No.

In The
Supreme Court of the United States

76 ORINDA,

Petitioner,

v.

FRANCISCA MORALEZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Definition: "ADA" refers to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

1. Should the Supreme Court adopt, as a national standard, *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 944 (9th Cir. 2011), to balance the need to deter abusive serial ADA filings with the need to afford relief to legitimate ADA claimants, by requiring the ADA plaintiff to plead and prove standing for each ADA non-compliance item alleged, as a condition for recovery of attorney's fees and costs?

2. Does a ADA defendant's stipulation to fix certain ADA non-compliance items preclude it from seeking Rule 11 sanctions against a serial ADA plaintiff for false assertions pleaded on her complaint?

3. Does the Court of Appeals lose jurisdiction to entertain a post-mandate motion for attorney's fees brought under Ninth Circuit Court of Appeals, Circuit Rule 39-1.6?

4. Is Ninth Circuit Court of Appeals, Circuit Rule 39-1.6, unconstitutional because it authorizes the Court of Appeals to decide post-appeal fee motions, thereby depriving parties of their right to appellate review?

PARTIES TO THE PROCEEDING

1. 76 Orinda, Petitioner;

2. Francisca Moralez, Respondent.

CORPORATE DISCLOSURE STATEMENT

Petitioner, 76 Orinda, aka Orinda Gas Station, Inc., is a California corporation, has no parent corporation, and is not publicly held. The Chief Executive Officer is Ms. Sadia Iqbal. The secretary, Chief Financial Officer, and Director is Ms. Bushra Begum.

STATEMENT OF RELATED CASES

There are no proceedings in other courts that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner 76 Orinda respectfully petitions for a Writ of certiorari to review the Final Opinion of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

1. Court of Appeals' Amended Opinion Affirming the District Court

The October 16, 2020 opinion of the United States Court of Appeals for the Ninth Circuit, as amended November 24, 2020, affirming the United States District Court's order dated November 6, 2019, granting Plaintiff Francisca Moralez' motion for attorney's fees and costs in the amount of $164,257.27, is unpublished and reported at 825 Fed.Appx.536, and is reprinted in the Appendix to this Petition ("App."), Appendix A, at App. 1a-4a.

2. District Court's $164,257.27 Attorney's Fee and Costs Award

The November 6, 2019 order of the United States District Court for the Northern District of California, awarding $146,806 in attorneys' fees, and $17,451.27 in costs, in *Francisca Moralez v. 76 Orinda, et al.*, No. 17-cv-03779-VC, is reprinted at Appendix B, at App. 5a-7a.

3. District Court's Oral Opinions

The relevant portions of the September 11, 2019 Opinions of the United States District Court for the Northern District of California, in relation to the hearing on Plaintiff Francisca Moralez' motion for attorney's fees and costs, in *Francisca Moralez v. 76*

Orinda, et al., No. 17-cv-03779-VC, taken from the Court transcript, are reprinted at Appendix C, at App. 8a-18a.

4. Court of Appeals' Order Denying Rehearing

The November 24, 2020 order denying rehearing and amending the opinion of the United States Court of Appeals for the Ninth Circuit is reprinted at Appendix D, at App. 19a-20a.

JURISDICTION

The United States Supreme Court has jurisdiction over the final order from the United States Court of Appeals pursuant to 28 U.S.C. § 1254(1). The order of the United States Court of Appeals for the Ninth Circuit was entered on October 16, 2020 and amended on November 24, 2020. (App. 1a.) On March 19, 2020 the United States Supreme Court issued an order (Order List 589 U.S.) extending the time to file a petition for writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This petition is timely filed within 150 days of the date of entry of the order as required by Supreme Court Rule 13.1, as amended on March 19, 2020 (Order List 589 U.S.).

The Ninth Circuit Court of Appeals has jurisdiction over decisions of the U.S. District Courts pursuant to 28 U.S.C. § 1291.

The United States District Court for the Northern District of California has Federal Question jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343 because the underlying action arises under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 et seq.

STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Art. III, Section 2, Clause 1 (Standing):

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; [...]

2. 42 United States Code section 12205:

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

3. Federal Rule of Appellate Procedure 41(c):

> (c) Effective Date. The mandate is

effective when issued.

4. Ninth Circuit Court of Appeals, Circuit Rule 39-1.6:

> (a) Time Limits (Rev. 7/1/07)
>
> Absent a statutory provision to the contrary, a request for attorneys' fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed, unless a timely petition for rehearing is filed. If a timely petition for rehearing is filed, the request for attorneys fees shall be filed no later than 14 days after the Court's disposition of the petition.

5. United States Constitution, Amendment 14:

> [...]nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. Federal Rule of Civil Procedure 11(b)(3):

> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later

> advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> [...]
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[;]

STATEMENT OF THE CASE

1. Nature of Action and Jurisdiction

Francisca Moralez (Plaintiff) filed suit under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. [dkt. 44]. The District Court has original jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 28 U.S.C. § 1343, and supplemental jurisdiction over the State law claims under 28 U.S.C. § 1367.

