S180890

Supreme Court Case No. ___

Supreme Court of California

LES JANKEY

Plaintiff-Petitioner

v.

SONG KOO LEE

Defendant-Respondent

Petition after a Decision by the Court of Appeal,
First Appellate District, Division Four

Ruvolo, P. J., Sepulveda and Rivera, JJ

Case No. A123006

PETITION FOR REVIEW

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ISSUE PRESENTED

Should California state courts split with California federal district courts and award mandatory (non-discretionary) attorney's fees to prevailing defendants against the plaintiff – under a state law the Ninth Circuit has already found preempted – for a non-frivolous yet unsuccessful Americans Disabilities Act ("ADA") claim?

WHY REVIEW SHOULD BE GRANTED

The issue raised by this petition is one of first impression before this Court – (1) Does Section 55 of the California Civil Code mandate an award of attorney fees to prevailing defendants; and, if it does, (2) Is Section 55 preempted to the extent it permits the award of fees against a disabled plaintiff for pursuing a non-frivolous ADA claim.[1] These are critically important questions that present significant precedential and public policy importance with which the lower courts – not only the state courts of California, but the federal district courts in the Ninth Circuit – have struggled. Both California state and federal courts have considered whether a defendant, who prevails over a disabled plaintiff's request for injunctive relief under Section 55 based on the denial of full and equal treatment under the ADA, is entitled to fees, and both have arrived at the opposite conclusions.

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[1] For simplicity's sake, petitioner will use the single term "frivolous" to denote claims that are "frivolous, unreasonable or groundless."

Indeed, the Ninth Circuit noted the split among federal district courts that have dealt with this issue, and invited this Court to provide an authoritative and definitive interpretation of the "prevailing party" language of this statute. *See Hubbard v. SoBreck,* 531 F.3d 983, 987 (9th Cir. 2008) ("we leave it to California courts to interpret Section 55 in a definitive way, and to decide authoritatively whether it would mandate fees to all prevailing defendants."). In addition to the Ninth Circuit, petitioner's counsel – who served as lead counsel in that federal appeal – has also previously asked the Court to resolve this conflict. *Molski v. Arciero Wine Group.*, Petition for Review, Case No. S165946, 2008 WL 6137582 (Aug. 15, 2008). Both requests were declined.

With no clear guidance from this Court, California courts of appeal have now (erroneously) concluded that because Section 55 does not, on its face, distinguish between plaintiffs and defendants, a successful defendant is automatically entitled to a mandatory, non-discretionary award of attorney's fees, regardless of whether the plaintiff's claims were meritorious (but unsuccessful) on the one hand; or frivolous on the other. *See Jankey v. Song Koo Lee*, --- Cal.Rptr.3d ----, 2010 WL 396355, at **7-8 (Feb. 5, 2010), citing with approval, *Molski v. Arciero Wine Group*, 164 Cal.App.4th 786 (2008) ("Arciero Wine"). With all due respect to these courts of appeal, their rulings are contrary to the test

established by the Supreme Court to determine whether a state law conflict is preempted; are inconsistent with the public policy that underlies all of California's disabled access legislation; are inconsistent with the legislative history of Section 55; and cut against the clearly emerging body of law interpreting and applying the fee-shifting provisions of various state and federal civil rights legislation. Although previous invitations have been declined, petitioner hopes the Court will take this opportunity to resolve what is now a full-blown split between California state and federal courts; and overturn the *Song Koo Lee* opinion with an authoritative and definitive interpretation that will bring Section 55 in line with other fee-shifting statute standards and the intent of the California legislature.

STATEMENT REGARDING PETITION FOR REHEARING

The decision of the court of appeal was final, and no petition for rehearing before that court was filed by either party.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Petitioner Les Jankey ("Jankey" or "petitioner") brought this lawsuit against Respondent Song Koo Lee ("Lee"), doing business as K & D Market, a small independently owned and operated grocery/liquor store in the Mission District of San Francisco. Jankey – a person with a disability who uses a wheelchair for mobility – alleged that a four-inch step located at the entry of K & D Market was an architectural barrier that prevented him and other wheelchair users from wheeling directly into the store. Jankey claimed Lee violated the ADA, (42 U.S.C. §§ 12101, *et seq.*); the California Disabled Persons Act ("CDPA"), (Calif. Civil Code §§ 54, *et seq.*); the California Unruh Civil Rights Act ("Unruh Act"), (Calif. Civil Code §§ 51, *et seq.*); and Part 5.5 of the California Health and Safety Code, (Calif. H & S Code §§ 19955, *et seq.*). Among other relief, Jankey sought injunctive relief under the ADA and Section 55 to "make [the store] readily accessible to and usable by [the disabled.]" Lee moved for (and the trial court granted) summary judgment in the defendant's favor on the grounds that Lee had proved his affirmative defense to all causes of action.

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[2] Unless specified otherwise, the facts contained in this section are drawn from the court of appeal's published opinion. *Song Koo Lee,* --- Cal.Rptr.3d ----, 2010 WL 396355, at **1 - 2.

The court never found that Jankey's lawsuit was frivolous.

Lee, as the prevailing party, brought a motion to recover his attorney fees under Section 55. The parties disagreed, however, on whether the trial court should apply the Ninth Circuit's analysis in *SoBreck,* or the California court of appeal's analysis in *Arciero Wine*. In *SoBreck*, the Ninth Circuit used preemption principles to require a prevailing defendant, seeking an award of attorney fees under Section 55, to show that the disabled plaintiff's claims were frivolous. *Hubbard v. SoBreck, LLC*, 554 F.3d 742, 746-747 (9th Cir. 2009). In *Arciero Wine*, the court of appeal held that attorney fees were automatically available to a prevailing defendant under Section 55, regardless of whether the disabled plaintiff's claims were frivolous. *Arciero Wine*, 164 Cal.App.4th at 791. Upon considering the parties' arguments, the trial court determined that the *Arciero Wine* analysis controlled, and that Lee was entitled to a mandatory award of $118,458 in attorney fees and $3,544.54 in costs under Section 55. Jankey appealed the trial court's decision, but the court of appeal – "respectfully disagreeing" with the Ninth Circuit's preemption analysis – affirmed. It is from this ruling that petitioner seeks review.

LEGAL DISCUSSION

Because the court of appeal acknowledged that its analysis in *Song Koo Lee* was in direct conflict with the Ninth Circuit's analysis in *Sorbeck*, petitioner will not belabor that point here. Instead, he will focus on why the *Song Koo Lee* analysis was erroneous as a matter of law and should be overturned.

I. *First Error* – Determining that the mandatory fee-shifting provision for prevailing defendants under California's Disabled Persons Act was not conflict preempted by the ADA *without* applying (much less addressing) the test developed by the Supreme Court to make such a determination.

The court of appeal's first error was to determine that Section 55 was not conflict preempted by the ADA *without* applying (much less addressing) the test developed by the Supreme Court to make such a determination. *Song Koo Lee*, --- Cal.Rptr.3d ----, 2010 WL 396355, at **6-7. According to the Supreme Court, when analyzing a conflict preemption, the primary function of a court is to determine "whether, under the circumstances of *this particular case*, [California] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (italics added); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (A court will find conflict preemption "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress."). *Accord, Gibbons v. Ogden*, 22 U.S. 1 (1824). This inquiry requires the court to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977), citing *De Canas v. Bica*, 424 U.S. 351, 363-365 (1976). What is a sufficient obstacle to a Congressional objective is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. *See Crosby*, 530 U.S. at 373, quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912); *see also Hines*, 312 U.S. at 67, fn. 20 (quoting same). Any state or local law that "interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666 (1962); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.").

In this particular case, the court of appeal erred in allowing prevailing defendants to receive fees under state law for non-frivolous ADA claims, as such an award is inconsistent with Congressional objectives. Congress drafted the ADA with the intent that trial courts, in their discretion, would award the prevailing party attorney's fees, including litigation expenses and costs. 42 U.S.C. § 12205; H.R.

REP. 101-485(II), at p. 140, reprinted 1990 U.S.C.C.A.N. 303, 423. Prevailing plaintiffs would automatically receive attorney fees, unless such an award would be "unjust." *See Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir. 2002), citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *see also Jankey v. Poop Deck*, 537 F.3d 1122, 1130 (2008), citing *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119, n.2 (9th Cir. 2000). When defendants are the prevailing parties, however, Congress intended for trial courts to only award fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation."[3] *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1154 (9th Cir.1997), quoting *Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978); H.R. REP. 101-485(111) at p. 73, reprinted 1990 U.S.C.C.A.N. 445, 496 (quoting same); 1990 U.S.C.C.A.N. at 423 ("It is intended that the term 'prevailing party' be interpreted consistently with other civil rights laws. Plaintiffs should not be assessed opponents' attorneys' fees unless a court finds the plaintiffs claim is frivolous, unreasonable, or groundless.") (citation and quotations omitted). Although the

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[3] A claim is frivolous if it is clear from "the outset of the litigation" that "it lacked a factual and legal basis." *See Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060-61 (9th Cir. 2006); *see also Wilson v. Pier Imports (US), Inc.*, 411 F.Supp.2d 1196, 1198 (E.D. Cal. 2006) (Frivolous defined with respect to the ADA.).

court of appeal considered the *Christianburg* standard for fee awards under federal civil rights laws as an unfair strategic advantage over defendants, it is precisely the standard that Congress intended in order to advance "the important policy objectives of the Civil Rights Statutes, and the intent of Congress to achieve such objectives through the use of plaintiffs as private attorney[s] general." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994) (internal quotation marks and citations omitted).[4]

By contrast, on its face, Section 55 neither gives courts the discretion to award fees, nor distinguishes between prevailing plaintiffs and prevailing defendants. As a result disabled plaintiffs, including the plaintiff *in this particular case*, are forced to pay fees and costs to prevailing defendants for what is in essence an unsuccessful, non-frivolous ADA claim for injunctive relief. To justify this irreconcilable conflict with Congress's objective (and marginalize the harm suffered by the plaintiffs burdened with such an award), the court of appeal

