

Supreme Court Case No. S180890

# Supreme Court of California

SUPREME COURT  
FILED

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**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

## **OPENING BRIEF ON THE MERITS**

Scottlynn J Hubbard IV, SBN 212970  
LAW OFFICES OF LYNN HUBBARD  
12 Williamsburg Lane  
Chico, California 95926  
(530) 895-3252  
lawofchaos@aol.com

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lawofchaos@aol.com

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

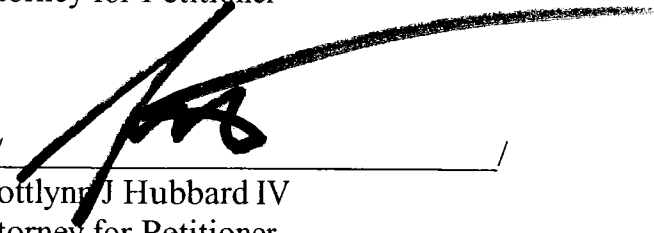
Petitioner hereby certifies that there are no interested entities or persons – other than the petitioner himself – that must be listed in this certificate under Rule 8.208 of the California Rules of Court.

Respectfully submitted this tenth day of June 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

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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?

## STATEMENT OF FUNDAMENTAL BACKGROUND INFORMATION<sup>1</sup>

Petitioner Les Jankey (“Jankey” or “petitioner”) brought this lawsuit against Respondent Song Koo Lee (“Lee” or “respondent”), 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

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<sup>1</sup> Unless specified otherwise, the facts contained in this section are drawn from the court of appeal's published opinion. *Jankey v. Song Koo Lee*, 105 Cal.Rptr.3d 290 (Feb 5, 2010) (“Song Koo Lee”).

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. 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. *Molski v. Arciero Wine Group*, 164 Cal.App.4th 786, 791 (2008) (“Arciero Wine”). 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 sought review.

### **STATEMENT OF APPEALABILITY**

The Superior Court for the County of San Francisco had original jurisdiction over appellant's claims brought for violation of his civil and personal rights under the CDPA. This appeal rises from the Superior Court's ruling on respondent's post-judgment motion for attorney fees under the same statute, and this Court, therefore, has jurisdiction over the appeal. Calif. Code of Civ. Pro. § 904.1(a)(2). The subject motion for award of attorney fees was granted on August 28, 2008. [CT 1674]. Notice of this ruling was given on the same date. [CT 1683]. A timely Notice of Appeal was filed on September 26, 2008. [CT 1691].

## LEGAL DISCUSSION

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.<sup>2</sup> 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. 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

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<sup>2</sup> For simplicity’s sake, petitioner will use the single term “frivolous” to denote claims that are “frivolous, unreasonable or groundless.”

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 fees, regardless of whether the plaintiff’s claims were meritorious (but unsuccessful) on the one hand; or frivolous on the other. *See Song Koo Lee*, 105 Cal.Rptr.3d at 294-300, citing with approval, *Arciero Wine Group*, 164 Cal.App.4th 786. With all due respect to these courts, their rulings are undercut by both state and federal law. 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* and *Arciero Wine* opinions 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.



**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* first applying (much less addressing) the test developed by the Supreme Court to make such a determination. *Song Koo Lee*, 105 Cal.Rptr.3d at 296-299. 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 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.”<sup>3</sup> *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 plaintiff’s claim is frivolous, unreasonable, or groundless.”) (citation and quotations omitted). Although the 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

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<sup>3</sup> 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).

omitted).<sup>4</sup>

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 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*

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<sup>4</sup> 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").

*Koo Lee*, 105 Cal.Rptr.3d at 296-299. 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*, 105 Cal.Rptr.3d at 297 (“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 297-298 (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 299. 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 intended 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 attorney fees to a prevailing plaintiff, as opposed to *the amount* of attorney 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*, 105 Cal.Rptr.3d at 298-299. 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.");<sup>5</sup> *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

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<sup>5</sup> 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.").



(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.

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*, 105 Cal.Rptr.3d at 298 (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;<sup>6</sup> 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 illusory; 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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<sup>6</sup> 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).

**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.<sup>7</sup> *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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<sup>7</sup> 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 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 where a state law is patterned after a federal law, federal cases interpreting the federal law offer persuasive

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 look 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 were modeled by the California legislature 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 that federal legislation. *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 666-676 (2009). Because that public policy is the same, the CDPA sits *in pari materia* with the Unruh Act and ADA, and the same rule concerning recovery of attorney fees to

a prevailing party ought to apply. Phrased somewhat differently, the Unruh Act's one-sided fee shifting provision prohibits an award of fees to defendants for an unsuccessful claim based on ADA violations. Calif. Civil Code § 52(a). By contrast, the CDPA – under the court of appeal's interpretation – permits an award of fees to defendants for an unsuccessful claim based on *the same* ADA violations. *Song Koo Lee*, 105 Cal.Rptr.3d at 296-299. Under California law, however, prevailing defendants cannot receive attorney fees for defending claims that inextricably overlap with other claims when a fee award is inappropriate for the defense of the latter. *See, e.g., Covenant Mutual Ins. Co. v. Young*, 179 Cal.App.3d 318, 324 (1986); *see also Earley v. Superior Court*, 79 Cal.App.4th 1420, 1429 (2000). *Accord, Norbreck*, 2007 WL 1063050 at \*\*2-3. Since Jankey's CDPA and Unruh Act claims were based on the same ADA violations, the defense *should not* have received an award of fees under the CDPA because it *could not* have received fees under the Unruh Act. Furthermore, because Jankey's CDPA claims paralleled his ADA claims, the award of fees under Section 55 was tantamount to the award of fees under the ADA itself and thus inappropriate under both state and federal law. *Ibid.*



**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*, 105 Cal.Rptr.3d at 299, 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, CCI, 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:

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 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 considered.

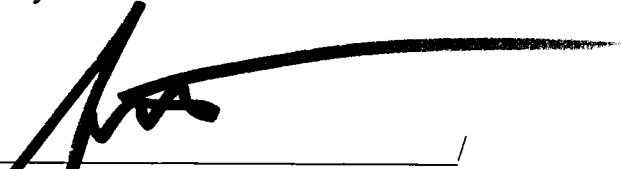
### CONCLUSION

Thirty years ago the United States Supreme Court declared that, where a piece of civil rights legislation states that a prevailing party is entitled to recover a reasonable attorney 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 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 tenth day of June 2010.

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

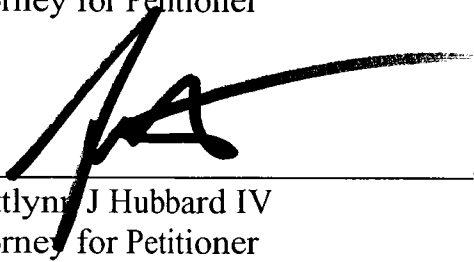
By:  /s/ \_\_\_\_\_  
Scottlynn Hubbard IV  
Attorney for Petitioner

**CERTIFICATE OF WORD COUNT**

This Petition contains 6,025 words from the cover page to signature block below.

Respectfully submitted this tenth day of June 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

## APPENDIX OF UNPUBLISHED AUTHORITY

<u>Name</u>	<u>Attachment No.</u>
<i>Jankey v. Song Koo Lee</i> , 105 Cal.Rptr.3d 290 (Feb 5, 2010).....	1
<i>In the Matter of Thomas Edward Frankovich</i> , Case No. 04-O-15890 (State Bar Court June 25, 2009).....	2
Excerpts of the Legislative History for Section 55 of the California Civil Code.....	3
<i>Dodson v. Dollar Tree Stores, Inc.</i> , 2006 U.S. Dist. Lexis 90416 (E.D. Cal. Dec. 14, 2006) .....	4
<i>White v. Save Mart Supermarkets</i> , 2005 U.S. Dist. Lexis 24386 (E.D. Cal. Oct. 20, 2005) .....	5
<i>Wilson v. Norbreck LLC</i> , 2007 WL 1063050 (E.D. Cal. Apr. 9, 2007) .....	6
<i>Louie v. Carichoff</i> , 2006 WL 662742 (E.D. Cal. March 16, 2006).....	7

# Attachment No. 1

*Jankey v. Song Koo Lee*, 105 Cal.Rptr.3d 290 (2010)



181 Cal.App.4th 1173, 105 Cal.Rptr.3d 290, 10 Cal. Daily Op. Serv. 1648, 2010 Daily Journal D.A.R. 2024  
**Review Granted Previously published at: 181 Cal.App.4th 1173 (Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 8.500, 8.1105 and 8.1110, 8.1115, 8.1120 and 8.1125)**  
(Cite as: 105 Cal.Rptr.3d 290)

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.<sup>FN\*</sup>

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.

**Background:** Wheelchair user brought action against store owner, seeking injunctive relief under Americans with Disabilities Act (ADA) and California Disabled Persons Act (CDPA). The Superior Court, City and County of San Francisco, No. CGC07-463040, Patrick J. Mahoney, J., granted summary judgment for store owner, and awarded attorney fees. Wheelchair user appealed.

**Holding:** The Court of Appeal, Ruvolo, P.J., held that CDPA's mandatory attorney fee provision was not subject to conflict preemption by the ADA.

Affirmed.

\*291 Thomas E. Frankovich, San Francisco, for Appellants.

Livingston Law Firm, Renée Welze Livingston, Walnut Creek, Jason G. Gong, San Ramon, for Respondent.

RUVOLO, P.J.

**\*1176 I.**

## INTRODUCTION

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. \*1177 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<sup>FN1</sup> (Section 55), which mandates that \*292 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

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**(Cite as: 105 Cal.Rptr.3d 290)**

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.

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."

## II.

### FACTS AND PROCEDURAL HISTORY

Jankey and Disability Rights Enforcement Education Services: Helping You Help Others (DREES)<sup>FN2</sup> 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.

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."

\*1178 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...."

