error, since the two components of comprehensive income would have resulted in a gain when totaled (i.e., approximately a gain of $11.7 million). Thus, at least to a reasonably cautious reader of such financial matters, the statement would not have been misleading.

Moreover, apart from the fact that such an inadvertent and easily discernable error by the Auto Club's accountants constitutes substantial compliance, the contention that the court should have ordered a correction is moot. It is moot because the March 1, 2002, audited statement for 2001, which compared 2000 and 2001 results, showed the correct comprehensive figure for 2000.

(D.) Issues pertaining to the nomination deadline, bylaws claims, and other discovery and damages matters

The claim by Olson and Seidenberg that the Auto Club's nominations missed the deadline is without merit. Bylaw 27(a) required the nominating committee to submit its "list of nominees" to the secretary before the December 4, 2000, nomination deadline, and the committee submitted the list on November 29, 2000. The contention that the list of nominees represented action by unanimous consent, which could not be counted until the last committee member signed, is belied by the evidence, which reveals that the committee did not act by unanimous consent. In fact, the committee finalized its recommendations at a teleconference meeting on November 29, 2000.

Regarding the contention that the court erred in approving 18 unspecified bylaw amendments, the opening brief fails to present the issues with sufficient analysis or argument.[5] Likewise, the mere assertion without argument that the court erred in refusing to rule on 25 claimed violations and in finding that the Auto Club's interpretation was based on the bylaws' plain meaning, does not preserve the complaint for appeal. A contention made without a "serious attempt to support its argument" is deemed waived. (*AICCO, Inc. v. Insurance Co. of North America* (2001) 90 Cal.App.4th 579, 595; see also *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

The contention that the trial court erred in striking the $10,000 compensatory damage claim and the punitive damage claim is also unavailing. We acknowledge that proxy expenses are logical damages (*Haas v. Wieboldt Stores, Inc.* (7th Cir. 1984) 725 F.2d 71, 73-74) and that punitive damages are recoverable (see *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519). However, Olson and Seidenberg have not challenged the finding that the changes ordered by the court would not have affected the outcome of the 2001 election. Absent any causation, the compensatory damage claim was properly stricken. As to punitive damages, Olson and Seidenberg have simply failed to argue the requisite elements necessary to establish an exemplary damages claim. (See Civ. Code, § 3294.)

Also without merit is the contention that the trial court erroneously denied certain discovery on constitutional grounds when only statutory privileges are recognized.

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[5] Only the amendment to Bylaw 6(b) was specifically noted, but it was not sufficiently argued with supporting authority. In any event, the complaint that the Auto Club improperly changed the bylaw without member approval so that no longer only 1 percent of the Auto Club's members could call a special meeting, but that now 5 percent of the members had to join together to call a special meeting, is without merit. The amendment simply brought that bylaw into compliance with section 7510, subdivision (e), which provides that in addition to a special meeting being called by the board and certain specified corporate personnel, a special meeting also "may be called by 5 percent or more of the members."

Although California accepts only "statutory" privileges, Evidence Code section 230 defines statutes as including constitutional provisions. The argument is thus frivolous.

(E.) Proposed restrictions on campaign spending and campaign speech

Olson and Seidenberg contend that the general reasonableness requirement for election procedures in section 7520, subdivision (a) means that the Auto Club (1) must limit its campaign spending to reasonable and proportionate amounts in relation to the amount spent by the petition nominees, and (2) must include opposition campaign statements and biographies in Auto Club proxy solicitations. They also urge the trial that court should have restricted the time during which the Auto Club could campaign, and that the Auto Club's board violated its fiduciary duties in authorizing campaign spending. However, these claims are meritless, as they are inconsistent with the statutory scheme and misconstrue the board's fiduciary duties.

As aptly discussed by the trial court, the question of whether it is unfair and unreasonable for a board to spend money to elect nominees it supports has been dealt with by the Legislature in section 7526, which permits spending on elections with the restriction that such expenditures are approved by the board. Even though the Auto Club's directors will likely continue to have an advantage, the matter has been debated and the Legislature has never modified the statute on corporate spending in elections.