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[4] Although the Supreme Court was speaking of federal civil rights statutes in general, Congress intended that the protections of the ADA would apply the same standard and preempt lesser state laws, which logically include less stringent standards for fee awards to prevailing defendants under California law. *Wilson v. Norbreck LLC*, 2007 WL 1063050 at fn. 3 (E.D. Cal. Apr. 9, 2007) ("The same result would likely follow under federal law under preemption principles.").

focused its conflict-preemption analysis on whether the *entire* CDPA was generally in conflict the ADA, and not just Section 55 in this particular case. In so doing, the court of appeal drew upon the broader scope of remedies available to disabled plaintiffs under both the Unruh Act and CDPA (when compared to the ADA); and criticized the Ninth Circuit for "parsing" and "dissecting" Section 55 from the rest of the act, and ignoring its role and purpose within the CDPA. *Song Koo Lee*, --- Cal.Rptr.3d ----, 2010 WL 396355, at **6-7. With all due respect to the court of appeal, this "big picture" analysis contradicts two hundred years of American jurisprudence and Congressional intent regarding attorney fees under the ADA. Assuming *arguendo* the criticism is valid, awarding attorney fees to prevailing defendants under state law for a non-frivolous ADA claim is *still* contrary to the stated objectives of Congress, regardless of whether that state law is examined as a single statute (Section 55) or an entire act (CDPA). In either scenario, the result is inconsistent with the ADA's objective of protecting disabled plaintiffs from paying attorney fees to the defense for unsuccessful, non-frivolous ADA lawsuits; and petitioner would ask this Court to overturn the underlying decision on that ground.

II. *Second Error* – Believing that neither Congressional intent nor the ADA's expressed preemption provision supported the Ninth Circuit's conclusion that state laws "guaranteeing" fee awards to prevailing defendants for non-frivolous ADA claims are preempted.

Having established that the court of appeal applied the incorrect standard for determining whether a state law is conflict preempted, and shown that Section 55 conflicts with Congress' objective that prevailing defendants only receive attorney fees if the underlying ADA claim was frivolous, we turn to the court of appeal's second error: assuming that Congress never intended to preempt state laws that mandated fee awards to prevailing defendants for non-frivolous ADA claims. *Song Koo Lee*, --- Cal.Rptr.3d ----, 2010 WL 396355, at *6 ("there is nothing in the ADA which would support [*SoBreck's*] conclusion that[,] in enacting the ADA, Congress intended to impose uniform standards for complementary state law remedies."). Although the court of appeal acknowledged that Congress intended to protect the disabled from lesser state laws, and that the ADA provided a "floor" on state law rights and remedies," the court of appeal nevertheless found that a two-way guaranteed fee provision did not put Section 55 in irreconcilable conflict with the ADA or abrogate the scope of the rights available under the ADA in any fashion. *Id.* at **6 - 7 (quote omitted). "We have found no legal authority," the court of appeal opined, "requiring each and every element of a multi-faceted state

remedial act to offer equal or greater benefits under all circumstances over a similar federal law in order to avoid a preemption finding." *Id.* at *7. On its face, however, this statement is in direct conflict with the ADA's preemption provision and the intent of Congress.

The text of the ADA makes clear that Congress intended to preempt state or local laws that limited or reduced the protections available under the Act: "[n]othing in [the ADA] shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State ... that provides greater or equal protection for the rights of individuals with disabilities than are afforded by [the ADA]." *See* 42 U.S.C. § 12201(b). By providing an express exemption for state laws that provide an equal or greater level of protection than the ADA, Congress intented to preempt all laws that conflict with the ADA by providing lesser levels of protection. *See Wood v. County of Alameda*, 875 F. Supp. 659, 663 (N.D. Cal. 1995) (noting that ADA was enacted to guarantee individuals with disabilities a baseline level of protection); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000) (Congress' explicit incorporation of one statutory provision into the ADA, to the exclusion of another, must be presumed intentional under the statutory canon of *expressio unius*.); 136 Cong Rec H 4169, 4191 (Joint Explanatory Statement of the Committee of

Conference); 136 Cong Rec H 4582, 4604 (same). The United States Department of Justice, which is entitled to *Chevron* deference, joined in this conclusion. 28 C.F.R. Pt. 36, App. B at 681; Title III Technical Assistance Manual, § III-1.8200 (1994 Supp.) ("Title III does not disturb other Federal laws or any State law that provides protection for individuals with disabilities at a level greater or equal to that provided by the ADA. It does, however, prevail over any conflicting State laws."). In light of this expressed preemption provision, the legislative record, and supporting regulations, the court of appeal's conclusion that nothing requires each and every element of the CDPA to offer equal or greater benefits than the ADA (under all circumstances) was incorrect and reversal is warranted.

III. *Third Error* – Assuming that the *award* of attorneys fees to a prevailing plaintiff, as opposed to *the amount* of attorneys fees awarded, is discretionary under the ADA and mandatory under Section 55.

The court of appeal's third error was to conclude that an award of attorney fees to a prevailing plaintiff is discretionary under the ADA and mandatory under Section 55. *Song Koo Lee*, --- Cal.Rptr.3d ----, 2010 WL 396355 at *7. Neither conclusion was correct. As alluded above, it is an abuse of discretion for a trial court to deny prevailing plaintiffs an award of attorney fees under the ADA, unless such an award would be "unjust." *See Barrios*, 277 F.3d at 1134, quoting *Hensley*, 461 U.S. at 429 (A prevailing plaintiff under the ADA "should ordinarily recover

an attorney's fee unless special circumstances would render such an award unjust.");[5] *see also Poop Deck*, 537 F.3d at 1130, quoting *Fischer*, 214 F.3d at 1119, n.2 ("The Supreme Court has explained that[,] in civil rights cases, the district court's discretion is limited."). Congress enacted the fee-shifting provisions of the ADA to ensure effective access to the judicial process for persons with civil rights grievances. *Poop Deck*, 537 F.3d at 1130, citing *Hensley*, 461 U.S. at 429 (quotation marks omitted). If successful plaintiffs were routinely forced to bear their own attorney fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the courts. *Ibid.*, citing *Newman*, 390 U.S. at 402. Consequently, recovery under the ADA is the rule rather than the exception. *Ibid.* citing *Herrington v. County of Sonoma*, 883 F.2d 739, 743 (9th Cir. 1989). This is, incidentally, the same standard that is applied to fee requests under Section 55.

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[5] The origin of the *Hensley* quote can be found in *Newman v. Piggy Park Enterprises*, 390 U.S. 400, 402 (1968) ("It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.").

Even though the plain language of the statute would suggest that fees to prevailing plaintiffs are mandatory, California courts have independently adopted the *Newman/Hensley* standard and declined to award fees to prevailing plaintiffs when such an award would be unjust. *See, e.g., Bartling v. Glendale Adventist Medical Ctr.*, 184 Cal. App. 3d 97, 104 (1986), citing *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) and *Newman*, 390 U.S. at 402. California courts also have discretion to reduce the fees awarded to prevailing plaintiffs under Section 55, when the lawsuit produces only limited success and the plaintiff fails to obtain a substantial part of the relief he or she sought. *See, e.g., Sokolow v. County of San Mateo,* 213 Cal.App.3d 231, 249-250 (1989); *Feminist Women's Health Center v. Blythe*, 32 Cal.App.4th 1641, 1674 (1995); *Bingham v. Obledo*, 147 Cal.App.3d 401, 407 (1983); *Californians for Responsible Toxics Management v. Kizer,* 211 Cal.App.3d 961, 974-975 (1989). Disabled plaintiff are no more "*guaranteed* an attorney fee award" under Section 55 by establishing "a single violation of a broad range of statutory requirements, of which a violation of the ADA is merely a subset," than they are under the ADA. *Song Koo Lee*, --- Cal.Rptr.3d ----, 2010 WL 396355 at *7 (italics in original). Quite the opposite, California dockets are replete with orders reducing fee awards (under both the ADA and Section 55) to

disabled plaintiffs who prove "a single violation" of statutory requirement;[6] and therein lies the flaw of the *Song Koo Lee* analysis. If trial courts apply the same standard to fee requests for prevailing plaintiffs under the ADA and Section 55, then the mandatory-fee awards to prevailing defendants under Section 55 offers *less* protection than the discretionary fee awards under the ADA. In other words, the benefit disabled plaintiffs purportedly receive under Section 55 is illusionary; and the court of appeal's belief that successful plaintiffs could demand, and were entitled to receive, mandatory attorney fees under Section 55 – regardless of their limited success or the unjustness of the award – is simply wrong.

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[6] *See, e.g., Dodson v. Dollar Tree Stores, Inc.*, 2006 U.S. Dist. Lexis 90416, **3, 13 (E.D. Cal. Dec. 14, 2006) (Plaintiff's fee award under ADA and Section 55 reduced forty-three percent to account for limited success); *White v. Save Mart Supermarkets*, 2005 U.S. Dist. Lexis 24386, **3, 12 (E.D. Cal. Oct. 20, 2005) (Plaintiff's fee award under ADA and Section 55 reduced twenty-percent to account for limited success); *White v. J.A. Sutherland, Inc.*, 2005 U.S. Dist. LEXIS 40713, **5, 22-23 (E.D. Cal. May 9, 2005) (Plaintiff's fee award under ADA and Section 55 reduced twenty-percent to account for limited success.).

IV. *Fourth Error* – Ignoring the legislative history behind Section 55, which shows that the California legislature was only concerned with fee awards to prevailing plaintiffs, to conclude that that statute contains a "two-way guaranteed fee provision" for prevailing defendants.

The court of appeal's fourth error was to presume that the California legislature intended to allow prevailing defendants to request attorney fees under Section 55. That was a mistake. The California legislature designed Section 55 to promote and encourage disabled plaintiffs to seek enforcement of California's disability access statutes by guaranteeing their attorney-fees:

> While California has some of the most progressive laws in terms of removing mobility barriers, there has been a constant problem of enforcement of those laws ... The disabled in the State need the courts to back them up in their efforts to move freely in their community. However, attorneys and courts cost money and according to Federal and State statistics, the disabled are among the most financially disadvantaged. *For this reason, AB2471 is needed to allow the disabled to bring action against those builders in violation of the law without the prohibitive burden of attorney's fees and court costs.* This would put the disabled in the State on a more equal footing with their able-bodied peers.

