

## **The Brea Mall Litigation (*The Retail Property Trust v. OCPA*)**

### **Summary**

The owner of the Brea Mall sued OCPA and activist Kavita Patel, seeking an injunction requiring that they follow the mall's onerous rules for expressive activity. At the outset, the mall obtained a temporary restraining order (TRO) in its favor. However, a few weeks later the judge dissolved the TRO and held the mall's application and ten of its rules unconstitutional, handing OCPA and Kavita a major victory. The mall then dismissed the case. A few weeks later, as provided under California's Anti-SLAPP statute, the judge awarded lawyers for OCPA and Kavita fees and costs incurred in defending the case, in an amount totaling about \$120,000. (Most of these fees went to the law firm of Ropers, Majeski, whose lawyers did a lot of the work.)

### **The Judge's Order**

The judge's order in the Brea Mall litigation is an unpublished trial court decision which, by its nature, applies only to Brea Mall and not to other malls. You can see the order, highlighted to show the specific items held unconstitutional, [here](#). The order holds that the Brea Mall's application is unconstitutional in its entirety, and further that the following rules for expressive activity are unconstitutional:

1. The provision allowing the mall, at its discretion, to require protesters to obtain special insurance.
2. The provision allowing the mall, at its discretion, to decide that a designated area is unavailable because the applicant poses a threat to the safety of others.
3. The provision allowing the mall, at its discretion, to ban expressive activity that would impose an undue administrative burden on the mall.
4. The provision requiring that signs be of "professional quality."
5. The provision requiring that protesters obey "reasonable requests" of mall management or security.
6. The provision allowing the mall, at its discretion, to change its rules without notice.
7. The provision requiring that protesters remain in "designated areas."
8. The provision limiting participation to no more than three protesters.
9. The prohibition against solicitation of donations.

10. The provision allowing the mall, at its discretion, to ban expressive activity on peak-traffic “black-out dates.”

### **The Effect on Brea Mall Protests and Protesters**

Until the Brea Mall promulgates new rules and a new application for expressive activity, people or groups interested in protesting there should follow these steps:

1. At least a few days before the protest, send a letter to the mall’s security office, or email the mall’s lawyer, Stacey Knight ([stacey.knight@kattenlaw.com](mailto:stacey.knight@kattenlaw.com)), stating that you intend to protest at the mall. State that you understand the mall’s application and rules have been declared unconstitutional, and that your letter is provided in lieu of an application. Include the protest’s date, time and estimated number of protesters (30 or under is probably fine). Also, mention that protesters will obey all laws and will not interfere with or obstruct any mall business.
2. During the protest, you may stand in front of the business (Barkworks or any other business you’re targeting). Stand at the sides of the corridor, out of the flow of traffic as much as possible, and do not interfere with or obstruct any mall business.
3. For signage, you can generally use or make anything in any reasonable size you desire. An unreasonable size would be something big enough to disrupt the flow of traffic or threaten injury to passersby. Avoid images that contain blood (one court has upheld a mall’s right to ban “gruesome or grisly” images). Also, avoid sticks that might cause or threaten injury.
4. Note that chanting is a legally untested activity inside a private mall. It is likely legal, provided it does not interfere with or disrupt a business, but if it is especially loud and persistent, it might be considered disruptive and thus illegal.
5. Expect to be photographed and/or videotaped, and make sure that your conduct would stand up in court if the mall unwisely decides to file another lawsuit.