

USDC SCAN INDEX SHEET



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

78

M.

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FILED

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

NUNC PRO TUNC

MAR 04 2005

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

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

17 Plaintiff,

18 v.

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

23 Defendant.

Case No.: 02CV2497-WQH (BLM)

24 NOTICE OF MOTION AND MOTION
25 FOR PRE-FILING ORDER
26 PROHIBITING VEXATIOUS LITIGANTS
27 FROM FILING NEW LITIGATION
28 WITHOUT LEAVE OF COURT, TO
POST SECURITY, AND FOR
MONETARY SANCTIONS PURSUANT
TO FEDERAL RULES OF CIVIL
PROCEDURE RULE 11 AGAINST
PLAINTIFFS LYNN J. HUBBARD AND
BARBARA J. HUBBARD AND HIS
COUNSEL

Date: April 1, 2005

Time: 11:00 a.m.

Ctrm.: 4

Complaint Filed: December 18, 2002

Trial Date: None

29 TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

30 PLEASE TAKE NOTICE that on April 1, 2005, at 11:00 a.m. or as soon thereafter
31 as this matter may be heard in Courtroom 4 of the above-entitled Court, Defendants RITE
32 AID CORPORATION and ARTHUR CIUFFO, JR. and EVELYN EMMERSON, Trustees
33 of the CIUFFO FAMILY TRUST B (collectively "RITE AID"), will and hereby do move

1 the Court for an order prohibiting Plaintiffs LYNN J. HUBBARD and BARBARA J.
2 HUBBARD ("plaintiffs") from filing any new litigation in the California courts without first
3 obtaining leave of the presiding judge of the court in which the litigation is proposed to be
4 filed, to give security in such amount as the Court determines to be appropriate to secure the
5 payment of any costs, sanctions or other amounts which may be awarded against plaintiffs,
6 and for the imposition of monetary sanctions against plaintiffs and their counsel .

7 The motion will be made on the grounds that Plaintiffs are vexatious litigants, and
8 have engaged in conduct which is harassing to RITE AID and to the Court, and will be made
9 pursuant to 28 U.S.C. § 1651 ("All Writs Act") and Federal Rules of Civil Procedure, Rule
10 11.

11 This motion will be based upon this notice of motion and motion, on the
12 memorandum of points and authorities in support of thereof, the Declarations of Wayne C.
13 Arnold, Melanie Knupp and Larry Griffith in support thereof, the pleadings and papers filed
14 herein, and upon such other matters as may be presented to the Court at the hearing of the
15 motion.

16
17 Dated: March 4, 2005

HART, KING & COLDREN

18
19
20 By:

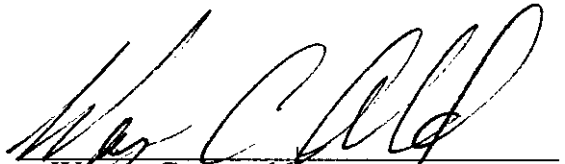

Wayne C. Arnold
Lisa D. Herzog
Attorneys for Defendants RITE AID
CORPORATION and ARTHUR
CIUFFO, JR. and EVELYN
EMMERSON, Trustees of the
CIUFFO FAMILY TRUST B

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND FACTUAL BACKGROUND**

3 On December 18, 2002, plaintiffs sued RITE AID alleging that RITE AID's store
4 located at 1135 Avocado Avenue, El Cajon, California violated the Americans With
5 Disabilities Act ("ADA") 42 USCS § 12101, et seq, California disabled Persons Act,
6 California Unruh Act, California Health and Safety Code, California Unfair Business
7 Practices Act and Negligence. Plaintiffs' "form style" boilerplate complaint consisted of
8 allegations that the RITE AID store had barriers making the store inaccessible to persons
9 with disabilities. Plaintiffs state:

10 "26. Plaintiffs were denied equal access to the Store because
11 Defendants failed to provide access to the Store from public
12 sidewalks, parking, or public transportation. This failure may
13 include, but is not limited to, installing an entrance ramp,
14 widening entrances, reducing door pressure, and providing
15 accessible parking spaces.

16 27. Plaintiffs were also denied access to the Store, because
17 Defendants failed to provide access to those areas of the Store
18 where goods and services are made available to the public. This
19 failure may include, but is not limited to, adjusting the layout of
20 display racks, widening of doors, rearranging furniture, providing
21 Braille and raised character signage, providing visual alarms,
22 adding an accessible check-out counter, and installing ramps.

