Attorney for Defendant , WIDGET Enterprises LLC

SUPERIOR COURT OF CALIFORNIA

COUNTY OF IMPERIAL

JOHN DOE Plaintiff, v. WIDGET ENTERPRISES, LLC Defendant	)	Case No.: **DEFENDANT'S TRIAL BRIEF** Judge: Dept.: Date: Time:

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Defendant respectfully submits the following Trial Brief.

I. STATEMENT OF FACTS

Defendant WIDGET ENTERPRISES, LLC (WIDGET) owns a small office building in Calexico, California which contains a number of offices with different addresses including 353 Main Street, 101 Main Avenue, and 103 Main Avenue, but which are all part of the same rectangular structure (the "Property").

On March 12, 2013, JOHN DOE ("DOE") signed a Verified Complaint under penalty of perjury containing a number of distinct factual allegations related to his lawsuit against WIDGET. The lawsuit was subsequently filed on March 21, 2013 and served on WIDGET.

II. LEGAL ISSUES

A. DOE Has The Burden Of Proving Standing To Sue Under The Americans With Disabilities Act Of 1990 (42 U.S.C. § 12101 Et Seq.)

As with all plaintiffs invoking the jurisdiction of the federal courts, those suing under the ADA bear the burden of proving that they have Article III standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To do so, they must show: (1) an injury in fact – "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) traceable to the challenged action of the defendant; and (3) likely to be redressed by a favorable decision. Id. (*internal citations omitted*).

To show that he has suffered 'an injury in fact,' DOE has the burden of proving that he encountered a barrier preventing him from accessing a place of public accommodation, and that there is a "'sufficient likelihood that he will again be wronged in a similar way . . . ." That is, he must establish a real and immediate threat of repeated injury.'" Fortyune v. American MultiCinema, Inc. 364 F.3d 1075, 1081 (9th Cir. 2004); *quoting* City of Los Angeles v. Lyons 461 U.S. 95, 111 (1983), *and* O'Shea v. Littleton 414 U.S. 488, 496 (1974). In practice, this requires a showing that DOE is "likely to return to patronize the accommodation in question." Harris v. Stonecrest Care Auto Center, LLC, 472 F. Supp. 2d 1208, 1215-16 (S.D. Cal. 2007).

To determine whether DOE's likelihood of returning and thus suffering future harm is sufficient, this Court should consider these four factors: (1) the proximity of the DOE's residence

to the businesses, (2) DOE's past patronage of the businesses, (3) the definiteness of DOE's plan to return, and (4) DOE's frequency of travel near the businesses. Harris v. StoneCrest Care Auto Ctr., LLC 472 F. Supp. 2d 1208, 1216 (S.D. Cal. 2007); *and* Molski v. Arby's Huntington Beach 359 F. Supp. 2d 938, 947 n.10 (C.D. Cal. 2005); *and* Wilson v. Kayo Oil Co. 535 F. Supp. 2d 1063, 1067 (S.D. Cal. 2007)

Courts typically evaluate whether the plaintiff's representations are credible in light of all the circumstances, such that there is in fact a reasonable likelihood that the plaintiff faces a "real [and] immediate" threat of repeated injury. City of Los Angeles 461 U.S. at 111. **Courts have frequently dismissed ADA cases when the plaintiff offered only vague allegations and testimony about a future plan to visit the defendant's property**. See, e.g., Shotz v. Cates 256 F.3d 1077, 1082 (11th Cir. 2001).

