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

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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United States District Court
Southern District Of California

BY FAX

Lynn J. Hubbard, Barbara Hubbard,
Plaintiffs,
Vs.
Rite Aid Corporation, et al.,
Defendants.

Case No. 02cv2497 WQH (BLM)

Hubbards' opposition to motions
to dismiss, to deem plaintiffs' (and
their counsel) vexatious litigants,
and to award sanctions.

Date: April 22, 2005
Time: 3:00 P.M.
Room: 16

Honorable William Q. Hayes

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1 **I. Background¹**

2 Plaintiffs Lynn J. Hubbard and Barbara J. Hubbard (collectively "the
3 Hubbards") have brought this instant action under the Americans with
4 Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*, and related state law
5 claims for denial of equal access to the Rite Aid store at 1135 Avocado
6 Avenue in El Cajon, California ("the store"), which is owned and operated
7 by defendants Rite Aid Corporation and the Ciuffo Family Trust B
8 (collectively "Rite Aid").

9 On January 20, 2005, Rite Aid represented to the court that they had
10 brought the store into compliance with the ADA and that all injunctive relief
11 relating to the Hubbards' ADA claims was now moot. (Docket No. 73). At
12 the court's behest, Rite Aid was instructed to bring a motion to dismiss for
13 want of subject matter jurisdiction, which Rite Aid did on March 8, 2005.
14 (Docket No. 75).

15 Citing, *inter alia*, the Ninth Circuit's opinion in *Wander v. Kaus*, (304
16 F.3d 856 (9th Cir. Cal. 2002)), this motion claimed that because all of the
17 barriers at the store had been removed, the Hubbards could no longer suffer
18 an actual injury if they revisited. Hence, because injunctive relief was no
19 longer available, they asked the court to dismiss the Hubbards' ADA claim
20 as moot, and decline supplemental jurisdiction over the remaining state law
21 claims.

22 But coupled with this motion was a request to have the Hubbards and
23 their counsel deemed vexatious litigants, claiming they engaged in conduct
24 which is harassing to Rite Aid and the Court. (Docket No. 78, 81). The
25 basis for this motion is that the Hubbards had filed approximately 178 ADA
26

27
28 ¹ Plaintiffs' counsel, Lynn Hubbard, will execute a declaration under the penalty of
perjury that the facts contained within this opposition are true, at the court's behest.

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1 lawsuits over the past 5 years, none of which had gone to trial. (*Id.* at 6-8).
2 And that the Hubbards—despite their advanced age and purported medical
3 records—weren't really disabled. (*Id.* at 8-9).

4 **A. The Hubbards visit to Rite Aid's store¹**

5 Great-grandparents who reside in San Diego, Lynn Hubbard is a 83
6 years old man who has had multiple open-heart surgeries, and wears a
7 pacemaker. He suffers from arthritis, and has a history of falling, (even
8 breaking vertebra in his back on one occasion). He finds it difficult to lift,
9 bend-over, and stand-up for more than 10 minutes. His wife, Barbara
10 Hubbard, is 82 years old, and suffers from severe osteoarthritis and
11 “constant pain” in her feet, ankles, and hips. Her arthritis makes it difficult
12 for her to lift, grasp, or walk more than six steps. Both use motorized
13 scooters, and a van with a wheelchair-lift, to travel in public.

14 On November 17, 2002, the Hubbards were looking for a scooter
15 advertised in the newspaper, happened upon the store, and stopped to buy
16 some nasal spray. (The Hubbards are constantly searching classified ads for
17 used vans or scooters.) During this visit—or one of the subsequent visits on
18 June 1, 2003, and July 29, 2003, to buy chocolate candy, shampoo, and
19 conditioner—the Hubbards faced a host of barriers that denied them “full &
20 equal” enjoyment, including:

- 21 • An unknown driver parking in the access aisle and blocking the curb
22 ramp (blocking access to the store);
23 • Having to park (partially) outside of the designated accessible parking
24 space to offload Mrs. Hubbard and her scooter;

25
26
27 ¹ Unless identified otherwise, the evidence supporting this brief history of the
28 Hubbards' claims is found in the declarations offered to support plaintiffs' motion for
partial summary judgment. (Docket Nos. 34, 35, 36, 37) And, in the interest of
judicial economy, the Hubbards will avoid specific cites to those declarations.

