Case No. S180890

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

♦

LES JANKEY
Plaintiff-Appellant,

v.

SONG KOO LEE, Individually and dba K&D MARKET,
Defendant-Respondent.

♦

RESPONDENT'S ANSWER BRIEF ON THE MERITS

♦

Re: Decision of the Court of Appeal
First Appellate District, Division Four
Case No. A123006

On Appeal from the Superior Court for San Francisco County
Case No. CGC07-463040
Honorable Patrick J. Mahoney, Judge

♦

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INTRODUCTION

This appeal presents an issue of first impression in this Court and arises from the First District Court of Appeal's decision affirming a trial court's award of attorney fees to defendant-respondent Song Koo Lee ("defendant" or "Lee") pursuant to Civil Code Section 55 of the California Disabled Persons Act ("CDPA"). The trial court awarded fees to defendant as the prevailing party after defendant obtained summary judgment against plaintiffs on all of their claims below. Plaintiff-appellant Les Jankey[1] ("plaintiff" or "Jankey") contends that the Court of Appeal erred when it considered and harmonized Section 55[2] along with other corresponding provisions of state law to conclude that Section 55 is not preempted by the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 *et seq.*) ("ADA"). Specifically, the Court of Appeal determined that Section 55 does not conflict with the stated purpose and intent of the ADA.

Section 55 clearly and unambiguously provides that "[t]he prevailing party in the action *shall be entitled to recover reasonable attorney's fees.*" *See* Section 55 (emphasis added). Accordingly, the plain meaning of the statute establishes that an award of attorney's fees to a prevailing party –

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[1] Disability Rights Enforcement, Education Services: Helping You Help Others, a co-plaintiff below, is not a party to this Supreme Court proceeding.

[2] All further statutory references to Section 55 are to the California Civil Code.

whether plaintiff or defendant – under Section 55 of the CDPA is *mandatory*.

Under the ADA, an award of attorney fees is discretionary. *See* 42 U.S.C. Section 12205. Section 12205 provides, among other things, that: "[i]n any action or administrative proceeding commenced pursuant to this Act, the court . . . *in its discretion*, may allow the *prevailing party* . . . a reasonable attorney's fee, including litigation expenses, and costs[.]" *See id.* (emphasis added).

The issue before this Court arises from separate rulings made by the Ninth Circuit Court of Appeals and the California Court of Appeal for the First District. Although each court was presented with the identical issue of whether the mandatory attorney fees provision under Section 55 of the CDPA conflicts with and is therefore preempted by the ADA, each court has reached the opposite conclusion on this issue.

In the Ninth Circuit case, the court concluded that Section 55 is preempted by the ADA because application of Section 55 conflicted with the ADA. *See Hubbard v. SoBreck, LLC*, 554 F.3d 742 (9th Cir. 2009). Specifically, the *Hubbard* Court determined that Section 55's mandatory fee provision is inconsistent with the ADA, because under the ADA, a prevailing defendant cannot recover attorney fees unless defendant can

establish that plaintiff's claims are frivolous, unreasonable or without foundation.[3] *See id.* at 744-47.

In contrast, the First District Court of Appeal rejected the Ninth Circuit's conclusion that Section 55 is in conflict with (and is therefore preempted by) the ADA. *See Jankey v. Lee* (2010) 181 Cal.App.4th 1173. Upon analyzing the legislative intent for both Section 55 and the ADA, the Court of Appeal determined that Section 55 is not in conflict with the ADA, because Section 55, when viewed in the context of the larger statutory scheme, provides an access plaintiff in California with additional remedies that are potentially *greater* than those available to plaintiffs under the ADA. *See id.* at 1186 (stating that the Ninth Circuit had "improperly parsed the law" by "dissecting the fee provision" and neglecting to consider Section 55's role and purpose within the CDPA and with the ADA when concluding that Section 55 was preempted).

Because an access plaintiff can choose to pursue (or forgo) the additional remedies under the Section 55 of the CDPA, the Court of Appeal concluded that plaintiff controls the relative risks and benefits of seeking relief under Section 55. *See id.* at 1186-87. In addition, the court stated that, when viewed in the proper context, Section 55 "represents precisely the kind of state law" authorized by 42 [U.S.C.] Section 12201(b)" of the

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[3] As used herein, the term "frivolous" will refer to claims that are frivolous, unreasonable or groundless.

ADA because it offers equal or greater remedies than those available under the ADA. *See id.* at 1186. Accordingly, the Court of Appeal concluded that Section 55 does not conflict with the ADA and is therefore not preempted. *See id.* at 1187.

Plaintiff asserts that this Court should reverse the Court of Appeal's decision, because the court incorrectly determined that an award of attorney fees to a prevailing defendant is *mandatory* under Section 55. However, the plain language of Section 55 establishes that the California Legislature intended to allow a bilateral fee recovery to the "prevailing party," whether plaintiff or defendant. Moreover, the legislative history of Section 55 confirms that the Court of Appeal correctly interpreted the plain meaning of Section 55.

Plaintiff also contends that, to the extent Section 55 permits an award of fees to a prevailing defendant in a non-frivolous action, Section 55 conflicts with, and is therefore preempted by, the ADA. However, plaintiff has failed to establish that Section 55 clearly stands as an obstacle to the accomplishment of Congress's stated purpose in enacting the ADA, which is the appropriate test for conflict preemption. Indeed, as discussed below, Section 55 represents precisely the type of statute that the ADA expressly provides will *not* be preempted. *See* 42 U.S.C. Section 12201(b). Because Section 55 simply provides an optional remedy that a plaintiff can

but need not pursue, the statute cannot possibly stand as an obstacle to Congressional purpose.

Accordingly, this Court should reject plaintiff's contentions and affirm the Court of Appeal's decision in its entirety.

NATURE OF THE CASE AND PROCEDURAL HISTORY

In his underlying lawsuit, plaintiff asserted claims against defendant under the ADA, Sections 54, 54.1, 54.3 and 55 of the CDPA, Sections 51 and 52 of the Unruh Civil Rights Act, and Section 19955 of California Health & Safety Code. *See Jankey*, 181 Cal.App.4th at 1178. Plaintiff's claims centered on a raised step located at the entryway of defendant's market, which plaintiff asserted was an architectural barrier that prevented him and other wheelchair bound individuals from wheeling directly into the store. *See id.* Plaintiff's complaint sought an array of relief including injunctive relief under both the ADA and Section 55 to compel defendant to remove the front step barrier as well as monetary damages under the CDPA and Unruh Act. *See id.* In addition, plaintiff sought an award of attorney fees pursuant to the ADA and Section 55.

Plaintiff could not establish that defendant had violated the ADA, CDPA, the Unruh Act, or Section 19955 of the Health & Safety Code. *See id.* Accordingly, the trial court granted defendant's motion for summary judgment on all of plaintiff's claims. *See id.* Thereafter, as the prevailing

party, defendant moved to recover his attorney fees pursuant to Section 55. *See id.* The parties fully briefed the applicable issues, including (1) whether the trial court should apply the Ninth Circuit's decision in *Hubbard v. SoBreck, LLC*, 531 F.3d 983 (9th Cir. 2008), *amended and superseded by Hubbard v. SoBreck, LLC*, 554 F.3d 742 (9th Cir. 2009), which held that a prevailing defendant seeking an award of attorney's fees under Section 55 of the CDPA must show that plaintiff's claims are frivolous; (2) whether the court should apply the Court of Appeal's decision in *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, which held that a prevailing defendant seeking attorney's fees under Section 55 is not required to first show that plaintiff's claims are frivolous; and (3) whether plaintiff's claims were frivolous under the circumstances. *See id.*

The trial court concluded that the *Molski* decision was controlling authority and determined that defendant, having prevailed on all of plaintiff's claims in the underlying summary judgment motion, was entitled to an award of his reasonable attorney fees and costs. *See id.* at 1179-80. The trial court awarded defendant attorney fees in the amount of $118,458.00 and costs in the amount of $3,544.54 for a total award against plaintiff in the amount of $122,002.54. *See id.* at 1180. Plaintiff appealed the court's order awarding attorney fees and costs, but did not appeal the order granting summary judgment. *See id.* at 1178-79.

