UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RONALD WILSON,
Plaintiff,
vs.
KAYO OIL COMPANY dba CIRCLE K #5250; TED KOBAYASHI, SUCCESSOR TRUSTEE OF THE WALSH TRUST AGREEMENT U/D/T DATED 5/7/86,
Defendants.

CASE NO. 06-CV-1035 BEN (AJB)

ORDER:

(1) GRANTING DEFENDANTS' MOTION FOR SANCTIONS; AND

(2) DISCHARGING THE COURT'S EARLIER ORDER TO SHOW CAUSE

I. INTRODUCTION

On October 25, 2007, the Court dismissed Plaintiff Ronald Wilson's ("Plaintiff" or "Wilson") case for lack of subject matter jurisdiction. The Court found that Plaintiff: (1) disregarded the Court's previous orders determining that he did not have standing, and (2) improperly brought this action in a federal court in an attempt to extort a monetary settlement from Defendants Kayo Oil Company and Ted Kobayashi ("Defendants" or "Kayo").

The Court retained jurisdiction to adjudicate Defendants' Motion for Sanctions but postponed ruling on the Motion in order to hold a hearing on the matter. *See* Doc. Nos. 21, 39. On the same day, the Court issued a *sua sponte* Order to Show Cause Why Sanctions Should not Be

Imposed against Plaintiff and His Attorneys ("OSC"), including monetary sanctions, vexations litigant sanctions, and a pre-filing order. *See* Doc. No. 39.

The parties had ample opportunities to address the sanctions issues, of which they took full advantage: (1) by filing over 340 pages in briefing and declarations addressing sanctions, and (2) by attending a hearing before this Court. *See* Doc. Nos. 21, 26, 27, 41, 42, 44. After carefully reviewing the parties' filings and giving them an opportunity to address the Court, the Court finds that sanctions are warranted it this case. Therefore, the Court GRANTS Defendants' Motion for Sanctions.

II. Factual and Procedural History

Plaintiff filed a Complaint with this Court on May 11, 2006, alleging that Defendant Kayo Oil Company discriminated against him on the basis of his physical disability. Along with this Complaint, Wilson filed five other Complaints on the same day – all making the same boilerplate allegations against various Southern California businesses.[1] Specifically, Plaintiff alleged violations of the Americans with Disabilities Act ("ADA"), the California Disabled Persons Act, the California Unruh Civil Rights Act, and the California Health and Safety Code. Plaintiff claimed that he visited the Defendants' gas station in San Marcos, California and encountered physical and intangible barriers, which interfered with or denied him ability to use and enjoy the goods, services, privileges, and accommodations offered at this facility.

On November 15, 2006 and again on December 15, 2006, Defendants provided informal notice to Plaintiff of their intent to bring a Rule 11 Motion for Sanctions, urging Plaintiff to dismiss his action voluntarily. *See* Doc. No. 21-2, at 2. Instead of dismissing this action, however,

[1] *Wilson v. BCNM, Inc.*, 06cv1050-J-POR (filed on 05/11/2006, dismissed pursuant to a settlement on 12/11/2006); *Wilson v. PFS LLC*, 06cv1046-WQH-BLM (filed on 05/11/2006, dismissed on a motion for summary judgment on 08/22/2007); *Wilson v. KA Mgmt Inc.*, 06cv1037-BEN-RBB (filed on 05/11/2006, dismissed pursuant to a settlement on 09/14/2006); *Wilson v. Hometown Buffet, Inc.*, 06cv1038-IEG-AJB (filed on 05/11/2006, dismissed pursuant to a settlement on 08/24/2006); *Wilson v. Chevron U.S.A., Inc.*, 06cv1036-AJB (filed on 05/11/2006, dismissed pursuant to a settlement on 02/13/2007).

Plaintiff filed a Motion for Summary Judgment on April 10, 2007, arguing that "there is no genuine issue of material fact" and asking the Court to rule in his favor. Doc. No. 17. In response, Defendants filed a Cross-Motion for Summary Judgment, urging the Court to dismiss the case for lack of subject matter jurisdiction and lack of standing. Additionally, after giving a timely notice to Plaintiff, Defendants filed a Motion for Sanctions on May 18, 2007, alleging, *inter alia*, that Plaintiff disregarded prior rulings from this Court regarding his standing. *See* Doc. No. 21.

