SUPREME COURT OF THE STATE OF CALIFORNIA

LES JANKEY, Plaintiff - Appellant, vs. SONG KOO LEE, Individually and dba K&D MARKET, Defendant - Respondent.	Case No. S180890 Court of Appeal First Appellate District, Division Four Case No. A123006 San Francisco Superior Court Case No. CGC07-463040 The Honorable Patrick J. Mahoney

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT-RESPONDENT SONG KOO LEE

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to rule 8.500(f) of the California Rules of Court, Amicus Curiae League of California Cities ("the League") respectfully requests permission to file the brief submitted herewith as Amicus curiae in support of Defendant-Respondent Song Koo Lee.

INTEREST OF AMICUS CURIAE

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The responsibilities of local governments include fostering and maintaining the economic viability of local communities. The backbone of a local community is its small businesses, such as Defendant-Respondent's K&D Market, "a small independently owned and operated grocery/liquor store that has been in [San Francisco's] Mission District for 61 years. Lee . . . has operated the market since 1985." (*Jankey v. Lee* (2010) 181 Cal.App.4th 1173, 1177.)

Amicus wholeheartedly agrees that accessibility is a crucial civil right guaranteed by federal and state law. Small businesses in California, however, face a rash of serial disability access lawsuits from plaintiffs who, without conducting any adequate investigation or analysis, file dozens – if

not hundreds – of lawsuits against small businesses they have no intention of ever patronizing. The merits of these serial disability access lawsuits against small businesses are rarely tested in court, since the cost of litigation deters small business owners who have complied with their disability access obligations from defending lawsuits against them. These blameless small businesses often settle by paying thousands of dollars. Unmeritorious lawsuits that wrongly accuse small businesses of violating disability access laws threaten the viability of these small businesses and their communities.

Amicus has reviewed the merits briefs in this case and does not seek simply to duplicate arguments set forth by Respondent. Rather, Amicus seeks to assist the Court by explaining: (1) the relationship between California's Disabled Persons Law and the federal Americans with Disabilities Act, which demonstrates the absence of any conflict between them; (2) that unmeritorious lawsuits combining claims under the ADA and state law undermine the spirit and purpose of the ADA.

Amicus respectfully submits that there is need for additional briefing on these matters and that, based on its experience, Amicus may assist this Court in making a sound decision. Accordingly, Amicus respectfully requests leave to file the brief submitted herewith.

January 10, 2011

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AMICUS BRIEF

INTRODUCTION

California's Disabled Persons Law ("CDPL") authorizes a private action to enjoin violations of a broad range of state statutes that benefit individuals with disabilities. "The prevailing party in the action shall be entitled to recover reasonable attorney's fees." (Cal. Civ. Code § 55) In this case, Petitioner Les Jankey challenges the unanimous judicial construction of Section 55's fee shifting rule, and in the alternative asserts that the federal Americans With Disabilities Act ("ADA") preempts Section 55's fee shifting rule.[1]

State and federal courts have unanimously construed Section 55's fee shifting rule as mandating a reasonable fee award to the prevailing party in an action brought pursuant to Section 55. Indeed, the Ninth Circuit expressly concurred in this interpretation of Section 55. "[W]e have no basis for doubting that the California Supreme Court will agree with *Molski* [*v. Arciero Wine Group*(2008) 164 Cal.App.4th 786] as to the meaning of Section 55." (*Hubbard v. SoBreck, LLC* (9th Cir. 2009) 554 F.3d 742, 745; see also *Jones v. Wild Oats Markets* (S.D. Cal. 2006) 467 F.Supp.2d 1004, 1011; *Goodell v. Ralphs Grocery Co.* (E.D. Cal. 2002) 207 F.Supp.2d 1124, 1126-27.)

In his Answer Brief On The Merits, Respondent Song Koo Lee explained why the trial court and the Court of Appeal in this case were correct in holding that Section 55 mandates a reasonable fee award to the prevailing party, equally to a prevailing plaintiff and a prevailing defendant. (Respondent's Answer Brief On The Merits ("RAB"), at pp. 8-25.) Amicus

[1] Petitioner did not appeal the summary judgment against him on the merits. Nor does he challenge the amount of fees the trial court awarded in this case.

agrees with the unanimous judicial construction of Section 55, as Mr. Lee has set forth in his merits brief, and will not repeat it here.

