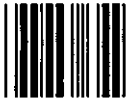


USDC SCAN INDEX SHEET



AJG 4/14/05 8:55

3:02-CV-02497 HUBBARD V. RITE AID CORPORATION

93

REQJNTC.

ORIGINAL

FILED

05 APR 13 PM 3:16

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:  DEPUTY

1 Wayne C. Arnold, Bar No. 103194
2 Lisa D. Herzog, Bar No. 194123
3 HART, KING & COLDREN
4 A PROFESSIONAL CORPORATION
5 200 East Sandpointe, Fourth Floor
6 Santa Ana, California 92707
7 Telephone: (714) 432-8700
8 Facsimile: (714) 546-7457

9 Attorneys for Defendants RITE AID CORPORATION and
10 ARTHUR CIUFFO, JR. and EVELYN EMMERSON,
11 Trustees of the CIUFFO FAMILY TRUST B erroneously
12 Sued as THE CIUFFO FAMILY TRUST B, ET AL.

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

BY FAX

15 LYNN J. HUBBARD, BARBARA J.
16 HUBBARD,

Case No.: 02CV2497-WQH (BLM)

17 Plaintiff,

18 DEFENDANTS' REQUEST FOR
19 JUDICIAL NOTICE OF COURT ORDER

20 v.

21 RITE AID CORPORATION; THE
22 CIUFFO FAMILY TRUST B, ET AL;
23 AVOCADO PLAZA, L.L.C. and DOES 1
24 through 20,

Date: April 22, 2005
Time: 3:00 p.m.
Ctm.: 4

25 Defendant.

Complaint Filed: December 18, 2002
Trial Date: None

26 Defendants RITE AID CORPORATION and ARTHUR CIUFFO, JR. and EVELYN
27 EMMERSON, Trustees of the CIUFFO FAMILY TRUST B (collectively "RITE AID") by
28 and through their attorney, hereby request the Court to take judicial notice pursuant to
Federal Rule of Evidence 201 of the following¹:

¹ Pursuant to Fed. Rule of Evidence 201(f), "Judicial notice may be taken at any stage of the proceeding." Additionally, The orders, decrees and judgments of other courts are proper subjects of judicial notice under Fed. Rule of Evidence 201. *Roberts v. Heim, et al.* (March 28, 1996) 1996 U.S. App. Lexis 8509, 5.

93

ck

EXHIBIT "1"

3

EXHIBIT "1"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ENTERED
CLERK, U.S. DISTRICT COURT
MAR - 8 2005
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
MAR - 8 2005
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAREK MOLSKI, et al.,
Plaintiffs,
v.
MANDARIN TOUCH
RESTAURANT, et al.,
Defendants.

Case Nos. CV 04-450 ER and
CV 03-2239 ER

MEMORANDUM DECISION RE
ORDERS TO SHOW CAUSE

LES JANKEY, et al.,
Plaintiffs,
v.
YANG CHOW RESTAURANT
PASADENA, et al.,
Defendants.

On December 9, 2004, this Court issued an order declaring Jarek Molski a vexatious litigant and requiring him to obtain leave of court before filing any further ADA claims in the district court. 347 F.

1 Supp. 2d 860 (C.D. Cal. 2004). That order and its
 2 findings with regard to Plaintiff Molski are
 3 incorporated by reference as though fully set forth
 4 As a result of the Court's factual investigation
 5 relating to that order, the Court issued additional
 6 orders to show cause to the Plaintiffs and attorneys in
 7 that case, as well as the Plaintiffs and attorneys in
 8 the case of Jankey v. Yang Chow Restaurant.
 9 Specifically, the Court ordered Disability Rights
 10 Enforcement Education Services: Helping You Help Others
 11 ("DREES"), a co-plaintiff in both cases, and The
 12 Frankovich Group, attorneys of record for the
 13 Plaintiffs in both cases, to show cause why the Court
 14 should not require them to seek leave of court before
 15 filing a complaint alleging violations of the Americans
 16 with Disabilities Act ("ADA"). Further, the Court
 17 ordered DREES to show cause why its complaints should
 18 not be dismissed for a lack of standing. Finally, the
 19 Court ordered the Plaintiffs to show cause why the
 20 Court should not dismiss their suits for lack of
 21 subject matter jurisdiction.¹

SEARCHED

23
 24 ¹ A hearing was held on these Orders to Show Cause on
 25 February 7, 2005, the Honorable Edward Rafeedie, presiding. At
 26 that hearing, the Court announced its tentative ruling, including
 27 the findings of fact and conclusions of law that form the basis
 28 of this order. Despite requesting (and receiving) a continuance,
 purportedly to allow counsel time to prepare for that hearing,
 the Plaintiffs did not challenge any of the Courts tentative
 findings or conclusions, and did not present any oral argument.

5

1 After an extensive review of The Frankovich Group's
2 litigation practices, the Court believes it must
3 exercise its inherent power to protect the judicial
4 system and the public from the abusive and predatory
5 litigation practiced by the respondents. Accordingly,
6 the Court HEREBY ORDERS that The Frankovich Group, as
7 presently constituted, and as it may hereafter be
8 constituted, including shareholders, associates and
9 employees, is required to file a motion requesting
10 leave of court before filing any new complaints
11 alleging violations of Title III of the Americans with
12 Disabilities Act in the United States District Court
13 for the Central District of California. Such a motion
14 must include a copy of this order. By prior orders,
15 the Court has also dismissed Plaintiff DREES's federal
16 ADA claims for lack of standing, and has dismissed the
17 four state law causes of action in these cases because
18 the Court declines to exercise supplemental
19 jurisdiction over these claims under 28 U.S.C. § 1367
20 (c) (1) and (2). The Court's reasons are fully set
21 forth herein.

22 I. Facts

23 Plaintiff Jarek Molski is a wheelchair bound
24 paraplegic. Since 1998, he has filed more than 400
25 federal lawsuits alleging violations of the Americans
26 with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et
27 seq., the vast majority of which were filed since 2001.

28

1 Plaintiff Les Jankey suffers from an unknown congenital
2 birth defect that deprived him of the use of his legs.
3 He relies on a wheelchair for mobility. Jankey has
4 filed 36 federal lawsuits alleging violations of the
5 ADA, 21 of which were filed in 2004. Plaintiff DREES
6 is a 501(c)(3) corporation, whose stated goal is to
7 empower persons with disabilities to be independent in
8 America. Thomas E. Frankovich, a Professional Law
9 Corporation dba The Frankovich Group is counsel of
10 record in both cases.

11 In 2004, The Frankovich Group filed at least 223
12 lawsuits in the United States District Courts for the
13 Northern and Central Districts of California, of which
14 approximately one-third targeted ethnic restaurants -
15 Asian and Mexican - perhaps because such establishments
16 are seen as easy prey for coercive claims.² Of those
17 lawsuits, 156 (or 70%) were filed on behalf of Jarek
18 Molski. Another 40 lawsuits (or 18%) were filed on
19 behalf of either Les Jankey or Patrick Connally, the
20 President of DREES and himself a serial plaintiff,
21 having filed 19 suits in 2004. DREES appeared as a co-
22 plaintiff in each of the 223 suits.

23 The 223 separate complaints are almost identical.
24 Each of the 223 complaints alleges the same five causes

25
26 ² The Court has obtained and read the 223 complaints that
27 it that it was able to recover. A handful of complaints filed in
28 the Northern and Central Districts were unavailable for various
reasons. The Court also identified, but was unable to obtain, at
least 11 complaints filed in the Eastern District.

