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9

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA  
12

13  
14 **KIM ANDREW BERRY,**  
15 Plaintiff,  
16 v.  
17 **THE STATE OF CALIFORNIA,**  
18 **CALIFORNIA STATE ATTORNEY**  
19 **GENERAL BILL LOCKYER,**  
**CALIFORNIA STATE JUDICIARY,**  
**and DOES 1-5,**  
20 Defendants.  
21

CIV S-04-2580 LKK-KJM-PS

**DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
REPLY TO PLAINTIFF'S OPPOSITION  
TO MOTION TO DISMISS**

Hearing: February 23, 2005  
Time: 10:00 A.M.  
Courtroom: 26  
Judge: The Honorable  
Kimberly J. Mueller

22 **INTRODUCTION**

23 Contrary to Plaintiff's assertion that he is not asking this Court to overrule a state court  
24 decision, that is precisely what he is doing. To review briefly:

- 25 ● Plaintiff Kim Berry filed a civil court action against Wife and her attorneys in clear  
26 violation of a Marital Settlement Agreement (MSA) he had entered into over a year  
previously.
- 27 ● Wife was granted attorneys fees under Family Code section 271 as compensation for  
28 having to defend against the civil court action. Fees granted under Section 271 are in the

1 nature of sanctions awarded against a party who seeks, as did Plaintiff, to  
2 interfere with a MSA.

- 3 ● Plaintiff appealed to the California Court of Appeal, challenging only the fact that the fees  
4 were awarded under Section 271. He did not challenge the dismissal of the civil suit,  
5 which he admitted had no merit. *Berry I*, at \*3.
- 6 ● When Plaintiff filed the appeal, Wife again sought fees under Section 271 to cover her  
7 expenses for now having to defend against the appeal. The family law court judge granted  
8 the fee request on the theory that the award was "a supplement to the first sanctions, for  
9 continuing unnecessary litigation." *Id.*, at \*1.
- 10 ● Plaintiff filed appeal number two, challenging the second fee award. After consolidating  
11 the two appeals, the Court of Appeal upheld the first fee award. However, the Court  
12 reversed the second fee award on the ground that such an award would tend to have a  
13 chilling effect on a party's right to file an appeal. *Id.* at \*7. The Court awarded Wife her  
14 costs on appeal and deemed her to be the prevailing party, a condition precedent to an  
15 award of appellate attorney's fees by a trial court.<sup>1</sup>
- 16 ● On Wife's motion on remand, a different family law judge did enter an award of attorney's  
17 fees pursuant to Section 271 to cover her costs on appeal.
- 18 ● Plaintiff filed appeal number three in which the only issue before the court was the legality  
19 of awarding appellate attorney's fees under Section 271 in the absence of a finding that  
20 the appeal was frivolous. *Berry II*, at \*1.
- 21 ● The Court of Appeal found against Plaintiff and ordered the parties to bear their own costs  
22 on this appeal. *Id.* at \*5.
- 23 ● Plaintiff's petition for review, raising the alleged chilling effect of Section 271, was  
24 summarily denied by the California Supreme Court. Complaint, ¶¶ 5, 32.

25 Based on the foregoing, and despite his protestations to the contrary, it is beyond dispute  
26 that Plaintiff is seeking a *de facto* review by this Court of a final decision of the California courts.  
27 Because this Court's jurisdiction is original, not appellate, it should dismiss the action as beyond its  
28 jurisdiction.

## 29 ARGUMENT

### 30 I.

#### 31 THIS COURT LACKS SUBJECT MATTER JURISDICTION

32 Although the constitutionality of awarding attorney's fees on appeal as sanctions pursuant  
33 to Section 271 in the absence of a finding that the appeal is frivolous was before the Court in

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34 1. Rule of Court 27(a) provides: "Except as provided in this rule, the party prevailing in the  
35 Court of Appeal in a civil case is entitled to costs on appeal." Rule of Court 27(c)(2) provides:  
36 "Unless the court orders otherwise, an award of costs neither includes attorney fees on appeal nor  
37 precludes a party from seeking them under rule 870.2."

