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ACCESS (ADA COMPLIANCE FOR CUSTOMER ENTRY TO STORES AND SERVICES) ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.R. 3356

JUNE 27, 2012

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David Warren Peters, CEO and General Counsel, Lawyers Against Lawsuit Abuse, submitted supplemental materials with his statement that the Committee chose not to print. However, the materials are on file in the official hearing record. Please contact the House Committee on the Judiciary's Subcommittee on the Constitution for that information.

ACCESS (ADA COMPLIANCE FOR CUSTOMER ENTRY TO STORES AND SERVICES) ACT

WEDNESDAY, JUNE 27, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:40 p.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, Lungren, King, Nadler, Scott, and Quigley.

Staff present: (Majority) Zach Somers, Counsel; Sarah Vance, Clerk; (Minority) Heather Sawyer, Subcommittee Chief Counsel, and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Good afternoon. We have called today's hearing to examine H.R. 3356, the "ACCESS Act," which Mr. Lungren of California introduced to make a minor, but very important, change to the Americans with Disabilities Act, the ADA.

The ACCESS Act is a common sense proposal to require plaintiffs to provide defendants with written notice and an opportunity to correct an alleged ADA violation voluntarily before they may file a lawsuit and force a business owner to incur legal costs.

This legislation, which applies to cases involving physical barriers to entry in public accommodations, would both improve public access for disabled individuals and eliminate thousands of predatory lawsuits.

When the ADA was signed into law by President George H.W. Bush in 1990, the goal was to provide the disabled with equal access to public facilities. And in large part, the ADA has worked. Unfortunately, enterprising plaintiffs and their lawyers have abused the law by filing tens of thousands of ADA lawsuits aimed at churning out billable hours and extracting money from small businesses rather than improving access for the disabled as the ADA intended.

These predatory lawsuits are possible for two chief reasons. First, 100 percent compliance with the ADA is very difficult to achieve. Even through good faith efforts, such as hiring an ADA compliance expert, a business can still find itself subject to a lawsuit for the most minor and unintentional of infractions.

According to one compliance specialist, "I rarely, if ever, see instances where there is not an access violation somewhere. I can

find something wrong anywhere." This makes compliance a challenge even for those with the very best of intentions.

Second, unlike Title II of the Civil Rights Act, the ADA does not currently require any notice before lawsuit can be filed. This has led to thousands of lawsuits being filed for issues of relatively minor noncompliance, such as a sign being the wrong color or having the wrong wording.

Abuse of the ADA has been noted by Federal judges in numerous cases throughout the country, who have referred to the proliferation of ADA lawsuits as a "cottage industry." These judges have recognized that the explosion of private ADA litigation is driven primarily by the ADA's attorneys' fees provision. One Federal court explained that "the ability to profit from ADA litigation has led some law firms to send disabled individuals to as many businesses as possible in order to have them aggressively seek out all violations of the ADA." Then rather than notifying the businesses of the violations and attempting to remedy them, lawsuits are preemptively filed since settlement prior to filing a lawsuit does not entitle plaintiff's counsel to attorney's fees under the ADA. As one Federal judge observed, the result is that "the means for enforcing the ADA attorney's fees—have become more important and desirable than the end—accessibility for disabled individuals." But the ADA was enacted to protect disabled individuals, not to support a litigation mill for entrepreneur plaintiffs' attorneys hunting for ADA violations to justify lawsuits.

The ACCESS Act would help eliminate predatory ADA lawsuits and increase compliance with the ADA by giving businesses the opportunity to fix ADA violations instead of dragging them into litigation. Lawsuits would be reserved for those instances in which offenders are truly unwilling to make appropriate changes. This would also allow legitimate claims to move through the legal system sooner and faster.

Moreover, requiring notification before filing an ADA lawsuit will benefit our economy. Many small businesses have been forced to close because of accessibility lawsuits and others have unnecessarily spent thousands of dollars in litigating claims. Small businesses are critical to America's economic recovery and should not be burdened by unnecessary or predatory litigation. The ACCESS Act whould protect the interests of the disabled and of America's small businesses and ensure that ADA violations can be remedied without the need to file a lawsuit, if possible.

The ACCESS Act preserves the rights of the disabled and fixes the ADA so that professional plaintiffs are not able to exploit this landmark civil rights law for their own private gain rather than for the benefit of the disabled.

And with that, I would now yield to the Ranking Member of the Subcommittee, Mr. Nadler, for his opening statement.

[The bill, H.R. 3356, follows:]

112TH CONGRESS
1ST SESSION

H. R. 3356

To amend the Americans with Disabilities Act of 1990 to impose notice and a compliance opportunity to be provided before commencement of a private civil action.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 3, 2011

Mr. DANIEL E. LUNGREN of California (for himself, Mr. HUNTER, Mr. CALVERT, and Ms. JENKINS) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the Americans with Disabilities Act of 1990 to impose notice and a compliance opportunity to be provided before commencement of a private civil action.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act of 2011".

SEC. 2. AMENDMENTS.

Section 308(a)(1) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12188(a)(1)) is amended—

(1) by striking "PROCEDURES.—" and all that follows through "The", and inserting the following: "PROCEDURES.—

"(A) IN GENERAL.—Subject to subparagraph (B), the", and

(2) by adding at the end the following:

"(B) STRUCTURAL BARRIERS TO ENTRY INTO EXISTING PUBLIC ACCOMMODATIONS.—A civil action for discrimination under section 302(b)(2) based on the failure to remove a structural barrier to entry into an existing public accommodation may not be commenced by a person aggrieved by such discrimination unless—

"(i) such person has provided to the owner or operator of such accommodation a written notice specific enough to allow such owner or operator to identify such barrier; and

"(ii) beginning on the date such notice was received and—

"(I) before the expiration of 60 days after such date, such owner or operator failed to provide to such person a written description outlining im-

1 provements that will be made to re-
2 move such barrier; or
3 "(II)(aa) before the expiration of
4 60 days after such date, such owner
5 or operator provided such description
6 to such person; and
7 "(bb) before the expiration of
8 120 days after such description is pro-
9 vided, such owner or operator failed to
10 remove such barrier.".

11 **SEC. 3. EFFECTIVE DATE.**

12 This Act and the amendments made by this Act shall
13 take effect on the 1st day of the 1st month beginning more
14 than 30 days after the date of the enactment of this Act.

○

Mr. NADLER. Thank you, Mr. Chairman. We have been here before. Twelve years ago, movie star and California business owner, Clint Eastwood, testified in support of legislation that would require pre-suit notification before a claim could be filed under Title III of the ADA. And we have had legislation on this introduced in every Congress since then, including this one.

Mr. Eastwood testified passionately about the need for pre-suit notification to prevent business owners, like himself, from being victimized by unscrupulous lawyers. The plaintiff and lawyer in his case actually had notified him of the alleged violations at his resort before filing suit.

Proponents of pre-suit notification ignore the fact that, as in Mr. Eastwood's case, a demand letter does not always work. Not every business owner will gladly make changes to increase accessibility. Nor is it clear why a letter should be required where a violation is obvious or where 22 years after enactment of the ADA, a public accommodation has taken absolutely no steps to bring itself into compliance with the law.

Pre-suit notification is a virtual get out of jail free card for every public accommodation in America. By requiring a person with a disability to notify a public accommodation before bringing legal action to enforce the law, bills like H.R. 3356 remove the only incentive for voluntary compliance with the ADA, namely the risk of being sued and having to fix the problem and pay reasonable attorney's fees.

Title III of the ADA does not allow private parties to sue for money damages. Only an order to remedy the ADA violation and reasonable attorney's fees are possible, and then only if the plaintiff is a prevailing party; that is to say, that the defendant is found to have violated the law.

By removing the risk of litigation, H.R. 3356 would send a clear and devastating message to every public accommodation in America that there is no need to comply voluntarily with the ADA. Instead, wait and see if you ever get a demand letter.

Twenty-two years after passage of the ADA, many businesses remain inaccessible to persons with disabilities. Yet instead of talking about how to improve compliance, here we are again considering a bill that further excuses noncompliance.

Proponents claim that pre-suit notification is needed to stop unscrupulous lawyers who have made a so-called cottage industry out of filing lawsuits in order to force businesses into quick cash settlements, and who have no intention of increasing access for persons with disabilities. But let us be clear about one thing. There simply is nothing unethical or inappropriate about suing a business that is violating the law.

The filing of a single or even multiple suits alleging violations of the ADA or State disability laws says nothing about the underlying merits of that, or those suits, or the intent of the parties involved. Moreover, there is absolutely no reason that the mere filing of a lawsuit should result in years of costly litigation. A defendant who is sued under Title III of the ADA responds to a summons by agreeing to remedy the problem, as we are assured would be the case of only pre-suit notification were required, faces only the cost of the repair itself and reasonable attorney's fees. Courts decide

every day whether a fee request is reasonable, and will not approve an award that is disproportionate to the actual work done.

While some might prefer that attorneys who enforce the law were to get nothing for their work, thus eventually forcing them out of business entirely and reducing the possibility that those who violate the law will ever be brought to justice, Congress decided to allow reasonable attorney's fees with the understanding that doing so is necessary to enable private lawyers to help enforce the ADA.

Where, as may sometimes be the case, the lawyer actually does engage in affirmative misconduct, for example, by providing misleading information, by making factual or legal arguments in bad faith, or by unreasonably and vexatiously prolonging the matter, courts have the tools they need to sanction this misconduct, and often do so. Courts in California and Florida, for example, have sanctioned lawyers who have brought ADA and States law claims where the underlying allegations were not sufficiently supported or where the lawyers misled defendants. The courts have required these lawyers to pre-file any future suits with the courts or in other cases have denied attorney's fees and damages available under some States' laws.

It is an unfortunate reality that some lawyers may act inappropriately at least some of the time, but this is not limited to lawyers who represent plaintiffs. One of our witnesses here today, Mr. Peters, whose practice consists of defending against ADA and States disability lawsuits, was found to have "acted intentionally in bad faith with an improper purpose and with an intent to harass the plaintiffs" in one case. Explaining why sanctions against him were warranted, the district court explained that Mr. Peters, "unreasonably and vexatiously multiplied the litigation, which resulted in excess costs, expenses, and attorney's fees to the other litigants," and that, "this is the essence of frivolous and bad faith litigation."

I would like to submit the District Court's ruling in that matter, along with the 9th Circuit's order affirming sanctions against Mr. Peters for the record.

Mr. FRANKS. Without objection.

[The information referred to follows:]

H
Only the Westlaw citation is currently available.

United States District Court.
S.D. California.
Lynn J. HUBBARD and Barbara J. Hubbard,
Plaintiffs,
v.
YARDAGE TOWN, INC. dba Yardage Town;
Stancil G. Jones, Defendants.
YARDAGE TOWN, INC., Cross-Claimant,
v.
Stancil JONES, Cross-Defendant.

No. 05 CV 0104 IEG BLM.
Dec. 2, 2005.

Lynn J. Hubbard, III, Chico, CA, pro se, for Plaintiffs.

David Warren Peters, Lawyers Against Lawsuit Abuse, San Diego, CA, for Defendants and Cross-Claimant.

Kirk D. Hanson, Grace Hollis Lowe Hanson and Schaeffer, San Diego, CA, for Cross-Defendant.

REPORT AND RECOMMENDATION FOR ORDER GRANTING MOTION TO ENFORCE SETTLEMENT AGREEMENT [Doc. Nos. 23, 26]
ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND DEFENDANT STANCIL JONES' MOTIONS FOR SANCTIONS [Doc. Nos. 23, 26]

MAJOR, Magistrate J.

*1 On June 21, 2005, the Court conducted a Settlement Conference during which the parties settled their dispute. The terms of the settlement were stated on the record and all of the parties verbally agreed to the stated terms. Plaintiffs Lynn and Barbara Hubbard ("Plaintiffs") subsequently notified the court that Defendant Yardage Town Inc. ("Defendant Yardage Town") was not complying with the terms of the settlement and requested a hearing. The Court set a Settlement Disposition Conference for August 5, 2005.

On August 5, 2005 at the Settlement Disposition Conference, Plaintiffs and Defendant Stancil Jones ("Defendant Jones") advised the Court that defendant Yardage Town had violated the terms of the settlement by refusing to pay Plaintiffs the full settlement amount. Transcript of Settlement Disposition Conference at 10-11, 14 (hereinafter "SDC Transcript"). Pursuant to a special briefing schedule, on August 19, 2005, Plaintiffs and Defendant Jones filed motions to enforce the settlement and for monetary sanctions against David Peters, counsel for Defendant Yardage Town. As an additional sanction, Plaintiffs moved to have Mr. Peters declared a vexatious litigant. Doc. Nos. 23-30. Defendant Yardage Town and Mr. Peters filed an untimely opposition, which the Court accepted on September 7, 2005. Doc. Nos. 31-35. On September 15, 2005, Plaintiffs and Defendant Jones filed a reply [Doc. Nos. 37-38] and the Court took the matter under submission pursuant to Civil Local Rule 7.1(d)(1). Doc. No. 36.

On October 31, 2005, Defendant Yardage Town filed a Request for Judicial Notice. Doc. No. 41. On November 15, 2005, Plaintiffs filed a Response to Defendant's Supplemental Evidence. Doc. No. 42.

For the reasons set forth herein, this Court RECOMMENDS that Plaintiffs' and Defendant Jones' motion to enforce the settlement be GRANTED. Furthermore, for the reasons set forth below, this Court GRANTS IN PART AND DENIES IN PART Plaintiffs' and Defendant Jones' motion for sanctions.

I
FACTUAL BACKGROUND

Plaintiffs allege in their complaint that they are disabled within the meaning of the American with Disabilities Act ("ADA"). They claim that prior to

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January 17, 2005 they experienced difficulty in accessing a Yardage Town store due to numerous ADA violations on the premise, partially owned by Defendant Jones. Complaint at 3. Plaintiffs sought injunctive relief under California Civil Code Section 52, 55 and the ADA. Plaintiffs also sought statutory monetary damages under California Civil Code Section 52(a) or 54.3 and attorneys' fees. Complaint at 9-10.

II

SETTLEMENT HISTORY

On April 11, 2005, Plaintiffs notified the Court that the parties had settled the case on their own. As a result, the Court vacated the Early Neutral Evaluation Conference and set a Settlement Disposition Conference. Doc. No. 11. On May 17, 2005, Plaintiffs advised the Court that the parties were unable to finalize the terms of the settlement or fully execute the written settlement agreement. In response, the Court vacated the Settlement Disposition Conference and scheduled a Settlement Conference. Doc. No. 13.

***2** On June 21, 2005, the Court conducted a Settlement Conference. The parties reached a settlement during this proceeding and the terms of the settlement were recorded. Transcript of the Settlement Conference ("SC Transcript). As part of the settlement, Defendant Yardage Town agreed to pay $3,000 and Defendant Jones agreed to pay an additional $2,000 to Plaintiffs. *Id.* at 4-5. At the conclusion of the hearing, the parties confirmed on the record that they understood and agreed to the settlement terms. *Id.* at 9-10. The parties, including the Yardage Town representative, subsequently signed a written settlement agreement.[FN1] Declaration of Lynn Hubbard in Support of Plaintiffs' Motion to Enforce Settlement, and for Sanctions ("Hubbard Decl."), Exh. E.

FN1. None of the parties dispute that the written settlement agreement was signed by all parties and all counsel except Mr. Peters. However, the only copy submitted to the court contains only the signatures of Plaintiffs, Mr. and Mrs. Hubbard, Plaintiffs' counsel, Lynn Hubbard, and someone (apparently Dean Goldman) on behalf of Defendant Yardage Town. Hubbard Decl., Exh. E. On the submitted document, the signature line for David Peters, attorney for Defendant Yardage Town, was crossed out. *Id.*

On July 1, 2005, Mr. Peters apparently sent Plaintiffs a check for $1,320, rather than the agreed-upon $3,000, and advised that he would not provide the rest of the settlement money unless and until Plaintiffs executed a W-9 form. Hubbard Decl. at 3. The parties exchanged letters in an effort to resolve this impasse but were unsuccessful. On July 13, 2005, Plaintiffs advised the Court that they were unable to finalize the settlement documents. As a result the Court scheduled a Settlement Disposition Conference for August 5, 2005.

On August 5, 2005, Defendant Yardage Town and Mr. Peters argued that they could not legally comply with the settlement because the terms, which they had agreed to during the settlement conference, violated the law. The Court advised counsel that Defendant Yardage Town and Mr. Peters were violating the terms of the settlement and that Mr. Peters appeared to be doing so in violation of his client's desires and without supporting legal authority. The Court permitted Plaintiffs and Defendant Jones to file motions relating to Mr. Peters' and Defendant Yardage Town's conduct.

A. *The Settlement Conference*

On June 21, 2005, the Court conducted a settlement conference. Lynn Hubbard, III appeared with his clients, Plaintiffs Lynn J. and Barbara J. Hubbard. Robert Walters and Dan Buoye appeared for Defendant Jones. Mr. Buoye was the property and business manager for Defendant Jones and stated that he had full settlement authority. David Peters and Dean Goldman appeared for Defendant Yardage Town. Mr. Goldman stated that he was Defendant Yardage Town's secretary and that he had full settlement authority. SC Transcript at 1-3. The

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parties settled this case during this conference. The terms of the settlement were placed on the record.

Initially, the Court advised the parties that they should listen carefully to the statement of the settlement terms because if all of the parties agreed on the record to the settlement terms, then the settlement as stated would be binding. *Id.* at 2. The clients confirmed that they understood that the settlement would be binding. *Id.* at 2-3. Mr. Hubbard then stated the terms of the settlement:

> ***3** HUBBARD: Yes. Your Honor, as to Defendant. Stancil Jones and Yardage Town, they are going to evaluate their facility and make the necessary changes, that are readily achievable, to bring up to the ADAG (phonetic) and California Title 24 standards within 24 months. In addition, they are going to pay a total sum of $14,000, which will compensate the Plaintiffs for any and all damages.
>
> The Court: All right.
>
> HUBBARD: I probably should put on the record that the Plaintiffs have already reviewed the document that was signed today by Yardage Town and approved as the form, as has my office and has Mr. Jones and attorney Robert Walters.
>
> The Court: All right. And when you talk of "that document" that's the settlement agreement?
>
> HUBBARD: That is the settlement agreement.
>
> *Id.* at 3-4.

Mr. Walters stated that he agreed with the settlement terms as stated by Mr. Hubbard with a few additions. *Id.* at 4. He then clarified several terms including that Defendant Jones and another defendant, K & K Lumber Corporation, already had paid $9,000 to Plaintiffs so to reach the $14,000 figure stated by Mr. Hubbard, Defendant Jones and Defendant Yardage Town only had to pay an additional $5,000. *Id.* at 4-5. Mr. Walters stated that as part of this additional settlement, Defendant Jones was going to pay an additional $2,000 and Defendant Yardage Town was going to pay $3,000. *Id.* at 5. Mr. Hubbard confirmed that clarification and that the settlement figure included all attorney's fees to date. *Id.* at 5-6.

The Court then asked Mr. Peters if he agreed with the stated settlement terms. *Id.* at 6. Mr. Peters replied as follows:

> PETERS: I agree with that. I object to the form and content of the document.
>
> The Court: What do you mean by that, sir?
>
> PETERS: In my opinion, it doesn't appear to comply with the clerk [sic] of the law, therefore I cannot endorse it, as attorney for Yardage Town, but I am here representing Yardage Town in other capacities.
>
> The Court: Have you made your concerns known to your client?
>
> PETERS: Yes, I have, your Honor.
>
> The Court: And, is your client-still want to go forward with the settlement?
>
> PETERS: Under protest and with no other option, my client is willing to proceed.
>
> The Court: Okay, well, it's not-he does have other options, Counsel.
>
> PETERS: I understand.
>
> The Court: I think you're aware of that. So, is it your understanding that your client wishes to go forward, having been advised of your concerns, with regard to the settlement agreement?
>
> PETERS: That is my understanding, your Honor.
>
> The Court: Do you have-you have stated your objection to the settlement agreement. Do you disagree with the terms, as stated by the-the two attorneys before you?

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PETERS: I do not disagree with their characterization. Although I would think the written document would govern if there was any disparity between their description of it and the actual document itself.

*4 The Court: Okay.

PETERS: And, I would also confirm that it's a document of-how many pages, Bob? A total of?

WALTERS: Eight pages.

PETERS: Eight pages.

