

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D) 7

1  
2  
3  
4  
5  
6  
7  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ENTERED**  
SEP 17 2004  
CLERK, U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION  
DEPUTY

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

FILED - EASTERN DIVISION  
CLERK U.S. DISTRICT COURT  
SEP 13 2004  
CENTRAL DISTRICT OF CALIFORNIA  
BY [Signature] DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JAMES COLLINS, )  
)  
Plaintiff, )  
)  
vs )  
)  
DAVID A MOCK, et al , )  
)  
Defendants )

NO EDCV 02-1343-SGL

ORDER GRANTING IN PART AND DENYING  
IN PART PLAINTIFF'S MOTION  
FOR ATTORNEY FEES, ORDER GRANTING  
PLAINTIFF'S MOTION TO REDUCE  
SETTLEMENT CONTRACT TO JUDGMENT

Upon hearing oral argument and reviewing the parties pleadings, the Court is prepared to issue its ruling on Plaintiff's Motion for Attorney's Fees and Plaintiff's Motion to Reduce Settlement Contract to a Judgment. Before doing so, some background is necessary to illuminate much of the discussion regarding these pending motions.

Plaintiff brought an action against the defendants, alleging that various access barriers at the defendants' saddlery business violated the provisions of the Americans with Disabilities Act ("ADA"). In the complaint plaintiff alleged that he suffered "physical, psychological and mental injuries" on account of defendants' failure to provide proper accessible facilities. (Def's' Opp, Ex C at 60, 61) The parties negotiated a resolution of the dispute during a settlement conference before this Court.

DOCKETED ON CM  
SEP 17 2004  
BY [Signature]

1 November, 2003, and consented in writing to proceed before this  
2 Court for the remainder of the case

3 On January 16, 2004, the parties executed a written settlement  
4 agreement formalizing the agreement reached during the November,  
5 2003, settlement conference The written settlement agreement  
6 required defendants to pay to plaintiff \$4,000 within sixty days and  
7 to make certain architectural changes at the saddlery shop In  
8 exchange, plaintiff agreed to release defendants from any and all of  
9 the claims raised in the federal lawsuit, except for the matter of  
10 attorney's fees Shortly before the sixty-day period lapsed,  
11 defendants filed an interpleader action in federal court, case no  
12 EDCV-04-395-VAP (SGLx), asserting that they faced the prospect of  
13 multiple claimants to the \$4,000

14 A MOTION FOR ATTORNEY'S FEES

15 The ADA provides for attorney fees as follows "[T]he court or  
16 agency, in its discretion, may allow the prevailing party a  
17 reasonable attorney's fee, including litigation expenses, and  
18 costs " 42 U S C § 12205

19 The defendants do not dispute that the plaintiff was a  
20 prevailing party in this case As a result of the settlement  
21 agreement, defendants agreed to make certain architectural changes  
22 to the saddlery shop Such a concession is enough to satisfy the  
23 prevailing party requirement See Fischer v SJB-P D Inc , 214  
24 F 3d 1115, 1118-19 (9<sup>th</sup> Cir 2000) (blind patron with service dog was  
25 a prevailing party in ADA access suit against restaurant when,  
26 pursuant to terms of settlement agreement, defendant agreed to place  
27 notices in restaurant informing readers that individuals with  
28 service dogs must be given equal access to restaurant) Nor do the

1 defendants seriously question the number of hours plaintiff's  
2 counsel has stated he expended in litigating this case, or the  
3 hourly rate at which he seeks to be compensated for the same <sup>1</sup>  
4 Normally that would be the end of the matter, but this is not an  
5 ordinary case