2. Plaintiff is a Serial Filer, having Filed More Than 200 ADA Suits

Plaintiff is a serial ADA filer, having filed in excess of 200 ADA suits. (See Appeal 19-17241 dkt. 9-1, bates pp. 379-382, and noting her most recent filings, *Moralez v. Lowe's Home Centers, LLC*, No. 4:2021-cv-01204 (2/18/21), and *Moralez v. Boutique*

Hotel Company-Beverly Hills, LLC, 2:2021-cv-00738 (1/27/21). Her attorney is also a serial filer, having filed more than 1,500 such suits. (See appeal no. 19-17241, dkt. 43 p.12, Declaration of Tanya E. Moore.)

3. Initial Complaint Raising 7 Arguably Meritorious Claims

Plaintiff's initial complaint presented seven arguably meritorious ADA non-compliance items. (*Moralez v. 76 Orinda*, et al., No. 3:17-cv-03779-EDL, dkt. 1, 6/30/17)

4. Amended Complaint Asserting 34 Additional Non-meritorious ADA claims

Plaintiff amended her complaint, and added 34 new ADA non-compliance items. (Appeal 19-17241 dkt. 9-1, bates 414-416.) Defendants did not believe the added claims were meritorious, because Plaintiff failed to plead allegations to show she had standing. Defendants' expert informed them that some of the added items did not exist at all, while others were within the normal range of acceptable variances. Moreover, Plaintiff failed to plead that the remaining items were capable of causing accessibility hardships based on her type of disability. Plaintiff also presented a number of untruthful allegations, therefore Defendants served a safe-harbor motion for sanctions under Fed. R. Civ.P. 11. (Appeal 19-17241 dkt. 9-1 bates 054-056.)

5. Settlement of Injunctive Relief Portion of the Suit

On June 24, 2019 the parties stipulated to remediation of a limited number of ADA non-compliance items, resolving the injunctive relief portion of the lawsuit. (Appendix C, p.15a, transcript p.17:8-19). The Court characterized the stipulation as a settlement, although the stipulation did not settle the entire case because Plaintiff's claims for fees and costs were to be adjudicated. (Appendix C, p.15a.)

6. Order Awarding $164,257.27 in Statutory Fees and Costs

On September 11, 2019 the Court heard Plaintiff's motion for fees and costs (Appendix C). Plaintiff moved for:

(A) $133,798.50 in attorney's fees for pursuit of the 41 ADA non-compliance items she alleged on her initial and amended complaints (case 3:17-cv-03779-VC, dkt. 121 p.2, Appendix B (order) at 6a);

(B) $26,015 in attorney's fees for 47.3 hours of "travel" time at $550 per hour (Appendix B (order) at 6a);

(C) $15,875.64 in costs related to all 41 of her alleged ADA non-compliance items (case 3:17-cv-03779-VC, dkt. 121 p.2, Appendix B (order) at 6a); and

(D) $3,141.86 for "hotel" and "food" (Appendix B at 6a)

(See Appeal 19-17241 dkt. 9-1, bates 168, also supplemental fee motion at dkt. 9.1 bates 395-6, and fee award at App. B, pp.6a-7a.)

The Court awarded Plaintiff 100% of the fees and costs she requested for pursuit of all 41 of her alleged ADA non-compliance items ($133,798.50 fees, $15,875.34 costs). (Appendix B, pp.6a-7a.) In addition, the Court awarded her $13,007.50 in attorney's fees for "travel" time, and $1,575.93 for "food" and "hotel" expenses (Appendix B, pp.6a-7a). The total award for fees and costs was for $164,257.27.

7. Court's Explanation for the High Award

The Court acknowledged that the amount of fees and costs were quite high for this type of case, but it was misinformed, therefore it erroneously justified the award by blaming Defendants' counsel for an alleged ill-conceived, intransigent, and inefficient handling of the case (Appendix B, pp. 5a-6a):

> Although the total amount of fees and costs is quite high for a case of this type, that is primarily because (as the written record and the hearing transcripts will reflect) the defense's approach to the case was ill-conceived, intransigent, and inefficient. In addition, defense counsel appeared to lack the basic legal or

> procedural knowledge necessary to move the case to resolution, not to mention being totally unprepared for trial. All of this required the plaintiff to incur more fees and costs than would normally be expected. It may well be that none of this is the fault of the defendants themselves, but neither is it the fault of the plaintiff or her counsel, and thus defense counsel's conduct cannot justify a reduction in the plaintiff's fee award.

In opining that "[I]t may be none of this is the fault of the defendants themselves," the Court disregarded Defendants' admission that some ADA violations existed, and admission that $4,000 in statutory damages were owed *(Francisca Moralez v. 76 Orinda, et al.*, No. 17-cv-03779-VC, dkt. 45 ¶ 40):

> 40. Defendants admit that $4,000 in statutory damages are owed to Plaintiff, and further, admit that they tendered same to Plaintiff unconditionally and before the Court at the last hearing before this filing.

The Court opined that despite these admissions, the defendants "should not have to pay a dime of the attorney's fees," but instead, their counsel "should be the one to pay" the entire amount (Appendix C, p. 10a):

> [Transcript p.3:20-24]
> I believe that your clients have a

> malpractice action against you and that they should not have to pay a dime of the attorney's fees for the Plaintiff. I think you should be the one who pays them for the way you conducted yourself.