Letter to Assemblyman Charles Warren from Saralea Altman, Legislative Chairwoman, California Coordinating Council, dated May 30, 1973 (emphasis added). The California legislature never intended for Section 55 to serve as a "two-way guaranteed fee provision," as the court of appeal believed. In fact, except for the plain language of the statute, which is ambiguous at best, no

authority has ever been offered to even *suggest* that the California legislature intended for prevailing defendants to receive fees under Section 55; and petitioner respectfully submits that the court of appeal's decision otherwise runs contrary to what the California legislature intended. Such a reading of Section 55 puts it squarely at odds with the legislative purpose and intent behind that provision:

> Starting in 1968, several laws requiring buildings and other facilities be accessible to the physically handicapped have been passed. Enforcement of these architectural barrier laws have [sic] been very weak. *Physically handicapped persons do not generally have income or resources necessary to pay for attorney fees when it is necessary to take flagrant violators to court.* This bill will make clear that the prevailing party will be entitled to attorney's fees.

Enrolled Bill Report, AB 2471, Enforcement of Architectural Barrier Laws, Analysis (September 1974) (emphasis added).

> This bill provides that a physically disabled person can give written notice of a deviation to the owner of a private facility... . If the deviation is not corrected within 90 days, the physically disabled person can then seek an injunction against further construction or operation of the nonconforming facility until the deviation is corrected.[7] *The bill also provides that if the person is successful in obtaining an injunction the court can award him reasonable attorneys' fees and court costs.*

Assembly Committee on Judiciary, Charles Warren - Chairman, Bill Digest, AB 2471, Bill Description, August 14, 1973 (emphasis added).

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[7] This notice provision was later deleted from the bill through amendment.

It is clear from the above that the intent behind what became Section 55 was – and is – to provide for an award of attorney's fees in favor of the disabled person who brings the action and prevails. This point is made all the more evident when one looks further into the legislative history of this enactment, *viz.*, Assembly Bill 1547, which laid the groundwork for AB 2471:

> If such deviation [architectural barrier] is not rectified ... a blind or physically handicapped person may bring an action for an injunction against further construction or operation of the nonconforming facility ... Such blind or physically disabled person shall not be required to post a bond ... and, *if successful in obtaining an injunction, shall be awarded reasonable attorneys' fees and court costs.*

Assembly Bill No. 1547 (proposed) (emphasis added).

> Assembly Bill 1547 would allow a blind or physically disabled person to obtain an injunction against construction or operation of a facility.... The bill would also award reasonable attorney fees and costs *to the person initiating the action.*

Bill Analysis, AB 1547, March 4, 1972 (emphasis added). Nothing in the legislative history of either AB 1547 or AB 2471 points to any sort of strict equivalence between a plaintiff and a defendant as a "prevailing party;" indeed, the legislative history points strongly in favor of a mandatory, non-discretionary award solely in favor of the disabled plaintiff. To hold otherwise would not only run contrary to the legislative record, but burden a group the California legislature found to be "the most financially disadvantaged," and who "do not generally have

income or resources necessary to pay for attorney fees," with the chilling threat of paying the *opposing party's* fees and costs. Obviously, the California legislature never intended such an absurd result, and petitioner respectfully requests the Court grant his review and overturn the underlying decision on that ground.

V. *Fifth Error* – Ignoring that Section 55 sits *in pari materia* with the ADA and other California disabled civil rights statutes – none of which permit a mandatory award of attorney fees and costs to a prevailing defendant (much less an award for non-frivolous ADA claims).

The court of appeal's fifth error was to ignore that Section 55 sits in *pari materia* with the ADA, the Unruh Act, and other provisions of the CDPA; and the what the court of appeal considered "an unfair strategic advantage over defendants" was, in fact, a conscientious decision by the California legislature to draft fee-shifting provisions, which favored prevailing plaintiffs, into the state's civil rights laws. It is an elementary principle in the interpretation of written law that statutes *in pari materia* are to be construed together. *Phalen v. Commonwealth of Virginia,* 49 U.S. 163, n.1 (1850). Similarly, when a state law is patterned after a federal law, the two are to be construed consistently with each other. *Natural Resources Defense Council v. Fish & Game Commission,* 28 Cal.App.4th 1104, 1117-18 (1994). In situations when a state law is patterned after a federal law, the federal cases interpreting the federal law offer persuasive rather

than controlling authority in construing the state law. *Moreland v. Department of Corporations*, 194 Cal.App.3d 506, 512 (1987). It is largely for this reason that California courts have often followed the federal lead by looking to federal precedent for guidance. *See, e.g., Price v. Civil Serv. Comm'n of Sacramento Cnty.*, 26 Cal.3d 257, 276 (1980); *Mixon v. Fair Employment & Hous. Comm'n,* 192 Cal.App.3d 1306, 1316-17 (1987). This has been true with respect to civil rights attorney fee and cost-shifting provisions. *See, e.g., Cummings v. Benco Bldg. Servs.,* 11 Cal.App.4th 1381, 1386-88 (1992); *Stephens v. Coldwell Banker Commercial Group, Inc.,* 199 Cal.App.3d 1394, 1405-1406 (1988) ("California courts should follow interpretations of similar federal laws in awarding attorney fees in [] discrimination cases."); *People v. Hedgecock,* 183 Cal.App.3d 810, 815-17 (1986).

Here, the Unruh Act and CDPA are but two of a series of anti-discrimination statutes enacted by the California legislature, all of which were modeled on federal civil rights laws, *e.g.*, the ADA, and share the same purpose and intent as their federal counterparts. *See, e.g., Wilson v. Murillo,* 163 Cal. App. 4th 1124, 1133 (2008); Calif. Civil Code §§ 51(f), 54(c), 54.1(d). The public policy underlying California's legislation is, thus, the same as the public policy underlying federal legislation. Because that public policy is the same, California's disabled access

laws sit *in pari materia* with the ADA, and the same rule concerning recovery of attorney's fees to a prevailing party ought to apply, petitioner respectfully submits that the award of mandatory fees to the defense violated that policy and should be overturned.

VI. *Sixth Error* – Relying on a vexatious litigant order that was criticized by the State Bar Court of California, nine Circuit Judges from the Ninth Circuit, and numerous California district courts, as being devoid of factual and legal support.

Finally, the court of appeal's analysis may have been colored by the vexatious litigant order issued against petitioner's trial counsel, attorney Thomas Frankovich, and the forty lawsuits filed by petitioner on behalf of DREES. *Song Koo Lee*, --- Cal.Rptr.3d ----, 2010 WL 396355, at *7, fn. 9, citing, *inter alia*, *Molski v. Mandarin Touch Restaurant*, 347 F.Supp.2d 860 (C.D. Cal. 2004), *affirmed sub nom, Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1064 (9th Cir. 2007) (Frankovich accused of "scorched-earth" litigation strategy, "tactical gamesmanship," and "unfair strategic advantage[s]" based on findings of vexatious litigant order.). Petitioner would respectfully suggest that reliance on that order, and consideration of his (Jankey's) litigation history, was inappropriate and does not support the *Song Koo Lee* analysis. The order in question has been widely criticized by the State Bar of California, numerous California district courts, and

nine Circuit Judges from the Ninth Circuit, as being devoid of both factual and legal support. *See, e.g., Louie v. Carichoff,* 2006 WL 662742, at *5 (E.D. Cal. March 16, 2006), citing *Wilson v. Pier 1 Imports, Inc.,* 411 F.Supp.2d 1196 (E.D. Cal. 2006) ("the reasoning of the district court in the [*Mandarin Touch Rest.*] decision has recently been compellingly refuted."). *Accord, Molski v. Evergreen Dynasty Corp.,* 521 F.3d 1215 (9th Cir. 2008) (Dissent by Kozinski, CCJ, Berzon, CJ, joined by Pregerson, Reinhardt, Hawkins, Mckeown, Wardlaw, W. Fletcher, and Paez, CJs). In fact, in its recent published decision exonerating attorney Frankovich of any ethical wrong-doing based on the conduct alleged in the vexatious litigant order, the State Bar Court of California recognized the overwhelming lack of factual, legal, and judicial support for that order:[8]

> While Judge Rafeedie made substantive findings that respondent [Frankovich] engaged in a scheme to extort ADA settlements, these findings were derived from a questionable evidentiary hearing that, according to Chief Judge Kosinski, was void of testimony and evidence. Based on the record before the court, it appears that Judge Rafeedie's findings were based more on assumption and innuendo than testimonial and documentary evidence. While Judge Rafeedie's findings were sufficient to meet the lower threshold of proof necessary to warrant pre-filing sanctions, they do not rise to the level of clear and

[8] Although a copy of the State Bar's opinion is available at http://members.calbar.ca.gov/courtDocs/04-O-15890-2.pdf, a copy of the relevant parts of this not readily accessible opinion is attached pursuant to California Rules of Court, Rule 8.504(e)(2)(C).

> convincing evidence. Any weight the court gives to Judge Rafeedie's orders is diminished by the disparity in treatment respondent has received in the federal court system. Facing a similar motion, Judge Trumbull of the Northern District declined to follow Judge Rafeedie's lead on this issue. Further, there is no indication in the record that any other court has found respondent or his client to be a vexatious litigant. This is despite the fact that respondent has filed hundreds of ADA lawsuits in the Central and Northern Districts.
>
> At first blush, the Ninth Circuit Court's affirmation of Judge Rafeedie's orders appears to bolster the State Bar's case. However, following closer examination, it's clear that the Ninth Circuit Court's holding demonstrates little aside from the fact that Judge Rafeedie's orders did not constitute an abuse of discretion. Based on the strenuous dissenting opinions voiced by Chief Judge Kozinski, and others, the Ninth Circuit Court's affirmation was hardly a ringing endorsement. [. . .]
>
> Finally, the court also considered whether the letter respondent sent defendants with each complaint supports the allegation that he was engaged in a scheme to defraud. While Judge Rafeedie found that this letter violated the Model Code of Professional Responsibility, the State Bar did not allege, and the court does not find, that it violates either the Rules of Professional Conduct or the Business and Professions Code. And although respondent's letter seeks to expedite settlement, this is not necessarily indicative of a scheme to extort.