The Court: Okay. So there is an eight page document. I would again note for the record that the other two parties will [sic] willing to proceed forward just on the written document and it was you, Counsel, that was unwilling to go forward just on the written document, and required this to be put on the record. So, do all-do the other two attorneys agree that this document-the title of it, Counsel?

WALTERS: "Settlement Agreement and Release in Full."

The Court: But that is the document that is binding in this case if there's a dispute among the parties. Do you agree to that, Mr. Hubbard?

HUBBARD: I do.

The Court: Mr. Peters?

PETERS: I do.

The Court: I'm sorry, and, Mr. Walters?

WALTERS: I do.

Id. at 6-8.

The Court then asked the parties if they understood the terms of the settlement and if each agreed to be bound by them. All of the parties replied affirmatively. *Id.* at 9-10. The Court specifically asked Defendant Yardage Town's representative, Mr. Goldman, if he understood that his "attorney disagrees with the language of the settlement and has recommended to you that you not enter into this agreement." *Id.* at 10. Mr. Goldman confirmed that he understood his attorney's objection and stated that he still wanted to settle the case on the stated terms. *Id.* The settlement agreement was then finalized. Hubbard Decl., Exh. E; Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Enforce Settlement, and for Sanctions ("Plaintiffs' Memo."), p. 6; Memorandum of Points and Authorities in Support of Defendant/Cross-Defendant Stancil Defendant Jones' Motion for Sanctions ("Jones' Memo."), p. 2.

B. *Written Settlement Agreement*

The written settlement agreement clearly states that "[t]he Settlement Payment shall be made payable to the Law Offices of Lynn Hubbard Trust Account (Federal Taxpayer Identification Number XXXXX [FN2]) and tendered to the Law Offices of Lynn Hubbard within ten (10) days from the date Plaintiff executes this Agreement." Hubbard Decl., Exh. E, 2.1. The parties further stipulate that "Plaintiff takes complete responsibility for any tax liability from the receipt of any settlement monies under this Agreement. An IRS 1099-MISC will be issued to the Law Offices of Lynn Hubbard for the payments contained in paragraph 2.1." *Id.* at 2.2.

FN2. The actual taxpayer identification number is provided in the settlement agreement but, for privacy reasons, the Court declines to include it in this order.

C. *Settlement Disposition Conference*

Prior to the Settlement Disposition Conference, Plaintiffs advised the Court that Defendant Yardage Town was unwilling to pay the entire $3,000 to Plaintiffs. During the conference, the Court asked Mr. Peters to explain the situation. Mr. Peters acknowledged that the settlement agreement required Defendant Yardage Town to pay $3,000 to Plaintiffs and that his client had given him the entire $3,000. SDC Transcript at 2, 4, 18-20.

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However, Mr. Peters argued that he had consulted numerous authorities [FN3] and that settlement payments must be made to both the attorney and the Plaintiffs and that, since Plaintiffs were unwilling to provide their individual social security numbers, he could not pay the full amount. *Id.* at 2-6. When questioned, Mr. Peters stated that he had not discussed with his client, Mr. Goldman, his decision not to pay Plaintiffs the full settlement amount. *Id.* at 5. Mr. Peters stated that he had "discussed it briefly" with another client representative, Mr. Recht, but that it was Mr. Peter's opinion that the law required him to withhold the money so he did not need his client's approval. *Id.* at 5-7, 16-17. Mr. Goldman then confirmed that it was his intention to settle the case in accordance with the settlement agreement, which required the money to be paid to Plaintiffs and acknowledged that any tax liabilities were the sole responsibility of Plaintiffs. *Id.* at 5-8. Mr. Goldman also confirmed that Mr. Peters' reservations or concerns about the tax consequences had been raised at the settlement conference and that Mr. Goldman entered into the settlement agreement anyhow, intending to settle the case in accordance with the written and verbal settlement agreement. *Id.* Mr. Peters reiterated that it was his belief that the IRS law required him to withhold money from the payment and that otherwise his client could face "penalties, including felonies and misdemeanors." *Id.* at 9. However, Mr. Peters admitted that he currently did not have an IRS opinion or other legal authority supporting his position, nor did he have such opinion at the time he made the decision to withhold the money. *Id.* at 7-11.

FN3. Counsel represented that he had spoken with two IRS attorneys, an IRS agent, and a tax attorney, and consulted a tax web site. SDC Transcript at 3. However, Mr. Peters never provides the court with a declaration or affidavit from any tax authority supporting or justifying his position or arguments.

*5 Mr. Walters then expressed his outrage at the way Mr. Peters had handled this case and explained the additional costs that his client had incurred as a result of Mr. Peters' conduct. *Id.* at 11-15.

III

DISCUSSION

Plaintiffs and Defendant Jones move to enforce the settlement agreement, arguing that all of the parties, including Defendant Yardage Town, entered into a valid settlement agreement and that Mr. Peters, apparently without Defendant Yardage Town's knowledge or consent, refused to honor the terms of that settlement. Plaintiffs' Memo. at 4-12; Jones' Memo. at 1-6.

Mr. Peters and Defendant Yardage Town argue that they did not breach the terms of the settlement agreement because the law required them to withhold 28% of the settlement when the individual Hubbards failed to provide Defendant Yardage Town with their social security numbers in accordance with the W-9 forms provided to Plaintiffs by Mr. Peters. Opposition of Defendant Yardage Town to Motions for Sanctions and to Enforce Settlement Agreement ("Opposition"). While counsel implicitly acknowledges that the settlement agreement required Yardage Town to pay the full $3,000 to the Hubbard Law Firm and to issue a 1099-MISC, counsel argues that his interpretation of the law prohibits him from complying with those provisions.[FN4] *Id.*

FN4. Mr. Peters claims that because the payment did not fall into one of the exceptions, e.g. personal injury, under IRC § 61 and § 62, "income from all sources is taxable and must be reported." Opposition at 6. Mr. Peters claims that the mere fact that Plaintiffs are asking for compensation for personal injuries is not wholly determinative of the characterization of payment. *Id.* Thus, Mr. Peters believes it is his duty to withhold 28 percent of the payment and report it to the IRS. *Id.* at 5-7.

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Plaintiffs and Defendant Jones also move for sanctions based on Mr. Peters' conduct relating to the settlement in this case. The moving parties argue that they incurred significant additional expenses as a result of Mr. Peters' refusal to comply with the settlement terms. The parties point out that Mr. Peters has failed to provide any law supporting his position and has failed to provide any evidence proving that his client supported his conduct. Plaintiffs' Memo at 6-12; Jones' Memo at 2-4; Plaintiffs' Reply in Support of Plaintiffs' Motion to Enforce Settlement, and for Sanctions ("Plaintiffs' Reply") at 4-5; Reply to Opposition of Defendant/Cross-Complainant Yardage Town, Inc., to Defendant/Cross-Defendant Stancil Jones' Motion for Sanctions ("Jones Reply") at 2-4. While Mr. Peters does not directly oppose either party's motion, he implicitly argues that he has not done anything wrong so sanctions would be inappropriate. Opposition at 2-30.

Finally, as an additional sanction, Plaintiffs move to have Mr. Peters declared a vexatious litigant. Again, Mr. Peters does not directly oppose this motion but merely argues that everything he did was proper and that Mr. Hubbard was the attorney acting inappropriately. *Id.*

A. *Motion to Enforce Settlement*

Plaintiffs and Defendant Jones seek an order enforcing the settlement. Settlement enforcement is appropriate under the court's inherent powers. *In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 957 (9th Cir.1994); *Doi v. Halekulani Corporation*, 276 F.3d 1131, 1136-38 (9th Cir.2002). In order for a settlement agreement to be enforced it must meet two elements. *Marks-Foreman v. Reporter Pub. Co.*, 12 F.Supp. 1089, 1092 (S.D.Cal.1998). First, the settlement agreement must be complete. *Id. citing Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir.1994); *Doi*, 276 F.3d at 1137. Second, the settlement agreement must be the result of the parties or their authorized representatives agreeing upon the terms of the settlement. *Marks-Foreman*, 12 F.Supp. at 1092 *citing Harrop v. Western Airlines, Inc.*, 550 F.2d 1143, 1144-45 (9th Cir.1977); *Doi*, 276 F.3d at 1137-38. When an objection to a settlement term is raised after a settlement is agreed upon by the parties, the court may rightfully deny such objections. *Harrop*, 550 F.2d at 1144.

***6** Here, the challenged settlement satisfies both elements. First, the settlement agreement was complete. The parties stated the terms of the settlement on the record after the court-conducted settlement conference. SC Transcript at 3-8. Moreover, there is a written settlement agreement allegedly signed by all parties and counsel, except Mr. Peters, and the copy provided to the Court clearly establishes that Defendant Yardage Town and Plaintiffs signed the agreement.[FN5] Hubbard Decl., Exh. E. In addition, Mr. Peters specifically stated that the written settlement agreement would control any disputes between the parties as to the settlement terms. SC Transcript at 7. Both the written settlement agreement and the verbal recitation of the settlement set forth all of the material terms of the settlement. Accordingly, the first element, a complete settlement agreement, is satisfied.

FN5. See footnote 1 for explanation regarding the signatures on the settlement agreement.

The second element requires that the settlement be the result of an agreement by the parties or their authorized representatives. In this case, the parties did reach an agreement on the terms of the settlement. First and foremost, the terms of the agreement are set forth in the written settlement agreement, signed by Defendant Yardage Town's authorized representative, Mr. Goldman. Hubbard Decl., Exh. E. Second, the essential terms were placed on the record at the conclusion of the settlement conference and Defendant Yardage Town's authorized representative agreed. SC Transcript at 8. Third, Defendant Yardage Town's agreement was voluntary and knowing. Mr. Peters advised his client of his concerns regarding the form and language of the settlement agreement before the case was settled. SC Transcript at 6-7; SDC Transcript at 17-20. Mr.

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Goldman, Defendant Yardage Town's representative, confirmed on the record that counsel had advised him not to sign the settlement agreement but that he wanted to settle the case and was going to execute the settlement agreement, agreeing to the disputed terms, despite counsel's advice. SC Transcript at 10; SDC Transcript at 6-7. Accordingly, the undisputed evidence establishes that Defendant Yardage Town knowingly and voluntarily agreed to the settlement terms.

The facts of this case clearly establish that the parties (Plaintiffs, Yardage Town and Jones) reached an enforceable settlement agreement and that Mr. Peters independently breached the agreement. In his opposition, Mr. Peters never addresses the fact that the parties had agreed to settlement terms or the standard for enforcing a settlement agreement. Rather, Mr. Peters merely reargues his position that public policy and IRS tax law require him to withhold the money and that the Hubbards engage in unfair, extortionate litigation. Opposition at 3-30. This is insufficient. First, Mr. Peters has not provided binding, or even persuasive, authority that he is "required" to withhold the money. Second, Mr. Peters took the contested action without discussing it with his client or obtaining his client's authorization, even though he knew that his client previously had chosen to disregard his advice and enter into the settlement.

*7 During the settlement conference, Mr. Peters stated that he objected to the form and content of the agreement but he did not provide any authority for his position. SC Transcript at 6. During the Settlement Disposition Conference, Mr. Peters stated that he had spoken with several IRS attorneys and opined that they would support his position. SDC Transcript at 3. However, Mr. Peters did not provide a declaration or other statement from an IRS attorney. Mr. Peters explained that he expected to receive such a letter on August 26, 2005. *Id.* In his opposition filed on September 2, 2005, Mr. Peters again failed to provide the anticipated IRS letter, upon which he allegedly premised his decision not to comply with the settlement terms. Finally, on October 31, 2005, Mr. Peters filed a request for judicial notice attaching several documents including a letter from the IRS. Request by Defendant Yardage Town for Judicial Notice ("Request"), Exh. A. Notably, this letter does not fulfill any of the predictions made by Mr. Peters. The letter merely sets forth general rules governing what constitutes gross income and the taxpayer's responsibilities regarding reporting gross income. *Id.* The letter specifically states "[w]hether a recovery under the ADA is excludable from gross income under § 104(a)(2) of the code is beyond the scope of this letter." *Id.* The letter also provides general information regarding reporting requirements. *Id.* The letter does not, however, address the reporting or withholding obligations of a defendant who is paying money to a plaintiff to settle a case. *Id.* The letter, while interesting and informative, does not support Mr. Peters' novel idea that he was required to breach the settlement agreement and withhold 28% of the settlement payment in the instant factual situation. *Id.*

In his pleadings and oral argument, Mr. Peters argued that *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 125 S.Ct. 826, 160 L.Ed.2d 859 (2005), mandated the withholding. Counsel is wrong. In *Banks*, the Supreme Court held that a taxpayer must include in his gross income, the portion of a taxable recovery that the taxpayer paid to his attorney as part of a contingent fee arrangement. *Id.* at 831-34. However, *Banks* does not address the obligations of the party who paid the litigation settlement. *Id.* As set forth in the IRS letter submitted by Mr. Peters,

> [w]hether settlement proceeds are excludable from gross income as damages received on account of personal injuries or physical sickness is, in part, a factual question. In reaching this determination, courts look at the settlement agreement in light of all the surrounding circumstances. Neither the courts nor the Commissioner are bound by the terms of a settlement agreement

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between third parties that is not the result of good faith, adversarial, arms-length negotiations. A court may look at the allegations of the complaint to determine whether the claims to which the proceeds are allocated in the settlement agreement are claims for personal physical injuries or physical sickness. The mere mention of "personal physical injuries" in a complaint does not, by itself, serve to bring a recovery within the exclusion.

***8** Request at Exh. A, p. 2. The IRS continued that "[w]hether a recovery under the ADA is excludable from gross income under § 104(a)(2) of the code is beyond the scope of this letter[.]" *Id.* Neither *Banks* nor the IRS informational letter submitted by Mr. Peters justifies Mr. Peters' argument that he was required to withhold 28% of the settlement figure. Accordingly, this Court finds that Mr. Peters did not have a legal obligation to withhold part of the settlement payment.

Second, Mr. Peters withheld a portion of the settlement proceeds in violation of his client's wishes. During the settlement conference, Mr. Peters explained his concerns regarding the form of the settlement to his client. At the conclusion of the conference, when the terms were stated on the record, Mr. Peters again voiced his concerns as to the "form and content" of the settlement agreement. SC Transcript at 6. The Yardage Town representative, Dean Goldman, stated that he understood his attorney's concerns and advice not to settle but wanted to settle in accordance with the settlement agreement anyhow. *Id.* at 6-8. Mr. Goldman signed the written settlement agreement. Hubbard Decl. at Exh. E. After the settlement conference, Defendant Yardage Town forwarded the full $3,000 to Mr. Peters with the expectation that the money would be paid to Plaintiffs. SDC Transcript at 6-7.

During the Settlement Disposition Conference, Mr. Peters acknowledged that his client had given him the entire $3,000 payment and that he independently decided to withhold the money. *Id.* at 20. Mr. Peters admitted that he had not discussed this tactic with Mr. Goldman, the Yardage Town representative who attended both the Settlement Conference and the Settlement Disposition Conference. *Id.* at 5. Mr. Peters asserted that he had "discussed it briefly" with another client representative, Mr. Recht. *Id.* However, in his Opposition and supplemental briefing, Mr. Peters did not provide a declaration from Mr. Recht, or any other Yardage Town representative, stating that he or she authorized Mr. Peters to violate the terms of the settlement agreement and withhold a portion of the $3,000 settlement payment.

For the reasons set forth above, the Court finds that there was a valid and enforceable settlement reached by the parties and that one provision required Defendant Yardage Town to pay $3,000 to Plaintiffs using their lawyer's trust account tax ID number. Hubbard Decl., Exh. E; *see Doi*, 276 F.3d at 1137-38 (finding a binding settlement agreement where terms of agreement were placed on the record and the party replied "yeah" when asked if she agreed with the terms). The Court further finds that Mr. Peters, counsel for Defendant Yardage Town, chose to violate material terms of the settlement by refusing to forward to Plaintiffs the full settlement payment made by his client. The Court concludes that counsel took this action without his client's authorization and in violation of the client's expectation that the full $3,000 would be paid to Plaintiffs. The Court also determines that Mr. Peters took this action despite his knowledge that his client had rejected his concerns and recommendation and had explicitly agreed to the settlement. Finally, the Court finds that since Mr. Peters did not have at the time of the settlement, at the time of the withholding, or at the time of any of the relevant court proceedings an opinion or other legal document mandating his position, Mr. Peters did not have a legal or factual basis for his conduct in violating the settlement.[FN6]

FN6. For the reasons set forth above, the Court also finds that the IRS opinion letter submitted by Mr. Peters does not justify

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his conduct. However, for purposes of this motion, the Court focuses on the fact that Mr. Peters chose to violate the terms of the settlement without any factual or legal basis; he merely had his belief (or hope) that the IRS would supply such support. This is insufficient.

***9** Accordingly, this Court RECOMMENDS that Plaintiffs' and Defendant Jones' motion to enforce the settlement be GRANTED.

B. *Sanctions*

A court has the power to issue sanctions under Rule 11 of the Federal Rules of Civil Procedure, Title 28 U.S.C. § 1927, and its inherent authority.

Rule 11(b) says:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonably under the circumstances, -

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to 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 a lack of information or belief.

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

Case law has established that sanctions must be imposed if the pleading or other paper is (a) filed for an improper purpose or (b) is "frivolous." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir.1990). Rule 11 standards of improper purpose and frivolousness should be viewed in light of an objective standard. *Id.* The court can impose sanctions for frivolousness if the filing is both "baseless" and made "without reasonable and competent inquiry." *Id.; In re: Keegan Mgmt. Co., Securities Litig.*, 78 F.3d 431, 434 (9th Cir.1996). Finally, Rule 11 does not require a finding of bad faith. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Rule 11(c) allows for "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" as requested in a motion. Fed.R.Civ.P. 11(c)(2); *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir.1998).

Section 1927 provides that "[a]ny attorney ... who so multiples 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." *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir.1989). The bad faith element is satisfied when an "attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *West Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1528 (9th Cir.1990).

***10** Finally, the court also may issue sanctions under its own inherent power. District courts have inherent power to impose sanctions even where the bad faith conduct also may be sanctioned under statutes or rules. *Chambers*, 501 U.S. at 45. These

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powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* When the court imposes sanctions under its inherent power, there must be some showing that the party acted willfully or in bad faith. *Id.* at 43.

The court's inherent power also includes imposing the less-severe sanction of assessment of attorneys' fees. *Id.* at 45. The court may assess attorneys' fees in three cases (1) "the common fund exception" where litigation directly benefits others (2) "willful disobedience of a court order" and (3) when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45-46 *quoting Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The third case, the bad-faith exception, resembles Rule 11's certification requirement, which requires a signer of a paper to ensure that the paper is not for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. *Id.* at 46.

Plaintiffs and Defendant Jones request sanctions based on Mr. Peters' repeated and unjustified interference with the parties' efforts to finalize the settlement. Plaintiffs request sanctions under § 1927 and the court's inherent authority and Defendant Jones requests sanctions under Rule 11(b) and (c). Each party requests sanctions in the amount of fees and costs the party incurred while attempting to force Mr. Peters to comply with the terms of the settlement. Jones Memo. at 5; Plaintiffs' Memo. at 13-14.

Here, the Court finds that the imposition of sanctions against Mr. Peters and in favor of both Plaintiffs and Defendant Jones is appropriate under all three legal authorities because Mr. Peters acted intentionally, in bad faith, for an improper purpose, and with an intent harass the Plaintiffs. Moreover, Mr. Peters' settlement withholding and legal papers, pleadings and arguments are without legal foundation or merit and he unreasonably and vexatiously multiplied the litigation, which resulted in excess costs, expenses, and attorneys' fees to the other litigants. As discussed at length above, Mr. Peters knew that his client had chosen to disregard his advice and enter into the settlement which required Defendant Yardage Town to pay $3000 to Plaintiffs, regardless of any potential tax concerns. Despite this knowledge, Mr. Peters, without his client's consent or even knowledge, decided not to comply with the valid settlement. Mr. Peters attempts to argue that he was "required" to take the disputed conduct. However, the "law" that he cites in support of his position was not available to him at the time he made his decision to violate the settlement terms or at the time of the settlement disposition conference. Moreover, the IRS opinion letter ultimately submitted did not live up to Mr. Peters' representations and did not support his arguments of conduct. Mr. Peters chose to violate the valid settlement, requiring the parties to engage in extended, expensive and unnecessary litigation, without his client's knowledge and without legal justification. This is the essence of frivolous and bad faith litigation and the imposition of sanctions against Mr. Peters is warranted.