Instead, Amicus will further explain why Section 55's mandatory fee shifting rule poses no obstacle to the purposes and objectives of the ADA and therefore is not preempted. A plaintiff is master of his or her complaint. Accordingly, a plaintiff may weigh the benefits and risks of a cause of action under Section 55 and may elect whether or not to invoke Section 55. The plaintiff's unfettered opportunity to ***choose*** whether to pursue a cause of action under Section 55 ensures that Section 55 will never conflict with the ADA's broad remedial purposes.

Moving beyond this commonsense and dispositive observation, the ADA expressly invites the States to enact laws providing "greater or equal protection" for individuals with disabilities. This is exactly what California has done with its Disabled Persons Law, the Unruh Act and other state laws protecting individuals with disabilities. Even when considering Scction 55's fee shifting rule in isolation (which is not appropriate for this preemption analysis), it offers advantages to plaintiffs that are not available under the ADA's fee shifting rule. Under Section 55, a prevailing plaintiff is guaranteed a reasonable fee award, whereas under the ADA, a fee award to a prevailing plaintiff is discretionary. State law on the "catalyst" theory and fee multipliers provide further benefits to prevailing plaintiffs that are not available under federal law. Far from creating a conflict with the purposes or objectives of the ADA, Section 55 and its fee shifting rule affirmatively promote the ADA's purpose of improving access for individuals with disabilities.

On the other hand, serial ADA lawsuits combining the ADA and state law causes of action, in which pecuniary recovery overshadows the

ADA's goal of improving access, subvert the purposes of the ADA. A single attorney may file dozens or even hundreds of such cookie-cutter lawsuits in a single year, without any adequate investigation into their merit. To avoid the risks and expense of litigation, often without the benefit of legal advice, small business owners routinely settle these lawsuits for substantial sums, regardless of fault, enriching the plaintiffs' attorneys and the few enterprising plaintiffs who collaborate with them. Section 55's mandatory fee award to prevailing parties does nothing more than encourage plaintiffs to evaluate carefully the merits of their claims before asserting a cause of action under Section 55.

For these reasons, as set forth more fully below and in Respondent's Answer Brief on the Merits, Amicus urges this Court to affirm the decision of the Court of Appeal and the trial court.

DISCUSSION

Respondent Song Koo Lce has explained that Section 55's mandatory fee shifting rule does not frustrate or prevent the accomplishment and execution of the full purposes and objectives of the ADA. (RAB, at pp. 32-49.) In the absence of any such a conflict, the ADA does not preempt Section 55's mandatory fee shifting rule. Amicus agrees with Mr. Lee's analysis and will not repeat it here. Instead, Amicus expands on those arguments by demonstrating how the fee shifting rules of the ADA and the Disabled Persons Law work harmoniously to advance their common remedial purposes.

I.

PLAINTIFFS ELECT TO ASSERT A SECTION 55 CLAIM ALONGSIDE THEIR FEDERAL ADA CLAIMS ONLY IF THEY DETERMINE IT IS IN THEIR INTEREST TO DO SO

The simple and dispositive answer to the preemption question is that a plaintiff is the master of his or her complaint. A disability access plaintiff has a free choice when commencing an action whether to include a claim under Section 55 alongside an ADA claim. A plaintiff will join the federal and state law claims only when the plaintiff perceives a benefit in doing so. Having made the choice to invoke Section 55 in an ADA lawsuit, a plaintiff cannot then complain that Section 55 conflicts with the ADA's purposes and objectives.

The California Legislature created Section 55 in 1974 as a tool for enforcing civil rights and provided a fee-shifting provision that balanced the interests of individuals with disabilities and of compliant businesses who are wrongly sued for violations. In the following decades, the Legislature has decided to leave Section 55's fee-shifting rule intact, notwithstanding many opportunities to modify the rule in the intervening years. Thus, a plaintiff who elects to take advantage of Section 55 must accept it in its entirety.

Section 55's even-handed fee shifting rule does not impair or discourage disability access litigation. Plaintiffs confident of the merits of their case will still invoke Section 55. Section 55 will have no impact whatsoever on lawsuits in which plaintiffs chose not to use it.

II.

THE ADA EXPRESSLY AUTHORIZES STATE LAW "THAT PROVIDES GREATER OR EQUAL PROTECTION" THAN THE ADA

The ADA creates a floor for disability access rights, expressly authorizing the states to impose equivalent or stricter disability access obligations.