1 Plaintiff's third appeal, and subsequently in the petition to the California Supreme Court, Plaintiff  
2 insists that this case is not a collateral attack on a final state court decision. Plaintiff's Opposition  
3 (Opp.) 4:6-7.

4 The United States Supreme Court has held that:

5 If the constitutional questions stated in the bill actually arose in the cause, it was  
6 the province and duty of the state courts to decide them; and their decision,  
7 whether right or wrong, was an exercise of jurisdiction. If the decision was  
8 wrong, that did not make the judgment void, but merely left it open to reversal  
9 or modification in an appropriate and timely appellate proceeding. Unless and  
10 until so reversed or modified, it would be an effective and conclusive  
adjudication. [Citations.] Under the legislation of Congress, no court of the  
United States other than this court could entertain a proceeding to reverse or  
modify the judgment for errors of that character. [Citation.] To do so would be  
an exercise of appellate jurisdiction. The jurisdiction possessed by the District  
Courts is strictly original.

11 *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923).

12 Plaintiff "raised the unconstitutional chilling effect of Section 271 sanctions against  
13 appeals" in both the appellate court and in his subsequent unsuccessful petition for review before the  
14 California Supreme Court. Complaint, § 5. As noted in Defendants' Opening Memorandum of  
15 Points and Authorities (Mem.), such a denial is a decision on the merits. Mem. 11:8-10. Thus, the  
16 only remaining court with jurisdiction to entertain Plaintiff's constitutional challenge to Section 271  
17 was the United States Supreme Court - had he filed a timely petition for writ of *certiorari*.  
18 Therefore, this action is barred by the *Rooker-Feldman* doctrine.

19 Plaintiff cites *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728 (7<sup>th</sup> Cir. 1993)  
20 as support for his contention that this action is not barred by *Rooker-Feldman*. Opp. 4:16-21. The  
21 quoted text, however, is no comfort to Plaintiff. Rather, it supports Defendants' position that,  
22 assuming solely for the sake of argument that this action is not barred by *Rooker-Feldman*, it is  
23 barred by principles of *res judicata*.

24 Plaintiff's opposition to application of the *Rooker-Feldman* doctrine rests on his firmly-  
25 held belief that *In re Marriage of Flaherty*, 31 Cal.3d 637 (1982) (*Flaherty*), controls *all* awards of  
26 attorneys fees on appeal and that there can be no such award absent a finding that the appeal was  
27 frivolous. This incorrect understanding of the law is apparently the basis for Plaintiff's much-  
28 repeated characterization of the holding of *Berry II* as "a new Rule of Law." It isn't. While it is true

1 that when a California appellate court imposes *sanctions* on appeal pursuant to Code of Civil  
2 Procedure section 907,<sup>2/</sup> it must first find that the appeal was frivolous as that term was defined by  
3 the Court in *Flaherty*, that rule does not invariably apply to an award of fees to parties who prevail  
4 on appeal. One obvious example is attorney's fees awarded pursuant to California Code of Civil  
5 Procedure section 1021.5 for the successful defense of an appeal in private attorney general cases.  
6 Under this theory, there is no requirement whatsoever that an appellate court find that the appeal was  
7 frivolous before making the award. See, e.g., *Save the Welwood Murray Memorial Library Comm.*  
8 *v. City Council of the City of Palm Springs*, 215 Cal.App.3d 1003, 1018 (1989) ["The judgment  
9 below will be affirmed, and so the Committee was entitled to its award of fees by the trial court, and,  
10 under the same theory, a further award of fees for the defense of its judgment on appeal."]; *Alice M.*  
11 *Beasley v. Wells Fargo Bank, N.A.*, 235 Cal.App.3d 1407, 1422 (1991) ["The plaintiffs request an  
12 award of their attorney fees for successfully defending both appeals. We conclude that, as at the trial  
13 level, they are entitled to such an award under section 1021.5."]