23 28. Plaintiffs were also denied equal access to the Store,
24 because Defendants failed to provide access to restroom facilities
25 at the Store. This failure may include, but is not limited to,
26 removal of obstructing furniture or vending machines, widening
27 of doors, installation of ramps, providing accessible signage,
28 widening of toilet stalls and installation of grab bars."

See plaintiffs' Complaint, pg. 6, lines 11-26.

Plaintiff claimed to have suffered damages as follows:

"31. Plaintiffs have suffered, or anticipate suffering, emotional
harm during each actual visit to, or incident of deterrence from
visiting, the Store.

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1 32. Plaintiffs would visit the Store, but for the future threat of
2 discrimination by Defendants.

3 33. Plaintiffs suffered physical discomfort, physical injury,
4 emotional distress, mental distress, mental suffering, mental
5 anguish, which includes shame, humiliation, embarrassment,
6 frustration, anger, chagrin, disappointment and worry, because of
7 this discrimination.

8 34. All of the injuries suffered by Plaintiffs are expectedly and
9 naturally associated with the denial of equal access to the Store
10 due to the acts and omissions of the Defendants in owning,
11 operating and maintaining these subject public facilities.”

12 See plaintiffs’ Complaint, pg. 7, lines 5-16. These allegations are virtually identical to those
13 in Plaintiffs’ many other Complaints filed in this Court. See Section IV B below.

14 RITE AID admits that the RITE AID store (store # 5625) located at 1135 Avocado
15 Avenue, El Cajon, California is a place of public accommodation as defined in 42 U.S.C. §
16 12181 and used in 42 U.S.C. § 12182 to which members of the public are invited.¹

17 Defendant RITE AID CORPORATION leases the RITE AID store along with a portion of
18 the parking lot directly in front of the RITE AID store from defendants ARTHUR CIUFFO,
19 JR. and EVELYN EMMERSON, Trustees of the CIUFFO FAMILY TRUST B referred to in
20 lease documents as “Parcel 2”. See Exhibit A, copy of shopping center plot map showing
21 outline portion of property leased by RITE AID and owned by the CIUFFO FAMILY
22 TRUST B. See also Exhibit B, Declaration of Wayne C. Arnold, ¶ 2.

23 **II. VEXATIOUS LITIGANT STANDARD IN FEDERAL COURT:**

24 According to federal case law and statutes, a court can prohibit a vexatious litigant
25 from continuing to file actions in federal court. A party’s right of access to the court is not
26 absolute or unconditional. *Green v. Warden* (7th Cir. 1983) 699 F. 2d 364, 369. The Ninth
27 Circuit has noted that “frivolous claims by a litigious plaintiff may be extremely costly to
28

¹ The RITE AID store is a place of public accommodation as that term is used in California Civil Code section 54.1 and California Health and Safety Code section 19955, to which members of the public are invited.

1 defendants and can waste valuable court time.” *Jones v. Town of Los Gatos* (N.D. Cal.
2 1993) 834 F. Supp. 1230, 1232 (quoting *De Nardo v. Murphy* (9th Cir. 1986) 781 F.2d 1345,
3 1348.

4 In dealing with abusive litigants, the federal courts possess “inherent power . . . to
5 regulate the activities of abusive litigants by imposing carefully tailored restrictions under
6 the appropriate circumstances.” *Id.* (quoting *Delong v. Hennessey* (9th Cir. 1990) 912 F. 2d
7 1144, 1147). “Under the inherent power of 28 USC § 1651(a), enjoining litigants with
8 abusive and lengthy histories is one such form of restriction that the District Court may
9 take.” *Id.* (quoting *Delong v. Hennessey* (9th Cir. 1990) 912 F. 2d 1144, 1147). 28 USC §
10 1651, known as the All Writs Act, provides as follows:

11 “(a) The Supreme Court and all courts established by Act of
12 Congress may issue all writs necessary and appropriate in aid of
13 their respective jurisdictions and agreeable to the usages and
14 principles of law.

15 (b) An alternative writ or rule nisi may be issued by a justice or
16 judge of the court which has jurisdiction.”