On appeal, the First District Court of Appeal (Division Four) applied conflict preemption principles articulated by the United States Supreme Court to determine whether the ADA preempted Section 55. *See Jankey*, 181 Cal.App.4th at 1183-84. After careful consideration of the issue, the Court of Appeal determined that Section 55 is not in direct conflict with the ADA and is therefore not preempted by federal law. *See id.* at 1185-87. Accordingly, the Court of Appeal affirmed the trial court's order and judgment in its entirety. *See id.* at 1187-88.

QUESTIONS PRESENTED

Plaintiff contends that the Court of Appeal committed "six errors," requiring reversal of the court's decision. These errors are centered on the following two questions:

(1) Whether the California Legislature intended that Section 55 of the CDPA provide a mandatory award of attorney fees for a prevailing defendant; and

(2) Whether Section 55 is in conflict with the ADA and is therefore preempted under federal law? [4]

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[4] Despite identifying six separate errors in his opening brief, plaintiff indicates that the two questions defendant has identified above are the issues that require this Court's resolution. *See* Plaintiff's Opening Brief at 4 ("Legal Discussion"). Accordingly, defendant's brief will begin by addressing plaintiff's alleged errors relating to the statutory interpretation of Section 55. Defendant's brief will then address plaintiff's alleged errors relating to whether Section 55 is preempted by the ADA.

DISCUSSION

I. THE COURT OF APPEAL CORRECTLY DETERMINED THAT CIVIL CODE SECTION 55 PROVIDES A MANDATORY AWARD OF ATTORNEY FEES TO A PREVAILING DEFENDANT.

A. The Plain Language Of Section 55 Establishes That The Legislature Intended To Provide A Mandatory Award Of Attorney Fees To Both Prevailing Plaintiffs And Prevailing Defendants.

As explained above, plaintiff challenges the Court of Appeal's conclusion that Civil Code section 55 mandates an award of attorney fees to a prevailing defendant. Although plaintiff's brief is not entirely clear, plaintiff appears to suggest that the court's conclusion was incorrect because attorney fees under Section 55 are not mandatory even for a prevailing *plaintiff*. Specifically, plaintiff contends that the Court of Appeal erred by "[a]ssuming 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." *See* Plaintiff's Opening Brief ("POB") at 13 (identified as "Third Error"). Plaintiff's contention should be rejected because it ignores the plain meaning of Section 55.

Section 55 authorizes a plaintiff to commence an action to enjoin a violation of California's access laws and provides that: "[t]he *prevailing*

party in the action shall be entitled to recover reasonable attorney's fees."[5] *See Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 790 (emphasis added).

In California, it is well-established that a court must ascertain the Legislature's intent to effectuate the purpose of the law when construing the meaning of a statute. *See Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; *California Teachers Ass'n v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698. To ascertain legislative intent, courts must first look to the words of the statute and apply their plain meaning "in light of the entire legislative scheme of which it is a part," because "the language chosen is usually the surest guide to legislative intent." *Runyon v. Board of Trustees of the Cal. State University* (2010) 48 Cal.4th 760, 767; *Delaney*, 50 Cal.3d at 798; *see also Unzipped Apparel v. Bader* (2007) 156 Cal.App.4th 123, 129. Thus, "[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature." *Delaney*, 50 Cal.3d at 798 (quoting *Lungren v. Deukmejian* (1988) 45 Cal. 3d 727, 735); *Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *see also Goodell v. Ralph's Grocery*, 207 F.Supp.2d

[5] 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."

1124, 1126 (E.D. Cal. 2002) (stating that "the language of the statute is the best evidence the court has of the legislature's intent").

Here, the language of Section 55 expressly provides that "[t]he *prevailing party* in the action shall be entitled to recover reasonable attorney's fees." *See* Section 55 (emphasis added); *Molski*, 164 Cal.App.4th at 790; *see also Jones*, 467 F. Supp.2d at 1011. Because the plain language of Section 55 is clear and unambiguous, the statutory language itself establishes that the Legislature clearly intended to allow a bilateral fee recovery to the "prevailing party," whether plaintiff or defendant. *See Runyon*, 48 Cal.4th at 767; *Delaney*, 50 Cal.3d at 798; *see also Bader*, 156 Cal.App.4th at 129. Accordingly, the Court of Appeal did not err when it held that a prevailing plaintiff may recover a guaranteed mandatory award of attorney fees under Section 55 independent of any claim asserted under the ADA. *See Jankey*, at 1185 (stating that "[a]s noted, unlike the ADA, which makes attorney fee recovery discretionary (42 U.S.C. § 12205), attorney fees are mandatory under Section 55"); POB at 13-15.

Notwithstanding the plain language of Section 55, plaintiff contends that a fee award made to a prevailing plaintiff is "illusionary" because California courts have adopted the federal standard applicable to fee awards under the ADA that allows a court to decline awarding fees to a prevailing plaintiff under Section 55 "when such an award would be unjust." *See* POB at 14 (citing *Bartling v. Glendale Adventist Medical Center* (1986)

184 Cal.App.3d 97, 104). Plaintiff further contends that such an award is not mandatory because California courts have "discretion to reduce fees awarded to prevailing plaintiffs under Section 55." *See* POB at 14-15 (citing *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249-50). These contentions are without merit.

First, *Bartling v. Glendale Adventist Medical Center* is inapposite because it did not involve a fee award under Section 55. *Bartling* instead involved an appeal from a trial court's order denying a request for attorney fees made pursuant to Code of Civil Procedure Section 1021.5 (the "private attorney general" doctrine),[6] which gives courts discretion to award attorney fees to successful parties in private actions to enforce important public polices which benefit a broad class of citizens. *See Bartling*, 184

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[6] Section 1021.5 is entitled "Attorney fees in cases resulting in public benefit" and provides in relevant part:

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

Code of Civil Procedure Section 1021.5 (emphasis added). All further statutory references to Section 1021.5 are to the California Code of Civil Procedure.

Cal.App.3d at 102 (discussing Court's holding in *Serrano v. Unruh* (1982) 32 Cal.3d 621, 632).

The issue in *Bartling* was whether the trial court properly denied a Section 1021.5 motion where the court did not conduct a recorded hearing and did not exercise its equitable discretion to "realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right." *See id.* at 103. Based upon these glaring deficiencies, the *Bartling* Court reversed the trial court's order and on remand, directed the trial court to consider whether "special circumstances" would render an award of fees unjust." *See id.* at 104 (citing *Serrano*, 32 Cal.3d at 639 and discussing trial court's discretion to deny attorney's fees).

As noted above, a fee award made pursuant to the private attorney general doctrine under Section 1021.5 is *discretionary* while an award of fees under Section 55 is *mandatory*. Thus, unlike in a case involving an award of fees pursuant to Section 1021.5, a court may not withhold an award of attorney fees to a prevailing party under Section 55 even if the court may subjectively believe that such an award would be unjust. *Cf. Serrano*, 32 Cal.3d at 639; *Bartling*, 184 Cal.App.3d at 104.

Second, *Sokolow v. County of San Mateo* is inapposite because it likewise did not involve a trial court's award of attorney fees to a prevailing party under Section 55. Instead, the issue in *Sokolow* was whether the trial

court had properly denied plaintiffs' request for discretionary attorney fees under 42 U.S.C. Section 1988 (the Civil Rights Attorneys' Fees Awards Act), and Code of Civil Procedure Section 1021.5 (the "private attorney general" doctrine). On appeal, the appellate court reversed after determining that plaintiffs were "prevailing parties" because they had achieved some of their requested relief. *See Sokolow*, 213 Cal.App.3d at 247. Regarding their request for attorney fees under the federal statute (Section 1988), the appellate court noted that plaintiffs were not automatically entitled to the full amount of their request and that the trial court should "award only that amount of fees that is reasonable in relation to the results obtained." *See id.* at 247-48.

Regarding plaintiffs' right to attorney fees under Section 1021.5, the *Sokolow* Court indicated that whether plaintiffs were entitled to the full amount of their requested fees under that statute presented a separate question because "[t]he right to attorney fees under the state statute is entirely independent of the federal right." *Sokolow*, 213 Cal.App.3d at 249. Accordingly, the court determined that federal precedent (e.g., *Hensley v. Eckerhart* (1983) 461 U.S. 424) is not binding on California courts and "is of only analogous precedential value." *See id.* Thus, *Sokolow* undermines plaintiff's contention that federal standards provide California courts with discretion to deny a prevailing party's request for attorney fees under Section 55. *See* POB at 14.