The Court further explained its consternation to the defendants, who were present in the courtroom (Appendix C, pp. 10a-11a):

> [Transcript p.2:19-20]
> THE COURT: Okay. I am glad that your clients are here.
>
> [Transcript p.3:6-24]
> THE COURT: And it seems that the only reason that, as far as I can tell from everything I experienced and everything I have read in connection with this fee motion, it seems that the only reason this case did not get resolved quickly, and the only reason why the Plaintiff racked up so many attorney's fees is defense counsel's incompetence. And I believe that the -- your clients very likely have a malpractice against you. One question I have is whether I could require you to pay the attorney's fees as a sanction for your conduct, instead of your clients. But I suspect that I don't have the authority to do that, unfortunately. But I do think that it is very likely -- I mean I'm likely to report you to the California Bar

> Association for the way you conducted this case and I believe that your clients have a malpractice action against you and that they should not have to pay a dime of the attorney's fees for the Plaintiff. I think you should be the one who pays them for the way you conducted yourself.
>
> [Transcript p.10:2-6]
> THE COURT: Oh I think there's very little doubt that you have committed malpractice here, yes. I mean the -- merely making the Rule 68 offer that you made, and refusing to agree to a judgment that included injunctive relief, in itself that's probably malpractice.[1]

The Court was primarily troubled by the defense counsel's belief that Plaintiff was required to prove standing for each ADA non-compliance item for which she claimed statutory fees and costs, despite the fact that the parties stipulated to resolving the injunctive relief portion of the suit (appendix C, p.15a):

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[1]The Court was not aware that the reason Defendants' settlement ("Rule 68") offer did not include a provision for injunctive relief was because their expert advised them that all of the non-compliance items capable of affecting the plaintiff had already been remediated.

> [Transcript p.17:8-19]
> THE COURT: So your -- your main point, as it relates -- I mean on one level, it kind of sounds like you're arguing that your client should not have been held liable, but of course you've entered a settlement agreement and you've agreed that the Plaintiff is the prevailing party. So we're not -- we're not here to re-litigate the merits of the case, but what you -- if I understand you correctly, what you're saying is that the Plaintiff grossly overreached in the lawsuit and made allegations that, even if some of the allegations had merit, made a number of allegations that lacked merit and to that extent, should not be permitted to recover attorney's fees?

The Court found Defendants' argument troubling because Defendants agreed that because some of the non-compliance items asserted by Plaintiff had merit (7 out of 41), this defined her as the "prevailing party." The Court interpreted her "prevailing party" status to mean that she was not required to prove standing to recover attorney's fees and costs for the ADA non-compliance items she withdrew, and for which she failed to prove she had standing to pursue in the first instance.

///

8. The Disagreement Between the Court and Defendants about the Requirement to Establish Standing After Resolving the Injunctive Relief Portion of the Suit

Defendants and the Court had a difference of opinion regarding whether the plaintiff was required to establish standing for every ADA non-compliance item for which she sought recovery of fees and costs. Defendants pointed out that most of Plaintiff's 41 alleged ADA non-compliance items were without merit (7 arguably meritorious, 34 non-meritorious). Only about 17% (17/41) of Plaintiff's ADA non-compliance items were meritorious. While this was sufficient to define her as the "prevailing party," in Defendants' view, this did not mean she was entitled to attorney's fees and costs on the non-meritorious (83%) ADA non-compliance items, many which she withdrew prior to settlement, and some which she had no standing to pursue in the first instance.

The Court disagreed, finding that because the parties resolved the injunctive relief portion of the suit by stipulation, this amounted to a settlement that precluded the defendants from being able to challenge Plaintiff's claim for fees on the ADA non-compliance items she withdrew, and on the ADA non-compliance items which she did not have standing to pursue in the first instance. The same discord arose in relation to a Rule 11 motion for sanctions Defendants had served in relation to the Amended Complaint, an action which befuddled the Court (Appendix C, p.18a):

> [Transcript p.18:12-p.19:5]
> THE COURT: But here's -- here's what I don't understand. Speaking of your Rule 11 motion, you know, I'm looking at this meet and confer letter that you sent to the Plaintiff in connection with the attorney's fees motion, and you state that you're renewing your Rule 11 motion against the Plaintiff and you say in that, "To date no declaration or evidence of any kind exists in the record to show that Ms. Moralez experienced the ADA barriers and was visiting the facility in good faith, rather than as a business venture aimed at earning income." But you already reached a settlement agreement in the case and agreed that she was the prevailing party. And now you're threatening to sanction to her? You're threatening to file a sanctions motion against her for filing a lawsuit that you've already agreed she was the prevailing party in. I mean this is one of the most bizarre things I have seen in my five years on the bench.

Defendants' counsel explained that the status of Plaintiff as the "prevailing party" did not mean that she was insulated from the reach of Rule 11 sanctions for the many false ADA non-compliance items and other false allegations presented on her complaint (appendix C, pp. 11a-12a):

[Transcript p.13:1 to p.14:16]
MR. SHALABY: They came into this courtroom on June 24th. A very large amount of money was spent on replacing those gas pumps, and you remember Mr. Best stood right there and he told you they were still not in compliance. It's on the transcript. We only got one of two sessions on the transcript. It's in the morning transcript. And then you heard what you did. You said, "Mr. Shalaby, this is your fault. Have you ever done a trial before? It looks like you've never done a trial before and this is all of your fault." And now you're doing the same thing.