6 Courts are allowed to consider a number of factors, first  
7 articulated in the case Kerr v Screen Extras Guild, Inc., 526 F 2d  
8 67 (9<sup>th</sup> Cir 1975), when deciding whether "to enhance or reduce the  
9 lodestar figure " <sup>2</sup> Fischer, 214 F 3d at 1119 One of the  
10 factors a court may consider is the quality of the representation  
11 provided by counsel Kerr, 526 F 2d at 70 (noting that among the  
12 factors that can be considered is "the experience, reputation, and  
13 ability of the attorney" in question) That an attorney has engaged  
14 in misconduct during the course of the litigation is certainly  
15 something that a court would factor in judging the "quality" of that  
16 representation See Baughman v Wilson Freight Forwarding Co., 583  
17 F 2d 1208, 1213 (3<sup>rd</sup> Cir 1978) (observing that district court  
18 considered attorney's "misconduct in his argument at the close  
19 of the first trial" under the rubric of the "quality" of counsel's  
20 performance when presented with an application for attorney's fees)

21 The focus of defendants' dispute with plaintiff's request for  
22 fees is on the alleged misconduct plaintiff's counsel engaged in  
23 \_\_\_\_\_

24 <sup>1</sup> Defendants quibble with a few specific entries on  
25 plaintiff counsel's time sheets, but the particular questions  
26 they raised have been adequately answered by plaintiff's counsel  
(Pl's Reply at 9-10 & Decl of Jason Singleton ¶ 7)

27 <sup>2</sup> The lodestar figure is the figure arrived at by  
28 calculating the number of hours reasonably expended on the  
litigation and multiplying it by a reasonable hourly rate See  
Fischer, 214 F 3d at 1119

1 while litigating this case Specifically, defendants allege that  
2 plaintiff's counsel shirked his Rule 11 obligations when filing the  
3 complaint as he did not conduct an investigation into whether his  
4 client suffered physical injuries as a result of encountering the  
5 access barriers at the saddlery shop (Opp at 4-8) The  
6 defendants also allege that plaintiff's counsel lied to the Court  
7 when he represented in his settlement conference brief that  
8 "Plaintiff has filed at least a dozen access suits over the  
9 years Many were for injunctive relief only " (Opp at 14) On  
10 account of this alleged misconduct, defendants seek for the Court to  
11 deny awarding fees to counsel altogether

12 1 Failure to Investigate

13 Defendants have repeatedly asserted that plaintiff's counsel  
14 failed to inquire into plaintiff's physical injuries before  
15 including that factual allegation in the complaint While they have  
16 repeated this assertion many times, nowhere have they offered any  
17 substantive proof to the Court that plaintiff's counsel in fact  
18 failed to conduct such an investigation in this case, despite being  
19 given repeated and extended opportunities to do so Rather, they  
20 have cast aspersions on counsel's conduct in other ADA access cases  
21 he filed for the same plaintiff (Defs' Opp at 6-8 & Ex C)  
22 Counsel's investigative efforts in other actions, even those  
23 involving the same plaintiff, do not move the ball forward in any  
24 meaningful respect on counsel's conduct in this case Moreover,  
25 plaintiff's counsel represented to this Court that his client  
26 informed him that he suffered stomach aches and a headache after  
27 encountering the barriers at the defendants' saddlery shop This  
28 would certainly give counsel a plausible basis to allege that his

1 client had suffered physical injuries by encountering the  
2 architectural barriers in this case

3 It appears to the Court that the real source of aggrievement  
4 for defendants is not so much counsel's investigative efforts prior  
5 to filing the lawsuit, but the motivation of the plaintiff and his  
6 counsel in pursuing such actions in the first place Defendants  
7 repeatedly refer to plaintiff as a "professional plaintiff," call  
8 plaintiff's injuries a "staged auto accident," and assert that he  
9 and his counsel pursue such claims not out of any concern for the  
10 disabled or in the true spirit of the ADA, but as a "game" to enrich  
11 their pocket books by extracting quick settlements from small  
12 businesses (Defs' Opp at 2, 10-11, 23, Defs' Suppl Brief at 11)  
13 This Court cannot speak to plaintiff's subjective motives in  
14 bringing this lawsuit Even if it could, the subjective motives of  
15 those who file ADA access cases are not relevant to the issues in  
16 this case See Molski v Price, No CV-03-8582-FMC \*9 (C D Cal  
17 filed August 20, 2004) (pending publication) (finding that "an ADA  
18 plaintiff's motivation is irrelevant for purposes of  
19 determining standing")