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;\*293 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.

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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.<sup>FN3</sup> (*Hubbard II*, *supra*, at pp. 746-747.) In *Molski*, \*1179 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.)

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

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.)

##### \*294 B. Analysis

Jankey's argument that Section 55's mandatory fee award provision is preempted by the discretionary standard under the ADA is supported by \*1180 the Ninth Circuit's decision in *Hubbard II*, *supra*, 554 F.3d 742.<sup>FN4</sup> 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

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**(Cite as: 105 Cal.Rptr.3d 290)**  
p. 744.) Plaintiffs appealed.

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.

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].)<sup>FNS</sup>

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, 98 S.Ct. 694; 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.

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, \*1181 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.*)

\*295 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, 79 Cal.Rptr.3d 574.) 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, 79 Cal.Rptr.3d 574.) The trial court awarded defendant its attorney fees for the state court action only. (*Ibid.*) Plaintiff appealed.

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

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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, 98 S.Ct. 694) 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, 79 Cal.Rptr.3d 574.) Specifically,\*1182 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, 79 Cal.Rptr.3d 574.)

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\*296 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.]"<sup>FN6</sup> (*Hubbard II, supra*, at p. 745.)

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

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 \*1183 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.<sup>FN7</sup> 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." ""])

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.

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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 \*297 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.)

\*1184 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.

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 \*1185 that California provide more protection to individuals\*298 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

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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.)

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 \*1186 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.<sup>FN8</sup>

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.)

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 \*299 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

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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 \*1187 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, 79 Cal.Rptr.3d 574.) 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.)<sup>FN9</sup>

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 Frankovich 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.)

\*300 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<sup>FN\*\*</sup>

FN\*\* See footnote \*, *ante*.

\*1188 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.  
 Cal.App. 1 Dist., 2010.



# Attachment No. 2

*In the Matter of Thomas Frankovich, Case No. 04-O-15890 (State Bar Court 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. )  

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**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,<sup>2</sup> and 40 were filed on behalf of either Les Jankey<sup>3</sup> or Patrick Connally.<sup>4</sup> 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.

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

<sup>3</sup> Mr. Jankey is an individual who relies on a wheelchair for mobility.

<sup>4</sup> 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, Molski 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.<sup>5</sup> 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

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<sup>5</sup> 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 (9<sup>th</sup> Cir.2002); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9<sup>th</sup> 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)*<sup>6</sup>

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

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<sup>6</sup> 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 opined 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,

# Attachment No. 3

Excerpts of the Legislative History for Section 55 of the California Civil Code

NATIONAL  
ASSOCIATION



CALIFORNIA  
COORDINATING  
COUNCIL

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CHAPTERS

Southern California  
Los Angeles

Sacramento Valley  
Sacramento

San Joaquin Valley  
Fresno

San Diego

San Bernardino  
Riverside

Los Padres  
Santa Barbara

Coast Counties  
San Jose

East Bay  
Oakland

San Mateo

Sacramento State  
University Campus

HARBOR CHAPTER  
Long Beach

R.C.A.C.

San Francisco

May 30, 1973

Assemblyman Charles Warren  
State Capitol Building  
Sacramento, California

Assemblyman Warren:

The California Coordinating Council of the National Rehabilitation Association on behalf of its statewide membership wishes to urge your YES vote for AB2471 when it is heard in the Assembly Judiciary Committee.

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. Public education of the architects and builders has helped, but it is not enough. 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.

Respectfully,

Saralea Altman  
Legislative Chairwoman  
California Coordinating Council  
2385 Roscomare Rd. #21  
Los Angeles, California 90024

SA:bn

cc: Assemblyman Alan Sieroty

# ENROLLED BILL REPORT

<b>AGENCY</b> Health and Welfare Agency	<b>BILL NUMBER</b> AB 2471 (8/8/74)
<b>DEPARTMENT, BOARD OR COMMISSION</b> Department of Rehabilitation	<b>AUTHOR</b> Sieroty
<b>SUBJECT:</b> Enforcement of Architectural Barrier Laws  <b>SPONSORSHIP:</b> Assemblyman Sieroty  <b>RELATED BILLS:</b> AB 1547 (Sieroty), 1972	
<b>HISTORY:</b> Assemblyman Sieroty carried AB 1547 (1972) which would have permitted a blind physically handicapped person to bring action for an injunction to stop construction or operation of a building or facility which did not meet the architectural barrier laws without being required to post a bond.	
<b>ANALYSIS:</b> This bill is much more moderate specifying that an injunction may be brought and specifies that the prevailing party will be entitled to reasonable attorney fees. Under AB 2471, the plaintiff would have to post bond in order to bring the action. <p style="margin-left: 40px;">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 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.</p>	
<b>FISCAL IMPACT:</b> No impact on state general funds. Other fiscal impact will depend upon awards made by the court.	
<b>FINANCE'S POSITION:</b> Neutral	
<b>RECOMMENDATION:</b> Sign the bill	
<b>DEPARTMENT DIRECTOR</b> <i>Alan C. Nelson</i>	<b>DATE</b> <i>9/4/74</i>
<b>AGENCY SECRETARY</b> <i>James E. Quinn</i>	<b>DATE</b> <i>9/17/74</i>

ASSEMBLY COMMITTEE ON JUDICIARY

CHARLES WARREN, CHAIRMAN

BILL DIGEST

Bill: AB 2471

Hearing Date: 8/14/73

AUTHOR: Sieroty

SUBJECT: Physically Handicapped; Access to Buildings

BACKGROUND:

Under existing law, all buildings and facilities built since 1968 using state or local funds, and all gas stations, office buildings, shopping centers, hospitals, convalescent homes, hotels, motels, restaurants and other places of amusement built since 1970, must insure reasonable access to the physically handicapped. All such buildings and facilities built before the applicable dates must comply with the necessary standards whenever they alter, repair or add to the building or facility.

Enforcement of this law presently rests with the Director of General Services if state funds were used. It rests with the building department of the applicable local government if local funds were used. Unauthorized deviations must be rectified within 90 days after discovery.

BILL DESCRIPTION:

This bill provides that a physically disabled person can give written notice of a deviation to the owner of a private facility, or to the person responsible for enforcing the law if the deviation is in a public 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.

The bill also provides that if the person is successful in obtaining an injunction the court can award him reasonable attorney's fees and court costs.

CONTINUED

SUPPORT:

National Rehabilitation Association.

OPPOSITION:

North Coast Builders Exchange.



# BILL ANALYSIS

DEPARTMENT GENERAL SERVICES	AUTHOR ASSEMBLYMAN SIEROTY	BILL NUMBER AB 1547
SPONSORED BY UNKNOWN	RELATED BILLS UNKNOWN	DATE LAST AMENDED ORIGINAL

## BILL SUMMARY

### Specific Findings:

Assembly Bill No. 1547 provides procedures for obtaining an injunction against further construction or operation of a private or public facility not conforming to building requirements in respect to the Physically Handicapped Law.

Assembly Bill No. 1547 would allow a blind or physically disabled person to obtain an injunction against construction or operation of a facility without being required to post a bond for the purposes of reimbursing the owner for monies lost as a result of such action. The bill would also award reasonable attorney fees and court costs to the person initiating the action.

We are concerned that the bill could result in unreasonable actions being taken against the owner of a building or facility. A handicapped person could initiate action against the owner of a building or facility without posting a bond to protect the owner against excessive losses of revenue. If enacted Assembly Bill No. 1547 could result in unreasonable actions being initiated.

### Financial Analysis:

The bill would have no fiscal impact upon the Department of General Services is indeterminate; however, if number of legal actions were filed against the state it could be substantial.

(Surge: 5/4/72.)

## INFORMAL POSITION:

Legislative Analyst  
July 12, 1972

ANALYSIS OF ASSEMBLY BILL NO. 1547 (Sieroty)  
As Amended in Assembly, June 19, 1972  
1972 Session

AB 1547 (Am. 6/19).

Fiscal Effect:

Cost: None.

Revenue: None.

Analysis:

This bill would allow blind or physically disabled persons to obtain an injunction against further construction or operation of a public or private facility if the facility contains unauthorized deviations from statutes regulating building accessibility for the physically handicapped and if 90 days have elapsed from the time said person gave written notice to the owner informing him of the deviations. A bond will not be required for filing of the injunction if the court finds evidence of nonconformity to be clear and convincing. If the injunction is obtained, the plaintiff is to be awarded all reasonable attorney's fees and court costs.

This procedure is to apply only to future construction or alterations of facilities.

Introduced by Assemblyman Sieroty

March 15, 1972

REFERRED TO COMMITTEE ON JUDICIARY

*An act to add Section 55 to the Civil Code, relating to disabled persons.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1547, as introduced, Sieroty (Jud.). Disabled persons.

Provides procedure for obtaining injunction against further construction or operation of a public or private facility not conforming to building requirements with respect to blind or disabled persons.

Vote—Majority; Appropriation—No; Fiscal Committee—No.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 55 is added to the Civil Code, to  
2 read:

3 55. (a) Notwithstanding any other provision of law, a  
4 blind or other physically disabled person may give notice  
5 to the owner of any private facility, or, in the case of a  
6 public facility, to the person designated in Section 4453 of  
7 the Government Code or in Section 19958 of the Health  
8 and Safety Code, that such facility contains unauthorized  
9 deviations from the requirements of Sections 54 and 54.1,  
10 Section 4451 of the Government Code, or Section 19955  
11 or 19955.5 of the Health and Safety Code.

12 (b) If such deviation is not rectified within 90 days of

1 such notice, a blind or other physically disabled person  
2 may bring an action for an injunction against further  
3 construction or operation of the nonconforming facility  
4 until the deviation is corrected. Such blind or physically  
5 disabled person shall not be required to post a bond  
6 pursuant to Section 529 of the Code of Civil Procedure,  
7 and, if successful in obtaining an injunction, shall be  
8 awarded reasonable attorney's fees and court costs,  
9 irregardless of whether the facility in question is public  
10 or private in character.