***11** Mr. Peters argues that he was required to engage in the disputed conduct. However, his opposition brief is very revealing. First, Mr. Peters never addresses the fact that his client agreed to the settlement terms. Rather, Mr. Peters reargues the inequities in the instant case and again asserts that the Plaintiffs and Plaintiffs' counsel are frequent litigators who need to be stopped.[FN7] While this issue may properly be raised in another forum or case, it is not relevant to the instant situation, where Defendant Yardage Town voluntarily and knowingly entered into the settlement. Second, Mr. Peters argues that he was required to withhold the money but he never provided legal authority for his position. Mr. Peters repeatedly stated that he had spoken with an IRS chief and tax lawyer who advised him that his position was correct. However, he never provided an affidavit from these individuals. Moreover, the IRS letter, which Mr. Peters' re-

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peatedly said would prove his point, merely is a general opinion, not tailored in any way to the facts of this case. And, significantly, it does not address the payer's withholding and reporting responsibilities and, therefore, is irrelevant to the instant dispute.

FN7. A review of Mr. Peters' oral arguments and his written submissions reveals that he routinely failed to address the relevant legal issues. Rather, he repeatedly, and at length, restates and reargues his position that the Hubbards file numerous and frivolous lawsuits, that attorney Lynn Hubbard engages in unethical litigation tactics and that all of the Hubbards are engaged in a scheme to defraud the tax authorities. However, these issues, valid or not, are not relevant to the instant case. In this case, the parties, including Mr. Peters' client, reached a settlement. Mr. Peters responsibility was to support and advance his client's settlement desire, not his personal beliefs regarding ADA litigation.

As set forth above, Mr. Peters acted with an improper purpose when he refused to forward all of the settlement money and vigorously litigated his right to do so. The evidence also establishes that Mr. Peters unreasonably and vexatiously multiplied the court proceedings. Mr. Peters willfully and intentionally engaged in this inappropriate conduct in an effort to harass the Plaintiffs because he disapproves of their ADA litigation tactics. And, he engaged in this conduct without any legal basis for his arguments, just the unfounded anticipation of a supporting IRS opinion. The totality of the circumstances establishes bad faith, improper purpose and frivolousness. Sanctions against Mr. Peters are appropriate. *See Doi,* 176 F.3d at 1140 (affirming the imposition of sanctions where litigant refused to sign written settlement agreement after verbally settling case).

Plaintiffs request sanctions in the amount of $10,866.78. Plaintiffs' Memo. at 14; Hubbard Decl. at 8-11, Exhs. R and S. The requested sanction figure is based upon the additional expenses that Plaintiffs incurred after the June 21st settlement conference as a result of Mr. Peters' conduct. *Id.* The figure consists of $8,936.75 in attorney and staff hours and $1930.03 in other expenses. *Id.* The Court finds that the described work was reasonable and necessary, given Mr. Peters' conduct, and directly attributable to Mr. Peters' conduct.

Defendant Jones request sanctions in the amount of $4,280.00 for the additional work that Mr. Walters, counsel for Defendant Jones, had to perform as a result of Mr. Peters' conduct.[FN8] Jones' Memo. at 5-6. Defendant Jones is not requesting reimbursement for any expenses, just the billable hours for the work that Mr. Walters was required to perform as a result of Mr. Peters' refusal to comply with the settlement agreement. *Id.* The Court finds that the described work was reasonable and necessary and directly attributable to Mr. Peters' actions.

FN8. Defendant Jones' memorandum describes the additional work that Mr. Walters was required to perform as a result of Mr. Peters' refusal to comply with the settlement agreement. Jones' Memo. at 5-6. The listed work totals $3,280.00. *Id.* The Court assumes that the additional $1,000 requested is due to the work that Mr. Walters had to perform in preparing Defendant Jones' motions and reply. This amount is less than the amount requested by Plaintiffs for preparing their pleadings. Accordingly, the Court finds that the requested amount of $4,280.00 is reasonable and directly attributable to Mr. Peters' conduct.

***12** Mr. Peters does not dispute the amount of the sanctions requested by the parties. Opposition; Declaration of Attorney David Peters in Opposition to Motions for Sanctions by Plaintiffs and Defendant Jones.

For the reasons set forth above, the Court finds

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it appropriate to sanction Mr. Peters' for his frivolous litigation, for needlessly increasing the litigation costs, and for engaging in litigation in bad faith and for an improper purpose. The Court sanctions Mr. Peters by requiring Mr. Peters to reimburse Plaintiffs' counsel and Defendant Jones' counsel for the additional costs they incurred in responding to Mr. Peters' refusal to comply with the settlement terms. Mr. Peters is ordered to pay $10,866.78 to Mr. Lynn Hubbard and $4,280.00 to Mr. Walters. Mr. Peters must transmit these funds to Mr. Hubbard and Mr. Walters by December 16, 2005 and must file a written declaration with the Court by December 23, 2005 confirming that the payments have been made. Plaintiffs' and Defendant Jones' motions for monetary sanctions are GRANTED.

C. *Vexatious Litigant*

As an additional sanction, Plaintiffs seek an order declaring Mr. Peters to be a vexatious litigant. To declare someone a vexatious litigant, the court must evaluate both the "number of and content of the filings as indicia" as to the frivolousness of the claims. *De Long v. Hennessey,* 912 F.2d 1144, 1148 (9th Cir.1990). However, an attorney appearing for and representing a client "cannot be sanctioned as a vexatious litigant; by definition, he or she is acting as an attorney and not a litigant." *Weissman v. Quail Lodge, Inc.,* 179 F.3d 1194, 1197 (9th Cir.1999). Because Mr. Peters has appeared throughout these proceedings as an attorney representing Defendant Yardage Town, not as a litigant, he cannot be sanctioned as a vexatious litigant. *Id.* Accordingly, Plaintiffs' motion for sanctions that Mr. Peters be declared a vexatious litigant is DENIED.

CONCLUSION

As set forth above, Plaintiffs' and Defendant Jones' motions for sanctions are GRANTED IN PART AND DENIED IN PART. Their motions for monetary sanctions are GRANTED. Mr. Peters, counsel for Defendant Yardage Town, is ordered to pay monetary sanctions to Plaintiffs' counsel in the amount of $10,886.78 and to Defendant Jones' counsel in the amount of $4280.00. Mr. Peters is required to make these payments so the money is received by counsel by the close of business on December 16, 2005. By December 23, 2005, Mr. Peters is required to file a declaration with the Court confirming that the required payments were made, with a copy to be served on all counsel.

Plaintiffs' Motion to Sanction Mr. Peters as a vexatious litigant is DENIED.

This Court RECOMMENDS that Plaintiffs' and Defendant Jones' Motions to Enforce the Settlement be GRANTED. If Defendant Yardage Town does not file an objection to this Recommendation, it must forward the remanding settlement money to Plaintiffs' counsel so it is received by the close of business on December 16, 2005. Any written objections to this Recommendation must be filed with the Court and served on all parties no later than *December 16, 2005.* The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be filed with the Court and served on all parties no later than *December 30, 2005.* The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *Turner v. Duncan,* 158 F.3d 449, 455 (9th Cir.1998).

***13** IT IS SO ORDERED.

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H
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.
Lynn J. HUBBARD; et al., Plaintiffs-Appellees,
v.
YARDAGE TOWN INC., dba Yardage Town, Defendant-cross-claimant-Appellant.

No. 06-55802.
Submitted Sept. 8, 2008.[FN*]

FN* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Filed Sept. 26, 2008.

Lynn Hubbard, III, Disabled Advocacy Group, APLC, Chico, CA, for Plaintiffs-Appellees.

David W. Peters, Esq., Lawyers Against Lawsuit Abuse, APC, San Diego, CA, for Defendant-cross-claimant-Appellant.

Appeal from the United States District Court for the Southern District of California, Irma E. Gonzalez, Chief Judge, Presiding. D.C. No. CV-05-00104-IEG.

Before: TASHIMA, SILVERMAN, and CALLAHAN, Circuit Judges.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

*1 Defendant's attorney David Warren Peters appeals from the district court's orders sanctioning him pursuant to 28 U.S.C. § 1927. We review for an abuse of discretion a district court's imposition of section 1927 sanctions. *Pacific Harbor Capital, Inc. v. Carnival Air Lines,* 210 F.3d 1112, 1117 (9th Cir.2000). We affirm.

The district court did not abuse its discretion in awarding sanctions in this case because Peters needlessly multiplied the litigation by refusing to comply with the parties' settlement agreement. *See* 28 U.S.C. § 1927 (permitting the district court to sanction an attorney who "multiplies the proceedings in any case unreasonably and vexatiously"); *B.K.B. v. Maui Police Dep't.,* 276 F.3d 1091, 1107 (9th Cir.2002) ("[S]ection 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.") (internal citation, quotation marks, and emphasis omitted).

AFFIRMED.

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Mr. NADLER. Thank you. This makes clear that the courts can and do handle complaints about attorney misconduct, and the notion that the mere filing of lawsuits alleging noncompliance with the ADA is itself an indicator of bad faith or frivolous litigation should be rejected. Indeed, as courts that have imposed sanctions against vexatious litigants have been careful to recognize, given the fact of widespread noncompliance with the ADA, lawsuits themselves are not an evil to be avoided, but the only way of enforcing the ADA and, thus, of achieving its goals.

As the 9th Circuit said in *Mosley v. Evergreen Dynasty*, "For the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation, advancing the time when public accommodations will be compliant with the ADA."

To the extent that continued noncompliance with the ADA is leaving businesses vulnerable to litigation, the appropriate solution is to beef up technical assistance or otherwise determine what more is needed to ensure affirmative voluntary compliance. We should not enact legislation like H.R. 3356, which seeks to excuse every public accommodation whether large or small, and even when knowingly and deliberately violating the law, from taking any steps to comply with the law until and unless it receives a specific enough demand letter.

With that, I look forward to hearing from our witnesses and yield back the balance of my time.

Mr. FRANKS. Thank you, Mr. Nadler. And without objection, other Members' opening statements will be made part of the record.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on the Constitution

Today we revisit the question of enforcement of the Americans with Disabilities Act. Although we have long had a bipartisan consensus in favor of vigorous ADA enforcement—going back to the administration of the first President Bush—the legislation we will examine today would undermine the most effective enforcement mechanism Congress created: the private right of action.

We have been through this before. I have had to sit though numerous hearings in which some members have ignored the widespread non-compliance with the ADA and the exclusion of persons with disabilities from too many places in our society, and instead preoccupy themselves with the complaints of businesspeople who, by their own admission, have violated the law.

We live in a topsy-turvy world, and the rights of those least able to defend their rights, rather than the law-breakers, have become the target. That's wrong.

Compliance with the ADA is largely voluntary. While the Justice Department does have enforcement power, it lacks the resources to reach the many facilities that are out of compliance, and the law grants them the power to enforce the act in a limited number of cases.

As a result, according to the National Council on Disability, "many public accommodations are not in compliance with Title III and are not, in fact, accessible."

Too many businesses are simply unwilling to comply with the law, which requires businesses to remove architectural barriers that are "structural in nature, in existing facilities . . . where such removal is readily achievable." The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." This "readily achievable" standard has been the governing legal principle for increasing access to existing facilities since the ADA's passage 22 years ago. It ensures that, rather than having a one-size-fits-all requirement, businesses have flexibility to determine what steps are possible based on their size and

resources and the prospective cost of an improvement. A small, family-owned business does not have to take the same steps as a large commercial chain.

I recall that businesses fought for this standard during passage of the ADA because of its flexibility; with flexibility also comes responsibility for determining, with guidance and rules from DOJ, what steps are possible.

After 22 years, the fact that many businesses have not undertaken that basic step is simply intolerable, and legislation that would further undermine the promise of the Americans with Disabilities Act is simply unacceptable.

As we discuss this issue, I hope we can keep these points in mind.

First, providing property owners with this kind of get-out-of-jail free card simply means that they can ignore the law with impunity. If they ever are caught, they can simply do what they should have done all along. There is absolutely no down side to failing to comply. You will more than likely get away with it—as the report of the National Council on Disability and other research on non-compliance demonstrate—and if you get caught, your only cost is to comply.

Second, this legislation is unnecessary. The much-touted problem of "drive-by law suits" is overblown. To the extent that it is a problem, it is limited to a few states that allow for monetary damages. That is an issue for the states with those laws, and does not demand radical changes to the ADA.

Many of the examples of fraudulent suits and other misconduct has nothing to do with the ADA or with the notification law. Those are problems that can come up in all civil litigation, and are not limited to ADA cases. Existing law does, however, provide remedies when parties lie, or engage in abusive conduct.

When faced with this problem courts have sanctioned parties found to be "vexatious litigants," have refused to award attorneys fees where a lawyer failed to serve a defendant with a demand letter prior to filing suit, and have dismissed cases for a lack of standing where the plaintiff cannot allege harm.

It is, again, not a question of notification, but of enforcing the basic rules governing conduct in all civil cases as the attorneys on the panel are, no doubt, well aware.

Third, there are ample resources to assist those businesses that genuinely want to comply with the law. There are substantial tax credits and deductions—up to 50% in credits for eligible expenditures to increase accessibility in a year, up to a maximum each year of $10,250. Section 190 of the Internal Revenue Code provides a tax deduction of up to $15,000 per year for removal of architectural barriers. Small businesses can use these incentives in combination if they qualify under both sections.

The Justice Department, as well as many state and local governments, and nongovernmental organizations, provide technical assistance so that those who, in good faith, wish to comply, can do so. Compliance with the law should not be a guessing game. The point of the ADA is not to encourage litigation, but to encourage compliance.

We should never forget that the reason Congress enacted the ADA, and why it has enjoyed such broad bipartisan support over the last 22 years, is that we are committed as a Nation to promoting inclusion. Too often, access to jobs, stores, restaurants, and other facilities that the rest of us simply take for granted are denied to those with disabilities.

When we fail to guarantee access to the disabled, they remain excluded from society and marginalized. There is no longer any question about the consequences of this exclusion, and a decent society must never tolerate it.

So, we should be working to promote greater compliance, not to undermine one of the few mechanisms available to assure greater compliance. To the extent that there are bad actors out there, we should be looking to the existing mechanisms available to punish misconduct in, and misuse of, our courts. If we need to ensure that those mechanisms are more effective, we can and should certainly discuss that. But undermining the available remedies for disabled people everywhere in all situations by giving property owners in violation of the law a free ride is not the way.

I join the distinguished Chairman in welcoming our witnesses today, and I look forward to their testimony.

I yield back the balance of my time.

Mr. FRANKS. Our first witness is Representative Dan Lungren of California. Mr. Lungren represents California's 3rd Congressional District. He was first elected to Congress in 1978.

From 1991 to 1999, Mr. Lungren served as Attorney General of California. In 2005, he returned to Congress and is currently the Chairman of the Committee on House Administration and is a Member of the Judiciary and Homeland Security Committees.

Mr. Lungren, your witness statement will be entered into the record in its entirety. And I would now recognize Representative Lungren for 5 minutes to make an opening statement.

TESTIMONY OF THE HONORABLE DANIEL E. LUNGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. LUNGREN. Thank you very much, Mr. Chairman. Thank you, Mr. Ranking Member and other Members of the Subcommittee. Since my statement will be entered into the record, let me just say a couple of things.

One is that my staff and I have spoken with dozens of small business owners in California, restaurants and other small business enterprises. And the number one fear that they expressed to me is the fear of abusive ADA lawsuits. They tell me that they want as many customers as possible to come to their store. It is not in their business interest to put up barriers of entry for people to come in.

But, in fact, the practice in California, and especially my district, where you have had thousands of lawsuits that have been filed, in most cases, without any specificity. And the claim that is being made or the grievance that is being presented without specificity gives no opportunity for the owner/operator to be able to respond in a meaningful way and thereby do what we really want this law to do, actually result in access.

My bill does nothing to change the underlying ADA. Rather, it requires that the grievant put in writing with sufficient specificity that the reasonable owner/operator understands he is in violation of the ADA. It then gives that individual an opportunity to respond, in writing, within a specific period of time, with specificity as to how they are going to handle it. And then the third part is that there would be a period of time in which the owner/operator can actually make those physical changes.

Now if the owner/operator does not do these things, it seems to me the grievant is in a remarkably enhanced position as they go to court. If I am a Federal judge, the fact that the owner/operator basically did not take this seriously, and if there is any basis whatsoever for finding that there is a violation of the ADA, that puts the defendant, I think, in a very, very poor position. In fact, that would be the best mechanism by which you could achieve access sooner rather than later.

I am aware of a sandwich shop that was a defendant in an ADA lawsuit in which the litigant never visited the shop, but used Google maps to determine that the disability or handicap signage was missing. The plaintiff in this case sued for trauma and embarrassment as a consequence of not being able to access a business that the plaintiff never visited.

In another case that has come to my attention recently, a locksmith owner in my district, who himself has a disability, closed his shop in mid-April 2012 to undergo surgery. When he came back a month later to reopen, he learned that a generally-stated ADA lawsuit had been filed against his business. His attorney advised him that at his age it would probably take a number of years for them to resolve it. The cost would be excessive. He never opened his doors again. The business owner called this extortion. Other tenants in the building may be told that they have to move as well. That is not what the ADA was intended to do.

Now, the Ranking Member referred to this as a Republican proposal. There is bipartisan concern about the ADA. In April 2012 letter, U.S. Senator Dianne Feinstein wrote to California Senate President Pro Temporary Darrell Steinberg and stated, "Today we are still witnessing an alarming rate of demand letters that are being sent to small business owners demanding settlements in the range of $5,000 to $8,000. The payment of this settlement amount, combined with the cost of hiring a lawyer to respond to a demand letter, can easily add up to more than $15,000 in costs for a small business owner. As you know, these unforeseen costs can be devastating to the mom and pop stores that are struggling to remain in business."

It is not, therefore, a partisan issue. There is an effort going on at the State level in California to try and respond to this in some enlightened way.

So, I hope this not viewed in a partisan way. I hope that Members will understand that there is a need to tweak this law to make it more effective to reach what I think we all, on a bipartisan basis, want. And that is access that has been established, not long litigation.

The abuse falls disproportionately on small businesses. In my State, it falls disproportionately on minority-owned businesses, which happen to be, in most cases, the ones that have less capital than others. Oftentimes, it falls on those operators whose first language is not English, and frankly, they have difficulty responding to a generalized letter of complaint. And really the demand that they get is pay up or you will suffer, and that is what we are trying to get away from.

Again, we do not in any way change the underlying proposition of ADA. We attempt to try and change the process so that there will be more expeditious resolution of problems which exist. Everybody admits that there are too many violations out there, technical and otherwise. The question is how do you handle that? How do you provide incentives for people to move toward access as opposed to a standoff? And if you require a specificity such that there can be, under the reasonable person standard, notice as to what the problem is, there is a far greater chance that you are going to have a resolution of that problem.

Simply, that is what this bill does. And I would say it has strong support from the small business community. I hope that we can reach a bipartisan accord on this. And I thank you for listening.

[The prepared statement of Mr. Lungren follows:]

Prepared Statement of the Honorable Daniel E. Lungren, a Representative in Congress from the State of California

Mr. Chairman, first, I would like to thank you for this opportunity to speak on behalf of my legislation—H.R. 3356, the ACCESS Act.

The Americans with Disabilities Act (ADA) is a landmark civil rights law. The passage of the ADA was a watershed moment in American history because our nation stood up to protect and defend the dignity of persons with disabilities and their rights to accessibility in our Nation. This is what the ADA was intended to do—to ensure that public accommodations will be accessible to all Americans.

Unfortunately, however, across the nation and especially in my district in California, thousands of lawsuits have been filed under the ADA in which litigants have the *sole intent* of obtaining settlement money from small business enterprises. These litigants usually have *no intent* whatsoever of obtaining increased accessibility for persons with disabilities. In these lawsuits that abuse the Americans with Disabilities Act, litigants routinely make general allegations against businesses about noncompliance with the ADA. Business owners all too often find themselves unaware of the specific nature of the allegations against them. The litigants then quickly seek to settle for thousands of dollars while usually not pursuing that business' actual compliance with the ADA. These kinds of abusive lawsuits are based upon a desire to achieve financial settlements. In the vast majority of these cases, they do not seek to achieve the facility modifications necessary to provide equal access to places of public accommodation.