A plaintiff's bare allegations that he or she "desires" to return to the place of public accommodation once architectural barriers are removed has been held to be insufficient to demonstrate a real and immediate threat of concrete and particularized injury to create sufficient standing for the case to proceed. *See* Dempsey v. Harrah's Atl. City Operating Co., LLC 2009 U.S. Dist. LEXIS 7551, at *12 (D.N.J. Feb. 2, 2009) (a general allegation of a desire to return "is essentially the equivalent of pleading that plaintiff may return 'some day' "); Brown v. Showboat Atl. City Propco, LLC 2010 U.S. Dist. LEXIS 133106, at *37 (D.N.J. Dec. 16, 2010) (holding that a plaintiff's "mere expressed desire" to return does not constitute or imply an intent to return); Feezor v. Sears, Roebuck and Co., 2012 U.S. Dist. LEXIS 141900, at *17 (E.D. Cal. Sept. 30, 2012) (collecting cases for proposition that "**standing does not exist where plaintiff offers a tenuous, conjectural and self-serving assertion of intent to return to an establishment.**"); Nat'l Alliance for Accessibility, Inc. v. Big Lots Stores, Inc. 2012 U.S. Dist. LEXIS 126049, at *8 (E.D.N.C. Sept. 3, 2012) (a plaintiff's profession of an intent to return to a place of public accommodation does not establish standing; "someday" intentions are not sufficient); Luu v. Ramparts, Inc., 926 F. Supp. 2d 1178, 2013 U.S. Dist. LEXIS 23712, at *11 (D. Nev. Feb. 21, 2013) (holding that plaintiff failed to establish standing to pursue Title III action against allegedly inaccessible hotel/casino where plaintiff's affidavit opposing motion to

dismiss contained only "classic 'some day,' non-concrete plans" to stay at the hotel/casino in the future).

B. DOE's Claims Of Injury In His Verified Allegations Are Demonstrably False And Therefore Fail To Meet The Standing Requirements

1. Law Office at 101 Main Avenue

At paragraph 4 of his sworn and Verified Complaint, DOE claims that on January 9, 2013, he went to the law office located at 101 Main Avenue.

In that paragraph, DOE further swore that he had been "patronizing the law office for the last few years". At paragraph 9 of his sworn and Verified Complaint, DOE further alleges that he is a "regular customer" of each of the three businesses identified at paragraph 4.

Alice from Mr. Moe's office will testify that DOE had never been a client nor even visited the law office.

Furthermore, the evidence will show that the law office moved away from the Property in November 2012, at least 2 months before DOE's alleged visit.

Based on the foregoing, DOE could not possibly have gone to the law office on January 9, 2012, as it did not exist at that location. DOE's additional claims that he was a client of the law office lack all credibility.

2. Chiropractor's Office at 353 Main Street

At paragraph 4 of his sworn and Verified Complaint, DOE claims that on January 9, 2013, he went to the chiropractor's office located at 101 Main Avenue.

In that paragraph, DOE further swore that he had been a customer there "since 2000".

The evidence will show that Dr. Roe's office had no record of DOE as a patient.

The evidence will also show that Dr. Roe did, in fact, have patients in wheelchairs who were accommodated by bringing them through the rear/side entrance. As such, DOE's claims of inaccessibility are meritless.

3. Servicios at 103 Main Avenue

In spite of the fact that paragraph 1 of his sworn and Verified Complaint states that he is "a California resident", DOE alleges that he went to Servicios for "immigration services" on January 9, 2013.

Based on DOE's false claims that he was a customer of the law office and chiropractor, his claim that he, a California resident, just happened to also be in need of "immigration services" on the same day at the identical location strain credulity.

4. DOE's Visit To The Property, If It Happened At All, Was Merely Designed To Generate Causes Of Action For The Instant Lawsuit

At paragraph 9 of his sworn and Verified Complaint, DOE alleges that he "would like to return and patronize these locations but will be denied full and equal access until the defendants provide an accessible path of travel leading into the businesses."

First, if DOE was a 12-year customer, which he was not, then he would be well aware of the accommodations offered by Dr. Roe and the other tenants.

Second, the only plausible purpose of DOE's January 9, 2012 visit was to accrue multiple causes of action against the Property then extort a settlement.

In Wilson v. Kayo Oil 535 F. Supp. 2d 1063 (2007), the court held that ADA plaintiffs "must have bona fide purposes for his visits," but that the visits of the plaintiff in that case appeared to have occurred solely for the purpose of "setting up future lawsuits." Id. at 1069-70

In this case, the evidence will show that DOE had not bona-fide purpose for visiting the Property, but was only there to "set up future lawsuits". As such, DOE's claims should be dismissed with prejudice.

5. DOE Has Suffered No Actual Injury

Parroting the text of Civil Code § 55.56(c), DOE claims to have suffered "difficulty, discomfort, or embarrassment". Verified Complaint at ¶ 16. It is worth pointing out that DOE uses the disjunctive when describing his alleged injury in his sworn Complaint, as he is apparently un aware of which of the three types of injuries he sustained.