Because the issues presented in *Bartling* and *Sokolow* involved *discretionary* awards of attorney fees pursuant to the "private attorney general" doctrine of Section 1021. 5 rather than a *mandatory* award of attorney fees to the prevailing party under Section 55, plaintiff's cases are distinguishable from the present case. Accordingly, the cases do not in any way undermine the Court of Appeal's conclusion that a prevailing "plaintiff is guaranteed an attorney fee award" under Section 55. *See Jankey*, 181 Cal.App.4th at 1185.[7]

Finally, to the extent plaintiff contends that the Court of Appeal's holding means a prevailing party is entitled to the *full* award of fees requested under Section 55, the contention is without merit and illustrates a fundamental misreading of Section 55 and the Court of Appeal's decision. *Compare Jankey*, 181 Cal.App.4th at 1184-86 *with* POB at 13-15 (citing cases where California appellate courts have exercised their discretion to reduce an attorney fee award to a prevailing plaintiff).

Section 55 guarantees only that the prevailing party will be entitled to receive an award of "*reasonable* attorney's fees" in an amount to be determined by the trial court. "The amount of the prevailing party's

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[7] Plaintiff's additional authorities (*Feminist Women's Health Center v. Blyth* (1995) 32 Cal.App.4th 1641, 1674; *Bingham v. Obledo* (1983) 147 Cal.App.3d 401, 407; *Californians for Responsible Toxics Mgmt. v. Kizer* (1989) 211 Cal.App.3d 961, 974-75) also involve a trial court's discretionary fee awards made under Section 1021.5 and thus do not support plaintiff's contention that a fee award under Section 55 is not mandatory. *See* POB at 14-15.

reasonable fees shall be calculated according to the lodestar method, in which an initial estimate of fees is obtained by multiplying the number of hours reasonably expended by counsel on the litigation by a reasonable hourly rate." *See Jones v. Wild Oats Market, Inc.*, 467 F. Supp.2d 1004, 1012-1013 (S.D. Cal. 2006).[8]

A court's decision to reduce a fee award to a reasonable amount under Section 55 is not a denial of fees in the first instance. To the contrary, a reduction in fees to a "reasonable" amount is properly made under the statute after a court has first determined that the moving party is entitled to an award of fees as a prevailing party. Thus, Section 55's mandatory fee provision does not ultimately guarantee that the prevailing party will recover the entire award of requested attorney fees.

In sum, the Court of Appeal correctly determined that the Legislature intended for an award of attorney fees under Section 55 to be mandatory, regardless of whether such fees are awarded to a prevailing plaintiff or a prevailing defendant. Plaintiff's contention that Section 55

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[8] This is precisely how the trial court determined the amount of attorney fees to award to defendant after the court had determined that defendant Lee was the "prevailing party" under Section 55. Although not specifically addressed in the published portion of the *Jankey* opinion, the trial court considered the evidence submitted by defendant in support of his requested fees and ultimately determined that a reduction in the amount of fees requested from $129,264.00 to $118,458 was warranted.

provides an "illusionary" benefit to a disabled plaintiff who prevails on his Section 55 claim is without merit and should be rejected.

B. Because Section 55's Attorney Fee Provision Is Clear And Unambiguous, There Is No Need To Consider The Statute's Legislative History.

Plaintiff contends that the Court of Appeal erred when it "presume[d] that the California legislature intended to allow prevailing defendants to request attorney fees under Section 55." *See* POB at 16 (identified as "Fourth Error"). Specifically, plaintiff contends that the court erroneously ignored the legislative history of Section 55, which purportedly shows that the legislature "never intended for Section 55 to serve as a 'two-way guaranteed fee provision' as the court of appeal believed." *See id.* Plaintiff's contention ignores well-established rules of statutory construction and is an unsuccessful attempt to persuade this Court that the legislature passed the attorney fees provision of Section 55 solely for the benefit of disabled plaintiffs.

As noted above, it is bedrock law that courts charged with the task of determining a statute's legislative intent must first turn to "the words themselves for the answer" and give effect to their plain meaning. *See Delaney*, 50 Cal.3d at 798; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724; *Bader*, 156 Cal.App.4th at 129. "If the language is clear and unambiguous there is no need for construction, nor is it necessary to

resort to indicia of the intent of the Legislature." *Delaney*, 50 Cal.3d at 798; *Burden*, 2 Cal.4th at 562; *Lungren*, 45 Cal. 3d at 735.

Here, the language at issue in Section 55 is clear and unambiguous. The statute plainly states that an "aggrieved or potentially aggrieved" person may bring an action to enjoin a violation of Civil Code Sections 54 or 54.1, or of Section 19955 of the California Health and Safety Code. *See* Section 55. The statute then plainly states that "[t]he *prevailing party* in such an action *shall be entitled to recover reasonable attorney's fees*." *See id.* (emphasis added). The only reasonable construction of that language is that the statute was intended to benefit *both* prevailing plaintiffs *and* prevailing defendants.

Other courts have agreed that Section 55 unambiguously provides for bilateral fee recovery. In *Molski*, the Court of Appeal held that "[t]he statute is unambiguous" and that "the plain language of section 55 allows bilateral fee recovery." *Molski*, 164 Cal.App.4th at 790. In *Jones*, the federal district court similarly determined that the language of Section 55 is unambiguous and clear and rejected plaintiff's assertion that "the legislature meant *prevailing plaintiff* when it stated *prevailing party*." *See Jones*, 467 F.Supp.2d at 1011. As these cases make clear, the legislature's deliberate use of the term "prevailing party" (and not "prevailing plaintiff") in Section 55 unquestionably demonstrates its intent to provide for a bilateral fee

recovery. *See Molski*, 164 Cal.App.4th at 790; *Jones*, 467 F.Supp.2d at 1011.[9]

Plaintiff nevertheless asserts that the language of Section 55 is "ambiguous at best" and does not establish that the "California legislature intended for prevailing defendants to receive fees under Section 55." *See* POB at 16-17.[10] Relying on selected excerpts of the legislative history of Section 55, plaintiff contends that this extrinsic information compels the conclusion that Section 55 provides that only a prevailing *plaintiff* may seek an award of attorney fees. *See id.* at 17-18. Plaintiff's assertions ignore this Court's established rules of statutory construction and are untenable.

First, if the Court limited application of Section 55's attorney fees clause to "prevailing plaintiffs" as plaintiff suggests, the Court "would be read[ing] the word '[party]' out of the section." *See Delaney*, 50 Cal.3d at 798. That would be contrary to the rule that courts are required to give meaning to every word of an act, if possible. *See Delaney*, 50 Cal.3d at 798-99 (citing *Mercer v. Perez* (1968) 68 Cal.2d 104, 112).

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[9] The *Molski* Court also explained that a defendant prevails if he obtains a dismissal of plaintiff's claims or if plaintiff recovers no relief against defendant. *See Molski*, 164 Cal.App.4th at 790 (citing Code of Civil Procedure Section 1032 (a)(4)). A plaintiff prevails under Section 55 if the action was the "catalyst motivating the defendant to modify its behavior or the plaintiff achieved the primary relief sought." *See id.* (citing *Donald v. Café Royale, Inc.* (1990) 218 Cal.App.3d 168, 185); *see also Jones*, 467 F.Supp.2d at 1011.

[10] Despite this assertion, plaintiff has not made an attempt to explain how the term "prevailing party" is either unclear or ambiguous.

Second, ignoring the clear and unambiguous language of Section 55 would violate the principle that, if the words of a statute are clear and unambiguous, a court "*may not alter them* to accomplish a purpose that does not appear on the face of the statute." *See Burden*, 2 Cal. 4th at 562 (emphasis added); *Bader*, 156 Cal.App.4th at 129.

Third, this Court has repeatedly held that, "[w]hen statutory language is thus clear and unambiguous there is no need for construction, and courts *should not indulge in it*." *See Delaney*, 50 Cal.3d at 800 (concluding that Court will not consider legislative history of statute to construe meaning of term that is clear and unambiguous); *Lungren*, 45 Cal.3d at 735; *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198. Considering the legislative history of Section 55 would violate that principle.

In sum, "the plain language of [Section 55] leads to only one tenable conclusion": Section 55 provides for a bilateral fee recovery and does not limit recovery only to a prevailing plaintiff. *See Delaney*, 50 Cal.3d at 800. Plaintiff's assertion that the Court should ignore the clear and unambiguous language of Section 55 in favor of considering the legislative history of the statute should be rejected. *See id.* at 800-01; *Lungren*, 45 Cal.3d at 735.

