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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CRISTINA VASQUEZ, Plaintiff and Respondent, v. STATE OF CALIFORNIA, Defendant and Appellant.	D046668 (Super. Ct. No. GIC740832)

APPEALS from orders of the Superior Court of San Diego County, William C. Pate, Judge. Affirmed.

We have previously published two opinions in this case. In *Vasquez v. State of California* (2003) 105 Cal.App.4th 849, 851, 856-857 (*Vasquez I*), we held as a matter of first impression that the State of California (the State) has a duty under Proposition 139, the voter-approved Prison Inmate Labor Initiative of 1990, to enforce a private business's duty to pay wages to inmate employees that are comparable to wages paid in the private sector, given the State's right to a percentage of their wages to defray expenses of

incarceration. We reversed a judgment entered for the State after the sustaining of a demurrer to Cristina Vasquez's taxpayer waste cause of action.

The California Supreme Court granted review of our second opinion, in which we upheld an award of $1,257,258.60 in attorney fees to Vasquez under the private attorney general statute. (Code Civ. Proc., § 1021.5.) The trial court granted the fees after it entered a stipulated injunction that requires the State to compel joint venture employers' compliance with Proposition 139. We concluded Vasquez was the successful party, her action resulted in the enforcement of an important right affecting the public interest, and it conferred a substantial benefit on the general public. The sole issue on review, however, is whether, under *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553 (*Graham*) and *Grimsley v. Board of Supervisors* (1985) 169 Cal.App.3d 960 (*Grimsley*), as a prerequisite to receiving fees Vasquez was required to reasonably attempt to settle the matter before filing suit (*Vasquez v. State of California* (2006) 138 Cal.App.4th 550, review granted August 16, 2006, S143710 (*Vasquez II*)), an issue we declined to address because the State neither raised it at the trial court nor presented a cogent argument on appeal. That matter is pending.

This appeal concerns the trial court's rejection of the State's proposed comparable wage plans for joint venture employers. The State contends the court has unreasonably retained jurisdiction over the stipulated injunction, since it only required the State to take "reasonable steps" to identify comparable wages and it has done so; the court misinterpreted Proposition 139 to require joint venture employers' payment of "prevailing" wages required on public works projects instead of "comparable" wages

required by Penal Code section 2717.8; and it improperly rejected expert opinion pertaining to comparable wages. We affirm the order as the court's ruling does not constitute abuse of discretion.

Further, the State seeks reversal of an additional award of $242,055 in attorney fees to Vasquez on the grounds the court lacks authority to award fees for work performed after entry of the stipulated injunction, she did not contribute to obtaining satisfaction of the injunction, and she did not confer a significant benefit on the public. As in *Vasquez II*, we conclude the State waived its argument that as a prerequisite to receiving fees Vasquez was required to engage in reasonable settlement efforts, and in any event, the record shows that any prelitigation settlement attempt would have been futile. We find no abuse of discretion and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

An overview of relevant statutes and regulations is necessary to put the facts in context. Under Proposition 139 (codified in Pen. Code, § 2717.1 et seq.), the Director of Corrections (Director) is required to establish joint venture programs with prisons to allow private businesses, referred to as joint venture employers, to employ inmates to produce goods or services that may be sold to the public. (Pen. Code, § 2717.2; Cal. Code Regs., tit. 15, § 3480.) The purposes of Proposition 139 are to require inmates to "work as hard as the taxpayers who provide for their upkeep," provide funds from which they can reimburse the State for a portion of their room and board, satisfy restitution fines and support their families, and assist in inmates' rehabilitation and teach skills they may

use after their release from prison. (Historical and Statutory Notes, 51B West's Ann. Pen. Code (2000 ed.) foll. § 2717.1, p. 223.)

Proposition 139 requires joint venture employers to pay wages to inmates that are "comparable to wages paid by the joint venture employer to non-inmate employees performing similar work for that employer," or if there are no such employees, wages "comparable to wages paid for work of a similar nature in the locality in which the work is to be performed." (Pen. Code, § 2717.8.) Before commencing business, a joint venture employer must submit a detailed job description for each inmate position, and "a wage plan detailing the comparable wage rate for each position, taking into account seniority, tenure, training, technical nature of the work being performed, or other factors." (Cal. Code Regs., tit. 15, § 3482, subd. (a)(12)(K)(1.) & (L)(1.).) The Department of Corrections must monitor joint venture employers' wage plans for compliance with Penal Code section 2717.8, and it "will obtain data, including wage range information, for each inmate-employee job description from the Employment Development Department [EDD], annually." (Cal. Code Regs., tit. 15, § 3484, subd. (b).)[1]

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1 For a history of private sector involvement in prison industry and the effect of inmate labor on the labor market, see Misrahi, *Factories With Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective* (1996) Am. Crim. L.Rev. 411 (hereafter Misrahi); Garvey, *Freeing Prisoners' Labor* (1998) Stan. L.Rev. 339 (hereafter Garvey); and Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America* (2006) UCLA L.Rev. 1143.

The federal government initially authorized the Prison Industry Enhancement Certification Program (PIECP) in 1979, and it "provides limited deregulation of federal prohibitions affecting both the movement of state prison-made goods in interstate commerce and the ability to use prison labor in government contracts in excess of

Inmate wages are subject to deductions, as determined by the Director, not to exceed 80 percent of gross wages, for taxes, reasonable charges for room and board, restitution to crime victims and family support. (Cal. Code Regs., tit. 15, § 3485.) The Director has determined that "[t]wenty percent of the inmate's net wages after taxes shall be for costs of room and board which shall be remitted to the department." (Cal. Code Regs., tit. 15, § 3485, subd. (h)(3).)

This litigation began in 1999 when inmates sued a joint venture employer for violations of Proposition 139's comparable wage requirement. A second amended complaint added Vasquez, the international vice president for the Union of Needletrades, Industrial & Textile Employees, as the plaintiff in a taxpayer waste cause of action

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$10,000. . . . [¶] The underlying theory of the program is to remedy the historical concerns of free labor competition and inmate exploitation associated with private sector involvement in prison industry by treating the convict laborer essentially the same as a free worker." (Misrahi, *supra,* Am. Crim L.Rev., at p. 420; 18 U.S.C. § 1761.) To be certified, a prison industry program must pay inmates "wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed." (18 U.S.C. § 1761(c)(2).) "This requirement benefits society by allowing for the development of prison industries while protecting the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace." (PIECP Guidelines, 64 C.F.R. §§ 17000, 17009 (1999).) According to one commentator, because of the additional costs of doing business inside prison, "few industries will find it worthwhile to set up shop behind prison walls if they are forced to pay inmates the prevailing wage," and thus PIECP industries employ only a small fraction of total state prison populations. (Garvey, *supra,* Stan. L.Rev. at pp. 373-374.)