In the Matter of Thomas Edward Frankovich, Case No. 04-O-15890, at pp. 3-11 (State Bar Court June 25, 2009). As the State Bar Court opinion succinctly summarized, the vexatious litigant order was based more on assumption and innuendo than testimonial and documentary evidence, and petitioner would respectfully suggest that the court of appeal erred by relying on its factual findings. Moreover, to the extent the court of appeal considered an award of fees under

Section 55 justified because the petitioner has filed forty ADA lawsuits, even the Ninth Circuit panel in *Mandarin Touch* found that filing a large number of complaints, standing alone, has no bearing on the merit of a claim. *Evergreen Dynasty Corp.,* 500 F.3d at 1061 (citation omitted). The similarity between the complaints filed in *Mandarin Touch* and the instant case is also of no import because the textual and factual similarity of a plaintiff's complaints, standing alone, also has no bearing on the merit of a claim. *Ibid.*, citing *Wilson v. Pier 1 Imps. (US), Inc.*, 411 F. Supp. 2d at 1201 (uniform instances of misconduct can justify uniform pleadings). Boiled to its essence, the court of appeal believed that petitioner engaged in "tactical gamesmanship" because his trial counsel was deemed a vexatious litigant (under questionable circumstances), and that mandatory fees were justified because he is one of the "small number of private plaintiffs who view themselves as champions of the disabled." *See, e.g., id.* at 1062. These beliefs were not only unfounded, they stemmed primarily from a discredited vexatious litigant order and should not have been consider.

CONCLUSION

The court of appeal in the instant action held that, because Section 55 does not on its face distinguish between a successful plaintiff and a successful defendant in a civil rights action, a successful defendant must be awarded its reasonable attorney's fees, regardless of whether *vel non* the plaintiff's claims were meritorious but simply unsuccessful. With all due respect to the court of appeal, this decision runs counter to logic, the legislative history of Section 55, and the emerging case law. Thirty years ago the Supreme Court declared that, where a piece of civil rights legislation states that a prevailing party is entitled to recover a reasonable attorney's fee, slightly different standards must apply to successful plaintiffs on the one hand and to successful defendants on the other. Thus, while a presumption exists in favor of awarding a reasonable attorney's fee to a successful plaintiff, a successful defendant may be awarded its fees against a non-prevailing plaintiff if and only if the plaintiff's claims were frivolous. That ruling has been followed and expanded upon by lower courts, both state and federal, throughout the country in the subsequent years in other areas of civil rights legislation. Consequently, the notion that because a statute does not, on its face, distinguish between plaintiffs and defendants where fees are concerned mandates a non-discretionary award of fees to a successful defendant should not be allowed to stand. Petitioner therefore

respectfully asks this Court to overturn the court of appeal's ruling and accept the Ninth Circuit's invitation to provide the courts, both state and federal, with a definitive interpretation of Section 55.

Respectfully submitted this first day of March 2010.

Scottlynn J Hubbard IV
Law Offices of Lynn Hubbard
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Chico, California 95926
Attorney for Petitioner

By: /s/ _____/

Scottlynn J Hubbard IV
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

This Petition contains 6,055 words from the cover page to signature block below.

Respectfully submitted this first day of March 2010.

Scottlynn J Hubbard IV
Law Offices of Lynn Hubbard
12 Williamsburg Lane
Chico, California 95926
Attorney for Petitioner

By: /s/ _____/
Scottlynn J Hubbard IV
Attorney for Petitioner

Attachment No. 1

Jankey v. Song Koo Lee, --- Cal.Rptr.3d ----, 2010 WL 396355 (Feb. 5, 2010)

Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 4, California.
Les JANKEY et al., Plaintiffs and Appellants,
v.
SONG KOO LEE etc., Defendant and Respondent.
No. A123006.

Feb. 5, 2010.
Certified for Partial Publication. [FN*]

San Francisco City and County Superior Court, Hon. Patrick J. Mahoney.

Thomas E. Frankovich, for Appellants.

Livingston Law Firm, Renée Welze Livingston, Jason G. Gong, for Respondent.

RUVOLO, P.J.

I.

INTRODUCTION

***1** Les Jankey (Jankey), a person with a disability who uses a wheelchair for mobility, brought an action against Song Koo Lee (Lee), the owner of K & D Market, a small grocery/liquor store in San Francisco's Mission District. The suit alleges that Lee discriminated against Jankey on the basis of his disability because architectural barriers denied him entry to the market. Jankey's action sought, among other relief, parallel causes of action for injunctive relief pursuant to the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq. (ADA)) and the California Disabled Persons Act (Civ.Code, § 54 et seq. (CDPA)). The court entered summary judgment on all causes of action for Lee, which is not at issue in this appeal.

Instead, this appeal is from an order awarding Lee his attorney fees in the amount of $118,458 under Civil Code section 55 [FN1] (Section 55), which mandates that the prevailing party in an action to enjoin a violation of disability access requirements "*shall* be entitled to recover reasonable attorney's fees." (Italics added .) Relying on the Ninth Circuit's decision in *Hubbard v. SoBreck, LLC* (9th Cir.2008) 531 F.3d 983 (*Hubbard I*), opinion amended and superseded on denial of rehearing by *Hubbard v. SoBreck, LLC* (9th Cir.2009) 554 F.3d 742 (*Hubbard II*), Jankey claims that attorney fees were improperly awarded to Lee as a prevailing defendant on Jankey's claim for injunctive relief under Section 55. *Hubbard II* held that a mandatory award of fees to a prevailing defendant under Section 55 without a showing that the plaintiff's lawsuit was frivolous, unreasonable, or groundless "is inconsistent with, and therefore preempted by, the ADA." (*Hubbard II* at p. 744.) We respectfully disagree with the *Hubbard II* court's preemption analysis, and conclude that attorney fees were properly awarded to Lee as a prevailing defendant under Section 55. We further find that the amount of attorney fees and costs was well within the trial court's discretion. Consequently, we affirm.

II.

FACTS AND PROCEDURAL HISTORY

Jankey and Disability Rights Enforcement Education Services: Helping You Help Others (DREES) [FN2] brought this lawsuit against Lee doing business as K & D Market, a small independently owned and operated grocery/liquor store that has been in the Mission District for 61 years. Lee does not own the building, but has operated the market since 1985.

Jankey asserted that Lee violated his rights by "denying plaintiffs and the class of other similarly situated persons with physical disabilities access to, the full and equal enjoyment of, opportunity to participate in, and benefit from, the goods, facilities, [and] services" offered by the market. Specifically, Jankey alleged that a four-inch step located at the entry of K & D Market was an architectural barrier that prevented him and other wheelchair bound individuals from wheeling directly into the store. Jankey claimed Lee was in violation of: (1) the ADA (42 U.S.C. § 12101 et seq.); (2) the CDPA (§ 54 et seq.); (3) the Unruh Civil Rights Act (§ 51 et seq. (the Unruh Act)); and (4) Health and Safety Code section 19955. Among other relief, Jankey's lawsuit sought injunctive relief pursuant to the ADA (42 U.S.C. § 12188(a)(2)) and under Section 55, "to make [the subject place of public accommodation] readily accessible to and usable by persons with disabilities...."

*2 Lee filed a motion for summary judgment contending that Jankey's claims were deficient because: (1) removing the threshold step at the market was not a "readily achievable task" within the meaning of the ADA; (2) Jankey was not denied reasonable access to goods and services; (3) Lee utilized alternative methods to provide goods and services to Jankey which complied with ADA requirements; (4) Jankey's claim under Health and Safety Code section 19955 was not cognizable because the market does not have a public restroom; and (5) DREES lacked standing to prosecute this lawsuit.

The trial court granted summary judgment in Lee's favor on June 12, 2008. The court found that Lee had proved his affirmative defense to all causes of action that because of the regulatory permit process, the removal of the architectural barrier and the installation of a ramp was "contrary to applicable law" and not readily achievable. The court also found that DREES lacked standing to maintain this action. As noted, the correctness of this ruling is not challenged by Jankey in this appeal.

Lee, as the prevailing party, thereafter brought a motion to recover his attorney fees under Section 55. In ruling on the fee motion, the parties below disagreed whether the trial court should apply the Ninth Circuit's decision in *Hubbard II, supra,* 554 F.3d 742, or the California appellate court's decision in *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 79 Cal.Rptr.3d 574 (*Molski*). As noted, in *Hubbard,* the court used preemption principles to require a prevailing defendant, seeking an award of attorney fees under Section 55, to show that the disabled plaintiff's claims were frivolous, unreasonable, or groundless. [FN3] (*Hubbard II, supra,* at pp. 746-747.) In *Molski,* the court held that attorney fees were automatically available to a prevailing defendant under Section 55, notwithstanding that the disabled plaintiff's claims could not be characterized as frivolous. (*Molski, supra,* 164 Cal.App.4th at p. 791, 79 Cal.Rptr.3d 574.)

Upon considering the parties' arguments, the trial court determined that the *Molski* court's analysis controlled, and that Lee was entitled to a mandatory award of attorney fees under Section 55. The court made no finding on whether Jankey's lawsuit could be characterized as frivolous. The court awarded Lee $118,458 in attorney fees and $3,544.54 in costs. Judgment was entered on August 28, 2008. Jankey then filed an appeal from the court's award of attorney fees and costs to Lee.

III.