C. Assuming *Arguendo* That The Court May Consider The Legislative History Of Section 55, The Legislative History Supports Its Plain Meaning.

Plaintiff contends that Section 55's legislative history makes it "clear . . . 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" and *not* to provide an award of attorney fees to the prevailing defendant. *See* POB at 18. This contention lacks merit.

First, plaintiff focuses on isolated excerpts from the legislative history of Assembly Bill 2471, the bill that was eventually enacted and codified as Section 55. Those excerpts reflect a concern that the prevailing plaintiff be awarded fees and costs, but do not rule out the possibility that the Legislature was *also* concerned that a prevailing *defendant* be allowed to recover fees and costs. *See* POB at 17 (citing excerpts of Enrolled Bill Report, AB 2471 (September 1974) and Bill Digest, AB 2471 (August 14, 1973)).

Second, plaintiff relies on an excerpt from a *defeated* bill - Assembly Bill 1547 - to support his assertion that "the legislative history [of Section 55] points strongly in favor of a mandatory, non-discretionary award *solely in favor of the disabled plaintiff*." *See* POB at 18 (emphasis added) (citing excerpt of Assembly Bill 1547 (proposed) and Bill Analysis, AB 1547 (March 4, 1972). Assembly Bill 1547, which would have provided fees and costs only to a prevailing *plaintiff*, was rejected in favor of Assembly

Bill 2471, which provided fees to the prevailing *party*. As explained in more detail below, the Legislature's decision to pass Assembly Bill 2471 instead of Assembly Bill 1547 reaffirms that the Legislature intended a prevailing defendant be awarded his or her attorney fees.[11]

1. Assembly Bill 1547

Introduced in the Assembly on March 15, 1972 by Assemblyman Alan Sieroty, AB 1547 initially provided that:

> Section 1. Section 55 is added to the Civil Code, to read:
>
> 55. (a) Notwithstanding any other provision of law, a blind or physically disabled person may give notice to the owner of any private [or public] facility . . . that such facility contains unauthorized deviations from the requirements of Sections 54, 54.1, Section 4451 of the Government Code, or Section 19955 or 19955.5 of the Health and Safety Code.
>
> (b) If such deviation is not rectified within 90 days of such notice, a blind or physically disabled person may bring an action for an injunction against further construction or operation of the nonconforming facility until the deviation is corrected Such blind or physically disabled shall not be required to post a bond . . . and, if successful in obtaining an injunction, shall be awarded reasonable attorney's fees and court costs[.]

See Assembly Bill No. 1547, Introduced by Assemblyman Sieroty (March 15, 1972) and referred to the Committee on Judiciary [attached as **Exhibit A** to Declaration of Jason G. Gong in Support of Defendant-Respondent's Motion for Judicial Notice ("Gong Decl.")].

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[11] The legislative history excerpts discussed below are attached as exhibits to defendant's Motion for Judicial Notice, which is concurrently filed with this brief.

Almost immediately, AB 1547 was met with uniform opposition from various state agencies that expressed their concerns that the bill could:

> [R]esult in *unreasonable actions being taken* against the owner of a building or facility. A handicapped person could initiate action . . . without posting a bond to protect the owner against excessive losses of revenues. If enacted, Assembly Bill No. 1547 could result in *unreasonable actions being initiated.*

See Bill Analysis for AB 1547, State Department of General Services (May 5, 1972) (emphasis added); *see also* Letter of Opposition and Analysis from Department of California Highway Patrol (June 8, 1972) (stating that AB 1547 could "[r]esult in a number of *nuisance-type complaints* and/or injunctions against the Department . . . the resultant expense . . . if this bill were passed . . . could be *quite large*) [attached as **Exhibits B** and **C** to Gong Decl.].

In response to the initial outpouring of opposition, Assemblyman Sieroty amended AB 1547 and introduced the amended bill to the Assembly on June 19, 1972. As amended, AB 1547 required a plaintiff to demonstrate unauthorized deviations by *clear and convincing evidence* and provided that the measures would apply only to *future* construction or alterations of facilities. *See* Assembly Bill No. 1547 (as amended and reintroduced) by Assemblyman Sieroty (June 19, 1972) (emphasis added) [attached as **Exhibit D** to Gong Decl.]. Although amended AB 1547 passed the Assembly, it was defeated in the Senate. *See* Journal of

Assembly (Volume 1), 1972 Regular Session [attached as **Exhibit E** to Gong Decl.].

2. **Assembly Bill 2471**

On May 13, 1973, Assemblyman Sieroty introduced Assembly Bill 2471, which contained essentially the same provisions previously found in amended AB 1547 with two key exceptions: the bill no longer exempted a plaintiff from posting a bond and no longer required the plaintiff to establish a claimed violation by clear and convincing evidence. *See* Assembly Bill No. 2471, Introduced by Assemblyman Sieroty (May 13, 1973) and referred to the Committee on Judiciary [attached as **Exhibit F** to Gong Decl.].

AB 2471 drew opposition from a variety of entities expressing their concern that the bill would lead to increased liability and severe financial hardships on businesses and local government agencies. *See* Letter of Opposition from North Coast Builders Exchange to Assemblyman Sieroty (July 5, 1973); Letter of Opposition from City of Pacific Grove to Senator Alfred H. Song, Chairman, Senate Committee on Judiciary (March 11, 1974); and Letter of Opposition from City of Pacifica to Senator Song (March 18, 1974) [attached as **Exhibits G, H** and **I** to Gong Decl.]. The Assembly passed AB 2471 and transmitted the bill to the Senate.

The Senate made significant amendments to AB 2471 by removing the requirement for owners to implement changes within 90 days of

receiving notice from a physically disabled person and by specifying that the "*prevailing party shall be entitled to reasonable attorney's fees.*" *See* Assembly Bill No. 2471 (as amended in Senate on April 22, 1974)[12] (emphasis added); *see also* Senate Committee on Judiciary Background Information Sheet provided for AB 2471 (as amended, April 22, 1974) (providing analysis of AB 2471 and stating that bill provides the "prevailing party" is entitled to reasonable attorney's fees) [attached as **Exhibits J** and **K** to Gong Decl.].

With these amendments, AB 2471 passed in both the Senate and the Assembly and was forwarded to Governor Reagan for his signature. In a letter dated August 30, 1974 from Assemblyman Sieroty to Governor Reagan, Assemblyman Sieroty expressly acknowledged "[t]he bill would. . . enable the *prevailing party . . . to recover reasonable attorney's fees.*" *See* Sieroty letter to Governor Reagan (August 30, 1974) requesting Governor to sign Assembly Bill 2471 (as amended, August 8, 1974) (emphasis added); *see also* Enrolled Bill Report, Department of Rehabilitation (September 4, 1974) (noting that AB 2471 is a "*much more moderate*" bill than AB 1547 and specifies that the "*prevailing party* will be entitled to reasonable attorney fees" and that "[t]his bill *will make clear*

[12] On August 8, 1974, the Senate made several minor amendments to AB 2471 before the bill was passed by the Senate. These additional amendments are reflected in the current version of Section 55.

that the prevailing party will be entitled to attorney's fees.") (emphasis added) [attached as **Exhibits L** and **M** to Gong Decl.]. The Governor signed AB 2471 in 1974, which later became Section 55.[13]

In sum, notwithstanding plaintiff's contentions to the contrary, an examination of Section 55's legislative history clearly shows that the California Legislature intended that a prevailing defendant, not just a prevailing *plaintiff*, is entitled to an award of attorney fees in an action under Section 55.

D. The Court Of Appeal Did Not Improperly Ignore The *In Pari Materia* Rule.

Plaintiff contends that the Court of Appeal erred by "ignor[ing] that Section 55 sits *in pari materia* with the ADA, the Unruh Act, and other provisions of the CDPA," all of which preclude a mandatory award of attorney fees to prevailing defendants. *See* POB at 19 (identified as "Fifth Error"). Plaintiff's contention lacks merit.

As explained in Sections I (A) and (B) above, the primary rule of statutory construction requires that a court first look to the words of the statute to ascertain legislative intent. It is only when the statutory language is *ambiguous* and susceptible to more than one reasonable interpretation that the courts may apply a secondary rule of statutory construction to

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[13] Section 55 was then enacted by Chapter 1443 of the Statutes of 1974 (enacting AB 2471), where it has remained unchanged as a part of the California Civil Code.

determine legislative intent and may utilize extrinsic aids such as legislative history, public policy, and the statutory scheme of which the statute is a part. *See People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-08; *Natural Resources Defense Council*, 28 Cal.App.4th at 1111; *see also Board of Medical Quality Assurance v. Superior Court* (1988) 203 Cal.App.3d 691, 698 (discussing application of the *in pari materia* rule to construe the meaning of statutes relating to the same subject matter).