DOE's vague and ambiguous claims lack any credibility and should be disregarded.

Moreover, the evidence will show that the Property has no parking and that the street parking provided by the City is not ADA-Complaint. As such, to even get to the building, DOE must have necessarily been injured by a superceding cause, namely the City's non-compliant curbs.

One can only assume that DOE not only failed to suffer any "difficulty, discomfort, or embarrassment", but was in fact excited and thrilled at the prospect of a fifth ADA lawsuit and the probable income it would generate.

Because DOE has failed to meet his burden of proving his standing to sue, injury in fact, and likelihood of returning, his claims should be denied.

C. DOE's Claims Also Fail Because The Applicable Statute of Limitations Had Long-Since Expired

The applicable statute of limitations for an ADA claim is the state's personal injury statute of limitations. Cordova v. Univ. of Notre Dame Du Lac 936 F.Supp.2d 1003 (2013) Because the ADA does not contain its own limitation period, courts have been directed to apply the statute of limitations of the state cause of action "most analogous" to the plaintiff's claims. Id. at 1007

In California, CCP § 335.1 is the two-year personal injury statue of limitation which is applicable to claims under the ADA.

In this case, DOE claims to have been "patronizing the law office for the past few years" and "going to the chiropractor since 2000". Verified Complaint at ¶ 4. As such, DOE had been aware of the issues with the Property for upwards of twelve (12) years!

Defendant respectfully requests that this Court take Judicial Notice of the fact that DOE and his current attorneys previously filed the following claims under the ADA:

1) JOHN DOE v. Petroleum LP 5/4/2005 GIN123456, Judge Michael Orfield, Vista, California

2) JOHN DOE v. India; 7/13/2004 (XXXXXX); USDC Southern District of California

3) JOHN DOE v. Jackson 1991 Trust, dated May 14, 1991; 7/9/2004 (XXXXXX); USDC Southern District of California

4) JOHN DOE v. Tony Trust 7/7/2004 XXXXXX); USDC Southern District of California

5) JOHN DOE v. Gas Corp. 6/8/2004 (XXXXXX); USDC Central District of California

Based on his prior ADA lawsuits, DOE cannot claim that he was ignorant of the architectural requirements thereunder and in no way can he properly claim the statute of limitations was "tolled".

Because DOE's claims are time-barred, they should be summarily dismissed.

D. DOE And His Attorneys Are Part Of The ADA Lawsuit "Cottage Industry"

1. DOE Failed To Provide the Statutory 90-day Notice

Cal Civ Code § 55.54 sets forth a system whereby aggrieved plaintiffs can contact property owners and attempt to resolve issues without resorting to filing lawsuits.

In this case, DOE provided no notice whatsoever before filing suit.

Why would DOE be in such a rush to file suit when only injunctive relief is available? Wouldn't conciliation and voluntary compliance be a more rational solution? Of course it would, but pre-suit settlements do not vest plaintiffs' counsel with an entitlement to attorney's fees. Buckhannon Bd. and Care Home, Inc., v. West Virginia Dept. of Health and Human Servs., 532 U.S. 598, 605 (2001). The current ADA lawsuit binge is, therefore, essentially driven by economics - that is, the economics of attorney's fees. Rodriguez v. Investco, L.L.C. 305 F. Supp. 2d 1278, 1281-2 (2004)

2. DOE's Unscrupulous Attorneys Already Had An Active Suit Against The Identical Property

DOE's law firm, which calls itself "Center for ADA" had filed an ADA suit against the Property less than a year earlier on May 2, 2012 with Plaintiff RON TOEOS Jr. That case is still currently pending before this Court.

The evidence will show that WIDGET was actively working to remedy the issues with the Property at the time DOE filed suit. In fact, the "Center for ADA" was in possession of the draft CASp Report. DOE's attorneys were also aware of the steps taken by Defendant as well as the accommodations available at the Property.