SCANNED

1 of action: a federal ADA claim, and the same four
 2 claims under California state law.³ The damages
 3 requested are also identical. Indeed, other than
 4 superficial alteration of the facts and names, the
 5 complaints are textually identical, often down to the
 6 typos.

7 A prominent common thread among the complaints is
 8 the allegation of physical injuries. In each and every
 9 complaint, Frankovich Group clients claim to suffer a
 10 bodily injury as a result of encountering an
 11 architectural barrier. Sometimes the claim of bodily
 12 injury is general, but more often, it is specific. For
 13 example, in 178 of the 223 cases, or 80% of the cases,
 14 the plaintiff claims an injury to his or her upper
 15 extremities. In 33 of the 223 cases, or 15% of the
 16 cases, the plaintiff claims to have scraped his or her
 17 hand or knuckles, generally when passing through a door
 18 which was too narrow.

19 It is also common for Frankovich Group clients to
 20 make multiple claims for injuries purportedly sustained
 21 on the same day. In the Court's Order Declaring Jarek
 22 Molski a Vexatious Litigant, it recounted the events of
 23 May 20, 2003. 347 F. Supp. 2d at 864-65. That day,

24
 25 ³ Those claims are 1) Violation of California Civil Code
 26 §54, et seq., The California Disabled Persons Act ("CDPA"); 2)
 27 Violation of California Health & Safety Code § 19955, et seq.,
 28 Denial of Accessible Sanitary Facilities; 3) Violation of
 California Civil Code § 51, et seq., The Unruh Civil Rights Act;
 and 4) Violation of California Business & Professions Code §
 17200, et seq., Unfair Business Practices.

1 Molski made nearly identical claims of injury at three
2 separate businesses. Now, after a review of all 223
3 complaints, the Court is in a position to supplement
4 that record. S-11

5 The following day, May 21, 2003, Molski claims to
6 have been injured at four separate businesses. In
7 Molski v. Longhouse Restaurant, C04-1492 (N.D. Cal.
8 2004), Molski alleges he injured his upper extremities
9 trying to transfer himself onto a toilet at the
10 Longhouse Restaurant in Gilroy. In Molski v. King & I
11 Investment Group, C04-1493 (N.D. Cal. 2004), he claims
12 to have injured his upper extremities ascending steps
13 at the King & I Thai Cuisine restaurant in Morgan Hill.
14 In Molski v. Morgan Hill 76, C04-1945 (N.D. Cal. 2004),
15 he claims to have injured his upper extremities going
16 over a step at the Morgan Hill 76 gas station.
17 Finally, in Molski v. La Rochelle, C04-1985 (N.D. Cal.
18 2004), Molski alleges he scraped his hands when he
19 became wedged in the bathroom door at the La Rochelle
20 winery in San Jose.

21 The day after that, May 22, 2003, Molski again
22 claims that he was injured at four separate business
23 establishments. In Molski v. Pump N Go, C04-1854 (N.D.
24 Cal. 2004), Molski claims to have injured his upper
25 extremities transferring himself to the toilet at the
26 Pump N Go gas station in Morgan Hill. In Molski v. The
27 Cove, C04-1880 (N.D. Cal. 2004), he claims to have
28 injured his upper extremities when he tried to transfer

1 himself onto a toilet that had only one grab bar at The
2 Cove restaurant in Gilroy. In Molski v. Casa Medina,
3 C04-1947 (N.D. Cal. 2004), Molski claims to have
4 injured himself while negotiating architectural
5 barriers at the Casa Medina restaurant in San Juan
6 Bautista. Finally, in Molski v. Albertson's, Inc.,
7 C04-1984 (N.D. Cal. 2004), Molski again claims to have
8 injured himself when negotiating architectural barriers
9 at the Albertson's market in Morgan Hill, California.
10 And the day after that, May 23, 2003, Molski claims
11 he was injured at five separate businesses that were
12 separated from one another by a total distance of more
13 than 140 miles, and which are 160 to 300 miles from his
14 home in Woodland Hills. In Molski v. Cloninger
15 Cellars, C04-1853 (N.D. Cal. 2004), Molski claims to
16 have injured his upper extremities traversing rocks in
17 a parking lot at the Cloninger Cellars winery in
18 Gonzales. In Molski v. Toro Petroleum, C04-1941 (N.D.
19 Cal. 2004), he claims to have injured his upper
20 extremities transferring himself onto a toilet at the
21 Gonzales Unocal 76 gas station in Gonzales. In Molski
22 v. Roy's Drive-In, C04-1983 (N.D. Cal. 2004), he claims
23 to have injured his shoulders transferring himself onto
24 the toilet, and also when he wheeled off the sidewalk,
25 at Roy's Drive-In restaurant in Salinas. In Molski v.
26 Di Fronzo Properties, CV 04-3122 (C.D. Cal. 2004), he
27 claims to have injured his upper extremities overcoming
28 a two-to-three inch threshold at Zadok's Coffee House

1 in Pismo Beach. Finally, in Molski v. Cracked Crab
2 Restaurant, CV 04-3544 (C.D. Cal 2004), Molski claims
3 to have injured his upper extremities transferring
4 himself onto a toilet at the Cracked Crab Restaurant in
5 Pismo Beach.

6 In total, Molski filed 16 federal lawsuits for
7 injuries purportedly sustained over this four-day
8 period of time. Expanding that window slightly, the
9 record reveals that Molski filed 26 lawsuits for
10 injuries allegedly sustained between May 16 and May 23,
11 2003 - with Molski purportedly sustaining at least one
12 injury on each day during that ten-day stretch. This
13 period was far from an isolated incident. The Court's
14 review of the complaints filed in 2004 alone reveals
15 that on 37 separate occasions, Molski claimed to be
16 injured twice or more on the same day. On 19 separate
17 occasions, he claimed to be injured three or more times
18 in one day. And on nine separate occasions, Molski
19 filed four or more federal lawsuits for injuries
20 allegedly sustained on the same day.

21 After filing the lawsuit, The Frankovich Group
22 sends a copy of the complaint directly to each
23 defendant, along with a letter, which can only be
24 described as astonishing.⁴ Describing itself as

25 _____
26 ⁴ The Court has attached a copy of the letter sent to
27 Kathy McInerney as an appendix to this order. When citing or
28 quoting the letter, this order refers specifically to that
letter. The record also contains the letters that The Frankovich
Group sent to the other defendants in Mandarin Touch and Yang

1 "friendly advice," the letter counsels the
2 unrepresented defendant against hiring his own lawyer.
3 The letter claims that the "vast majority" of defense
4 attorneys simply "embark on a 'billing' expedition"
5 when hired, rather than looking out for their client's
6 best interest. "Simply put," the letter continues,
7 "defense attorneys want to sufficiently 'bill it'
8 before they get realistic about the settlement."
9 Accordingly, the letter states, the money required to
10 retain a defense attorney "could be better spent on the
11 remedial work and settlement of the action."

12 The letter further advises the defendants that
13 their insurance policy may cover this claim, and goes
14 on to describe, in considerable detail, what provisions
15 of a general liability policy might provide coverage,
16 including separate discussions of bodily injury,
17 advertising, and wrongful eviction coverage. The
18 Frankovich Group even offers to represent the
19 defendants in a suit against their insurer, should the
20 insurer refuse to provide coverage.

21 Finally, the letter advises the defendants that
22 they do not "have any bona fide defense" to the
23 lawsuit, and recommends that they quickly settle the
24 matter, rather than "waste your money on needless
25 litigation."