20 What is important is whether the present case was filed with a  
21 good faith belief in the merit of the claims and allegations  
22 asserted That plaintiff and his counsel may have had ulterior  
23 motives in bringing this lawsuit does not shed any light as to the  
24 probable merit of the claims and allegations they asserted One can  
25 have a bad motive to sue and still file a case with legal merit,  
26 just as surely as one may have a good motive in bringing a motion  
27 but still file one that lacks legal merit Perhaps, as defense  
28 counsel has advocated, reforms are needed to be made to the ADA,

1 perhaps not What is beyond dispute is that it is not the province  
2 of this Court to make such policy decisions As Alexander Hamilton  
3 cautioned

4 It can be of no weight to say that the courts,  
5 on the pretense of a repugnancy, may substitute  
6 their own pleasure to the constitutional  
7 intentions of the legislature This might as  
8 well happen in the case of two contradictory  
9 statutes, or it might as well happen in every  
10 adjudication upon any single statute The  
11 courts must declare the sense of the law, and if  
12 they should be disposed to exercise WILL instead  
13 of JUDGMENT, the consequence would equally be  
14 the substitution of their pleasure to that of  
15 the legislative body The observation, if it  
16 prove anything, would prove that there ought to  
17 be no judges distinct from that body

18 THE FEDERALIST NO 78 (Alexander Hamilton)

19 With no proof proffered regarding counsel's lack of conducting  
20 a reasonable investigation into the physical injuries alleged in the  
21 complaint (and indeed counsel's assertions that his client testified  
22 that such injuries were indeed suffered), the Court finds that such  
23 allegations are unfounded and not worthy of displacing or otherwise  
24 reducing counsel's entitlement to a fee award

## 25 2 Misrepresentation During Settlement

26 The same cannot be said about counsel's misrepresentation to  
27 this Court in the settlement conference brief he lodged  
28 Plaintiff's counsel does not dispute that he mis-spoke when he  
represented to the Court that "Plaintiff has filed at least a  
dozen access suits over the years Many were for injunctive relief  
only " (Pl's Suppl Brief at 3) Rather than many cases being  
filed seeking only injunctive relief, the truth was that a vast  
majority (nay, nearly all) of the cases filed sought monetary

1 damages for physical and/or emotional injuries allegedly suffered by  
2 plaintiff (Defs' Opp , Ex C) Plaintiff's counsel, however,  
3 sought to brush his misstatement aside during the hearing herein as  
4 being the result of a "semantical failure" (whatever that means),  
5 and later described the misstatements as the ordinary "puffery" that  
6 occurs during settlement negotiations (Pl's Suppl Brief at 2-3)  
7 The Court would hope that counsel's employment of semantics and  
8 puffery as a negotiation tactic against opposing counsel (a view  
9 which the Court finds ethically problematic in itself) is not one he  
10 believes is deserving of approval for use against a judicial  
11 officer Defendants' criticism, however, is not that plaintiff's  
12 counsel exaggerated or sought to split fine legal hairs in the  
13 settlement conference brief Rather, their criticism is that  
14 plaintiff's counsel lied to this Court in an effort to establish a  
15 more favorable posture during the settlement negotiation itself by  
16 falsely portraying plaintiff and plaintiff's counsel as being  
17 primarily concerned with obtaining remedial measures through  
18 injunctive relief, and not, as defendants asserted, for pecuniary  
19 gain To a significant degree, plaintiff's posture at the  
20 settlement conference was that the case was "about access, not  
21 money," and it was to convince the Court that his cause was  
22 righteous that plaintiff's counsel insisted that of the dozen access  
23 suits filed by plaintiff, "[m]any were for injunctive relief only "  
24 (Pl's Settlement Conf Statement at 8) (emphasis added)