O

# Attachment No. 4

*Dodson v. Dollar Tree Stores, Inc.*, 2006 U.S. Dist. Lexis 90416 (E.D. Cal. 2006)



LEXSEE 2006 U.S. DIST. LEXIS 90416

**ROBERT DODSON, Plaintiff, v. DOLLAR TREE  
STORES, INC. dba, DOLLAR TREE # 1203, et al., Defen-  
dant.**

**2:04-cv-1068-MCE-CMK**

**UNITED STATES DISTRICT COURT FOR THE EAST-  
ERN DISTRICT OF CALIFORNIA**

*2006 U.S. Dist. LEXIS 90416*

**December 13, 2006, Decided  
December 14, 2006, Filed**

**PRIOR HISTORY:** *Dodson v. Dollar  
Tree Stores, Inc., 2006 U.S. Dist. LEXIS  
54529 (E.D. Cal., July 25, 2006)*

**JUDGES:** MORRISON C. ENGLAND,  
JR, UNITED STATES DISTRICT  
JUDGE.

**COUNSEL:** [\*1] For Robert Dodson,  
Plaintiff: Adam Sorrells, Disabled Ad-  
vocacy Group, APLC, Chico, CA.; Lynn  
Hubbard, Mark W. Emmett, Law Offic-  
es of Lynn Hubbard III, Chico, CA.

**OPINION BY:** MORRISON C. ENG-  
LAND, JR

**OPINION**

*MEMORANDUM AND ORDER*

For Dollar Tree Stores, Inc., Doing  
business as Dollar Tree # 1203, Defen-  
dant: Shalend Shane Singh, Kring &  
Chung, Sacramento, CA.

Through the present motion, Plaintiff  
Robert Dodson ("Dodson") seeks attor-  
ney's fees and litigation expenses pur-  
suant to both state law and 42 U.S.C. §  
12205 of the Americans with Disabili-  
ties Act ("ADA"), as a result of a favor-  
able judgment by this Court on July 25,  
2006. Plaintiff requests \$ 52,250.00 for

Jason B Matecki, Defendant, Pro se,  
Modesto, CA.

fees incurred by various attorneys, \$ 3,480.00 for paralegals, and \$ 9,663.41 in costs and litigation expenses, for a total of \$ 65,393.41. Plaintiff further seeks a total of \$ 1,095.15 pursuant to a Bill of Costs. Defendant Dollar Tree ("Dollar Tree") opposes Plaintiff's requests, claiming that the fees, expenses, and costs sought are unwarranted, unreasonable, and, or, excessive.

1 Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

## [\*2] BACKGROUND

This dispute arises from Plaintiff's claim that he encountered various architectural barriers when attempting to visit Double Tree's 98 Cents 'n Deals Store at

Sacramento, California. Plaintiff is a quadriplegic unable to walk, stand or use his arms. As a result, Plaintiff must use an electronic wheelchair when traveling about in public.

On June 28, 2006, a one-day court trial was held, which resulted in judgment in favor of Plaintiff. On July 25, 2006, the Court granted Plaintiff's injunctive relief on four of seven issues: 1) placement of the entry door's ISA sign; 2) provision of two handicapped-accessible checkstands; 3) Closure of the second primary entrance; and 4) fire exit requirements. On September 11, 2006, Plaintiff filed the instant motion seeking litigation expenses in the amount of \$ 9,663.41, as well as attorneys' fees totaling \$ 52,250.00 and paralegal fees in the amount of \$ 3,480.00, itemized as follows:

Lynn Hubbard	55.65 hours at \$ 300/hr
Adam Sorrells	63.15 hours at \$ 250/hr
	8.40 hours at \$ 175/hr
Scott Hubbard	24.10 hours at \$ 175/hr
Mark Emmett	70.40 hours at \$ 200/hr
Paralegals	46.60 hours at \$ 75/hr

Additionally, [\*3] as stated above, Plaintiff further requested taxable costs in the amount of \$ 1,095.15 pursuant to a Bill of Costs.

## STANDARD

Plaintiff's Complaint alleged violations of federal and California law.

Plaintiff's federal claim arose under the ADA, while her state law claims arose under the California's Unruh Act, *Cal. Civ. Code § 51*, *California Health & Safety Code § 19953*, and the California Disabled Persons Act, *Cal. Civ. Code § 54-55*.

Section 12205 of the ADA authorizes a court, in its discretion, to "allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs ...." 42 U.S.C. § 12205. A prevailing plaintiff under a statute so worded "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir. 2002), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). A plaintiff who enters a legally enforceable settlement agreement is considered a prevailing party. *Id.*

[\*4] Section 55 of the California Disabled Persons Act provides that "the prevailing party in the action shall be entitled to recover reasonable attorney's fees." *Cal. Civ. Code* § 55. Also, under *California Health & Safety Code* § 19953, "[a]ny person who is aggrieved or potentially aggrieved by a violation of this part ... may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees."

## ANALYSIS

Dollar Tree first asks the Court to follow the Central District's recent decision in *Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028 (C.D. Cal. 2005), which denied attorneys' fees in an ADA case where the plaintiff had neither provided pre-litigation notice of his intent to sue nor afforded the defendant, prior to suit,

a reasonable opportunity to cure any alleged violations. As even the *Doran* court recognized, however, there is no Ninth Circuit precedent requiring an ADA plaintiff to provide notice before filing suit. *Id.* at 1031. Indeed, in *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000), [\*5] the Ninth Circuit held squarely to the contrary. Moreover, as *Doran* further concedes, repeated efforts by Congress failed. *Id.* Consequently, even assuming Plaintiff failed to provide Dollar Tree with adequate notice of its ADA shortcomings before instituting this lawsuit, the Court declines to rely on the reasoning of *Doran* in altogether denying Plaintiff's instant request for fees or expenses.

This Court must therefore determine the extent to which attorneys' fees and litigation expenses are recoverable. In making that assessment, the Court must identify the applicable "lodestar" for calculating attorneys' fees. Under the lodestar method, a court multiplies the number of hours the prevailing attorney reasonably expended on the litigation by a reasonable hourly rate. See *Hensley*, 461 U.S. at 433; see also *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132, 104 Cal. Rptr. 2d 377, 17 P.3d 735 (2001) (expressly approving the use of prevailing hourly rates as a basis for the lodestar). Courts may then adjust the lodestar to reflect other aspects of the case. See *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); see also *Serrano v. Priest*, 20 Cal. 3d 25, 141



*Cal. Rptr. 315, 569 P.2d 1303 (1977).* [\*6] That adjustment can go either upwards or downwards depending on the circumstances present. *Van Gerwen v. Guar. Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000).*

Turning first to the number of hours reasonably billed, the Court finds that the amount claimed by Plaintiff for certain tasks are unreasonable and must be adjusted accordingly. Plaintiff's counsel has filed literally hundreds of ADA lawsuits similar to this one. Those cases share similar pleadings, discovery requests and motions. Certain documents generated in this matter, such as the Complaint and discovery requests, are almost identical to those generated in other cases, and the reasonable fee claimed by Plaintiff's counsel in performing those tasks must therefore be reduced.

After analyzing the billing entries generated by Plaintiff's counsel, the Court will strike from the award the 1.7 hours Lynn Hubbard billed for drafting the Complaint, the 2.0 hours Scott Hubbard billed for drafting Plaintiff's Request for Admissions, and the 2.0 hours Scott Hubbard billed for drafting Plaintiff's Request for Production of Documents.

Even more significant than the fees generated by Plaintiff's Complaint and [\*7] discovery requests were fees incurred in drafting Plaintiff's Motion for Summary Judgment. After analyzing the Plaintiff's billing entries, the Court iden-

tified 24.1 hours credited to the time spent on Plaintiff's Motion for Summary Judgment. The 24.1 hours credited is highly dubious since the motion here is nearly identical to the unsuccessful Motion for Summary Judgment filed by Plaintiff's attorneys in *Jones v. Dollar Tree*, Case No. 2:04-cv-2002-MCE-KJM, 2005 U.S. Dist. LEXIS 31517 (December 2005). As such, the Court supports Defendant's recommendation that fifty percent of the hours spent on the motion should only be compensated. Accordingly, Lynn Hubbard's compensation for time spent on the Plaintiff's Motion for Summary Judgment will be reduced to 12.05 hours.

Another general classification of fees sought by Plaintiff will also not be permitted. Plaintiff seeks compensation for 8.4 hours of travel time by Adam Sorrells to Sacramento from Chico. This is despite the fact that Plaintiff's counsel, Adam Sorrells, has a history of working with Lynn Hubbard's Chico-based law firm in filing similar ADA cases in the Sacramento Division of the Eastern District.

No evidence has been presented suggesting [\*8] that Plaintiff's counsel tries more cases in Chico than in Sacramento, or that Plaintiff's counsel maintains offices outside the Sacramento area for any reason other than his own convenience. Assuming Sorrells charges his regular paying clients for travel time, this does not justify shifting these ex-

penses to Dollar Tree since a paying client can negotiate travel expenses in advance. *Martinez v. Longs Drugs Stores, Inc.*, No. 2:03-cv-1843-DFL-CMK, 2005 U.S. Dist. LEXIS 30226, 2005 WL 3287233 at \*5 (E.D. Cal. Nov. 28, 2005). More specifically, Dollar Tree did not have a paying client's choice of seeking other representation if travel expenses were deemed too costly. Consequently, Dollar Tree should not be required to shoulder Sorrells' travel expenses to Sacramento, and as such, will not be compensated for the 8.4 hours of travel time.