26

27

28 Chow. For all relevant purposes, the letters are identical.

1 II. Analysis

2 1. Sanctions

3 a. Inherent Power to Levy Sanctions

4 The District Court has the inherent power to levy
5 sanctions in response to abusive litigation practices.
6 See, e.g., Roadway Express, Inc. v. Piper, 447 U.S.
7 752, 765-66 (1980). It has long been recognized that
8 this power includes the inherent authority to suspend
9 or disbar lawyers. In re Snyder, 472 U.S. 634, 643
10 (1985) (citing Ex parte Burr, 9 Wheat. 529, 531 (1824)).
11 This inherent power derives from the lawyer's role as
12 an officer of the court which granted admission.
13 Snyder, 472 U.S. at 643. "It is extremely desirable
14 that the respectability of the bar should be
15 maintained, and that its harmony with the bench should
16 be preserved. For these objects, some controlling
17 power, some discretion ought to reside in the Court.
18 This discretion ought to be exercised with great
19 moderation and judgment; but it must be exercised." Ex
20 parte Burr, 9 Wheat. at 530 (emphasis added).

21 Moreover, a district court has "the power and
22 obligation to protect the public and efficient
23 administration of justice" from vexatious litigation.
24 In re Martin-Trigona, 737 F.2d 1254, 1262 (2d Cir.
25 1984). See also Peabody v. Schroll Trust, 892 F.2d
26 772, 777 (9th Cir. 1989) (recognizing that, in addition
27 to its inherent power to sanction attorneys for reasons
28 related to its own docket, a district court has "a

1 broader duty to the public, as well"); Standing Comm.
2 on Discipline v. Ross, 735 F.2d 1168, 1170 (9th Cir.
3 1984) (stating that, in a disciplinary proceeding,
4 "[t]he court must consider ... the need to protect the
5 public from an unqualified or unscrupulous
6 practitioner.").

7 In this case, the Court has taken into account
8 several factors in determining whether it is necessary
9 to exercise its inherent power to protect the public
10 and the courts. Based on the litigation history of The
11 Frankovich Group, including its history of giving
12 unethical advice, making questionable allegations of
13 physical injury, pursuing excessive compensatory
14 damages, and securing quick settlements, the Court
15 concludes that an exercise of its inherent power is
16 appropriate.

17 b. Ethical Prohibition Against Advising
18 Unrepresented Parties

19 It is unethical for a lawyer to offer advice to an
20 unrepresented party whose interests actually or
21 potentially conflict with the lawyer's client. A.B.A.
22 Model Rule of Professional Conduct 4.3 (2003)⁵ states,
23 in relevant part: "The lawyer shall not give legal
24 advice to an unrepresented person, other than the
25 advice to secure counsel." Accord Model Code of Prof'l
26

27 ⁵ Pursuant to C.D. Cal. Local Rule 83-3.1.2, the Model
28 Rules of Professional Conduct of the American Bar Association may
be considered as guidance when disciplining attorneys.

1 Responsibility DR 7-104(A)(2) (stating that a lawyer
2 shall not "[g]ive advice to a person who is not
3 represented by a lawyer, other than the advice to
4 secure counsel"). See also W. T. Grant Co. v. Haines,
5 531 F.2d 671, 676 n.3 (2d Cir. 1976) ("it is ...
6 improper for one party's attorney to advise the
7 unrepresented other party as to the course of conduct
8 the attorney thinks the latter should pursue").

9 In the letter, The Frankovich Group violates this
10 ethical rule in at least three ways. First, it advises
11 an unrepresented party against obtaining counsel, when
12 it may only advise the opposite. Second, it provides a
13 considerable amount of legal advice on pursuing a claim
14 against the defendant's insurance company. Third, it
15 advises the unrepresented party that it does not "have
16 any bona fide defense" to the lawsuit and recommends
17 that it quickly settle the matter, rather than "waste
18 [its] money on needless litigation."⁶

19 The first of these violations is particularly
20 egregious. The Frankovich Group's act of advising an
21

22
23 ⁶ Although this Court has focused on three specific
24 violations of the rule, the letter itself recognizes that it has
25 actually given advice about seven different matters. See
26 McInerney Letter at 5 ("We find all to [sic] often that many
27 defendants are not properly advised as to their position in the
28 litigation, insurance coverage issues, injunctive relief sought,
damages, the tactics of insurance defense attorneys, attorneys'
fees, and the use of an early mediation/settlement conference to
resolve the matter."). As the Model Rules and relevant case law
make clear, it is not the place of adverse counsel to advise an
unrepresented defendant on these matters.

1 unrepresented party against retaining counsel is in
2 direct conflict with the letter and spirit of the Rule.
3 In the guise of what is described as "friendly advice,"
4 The Frankovich Group purports to expose the tactics of
5 defense attorneys. According to the letter, "the vast
6 majority" of defense attorneys, once retained, will
7 simply "embark on a 'billing' exercise." "Simply put,
8 the defense attorneys want to sufficiently 'bill it'
9 before they get realistic about the settlement." The
10 letter goes on to instruct defendants that, because
11 defense attorneys are presumably more interested in
12 lining their own pockets than looking out for their
13 client's best interest, the money spent on a defense
14 attorney "could be better spent on remedial work and
15 settlement of the action."

16 In addition, the legal advice regarding insurance
17 coverage appears questionable at best. The letter
18 suggests that various provisions of the defendants'
19 insurance policy may provide coverage for Molski's
20 lawsuit. However, the California Court of Appeals has
21 held that there can be no insurance coverage for the
22

23
24 ? There should be no doubt that advising a party against
25 retaining counsel constitutes legal advice under the Rule. The
26 Model Rules specifically state that an attorney "shall not give
27 legal advice to an unrepresented person, other than the advice to
28 secure counsel." ABA Model Rules of Prof'l Conduct 4.3 (emphasis
added). Thus, by its very words, the Rule recognizes that a
recommendation to secure counsel qualifies as advice. It
necessarily follows that advising an unrepresented party against
retaining counsel constitutes legal advice as well.

1 sort of ADA violations alleged. Modern Development Co.
2 v. Navigators Ins. Co., 111 Cal. App. 4th 932, 941 43
3 (2d. Dist. 2003). Mr. Frankovich is unquestionably
4 aware of this decision, because he challenged it and
5 lost in the case of Frankovich v. Truck Insurance
6 Exchange, 2003 Cal. App. Unpub. LEXIS 11714, at *11,
7 2003 WL 22965254, at *4 (Cal. App. 2d. Dist.
8 2003) (noting that "this court recently rejected
9 Frankovich's precise argument in Modern Development Co.
10 v. Navigators Ins. Co."). Moreover, the Truck
11 Insurance case was decided six months before The
12 Frankovich Group sent its letters to the Mandarin Touch
13 Defendants. Thus, The Frankovich Group's advice is not
14 only unethical, it is misleading as well.

15 These ethical violations are particularly
16 significant because they all appear to be aimed at one
17 goal: coercing a quick settlement. In essence, the
18 letter urges a Defendant to make a quick and uninformed
19 decision to settle. The decision to settle must be
20 made quickly because the letter warns of
21 "skyrocket[ing]" costs if the matter does not settle
22 immediately. The decision is uninformed because the
23 letter advises the party against retaining counsel.
24 The advice regarding insurance coverage further
25 buttresses this conclusion.

26 c. Questionable Allegations of Physical Injury

27 As discussed above, the Court reviewed 223
28 complaints filed by The Frankovich Group in 2004, and

1 found that each one contains some allegation of bodily
2 injury. For the reasons discussed below, the Court
3 believes that many of the claimed physical injuries are
4 contrived in order to implicate the defendants'
5 insurance policies.

