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In the

Supreme Court

of the

State of California

SUPREME COURT
CRC 8.25(b)
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Deputy

TRACT 19051 HOMEOWNERS ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

MAURICE KEMP, et al.,

Defendants-Respondents.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B235015
SUPERIOR COURT OF LOS ANGELES · HON. RICHARD L. FRUIN, JR · NO. BC398978

ANSWERING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. THE COURT OF APPEAL CORRECTLY DECLINED TO APPLY A FEE-SHIFTING STATUTE FROM THE DAVIS-STIRLING ACT AFTER FINDING THAT THE ACT HAS NO APPLICATION TO THE CASE. 2

A. The American Rule and Statutory Construction in California. 2

B. The American Rule and Statutory Construction in California. 3

C. Defendants' Tortured Interpretation of Section 1354(c) was Properly Rejected. 4

1. By the Act's plain language, Section 1354(c) does not apply where the Davis-Stirling Act does not apply to the case 4

2. Mutuality of Remedy has no application here and, in any event, conflicts with the statute's plain language 8

3. The result here is neither absurd nor wasteful, as it is the precise result the Legislature intended 9

4. The Davis-Stirling Act's legislative history confirmed the Court of Appeal's interpretation 11

5. None of the cases or statutes Defendants cite compel a different result because they are all inapposite 12

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

DECLARATION OF SERVICE

TABLE OF AUTHORITIES

CASES

Blue Lagoon Cmty. Ass'n v. Mitchell,
(1997) 55 Cal. App. 4th 472 ..... 6, 7, 8

Bovard v. Am. Horse Enters.,
(1988) 201 Cal. App. 3d 832 14

Care Constr., Inc. v. Century Convalescent Centers, Inc.,
(1976) 54 Cal. App. 3d 701 14

Chinn v. KMR Property Management,
(2008) 166 Cal. App. 4th 175 ..... 2, 4, 11

Gil v. Mansano,
(2004) 121 Cal. App. 4th 739 ..... 7, 9, 11, 14

Hsu v. Abbara,
(1995) 9 Cal. 4th 863 14

Hunt v. Alum Rock Union Elementary Sch. Dist.,
(1970) 7 Cal. App. 3d 612 6

In re Ethan C.,
(2012) 54 Cal. 4th 610 2

Mechanical Wholesale Corp. v. Fuji Bank, Ltd.,
(1996) 42 Cal. App. 4th 1647 ..... 14, 15

Mepco Services, Inc. v. Saddleback Valley Unified School Dist.,
(2010) 189 Cal. App. 4th 1027 14

Mount Olympus Property Owners Ass'n v. Shpirt,
(1997) 59 Cal. App. 4th 885 ..... 6, 7

Quackenbush v. Superior Court,
(1997) 57 Cal. App. 4th 660 6

Richards, Watson & Gershon v. King,
(1995) 39 Cal. App. 4th 1176 6

Salehi v. Surfside III Condominium Owners Assn.,
(2011) 200 Cal. App. 4th 1146 ..... 15, 16

STATUTES

Civil Code § 55 13

Civil Code § 86 13

Civil Code § 789.3(d) 13

Civil Code § 815.7(d) 13

Civil Code § 1351 ..... 10, 13

Civil Code § 1352 ..... 3, 5

Civil Code § 1354(c) ..... *passim*

Civil Code § 1354(f) 7

Civil Code § 1356 7

Civil Code § 1374 ..... *passim*

Civil Code § 1584.5 13

Civil Code § 1584.6 13

Civil Code § 1714.1 13

Civil Code § 1717 ..... 9, 11, 13, 14

Civil Code § 1717.5 13

Civil Code § 1811.1 13

Civil Code § 1942.5 13

Civil Code § 2893.4 13

Civil Code § 3250 13

Civil Code § 3176 14

Code of Civil Procedure § 128.5 13

Code of Civil Procedure § 396 13

Code of Civil Procedure § 527.6(r) 13

Code of Civil Procedure § 1021 ..... 2, 4, 10

Code of Civil Procedure § 1032 13

INTRODUCTION

The core issue in this case is whether a prevailing defendant that successfully argues that an entire statutory scheme does not apply in a case may then cherry-pick the narrowly tailored fee-shifting provision out of the inapplicable statute and demand that the generally applicable America Rule be discarded. The common sense answer is "no." Defendants-Appellants cannot have their cake and eat it too.