- 1 • Traversing curb ramp slopes that were too steep and dangerous; and
- 2 • Difficulty using counters and Pay Point machines that were too high,
- 3 and crowded with merchandise.

4 On December 18, 2002, the Hubbards filed this action, and sought to
5 eliminate these barriers, and any others that related to their disability.
6 (Docket No. 1).

7 Following two years of litigation (and repeated claims by Rite Aid
8 that all of the barriers had been removed), the Hubbards proceeded to trial
9 with the intent to remove barriers from the store's checkout counters, ice
10 cream counter, fire exits, restrooms, doors (including mats, pressure to
11 operate, strike-side clearance), telephones, accessible parking spaces (and
12 access aisles), ramps, paths of travel, and signage.¹ (Docket 56, page 4).

13 Of these barriers, defense expert, David Musser, confirmed (in part)
14 that many indeed existed at the store, including:

- 15 1.) Lack of properly identified building entrances accessible to the
16 disabled, (Title 24 § 1117B.5.7);
- 17 2.) Improperly identified accessible parking spaces, (ADAAG §§ 4.6.3,
18 4.6.4);
- 19 3.) Improperly identified accessible restrooms, (Title 24 § 1115B.5;
20 ADAAG § 4.30.6);
- 21 4.) No directional signage pointing disabled customers to the accessible
22 restrooms, (Title 24 § 1115B.5.1.3);
- 23 5.) Slopes of accessible routes of travel, which includes sidewalks, that
24 exceeded 5%, (Title 24 § 1133B.7.3; ADAAG § 4.3.7);
- 25 6.) Cross-slopes of accessible routes of travel that exceeded 2%, (Title 24
26 § 1133B.7.1.3; ADAAG § 4.3.7);

27
28 ¹ This synopsis was drawn from plaintiff's finding of fact and conclusion of law,
(docket 56), which was (in turn) based on the expert report prepared by Reed Settle.

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- 1 7.) Slopes on the flared sides of the store's ramp that exceeded 10%,
2 (Title 24 § 1129B.4.3);
- 3 8.) Ramps that encroached into accessible parking spaces or access aisles,
4 (Title 24 § 1127B.5.3; ADAAG § 4.7.5);
- 5 9.) Access aisles without the words "NO PARKING" painted on the
6 asphalt, (Title 24 § 1129B.4.1, 2);
- 7 10.) Doormats that weren't securely attached, anchored, or recessed to the
8 floor, (Title 24 § 1124B.3; ADAAG § 4.5.3);
- 9 11.) Interior doors that required more than five pounds of pressure to
10 operate, (Title 24 § 1133B.2.5; ADAAG § 4.13.11(2)(b));
- 11 12.) Knee clearance under front lip of the lavatories that weren't a
12 minimum of 27" high, (Title 24 § 1504.2.1; ADAAG § 4.19.2, Fig.
13 31);
- 14 13.) Sidewall-grab bars in the men's restroom that weren't 12" from the
15 rear wall, (Title 24 § 1115B.8.1; ADAAG § 4.17.6);
- 16 14.) Clear space that wasn't 18" from the centerline of the water closet (in
17 the men's restroom) to the closest wall, (Title 24 § 1115B.7.2;
18 ADAAG § 4.17.3).
- 19 15.) Accessible stall doors in both the men's and women's restrooms that
20 lacked a loop or "U"-shaped handle immediately below the door's
21 latch, (Title 24 § 1115B.7.14; ADAAG § 4.13.9);
- 22 16.) Mounting the highest operable parts of the towel dispensers in both
23 the men's and women's restrooms over 40 inches above the floor,
24 (Title 24 § 1115B.9.2; ADAAG § 4.23.7); and
- 25 17.) Ice cream and check-out counters that were higher than 36" above the
26 floor, that lack a 36" wide section, and (in some instances) that were
27 cluttered with merchandise, (Title 24 § 1122B.4; ADAAG § 7.1).
- 28

1 At the final pretrial conference, Rite Aid represented to both plaintiffs'
2 counsel and the court that all of the aforementioned barriers had been (or
3 were soon to be) removed.