6 First, the rate of physical injury defies common
7 sense. In every complaint filed in 2004, Frankovich
8 clients allege a physical injury. In 80% of the
9 complaints, the plaintiff alleges an injury to his or
10 her upper extremities. Additionally, clients such as
11 Molski routinely make claims for multiple similar
12 physical injuries that are purportedly sustained in
13 different businesses on the same day. It is
14 particularly troubling that many of these injuries are
15 sustained in similar fashion, such as wheeling over
16 uneven terrain, ascending or descending steps, or
17 squeezing into a door which is too narrow. Common
18 sense dictates that an individual who has encountered
19 as many architectural barriers as Mr. Molski would know
20 which barriers should be avoided, and which are
21 unlikely to result in injury. It seems likely that, if
22 Molski indeed injured himself repeatedly in nearly
23 identical fashion, the injuries are not accidental as
24 claimed, but instead are sustained intentionally so
25 that a physical injury can be alleged as part of a
26 subsequent lawsuit.

27 This conclusion does not excuse the existence of an
28 architectural barrier, nor does it disparage Molski's

1 right of access at any public accommodation. It is
2 merely a recognition of the fact that reasonable
3 people, once injured, tend to take affirmative steps to
4 avoid similar physical injuries, rather than repeat
5 that same activity 400 times (or five times in the same
6 day), even if the activity is one that they are
7 unquestionably entitled to perform.

8 Second, the complaints uniformly allege physical
9 injury, even when this claim appears to directly
10 contradict the facts alleged. For example, in Molski
11 v. Casa Medina, C04-1947 (N.D. Cal. 2004), Molski
12 alleges that "as a legal result of defendants [sic]
13 breach of duty to remove those barriers encountered by
14 plaintiff, plaintiff suffered bodily injury."
15 Complaint at ¶ 29 (emphasis added). Specifically,
16 Molski's complaint alleges that he "suffered bodily
17 injury (including, but not limited to, fatigue, stress,
18 strain and pain in wheeling and attempting to and/or
19 transferring)" due to the defendants' failure to provide
20 accessible facilities. Complaint at ¶ 30. However,
21 according to the factual allegations in Molski's
22 complaint, Molski never attempted to negotiate any
23 barrier in the restaurant. His complaint identifies
24 three barriers: First, he claims the restaurant lacked
25 adequate directional signage to an accessible entrance.
26 Second, he claims a flight of stairs prevented him from
27 entering. Third, he claims that his significant other
28 informed him the bathrooms were not accessible.

1 Clearly, Molski could not have been physically injured
2 by a lack of signage, or by a bathroom that he never
3 personally observed, let alone entered. Molski could
4 have been physically injured had he attempted to climb
5 the stairs, but according to his complaint, he made no
6 attempt to do so. See id. at ¶ 23 ("At said time and
7 place, plaintiff JAREK MOLSKI stared helplessly at the
8 front stairs. The staircase was simply too high for
9 plaintiff JAREK MOLSKI to attempt to crawl or be pulled
10 up."). Since there is no way that Molski could have
11 been physically injured by observing a staircase, and
12 since the complaint's allegations foreclose any
13 possibility that Molski was able to enter the
14 establishment and encounter other barriers, the claim
15 of physical injury appears to be contrived.

16 Just as in Casa Medina, in Molski v. Albertson's,
17 Inc., C04-1984 (N.D. Cal. 2004), Molski claims that "as
18 a legal result of defendants [sic] breach of duty to
19 remove those barriers encountered by plaintiff,
20 plaintiff suffered bodily injury." Complaint at ¶ 24.
21 However, once again, the barriers that Molski
22 encountered do not seem to be responsible for any
23 physical injury that he alleges. Molski alleges an
24 improper number of accessible parking spaces and a lack
25 of adequate signage. As a result, he claims that he
26 was forced to wait for a handicapped space to become
27 available. Id. at ¶ 21. While waiting for an
28 accessible parking space may be unpleasant, there is no

1 way that it could be responsible for the bodily injury
2 alleged by Molski, which once again consisted of
3 "fatigue, stress, strain and pain in wheeling and
4 attempting to and/or transferring." ^{SCANNED} Id. at ¶ 26.

5 Based on the above, the Court believes that the
6 Plaintiffs contrived many of their allegations of
7 bodily injury. The only logical reason to contrive
8 minor injuries is to implicate the personal injury
9 provisions of the defendant's insurance policy. As
10 discussed above, The Frankovich Group encourages
11 defendants to seek insurance coverage under, inter
12 alia, the personal injury provisions of their general
13 liability policy. The allegations of physical injury,
14 which are not an essential element of a claim of
15 discrimination under the ADA, thus appear to be
16 included in the complaint to improve the chances of
17 invoking insurance coverage as a source for the payment
18 of damages.⁹

19
20 ⁸ Similar contradictions occur in complaints filed on
21 behalf of other Frankovich Group clients. For example, in Jankey
22 v. Mister D's Liquor Market, CV 04-9112 (C.D. Cal. 2004), Jankey
23 was unable to access the sidewalk in front of a liquor store due
24 to a lack of ramps or cut curbs. Jankey blew his horn, at which
25 time an employee came out of the store and assisted him with his
26 order. Complaint at ¶ 22. Jankey noted other violations before
leaving without attempting to enter the store. Despite a lack of
any physical contact with an architectural barrier, Jankey then
makes an identical claim of bodily injury "including, but not
limited to, fatigue, stress, strain and pain in wheeling and
attempting to and/or transferring." Id. at ¶ 28.

27 ⁹ Further proof of canned allegations comes from a letter
28 that The Frankovich Group sends to prospective clients, which
outlines its litigation philosophy. See Ex. B to Declaration of

1 d. Damage Issues

2 In every complaint reviewed by this Court, clients
3 of The Frankovich Group seek damages of \$4,000/day for
4 each day from the date of their visit to the date when
5 repairs are completed. The Court's review of the
6 complaints filed demonstrates that it is a regular
7 practice of the Plaintiffs to wait up to one year
8 before filing their claims, during which time the
9 requested daily damages continue to accumulate.¹⁰ In
10 its Order Declaring Jarek Molski a Vexatious Litigant,
11 the Court calculated that the damages requested totaled
12 \$1,452,000 by the time the Mandarin Touch case was
13 filed. Such a damage claim can have an intimidating
14 and coercive effect on a small business.

15 In response to the Order to Show Cause, Frankovich
16

17 Thomas E. Frankovich. The letter informs prospective clients
18 that "[y]ou should also know that we use the terms 'emotional
19 distress' and 'negligence as we prosecute your case. Although we
20 use those terms, we do not file a cause of action based upon
21 negligence, the negligent infliction of emotional distress, or
22 the intentional infliction of emotional distress." The
23 Frankovich Group made good on its pledge. In every case filed in
24 2004, Frankovich Group clients allege emotional distress and
25 negligence without bringing a cause of action for negligence, or
26 the negligent or intentional infliction of emotional distress.
27 But how could The Frankovich Group have known this in advance?
28 Surely it was likely that in (at least) one of the 223 cases, a
client would be injured as the result of negligence, or not
suffer emotional distress. That fact that 223 separate cases
unfolded exactly as described in advance suggests that the
identical allegations of emotional distress were contrived.

¹⁰ The requested damages accumulate during this time
despite a lack of any notice to the defendants, who presumably
would have some interest in mitigating their liability by
performing the repairs immediately.