> Nothing in this Act shall be construed to invalidate or limit the rcmedies, 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. § 12201(b).) This "anti-preemption provision" (See 136 Cong. Rec. E1913-01, E1921 (1990).) repudiates any congressional interest in national uniformity of disability access standards. (*Compare*, *e.g.*, *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861 [federal interest in uniformity of automobile safety standards]; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504 [federal interest in uniformity of cigarctte safcty warnings].) With this anti-prcemption provision, Congress explicitly stated that it did not intcnd to impose uniform disability access standards nationwide or to preclude the states from establishing stricter access standards.[2]

III.

CALIFORNIA'S DISABLED PERSONS LAW PROVIDES GREATER PROTECTION FOR PLAINTIFFS THAN DOES THE FEDERAL ADA

California law does only what the ADA explicitly invites the states to do, namely to enhance disability access beyond the ADA's minimum requirements. In 1992, the California legislature amended both the Unruh

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[2] Congress also contemplated state disability access laws that provide fewer substantive rights than the ADA. (See H.R. Rep. 10-485(III) at 44 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 493; 28 C.F.R. Pt. 36, App. B at 672.) (See RAB, at pp. 42-43 & fn. 22.)

Act and the Disabled Persons Law to state explicitly that violations of the ADA "shall also constitute a violation of this section." (Cal. Civ. Code §§ 51(f), 54(c), 54.1(d).) The legislature explained in the preamble to this 1992 legislation:

> It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the [ADA] and to retain California law when it provides more protection for individuals with disabilities than the [ADA].

(Stats. 1992 c. 913 § 1 (A.B. 1077).)

California law provides greater protection than thc ADA in several respects. Both the Unruh Act and the CDPL provide money damages that are unavailable under the ADA. Under Section 55, a plaintiff may enforce various state statutes (not just Civil Code Sections 54 or 54.1) and state regulations that exceed the requirements under the ADA. (Cal. Civ. Code § 55) As the California legislature declared in 2000:

> The law of this state in the area of disabilities provides protections independent from those in the [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.

(Cal. Gov't Code § 12926.1.)

Indeed, Mr. Jankey in this case nccessarily perceived a benefit to him in pursuing his injunctive relief claim under Section 55, in addition to his separately enumerated cause of action for injunctive relief under the ADA. Otherwise, he would have dispensed with his Section 55 claim and relied on his ADA claim. Having chosen to invoke Section 55, Mr. Jankey cannot now credibly argue that Section 55 confers no additional benefit to plaintiffs beyond the ADA.

The Court of Appeal below criticized the *Hubbard* court's preemption analysis for "improperly pars[ing]" the CDPA and "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." (*Jankey v. Lee* (2010) 181 Cal.App.4th 1173, 1186.) There is no authority supporting the *Hubbard* court's analysis. (*Id.*)[3] Yet, even considering Section 55's fee shifting provisions in isolation, Section 55's mandatory fee award provides benefits to plaintiffs that the ADA does not. As the Court of Appeal explained below, prevailing plaintiffs too benefit from Section 55's mandatory fee award.

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

(*Jankey v. Lee* (2010) 181 Cal.App.4th 1173, 1185-86 (emphasis in original).)

Fee awards under California law favor plaintiffs in additional ways. For example, California recognizes the catalyst theory for plaintiffs to recover fees, whereas federal law does not. (Compare *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598 with *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553.) Thus, under Section 55, a plaintiff will be deemed to have prevailed, and therefore be entitled to a mandatory fee award, if his lawsuit

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[3] Although the *Hubbard* court properly accepted the universal judicial construction of Section 55, Amicus believes the court erred in holding that the ADA selectively preempts Section 55's fee shifting rule.

prompted a change in the defendant's behavior, even in the absence of a judgment for the plaintiff or judicially enforceable change in the legal relationship between the parties. Under those circumstances, a plaintiff would not be entitled to any fees under the ADA. This is a real benefit to plaintiffs, who face a substantial risk that a defendant will moot their injunctive claims by remediating alleged barriers while the lawsuit remains pending.

Likewise, California law authorizes fee multipliers for plaintiffs more freely than federal law does. [Compare *City of Burlington v. Dague* (1992) 505 U.S. 557 with *Ketchum v. Moses* (2001) 24 Cal.4th 1122.) Thus, under Section 55, a prevailing plaintiff could receive a larger fee award than would be permissible under the ADA.