DISCUSSION

A. Standard of Review

Generally, a trial court's determination of whether a party is entitled to an award of attorney fees, and the calculation of such a fee award, are both reviewed for abuse of discretion. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 315, 193 Cal.Rptr. 900, 667 P.2d 704; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 621, 98 Cal.Rptr.2d 388.) However, Jankey claims the trial court used the wrong legal standard in granting Lee attorney fees under Section 55. "[A]lthough the normal standard of review regarding an attorney fees award is abuse of discretion, 'discretion may not be exercised whimsically, and reversal is required where there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied.' [Citation.]" (*Ramos v. Countrywide Home Loans, Inc., supra,* at p. 621, 98 Cal.Rptr.2d 388.) In determining whether the court used the correct legal standard in awarding attorney fees, de novo review is required. (*Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1308, 39 Cal.Rptr.3d 589; *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 448-449, 118 Cal.Rptr.2d 475.)

B. Analysis

***3** Jankey's argument that Section 55's mandatory fee award provision is preempted by the discretionary standard under the ADA is supported by the Ninth Circuit's decision in *Hubbard II, supra,* 554 F.3d 742. [FN4] The complaint filed by the disabled plaintiffs in *Hubbard* alleged, among other things, that the defendant restaurant owners violated both the federal ADA and California's CDPA. The court entered judgment for the defendants, finding that plaintiffs had failed to show that the alleged barriers denied them full and equal enjoyment of the restaurants' services and facilities. (*Id.* at p. 744.) Defendants then moved for attorney fees under the ADA and Section 55 of the CDPA. (*Hubbard II, supra,* at p. 744.) The district court concluded that attorney fees were not warranted under the ADA because the plaintiffs' claims for injunctive relief were not frivolous, but awarded defendants attorney fees under Section 55 of the CDPA, which is mandatory and guarantees attorney fees to a prevailing party. (*Hubbard II, supra,* at p. 744.) Plaintiffs appealed.

Although the issue of preemption was not raised or ruled on in the district court, the Ninth Circuit reversed and vacated the award of attorney fees to the prevailing defendants under Section 55, because the court believed the attorney fee award was inconsistent with, and thus preempted by, the ADA. (*Hubbard II, supra,* 554 F.3d at p. 744.) The *Hubbard* court noted that, while both plaintiffs and defendants may be declared prevailing parties under the ADA, attorney fees may not be awarded to a prevailing defendant under the ADA unless the defendant establishes that the plaintiff's suit was frivolous. (See *Summers v. A. Teichert & Son, Inc.* (9th Cir.1997) 127 F.3d 1150, 1154 (*Summers*) [adopting Title VII standard in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (*Christiansburg*), for defendants to recover attorney fees under the ADA].) [FN5]

The *Hubbard* court went on to point out that a violation of the ADA constitutes a violation of the CDPA. (See §§ 54, subd. (c), 54.1, subd. (d), 54.2, subd. (b).) (*Hubbard II, supra,* 554 F.3d at p. 745.) Consequently, the proof required to establish a violation of the CDPA and the ADA is identical, and "it is impossible to distinguish the fees necessary to defend against the CDPA claim from those expended in defense of the ADA claim...." (*Id.* at p. 745.) Accordingly, "a grant of fees on the California cause of action is necessarily a grant of fees as to the ADA claim." (*Ibid.*) Because the ADA bars fees to defendants for nonfrivolous actions, the *Hubbard* court concluded "preemption principles preclude the imposition of fees on a plaintiff for bringing non-frivolous claims under state law that parallel claims also filed pursuant to the federal law. [Citation.]" (*Ibid.*)

A few days after the *Hubbard I* opinion was issued, the court in *Molski, supra,* 164 Cal.App.4th 786, 79 Cal.Rptr.3d 574, addressed the question of whether Section 55 authorizes a fee award in favor of a prevailing defendant, regardless of whether the plaintiff's claims could be characterized as frivolous. In *Molski,* the plaintiff filed an action alleging that he encountered barriers to wheelchair access while visiting the defendant winery. After his federal action

was dismissed, Molski filed a lawsuit in state court asserting claims for relief under the Unruh Act, the CDPA, Health and Safety Code section 19955, and for injunctive relief under Section 55. (*Molski, supra,* at p. 789.) The trial court ultimately granted defendant's motion for judgment on the pleadings. (*Id.* at p. 790, 79 Cal.Rptr.3d 574.) The defendant then moved to recover attorney fees as the prevailing party under Section 55 for fees incurred in both the federal and state court proceedings. (*Molski, supra,* at p. 790.) The trial court awarded defendant its attorney fees for the state court action only. (*Ibid.*) Plaintiff appealed.

*4 On appeal, the appellate court first found Section 55's mandatory language to be unambiguous authorizing "bilateral fee recovery" for both prevailing plaintiffs and prevailing defendants. (*Molski, supra,* 164 Cal.App.4th at p. 790, 79 Cal.Rptr.3d 574.) Next, the court determined that the defendant winery was the "prevailing party" because Molski had obtained none of the relief he sought. (*Id.* at p. 791, 79 Cal.Rptr.3d 574.)

The court then considered Molski's assertion that, "notwithstanding the plain language of section 55 and the outcome of this litigation," attorney fees should not be assessed against a plaintiff unless the defendant demonstrates that the claims were frivolous. (*Molski, supra,* 164 Cal.App.4th at p. 791, 79 Cal.Rptr.3d 574.) The *Molski* court rejected plaintiff's assertion that the *Christiansburg* standard (434 U.S. at p. 421) should be applied to Section 55 as well. The *Molski* court noted that *Christiansburg* involved a case brought under Title VII, not to "access litigation in California state court, where a plaintiff controls the relative risks, burdens and benefits by selecting from among several statutory options." (*Molski, supra,* at p. 791.) Specifically, the *Molski* court noted that, unlike a Title VII plaintiff, a plaintiff prosecuting an access claim in California "has several alternatives under California law" and can seek relief under the Unruh Civil Rights Act, the CDPA, or he or she can file an action under Section 55 for injunctive relief. (*Molski, supra,* at pp. 791-792.)

The *Molski* court noted that a plaintiff could seek monetary relief under section 54 of the CDPA or section 51 of the Unruh Act without being exposed to the risk of an adverse judgment for attorney fees. Because fees are only authorized for prevailing plaintiffs, the same is not true when a plaintiff seeks relief under Section 55 to enjoin a technical violation of California's access laws. (*Molski, supra,* 164 Cal.App.4th at p. 792, 79 Cal.Rptr.3d 574.) By including a claim for injunctive relief under Section 55, Molski knew that he could be exposed to an adverse fee award, and therefore "ha[d] something to lose if he ... [did] not carefully assess the merits" of his claim. (*Ibid.*) The court concluded that entitling a prevailing defendant to fees on the same basis as a prevailing plaintiff under Section 55, without a finding that the plaintiff's claims were frivolous, does not violate "[t]he spirit of California's statutory scheme." (*Ibid.*) A plaintiff should be held accountable for "the consequences of this scorched earth strategy" of electing to pursue every available statutory option available to enforce his right of access under California law, thereby "maximiz [ing] the litigation expenses of his adversary." (*Ibid.*)

In response to the *Molski* opinion, the Ninth Circuit granted a petition for rehearing in *Hubbard I, supra,* 531 F.3d 983 and issued an amended opinion. (*Hubbard II, supra,* 554 F.3d 742.) Although the Ninth Circuit reaffirmed its ultimate conclusion that the defendants' mandatory award of attorney fees under Section 55 was preempted by the ADA, the court acknowledged that *Molski* upheld an award of attorney fees to a prevailing defendant on a Section 55 claim found not to be frivolous. (*Hubbard II, supra,* at p. 745.) The *Hubbard* court went on to note that under Section 55 "[f]ees are not discretionary; they are mandatory.... Given this language, we have no basis for doubting that the California Supreme Court will agree with *Molski* as to the meaning of Section 55. [Citation.]" [FN6] (*Hubbard II, supra,* at p. 745.)

*5 The *Molski* court had no reason to address the preemption issue Jankey raises because the plaintiff in *Molski* had voluntarily dismissed his federal claims under the ADA, and the operative complaint contained only state law claims when attorney fees were awarded. (*Molski, supra,* 164 Cal.App.4th at p. 789, 79 Cal.Rptr.3d 574.) Thus, it is unsurprising that the court's opinion in *Molski* does not contain a word about parallel state and federal claims for injunctive relief, nor does it address whether federal preemption principles preclude giving effect to the provision in Section 55, which automatically grants attorney fees to prevailing defendants.

Procedurally, the case before us is analogous to *Hubbard,* where the plaintiff made parallel claims for injunctive relief under the ADA and Section 55 of the CDPA, and the defendant prevailed on the ADA claim for the same reasons he prevails on the CDPA claim. [FN7] Because the instant case is procedurally identical to *Hubbard,* and *Molski, supra,* 164 Cal.App.4th 786, 79 Cal.Rptr.3d 574 did not directly address this issue, we must decide whether *Hubbard's* preemption analysis has merit. (*Wagner v. Apex Marine Ship Management Corp.* (2000) 83 Cal.App.4th 1444, 1451, 100 Cal.Rptr.2d 533 [" ' "decisions of the lower federal courts, while persuasive, are not binding on us." ' "].)

We start with long-settled preemption principles. "Whether federal law preempts state law is fundamentally a question whether Congress has intended such a result. [Citations.] [¶] The 'starting presumption' is that Congress has not so intended. [Citations.] [¶] Preemption of state law by federal law is found in 'three circumstances.' [Citations.] [¶] First, there is so-called 'express preemption': 'Congress can define explicitly the extent to which its enactments pre-empt state law.' [Citations.] [¶] Second, there is so-called 'field preemption': '[S]tate law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.' [Citations.] [¶] Third, there is so-called 'conflict preemption': '[S]tate law is pre-empted to the extent that it actually conflicts with federal law.' [Citations.] Such conflict must be 'of substance and not merely trivial or insubstantial.' [Citation.] It exists when it is 'impossible ... to comply with both state and federal requirements' [citations] or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' underlying federal law [citations]." (*Peatros v. Bank of America* (2000) 22 Cal.4th 147, 157-158, 91 Cal.Rptr.2d 659, 990 P.2d 539; *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 698-699, 104 S.Ct. 2694, 81 L.Ed.2d 580.) In determining whether a state statute is preempted by federal law, courts may find preemption only when congressional intent is " 'clear and manifest.' " (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371-1372, 104 Cal.Rptr.2d 197; *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700.)

