

ORIGINAL

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11 and DISABILITY RIGHTS ENFORCEMENT,  
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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA

15 JAREK MOLSKI, an individual; and  
16 DISABILITY RIGHTS  
17 ENFORCEMENT, EDUCATION  
18 SERVICES: HELPING YOU HELP  
19 OTHERS, a California public benefit  
20 corporation,

21 Plaintiffs,

22 v.

23 MANDARIN TOUCH  
24 RESTAURANT; EVERGREEN  
25 DYNASTY CORP., a California  
26 corporation; and BRIAN  
27 MCINERNEY and KATHY S.  
28 MCINERNEY, as joint tenants,

Defendants.

CASE NO.CV 04-0450 ER (SHSx)

MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S  
MOTION FOR A PREFILING  
ORDER AND MONETARY  
SANCTIONS

Date: October 25, 2004  
Time: 10:00 a.m.  
Court: #1  
Location: 312 N. Spring Street  
Los Angeles, California  
Telephone: (213)894-3453

OCT 14 2004  
BY [Signature]

Plaintiffs, by and through their counsel of record, submit this memorandum of points and authorities in opposition to defendant Evergreen Dynasty Corporation's motion for a prefilng order and sanctions.

**INTRODUCTION**

On July 26, 1990, then President George Bush signed the Americans with Disabilities Act ("ADA") into law. Finding that "historically, society has tended to isolate and segregate individuals with disabilities" and that "discrimination

1 against individuals with disabilities continue[s] to be a serious and pervasive  
2 social problem,” 42 U.S.C. § 12101(a)(2), Congress drafted the ADA “to provide a  
3 clear and comprehensive national mandate for the elimination of discrimination  
4 against individuals with disabilities; to provide clear, strong, consistent,  
5 enforceable standards addressing discrimination against individuals with  
6 disabilities.” 42 U.S.C. § 12101(b)(1) and (2). Regrettably today, some fourteen  
7 years after enactment of the ADA, discrimination against individuals with  
8 disabilities in public accommodations remains rampant, and it is this state of  
9 affairs which motivates plaintiffs to seek enforcement of the law.

10 The enforcement mechanism for the ADA adopted by Congress relies on  
11 private civil actions to effectively secure compliance in most instances, preserving  
12 the scant resources of the Attorney General for actions directed toward the few,  
13 most egregious violators--those who “engaged in a pattern or practice of  
14 discrimination” or where the “discrimination raises an issue of general public  
15 importance.” 42 U.S.C. § 12188(b)(1)(B). It is in this “private attorney general”  
16 spirit that plaintiffs have brought this action, and in which plaintiff Jarek Molski  
17 has brought the other actions of which defendant complains.

## 18 ARGUMENT

### 19 **I. ISSUANCE OF A PREFILING ORDER WOULD BE IMPROPER** 20 **BECAUSE PLAINTIFF JAREK MOLSKI IS NOT A VEXATIOUS** 21 **LITIGANT**

22 Access to our courts is a basic and vital constitutional rights which may  
23 only be curtailed under the most exigent of circumstances. In Re Oliver, 682 F.2d  
24 443, 445 (3<sup>rd</sup> Cir. 1982). Thus, the issuance of a prefiling order restricting such  
25 access is an extreme measure which should rarely be imposed. DeLong v.  
26 Hennessey, 912 F.2d 1144, 1147 (9<sup>th</sup> Cir. 1990). This is not to say that the Court’s  
27 inherent power to maintain the orderly and expeditious administration of justice is  
28 so neutered as to be meaningless, but in the instance of a prefiling order it must be  
carefully and judicially applied.

1 Before a court may issue a prefiling order on a litigant, “it is incumbent on  
2 the court to make ‘substantive findings as to the frivolousness or harassing nature  
3 of the litigant’s actions.’” DeLong, 912 F.2d at 1148 (*quoting In Re Powell*, 851  
4 F.2d 427, 434 (D.C. Cir. 1988)). “To make such a finding, the district court needs  
5 to look at ‘both the number *and content* of the filings as indicia’ of the  
6 frivolousness of the litigant’s claims.” Id. (emphasis added). “Mere litigiousness  
7 alone does not support the issuance of an injunction. Both the number *and*  
8 *content* of the filings bear on a determination of frivolousness or harassment.” In  
9 Re Powell, 851 F.2d 427, 434 (D.C. Cir. 1988)(citations omitted)(emphasis  
10 added).

11 While plaintiff Jarek Molski’s actions may indeed be numerous, they are  
12 neither frivolous nor harassive. Plaintiff does not contest that he has filed in  
13 excess of three hundred lawsuits between 1998 and the present. However, he does  
14 refute defendant’s unsupported assertion that these suits were brought for a  
15 harassive or extortive purpose. Defendant’s attempt to paint plaintiff Jarek Molski  
16 with the same brush as the Trevor Group is wholly misplaced.