California was certified under the Justice System Improvement Act of 1979 (64 C.F.R. 17003 (1999)), and Proposition 139 generally parallels PIECP. According to the State, since the onset of this litigation California's joint venture program has dwindled to three joint venture employers who employ approximately 70 inmates out of a statewide inmate population of more than 160,000.

against the State for its alleged failure to discharge its duty to compel joint venture employers to pay inmates comparable wages.[2] The matter was tried in January 2004, and after the second day of testimony the parties agreed to a stipulated injunction, which was entered on February 17, 2004.

Terms of Injunction

The stipulated injunction requires the State to "make reasonable and good faith efforts" to obtain information from joint venture employers, including "Duty Statements," which are to include for each inmate job a description of work tasks, machines used and required skills, and "Wage Plans," which are to show the employer's planned schedule of wages for each job description and the number of employees in each job.

The injunction further provides that based on the Wage Plans, the State "shall take reasonable steps to identify the comparable wages required to be paid as required by Penal Code [section] 2717.8. In the event the employer does not have non-inmate employees performing similar work for that employer, then, in identifying the comparable wages, [the State] shall consider factors such as the wages paid for work of a similar nature in the locality in which it is performed, the tenure of the employee who occupies the position, the requirements of Proposition 139, and available wage survey data from the EDD (and other sources)."

Additionally, the injunction provides it "shall be effective for a period of two years

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[2] The record here shows that joint venture employers have generally been paying inmates minimum wage.

from the date of issuance and may be extended and/or terminated by the Court upon a showing of good cause. The Court will retain jurisdiction for the purpose of enforcing, modifying and/or dissolving the Stipulated Injunction, in conformity with the applicable provisions of Proposition 139, until the date of its expiration." The injunction requires the parties to report to the court every 90 days concerning the State's progress toward complying with its terms.

Initial Progress Reports

The State's first progress report does not appear to be in the appellate record. The State filed its second progress report in July 2004. At the time, five joint venture employers participated in the Proposition 139 program: (1) Western Manufacturing, at Calipatria State Prison, Imperial County; (2) Labcon North America (Labcon), at San Quentin State Prison, Marin County; (3) Pub Brewing Company (Pub Brewing), at Richard J. Donovan Correctional Facility (Donovan), San Diego County; (4) Five Dot Land & Cattle Co. (Five Dot), at California Correctional Center in Lassen County; and (5) Allwire, Inc. (Allwire), at both the Central California Women's Facility and Valley State Prison for Women, Madera County.

The State contracted with a human resources specialist, Barbara Santos, and she reviewed wage plans and job descriptions the joint venture employers submitted. Santos, however, had visited only Western and Labcon, and the State intended to produce a final report after she had visited the remaining three companies and completed her comparable wage analysis.

Third Progress Report

The State issued its third progress report on November 3, 2004, and the court held a hearing on it on December 20 and 23, 2004.

The third progress report pertained to Pub Brewing, Western Manufacturing, Allwire and Labcon, employers that apparently had no non-inmate employees performing similar work to that of inmate employees, and thus were required to pay inmates wages comparable to wages paid in the local job market for similar work. The report did not include Five Dot, because it employed inmates and non-inmates and paid them all minimum wage for similar work.

The wage data EDD maintains are based on federal Standard Occupational Classification (SOC) codes.[3] SOC code wages are reported as the entry-level hourly wage, which is the mean, or average, wage of the first third of the wage distribution, and as certain percentiles, such as the 25th, 50th and 75th percentiles. The 25th percentile hourly wage is the top wage of the first 25 percent of the wage distribution, and the 50th percentile hourly wage is referred to as the median.

Santos's methodology consisted of visiting joint venture operations to observe the

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[3] The SOC "system provides the occupational title and code utilized in the Department of Labor's electronic Occupational Information Network (O*NET) system. 'The O*NET system, using common language and terminology to describe occupational requirements, supersedes the seventy-year-old *Dictionary of Occupational Titles* with current information that can be accessed online through a variety of public and private sector career and labor market information systems.' " (*Crider v. Highmark Life Ins. Co.* (W.D. Mich. 2006) 458 F.Supp.2d 487, 511, fn. 19 [2006 U.S.Dist. Lexis 65561, **62, fn. 19].)

work being performed, "to fully understand the complexity, level of independence, consequence of error, difficulty, and level of responsibility"; interviewing owners, management and inmates; reviewing and revising employer job descriptions; comparing employee positions to the SOC codes and assigning one or more SOC codes as appropriate; and finally, determining "how to relate the work performed" to the SOC code wages.

For all joint venture employers and all job classifications, Santos recommended entry-level wages for inmates that were lower than entry-level SOC code wages. Additionally, Santos recommended the minimum wage, then $6.75,[4] as the entry-level wage for most inmate positions. Further, she frequently recommended that the ceiling for inmates' wages be at or lower than the 25th percentile SOC code wage.

According to Santos's report, she reduced SOC code wages because the SOC system of tracking wages "consolidates multiple occupations with varying levels of complexity into a single salary report. For example, the code for welder encompasses occupations as diverse as novice production spot welder with low skill levels working on simple products to certified welders working [on] a variety of construction or aerospace projects utilizing multiple metals and requiring multiple certifications. Using the median salary [reflected in SOC code data] for positions without thorough study may establish a salary that is actually too high or too low for the work being performed." Santos

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4 All wage rates discussed are per hour.

generally found inmates performed less sophisticated tasks than those reflected in the SOC codes.

For instance, for Allwire, which assembles circuit boards and other electrical products, Santos approved of the employer's plan to begin "Machine and Hand Soldering Operator[s]" and "Wire Harness Assemblers," which positions encompassed most employees, at minimum wage with "increases averaging $.10 per hour per year with a maximum wage of $11.75 per hour." Santos determined the SOC code that corresponded with the above positions at Allwire was electrical and electronic equipment assembler, with an entry-level wage of $9.56.