On October 25, 2007, the Court dismissed this case, finding that Wilson lacked standing to bring the instant lawsuit. The Court retained jurisdiction to adjudicate Defendants' Motion for Sanctions. *See Branson v. Nott*, 62 F.3d 287, 293 n.10 (9th Cir. 1995). Additionally, the Court issued a *sua sponte* ruling, ordering Plaintiff and his attorneys to show cause why Wilson should not be declared a vexations litigant, and why the Court should not impose a pre-filing order against Plaintiff's attorneys – Lynn Hubbard III and Scotlynn J. Hubbard IV ("the Hubbards"). *See* Doc. No. 39. On January 28, 2008, the Court held a hearing on the sanctions issue, where attorneys for both sides presented oral arguments. The Court thus afforded Plaintiff and his attorneys adequate notice and an opportunity to be heard, as it must do prior to deciding whether to impose sanctions. *See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1063 (9th Cir. 2007).

III. Discussion

After reviewing numerous filings and conducting a hearing on the matter, the Court finds that sanctions are warranted. Specifically, and as discussed in detail below, the Court imposes sanctions pursuant to Federal Rules of Civil Procedure Rule 11 and pursuant to its own authority, based on the following improper conduct: (1) exaggerated claims of Wilson's physical disability; (2) Wilson's material misrepresentations to the Court; (3) breach of the duty of candor; (4) attorneys' misrepresentations to the Court; (5) violations of local rules; 6) omissions of the dates from the Complaint to circumvent dismissal; (7) waste of judicial resources; (8) using the ADA for oppressive reasons; and (9) bad-faith actions in bringing this lawsuit.

The Court notes that it did not need to rely on *all* of these violations to impose sanctions. Significantly, only one or several of these violations such as, for example, misrepresentations made to the Court are sufficient to impose sanctions in this case. Therefore, even if Plaintiff acted properly in bringing this action in a federal court, the Court would still impose sanctions based on

this bad-faith conduct.

Defendants asked for $112,122.50 in sanctions, which represents the amount of the attorney's fees and costs incurred by Defendants in this litigation. *See* Doc. No. 42-1, at 4. Defendants have engaged in modest discovery, making every effort to reduce the attorney's fees. Furthermore, after reflecting on the quality of work of the Defendants' counsel, the Court finds his hourly rate and his fees to be reasonable. Nevertheless, the Court finds it appropriate to award a smaller amount in monetary sanctions in this case, as the circumstances and the nature of this case call for reduced sanctions. Accordingly, the Court awards $25,000 in sanctions to Defendants, to be payable by Wilson and the Hubbards, jointly and severally. This amount represents approximately twenty percent of Defendants' attorney's fees and costs and is sufficient to deter further frivolous litigation and improper litigation conduct.

A. Sanctions under the ADA

Section 12205 of the ADA provides that the Court may, in its discretion, award attorney's fees, litigation expenses, and costs to the "prevailing party" in an ADA lawsuit. 42 U.S.C. § 12205. In their moving papers, Defendants requested attorney's fees, while properly acknowledging that they may not be a "prevailing party" in this litigation because this case was dismissed on summary judgment. *See* Doc. 42-1, at 3:24-28. As Defendants appear to acknowledge, the Court's hands are tied. In this jurisdiction, a "grant of summary judgement based on lack of standing is not a judgment on the merits." *Feezor v. Lopez De-Jesus*, 439 F. Supp. 2d 1109, 1111 (citing *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1397 (9th cir. 1995)). Accordingly, the Court must DENY Defendants' request for attorney's fees and costs pursuant to the ADA fee-shifting provision.

Mindful of the possible inapplicability of the ADA fee-shifting provision, Defendants point out that there are three additional ways in which the Court may still sanction Plaintiff and his attorneys: (1) by statute, 28 U.S.C. § 1927; (2) under Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"); and (3) pursuant to the Court's inherent power to vindicate justice and the purposes of Rule 11. The Court will address each of them in order.

B. Sanctions under 28 U.S.C. § 1927

Defendants raise 28 U.S.C. § 1927 as an alternative ground for sanctions for the first time in their response to the Court's OSC. This statute provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. "Section 1927 sanctions must be supported by a finding of subjective bad faith," which "is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *B.K.B. v. Maui Police Dept.,* 276 F.3d 1091, 1107 (9th Cir. 2002) (citation omitted).