Regarding the amount of spending, campaign spending decisions are subject to the fiduciary duty standard in section 7231 (see § 7232, stating that § 7231 "governs the duties of directors as to any acts or omissions in connection with the election . . . of directors"), rather than any proportionate spending limits urged by Olson and Seidenberg. After directors have made a reasonable investigation, they must act in what they in good faith believe is in "the best interests of the corporation." (§ 7231, subd. (a).) Moreover, no arbitrary campaign spending limits and no restrictions on the timing of campaign advocacy are imposed by the safe harbor elections procedures. (See § 7520.)

The Auto Club asserts that it need not include opposition statements in any letters supporting its nominees. Section 7523, one of the safe harbor provisions, states what the Legislature has determined is a reasonable equal space requirement, and it refers by its

terms to a corporation publishing "any material soliciting a vote" and to the "issue of the publication" by the corporation, which the trial court has properly interpreted.

(F.) Attorney fees

The litigation spanned approximately two years, and counsel for Olson and Seidenberg claimed 14,502 hours of attorney time devoted to the case. According to counsel for Olson and Seidenberg, under the established lodestar method of computing fees in complex public interest litigation, they were entitled to fees based on an unadjusted lodestar of $3.8 million, even without a multiplier. And counsel volunteered to adjust the lodestar downward 10 percent.

The trial court, however, awarded fees totaling $1,171,552.50, including $90,466.85 in expert witness fees (under Code of Civil Procedure section 1021.5), but nothing "for other than ordinary costs." Counsel for Olson and Seidenberg complain that the court erred in refusing to compensate for thousands of hours devoted to the case, and assert that they spent a very high percentage of their total time on claims that were successful. They also complain that the court did not factor in any attorney time after December 2002, which was even before the date of the final statement of decision, and that the court denied fees related to inspection and disclosure issues and denied or reduced some of the costs for expert witnesses. Counsel for Olson and Seidenberg thus seek a remand to have the trial court apply the lodestar approach to all hours reasonably spent on prevailing claims (including work on losing issues related to prevailing claims) and in obtaining catalytic relief triggered by this suit.

The award of attorney fees is appropriate, under "a private attorney general theory" (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142), when a litigant has been successful "in any action which has resulted in the enforcement of an important right affecting the public interest." (Code Civ. Proc., § 1021.5.) "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of the time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fees award.' [Citation.] The

reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*).)

Successful litigants must be assured of compensation that fairly covers the legal services required, and fee awards should cover all hours reasonably spent unless special circumstances render an award unjust. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 632-633, 635.) We also acknowledge that litigants should be accorded breathing room to raise alternative legal grounds without fear that merely raising an alternative theory will threaten the subsequent request for attorney compensation. (See *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273-274.) And, "[w]here a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.)

Nonetheless, a reduction in fees for limited litigation success is permitted. (See *PLCM, supra,* 22 Cal.4th at p. 1096; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249-250 (*Sokolow*).) The trial court may "reduce the amount of the attorney fees to be awarded where a prevailing party plaintiff is actually unsuccessful with regard to certain objectives of its lawsuit." (*Sokolow, supra,* at p. 249.)

The trial court has discretion to determine that time spent on issues and claims on which plaintiff did not prevail was time not reasonably spent. (*Boquilon v. Beckwith* (1996) 49 Cal.App.4th 1697, 1722-1723.) "'There is no precise rule or formula for making these determinations. The [trial] court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.'" (*Sokolow, supra,* 213 Cal.App.3d at p. 248; see also *PLCM, supra,* 22 Cal.4th at p. 1096.)

The award of attorney fees "'"is a matter within the sound discretion of the trial court and absent a manifest abuse of discretion the determination of the trial court will not be disturbed." [Citation.]'" (*Lerner* v. *Ward* (1993) 13 Cal.App.4th 155, 158.) In assessing attorney fees myriad factors may be considered (see *City of Oakland* v. *Oakland Raiders* (1988) 203 Cal.App.3d 78, 82-83), and the trial court may rely on its own experience and knowledge in determining the reasonable value of the attorney's services. (*Niederer* v. *Ferreira* (1987) 189 Cal.App.3d 1485, 1507.)