Santos found that Allwire's plan to pay minimum wage was reasonable "since experience is not required." Her report noted the SOC code for electrical and electronic equipment assembler "indicates that the typical preparation would be some vocational education or an associate degree combined with some degree of experience and one to two years of on the job training. Most employees at Allwire have little or no prior experience when hired in and all training is on the job."

Santos's report also stated that "setting the initial salary at the minimum wage is appropriate, provided progression beyond minimum wage is provided in a reasonable timeframe." She conceded, though, that given $.10 annual raises it would take an inmate 50 years to earn $11.75. She found that acceptable because $11.75 was excessive, and a maximum inmate wage at the 25th percentile of the SOC code wage, $9.91, would be acceptable. She conceded, however, that it would take an inmate 20 years to earn $9.91.

Labcon produces a variety of plastic tubes, pipette tips and related products for laboratories, and it employs inmates to pack and label products. Santos identified the SOC code for "Packers and Packagers, Hand" as the closest match, with an entry-level wage of $7.51 and, oddly, a 25th percentile wage of $7.49. Santos, however, found "many of the duties performed by this code are more complex than work performed by [Labcon's] employees. For example, Packers and Packagers, Hand may be required to hand dispense product such as fluids, powders or other materials into containers using pipettes, spouts etc[.] and measure volumes or weights to close tolerances. That task is never performed by these employees. They do not examine or inspect packing materials to ensure they meet specifications, they do not sort materials, they don't measure, weigh or count materials, except in one very limited situation where they weigh bulk tubes to a predetermined weight, and they do not record any packing information."

Santos wrote that "[as] a result, I believe the correct salary range for this class would be no greater than the 10th percentile, or a range of $6.75 - $7.06 per hour." She also wrote: "I recommend that the increases be based on seniority, since that is the primary distinction among the inmates. A $.20 increase after 2080 hours (1 year) worked and another $.21 increase after 6240 hours (3 years) worked is recommended. I do not recommend an increase at 2 years as inmates sentenced to life are limited to working for two years by a tacit agreement to spread the work among as many inmates as possible and it may raise hard feelings about being terminated concurrent with a scheduled increase."

Western Manufacturing manufactures such items as metal and wire display racks to customer specifications. Santos found the employer's job descriptions deficient and recommended the creation of Production Worker I, II and III positions, to reflect "the varying levels of work that COULD exist within the factory setting." Santos rejected the creation of "job descriptions for the various machine operators, painters, welders and other workers," with corresponding wages, because "such a system is difficult to administer" and "could also result in morale problems among inmates who receive varying rates of pay for what they perceive as similar work."

Production Worker I would be an entry-level position and the inmate would be "[u]nder immediate supervision, perform[] unskilled labor in operating a variety of production equipment, package[] finished goods for shipment, clean[] shop area, and perform[] related tasks." Specifically, typical duties would include operating wire cutters, shears, a press, or saw to cut wire and metal to predetermined lengths; forming wire and sheet metal using a press brake, air bender or punch press; inserting material into automated forming equipment; operating a spot welder and ensuring all spot welds are made; and participating in the powder coating operation.

Production Worker II would be "a second working level" position, and an inmate would be "[u]nder general supervision, perform[] unskilled and semi skilled labor in operating a variety of production and equipment, package[] finished goods for shipment, clean[] shop area, and perform[] related tasks." Typical duties would include setting up, testing and operating a wire cutter, press, or metal saw to cut wire and metal strips or metal tubing to predetermined lengths; setting up, testing and operating metal forming

equipment; determining machine setup from a template or blueprint; monitoring counters to produce a predetermined quantity of items; welding; inserting welded objects into a roller to create curved parts; creating jigs from models or prototypes; constructing prototypes from sketches, prints or general instructions; and setting up and operating the powder coating operation.

Santos's report stated "Production Worker III is the fully experience[d] level, with substantial experience in the production work being performed, able to perform the full range of duties of the factory and . . . able to set up production, set up equipment, test for quality, maintain necessary record of production as well as operate production equipment."

Santos determined there were three SOC codes that described the majority of tasks at Western Manufacturing, including "Cutting, Punching, and Press Machine Setters, Operators, and Tenders, Metal and Plastics," with entry-level and 25th percentile wages of $10.11 and $10.94, respectively; "Welders, Cutters, Solderers, and Brazers," with entry-level and 25th percentile wages of $10.68 and $11.89, respectively; and "Coating, Painting and Spraying Machine Setter, Operators and Tenders," with entry-level and 25th percentile wages of $7.79 and $8.33, respectively. Santos averaged the three SOC code wages, for an entry-level wage of $9.53 and a 25th percentile wage of $10.39.

Santos, however, found that "the work performed by the inmates currently assigned to Western [Manufacturing] is structured such that it is at a much lower level than the work performed by the occupations above. The SOC descriptions . . . are the full working level, equivalent to Production Worker III." Santos recommended a maximum

wage of $10.39 for Production Worker III, based on the average of the 25th percentile SOC code wage, and that the maximum wage for Production Worker II be set at 15% below Production Worker III and the maximum wage for Production Worker I be set at 20% below Production Worker II. She also recommended for "all three classes . . . an entry salary set at 10% below the maximum," with "no salary being set at below minimum wage."

The chart in Santos's report shows entry-level and maximum wages for Production Worker I of $6.75 and $7.06, respectively, and for Production Worker II an entry-level wage range of between $7.29 and $8.10, and a maximum wage of $8.83. Under Santos's percentage deductions, the entry-level wage for Production Worker I would have been $6.35 had it not violated minimum wage law.[5]

The court rejected the State's proposed wage plans on the ground that Santos's findings and recommendations "did not have any basis in reason or rationale that I can determine." The court explained it would not pick any particular job classification and wage recommendation "and say[] it's right or wrong," because the wage plans as a whole were unacceptable. The court explained further that perhaps some classifications may be minimum wage jobs, but Santos's "conclusion basically is . . . that for all intents and purposes, everybody starts out at minimum wage . . . and then has very minor increases.

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[5] We do not discuss Santos's report concerning Pub Brewing, because it reportedly no longer operates in the prison system. We recognize that the comparable wage issue may still affect Pub Brewing because of back wage issues, but those issues are not at issue in this appeal.

