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and Robert H. Heston, individually, and Misty Kastner
11 as the Administrator of the Estate of Robert C. Heston, deceased

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15
16 BETTY LOU HESTON and ROBERT
17 H. HESTON, individually, and MISTY
KASTNER, as the Administrator of the
18 Estate of ROBERT C. HESTON,
deceased,

19 Plaintiffs,

20 v.

21 CITY OF SALINAS, SALINAS
22 POLICE DEPARTMENT, MICHAEL
DOMINICI, JAMES GODWIN, LEK
23 LIVINGSTON, JUAN RUIZ and
TASER INTERNATIONAL, INC.,

24 Defendants.

Case No. C 05-03658 JW

PLAINTIFFS' CONDITIONAL
MOTION FOR ATTORNEYS' FEES
ON JUDGMENT AGAINST TASER
INTERNATIONAL, INC.,
PURSUANT TO CAL. CIV. PROC.
CODE § 1021.5

25
26 TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that plaintiffs Betty Lou Heston, Robert H. Heston and
28 Misty Kastner, as Executor of the Estate of Robert C. Heston, deceased, hereby move the

1 Court, for an award of reasonable attorneys' fees in the judgment against defendant TASER
2 International, Inc. This motion is made conditional on the Court's granting over plaintiffs'
3 opposition the pending motion of defendant TASER International, Inc., to reduce or
4 strike entirely the jury's award of punitive damages

5 The motion is made pursuant to Cal. Civ. Proc. Code § 1021.5, on the following
6 memorandum of authorities, on all pleadings and papers on file herein, and on such other
7 and further matters as the Court deems appropriate.

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9 DATED: August 4, 2008

10 Respectfully submitted,
11 THE LAW OFFICES OF JOHN BURTON
12 WILLIAMSON & KRAUSS

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15 BY: /s/ JOHN BURTON
16 Attorneys for Plaintiffs
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MEMORANDUM OF LAW

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2 The Court is familiar with this matter. Plaintiffs’ decedent, Robert C. Heston,
3 sustained a cardiac arrest after being shocked repeatedly by electronic control devices. After
4 a hotly contested trial, the jury returned a defense verdict in favor of the Salinas Police
5 Department defendants and a plaintiffs’ verdict against defendant TASER International,
6 Inc., the ECD manufacturer. The jury found plaintiff to be entitled to slightly more than
7 \$1,000,000.00 in compensatory damages, but assessed 85 percent of the fault to the
8 decedent, making the net compensatory damages slightly more than \$150,000.00.

9 The jury awarded \$5.2 million in punitive damages. Defendant TASER has filed a
10 Rule 50 Motion for Judgment as a Matter of Law seeking a reduction in the amount of the
11 punitive damages verdict, or its elimination altogether. For reasons plaintiffs will set forth
12 in their opposition papers to be filed later this month, that motion should be denied in its
13 entirety. The punitive damages are within the law and reflect the jury’s considered
14 judgment that TASER marketed the M-26 Electrical Control Device with reckless
15 disregard for the consequences of causing cardiac arrest through acidosis. The amount
16 reflects a one to five ratio to the punitive damages – well within the due process limit – and
17 a less than one to one ratio to the actual damages – the loss of a human life – which is
18 valued at \$6.9 million.¹

19 If the court does determine, however, that the punitive damages should be
20 substantially reduced or eliminated altogether, plaintiffs respectfully urge that it exercise its
21 discretion to award plaintiffs their attorneys’ fees under the California “private attorney
22 general” statute because of the benefit this litigation has rendered to the public and the lack
23 of a fund available to pay fees. If the Court reduces the punitive damages and then grants
24 this motion, plaintiffs counsel will submit the appropriate declarations and time sheets to
25 establish the fee lodestar.

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28 ¹ The value of a statistical life is \$6.9 million according to calculations made by the Environmental
Protection Agency.

1 While frequently the defendant against whom such fees are sought is a public entity,
2 fees can be assessed against private companies when the litigation, as here, confers a
3 significant benefit on the public. **Press v. Lucky Stores**, 34 Cal. 3d 311, 317-18 (1983).

4 The relevant statute, Cal. Civ. Proc. Code § 1021.5 provides, in relevant part:

5 Upon motion, a court may award attorneys' fees to a successful party
6 against one or more opposing parties in any action which has resulted in the
7 enforcement of an important right affecting the public interest if: (a) a
8 significant benefit, whether pecuniary or nonpecuniary, has been conferred
9 on the general public or a large class of persons, (b) the necessity and financial
10 burden of private enforcement . . . are such as to make the award appropriate,
11 and (c) such fees should not in the interest of justice be paid out of the
12 recovery, if any.