As an initial matter, this section does not apply to the filing of a complaint and covers only subsequent conduct. *See In re Keegan Management Co., Securities Litigation,* 78 F.3d 431, 435 (9th Cir. 1996); *Matter of Yagman,* 796 F.2d 1165, 1187 (9th Cir. 1986) ("Section 1927 does not apply to initial pleadings, since it addresses only the multiplication of proceedings. It is only possible to multiply or prolong proceedings after the complaint is filed."). In addition, the statute by its terms only applies to the person "admitted to conduct cases" and does not apply to Plaintiff once he obtained legal representation.

Although Plaintiff and his attorneys engaged in improper litigation behavior, there is no clear indication that they unduly multiplied the proceedings – a conduct, which would allow the Court to impose sanctions under section 1927. Following the filing of the Complaint, the proceedings in the case were not numerous. Rather, there was an average amount of docket activity for a case in this District. Furthermore, the Court found no cases, and Defendants point to none, where section 1927 sanctions were imposed in similar circumstances. Accordingly, Defendants' Motion for Sanctions under section 1927 is DENIED.

C. Sanctions under Rule 11

Under Rule 11, by signing or filing pleadings, written motions or other papers, an attorney or a party certifies that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:"

(1) [the papers are not] being presented for any improper purpose, such as to harass, cause

unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. Proc. 11(b).

"Rule 11 applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys." *Bell Atlantic Corp. v. Twombly,* __U.S.__ 127 S.Ct. 1955, 1988 n. 13 (2007) (citation omitted). Violations of Rule 11 may result in sanctions. Fed. R. Civ. P. 11(c). Rule 11 contains a "safe harbor" provision, under which the motion must be first served on the alleged violator and filed with court only if the violator does not correct the challenged papers within 21 days from the service. Fed. R. Civ. P. 11(c)(2). "The safe harbor provision gives an attorney the opportunity to withdraw or correct a challenged filing by requiring a party filing a Rule 11 motion to serve the motion 21 days before filing the motion." *Retail Flooring Dealers of America, Inc. v. Beaulieu of America, LLC,* 339 F.3d 1146, 1150 (9th Cir. 2003).

Defendants amply complied with the safe harbor provisions of Rule 11. First, on November 15, 2006 and on December 15, 2006, they provided notice to Plaintiff of their intent to bring a Rule 11 Motion for Sanctions and urged Plaintiff to dismiss his action voluntarily. *See* Doc. No. 21-2, at 2. Second, Defendants served their Motion for Sanctions on Plaintiff at least 21 days before filing it with the Court. *See* Doc. No. 21. As discussed below, in light of the circumstances of this case, the purposes of Rule 11 can be vindicated by imposing sanctions. Accordingly, the Court awards sanctions pursuant to this Rule.

D. Sanctions under the Inherent Power of the Court

In the alternative, the Court also imposes sanctions under its inherent power. The district court has "inherent power to levy sanctions against attorneys who abuse the litigation process." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1054 n.1 (9th Cir. 2007) (citing *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 928-29 (C.D. Cal. 2005)). Rules and statutes do not displace a court's inherent power to impose sanctions for bad-faith conduct. *Chambers v. NASCO,*

1 *Inc.,* 501 U.S. 32, 46-47 (1991). "At the very least, the inherent power must continue to exist to
2 fill in the interstices." *Id.* at 46. Under the inherent power, "every federal court" may sanction
3 "abusive litigation practices." *Marrama v. Citizens Bank of Massachusetts,* __U.S.__ 127 S.Ct.
4 1105, 1112 (2007). The court may, for example, assess attorney's fees when a party has "acted in
5 bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers,* 501 U.S. at 45-46
6 (citations omitted).

7 As concluded above, the seriousness of Plaintiff and his attorneys' abusive litigation
8 practices and their improper, bad-faith actions during these proceedings present more than
9 sufficient grounds to declare this litigation vexatious, improper, and oppressive. Accordingly,
10 sanctions under the inherent power of the court are warranted as alternative sanctions against
11 Plaintiff and his attorneys. Therefore, the Court imposes sanctions on Ronald Wilson, Lynn
12 Hubbard, and Scotlynn Hubbard under this authority as well.

13 **D. Sanctionable Conduct**

14 In deciding to impose sanctions on Plaintiff and his attorneys, the Court has relied, in part,
15 on the following improper and bad-faith conduct. However, as mentioned above, the Court would
16 impose sanctions in this case merely based on only one or several of these violations.