Finally, Defendant asserts that \$ 921.50 should be disallowed from Plaintiff's attorney's fees attributed to clerical work. Upon reviewing counsel's billing entries, the work deemed by Defendant to constitute overhead was performed by paralegals; thus, Defendant argues that certain paralegal costs should be disallowed because they were "clerical/secretarial" in nature. [\*9] Although secretarial costs are deemed by courts within this Circuit to constitute overhead, the Court will permit recovery of time expended by paralegals. (See *Shaffer v. Superior Court*, 33 Cal. App. 4th 993, 39 Cal. Rptr. 2d 506 (1995)). Defendant failed to demonstrate, however, that the tasks represented by the billing entries in question were not properly performed by paralegals. Accordingly, the Court will require Defendant to reimburse Plaintiff for paralegal services.

The above analysis all pertains to the reasonableness of the number of hours for which compensation is sought. The second step of the lodestar analysis requires that the rate sought to be charged per hour also be reasonable. Courts generally calculate reasonable hourly rates according to the prevailing market rates in the relevant legal community. *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). The general rule is that courts use the rates of attorneys practicing in the forum district, in this case, the Eastern District of California, Sacramento Division. *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (1993); *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991), cert. denied [\*10] 502 U.S. 899, 112 S. Ct. 275, 116 L. Ed. 2d 227 (1991).

The burden is on the fee applicant to produce satisfactory evidence that the requested rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n.11. A court will normally deem a rate determined this way to be reasonable. *Id.*

Previously in *White v. Save Mart Supermarkets*, the Court awarded the Plaintiff's attorney, Lynn Hubbard, \$ 250.00 per hour, limited associate attorney compensation to \$ 150.00 per hour and confined paralegal services to \$ 75.00 per hour in cases of this nature. No. 2:03-cv-2402-MCE-KJM, 2005 U.S. Dist. LEXIS 24386, 2005 WL 2675040, at \*3 (E.D. Cal. Oct. 20, 2005).

Consequently, after deducting the unreasonable hours expended in this matter and adjusting the hourly rate, Lynn Hubbard's compensation should be reduced from \$ 16,695 to \$ 10,475, Adam Sorrells' compensation should be reduced from \$ 17,257.50 to \$ 15,787.50, Scott Hubbard's compensation should be reduced from \$ 4,217.50 to \$ 3,015.00, and Mark Emmett's compensation should be reduced from \$ 14,080.00 to \$ 10,560.00.

As outlined above, after [\*11] adjusting for reasonable attorney rates and for reasonable hours expended, a lodestar figure for professional fees in this matter is calculated to be \$ 43,317.50. However, Dollar Tree further claims that Plaintiff's attorney fees should be reduced to reflect the fact that Plaintiff ultimately prevailed on only four of seven issues. In assessing whether the lodestar figure should be adjusted, the Court must consider the extent to which Plaintiff prevailed on the demands presented, especially if she did not succeed on such demands in their entirety. *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995). In cases achieving partial success, courts must follow a two-part analysis in deciding whether to reduce an attorneys' fee award:

First, the court asks whether the claims upon which the plaintiff failed to prevail were related to the

plaintiff's successful claims. If unrelated, the final fee award may not include time expended on the unsuccessful claims. If the unsuccessful and successful claims are related, then the court must apply the second part of the analysis, in which the court evaluates the 'significance of the overall relief obtained [\*12] by the plaintiff in relation to the hours reasonably expended on the litigation.' If the plaintiff obtained 'excellent results,' full compensation may be appropriate, but if only partial or limited success' was obtained, full compensation may be excessive. Such decisions are within the district court's discretion.

*Id. at 901-02.*

In determining whether the unsuccessful and successful claims are related,

...the test is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised. Thus, the focus is to be on whether the unsuccessful and

successful claims arose out of the same course of conduct.

*Id.* at 903, quoting *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986). If a court finds the unsuccessful claims to be unrelated to the successful claims, it may either attempt to identify specific hours that should be eliminated or simply reduce the award to account for the limited success. *Id.* at 904.

In the present matter, the Court finds it [\*13] appropriate to reduce the lodestar figure based on Plaintiff's limited success. Plaintiff succeeded on four of seven claims, in which the remaining three claims were not related to the successful four claims, since each was a distinct alleged violation requiring separate evidence. See *White v. GMRI*, 2:04-cv-0465-DFL-CMK, 2005 U.S. Dist. LEXIS 44231, \*16 (E.D. Cal. Aug. 19, 2005) (finding that "alleged violations are premised on different facts and require the application of different sections of the ADA Accessibility Guidelines to determine liability"). The facts and evidence needed for claims pertaining to the pressure required to open the front door, for example, are completely separate from claims relating to handicapped-accessible checkstands, or to claims relating to the entry door's ISA sign. Because it is impossible to apportion attorneys' fees between the unsuccessful claims from the successful claims with any degree of certainty, the Court reduces Plaintiff's award of attor-

neys' fees by 3/7, or forty three percent, to account for his limited success. Forty three percent of the \$ 43,317.50 lodestar is \$ 18,626.52. Total fees awarded for Plaintiff's claimed attorney fees will thus be \$ [\*14] 24,690.98.

Lastly, Plaintiff may recover, as part of the award of his fees in this matter, litigation expenses pursuant to 42 U.S.C. § 2205. The term "litigation expenses" in Section 12205 has been interpreted to include "the same out-of-pocket expenses that are recoverable under 42 U.S.C. § 1988." *Robbins v. Scholastic Book Fairs*, 928 F. Supp. 1027, 1037 (D. Or. 1996). Under Section 1988, Plaintiff recover those out-of-pocket expenses that "would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

Plaintiff seeks a total of \$ 9,663.41 in litigation expenses. Of that amount, Defendant contests \$ 7,442.50 sought for expert fees and costs submitted by Plaintiff's expert, Joe Card. Specifically, Defendant claims that Mr. Card's charges relating to travel and inspection should be reduced by 50% because a similar inspection was conducted in *Jones v. Ralph's*, 2:04-cv-2002-MCE-KJM, 2006 U.S. Dist. LEXIS 94565 (E.D. Cal. Nov. 17, 2006). However, Plaintiff fails to address the fact that the Dollar Trees in *Jones* and in this matter are in different locations. Thus, the Court does not find [\*15] an issue of double billing in regards to Mr. Card's work. Consequently,

the Plaintiff will be awarded the full amount sought for Mr. Card's services.

Defendant further asserts that certain litigation expenses amounting to \$ 932.15 should be disallowed because they were also included in the Bill of Costs. <sup>2</sup> The Court found that Plaintiff has double billed for the aforementioned items. However, the Court will only disallow \$ 569.15 from the \$ 932.15 requested because the expenses relating to the rental of audio-visual equipment is an appropriate litigation expense. <sup>3</sup>

2 Specifically, the costs at issue include: fee for subpoena of building records, fee for subpoena of records, costs for creating trial binders and exhibits, and the rental cost for audio visual equipment for the PowerPoint presentation at trial.

3 As such, \$ 363 will be disallowed from the Bill of Costs for expenses relating to the audio-visual equipment. Thus the Bill of Costs will be reduced to \$ 732.15 from the \$ 1,095.15 requested.

**[\*16] CONCLUSION**

Based on the foregoing, Plaintiff is entitled to reasonable attorneys' fees in the amount of \$ 24,690.98 and reasonable litigation expenses in the amount of \$ 9,094.26 for a total of \$ 33,785.24. Additionally, the Plaintiff is entitled to \$ 732.15 in taxable costs pursuant to her Bill of Costs.

IT IS SO ORDERED.

DATED: December 13, 2006

MORRISON C. ENGLAND, JR

UNITED STATES DISTRICT  
JUDGE



# Attachment No. 5

*White v. Save Mart Supermarkets*, 2005 U.S. Dist. Lexis 24386 (E.D. Cal. 2005)



LEXSEE 2005 U.S. DIST. LEXIS 24386

**SHERIE WHITE, Plaintiff, v. SAVE MART SUPER-  
MARKETS dba FOOD MAXX; WRI GOLDEN STATE,  
LLC; and DOES 1 through 10, Defendants.**

**NO. CIV. S 03-2402 MCE KJM**

**UNITED STATES DISTRICT COURT FOR THE EAST-  
ERN DISTRICT OF CALIFORNIA**

*2005 U.S. Dist. LEXIS 24386*

**October 20, 2005, Decided**

**PRIOR HISTORY:** *White v. Save Mart Supermarkets*, 2004 U.S. Dist. LEXIS 29265 (E.D. Cal., Apr. 26, 2004)

**JUDGES:** MORRISON C. ENGLAND, JR., UNITED STATES DISTRICT JUDGE.

**COUNSEL:** [\*1] For Sherie White, Plaintiff: Lynn Hubbard, Law Offices of Lynn Hubbard III, Chico, CA.

**OPINION BY:** MORRISON C. ENGLAND, JR.

For Save Mart Supermarkets, Doing business as Food Maxx, Defendant: Martin H. Orlick, Jeffer, Mangels, Butler & Marmaro LLP, San Francisco, CA.

**OPINION**

For WRI Golden State, Defendant: Leland Peter Ryan MBV Law, San Francisco, CA.

**MEMORANDUM AND ORDER**

Through the present motion, Plaintiff Sherie White ("Plaintiff") seeks attorney's fees and litigation expenses, pursuant to both state law and 42 U.S.C. § 12205 of the Americans with Disabilities Act ("ADA"), following her settlement with Defendant SaveMart Supermarkets dba Food Maxx ("SaveMart") for violations of Title III of the ADA



pertaining to SaveMart's facility located at 1330 Chum Creek Road in Redding, California. Plaintiff requests \$ 11,211.25 for fees incurred by various attorneys and paralegals, and \$ 5,927.64 in costs and litigation expenses, for a total of \$ 17,138.89. Save Mart opposes Plaintiff's motion, claiming that the fees and expenses sought are unwarranted, unreasonable and/or excessive.

### BACKGROUND

[\*2] This dispute arises from Plaintiff's claim that she encountered various architectural barriers when attempting to visit SaveMart's Redding facility. Plaintiff is a quadriplegic unable to walk, stand or use her arms. Plaintiff must use an electronic wheelchair when traveling about in public.