Section 55, including its mandatory fee award to prevailing parties, simply embodies the ADA's express invitation to enact "greater or equal protection for the rights of individuals with disabilities than are afforded by" the ADA. (42 U.S.C. § 12201(b).) Accordingly, there can be no conflict preemption. Plaintiff has not met his burden to demonstrate that Section 55 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of " the ADA. (See, *e.g.*, *English v. General Elec. Co.* (1990) 496 U.S. 72, 79.) The Court, therefore, should reject Petitioner's assertion that conflict preemption invalidates Section 55.

IV.

SERIAL DISABILITY ACCESS LAWSUITS FOR DAMAGES CIRCUMVENT THE INTENT OF CONGRESS, UNDERMINING THE SPIRIT AND PURPOSE OF THE ADA

Title III of the ADA governs public accommodations, including small businesses that serve the public, such as the K&D Market. To enforce Title III, the ADA authorizes 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).) The Attorney General may seek monetary relief on behalf of an aggrieved party. (42 U.S.C. § 12188(b)(2)(B).) By contrast, the sole remedies available to a private plaintiff under Title III of the ADA are injunctive relief and attorney fees and costs. (42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a).) By providing different remedies for public and private enforcement, Congress clearly demonstrated its intent to prevent private plaintiffs from recovering money damages under the ADA. (*American Bus. Ass'n v. Slater* (D.C. Cir. 2000) 231 F.3d 1, 5 ["By specifying the circumstances under which monetary relief will be available, Congress evinced its intent that damages would be available in no others."].) California law, by contrast, provides for statutory money damages in a disability access lawsuit, even in the absence of any actual injury. (Cal. Civ. Code §§ 51(f), 54(c).)

When pecuniary relief overshadows the goal of improving access, serial lawsuits circumvent the intentions and purposes of the ADA.

> The ability to profit from ADA litigation has given birth to what one Court described as "a cottage industry." [citation] The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through "conciliation and voluntary compliance," [citation], a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.
>
> The result of this scheme is that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)." [citation] Serial plaintiffs [ ] serve as "professional pawn[s] in an ongoing scheme to bilk attorney's fees." [citation] It is a "type of

> shotgun litigation [that] undermines both the spirit and purpose of the ADA." [citation].

(*Molski v. Mandarin Touch Restaurant* (C.D. Cal. 2004) 347 F.Supp.2d 860, 863, affd. (9th Cir. 2007) 500 F.3d 1047.) Mr. Frankovich, trial counsel in this case, has engaged in just such conduct that combines state and federal causes of action in serial lawsuits, "undermin[ing] both the spirit and purpose of the ADA." (*Id.*) "In 2004, The Frankovich Group filed at least 223 lawsuits in the United States District Courts for the Northern and Central Districts of California, of which approximately one-third targeted ethnic restaurants – Asian and Mexican – perhaps because such establishments are seen as easy prey for coercive claims." (*Molski v. Mandarin Touch Restaurant* (C.D. Cal. 2004) 359 F.Supp.2d 924, 926, affd. (9th Cir. 2007) 500 F.3d 1047.)

Plaintiff Les Jankey has been in longtime collaboration with attorney Frankovich in such coercive lawsuits. (*Molski*, *supra*, 359 F.Supp.2d at pp. 926 & 932 n.9) As of March, 2005, Mr. Jankey had filed 36 ADA lawsuits in federal court, 21 of which he filed in 2004, and each of which was virtually identical. (*Id.* at p. 926) Although Mr. Jankey lives in Los Angeles (CT at I:0037, IV:1182.), he brought this meritless lawsuit against a neighborhood market in San Francisco, 350 miles away.

Mr. Jankey's lawsuit against Mr. Lee is part of a larger wave of lawsuits against local Mission District businesses by clients of Mr. Frankovich.

> In addition to the building that houses [empanada take-out shop] Chile Lindo, [Frankovich client Craig Yates] filed suit against Cafe Gratitude, Elsy's Pupuseria, Mikado Sushi, Pete's Bar-B-Q, and Balompie Cafe. Yates has also targeted the Richmond District's Pot De Pho Noodle house and Pho Clement Restaurant, West Portal's Cafe For All Seasons, and Nob Hill's Pizza Pino, among many, many others.

