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ISSUES TO BE DECIDED

1. Are Plaintiffs' claims under the Unfair Competition Act, which do not seek relief in the form of money or damages, barred by the Tort Claims Act?

2. Is Defendant subject to the Unfair Competition Act in its operation of a bus system?

BACKGROUND

Plaintiffs Joshua Loya and Deborah Lane are residents of Santa Cruz County,
California. Mr. Loya is blind, and Ms. Lane has multiple sclerosis (along with other
disabilities) which causes periodic bouts of double vision. Because of their disabilities, neither
Plaintiff can drive, and both rely upon the Santa Cruz public transportation system as their
principal means of transportation. This system is operated by Defendant Santa Cruz
Metropolitan Transit District.

13 Because of their disabilities, Plaintiffs need bus stops to be announced by bus operators (or electronically on buses equipped with the appropriate technology) and, at bus stops serving 14 more than one route, the routes of the buses announced so that they can board the correct bus. 15 16 This lawsuit arises out of Defendant's repeated failures to ensure that bus stops and bus routes 17 are announced. Plaintiffs have asserted claims for violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, et seq., the Rehabilitation Act of 1973, 29 18 19 U.S.C. § 701, et seq., the Unruh Civil Rights Act, Cal. Civ. Code § 51, et seq., the Public Accommodations Law, Cal. Civ. Code § 54, et seq., California Government Code § 11135, et 20 seq., and the Unfair Competition Statute, Cal. Bus. & Prof. Code § 17200, et seq. Defendant's 21 22 Motion to Dismiss seeks dismissal of Plaintiffs' claims under the Unfair Competition Act. 23 ARGUMENT 24 Defendant's Motion to Dismiss, although not expressly divided as such, is actually 25

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based on two arguments: (1) that California's Tort Claim Act immunizes Defendant from
 liability under the Unfair Competition Act; and (2) that Defendant, as a public entity, is not a
 "person" covered by the Unfair Competition Act. These arguments are incorrect.

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A.

The Tort Claims Act Does Not Apply to Non-Monetary Relief.

5 Defendant argues that the Tort Claims Act protects it from liability under the Unfair 6 Competition Act. (Motion to Dismiss at 3-4.) This argument can be disposed of quickly. The 7 Tort Claims Act, by its express terms, does not immunize public entities from claims seeking 8 "relief other than money or damages." Cal. Gov't Code § 814; see also Qwest 9 Communications Corp. v. City of Berkeley, 146 F. Supp. 2d 1081, 1090 (N.D. Cal. 2001) (stating that "injunctive relief . . . is not subject to the procedural requirements of the Tort 10 11 Claims Act"(citations omitted)); Minsky v. City of Los Angeles, 11 Cal. 3d 113, 121 (1974) 12 ("The claims statutes do not 'impose any . . . requirements for nonpecuniary actions, such as 13 those seeking injunctive, specific, or declaratory relief." (Emphasis and citation omitted.)) 14 The Unfair Competition Act provides for injunctive relief, but damages are not 15 recoverable.¹ See Cal. Bus. & Prof. Code § 17203; Rosales v. Citibank, Fed. Sav. Bank, 133 F. Supp. 2d 1177, 1181 (N.D. Cal. 2001) (stating that damages are not recoverable under the 16 17 Unfair Competition Act). Because Plaintiffs do not seek money or damages under the Unfair 18 Competition Act, their claims under that statute are not barred by the Tort Claims Act.

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 The Unfair Competition Act also provides for "disgorgement of monies wrongfully obtained." <u>Vikco Ins. Servs., Inc. v. Ohio Indem. Co.</u>, 70 Cal. App. 4th 55, 67 (1999). Claims seeking disgorgement are not subject to the Tort Claims Act. <u>See Minsky</u>, 11 Cal. 3d at 117, 124 (holding that complaint seeking recovery of money wrongfully withheld by the defendant was not subject to the Tort Claims Act). In any event, Plaintiffs in this action do not seek disgorgement under the Unfair Competition Act, and thus the issue of whether Defendant would be immune to such a claim is irrelevant.

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B. Defendant Is Covered By The Unfair Competition Act.

1. The Unfair Competition Act applies to Defendant unless doing so would impair Defendant's sovereign powers.

The Unfair Competition Act authorizes relief against any "person,"² and the Act defines "person" to include "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." Cal. Bus. & Prof. Code § 17201. Defendant argues that because this definition does not expressly include "public entities," such entities are not covered by the Unfair Competition Act. (Mot. to Dismiss at 4-5.) This contention is contrary to a long line of California Supreme Court decisions (as well as appellate court decisions cited by Defendant) that hold that a statute of general application covers public entities unless doing so would impair their sovereign powers.