14 Moreover, there are also any number of federal statutes that provide for an award of  
15 attorney's fees on appeal even though the appeal was not determined to be frivolous. For example,  
16 42 U.S.C. section 1988 (Section 1988), provides for an award of attorney's fees for successfully  
17 defending an appeal in an action under 42 U.S.C. section 1983, without any requirement that the  
18 appeal be frivolous. See, e.g., *Democratic Party of Washington State v. Reed, et al.*, 388 F.3d 1281,  
19 1285, 1288 (9<sup>th</sup> Cir. 2004); *Oviatt v. Pearce*, 954 F.2d 1470, 1483 (9<sup>th</sup> Cir. 1992) ["plaintiff is  
20 entitled to a reasonable attorney's fee on appeal because he is the prevailing party with regard to  
21 defendants' appeal."]. Section 1988 is also employed by California Courts of Appeal to award fees  
22 on appeal even though there is no showing that the appeal was frivolous. See, e.g., *Sebago, Inc. v.*  
23 *City of Alameda*, 211 Cal.App.3d 1372, 1388 (1989) ["If Sebago was entitled to its attorney fees for  
24 successfully prosecuting this action below, it is necessarily entitled to its attorney fees for defending  
25 against the city's appeal. The question of entitlement has already been established."].

26  
27 2. California Code of Civil Procedure section 907 provides: "When it appears to the  
28 reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on  
appeal such damages as may be just."

1 If *Flaherty* applied to every case in which a party is awarded attorney's fees on appeal,  
2 Courts of Appeal would not be able to award such fees without first finding that the appeal is  
3 frivolous. That they are able to do so, as demonstrated by the cases cited above, is dispositive of the  
4 fact that *Flaherty* does not control all awards of fees on appeal.

5 It follows that, if fees can be awarded for the successful defense of an appeal where there  
6 is no requirement of a finding of inappropriate motive or behavior, *a fortiori*, the trial court can make  
7 such an award under a provision such as Section 271 where fees are imposed only after a  
8 determination that the losing party did engage in behavior proscribed by the statute, as *admitted* by  
9 Plaintiff. *Berry I*, at \*3.

10 Plaintiff urges this Court to consider once again whether Section 271 violates the Petition  
11 Clause of the First Amendment. Opp. at 4:24-5:2. Because that very issue was before the California  
12 Supreme Court when it denied his petition for review, this Court would necessarily be required to  
13 review and reverse the state court decision in order to rule in Plaintiff's favor in this case. This is  
14 precisely what the *Rooker-Feldman* doctrine forbids. Based on its lack of subject matter jurisdiction,  
15 this Court should dismiss the action forthwith.

## 16 II.

### 17 ABSTENTION<sup>3</sup>

18 Plaintiff's opposition to the application of the *Younger* abstention doctrine is likewise  
19 based on his erroneous belief that *Flaherty* controls in all cases in which attorney's fees are awarded  
20 to the prevailing party in an appeal. Opp. 5:21-25. Plaintiff's alleged decision to argue the "*stare*  
21 *decisis*" effect of *Flaherty*, rather than the constitutional issue, is not supported by either the law or  
22 the facts. As explained above, *Flaherty* is controlling *only* in those cases in which an appellate court  
23 itself imposes sanctions; therefore, it is not applicable to this case. Moreover, Plaintiff did argue the  
24 constitutional issue in both the appellate court and the Supreme Court and his argument was rejected.

25  
26 3. Defendants' Opening Memorandum of Points and Authorities stated that *Younger*  
27 abstention was required where the court lacks subject matter jurisdiction. That is incorrect. *Younger*  
28 applies where the court does have subject matter jurisdiction, but should, for stated reasons, abstain  
from exercising it and dismiss the action, as set forth in *H.C. v. Koppel*, 203 F.3D 610, 613-14 (9<sup>th</sup>  
Cir. 2000).

1 Nor do the two cited United States Supreme Court cases assist him - in both cases, the Court held  
2 that the federal district court should have abstained from exercising jurisdiction over the matter  
3 before it. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435, 437; 102  
4 S.Ct. 2515, 2523, 2524, 73 L.Ed.2d 116 (1982); *Ohio Civil Rights Comm. v. Dayton Christian*  
5 *Schools, Inc.*, 477 U.S. 619, 628, 106 S.Ct. 2718, 2723, 91 L.Ed.2d 512 (1986).