17 **1. Plaintiff Exaggerated the Extent of His Disability**

18 Initially, Plaintiff claimed that he is physically disabled and "requires the use of a walking
19 device, wheel-chair and mobility-equipped van, when traveling about in public." *See* Doc. No. 1,
20 at 3. In his subsequent filings, however, Wilson admitted that he can also move around using a
21 cane. *See* Doc. No. 17-2, at 2:26 (admitting that Wilson can use a cane *or* a wheelchair when
22 "traveling about in public"). At the hearing, Wilson's attorney further acknowledged that Wilson
23 (1) can get around his house, (2) walk to the back of his car, and (3) take out his wheelchair – all
24 on his own, with the help of a cane. *See* Hearing Tr. 6:21-23, 7:1-2, Jan. 28, 2008.

25 More importantly, it was recently brought to the Court's attention that, according to a 2005
26 report from Wilson's cardiologist, Wilson "*is able to run a single flight of stairs 3 times* without
27 breathlessness in rapid succession." *See* Doc. No. 42-2, Ex. F, Subpoenaed Medical Records
28 (emphasis added). The Court questioned Plaintiff's attorneys at length regarding this issue at the

hearing. However, Plaintiff's attorneys did a great job of avoiding the question by claiming they had never seen this report – despite the fact that this report *is a part of the record* in this and at least two other cases in the Southern District.

The Court has no reasons to doubt the authenticity of the cardiac report. Furthermore, neither Wilson nor his attorneys made any effort to dispute the statement in the report. Accordingly, the Court finds that Wilson and his attorneys have repeatedly exaggerated and grossly misrepresented the extent of Wilson's disability, further calling into question his standing to bring this ADA lawsuit. Sanctions are appropriate for this reason alone.

2. Plaintiff Made Numerous Misrepresentations to the Court

The Ninth Circuit recently noted that, where "discovery shows that a party did not have a good-faith basis for the general factual allegations made in a complaint, then that party will be subject to sanctions[.]" *Skaff v. Meridien North America Beverly Hills*, LLC, 506 F.3d 832, 842-43 n.9 (9th Cir. 2007) (citing *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1065 n. 8 (9th Cir. 2007) (per curiam)). In the course of this litigation, Plaintiff made numerous misrepresentations to this Court. First, as discussed above, Plaintiff misrepresented the extent of his disability, thus further calling into question his standing to bring this lawsuit.

Second, Plaintiff represented to the Court that he did not keep some of his receipts from visits to Defendants' gas station. *See*, *e.g.*, Doc. No. 18, at 7. Meanwhile, in another ADA case filed by Wilson, Wilson admitted at the deposition that he "save[s] all [his] receipts from everything . . . . At least for five or six years." *See* Doc. No. 42-1, at 9-10 (citing *Wilson v. Marie Callender Pie Shops, Inc.*, 06-cv-1537-DFL-KJM (E.D. Cal.) (deposition transcripts)). The Court finds this to be a material misrepresentation, which goes to the heart of Plaintiff's claim.

Third, Plaintiff claimed that his reasons for traveling to Southern California was to visit friends and relatives and to meet with the members of a group called "Citizens Acting for the Rights of the Disabled" ("CARD"). *See*, *e.g.*, Doc. No. 22-3, at 2-3. However, he never named a single living friend or relative or a CARD member in the area of Defendants' establishment. In fact, at a deposition in another case, Wilson admitted that he no longer meets with the CARD members in person, and that those meetings are conducted by telephone. *See* Doc. No. 42-1, Ex.

D. Furthermore, at a deposition in another case, Wilson further contradicted the testimony given to this Court when he conceded that he no longer had any living friends or relatives in the San Marcos area. In Wilson's own words, he "outlived them." *See* Doc. No. 42-1, at 14. Although Defendants pointed out these inconsistencies in their brief, Plaintiff failed to acknowledge and explain them in any way – either at the hearing or by requesting supplemental briefing.

Fourth, Plaintiff claimed that he visits Defendants' gas station because he is loyal to this brand. However, as the Court has already determined, Wilson visited *four different* branded gas stations on the day of alleged violations, making token purchases at each one of them. In this Court's view, this negates Wilson's claim that he drives such a long distance specifically to visit his "favorite" gas station.