In the present case, Olson and Seidenberg argue that the attorney fees must be calculated from the time spent, with deductions for excessive charges, unrelated losing claims and similar items, and that the trial court's deductions from the lodestar were unjustified. However, as both parties ultimately acknowledge, the court actually did not make deductions from the lodestar. Instead, the court reasonably estimated the time that should have been spent, rather than calculating that time from the lodestar. It did so for two reasons.

First, a lodestar analysis was difficult for several related reasons articulated by the trial court in its ruling on the motion for attorney fees: the case was in the opinion of the court "grossly over-litigated"; a "great majority" of the claims were unsuccessful; "excessive time" was spent on the winning claims, showing the size, nature and operations of the Auto Club and proving context for their election claim; and the main focus of the trial was not on reasonable election procedures. Nor did Olson and Seidenberg establish for the trial court that their 10 percent "safety factor" lodestar deduction was adequate.

Second, these above-noted problems could not be remedied by reference to many of the billing time sheets submitted, because the court found that so-called block billing (i.e., describing all tasks performed on a day and giving the total time spent that day) made it difficult or impossible in many instances to determine from the records how much time had been reasonably spent on successful claims. Although block billing is certainly not prohibited, when block billing is used, the trial court may "exercise its discretion in assigning a reasonable percentage to the entries, or *simply cast them aside*."

(*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689, italics added.) Similarly, where allocation between fee and nonfee claims is a "'near impossibility,'" the court may simply make a reasonable estimate. (*Track Mortgage Group, Inc. v. Crusader Ins. Co.* (2002) 98 Cal.App.4th 857, 867-868.)

Moreover, fees must be reasonable in light of the results achieved, whether or not the claims are related. "'A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.'" (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1019.) As explained in *Hensley v. Eckerhart* (1983) 461 U.S. 424, 436, "If . . . a plaintiff has achieved only partial . . . success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount . . . even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith."

On appeal, in arguing the attorney fees issue Olson and Seidenberg largely ignore unfavorable evidence and unfavorable aspects of the judgment. For example, they assert they "won their election case," but fail to describe in their opening brief the election claims they lost in the context of the attorney fees issue. Thus, while they identify nine election claims on which they prevailed, some of which the Auto Club agreed to in mediation, Olson and Seidenberg lost what the trial court referred to as a "fundamental and overriding" election claim pertaining to the Auto Club's right to spend its funds campaigning for its nominees, and many of the contested aspects of the election were resolved in favor of the Auto Club.[6] Since Olson and Seidenberg have failed to describe

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[6] For example, Olson and Seidenberg failed in the following goals: to change the Auto Club's nomination procedures; to disqualify three Auto Club nominees; to declare the petition nominees elected; to obtain a new election; to obtain equal space in Auto Club campaign literature; to require SEC-type disclosures; to apply the unfair business practices statute to nonprofit corporate election campaigns; to obtain compensatory and punitive damages; to require a "proxy ballot"; to establish that the inspector of elections had violated his duties; to prohibit the postponement of the annual meeting; to change the

in their argument the claims they lost, they have failed to provide a factual basis for comparing their winning and losing claims. Thus, they have arguably waived their challenge to any evaluation of the evidence on that issue. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Similarly, Olson and Seidenberg have provided self-serving time estimates for supposed winning claims and ignore evidence supporting the judgment on the attorney fees issue. For example, they contend the court erroneously denied compensation of 11,774 hours "reasonably" spent, that over 86 percent of their time "related to" winning claims, that they spent 86 percent of their time on election claims, and that over 71 percent of the trial related to the election claims. However, they ignore certain declarations cited by the trial court which explained that (1) only 5.4 percent of the 644 discovery requests by Olson and Seidenberg and only 6.49 percent of the trial testimony related to issues they won, and (2) only 8 percent of the deposition questions directed to Auto Club directors related to the issues on which Olson and Seidenberg prevailed.

Also without merit is the related assertion by Olson and Seidenberg that the court erred in denying fees for their inspection, accounting and reporting claims. The Auto Club acknowledges that Olson and Seidenberg obtained some information through discovery, and that the court said inspection was justified as to some of those discovery requests. The problem is that Olson and Seidenberg ignore applicable statutory standards. Section 8337 authorizes fees only for the failure "without justification" to comply with a "proper" inspection demand (see also § 8323, subd. (b)), and the court found the demands grossly excessive.[7] Also, the trial court is not required to but "may"

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procedures of the member meeting; to disqualify the chair of the Auto Club as a proxy holder; and to require the meeting to be reconvened to announce the results.