6 Plaintiff's clearly groundless assertion that he was "precluded from fully arguing whether  
7 Section 271 violated the Petition Clause" in the state court proceedings addresses only one of the  
8 grounds counseling *Younger* abstention. He has failed altogether to address the other two grounds:  
9 (1) that there are ongoing state proceedings (2) that implicate important state interests. Mem., 9:12-  
10 13.

11 Because the Sacramento family law court retained jurisdiction over the MSA, and because  
12 "family relations are a traditional area of state concern," (*Koppel, supra*, 203 F.3d at 613), this Court  
13 should apply *Younger* abstention principles, decline to exercise jurisdiction and dismiss the action.

### 14 III.

#### 15 THE COMPLAINT FAILS TO STATE FACTS UPON 16 WHICH RELIEF MAY BE GRANTED

##### 17 A. Res Judicata

18 Plaintiff's opposition to application of the principles of *res judicata* is based on a failure  
19 to appreciate the breadth of the doctrine. As explained by the California Supreme Court over 60  
20 years ago:

21 Obviously, if [a matter] is actually raised by proper pleadings and treated as an  
22 issue in the cause, it is conclusively determined by the first judgment. But the  
23 rule goes further. If the matter was within the scope of the action, related to the  
24 subject-matter and relevant to the issues, so that it could have been raised, the  
25 judgment is conclusive on it despite the fact that it was not in fact expressly  
26 pleaded or otherwise urged. The reason for this is manifest. A party cannot by  
27 negligence or design withhold issues and litigate them in consecutive actions.  
28 Hence the rule is that the prior judgment is *res judicata* on matters which were  
29 raised or could have been raised, on matters litigated or litigable.

30 *Sutphin v. Speik*, 15 Cal.2d 195, 202 (1940).

31 Once again, Plaintiff's opposition is based on his mischaracterization of the state courts'  
32 rulings as "a new rule of law." Opp. 6:19. That Plaintiff believed new law was being enunciated

1 does not make it so. Nor is he aided by *In re Marriage of Schulze*, 60 Cal.App.4th 519 (1997), a  
2 case in which the Court of Appeal specifically found that the \$5,000 attorney fee award imposed as  
3 a sanction against the husband under Section 271, for frustrating possible earlier settlement of the  
4 case, constituted an abuse of discretion on the part of the trial judge. Unlike the situation facing the  
5 family court judge in *Berry I*, there was *no* evidence that the husband had done anything to frustrate  
6 the settlement. *Schulze, supra*, 60 Cal.App.4th at 530-31. The text quoted by Plaintiff at 7:9-12 is  
7 simply an application of *Flaherty*, in which the appellate court noted that there was no basis for  
8 awarding Wife attorney's fees as a matter of *appellate* law, as, for example, under Code of Civil  
9 Procedure section 907, because the appeal was so clearly *not* frivolous, but also recognizing that the  
10 trial court could award such fees. Of course, having found that there was no evidence that husband  
11 had violated Section 271, the fee award would necessarily have to be based on some other statute.  
12 There is nothing remarkable in that conclusion or helpful to Plaintiff herein.

13 Finally, although Plaintiff's citation to *Poe v. Ullman*, 367 U.S. 497, 526, 81 S.Ct. 1752,  
14 1768, 6 L.Ed.2d 989 (1961), was from Justice Harlan's dissenting opinion, it nonetheless reinforces  
15 the point that appeal from a final state court decision is to the United States Supreme Court, not to  
16 a federal district court.

17 In sum, Plaintiff has failed to demonstrate why *res judicata* should not be employed by this  
18 Court to dismiss the action.

19 **B. Eleventh Amendment Immunity**

20 Plaintiff's position that the State has waived its Eleventh Amendment immunity to suit in  
21 this matter is based on an order that was evidently entered against Attorney General Bill Lockyer,  
22 permanently enjoining him from enforcing against federally chartered credit card issuers a state  
23 statute mandating certain disclosures by credit card issuers in their billings to consumers.<sup>4/</sup> The  
24 ruling on its face reveals simply that the state statute cannot be enforced against federally chartered  
25

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26 4. Defendants do not object to Plaintiff's citation to this Order, or to the District Court Order  
27 cited in conjunction with his discussion of judicial immunity, to the extent that they are cited to  
28 demonstrate the Court's authority to enjoin state officials from enforcing unconstitutional statutes  
over which the officials have enforcement authority. Defendants do object to any other purported  
use of these otherwise uncitable Orders.