And then we went back to the room and after he [Mr. Best] made a comment that he's going to be very careful, he came back in here and now it's like, "Oh, guess what? The pumps are fine. There's no violation, there's nothing wrong with these pumps." Same with the cutoff switch and so many other items. "Nothing wrong with the cutoff switch." [Quotations added.] A person in a wheelchair doesn't get to cutoff the fuel pumps. He [Mr. Best] puts it on there. He pleads it on his complaint. He says "injunctive relief" [quotations added] -- they're entitled to injunctive relief on it. He's billed attorney's fees for it. They're

> not entitled to that. They're not entitled to many many items.
>
> "Floor clearance adjacent to public telephone contains excessive slopes." And then when we come back [from settlement conference room], "Oh no, they've repaired it." It never had it in the first place.
>
> "Restroom door closes too quickly." And then when they come back [from the conference room], "Withdrawn."
>
> "Restroom door closing mechanism requires tight grasping." They come back [from the conference room], "They fixed it and we're waiving that."
>
> "Plumbing beneath restroom sink not insulated." They come back [from conference room], they waived that.

Defendants' counsel further explained that Plaintiff's "prevailing party" status did not mean she could no longer be sanctioned for violating Rule 11(b)(3), the mandate for truthfulness (Appendix C, p.17a):

> [Transcript p.20:5-7]
> MR. SHALABY: Rule 11 mandates truthfulness. It's not dependent on whether you're a prevailing party or not, at all. It mandates truthfulness.

[Transcript p.20:20-21:16]
MR. SHALABY: You have a meet and confer, you have an agreement she's a prevailing party on the Unruh Act, which makes her a prevailing party in the action. It certainly does not make her a prevailing party on the gas pumps when they say those gas pumps are out of compliance and those need to be removed and redone again. She can't be a prevailing party on every item. She's not a prevailing party on every item. She's a prevailing party on the Unruh Claim, which makes her a prevailing party in the action. I gave the Court the authority on that from the Ninth Circuit. And so for somebody to come into your courtroom, your Honor, and say, "Hey, you know, about these pumps, they've been put up for a couple hundred thousand dollars or something and they don't comply." And they do comply. It's a Rule 11 violation and if you give somebody a Rule 11 motion saying, "Come on, this is not the truth, you've got 21 days to retract it, and if you don't then I'm entitled to sanctions against you." And if they don't retract it within 21 days and they've got to plead it on a complaint, for example, then yes, there's an entitlement to Rule 11 sanctions. There's no question about it. Even if they are the prevailing parties of the

action.

The Court understood the point urged by Defendants' counsel, but believed that the only way Defendants could challenge Plaintiff's non-meritorious claims was not to have stipulated to resolving the injunctive relief portion of the suit, but instead, to have gone to trial (Appendix C, pp. 18a):

> [Transcript p.22:15-17]
> THE COURT: It sounds like -- if you think the allegations were untrue, then it sounds like you should have gone to trial instead of settled.

Defendants' counsel brought to the Court's attention that it's earlier statements were too indicative of the likelihood that they would lose the case at trial by way of judicial prejudice, even though the merits were in their favor (Appendix C, pp. 18a):

> [Transcript p.22:18-19]
> MR. SHALABY: That would have been suicide after the -- the statements made by the Court.

The Court's response re-affirmed that Defendants would not likely have been able to prevail at trial because of the Court's repeated misinformed accusation that Defendants' counsel was incompetent (Appendix C, pp. 18a)

> [Transcript p.22:20-25]
> THE COURT: Oh I don't think so. I would not have held the incompetence of their lawyer against them. I mean I would not hold against the Defendants the incompetence of their lawyer. I mean that happens all of the time in courtrooms all across America. The judges make sure not to hold it against the client that their lawyer is incompetent.

The Court spoke in haste because it did not have sufficient command of the facts upon which it based it's belief that Defendants' counsel was incompetent.

9. The Court's Erroneous Belief Regarding Settlement

The main reason the Court believed that Defendants' counsel was incompetent was because he communicated Defendants' settlement offer ("Rule 68" offer), and their offer did not include a provision for injunctive relief. The Court was not aware of the underlying facts. The Court scheduled two settlement conferences with the Honorable Magistrate Judge Thomas Hixson. The settlement efforts were unsuccessful, but followed by a Rule 68 offer to compromise presented by Defendants' counsel. The Court was not aware of what transpired in the settlement conferences because settlement discussions were statutorily confidential. (See Federal Rule of Evidence 408.) The Court therefore presumed, incorrectly, that because there was no injunctive relief

provision on the Rule 68 offer to compromise, this meant that Defendants' counsel committed malpractice (Appendix C, p.11a):

> [Transcript p.10:2-6]
> THE COURT: Oh I think there's very little doubt that you have committed malpractice here, yes. I mean the -- merely making the Rule 68 offer that you made, and refusing to agree to a judgment that included injunctive relief, in itself that's probably malpractice.

The Court was not aware that the reason the Rule 68 offer did not include injunctive relief provisions was because Defendants' ADA inspector advised the parties at the settlement conference that the ADA non-compliance items applicable to Plaintiff had already been remediated.

10. The Court of Appeals Affirmed the District Court

On October 16, 2020 the Court of Appeals affirmed the District Court's order, finding that a plaintiff is not required to provide additional evidence "proving her claims" following settlement of the injunctive relief portion of the lawsuit, as a condition for recovery of attorney's fees for every ADA non-compliance items asserted, whether those items were withdrawn before "settlement," or whether she failed to prove she had standing in the first instance to pursue those items (Appendix A, p.3a):

> Contrary to 76 Orinda's contention, a plaintiff is not required to provide additional evidence proving her claims, following settlement, to obtain attorney's fees.