1 ridicules the suggestion that Molski genuinely expects
2 to collect that amount, asking, "how could any lawyer
3 or this Court believe that Jarek Molski is seeking
4 anywhere near this amount in damages?" Declaration of
5 Thomas E. Frankovich at 35: 4-5. The Court's response
6 is simply: Is the Court not to believe a request for
7 damages made in a verified complaint? Frankovich's
8 argument is further undercut because he specifically
9 advises unrepresented parties not to obtain counsel,
10 and in the same letter, refers them to the portion of
11 the complaint where daily damages are requested. Thus,
12 even if the Court makes the questionable assumption
13 that no attorney could believe that Jarek Molski was
14 actually seeking that amount in damages, an
15 unrepresented party certainly could. In re Marriage of
16 Foran, 67 Wn. App. 242, 254 (Wash. Ct. App. 1992) ("That
17 which is obvious to attorneys and judges may not be
18 obvious to the unrepresented and economically
19 subservient party.").¹¹

20 e. Issues Involving Settlement

21 In its Order Declaring Jarek Molski a Vexatious
22

23 ¹¹ Moreover, it is unclear whether the sort of daily
24 damages requested are available under California law. California
25 courts read a statute against permitting cumulative daily damages
26 unless the statute specifically authorizes them. See Hale v.
27 Morgan, 22 Cal. 3d 388, 401 (1978) ("Uniformly, we have looked
28 with disfavor on ever-mounting penalties and have narrowly
construed the statutes which either require or permit them.").
Neither the Unruh Act nor the CDPA specifically authorize daily
damages, and thus, it is questionable whether such damages would
be permissible under California law.

1 Litigant, the Court noted that the vast majority of
2 Molski's claims settle. Despite the fact that he has
3 filed approximately 400 lawsuits, Molski has apparently
4 tried only one case on the merits, Molski v. Cable's
5 Restaurant, CV 03-4809 (C.D. Cal. 2003).¹² The Court
6 concluded that the unusual amount of settlements was
7 indicative of an extortion scheme.

8 In response to the Order to Show Cause, Frankovich
9 disputes this conclusion, arguing that the suits settle
10 because the defendants lack any meritorious defense.
11 While this certainly may be true in some cases, it
12 misses several important points. First, even if a
13 party had a meritorious defense, the cost of litigating
14 the matter would likely exceed the cost of settling.¹³
15 In such a circumstance, it would make little sense for
16 a party to persist in its defense, even if meritorious.
17 Second, even if innocent, parties may prefer to avoid
18 the rigors of litigation - especially in a matter
19 involving an allegation of intentional discrimination -
20 and in such a circumstance, would be willing to settle

21

22

23

24

25 ¹² On November 18, 2004, a jury, finding no violations of
the ADA, unanimously ruled in favor of the Defendants.

26

27 ¹³ This is implicitly pointed out in the aforementioned
letter which is sent to all defendants. The letter notes that if
28 the matter does not settle quickly, the cost of litigation will
"start[] to rise, or as some may say, skyrocket."

1 in order to "avoid litigation and buy their peace."¹⁴
2 Finally, in the case of unrepresented parties, it does
3 not take into account that it is The Frankovich Group
4 itself that is advising the parties that they have no
5 meritorious defense. The parties may believe that they
6 have no meritorious defense based on the contents of
7 The Frankovich Group's letter, but, if they accepted
8 the letter's advice, they would not independently
9 confirm the matter.¹⁵

10 Moreover, Courts have recognized that an unusual
11 number of settlements can be evidence of an extortion
12 scheme. In Reed v. Great Lakes Cos., 330 F.3d 931 (7th
13 Cir. 2003), the district court imposed sanctions on
14 Melvin Reed, who had worked for 25 different employers
15

16
17 ¹⁴ Such an understanding is even reflected in some of the
18 settlement agreements which the Plaintiffs lodged with the Court.
19 See, e.g., Declaration of Thomas E. Frankovich, Ex. 61
20 (Settlement Agreement for Molski v. Valencia Lanes, Inc., CV 03-
21 5455 (C.D. Cal. 2003)) at ¶ 3 ("It is understood and agreed that
22 this settlement is the compromise of a doubtful and disputed
claim, and that the payment made is not to be construed as an
admission of liability on the part of Releasees, and each of
them, and that said Releasees deny liability therefor and make
settlement reflected herein merely to avoid litigation and buy
their peace.") (emphasis added).

23 ¹⁵ There is no evidence that proves that the barriers
24 alleged actually exist, and if they do, whether their removal
25 would be "readily achievable." None of the 65 settlement
26 agreements which the Plaintiffs submitted to the Court contains
27 an admission of liability, and Molski lost the only case he ever
28 took to trial (with the jury making a special verdict finding
that no barriers existed). The Plaintiffs almost never need to
prove their allegations of discrimination because considerable
disincentives discourage defendants from litigating a matter on
its merits.

1 over the previous 15 years, and filed 13 employment
2 discrimination suits against them. The district court
3 inferred that Reed was engaged in a pattern of
4 extortion, working for an employer just long enough to
5 obtain a pretext for a discrimination lawsuit, and
6 imposed sanctions on him. The Seventh Circuit reversed
7 the sanctions, noting that a lack of settlements belied
8 any claim of extortion. Reed, 330 F.3d at 936 ("Were
9 he engaged in extortion he would have dropped his suits
10 in exchange for nuisance-suit settlements.").

11 The indicia of extortion described in that case -
12 an unusually high rate of discrimination lawsuits
13 combined with an unusually high rate of settlements -
14 are present in this case. Although standing alone this
15 would not be proof of extortion, when combined with the
16 other evidence that The Frankovich Group has
17 aggressively and unethically pursued cash settlements,
18 the high rate of settlements indicates such a scheme.

19 f. Conclusions

20 This Court has an obligation and a duty to protect
21 the public from an unscrupulous practitioner. The
22 record before the Court establishes that The Frankovich
23 Group has engaged in a pattern of unethical behavior
24 designed ultimately to extort money from businesses and
25 their insurers. The Court believes that the record
26 before it is sufficiently egregious to justify the
27 suspension, or even disbarment, of the lawyers
28 constituting The Frankovich Group. Accordingly, the

1 Court has requested that the State Bar investigate the
2 matter and consider disciplinary action if appropriate.
3 In the meantime, the Court believes that the public can
4 be adequately protected by a less restrictive and
5 drastic measure: a pre-filing order that requires The
6 Frankovich Group to seek leave of court before filing
7 any new complaints under Title III of the Americans
8 with Disabilities Act.

9 A pre-filing order is the least restrictive
10 sanction that protects both the public and the courts.
11 Some sort of pre-filing notice to the courts is
12 necessary because of The Frankovich Group's history of
13 filing lawsuits and then quickly settling the matter.
14 If a court is not allowed to examine the complaint
15 before it is served on the party, the matter may be
16 settled and dismissed before the court has a chance to
17 determine the issues of standing and jurisdiction
18 discussed herein. Moreover, it is not sufficient
19 merely to require Plaintiff Molski to seek leave of
20 court before filing a complaint, because The Frankovich
21 Group has demonstrated an ability to recruit additional
22 serial plaintiffs who make nearly identical claims.
23 Therefore, it is the order of the Court that The
24 Frankovich Group, as presently constituted, and as it
25 may hereafter be constituted, including all
26 shareholders, associates and employees, is hereby
27 required to file a motion requesting leave of court
28 before filing any new complaints alleging violations of

1 Title III of the Americans with Disabilities Act in the
2 United States District Court for the Central District
3 of California. Such a motion must include a copy of
4 this order.