Fifth, Wilson claimed that he sent a letter to Defendants on January 19, 2006, discussing the perceived ADA violations at the gas station. *See* Doc. No. 18, at 7. However, there is no evidence Plaintiff had actually sent such a letter. Defendants noted in their briefs that they have no record of ever receiving such a letter from Plaintiff. Plaintiff – who claims to diligently document everything – presented no receipts or evidence of any kind suggesting this letter was mailed to Defendants. Furthermore, Plaintiff claimed that this letter was accompanied by four pages of violations, but he failed to produce a copy of these four pages.

Finally, as discussed in detail in this Order, Plaintiff misrepresented his past patronage and failed to identify any credible reason to be in San Marcos. Accordingly, the Court finds that Plaintiff is not credible, and that his misrepresentations to the Court warrant sanctions.

3. <u>Wilson's Attorneys Violated Their Duty of Candor to the Court</u>

Plaintiffs attorneys also violated their "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation. *See Bd. of License Com'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (internal citations omitted); *see also Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1164 (5th Cir. 1983) ("The party opposing summary judgment has a duty to inform the district court of the reasons why summary judgment is not appropriate."); *Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1068-69 (7th Cir. 2000).

Specifically, counsel failed to inform the Court that a pending appeal with the Ninth Circuit

Court of Appeals in another case – *in which they were counsel of record* – involved similar issues and could affect the disposition of this case. *See Doran v. 7-Eleven, Inc.*, 506 F.3d 1191 (9th Cir. 2007).[2] Rather, the Hubbards engaged in unethical litigation techniques by waiting and only notifying the Court about the *Doran* appeal *after* determining that the outcome was favorable to them. By failing to inform the Court about the pending appeal in *Doran*, Plaintiff's attorneys violated their duty before the Court.

Furthermore, the Hubbards may have violated California Rules of Professional Conduct, which provide that the attorneys should not mislead the judge regarding factual and legal issues. *See* Cal. Rules Prof. Conduct, Rule 5-200(B); *Hendon v. Ramsey*, 2007 WL 1120375, at *10 n.3 (S.D. Cal. Apr. 12, 2007); *United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting that "an attorney admitted to a particular bar may be disciplined for conduct that violates that bar's local rules of professional conduct").[3]

Finally, Plaintiff and his attorneys failed to inform the Court of a case in this jurisdiction, which was directly adverse to Wilson on the issue of standing. Specifically, a decision from the Southern District of California, issued before Wilson filed the instant lawsuit, adversely adjudicated Wilson's personal standing in a similar case. *See Wilson v. Costco Wholesale Corp.*,

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[2] Plaintiff filed a Motion for Summary Judgment in this case on April 10, 2007. In his Reply, addressing the issue of standing – a determinative issue in this case – "Wilson concede[d] that the [500-mile] distance of his residence in Dixon, California, does indeed work against him." *See* Doc. No. 22, 4:19-20. On October 25, 2007, the Court dismissed this case on summary judgment for lack of standing. Apparently, at that time, the Hubbards had already completed the briefing and oral arguments before the Ninth Circuit in *Doran v. 7-Eleven*, a case, which Hubbards now argue is directly controlling on the issue of standing. *See* Doc. No. 41-1, 3:5-6. Nevertheless, at no point did they inform the Court about the pending appeal in *Doran*, despite its obvious relevance to this litigation.

[3] At the sanctions hearing, Scott Hubbard apologized for failing to notify the Court about the pending *Doran* appeal. However, this does not change the fact that the Hubbards' failure to notify the Court of this pertinent information deprived the Court of an opportunity to consider the Ninth Circuit's guidance on the issue of standing prior to dismissing this case.

426 F. Supp. 2d 1115 (S.D. Cal. 2006). Wilson had a duty to inform the Court about this ruling but failed to do so, only addressing the adverse decision after Defendants brought it to the Court's attention.

4. Plaintiff's Attorneys Made Misrepresentations to the Court

Additionally, after holding the hearing on the matter, the Court finds that Plaintiff's attorneys made numerous misrepresentations to the Court. First – in response to the Court's questions regarding other OSC hearings in which the Hubbards were involved – Scotlynn Hubbard claimed that Judge Whelan discharged his OSC "when we presented the evidence, the same evidence that we presented to this Court." *See* Hearing Tr. 9:7-9, Jan. 28, 2008. In making this claim, counsel attempted to suggest that Judge Whelan discharged his OSC after being persuaded by the evidence presented by the Hubbards. However, the Court's independent review of Judge Whelan's order revealed that the OSC was discharged because the Hubbards had quickly settled the case before Judge Whelan had an opportunity to hold a hearing and to issue a ruling on the OSC. This directly contradicts the Hubbards' contention that Judge Whelan was persuaded by the evidence they had presented.