17 As a means of stemming abusive litigation, the Court may issue an order requiring a
18 litigant to seek permission from a district court prior to filing future suits. *Id.* A pre-filing
19 review order may be imposed when four conditions are met:

- 20 (1) plaintiff is given adequate notice to oppose a restrictive
pre-filing order before it is entered;
- 21 (2) the court provides an adequate record for review,
22 including a list of all the cases and motions that led to court to
conclude that a vexatious litigant order was needed;
- 23 (3) the court makes substantive findings as to the frivolous or
24 harassing nature of the litigant’s actions;
- 25 (4) the court order is narrowly tailored.

26 *Id.* (citing *DeLong v. Hennessey*, supra, 912 F. 2d at 1147-48).

27 ///

1 **III. DECISION IN MOLSKY V. MANDARIN TOUCH, ET AL:**

2 In the recent case of *Molski v. Mandarin Touch, et al.* (C.D. CA. 2004) 347 F. Supp.
3 2d 860, the Court found that Plaintiff was a vexatious plaintiff and entered an order requiring
4 Plaintiff to obtain leave of court before filing any additional ADA complaints. Jarek Molski
5 was a disabled person² who filed hundreds of ADA lawsuits.³ *Id.* at 861. The claims
6 asserted in each of the cases was nearly identical.⁴ *Id.* The complaints seek injunctive relief,
7 but also add damages claims under California State Law.⁵ *Id.* at 862-863. Plaintiff had
8 never litigated an ADA case on merits, but settled the vast majority of his cases with a
9 significant minority being dismissed.⁶ *Id.* at 861, n2.

10 The Court noted that in addition to its local rules, “[t]he District Court has the
11 inherent power to levy sanctions in response to abusive litigation practices.” *Id.* at 863. The
12 Court noted that shotgun litigation used as means to enforce attorneys fees rather than
13 increasing accessibility undermines the ADA. *Id.*

14 The Court looked at several factors should be considered in deciding whether a
15 litigant is vexatious:

16 “(1) the litigant’s history of litigation and in particular whether it
17 entailed vexatious, harassing, or duplicative lawsuits; (2) the
18 litigant’s motive in pursuing the litigation, e.g., does the litigant
19 have an objective good faith expectation of prevailing?; (3)
20 whether the litigant is represented by counsel; (4) whether the
21 litigant has caused needless expense to other parties or has posed
22 an unnecessary burden on the courts and their personnel; and (5)
23 whether other sanctions would be adequate to protect the courts
24 and the parties.”

25 *Id.* at 864.

26 _____
27 ² It is questionable whether the Hubbards are even disabled. See Section 4D below.

28 ³ The Hubbards have likewise filed hundreds of ADA cases. See Section 4A below.

⁴ The Hubbards have filed form-style complaints as well. Section 4B.

⁵ The Hubbards likewise tack on damage claims under California law to their claims for injunctive relief under the ADA. See Complaint.

⁶ As of the date of their depositions in this case, the Hubbards had never tried an ADA case. In fact, the Hubbards had difficulty remembering much about any of their many lawsuits. See Section 4C.

1 The issue was not whether the businesses sued were in compliance with the ADA. If
2 fact, the Court noted that many probably were not. The issue was whether Molski (described
3 by the Court as a “serial plaintiff,” *Id.* at 863) was filing these actions for the improper
4 purpose of extorting settlements. *Id.* at 865. In finding Molski a vexatious litigant, the
5 Court noted the volume of cases (*Id.* at 864), the use of boilerplate complaints (*Id.* at 864),
6 the number of cases that settle (*Id.* at 866), and the fact that he was “aided and abetted by
7 attorneys (*Id.* at 866-67).⁷ The Court found that while an individual case might appear
8 credible, there was “an overall pattern of behavior that demonstrates Molski’s motivation is,
9 ultimately, to extract a cash settlement.” *Id.* at 866.

10 The history of the Hubbards’ ADA litigation shows that, like Molski, they have a
11 clear m.o.: “sue, settle, and move on to the next suit.” *Id.* at 866. Again, there is an overall
12 pattern that the Hubbards are acting like serial plaintiffs to extort settlements to fund
13 attorneys fees rather than expand accessibility. They are vexatious and should be sanctioned.