[7] Regarding fees for requiring the Auto Club to publish the yearly notice of members' rights to receive a copy of the financial report (§ 8321), this claim entailed almost no work because the Auto Club immediately complied when the issue was first raised and agreed that the judgment could include a provision requiring compliance.

(§§ 8337, 8323, subd. (b)) award reasonable expenses including attorney fees, and Olson and Seidenberg do not specifically argue the court abused its broad discretion.

Nor would we find any abuse of discretion, as the court did in some fashion factor these matters into the award of attorney fees. As the trial court stated in its written ruling on attorney fees, "there is a likely catalytic effect arising from the litigation of some of the issues that were lost, in particular the causes of action for inspection rights and accounting books and records. While the court ruled against [Olson and Seidenberg] on these causes of action, the court is of the view that the Judgment and Statement of Decision, and other aspects of the litigation, provide some guidance for the future and therefore are likely to have a catalytic effect." It is thus apparent that the trial court gave some credit on this matter in the nature of a catalytic-effect fee award, acknowledging that the lawsuit served as a catalyst for beneficial change. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1290.)[8]

Olson and Seidenberg, however, properly contend that the trial court erred in denying attorney fees for work performed in 2003.[9] As the Auto Club notes, the trial court's 13-page ruling on attorney fees, filed on May 16, 2003, stated that it included fees for the "time necessary to litigate this case to a successful conclusion on the issues won." The court's ruling also acknowledged that it knew Olson and Seidenberg had "additional [attorney time] time in 2003," and asserted that it had somehow taken "that fact into

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Nonetheless, Olson and Seidenberg continued and unsuccessfully attacked the placement and size of the notice.

8 To the extent Olson and Seidenberg request an award of attorney fees on appeal by summarily requesting "fees and costs" at the conclusion of their opening brief, such fees can only be awarded "[u]pon motion." (Code Civ. Proc., § 1021.5.) They have not filed such a motion and have thus waived the issue.

9 The Auto Club asserts that Olson and Seidenberg waived this matter by not objecting to premature timing as to the fee request scheduling deadline set by the trial court. However, in their motion for attorney fees (filed November 8, 2002), Olson and Seidenberg did request that the court retain jurisdiction for supplemental awards for fees, expenses and court costs, and thus they have not waived the matter.

account in choosing to calculate the fees based on the time records through 12/31/02 [,and that any] further submission of time would not cause the court to change its fee award." Similarly, on July 2, 2003, the court stated that it had read the supplemental fee request in the motion for a new trial filed by Olson and Seidenberg on June 27, 2003, (which detailed their 2003 time), but the court did not intend to award fees for attorney work in 2003, since it had already "given what it believed to be [an] appropriate fee."

Thus, although the court may have thought it had awarded enough attorney fees already, it specifically did not consider work performed after December 2002, which was even before its March 19, 2003, final statement of decision. Fee motions often cannot be determined until after judgment is fixed (here, on May 16, 2003), at which time the parties would know the exact contours of the claims won and lost. (See *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 428-429; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 226-227; Cal. Rules of Court, rule 870.2.) A court "abuse[s] its discretion in ruling on the issue of attorney fees and costs without having before it all of the evidence necessary to make a reasoned decision." (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1817.) "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

The Auto Club does not specifically dispute Olson and Seidenberg's claim of 1,055 hours spent in 2003, which would translate to $286,905, at the reduced rate that the trial court had essentially ruled applicable to other attorney fees awarded. Although the court arguably could have denied all compensation for 2003 because their approximately $8.1 million fee award request (100 percent of their fees increased by a multiplier) could have been deemed unreasonable (see *Serrano v. Unruh, supra,* 32 Cal.3d at p. 635), it did not do so.

Rather, the court impermissibly sought to magically deem the award to include an appropriate amount for work it acknowledged it did not consider in setting the fee award. It prematurely set the fee award and deemed it reasonable even before it received the detailed motion for supplemental attorney fees.