Plaintiff filed her complaint against Save Mart on November 18, 2003. Thereafter, her counsel conducted site assessments of the Save Mart facility and had a report prepared which listed some thirty-nine (39) separate ADA violations within that facility. In August of 2005, Plaintiff and SaveMart entered into a settlement agreement pursuant to which SaveMart agreed to pay Plaintiff damages in the amount of \$ 4,000 and to remedy certain of the claimed ADA violations. Prior to settling the case, Plaintiff dropped her demands pertaining to many of the alleged violations identified in the site report prepared by her expert. Specifically, Plaintiff did not pursue some eighteen (18) claims pertaining to deficiencies involving the men's restroom.

Since the parties also agreed that the Court would retain jurisdiction to hear Plaintiff's request for fees and expenses, the present motion was filed on September 14, 2005.

### [\*3] STANDARD

Plaintiff's complaint alleged violations of federal and California law. Plaintiff's federal claim arose under the ADA, while her state law claims arose under the California's Unruh Act, *Cal. Civ. Code § 51, California Health & Safety Code § 19953*, and the *California Disabled Persons Act, Cal. Civ. Code § 54-55*.

*Section 12205 of the ADA* authorizes a court, in its discretion, to "allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs. . . ." *42 U.S.C. § 12205*. A prevailing plaintiff under a statute so worded "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir. 2002), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). A plaintiff who enters a legally enforceable settlement agreement is considered a prevailing party. *Id.*

*Section 55 of the California Disabled Persons Act* provides that "the prevailing party in the action shall be entitled [\*4] to recover reasonable attorney's fees." *Cal. Civ. Code § 55*. Also, under *Cal-*

*formia Health & Safety Code § 19953*, "[a]ny person who is aggrieved or potentially aggrieved by a violation of this part . . . may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees."

## ANALYSIS

SaveMart does not dispute that this Court has discretion to award Plaintiff, as the prevailing party in this litigation, both attorneys' fees, as well as litigation expenses and costs, in pursuing her case. Rite Aid nonetheless asserts that the Court should exercise its discretion in determining that, under the circumstances present, those fees and expenses should either be disallowed in their entirety or significantly reduced.

SaveMart first asks the Court to follow the Central District's recent decision in *Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028 (C.D. Cal. 2005), which denied attorneys' fees in an ADA case where the plaintiff had neither provided pre-litigation notice of his intent to sue nor afforded the defendant, prior to suit, a reasonable opportunity [\*5] to cure any alleged violations. As even the Doran court recognized, however, there is no Ninth Circuit precedent requiring an ADA plaintiff to provide notice before filing suit. *Id.* at 1031. Indeed, in *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000), the Ninth Circuit held squarely to the contrary. Moreover, as Doran further concedes, repeated efforts by Congress to amend

the ADA to provide pre-suit notice have uniformly failed. *Id.* Consequently, even assuming Plaintiff failed to provide SaveMart with adequate notice of its ADA shortcomings before instituting this lawsuit, the Court declines to rely on the reasoning of Doran in altogether denying Plaintiff's instant request for fees/expenses.

This Court must therefore determine the extent to which attorneys' fees and litigation expenses are recoverable. In making that assessment, the Court must identify the applicable "lodestar" for calculating attorneys' fees. Under the lodestar method, a court multiplies the number of hours the prevailing attorney reasonably expended on the litigation by a reasonable hourly rate. *See Hensley*, 461 U.S. at 433; [\*6] *see also Ketchum v. Moses*, 24 Cal. 4th 1122, 1132, 104 Cal. Rptr. 2d 377, 17 P.3d 735 (2001) (expressly approving the use of prevailing hourly rates as a basis for the lodestar). Courts may then adjust the lodestar to reflect other aspects of the case. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *see also Serrano v. Priest*, 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977). That adjustment can go either upwards or downwards depending on the circumstances present. *Van Gerwen v. Guar. Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

Turning first to the number of hours reasonably billed, the Court finds that the amounts claimed by Plaintiff for certain tasks are unreasonable and must

be adjusted accordingly. As SaveMart points out, Plaintiff's counsel has filed literally hundreds of ADA lawsuits similar to this one. Those cases share similar pleadings, discovery requests and motions. Certain of the documents generated in this matter are almost identical to those generated in other cases, and the reasonable fee claimed by Plaintiff's counsel in performing those tasks must therefore be reduced. After analyzing the billing entries generated [\*7] by Plaintiff's counsel, along with evidence submitted by SaveMart, the Court finds that a total of 4.55 hours billed by attorney Lynn Hubbard at \$ 250/hour are not reasonable, and that a further 3.0 hours of paralegal time at \$ 75/hour is also not reasonable. Consequently \$ 1,137.50 will be deducted from the total attorneys' fees sought on behalf of Plaintiff.

While SaveMart also claims that hours expended by paralegals in this matter are not legally compensable, and hence are unreasonable, that is incorrect. Paralegal time has been consistently deemed compensable by federal courts if the local practice is to separately bill clients for paralegal services. See, e.g., *Missouri v. Jenkins*, 491 U.S. 274, 285-87, 105 L. Ed. 2d 229, 109 S. Ct. 2463 (1989); *United Steelworkers of America v. Phelps Dodge Corp.* 896 F.2d 403, 407-08 (9th Cir. 1990). The defense has not disputed that paralegal services are so billed, and accordingly the hours spent are deemed reasonable. '

1 Save Mart does argue that certain paralegal costs should be disallowed because they were "clerical/secretarial" in nature. The Court declines, however, to parse the paralegal tasks performed that closely and will permit reimbursement of the amounts claimed by Plaintiff for paralegal services.

[\*8] The above analysis all pertains to the reasonableness of the number of hours for which compensation is sought. The second step of the lodestar analysis requires that the rate sought to be charged per hour also be reasonable. Courts generally calculate reasonable hourly rates according to the prevailing market rates in the relevant legal community. *Blum v. Stenson*, 465 U.S. 886, 895, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984). The general rule is that courts use the rates of attorneys practicing in the forum district, in this case, the Eastern District of California. *Gates v. Deukmejian*, 987 F.2d 1392,1405 (1993); *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991), cert. denied 502 U.S. 899, 116 L. Ed. 2d 227, 112 S. Ct. 275 (1991).

The burden is on the fee applicant to produce satisfactory evidence that the requested rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n.11. A court will normally deem a rate determined this way to be reasonable. Id.

While the Court agrees with Plaintiff that the both the \$ 250/hour rate sought on behalf [\*9] of attorney Lynn Hubbard is reasonable, and further concurs that the rate of \$ 75/hour claimed for paralegal services is also reasonable, it does not agree that \$ 175/hour, as sought for associate attorney Scott Hubbard's time, is reasonable. Courts in this district have generally limited associate attorney compensation to \$ 150 per hour in cases of this nature. *See, e.g., Loskot v. USA Gas Corp., 2004 U.S. Dist. LEXIS 29174, CIV. S-01-2125 WBS KJM (E.D. Cal. April 26, 2004); Pickern v. Marino's Pizza & Italian Rest., CIV. S-01-1096 WBS GGH (E.D. Cal. April 9, 2003); Loskot v. Pine Street Sch. Off. Bldg., CIV. S-00-2405 DFL JFM (E.D. Cal. Nov. 7, 2002).* Consequently, the 7.85 hours sought for Scott Hubbard's services should be reduced from \$ 1,373.75 to \$ 1,177.50, for a total net reduction of \$ 196.25 from the attorneys' fees claimed herein.

As outlined above, after deducting time not deemed by the Court to have been reasonably expended in this matter (\$ 1,137.50), and after adjusting the hours claimed to a reasonable hourly rate (for an additional deduction of \$ 196.25 from the originally claimed total of \$ 11,211.25 in attorney and paralegal fees), a lodestar figure for professional fees [\*10] in this matter is calculated to be \$ 9,877.50. SaveMart claims this figure should also be reduced to reflect the fact that Plaintiff ultimately abandoned many of the ADA compliance demands

she initially made in connection with this case. Specifically, of some thirty-nine (39) different claimed violations identified in Plaintiff's expert report as constituting disability access violations, Plaintiff dropped eighteen (18) before deciding to settle this case. Those eighteen (18) alleged violations all pertained to claimed inadequacies involving the men's restroom, claims that as a woman Plaintiff lacked standing to pursue under the ADA. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).*

In assessing whether the lodestar figure should be adjusted, the Court must consider the extent to which Plaintiff prevailed on the demands presented, especially if she did not succeed on such demands in their entirety. *Schwarz v. Sec'y of Health & Human Servs., 73 F.3d 895, 901 (9th Cir. 1995).* In cases achieving partial success, courts must follow a two-part analysis in deciding whether to reduce an attorneys' fee award:

First, the court asks whether [\*11] the claims upon which the plaintiff failed to prevail were related to the plaintiff's successful claims. If unrelated, the final fee award may not include time expended on the unsuccessful claims. If the unsuccessful and successful claims are related, then the court must apply the second part of the

analysis, in which the court evaluates the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' If the plaintiff obtained excellent results,' full compensation may be appropriate, but if only partial or limited success' was obtained, full compensation may be excessive. Such decisions are within the district court's discretion.

*Id. at 901-02.* In determining whether the unsuccessful and successful claims are related,

. . . the test is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised. Thus, the focus is to be on whether the unsuccessful and successful claims arose out of the same course of conduct.