14
15 **IV. LYNN AND BARBARA HUBBARD’S PROLIFIC ADA COMPLAINTS:**

16 RITE AID had previously litigated a case against plaintiffs which was resolved in a
17 relatively early settlement. This case was also filed in the Southern District of California.⁸
18 When plaintiffs sued RITE AID again for another store location, this time on a store 20.86
19 miles from their home, RITE AID began to look at how many lawsuits these plaintiffs have
20 filed. See Exhibit C, Mapquest printout of the distance between plaintiffs’ home and the
21 RITE AID store which is the subject of this litigation. See also Exhibit D, Declaration of
22 Melanie Knupp, ¶ 2.

23
24 ⁷ The Hubbards are also represented by counsel – their son and grandson, whose use of boilerplate
25 complaints has already been criticized by the courts as burdening the system. See Section V.
26 Indeed, while Court in *Molski* described ADA litigation as a cottage industry, 347 F. Supp. at 863,
27 the Hubbards have developed this enterprise as a family business.

28 ⁸ In addition to plaintiffs, RITE AID has litigated numerous other cases against the Law Offices of
Lynn Hubbard. As such, counsel for RITE AID has extensive knowledge of the form style
pleadings that opposing counsel utilizes in their ADA practice. See Exhibit B, Declaration of
Wayne C. Arnold, ¶ 3.

1 **A. The Hubbards Have Filed A Tremendous Number Of Lawsuits In Federal**
2 **Court:**

3 By reviewing federal lawsuits filed by these plaintiffs' on the Southern, Central,
4 Eastern and Northern District Court's websites, RITE AID determined that plaintiff Lynn
5 Hubbard has filed 178 lawsuits in federal district court since May 18, 2000 and plaintiff
6 Barbara Hubbard has filed 176 lawsuits in federal district court since May 18, 2000. See
7 Exhibit E, summary chart of the lawsuits filed by Lynn and Barbara Hubbard broken down
8 by district and type of business. See also Exhibit F, listings of all California federal cases
9 filed by plaintiffs obtained from court websites. See also Exhibit D, Decl. of Knupp, ¶¶ 3,4.

10 Breaking these lawsuits down by type of business establishment, the plaintiffs (either
11 individually or collectively) have chosen their lawsuits as follows for a total of 178 lawsuits:

- 12 a. Restaurants – 55
- 13 b. Retail stores – 38
- 14 c. Auto stores and services – 16
- 15 d. Grocery stores - 9
- 16 e. Pharmacies – 6
- 17 f. Other businesses – 59

18 See Exhibit E. See also Exhibit D, Decl. of Knupp, ¶ 4.

19 **B. Plaintiffs' Complaints All Contain The Same Boilerplate Language:**

20 Plaintiffs complaint in their litigation against RITE AID contain the exact same
21 boilerplate language as in other complaints against other businesses. Plaintiffs' complaint
22 against RITE AID was filed on **December 18, 2002.**

23 A quick review of cases filed on the same day and/or in the same week as plaintiffs'
24 complaint was filed against RITE AID⁹ reveal the following:

25 _____
26 ⁹ Plaintiffs do not allege a particular "date" they visited the RITE AID store or other businesses in
27 other complaints. See Exhibit H. Therefore, RITE AID chose to examine the time frame around
28 when plaintiffs' complaint was filed against RITE AID rather than the time frame around
plaintiffs alleged visit to the RITE AID store in question.

- 1 **December 13, 2002** - *Lynn J. Hubbard, Barbara J. Hubbard v. Wild Oats*
2 *Markets, et al*, United States District Court, Eastern District of California, case
3 no. 02 CV 2447 JM (LAB) – exact same allegations of alleged barriers and
4 alleged injuries as the RITE AID complaint at issue in this case.
- 5 **December 17, 2002** – *Lynn J. Hubbard, Barbara J. Hubbard v. Vicorp*
6 *Restaurants, Inc. dba Bakers Square, et al.*, United States District Court,
7 Southern District of California, case no. 02 CV 2478 J (POR) - exact same
8 allegations of alleged barriers and alleged injuries as the RITE AID complaint
9 at issue in this case.
- 10 **December 17, 2002** – *Lynn J. Hubbard, Barbara J. Hubbard v. Cambridge*
11 *Investments, L.L.C. dba Arby's, et al.*, United States District Court, Southern
12 District of California, case no. 02 CV 2480 JM (RBB) - exact same allegations
13 of alleged barriers and alleged injuries as the RITE AID complaint at issue in
14 this case.
- 15 **December 17, 2002** – *Lynn J. Hubbard, Barbara J. Hubbard v. Golden Arch*
16 *of California, Inc. dba McDonalds # 11206, et al.*, United States District Court,
17 Southern District of California, case no. 02 CV 2479L (JAH) - exact same
18 allegations of alleged barriers and alleged injuries as the RITE AID complaint
19 at issue in this case.
- 20 **December 20, 2002** – *Lynn J. Hubbard, Barbara J. Hubbard v. Hometown*
21 *Buffet, Inc., et al.*, United States District Court, Southern District of California,
22 case no. 02 CV 2512 J (CGA) - exact same allegations of alleged barriers and
23 alleged injuries as the RITE AID complaint at issue in this case.