That answer is also consistent with the plain and unambiguous language of the fee-shifting provision at issue in this case. Defendants-Appellants readily acknowledge that, under California law, statutes are interpreted by looking at their words, that the statute's words are given their "usual and ordinary" meaning, construed in light of the statute as a whole and its purpose, and that, absent ambiguity, the plain meaning of the statute's language governs. But they then proceed to ignore the plain meaning of the applicable statute's words, distort the words that are in the statue, and add in other words not contained in the statute. That is because they recognize that they cannot prevail on the merits relying upon the statute as it is written, because it does not apply to this case on its face.

In sum, the Court of Appeal correctly ruled that Defendants could not reap a windfall by successfully arguing that a statutory scheme does not apply to the case in any way, shape, or form, and then rely upon that same scheme to evade the American Rule. The Court of Appeals decision regarding the fee award should be affirmed, together with such other and further relief to Plaintiffs-Respondents as this Court deems just and proper.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY DECLINED TO APPLY A FEE-SHIFTING STATUTE FROM THE DAVIS-STIRLING ACT[1] AFTER FINDING THAT THE ACT HAS NO APPLICATION TO THE CASE.

Defendants persist in advancing the fatally flawed argument that the fee-shifting statute in the Act applies even when the Act does not. The fatal defect in their contention ignores the nature of their defense; Defendants claim that the Davis-Stirling Act does not apply at all, in any way, shape, or form, to this case. Having succeeded in advancing that claim, Defendants cannot now argue that the Act does apply when it comes to shifting liability for attorneys' fees. As detailed below, the plain language of the Act and common sense confirm that the Court of Appeal's decision should be affirmed.

A. The American Rule and Statutory Construction in California.

California law follows the American Rule that attorney's fees are generally not recoverable as costs unless authorized by statute or the parties' agreement. Code of Civil Procedure ("CCP") § 1021; *Chinn v. KMR Property Management* (2008) 166 Cal. App. 4th 175, 190. Thus, absent an agreement by the parties or a statute expressly authorizing fee shifting, each party bears its own attorney's fees.

Under California law, statutes are interpreted by looking at their words, which provide the most reliable indicator of the legislature's intent. *In re Ethan C.* (2012) 54 Cal. 4th 610, 627. The statute's words are given their "usual and ordinary" meaning, and they are construed in light of the

---

[1] The Act has since been amended, effective January 1, 2014, by 2012 Cal ALS 180 (Statutes 2012 ch 180 § 1 (AB 805)). All references to the Act herein referee to the prior version applicable to this case.

statute as a whole and its purpose. *Id.* Absent ambiguity, the plain meaning of the statute's language governs. *Id.*

Defendants do not dispute this, and in fact agree. (AOB at pp. 7-9). But, after paying lip service to these principles, Defendants proceed to ignore them in offering a tortured interpretation of the Davis-Stirling Act which may be summed up as "the parts of the Act we like apply even when the Act itself does not." As detailed below, the Court of Appeal correctly rejected this result.

B. The Relevant Language of the Davis-Stirling Act.

Section 1354(c) of the Act is the statutes fee shifting provision. It provides that "[i]n an action to <u>enforce</u> the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." Civil Code § 1354(c) (emphasis added).

In addition, Section 1352 of the Act provides, in relevant part, that:

> This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided, all of the following are recorded:
>
> (a) A declaration.
>
> (b) A condominium plan, if any exists.
>
> (c) A final map or parcel map, if Division 2 (commencing with Section 66410) of Title 7 of the Government Code requires the recording of either a final map or parcel map for the common interest development.

Civil Code § 1352. Section 1374 further provides that the Act does not apply where there is no common interest development ("CID"):

> <u>Nothing in this title may be construed to apply to a development wherein there does not exist a common area</u> as defined in subdivision (b) of Section 1351.

Civil Code § 1374 (emphasis added). Applying the plain an unambiguous meaning of these words, the Court of Appeal correctly determined that Section 1354(c) had no application in this case after it determined that there was no "common area" that qualified Tract 19051 as a CID.

C. Defendants' Tortured Interpretation of Section 1354(c) was Properly Rejected.

The Court of Appeal correctly held that Defendants could not invoke Section 1354(c) after having convinced the courts below that the Act was not applicable to Tract 19051. This interpretation is obvious from the Act's plain language. As discussed below, none of Defendants' specious arguments that an inapplicable statute should be applied to shift the obligation to pay attorney's fees has merit. Accordingly, the Court of Appeals judgment should be affirmed.