1 issuers. The order has no relevance to any issue herein, nor is it authority for the proposition that  
2 the Attorney General has waived the Eleventh Amendment immunity to suit in federal court. While  
3 the Attorney General may be ultimately responsible for enforcing the particular Civil Code section  
4 at issue in the cited District Court case, he has no responsibility or authority with respect to Family  
5 Code section 271.

6 Thus, Plaintiff's citation to *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714  
7 (1908), is particularly unhelpful to him. In that case, the Court stated:

8 In making an officer of the state a party defendant in a suit to enjoin the  
9 enforcement of an act alleged to be unconstitutional, it is plain that such officer  
10 must have some connection with the enforcement of the act, or else it is merely  
11 making him a party as a representative of the state, and thereby attempting to  
12 make the state a party.

13 *Ex Parte Young*, 209 U.S. at 158, 28 S.Ct. at 453.

14 This was the reasoning followed by the Ninth Circuit in rejecting a lower court's  
15 suggestion that the plaintiffs could have added the Idaho Attorney General to their complaint for  
16 prospective injunctive relief in *Chaloux v. Killeen*, 886 F.2d 247 (9<sup>th</sup> Cir. 1989). The Court stated  
17 that the suggestion was "specious because that official has no state constitutional or statutory  
18 obligation to administer or enforce the [statutory] procedure in question." *Id.*, at 252, n.6. Similarly,  
19 there is no allegation in the Complaint herein, nor could there be, that Attorney General Bill Lockyer  
20 has any obligation to enforce Section 271.

21 Plaintiff has apparently acquiesced in Defendants' argument regarding the Eleventh  
22 Amendment immunity as applied to the State and to the State Judiciary as he does not even address  
23 the issue as to them. Because *all* of the Defendants are entitled to the immunity, this Court should  
24 dismiss the action.

### 25 **C. Absolute Judicial Immunity**

26 As with his argument against the application of Eleventh Amendment immunity, Plaintiff  
27 cites only an order from another district court case enjoining an executive branch official from  
28 enforcing a particular statute on the ground that it was unconstitutionally vague. And again, the  
particular official was the one responsible for enforcing the statute and therefore the proper party to  
be enjoined. It has no relevance herein.

1 **CONCLUSION**

2 In his Conclusion, Plaintiff quotes from the *Flaherty* case: "[v]ague definitions of what  
3 constitutes a frivolous appeal raise the danger that attorneys will be deterred from asserting valid  
4 claims out of a fear that they will incur court sanctions." *Flaherty, supra*, 31 Cal.3d at 651.

5 The issue addressed by the California Supreme Court in *Flaherty* was the total lack of  
6 standards to be applied by an appellate court in imposing sanctions and the lack of a notice  
7 requirement in Code of Civil Procedure section 907. *Id.* at 646, 651.

8 In contrast, Section 271 contains both the standards to be applied in imposing fees as a  
9 sanction and a notice requirement. Mem. 3, fn. 3.

10 In the instant matter, Plaintiff's civil suit frustrated the policy of the law to promote  
11 settlement and increased the costs of litigation. For that reason, the family court judge imposed  
12 attorney's fees as a sanction under Section 271, a clearly appropriate application of the statute which  
13 Plaintiff chose to appeal. If it was appropriate to award attorney's fees against Plaintiff for  
14 improperly including Wife in the civil action, it was also appropriate to award the additional fees  
15 when Plaintiff continued to increase the cost of litigation by filing an equally groundless appeal.  
16 There is nothing in Section 271 or in its application to Plaintiff that offends any constitutional  
17 principle. Plaintiff's argument to the contrary was rejected by the state courts and that decision is  
18 reversible only by the United States Supreme Court. Accordingly, this action must be dismissed for  
19 lack of subject matter jurisdiction in this Court or by application of *Younger* abstention or the  
20 principles of *res judicata*.

21 Dated: February 15, 2005

Respectfully submitted,

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25 /s/

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