24 This is just a sampling of the complaints filed on a weekly basis by the Hubbards.
25 Examination of additional complaints would surely reveal the same type of boilerplate
26 allegations of barriers and injuries. No date of visit is included in any complaint, no specific
27 barriers allegedly encountered, no specific injuries alleged – just the same language in each
28 complaint leading a person to wonder if they had actually visited these establishments.

1 Certainly, this type of boilerplate complaint give defendants no indication of the “alleged
2 barriers.” If the goal of these plaintiffs was not to obtain damages (and churn attorneys fees
3 for their son), but to eliminate barriers, it would only be logical to (1) inform the business of
4 any alleged barriers prior to suing the business; (2) at a minimum, specify what barriers
5 allegedly exist in the store/restaurant when the lawsuit is filed.

6 As in *Molski*, the sheer volume of boilerplate cases establishes a pattern of being
7 serial plaintiffs with an improper motive.

8 **C. Plaintiffs Have Never Taken A Case To Trial:**

9 At the time of their depositions in this current case on April 28, 2004, plaintiff Lynn
10 Hubbard stated that none of his cases had gone to trial. See Exhibit I, excerpts from Lynn
11 Hubbard deposition transcript.

12 Again, the inability or unwillingness to truly litigate a case mirror’s Mr. Molski’s
13 patterns and practices. Like Mr. Molski, plaintiffs are vexatious litigants. These Plaintiffs
14 are in the business of litigating simply to extort settlements.

15 **D. Plaintiffs Are Not Truly Disabled Under The ADA Or Title 24 – A Clear
16 Bad Faith Motivation For Bringing ADA Lawsuits:**

17 Plaintiffs designated Arizona nurse Lisa Williams as an expert in this case regarding
18 the extent plaintiffs’ medical conditions limit major life activities with (or without)
19 mitigation devices. See Exhibit J, copy of plaintiffs’ expert designation. See also Exhibit B,
20 Decl. of Wayne C. Arnold, ¶ 4. RITE AID also obtained plaintiffs’ medical records pursuant
21 to a request for production. See Exhibit K, copy of the Request For Production served on
22 plaintiffs by RITE AID. See also Exhibit B, Decl. of Arnold, ¶ 5. RITE AID designated Dr.
23 Mark Rosenthal as a rebuttal expert in this case. See Exhibit L, Designation of Rebuttal
24 Expert. See also Exhibit B, Decl. of Arnold, ¶ 6.

25 Dr. Rosenthal reviewed all records produced by plaintiffs pursuant to RITE AID’s
26 request for production. It is Dr. Rosenthal’s opinion that the plaintiffs, although older, are
27 not disabled pursuant to the Federal and California definitions. See Exhibit M, Declaration
28 of Dr. Mark Rosenthal previously submitted to the court as part of RITE AID’s Opposition

1 To Motion For Summary Judgment. See also Exhibit N, excerpts from deposition testimony
2 of Dr. Mark Rosenthal with attached reports for Barbara and Lynn Hubbard.

3 If these plaintiffs are actually not disabled, then they lack standing to bring claims
4 under the ADA. A plaintiff's prima facie case of discrimination under the Americans With
5 Disabilities Act (ADA) 42 USCS § 12101, et seq., depends on his ability to show the
6 following: (1) that he is disabled; (2) the location is a place of public accommodation; and
7 (3) that he was denied full and equal treatment because of his disability. *Access Now, Inc.*
8 *and Resnick v. South Florida Stadium Corp., et al.* (2001) 161 F. Supp. 2d 1357. The
9 Americans With Disabilities Act defines an individual with a disability as someone who has
10 a physical or mental impairment that substantially limits one or more of the major life
11 activities of such individual. 42 USCS § 12102(2)(A).