On exhibit 11, there were 16 positions listed with a State recommendation next to it, and of those 16, ten are at minimum wage. Of those 16, 15 are either minimum wage or within ten percent deviation of minimum wage. [¶] I think we can recognize that a person who works full-time making minimum wage is not able to earn a living from which they can live in the State of California, and I think that's well documented and recognized by just about everybody."[6]

The court was also "very troubled by the lockstep pay raise of ten cents an hour" that Santos recommended for Allwire. The court reasoned that to satisfy Proposition 139, entry level employees who were paid minimum wage, as Santos recommended, "should probably get some pay raise that's fairly close to what the State employees get just for cost of living. . . . [There] didn't seem to be any thought process at all by . . . Santos in terms of pay raises. The court was presented with no historical data or any tie-in to anything. It was just ten cents. That was, to me, kind of a knee-jerk reaction and that causes me to question . . . the logic and rationale of the entire report." In closing, the court said it "can't leave its common sense and real world life experiences out in the street."

The court ordered the State to "go back to the drawing board and fine-tune this thing a little better so we've got the realistic numbers to go on[,] because if we go with these numbers, I think the State will be perpetuating a situation where the people working

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6 We requested that the parties submit exhibit No. 11 and they have been unable to do so. It is the appellant's burden to provide a sufficient record on appeal. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

in the prison system are not being paid prevailing wage and thus are not complying with [Proposition 139]."

Amendment of Wage Plans

In January 2005 Santos issued amended findings and recommendations, and the court held a hearing on the matter on April 18, 2005.

Santos's recommendations were unchanged for Western Manufacturing and Labcon. For Allwire, Santos did not alter the $.10 per year raises. She did, however, recommend higher wages for Allwire's shipping and receiving staff and office staff, as they "perform materiel control functions that require strong organizational skills, mathematical skills, and the ability to use computer programs" and inmates in those positions "generally have prior relevant experience."

Vasquez's expert, Roger Miller, submitted a report setting forth wages he believed were comparable wages for Allwire, Western Manufacturing and Labcon. In contrast to Santos's recommendations, Miller recommended that all wages be above minimum wage, based on SOC data, employers' job descriptions, visits to the joint venture programs to observe work being performed, interviews with inmates and managers, and discussions with private sector competitors. Miller disagreed with Santos's conclusion that SOC code wages should be reduced because most of the inmate jobs required little to no skill or training.

For Labcon, Miller recommended an entry-level wage range of $7.51 and $9.20, and a 5 percent premium for the lead packer because of added responsibilities. Miller

testified that for the maximum wage he selected the 50th percentile SOC code wage based on the knowledge and skills inmates were required to have.[7]

Concerning Allwire, Miller's report stated the inmates "acquire skills through on-the-job training. I observed many inmate employees using solders and other manual tools under large mounted magnifying glasses to perform intricate assembly work. [¶] Allwire's General Manager indicated that it takes about two years for inmate employees to be fully cross-trained and for their work to be both efficient and of consistently high quality. Further, the manager told me that defective assemblies are often sent to Allwire's inmate staff for assessment and renovation. This information supports my conclusion that the jobs at Allwire are skilled." Miller recommended a wage range of $8.14 to $11.39 for packagers, a range of $8.39 and $11.72 for assemblers, a range of $8.39 to $10.72 for quality assurance workers and a range of $8.39 to $11.77 for the office manager. Miller testified he relied on the entry-level and 25th percentile SOC code wages based on the skills required of inmates.

Concerning Western Manufacturing, Miller's report stated that "[a]ll of the inmates with whom I spoke had some prior experience in construction, mechanics, or other trades

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7 Miller submitted evidence that in 2001 Labcon used non-inmate temporary workers as packers and paid them between $.75 and $1.75 above minimum wage, net of the placement agency's fee. Using a cost of living index, he calculated that in 2005 the non-inmate workers would have earned between $7.54 and $8.61. The State, however, submitted the declaration of Allwire's chief financial officer, which stated Allwire used temporary workers for only a couple of weeks in 2001 and "[u]nlike the inmate employees, the temporary workers did all their own Quality Control . . . and created their own labels for products. . . . In addition, the temporary workers were available for and used for more functions than inmate employees carry out at San Quentin."

working with tools and/or heavy machinery when they were hired." Miller recommended Production Worker I wages of between $7.52 and $10.52, and Production Worker II wages of between $9.61 and $16.56; he found the Production III category inapplicable.[8]

After Miller and Santos testified, the court took the matter under submission. In a May 3, 2005 order it again rejected the State's comparable wage plan, as the "wage ranges . . . do not seem to be supported by any empirical evidence." The court explained: "For instance, the Western [Manufacturing] employees are proposed to be broken down into three job categories, Production Worker(s) I, II and III. The Plan concludes that a comparable Production Worker in Imperial County would have an 'Entry Level' (beginning) wage of $9.53 per hour. This would be the wage for a Production Worker at the 16th percentile of Production Workers paid in Imperial County.

"The State's Plan ignores the Entry Level wage in Imperial County and sets the beginning wage for a Production Worker I at the minimum wage of $6.75. The maximum wage for a Production Worker I is $7.06, capping any raise for a Production Worker I at $.36. [*Sic*.] Likewise a Production Worker II would have an Entry Level range of $7.29 to $8.10, still well below the Entry Level for the Imperial County production worker. [¶] The Production Worker II caps out at $8.83[,] $.70 less [than] the

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8 Miller interviewed competitors of Allwire in Contra Costa County and in Mountain View, California, but he had no information from competitors in Madera County, where Allwire is located. Miller also interviewed competitors of Western Manufacturing in San Bernardino County, Los Angeles County and Orange County. He submitted no information from any business in Imperial County, where Western Manufacturing is located.

Imperial County entry level. The Production Worker III has an entry level range of $8.57 to $9.53 with a maximum cap of $10.39, which is equal to the 25th percentile for Imperial County production workers.

"The selection of the 25th percentile cap was based on [Santos's] analysis of the skill requirements for performing the production tasks at Western [Manufacturing]. Assuming the analysis is correct, it does not logically follow that lower level workers would be paid a wage based on a percentage reduction of the 25th percentile wage. Instead, the wage for lower level workers must be based on comparable wages in the locality."

The court ordered the State to submit a revised comparable wage plan on or before June 30, 2005. On June 1, 2005, the State filed a motion, ostensibly for "clarification" of the court's order. The court denied the motion on the ground it was an untimely and meritless motion for reconsideration.

On June 2, 2005, the court granted Vasquez $242,055 in attorney fees (1) incurred in the application for and defense of the application for the previous fee award, and (2) incurred in the months following entry of the stipulated injunction. The State did not further revise its wage plan and instead appealed the court's orders.