11. Petition for Rehearing on Issue of Standing

Defendants moved for rehearing on the question of standing (appeal 19-17241 dkt. 39 p.6):

> The plaintiff did not have standing to sue for ADA barriers which either did not apply to her based on her type of disability, or which were not capable of causing any accessibility hardships for her. The fact that she was deemed, generally, the "prevailing party" in the action, does not mean that she is entitled to an award of attorney's fees for pursuit of such barriers which did not apply to her.

12. Amendment to the Appellate Decision

On November 24, 2020 the Court of Appeals denied the petition for rehearing, but amended it's decision (Appendix D, p.20a):

> The panel has voted to amend the memorandum disposition filed in this case on October 16, 2020. The amended memorandum disposition is attached

hereto.

The amendment was as follows:

(A) Error on October 16, 2020 Decision [34-1 p.3]

> Finally, the district court did not err in failing to reconcile ADA case law with California Senate Bill 269. Subject to exceptions that do not apply here, we will not consider an issue raised for the first time on appeal. See *Bolker v. Comm'r of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985). **Moralez** waived this issue by failing to raise the argument below. [Emphasis added.]

(B) Correction on Amended Opinion

> Finally, the district court did not err in failing to reconcile ADA case law with California Senate Bill 269. Subject to exceptions that do not apply here, we will not consider an issue raised for the first time on appeal. See *Bolker v. Comm'r of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985). **76 Orinda** waived this issue by failing to raise the argument below. [Emphasis added.][Appendix D p.4a]

This Petition for a Writ of Certiorari now follows.

REASONS FOR ALLOWANCE OF THE WRIT

I. SERIAL NON-MERITORIOUS ADA FILINGS HAVE BECOME A NATIONAL PROBLEM WHICH THE UNITED STATES SUPREME COURT SHOULD NOW REMEDY

The grant of Certiorari is requested to remedy a very serious national problem, best explained by the Federal Courts from coast to coast.

New York

The Honorable Brian M. Cogan, explains that judges around the country question whether the ADA has become a vehicle of abuse by plaintiff's attorneys. *Adams v. 724 Franklin Ave. Corp.,* 2016 U.S. Dist. LEXIS 180432, 3-4, 2016 WL 7495804:

> It is true that not only the undersigned, but other judges in this district, and indeed judges around the country, have questioned whether the ADA in some instances has become a vehicle of abuse by certain plaintiff's attorneys who have created a cottage industry by bringing multiple cases against small businesses on behalf of the same plaintiff when that plaintiff has no genuine intention of using the services of so many businesses. See *Cankat v. 41st Avenue Rest. Corp*., No. 15-cv-4963, 2016 U.S. Dist. LEXIS 171406, 2016 WL 7217638 (E.D.N.Y. Dec.

12, 2016) (Johnson, J.); *Deutsch v. Henry*, A-15-CV-490-LY-ML, et al., 2016 U.S. Dist. LEXIS 168987, 2016 WL 7165993 (W.D. Tex. Dec. 7, 2016); *Taylor v. 312 Grand St.,* No.15-cv-5410, 2016 U.S. Dist. LEXIS 36623, 2016 WL 1122027 (E.D.N.Y. March 22, 2016) (Cogan, J.); *Shariff v. Beach 90th St. Realty Corp.,* No. 11 Civ. 2551, 2013 U.S. Dist. LEXIS 179255, 2013 WL 6835157 (E.D.N.Y. Dec. 20, 2013) (Bloom, M.J.); *Nat'l Alliance for Accessibility, Inc. v. Big Lots Stores, Inc.,* No. 11-cv-941, 2012 U.S. Dist. LEXIS 58200, 2012 WL 1440226 (M.D.N.C. April 26, 2012); *White v. Sutherland*, No. CIV S-03-2080, 2005 U.S. Dist. LEXIS 40713, 2005 WL 1366487 (E.D. Cal. May 6, 2005); *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278 (M.D. Fla. 2004); *Steven Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368 (M.D. Fla. 2004); *Molski v. Mandarin Touch Rest.,* 347 F. Supp. 2d 860 (C.D. Cal. 2004); see also Caitlin Nolan and John Marzulli, Disabled Queens man sues at least 20 mom-and-pop businesses over 'architectural barriers' preventing wheelchair access, New York Daily News (April 28, 2015), http://www.nydailynews.com/new-york/queens/disabled-queens-man-sues-20-businessesbarriers-article-1.2201545; Alison Stateman, Lawsuits by the Disabled: Abuse of the System?, Time

> Magazine (Dec. 29, 2008), http://[-] content.time.com/time/nation/article/0,8599,1866666,00.html.