The *in pari materia* rule, for example, provides that statutes which relate to "the same person or thing, or the same class of persons or things" should be "construed together and harmonized if possible." *See Board of Medical Quality Assurance*, 203 Cal.App.3d at 698 (citing *Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 590). However, as a secondary rule of statutory construction, the *in pari materia* rule has no application when a statute's language is clear and unambiguous. *See Natural Resources Defense Council v. Fish & Game Comm'n* (1994) 28 Cal.App.4th 1104, 1111; *Board of Medical Quality Assurance*, 203 Cal.App.3d at 698.

Here, as explained above, the plain language of Section 55 establishes that the Legislature intended to provide a mandatory award of attorney fees to both a prevailing plaintiff and a prevailing defendant. Because the terms of the statute are clear and unambiguous, there is no

need for construction, and the statutory analysis ends. *See Delaney*, 50 Cal.3d at 798; *Burden*, 2 Cal.4th at 562. Accordingly, plaintiff's contention that Section 55 "sits *in pari materia* with the ADA, the Unruh Act, and other provisions of the CDPA" erroneously *assumes* that the statutory language of Section 55 is unclear and ambiguous and should be rejected.

Plaintiff further contends that because Section 55 is "patterned after a federal law, federal cases interpreting the federal law offer persuasive authority in construing the state law." *See* POB at 19. Accordingly, plaintiff contends that Section 55 should be construed with federal law interpreting civil rights attorney fee and cost-shifting provisions that preclude mandatory fee recoveries to prevailing defendants. *See id.* at 20. This contention fails for the same reason that the "in pari materia" contention fails: it incorrectly assumes that Section 55's attorney fees clause is unclear and ambiguous.

Moreover, the rule that California courts should look to federal law applies only where the California and federal statutes use similar language. *See Natural Resources Defense Council*, 28 Cal.App.4th at 1117-18 (noting similarity in language between state and federal statutes). Here, the language at issue is *not* similar. Whereas the ADA provides that a court

"may" award fees (42 U.S.C. § 12205), Section 55 provides that the court "shall" award fees.[14]

Plaintiff's final contention in support of bypassing Section 55's legislative intent is that California law provides that "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 [overlapped claims]." *See* POB at 21. Specifically, plaintiff asserts that because his claims under the Unruh Act and the CDPA were based on the same ADA violations, defendant "should not have received an award of

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[14] Plaintiff's reliance on *Cummings v. Benco Bldg. Servs.* (1992) 11 Cal.App.4th 1311, 1386-88; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1405-06, *overruled by White v. Ultramar* (1999) 21 Cal. 4th 563, 575; and *People v. Hedgecock* (1986) 183 Cal.App.3d 810, 815-17 to support the contention that Section 55 does not mandate an award of attorney fees for a prevailing defendant is misplaced. These authorities do not involve application of a state statute expressly *mandating* an award of attorney fees to a prevailing defendant. Instead, these cases involve application of *discretionary* attorney fee clauses for prevailing plaintiffs modeled after similar attorney fee provisions addressing discrimination claims under Title VII of the Civil Rights Act. The appellate courts in *Cummings*, *Stephens*, and *Hedgecock* each noted that the language, purpose, and intent of the state attorney fee provisions were nearly identical to analogous provisions under Title VII and concluded that the analysis in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) applied to a prevailing defendant seeking to recover his fees under these statutes. Under *Christiansburg*, a prevailing defendant in a Title VII case must establish that plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *See Hedgecock*, 183 Cal.App.3d at 816-17. There is no basis to apply the *Christiansburg* standard to Section 55, both because Section 55's attorney fee provision is mandatory rather than discretionary, and because the policy reasons supporting application of a heightened standard to prevailing defendants are simply not present. *See Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 791-93.

fees under the CDPA because it could not have received fees under the Unruh Act" and the ADA. *See id.* (emphasis omitted).

In support of this contention, plaintiff relies on *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 324; *Earley v. Superior Court* (2000)79 Cal.App.4th 1420, 1429; and *Wilson v. Norbreck LLC* (E.D. Cal. 2007) 2007 WL 1063050, an unpublished memorandum disposition. *See* POB at 21. *Young* and *Earley* are both distinguishable because neither case involves the issue of overlapping claims and the apportionment of attorney fees between claims where fees are recoverable and claims where fees are not. Although the *Wilson* case addresses the "overlap" issue presented by plaintiff, it is an unpublished federal district court decision and should be given little, if any, weight.

Moreover, *Wilson* relies on *Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, a case that addresses the "overlap" issue in an entirely different context involving state antitrust claims under the Cartwright Act (Bus. & Prof. Code Section 16720 *et seq.*). *See id.* at 503-05. In *Carver*, the Court of Appeal affirmed a trial court's fee apportionment order that reduced a prevailing defendant's requested contractual attorney fees by 65% on the ground that the fees either related exclusively to, or inextricably overlapped with, claims under the Cartwright Act. *See id.* at 501, 503. Under the Cartwright Act, attorney fees are not recoverable by prevailing defendants.

However, defendant asserted that the Cartwright Act did not bar contractual fees that were incurred for defending claims common to both Cartwright Act and non-Cartwright Act claims. In rejecting defendant's assertion, the *Carver* court examined the Cartwright Act's non-reciprocal attorney fee provision and determined that it established the Legislature's intent to encourage injured parties to enforce their rights under the Cartwright Act "'in situations where they otherwise would not find it economical to sue.'" *See id.* at 503-04 (quoting *Covenant Mutual Ins. Co. v. Young*, 179 Cal.App.3d at 325).

In light of the statute's legislative intent and these important public policy considerations, the *Carver* court concluded that the Cartwright Act's non-reciprocal attorney fee provision precludes a prevailing defendant from recovering contractual attorney fees for Cartwright Act and non-Cartwright Act claims that overlap. Specifically, the court held that a contrary conclusion would "superimpose a judicially declared principle of reciprocity on the statute's fee provision, a result unintended by the Legislature, and would thereby frustrate the legislative intent to 'encourage improved enforcement of public policy.'" *See id.* at 504. Accordingly, the court affirmed the trial court's order reducing the portion of defendant's fees that overlapped with claims under the Cartwright Act. *See id.* at 506.

The court's holding in *Carver* does not support plaintiff's contention that a prevailing defendant should not receive an award of attorney fees

under Section 55 when the defense of that claim overlaps with the successful defense of claims for which fees are unavailable. *See* POB at 21.

First, an award of fees under Section 55 does not implicate the same public policy concerns addressed by *Carver*, because the California Legislature has specifically expressed its intent to allow prevailing defendants to recover attorney fees under Section 55. *Cf. Carver*, 119 Cal.App.4th at 503-05. In *Carver*, the court invalidated a contractual provision that was contrary to the public policy of the state embodied in the Cartwright Act. That is very different from the situation here, where the Court of Appeal gave effect to the letter of, and the public policy, behind Section 55.

Second, an award of fees to a prevailing defendant under Section 55 will not deter a disabled plaintiff from enforcing his or her rights under the ADA, Unruh Act and other provisions of the CDPA. A plaintiff, as the master of his or her complaint, can readily avoid the potential of an adverse fee award by electing not to seek an injunction under Section 55, a remedy that is readily available to plaintiff under the ADA.

Third, a closer review of the policy reasons articulated by the *Carver* court demonstrates that, by accepting plaintiff's contention, courts would effectively be engaging in the same type of judicial activism that *Carver* forbids -- the superimposing of "a judicially declared principle of

[non]reciprocity on [Section 55]'s fee provision, a result unintended by the Legislature, [which] would thereby frustrate the legislative intent" to award attorney fees to prevailing defendants. *Cf. Carver*, 119 Cal.App.4th at 504-05.[15]

In sum, because Section 55 clearly and unambiguously mandates an award of attorney fees to a prevailing defendant, application of secondary rules of statutory construction such as the *in pari materia* rule is unnecessary and unwarranted. Accordingly, plaintiff's contrary contentions should be rejected.