What is the impact of these lawsuits that abuse the Americans with Disabilities Act? Professional litigants make money. ADA compliance is not truly enforced because these cases often never make it to court. Unsuspecting businesses in my state are forced to close or temporarily shut down because of the inability to pay settlements or insufficient time to make the necessary improvements. Nobody wins. In one particularly egregious example, one plaintiff has filed over 2,000 of these kinds of lawsuits. The ADA was never intended to be a money making machine for the few while failing to increase accessibility for the many.

My staff and I have spoken with dozens of small business owners in California—restaurants and other small business enterprises. What is the number one threat they fear—abusive ADA lawsuits. They tell me they want as many customers as possible. They tell me they try hard to comply with the ADA because they do not want to turn anyone away, especially in this economy. But they believe these abusive ADA lawsuits are not what the ADA was intended to do.

With thousands of these lawsuits nationwide and in my district in particular, the number of egregious lawsuits are too numerous to count. I have been told of a music store that was the defendant in an ADA lawsuit in which the complaint failed to state any violations specific to that store. What was the primary issue of the lawsuit? The number of handicapped parking spaces in the parking lot despite the fact that the plaintiff had not ever visited the music store. I am aware of a sandwich shop that was the defendant in an ADA lawsuit in which the litigant never visited the shop but used Google maps to determine that the handicapped signage was missing. The plaintiff in this case sued for trauma and embarrassment as a consequence of being unable to access a business that the plaintiff never visited. In another case, a locksmith owner, who himself has a disability, closed his shop in Mid-April 2012 to undergo surgery. His shop is located in a building that is approximately 100 years old. When he came back a month later to reopen he learned that an abusive ADA lawsuit had been filed against his business. His attorney advised the owner, age 66, to never open his doors again. The business owner calls it "extortion." Other tenants in the building may be told they have to move. This is not what the Americans with Disabilities Act was intended to do. It was intended to increase accessibility for all Americans with disabilities not to enrich the few.

There is bipartisan concern about abuse of the ADA. In an April 2012 letter, U.S. Senator Dianne Feinstein wrote to California Senate President pro Tempore Darrell Steinberg and stated:

"[t]oday, we are still witnessing an alarming rate of demand letters that are being sent to small business owners demanding settlements in the range of $5,000–$8,000. The payment of this settlement amount, combined with the cost of hiring a lawyer

to respond to the demand letter, can easily add up to more than $15,000 in costs for a small business owner. As you know, these unforeseen costs can be devastating to the "moms and pop shops" that are struggling to remain open for business."

Though discussing state legislation and not commenting on my ACCESS Act specifically, Senator Feinstein agrees that a new right to cure approach is needed to solve this problem. She continues:

> "Thus, I believe it is critical that a 90-day right to cure be enacted to help small businesses respond to this problem and, once and for all, to end these abuses by certain aggressive attorneys and predatory plaintiffs. I strongly urge you to reconsider your position on this approach. A business owner's ability to cure an ADA violation within 90 days would give that owner the opportunity to comply with the law without the wasteful expense of a lawsuit, which in my view would represent a win both for people with disabilities and for California small businesses."

Mr. Chairman, I would like to submit Senator Feinstein's April 13, 2012 letter for the record.

My legislation, H.R. 3356, the ACCESS (*ADA Compliance for Customer Entry to Stores and Services*) Act of 2011, ensures greater compliance with the Americans with Disabilities Act while protecting small businesses from abusive lawsuits.

The ACCESS Act would serve the underlying purpose of the ADA by creating a legal structure which enhances the prospects for real corrective action. Under my legislation, *any person aggrieved by a violation of the ADA would provide the owner or operator with a written notice of the violation specific enough to allow the owner or operator to identify the barrier, make the needed changes, and thus become compliant.* Within 60 days the owner or operator would be required to provide the aggrieved person with a description outlining improvements that would be made to address the barrier. The owner or operator would then have 120 days to remove the infraction. *The failure to meet any of these conditions would allow the suit to go forward.*

The ACCESS Act will refocus the ADA on what it was meant to do—ensure that public accommodations will be accessible to all Americans. Increasing public accommodations for persons with disabilities is not inconsistent with the need to protect small business owners from lawsuits that abuse the purpose of the Americans with Disabilities Act. The ACCESS Act demonstrates that we can indeed do both.

Mr. FRANKS. Well, thank you, Mr. Lungren. And I will now begin the questioning by recognizing myself for 5 minutes.

Mr. Lungren, you have been an attorney in private practice. You served as an attorney general of California. And I am not a lawyer, but it would seem to me that as a matter of professionalism and courtesy, a lawyer should at least make some attempt to work out a dispute prior to going to the trouble of filing a lawsuit.

Does your bill require anything more than the common courtesy of asking a business to fix a violation so that a lawsuit does not need to be filed?

Mr. LUNGREN. The only thing I would say is that it requires a level of specificity so that under a reasonable person standard, one would be put on notice as to what the violations of the ADA are. And that would be my only addendum to your statement.

Mr. FRANKS. Well, I think your legislation is a common sense solution to predatory ADA lawsuits, and it is consistent with other civil rights laws that require notice before lawsuits can be filed. However, those opposed to your legislation argue that if this bill becomes law, the rights of the disabled will be threatened. Do you believe that your bill will threaten the rights of disabled individuals to use public accommodations?

Mr. LUNGREN. If my bill in any way changes the underlying proposition of the ADA, you might be able to make that argument, but it does not. What it does is change the process and provide an incentive for resolution of the problem in a specific, practical way. And it seems to me rather than undercutting the rights of anybody, it enhances the rights of individuals who are disabled in one fashion or another.

I guess I would call it a common sense approach to improving the underlying bill such that you can resolve the problem rather than extend the problem or never get satisfaction to a complaint.

Mr. FRANKS. Well, thank you, Mr. Lungren. And I am going to now yield to Mr. Nadler for 5 minutes.

Mr. NADLER. Thank you. I understand and somewhat even sympathize with what you are saying in some cases, I suppose. My problem is we do not permit damages here. If someone has not complied for 20 years and is found not have complied, the only remedy we have is comply. Spend the money to make your business accessible.

Now in various other things we allow damages. Here we do not. But if that is the only remedy—get into compliance now—order an injunctive action, in effect, to get into compliance now. And you cannot bring a lawsuit even to do that until you have had a letter, which presumably has not been reacted to adequately, what incentive is there for someone, other than pure good will, what incentive, what legal or monetary incentive is there for a business owner to get into compliance before he gets a demand letter?

Mr. LUNGREN. Well, thank you for the question. I would say a couple of things. One is right now there are demand letters oftentimes made, but they are of a general nature. They do not put the person on notice as to how they could take care of it so that there is not the incentive to try and take care of it with a sense of immediacy.

Secondly, I would argue, having been a litigator for a number of years, that if a business called me up and said we had this letter that told us what we needed to do, we have ignored this letter, frankly, I do not want to take it seriously. I would either tell them find another attorney, or I would say, let me tell you what your circumstance is. You are going into Federal court, and the first thing the judge is going to read in the file is that you were put on notice with a degree of specificity so that any reasonable person could figure out what the problem was, and you ignored it. I am going to tell you, you are in trouble here.

So I would suggest it actually gives the plaintiff an upper hand in a case where there has not been a good faith attempt to try and resolve the problem. And, again, I say that as someone who has litigated——

Mr. NADLER. I understand that. And certainly if I were the attorney for a plaintiff, I might very well start with such a letter. But, again, what incentive, if your bill passed, would there be for anyone to bother with compliance at all until he received such a letter?

And let me ask you one other question as you answer that. What would you think of a proposal to say, okay, we will enact your bill, but we will amend it to include some sort of sanction, maybe monetary sanctions, if you should have brought yourself into compliance,

if you did not have to be a genius not to know that you were not in compliance and you did not do it before the letter.

In other words, the problem right now is that your letter, I think, would completely eliminate any incentive for someone to spend money to bring himself into compliance before that letter was received. And maybe if we had the letter, but we still had some sort of sanction for not having acted if you knew you should have acted beforehand, that would be more reasonable. What would you think of that?

Mr. LUNGREN. Well, first of all, I would just say we are talking about my bill versus the status quo. For the status quo now, one would have to ask what is the incentive for someone to try and take care of a violation of ADA prior to legislation being filed. Ours is a predicate to the litigation, but it does not stop the litigation from going forward.

Mr. NADLER. Excuse me, Dan. The incentive now under the status quo is that you may be sued and be responsible not only for the expense of getting into compliance, but for attorney's fees.

Mr. LUNGREN. Sure.

Mr. NADLER. That is a fairly weak incentive perhaps, but it is an incentive.

Mr. LUNGREN. Well, you still have that as it exists now. Mine, I think, actually puts some robustness behind the threat of a lawsuit because you have got to take seriously if, in fact, they have given you notice. So I would say it adds to an incentive.

The fact of the matter is, and I think you will hear this testimony, there are, for instance, 100 specific standards that deal with a disabled restroom. There are, I believe, something like 2,400 or 2,500 separate standards, physical standards, that deal with operating a business that comes under the aegis of this statute.

To suggest that people are sitting around consciously violating these things, I think is incorrect. And the idea that they have 20 years to do this—oftentimes we are talking about businesses that have just set up. Someone goes in. They are starting a small business. And this happens to be the case, and it goes to one of the points you made earlier about a lack of full information. They may have, and we have had instances of this, people going to the local building department of their local jurisdiction and being told, oh, yeah, you have met the standards, or, you know, under the law, there is a grandfather clause, which there is not.

And I remember when I was attorney general, one of the things we attempted to do was to try and help local jurisdictions in California understand precisely what the laws were. We had a case where the City of Pasadena and the Rose Bowl were undergoing a major renovation of the Rose Bowl. Part of it was actually a replacement of their press box. And what they intended to do with respect to accommodation for disabled was insufficient for the law.

We had to go down as the office that has overall responsibility in our State and basically demand that they make the change and make it within a very short time period. They were gearing up for either the World Cup in soccer or the Super Bowl, I forget which. But we did that. Now, if you are going to ask me did they intend to violate the law? No, they did not understand even with their own building department, even with the information they had.

So, in many cases you have these businesses that, frankly, are unaware. And I am not saying they are all that way, but I am saying the vast majority, in my experience, are that way. So, how do we get from there to doing what we want to do, which is to get access to places of public accommodation?

It seems to me creating a path where there is a greater incentive to work it out sooner rather than later is the way to do it. Now that is my approach to my bill. You may disagree with me, but that is the intent behind it.

Mr. FRANKS. Thank you, Mr. Nadler. And I now recognize the distinguished gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I want to thank the gentleman from California for bringing the bill. This seems like such pure common sense to me, it is a little amazing that we have sat around here for over 2 decades before something as simple as this has come forward.

But I am curious, and I may be missing it in your testimony, how does that first notice come? If you have a disabled individual who is aggrieved by this, how does that first notice come to their attention?

Mr. LUNGREN. They would send a written notice, most likely a letter, to the individual owner or operator of the place of public accommodation. And in there, they would be required to have sufficient specificity such that the person receiving it, under a reasonable person standard, which is a common law notion, reasonable person standard would be able to determine what the violation of the Act is. And then that person would be given a 60-day period of time to provide the aggrieved person with a description outlining the improvements to address the barrier. And then they would have 120 days in which to take care of it, then actually go forward.

Mr. KING. Would this likely be the form of a letter from the attorney of the aggrieved person then?

Mr. LUNGREN. It would not have to be an attorney. It could be an individual so that they could describe, as I say, with particularity, as to what the violation is.

Mr. KING. I am just wondering because I do some of my own work that way without going to the attorney. But if I sent a letter to someone and they ignored that letter, then is it likely it would be a certified letter in order to prove that they received it? I am just trying to figure out how do you establish how the clock starts to tick on the first 60 days.

Mr. LUNGREN. Upon receipt of the letter. I suppose if you wanted to be careful, you could make sure it was certified. You could also hand it to them. I mean, there are any number of ways of doing it.

Mr. KING. Okay. But you have determined that, and that has already been a legal pattern, so I understand that.

I am just thinking about the statement that you made about the proprietor who got back from his surgery and decided that he could not continue his business because the cost to recover the loss of the investment was too great. And I am just thinking of a community in my district that had about a lot and a half alongside a lake. For years they provided a dock for public access in a tiny little town with hardly any tax base, but it was a convenience thing.

And there was a little accident down alongside that resulted in just a few stitches. And in the ensuing litigation that came, the city council just decided that is it, we are not going to allow access to this any longer because the liability is too great.

I just add that to your statement on what are we missing in this country, that we do not even know we are missing, because of the heavy burden of unnecessary litigation, among other things, and heavy regulation, and a whole list of things.

I just think the richness of the life that we have in this country could be greater if we were not intimidating and discouraging people, especially small business folks. I started a business up in 1975, and my biggest fear then was how do I meet with all the risks of regulation and potential litigation? My oldest son owns that company today. We are in our 37th season. But, it has gotten greater and greater.

The country has changed. The culture has shifted. We have fewer entrepreneurs per capita because of the weight of regulation, the weight of the threat of litigation. I just would point out that I think in those days, when Mr. Lungren and I and many others in this room were growing up, we would have an idea, and someone might say, well, I have checked my moral compass now, but there is no law against it, let us go ahead. And today it is entirely different. Now young people say, no one else is doing this, we have to get permission to go ahead, so let us just forget it.

I just think our society is not as rich as it might have been otherwise. I think we are losing entrepreneurs. We are losing competition in business. Our costs are going up, and we have a lot of burden in this economy that is not productive, that does not help the quality of life. It just churns dollars, and intimidates people, and reduces the quality of life.

I think this bill adds to our quality of life, and anybody that can resolve this issue within 60 to 120 days is a well-intentioned person. I do not see a down side to it at all, and I fully support it. I would yield to the gentleman to say anything he would further like to say.

Mr. LUNGREN. Well, I just say there is a famous case in California dealing with this. The Salary Shop made saddles. I think it was also a feed store. And they had actually been pioneers in working with those who suffered from disabilities in using horseback riding as a therapy. They were sued because it was an older store, and they had a handicapped access in the side of the back, not in the front. They were sued, and yet they could never get the person suing them to tell them precisely what it was they wanted them to fix.

If you question the good faith of those folks, you know, were they folks that were not interested in assisting the disabled? Well, I mean, they had been pioneers in helping with therapeutic riding, which would suggest that they wanted to assist.

That may be an extreme example, but that is an example of the kind of thing that I think most of us would say is contrary to common sense. What I am trying to do here is to figure out a common sense process change that does not change the underlying law, but would get us to resolution sooner rather than later.

Mr. KING. It is common sense. Thanks, Mr. Lungren. Thanks for bringing it. I yield back.

Mr. FRANKS. Thank you, Mr. King. And I would now yield to Mr. Scott from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Lungren, you know, if we are going to live in a society where those with disabilities have access to public accommodations, there is going to be some inconvenience to people. And obviously, as you have suggested, it ought to be with common sense.

What should the standard be? The present standard is that any change, in order to get into compliance, that would be required has to be easily accomplishable and able to be carried out without much difficulty or expense. Is that the standard that put your constituent out of business?

Mr. LUNGREN. That is a standard that has been interpreted by a number of different courts, and some refer to that as a small business exception. It has not proven to be a small business exception.

If someone makes that claim, as I understand it, it then makes it relevant in discovery for the plaintiff to be able to see the books of the operating entity, perhaps going back any number of years to prove that relative to the amount of money they have, this would fall within that definition. And, that often leads to a tremendous amount of litigation.

I think we all agree that it ought to be something that is reasonably achievable, that it is not unduly costly. So, I think that is a common sense portion of the law, but it does not appear, at least in the experience of those people that have come to my attention in California, to have worked in the way that we all would have thought it would have worked.

Mr. SCOTT. Well, if easily achievable and able to be carried out without much difficulty and expense is too stringent a standard, what kind of standard would you suggest?

Mr. LUNGREN. I am not suggesting to change the standard. What I am suggesting is that we have preliminary litigation as an opportunity to resolve the issue such that the priority is not put on litigation, but the priority is put on accommodation.

Mr. SCOTT. So you are not suggesting we change the standard at all.

Mr. LUNGREN. No, I am not suggesting we change the standard.

Mr. SCOTT. And the bill, as I read it, only applies to entry. What about everything else that is covered by the ADA?

Mr. LUNGREN. Excuse me, I am sorry. I cannot hear you.

Mr. SCOTT. As I read your bill, it only speaks to the barrier to entry into a public accommodation. How about anything else that is covered by the ADA?

Mr. LUNGREN. This is supposed to deal with the issue of removing structural barriers to entry as the ADA requires because that seems to be the locus of complaints that we have received, claims of structural barriers without specificity as to what they are.

I mean, you and I would talk about structural barriers. It goes to those standards that have been established, as I said. I believe there are 2,400, 2,500 of them in various regulations with respect

to physical requirements. And they are generally known as structural barriers.

Mr. SCOTT. Thank you, Mr. Chairman. I yield back.

Mr. FRANKS. I thank the gentleman. Well, Mr. Lungren, we are out of questions here. And I want to thank you again for testifying today. You are excused if you would like, but otherwise you are certainly welcome to join us on the dais here. And I would like to go ahead and invite you to do that, and also invite the members of our second panel of witnesses to come forward.

I want to thank all of you for appearing before us today. Our first witness on this panel is Lee Ky. Ms. Ky operates and manages two donut shops owned by her mother in Reedley and Stockton, California. Ms. Ky was born with cerebral palsy and has been in a wheelchair her entire life. Her family's two business have both been the subject of abusive ADA lawsuits. In 2010 her family's Reedley shop, where Ms. Ky regularly works alongside her employees, was sued for alleged violations of the ADA that were substantially, but not exclusively, based on signage not being placed in exactly the right position or the failure to have the exact number of signs called for under the applicable statute. Ms. Ky was not given any notice of the alleged ADA violations before the lawsuit was filed.

Our second witness is Andy Levy, a named partner with the law firm Brown, Goldstein & Levy, where his practice focuses on civil, criminal, and appellate litigation. He is a fellow of the American College of Trial Lawyers, and is listed in Best Lawyers in America in 5 categories. Mr. Levy is a longtime member of the adjunct faculty at the University of Maryland School of Law, and his publications include the books, Maryland Evidence: A Courtroom Manual and Appellate Practice for the Maryland Lawyer.

And our final witness is David Peters, CEO and general counsel at Lawyers Against Lawsuit Abuse. Mr. Peters has been consulted in more than 900 ADA accessibility lawsuits throughout the United States and has served as lead counsel in over 300 in California alone. Through his work he has exposed over 600 false and/or inappropriate claims in ADA accessibility lawsuits. Mr. Peters has written extensively and has appeared in numerous national television and print news features on the problem of litigation abuse.

Each of the witness' written statements will be entered into the record in its entirety, so I would ask that each of you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on the table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

And before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn, so please raise your right hand to be sworn.

[Witnesses sworn.]

Mr. FRANKS. Thank you. And I would now recognize our first witness for 5 minutes. And, Ms. Ky, if you will make sure that that microphone is on before you start speaking.

TESTIMONY OF LEE KY, REEDLEY, CALIFORNIA

Ms. KY. Hi. My name is Lee Ky, and I do live in Reedley, California. I am here to express my concern regarding the Americans with Disabilities Act and how it is being used toward all businesses.

I understand that all businesses must be accessible for all customers. I have been disabled all my life, and I am grateful for the President George Bush who recognized the needs for accessibility for the disabled community when he signed ADA into the law in 1990.

Public buildings should have accessible entrance doors for both wheelchairs and stroller users. Public facilities that have an eating area and restrooms should be accessible with tables wide enough and high enough for a wheelchair to fit. The eating area should not be designated just for the disabled people. I am going to add something right now. At this table here does not have a sign that say for wheelchair only.

Accessible buildings allow people with disabilities to become more independent and self-sufficient. As for me, I appreciate businesses that have accessible facility. But personally, I do not care if the grab bar is 40 inches or 32 inches on either side as long as it is provided and is there when I need it.

All business owners have to recognize the needs for all customers. For example, many businesses provide carpet or rubber mat at the entrance outside or inside to prevent able-bodied customers from slipping.

Many business owners are not aware of the changes or new regulations related to ADA. Not all businesses are up to code with the ADA guidelines. My mother has to donut shops and has been sued at both locations for alleged ADA violations. It is not fair for business owners to receive a lawsuit package not knowing what it was for, being asked for a certain amount of money and still having to pay for the corrections.