17 **A. Frivolousness**

18 Each of plaintiff’s complaints alleges the existence of specific  
19 architectural barriers which violate State and federal civil rights laws; and each  
20 complaint seeks the removal of these architectural barriers<sup>1</sup>. Prior to the filing of  
21 any complaint by this counsel, plaintiff Jarek Molski’s allegations are confirmed  
22 through counsel’s personal Rule 11 inspection of the subject premises and often  
23 times a separate *sub rosa* inspection by a retained access consultant. (Declaration

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25 <sup>1</sup> By way of example, plaintiff draws the Court’s attention to paragraph 29 of the  
26 complaint filed in *Molski v. Tacos Lupita*, USDC N.D. Ca. Case No. C 04-1852 PVT (Exhibit 36  
27 to Defendant’s Appendix of Exhibits, Vol. 2). In this instance, plaintiffs’ complaint details  
28 eleven (11) separate and discreet areas of access violation which range from lack of accessible  
parking, lack of an accessible entrance, lack of an accessible food service counter and lack of  
accessible restroom facilities. Such a complaint is hardly comparable to the filings of the Trevor  
Group for such insignificant infractions as a nail salon reusing open nail polish containers on  
multiple customers as referenced by defendant in its Notice of Motion.

1 of Thomas E. Frankovich (“Frankovich Dec.”), ¶ 3.) The purposes of these  
2 inspections is to ensure that the architectural barriers reported by plaintiff in fact  
3 exist, and to make a preliminary assessment of whether the barriers can be  
4 removed under the ADA’s readily achievable standards. In other words,  
5 plaintiffs’ counsel evaluates and determines whether plaintiff’s claims have merit;  
6 whether they can be successfully prosecuted through trial; and he ensures that the  
7 claims are not frivolous.

8 The non-frivolous nature of plaintiff’s claims are further evidenced by the  
9 results that Mr. Molski achieves through his litigation. In each of plaintiff’s cases  
10 he receives injunctive relief—relief which would not be available but for the  
11 existence of architectural barriers at the subject place of public accommodation.  
12 For example, if we look at the cases where defendant herein has provided copies  
13 of the settlement agreements by way of its Appendix of Exhibits, in the matter of  
14 *Molski v. Meridian Vineyards*, USDC C.D. Ca. Case No. CV 03-6056 TJH  
15 (MANx) (Exhibit 33 of Defendant’s Appendix of Exhibits, Vol. 1) plaintiff  
16 received injunctive relief which required the defendant to:

- 17 • provide one regular disabled and one van accessible disabled parking  
18 space, complete with all requisite signage;
- 19 • provide ADAAG/Title 24 compliant directional signage, the visibility  
20 of which is not impaired by plants or other obstructions;
- 21 • reduce the entrance door opening pressure to 8.5 pounds or less;
- 22 • provide an accessible path of travel from the parking area and the  
23 tasting room to the picnic area, and provide access to the picnic area  
24 itself;
- 25 • provide a lowered tasting counter which is identified for use by  
26 disabled patrons with the international symbol of disability;
- 27 • reduce the men’s and women’s restroom door opening pressure to 5.5  
28 pounds or less;

- 1 • provide knee-clearance beneath the lavatories within the men's and
- 2 women's restrooms through removal of the decorative screens; and
- 3 • lower the toilet seat cover dispenser in the men's restroom to a height
- 4 of 48 inches or less.

5 Likewise, in *Molski v. Yang Chow Restaurant*, USDC C.D. Ca. Case No. CV 03-  
6 1433 NM (Snx) (Exhibit 35 of Defendant's Appendix of Exhibits, Vol. 1),  
7 defendant agreed to:

- 8 • provide two (2) disabled access parking spaces, one of which shall
- 9 meet all requirements of a van accessible parking space, complete
- 10 with all required signage and pavement markings;
- 11 • provide an accessible entrance ramp the slope of which shall not
- 12 exceed 8.33%;
- 13 • reduce and maintain an opening pressure on the entrance door which
- 14 does not exceed 8.5 pounds;
- 15 • provide an accessible men's public restroom; and
- 16 • provide an accessible women's public restroom.

17 Similar results were realized in *Molski v. Hunt Cellars*, USDC C.D. Ca. Case No.  
18 CV 03-6262 RGK (JWJx) (Exhibit 28 to Defendant's Appendix, Vol. 1) and  
19 *Molski v. Jewel City Bowl*, USDC C.D. Ca. Case No EDCV 03-0620 VAP(SGLx)  
20 (Exhibit 34 to Defendant's Appendix, Vol. 1). This pattern of prevailing on  
21 defendants to undertake significant remediation at their places of public  
22 accommodation is a testament to the merit and validity of plaintiff's actions.