4 With federal question jurisdiction in question, the court allowed Rite
5 Aid to file and serve a motion to dismiss the Hubbards' ADA claims, which
6 Rite Aid did. Yet, a March 17th site inspection revealed that—despite Rite
7 Aid's claims otherwise—barriers remain at the store (a fact conceded by
8 defense counsel). See Declaration of Adam Sorrells, Exhibits A and B,
9 respectively.¹ As ADAAG violations continue to exist at the store, and a
10 triable issue of material fact remains over the remaining, disputed barriers,
11 dismissal of this action is inappropriate.

12 B. Vexatious Litigants

13 On December 9, 2004, the Honorable Edward Rafcedic published an
14 order that has since become the rallying cry for ADA defense lawyers
15 everywhere. In *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860 (C.D.
16 Cal. 2004), the court examined the filings of Jarek Molski ("Molski"), a
17 disabled individual, who claimed to have suffered 13 nearly identical
18 injuries, generally to the same part of his body, in the course of performing
19 the same activity, over a five-day period. *Id.* at 865. This examination
20 focused on his history of litigation, motive, representation by counsel, and
21 the burden on the courts. *Id.* at 865-867.

22 The court concluded that Molski's ADA lawsuits were filed
23 maliciously, in order to extort a cash settlement, and that his original federal
24 question jurisdiction was a "sham." *Id.* The court further ordered that
25 Molski and (potentially) his attorney, the Frankovich Group ("Frankovich"),
26 were required to serve a copy of this order on every new ADA complaint.

27
28 ¹ Hereafter, "Exhibit" will refer to the exhibits attached to the declaration of Lynn
Hubbard.

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1 *Id.* Both Frankovich and Molski have since filed a petition for emergency
2 writ of mandamus (and nine boxes of exhibits) with the Ninth Circuit.

3 Yet, despite the alarm raised by *Molski*, the Hubbards—who have
4 considerable ties with the ADA plaintiffs bar—could find only one other
5 court to discuss the issue of multiple ADA filings, *Molski v. Arby's*
6 *Huntington Beach* (“*Molski II*”), USDC CDCA Case No. SACV 04-0038
7 CJC (AJWx)(C.D. Cal. March 14, 2005). (Exhibit C). In *Molski II*, the
8 district court looked at the same facts as the *Molski* court, but arrived at the
9 opposite conclusion (the analysis of which is discussed in greater detail
10 below). Moreover, the Hubbards and their counsel are distinguished from
11 *Molski* and Frankovich in the following respects:

12 **1. Plaintiffs’ counsel is a true litigator**

13 Rite Aid takes issue with the fact that the Hubbards have never taken a
14 case to trial, as proof of their vexatious nature. Yet, this is spccious
15 reasoning at best, as plaintiffs’ counsel has tried four ADA cases over the
16 last two years, and settled countless others on the eve of trial. In fact, he is
17 currently preparing for nine trials that are scheduled over the next five
18 months. And, according to the clerk of the Honorable David F. Levi, he is
19 the only ADA lawyer to try cases in the Eastern District of California.

20 Case Name (Post-Verdict)	Case Number	Trial
21 <i>Hooper v. Taco Bell</i>	Civ. S 03-0167 DFL GGH	n/a
22 <i>Dodson v. Pan Pacific</i>	Civ. S 02-0258 WBS KJM	n/a
23 <i>Loskot v. USA Gas</i>	Civ. S 01-2125 WBS KJM	n/a
24 <i>Wilson v. Nimbus Winery,</i>	Civ. S 02-0992 GEB JFM	n/a

25
26 **Case Name (Pending Trials)**

27 <i>Sanford v. Rite Aid</i>	CIV.S 02-0480 MCE JFM	3/30/05
28 <i>Martinez v. Longs</i>	CIV.S 03-1843 DFL CMK	4/5/05