We note that some of the work performed in 2003 had been ordered by the court, and some of the work included a defense of the $1.2 million award in response to the Auto Club's new trial motion. Also, additional relief ensued as a result of work in 2003, such as the aspects of the judgment that prohibited misappropriating proxy machinery by printing advocacy proxies, and that granted certain director-compensation disclosure relief. Since, as previously stated, the Auto Club does not refute the estimate of the value of attorney services for Olson and Seidenberg for 2003 as $286,905, based on the trial court's own valuation of reasonable rates for the other attorney work performed, we deem it appropriate to so modify the judgment as to attorney fees.[10]

Accordingly, but for the matter of the award of attorney fees for work in 2003, in view of all the evidence before the trial court (including the evidence not pointed out in the argument by Olson and Seidenberg), even if another judge may reasonably have assessed a more generous amount for attorney fees, we find no reversible error. The award of attorney fees was not so small that it was "clearly wrong" (*Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1217) and the trial court did not abuse its broad discretion (see *PLCM, supra*, 22 Cal.4th at p. 1096; *Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1642), other than as to attorney fees for 2003.

III. The cross-appeal by the Auto Club

The Auto Club cross-appeals, raising two major issues: that the trial court had no authority to award fees for expert witnesses it did not appoint; and that the award of costs

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[10] Olson and Seidenberg also complain that the trial court awarded none of the $50,905.29 in extraordinary costs claimed, even though the costs were incurred on prevailing election claims, and some on nonprevailing claims that acted as catalysts. On appeal, the only legal issue raised is that the trial court's decision was arbitrary because "it gave no reasons." However, no reasons were required. (Cf. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 ["'reasoned explanation'" not required for fee award].)

Regarding the complaints by Olson and Seidenberg as to the court's reduced award of expert witness fees (expert witnesses Steinberg and Riddlehoover) and denial of any award in other regards (expert witness Searfoss), the issue is dealt with hereinafter in the discussion of the Auto Club's cross-appeal.

should be reversed and the Auto Club awarded costs as the prevailing party. We find merit only as to the first contention and thus strike the expert witness fees awarded.

(A.) The authorization in Code of Civil Procedure section 1021.5 (hereinafter, section 1021.5) for an award of "attorneys' fees to a successful party" in a private attorney general action does not include expert witness fees

The judgment entered against the Auto Club included an award of $90,466.85 in expert witness fees pursuant to section 1021.5. The fee awarded represented a portion of the expert witness fees for two witnesses presented by Olson and Seidenberg, an election expert (Steinberg) and an economist (Riddlehoover). Only one reported decision, *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1421 (*Beasley*), permits the award of expert witness fees under section 1021.5 for experts not ordered by the court. We disagree with *Beasley*, as its conclusion is contrary to the plain statutory language and legislative intent, and its reasoning is unpersuasive.

Section 1021.5 permits a trial court to "award attorneys' fees" to a successful party where the requirements for a private attorney general action have been satisfied. Code of Civil Procedure, section 1033.5, subdivision (b) provides that fees for experts *not ordered by the court* are "not allowable as costs except when expressly authorized by law." *Beasley* assumed that the Legislature intended that section 1021.5 would authorize expert fee awards. *Beasley* surmised that section 1021.5 was an explicit reaction to the rejection of private attorney general fee awards in *Alyeska Pipeline Serv. Co. v. Wilderness Society* (1975) 421 U.S. 240 (holding federal courts could no longer award attorney fees in private attorney general actions without specific statutory authorization), and that since the Legislature "relied heavily on" prior federal decisions in framing section 1021.5's authorization for attorney fees, "we must assume" that the Legislature intended to adopt the federal court's practice with respect to expense awards. (*Beasley*, *supra*, 235 Cal.App.3d at p. 1421.)

However, this assumption by the *Beasley* court is unsupported by anything in the legislative history of section 1021.5, as indicated by the legislative history provided by the "Legislative Intent Service." (See *People v. Sanchez* (2001) 24 Cal.4th 983, 992,

fn. 4.) For example, our review of various digests and analyses of Assembly Bill No. 1310 of the 1977-1978 Regular Session of the Legislature, the bill which became section 1021.5, reveals absolutely no mention of expert witness fees or any expenses other than attorney fees, and no determination of whether the acknowledged federal practice regarding expenses should be adopted or not.