13 “The trial court is to assess the litigation realistically and determine from a practical
14 perspective whether [the statutory] criteria have been met.” **Families Unafraid to Uphold**
15 **Rural El Dorado County v. Board of Supervisors**, 79 Cal. App.4th 505, 511 (2000). Here,
16 all three criteria have been satisfied by the difficult, but important, result plaintiffs obtained
17 in this litigation.

18 First, the verdict has already performed a valuable public service. The TASER ECD
19 is a new device, on the market for less than ten years, and possesses significant health risks
20 not obvious to the police-officer user. The device has become ubiquitous in law
21 enforcement, yet training is provided by TASER. The Court may recall the testimony that
22 the state agency responsible for overseeing police officers Peace Officer Standards and
23 Training (POST), has yet to issue any training on the device.

24 In this case the jury decisively rebuked TASER's phony claims of safety. The Court
25 will recall TASER's counsel's opening statement, and her repetition of TASER's reckless
26 claim that there was not a “scintilla” of proof that TASER ECD can cause cardiac arrest
27 through acidosis, or in any other manner. That is what TASER has been telling police
28 officers during training. That misinformation— motivated by TASER's sales department

1 and its slogan that TASER is “Saving lives every day” – has resulted in a series of tragic
2 deaths such as Mr. Heston’s.

3 This historic verdict is causing police agencies in California, and indeed throughout
4 the nation, to finally take heed of the risks caused by prolonged and multiple applications
5 of ECD electric current, and will eventually cause TASER to revise its training and
6 warnings so that unnecessary deaths such as Robert Heston’s can be avoided in the future.
7 Such actions benefits the general public, which is subject to TASER ECD exposure from
8 local police agencies.

9 Second, as the Court saw at trial, plaintiffs’ counsel had to make an extraordinary
10 effort to overcome the considerable financial resources of TASER International, so they
11 could present a compelling case to the jury. Pretrial preparation was unnecessarily
12 expensive because TASER’s counsel insisted on designating 14 retained expert witnesses,
13 located throughout the United States, although it called only four to testify at trial. Even
14 with the Court’s order that TASER pay its own experts for deposition time and reimburse
15 plaintiffs’ counsel for their travel expenses, expert discovery took an exceptional amount of
16 resources. Plaintiffs’ counsel had to spend weeks traveling to Alabama, Florida, New Jersey,
17 St. Louis, Minnesota, Idaho, Indiana and Texas.

18 As a result, plaintiffs’ counsel have advanced over \$200,000.00 in out-of-pocket
19 expenses and accrued approximately 2,500 hours in time, due primarily to the complex
20 scientific issues raised. If the punitive damages are reduced or stricken, there will be no
21 fund available out of which plaintiffs can pay their counsel. The compensatory damages will
22 be depleted significantly just to reimburse the out-of-pocket costs not reimbursable through
23 a cost bill.

24 While the Court has discretion to deny fees where “the plaintiff’s personal stake in
25 the outcome was not disproportionate to the burden of private enforcement, even where
26 the litigation enforced an important right and conferred a significant benefit upon the
27 public,” *Satrap v. Pacific Gas & Electric Co.*, 42 Cal. App. 4th 72, 78 (1996), that was not
28 the case here unless the law provides for the availability of adequate punitive damages.

1 “Under the private burden prong of section 1021.5, fees are recoverable ‘ “when the
2 cost of the claimant’s legal victory transcends his personal interest, that is, when the
3 necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his
4 individual stake in the matter.” **Woodland Hills Residents Assn., Inc. v. City Council of**
5 **Los Angeles**, 23 Cal.3d 917, 941 (1979), see also, e.g., **Lyons v. Chinese Hospital Assn.**,
6 136 Cal. App.4th 1331, 1348 (2006). Plaintiffs’ counsel accepted this case knowing that
7 the decedent was a troubled man with a significant drug history who had ingested
8 methamphetamine and lost control of his behavior in the throes of a paranoid delusion.
9 Under such circumstances a significant compensatory damages award is not feasible, and
10 any such award was likely to be reduced, as this one will be, by the obvious comparative
11 fault of the decedent. If adequate punitive damages are not legally available, section 1021.5
12 “private attorney general” fees should be awarded instead so that plaintiffs’ counsel are
13 adequately compensated for their work in promoting the public interest.

14 For the foregoing reason, if the Court determines that plaintiffs are not entitled to
15 punitive damages, or that their punitive damages should be reduced substantially, the Court
16 should grant this motion for “private attorney general” attorneys fees and allow plaintiffs
17 to submit their times, along with declarations establishing reasonable hourly rates, so that
18 the Court can award them attorneys’ fees as an item of costs.

19 DATED: August 4, 2008

20 Respectfully submitted,

21 THE LAW OFFICES OF JOHN BURTON
22 WILLIAMSON & KRAUSS

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25 BY: /s/ JOHN BURTON
26 Attorneys for Plaintiffs
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