II. THE COURT OF APPEAL CORRECTLY DETERMINED THAT SECTION 55 IS NOT PREEMPTED BY THE ADA.

A. The Governing Principles of Preemption Law.

Pursuant to the Supremacy Clause of the United States Constitution, Congress may "preempt state law concerning matters that lie within the authority of Congress." *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). "In determining whether federal law preempts state law, a court's

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[15] Moreover, courts have acknowledged what appears to be the general rule in California that "[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." *See Reynolds Metals Company v. Alperson* (1979) 25 Cal.3d 124, 129-130; *accord, Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1086.

task is to discern congressional intent." *Id.* (quoting *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)).

Federal law "may preempt state law in three situations, commonly referred to as (1) express preemption, (2) field preemption, and (3) conflict preemption." *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814. "First, Congress can define explicitly the extent to which its enactments pre-empt state law . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law." *English*, 496 U.S. at 78-79.

"The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption." *Bronco Wine Co.*, 33 Cal.4th at 956; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 422. An important corollary to this rule often recognized and applied by the United States Supreme Court is that, "[i]n *all pre-emption cases*, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied,[courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996) (internal quotation marks and citations omitted); *see also California v. ARC Am. Corp.*, 490

U.S. 93, 101 (1989); *accord Bronco Wine Co.*, 33 Cal.4th at 957; *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371-72 (stating that courts may find preemption only when Congressional intent is "clear and manifest"). This assumption assures that the "'federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Bronco Wine Co.*, 33 Cal.4th at 957 (citing numerous decisions of United States Supreme Court).

In applying this assumption, the Supreme Court has instructed courts to narrowly interpret the scope of Congress's "intended invalidation of state law" whenever possible. *Medtronic*, 518 U.S. at 485; *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 523 (1992) (holding that the presumption against preemption "reinforces the appropriateness of a narrow reading of" the federal statute's preemptive effect).

B. The Court of Appeal Applied The Correct Test To Determine Whether Section 55 Is In Conflict With The ADA.

Plaintiff contends that the Court of Appeal erred when it "determine[d] 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." *See* POB at 6 (Plaintiff's

"First Error").[16] Plaintiff also contends that the Court of Appeal's decision is "inconsistent with Congressional objectives" requiring trial courts not to award attorney fees to a prevailing defendant unless a court finds that plaintiff's action was frivolous. *See id.* at 7-8. Plaintiff's contentions lack merit and fail to establish that Section 55 stands as an obstacle to the purposes and objectives of the ADA.

The Supreme Court has explained that a state law *actually conflicts* with federal law when it is "impossible for a private party to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (discussing "conflicts" that *prevent* or *frustrate* the accomplishment of a federal objective and conflicts that make it *impossible* for private parties to comply with both state and federal law) (internal quotation marks omitted); *Crosby*, 530 U.S. at 372-73 (2000).[17]

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[16] Plaintiff does not contend that the ADA expressly preempts all state authority regarding civil rights in general or disability access in particular, or that Congress, by occupying this field, has impliedly preempted Section 55. Plaintiff's contention, consistent with the Ninth Circuit's opinion in *Hubbard v. SoBreck, LLC,* 554 F.3d 742, 744 (9th Cir. 2009), is only that Section 55 is in actual conflict with the ADA and is therefore preempted.

[17] Because plaintiff does not contend that it is impossible for him, as a private party, to comply with both state and federal requirements, plaintiff's conflict preemption argument necessarily depends on a determination that Section 55 stands as an obstacle to the accomplishment and execution of the full purposes

"What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute *as a whole* and identifying its purpose and intended effects[.]" *Crosby*, 530 U.S. at 373 (emphasis added). To make this determination, a court must examine the entire statutory scheme and identify the statute's purpose and intended effects when determining whether the state law stands as an obstacle to the purpose of the federal act. "If the purpose of the [federal] act cannot otherwise be accomplished – if its operation within its chosen field [would] be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id.* (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

Here, the Court of Appeal correctly analyzed the ADA as a whole to before concluding that Section 55 does *not* stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[18] *See Jankey*, 181 Cal.App.4th at 1184-86; *see also McMahon v.*

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and objectives of Congress. *See Bronco Wine Co.*, 33 Cal.4th at 956-57 (determining that, where express or field preemption issues were absent, issue presented was whether state law stands as an obstacle to Congress's purpose and objectives).

[18] Congress has stated that the purpose and objective of the ADA is to remedy widespread discrimination against disabled individuals by enacting a comprehensive national mandate to integrate disabled individuals "into the economic and social mainstream of American Life." *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001). To effectuate this broad purpose, the ADA prohibits discrimination against disabled individuals in major areas public life, among them, public accommodations. *Id.* at 675. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the

City of Los Angeles (2009) 172 Cal.App.4th 1324, 1331-32 (stating rule that courts engaged in construction of statute must examine the statute in context with other parts of legislative scheme with a view to promoting rather than defeating statute's purpose).

First, the court reviewed the ADA's preemption clause and determined that, "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." *Jankey*, 181 Cal.App.4th at 1184.

Second, the court observed that the ADA's preemption clause provides a "'floor' for a plaintiff's rights and remedies while freeing the states to construct a statutory 'ceiling.'" *Id.* (citing *Wood v. County of Alameda*, 875 F.Supp. 659, 663 (N.D. Cal. 1995).

Third, the court indicated that the California Legislature has expressly stated its intent to provide more protections to disabled individuals than the ADA. *See id.* (quoting portion of Cal. Gov. Code

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full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. Section 12182(a); *see also Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 606 (N.D. Cal. 2004). The ADA permits reliance on state laws that provide greater protection to effectuate its stated purpose and objective. *See* 42 U.S.C. Section 12201(b) (stating that ADA does not preempt state laws providing greater or equal protection for disabled individuals).

Section 12926.1(a)). Specifically, the court observed that an ADA plaintiff in California may seek additional protections that "go far beyond the ADA" by suing for money damages under Civil Code Sections 52 (Unruh Civil Rights Act) and Section 54.3 (CDPA). *See id.* at 1185 (citing *Pickern v. Best Western Timber Cove Lodge Marina*, 194 F.Supp.2d 1128 (E.D. Cal. 2002)). In addition, the court observed that a prevailing plaintiff under the Unruh Act and CDPA is entitled to seek attorney fees while a prevailing defendant is not. *See id.* (citing *Molski*, 164 Cal.App.4th at 791-92).[19]

Fourth, the court emphasized that, "unlike the ADA, which makes attorney fee recovery discretionary (42 U.S.C. Section 12205),[20] attorney fees are mandatory under Section 55," meaning that "if the plaintiff [under Section 55] 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 [where the trial court issues an injunction under section 55]." *See id.* Because the ADA does not preclude state laws which provide greater protection than those offered under the ADA, the court concluded that Section 55 is not "in irreconcilable conflict

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[19] Plaintiff does not challenge any of these conclusions made by the *Jankey* court.

[20] Section 12205 of the ADA provides: "[i]n any action or administrative proceeding commenced pursuant to this Act, the court or agency, *in its discretion*, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual." 42 U.S.C. Section 12205 (emphasis added).

with the ADA" and does not "abrogate the scope of rights available under the ADA in any fashion." *See id.* at 1186.

In sum, the Court of Appeal applied the correct analysis to conclude that Section 55 does not stand as an obstacle to Congress's stated purpose and objectives regarding the ADA. *See id.* (concluding that Section 55 "provides *greater* incentives and rights to a person pursuing a disability access claim in California").[21] Because Section 55 merely provides optional relief that need not be pursued, it does not pose a material obstacle to the objectives of the ADA, nor does it frustrate federal policy in a material way. To the contrary, a California access plaintiff seeking to avoid the risk of an adverse fee award can simply choose to forgo a Section 55 claim and assert only federal claims and state law claims that limit fee awards to prevailing plaintiffs.

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[21] In contrast, cases where obstacle preemption has been found will typically involve a state law that significantly frustrates or undermines the purpose of the federal statute as a whole. *See, e.g.*, *Crosby*, 530 U.S. at 373 (holding that Massachusetts's law restricting its agencies from purchasing goods and services from companies doing business with Burma stood as an obstacle to a federal act imposing its own sanctions on Burma); *Geier*, 529 U.S. at 873 (holding that a rule of state tort law imposing a duty that would have required installation of airbags rather than passive restraint systems "presented an obstacle to the variety and mix of devices that the federal regulation sought"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494-97 (1987) (holding that Vermont nuisance law permitting common law suits that had the potential to undermine regulatory structure and objectives of Clean Water Act presented an obstacle to federal statute); *Hines*, 312 U.S. at 67-74 (holding that Pennsylvania alien registration act presented an obstacle to Congress's purpose in establishing a single integrated system for alien registration).