Florida

The Honorable Judge Paul C. Huck observed the illicit joint enterprise between the serial ADA plaintiff and his counsel, and their abusive billing practices, in *Johnson v. Ocaris Mgmt. Group*, 2019 U.S. Dist. LEXIS 144773, *1-2

> Twenty-nine years ago, Congress passed the Americans with Disabilities Act ("ADA") in an effort to remove and prevent barriers for the disabled. See generally 42 U.S.C. § 12101, et seq. The statute authorizes parties to file lawsuits against those who violate the ADA in order to benefit the disabled whom the ADA serves to protect. *Id.* Lawyers who champion these cases are granted reasonable attorney's fees for advancing Congress's laudable goal of protecting the disabled community. *Id.* This is not one of those cases. This case reveals an illicit joint enterprise between Plaintiff, Alexander Johnson, and his attorney, Scott R. Dinin of Scott R. Dinin P.A., to dishonestly line their pockets with attorney's fees from hapless defendants under the sanctimonious guise of serving the interests of the disabled community.

> Through this illicit joint enterprise, Johnson and Dinin filed numerous frivolous claims, knowingly misrepresented the billable time expended to litigate these claims, made numerous other misrepresentations to the Court, and improperly shared attorney's fees in violation of the Rules Regulating the Florida Bar, all done without regard to the interests of those with disabilities.

Judge Huck imposed a remedy very different from the one fashioned by the District Court on this case. He articulated the abuse of process, dismissed the cases with prejudice, and retained jurisdiction to impose sanctions:

> **B. Systemic Inflated Billing**
>
> The Court finds that in both Ocaris and Caraf, as well as in other ADA cases, Dinin egregiously inflated his attorney's fees claims by overbilling for simple, repetitive tasks and by billing for work which he did not perform. (*Id.* at 9.)
> [...]
>
> For the reasons set forth above, both Ocaris and Caraf are DISMISSED WITH PREJUDICE. The Court retains jurisdiction to enforce the sanctions against Johnson and Dinin. The cases are CLOSED and all pending motions are

> denied as moot. The clerk is ordered to provide a copy of this order, the show cause order (Ocaris, [ECF No. 36]), and the transcripts for the May 9, 2019 (Ocaris, [ECF No. 35]) and July 22, 2019 (Ocaris, [ECF No. 78]) hearings to the Florida Bar and to the Ad Hoc Committee on Attorney Admissions, Peer Review and Attorney Grievance. (*Id.* at 30.)

Arizona

The Honorable Diane J. Humetewa provides insight on the characterization of a vexatious ADA litigant in *Strojnik v. Driftwood Hospitality Mgmt. LLC*, 2021 U.S. Dist. LEXIS 1720, *5-7, 2021 WL 50456:

> In practice, these serial litigants come in different forms. Some, ADA "testers," go about intentionally looking for ADA violations to remedy through litigation, a prerogative that gives these litigants legal standing in court. See *Civil Rights Educ. & Enforcement Ctr. v. Hosp. Properties Trust*, 867 F.3d 1093, 1102 (9th Cir. 2017) (holding that a plaintiff's status as an ADA tester does not deprive him or her of standing to bring a claim). Others, however, are vexatious serial litigants whose claims frustrate the ADA's central purpose.

These vexatious ADA litigants are characterized by "[f]alse or grossly exaggerated claims of injury, especially when made with the intent to coerce settlement . . . ." *Evergreen*, 500 F.3d at 1062 (emphasis added). No legal barrier prevents parties from settling ADA cases. And generally, federal courts encourage settlement before trial. *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989). "Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible." Fed. R. Civ. P. 16(c) advisory committee's note to 1983 amendment. Indeed, ADA plaintiffs may also prefer settlement to trial because, in a settlement agreement, plaintiffs may receive a monetary award and their attorneys may still receive an award of attorney's fees. See e.g., *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1137 (9th Cir. 2002) (holding that a plaintiff's attorney could receive an award of fees after the settlement of a case, which included an ADA claim, awarded $10,000 for the plaintiff). Put another way, serial ADA plaintiffs themselves face a strong financial incentive to avoid trial, possibly forgoing injunctive relief and failing to vindicate

the rights of the disabled as a whole.

Texas

The Honorable Melinda Harmon pointed out that the abusive ADA filings proliferating around the country have lead to a wide and varied spectrum of judicial decisions addressing complex issues of, and policies regarding, standing. *Gilkerson v. Chasewood Bank*, 1 F. Supp. 3d 570, 573-575, 2014 U.S. Dist. LEXIS 25849, *5-7:

> This case is one of many controversial putative class actions proliferating around the country brought often without notice by disabled individuals, who, frequently along with an organization dedicated to the rights of the disabled, are "serial plaintiffs" or "testers" acting as private attorneys general challenging various entities' noncompliance in their places of public accommodation with Title III of the ADA, leading to a wide and varied spectrum of judicial decisions addressing complex issues of, and policies regarding, standing. Because the statute does not authorize an award of damages to a prevailing plaintiff, but only equitable relief and an award of attorneys' fees, concerns about abusive litigation by plaintiffs' lawyers must be balanced against widespread noncompliance with the ADA and

> inadequate enforcement of the civil rights of individuals with disabilities. See, e.g., *Leslie Lee, Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation Note, 19 Va. J. Soc. Pol'y & L. 319* (Winter 2011); *Kelly Johnson, Testers Standing Up For Title III of the ADA,* 29 Case W. Res. L. Rev. 683 (Spring 2009); *Wayne C. Arnold and Lisa Herzog, How Many Lawsuits Does It Take to Declare an ADA Plaintiff Vexatious? Apparently More Than Judge Rafeedie Thought*," 48-JUL Orange County Law. 50 (July 2006); *Samuel R. Bagenstos, The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation,* 54 UCLA L. Rev. 1 (Oct. 2006); and *Carrie Becker, Private Enforcement of the Americans With Disabilities Act Via Serial Litigation: Abusive or Commendable*?, 17 Hastings Women's L.J. 93 (2006).