Second, the Hubbards falsely claimed that they had never seen the report of Wilson's cardiologist. *See* Hearing Tr. 20:14, 20:21, Jan. 28, 2008. The attorneys are presumed to have reviewed the record in their case, including the briefs and exhibits filed by the opposing party. Indeed, they have a duty to do so. In this case, the cardiologist's report appeared in Defendant's reply to the Court's OSC on two separate occasions – (1) a lengthy discussion in Defendant's brief, and (2) as an exhibit attached to the Defendant attorney's declaration. *See* Doc. No. 42-2, Ex. F; 42-1, at 22-23. Furthermore, this information appeared in at least two other cases filed by Wilson. *See Wilson v. PFS LLC*, 06cv1046-WQH-BLM (S.D. Cal.), Doc. No. 98, at 2; *Wilson v. Marie Callender Pie Shops, Inc.*, 06-cv-1537-DFL-KJM (E.D. Cal.) (deposition subpoena transcripts attached to Exhibit F in the instant case). Importantly, Hubbards represented Wilson in all these cases. Accordingly, the Court finds that Hubbards' claims that they had "never seen that document" to be a willful misrepresentation to the Court – conduct subject to sanctions. *See* Hearing Tr. 20:21, Jan. 28, 2008.

Third, in falsely claiming they had not seen the report, the Hubbards failed to address the Court's concerns regarding evidence on the record, which suggests that Plaintiff exaggerated the extent of his disability. Although the Court repeatedly inquired into this issue at the hearing, Plaintiff's attorneys made deliberate efforts to avoid answering the Court's questions.

Finally, counsel claimed at the hearing that the reason they failed to respond to Defendant's "report" and "documents" was because the Court did not give Plaintiff an opportunity to do so. According to Mr. Hubbard: "I said to the Court, in their briefing schedule, 'give us room to respond to this,' and you did not." *See* Hearing Tr. 20:10-11, Jan. 28, 2008. After reviewing the record, however, the Court finds no instances where counsel's request for supplemental briefing was denied.

5. Plaintiff's Attorneys Violated Local Court Rules

Plaintiff's attorneys also violated the local rules by filing oversized briefs without obtaining permission from the Court. *See* Local Rule 7.1(h). As the Ninth Circuit recognized in *Smith v. Frank*, the "local rules open the door to control of the business of the court, such as limitations on the length of pleadings or paper size, to avoid an unnecessary burden on the court." 923 F.2d 139, 142 (9th Cir. 1991). The district court may impose sanctions for violations of the local rules. *Id.*; Local Rule 83.1(a).

In this case, the Court does not base its decision to impose monetary sanctions on counsel's violation of the local rules alone. However, the Court finds it important to caution Wilson's attorneys regarding their failure to comply with local rules and to inform them of the possibility of sanctions for similar violations before this Court in the future. Local rules are of paramount importance in that they allow the Court to carry out its functions, and the Court has "broad discretion in interpreting and applying their local rules." *See Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916, 919 n.2 (9th Cir. 1999) (internal citations omitted); *Fish v. Watkins*, 2006 WL 411302, at *1 (D. Ariz. Feb. 17, 2006) ("Compliance with the Local Rules . . . is of paramount importance.").

6. Plaintiff Intentionally Omitted Dates in the Complaint to Avoid Dismissal

In every one of his six Complains filed on May 11, 2006 – as well as in all other

Complaints filed by Wilson that this Court was able to review – Plaintiff intentionally omitted the dates of his purported visits to the defendants' premises. In this Court's opinion, Plaintiff did this to avoid dismissal and sanctions because listing actual dates in the Complaint would make it immediately possible for the Court and Defendants to ascertain the truthfulness of Plaintiff's allegations, the availability of proof of these purported visits, and the applicability of the statute of limitations.