(Smiley, *Disabled Proxy Suing Landlord of Chile Lindo, Other Mission Mom and Pops*, SFWeekly.com (Aug. 13, 2010).)[4]

A unique attraction of San Francisco's neighborhoods is the plethora of small, one-of-kind, locally owned businesses. San Francisco is famous for its hills and its steep streets. The buildings in San Francisco's North Beach, Mission, Richmond and Polk Street neighborhoods are typically old, predating the ADA, and retail space is often tight. Yet serial lawsuits have targeted dozens of small businesses in these neighborhoods.

> Cluttered but quaint, off-kilter but authentic XOX Truffles is just the sort of place that one might associate with North Beach's motley character.
>
> Yet one of its design anomalies – a step from the curb into the shop – may turn out to be its downfall. On Jan. 26, Gorce and his wife, Casimira, were served with an Americans with Disabilities Act accessibility lawsuit, in which the plaintiff [ ] claimed he had visited the store on six occasions and was prevented from entering the shop in his wheelchair.
>
> The parties are in settlement negotiations, with Gorce hoping to avoid a trial.
>
> He said the cost of the suit has already forced him to lay off his three full-time employees and man the shop by himself. If the case ends up in court, he says, legal costs may shut his business.
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> * * * *
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> Along with XOX Truffles, at least six other businesses on the same block of Columbus Avenue have been served, including Sushi on North Beach, Italian restaurant Da Flora and the sandwich shop Petite Deli. Last week, Ricos, a burrito joint on the same [side of] the street, received its summons.
>
> On Polk Street, Teresa Nittolo, owner of the gift store Molte Cose, said her store and about 10 others have been sued.
>
> Many of these suits have been filed by one of a handful of disabled plaintiffs who are represented by Thomas Frankovich . . . . [¶] Frankovich told me he

[4] The full text of this article can be found at http://blogs.sfweekly.com/foodie/2010/08/disabled_man_sues_chile_lindo.php.

> doesn't keep count but he estimates that he's filed 1,500 to 1,800 ADA accessibility lawsuits since 1994 and he has about 50 active suits in San Francisco.

(Lloyd, *Small S.F. Businesses Get Hit By Lawsuits Over Access For Disabled: Merchants in older buildings find it's not easy to comply*, San Francisco Examiner (June 15, 2008), at p. C-1.)[5] "At least 30 restaurants and other mom-and-pop businesses – many of them clustered in North Beach and along Clement Street in the lnner Richmond – have been sued by clients represented by Frankovich since the first of the year [2008], court records show." (Russell, *Frankovich Invades North Beach: But State Bar may stop attorney using, and possibly abusing, the ADA*, S.F. Weekly (June 18, 2008), at p. 1.)[6]

Serial lawsuits from out-of-town plaintiffs like Mr. Jankey have forced small neighborhood businesses in San Francisco to close down, without any determination whether these businesses complied with the ADA. Lea Dimond until recently ran an independent bookstore in San Francisco's Richmond District for more than a decadc.

> Lea Dimond, who has owned Thidwick Books in the building [at Clement and Arguello streets] since 1999, plans to shut down her store today and try to find a new place rather than fight Yates or significantly alter the configuration of her 865-squrae-foot shop. She believes she would lose too much inventory to be financially viable if she made the changes necessary to create room for a wheelchair to maneuver.

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[5] The full text of this article can be found at http://articles.sfgate.com/2008-06-15/business/17161926_1_accessibility-ada-lawsuits.

[6] The full text of this article can be found at http://www.sfweekly.com/2008-06-18/news/frankovich-invades-north-beach/.

(Selna, *S.F. Bookshop Owner To Close Over ADA Lawsuit*, San Francisco Chronicle (Dec. 24, 2010), at p. A-1.)[7] Similarly, a small take-out empanada shop in San Francisco's Mission District recently closed its doors after Frankovich client Craig Yates sued it because it had a step at the threshold from the sidewalk on the way to the order counter.

> . . . Paula Tejeda has decided to close her restaurant, Chile Lindo, after her landlord was sued by a wheelchair-using man for not having a ramp leading into the takeout eatery. Tejeda says she wants to save her landlord from potential damages of at least $1,000 every time the plaintiff is denied entry to the empanada kitchen with a six-inch step.
>
> * * * *
>
> Tejeda says she will continue to sell empanada out of a basket to Mission bargoers – the way she did for months in order to raise the money to open the brick-and-morter location on 16th Street at the beginning of this year.