25 Moreover, plaintiff's counsel voluntarily provided his  
26 settlement position to the defense, stating at the beginning of his  
27

1 confidential settlement conference statement

2 While the Court designated this statement as  
3 confidential, Plaintiff's counsel found nothing  
4 herein that could not be shared with opposing  
5 counsel. Moreover, Plaintiff's counsel has  
6 found it useful in the past to provide  
7 settlement conference statements to defendants.  
8 Opposing counsel was provided a copy of this  
9 statement, with all attachments.

10 (Pl's Settlement Conf Statement at 1) Thus, not only was the  
11 settlement statement - including the false information regarding his  
12 client's past lawsuits - intended to influence the Court in the  
13 settlement conference, it was also clearly intended to influence  
14 opposing counsel in how he evaluated the value of the case and  
15 plaintiff's demand for the \$4,000 statutory cap for damages.

16 The Court finds that counsel's statement was a purposeful  
17 attempt to deceive the Court. The discrepancy between what was  
18 represented to the Court and what was the truth is such a large and  
19 glaring one as to obviate any belief that the misstatement was the  
20 product of mistake or oversight on counsel's part. Moreover, the  
21 truth regarding the factual issue in question was something that was  
22 uniquely within counsel's knowledge. He had, after all, filed the  
23 actions in question. He, unlike the Court, was uniquely situated to  
24 know roughly how many of those suits sought only injunctive relief  
25 and how many sought monetary damages. Given its source, the Court  
26 relied, in part, on this representation in its successful effort to  
27 persuade the defendants to settle the dispute. Perhaps of greatest  
28 concern to the Court is counsel's apparent belief that his  
misrepresentation to a judicial officer is of no moment, and the  
only corrective action he intends to take is avoid consenting to



1 conduct settlement conferences before judicial officers in the  
2 future

3 The only defense that counsel has asserted to using his  
4 misconduct as a basis to reduce or deny altogether his fee award is  
5 that settlement negotiations are confidential and are not admissible  
6 evidence Counsel's argument misses the mark His misconduct at  
7 the settlement conference is not being used as evidence to prove  
8 liability for or invalidity of the claims in the matter See Fed  
9 R Evid 408 Rather, it is being used to rebut or deflect the  
10 reasonableness of his request for attorney's fees Even more  
11 problematic is that there is a wealth of caselaw supporting the  
12 proposition that intentional misrepresentations made to a judicial  
13 officer during the course of settlement negotiations is sanctionable  
14 conduct despite the curtain of confidentiality that surrounds such  
15 proceedings See Crowe v Smith, 261 F 3d 558, 563 (5<sup>th</sup> Cir  
16 2001) (counsel sanctioned for misrepresentations made during  
17 settlement conference), Dawson v United States, 68 F 3d 886, 893-94  
18 n 12 (5<sup>th</sup> Cir 1995) (same) Indeed, settlement agreements  
19 themselves can be rescinded by a court when they are procured by  
20 misrepresentations made by one side during the negotiations See  
21 Digital Equip Corp v Desktop Direct, Inc, 511 U S 863 (1994)

22 Having determined that plaintiff's counsel made a purposeful  
23 misrepresentation to the Court during the course of the settlement  
24 negotiations and that such conduct is not shielded from scrutiny  
25 simply because it took place during the course of confidential  
26 discussions, the only question remaining is how such misconduct on  
27