12 Because of Dr. Rosenthal's opinion, RITE AID commissioned a surveillance of
13 plaintiffs in public places. See Exhibit 6, video obtained of plaintiffs. See also Exhibit O,
14 Declaration of Larry Griffith, ¶ 2. This video shows plaintiffs moving around without
15 wheelchairs. It also shows that plaintiffs' resident is not ADA or Title 24 compliant at its
16 front entrance as plaintiffs are required to walk up stairs to enter their trailer. Surely, if
17 plaintiffs experienced the anguish and injury they describe in all of their complaints, they
18 would take steps to make their own home ADA and Title 24 compliant.

19 This evidence juxtaposed with the volume of their litigation bolsters the conclusion
20 that the Hubbards are in the business, not of enforcing the ADA, but to profit from the
21 availability of these remedies.

22 **V. THE LAW OFFICES OF LYNN HUBBARD, III – 998 FEDERAL LAWSUITS**
23 **AND COUNTING:**

24 The Law Offices of Lynn Hubbard represents plaintiffs in this action – Lynn Hubbard
25 III is plaintiffs' son. In addition to representing his parents in their 178 federal lawsuits,
26 opposing counsel has also filed volumes of other ADA lawsuits. By doing brief research on
27 the internet, counsel for RITE AID learned the following:
28

- 1 • The Law Offices Of Lynn Hubbard has filed 998 lawsuits in federal courts of
2 California (384 in the Southern District, 67 in the Central District, 1 in the
3 Northern District and 546 in the Eastern District). See Exhibit P, summary chart
4 of cases filed by the Law Offices of Lynn Hubbard III with attached list of cases.
5 See also Exhibit D, Decl. of Knupp, ¶ 5.
6
- 7 • The Law Offices of Lynn Hubbard III uses form documents such as complaints¹⁰,
8 discovery questions and demand letters and sometimes forgets to change the name
9 of the plaintiff from one case to another. See Exhibit Q, copy of Notice of Taking
10 Deposition of Rite Aid Corporation in *Sanford v. Rite Aid*. See also Exhibit B,
11 Decl. of Arnold, ¶ 7.
12
- 13 • The Law Offices of Lynn Hubbard routinely sends out a “demand letter” for
14 \$40,000 without regard to the number of “visits” by a plaintiff in an attempt to
15 obtain an early settlement while threatening exorbitant damages and attorneys fees
16 claims if the business does not comply. See Exhibit R, demand letters received in
17 various cases by the Law Offices of Lynn Hubbard against Rite Aid Corporation.
18 See also Exhibit B, Decl. of Arnold, ¶ 8. See also *Peters v. Winco Foods, Inc.*
19 (E.D. Cal. 2004) 320 F. Supp. 2d 1035, 1037-1038 where the Law Offices of Lynn
20 Hubbard III represented an ADA plaintiff. In *Peters*, defendants argued that
21 plaintiff’s claims were frivolous and without merit. *Id.* The court awarded
22 defendant’s attorneys’ fees in the amount of \$37,563.00 and also references the
23 same type of demand letter from the Law Offices of Lynn Hubbard III and notes
24 defense counsel’s characterization of this letter as a “shakedown letter.” *Id.* at
25 1040.
26
27

28 ¹⁰ See Section I above.