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1	<i>Jones v. Econolodge</i>	SACV04-0185 JVS (MLGx)	5/31/05
2	<i>White v. Olive Garden</i>	CIV.S 04-0465 DFL CMK	6/27/05
3	<i>Martinez v. Folsom Broadstone</i>	CIV.S 03-1895 FCD DAD	6/27/05
4	<i>Harris v. Del Taco</i>	SACV04-0730 DOC (MLGx)	6/28/05
5	<i>Feezor v. Super 8 Willows</i>	CIV.S 03-2134 GEB GGH	7/12/05
6	<i>Doran v. Taco Bell Willows</i>	CIV.S 03-2081 MCE CMK	7/13/05
7	<i>Doran v. Bakers Square</i>	SACV04-0506 JVS (Ex)	7/26/05

8 The Hubbards have never tried a case because they stay close to
9 home, (*i.e.*, the Southern District of California), where the E.N.E. process
10 is—in their counsel’s opinion—the most efficient of all of California’s
11 district courts at settling ADA cases. In fact, of the nine cases that plaintiffs’
12 counsel is scheduled to try over the next five months, three are in the Central
13 District, and six are in the Eastern District—none are scheduled in the
14 Southern District.¹ Nor are the eleven trials that follow, currently scheduled
15 in the Southern District, either.

16 The Hubbards aren’t afraid of going to trial—in fact quite the
17 opposite. Their counsel expressed concerns about the delay of trial at the
18 January 20th pretrial conference for this case. The fact that Rite Aid is
19 raising this lie of omission now (on the eve of trial) only serves to belittle the
20 merit of their argument.

21 **2. If the Hubbards were extorting settlements, they’d live better.**

22 The best evidence the Hubbards can offer to dispute the contentions
23 that they are making money hand over fist, and using the ADA for their own
24 financial gain, is Rite Aid’s video, which shows snippets of the Hubbards’
25 daily activities, when they’re most active. (*See* Docket 79, Exhibit G). Yet,
26
27
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¹ Plaintiffs’ counsel doesn’t litigate in the Northern District.
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1 the video shows something else: *where the Hubbards work, where the*
2 *Hubbards live, and what the Hubbards drive.*

3 More specifically, the Hubbards live in a Chula Vista trailer slightly
4 bigger than the court's jury box, work out of a cinderblock storage locker
5 (where they continue to hand-make leather goods), and drive a van that can
6 charitably described as "used." And, at both their home and work, visitors
7 can hear the roar of their neighbor—Interstate 5.

8 Admittedly, the Hubbards have filed a large number of ADA lawsuits
9 over the past years. But one would assume that if they were using these
10 lawsuits as a cottage industry (or family business), they would live better—
11 or at least above the poverty line. One would also assume that if their
12 counsel (and son) had sufficient funds to offer them a better environment, he
13 would. The fact that they aren't, and their son hasn't, should be sufficient to
14 show that disabled lawsuits aren't the cash cows Rite Aid makes them out to
15 be.

16 But while Rite Aid (probably) never intended to document the
17 Hubbards' poverty, having inadvertently done so, the Hubbards would ask
18 the court to examine their home and work environment, and ask, "Does this
19 look like the surroundings of a family extorting money?" In light of the fact
20 that the Hubbards can't even afford an accessible home, and must continue
21 to work into their 80's, the answer is a predictable, "no."

22 **3. Plaintiffs' counsel's settlements always include injunctive relief.**

23 Plaintiffs' counsel has settled no fewer than nine cases with Rite Aid;
24 seven by settlement agreement, and two by accepting a Rule 68 offer. Three
25 of those settlements are subject to a confidentiality provision, and cannot be
26 discussed here (without court request).

27 Of those settlements that aren't confidential, *Bates v. Rite Aid Corp.*,
28 (Exhibit D); *Harris v. Rite Aid Corp.*, (Exhibit E); *Dodson v. Rite Aid Corp.*

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1 (Exhibit F); *Hooper v. Rite Aid Corp.* (Exhibit G); *Jones v. Thrifty Payless,*
2 *Inc. dba Rite Aid,* (Exhibit H); *Eiden v. Thrifty Payless, Inc. dba Rite Aid,*
3 (Exhibit I), the court will find that substantial injunctive relief is both
4 sought—and agreed to—in each and every settlement. *Id.* And the court
5 will also find the injunctive relief agreed to those cases, (*viz. counter height,*
6 *restrooms, reach range, and parking*), is the same injunctive relief
7 demanded in this one.