The Court's inability to determine the dates of the alleged violations made it difficult to adjudicate the pending motions, forcing the Court to undertake extensive record-searching of various filings made by Wilson in other cases. After reviewing motions, pleadings, and exhibits in other cases, the Court was able to determine that Plaintiff made numerous visits to various establishments on the same day, including visits to at least four different gas stations, making token purchases at each of them. Plaintiff's failure to include the dates of the alleged violations thus placed significant burden on the Court, unnecessarily forced the expenditure of scarce judicial resources, and unduly prolonged the resolution of this case.

7. Plaintiff Attempted to Raise a Theory not Advanced Previously

Furthermore, Plaintiff attempted to raise a theory not advanced previously – after the Court had dismissed this case. Specifically, in the post-OSC filing, Plaintiff made a new claim that the reason for his visits to the San Marcos area was because he has a preference for a La Quinta Inn hotel located there. In this Court's view, this argument is a deceptive claim, fabricated to fit the corners of *Doran v. 7-Eleven, Inc.*, 506 F.3d 1191, 1196 (9th Cir. 2007). Although Plaintiff has offered a long grocery list of reasons for visiting San Marcos in the past, he had never mentioned the La Quinta hotel prior to the Ninth Circuit's decision in *Doran*. Accordingly, the Court will not consider this a legitimate reason for his visits to San Marcos.

Additionally, Plaintiff attempted to reargue the merits of his case by claiming that the decision in *Doran v. 7-11*, rendered this Court's dismissal of his case erroneous. However, Plaintiff may not now withdraw his previous admission that, in this case, the 500-mile distance between Plaintiff's residence and Defendants' place of business works "against him." *See* Doc. No. 22-1, at 4. Appellate courts in other jurisdictions "have specifically refused to overturn a

summary judgment motion on a theory not advanced in opposition to the motion in the district court." *See*, *e.g.*, *Savers Fed. Sav. & Loan Assoc. v. Reetz*, 888 F.2d 1497, 1501 (5th Cir.1989).

Finally, not only has Plaintiff failed to file a motion to stay or a motion for reconsideration in this case, he never before advanced a theory before this Court that the four-prong standing test should not be used. On the contrary, Plaintiff affirmatively *advocated* the application of this test. *See* Doc. No. 22-1, at 4-9. Plaintiff cannot now attempt to reargue the merits of his claims by alleging the test, which he himself suggested, is not an appropriate test for standing. Plaintiff's conduct regarding the applicable test for standing is an improper way to prolong this litigation and to place further burden on the Court.

8. Plaintiff and His Attorney Used ADA for Oppressive Reasons

In support of their Motion for Sanctions, Defendants pointed out that, in light of a recent decision from this Court dismissing another one of Wilson's lawsuits for lack of standing, Plaintiff and his attorneys "knew full well that they did not have standing to file this lawsuit." *See Costco Wholesale Corp.*, 426 F. Supp. 2d at 1121 (Hayes, J.). Defendants further argued that Wilson's "repetitive ADA Title III litigation history also weighs heavily in favor of finding [his] token visits were designed solely to set up lawsuits." Finally, Defendants alleged that Wilson's five post-filing visits indicate that he tried to bolster his claim for standing and damages, after learning that Defendants would not quickly settle.

As this Court had previously concluded, some ADA plaintiffs use the Act for illegitimate purposes. As it turns out, the threat of lawsuits and money damages in ADA cases is an "effective inducement to settle" quickly. *Wilson v. Wal-Mart Stores, Inc.*, 2005 WL 3477827, at *3 (S.D. Cal. Oct. 12, 2005) (Benitez, J.) (citing *Mandarin Touch Rest.*, 347 F. Supp. 2d at 866). In fact, the Hubbards conceded at the hearing that – for most defendants – it makes more economic sense to settle the cases brought by the Hubbards rather than spend attorney's fees litigating on the merits. *See* Hearing Tr. 24:5-11, Jan. 28, 2008.