DISCUSSION

I

Wage Plans

A

"Prevailing" Wages versus "Comparable" Wages

The State's principal contention is that the trial court erroneously interpreted Penal Code section 2717.8 to require the payment of "prevailing" wages instead of "comparable" wages, and the error caused it to misconstrue the applicable standards and reject the State's proposed wage plans. The State points out that under Labor Code section 1773, prevailing wages as determined by the Director of Industrial Relations must be paid on any public works project. Penal Code section 2717.8 requires a joint venture employer to pay inmates wages that are "comparable to wages" paid to non-inmate employees or, if none, to the employees of other private sector employees for similar work in the relevant locality.

The State relies on the trial court's reference at times to inmate wages as "prevailing" wages. The word "prevailing" commonly means "predominant" or "prevalent" and it "can apply to what . . . exists generally." (Webster's 3d New Internat. Dict. (1993) p. 1797.) The court has handled this litigation for many years, and a review of the record demonstrates it clearly knew the requirements of Penal Code section 2717.8 and used the term "prevailing" in its common sense. In *Vasquez I, supra*, 105 Cal.App.4th at pp. 851, 856, this court also used the term "prevailing" in reference to

Proposition 139's comparable wage requirements. We conclude that when read as a whole, the record clearly shows the court applied the proper standard.

B

Expert Opinion

The State also contends the court improperly rejected Santos's opinions pertaining to comparable wages without "external evidence that supported a higher wage calculation." The State complains that the court "substitute[d] its own judgment for the meticulously researched and analyzed findings of [its] expert." The State points out that it retained two additional experts who were of the opinion that Santos's methodology was proper.

We review the court's rulings on injunctions under an abuse of discretion standard. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.) "The exercise of discretion must be supported by the evidence and, 'to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard.' [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order." (*Ibid.*)

"Generally a trier of fact may reject the evidence of a witness, including an expert, even though that evidence is uncontradicted. However, the trier of fact may not act arbitrarily in doing so and thus where testimony is uncontradicted, unimpeached, and no rational reason for rejecting it appears, then the trier of fact may not reject it." (*Beck*

Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160, 1206, fn. 27.)

After reviewing the entire record, we conclude the court did not arbitrarily reject Santos's opinions or abuse its discretion by rejecting the State's proposed wage plans. The court showed its open mind by advising the State "there can be disagreements by reasonable minds as to what is the [comparable] wage within some spectrum for a given job classification. . . . And if we are in the spectrum of reasonable minds, I'll go with it; if it's clear wrong, then I won't." It is apparent, however, that the court lacked confidence in Santos's recommendations.

The State essentially ignores that Santos's opinions were contradicted by Vasquez's expert, Miller. The parties' disagreement centers on whether Santos properly reduced SOC code wages by certain percentages based on the notion that essentially across the board, inmates were performing less sophisticated work than the work reflected in SOC codes. For the three joint venture employers still at issue, Western Manufacturing, Allwire and Labcon, Santos set all entry-level inmate wages significantly lower than entry-level SOC code wages. For Labcon, she set the ceiling on inmate wages at the 10 percentile of the SOC code wages, lower than the entry-level SOC code wage. Santos's recommended pay range for inmates working for Labcon was $6.75 to $7.06, and she conceded the wage plan included no guidance on where in the range particular employees would fall.

For Allwire, Santos approved a ceiling on inmate wages of the 25th percentile SOC code wage, but conceded it would take an inmate 20 years to reach that level given

$.10 annual raises. For Western Manufacturing, she set the ceiling on inmate wages below the entry-level SOC code wage for Production Workers I and II. Santos recommended the $6.75 minimum wage for Production Workers I at Western Manufacturing, for assemblers at Allwire and for packers at Labcon, when the entry-level SOC code wages were $9.53, $9.56 and $7.51, respectively.

Based on his investigation and research, Miller believed Santos's proposed wages were not comparable within the meaning of Proposition 139. Miller observed the joint venture operations and disagreed with Santos's consistent findings that inmates were performing minimum wage jobs. Miller was employed by the State of California for 32 years in its Division of Industrial Welfare and Division of Labor Standards Enforcement, and he had conducted and supervised thousands of investigations involving wage rates, job classifications, hours and working conditions. The court presumably found Miller more persuasive, and it is not our province to assess the credibility of witnesses or reweigh the evidence.[9] (*Camarena v. State Personnel Bd.* (1997) 54 Cal.App.4th 698, 703; *Estate of Teel* (1944) 25 Cal.2d 520, 526.) The applicable SOC code wages were *all* above minimum wage, and Santos testified the SOC data is "the best" as it is gathered on a consistent basis and is updated regularly. The State produced no evidence that any

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9 The State asserts the trial court also rejected "the approach taken by . . . Miller." The State does not cite the record for that proposition, however, and the court's order does not indicate it rejected Miller's contradiction of Santos's opinions. In its motion for "clarification" the State requested that if the court disagreed with Santos's approach it "either adopt the range determined by [Vasquez] or specify its own range, so that this issue [comparable wages] can be determined." The court, however, denied the motion on the ground it was an untimely motion for reconsideration.

private sector businesses paid non-inmates minimum wage for work similar to that of inmates.[10]

Additionally, Santos conceded that in some instances her reductions of a percentage she chose from SOC code wages resulted in inmate wages *below* minimum wage. Accordingly, in those instances her method necessarily failed to determine a comparable wage as private sector employers, of course, must pay employees at least minimum wage. That frailty in her calculations gave the court an additional reason to question her methods. A comparable wage analysis that at times rendered results lower than minimum wage could also be faulty in other instances.

Santos also testified she had no written protocol pertaining to her selection of inmates to interview or the confidentiality of her conversations with them, and she did not contact any outside source to see if any particular protocol was in order. In a memorandum to her, Miller had suggested that in advance of the interviews she should get a list of employees and their job descriptions from the joint venture employer so she could randomly select inmates for interviews. Also, she conceded she did not follow federal PIECP guidelines that "recommend randomly selecting either ten percent of the work force or five workers, whichever is greater, to [ensure] the most accurate type of information."

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10 Pertaining to inmates' skill levels, Vasquez also produced evidence that the owner of Western Manufacturing had given favorable employment evaluations to inmates working for it. For instance, the owner stated that one inmate made jigs and had "developed technical skills with regard to . . . fabrication" and another inmate "came to us as a competent welder and mechanic."