- 1 • The Law Offices Of Lynn Hubbard has been criticized in the media for filing huge
2 numbers of lawsuits. A quick search on the internet revealed articles about this
3 criticism. See Exhibit S, internet posting from the Herald Newspaper posted on
4 August 11, 2004 regarding the criticism by a federal judge for filing “a staggering
5 291 separate ADA actions.” See also Exhibit D, Decl. of Knupp, ¶ 7.
6
- 7 • Lynn Hubbard told counsel for RITE AID that he could not settle a case for less
8 than \$16,000.00 as this, according to his financial advisors, was his “break even
9 point” for the litigation – no discussion was given to the actual amount of fees and
10 costs expended in a particular case. See Exhibit B, Decl. of Arnold, ¶ 11. This
11 amount bears no relationship to what fees would have been incurred just to file a
12 case – particularly one with boilerplate allegations. Settlement values are being
13 set, not at what fees have been incurred, but at what it costs to run Mr. Hubbard’s
14 law office. These cases are not about the ADA but about attorneys fees.
15
- 16 • Lynn Hubbard has offered to settle all pending litigation against Rite Aid
17 Corporation for various different plaintiffs in exchange for deeding “excess
18 property” owned by Rite Aid located on East Avenue in Chico, California to Mr.
19 Hubbard. Mr. Hubbard writes “In return for the aforementioned, I will accept that
20 property as complete compensation on behalf of my clients’ (with the exception of
21 O’Campo vs. Rite Aid) present and future actions, attorneys fees and costs.” See
22 Exhibit T, letter dated January 5, 2004 from Lynn Hubbard to counsel for RITE
23 AID. See also Exhibit B, Decl. of Arnold, ¶ 9.
24
- 25 • Lynn Hubbard subsequently offered to settle all of the RITE AID cases in
26 litigation in exchange for RITE AID stock to be issued to Mr. Hubbard – again
27 where he would “take care” of the plaintiffs. See Exhibit B, Decl. of Arnold, ¶ 10.
28 These cases are not about the ADA, but about attorneys fees.

- 1 • On February 19, 2005, Adam Sorrells wrote to counsel for RITE AID offering to
2 mediate the case and informing counsel that they attorneys fees and costs were
3 now \$67,980.27 and stating “if the matter settles, we may be able to waive some
4 of the requested repairs.” See Exhibit U. See also Exhibit B, Decl. of Arnold, ¶
5 12. This case is not about expanding accessibility. It is about attorneys fees.
6
- 7 • In the letter from Mr. Sorrells, he indicates that he does not want to “tip his hand”
8 about certain path of travel issues. As the Court has heard in recent arguments at
9 status conferences, RITE AID has been making changes to increase accessibility.
10 However, Plaintiffs’ counsel has indicated a desire to “hide the ball” with respect
11 to what they might claim is still out of compliance so that RITE AID would not
12 have a chance to modify that condition before trial and Plaintiffs’ ultimate claim
13 for attorneys fees. This case, and all the others filed by the Hubbards (as parties
14 and lawyers), are not about the ADA. They are about attorneys fees!
15

16 Additionally, the Law Offices of Lynn Hubbard III have been criticized in other
17 published cases for their tactics and litigation style. In *Peters v. Winco Foods, Inc., et al.*
18 (E.D. Cal. 2004) 320 F. Supp. 2d 1035, 1037-1038, a case where the plaintiff was also
19 represented by the Law Offices of Lynn Hubbard, the allegations in the “form style
20 complaint” were identical to those in this case as stated in paragraphs 19-21 above. In
21 *Peters*, defendants argued that plaintiff’s claims were frivolous and without merit. *Id.* The
22 court awarded **defendant’s** attorneys’ fees in the amount of \$37,563.00 and stated:

23 “This is particularly troubling in light of plaintiff’s remarkable
24 litigiousness. Plaintiff has initiated no less than **thirty** separate
25 lawsuits in this court, filing form complaints which stretch the
26 meaning of notice pleading by alleging boilerplate violations of
27 the ADA and state law. Such multiplicitous “off the shelf”
28 filings of questionable merit divert judicial resources away from

1 cases alleging specific, legitimate and substantial violations of
2 the rights of disabled persons. Further such litigation ‘brings into
3 disrepute’ the important objectives of the ADA by instead
4 focusing public attention on the injustices suffered by defendants
5 forced to expend large sums to mount defenses to groundless or
6 hyper-technical claims.”

7 *Id.* at pg. 1040-1041.

8 Similarly, in *Pickern v. Pier 1 Imports, Inc.* (E.D. Cal. 2004) 339 F. Supp. 2d 1081,
9 the Court declined to sanction the Law Offices of Lynn Hubbard when it dismissed
10 plaintiff’s state law claims and awarded defendant summary judgment as to federal claims.