Prior to filing a lawsuit, notification should be sent to a business if their facility is not compliant with the ADA. All businesses should have 30 days to correct minor violations and 120 days for constructional barriers.

In my experience, the carpet or the mats have never become entangled in my wheelchairs. If the ADA regulations remain the same and require businesses to remove carpets or mats for the inconvenience of the disabled people, then the ADA will be creating a hazard for the able-bodied person. We, the disabled community, should not be able to feel segregated from the rest of society. This will create bitterness between the customer and the business. I do not need a sign to inform me that I am disabled or where I should sit.

The ADA should concentrate on accessible curbs and ramps that do not wrap around the building with back door access only. Generally, when I enter through the back door, I feel like businesses are embarrassed or ashamed to associate with me because of my physical limitations. This is understandable to a point because there are a few disabled individuals, including lawyers, that make it their personal mission in life to collect money from businesses that they have never been to. It seems this handful of people feel

that small businesses owe it to them because of their current situation. This makes the rest of disableds, who are trying to earn an honest living, look bad.

Throughout my life, people in general are very helpful. Whenever I am out and about by myself, people offer their kindness to assist me. Whether I accept or decline is up to me. I also have a voice. If I need assistance, I can ask for help. I do not want business owners to cringe when they see me enter their establishment whether to purchase or to simply use the restroom.

I would like to see the ADA regulation or Federal laws to be fair and not be taken advantage of or misused. I believe our elected officials and city inspectors should inform all businesses in their district of all new laws and changes.

If this frivolous, nitpicky, and unnecessary money hungry ADA laws will continue, many businesses will be forced to shut down because they do not have the money to pay for the lawsuit. To me, it is reminiscent of mobsters requesting protection money.

Thank you.

[The prepared statement of Ms. Ky follows:]

Prepared Statement of Lee Ky, Reedly, California

My name is Lee Ky and I live in Reedley, Ca. I am here to express my concerns regarding the Americans with Disabilities Act and how it's being used toward all businesses. I understand that businesses must be accessible for all customers. I have been disabled all my life and I am grateful that President George H. W Bush recognized the needs for accessibilities for the disabled community when he signed the ADA into law in 1990.

Public buildings should have accessible entrance doors for both wheelchair and stroller users. Public facilities that have an eating area and restrooms should be accessible, with tables wide enough and high enough for a wheelchair to fit. The eating area should not be "designated" just for disabled people. Accessible public buildings, allow persons with disabilities become more independent and self-reliant. As for me, I appreciate businesses that have accessible facilities. But, personally, I don't care if the grab bar is 48" or 32" on either side, as long as it's provided and it's there when I need it.

All business owners have to recognize the needs of all customers. For example, many of businesses provide a carpet or rubber mat at the entrance outside or inside to prevent able-bodied customers from slipping. In my experience, the carpet or the mat has never become entangled in my wheels. If the ADA regulations remain the same and require businesses to remove carpets or mats for the convenience of the disabled people, then the ADA will be creating a hazard for the able-bodied person. We (the disabled community) should not be made to feel segregated from the rest of society. This will only create bitterness between customers and businesses. I don't need a sign to inform me that I am a disabled or where I should sit.

The ADA should concentrate on accessible curbs and ramps that do not wrap around the building with back door access only. Generally, when I enter through the back door, I feel like businesses are embarrassed or ashamed to associate with me because of my physical limitations. This is understandable to a point, because there are a few disabled individuals (including lawyers) that make it their personal mission in life to collect money from businesses that they have never been to. It seems this handful of people feel that small businesses owe it to them because of their current situation. This makes the rest of the disabled who are trying to earn an honest living look bad.

Many business owners are not aware of the changes or new regulations related to the ADA. Not all businesses are up to code with ADA guidelines. My mother has two donut shops and has been sued at both locations for alleged ADA violations. It's not fair for business owners to receive a lawsuit package not knowing what it is

for, being asked for certain amount of money, and still having to pay for corrections. Prior to filing a lawsuit, notification should be sent to businesses if their facilities are not compliant with the ADA. All businesses should have 30 days to correct minor violations and 120 days for construction barriers.

Throughout my life people in general are very helpful; whenever I am out and about by myself, people offer their kindness to assist me whether I accept or decline is up to me. I also have a voice and if I need assistance I can ask for help. I don't want business owners to cringe when they see me entering their establishment whether to purchase or to simply use the restroom. I would like to see the ADA regulations or Federal laws be fair and not be taken advantage of or abused. I believe our elected officials and city inspectors should inform all businesses in their districts of all new laws and changes.

If these frivolous, nit-picky, unnecessary money hungry ADA lawsuits continue, many businesses will be forced to shut down because they don't have the money to pay for the lawsuit or correct the facility. To me it's reminiscent of mobsters requesting protection money.

Mr. FRANKS. Thank you, Ms. Ky.

And I would now recognize Mr. Levy for 5 minutes. And you have got that microphone on, sir.

TESTIMONY OF ANDREW D. LEVY,
PARTNER, BROWN, GOLDSTEIN & LEVY

Mr. LEVY. Thank you. Mr. Chairman, Members of the Subcommittee, thank you for giving me the opportunity to testify on H.R. 3356. It would amend the ADA to require that individual defendants be sent a letter before they could be sued for violating the ADA, even if they had been violating it for years, and even if the nature of their violations were open and obvious to all, such as a few steps that could easily be ramped.

It is particularly ironic that Congress is considering this bill now when we have thousands of newly disabled veterans who need the protections promised by the ADA now more than ever.

Passage of the bill will make enforcement of the ADA more cumbersome and more expensive. Worse, it will eliminate much of the existing incentive businesses have to attempt to comply with the law voluntarily. The net result of this is that there will be much less voluntary compliance.

The dirty little secret of the ADA is that its enforcement provisions, particularly those relating to public accommodations, are relatively weak. Virtually alone, among Federal statutes, the law currently provides no damages for its violations. Since there are no damages for past violations and, if this bill becomes law, you cannot be sued until you get notice, there is zero incentive to comply with the ADA until you get a letter, if you get one. And then you can comply without risking any sanction for the many years you waited to comply. Thus, the proposed amendment effectively creates a blanket nationwide exemption to the ADA.

In addition, Congress correctly recognized that the Federal Government does not have the resources to enforce the civil rights laws entirely on its own. The ADA, like other civil rights statutes, relies primarily on private individuals for its enforcement. Lawyers who bring ADA cases already assume the risk that they will lose and be paid nothing. By making the ADA increasingly difficult and cumbersome to enforce, you create additional disincentives for law-

yers to take these cases. It is basic economics. The greater the incentive, the greater the participation.

The ADA is already a chronically under enforced statute, and it benefits a group that already has difficulty accessing legal services. If Congress further reduces these incentives that do exist, the result will inevitably be less enforcement of the ADA. If you make enforcement of the ADA rely on charity, the ADA will die.

One should not need a special invitation to comply with the law, particularly one that has been on the books for more than 20 years. Moreover, the notion that the epidemic of noncompliance with the ADA could easily be cured by sending a letter is, in my experience, a myth. Implicit in the idea of notification is the idea that most violators are genuinely unaware that they are violating the ADA, and that upon getting a letter, they will immediately bring themselves into compliance. And yet, they cannot or will not take those same steps after they are sued, that once sued, they are mired in the courts for years.

In truth, this hypothetical violator, the one who would have complied if only someone had bothered to let him know that there were a couple of steps preventing wheelchair access to a store, assuming he exists, can just as easily comply with the law after being sued. And under the Supreme Court's *Buckhannon* precedent can do so without incurring liability for any attorney's fees.

Particularly disappointing is the claim that this amendment is needed to help small business. Nothing in this bill is limited to small business. Large companies, who routinely employ lawyers to advise them on what other Federal statutes require, can certainly do the same with respect to the ADA. As for small business, the ADA already has several provisions that protect small businesses from unreasonable requirements, which Mr. Scott in his questions earlier pointed out.

It is a flexible law. The flexibility was purposely included as a bipartisan compromise so that businesses of different sizes and circumstances could be treated differently. But with flexibility comes responsibility. One cannot fairly complain that the law's requirements are vague and imprecise on the one hand and not lift a finger to investigate what it requires on the other.

In closing, I respectfully submit that passage of this ill-advised bill is unnecessary and will do far more harm than good to the cause of equality and accessibility. Thank you.

[The prepared statement of Mr. Levy follows:]

Andrew D. Levy
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Admitted in Maryland and the District of Columbia

Testimony of Andrew D. Levy on HR 3356,
the ADA Compliance for Customer Entry to Stores and Services Act of 2011
before the United States House of Representatives Committee on the Judiciary
Subcommittee on the Constitution

June 27, 2012

Mr. Chairman, and members of the Subcommittee:

Thank you for giving me the opportunity to testify on HR 3356, the "ADA Compliance for Customer Entry to Stores and Services Act of 2011." My name is Andrew D. Levy. I am a practicing trial lawyer based in Baltimore, Maryland. For thirty years I have represented a wide range of individuals and businesses – large and small, plaintiffs and defendants – in a variety of civil and criminal matters. Because I use a wheelchair as a result of a central nervous system infection I developed during my first semester of law school, the ADA has been important to me both personally and professionally.

I last had the privilege of testifying before this Committee in 2000 at a hearing on a bill that, like HR 3356, would have amended the ADA to require that individual defendants be sent a letter before they could be sued for violating the ADA, even if they had been violating it for years, and even if the nature of their violations were open and obvious to all. I believed then and I believe now that the proposed amendment will make enforcement of the ADA increasingly cumbersome and expensive. Worse, it will eliminate much of the existing incentive businesses have to attempt to comply with the law voluntarily. The net result of this is that there will be much <u>less</u> voluntary compliance with the law's requirement that places of public accommodation be accessible to all. The proposed amendment will give the overwhelming advantage to those who would choose to ignore the law, and in most cases will allow them to violate the law with impunity.

To understand why this seemingly modest notification provision would do such harm one needs to understand a very unusual aspect of Title III of the ADA: virtually alone among federal statutes, the law currently provides no damages for its violation. With respect to public accommodations there is only one true incentive built in to the law: the desire not to get sued and be required to pay a successful plaintiff's attorney's fees. If the proposed amendment becomes law, however, people will not have to even consider complying with the law until (and unless) they get a letter. Since there is no risk that they will have to pay damages as a result of not complying, the effect of prohibiting lawsuits unless they get at least 60 days notice is to allow – indeed, encourage – them to do nothing until they get a letter. Thus, the proposed amendment effectively creates a blanket, nationwide exemption to the ADA, a virtual "get-out-of-jail-free card," if you will.

Consider the practical consequences of adding a notice requirement to two statutes, one with a provision for damages, and one without. A statute providing for damages theoretically allows a person to wait to comply until he gets notice – but he would do so at his own risk, for if he is eventually sued, he faces the prospect of paying damages for his entire period of noncompliance (these laws typically provide that damages begin to accrue at the time the violation occurs). In a statute that requires violators to pay damages a rational actor does not wait until he gets notice before investigating what the law requires and complying with it.

On the other hand, if this amendment is passed, the combination of notice and no damages would cause a rational actor to act in precisely the opposite way. Since there are no damages for a violation, and he can't be sued until he gets notice, the rational actor needn't bother to ascertain the requirements of the ADA until he gets a letter. Once he gets a letter – <u>if</u> he gets one – he can comply without risking any sanction for all of the time he waited to comply. It has long been a fundamental principle of law that "a right without a

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remedy is no right at all."[1] Similarly, a law that provides no sanction for years of violation is no law at all.

There is another important consideration, and it relates to the enforcement mechanism Congress built in to the ADA. Congress correctly recognized that the federal government does not have the resources to enforce the civil rights laws entirely on its own. While the Department of Justice plays a critical role, the ADA, like other civil rights statutes, relies primarily on private individuals for its enforcement. Congress created incentives for private individuals – acting as "private attorneys general" – to enforce the law. Usually these incentives take two forms: damages – both compensatory and punitive – that a wronged individual can obtain for the violation of his statutory rights, and the payment of the plaintiff's attorneys fees if he is successful. In the case of Title III, however, as a result of a bipartisan compromise Congress chose not to allow damages to private parties for public accommodation violations.

Although Congress did not provide for damages, it understood that if it was going to rely on private parties to enforce the ADA, it had to have some provision encouraging the private bar to take the cases. As a result, Congress provided that a successful plaintiff could ask the Court to order the defendant to pay him a reasonable attorney's fee.

Keep in mind, that there are important limitations on payment of attorney's fees. First, plaintiffs' attorneys are only entitled to be paid if they win. Thus, there is no incentive for bringing frivolous lawsuits, because if you do, you're going to end up having worked for free. And, federal court rules provide that the defendant can recover its own attorney's fees if the plaintiff's lawsuit was frivolous or brought in bad faith.

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[1] "[A] maxim of equity states that '[e]quity suffers not a right to be without a remedy.'" *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 1879 (2011) (Breyer, J.), quoting R. Francis, MAXIMS OF EQUITY 29 (1st Am. ed. 1823).

Second, even if you win, you are only entitled to a fee that the judge finds is "reasonable" – usually calculated by the lawyer's normal hourly rate (that is, the rate that his private clients in non civil rights cases pay) – multiplied by the number of hours the judge finds the case reasonably should have taken to litigate.

Professor Sam Bagenstos, in his masterful 2006 article, "The Perversity of Limited Civil Rights Remedies,"[2] aptly summarized the economic realities which greatly reduce the incentive of the private bar to represent individuals with disabilities – who have difficulty accessing legal services under the best of circumstances – in ADA cases:

> [B]ecause ADA public accommodations plaintiffs have no prospect of a monetary recovery out of which to carve a contingent fee, statutory attorneys' fees are likely to be the exclusive source of compensation for their lawyers. ... But under the Supreme Court's interpretation of the fee-shifting statutes, practitioners who rely on statutory attorneys' fees will always earn lower effective hourly rates than similarly credentialed practitioners with fee-paying clients. The Court has held that statutory attorneys' fees must be calculated by determining the number of hours plaintiff's counsel reasonably expended and multiplying that number by a "reasonable hourly rate" for counsel's services. ... The Court specifically rejected a rule that would enhance the lodestar to compensate for risk of loss and of consequent nonpayment. As a result, plaintiffs' lawyers in statutory fee cases, who get paid only for hours expended in cases they win, are paid for those hours at the same hourly rate as lawyers with fee-paying clients, who get paid for all of the hours they work, win or lose.[3]

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[2]Samuel R. Bagenstos, "The Perversity of Limited Civil Rights Remedies: The Case of 'Abusive' ADA Litigation," 54 U.C.L.A. L. REV. 1 (2006).

[3]*Id.* at 11.

Finally, as Professor Bagenstos also points out, there is the Supreme Court's *Buckhannon* decision,[4] which allows a defendant who makes no effort to comply with the ADA until after he is sued, to avoid paying the plaintiff's attorney's fees if he comes into compliance without waiting for the court to formally order it.

It's not a complicated arrangement nor is it a system calculated to make anyone rich. It's just basic economics. The greater the incentive, the greater the participation. Lawyers who bring ADA cases already assume the risk that they will lose and be paid nothing, with their only upside being that they simply get their normal hourly rate if they win, while defendants' attorneys get paid their hourly rate whether they win or lose. By making it even more difficult to get paid for enforcing the ADA, the amendment builds into the statute more disincentives to enforcement, resulting in less compliance and accessibility.

Much has been made of so-called "drive-by" lawsuits, which purportedly abuse the rights protected by the ADA and require action by this Congress to protect unjustly sued defendants. In truth, the vast majority of such lawsuits have been filed against defendants who are violating the ADA.

Efforts to address the perceived problem of vexatious ADA lawsuits by making it more difficult for all ADA plaintiffs to file lawsuits risk "throwing out the baby with the bath water." As the National Council on Disability has observed:

> Ultimately, it is not possible to draw a clean line between "good" litigants and serial litigants. The serial litigant is simply the attorney and/or plaintiff who has figured out a way to bring Title III actions despite all the roadblocks. Having figured that out, he or she has no reason not to continue, given the existence of such widespread noncompliance. ...

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[4] *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, 531 U.S. 1004 (2000).

> [I]f the Title III private right of action is weakened or restricted in a misguided attempt to control serial plaintiffs and attorneys, but no measures are taken to strengthen the ability of the average person with a disability to bring a private lawsuit, not only will physical accessibility among pubic accommodations come to a halt, but all the other nondiscrimination requirements of Title III will suffer as well.[5]

In the relatively rare case of defendants who are not violators and who have been sued without a reasonable investigation, the federal courts already enjoy powerful authority to sanction such conduct, authority which they have not been shy about using.[6]

The ADA is already a chronically *under*-enforced statute.[7] If Congress further reduces those incentives that do exist, the result will inevitably be less enforcement of the ADA. If you make enforcement of the ADA rely on charity, the ADA will die. Just as cutting a horse's hay with straw eventually kills the horse, continuing to water down the incentives for enforcing the ADA will kill the ADA.

There is a premise underlying this bill that I do not understand. It is the idea that people need a special invitation to comply with a law passed by Congress and signed by the President, a Republican President. Next month will mark 22 years since the ADA was passed. Anyone who truly cares about accessibility has had ample opportunity to find out

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[5]"Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success," National Council on Disabilities, July 26, 2007 at 192-193.

[6]*See, e.g., id.* at 193-196.

[7]*See, e.g.*, Michael Waterstone, "The Untold Story of the Rest of the Americans with Disabilities Act," 58 VAND. L. REV. 1807, 1854 (2005) (arguing that "[c]ombined with survey data and other social science research showing that people with disabilities are still at the margins of society in areas covered by Titles II and III, these low numbers demonstrate under-enforcement of these Titles ... [and] demonstrated noncompliance."); Ruth Colker, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (NYU Press 2005) at 188.

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what the law requires and to conform their conduct to the law. Not only is ignorance of law no excuse, but in the case of the ADA there is no excuse for being ignorant of the law. Who by now has not heard of the ADA?

As with any law, there may be occasional ambiguities, but most of the violations I see are not ambiguous. It is as clear as can be that places with steps to get in, and bathrooms too narrow for a wheelchair to pass, are not accessible. You shouldn't need a letter informing you of the obvious.

Also, there is an abundance of free technical assistance available to the public on how to comply with Title III's requirements. The ADA itself expressly requires the Department of Justice, in consultation with other agencies, to assist small and large businesses alike in understanding Title III's requirements. The Department of Justice has developed a large number of publications on Title III's requirements, including a compliance manual, and it maintains a telephone information line to respond to public inquiries and operates a web site with a full complement of technical assistance materials. If there is a lack of understanding within the business community about the ADA's requirements, which is leading to non-compliance, the answer is to beef up the Government's technical assistance activities – not to diminish the rights of persons with disabilities through this notice requirement.

A second thing I don't understand is the assumption, implicit in this amendment, that most violators are genuinely unaware they are violating the ADA, that upon getting a letter they will immediately bring themselves into compliance, and yet they can't or won't take those same steps after they're sued – that once sued they're mired in the courts for years. In truth, this hypothetical violator, the one who would have complied if only someone had bothered to let him know there were a couple of steps preventing wheelchair access to his store – assuming he exists – can just as easily comply with the law after being sued, and under the *Buckhannon* precedent can do so without incurring liability for

attorney's fees. The notion that the epidemic of noncompliance with the ADA could easily be cured by sending a letter is quite simply a myth.

Particularly disappointing is the claim that this amendment is needed to help small businesses. To begin with, nothing in this bill is limited to "small" businesses. Large companies who routinely employ lawyers to advise them on what other federal statues require can certainly do the same with respect to the ADA.

As for small business, the ADA already has several provisions that protect small businesses from unreasonable requirements. Title III, for example does not require any action with respect to existing buildings that would cause an "undue burden"[8] or that is "not readily achievable,"[9] defined as "easily accomplishable and able to be carried out without much difficulty or expense."[10] This flexibility was purposely included in to the ADA so that businesses of different sizes and circumstances could be treated differently. But with flexibility comes responsibility. One cannot fairly complain that the law's requirements are vague and imprecise on the one hand, and not lift a finger to investigate what it requires, on the other.