In addition, the State produced no evidence that any private sector business limited annual pay increases to $.10, as Santos recommended for Allwire, which would make it virtually impossible for any inmate to reach the maximum wage that business purported to propose, or even to reach the 25th percentile SOC code wage that Santos found acceptable as a highest possible wage. Miller testified that Santos's "recommendation that the wages be increased 10 cents an hour on a yearly basis is way unreasonable in what the comparable wage would require. Even if you start [inmates] at the low level, you have to reach a comparable wage sometime, and not way down in the future." In contrast to Allwire, for Western Manufacturing Santos recommended that inmates beginning at minimum wage receive annual raises of between 2 and 5 percent. The court expressly noted that because of Santos's approval of Allwire's plan to pay minimum wage and then limit annual raises to $.10, it questioned "the logic and rationale of the entire report."

Santos also appeared to be concerned with issues irrelevant to the identification of wages comparable to those in the private sector. For instance, she recommended against any raise at the two-year anniversary date for any inmate working for Labcon at San Quentin, because "inmates sentenced to life are limited to working for two years by a tacit agreement to spread the work among as many inmates as possible and it may raise hard feeling[s] about being terminated concurrent with a scheduled increase." For Western Manufacturing, Santos cited potential morale problems among inmates if she created job descriptions and assigned corresponding wages "for the various machine

operators, painters, welders and other workers," since inmates may feel they perform similar work.

The State relies on the court's comment at the December 23, 2004 hearing on the State's third progress report, that "the methodology used by . . . Santos was a good, professional methodology and . . . she went about gathering information in a way that seems to be reasonable and logical to the court." The State does not report, however, that immediately thereafter the court explained "the conclusions reached by . . . Santos in her report did not seem to have any basis in reason or rationale that I can determine."

The State also argues a "wage that is too high will effectively discourage private businesses from participating in the Prison Work Initiative. An artificially high wage that cannot be supported would decrease participation by private businesses and lower the amount the State would collect from working inmates, a result clearly contrary to the expressed goals of Proposition 139." The record does not suggest, however, that the trial court advocates an artificially high wage. Proposition 139's comparable wage component is intended to protect private industry, and the payment of artificially low inmate wages would violate the voters' intent, and also federal law when interstate commerce is involved. As we discussed in footnote 1 of this opinion, few private industries are willing to incur the added costs of conducting business within prisons if they are also required to pay inmates the same wages they would have to pay employees in the free market. The court's task, however, is to enforce the comparable wage requirement of Proposition 139, not to allow a lower wage that may encourage private businesses to join or remain in California's joint venture program. Whether the program can be sustained

when joint venture employers are finally required to pay market rates is not the courts' concern, but is a matter of economics. If it cannot be sustained, the Legislature and the voters will have to address the problem.

" ' "It is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. . . .' " . . . 'The abuse of discretion standard . . . measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria.' " (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815, italics omitted.) Given the evidence here, the court's ruling does not exceed the bounds of reason. As the court noted, perhaps some of Santos's wage recommendations were proper, but the State does not contend the court erred by not ruling on the recommendations piecemeal.[11] If, as the State asserts, its expert has reached a "dead end" and cannot further amend the wage recommendations, the court and parties must proceed accordingly.

C

Trial Court's "Jurisdiction"

Additionally, the State contends the trial court "is unreasonably retaining jurisdiction to ensure the State is meeting its obligations." (Boldface and some capitalization omitted.) The State asserts it complied with the stipulated injunction by taking "reasonable steps" to identify the comparable wages required to be paid as

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11 The State erroneously asserts the court's ruling pertained only to Western Manufacturing. The court's order shows it discussed Western Manufacturing as an example of the deficiencies in Santos's wage recommendations.

required by Penal Code [section] 2717.8," and it is not required to submit "serial . . . expert reports with comparable wage numbers until one finally met the unspecified subjective criteria of the trial court." The State claims the court erred by "focus[ing] on the end number for the wages, rather than [the State's] efforts to take 'reasonable steps' to come up with the number."

The State includes no legal discussion of "jurisdiction" principles. "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.)

In any event, the State's position lacks merit. The stipulated injunction expressly gives the court continued subject matter jurisdiction to monitor the State's compliance with Proposition 139. Proposition 139 requires that the State compel joint venture employers to actually pay comparable wages, and thus the stipulated injunction necessarily allows the court to ensure the State's proposed wage plans comply with that requirement. The "reasonable steps" language of the stipulated injunction does not exist in a vacuum, and the idea that the court cannot consider the *result* of Santos's methodology is baseless.

II

Attorney Fees

A

Prelitigation Settlement Attempt

The State contends Vasquez is not entitled to attorney fees under Code of Civil Procedure[12] section 1021.5 because she failed to make a reasonable attempt to settle her claim before suing the State. The State relies on *Graham, supra,* 34 Cal.4th 553, which involved the "catalyst theory" of recovery under section 1021.5. Under that theory, "attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." (*Graham, supra,* at p. 560.) The catalyst theory "is an application of the . . . principle that courts look to the practical impact of the public interest litigation . . . to determine whether the party was successful, and therefore potentially eligible for attorney fees." (*Id.* at p. 566.)

In *Graham,* the defendant criticized the "catalyst rule [because] it could encourage nuisance suits by unscrupulous attorneys hoping to obtain fees without having the merits of their suit adjudicated." (*Graham, supra,* 34 Cal.4th at p. 574.) The California Supreme Court retained the catalyst theory in California, but added two prerequisites to the recovery of fees under the theory. To avoid "rewarding a significant number of

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12 Further statutory references are to the Code of Civil Procedure unless otherwise specified.

extortionate lawsuits," the trial court must now determine the law suit has some merit and is not " 'frivolous, unreasonable or groundless' " (*id.* at p. 575), and "the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." (*Id.* at p. 561.)

The *Graham* court found the reasonable settlement component "fully consistent with the basic objectives behind section 1021.5 and with one of its explicit requirements — the 'necessity . . . of private enforcement' of the public interest. Awarding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance that objective and encourages lawsuits that are more opportunistic than authentically for the public good." (*Graham,* 34 Cal.4th at p. 577.)