1. By the Act's plain language, Section 1354(c) does not apply where the Davis-Stirling Act does not apply to the case.

It is axiomatic that, if the Davis-Stirling Act does not apply to Plaintiffs or defendants in this case because there was never a compliant planned development, then its fee shifting provision does not apply either. In order for § 1354(c) to apply, there must be an action to "enforce" governing documents. This necessarily means that there must be valid "governing documents" that are compliant with the Davis-Sterling Act to be "enforced" in the first instance. Otherwise, the Act never applies, and the general rule that fees are not recoverable controls. Code of Civil Procedure § 1021; *Chinn,* 166 Cal. App. 4th at 190. If there is nothing to "enforce", then there can be no action to "enforce".

Defendants "heads I win, tails you lose" argument, while an elegant piece of sophistry, is unavailing. Defendants misrepresent that a prevailing defendant could never recover attorney's fees under § 1354(c) if they are not allowed to recover them. For example, had the trial court determined

that Tract 19051 was in fact a planned development under the Act, but the Defendants had not violated the DORs, then Defendants would have prevailed in an action to "enforce" the DORs. Defendants defense to this action, however, was that there were no DOR's to enforce because they had expired, and the Act did not apply to this case at all. Having prevailed in their assertion that the Act is not applicable, they cannot no argue that the Act does apply because they perceive an advantage in doing so. Defendants should not be permitted to cherry-pick which portions of the Act do or do not apply to the case.

The plain language of Sections 1352 and 1374 reinforces this interpretation. Section 1352 states, without qualification, that "[t]his title applies..." only when the conditions necessary to create a CID are met. Here, the lower courts both concluded that Tract 19051 was not a CID. Therefore, the Act – including its fee-shifting provision – is inapplicable.

Similarly, the Legislature left no room for misunderstanding in Section 1374, expressly stating, again without qualification, that "[n]othing in this title may be construed to apply to a development wherein there does not exist a common area as defined in subdivision (b) of Section 1351." Civil Code § 1374 (emphasis added). "Nothing in this title may be construed to apply to a development" that is not a CID is plain, unambiguous, and unequivocal, and obviously includes Section 1354(c). Defendants claim, without pointing to any limiting language in the sections themselves or to any other authority, that the words in these sections mean something other than what they say, and that the fee-shifting provision is carved out from these exclusions. Not so.

Indeed, the only way to reach the twisted interpretation Defendants advance is to impermissibly read words into the Act that are not there. It should be presumed that the legislature intended to say what it said, and that it would have carved out an exception for the fee-shifting statute or

drafted it differently if it intended for the statute to apply regardless of whether or not there was a CID. *Richards, Watson & Gershon v. King* (1995) 39 Cal. App. 4th 1176, 1179 (if legislature had intended mandatory dismissal, it would have said so); *Hunt v. Alum Rock Union Elementary Sch. Dist.* (1970) 7 Cal. App. 3d 612, 614 (if the legislature had intended to make increments mandatory, it would have said so). "In order to construe a statute as imposing a mandatory duty, the mandatory nature of the duty must be phrased in explicit and forceful language." *Quackenbush v. Superior Court* (1997) 57 Cal. App. 4th 660, 663. No "explicit and forceful language" is found in the Act making the fee-shifting provision applicable even where the Act itself does not apply.

Here, if the legislature had intended for attorneys' fees to be awarded under the Act, even when the Act was deemed not to apply, it would have expressly said so. For example, it would have said something like, "in <u>any</u> action brought under this Act, the prevailing party shall be awarded reasonable attorney's fees and costs." Or it would have added language excepting the fee-shifting provision from the blanket prohibition in Section 1374. Instead, the legislature very carefully carved out a limited set of circumstances when attorneys fees would be available under the Act, and that was "[i]n <u>an</u> action to <u>enforce</u> the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." Civil Code § 1354(c) (emphasis added). This presumes that the Act is applicable in the first instance. This interpretation is reinforced by the Legislature's strict instruction that no part of the Act may be applied where there is no CID. Civil Code § 1374.