Accordingly, plaintiff's contention that Court of Appeal erred when it determined that the ADA does not preempt Section 55 is without merit and should be rejected. *See Bronco Wine Co.*, 33 Cal.4th at 956 (stating that party claiming that state law is preempted bears the burden of demonstrating preemption).

C. Plaintiff's Contention Concerning the ADA's Anti-Preemption Clause Lacks Merit.

Plaintiff next contends that the Court of Appeal erred by "assuming that Congress never intended to preempt state laws that mandated fee awards to prevailing defendants for non-frivolous ADA claims." *See* POB at 10 (Plaintiff's "Second Error"). Specifically, plaintiff contends that the ADA expressly preempts state laws that provide "lesser levels of protection" than that provided under the ADA. *See id.* at 11-12. Plaintiff's contention is not supported by the express terms of the ADA, Congressional intent, or by any of the authorities on which he relies.

1. The plain meaning and legislative history of the ADA's anti-preemption clause does not support plaintiff's contention.

Section 12201(b) of the ADA specifically provides that:

> *Nothing* in this Act *shall be construed to invalidate or limit* the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides *greater or equal protection* for the rights of individuals with disabilities than are afforded by this Act.

42 U.S.C. Section 12201(b) (emphasis added).

Although the Court of Appeal below and plaintiff refer to Section 12201(b) as either an "express preemption" (*see Jankey*, 181 Cal.App.4th at 1184) or "expressed preemption provision" (*see* POB at 12), the statute does not specifically provide that any particular laws providing "lesser levels of protection" are in fact, preempted. Instead, Section 12201(b) of the ADA expressly states that certain laws are *not* preempted. *See* Section 12201(b); *Californians for Disability Rights v. Mervyn's LLC* (2008) 165 Cal.App.4th 571, 585; *see also Wood*, 875 F.Supp. at 665 (referring to Section 12201(b) of the ADA as a "no limitation or invalidation" clause and interpreting statutory language as providing "assurances in the ADA that the statute does not 'limit or invalidate' certain state laws"). Thus, far from expressing an intent to completely preempt state law in the area of disability discrimination, Congress envisioned through Section 12201(b) of the ADA that a disabled plaintiff would be able to pursue *both* state law remedies and ADA remedies simultaneously to enable plaintiff to potentially receive equal or greater relief than he or she might otherwise receive under the ADA alone. *See Dichner v. Liberty Travel*, 141 F.3d 24, 32 (1st Cir. 1998); *see also Wood*, 875 F.Supp. at 664, 666.

In addition, the legislative history of the ADA does not refer to Section 12201(b) as an express preemption provision, but rather, as an *anti-preemption* provision. *See* 136 Cong. Rec. E1913-01, E1921 (1990)

("Section 501(b) [codified at 42 U.S.C. § 12201(b)] is an *antipreemption provision* that provides that the rights, remedies and procedures of any Federal law - including the Rehabilitation Act of 1973 - and of any State law - including State common law - that provides protection for people with disabilities are not preempted.") (emphasis added)). Thus, as the legislative history makes clear, the anti-preemption provision was not intended to expressly preempt state laws, but simply to ensure that plaintiffs would be able to utilize available state law remedies in addition to those provided by the ADA. That is true even though the state law may in some respects be *less protective* than the federal law. Specifically, as explained in a House Report:

> A plaintiff may choose to pursue claims under a state law that does not confer greater substantive rights, or even confers fewer substantive rights, if the plaintiff's situation is protected under the alternative law and the remedies are greater. For example, the California Fair Enforcement and Housing Act (FEHA) does not cover persons with mental disabilities. However, the FEHA has been construed to provide compensatory and punitive damages. Because the ADA covers mental disabilities, the FEHA could be construed as not conferring equal or greater rights than the ADA. However, a person with a physical disability may choose to sue under the FEHA, as well as under the ADA, because of the availability of damages under the FEHA. Section 501(b) ensures that the FEHA is not preempted by the ADA.

See H.R. Rep. 101-485(III) at 44 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 493.

The foregoing excerpt demonstrates that Congress did not intend to preempt all state laws that did not provide equal or greater rights to disabled persons. To the contrary, the plain meaning and legislative history of Section 12201(b) establishes that Congress intended to provide a disabled plaintiff with the *option* to seek additional relief under state laws offering equal, greater, or even less protection, if plaintiff so *chooses*.[22]

2. The authorities cited in the opening brief do not support plaintiff's contention.

Despite the plain language of Section 12201(b) expressing Congress's intent to enable an ADA plaintiff to simultaneously pursue remedies under the ADA and state law, plaintiff appears to contend that Section 55 is nevertheless in conflict with the ADA (and therefore preempted) because it offers "less" protections than are available under the ADA. *See* POB at 12-13. In support of this contention, plaintiff relies on *Wood v. County of Alameda*, 875 F.Supp. 659 (N.D. Cal. 1995); *Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000); and excerpts from the

[22] Congress's intent to preserve plaintiff's choice of remedies under the ADA and state law is also expressed in the Code of Federal Regulations. *See* 28 C.F.R. Pt. 36, App. B at 672 (7-1-04 ed.). Specifically, Appendix B makes this point with the following statement: "A plaintiff *may choose* to pursue claims under a State law that does not confer greater substantive rights, or even confers *fewer substantive rights*, if the alleged violation is protected under the alternative law and the remedies are greater. For example, assume that a person with a physical disability seeks damages under a State law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but does not allow them on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws *could choose* to bring an action under both laws." *See id.* (emphasis added).

legislative record of the ADA. *See id.* at 13. However, none of plaintiff's cited authorities support his contention.

First, as discussed above, the court in *Wood v. County of Alameda* did not conclude that the ADA preempts all state laws that allegedly offer less protection than the ADA. Instead, the court in *Wood* merely noted that the ADA was enacted to "guarantee individuals with disabilities a *baseline level of protection* through the establishment and enforcement of *federal* standards." *Wood*, 875 F.Supp. at 663 (emphasis added). A state law such as Section 55 that provides optional relief *in addition* to that provided by the ADA does not interfere with that baseline level of protection. Indeed, as the court in *Wood* explained, when "[v]iewed within the context of the ADA as a whole, §12201(b) clearly reflects Congress' intent to ensure that plaintiffs are not denied the benefits of compatible state statutes on the ground that a federal statute precludes any cause of action under the state law." *Id.*

Because Section 55 is the type of "compatible state statute[ ]" contemplated by Congress, Section 55 is not preempted by 12201(b). *See id.* at 663-64; *cf. Jankey*, 181 Cal.App.4th at 1184-86 (examining statutory scheme of CDPA and Unruh Civil Rights Act and noting that remedies under CDPA and Section 55 "go far beyond the ADA" because a plaintiff may seek statutory damages as well as injunctive relief for alleged

violations of equal access or accommodation and is entitled to mandatory fee award upon prevailing on claims).

Second, plaintiff's citation to *Botosan v. Paul McNally Realty* is similarly misplaced. The court in *Botosan* relied on the principle of *expressio unius* to hold that Congress's failure to reference a Title VII notice provision in one section of the ADA, while expressly incorporating another Title VII provision into the ADA, demonstrated that Congress did not intend to incorporate the notice provision. *See id.* at 831-32. However, *Botosan* did not address the ADA's anti-preemption provision under Section 12201(b) and therefore does not support plaintiff's contention that Congress *impliedly* preempted state laws offering lesser levels of protection.