SCANNED

5 2. Jurisdictional Issues

6 As the Court noted in its prior Order Declaring
7 Jarek Molski a Vexatious Litigant, the Plaintiffs seek
8 damage remedies under state law that are not available
9 under federal law. Congress made a conscious choice to
10 limit a private plaintiff's remedy under the ADA to
11 injunctive relief. See, e.g., Adam A. Milani, Go
12 Ahead. Make My 90 Days, 2001 Wis. L. Rev. 107, 115
13 (2001). While the Plaintiffs could seek all of the
14 remedies they are seeking in state court, they bring
15 these suits in federal court for a reason. The Court
16 believes that one of the reasons is intimidation. The
17 letters sent to the defendants in these cases (mostly
18 small business owners) state prominently that these
19 suits are brought in federal court. This fact may be
20 intimidating to small business owners, and attorneys
21 unaccustomed to practicing in the federal courts, and
22 thus increases the likelihood of settlement. Another
23 reason for bringing these suits in the federal court is
24 the added inconvenience to parties who reside some
25 distance from a federal courthouse, many of whom would
26 be forced to retain new counsel or pay the travel
27 expenses of their local counsel.

28 While the Plaintiffs can choose the forum in which

1 they bring a suit consistent with the principles of
2 concurrent and pendant jurisdiction, the exclusive
3 federal remedy allowed by Congress for suits brought
4 under the ADA raises a number of jurisdictional
5 concerns.

6 a. Standing

7 Following the February 7, 2005 hearing, the Court
8 issued an Order to Show Cause why the individual
9 Plaintiffs' federal claims should not be dismissed for
10 lack of standing because the Court found there were
11 substantial questions regarding the standing of the
12 individual Plaintiffs in these cases to seek
13 injunctions under the ADA.

14 Prior to that hearing, the Court ordered Plaintiff
15 DREES to show cause why its claims should not be
16 dismissed for lack of standing. An organization may
17 have standing to sue on behalf of its members if (1)
18 its members would otherwise have standing to sue in
19 their own right, (2) the interests it seeks to protect
20 are germane to the organization's purpose, and (3) the
21 participation of individual members in the lawsuit is
22 not required. Hunt v. Washington Apple Advertising
23 Comm'n, 432 U.S. 333, 343 (1977). DREES asserts the
24 same claims as the individual Plaintiffs; it would
25 clearly not have standing if the individual Plaintiffs
26 did not have standing. And even if the individual
27 Plaintiffs did have standing, DREES does not have
28 standing in these cases. The third requirement for

1 organizational standing is not met for the following
2 reason: the individual Plaintiffs' participation ^{is} ~~is~~
3 required in these cases, because they must present ^{5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28} evidence to establish their own standing. See Disabled
4 In Action of Metropolitan New York v. Trump Int'l Hotel
5 & Tower, No. 01 Civ. 5518, 2003 U.S. Dist. LEXIS 5145,
6 at *32-33, 2003 WL 1751785, at *10 (S.D.N.Y. April 2,
7 2003) (dismissing organizational plaintiff for lack of
8 standing on this ground).
9

10 Moreover, beyond the standing requirements
11 mentioned above, other prudential standing doctrines
12 suggest that DREES lacks standing in these cases,
13 including the "general prohibition on a litigant's
14 raising another person's legal rights," Allen v.
15 Wright, 468 U.S. 737, 751 (1984), and that courts
16 "limit access to the federal courts to those litigants
17 best suited to assert a particular claim," Gladstone
18 Realtors v. Village of Bellwood, 441 U.S. 91, 100
19 (1979). See Access 123, Inc. v. Markey's Lobster Pool,
20 Inc., No. Civ. 00-382-JD, 2001 U.S. Dist. LEXIS 12036,
21 at *9-12, 2001 WL 920051, at *4 (D.N.H. Aug. 14, 2001)
22 (dismissing organizational plaintiff for lack of
23 standing on these grounds). In the cases currently
24 before the Court, DREES merely repeats the claims
25 brought by the individual Plaintiffs. The Court
26 believes that DREES is added as a plaintiff to lend an
27 aura of legitimacy to this predatory litigation as part
28 of the strategy to encourage settlement. However, the

1 individual Plaintiffs appear to be the better parties
2 to assert their own claims. For all of these reasons,
3 the Court concludes that DREES lacks standing in these
4 cases. Accordingly, this Court has dismissed DREES's
5 claims under the ADA.

6 b. Subject Matter Jurisdiction

7 The Court ordered the Plaintiffs to show cause why
8 their federal claims should not be dismissed for lack
9 of subject matter jurisdiction as sham complaints,
10 brought as a pretext to gain access to the federal
11 courts. The Supreme Court has held that "a suit may
12 sometimes be dismissed for want of jurisdiction where
13 the alleged claim under the Constitution or federal
14 statutes clearly appears to be immaterial and made
15 solely for the purpose of obtaining jurisdiction or
16 where such a claim is wholly insubstantial and
17 frivolous." Bell v. Hood, 327 U.S. 678, 682-83 (1946).
18 While the Court believes the ADA claim is asserted for
19 the purpose of obtaining federal jurisdiction, the
20 Court cannot conclude that the ADA claim is clearly
21 immaterial or wholly insubstantial. The ADA claim is
22 an element of the state law claims and therefore is not
23 immaterial to the state law claims asserted. Thus, the
24 court would have jurisdiction over the ADA claim. That
25 the ADA claim is an element of the state law claims,
26 however, does not mean that there is independent
27 federal jurisdiction for the state law claims. Wander
28 v. Kaus, 304 F.3d 856, 859 (9th Cir. 2002).

1 There are compelling reasons for declining to
2 exercise supplemental jurisdiction over these state law
3 claims, which seek remedies that Congress clearly
4 intended to preclude under the ADA. "[P]endant
5 jurisdiction is a doctrine of discretion, not of
6 plaintiff's right." City of Chicago v. Int'l College
7 of Surgeons, 522 U.S. 156, 172 (1997). Federal courts
8 may decline to exercise supplemental jurisdiction over
9 claims in the following circumstances:

10 (1) if the claim raises a novel or complex
11 issue of state law, (2) if the claim
12 substantially predominates over the claim or
13 claims over which the district court has
14 original jurisdiction, (3) if the district
15 court has dismissed all claims over which it
16 has original jurisdiction, or (4) if in
17 exceptional circumstances, there are other
18 compelling reasons for declining jurisdiction.

19 28 U.S.C. § 1367 (c). The language of the statute is
20 disjunctive, meaning that any one of the four reasons
21 would be sufficient to decline to exercise
22 jurisdiction. At least two of these reasons apply in
23 this case.

24 First, the state law claims raise novel and complex
25 issues of state law. The state statutes under which the
26 Plaintiffs sue for damages have not been widely
27 interpreted. For example, there is no definitive
28 decision from the California courts with regard to
29 daily damages. Federal courts have disagreed on the
30 subject, which has created unnecessary confusion.
31 Compare Botosan v. Fitzhugh, 13 F. Supp. 2d 1047 (S.D.
32 Cal. 1998) (permitting recovery of daily damages) with

1 Doran v. Embassy Suites Hotel, No. C02-1961, 2002 U.S.
2 Dist. LEXIS 16116, at *12-17, 2002 WL 1968166, at 4-6
3 (N.D. Cal. 2002) (finding daily damages are not
4 authorized by statute and criticizing the holding in
5 Botosan). Ultimately, this is a matter of state law,
6 which is better left to the California courts. United
7 Mine Workers v. Gibbs, 383 U.S. 715, 726
8 (1966) ("Needless decisions of state law should be
9 avoided as a matter of comity.").