California (re Same Plaintiff Moralez)

In the most recent case filed by Respondent Francisca Moralez, *Moralez v. Boutique Hotel Company - Beverly Hills*, No. 2:21-cv-00738-MCS (Central Dist. CA), the Honorable Stephen M. Kerr stated his observations (dkt. 10):

> The Court presides over many cases

> under the Americans with Disabilities Act ("ADA") involving physical barriers in places of public accommodation. Most of these cases are brought by a small number of repeat plaintiffs and an even smaller number of law firms.

California (re Same Attorney, Tanya Moore)

In *Saniefar v. Ronald D. Moore, Tanya E. Moore, et al.*, 1:17-cv-00823-LJO-BAM (Eastern Dist. CA), the Honorable Lawrence J. O'Neill presided over a case alleging that Attorney Moore, the same attorney representing respondent Moralez, engaged in Racketeering Influenced and Corrupt Organization (RICO) activities in pursuit of over 1,400 ADA lawsuits (dkt. 29 pp. 1-3). The Court found witness tampering in ADA lawsuits filed by Mr. & Mrs. Moore. Judge O'Neill stated his findings about the credibility of the attorney witnesses at trial (transcript, dkt. 180, pp. 132-133):

> THE COURT: You mean tampering?
>
> MR. INOUYE: Witness tampering. Wiretapping and witness tampering.
>
> THE COURT: Well, I suppose I don't believe the two witnesses who testified?...
>
> THE COURT: The two witnesses I'm talking about, Mr. Moore and Mr. Levinson, the two defendants.

> MR. INOUYE: Absolutely, your honor.
>
> THE COURT: Because I will tell you, I think they both have terrible credibility in this courtroom based on their testimony.
> [...]
>
> THE COURT: Oh, I'm never pleased with perjury.
> [...]
>
> THE COURT: Witness tampering is a serious, serious matter in any case, criminal or civil. And as a result of that, this Court makes a finding that witness tampering occurred by both the defendants. And further, that the only possible remedy that is of any value or any justice here is a striking of the Answers by each of the defendants, and those Answers are stricken.

A news story summarizes the matter well:

> Two defendants have been caught tampering with a witness in a lawsuit against a San Jose law firm that has sued thousands of California small businesses for minor accessibility violations. A federal judge last month determined that an attorney and a compliance consultant linked to the

> Mission Law Firm had illegally eavesdropped on a phone call with a witness and later coached him to act dumb on the stand.
>
> The Mission Law Firm, headed by attorney Tanya Moore, has become notorious for filing countless lawsuits against small restaurants and shops, including ones in Menlo Park and Mountain View, for violations under the federal Americans with Disabilities Act (ADA).

The news story is posted at:

> https://www.almanacnews.com/news/2019/07/07/judge-finds-witness-tampering-in-ada-lawsuit

Petitioner believes that most or all of wrongful acts observed by the aforementioned federal courts throughout the country, including those summarized above, have taken place in the underlying case, therefore this case well suited for grant of certiorari.

II. ADOPTING *CHAPMAN* AS A NATIONAL STANDARD WILL RESOLVE THE PROBLEM BY REQUIRING ADA CLAIMANTS TO ESTABLISH STANDING FOR EACH CLAIM ASSERTED

The Honorable Melinda Harmon identified the problem: the abusive ADA filings proliferating around

the country have lead to a wide and varied spectrum of judicial decisions addressing complex issues of, and policies regarding, standing. The case at bar is such a case. On one end of the spectrum, cases like *Chapman* require the ADA plaintiff to plead and establish standing for every ADA non-compliance item in order to recover fees and costs. On the other end of the spectrum are decisions such as the one rendered in this case, holding that the plaintiff is not required to plead and prove standing once the injunctive relief portion of the suit has been resolved by stipulation. *Chapman* resolves this problem by requiring the ADA plaintiff to establish standing for every ADA non-compliance item:

> Here, however, Chapman has failed to allege and prove the required elements of Article III standing to support his claim for injunctive relief under the ADA. Specifically, he has not alleged or proven that he personally suffered discrimination as defined by the ADA as to encountered barriers on account of his disability. We therefore vacate the district court's grant of summary judgment, and remand with instructions to dismiss Chapman's ADA claim for lack of jurisdiction and for further proceedings consistent with this opinion. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 944 (9th Cir. 2011)

The Ninth Circuit Court of Appeals found that

Chapman failed to meet the requirements of Article III standing:

> Unlike in other cases where we have found Article III standing, see, e.g., *D'Lil,* 538 F.3d at 1037, Chapman leaves the federal court to guess which, if any, of the alleged violations deprived him of the same full and equal access that a person who is not wheelchair bound would enjoy when shopping at Pier One. Nor does he identify how any of the alleged violations threatens to deprive him of full and equal access due to his disability if he were to return to the Store, or how any of them deter him from visiting the Store due to his disability. Although Chapman may establish standing as to unencountered barriers related to his disability, the list of barriers incorporated into his complaint does nothing more than "perform a wholesale audit of the defendant's premises." *Martinez v. Longs Drug Stores, Inc.,* No. CIV-S-03-1843 DFL CMK, 2005 U.S. Dist. LEXIS 23737, at *12 (E.D. Cal. Aug. 25, 2005).
>
> Because Chapman lacked standing at the outset of this litigation to assert the ADA claims, the district court should have dismissed them. See Fed. R. Civ. P. 12(b)(1); *Hays*, 515 U.S. at 747 (ordering the district court to dismiss the

> complaint for lack of standing). We therefore vacate the district court's grant of summary judgment, and remand with instructions to dismiss Chapman's ADA claim for lack of jurisdiction and for further proceedings consistent with this opinion. (*Id.* at 955.)