In considering the different categories of federal preemption, it appears the *Hubbard* court employed a conflict preemption analysis. According to *Hubbard,* a violation of the ADA is a violation of the CDPA (§§ 54, subd. (c), 54.1, subd. (d), 54.2, subd .(b)), and it is "impossible to distinguish the fees necessary to defend against the CDPA claim from those expended in defense against the ADA claim...." (*Hubbard II, supra,* 554 F.3d at p. 745.) Because the ADA bars attorney fees to defendants for nonfrivolous actions, the *Hubbard* court believed that the mandatory fee award to a prevailing defendant under Section 55 of the CDPA was inconsistent with and thus preempted by the ADA.

***6** In our view, *Hubbard* improperly used conflict preemption principles to decide the issue before it, and in applying those principles, erroneously concluded that the ADA and Section 55 were in conflict. Certainly, there is nothing in the ADA which would support *Hubbard's* conclusion that in enacting the ADA, Congress intended to impose uniform standards for complementary state law remedies. In fact, the ADA's express preemption clause, which is not even mentioned in *Hubbard,* leads to the opposite conclusion.

The ADA has explicitly defined the extent to which its enactment preempts other laws. The text of that provision provides that "[n]othing in [the ADA] shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State ... that provides greater or equal protection for the rights of individuals with disabilities than are afforded by [the ADA]." (42 U.S.C. § 12201(b).) Accordingly, rather than express an intent to displace state law in the field of disability discrimination, Congress envisioned that a plaintiff will be permitted to pursue state law remedies simultaneously with the remedies provided under the ADA, which may potentially provide the plaintiff with equal or greater relief than he or she may be entitled to under the ADA alone. (See *Dichner v. Liberty Travel* (1st Cir.1998) 141 F.3d 24, 32 ["the ADA anticipates that disabled persons will enjoy the full protection of both federal and state antidiscrimination schemes"]; *Wood v. County of Alameda* (N.D.Cal.1995) 875 F.Supp. 659, 665 (*Wood*) ["plaintiffs are free to bring suit under *both* state statutes and the ADA, to the extent that those state laws are consistent with the accomplishment of the federal purposes stated in the federal law"]. (Original italics.).)

It has been recognized that the express purpose of the ADA's preemption provision is to maximize the options available to plaintiffs by ensuring that the ADA provides a "floor" for a plaintiff's rights and remedies while freeing the states to construct a statutory "ceiling." (*Wood, supra,* 875 F.Supp. at p. 663.) In California, the Legislature has proclaimed its intent that California provide more protection to individuals than the ADA: "The law of this state in the area of disabilities provides protections independent from those in the federal [ADA].... Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections." (Gov.Code, § 12926.1, subd. (a).)

Indeed, a perusal of the array of remedies available under California law leads quickly to the inescapable conclusion that the protections of state law go far beyond the ADA. As noted, the ADA provides only injunctive relief, not money damages. (42 U.S.C. § 12188(a)(2).) In contrast, both the Unruh Act and the CDPA allow a plaintiff who is denied equal access or accommodation to sue for money damages. (§§ 52, 54.3.) The importance of this expansion of remedies was explained by the court in *Pickern v. Best Western Timber Cove Lodge Marina* (E.D.Cal.2002) 194 F.Supp.2d 1128: "After the ADA was passed in 1990, the California Disabled Persons Act and the Unruh Civil Rights Act were amended to provide that a violation of the ADA constitutes a violation of their provisions. [Citations.] Thus, a plaintiff whose rights are violated under the ADA may now seek damages under the California statutes...." (*Id.* at p. 1131.) More recently, our Supreme Court settled a disagreement among the appellate courts and held that a plaintiff who seeks damages under section 52, claiming the denial of full and equal treatment on the basis of disability in violation of the Unruh Act and the ADA, need not prove intentional discrimination. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665, 94 Cal.Rptr.3d 685, 208 P.3d 623.)

*7 Furthermore, when money damages are sought under both the CDPA and the Unruh Act, the attorney fee provisions offer a unique departure from the ADA's bilateral attorney fee provision. Under the CDPA and the Unruh Act, the prevailing plaintiff is entitled to seek recovery of attorney fees, but a prevailing defendant is not similarly entitled to fees. (See §§ 54.3, 52, subd. (a); *Molski, supra,* 164 Cal.App.4th at pp. 791-792, 79 Cal.Rptr.3d 574.)

As noted, unlike the ADA, which makes attorney fee recovery discretionary (42 U.S.C. § 12205), attorney fees are mandatory under Section 55. Consequently, if the plaintiff proves a single violation of a broad range of statutory requirements, of which a violation of the ADA is merely a subset, the plaintiff is *guaranteed* an attorney fee award. Far from weakening the rights of plaintiffs, the legislative history reveals that the California Legislature designed Section 55's guaranteed attorney fee provision to promote, and encourage plaintiffs to seek enforcement of California's disability access statutes. [FN8]

The fact that the Legislature decided to impose a two-way guaranteed fee provision does not put Section 55 in irreconcilable conflict with the ADA or abrogate the scope of the rights available under the ADA in any fashion. Section 55, like other provisions of the CDPA and the Unruh Act, provides greater incentives and rights to a person pursuing a disability access claim in California. The risk that a plaintiff will be liable to a defendant for attorney fees if a Section 55 injunction claim fails is more than offset by the greater rights afforded a plaintiff, including money damages and a guaranteed attorney fee recovery in all instances where the plaintiff prevails.

The *Hubbard* court also went astray when it failed to look at the CDPA as a whole in measuring it against the ADA's protection, and instead improperly parsed the law. We have found no legal authority requiring each and every element of a multi-faceted state remedial act to offer equal or greater benefits under all circumstances over a similar federal law in order to avoid a preemption finding. Rather than dissecting the fee provision as did *Hubbard,* when Section 55's role and purpose within the CDPA is considered, it represents precisely the kind of state law authorized by 42 U.S.C. section 12201(b)--a law where "the potential available remedies would be greater than those available under the ADA...." (Appen. to 29 C.F.R. § 1630.1, subds. (b)(c) (2009), p. 369.)

Lastly, *Hubbard* failed to acknowledge the point so persuasively made by *Molski* that, in California, "a plaintiff controls the relative risks, burdens and benefits by selecting among several statutory options," and that by invoking Section 55, Jankey knew he "ha[d] something to lose if he ... [did] not carefully assess the merits" of his claim. (*Molski, supra,* 164 Cal.App.4th at pp. 791-792, 79 Cal.Rptr.3d 574.) In this case, Jankey chose to pursue claims for injunctive relief under *both* the ADA and Section 55. If his lawsuit had been successful, he certainly would have claimed a mandatory right to attorney fees under Section 55. Nullifying Section 55 to the extent that it guarantees prevailing defendants attorney fees now that Jankey has lost would give him all the benefits of a "scorched-earth" litigation strategy while incurring none of the risks. (*Molski, supra,* at p. 792.) Moreover, if we accepted Jankey's argument, it would result in giving plaintiffs in disability discrimination litigation an unfair strategic advantage over defendants, who will be subject to Section 55's mandatory attorney fee provision if they lose and the ADA's discretionary attorney fee provision if they win. This result would potentially inject even greater tactical gamesmanship into an area of the law where gamesmanship is already an acute concern. (See generally *Molski v. Mandarin Touch Restaurant* (C.D.Cal.2004) 347 F.Supp.2d 860, 863.) [FN9]

***8** We therefore reject Jankey's claim, based on *Hubbard II, supra,* 554 F.3d 742, that "[t]he discretionary attorneys' fee provision of the ADA and the mandatory nature of fees under section 55 raise [an irreconcilable] conflict" and that "preemption principles preclude the imposition of fees on [Jankey] unless the trial court was to find that [his] action was frivolous, unreasonable, or groundless." We conclude no such finding was required under Section 55, nor is the statute preempted by the ADA. Accordingly, the trial court properly awarded Lee, as the prevailing party, his attorney fees in this case.

C. Amount of Attorney Fees Award [FN**]

IV.

DISPOSITION

The judgment is affirmed. Lee is entitled to his costs and an award of attorney fees on appeal in an amount to be determined in the trial court. (See Cal. Rules of Court, rule 8.278(a)(1); *Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927, 275 Cal.Rptr. 187, 800 P.2d 543 ["statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals."].)

We concur: SEPULVEDA and RIVERA, JJ.

FN* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part III.C.

FN1. All undesignated statutory references are to the Civil Code. Section 55 also provides that "[a]ny person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code, or Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation."

FN2. DREES is described in Jankey's pleadings as a nonprofit organization "that works with persons with disabilities to empower them to be independent in American society."

FN3. For simplicity's sake, we will hereafter use the single term "frivolous" to denote claims that are "frivolous, unreasonable or groundless."

FN4. The relevant language regarding preemption in *Hubbard I, supra,* 531 F.3d 983, and *Hubbard II, supra,* 554 F.3d 742, is identical. Therefore, for the sake of convenience, our references to *Hubbard* are to *Hubbard II* unless otherwise noted.

FN5. In prescribing the appropriate criteria for discretionary decisions whether to award attorney fees to a prevailing defendant under the ADA, the Ninth Circuit in *Summers* applied the test established for Title VII employment discrimination cases in *Christiansburg, supra,* 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648. That is, where the prevailing party in an ADA action is the defendant, the court may award fees only if the plaintiff's action is found to be "frivolous, unreasonable, or without foundation." (*Id.* at p. 421; see, *Summers, supra,* 127 F.3d at p. 1154.) No argument is made in this appeal that *Summers* was incorrect by using the *Christiansburg* standard in an ADA context.

FN6. The California Supreme Court denied review of the *Molski* decision on October 16, 2008 (S165946).

FN7. However, we point out one difference in *Hubbard* and the instant case. While the prevailing defendants in *Hubbard* moved for attorney fees and costs pursuant to both the ADA and Section 55 of the CDPA (*Hubbard II,supra,* 554 F.3d at p. 744), Lee sought attorney fees under Section 55 only.