This case, however, is not a catalyst case and there is no uncertainty as to the merits of Vasquez's claims against the State. Although the *Graham* court's reliance on section 1021.5's requirement of the necessity of private enforcement of the public interest suggests the case's applicability to non-catalyst theory cases as well, a "decision is authority only for the point actually passed on by the court and directly involved in the case. General expressions in opinions that go beyond the facts of the case will not necessarily control the outcome in a subsequent suit involving different facts." (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985.) The *Graham* court stated, "In addition to some scrutiny of the merits, we conclude that another limitation *on the catalyst rule* [reasonable settlement effort] . . . should be adopted by this court." (*Graham, supra,* 34 Cal.4th at p. 577, italics added.)

The State also cites *Grimsley, supra,* 169 Cal.App.3d 960, which was not a catalyst theory case. In *Grimsley*, plaintiff Grimsley sought an alternative writ of prohibition and injunctive relief, alleging the San Benito County (County) had not properly adopted a revised general plan. The court noted that "[m]any of the matters concerning which relief was sought by Grimsley, were already under consideration by the Director [of State Planning and Research] and apparently by [. . .] County, when the action was filed." (*Id.* at p. 964.) Prior to Grimsley's suit, another party sued the County and proved environmental shortcomings in its general plan. The court ordered the County to amend its general plan, and it had taken steps to do so. (*Id.* at pp. 962-963.) In Grimsley's action, the trial court found the County did not follow proper procedures in adopting the revised general plan and thus had no authority to approve land use applications. The court ordered the County to adopt a proper general plan. (*Id.* at p. 964.)

In denying Grimsley attorney fees under section 1021.5, the trial court explained: " '[J]udgment in favor of plaintiff was on the narrowest grounds of the numerous grounds alleged by plaintiff. These grounds were essentially procedural defects in the adoption by the County . . . of a general plan. The ruling resulted in a finding that because of the flawed procedure, no general plan was adopted. No findings were made as to the substantive issues in the petition relating to the specific contents of the general plan. The court therefore finds that plaintiff's success did not result in the enforcement of an important public right but alerted the Board of Supervisors to a procedural necessity in the adoption of an important public document.' (The 'flawed procedure' . . . was the

failure to approve its revised general plan as required by the Government Code.)" (*Grimsley, supra,* 169 Cal.App.3d at p. 965.)

The appellate court affirmed the ruling, finding "it patent that no important right affecting the public interest had at that point 'been vindicated.' " (*Grimsley, supra,* 169 Cal.App.3d at p. 966.) The court went on to find that "Grimsley, although he had ample opportunity to do so before commencement of his action, made no complaint or suggestion to the concerned county officials about the failure to comply with Government Code sections 65356 and 65356.1, or in what respects those statutes were not followed. [¶] We are of the opinion, *in a case such as this,* that before commencing his action a 'private attorney general,' such as plaintiff Grimsley, must be required reasonably to point out to the responsible county official or administrative or legislative body, such a claimed shortcoming of a general plan, thus to avoid litigation and substantial public expense." (*Grimsley, supra,* at p. 966, italics added.) The court concluded that "[h]ere, it is a near certainty that had Grimsley timely pointed out to an appropriate county official or agency, the respects in which [the] Government Code . . . had not been followed, appropriate corrective action would have been promptly forthcoming." (*Ibid.*)

The State concedes that at the trial court it never argued a reasonable settlement attempt was a prerequisite to an attorney fees award. Indeed, the State did not raise the issue in this appeal until after briefing was completed and the Supreme Court granted review in *Vasquez II.* " 'Ordinarily the failure to preserve a point below constitutes a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system . . . . " 'In the hurry of the trial many things may be, and are,

overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his [or her] legal rights and of calling the judge's attention to any infringement of them.' " . . . [¶] The same policy underlies the principles of "theory of the trial." "A party is not permitted to change his [or her] position and adopt a new and different theory on appeal. To permit him [or her] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party." [Citation.] The principles of "theory of the trial" apply to motions . . . .' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1468.)

Although we have discretion to consider a belatedly raised question of pure law (*Sommer v. Gabor, supra,* 40 Cal.App.4th at p. 1468), the reasonable settlement issue involves related issues of law and fact. In *Graham,* the court explained, "Lengthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time." (*Graham, supra,* 34 Cal.4th at p. 577.) Here, Vasquez asserts she did make reasonable settlement efforts, and she has moved this court to take evidence on appeal and make factual findings. Acknowledging that the Supreme Court disagrees with us on the waiver issue, as demonstrated by its grant of review in *Vasquez II,* we again deem the matter waived.[13]

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13 We deny Vasquez's September 25, 2006 "Motion for Reviewing Court To Make Findings on Appeal [and] Motion for Leave To Take Evidence on Appeal, and "Motion to Augment Record on Appeal." (Some capitalization omitted.)

Moreover, even absent waiver the State's position is unpersuasive. Here, in contrast to *Grimsley*, the record reveals no "near certainty" that had Vasquez "timely pointed out" to the State that joint venture employers were not paying inmates comparable wages under Proposition 139, "appropriate corrective action would have been promptly forthcoming." (*Grimsley, supra,* 169 Cal.App.3d at p. 966.) Indeed, the record shows the State's continuing recalcitrance.

In February 1996 the Department entered into a joint venture agreement with CMT Blues for its manufacture of clothing at Donovan. This action began in August 1999 when two former Donovan inmates sued CMT Blues for unfair business practices and other counts. They alleged, among other things, that CMT Blues violated Proposition 139 by failing to pay them comparable wages and overtime compensation. The State presumably became aware at this time of alleged Proposition 139 violations, yet it did not rectify the problem.

The State was not named in the litigation until July 2000, nearly a year after the original complaint was filed. In a second amended complaint, Vasquez was added as a plaintiff in a cause of action against the State for taxpayer waste. Yet, the State continued to resist compelling employers to pay comparable wages. In *Vasquez I*, we reversed a judgment of dismissal granted after the State successfully demurred to Vasquez's action against it on the ground it had no duty under Proposition 139 to compel joint venture employers to pay comparable wages. We wrote that "[c]ontrary to the State's view, it cannot sit idly by while CMT Blues violates Proposition 139 and the express terms of the joint venture agreement." (*Vasquez I, supra,* 105 Cal.App.4th at p. 856.)

On remand, the State continued to resist Vasquez's efforts to obtain compliance with Proposition 139 and she was required to vigorously pursue the matter. In 2004 she obtained a stipulated injunction that put the joint venture program under the court's supervision, and the State has still not complied with it by submitting an adequate comparable wage plan. At an October 2004 hearing, the court noted "the State went out of its way to [a] great extent to make [Vasquez's] job very difficult. [It] resisted [her] at every turn, [it] resisted this court at many occasions."