1 counsel's part should be factored in determining the reasonableness  
2 of his attorney's fees The Court concludes that plaintiff's  
3 counsel's misconduct surrounding the settlement conference precludes  
4 him from obtaining any fee or cost he incurred related to that  
5 event Such misconduct well-exceeded the proper role an advocate  
6 may serve in litigation As counsel did not act like an attorney  
7 during the settlement, the Court finds that he should not be awarded  
8 fees for his actions during that occasion as if he were one  
9 Accordingly, plaintiff's fee request for preparing (listed as being  
10 worth \$375), traveling (listed as being worth \$1,800), costs for his  
11 private airplane (listed as costing \$600), lodging (listed as  
12 costing \$70 92), and attending (listed as being worth \$2,925) the  
13 settlement conference are disallowed Plaintiff's corresponding fee  
14 application is therefore reduced by \$5,770 92

15 Plaintiff initially sought \$29,213 23 in fees and costs, but  
16 later supplemented that application by an additional \$4,996 70 for  
17 expenses incurred by the supplemental briefing and hearings the  
18 Court ordered for the application itself in light of the serious  
19 allegations made by the defendants Given that the Court has found  
20 that defendants' post-settlement contentions, in part, have merit,  
21 and given their connection to the underlying misconduct, the Court  
22 further disallows the supplemental request Offsetting the  
23 deductions related to counsel's misconduct, plaintiff's application  
24 for attorney's fees is granted for a total amount of \$23,442 31

25 B MOTION TO REDUCE SETTLEMENT TO JUDGMENT

26 Plaintiff seeks for the Court to reduce the Settlement  
27  
28

1 Agreement, notably defendants' obligation thereunder to pay the  
2 plaintiff \$4,000, to a Judgment Defendants assert that the \$4,000  
3 in question is the subject of an interpleader action filed in  
4 federal court, case no EDCV-04-395-VAP, and that reducing the  
5 settlement agreement to a judgment would "defeat the protections"  
6 afforded by the interpleader statute by potentially subjecting them  
7 "multiple claims" for that money (Defs' Suppl Brief at 6) The  
8 only authority the defendants can point to for denying plaintiff's  
9 request is 28 U S C § 2361 (Defs' Suppl Brief at 7) That  
10 statute provides that "[i]n any civil action of interpleader a  
11 district court may enter its order restraining them [the  
12 claimants] from initiating or prosecuting any proceeding in any  
13 state or United States court affecting the property until  
14 further order of the court " As is apparent from the statutory  
15 language such authority to bar prosecuting a claim to judgment is  
16 vested solely with the district court hearing the interpleader  
17 action itself That this is so makes a good deal of sense when one  
18 thinks of the potential for chaos if a number of different federal  
19 judges could lay claim to deciding whether a particular stakeholder  
20 could or could not proceed with an action that may affect the res  
21 that is the subject of the interpleader action in another court  
22 With so many hands in the pot over discrete elements of the case the  
23 ability of the federal court hearing the interpleader action to  
24 effectively manage the case would effectively be compromised Here,  
25 the Court is not handling the interpleader action, such a task is  
26 with another federal judge If they wished to prevent the  
27


1 settlement agreement from being reduced to a judgment, they should  
2 have asked the district court handling the interpleader action to  
3 exercise its discretionary authority and enjoin the plaintiff from  
4 doing the same This they did not do

5 Even more importantly, the Court has been informed that the  
6 interpleader action filed by the defendants has been dismissed  
7 (Decl Jason Singleton Sept 10, 2004 ¶ 3) Given this fact, as  
8 well as the defect in defendant's statutory argument, there remains  
9 no impediment to this Court reducing the settlement agreement to a  
10 judgment With nothing standing in the way of granting the  
11 plaintiff's request, the Court hereby GRANTS the motion and ORDERS  
12 that the settlement agreement be reduced to judgment

13 IT IS SO ORDERED

14  
15 Date

9-10-04

16  
17   
18 \_\_\_\_\_  
19 STEPHEN G LARSON  
20 UNITED STATES MAGISTRATE JUDGE  
21  
22  
23  
24  
25  
26  
27  
28