Olson and Seidenberg urge that since the Legislature must be presumed to have been aware for the past 15 years of the holding in *Beasley* and yet did nothing to overrule or limit it, even though it had otherwise amended section 1021.5 (see Stats. 1993, ch. 645, § 2, p. 3747), the Legislature intended and then approved of the holding in *Beasley*. Indeed, the Legislature's amendment of a statute with its failure to abrogate the holding of a case interpreting that statute can imply legislative acquiescence in the holding of the case. (*People v. Salas* (2006) 37 Cal.4th, 967, 979.)

Nonetheless, that notion of legislative acquiescence is unpersuasive here for two reasons. First, inferring legislative acquiescence in the holding of a case interpreting a statute is most compelling where the case specifically invites the Legislature to clarify the statute. (*People v. Salas, supra*, 37 Cal.4th at p. 979.) Here, *Beasley* did not specifically invite such legislative review of the issue. Second, it is significant that the Legislature has in other contexts demonstrated an ability to clearly and unambiguously authorize an award of expert witness fees when it intends to do so. (See, e.g., Code Civ. Proc., 1021.8 [when the Attorney General prevails in certain actions, the court shall award "all costs of investigating and prosecuting the action, including expert witness fees, reasonable attorney's fees, and costs"].) The Legislature's failure to use such specific additional language here indicates its intent to authorize only an award for "attorneys' fees" (§ 1021.5), as revealed by the plain meaning of those words in the statute. (See *California Teachers Assn. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.)

In a somewhat analogous situation, the California Supreme Court in *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, found that Government Code section 12965, subdivision (b), which at the time authorized a court to award attorney fees and costs to

the prevailing party in an action under the Fair Employment and Housing Act (FEHA), did not permit recovery of the successful litigant's expert witness fees. "[B]oth before and after . . . section 12965, subdivision (b), was enacted, the fees of experts not ordered by the court were not an item of allowable costs. Code of Civil Procedure section 1033.5 simply codified prior law to that effect. [¶] . . . [T]he Legislature has created exceptions to the general rule concerning costs [] by expressly authorizing the shifting of the fees of an expert in specific types of actions. . . . [¶] Although it could have done so, it did not authorize a similar exception to the general rule for parties in a FEHA action." (17 Cal.4th at p. 442; see also *West Virginia Univ. Hospitals, Inc. v. Casey* (1991) 499 U.S. 83, 99 [federal statute allowing the recovery of reasonable attorney fees in civil rights actions did not authorize recovery of expert witness fees].)

Accordingly, none of the expert witness fees awarded by the trial court were authorized by statute, which limits recovery to "attorneys' fees." (§ 1021.5.) The Legislature, of course, may wish to change this and permit the recovery of such fees (cf. *Stender v. Lucky Stores, Inc.* (N.D.Cal. 1992) 780 F.Supp. 1302, 1306, fn. 13 [noting that Congress has legislatively reversed *West Virginia Univ. Hospitals, Inc. v. Casey, supra,* 499 U.S. 83, by permitting recovery of expert witness fees as part of the attorney fees award]), but that is not our function. (See *California Teachers Assn. Governing Bd. of Rialto Unified School Dist., supra,* 14 Cal.4th at p.632.) Thus, the award of expert witness fees must be stricken from the judgment.

(B.) The trial court did not abuse its broad, equitable discretion in finding Olson and Seidenberg the prevailing parties and thus entitled to costs

Code of Civil Procedure section 1032 (hereinafter, section 1032) provides that "When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ." Under section 1032, "the court retains ultimate discretion when awarding attorney fees, not only as to the amount but also in the choice of the statutory basis for the award and in the identification of the prevailing party." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136,

1143.) The trial court has "broad equitable discretion" in this matter. (*Id.* at p. 1152.) "Obviously this inquiry is fact intensive and therefore requires us to give considerable deference to the fully informed determinations of the trial court." (*Id.* at p. 1155.) Thus, as the trial court is accorded "wide discretion" in this matter, appellate courts "will not disturb the trial court's determination of the prevailing party absent a clear abuse of discretion." (*Id.* at p. 1158.)