23 Finally, despite defendant's characterization of many of the dismissals of  
24 plaintiffs' actions as "adverse," in reality none of the outcomes of these cases were  
25 adverse in the sense that plaintiff failed to recover or otherwise prevail. Defendant  
26 raises thirty-one (31) specific cases which it labels "adverse." Of these thirty-one  
27 cases, fourteen were dismissed with prejudice pursuant to a stipulation by the  
28 parties and nine were voluntarily dismissed by the plaintiff. These types of

1 dismissals most commonly result from the parties reaching a private settlement,  
2 with the plaintiff voluntarily dismissing the case if settlement is reached before the  
3 defendant has appeared in the case, and the parties stipulating to dismissal if an  
4 appearance has been made by defendant. (Frankovich Dec., ¶ 5). With the  
5 exception of one of these cases<sup>2</sup>, there is nothing offered to indicate that any of the  
6 cases resulted in something less than a favorable recovery by plaintiff.

7 Of the remaining eight cases referenced by defendants, five (5) were  
8 dismissed for lack of prosecution and three (3) were dismissed for plaintiffs'  
9 failure to comply with a Court order. While these dismissals may be more likely  
10 to fall within the confines of an "adverse" action, they again are not indicative of  
11 any frivolity in plaintiffs' underlying claims but instead speak to procedural  
12 deficiencies most probably borne out of counsel's excusable error or neglect. An  
13 example of this is evident in the matter of *Molski v. Hunt Cellars*, USDC C.D. Ca.  
14 Case No. CV 03-6262 RGK (JWJx) (Exhibit 28 of Defendant's Appendix, Vol 1),  
15 where plaintiffs' action was dismissed for lack of prosecution after a clerical error  
16 caused a stipulation between the parties from being timely filed. (Frankovich  
17 Dec., ¶ 7). Nevertheless, in that case the parties continued to negotiate a private  
18 settlement which assured plaintiffs significant injunctive and monetary relief. *Id.*

19 Frankly, despite defendant's voluminous pleadings to this Court, defendant  
20 has failed to show even one instance of a frivolous filing by plaintiff. There have  
21 been no dismissals of plaintiffs' actions after consideration of the true merits by  
22 the Court, nor has there been any sanction imposed on either plaintiff or his  
23 counsel under Rule 11 of the Federal Rules of Civil Procedure. (Frankovich Dec.,  
24

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26 <sup>2</sup> Plaintiffs' voluntarily dismissal of the matter *Molski v. Longhouse Restaurant*, USDC  
27 C.D. Ca. Case No. CV 04-3121 MMM, resulted from the inadvertent filing of the matter in the  
28 of Voluntary Dismissal without prejudice was filed in the Central District and the case was  
properly filed in the Northern District of California where it continues to be litigated.  
(Frankovich Dec., ¶ 6.)

1 ¶ 8). The reality is that plaintiff's claims are well-grounded and supported by  
2 valid evidence. While they may be numerous, they are also meritorious.

3 **B. Harassment**

4 Aside from frivolity, a litigant's actions may be deemed vexatious if  
5 they are filed for the purpose of harassment. DeLong v. Hennessey, 912 F.2d  
6 1144, 1148 (9<sup>th</sup> Cir. 1990). Here again, defendant has offered no evidence other  
7 than the sheer volume of cases filed by plaintiff Jarek Molski to support a finding  
8 of harassment. There is no evidence to suggest that plaintiff Jarek Molski files  
9 repeated complaints against the same defendants, nor that his litigation is in any  
10 way motivated by a desire to harass or oppress his adversaries. Rather, plaintiff  
11 Jarek Molski's actions are brought primarily as a means of enforcing the disability  
12 access provisions of the ADA and companion State laws.

13 Despite defendant's likening of plaintiff to the Trevor Group, and accusing  
14 plaintiff of trying to "shakedown" his adversaries for a quick monetary settlement,  
15 this characterization ignores the fact that plaintiff Molski will not settle a lawsuit  
16 which does not ensure that the offending architectural barriers at the subject public  
17 accommodation are removed to the fullest extent available under the law. It is  
18 understood and agreed between plaintiff and his counsel that recovery of  
19 injunctive relief is of primary importance in the prosecution of his claims, and that  
20 monetary recovery is a secondary concern<sup>3</sup>. (Frankovich Dec., ¶ 4). Adopting the  
21 moniker Jarek "The Sherrif" Molski in his complaints, plaintiff Molski's  
22 motivation in filing suit is to bring about the change promised by the ADA—to end  
23 the lingering segregation and isolation and make the goods and services of all  
24 places of public accommodation as accessible and available to individuals with

25 \_\_\_\_\_  
26 <sup>3</sup> It should be recognized by the Court, that a considerable portion of the monetary  
27 recovery realized in the name of plaintiff Molski is in actuality recovery of attorneys' fees,  
28 litigation expenses and costs, and that Mr. Molski's personal monetary gain from his litigation  
activities is only a small fraction of the global settlement amounts recited by defendant in its  
moving papers.