Moreover, in the preemption context, the *expressio unius* principle (the express mention of one thing excludes all others) can be applied only in a manner that *disfavors* preemption. *See Cipollone*, 505 U.S. at 518 (explaining a variant of the "*expressio unius est exclusio alterius*" principle: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are *not pre-empted*") (emphasis added). In light of this presumption *against* preemption, plaintiff's attempt to invoke the principle of *expressio unius* to demonstrate that Section 12201(b) preempts state laws offering "lesser levels of protections" should be rejected. *See Ishikawa v. Delta Airlines, Inc.*, 343

F.3d 1129, 1132-33 (9th Cir. 2003) (stating that a sentence in a federal statute expressly *not* preempting state law, did not imply that other state law is preempted; only sentence expressly stating that laws *were* preempted was entitled to "*expressio unius est exclusio alterius* interpretation"). Indeed, if Congress had intended to preempt all state laws providing lesser protection, it could have affirmatively done so.[23]

Third, plaintiff's citation to excerpts from the Congressional Record and the ADA Title III Technical Assistance Manual is similarly unavailing. These excerpts merely explain that certain state laws are *not* preempted by Section 12201(b) of the ADA and state the general rule that state laws could be preempted if they conflict with the purposes of the ADA. *See, e.g.,* 136 Cong. Rec. H4169-04, H4191 (1990) (explaining laws that would be preempted by the ADA); 136 Cong. Rec. H4582-02, H4604 (1990) (stating same); ADA Title III Technical Assistance Manual § III-1.8200

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[23] *See, e.g.,* the Federal Debt Collection Procedure Act, 28 U.S.C. § 3003(d) ("This chapter *shall preempt* State law to the extent such law is inconsistent with a provision of this chapter") (emphasis added); the Employee Retirement Income Security Act, 29 U.S.C. § 1144 (ERISA) ("Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter *shall supersede* any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .") (emphasis added); and the Endangered Species Act, 6 U.S.C. § 1535(f) ("Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species *is void* to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter") (emphasis added).

(1994 Supp.) (stating general rule that federal or state laws providing disabled individuals with equal or greater protections than those under the ADA are not preempted).[24] As explained above, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

Because Section 12201(b) simply identifies which laws are *not* preempted, the clause should be properly interpreted as a *limitation* on the reach of conflict preemption principles. This interpretation is entirely consistent with the applicable authorities discussed above and effectuates Congressional intent. Of course, with respect to laws that may arguably provide lesser protection than under the ADA, whether or not those laws are preempted will depend upon an analysis of whether the law(s) in question conflict with the ADA. *See, e.g., Crosby*, 530 U.S. at 372-73 (determining that state law was preempted because it stood as an "obstacle to the accomplishment of Congress's full objectives under the federal Act"); *Wood*, 875 F.Supp. at 665 (concluding that ADA preempts state law that stands as an obstacle to the accomplishment of Congress's stated purpose under the ADA by "significantly limit[ing] the scope of relief available to plaintiffs under the ADA"). As explained above, Section 55

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[24] Plaintiff also cites to a page in the Code of Federal Regulations (*see* POB at 12), but it is not clear what language is being referenced therein.

does not conflict with the ADA because Section 55 provides optional relief that need not be pursued and therefore does not stand as an obstacle to the accomplishment of Congress's objectives.

Finally, assuming *arguendo* that Congress intended to expressly preempt state law remedies providing for "lesser" protection, it does not follow that Section 55 provides "lesser" protection simply because it provides that a prevailing defendant is entitled to recover attorney fees. As the Court of Appeal explained in its opinion, "the protections of state law go far beyond the ADA." *See Jankey*, 181 Cal.App.4th at 1185; *see also Molski*, 164 Cal.App.4th at 791-92 (stating that access plaintiff in California "controls relative risks, burdens and benefits by selecting from several statutory options"). For example, whereas an ADA plaintiff may obtain an injunction only for conduct that violates the ADA, a Section 55 plaintiff may obtain an injunction not only for conduct that violates the ADA but also for conduct that violates provisions of the CDPA, but *not* the ADA. *Cf. Molski*, 164 Cal.App.4th at 792 (stating that plaintiff may seek to enjoin "technical violations of California's access laws . . . [and] will not be required to prove an actual attempt to access the facility or to prove that the violation results from discrimination").

By allowing states to provide separate remedies for disability access claims, Congress did not require that every feature of a state law remedy be

identical to a corresponding federal remedy. Instead, Congress wanted to ensure that a plaintiff would have the *option* of pursuing state law remedies if the plaintiff believed he or she would benefit from them. Thus, an access plaintiff in California has several options available when seeking relief. If plaintiff does not believe he or she will benefit from a state law remedy and that the risk of prosecution will outweigh the benefits, plaintiff can simply elect not to pursue the particular remedy. *See Molski*, 164 Cal.App.4th at 791-92; *Jones*, 462 F.Supp.2d at 1012; *Goodell*, 207 F.Supp. 2d at 1129.

In sum, as the Court of Appeal correctly *determined*, "Section 55's role and purpose within the CDPA . . . represents precisely the kind of state law authorized by [Section 12201(b)] – a law where "'the potential available remedies would be greater than those available under the ADA . . .'" *Id.* at 1186 (quoting Appendix to 29 C.F.R. Section 1630.1(b) and (c) (2009)). Accordingly, plaintiff's contention that Section 55 is preempted as a statute providing less protection than the ADA fails and should be rejected.

III. THE COURT OF APPEAL DID NOT IMPROPERLY RELY ON A VEXATIOUS LITIGANT ORDER ENTERED AGAINST PLAINTIFF'S COUNSEL IN ANOTHER MATTER.

Plaintiff contends that the Court of Appeal's decision should be reversed because "the court of appeal's analysis may have been colored by the vexatious litigant order issued against [plaintiff's] trial counsel, attorney

Thomas Frankovich, in another matter. *See* POB at 22 (Plaintiff's "Sixth Error"). Plaintiff's contention is based entirely on speculation and should be rejected.

Here, there is no indication that the Court of Appeal's decision reveals (or even suggests) that the court improperly relied on the vexatious litigant order to determine that Section 55 is not preempted by the ADA. Instead, the court merely observed that accepting plaintiff's arguments that Section 55 is preempted by the ADA would give disabled plaintiffs 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." *See* Jankey, 181 Cal.App.4th at 1187 (noting that nullifying Section 55's mandatory fee provision would give plaintiffs "all the benefits of a 'scorched-earth' litigation strategy while incurring none of the risks"). The court also observed that such a result "would potentially inject even greater tactical gamesmanship into an area of the law where gamesmanship is already an acute concern." *See id.* & n.9 (citing *Molski v. Mandarin Touch Rest.*, 359 F.Supp.2d 924, 926 (C.D. Cal. 2005) and referencing district court's vexatious litigant order and noting that potential "gamesmanship" problem "is hardly speculative").

In sum, the Court of Appeal's reference to the district court's vexatious litigant order (in a footnote to its decision) had no bearing on the

court's analysis of the issues and its conclusion that Section 55 is not preempted by the ADA. Accordingly, plaintiff's contrary contention should be rejected.

CONCLUSION

For the foregoing reasons, the Court of Appeal correctly determined that the statutory intent of Section 55 allows a prevailing defendant to recover his or her attorney fees. Thus, plaintiff's assertion that this Court should interpret Section 55 in a different manner should be rejected. *See Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 676 (stating that when legislature's intent is clear, courts may not substitute their concerns to justify altering the clear and unambiguous meaning of a statute). The Court of Appeal also properly applied governing preemption principles and correctly determined that Section 55 is not preempted by the ADA because it does not stand in conflict with the ADA. Accordingly, the Court of Appeal's decision should be affirmed.[25]

REQUEST FOR ATTORNEY FEES AND COSTS ON APPEAL

"[S]tatutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals."

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[25] If the Court determines that Section 55 is preempted by the ADA, defendant respectfully requests that this case be remanded to the trial court for a determination of whether plaintiff's claims were frivolous. *See Jankey*, 181 Cal.App.4th at 1179 (noting that trial court did not make a finding on whether plaintiffs' claims were frivolous when it determined that *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786 applied).

Morcos v. Board of Ret. (1990) 51 Cal.3d 924, 927; *see also Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 629 n.4

Accordingly, defendant requests that the Court award him his attorney's fees and costs incurred on this appeal if the Court affirms the Court of Appeal's decision. Defendant also requests an award of his costs incurred on appeal pursuant to Rule 8.544 of the Cal. Rules of Court.

Respectfully submitted,

Dated: September 6, 2010

LIVINGSTON LAW FIRM

By: _____

Jason G. Gong
Attorneys for Defendant-Respondent SONG KOO LEE, Individually and dba K&D MARKET

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.204(c))

The text of Respondent's Brief consists of 12,852 words as counted by the Word, Version 2007, word-processing program used to generate the document.

Dated: September 6, 2010

LIVINGSTON LAW FIRM

By: _____

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Attorneys for Defendant-Respondent SONG KOO LEE, Individually and dba K&D MARKET

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Attys for: Petitioner Les Jankey

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Corine Darrow

Corine Darrow