10 The Court also believes that there is a question
11 regarding the applicability of California Proposition
12 64 to the Plaintiffs' Fifth Causes of Action for
13 alleged violations of California's unfair business
14 practices law. Proposition 64, approved by California
15 voters in November 2004, limited the standing of
16 plaintiffs to sue under that law. Proposition 64
17 eliminated the provision of California Business and
18 Professional Code § 17204 authorizing initiation of a
19 complaint by "any person acting for the interests of
20 itself, its members, or the general public," and
21 substituted a provision for enforcement only by "any
22 person who has suffered injury in fact and has lost
23 money or property as a result of such unfair
24 competition." Proposition 64 also amended section
25 17203, concerning injunctive relief under the unfair
26 business practices law, to provide that a private
27 person "may pursue representative claims or relief on
28 behalf of others only if the claimant meets the

1 standing requirements of Section 17203 [i.e., actual
2 injury] and complies with Section 382 of the Code of
3 Civil Procedure" governing class actions. The meaning
4 and scope of Proposition 64 are being hotly contested
5 in the California state courts at this time. Compare
6 Californians for Disability Rights v. Mervyn's, LLC, 24
7 Cal. Rptr. 3d 301 (Cal. App. 1 Dist. 2005) (declining
8 to apply Proposition 64 retroactively) with Benson v.
9 Kwikset Corp., ___ Cal. Rptr. 3d ___ (Cal. App. 4 Dist.
10 2005) (applying Proposition 64 retroactively).
11 Accordingly, the Court believes that the state courts
12 are the proper forum for the resolution of this novel
13 issue of state law.

14 Second, the state law claims "substantially
15 predominate" in terms of "the comprehensiveness of the
16 remedy sought." Gibbs, 383 U.S. at 726. All but one
17 of the claims sought by the Plaintiffs are state law
18 claims. The state law claims allow for injunctive
19 relief as well as damages, allowed only under state
20 law. As the Court has previously noted, damages are
21 central to the Plaintiffs' litigation strategy of
22 seeking cash settlements. The Court is convinced that
23 the state law claims substantially predominate over the
24 federal claim and that the Plaintiffs have asserted the
25 federal claim for the purpose of bringing the suit in
26 federal court.

27 Finally, the Court must consider whether declining
28 to exercise jurisdiction serves the principles of

1 economy, convenience, fairness and comity. Int'l
2 College of Surgeons, 522 U.S. at 172-73. Although
3 principles of economy and convenience may not be fully
4 served if the federal claim remains, the principle of
5 comity strongly favors dismissing the state law claims.
6 See Executive Software N. Am., Inc. v. United States
7 Court for the Central District of Cal., 24 F.3d 1545,
8 1553 (9th Cir. 1994) ("When novel issues of state law
9 are presented, though, considerations of judicial
10 economy are not determinative.") (quoting Gingerich v.
11 White Pigeon Community Schs., 736 F. Supp. 147, 149-51
12 (W.D. Mich. 1990)). Therefore, the Court believes that
13 declining supplemental jurisdiction over the state law
14 claims in these cases is appropriate. Accordingly, the
15 Court has dismissed the Plaintiffs' state law claims.

16 III. Conclusions

17 The record before the Court demonstrates that the
18 Plaintiffs and their attorneys have participated in a
19 pattern of abusive litigation, bordering on
20 extortionate shysterism. The damage is not limited,
21 however, to the businesses and insurers who are the
22 direct victims of this scheme. The integrity of the
23 bar is called into question by the well-publicized
24 accounts of lawyers employing unethical tactics in the
25 pursuit of their own financial gain. The legitimacy of
26 the courts is also injured because the public may view
27 the courts as complicit in allowing these shakedown
28 schemes to continue. Most importantly, this type of

1 litigation creates a backlash against disabled persons
 2 who rely on the ADA as a means of achieving equal
 3 access.

4 In such a circumstance, the Court has an obligation
 5 to protect both the public and the judicial system. By
 6 requiring the architects of the scheme to seek leave of
 7 court before filing any similar complaints, the Court
 8 has employed the least restrictive measure available
 9 that achieves this goal. Further, the Court has
 10 concluded that DREES lacks organizational standing to
 11 pursue a claim under the ADA, and accordingly has
 12 dismissed its ADA causes of action. Finally, the Court
 13 has concluded that the state law claims predominate,
 14 and that the complex issues of state law are best left
 15 to the California courts. Accordingly, the Court
 16 declines to exercise supplemental jurisdiction over the
 17 Plaintiffs' state law claims.

18 Despite these conclusions, the Court understands
 19 and sympathizes with the frustration that disabled
 20 individuals feel whenever they encounter an
 21 architectural barrier that limits their right of
 22 access. The Court encourages such persons to seek
 23 federal court remedies under the ADA.

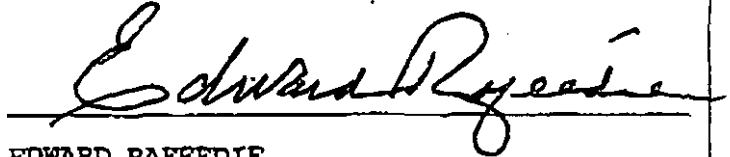
24
 25
 26
 27
 28

SCANNED

1 IT IS SO ORDERED.

2 IT IS FURTHER ORDERED that the Clerk of the Court shall
3 serve, by United States mail or by telefax or by email,
4 copies of this Order on counsel for the parties in this
5 matter.

6 Dated: MAR 8 2005

7
8 

9 EDWARD RAFEEEDIE
10 Senior United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

SCANNED

Appendix

THE FRANKOVICH GROUP*
LAWYERS

2806 Van Ness Avenue - San Francisco, CA 94109-1426
Phone: 415-674-8600 • Facsimile: 415-674-9900 • TDD: 415-441-6100

SCANNED

June 18, 2004

Kathy McInerney
538 Miramonte Drive
Santa Barbara, CA 93109

Re: *Molski v. Mandarin Touch*
USDC C.D. Ca Case No. CV 04-0450 ER (SHx)
Our Reference: Mandarin Touch
Subject: *Discrimination by Failure to Remove Architectural Barriers*

Dear Ms. McInerney:

You are being served with a Summons and Complaint for failure to remove architectural barriers as required under state discrimination statutes and/or under the Americans with Disabilities Act of 1990. The failure to remove barriers deprived our client of the full use, enjoyment of goods, services and opportunities of your public accommodation.

Please read the "Factual Allegations" section of the Complaint. That section sets forth the major architectural barriers about which our client and the disability community are most concerned. This will allow you to quickly assess the barriers and determine the cost of the remedial work sought.

We believe the following architectural barriers could be addressed/removed within ninety (90) days:

1. reconfigure the register area and seat near the restrooms to provide for additional space for a restroom remodel;
2. with a reconfiguration of the register area combine the men's and women's restroom into a unisex handicapped accessible restroom.

The concept of barrier removal is probably clear to you. The details of barrier removal are probably unclear to you. We are more than willing to do a walk-through with you and suggest solutions.