*Id. at 903, [\*12]* quoting *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986). If a court finds the unsuccessful claims to be unrelated to the successful claims, it may either attempt

to identify specific hours that should be eliminated or simply reduce the award to account for the limited success. *Id. at 904.*

In the present matter, the Court finds it appropriate to reduce the lodestar figure based on Plaintiff's limited success, as demonstrated by the fact that she ultimately prevailed by way of settlement on just more than half of ADA violations she originally identified. Each of violations claimed by Plaintiff represent different and unrelated claims that are premised on different sections of the ADA Accessibility Guidelines to determine liability. Claims pertaining to the accessibility of plastic bags in the produce department, for example, are completely separate from claims relating to checkstand height, or to claims involving restroom access. Consequently, Plaintiff's claims relating to the men's bathroom, with respect to which she failed to prevail, are both unrelated and distinct. Because it is impossible to apportion attorneys' fees between these unsuccessful [\*13] claims from the claims upon which Plaintiff did prevail with any degree of certainty, the Court reduces Plaintiff's award of attorneys' fees by twenty percent to account for her limited success. Twenty percent of the \$ 9,877.50 lodestar is \$ 1,975.50. Total fees awarded for Plaintiff's claimed attorney/paralegal fees will thus be \$ 7,902.00.

Lastly, Plaintiff may recover, as part of the award of her fees in this matter, litigation expenses pursuant to 42 U.S.C.

§ 2205. The term "litigation expenses" in *Section 12205* has been interpreted to include "the same out-of-pocket expenses that are recoverable under 42 U.S.C. § 1988." *Robins v. Scholastic Book Fairs*, 928 F. Supp. 1027, 1037 (D. Or. 1996). Under *Section 1988*, Plaintiff recover those out-of-pocket expenses that "would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

As stated above, Plaintiff seeks a total of \$ 5,927.64 in litigation expenses. Of that amount, SaveMart has contested only the \$ 4,401.25 sought for expert fees and costs submitted by Plaintiff's expert, Joe Card. SaveMart claims that [\*14] Mr. Card's invoices should be rejected in their entirety because they do not provide enough detail for the Court to discern whether the requested amount is reasonable. Plaintiff has submitted, however, two invoices from Mr. Card which furnish seven different time entries showing the tasks performed and the hourly rate. Plaintiff has also submitted Mr. Card's opinion and report which detail the accessibility violations he identified. 3 Hence Mr. Card's invoices are sufficiently detailed and are properly subject to reimbursement.

2 While SaveMart also claims that a total of \$ 1,523.75 for draftsman services contained within Mr. Card's invoice is not factually supported, the Card report contains architectural drawings pertaining to many of the claimed violations that appear to be the product of those services.

### CONCLUSION

Based on the foregoing, Plaintiff is entitled to reasonable attorneys' fees in the amount of \$ 7,902.00 and reasonable litigation expenses in the amount of \$ 5,927.64, for a total of \$ [\*15] 13,829.64. Plaintiff will accordingly be awarded that amount. 3

3 Because oral argument would not be of material assistance, this matter was deemed suitable for decision without oral argument. E.D. Local Rule 78-230(h).

IT IS SO ORDERED.

DATED: October 20, 2005

MORRISON C. ENGLAND, JR

UNITED STATES DISTRICT  
JUDGE

# Attachment No. 6

*Wilson v. Norbreck LLC*, 2007 WL 1063050 (E.D. Cal. 2007)

**H**

Wilson v. Norbreck LLC  
E.D.Cal.,2007.

Only the Westlaw citation is currently available.  
United States District Court,E.D. California.  
Ronald WILSON, Plaintiff,

v.

NORBRECK LLC DBA Johnny Carino's; Fairbreck,  
LLC; AH Foods Corporation, and Does 1 to 10  
Defendants.

No. CIV S-04-690DFLJFM.

April 9, 2007.

*Memorandum of Opinion and Order*

LEVI, J.

\*1 Plaintiff Ronald Wilson, who is disabled, brought suit against defendant Norbreck LLC, making various ADA and state related claims. Wilson visited one of Norbreck's Johnny Carino's restaurants and allegedly encountered numerous architectural barriers. The court dismissed Wilson's claims based on five of these allegations at summary judgment, and, after a bench trial, the court ruled in favor of Norbreck on Wilson's remaining claims. Norbreck now moves for attorney's fees and costs under the ADA and the California Disabled Persons Act ("CDPA"). For the reasons below, the court denies Norbreck's motion.  
FN1

FN1. In its reply, Norbreck argues that, under Local Rule 78-230(c), the court should disregard Wilson's opposition because Wilson served his opposition one day late. While Norbreck is correct that Wilson did not timely serve his opposition, the court finds the requested sanction too harsh in this case.

I.

Wilson visited a Johnny Carino's restaurant ("the restaurant") and allegedly encountered various architectural barriers. Norbreck owns the restaurant. On April 7, 2004, Wilson filed suit against Norbreck, seeking compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees and costs under: (1) the ADA; (2) Cal. Health & Safety Code § § 19955 et seq.; (3) the Unruh Civil

Rights Act; (4) the California Disabled Persons Act; (5) the Unfair Business Practices Act; and (6) Cal. Civ.Code § 1714. Both parties subsequently moved for summary judgment.

In the course of the litigation, Wilson "alleged" that there were more than 60 different ADA violations at the restaurant. But Wilson failed to include many of these allegations in his complaint. Instead, Wilson listed many of his allegations only in a letter he sent to Norbreck or in his expert report. Wilson further complicated matters when he moved for summary judgment on some of these allegations. Because of the resulting confusion as to which claims were part of this case, the court ordered both parties to submit a final list of alleged violations Wilson intended to pursue. The parties submitted a list of 24 allegations. On December 15, 2005, the court found that Wilson adequately pleaded 11 alleged ADA violations in the complaint. The court then granted Norbreck summary judgment on Wilson's claims based on five of these allegations.

On August, 1, 2006, the court held a bench trial for Wilson's remaining claims. At trial, Wilson sought only damages and injunctive relief under the ADA and the Unruh Civil Rights Act, abandoning his other causes of action. After a one day trial, the court found that Wilson failed to prove any ADA violation.

II.

Under the ADA, the court, in its discretion, may award "the prevailing party" attorney's fees, including litigation expenses and costs. 42 U.S.C. § 12205. When defendants are the prevailing parties, however, courts should award fees and costs only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1154 (9th Cir.1997) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). 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).

\*2 Norbreck is correct that Wilson made 69 "allegations" of architectural barriers but the majority of these allegations were not claims in suit.



Accordingly, the court finds that Norbreck prevailed only as to 11 ADA claims that were part of this lawsuit. Just as the court disregarded Wilson's assertions that were not part of the complaint upon summary judgment, so does the court disregard them now. Neither party is entitled to any advantage from assertions that were never in suit. Thus, while Norbreck contends in its motion that it defended more than 60 different violations, most of this work is not compensable because the allegations were never made part of the case. To consider assertions in letters, reports, and briefs as if such assertions were part of an amended complaint is inconsistent with the architecture of the civil rules as well as the pre-trial scheduling order. The court declines to follow a path that can only lead to confusion and inefficiency.

Out of Wilson's eleven ADA claims, the court finds that nine had a factual and legal basis from the outset of litigation, and, therefore, were not frivolous. Although lacking in merit, Wilson's punitive damages claim and his Cal. Bus.Code § 17200 claim were colorable. Similarly, five of Wilson's claims were based on colorable, albeit incorrect, interpretations of the Accessibility Guidelines ("ADAAG") and the California Business Code ("CBC"): (1) unsecured floor mats, (2) dining booths spacing, (3) accessible seating in the bar and restaurant, (4) entrance door pressure, and (5) bar accessibility. As to Wilson's toilet paper dispenser claim and his encroaching wastebasket claim, the court determined that Wilson failed to provide sufficient evidence to establish ADA violations. However, neither claim was frivolous.

Norbreck is correct that the remaining two claims were frivolous: (1) lack of signage directing disabled patrons along accessible route to the restaurant entrance and (2) uninsulated hot water lines. Both claims cite ADAAG and CBC provisions that clearly do not apply to the restaurant's configuration at the time of Wilson's visits. The court, however, declines to award Norbreck attorney's fees and costs for their defense. Any fees and costs award would be de minimus. Moreover, it is impossible for the court to separate the fees and costs related to Norbreck's defense against the two frivolous claims from the fees and costs related to Norbreck's defense against Wilson's other allegations.

### III.

Norbreck also argues that it is entitled to attorney's fees and costs under Wilson's failed CDPA claims,

Cal. Civ.Code § § 54.1 and 54.3 (2007). As with Wilson's ADA claims, Norbreck prevailed on 11 CDPA claims brought by Wilson in the complaint.<sup>FN2</sup>

FN2. In his opposition, Wilson contends that Norbreck did not prevail as to any CDPA claim because he abandoned such claims before trial. This argument is unconvincing. Defendants prevail for the purpose of attorney's fees even if plaintiffs voluntarily dismiss their claims before trial. See *Corcoran v. Columbia Broadcasting Sys.*, 121 F.2d 575, 576 (9th Cir.1941).

The CDPA has its own attorney's fees provision. Cal. Civ.Code § 55, provides that "[t]he prevailing party in the action shall be entitled to recover reasonable attorney's fees." On its face, § 55 does not give courts discretion as to awarding fees, and it does not distinguish between prevailing plaintiffs and prevailing defendants. Accordingly, some courts have found that prevailing defendants are automatically entitled to fees under § 55 without further inquiry as to whether the claims were frivolous. See, e.g., *Jones v. Wild Oats Markets, Inc.*, 467 F.Supp.2d 1004, 1011 (S.D.Cal.2006); *Goodell v. Ralphs Grocery Co.*, 207 F.Supp.2d 1124, 1126 (E.D.Cal.2002). But in a recent case, a California court left open the issue of whether a prevailing defendant could recover attorney's fees under § 55. *Gunther*, 144 Cal.App. 4th at 243 n. 18 ("We leave for another day the issue of how section 55 interacts with section 54.3 [of the CDPA] and specifically whether a section 54.3 plaintiff is vulnerable as the nonprevailing party under section 55.")

\*3 Without deciding this precise issue, the court holds that when a plaintiff brings parallel CDPA and ADA claims, the ADA fees provision controls as a matter of state law.<sup>FN3</sup>

FN3. The same result would likely follow under federal law under preemption principles.