Where, as here, there are no CC&Rs to "enforce" under the Act, then § 1354(c) is not applicable. *Blue Lagoon Cmty. Ass'n v. Mitchell* (1997) 55 Cal. App. 4th 472; *Mount Olympus Property Owners Ass'n v. Shpirt* (1997) 59 Cal. App. 4th 885, 892-897. In *Blue Lagoon*, the court noted that §

1354(c) did not apply to allow the prevailing objectants to recover their fees in defeating a petition under § 1356 because the matter did not involve the enforcement of any governing documents within the meaning of § 1354(c). *Id.* at 476-478. In reaching this conclusion, the court expressly rejected the argument that "equitable principles" could be used to render § 1354(c) applicable to a situation where it did not apply on its face. Contrary to Defendants' protestations, this case is applicable here, and demonstrates that the judgment for attorney's fees should be reversed.

Similarly, in *Mount Olympus*, the Court of Appeal held that it was error to award fees under the predecessor section of Section 1354(c), which was substantially similar in language, where there was no CID. *Mount Olympus, supra.* Defendants' attempts to discredit this decision impugn the Court of Appeal's intelligence and integrity. The interpretation is consistent with the statutory language, as discussed above, and the Court of Appeal clearly considered the interplay between the relevant portions of the Act. Indeed, it appears that this Court at least tacitly approved the interpretation, as it denied review of *Mount Olympus*. *Mount Olympus Prop. Owners Ass'n v. Shpirt* (Feb. 25, 1998) Cal. LEXIS 1338.

Moreover, where, as here, the statute is used defensively and the language authorizing recovery of attorney's fees is limited to "actions to enforce", an award of attorney's fees is not authorized. *Gil v. Mansano* (2004) 121 Cal. App. 4th 739, 744-745. While broad statutory language like "in any action" will authorize an award of fees when the statute is used defensively, "[n]arrow statutory language limited to 'actions to enforce' does not authorize attorney fee awards where the statute is used defensively." *Id.* (citing specifically to Civil Code § 1354(f), which is § 1354 (c)'s predecessor). Section 1354(c) is specifically limited on its face to "actions to enforce". It is undisputed that Defendants were not seeking to enforce the DORs here. Rather, they successfully advanced the claim

that the DORs were invalid under the Act. Accordingly, their defensive use of the Act cannot be the basis for an attorney's fees award. *Id.* Therefore, the judgment awarding attorney's fees was properly reversed.

Defendants also persist in misrepresenting that a prevailing defendant could never recover attorney's fees under § 1354(c) if Defendants themselves are not allowed to have their cake and eat it too. This argument is fatally defective because it ignores the far more frequent scenario where the parties are not claiming that the Act is inapplicable, but are instead advancing competing interpretations of the DORs. For example, had the trial court determined that Tract 19051 was in fact a planned development under the Act, but the Defendants had not violated the DORs, then Defendants would have prevailed in an action to "enforce" the DORs. In such cases, it makes perfect sense for a defendant to recover attorneys' fees as a prevailing party, because the Act applies, and it provides for attorneys' fees to the prevailing party in any action to "enforce" the DORs.

Here, however, Defendants claimed that there were no DOR's to enforce because they had expired, and the Act did not apply to this case at all. Having prevailed in their assertion that the Act is not applicable, they cannot now argue that the Act does apply because they perceive an advantage in doing so. Defendants should not be permitted to cherry-pick which portions of the Act do or do not apply to the case.

2. Mutuality of Remedy has no application here and, in any event, conflicts with the statute's plain language.

Defendants' musings on mutuality of remedy, which is a contract law doctrine, are simply inapplicable when the statute containing the fee-shifting provision relied upon does not apply to the case. Equitable principles may not be used to invoke application of an otherwise inapplicable fee shifting statute. *Blue Lagoon, supra.* Moreover, the policy

considerations that give rise to the mutuality of remedy doctrine in the contract context do not apply here, as there is no unequal bargaining power, oppression, or leverage involved in the Legislature's enactment of a statute. The Legislature carefully drafted Section 1354(c) to apply in narrowly tailored situations. This case is not one of them. Defendants gripe should be with the Legislature.

All of the cases Defendants rely upon to advance this argument are therefore inapposite, as this is not a contract matter. Defendants do not cite any authority for the novel proposition that courts should be permitted to rewrite statutes to impose mutuality of remedy where the Legislature has decided that the fee-shifting statute may only be applied in certain limited circumstances. Indeed, such an argument would run afoul of California law regarding statutory interpretation and separation of powers. Civil Code § 1717 is a broadly worded statute, affording relief "in any action on a contract..." Meanwhile, Section 1354(c) is expressly limited to "an action to enforce the governing documents" of a CID, and the Act expressly states without qualification that no part of the Act shall apply where there is no CID. This limiting language makes Section 1354(c) a narrowly tailored fee-shifting statute that may not be used defensively. *Mansano,* 121 Cal. App. 4th at 744-745. Here, Defendants' claim that Plaintiffs' suit was frivolous has no support in law or fact, as there has never been a finding that Plaintiffs' suit was frivolous, and the mere fact that they did not prevail does not make it so.