Beginning by at least 1942, California courts construing statutes of general application 12 have held that such statutes apply to public entities "[w]here . . . no impairment of sovereign 13 powers would result." Hovt v. Board of Civil Serv. Comm'rs, 21 Cal. 2d 399, 402 (1942). 14 Since that time, the California Supreme Court has repeatedly affirmed this principle. See, e.g., 15 Flournoy v. State, 57 Cal. 2d 497, 498-99 (1962) (holding that a public entity is covered by a 16 statute "unless the state's position as sovereign warrants special protection" (citations 17 omitted)); City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 276-77 (1975) (same); 18 People v. Crow, 6 Cal. 4th 952, 959 (1993) ("In this case, the sovereign powers of the 19 government would not be impaired if defrauded government agencies can be deemed victims 20 within the meaning of section 13967(c). It is thus proper for us to conclude that the 21 Legislature intended the term 'victim,' as used in section 13967(c), to include defrauded 22 government agencies."). 23

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Indeed, two of the cases cited by Defendant explicitly recognize the principle that 1 2 "[w]here ... no impairment of sovereign powers would result . . . the Legislature may properly 3 be held to have intended that the statute apply to governmental bodies even though it used general statutory language only." Cmty. Mem'l Hosp. v. County of Ventura, 50 Cal. App. 4th 4 5 199, 209 (1996) (citations omitted); Cal. Med. Ass'n, Inc. v. Regents of the Univ. of 6 California, 79 Cal. App. 4th 542, 548 (2000) ("The University of California is excluded from 7 the operation of a general statutory provision if the University's inclusion would result in an 8 infringement upon the powers granted to it as an instrumentality of the state." (Citations 9 omitted.). Each of these cases, however, involved operating a hospital, and "there can be no 10 dispute that guarding the public health is within the [defendant's] sovereign powers." Cmty. 11 Mem'l Hosp., 50 Cal. App. 4th at 209.

12 Defendant cites two other cases -- Janis v. California State Lottery Commision, 68 Cal. 13 App. 4th 824 (1998) and Trinkle v. California State Lottery, 71 Cal. App. 4th 1198 (1999) -- in 14 which the courts found that the defendants in those cases were not covered by the Unfair 15 Competition Act. Although these cases do not explicitly refer to the statutory construction 16 principles set forth in Hoyt and its progeny, the results in both cases are consistent with these 17 principles. Both Janis and Trinkle concerned operation of a state lottery, and numerous cases have held that operating a lottery is an exercise of sovereign rather than proprietary power. 18 19 See, e.g., Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 100 (1st Cir. 2002) ("This 20 revenue-raising function [of a state lottery] is decidedly governmental in nature."(Citations omitted.)); Hilton Apothecary, Inc. v. State, 630 N.Y.S.2d 446, 448 (Ct. Cl. 1995) ("Here, the 21 22 activity involved, the operation of the Lottery, is fully governmental and not proprietary in 23 nature.").

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This action concerns Defendant's failure to ensure that bus stops and bus routes are

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announced, and thus pursuant to the numerous authorities set forth above, the Unfair
 Competition Act applies to Defendant if (1) Defendant's operation of its bus system is not an
 exercise of its sovereign power, or (2) subjecting Defendant to the Unfair Competition Act
 would not impair such power.

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2. Defendant's operation of its bus system is not an exercise of its sovereign powers.

Numerous cases in California and elsewhere demonstrate that operating a bus system is not an exercise of sovereign power.

8 For example, in Lopez v. Southern California Rapid Transit District, 200 Cal. Rptr. 779 9 (Ct. App. 1984), aff'd on other grounds, 40 Cal. 3d 780 (1985), a bus passenger who was 10 assaulted by other passengers brought suit against the public corporation that operated the bus 11 system. The court enunciated the established principle that "[a] generally worded code section 12 ... applies to governmental bodies if no impairment of sovereign powers would result." Id. at 13 787. The court held that operating a bus system is not an exercise of sovereign power: "[O]nce 14 a government decides to run a bus line it is required to make the same business judgments that 15 a private bus company must make. The government bus line is also subject to the same 16 operational expenses as the privately owned bus line including the cost of providing security 17 for the passengers." Id. Thus "[b]y voluntarily undertaking the business of a common carrier. 18 . . the RTD became subject to the specific mandatory duty imposed by California statute on 19 every common carrier . . ." Id. at 788.³

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³ The California Supreme Court affirmed this decision on similar, but not
identical, grounds that demonstrate that a statute need not expressly cover "public entities" in
order for such entities to be subject to the statute. The Court cited Government Code section
815, which provides tort immunity to public entities "[e]xcept as otherwise provided by
statute," and found that "all governmental tort liability must be based on statute." Lopez, 40
Cal. 3d 780, 785 n.2 (1985). The Court went on to hold, however, that the statute need not
"provide on its face that it is applicable to public entities. 'Rather, a liability is deemed