Under California law, prevailing defendants cannot receive attorney's fees for defending claims that inextricably overlap with other claims when a fee award is inappropriate for the defense of the latter. *Carver v. Chevron U.S.A., Inc.*, 119 Cal.App. 4th 498, 506 (2004). In *Carver*, plaintiffs sued defendant for alleged antitrust violations under the Cartwright

Act and also brought various common law claims. *Id.* at 501. Defendant ultimately prevailed on all of plaintiff's causes of action and moved for attorney's fees. *Id.* at 502.

Many of the *Carver* plaintiffs' common law claims inextricably overlapped with their Cartwright Act claims. But while defendant could receive fees for prevailing as to the former, the Cartwright act allows an award of fees only to prevailing plaintiffs and not prevailing defendants. *Id.* at 503-04. "The public policy implicit in the unilateral fee-shifting provision of [the Cartwright Act] is to encourage injured parties to broadly and effectively enforce the Cartwright Act 'in situations where they otherwise would not find it economical to sue.'" *Id.* at 504 (citation omitted). The court concluded that awarding defendants fees for the defense of claims that overlapped with the Cartwright Act claims would violate that public policy. *Id.* (noting that "[t]o allow Chevron to recover for fees for work on Cartwright Act issues ... would superimpose a judicially declared principle of reciprocity of the [Cartwright Act's] fee provision ... and would thereby frustrate the legislative intent to 'encourage improved enforcement of public policy'" (citation omitted)).

Similarly, in this case, where the CDPA claims parallel the ADA claims, to award fees under the CDPA would compromise the public policy underlying the ADA's attorney's fees provision, which distinguishes between prevailing plaintiffs and prevailing defendants. *See Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1154 (9th Cir.1997). Accordingly, the court declines to award fees to defendant under the CDPA where to do so would be tantamount to awarding fees under the ADA upon a standard inconsistent with the fees provision in the ADA. Therefore, the court also finds that Norbreck is not entitled to fees and costs under the CDPA.

V.

For the reasons above, the court denies Norbreck's motion for attorney's fees and costs.

IT IS SO ORDERED.

E.D.Cal.,2007.  
Wilson v. Norbreck LLC  
Slip Copy, 2007 WL 1063050 (E.D.Cal.)

END OF DOCUMENT

# Attachment No. 7

*Louie v. Carichoff*, 2006 WL 662742 (E.D. Cal. 2006)

**Motions, Pleadings and Filings**

Only the Westlaw citation is currently available.

United States District Court,  
E.D. California.

George S. LOUIE, Plaintiff,  
v.

Robert A. CARICHOFF, et al., Defendants.  
**No. S-05-0984 DFL DAD PS.**

March 16, 2006.

Jeff Grant Kennedy, Law Offices of J. Grant  
Kennedy, West Lake Village, CA, for Plaintiff.

Robert A. Carichoff, Law Office of Robert A.  
Carichoff, Sacramento, CA, for Defendant pro se and  
Jessica Lynn Coleman.

*FINDINGS AND RECOMMENDATIONS*

DROZD, Magistrate J.

\*1 This matter is before the court on defendants' motion to dismiss plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative summary judgment. Attorney Robert A. Carichoff appeared on his own behalf and on behalf of defendant Jessica Lynn Coleman at the hearing on the motion. J. Grant Kennedy appeared on behalf of plaintiff. Having considered all written materials submitted in connection with the motion, and after hearing oral argument, the undersigned will recommend that defendants' motion to dismiss be granted and this action be dismissed with prejudice.

PLAINTIFF'S AMENDED COMPLAINT [FN1]

FN1. At the time defendants filed their motion to dismiss the operative pleading in this case was plaintiff's original complaint. In response to defendants' motion, plaintiff filed an amended complaint, which he was entitled to do. *See* Fed.R.Civ.P. 15(a)("[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served); *Doe v. United States*, 58 F.3d 494, 496-97 (9th Cir.1995). While in some instances the filing

of an amended pleading moots a motion to dismiss, such is not the case here. As explained below, plaintiff's amended complaint does not cure the deficiencies detailed in defendants' motion. Therefore, the undersigned has considered defendants' motion to dismiss as directed at plaintiff's amended complaint. *See* Schwarzer, Tashima and Wagstaffe, *Federal Procedure Before Trial*, ¶ 9:262 (The Rutter Group 2004) ("An amended complaint supersedes the prior complaint as a pleading. Thus, the court will usually treat the motion to dismiss as mooted. It may, however, proceed with the motion if the amendment does not cure the defect."). The court has disregarded plaintiff's second amended complaint because it was filed without leave of court. *See* Fed.R.Civ.P. 15(a).

Plaintiff has brought this action under the Americans With Disabilities Act ("ADA"), against defendant Jessica Lynn Coleman and her lawyer, defendant Robert A. Carichoff. Mr. Carichoff represents Ms. Coleman in connection with the defense of an action brought by plaintiff against her in Yolo County Superior Court, *George Louie v. Jessica Lynn Coleman*, No. CV 04-885. This federal action arises out of a dispute over where plaintiff's deposition in that state court action should be taken.

According to the amended complaint, during discovery in state court Mr. Carichoff noticed the deposition of plaintiff to occur at a local deposition reporters' office. [FN2] On the same day the deposition notice was served, plaintiff, who often requires a wheelchair to travel about in public, paid a visit to the office in question and "encountered discriminatory conditions (including, but not limited to, inaccessible handicapped parking and a lack of lower service counters.)" (Compl. at 3.) Plaintiff advised the deposition reporters' office of those conditions. Several weeks later, and four days prior to the noticed deposition, plaintiff advised Mr. Carichoff of the access problem and "insisted that any deposition location ... meet federal requirements for accessibility." (Compl. at 3.) Plaintiff declined Mr. Carichoff's invitation to identify a suitable location for the deposition. Mr. Carichoff then re-noticed the deposition to be held at a large commercial office building in downtown

Sacramento.

*Van Hulle v. Pacific Telesis Corp.*, 124  
F.Supp.2d 642, 643 n. 2 (N.D.Cal.2000).

FN2. Mr. Carichoff is the main defendant. Ms. Coleman is named because, as her counsel's client, she allegedly "acted so as to precipitate" and/or "failed to prevent" Mr. Carichoff's actions. (Compl. at 3.)

A few weeks prior to the re-scheduled deposition, plaintiff visited the commercial office building in question and again "encountered discriminatory conditions (including, but not limited to, a lack of lower service counters)." (Am. Compl. at 4.) Plaintiff advised the building's management of such conditions. While it is unclear from the amended complaint, since Mr. Carichoff filed a motion in the state court proceedings to compel plaintiff's attendance at the re-noticed deposition he appears to have been made aware of plaintiff's concerns regarding conditions at that location. The amended complaint alleges that the motion to compel was filed prior to the date for plaintiff's deposition and that plaintiff did not cancel either of his depositions nor did he refuse to appear as suggested in the motion to compel. According to the amended complaint, plaintiff perceived the motion to compel as "an effort to force the abdication of federal rights..." (Compl. at 4-5.) Plaintiff then initiated this ADA action.

\*2 The amended complaint alleges that Mr. Carichoff "showed that he planned to operate" the deposition reporters' office and commercial office building by noticing depositions there. (Am. Compl. at 3, 4.) The amended complaint alleges six causes of action. The first cause of action is brought under Title III [FN3] of the ADA pursuant to 42 U.S.C. § 12182(b)(1)(D)(i) which provides that "[a]n individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration ... that have the effect of discriminating on the basis of disability[.]" The amended complaint alleges that Mr. Carichoff's "standards or criteria for the selection of venues for depositions have the effect of discriminating on the basis of disability...." (Am. Compl. at 5.)

FN3. As one district court has explained:  
The ADA initially was enacted as Public Law 101-336 and was organized into Titles I through V. When the ADA was codified as 42 U.S.C. § 12101, et seq., the "Titles" were re-labeled as "Subchapters." Titles I, II, and III became Subchapters I, II, and III, respectively, and Title V became Subchapter IV.

Plaintiff's second cause of action is a Title III claim brought pursuant to 42 U.S.C. § 12182(b)(2)(A)(ii) which, in prohibiting discrimination on the basis of disability, defines discrimination as follows:

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations[.]

Here, plaintiff alleges that Mr. Carichoff "has failed to make reasonable modifications to his policies" regarding noticing depositions of disabled persons "even though he has been put on notice that the venues he has selected have repeatedly been inaccessible." (Am. Compl. at 6.)

The third cause of action is brought under Title V of the ADA and alleges that Mr. Carichoff retaliated against plaintiff in violation of 42 U.S.C. § 12203(a), which provides as follows:

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

According to plaintiff's allegations, the motion to compel filed by Mr. Carichoff, and a related motion to have plaintiff declared a vexatious litigant, amount to retaliatory conduct in response to plaintiff's "protected opposition to Carichoff's discriminatory standards ... vis-a-vis selection of venues for depositions of disabled persons ..." (Compl. at 6.)

The amended complaint's fourth cause of action also is brought under Title V and alleges that Mr. Carichoff engaged in coercive, intimidating and threatening conduct in violation of 42 U.S.C. § 12203(b) which states:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

\*3 In this regard, plaintiff alleges that Mr. Carichoff has coerced, threatened and intimidated plaintiff by

"repeatedly" noticing his depositions for locations that are inaccessible and "attempt[ing] to arrogate unto himself the authority to require [plaintiff] to locate an accessible venue...." (Am. Compl. at 7.)

Finally, in the fifth and sixth causes of action plaintiff alleges that defendants' conduct has denied plaintiff equal access to deposition facilities in violation of California's Unruh Civil Rights Act, California Civil Code § 51, and the California Disabled Persons Act, California Civil Code § 54, respectively. [FN4]

FN4. Plaintiff's use of boilerplate allegations renders the fifth and sixth causes of action somewhat difficult to decipher. Nonetheless the fifth cause of action refers to California Civil Code § 51 and the sixth cause of action refers to § 54. Therefore, the court has construed the causes of action as described above.