It is also the case that the proposed notice requirement would have a particularly onerous impact where the violations pose a threat to one's health or deny access to critical services. Persons with disabilities must be able to invoke the jurisdiction of the courts to ensure their access to doctors' offices, hospitals and other medical services, and in some cases, requiring a six-month waiting period may place their health in jeopardy. Likewise, individuals with disabilities should not be required to wait up to six months before resorting to the enforcement power of the courts to ensure access to critical educational or

[8] 42 U.S.C. § 12182(b)(2)(A)(iii).

[9] 42 U.S.C. § 12182(b)(2)(A)(v).

[10] 42 U.S.C. § 12181(9).

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financial services (*e.g.*, insurance and mortgage services). Indeed, this bill would effectively rob individuals of their right to seek a preliminary injunction (which the courts will grant when there is the risk of irreparable harm if the court does not act promptly). Depending on the type of violation involved, moreover, and the specific circumstances of the aggrieved party, many lawyers routinely provide notice in an effort to settle Title III actions voluntarily. In many cases, however (such as where there is a need for prompt injunctive relief), there is a need to dispense with long delays before proceeding to court. This option should not be denied in situations where the attorneys have determined that speed is of the essence.

The specifics of the proposed notice provision are troublesome on a technical level. For example, the bill requires "a written notice specific enough to allow" the owner "to identify [the] barrier." But a plaintiff often does not know the full nature of the violations until after he files suit, nor could he, since the defendant controls access to the premises. It is the defendant who is in the best position to know the extent of the problem, not the plaintiff.

Take the example of a hotel. If there are steps to get in, all a wheelchair user knows is that he can't get in. He obviously can't know anything about other violations (although he might suspect that they exist). Even if he gets in, he will likely only know the specifics of one room – the one he was in. As written, however, the law would prohibit a lawsuit to correct anything but the steps, or that one room. The law thus encourages piecemeal litigation, which wastes everybody's time, including the judge's and the defendant's. Courts have an interest in resolving all related matters at the same time. Once at least one violation exists, a plaintiff ought to be entitled to challenge all violations that he finds exist at the same location.

I do not question the motives of the people who are supporting this amendment. But I am positive that its passage will turn back the clock more than two decades, and continue the historic exclusion of people with disabilities from the mainstream of society.

Thank you.

Mr. FRANKS. Thank you, Mr. Levy.

Mr. Peters, you are now recognized for 5 minutes, sir.

TESTIMONY OF DAVID WARREN PETERS, CEO AND GENERAL COUNSEL, LAWYERS AGAINST LAWSUIT ABUSE

Mr. PETERS. Thank you, Mr. Chairman, Members of the Subcommittee. Thank you for the opportunity to address these issues. While I have only been consulted in about 900 ADA cases around the country, I am in touch with attorneys who have handled a far larger number than that, so I have knowledge of a larger group of cases. And I am here to tell you about some of the troubling practices that we have seen occurring in hundreds of cases around the country, which have, not surprisingly, required a number of businesses to close. And I would add that that should never need to occur in one of these cases.

H.R. 3356 would change all that in that it would require an almost immediate agreement to make changes with the knowledge that if those changes were not quickly made, the pre-litigation notice letter it requires would almost certainly exhibit A to a costly Federal lawsuit. I think that is about the worst way to get on the wrong side of a Federal judge is to have such an exhibit in your lawsuit showing that you were asked to make a change and you were not willing to make it.

In these very difficult financial times, we need to give individuals confidence to step forward and create jobs, but hundreds of my clients have received inaccurate information from their local building departments, city leaders, and even legislators being told that they were grandfathered and that their business did not need to make these changes. Of course, grandfathering applies to building codes, and these laws involve civil rights at businesses that are open to the public.

So while it is certainly not true that they were grandfathered, the answer is that these businesses need information, not to be blindsided by a lawsuit for changes that most would gladly make if they only knew of the requirements. A lawsuit should not be the first notice they get.

In 2005, I personally witnessed at least 7 small businesses close very quickly in the small mountain community of Julian, California after an attorney demanded $200,000 as an unlawful investigation fee after he had spent a weekend there from about 67 businesses in the name of an organization that he created and represented. The demands were calculated to increase every day during which they were not accepted.

Since then, we have seen dozens of other businesses close as a direct result of these lawsuits, in many cases after making all appropriate changes, just because they never wanted to deal with the nightmare of another ADA lawsuit.

But more troubling is the fact that many hundreds, if not thousands, of these cases are concluded without any changes ever being made, which undermines the important public policy objectives of the ADA. Exhibit D is just one example of standard terms offered by one law firm known to have filed over 2,000 ADA accessibility lawsuits. Basically, if you pay the right price, you can obtain a settlement agreement wrapped in a strong confidentiality clause, which is, for practical purposes, all but unenforceable.

Note that the agreement only requires that the defendant do what its consultant recommends, but does not require that the consultant be qualified or even that the items mentioned in the complaint be fixed. In many cases, hundreds of cases, they simply are not. Many attorneys deliberately leave information about conditions which may need to be changed out of their lawsuits for fear defendants will make all of the changes and moot the case. But since so many of these cases are settled informally, many defendants never learn about all the changes they need to make.

The 9th Circuit Court of Appeals recently commented that a filer of thousands of these lawsuits admitted that he rarely mentioned all conditions which could limit accessibility for his clients in the complaints he filed because, and I quote, "Otherwise, a defendant could remove all the barriers prior to trial and moot the entire

case." We are citing *Oliver v. Ralphs*, which is in Exhibit E. So if one of the purposes of the ADA was that these lawsuits would operate to prompt changes for others, practices like these directly undermine that objective.

But not all lawyers conceal claims. A discreet selling of noncompliance is far more common. I have been told that if my client pays the right amount, the plaintiff's attorney will agree with my access plan whether it is appropriate or not. And if that amount is not paid, they will find a way to object to it, no matter how meritorious it is.

At one struggling charity thrift store, which was only months from being taken by eminent domain, I was told that if my client did not pay $50,000, the plaintiff's attorney would contend that a power door should be installed, even though the business only had 8 months left to operate.

In the same way noncompliance is often overlooked in these cases, conditions which are completely compliant will provide no protection. In the case of Kohler vs. Flava, we had to litigate for 17 months to prove that each of the claims made by plaintiff's counsel were meritless. This required over $100,000 in legal expense for which we could not bill this very small client, and for which the court declined to award us fees, as shown in your exhibits.

As you probably are aware, there is a one-way fee statute in these cases by which prevailing plaintiffs almost always recover their legal fees, while prevailing defendants are lucky to ever recover a fraction, if any, of them. These have been described as the cases you cannot afford to win, and creates a situation where inappropriate positions can easily be taken without accountability.

The Flava case was unusual because we had photographic proof that two of the three sole claims in the complaint were false. The property had previously been sued by the same attorney, and the changes had been photographed, text messaged, and e-mailed in 2009. So there could be no question that they did not exist in 2010 when the plaintiff claimed he had visited. As to the third claim, the attorney had sued 105 defendants on that same claim, which is basically that a bench longer than 48 inches, a dressing room bench, would cause problems for people with disabilities. And he failed in every adjudication, but he nevertheless advanced litigation against my client on that claim for 17 months and failed in that case as well.

In that case, what made it unusual was that this attorney has falsified the signatures of a deceased client of his on documents which were first prepared weeks after the client's death. When we reported this to the court, that attorney sued each of the defendants that had reported the signature forgery to the court. And so my client had not one, but 2 lawsuits to deal with. Another defendant had several lawsuits to deal with.

Worst of all, the attorney felt that he was entitled to falsify those signatures 3 weeks after his client had died. And every judge who has considered the matter has disagreed with him. But that did not help my small business client at all. To date, we probably have about a half million dollars in fees that we cannot bill the client, and we will probably not see from the court.

The ADA does not need to be a game where only the attorneys win and people with disabilities too often are the losers. As you may know, vast numbers of these cases are concluded without appropriate changes ever being made. One of the reasons for this is that it can take 2 years or more to litigate a case, and during that time attorneys must often advise their clients not to make changes for fear they will be accused of destroying evidence, as one of my clients was when making the very changes that the plaintiffs sought. In that case as well, two of the three sole claims were adjudicated in the defendant's favor, and as to the third, the plaintiff failed in every known adjudication, but prolonged the litigation even beyond the summary judgment phase.

Moving on, in *Pinnock v. Michelin*, even though the plaintiff's attorney could find no problem at a site meeting with attorneys, witnesses, and experts, they nevertheless converted the lawsuit to a class action and litigated for an additional 8 months against my client.

Mr. FRANKS. Mr. Peters, I have got to ask you to wrap up here.

Mr. PETERS. Understood. I wholeheartedly support H.R. 3356. It gives a plaintiff the power to have a change made immediately rather than maybe after 2 years and maybe not at all. Thank you.

[The prepared statement of Mr. Peters follows:]

Prepared Statement of David Warren Peters, Esq., CEO and General Counsel, Lawyers Against Lawsuit Abuse*

I've been consulted in over 900 ADA/accessibility lawsuits throughout the United States, and defended over 400 such claims as lead counsel. I urge your support of H.R. 3356 because it will stop some widespread, troubling practices in these cases, reduce the number of businesses which close as a direct result and accelerate improvements for disabled access which are currently not being made in a very large number of these cases.

H.R. 3356 would require an almost immediate agreement to make changes with the knowledge that, if changes were not quickly made, the pre-litigation notice letter it requires would most likely be "Exhibit A" to a costly lawsuit where the business could be forced to make those same changes and pay the plaintiff's attorney. In these very difficult financial times, we need to give individuals confidence to step forward and create jobs. But hundreds of my clients received inaccurate information from their local building departments, city leaders and even legislators that they were "grandfathered" and only needed to make improvements if they made significant structural changes at their business. While that's certainly not true, the answer is that businesses need information—not to be "blindsided" by lawsuits for changes most would gladly make if they only knew of the requirements. A lawsuit should not be the first notice they get.

In 2005, I personally witnessed at least seven (7) small businesses close very quickly in the small mountain community of Julian, California after an attorney demanded a $200,000 (Exhibit "A") as an unlawful "investigation fee" (Exhibit "B" page 7 paragraph 2) from about 67 businesses in the name of an organization he created and represented, which demands increased every day his terms were not accepted (Exhibit "C"). Since then, we've seen dozens of other businesses close as a direct result of these lawsuits, in many cases after making all appropriate changes, just because they never wanted to deal with the nightmare of another ADA lawsuit.

But more troubling is the fact that many hundreds, if not thousands of these cases, are concluded without any changes ever being made, which undermines the

*Mr. Peters submitted supplemental materials with his statement that the Committee chose not to print. However, the materials are on file in the official hearing record. Please contact the House Committee on the Judiciary's Subcommittee on the Constitution for that information.

important public policy objectives of the ADA. Exhibit "D" is just one example of the standard terms offered by one law firm known to have filed over 2,000 ADA/accessibility lawsuits. Basically, if you pay the right price, you can obtain a settlement agreement wrapped in a strong confidentiality clause which is, for practical purposes, all but unenforceable. Note that the agreement only requires the defendant to do what its consultant recommends, but does not require that the consultant be qualified or even that the items mentioned in the complaint be fixed.

Many attorneys deliberately leave information about conditions which may need to be changed out of their lawsuits for fear defendants will make all the changes and moot the case; but since so many of these cases are settled informally, many defendants never learn about all the changes they need to make. The Ninth Circuit Court of Appeals recently commented that a filer of thousands of these lawsuits admitted that he rarely mentioned all conditions which could limit accessibility for his clients in the complaints he filed because ". . . otherwise a defendant could remove all the barriers prior to trial and moot the entire case" (see footnote 7 on page 10888 of Exhibit "E"—*Oliver v. Ralphs*). So if one of the purposes of the ADA was that these lawsuits would operate to prompt changes for others, practices like these directly undermine that objective.

But not all lawyers conceal claims—a discrete selling of noncompliance is far more common—I've been told that if my client pays the right amount, the plaintiff's attorney will agree with my access plan whether it is appropriate or not, and if that amount is not paid, they will find a way to object to it no matter how meritorious it is. At one struggling charity thrift store which was only months from being taken by eminent domain, I was told that if my client didn't pay $50,000, the plaintiff's attorney would contend that a power door should be installed to prolong the case and increase defense expense.

In the same way noncompliance is often overlooked in these cases, conditions which are completely compliant still provide no protection. In the case of *Kohler v. Flava* we had to litigate for 17 months to prove that each of the claims made by plaintiff's counsel were meritless (Exhibit "F"). This required over $100,000 in legal expense for which we could not bill this very small client and for which the Court declined to award us fees, as shown in Exhibits "G1" and "G2". As you are probably aware, there is a one-way fees statute in these cases by which prevailing plaintiffs almost always recover their legal fees while prevailing defendants are lucky to ever recover a fraction, if any, of them. These have been described as "the cases you can't afford to win" and creates a situation where inappropriate positions can easily be taken without accountability.

The *Flava* case was unusual because we had photographic proof that two of the three sole claims in the complaint (Exhibit "H") were false—the property had previously been sued by the same attorney, and the changes had been photographed, text messaged and emailed in 2009, so there could be no question that they did not exist in 2010 when the plaintiff testified he'd first visited. As to the third claim, the attorney had sued 105 defendants and failed in every known adjudication (Exhibits "M", "N" and "F"), but kept demanding and receiving nuisance settlements from defendants who found it would cost them less to settle than to prove their innocence. The real reason my client was sued is shown in Exhibits "I" and "J"—because we reported to the court that this attorney falsified several signatures of a deceased client on documents which were first prepared weeks after her death. This attorney then filed a handful of new lawsuits against each of the defendants who'd reported the signature falsification to the court. Even though the falsity of many of the claims was documented in considerable detail, the judges were never willing to consider the evidence about the various cases together because it could create the impression that they were not limiting their focus to the case in question.[1]

But the ADA does not need to be a game where only the attorneys win and people with disabilities too often are the losers. As you may know, vast numbers of these cases are concluded without appropriate changes ever being made. One of the reasons for this is that it can take two years or more to litigate a case, and during

[1] Each of the foregoing decisions has already been appealed or is shortly expected to be thus requiring even more work for which we can't bill out clients.

that time attorneys must often advise their clients not to make changes for fear they will be accused of destroying evidence, as one of my clients was when making the very changes the plaintiff sought (Exhibit "K" at 2:7). In that case as well, two of the three sole claims were adjudicated in the defendant's favor (Exhibit "L"), and as to the third, the plaintiff failed in every known adjudication (Exhibits "M", "N" and "F")—basically, the plaintiff contended that a dressing room bench longer than 48 inches in length somehow limited accessibility for people with disabilities. While every judge we know of has disagreed, if this attorney received similar amounts in each of the cases in which he made these claims, he would have received $500,000 or more for advancing claims which consistently failed.

In T3Pinnock v. Michlin even though the plaintiff's attorney could find no problems whatsoever at a site meeting with a number of witnesses (Exhibit "O"), they still converted the claim to a class action (Exhibit "P") and litigated for over 8 months against this small picture frame shop shown in Exhibit "Q". In the end, the sole picture they produced by court order of the condition on which their claim was based showed a compliant counter which had existed unchanged for decades (Exhibit "R").

In *Pinnock v. Coles*, that same law firm filed a complaint which represented that their client had visited a carpet store on two specific dates (Exhibit "S"); but when confronted with video footage from the 10 high definition cameras which covered every area of the store and that the plaintiff did not appear in it for a week before and after each date, they filed *another* lawsuit (Exhibit "T") in the name of one "Robin Member." When reminded that pseudonyms were inappropriate for adult plaintiffs (and few kids buy carpet), they indicated that the Plaintiff's true name was Robin Lavender but that they could no longer contact her. We decided to help but one of the best private investigators in the area could find no record of anyone named Robin Lavender ever having lived anywhere in the county (and most people who buy carpet tend to have property ownership or leasing information in credit records). Unable to produce plaintiff number two, the lawfirm filed a *third* lawsuit—this time a statewide class action lawsuit (Exhibit "U") for a failure to provide Braille and wheelchair access. But when the plaintiff in that case finally arrived in court, a courtroom full of witnesses and two Federal judges saw that she needed neither Braille nor wheelchair access, because she walked in without assistance and was seen reading an ordinary book (Exhibits "V" and "W").

But the dozens of false claims this lawfirm filed in the name of Plaintiff Lissa Hayes were just the beginning. As you can see on the news video I am showing, the KABC news copter caught their client Jim Cohan hiking up a hill with his dogs, even though they had filed countless claims in his name alleging a lack of Braille and wheelchair access (Exhibit "X" is just one example). Their former client Noni Gotti recently testified to the California State Senate on video (available on request) that she Googled her name and was shocked to see that they filed as many as 243 lawsuits about a lack of Braille, wheelchair accessibility and numerous other conditions which had never been a problem for her, against many places she's never visited (Exhibits "Y1" through "Y4"). While it is true that one of the attorneys who worked on her cases fled the country and tried to resign; the State Bar opposed his resignation and pressed charges—the problem is that the charges had almost nothing to do with the false claims discussed above, and to date, there has been almost no accountability for any of the small businesses sued in these cases, many of which closed immediately.

But H.R. 3356 can put a stop to all that, and can restore the ADA to its original intent and the dignity and respect it was intended to have. What defendant would not immediately change out a round door knob or remove an unsecured floormat—even if the plaintiff did not need really those things? Almost any small business would make the change immediately with its "first dollars" instead of putting them toward litigation, where too often they are never made once a settlement is paid.

I personally visited, photographed and documented 100 properties in 4 cities which had been sued in ADA/accessibility lawsuits at least 5 years earlier, so the time for appeals and reconsideration would have passed long before. 98 of those properties had significant conditions which would immediately support a new ADA/lawsuit, and at many, no changes whatsoever had been made. H.R. 3356 would have

had changes made at every one of those properties within weeks. After 20 years of lawsuits and only a fraction of the progress we owe our citizens with disabilities, it's time to adopt a system which would guarantee immediate changes and stop the inappropriate use of these noble laws for improper purposes. I respectfully urge your strong support and swift passage of H.R. 3356.

Mr. FRANKS. Thank you, sir. Thank you very much.

I will now begin by recognizing myself for 5 minutes for questions.

And, Ms. Ky, I will begin with you, if I could. Mr. Lungren's bill requires a plaintiff to give a business owner notice of an alleged ADA violation and the opportunity to fix that violation before a lawsuit may be filed. So I ask you the rather obvious, but I think critical, question since you are uniquely credible to answer. Do you believe that it is fair to the disabled to require notice and an opportunity to fix a violation before a lawsuit can be filed?

Ms. KY. Yes, I do. The reason is that many of this is not updated. For example, in this building, if I go around, this building is not compliant with ADA, and the law is written by you guys. So how can you expect the general population to be aware what is being written if it is not being publicized? For example, using a speed limit, it is posted every, what, half a mile? Say, speed limit 45. If you go over it, you get a ticket. You choose to go over it. But we did not choose not to comply.

So minor violations, 30 days, perfect. If I need Braille stickers, 60 inches above from the ground, I will go to the store to get it. But if the concrete needs to be removed and redo it because it is 3.8 percent because it is not 2.8 percent, we have to find construction. We have to find people that know how to do concrete. And that gave me 120 days to do that.

It is only fair. It is for the community. It is for everybody. You cannot just give me a sue packet and say, you sue. What did we do? Well, because you are not complying. Well, I did not know the law changed every 5 years or every 3 years. Was it announced? Was it publicized? Is it 3 strikes, you are out? No.

So we need some notice whether from the lawyer, from the plaintiff, from somebody. Give me the list.

Mr. FRANKS. Well, thank you. I am just curious, did I hear you say that this building or where you are sitting now is not ADA compliant as we have written it?

Ms. KY. I am sorry, say that again?

Mr. FRANKS. Maybe I misunderstood. Did you say that the building that we are in now or that the table that you are at is not ADA compliant as you understand it?

Ms. KY. Yeah, your table here, I do not see a disabled symbol because, you know, on the list that we were cited for, I believe in the ADA regs or policy is that a business owner needs to put a universal word symbol on their table to signify saying, oh, this section is for you, and you only sit in here.

So as you can see, I am looking around, I do not see that in here. This is a public place, so why is it not in your building?

Mr. FRANKS. Thank you. I hope somebody gives us notice on that.

Ms. KY. Yeah, that would be great. May I go around how accessible you are?

Mr. FRANKS. All right. Thank you. Thank you, Ms. Ky.