FN8. In working to pass Assembly Bill 2471 during the 1973-1974 legislative session, which became Section 55, a proponent of the bill wrote: "The disabled in the State need the courts to back them up in their efforts to move freely in their community. However, attorneys and courts cost money and according to Federal and State statistics, the disabled are among the most financially disadvantaged. For this reason, AB2471 is needed to allow the disabled to bring action against those builders in violation of the law without the prohibitive burden of attorney's fees and court costs. This would put the disabled in the State on a more equal footing with their able-bodied peers." (Saralea Altman, Legis. Chairwoman, Cal. Coordinating Council, letter to Assemblyman Charles Warren, May 30, 1973.)

FN9. This concern is hardly speculative. The similarity between the complaints filed in *Molski* and the instant case goes beyond mere coincidence. Both Jankey and Molski are represented by the same attorney--Thomas Frankovich. As one court has noted, complaints filed by Frankovich on behalf of plaintiffs invariably combine an ADA claim with claims under the Unruh Act, the CDPA, and the Health and Safety Code. (*Molski v. Mandarin Touch Restaurant* (C.D.Cal.2005) 359 F.Supp.2d 924, 926.) Indeed, the court in that case found that *all* 223 of the Frankovich complaints it examined combined roughly the same causes of action. (*Ibid.*)
Moreover, as the *Molski* opinion noted, Frankovich is subject to a prefiling order in federal court. (*Molski, supra,* 164 Cal.App.4th at p. 789, 79 Cal.Rptr.3d 574; see *Molski v. Evergreen Dynasty Corp.* (9th Cir.2007) 500 F.3d 1047, 1064 ["district court's pre-filing sanction is sufficiently tailored to combat the Francovich Group's practice of repetitive litigation based on false allegations of injury"].) It noted further that while 156 such lawsuits were filed on behalf of Molski, another 40 were filed on behalf of Jankey or Patrick Connally, the president of DREES. (*Molski v. Mandarin Touch Restaurant, supra,* 359 F.Supp.2d at p. 926.)

FN** See footnote *, *ante*.

END OF DOCUMENT

Attachment No. 2

In the Matter of Thomas Edward Frankovich,
Case No. 04-O-15890 (State Bar Court June 25, 2009)

FILED JUNE 25, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No.: **04-O-15890-PEM;**
	)	**06-J-13032 (Cons.)**
THOMAS EDWARD FRANKOVICH	)	
	)	**DECISION**
Member No. 74414	)	
	)	
A Member of the State Bar.	)	

I. Introduction

The aggressive pursuit of litigation involving violations of the Americans with Disabilities Act (ADA) has become a highly contested area of law. Attorneys, such as respondent Thomas Edward Frankovich, who seek out and profit from violations of the ADA are at the center of this controversy. Some see these attorneys as champions of the disabled, while others view them as unscrupulous pariahs. The flames of this controversy have spread beyond the realm of public opinion and into the federal court system.

In this contested matter, respondent is alleged to have committed multiple acts of misconduct involving his federal ADA practice. Said misconduct includes scheming to extort settlements, seeking to mislead a judge, and committing acts of moral turpitude. Respondent is also charged with an unrelated allegation that he committed misconduct in a foreign jurisdiction by improperly communicating with a represented party. Based on the evidence presented at trial,

C. Respondent's ADA Practice - Case No. 04-O-15890

1. Findings of Fact

Background

The ADA, 42 U.S.C. §12101 et seq., was signed into law in 1990. Its stated goal is to remedy discrimination against individuals with disabilities. A major source of discrimination suffered by disabled individuals is the inability to gain access to public accommodations. Title III of the ADA, 42 U.S.C. §12181 et seq., requires the removal of structural barriers in existing public accommodations "where such removal is readily achievable." Where removal of the barrier is not readily achievable, the facility must provide access through alternative methods if such methods are readily achievable. (U.S.C. §12182(b)(2)(A)(v).)

To enforce Title III, the ADA contains both a private right of action, 42 U.S.C. §12188(a), and a right of action for the Attorney General, 42 U.S.C. §12188(b). While the Attorney General may seek monetary damages on behalf of an aggrieved party, the only remedies available under the private right of action are injunctive relief and the recovery of attorneys' fees and costs. (42 U.S.C. §12188(a)(1); 42 U.S.C. §2000a-3(a).)

On the other hand, California's state civil rights law amplifies the available scope of relief by permitting the recovery of money damages. Because violations of the ADA also constitute a violation of California's Unruh Civil Rights Act (Cal. Civ. Code §51(f)) and the California Disabled Persons Act (Cal. Civ. Code §54(c)) plaintiffs can sue in federal court for injunctive relief under the ADA, and tack on state law claims for money damages under the Unruh Act and the California Disabled Persons Act.

In 2004, respondent filed at least 223 lawsuits in the United States District Courts for the Northern and Central Districts of California alleging violations of the ADA. Of those lawsuits,

156 were filed on behalf of Jarek Molski,[2] and 40 were filed on behalf of either Les Jankey[3]or Patrick Connally.[4] Disability Rights Enforcement Education Services (DREES) was a co-plaintiff in all of the lawsuits.

Molski Found to be a Vexatious Litigant in the Central District Court of California

In or about 2004, respondent filed an ADA action on behalf of Mr. Molski entitled *Molski v. Evergreen Dynasty Corporation d/b/a Mandarin Touch Restaurant, et al.*, United States District Court, Central District of California, Case No. CV 04-0450 ER. Defendant Evergreen Dynasty, doing business as Mandarin Touch Restaurant, sought an order declaring Mr. Molski a vexatious litigant and requiring him to obtain leave of court before filing additional ADA suits. On November 15, 2004, District Court Judge Edward Rafeedie presided over a hearing on this issue.

In determining that Mr. Molski was a vexatious litigant, Judge Rafeedie applied five factors set forth in *Safir v. United States Lines, Inc*, 792 F.2d 19, 24 (2d Cir. 1986). These factors include: (1) the litigant's history of litigation, in particular whether it entailed vexatious, harassing or duplicative suits; (2) the litigant's motive in pursuing the litigation, for example, whether the litigant had a good faith expectation of prevailing; (3) whether the litigant was represented by counsel; (4) whether the litigant caused unnecessary expense to the parties or placed needless burden on the courts; and (5) whether other sanctions would be adequate to protect the courts and other parties.

Judge Rafeedie found that Mr. Molski had filed approximately 400 lawsuits alleging violations of ADA in the federal courts since 1998. Many of these were nearly identical in terms of the facts alleged, the claims presented, and the damages requested. Judge Rafeedie found it very unlikely that Mr. Molski suffered the same injuries, often multiple times in one day.

---

[2] Mr. Molski resides in Woodland Hills, California, and is an individual who is paralyzed from the chest down and uses a wheelchair for mobility.

[3] Mr. Jankey is an individual who relies on a wheelchair for mobility.

[4] Mr. Connally is a disabled individual and president of Disability Rights Enforcement Education Services.

Judge Rafeedie further found that Mr. Molski's primary motivation for filing ADA lawsuits was to extract a cash settlement. This finding was based on the fact that Mr. Molski always raised additional state law claims that allow for the recovery of money damages. Moreover, Judge Rafeedie concluded that because an overwhelming majority of the cases settle, with a significant minority dismissed for a violation of a court order or failure to prosecute the claim, it calls into question Mr. Molski's good faith expectation of prevailing on the merits of his claim, and suggests that he does not have a reasonable expectation (or intention) of litigating the suit on the merits.

Additionally, the Judge Rafeedie determined that since Mr. Molski was represented by counsel in every lawsuit the court was aware of, Moslki was not entitled to the protection generally accorded *pro se* litigants. The court further reasoned that since Mr. Molski filed countless numbers of vexatious claims, he caused needless expense to other parties and obviously burdened the courts.

Therefore, on December 9, 2004, Judge Rafeedie issued an order declaring Mr. Molski a vexatious litigant and ordering him to obtain leave of court before filing any other lawsuits alleging violations of the ADA in the United States District Court for the Central District of California.

Molski Aided by Respondent

In his December 9, 2004 order, Judge Rafeedie noted that Mr. Molski had not acted alone. Judge Rafeedie acknowledged that Mr. Molski was aided and abetted by his attorneys, often respondent's law offices, and his corporate co-plaintiff DREES. For that reason, Judge Rafeedie issued an order to show cause against respondent's law office to show why they should not be required to obtain leave of court to file any future lawsuits alleging violations of the ADA.

On March 8, 2005, Judge Rafeedie issued a memorandum decision ordering respondent to obtain leave of court before filing any new complaints alleging violations of Title III of the ADA in the United States District Court for the Central District of California. This decision was based on the following factual findings: (1) respondent's law firm filed at least 223 lawsuits in the Northern and Central

Districts of California in 2004, one-third of which were against ethnic restaurants; (2) because of the similarity and multitude of Mr. Molski's injuries, many of his claimed physical injuries were contrived; (3) the only reason respondent made a claim for physical injury in every complaint was to invoke the personal injury provisions of defendant's insurance policy; and (4) respondent's law firm had aggressively and unethically pursued and obtained a high rate of cash settlements - indicative of an extortion scheme.

The basis for Judge Rafeedie's finding that respondent unethically pursued cash settlements was the letter respondent sent defendants with each complaint. Judge Rafeedie found that this letter violated the Model Code of Professional Responsibility in that it: (1) advised an unrepresented party against obtaining counsel; (2) provided a considerable amount of legal advice on pursuing a claim against the defendant's insurance company; and (3) advised the unrepresented party that it does not have "a bona fide defense" to the lawsuit and recommended a quick settlement, rather than wasting money on "needless litigation." Judge Rafeedie further concluded that the only reason respondent waited a year before filing suit was to intimidate small businesses by increasing the statutory damages claim.