8 Moreover, Jones and Eiden both accepted Rule 68 offers for statutory
9 minimum damages only (based on one visit)—the absolute minimum
10 monetary recovery a disabled plaintiff is entitled to under California law.
11 Such an acceptance is hardly standard practice for a “Trevor Law Group”-
12 type firm.

13 Nothing within these settlements suggests that the demands for
14 injunctive relief were unwarranted. Nor do these settlements include
15 monetary amounts that shock the conscience. In fact, this isn't a case of
16 vexatious plaintiffs (and their counsel) extorting monetary settlements from
17 Rite Aid, but rather the case of a slow-to-change corporation that doesn't
18 have enough common sense to comply with disabled access laws.

19
20 **4. Rite Aid's reliance on an old version of a complaint (to prove**
vexatious litigant status) is misplaced.

21 Rite Aid also takes issue with the Hubbards' complaint, (docket no.
22 78, pages 6-8), as “no date of visit is included in any complaint, no specific
23 barriers allegedly encountered, no specific injuries alleged - just the same
24 language in each complaint leading a person to wonder if they had actually
25 visited these establishments.” In support of this argument, Rite Aid focuses
26 on a version of the Hubbards' complaint that their counsel has long since
27 abandoned, which contains generic, hypothetical allegations intended to
28 illustrate how the plaintiffs were denied access. (*Id.* at pages 1-2). As in

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1 *Molski*, Rite Aid concludes, the sheer volume of boilerplate cases establishes
2 a pattern of being serial plaintiffs with an improper motive. (*Id.* at page 8).

3 *Balderdash*.

4 As Rite Aid is aware, the generic, hypothetical allegations of the
5 Hubbards' complaint were based on plaintiffs' counsel's misunderstanding
6 of Rule 8(a). *See, e.g., Pickern v. Pier 1 Imps. (U.S.), Inc.*, 339 F. Supp. 2d
7 1081, 1090-1091 (E.D. Cal. 2004). He has since abandoned such
8 allegations, at the behest of the *Pickern* court, in favor of a more fact specific
9 complaint. *Id.* at 1091. So, despite Rite Aid's allusion otherwise, there are no
10 similarities between the *Molski* boiler-plate, personal injury complaint, and
11 generic allegations of the Hubbards' complaint, which has since been
12 abandoned.

13 Unlike *Molski*, the Hubbards have offered receipts, photographs, site
14 reports, and deposition testimony, (docket no. 51), that documents their
15 actual visits to the store, the barriers they encountered, and the injuries they
16 suffered. In fact, many of these items were disclosed during the parties' case
17 management conference on May 20, 2003. (Docket No. 13). Barbara
18 Hubbard even wrote a letter to Rite Aid (before filing a lawsuit) on
19 December 8, 2002, but never received a reply. (Exhibits J and K).

20 The fact that Rite Aid forgot about this evidence, letter, testimony,
21 and conference is understandable in a document rich case such as this one.
22 But that lapse in memory doesn't pigeon-hole the Hubbards (or their
23 counsel) into the category of vexatious litigants.

24 II. Discussion

25 A. Motion to Dismiss

26 The court is well versed in the rules governing motions to dismiss,
27 (*see, e.g., Bosley Med. Inst., Inc. v. Kremer*, USDC SDCA Case No. 01-cv-
28

1 1752 WQH (JMA) *reprinted* 2004 U.S. Dist. LEXIS 8336), so the Hubbards
2 will avoid repeating those standards here.

3 **1. Mootness**

4 Damages are not recoverable under Title III of the ADA - only
5 injunctive relief is available for violations of Title III. *See* 42 U.S.C. §
6 12188(a)(1); *Wander*, 304 F.3d at 858. A claim for injunctive relief is moot
7 if "it is absolutely clear that the allegedly wrongful behavior could not
8 reasonably be expected to occur." *Friends of the Earth, Inc. v. Laidlaw*
9 *Enviornmental Services*, 528 U.S. 167, 190 (2000). A defendant bears the
10 "formidable burden" of showing that a plaintiff's claim is moot. *Id.*

11 Here, Rite Aid contends that they have cured all of the problems the
12 Hubbards identified at the store and therefore they (the Hubbards) cannot be
13 re-injured should they visit in the future. (Docket No. 75, pages 3-5).
14 However, the Hubbards raised a material issue of fact as to whether the
15 improvements fully comply with the ADA—a point defense counsel
16 concedes. (Exhibits A and B). In light of this concession, a triable issue
17 remains as to the store's ADA compliance, and the Hubbards' ADA claim is
18 viable.