Mr. Peters, I would like to ask you, the ACCESS Act would require a plaintiff to send the owner or operator of a public accommodation notice of an alleged ADA violation before the plaintiff may file a lawsuit. I keep repeating the obvious, but it is important to understand really the simplicity, if I am getting it right here. The owner/operator then has up to 120 days to make necessary repairs.

Given your experience with ADA lawsuits, is this 120-day time period a significant delay for plaintiffs? Do ADA lawsuits usually get resolved more quickly than 120 days under current law?

Mr. PETERS. A hundred and twenty days——

Mr. FRANKS. Make sure your microphone is on, sir.

Mr. PETERS. Yes, I think it is.

Mr. FRANKS. All right.

Mr. PETERS. I did a study of 100 properties that had been sued in ADA lawsuits in Federal court as far as 5 years back, so that the time for appeals or permits, et cetera, should all have been behind by then. Ninety-eight of those properties still had conditions which would support a lawsuit only, and at many of them no changes whatsoever had been made. And only 2 could I say I really did not see things that would lead to another claim.

And so you asked about 120 days. That would be a dream come true for many members of my family, and many clients and plaintiffs that I have met that tell me that they have asked for months, if not years, for changes to be made, and the changes are never made. With this bill, if you do not agree to make the change and quickly make the change, you are going to have one angry Federal judge on your case. And that is the last thing any of these small businesses can afford.

Mr. FRANKS. Well, opponents of the bill also argue that if a plaintiff has to provide notification of alleged ADA violation before they can file a suit, then business owners will have no incentive to make their buildings accessible until they receive notice. Based on your experience, do you believe that that argument has merit?

Mr. PETERS. No, not at all. There are a variety of States laws in which a business can still be sued. Actions can still be brought by the attorneys general, State or Federal. Frankly, the ADA is still the law. This does not change that. It is what needs to be done. There are massive tax credits for making ADA changes, and many businesses will obey the law because it is the law.

The overwhelming majority of defendants who have contacted me simply did not understand that it was required. Sadly, they got bad information from their building departments or their city officials. But the minute they understood that it applied to them, they gladly made the changes.

Mr. FRANKS. Thank you, Mr. Peters. Thank all of you.

Mr. Nadler, I recognize you for 5 minutes for questioning, sir.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Levy, if lawyers sometimes send demand letters before suing, what is the harm in making that a statutory requirement for everyone?

Mr. LEVY. There are cases in which the lawyer representing a particular client may choose to do so for any number of reasons. The problem with making it a statutory requirement is that it cre-

ates an exemption from the law to anyone who has not gotten such a letter, regardless of how long the violation has occurred. The clock does not start at all until they get the letter.

Mr. NADLER. Okay. So, in fact, that is no incentive to comply with the law until you get the letter.

Mr. LEVY. No incentive at all. You are not going to have to pay damages because Title III does not provide for damages. So it does not matter how long the violation——

Mr. NADLER. Well, let me ask you a question that I asked our colleague, Mr. Lungren. Let us assume that statute provided that you cannot be sued until receipt of the letter, but also provided for damages. Would that be reasonable?

Mr. LEVY. I think that would be a good starting point, Congressman. I think that if you had a law that provided for damages, it changes the dynamic, and no longer notification—just like administrative exhaustion in Title I no longer provides for an exemption because damages will be running for violation if there are violations.

Mr. NADLER. So if the proposal said you are responsible for violations as you are now. You are supposed to comply with the law. But you cannot be sued until you get a demand letter, but once you get a demand letter, or whatever you call this letter, you can be sued for violations going back.

Mr. LEVY. I think that would be——

Mr. NADLER. You can get damages rather for violations.

Mr. LEVY. That would be a much better bill than the one that is proposed.

Mr. NADLER. It would be better than the current law?

Mr. LEVY. This one solves a problem that basically does not exist in my experience.

Mr. NADLER. Would such a bill be better than the current law?

Mr. LEVY. The current bill.

Mr. NADLER. No, no. What I just suggested.

Mr. LEVY. I think that the availability of damages in Title III would be much better than the existing status quo. How that would be structured in terms of notification or exhaustion, clearly that is a much more even way to begin the discussion than the existing bill.

Mr. NADLER. Thank you. Mr. Levy again, the bill requires notice that is "specific enough," for a defendant to remedy the problem. What do you take this to mean, and might this simply foster litigation over whether a letter was "specific enough?"

Mr. LEVY. You already have someone who goes and hires Mr. Peters and brings this letter to him. If he is a capable defense lawyer, as I know he is, the first thing he is going to do is quarrel with the specificity in the notice. He is going to say the notice is not specific enough. Here are all the things it does not tell us. Here are all the things we need to know. It creates issues. Issues are the mother's milk of lawyers in terms of billing time. It is going to make enforcement of this law all the more——

Mr. NADLER. So this is a trial lawyer's bill?

Mr. LEVY. For the defense it is because they get paid whether they win or lose.

Mr. NADLER. So this would be a measure to foster more litigation. Mr. Peters——

Mr. LEVY. Would have that——

Mr. NADLER. What is your reaction to that? Would, in fact, a requirement of a letter "specific enough" lead to litigation over what is "specific enough?"

Mr. PETERS. Well, for us to take a case, first of all, we require that the client be willing to make all required changes within 30 days. And, in fact, if it can be done in 10 days, it needs to be.

Mr. NADLER. No—yeah.

Mr. PETERS. I am getting to your answer.

Mr. NADLER. Okay.

Mr. PETERS. Since Mr. Levy referred to our office, if a letter like that comes into our office, we are going to require the client to be making all the changes immediately. If the letter is not "specific enough," we can get an investigator to go—I usually visit the property and meet the client and talk about the changes that——

Mr. NADLER. But do you think there would be more litigation over whether it is specific enough? You say it was not. Someone would say it was.

Mr. PETERS. I really do not. I must tell you, though, I have seen a small number of letters, a very small number, where someone said I had difficulty in your parking area.

Mr. NADLER. Okay. Mr. Levy, since I am running out of time, my last question. There are reported claims of businesses routinely having to shut down because of ADA. If the required changes for existing structures under the ADA only need be made "readily achievable," why is this happening, or this, in fact, happening?

Mr. LEVY. It is not happening in my experience. I hear these anecdotes. They are not consistent with any universe in which I live or I practice. In fact, much more common is all you need to do is drive down the street and look at the number of storefronts with a couple of steps into them that, 20 years after the ADA has been the law, no one has bothered to install a ramp.

They do not need notification. What we need are stronger enforcement provisions so people will be worried enough about complying with the law that they, in fact, go and do so.

Mr. NADLER. Thank you.

Mr. FRANKS. Thank you, Mr. Nadler. And, let us see. I guess we go to Mr. Scott here. I keep looking for Mr. Quigley here. I am not forgetting your name, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. FRANKS. Yes, sir.

Mr. SCOTT. Mr. Levy, you suggested that if this bill goes into effect, there would be no incentive for any business to get into compliance with the ADA until such time as they have statutory notice of a specific violation. Is that right?

Mr. LEVY. Yes, sir.

Mr. SCOTT. Now what kind of voluntary compliance has occurred since 1990?

Mr. LEVY. Well, everyone who has looked at this has recognized that the ADA is a notoriously under enforced and un-complied with law. I mean, I am from Baltimore. We could take a walk 2 blocks from my office, see the number of stores that still had steps to get

into them. And these are not, you know, flights of stairs. These are a small number of steps that could easily be ramped.

And it is the case that not only has there not been voluntary compliance up to now, there has been widespread just ignoring of the requirements of the law that is on the books. If we put further obstacles in the way of plaintiffs seeking to enforce this law, it is not complicated. There is going to be less compliance. There is going to be less accessibility. You know, it is a simple game, as they say.

Mr. SCOTT. Mr. Peters, did I understand you to say that you could be in compliance with building codes and still be in violation with the ADA?

Mr. PETERS. Absolutely. In fact, there are a number of direct contradictions. Speaking only for California, which is where I am from, there are about 2,400 points between the ADA and the California Building Code. And with some you do ADA, with some you do California. It is really hard for a small business owner to know.

And there are at least 7 points where they directly conflict. We get 3 experts in a room, and they cannot even agree on what needs to be done at a particular business.

Mr. SCOTT. Well, would it make sense to work with the building code and the ADA rather than inflict this kind of bill on the public that would discourage anyone from coming into voluntary compliance?

Mr. PETERS. That is what has been happening. There is an effort to reconcile the building codes with ADA standards. It has been going on for, I think, way over a decade. And the progress is commendable, but it is the uncertainty that often drives these cases.

Mr. SCOTT. Thank you. I have no further questions. Mr. Chairman, parliamentary inquiry.

Mr. FRANKS. Sir.

Mr. SCOTT. Mr. Lungren is a Member of the Committee. If I yielded time to him, would he be able to ask questions?

Mr. FRANKS. I am afraid, Mr. Scott, the rules do not allow the august Mr. Lungren the opportunity to speak or ask questions from the dais.

Mr. NADLER. Mr. Chairman.

Mr. FRANKS. And I am going to ahead, given the past enforcement of that rule, we are going to enforce that.

Mr. NADLER. I would ask unanimous consent that he be permitted, if he is still here.

Mr. FRANKS. And with loving deference my friend, and he understands why I would object. However, I will take the Chairman's prerogative to say that I think he has done a wonderful thing here today. [Laughter.]

And that this is a very good bill, and I hope that it succeeds.

And I thank all the witnesses for being here today.

Without objection, all of the Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion in the record.

And with that, again, I thank the witnesses, and I thank the Members and observers. Thank all of you for being here. And this hearing is adjourned.

[Whereupon, at 2:56 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution

Statement
Of the
National Restaurant Association

ON: H.R. 3356, THE "ACCESS (ADA COMPLIANCE FOR CUSTOMER ENTRY TO STORES AND SERVICES) ACT"

TO: U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION

BY: ANGELO AMADOR, VICE PRESIDENT

DATE: JUNE 27, 2012

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Statement on
H.R. 3356, The "ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act"

Before the
U.S. House of Representatives, House Committee on the Judiciary
Subcommittee on the Constitution

By
Angelo I. Amador, Vice President of the
National Restaurant Association

June 27, 2012

I submit this statement on behalf of the National Restaurant Association in support of H.R. 3356, ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act of 2011. I, particularly, want to thank Representative Dan Lungren for his leadership on this issue.

This important legislation would give businesses a fair opportunity to learn about and correct potential accessibility issues. The National Restaurant Association is the leading business association for the restaurant and foodservice industry. The Association's mission is to help our members build customer loyalty, rewarding careers and financial success. Nationally, the industry is comprised of 970,000 restaurant and foodservice outlets employing 12.9 million people. We serve more than 130,000 million guests per day.

Representative Lungren's state of California alone has more than 90,000 eating and drinking establishments currently operating with an estimated $56.7 billion in food and drink sales in 2009 and the generation of $4.5 billion in California sales tax per year. However, despite being the nation's second-largest private-sector employer, the restaurant industry is predominately composed of small businesses.

The ADA, passed in 1990, requires restaurant and other places of public accommodation to be accessible to customers with disabilities. Restaurateurs welcome and accommodate guests with disabilities. Providing access is not just good business; it's the right thing to do. Over the years, restaurants have invested heavily in renovations and other changes to ensure their operations are welcoming and comply with the law.

Unfortunately, some restaurants, particularly, but not exclusively, in California, have been victim of a number of abusive "drive-by" ADA lawsuits. Typically, these attorneys allege technical violations in hopes that a small business owner will settle the case instead of spending the time and money to defend the case in court.

We believe that businesses should be allowed a fair opportunity to address potential accessibility issues before the business is sued.

The ACCESS Act of 2011 would give restaurateurs and other business owners 60 days to address any person allegedly aggrieved by a violation and provide a description outlining improvements. Then, the owner or operator would have 120 days to correct the alleged accessibility problems. This would help prevent lawsuit abuse, while conserving a restaurant's resources to improve accessibility.

Under the ACCESS Act of 2011, restaurateurs and other business owners would be protected from lawsuits during the 120 days period. We stand ready to help move this legislation forward and encourage all members of this Sub-Committee to co-sponsor the ACCESS Act of 2011, H.R. 3356.

Thank you for holding this hearing on such important legislation and for considering our industry's concerns. I hope Congress will take action this year to reduce ADA lawsuit abuse.

Written Statement of the
International Council of Shopping Centers, the
National Association of Real Estate Investment Trusts,
The Real Estate Roundtable, the
Retail Industry Leaders Association and the
National Restaurant Association
Submitted for the Hearing on

H.R. 3356, the "ACCESS (ADA Compliance for Customer Entry to
Stores and Services) Act"
House Committee on the Judiciary
Subcommittee on the Constitution
June 27, 2012

The International Council of Shopping Centers ("ICSC"), the National Association of Real Estate Investment Trusts ("NAREIT"), the Real Estate Roundtable, the Retail Industry Leaders Association ("RILA"), and the National Restaurant Association (collectively, "the trade associations") hereby submit the following statement for the record in reference to the above-entitled hearing.

Founded in 1957, ICSC is the premier global trade association of the shopping center industry. Its more than 55,000 members in over 90 countries include shopping center owners, developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials.

NAREIT®, the National Association of Real Estate Investment Trusts®, is the worldwide representative voice for REITs and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

The Real Estate Roundtable represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending and management firms, as well as the elected leaders of the major national real estate industry trade associations. Collectively, Roundtable members hold portfolios containing over 5 billion square feet of developed property valued at over $1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Participating Roundtable trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

By way of background, RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

The National Restaurant Association is the leading business association for the restaurant and foodservice industry. The Association's mission is to help our members build customer loyalty, rewarding careers and financial success. Nationally, the industry is comprised of 970,000 restaurant and foodservice outlets employing 12.9 million people. We serve more than 130,000 million guests per day. Despite being an industry of predominately small businesses, the restaurant industry is the nation's second-largest private-sector employer.

The trade associations support H.R. 3356, the "ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act" as a meaningful first step in correcting an area of the law that has become a focus of abuse for opportunistic trial lawyers, while ensuring that the owners and operators of public accommodations can address identified access violations before they face litigation. The trade associations also respectfully suggest that Congress look to recent reforms in California that filter out meritless lawsuits prior to trial when considering solutions to frivolous ADA litigation.

The trade associations support the intent and spirit of the Americans with Disabilities Act of 1990 which requires that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, or leases to, or operates a place of public accommodation. Entities covered by the term "public accommodation" include shopping centers, hotels, restaurants, theaters, and auditoriums. We believe it is appropriate to establish a framework or process by which public accommodations that are not currently accessible can be made accessible prior to the initiation of costly lawsuits.

However, beginning as far back as the late 1990s, members of the trade associations became victims of unscrupulous attorneys who file, or threaten to file, lawsuits against property owners for minor access violations with little or no advanced warning. These attorneys have now developed a mature, cottage industry of "inspecting" various shopping centers, stores and restaurants in order to locate minor, easily-correctable ADA infractions, such as those relating to parking lot striping and signs, bathroom dispensers, ramps and signage.

While most provisions of the ADA require a plaintiff to notify and provide the owner an opportunity to correct an alleged violation before a lawsuit can go forward, the section of the ADA relating to public access to private property does not contain such notice provision. Taking advantage of this loophole, some attorneys (without giving property owners an opportunity to fix the alleged violations) are filing, or threatening to file, lawsuits that usually lead to cash settlements – because property owners want to avoid the time, expense and hassle of litigation and the potential negative publicity associated with it. To make matters worse, many property owners pay a nuisance settlement even though they reasonably believed their properties were ADA-compliant based on assurances by state or local inspectors and/or outside consultants.

H.R. 3356, by requiring notice before the filing of a lawsuit, will permit property owners to comply with the ADA in a timely and reasonable manner. The current practice of "sue first, ask questions later" only serves to enrich trial attorneys without true benefits to disabled Americans. For instance, in the court case of *Molski v. Mandarin Touch Restaurant* the court

found that the plaintiff was a vexatious litigant who filed 300-400 law suits designed to harass and intimidate business owners into agreeing to cash settlements. In that case, both the litigant and the attorney faced sanctions for frivolous ADA litigation. H.R. 3356 would do much to reduce the incentive for the type of litigation at issue in the *Molski* case.

In conclusion, the trade associations and others in the business community have long been committed to finding a solution, legislative or otherwise, that will preserve the rights of the disabled community and ensure access to public accommodations for disabled individuals, while curtailing counterproductive ADA litigation. The trade associations believe an ADA compromise must be reached that balances the spirit of ADA with a common sense and fair approach to correcting alleged violations, such as the notice regime proposed by H.R. 3356.

The trade associations would also call to the Subcommittee's attention recent reforms in California which mandate pre-trial hearings to filter out frivolous suits and which permit property owners to be certified as ADA-compliant by neutral third parties. In addition to the notice requirements contained in the bill under consideration today, the trade associations would suggest that similar measures be considered at the federal level. Ultimately, there is a compelling need for Congress to act in this area. Under current law, unscrupulous attorneys and others are benefitting rather than those ADA was meant to protect.

Material submitted by the Honorable Daniel E. Lungren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary

DIANNE FEINSTEIN
CALIFORNIA

SELECT COMMITTEE ON INTELLIGENCE - CHAIRMAN
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

April 13, 2012

The Honorable Darrell Steinberg
Senate President pro Tempore
California State Senate
State Capitol
Room 205
Sacramento, California 95814

Dear Darrell:

Thank you for your prompt response to my March 8th letter regarding abusive demand letters and lawsuits filed against California small business owners for noncompliance with the Americans with Disabilities Act (ADA). I appreciate your leadership on this issue and commend you for your efforts to address this problem through the passage of SB 1608 (Corbett, 2008) and SB 384 (Evans, 2011).

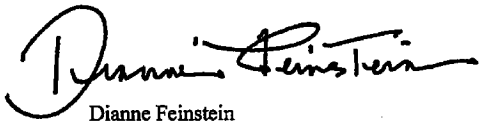
I understand that SB 1608 was a carefully-crafted compromise agreement that has created some positive changes related to disability access lawsuit reform. However, despite these sincere efforts, it appears that this legislation has not succeeded in ending these abusive lawsuit practices, as they nevertheless have continued to occur in the three years that have passed since SB 1608 became law. As you may recall, a majority of the demand letters that I shared with you in my previous letter were sent after the enactment of SB 1608.

Today, we are still witnessing an alarming rate of demand letters that are being sent to small business owners demanding settlements in the range of $5,000 - $8,000. The payment of this settlement amount, combined with the cost of hiring a lawyer to respond to the demand letter, can easily add up to more than $15,000 in costs for a small business owner. As you know, these unforeseen costs can be devastating to the "mom and pop shops" that are struggling to remain open for business.

Thus, I believe it is critical that a 90-day right to cure be enacted to help small businesses respond to this problem and, once and for all, to end these abuses by certain aggressive attorneys and predatory plaintiffs. I strongly urge you to reconsider your position on this approach. A business owner's ability to cure an ADA violation within 90 days would give that owner the opportunity to comply with the law without the wasteful expense of a lawsuit, which in my view would represent a win both for people with disabilities and for California small businesses.

Thank you again for your efforts in this area, and I hope that you will reconsider your position and help to advance the "right-to-cure" proposals that have been introduced in the California State Legislature.

Sincerely,



Dianne Feinstein
United States Senator

Material submitted by the Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution

Policy Statement of the National Council on Disability Regarding the ACCESS Act of 2011

The National Council on Disability (NCD) is an independent federal agency that makes recommendations to the President and Congress on disability policy. In this role, NCD is responsible for advising on the implementation, impact and effectiveness of the Americans with Disabilities Act. NCD first proposed the concept of the ADA in 1986 during the Reagan Administration, and in 1990 it was signed into law by President George H.W. Bush. Congress relied on and acknowledged the influence of NCD, its reports, and its testimony throughout the legislative process. Since passage of the ADA, NCD has remained actively involved in monitoring its impact and advising federal entities on policy issues.

NCD is deeply concerned about the proposed ADA Access Act of 2011. The Act proposes to amend the ADA to require that an individual alleging a business is inaccessible provide written notice to the business about the specific ADA violation before bringing suit.