#### LEGAL STANDARDS

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. *See Iletto v. Glock Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir.2003), *cert. denied* 543 U.S. 1050, 125 S.Ct. 865, 160 L.Ed.2d 770 (2005); *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.1983). Dismissal of the complaint or of any claim within it "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990); *see also Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984).

In considering a motion to dismiss for failure to state a claim, the court accepts as true all material allegations in the complaint and construes those allegations, as well as the reasonable inferences that can be drawn from them, in the light most favorable to the plaintiff. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989). In a case where the plaintiff is pro se, the court has an obligation to construe the pleadings liberally. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir.1985) (en banc). However, the court's liberal interpretation of a pro se complaint may not supply essential elements of a claim that are not pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir.1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.1982). [FN5]

FN5. Plaintiff was proceeding pro se when he drafted the amended complaint which is the subject of the pending motion.

#### ANALYSIS

The allegations of plaintiff's amended complaint speak for themselves. As the undersigned observed at the hearing on defendants' motion, this action borders on frivolous. Nonetheless, the undersigned resolves the instant motion as if the allegations in the amended complaint are pled in good faith. [FN6]

FN6. For this reason, the undersigned does not reach defendants' contention that the court lacks subject matter jurisdiction over this matter, although there is authority to support such a contention. *See Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946) (recognizing that a claim is subject to dismissal for want of jurisdiction where it is "wholly insubstantial and frivolous" and "so patently without merit"); *Hagans v. Levine*, 415 U.S. 528, 543, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) (a claim may be dismissed for lack of jurisdiction where it is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court").

As set forth above, plaintiff's first and second causes of action are brought under Title III pursuant to 42 U.S.C. § 12182(b)(1)(D)(i) and 12182(b)(2)(A)(ii), respectively. By its terms, § 12182 applies to "any person who owns, leases (or leases to), or operates a place of public accommodation." Defendants argue that plaintiff's first and second causes of action must be dismissed because they are not "operators" of a place of public accommodation as alleged in the amended complaint. [FN7] The undersigned agrees.

FN7. The amended complaint alleges that Mr. Carichoff "showed that he planned to operate" the venues in question by noticing depositions at these locations. (Am. Compl. at 3, 4.)

\*4 Because the ADA does not define the term "operates," the court should "construe it in accord with its ordinary and natural meaning." *See Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Relying on a variety of dictionary definitions, the Ninth Circuit recently

recognized that to "operate," in the context of a business, means "to put or keep in operation," "[t]o control or direct the functioning of," and "[t]o conduct the affairs of; manage." *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 878 n. 14 (9th Cir.2004) (citations omitted). In that same case the court observed:

[W]hether Title III applies to [a rodeo's sponsor and presenter] depends on whether those private entities exercise sufficient control over the Center, and in particular over the configuration of the facilities, even temporarily, with regard to accessibility, that they can be said to 'operate' the stadium.  
375 F.3d at 878.

Here, defendants do not rise to the level of "operators" simply by noticing depositions at a space in a court reporter's office or in a commercial office building. By convening a deposition in a conference room, a person does not put or keep the entire building in operation; he or she does not control the functioning of the facilities; nor does he or she manage the affairs of the buildings. In the context of litigating the underlying state court action and conducting routine discovery, defendants did not exercise the required management, control or oversight of the subject buildings to become "operators" of those facilities. There is no allegation that the defendants exercised sufficient control over the configuration of the facilities with regard to accessibility. For all of these reasons, defendants are not "operators" of the venues in question and Title III does not apply to them. *See Aikins v. St. Helena Hosp.*, 843 F.Supp. 1329, 1335 (N.D.Cal.1994)(Title III did not apply to independent contractor physician at a hospital where the physician was not on hospital's board of directors, had no authority to enact or amend hospital policy, and lacked power to control hospital policy on use of interpreters). Therefore, plaintiff's first and second causes of action under Title III should be dismissed. [FN8]

FN8. Plaintiff's citation to *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir.2000), *aff'd*, 532 U.S. 661, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001) in a post-hearing letter brief is not persuasive with respect to the issue posed here. The court in *Martin* was not called upon to address the meaning of "to operate" in that it appears to have been undisputed in that case that "[o]n days of tour competition, PGA is the operator of the golf course." 204 F.3d at 996.

The undersigned also will recommend dismissal of the third and fourth causes of action for retaliation and intimidation under Title V, respectively. There currently is a split among the circuits as to whether individuals can be liable under Title V of the ADA. *Compare Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179-80 (11th Cir.2003)(holding that an individual may be sued in his personal capacity for violating § 12203) *with Baird v. Rose*, 192 F.3d 462, 472 (4th Cir.1999) (holding that Congress did not intend individuals to be liable under § 12203). The Ninth Circuit has not addressed the issue in a published opinion and district courts within this circuit are split on the matter. *Compare Cable v. Dep't. of Dev. Servs. of the State of Cal.*, 973 F.Supp. 937, 943 (C.D.Cal.1997)("individuals cannot be held liable under Title V of the ADA") *and Stern v. California State Archives*, 982 F.Supp. 690, 691 (E.D.Cal.1997)("the court holds that individuals who do not qualify as 'employers' are not subject to personal liability under section 12112(a)" *with Ostrach v. Regents of the Univ. of Cal.*, 957 F.Supp. 196, 200 (E.D.Cal.1997) ("[p]laintiff may sue the individual defendants under the anti-retaliation provision of the ADA").

\*5 Nonetheless, even if the Ninth Circuit were to determine that individuals can be held liable under § 12203(a) and (b), the court finds that the actions allegedly engaged in by defendants Carichoff and Coleman do not fall within the "retaliation," "coercion," "intimidation," "threats," or "interference" contemplated by Congress in enacting § 12203. A motion to compel plaintiff's deposition within the context of a civil lawsuit initiated by plaintiff, and after at least two unsuccessful attempts to secure plaintiff's deposition testimony, can hardly be characterized as retaliation. Nor can defendants' efforts in noticing the deposition, and attempting to cooperate with plaintiff to find a suitable location for the deposition, be characterized as any kind of coercive or threatening behavior. The unfortunate events leading to the initiation of this action amount to a routine discovery dispute in state court, not a federal civil rights lawsuit. For these reasons, the undersigned finds that plaintiff's Title V claims fail as a matter of law and will recommend that the third and fourth causes of action be dismissed with prejudice. *See Douris v. Office of the Pennsylvania Attorney General*, No. Civ. A. 03-CV-5661, 2004 WL 322907, \*3 (E.D.Pa. Feb.9, 2004)(even if individuals could be held liable under Title V, "[c]ertainly the refusal to pay money to settle a claim and the refusal to capitulate to all demands of accommodation cannot be characterized as 'retaliation'").

Next, plaintiff's state law claims are predicated on his ADA claims. A violation of the ADA also constitutes 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). *Molski v. Mandarin Touch Restaurant*, 347 F.Supp.2d 860, 862-63 (C.D.Cal.2004); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 607 (N.D.Cal.2004). Because plaintiff is unable to state a cognizable claim under the ADA, plaintiff's state law claims must also be dismissed without leave to amend.

Finally, defendants seek an order declaring plaintiff a vexatious litigant and subjecting him to a pre-filing order. Defendants seek such an order on the grounds that plaintiff has filed over 1,000 lawsuits alleging violations of the ADA. They rely on the decision in *Molski v. Mandarin Touch Restaurant*, 347 F.Supp.2d 860 (C.D.Cal.2004). However, the reasoning of the district court in the *Molski* decision has recently been compellingly refuted. See *Wilson v. Pier 1 Imports, Inc.*, 411 F.Supp.2d 1196 (E.D.Cal.2006) Moreover, vexatious litigant orders are rarely justified. See *De Long v. Hennessey*, 912 F.2d 1144, 1146-47 (9th Cir.1990); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523-26 (9th Cir.1993); *Wilson*, 347 F.Supp.2d at 1199. Clearly "mere litigiousness is insufficient" to justify such an order. *De Long*, 912 F.2d 1147; *Wilson*, 347 F.Supp.2d at 1200.

\*6 Here, defendants have not even attempted to demonstrate that any of plaintiff's previously filed lawsuits were frivolous. There has been no representation by defendants that plaintiff has filed other meritless actions arising out of discovery disputes in state court actions. Therefore, the court will recommend that defendants' request for an order declaring plaintiff a vexatious litigant be denied without prejudice to renewal in the event plaintiff were to pursue additional abusive lawsuits of this same nature.

#### CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to dismiss be granted and this entire action be dismissed with prejudice; and
2. Defendants' request for an order declaring plaintiff a vexatious litigant be denied without prejudice.

These findings and recommendations are submitted

to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten (10) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

Slip Copy, 2006 WL 662742 (E.D.Cal.)

#### Motions, Pleadings and Filings (Back to top)

- 2:05cv00984 (Docket) (May. 18, 2005)

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## 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 OPENING BRIEF ON THE MERITS, 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.

Supreme Court of California  
(Original plus 13 copies)  
Office of the Clerk  
350 McAllister Street  
San Francisco, CA 94102-4783

Renee Welze Livingston, esq.  
Jason G. Gong, esq.  
Livingston Law Firm (1 copy)  
A Professional Corporation  
1600 South Main Street, Suite 280,  
Walnut Creek, CA 94596

Court of Appeal  
First Appellate District (1 copy)  
350 McAllister Street  
San Francisco, CA 94102

Solicitor General (1 copy)  
Office of the Attorney General  
1300 "I" Street  
P.O. Box 944255  
Sacramento, CA 94244-2550

San Francisco County Superior Court  
– Main (1 copy)  
Civic Center Courthouse  
400 McAllister Street  
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Rafael, California on June 10<sup>th</sup>, 2010.

By: 