19 **2. Private liability for public sidewalks**

20 Title III of the ADA prohibits discrimination against persons with
21 disabilities in places of public accommodation. *See* 42 U.S.C. §12182(a).
22 Liability under Title III, however, is limited to those who own, operate, or
23 lease places of public accommodation.¹ *Id.* Rite Aid raises two arguments
24 to explain why the inaccessible sidewalk is neither their problem nor a
25 barrier under state and federal disability access standards.

26
27 ¹ As the store was renovated in 1998, the alteration standards of the ADA apply, and
28 the store must remove ADAAG violations in the altered areas and all "primary
function areas." *See* 42 U.S.C. § 12183(a)(2).

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1 They argue that Title II of the ADA governs public sidewalks, and
2 limits liability to "public entities" (*i.e.*, any state or local government). 42
3 U.S.C. § 12132. So, as a private entity, Rite Aid cannot be held liable for
4 barriers contained within public sidewalks that are owned by the City of El
5 Cajon.

6 The inherent flaw of this argument, however, is the Ninth Circuit
7 opinion that public and private entities can share liability under the ADA for
8 public accommodations owned by a public entity but operated by a private
9 entity.¹ *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d
10 861 (9th Cir. Nev. 2004)(*"DRAC"*). It's simply a matter of control: *Does*
11 *Rite Aid have sufficient control over the public sidewalks adjacent to the*
12 *store to bring them into compliance with the ADA?* The answer is "yes."

13 Under the Improvement Act of 1911, (Calif. Strt. & Hwy, Code §
14 5880 *et seq.*), it is the duty of the owners of lots (or portions of lots) fronting
15 on any public street to construct (or causing the construction of) sidewalks
16 or curbs in front of their properties upon notice so to do by the
17 superintendent of streets. *Id.* at § 5875. Upon proper notice by the
18 superintendent, (*Id.* at §§ 5876-5879), the adjacent property owner must
19 construct or modify the sidewalk in the manner proscribed by the
20 superintendent. *Id.* at § 5879. Failure to do so reap the penalties set forth in
21 sections 5890-5890, in which the superintendent of streets performs the
22 work and then seeks reimbursement for the costs of construction against the
23 adjacent property owner in a hearing before the City's legislative body. *Id.*
24 at 5890-5890.

27 1 Unfortunately, the *Pickern* court never addressed the Ninth Circuit's opinion in
28 *DRAC*, and held that liability under Titles II and III is mutually exclusive. Brenda
Pickern is appealing the district court's ruling.

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1 So, while Rite Aid may argue that (because they lack ownership) they
2 exert insufficient control over the public sidewalk to establish liability under
3 Title III, they cannot escape the control that the California Legislature has
4 burdened adjacent landowners with in designing, constructing, and
5 maintaining public sidewalks.¹ Hence, Rite Aid has sufficient control over
6 the public sidewalk to be held liable under Title III of the ADA.

7 **3. Rite Aid's contractual control over the common areas**

8 Rite Aid also seeks to dismiss the Hubbards' claims for injunctive
9 relief relating to the common areas of the shopping center on the grounds
10 that they neither own, lease nor control these areas. (Docket No. 75, pages
11 2, 5-7). The common areas of the shopping center, according to public
12 records offered by Rite Aid, are owned by Terra West Investments, and
13 comprised of Parcels 1, 3, 5, 6, 7, 8, 9 and 10. *Id.* And, because they only
14 own, operate, and lease Parcel 2, Rite Aid avers that they are not liable under
15 Title III of the ADA.