3. The result here is neither absurd nor wasteful, as it is the precise result the Legislature intended.

Defendants' claim that not allowing them to disregard the Legislature's intent and the plain words of the Davis-Stirling Act in order to contrive a justification for an attorneys' fee award would lead to "absurd results" is itself absurd. First, as stated above, the Act's statutory scheme

makes it clear that the Legislature expressly intended that Section 1354(c) would not apply where there was no CID. Civil Code §§ 1351, 1354(c), 1374. It is hardly absurd that the result is exactly what was intended. Again, Defendants' gripe is with the Legislature if it finds the result here distasteful.

Moreover, as discussed above, Defendants ramblings about "legitimacy," perceived lack of merit, and frivolity are nothing more than self-serving rants. Defendants have the audacity to assume that, merely because they ultimately prevailed, Plaintiffs' claims were illegitimate or frivolous. Not so. Again, Defendants' claim that Plaintiffs' suit was frivolous has no support in law or fact, as there has never been a finding that Plaintiffs' suit was frivolous, and the mere fact that they did not prevail does not make it so. Nor is there any indication of oppression or other nefarious motives behind the litigation. This is nothing more than a legitimate dispute over legal questions. The mere fact that the courts ultimately agreed with Defendants does not make Plaintiffs' position frivolous, or their suing to enforce the DORs improper.

Defendants' complaints about the number of Plaintiffs vis-à-vis proportional liability for fees are simply irrelevant. First, Defendants invited this litigation by simply coming into the development and demolishing existing structures and building a non-compliant one. Despite notice of the DORs, Defendants simply disregarded them without even seeking to resolve the matter informally or even presenting his case that Tract 19051 was not a CID. It is not surprising that so many members of the community acted to enforce the DORs that they had been living under in response to the brash action.

Moreover, the argument is merely quibbling over the American Rule. In California, absent authorization by statute or the parties' agreement, attorney's fees are generally not recoverable. CCP § 1021;

Chinn, 166 Cal. App. 4th at 190. There is nothing in the American Rule that makes an exception based on proportionality or the number of litigants on each side. Again, Defendants can repeat like a mantra that Civil Code § 1717 is "analogous" to Section 1354(c), but it is not.

The argument that denying Defendants a fee award wastes judicial resources is patently frivolous. As explained above, this was a legitimate dispute that ultimately resolved in Defendants' favor. Similarly, all of the considerations raised by Defendants are already addressed by authorities awarding fees and sanctions for frivolous or vexatious litigation. Indeed, Defendants fail to cite any authority supporting this contention.

In sum, there was no absurd result here. Instead, the Act worked exactly as the Legislature designed it to work. The reversal of the fee award should be affirmed.

4. The Davis-Stirling Act's legislative history confirmed the Court of Appeal's interpretation.

Plaintiffs contend that there is no reason to resort to legislative history because the plain an unambiguous language of the relevant statutes is clear. Defendants understandably wish to muddy the water with extraneous materials for the same reason, as the clear language compels an outcome they dislike. But even if it is appropriate to consider the legislative history here, it does not aid Defendants, because the legislative history confirms the Legislature's intent to limit the applicability of Section 1354(c).

Originally, the predecessor statute to Section 1354(c) was broadly worded to state "[i]n any action to enforce..." (Defendants' RJN Exh. A). This "in any action" language signifies a broad applicability. *Mansano,* 121 Cal. App. 4th at 744-745. In the next amendment, the "in any action" language was maintained. (Defendants' RJN Exh. C).

Defendants' claim that "[i]n 2004, the attorney fees provision was moved without substantive change from 1354(f) to 1354(c), the statute at issue in this case," (AOB at p. 28) is false. There was in fact a significant substantive change; the "in any action" language was eliminated and replaced with "[i]n an action to enforce..." (Defendants' RJN Exh. D). Thus, the scope of the provision's applicability was truncated.