11 The court did state the following:

12 “Contrary to plaintiff’s counsel’s understanding, counsel cannot
13 evade Rule 11 investigation requirements by filing a generic
14 complaint which lists “hypothetical” violations. In short,
15 plaintiff’s counsel signed a complaint containing allegations
16 without factual support. This constitutes a violation of Rule 11.”

17 *Id.* at 1090.

18 Clearly, the Law Offices of Lynn Hubbard, III have been admonished for the very
19 practices which troubled the Court in *Molski*.

20
21 **VI. SIMILARITIES TO THE TREVOR LAW GROUP:**

22 The activities of the Law Offices of Lynn Hubbard III are somewhat akin to the
23 actions of the “Consumer Enforcement Watch Corporation” which was formed by State Bar
24 Disciplined Attorney Damien Trevor (“Trevor”). Trevor sued various businesses for
25 violations of California Business and Professions Code § 17200 for alleged regulatory
26 violations – however small. (The Law Offices of Lynn Hubbard III has sued various
27 businesses for violations of the ADA – however small – be it a counter is ¼ inch too high, a
28 running slope is 2 percent to steep, etc). Owners of businesses were then notified by Trevor

1 that they could buy their way out of liability by paying a set fee. (The Law Offices of Lynn
2 Hubbard III sues businesses and then sends a demand letter for \$40,000 to settle the litigation
3 or face huge attorneys fees and damage claims).

4
5 **VII. SANCTIONS SHOULD BE IMPOSED:**

6 When addressing the issue of sanctions, the Court in *Molski* asked whether other
7 sanctions would adequate to protect the courts and other parties. *Molski v. Mandarin Touch,*
8 *et al.*, supra, 347 F. Supp. at 864, 866-67. The Court concluded that Molski's filings, when
9 viewed as an aggregate rather than individually, justified a pre-filing order as a sanction.
10 The Hubbard's litigation history is so similar to that of Jarek Molski that such a sanction
11 would be justified in this action as well. No other sanction would protect the court and other
12 parties from the burden of responding, not to meritorious claims, but to a shakedown for a
13 settlement to cover attorney's fees.

14 The Court in *Molski* also noted that all of the available remedies (including injunctive
15 relief) were available in state court, and that the ADA claims appeared to be a sham to file an
16 action in federal court seeking remedies exclusively available in state court. Therefore, the
17 Court issued an order to show cause why the federal claims should not be dismissed and the
18 matter remanded to state court for lack of subject matter jurisdiction. *Id.* at 867. Rite Aid
19 has filed a separate motion to dismiss for lack of subject matter jurisdiction. Certainly, it
20 would appropriate to enter a similar order in this motion for the reasons set forth herein.

21 The Court in *Molski* denied monetary sanctions under Rule 11. *Id.* at 868. However,
22 there seems to be such a strong relationship between the Hubbards and their counsel that this
23 endeavor does appear to be a joint enterprise – driven not by remedies available to the
24 Hubbards, but by claims for their family's attorneys fees. Therefore, Rite Aid believes that
25 this would be an appropriate case for the award of Rule 11 monetary sanctions and requests
26 an order awarding it attorneys fees and costs and allowing Rite Aid to file a separate motion
27 to set the amount of that award.

28 ///

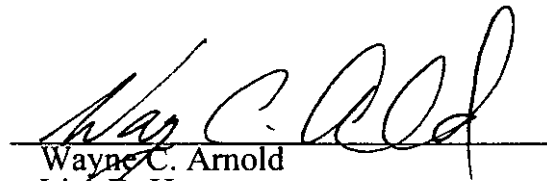
1 **VIII. CONCLUSION**

2 Based on an aggregate view of Plaintiffs' and their counsel's litigation history, there
3 is a pattern of shotgun complaints being filed for purpose of funding attorneys fees. Rite Aid
4 respectfully requests that the Court find that the Hubbards are vexatious litigants and enter an
5 order awarding sanctions including a pre-filing order against the Hubbards, dismissing this
6 action and remanding it to state court, and awarding Rite Aid its attorneys fees and costs.

7
8
9 Dated: March 4, 2005

HART, KING & COLDREN

10
11 By:



12 Wayne C. Arnold
13 Lisa D. Herzog
14 Attorneys for Defendants RITE AID
15 CORPORATION and ARTHUR
16 CIUFFO, JR. and EVELYN
17 EMMERSON, Trustees of the
18 CIUFFO FAMILY TRUST B

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