(Smiley, *Chile Lindo Closing Doors After Landlord Caught In Barrage Of Disability Suits*, SFWeekly.com (Aug. 17, 2010).)[8]

As the case now before this Court demonstrates, a step or other barrier whose removal is not "readily achievable" does ***not*** violate the ADA or California law, but that fact is prohibitively expensive to establish in court, requiring analysis of topography, the existing conditions in cramped,

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[7] The full text of this article can be found at http://articles.sfgate.com/2010-12-24/news/25547694_1_ada-lawsuit-merchants-business-owners.

[8] The full text of this article can be found at http://blogs.sfweekly.com/thesnitch/2010/08/chile_lindo_closing_doors_after.php.

Chile Lindo subsequently reopened, barring all patrons from entering the store. The staff take orders from the sidewalk and hand patrons their empanadas through a grate in the door. (Birdsall, *Chile Lindo Reopens. Only Now, Nobody Gets To Go Inside*, SFWeekly.com (Aug. 20, 2010) [http://blogs.sfweekly.com/foodie/2010/08/chile_lindo_reopens_now_nobody.php].)

old buildings, and applicable building code requirements. Indeed, in this case, Respondent Mr. Lee incurred reasonable fees of $118,458 to demonstrate on summary judgment that removal of the step from the sidewalk into his market was not "readily achievable" and that his market complies fully with federal and state disability access laws. With Section 55, the California Legislature determined it would be unfair to saddle a blameless small business owner like Mr. Lee with those costs.

Attorneys and serial plaintiffs have expanded their targets to include cities and counties. (Ryan, *Cities Face ADA Lawsuits,* Napa Valley Register (Jan. 9, 2007.)[9] Serial lawsuits, geared more toward collecting attorney fees than improving access for individuals with disabilities, already cast a pall over entire neighborhoods and now threaten to extort sorely needed public funds from cash-strapped local governments. These lawsuits circumvent the intent of Congress, and they undermine the spirit and purpose of the ADA. Section 55, by contrast, with its even-handed fee rule, promotes the ADA's remedial purposes by providing a tool with enhanced substantive protections that plaintiffs may choose to use, while encouraging plaintiffs to evaluate the merits of their claims before invoking it.

CONCLUSION

Section 55 imposes no impediment to the accomplishment and execution of the full purposes and objectives of the ADA. Petitioner made a free choice when he drafted his complaint to invoke the higher protections of Section 55. Had Petitioner wished to avoid Section 55's fee-shifting rule,

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[9] The full text of this article can be found at http://napavalleyregister.com/news/local/article_946bd378-6e7c-5f44-a1f9-2e98cee8fddd.html.

it would have been a simple matter to rely instead on the ADA for injunctive relief. There is no unfairness when a trial court applies Section 55's fee shifting rule against a plaintiff who chose to take advantage of Section 55. Rather, it is a plaintiff who simultaneously seeks to invoke section 55 as a sword and hides behind the ADA as a shield who subverts the purposes and objectives of the ADA. A plaintiff who invokes Section 55 should accept Section 55 in its entirety – honoring the careful balance of benefits and incentives the Legislature created in drafting it. For the foregoing reasons, Amicus urges this Court affirm the decision below.

January 10, 2011

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LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,335 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 10, 2011.

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By: _____
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LEAGUE OF CALIFORNIA CITIES

PROOF OF SERVICE

I, MARTINA HASSETT, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On January 10, 2010, I served the following document(s):

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT-RESPONDENT SONG KOO LEE

on the following persons at the locations specified:

Clerk
San Francisco County Superior Court
400 McAllister Street
San Francisco, CA 94102

(1 copy - by hand delivery)

Clerk
California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

(1 copy – by hand delivery)

Clerk
San Diego County Superior Court
Hon. Luis R. Vargas
Department 63
330 W. Broadway
San Diego, CA 92101

Solicitor General
Office of the Attorney General
State of California
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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery ☐ is attached or ☐ will be filed separately with the court.**

☐ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☐ **BY FACSIMILE**: Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number Fax #' to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a **copy of the transmission report ☐ is attached or ☐ will be filed separately with the court.**

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed January 10, 2011, at San Francisco, California.

Martina Hassett
Martina Hassett