39

Thomas E. Frankovich, A Professional Law Corporation
Accessible Accommodations and Parking at One Daniel Burnham Court, San Francisco, CA
or at Your Home



BY APPOINTMENT ONLY AT ALL LOCATIONS

Kathy McInerney
June 18, 2004
Page 2

RESCANNED

Once you have retained counsel, we will not be able to communicate with you directly. That why we are taking this opportunity to discuss our position on this action and to call attention to certain issues that you should be aware of:

1. This action is filed in the Federal District Court.
2. The action seeks:
 - Injunctive Relief
 - Compensatory Damages
 - Attorneys' fees and costs
3. Injunctive Relief: Plaintiff seeks an order from this court to issue a mandatory injunction compelling you to make the subject public accommodation accessible as set forth in the Complaint.
4. Compensatory Damages: Monetary damages (money) are sought on behalf of the plaintiff for the damages suffered as a result of the acts of discrimination. This is a state cause of action
5. Attorneys' fees, costs and litigation expenses are provided both under state and federal law. If the plaintiff prevails, these costs and litigation expenses will be awarded against you.
6. Insurance Coverage: Insurance may be available to you for this claim. CAVEAT/BEWARE:
 - i. Your insurance company may deny coverage.
 - ii. Your insurance company may defend you under a "Reservation of Rights." That means your insurance company will provide a defense for you (hire attorneys on your behalf) but reserve the issue as to whether they are obligated to pay the claim.
 - iii. If you have a general liability policy, coverage may be extended to you under the following provisions: bodily injury coverage; advertising coverage; and/or wrongful eviction coverage. *

Kathy McInerney
June 18, 2004
Page 3

SCANNED

- Bodily Injury Coverage: Bodily injury coverage is generally extended to claims that pertain to "bodily injury" and emotional distress if there is a direct relationship to bodily injury.
- Advertising Coverage: Advertising coverage may be extended if you advertised that your public accommodation was accessible which resulted in bodily injury, property damage or damages. Examples of advertising, publicizing or representing that the public accommodation was accessible would be displaying the international disability symbol, advertising that the public accommodation is accessible, representations by employees stating that the public accommodation is wheelchair accessible, usable by persons with disabilities, can accommodate a person with disabilities, or the like.
- Wrongful Eviction Coverage: Wrongful eviction coverage is normally extended for the hotel/motel/resort industry where a disabled person is forced/compelled to leave a guest room because it is not accessible. The theory is that this constitutes an "actual eviction." Another "theory" for coverage is "constructive" eviction. For example, if a room is available but not accessible, this may constitute constructive eviction as it would be a "futile gesture" for a person with disabilities to attempt to secure the guest room.

*These are theories and you should consult your coverage counsel to discuss their application, validity and usefulness.

- iv. Insurance may or may not cover attorneys' fees and costs that you may be ordered to pay. Too often defendants believe, or are led to believe, that their insurance companies will pay the plaintiff's attorneys' fees. You must determine what your insurance actually provides. Ultimately, you will be responsible for paying our fees, should we prevail. Therefore, the issue of coverage

Kathy McInerney
June 18, 2004
Page 4

SCANNED

should be of utmost concern to you. Simply put, if you receive a "Reservation of Rights" letter, you may still be financially responsible to pay compensatory damages and plaintiff's attorneys' fees and costs. We urge you in this instance, to seek independent counsel, and not rely upon insurance defense attorneys, to determine your rights and your exposure.

7. **Defense Billing:** Once defense attorneys respond to or answer the Complaint, the vast majority, rather than attempt to settle the action, embark on a "billing" exercise. Simply put, the defense attorneys want to sufficiently "bill it" before they get realistic about the settlement. This may cost you a significant amount of money that could be better spent on the remedial work and settlement of the action. Keep in mind, the more work your attorneys force on us, the more work we must do. The more work we do is just that much more money you may be responsible for paying.

We do not believe you have any bona fide defense to your continuing obligation to identify and remove architectural barriers pursuant to the ADA, which was passed over a decade ago, (14 years). We do not want to see you waste your money on needless litigation. We want access agreed to now, not later. In essence, we are making a demand that you enter into a Mutual Settlement Agreement and Release for the removal of all of the architectural barriers raised in the complaint to completely resolve this aspect of the case. This will accomplish two things – first, it will provide full access which is positive; and second, it will significantly reduce attorneys' fees for all parties. Keep in mind that all remedial work necessary to remove barriers at Mandarin Touch can be resolved in a settlement agreement by setting forth a reasonable time line. This will give you financial flexibility in your planning.

You may contact us for the agreement before you retain counsel to explore resolution of this action. Otherwise, we will forward a copy to your counsel when you become represented.

Once you have committed or can assure us, in writing, that the remedial work will in fact be undertaken, you may have your attorneys contact us to resolve all aspects of the action now. That can occur through a direct negotiation with your attorneys or through a court-supervised mediation/settlement conference.

If you do not follow our suggestions or requests, which is your choice, we understand. We can then rest assured that you received our message on how this case could

Kathy McInerney
June 18, 2004
Page 5

SCANNED

efficiently and cost effectively be resolved at this stage in the litigation. It will also serve as a reminder to you later in the litigation that we gave you the earliest opportunity to settle the action before the cost of litigation started to rise, or as some may say, skyrocket.

We hope you accept this letter as friendly advice. We find all too often that many defendants are not properly advised as to their position in the litigation, insurance coverage issues, injunctive relief sought, damages, the tactics of insurance defense attorneys, attorneys' fees, and the use of an early mediation/settlement conference to resolve the matter.

Returning to the issue of full insurance coverage, if in fact you are denied coverage (money) to pay any part of the claim which is monetary in nature, this office at the conclusion of the litigation would consider discussing with you the merits of a "bad faith" case against your insurance carrier. You should keep this in mind and discuss it with your own private counsel, not counsel hired by the insurance company.

Defendants that do not consider an early settlement eventually face the hard reality that the remedial work will have to be done, compensatory damages paid and that attorneys' fees and costs have risen substantially. That is why we have taken this opportunity to explain to you our position so you can make a sound decision as to the course you wish to take — that being either to consider early settlement discussions or to litigate the matter. If you wish to entertain settlement now, you may contact us directly unless you have retained counsel. In that event, you may have your attorneys contact us. I remain,

Very truly yours,


Thomas E. Frankovich

Dictated but not read in the interest of time

TEF/amc

HK&C

HART, KING & COLDREN

Facsimile Transmission Cover Sheet

DATE: April 13, 2005 PAGES (incl. cover sheet): 45
 TO: Lynn Hubbard, III
 COMPANY: Law Offices of Lynn Hubbard
 FAX NO.: (530) 894-8244 PHONE:(530) 895-3252
 FROM: Lisa D. Herzog
 FILE NO.: 55001.036/305
 RE: *Hubbard v. Rite Aid*
 MESSAGE: Appended is Defendants' Request for Judicial Notice of Court Order.

- ORIGINAL WILL NOT FOLLOW
- ORIGINAL WILL FOLLOW BY:
[U.S. MAIL]

If there are any questions regarding this FAX transmittal, please call Dora at (714) 432-8700.

CAUTION: PRIVILEGED AND/OR CONFIDENTIAL INFORMATION

This message is intended only for the use of the individual to which it was addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employer or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original to us at the above address via United States Postal Service.

A Professional Law Corporation
200 East Sandpointe, Fourth Floor, Santa Ana, California 92707 | Mailing Address: PO Box 2507
PH 714 432 8700 | FAX 714 432 8701

TX RESULT REPORT

NAME:HART KING COLDREN
TEL :7145467457
DATE:APR.13'2005 11:47

SESSION	FUNCTION	NO.	DESTINATION STATION	DATE	TIME	PAGE	DURATION	MODE	RESULT
3774	TX	01	5001036*915308948244	APR.13	11:42	045	00H05'52"	ECM	OK