Moreover, contrary to Defendants misreading, the legislative history of Section 1374 confirms that the Legislature intended to make clear that the Act had no application whatsoever unless there was a CID. (Defendants' RJN Exh. E). Defendants concede that Section 1374 was added after the fee-shifting provision was added to the Act, so that there can be no argument that Section 1374 was not intended encompass Section 1354(c). (AOB at p. 29). They claim that the legislative history evinces an intent to except the fee provision from Section 1374's reach, but the opposite is true:

> This bill clarifies that the Davis-Stirling Common Interest Development Act <u>does not apply to common interest developments that do not have a common area</u>.
>
> * * *
>
> The author wants to <u>clarify and reinforce existing CID law so that it does not apply to a homeowner association that has no common area to maintain</u>.

(Defendants' RJN Exh. E) (emphasis added).

This legislative history confirms what the plain language of the statutes states: the Act – including its fee-shifting provision – does not apply where there is no CID. Accordingly, the Court of Appeal should be affirmed.

5. <u>None of the cases or statutes Defendants cite compel a different result because they are all inapposite</u>.

Defendants scatter citations to various other cases and statutes involving fee-shifting throughout their brief. But none of these authorities

compels the result Defendants wish for, because they involve much more broadly worded fee-shifting provisions or because situations that are not analogous.

For example, Defendants' reliance upon Civil Code § 55 is misplaced because that statute permits "any person who is aggrieved or potentially aggrieved by a violation" of California's disability act to bring an action under the section, and then states that the prevailing party in such an action shall recover attorney's fees. But, as discussed above, the Act is limited in scope to CIDs, only awards fees for actions to enforce the CID's governing documents, and expressly excludes application of any provision of the Act when there is no CID. Civil Code §§ 1351, 1354(c), 1374. Similarly, Defendants' reliance upon various statutes that award attorneys' fees "in any action[2]" or apply generally to all types of actions[3] is misplaced

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[2] *See* Civil Code § 86; Civil Code § 789.3(d); Civil Code § 815.7(d); Civil Code § 1584.5 ("after <u>any</u> receipt deemed to be an unconditional gift under this section...an action may be brought...may also be awarded reasonable attorneys' fees" (emphasis added)); Civil Code § 1584.6 (similar language as § 1584.5); Civil Code § 1714.1 ("<u>Any</u> act of willful misconduct of a minor...shall be imputed to the parent or guardian...for all purposes of civil damages, including court costs, and attorney's fees, to the prevailing party..." (emphasis added)); Civil Code § 1717 ("In <u>any</u> action on a contract..." (emphasis added)); Civil Code § 1717.5 ("...in <u>any</u> action on a contract based on a book account..." (emphasis added)); Civil Code § 1811.1 ("...in <u>any</u> action on a contract or installment account subject to the provisions of this chapter <u>regardless of whether such action is instituted by the seller, holder or buyer</u>." (emphasis added)); Civil Code § 1942.5 ("In <u>any</u> action brought for damages for retaliatory conviction..." (emphasis added)); Civil Code § 2893.4 ("...in <u>any</u> action on a contract or purchase order subject to the provisions of this chapter <u>regardless of whether the action is instituted by the seller, holder or buyer</u>." (emphasis added)); Civil Code § 3250 (now repealed) ("In <u>any</u> action, the court shall award the prevailing party attorney's fees..." (emphasis added)); CCP 527.6(r) ("...in <u>any</u> action brought under this section..." (emphasis added));

[3] CCP § 128.5 (applies generally to all actions); CCP § 396 (same); CCP § 1032 (same);

because Section 1354(c) does not contain such broad language. Section 1354(c) is expressly limited to "an action to enforce the governing documents" of a CID, and the Act expressly states without qualification that no part of the Act shall apply where there is no CID. This limiting language makes Section 1354(c) a narrowly tailored fee-shifting statute that may not be used defensively. *Mansano,* 121 Cal. App. 4th at 744-745.

The cases relied upon by Defendants are also unavailing. The case of *Hsu v. Abbara* (1995) 9 Cal. 4th 863 involves Civil Code § 1717. As stated above, that is a broadly worded statute that expressly authorizes mutuality of remedy in any contract action. This is not a contract action, and Section 1354(c) is worded differently and far more narrowly than Section 1717. Moreover, the Act expressly states, without limitation, exception, or qualification, that no statute in the Act – including Section 1354(c) – applies when there is no CID. Civil Code § 1374. The same reasoning applies to *Bovard v. Am. Horse Enters.* (1988) 201 Cal. App. 3d 832, *Mepco Services, Inc. v. Saddleback Valley Unified School Dist.* (2010) 189 Cal. App. 4th 1027, and *Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal. App. 3d 701. Defendants disingenuously state that these are cases where the statutory scheme was found not to apply. This is a gross distortion of those holdings, and fails to consider that there is no comparable statute to Section 1374 curtailing the application of Section 1717 when the contract at issue is found to be invalid or unenforceable.