In *Grimsley*, the court relied on *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 372, which held: " 'Before seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue unless it appears that the demand *would have been futile*.' " (*Grimsley, supra,* 169 Cal.App.3d at p. 966, italics added.) The record only permits a finding that a prelitigation settlement attempt by Vasquez would have been futile. Accordingly, we conclude that even if the Supreme Court ultimately determines *Graham* applies to non-catalyst theory cases, the prelitigation settlement attempt requirement does not apply to Vasquez.

B

Work Performed After Entry of Stipulated Judgment

The State next contends the court erred by awarding Vasquez $242,055 in attorney fees incurred *after* entry of the stipulated judgment. That amount, however, included fees incurred in applying for and defending the application for the $1,257,258.60 in fees the court previously awarded on entry of the stipulated judgment. The State does not contest

that fees incurred in litigating entitlement to fees are recoverable. "[A]bsent circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639.) Accordingly, Vasquez's argument concerns only the portion of fees awarded for work after entry of the stipulated injunction.[14]

The State asserts fees are improper because after entry of the stipulated judgment Vasquez was no longer the prevailing party. It argues that had "the trial gone to verdict, [Vasquez's] claim for attorneys' fees would have been cut off." It cites section 685.040, which provides that attorney fees "incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law."

We reject the State's position, as the stipulated injunction provides "the Court reserves jurisdiction to determine the issue of attorneys' fees and costs. Any claim for costs and/or attorneys' fees shall be served and filed by May 1, 2004. . . . This paragraph shall be *without prejudice to any application for attorneys' fees in consequence of the Stipulated Injunction*." (Italics added.)

The State submits that the "court's offer to hear a motion is not authority for

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14 Vasquez applied for $121,146.25 in attorney fees for applying for and defending the previous application for fees, and $163,052.50 in fees incurred after entry of the stipulated injunction, for a total request of $284,198.75. The court's order awarding $242,055 in fees states it covers both requests, but it makes no allocation.

[Vasquez] to recover[] fees." That is not, however, a reasonable construction of the provision in the stipulated injunction pertaining to attorney fees. "A stipulation is an agreement between counsel respecting business before the court [citation], and like any other agreement or contract, it is essential that the parties or their counsel agree to its terms." (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142.) "Stipulations must be given a reasonable construction with a view to giving effect to the intent of the parties." (*Id.* at p. 144.) An interpretation that renders part of an instrument surplusage should be avoided. (*National City Police Officers' Assn v. City of National City* (2001) 87 Cal.App.4th 1274, 1279.) The only reasonable interpretation of the stipulated injunction is that the parties negotiated that Vasquez may be entitled to fees incurred after entry of the injunction to enforce, or try to enforce, the State's obligation to comply with it.

C

Significant Benefit to the Public

The State also contends Vasquez is not entitled to fees because she did not confer a significant benefit to the public in the post-injunction proceedings. This argument also applies only to the portion of fees awarded for post-injunction work.

"The significant benefit criterion calls for an examination whether the litigation has had a beneficial impact on the public as a whole or on a group of private parties which is sufficiently large to justify a fee award. This criterion thereby implements the general requirement that the benefit provided by the litigation inures primarily to the public." (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1417.)

The State asserts Vasquez's post-injunction work was not beneficial because she and the court "misconstrued Penal Code [section] 2717.8 and confused the prevailing wage/comparable wage distinction. This resulted in the erroneous ruling of the trial court that an arbitrary objective standard can be developed to assign comparable wages to specific work performed by prison inmates in joint venture companies." We rejected this argument earlier.

The State's voters and taxpayers constitute a large class of persons, and a benefit was conferred on them by Vasquez's continued efforts to obtain the State's compliance with Proposition 139 and the stipulated injunction. The trial court cannot be expected to monitor the State's performance without assistance from its adversary, and Vasquez is not required to depend solely on the trial court. (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1768 [a " 'prospective private attorney general should not have to rely on the prospect that the court will do the right thing without opposition' "].) This is particularly true when the State has been recalcitrant. As the court explained in November 2004: "To be honest, the Court is, I think amazed would be the best word, at the difficulty the State is having complying with the order [it] agreed to back in February [2004]. . . . [¶] All that the Court has ordered, all that [Vasquez] ha[s] asked the State to do, is to see that these Joint Ventures that they've entered into are paying the state their due share. . . . [¶] Now, if I were a lawyer and my client came in to me and said, I've got a bunch of employees that are being underpaid, they should have been paid more, I want to make sure in the future they get paid more, . . . it's hard for me to believe nine months later I'd still be sitting

around trying to figure out what the numbers are. I mean, that boggles the mind when you think about it."

In March 2005 the court described its continued frustration as follows: "[T]he court is concerned, has been concerned for a long time as a matter of fact, that the State is not acting in good faith in attempting to comply with the orders of this court, and that it's acted in a concerted fashion to delay this matter for whatever reason. . . . And I've expressed that on the record numerous times, that this is a process that the court has made an order on, that the timelines have been definitive, that they were agreed to, stipulated by the parties . . . , and the State has failed in every instance to come even close to any of the timelines that have been set and has also resisted the efforts of [Vasquez] to be able to get into the prison system and find out what the . . . situation is there in terms of the various Joint Venture operations. . . . [¶] And the court has great concern with the [preliminary report for Western Manufacturing] that's been filed because it basically just comes up with a minimum wage analysis, for the most part, . . . [a]nd while that may be a correct analysis, . . . on the surface it appears to be one that is not correct because the levels of skill required in some of the operations as described to the court appear to be ones that would exceed what one would pay minimum wage for. So for those reasons the court has great concerns on why the State is attempting to drag this out."

Whether the applicant for attorney fees has proved section 1021.5's elements is a matter vested in the trial court. (*Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 571.) "We will reverse the trial court's decision only if there has been a prejudicial abuse of discretion, i.e., where "there has been a manifest miscarriage of

justice or ' "where no reasonable basis for the action is shown." ' " (*Hull v. Rossi*, *supra*, 13 Cal.App.4th 1763, 1767.) We find no abuse of discretion.

DISPOSITION

The orders are affirmed. Vasquez is entitled to costs on appeal.

MCCONNELL, P. J.

WE CONCUR:

BENKE, J.

NARES, J.