"[I]n determining litigation success, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877, italics omitted.)

In the present case, to recap briefly, Olson and Seidenberg prevailed insofar as the court ordered the Auto Club to do the following: distribute future election materials containing statements from *all* candidates by both direct mail and Westways (which they assert is the "crux of the case" and worth over $1.7 million of benefit per election year); place future election materials on the Auto Club's website; eliminate advocacy materials from proxy forms; inform candidates about director compensation; disclose vote counts to candidates; cease using proxies that remain effective for more than a year and fail to allow members to appoint any proxy holder; allow challengers to campaign at the Auto Club's district offices; include the same figures in published financial summaries that are in the audited financial statements; and disregard hundreds of thousands of proxies deemed illegal general proxies. However, Olson and Seidenberg lost what the trial court deemed a "fundamental and overriding" election claim pertaining to the Auto Club's right to spend its funds campaigning for its nominees, and they did not prevail on a laundry list of mostly procedural election matters that were resolved in the Auto Club's favor (as previously noted herein, at footnote 6, *ante*).

Essentially, election issues were at the heart of the case. Olson and Seidenberg certainly were not successful in all regards, but there is no doubt they secured some

significant election reforms. The trial court did not abuse its broad discretion in finding Olson and Seidenberg the prevailing parties.

DISPOSITION

The judgment is modified by striking $90,466.85 in expert witness fees awarded to Olson and Seidenberg, and by adding to the award of attorney fees for Olson and Seidenberg the additional sum of $286,905 for attorney work performed in 2003. In all other respects, the judgment is affirmed. Each party is to bear its own costs on appeal.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CARL OLSON et al., Plaintiffs and Appellants, v. AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, Defendant and Appellant.	B168730 (Los Angeles County Super. Ct. No. BC244326) **ORDER MODIFYING OPINION AND DENYING REHEARING, CERTIFYING FOR PARTIAL PUBLICATION** **[No Change in Judgment]**

THE COURT:

The opinion filed herein on April 21, 2006, is modified as follows:

1. Page 22, line 6, after the word "memberships" insert the clause ", at least for the purposes of corporate securities law," so that the sentence in its entirety reads:

And, the trial court here aptly concluded that Auto Club memberships, at least for the purposes of corporate securities law, "are not securities or financial investments and are not analogous to shares of stock for a for-profit corporation."

2. Page 37, footnote 8, delete the last sentence of the footnote and insert the following sentence in its place: They may file such a motion in the trial court, pursuant to California Rules of Court, rule 870.2.

3. Page 42, line 12, delete the final sentence of that first full paragraph and replace it with the following new paragraph:

Although Olson and Seidenberg claim detrimental reliance on *Beasley*, we decline to apply our holding herein prospectively only. Reliance on *Beasley* as entrenched law is

simply unwarranted. *Beasley* is the only case permitting the award of expert witness fees under section 1021.5, and it flies in the face of the plain language of the statute. In 1998, our Supreme Court specifically cited *Beasley* and decided "not [to] reach the question whether fees of experts may be recovered in an action . . . brought on a private attorney general theory, to benefit the public, under [section] 1021.5." (*Davis v. KGO-T.V., supra*, 17 Cal.4th at p. 446, fn. 5), apparently leaving the propriety of *Beasley*'s view of section 1021.5 an open issue. We also note that our rejection of *Beasley*'s view of section 1021.5 entails no impairment of contract or property rights, further negating the need for a prospective holding. (See *Estate of Propst* (1990) 50 Cal.3d 448, 462-465.) Thus, a weighing of relevant factors favors application of the general rule of full retroactive effect (*Id.* at p. 462), and the award of expert witness fees must be stricken from the judgment.

Add a * footnote on Page 1 to read as follows: *Under California Rules of Court, rules 976(b) and 976.1, only the following portions of the opinion are certified for publication: the first two paragraphs on page 2; the Discussion starting on page 29 at the beginning of the last paragraph and ending on page 42 including the new paragraph added by the modification herein above; and the Disposition section on page 44.

This modification does not effect a change in judgment.

Olson and Seidenberg's petition for rehearing is denied.