As many district courts have bemoaned, the objectives of the ADA have been subverted by a substantial number of plaintiffs' lawyers who bring scores of ADA suits not to improve

access for the disabled but, instead, to extract payments of attorney's fees. *See* Brother v. Tiger Partner, LLC 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004) (observing that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for [the] disabled)", and that this "type of shotgun litigation undermines both the spirit and purposes of the ADA"). One court described the practice as follows:

> The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through 'conciliation and voluntary compliance,', a lawsuit is filed, requesting damage awards [under California statutes] that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter. Molski v. Mandarin Touch Restaurant 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004); *see also* Rodriquez v. Investco, L.L.C. 305 F. Supp. 2d 1278(2004) (describing plaintiff as "merely a professional pawn in an ongoing scheme to bilk attorney's fees from the Defendant").

Consistent with this authority, several district judges in Florida have dismissed ADA suits brought by serial plaintiffs on the ground that the plaintiff's allegations – though arguably sufficient to establish standing if believed – were simply not credible in light of the plaintiff's (and counsel's) extensive litigation history. *See e.g.* Brother v. CPL Investments 317 F. Supp. 2d 1368, 1369 (S.D. Fla. 2004)

E. Defendant Has The Benefit Of A Number Of Dispositive Affirmative Defenses

As set forth in the Verified Answer, WIDGET may properly assert a litany of Affirmative Defenses which limit and/or eliminate DOE's claims.

1. Failure To State A Claim

As set forth above, DOE has failed to prove he has standing to sue and therefore has failed to state a claim for relief.

2. DOE's Negligence

DOE, claiming to be a 12-year customer of the chiropractor and long term client of the law office, went to the Property knowing that he was assuming a risk of injury.

Per CACI 403, the Standard of Care for Physically Disabled Person is as follows:

> "A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation."

In this case, DOE failed to use reasonable care when visiting the business he had allegedly frequented for the previous 12 years. As such, DOE's own negligence is the cause of any injury.

3. DOE Failed To Mitigate His Damages, Consent

DOE failed to take steps to mitigate his damages on the day of his alleged visit by contacting the chiropractor and having him use the usual existing accommodation for his disabled patients. As such, DOE cannot properly recover to the extent that his own mitigation would have reduced or eliminated his damages.

Further, by knowingly visiting the Property, DOE consented to the situation he alleges caused him injury.

4. Unclean Hands, Failure In Equity, Lack Of Notice, Duplicative Claim

As discussed above, the instant action is a classic ADA "shakedown" lawsuit. Because DOE has unclean hands, he cannot properly recover. Further, any recovery by DOE or his attorneys would result in a failure of equity.

DOE's lack of reasonable or statutory notice to Defendant, and the filing of a duplicative claim by DOE's attorneys reinforces these affirmative defenses.

5. Statute Of Limitations, Waiver

Statutes of limitation are discussed at length hereinabove. DOE also waived his right to sue Defendant because he knowingly assumed the risk of injury at the Property for the prior 12 years without complaint or injury.

6. Lack Of Causation, Third Party Fault, Lack Of Ownership

At paragraph 7 of his sworn and Verified Complaint, DOE alleges that, because of an "unramped step at the entrance of these respective businesses", he was "prevented from entering these businesses on the day of his visit".

DOE claims that WIDGET has the "means and ability to make the change". Verified Complaint at ¶ 8

The evidence will show that the Property (formerly the City of Calexico Police and Fire headquarters) has a Zero Lot Line and abuts the City of Calexico Right-of-way. WIDGET has no control over the placement of the City sidewalks. The City is responsible for failing to timely work with WIDGET to allow the Property to extend into the City's sidewalks.

DOE's claims that WIDGET are the cause of his alleged injuries are misplaced, as DOE must prove that Defendant has control and ownership of the areas within which the accessible ramp might be built.

WIDGET cannot make any changes to the Property without City approval which is being diligently sought

7. The Proposed Changes To The Property Are Neither Feasible Nor Reasonable

The ADA defines discrimination as a failure to make reasonable modifications or accommodations to individuals with disabilities. Baughman v. Walt Disney World Co. 217 Cal.App.4th 1438, 1446 (2013)

In this case, the City ownership of the adjacent land severely limits Defendants' ability to make modifications.

The evidence will show that it is not technically feasible to eliminate the steps up to the building, therefore, an alternate means of equivalent access must be provided created which may include a portable ramp. The problem is that even a portable ramp would jut into the City's right of way and therefore requires City approval which, again, is being diligently sought.