Title III of the ADA was intended to balance the interests of small businesses along with the accessibility concerns of people with disabilities. It is a myth that the ADA's requirements are too hard on small businesses. The legislative history of the ADA is rife with concern about the burden on small businesses and as a result, Title III does not require any action with respect to existing buildings that would cause an undue burden or that is not readily achievable. The approach of the ADA was not to exempt small businesses from the requirements of the bill, but rather to tailor the requirements of the Act to take into account the needs and resources of small businesses– to require what is reasonable and not to impose obligations that are unrealistic or debilitating to businesses. Each of the major sections and requirements of the ADA takes into account the fact that some businesses are very small local enterprises that may have very limited resources. The following are some of the ways in which the provisions of the ADA provide great deference for the characteristics and needs of small businesses:

- the exemption for small employers;
- the undue hardship limitation;
- the readily achievable limit on barrier removal in existing public accommodations;
- the undue burden limitation regarding auxiliary aids and services; and
- the elevator exception for small buildings, among others.

NCD addresses this in its policy brief series, *Righting the ADA,* found at http://www.ncd.gov/publications/2003/Feb202003.

In addition, businesses have had almost a quarter of a century to comply with the provisions of Title III. DOJ has published and distributed multiple technical assistance documents– all of which are available 24 hours a day through DOJ's home page on the Internet. The National Institute on Disability and Rehabilitation Research established regional centers on the ADA, the Disability and Business Technical Assistance Centers (DBTACs), to provide technical assistance to businesses. Clearly, businesses have been put on notice of this 22-year-old landmark law.

An amendment to the ADA such as the proposed ADA Access Act of 2011, is superfluous. While at first impression the proposed amendment's notice requirement does not appear to be an imposing burden for an aggrieved individual to correct an ADA violation, this provision will have the drastic effect of creating a nationwide exemption to the ADA. It encourages businesses to do nothing until they get a letter of notification– no other civil rights law has a notice provision like this.

NCD recommends that Congress follow its own careful considerations when enacting the ADA—and not pass this unnecessary amendment.

Prepared Statement of the National Disability Rights Network

The National Disability Rights Network (NDRN) would like to thank Representative Franks, Representative Nadler, and the House Subcommittee on the Constitution for the opportunity to submit testimony on the important issue of accessibility for people with disabilities. NDRN is a nonprofit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) systems, created by Congress in the 1970's to protect the rights of children and adults with disabilities and their families. With a presence in every state and U.S. territory and the District of Colombia, the P&A/CAP network is the largest provider of legal services for people with disabilities in the United States. The P&As and CAPs offer an advocacy and legal voice to individuals with disabilities by uncovering and eliminating maltreatment and ensuring compliance with laws designed to protect the rights of individuals with disabilities, including the Americans with Disabilities Act.

We need to start with the recognition that even though the Americans with Disabilities Act was signed into law almost twenty-two years ago, people with disabilities still face barriers to many places of public accommodation. Although NDRN appreciates the interest in ensuring that places of public accommodation have an incentive to comply with the provisions of the ADA, we are opposed to the "ACCESS" Act because it would limit the ability of people with disabilities to efficiently obtain remedy to ADA violations.

The ACCESS Act would force people with disabilities to wait between sixty (60) and one hundred eighty (180) days to pursue legal action based on a violation of the ADA. This would delay the ability of people with disabilities to gain critical access to public accommodations ranging from restaurants to retail stores and lawyers', accountants' and doctors' offices. People with disabilities have had to wait decades to obtain access to these places, and no other civil rights law allows people to remain in non-compliance for so long.

While NDRN understands the concerns behind the desire to pass the ACCESS Act, behind the lawsuits filed under the ADA are legitimate concerns regarding lack of accessibility. The solution to the perceived problem that is the topic of today's hearing is not to prevent legitimate lawsuits from moving forward and the rights of people with disabilities from being promptly addressed.

Federal law and the Federal court system already have numerous protections in place to prevent attorneys from filing frivolous lawsuits, and often impose sanctions against attorneys who file these lawsuits. Rule 11 of the Federal Rules of Civil Procedure requires attorneys to certify that a pleading is not being filed for an improper purpose and is supported by the law and facts. If an attorney violates this rule, they may be subject to monetary or other sanctions. Although courts will award attorneys' fees under Title III of the Americans with Disabilities Act, these fees will not go to a party that does not prevail, and when an attorney does win attorneys' fees, courts examine closely the amount of time that an attorney spent on a case and only award a reasonable amount of attorneys' fees based on the effort an attorney put into the case. Some courts have even limited repeat "frequent flyers" by requiring them to get the court's leave before filing a lawsuit in certain courts. In especially egregious cases, like when an attorney requests monetary payment in exchange for not filing a lawsuit, an aggrieved party can file a complaint with the State Bar Association.

Most importantly, there is little that an amendment to the Federal ADA would do to remedy the issues raised today. There are currently no monetary damages available under Title III of the ADA, and only some state statutes provide monetary damages for plaintiffs in accessibility suits, but that is only under STATE law. To the extent that plaintiffs' attorneys file perceived frivolous lawsuits to gain monetary damages through civil damage settlements, amending the federal ADA statute would change nothing.

Current practice is already tilted toward the business community since many people with disabilities are on a limited income, and an award of attorneys' fees is never certain. So plaintiffs' attorneys tend to only work on cases where the plaintiff will likely prevail, which limits access to attorneys for people with disabilities.

Again, thank you for the opportunity to submit testimony today. For the reasons stated above, we oppose the ACCESS Act because it would require people with disabilities to wait even longer than they already have to obtain equal access to public accommodations.

July 11, 2012

The Honorable Trent Franks
Chairman
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler:

The American Association of People with Disabilities (AAPD) opposes H.R. 3356, the ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act of 2011. We ask that these comments be submitted for the record of the June 27, 2012 subcommittee hearing, "H.R. 3356, the 'ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act.'"

AAPD is the nation's largest disability rights organization. We promote equal opportunity, economic power, independent living, and political participation for people with disabilities. Our members, including people with disabilities and our family, friends, and supporters, represent a powerful force for change.

The Americans with Disabilities Act of 1990 (ADA) requires that architectural barriers in privately owned facilities be removed if it is possible to do so in a readily achievable manner. Readily achievable is defined as accomplishable without difficulty or expense.

H.R. 3356 would amend the ADA by requiring plaintiffs to give sixty days' notice to businesses that are in violation and wait four months before commencing an action seeking injunctive relief to remove barriers at the entrances to buildings. The ADA was passed in 1990. Businesses have been on notice for 22 years that they must provide accessible entries if readily achievable. People with disabilities should not have to continue to wait for businesses to comply.

Furthermore, the proposed amendment will make enforcement of the ADA increasingly difficult and expensive and will eliminate much of the existing incentives for businesses to attempt to comply with the law voluntarily. Under Title III of the ADA, there is only one true incentive built in for public accommodations to provide accessible entries - the desire not to get sued and be required to pay a successful plaintiff's attorney fees. If the proposed amendment becomes law, businesses will not have to consider complying with the law until they get a letter.

[illegible] Street, NW, Suite [illegible] • Washington, DC [illegible] • Toll Free: [illegible] (V/TTY) • Fax: [illegible] • www.aapd.com

The law should be enough. We do not need notification. We need stronger enforcement provisions so that people will be motivated to comply with the law.

Furthermore, the vast majority of lawsuits filed by plaintiffs have been against defendants who are violating the ADA. These businesses have had plenty of time to meet the requirements of the ADA. They should not need a special invitation to comply with the law. Most violations are not ambiguous. Inaccessible entries should not have to be pointed out in a letter.

Concerns have been expressed regarding damages and attorney fees awards to successful plaintiffs. Damages are not available under the ADA. They may be available under state laws, which will not be affected by this legislation. Under existing law, attorney fees are awarded at the discretion of the court. If a covered entity is sued for not removing an entrance barrier and immediately takes steps to remove the barrier, the case will be dismissed and any fee awarded will be minimal.

H.R. 3356 will postpone the civil right of people with disabilities to have accessible entry to medical offices, restaurants, hotels, hospitals, private schools, stores, and theaters without reason. Most attorneys put potential defendants on notice prior to commencing an action, even though they are not obligated to. Furthermore, the requirement to make entrances accessible, assuming barrier removal is readily achievable, is 22 years old. Notice is not an issue.

We urge you to consider the civil rights of people with disabilities and the damage that these amendments to the ADA would do. Thank you for your consideration and for the opportunity to comment.

Sincerely,

Mark Perriello
President & CEO

[illegible] • Washington, DC [illegible] • Toll Free [illegible] (V/TTY) • Fax [illegible] • www.aapd.com

Disability Rights Education & Defense Fund DREDF

July 11, 2012

The Honorable Trent Franks
Chairman
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

Re: H.R. 3356, the ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act.

Dear Chairman Franks and Ranking Member Nadler:

The Disability Rights Education and Defense Fund (DREDF) is writing this letter in opposition of H.R. 3356, the ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act of 2011. We ask that our comments be submitted for the record of the June 27, 2012 subcommittee hearing on H.R. 3356. DREDF works to advance the civil and human rights of people with disabilities through legal advocacy, training, education and public policy and legislative development.

H.R. 3356 would amend the Americans with Disabilities Act (ADA) by requiring aggrieved plaintiffs to wait for months before commencing an action seeking injunctive relief to remove barriers at the entrance to buildings. We oppose the legislation for the following reasons:

1. The ADA has been in effect now for 22 years; barrier removal to entrances and other facilities so that people with disabilities have the same access to goods and services as people without disabilities, has been required since that date. Title III requirements, which governs places of public accommodation, including hospitals, pharmacies, schools, supermarkets, banks, etc., come as no surprise to anyone. The idea of requiring a person with a disability to wait four months after notification is incongruous with the ADA – and will force people with disabilities to wait even longer than they have been waiting for real access.

2. H.R. 3356 would force people with disabilities to wait as long as six months to obtain redress for businesses' continuing legal violations. If law, people with disabilities would no longer be able to seek immediate injunctive relief to secure access to urgent goods and services in the area of education, healthcare and finance.

MAIN OFFICE: 3075 Adeline Street, Suite 210 • Berkeley, CA 94703 • 510.644.2555 • tty/fax 510.841.8645 • www.dredf.org
GOVERNMENT AFFAIRS OFFICE: 1825 K Street, NW, Suite 600 • Washington, DC 20006 | *Doing disability justice*

3. H.R. 3356 would create disincentives for places of public accommodation to comply with the ADA. Businesses would be encouraged to continue denying access to individuals with disabilities until and unless they receive a notice that someone intends to sue. Therefore, it would allow businesses to avoid making any accessibility modifications or any other efforts towards non-discrimination until they are "caught." It would discourage voluntary compliance with the ADA's requirements and penalize all those who made efforts to ensure accessibility and civil rights protections.

   In addition, as discussed in the hearing, the notice in H.R. 3356 must be specific enough for a business to know how to remedy the violation. This would mean that the individual with disability, before submitting a notification letter, would have to have the technical knowledge to be specific enough, and the issue of specificity could open a larger door to litigation even prior to getting to the ADA violation at issue.

4. The proposal in H.R. 3356 is a response to concerns about damages and attorneys fees awards to successful plaintiffs. Under the ADA, damages are unavailable to plaintiffs, but may be available under state law. This will not be changed or affected by this legislation. Attorneys fees are awarded at the discretion of the court under existing law. If a covered entity is sued for not removing a barrier and immediately takes steps to remove the barrier as a result, the case will be dismissed and any attorney's fee award will be minimal.

5. H.R. 3356 puts the burden on the individual with a disability. The burdens to provide notice with sufficient specificity ("written notice specific enough to allow the owner "to identify [the] barrier" and to be sure the business receives the notice, which starts the notification period running. A plaintiff often doesn't know the full nature of the violations until after he/she files suit, as the defendant controls access to the premises and the specificity of the type of violation required is still unclear. This burden will essentially rest on the person with a disability to ensure any notice period under the legislation begins running. This is not the job of an individual with a disability.

The Americans with Disabilities Act of 1990, and the ADA Amendments Act of 2008 were each passed with overwhelming bipartisan support during Republican administrations. Their provisions encompass carefully crafted compromises between people with disabilities, business owners and others that should not be undone.

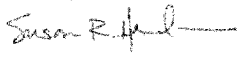
The ADA requires that architectural barriers in privately owned facilities be removed if such barriers can be overcome in a readily achievable manner. Readily achievable is defined as accomplishable without difficulty or expense. The United States Department of Justice, in its implementing regulations, provides guidance to entities covered by the barrier removal requirement of the ADA so that they can determine priority for barrier removal; entrances are most often the first priority. Under the readily achievable standard, the business has an ongoing responsibility to remove barriers; if it is not readily achievable in the current year, then it needs to be re-evaluated and removed at a later date in the future.

H.R. 3356 will postpone the rights of people with disabilities to remove obstacles to medical offices, restaurants, hotels, hospitals, private schools, stores and theaters without reason. Most attorneys already put potential defendants on notice prior to commencing an action. Those businesses can then choose to remedy the situation before any litigation commences or expensive fees are incurred.

In addition, if H.R. 3356 were enacted, the business would still incur the same penalty – to remove the barrier. Waiting four months past notice will not change the result under the ADA. A plaintiff will not be able to recover any additional damages after waiting the four months. Punitive damages should be made available for violations to Title III of the ADA that are intentional. If defendants must be notified, as required by H.R. 3356, those defendants that continue to ignore the ADA (i.e. with clearly inaccessible entrances) should be subject to punitive damages and attorneys fee awards.

The ADA is about achieving accessibility and abolishing disability discrimination for society at large. While there is widespread acknowledgment that the goals of Title III are worthwhile, the goals are far from achieved. H.R. 3356 rewards small businesses for failing to comply with a federal civil rights law, create disincentives for voluntary compliance and create greater barriers to people with disabilities as we use the rule of law to obtain our rights. We urge you to reject the 'ACCESS' Act, H.R. 3356.

Sincerely,



Susan Henderson
Executive Director

CONSORTIUM FOR CITIZENS WITH DISABILITIES

June 27, 2012

Hon. Lamar Smith
Chairman, House Committee on the Judiciary
2409 Rayburn House Office Building
Washington DC 20515

Hon. John Conyers
Ranking Member, House Committee on the Judiciary
2426 Rayburn House Office Building
Washington DC 20515

Re: H.R. 3356 – ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act of 2011

Dear Chairman Smith and Ranking Member Conyers:

The Consortium for Citizens with Disabilities (CCD) Rights Task Force submits this letter in opposition to H.R. 3356. The Consortium of Citizens with Disabilities (CCD) is a coalition of national disability-related organizations working together to advocate for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

The requirements of Title III of the Americans with Disabilities Act (ADA), which governs places of public accommodation, come as a surprise to no one. Title III entities, such as hospitals, pharmacies, schools, supermarkets, banks, and homeless shelters, have had 22 years to bring themselves into compliance with the law so that people with disabilities can access the same goods and services as people without disabilities. H.R. 3356, disingenuously dubbed the "ACCESS Act," seeks to protect noncompliant Title III establishments from suits to compel them to comply with accessibility requirements, while forcing people with disabilities to wait even longer than they already have waited for such access to become a reality.

The proposed amendments to the ADA in H.R. 3356 would force people with disabilities to wait as long as six months to obtain redress for Title III establishments' continuing legal violations. This provision effectively tells people with disabilities who need medical treatment to come back to their doctor's office in six months, or those who are in school, to sit out more than a semester. If H.R. 3356 becomes law, individuals with disabilities will no longer be able to seek immediate injunctive relief to secure access to urgent goods and services in the critical areas of health, finance, and education.

Moreover, H.R. 3356 would effectively bar people with disabilities from bringing actions to remove structural barriers replicated in each location of large chain businesses; the process of identifying each individual barrier in the notice would be virtually impossible for the average person with a disability.

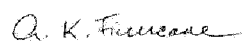
Further, H.R. 3356 would also create a disincentive for places of public accommodation to comply with the ADA. Businesses would be encouraged to continue denying access to individuals with disabilities unless and until they receive a notice that someone intends to sue.

Finally, H.R. 3356 responds in part to concerns about damages awards that have nothing to do with the ADA, but this is a misguided attempt to resolve a non-existent problem. The ADA does not allow customers or clients with disabilities to obtain damages against Title III entities that fail to comply with the ADA's accessibility requirements. Such damages are only available under state laws in a handful of states. Adding a notice requirement to the ADA will do nothing to prevent damage awards under state laws.

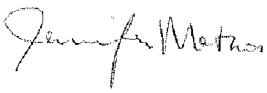
The Americans with Disabilities Act of 1990, and the ADA Amendments Act of 2008, were each passed with overwhelming bipartisan support during Republican administrations. Their provisions encompass carefully crafted compromises between people with disabilities, business owners, and others that should not be undone. The CCD Rights Task Force strongly opposes the so-called "ACCESS" Act because it would weaken the ADA's promise of equal access for all Americans and diminish opportunities for people with disabilities to be full participants in their communities.

Sincerely,

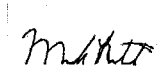
Curt Decker
National Disability Rights Network



Sandy Finucane
Epilepsy Foundation

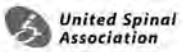


Jennifer Mathis
Bazelon Center for Mental Health Law



Mark Richert
American Foundation for the Blind

Co-Chairs, CCD Rights Task Force



June 27, 2012

The Honorable Trent Franks
Chairman
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler:

The United Spinal Association opposes H.R. 3356, the ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act of 2011. We ask that our below comments be submitted for the record of the June 27, 2012, subcommittee hearing, "H.R. 3356, the 'ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act.'"

United Spinal Association is a 66 year old membership organization comprised of people in all 50 states with spinal cord injury or disease. Our membership includes 22 chapters of the National Spinal Cord Injury Association.

H.R. 3356 would amend the Americans with Disabilities Act (ADA) by requiring aggrieved plaintiffs to wait four months before commencing an action seeking injunctive relief to remove barriers at the entrances to buildings. We oppose the legislation for the following reasons:

1. Barrier removal was supposed to commence 22 years ago. Entrances were to be a priority. The proposal encourages entities to keep their entrances inaccessible until four months after an aggrieved party notifies the covered entity that it is in violation.

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2. The proposal is a response to concerns about damages and attorneys fees awards to successful plaintiffs.

a. Damages are unavailable to plaintiffs under existing law but may be available, in barrier removal cases, under state law which would not be affected by this legislation.

b. Attorneys fees are awarded at the discretion of the court under existing law. If a covered entity is sued for not removing an entrance way barrier and immediately takes steps to remove the barrier in response, the case will be dismissed and any fee award would be minimal.

The ADA, passed in 1990, requires that architectural barriers in privately owned facilities be removed if such barriers can be overcome in a readily achievable manner. Readily achievable is defined as accomplishable without difficulty or expense.

The United States Department of Justice, in its implementing regulations, provides guidance to entities covered by the barrier removal requirement of the ADA so that those entities can determine a priority for ordering barrier removal. Entrances are the first priority.

The barrier removal requirement of the ADA is an ongoing responsibility to permit covered entities to plan to remove barriers, i.e., something not affordable this year would not be readily achievable; however, with responsible planning the barrier could be removed at some time in the future.

It is also important to recognize that plaintiffs seeking barrier removal cannot receive money damages awards pursuant to the ADA. Prevailing parties, however, can seek attorneys fees.

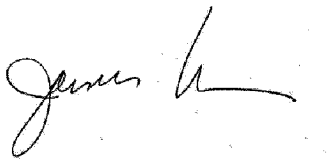
H.R. 3356 will postpone the right of people with disabilities to remove obstacles to medical offices, restaurants, hotels, hospitals, private schools, stores, and theaters without reason. Most attorneys put potential defendants on notice prior to commencing an action. Those that currently do not have no obligation to; however, the requirement to make entrances accessible, assuming barrier removal is readily achievable, is 22 years old. United Spinal Association does not feel "notice" is an issue.

Moreover, if H.R. 3356 is enacted, granting an additional four months to a covered entity to make an entrance accessible, the penalty for not removing the barrier would still be the same as it was under existing law. After a covered entity has been given notice and fails to remove a barrier, plaintiffs will have waited four months and still must commence an action to have the

barrier removed. No damages can be recovered for the additional four months wait. Punitive damages should be made available for violations of Title III of the ADA that are willful. If defendants must be noticed as required by H.R. 3356, those defendants that continue to ignore the ADA should be subject to punitive damages and attorneys fees awards.

If you have any questions, please contact Heather Ansley, Vice President of Veterans Policy for VetsFirst, a program of United Spinal Association, at (202) 556-2076, ext. 7702 or by e-mail at hansley@vetsfirst.org.

Sincerely,



James J. Weisman
Senior Vice President and General Counsel
United Spinal Association

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