16 The problem with this argument is that Rite Aid forgot that, as the
17 owner/operator of Parcel 2, they have a right under section 5.7(a) of the
18 Declaration of Protective Covenants, Conditions and Restrictions and Grants
19 of Easements recorded February 1, 1989 as File No. 89-056224 of Official
20 Records of San Diego, California to assume the rights, duties, remedies, and
21 obligations over the common areas of the shopping center. (*See Exhibit L*).²

22
23
24
25 ¹ Other cases to address private liability for public sidewalks, (*see, e.g., Indep. Living*
26 *Res. v. Or. Arena Corp.*, 1 F.Supp.2d. 1124, 1127 (D. Or. 1998)), have focused on the
27 amount of control the private entity exerted over the public sidewalk to determine
28 liability.

² The Hubbards only included the excerpts of the County records necessary to establish
Rite Aid's control over the common areas. At the court's behest, however, they will
produce all 100 pages for review.

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1 All Rite Aid has to do is give Terra West Investments written notice,
2 and they can make the requested changes to the common areas. This
3 qualifies as "control" under the ADA, and should defeat Rite Aid's motion.

4 **B. Motion to Deem Plaintiffs Vexatious Litigants**

5 As the opinions in *Molski* and *Molski II* adequately set forth the court
6 inherent power to label someone a vexatious litigant, (*see, e.g., Molski*, 347
7 F. Supp. 2d at 863-864; exhibit C), those standards will not be repeated here.
8 Instead, the Hubbards will discuss each of the five elements, sciatim:

9 **1. Litigant's History**

10 First, Rite Aid attempt to buttress their argument that the Hubbards
11 and their counsel are vexatious litigants by emphasizing the "staggering"
12 number of anti-discrimination lawsuits filed by the Hubbards' and their
13 counsel, implying that being branded a vexatious litigant could be justified
14 as a form of sanction against such plaintiffs, lawyers, and law firms. This is
15 a sleight of hand trick worthy of the most unscrupulous three-card monte
16 dealer.

17 While Rite Aid is quick to identify the number of ADA actions filed
18 by the Hubbards and their counsel in this District, they provide *no* statistics
19 showing how many of those actions resulted in settlements in favor of the
20 plaintiffs, or how many of those actions that went to trial resulted in
21 judgments in favor of the plaintiffs and against defendants. More to the
22 point, Rite Aid is well aware that plaintiffs' counsel is a "boutique" law firm
23 with a practice devoted almost exclusively to representing disabled plaintiffs
24 in civil rights anti-discrimination cases.

25 As noted above, to penalize the Hubbards and their counsel for filing
26 similar actions on behalf of disabled individuals is tantamount to penalizing
27 the local prosecuting attorney's office for filing "a staggering" number of
28 criminal complaints, or a bankruptcy firm for filing "a staggering" number

1 of petitions in bankruptcy, or the local chapter of the NAACP for filing "a
2 staggering" number of civil rights claims.

3 To adopt Rite Aids reasoning would result in corporate defendants
4 being able to suspend a Sword of Damocles over plaintiffs and their counsel
5 by using the threat of a vexatious litigant branding to undercut the policy
6 behind the ADA, viz., promoting the efforts of private attorneys general to
7 correct instances of accessibility discrimination. 42 USC § 12188(a).

8 **2. Motive**

9 Rite Aid also opines that the Hubbards motive was to obtain damages
10 (and churn attorney's fees for their son). Otherwise, they "logically" would
11 have (1) informed the business of any alleged barriers prior to suing the
12 business; (2) at a minimum, specified what barriers allegedly exist in the
13 store when the lawsuit is filed. (*Id.* at page 7). Ignoring the fact that
14 Barbara Hubbard sent a letter and that a list of barriers was provided, the
15 Hubbards' exercise of this court's jurisdiction rests on their claim that Rite
16 Aid violated the ADA by failing to provide them full and equal access to and
17 enjoyment of the store, a right guaranteed by the ADA. And, based on the
18 present record, the Court cannot conclude that these ADA claims are
19 "immaterial and made solely for the purpose of obtaining jurisdiction" or
20 "wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-683
21 (1946). Quite the opposite; both parties' experts have documented a wide
22 range of ADA violations at the store.