8. Changes Have Been Made At The Property And More Are In Progress

Since receiving the SANTOS lawsuit, WIDGET has been working diligently to make the Property ADA compliant.

The evidence will show that within 90 days, WIDGET had engaged the services of a CASp engineer, but that those firms are overwhelmed and it took 10 months to obtain a final report.

The evidence will also show that additional accommodations have already been installed at the Property including buzzers and placards at all entrances directing disabled individuals how to proceed.

F. Defendant WIDGET Is Entitled To An Award Of Attorney Fees

1. WIDGET Is Entitled To A Mandatory Award Of Attorney Fees Pursuant To Civil Code § 55

At paragraph 21 of his Verified Complaint, DOE "generally" invokes the provisions of the California Disabled Persons Act (Civ. Code §§ 54-55.2) to support his Negligence cause of action. Civil Code § 55 guarantees attorney fees to the prevailing party in a suit predicated on the California Disabled Persons Act. In fact the California Supreme Court held that an award of attorney fees to prevailing defendant under Civil Code § 55 to be mandatory. Jankey v Lee 55 Cal.4th 1038, 1046 (2012)

Furthermore, the mandatory fee provision in CC § 55 is not preempted by the discretionary attorney fee provision of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*. Jankey v. Lee 181 Cal App 4th 1173 (2010).

2. WIDGET Is Entitled To A Discretionary Award Of Attorney Fees Pursuant To 42 U.S.C. § 12205

The ADA provides for a discretionary award of attorney fees to the prevailing party pursuant to 42 U.S.C. § 12205. Bercovitch v. Baldwin Sch. Inc. 191 F.3d 8 (1999)

Fees are properly awarded to a prevailing defendant when a plaintiff's claim is frivolous, unreasonable, or groundless, or when plaintiff continued to litigate claim after it clearly became so. Parker v Sony Pictures Entm't, Inc. (2001, CA2 NY) 260 F3d 100; *see also* No Barriers, Inc. v Brinker Chili's Tex., Inc. (2001, CA5 Tex) 262 F3d 496

In this case, DOE's claims are demonstrably groundless as he claims to have visited businesses that were not even at the property on the date in question. He further falsely claims to have been a long-term customer of two of the businesses.

A party is entitled to attorney's fees and costs pursuant to Americans with Disabilities Act, 42 U.S.C. § 12205 where a court enters final judgment in favor of the defendant and

determined that the plaintiff and its counsel had disregarded their pre-filing obligation of investigating factual bases underlying its claim and had exhibited deficient standard of professional conduct in filing its claim. Goldstein v Costco Wholesale Corp. 337 F Supp 2d 771 (2004, ED Va).

In this case, DOE and his attorneys failed to contact WIDGET prior to filing the suit, failed to provide any 90-day notice, and filed suit against the identical property that had been sued by the same firm using a different plaintiff the prior year (and which case is still pending).

As such, WIDGET is entitled to a discretionary award of attorney fees pursuant to 42 U.S.C. § 12205. Id.

3. DOE Is Not Entitled To Any Award Of Attorney Fees

DOE claims a right to a discretionary award of attorney fees pursuant to 42 U.S.C. § 12205, Civil Code §§ 52 and 54.3, and Code of Civ. Proc. § 1021.5. Verified Complaint at 5:17-18. Furthermore, DOE explicitly disclaims any right to a mandatory award of attorney fees pursuant to Civil Code § 55. Verified Complaint at 5:10-12.

Even if DOE were to prevail, he is in no way entitled to an award of attorney fees. DOE propounded no discovery at all in this matter. He filed suit without first contacting Defendant to discuss remediation. His lawfirm had already sued WIDGET over violations at the identical property.

DOE also opposed a motion to consolidate this matter with the TOEOS matter of the same address, and any fees incurred in opposing such motion were necessarily shared between clients. The pleadings filed in opposition to the Motion to Consolidate were clearly form pleadings which required little time to modify.

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DOE could have shared expenses with TOEOS, but instead chose to try this case separately. The only possible motive for doing to is to increase the attorney fees associated with this case. Such transparent gamesmanship and shameless waste of judicial resources should not be rewarded.

DATED: June 24, 20xx

By: _____

Attorney for Defendant
WIDGET Enterprises, LLC