Molski Found not to be a Vexatious Litigant in the Northern District Court of California

Once Judge Rafeedie declared Mr. Molski a vexatious litigant in the Central District Court of California, defendants in *Jarek Molski et al v. Rapazzini Winery*, brought a motion to declare Mr. Molski a vexatious litigant in the Northern District Court of California. However, on April 6, 2005, the Honorable Patricia V. Trumbull declined to follow Judge Rafeedie's ruling.

After examining the contents of Mr. Molski's pleadings, Judge Trumbull found that his ADA claims were not frivolous, and that Mr. Molski provided reasonable explanations for the number of violations he discovers and for the number of injuries he suffers. Judge Trumbull disagreed with Judge Rafeedie's conclusion that Mr. Molski's high settlement rate and failure to take cases through trial evidenced lack of a good faith expectation of prevailing on the merits. Judge Trumbull instead

concluded that a high settlement rate is merely a fact of modern litigation. Judge Trumbull further concluded that Mr. Molski did not cause needless expense to the federal court system because he has a right to seek redress in federal court, even though he also seeks remedies under pendant state claims that are not available under federal law.

Respondent's Appeal of the Central District Court's Findings

Respondent appealed and the Ninth Circuit Court of Appeal reviewed Judge Rafeedie's orders for abuse of discretion.[5] On August 31, 2007, the Ninth Circuit Court of Appeal issued an opinion affirming Judge Rafeedie's orders declaring Mr. Molski a vexatious litigant and requiring that he and respondent obtain leave of court prior to filing any new ADA complaints.

After the Ninth Circuit affirmed Judge Rafeedie's orders, respondent filed a petition for rehearing. The panel denied the petition for rehearing, but not without vigorous dissent. In his dissenting opinion, Chief Judge Alex Kozinski argued that Judge Rafeedie had no basis to find that Mr. Molski made meritless claims or lied about his injuries. In his scathing assessment of Judge Rafeedie's "hearing," Judge Kozinski wrote:

> Oh, sure, the docket indicates (somewhat misleadingly) that a "hearing" was held on the vexatious litigant motion, but it plainly was not an evidentiary hearing. What happened instead is this: The judge spent the first half of the hearing berating Molski and his lawyers, in pretty much the same terms as his subsequent order-which suggests that his views were cast in cement by the time of the "hearing." [Citations.] After the judge was done, Molski's counsel was allowed to address the court, [Citation], but no witnesses testified, no evidence was presented, there was no cross-examination and there were no evidentiary rulings-in short, there was no trial. Molski, whose veracity the district court impugned, was not even present.
>
> How then did the judge manage to make factual findings, and how does this panel affirm those findings on appeal? It's bad enough that the panel relies on its own armchair wisdom about plaintiff's supposed ability to avoid repetitive injuries, [Citation], rather than looking to whether the record supports the findings of the district court. Worse still is that there is no record the panel could consult if

[5] Abuse of discretion can be found when a district court bases its decision on an incorrect view of the law or a clearly erroneous finding of fact. (*United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir.2002); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996).)

it were of a mind to do so. There is no statement at all from Molski himself, as the complaint is not verified. The panel does not find the absence of an evidentiary record remarkable, perhaps laboring under the mistaken impression that there must be an evidentiary record somewhere under all that paper. Still and all, those of us unfamiliar with the alchemy of making findings based on no evidence-and affirming them based on no record-would dearly love to know why the absence of an evidentiary record is not an insuperable obstacle to affirming a district court's factual finding.

The bottom line is this: The district court made, and the panel affirms, a finding that Molski is a liar and a bit of a thief, without any evidence at all. The district court and the panel also manage to find that plaintiff just couldn't have suffered the injuries he alleges, without the benefit of an expert or any other proof. But does the district court have authority to make findings that severely curtail access to the federal court, not only for plaintiff but also for his lawyers and their other clients (present and future), without swearing in a single witness? Without giving notice and an opportunity to present evidence? Without cross-examination? Without any of the other rudiments of due process? Isn't Molski at least entitled to get on the stand, look the judge in the eye and tell his story?

2. Conclusions of Law

Count One: Moral Turpitude –Scheme to Extort (Bus. & Prof. Code § 6106)[6]

Moral turpitude has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general . . . . [Citations.] Moral turpitude has also been described as any crime and misconduct committed without excuse [citations] or as any 'dishonest or immoral' act, not necessarily a crime. [Citations.] The concept of moral turpitude depends upon the state of public morals . . . as well as on the degree of public harm produced by the act in question." (*In re Higbie* (1972) 6 Cal.3d 562, 569-570.)

The State Bar alleges that respondent engaged in a scheme to extort by: (1) filing claims that contained false and contrived claims of bodily injury; (2) filing numerous complaints alleging plaintiffs had been injured numerous times in a single day; (3) making misleading statements to defendants about hiring counsel, the merits of their defense, and discussing

[6] All references to section are to Business and Professions Code, unless otherwise indicated.

whether their insurance might cover any claims; and (4) not notifying the defendants of the claim until after significant time had passed so that a large daily damage total could accumulate.

The State Bar has the burden of proving that respondent is culpable by clear and convincing evidence. The State Bar's case, however, relies almost entirely on: (1) Judge Rafeedie's orders, (2) the Ninth Circuit Court's decision affirming Judge Rafeedie's orders, and (3) the testimony of James Link.

While Judge Rafeedie made substantive findings that respondent engaged in a scheme to extort ADA settlements, these findings were derived from a questionable evidentiary hearing that, according to Chief Judge Kosinski, was void of testimony and evidence. Based on the record before the court, it appears that Judge Rafeedie's findings were based more on assumption and innuendo than testimonial and documentary evidence. While Judge Rafeedie's findings were sufficient to meet the lower threshold of proof necessary to warrant pre-filing sanctions, they do not rise to the level of clear and convincing evidence.

Any weight the court gives to Judge Rafeedie's orders is diminished by the disparity in treatment respondent has received in the federal court system. Facing a similar motion, Judge Trumbull of the Northern District declined to follow Judge Rafeedie's lead on this issue. Further, there is no indication in the record that any other court has found respondent or his client to be a vexatious litigant. This is despite the fact that respondent has filed hundreds of ADA lawsuits in the Central and Northern Districts.

At first blush, the Ninth Circuit Court's affirmation of Judge Rafeedie's orders appears to bolster the State Bar's case. However, following closer examination, it's clear that the Ninth Circuit Court's holding demonstrates little aside from the fact that Judge Rafeedie's orders did not constitute an abuse of discretion. Based on the strenuous dissenting opinions voiced by

Chief Judge Kozinski, and others, the Ninth Circuit Court's affirmation was hardly a ringing endorsement.

The court also took into consideration the testimony of attorney James Link. Mr. Link's practice is made up of litigation and appellate work. In the last four years, he's worked on 80 cases where ADA was an issue. Of these 80 ADA cases, Mr. Link never represented a plaintiff. Mr. Link opinioned that respondent overbills, works cases longer than needed, and asks for outrageous attorney fees. The court, however, found Mr. Link to be a biased witness considering his perspective, demeanor, and extensive background in ADA defense.

Finally, the court also considered whether the letter respondent sent defendants with each complaint supports the allegation that he was engaged in a scheme to defraud. While Judge Rafeedie found that this letter violated the Model Code of Professional Responsibility, the State Bar did not allege, and the court does not find, that it violates either the Rules of Professional Conduct or the Business and Professions Code. And although respondent's letter seeks to expedite settlement, this is not necessarily indicative of a scheme to extort.

Accordingly, the court finds that the State Bar did not prove, by clear and convincing evidence, that respondent committed moral turpitude by engaging in a scheme to extort. Count One is dismissed with prejudice.

Count Two: Seeking to Mislead a Judge (§ 6068, Subd. (d))

Section 6068, subdivision (d), prohibits an attorney from seeking to mislead the judge or any judicial officer by an artifice or false statement of fact or law. The State Bar alleges that by filing complaints containing allegations of bodily injury when there were no facts to support such a claim, respondent sought to mislead the judge or judicial officer by an artifice or false statement of fact or law.

The State Bar failed to establish, by clear and convincing evidence, their underlying premise that no facts supported respondent's allegations of his clients' bodily injuries. As noted above, the findings of Judge Rafeedie on this issue were conclusory and subsequently contradicted by the findings of Judge Trumbull. Consequently, Count Two is dismissed with prejudice.

Count Three: Moral Turpitude – (§ 6106)

The State Bar alleges that respondent committed acts of moral turpitude by making settlement demands and settling with defendants without "appropriately apportioning" each defendants' responsibility for the repetitive, continuous, and cumulative trauma Mr. Molski suffered, thereby making defendants responsible for more than their share. The State Bar, however, failed to present clear and convincing evidence of the alleged misconduct. Furthermore, the State Bar did not establish under what duty respondent is required to "appropriately apportion" for each defendant's responsibility. Consequently, there is no basis in the record to support a finding of culpability in Count Three. Count Three is dismissed with prejudice.

D. Case No. 06-J-13032

1. Findings of Fact

Professional Misconduct in a Foreign Jurisdiction

Section 6049.1, subdivision (a) provides, in pertinent part, that a certified copy of a final order made by any court of record of any state of the United States, determining that a member of the California State Bar committed professional misconduct in that jurisdiction is conclusive evidence that the member is culpable of professional misconduct in this State. This court accepts such a determination as conclusive evidence of misconduct, even when the findings of the court of foreign jurisdiction were made under a lower evidentiary standard. (Cal. § 6049.1,

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am a citizen of the United States and a resident of Marin County, California. I am over the age of eighteen years and not a party to the within action; I am employed in the office of a member of the bar of this court at whose direction service was made; my business address is 4328 Redwood Hwy., Ste. 300, San Rafael, California 94903. The document identified below and this affidavit has been printed on recycled paper meeting EPA guidelines. On the date this affidavit is signed below, a true copy of the PETITION FOR REVIEW, was placed by me in an envelope addressed to the person(s) at the address(es) set forth below, then sealed and, following ordinary business practices, placed for delivery with the Federal Express Service in San Rafael, California.

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San Francisco, CA 94102-4783

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I declare under penalty of perjury that the foregoing is true and correct. Executed in San Rafael, California on March 9th, 2010.

By: Armetrice Cooper