23 The *Molski II* court was aware of no authority that suggests a disabled
24 plaintiffs' motivation in filing suit, whether it be recovery of monetary
25 damages under analogous state law and attorneys' fees or forcing public
26 facilities to adhere to the ADA, is a factor to be evaluated by the court in
27 reviewing its own jurisdiction. *Id.* at page 9. Indeed, the *Molski II* court
28 suggested that a rule requiring the court to examine plaintiffs' motivations

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1 prior to exercising the court's jurisdiction would run afoul of our system of
2 jurisprudence and place the court in the compromising position of weighing
3 facts and making credibility determinations at the early pleading stage. *Id.*

4 As for Rite Aid's claims that the Hubbards aren't disabled, this court
5 has already found (based on Rite Aid's opposition to summary judgment,
6 docket no. 38), the Hubbards' status as disabled individuals is a triable issue
7 of material fact. (Docket No. 46). It seems odd for Rite Aid to ignore that
8 disputed status (and their opposition), and resurrect the issue in support their
9 own vexatious litigant motion. Such a narrow view of the court's July 27th
10 order ignores one of the maxims of the Honorable Judith Keep: *what's good*
11 *for the goose is good for the gander.*

12 **3. Burden on the courts / Represented by counsel**

13 The third and fourth elements of the vexatious litigant test can be
14 telescoped into a single issue: *Is the filing of lawsuits by the Hubbards (and*
15 *their counsel) burdening the courts?* The answer is "yes." But, because the
16 Hubbards are adhering to the statutory framework of the ADA, and alleging
17 a material, non-frivolous, and substantial violation of federal law, this court
18 has "a 'virtually unflagging obligation ... to exercise the jurisdiction given
19 [it].'" *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (*quoting Colorado*
20 *River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

21 Contrary to Rite Aid's assertions, the fact that the Hubbards have filed
22 hundreds of virtually identical lawsuits throughout the Southern District of
23 California alleging violations of the ADA and routinely dismissed such
24 matters in exchange for a monetary settlement is irrelevant for purposes of
25 this Court's examination of its own jurisdiction. *Molski II*, slip opinion at
26 page 8. In fact, the filing of hundreds of lawsuits by individual plaintiffs is
27 not a matter unique to the Southern District of California.

28

1 As noted by the court in *Brother v. Tiger Partner, LLC*, from the
2 Middle District of Florida, "it should be emphasized that the system for
3 adjudicating disputes under the ADA cries out for a legislative solution.
4 Only Congress can respond to vexatious litigation tactics that otherwise
5 comply with its statutory framework. Instead of promoting 'conciliation and
6 voluntary compliance,' the existing law encourages massive litigation. ...
7 This is particularly the case in the Middle District of Florida where the same
8 plaintiffs file hundreds of lawsuits against establishments they purportedly
9 visit regularly. This type of shotgun litigation undermines the spirit and
10 purpose of the ADA." 331 F. Supp. 2d 1368, 1375 (M.D. Fl.2004).

11 Hence, until the Ninth Circuit says otherwise, any problem the court
12 may perceive is systemic and neither Hubbard nor their counsel should be
13 penalized for adhering to both the letter and spirit of the law.

14 **4. Adequacy of other sanctions**

15 The final factor is whether sanctions, other than a pre-filing order,
16 could adequately protect the court and other parties. For the reasons already
17 discussed above, the *Molski* court believed the answer was no, upon viewing
18 the totality of Molski's complaints.


19 In this case, the Hubbards would argue that the totality of the evidence
20 presented by Rite Aid fails to establish the totality of conduct found in
21 *Molski*. As such, the Hubbards would suggest that if the court is unhappy
22 with the quality of their pleading or experts, to instruct plaintiffs' counsel in
23 how to make them better. As the *Pickern* court noted, plaintiffs' counsel is
24 more than happy to remedy any deficiency. In the alternative, they'd ask the
25 court to delay their ruling until the Ninth Circuit decides whether to accept
26 Molski and Frankovich's petition for emergency writ of mandamus, and, if
27 the Ninth Circuit doesn't, revisit the issue then.

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DATED: March 25, 2005

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8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

BY FAX

10

11 LYNN J. HUBBARD, BARBARA J. Case No. 02 cv 2497 WQM (BLM)
 HUBBARD,

12 Plaintiffs,

PROOF OF SERVICE

13 v.

14 RITE AID CORPORATION; THE CIUFFO
 15 FAMILY TRUST B, ET AL, et al,

16 Defendants.

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