Specifically, 99.8% of ADA lawsuits filed by Wilson's attorney, Lynn Hubbard, settle before going to trial. *Wilson v. Pier 1 Imports (US), Inc.*, 411 F. Supp. 2d 1196, 1201 (E.D. Cal. 2006). At the hearing, the Hubbards further acknowledged that their firm has "filed about 1,100"

ADA cases in this jurisdiction. *See* Hearing Tr. 10:21-24, Jan. 28, 2008. Meanwhile, only 15-16 of these cases went to trial. *See id.*

A high settlement rate, taken alone, may not necessarily indicate that the plaintiff is filing lawsuits in bad faith. *Evergreen Dynasty Corp.*, 500 F.3d 1047, 1051-52 (9th Cir. 2007). Likewise, a large volume of suits, "standing alone, does not warrant a pre-filing order." *Id.* (citation omitted). But, taken together with other factors, this evidence may "indicate an intent to harass defendants into agreeing to cash settlements." *Id.* (citation omitted). Where, as here, this evidence is accompanied by other factors – such as (1) the plaintiff's "shopping spree" to a variety of establishments; (2) making petty purchases and retaining receipts as evidence; (3) visiting similar establishments on the same day; and (4) traveling to a distant location for one day only to spend most of that day driving around to visit gas stations, restaurants, and stores – this evidence indicates that an ADA plaintiff is setting up lawsuits for improper purposes.

In this case, the evidence of improper acts on behalf of Plaintiff and his attorneys is overwhelming. The Hubbards themselves admitted that the ADA lawsuits they bring against California businesses present a difficult choice to the defendants – settle for a small sum or potentially incur tens or hundreds of thousands of dollars litigating the case. The Supreme Court had noted that the courts can sanctions the conduct of the parties who had "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-46 (1991) (internal citations omitted). The Court concludes that the evidence of a high settlement rate, coupled with other improper conduct by Plaintiff and his attorneys, also warrant an imposition of sanctions.

9. <u>Plaintiff and His Attorney Filed this Lawsuit in Bad Faith</u>

Finally, after hearing the evidence, reviewing the voluminous record in this case, and taking judicial notice of other lawsuits brought by Wilson and his attorneys in this District, the Court concludes that Wilson and the Hubbards brought this lawsuit in bad faith. The Court finds it especially troubling that Wilson failed to present any bona-fide, legitimate reasons for his visits to the San Marcos area.

Furthermore, Wilson failed to present any evidence, which would show that he is likely to

return to San Marcos in the future. The Ninth Circuit emphasized that the plaintiff in *Doran* made "ten to twenty" prior visits to the location in question, and his visits were annual visits to a truly unique attraction – the nearby Disneyland park. *See Doran v. 7-Eleven, Inc.*, 506 F.3d 1191, 1196 (9th Cir. 2007). Meanwhile, Wilson has not alleged any bona-fide reasons for traveling to San Marcos, and the Court finds his unsupported claim to the contrary not credible. This evidence – coupled with Wilson's failure to abide by or at least to inform the Court of the decisions in this jurisdiction indicating Wilson did not have standing to bring this lawsuit – presents yet another independent reason to sanction Wilson and his counsel for improper conduct.

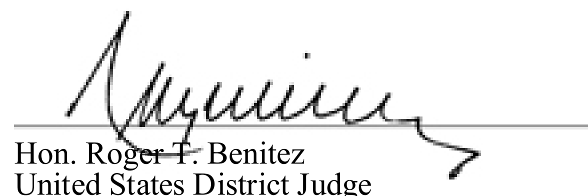
IV. Conclusion

For all the reasons above, the Court imposes sanctions on Ronald Wilson, Lynn Hubbard, and Scotlynn Hubbard. This decision does not mean that ADA plaintiffs are now precluded from bringing actions before this Court. On the contrary, this decision fosters the legitimate goals of the Act, while applying narrowly to a pattern of abusive litigation techniques employed by one particular ADA Plaintiff and his attorneys. It is important to recognize that the Court's decision goes only as far as necessary to punish and deter improper litigation conduct and does not affect legitimate ADA plaintiffs who file their lawsuits in federal courts in good faith, alleging *bona fide* violations, and who do not engage in improper and misleading litigation practices such as the ones discussed in this Order.

Accordingly, the Court orders Ronald Wilson, Lynn Hubbard, and Scotlynn Hubbard to pay $25,000 in sanctions to Defendants. The Court hereby discharges its earlier Order to Show Cause, finding monetary sanctions more appropriate for this case at present. Plaintiff and his attorneys are cautioned, however, to cease the vexatious practices and to take steps to ensure future lawsuits are prosecuted in good faith. They are further ordered to include the dates of the alleged violations when filing ADA complaints with this Court, thus reducing unnecessary burden on the Court and on the defendants.

IT IS SO ORDERED.

DATED: February 29, 2008



Hon. Roger T. Benitez
United States District Judge