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Lopez is consistent with the decisions of numerous courts across the country holding 1 2 that operating a bus system is not an exercise of sovereign power. See. e.g., Gleason v. Metro. 3 Council Transit Operations, 582 N.W.2d 216, 221 (Minn. 1998) ("[T]he rational ... that the 4 inequity of extending official immunity to governmental employees who perform the same 5 proprietary functions as private entities would be unwarranted, applies equally to a bus driver 6 who discriminates against a disabled passenger."); Board of Comm'rs v. Chatham Advertisers, 7 371 S.E.2d 850, 851 (Ga. 1988) ("The operation of a public transportation system, such as a 8 scheduled fixed-route transit bus system . . . is a proprietary or ministerial function." (Citations 9 omitted.); Lepore v. R.I. Pub. Transit Auth., 524 A.2d 574, 575 (R.I. 1987) (holding that 10 operation of a public bus system was not a governmental function); Comastro v. Vill. of 11 Rosemont, 461 N.E.2d 616, 619 (Ill. App. 1984) (Holding that "[a] municipal corporation 12 engaged in a non-governmental function, such as the operation of ... a public transportation 13 system ... will be held to the same standard of care as that imposed on a private party." 14 (citations omitted)); Johnson v. Detroit Metro, Airport, 350 N.W.2d 295, 297 (Mich. App. 15 1984) (Holding that "the municipal operation of bus and streetcar companies . . . were always 16 considered proprietary ... "); Butts v. County of Dade, 178 So. 2d 592, 596 (Fla. Dist. Ct. App. 17 1965) ("We therefore hold that the operation of the transit system is not a governmental operation of Dade County . . . "). 18 19 The numerous authorities cited above demonstrate that Defendant's operation of a bus 20 system is not an exercise of its sovereign power. Under Hoyt and its progeny, because 21 subjecting Defendant to the Unfair Competition Act will not impair its sovereign power, 22 23 'provided by statute' if a statute defines the tort in general terms." Id. (citation omitted). The Court found that Civil Code section 2100 – which does not expressly apply to "public entities" - nevertheless "otherwise provide[d]" for the liability of public entities within the meaning of 24 section 815. Id. 25 Plaintiffs' Memorandum in Opposition to Defendant's 26 Motion to Dismiss Plaintiffs' 6th Claim for Relief -7-

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Defendant is covered by the Act.

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Subjecting Defendant's Bus Stop and Route Announcement Practices to the Unfair Competition Act Will Not Impair Any Of Its Powers.

Plaintiffs' Unfair Competition Act claim is limited to Defendant's failure to ensure that bus stops and bus routes are announced. These aspects of Defendant's bus system are subject to specific requirements set forth in other state and federal laws. Thus even if Defendant's operational decisions concerning its bus system generally are exercises of its sovereign power, its practices concerning stop and route announcements are highly regulated. Applying the Unfair Competition Act with respect to these aspects of Defendant's bus system, therefore, cannot impair its sovereign power.

The requirements under Title II of the ADA concerning announcement of bus stops and 11 bus routes are specific and clear. Defendant must (1) announce stops at the request of an 12 individual with a disability, (2) announce transfer points with other fixed routes,⁴ (3) announce 13 other major intersections and destination points, and (4) announce intervals along a route 14 sufficient to permit individuals with visual impairments or other disabilities to be oriented to 15 their location. 49 C.F.R. § 37.167(b)(1), (2). In addition, where buses for more than one route 16 serve the same stop. Metro must provide a means by which an individual with a visual 17 impairment or other disability can identify the proper bus to enter. 49 C.F.R. § 37.167(c). 18

In addition, the California Public Accommodations Law provides that "[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations . . . and privileges of all common carriers . . . motorbuses . . . or any other public conveyances or modes of transportation (whether private, public, franchised,

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⁴ A transfer point is any stop "where a passenger can get off and transfer to another bus or rail line (or to another form of transportation, such as commuter rail or ferry)" 49 C.F.R. pt. 37, app. D, § 37.167.

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1	licensed, contracted, or otherwise provided)" Cal. Civ. Code § 54.1(a)(1). The Public
2	Accommodations Law expressly incorporates the requirements of Title II and its regulations.
3	<u>Id.</u> § 54.1(a)(3).
4	Defendant is bound by the requirements of California and federal law. Therefore
5	subjecting Defendant to the Unfair Competition Act based on its failure to ensure that bus
6	stops and bus routes are announced cannot, by definition, impair any of its powers, sovereign
7	or otherwise.
8	CONCLUSION
9	For the reasons set forth above, Plaintiffs respectfully request that Defendant's Motion
10	to Dismiss be denied.
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12	Respectfully Submitted,
13	FOX & ROBERTSON, P.C.
14	BY: s/ Timothy P. Fox
15	Timothy P. Fox
16	DISABILITY RIGHTS EDUCATION AND
17	DEFENSE FUND, INC.
18	Linda D. Kilb
19	Dated: September 26, 2002 Attorneys for Plaintiffs
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25 26	Plaintiffs' Memorandum in Opposition to Defendant's
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