1 disabilities. Nevertheless, even if plaintiff Molski were acting, as defendant  
2 alleges, solely for his own personal financial gain, his actions still would not have  
3 the harassive intent necessary for plaintiff to be deemed a vexatious litigant.

4 Because plaintiff Jarek Molski's various lawsuits are neither frivolous nor  
5 harassive, the issuance of a prefiling filing order and/or restriction of his access to  
6 this Court would be improper.

7 **II. THERE IS NO BASIS FOR SANCTIONS IN THIS CASE AS**  
8 **PLAINTIFFS' ACTION AGAINST DEFENDANT IS NEITHER**  
9 **FRIVOLOUS NOR BROUGHT FOR AN IMPROPER PURPOSE**

10 Federal Rule of Civil Procedure 11 requires that an attorney filing any  
11 pleading with the Court certify through signature that the papers being submitted  
12 are: (1) not being presented or maintained for any improper purpose; and (2) are  
13 nonfrivolous in nature. Fed. R. Civ. P. 11(b). Plaintiffs' counsel in filing  
14 plaintiffs' complaint herein clearly met his obligation under Rule 11. As stated in  
15 the declaration of Thomas E. Frankovich in support of this opposition, prior to  
16 filing the complaint he personally interviewed plaintiff Jarek Molski with regard  
17 to his visit to the Mandarin Touch Restaurant (Frankovich Dec., ¶ 2), he reviewed  
18 the documentary evidence provided by plaintiff (Frankovich Dec., ¶ 2, Exh. A),  
19 and he conducted an inspection of the subject public accommodation to confirm  
20 the existence of the reported architectural barriers. (Frankovich Dec., ¶ 2).

21 Counsel undertook the inquiry necessary to ensure that plaintiffs' claims had both  
22 the legal and evidentiary support not just to sustain a cognizable action, but to  
23 prevail at time of trial if necessary.

24 Counsel also reviewed with plaintiff Jarek Molski their shared philosophy  
25 with regard to prosecution of plaintiff's claims—a philosophy that places emphasis  
26 on the recovery of substantive injunctive relief first and foremost. (Frankovich  
27 Dec., ¶ 4). By seeking the removal of architectural barriers at places of public  
28 accommodation through private litigation, plaintiff Jarek Molski and his counsel  
are only pursuing enforcement of the ADA and incorporating State statutes in the

1 manner made available by Congress and the Legislature. This action, like all of  
2 the actions filed by this counsel on behalf of plaintiff Jarek Molski, fulfills both  
3 the requirements and the spirit of Rule 11, and provides this Court no with basis  
4 on which to impose sanctions.

5 **CONCLUSION**

6 For the foregoing reasons, defendant's motion for issuance of a prefiling  
7 order and for sanctions should be denied.

8  
9 Dated: 10/11/04, 2004

THOMAS E. FRANKOVICH  
A PROFESSIONAL LAW CORPORATION

10  
11 By: 

12 Thomas E. Frankovich  
13 Attorneys for Plaintiffs JAREK MOLSKI  
14 and DISABILITY RIGHTS  
15 ENFORCEMENT, EDUCATION  
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CERTIFICATE OR PROOF OF SERVICE

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State of California )  
County of San Francisco ) ss

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Francisco, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 2806 Van Ness Avenue, San Francisco, CA 94109-5460; that on the below date, following normal business practice, I served the foregoing document, described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR A PREFILING ORDER AND MONETARY SANCTIONS**

on the interested parties in the action, conveyed as follows:

- by depositing true copies thereof, enclosed in a sealed envelope, with postage thereon fully prepaid as stated on the attached service list:
  - in first class U.S. Mail
  - in \_\_\_\_\_ priority or X standard overnight mail via Federal Express.

I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service or Federal Express. In the ordinary course of business, correspondence, including said envelope, will be deposited with the United States Postal Service or Federal Express in San Francisco.

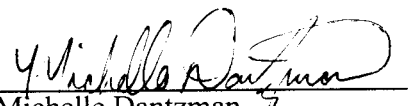
- by transmitting via facsimile to the fax number(s) set forth below on the attached service list.

Addressed to:

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Alan H. Boon  
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I declare under penalty of perjury under the laws of the State of California that I am employed in the office of a member of this court at whose direction the service was made, and that the foregoing is true and correct. Executed this October 11, 2004 at San Francisco, California.

  
Michelle Dantzman  
(Original Signed)