Had *Chapman* been applied, Plaintiff would have only recovered fees and costs for her meritorious claims, but not for her claims which had no merit. Approximately 17 percent of her claims (7/41) arguably had merit. The Court would then have been able to adjust for her heavily inflated claim for fees and costs, which the Court has discretion to do under 42 U.S.C. 12205.

III. IMPOSING SANCTIONS FOR ASSERTION OF NON-MERITORIOUS ADA CLAIMS EVEN AFTER RESOLUTION OF THE INJUNCTIVE RELIEF PORTION OF THE LAWSUIT

Certiorari should also be granted so the Supreme Court can decide whether Rule 11 sanctions may be recovered to deter assertions of non-meritorious ADA non-compliance allegations, even after the parties have resolved the injunctive relief portion of the lawsuit. The case at bar illustrates the problem. The Court stated rather strongly it's opinion that a defendant could not move for Rule 11 sanctions against a "prevailing party" (Appendix C, p.18a):

> But you already reached a settlement agreement in the case and agreed that

> she was the prevailing party. And now you're threatening to sanction to her? You're threatening to file a sanctions motion against her for filing a lawsuit that you've already agreed she was the prevailing party in. I mean this is one of the most bizarre things I have seen in my five years on the bench.

The federal courts throughout the country are very upset over the epidemic of abusive serial ADA filings seeking fees for non-meritorious claims. Judge Huck also observed that the serial filer in *Johnson v. Ocaris Mgmt. Group* (supra) improperly shared attorney's fees in violation of the Rules. This appears to be the case in most or all of the serial ADA filer cases. In California, the plaintiff is only entitled to $4,000 in statutory damages under the Unruh Act. However, it appears that the attorneys for the serial ADA filers have fee-sharing arrangements with the plaintiffs to motivate them to continue the abusive filings. The only way these illicit partnerships will come to an end is if the Courts allow, and even encourage, use of Rule 11 at all stages of the proceeding, especially in relation to post-settlement fee motions. The law does not contain any provision stating that the status of a ADA plaintiff as a "prevailing party" means that the plaintiff can get away with violation of the mandate of truthfulness in Rule 11(b)(3).

Another problem now identified by the underlying decisions is that federal courts often are hesitant to award fees to the defendant for defending

against the non-meritorious portions of the serial ADA filers. As illustrated below, the courts often understand the term "prevailing party" in ADA actions to mean that the plaintiff is entitled to recovery of fees, while the defendant is not entitled to recovery of fees for successfully defending against non-meritorious claims. As seen in the underlying case, the defendants were successful on the ADA non-compliance items which Ms. Moralez withdrew prior to settling the injunctive relief portion of the suit, but they were not able to recover fees for defending against those claims. A decision by the Supreme Court, establishing that an agreement by the parties resolving the injunctive relief portion of an ADA suit does not immunize the ADA plaintiff from Rule 11 sanctions for non-meritorious claims she asserted, would provide a more balanced and equitable result in serial ADA actions, where the majority of the time the serial filers present a significant number of non-meritorious claims to bolster their attorney fee claims.

IV. CERTIORARI SHOULD BE GRANTED TO DETERMINE IF NINTH CIRCUIT RULE 39-1.6 IS INVALID DUE TO EARLIER ISSUANCE OF THE MANDATE

A mandate under Federal Rule of Appellate Procedure 41(b) returns the case to the District Court 7 days after entry of the final order, and divests the Courts of Appeals of jurisdiction:

> (b) When Issued. The court's mandate must issue 7 days after the time to file a

> petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

However, Ninth Circuit Court of Appeals, Circuit Rule 39-1.6, allows a party to file a motion for attorney's fees in the Court of Appeals, in the first instance, seven days after the mandate is issued:

> **39-1.6. Request for Attorneys Fees**
>
> (a) Time Limits (Rev. 7/1/07)
>
> Absent a statutory provision to the contrary, a request for attorneys' fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed, unless a timely petition for rehearing is filed. If a timely petition for rehearing is filed, the request for attorneys fees shall be filed no later than 14 days after the Court's disposition of the petition. (Rev. 12/1/09)

It appears Cir. R. 39-1.6 should be declared void because the Court of Appeals loses jurisdiction once the mandate is issued.

It also appears the Rule is unconstitutional

because the Court of Appeals decides the fee motion in the first instance, depriving the aggrieved party of the right to an appeal as a matter of right. This is consistent with the holding in *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223, 90 S. Ct. 1989, 1990:

> The amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered.

The grant of certiorari should therefore extend to determination of validity and constitutionality of Ninth Circuit Rule 39-1.6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew W. Shalaby
Counsel for Petitioner

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