Defendants' reliance upon *Mechanical Wholesale Corp. v. Fuji Bank, Ltd.* (1996) 42 Cal. App. 4th 1647, is misplaced because the statute at issue read differently than the fee-shifting provision in the Act. Civil Code § 3176 (now repealed) read, in relevant part, as follows: "In *any* action against . . . [a] construction lender to enforce payment of a claim stated in a bonded stop notice, *the prevailing party* shall be entitled to collect *from the*

party held liable by the court for payment of the claim, reasonable attorney's fees in addition to other costs and in addition to any liability for damages. The court . . . shall determine who is the prevailing party for purposes of this section, whether or not the suit proceeds to final judgment. Except as otherwise provided by this section, the prevailing party shall be the party who recovered a greater relief in the action. . . ." *Id.* at 1660-1661 (emphasis in original). None of this broad language, emphasized by the Court of Appeal in reaching its decision, appears in Section 1354(c). Rather, as discussed above, Section 1354(c) does not apply "in any action", but only in a particular type of action. The difference in language between these two sections confirms the legislature's intent to limit the scope of Section 1354(c). Defendants misstate the court's reasoning in footnote 14 of that case as well, as the footnote actually refers to invalid contracts, not invalid statutes. *Id.* at 1661, n. 14. Similarly, there is no indication of a comparable statute to Section 1374 curtailing the application of Section 3176 or its current iteration when no bonded stop notice was found to exist.

Defendants' reliance on *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal. App. 4th 1146, is also misplaced. Indeed, that case actually supports Plaintiffs. In *Salehi*, neither party disputed that the development was a CID or that the CC&Rs were valid. *Id.* at 1150-1151. The plaintiff, an attorney, asserted that the defendant association had violated the CC&Rs, and commenced litigation under the Act. *Id.* She subsequently dismissed the eight claims under the CC&Rs without prejudice, because her expert was ill. *Id.* The defendant association, however, contended that the dismissal was actually because the plaintiff had lost a virtually identical case in another development where she represented the plaintiff, and sought fees under Section 1354(c). *Id.* at 1151-1152. The Court of Appeal stated that, even accepting the plaintiff's proffered reason for the dismissal, the defendants were prevailing parties

because the plaintiff was not prepared to proceed procedurally and there was no indication that she could prove her case substantively. *Id.* at 1155.

This case supports Plaintiffs' interpretation of Section 1354(c) that, when the Act applies, the prevailing party defendant may be awarded fees. In *Salehi*, there was no dispute that the CC&Rs were valid and enforceable. The parties were merely litigating over different interpretations of the defendants' obligations thereunder. This is in stark contrast to here, where the defense was that the Act did not apply at all because there was no CID, which implicates Section 1374. Accordingly, *Salehi* does not help Defendants.

In sum, Defendants successfully argued that the governing documents were invalid, and that the Act therefore did not apply to the case. The trial court and the Court of Appeal ultimately agreed. Despite having successfully argued that the Act did not apply, Defendants claim that they were entitled to the benefits of the Act's fee-shifting provision. The Court of Appeal correctly saw through this charade, and properly interpreted the plain and unambiguous language of the relevant statutes as precluding the application of Section 1354(c) when there was no CID. This Court should affirm that correct determination.

CONCLUSION

For the reasons stated above, the Court of Appeals judgment reversing the erroneous award of attorneys' fees to Defendants should be affirmed, in its entirety, together with such other and further relief to Plaintiffs as this Court deems just and proper.

Dated: February 7, 2014 Respectfully submitted,

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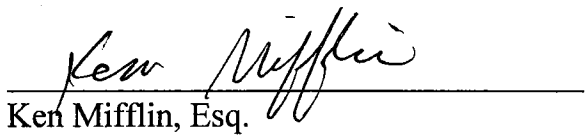
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Answering Brief of the Merits is produced using 13-point or greater Roman type, including footnotes, and contains 4,984 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 7, 2014 Respectfully submitted,



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