[redacted]

STROJNIK, P.C.
ATTORNEY AT LAW

RULE 408 PROTECTED
SETTLEMENT COMMUNICATION

[redacted], 2016

[redacted]

Re: *Advocates for Individuals with Disabilities Foundation, Inc.* [redacted]

Dear [redacted]:

In an effort to streamline this matter, we prefer to perform all communication via email and hope you accept my response in such format.

Plaintiffs are champions for the rights of the disabled and benefit individuals with disabilities, please review information about the mission at www.Aid.org. Plaintiff is actively committed to bringing serial litigation with the goal of advancing the time when public accommodations will be compliant with the ADA. As the 9th Circuit Court of Appeals plainly stated in *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1061-62 (9th Cir.2007) (per curiam):

> **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.** (Emphasis supplied.)

District Courts have recognized the hostility of small businesses towards civil rights' plaintiffs and their attorneys, particularly in the ADA litigation. *See, e.g., Hernandez v. El Grullense*, 12-cv-03257-WHO (N.D. Cal., 2014); however, we fully subscribe to Frederick Douglass who famously said, "If there is no struggle, there is no progress."

The enforcement of the ADA by private attorneys general is central to ADA's sustainability. Since the ADA provides for strict liability for denial of access— motive and intent are irrelevant—it is often wise for defendants to promptly investigate the premises and if they are not in compliance, admit liability and agree to fix the problems, forestalling

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the need for plaintiffs to incur additional attorneys' fees to achieve ADA compliance, therefore reducing potential liability to your client. *Hernandez.*

While the 9th Circuit has encouraged civil rights plaintiffs to file serial lawsuits in order to advance the time when public accommodations will "yield its promise of equal access for the disabled", *Molski* 500 F.3d at 1062, some offending business have countered this legitimate and socially important exercise through numerous licit and illicit means. We do not, of course, suggest any such action on the part of your client; we merely provide anecdotal evidence of extreme, but foolish, hostility on the part of commercial enterprises.

Thus far, plaintiffs I have represented, have single-handedly, but amicably, brought actions to further ADA compliance at 100's of commercial establishments in both State and Federal Court. We have been able to achieve this tremendous feat through cooperative efforts with defendants who recognize that Congress has spoken on the matter. Compliance is mandatory. It is often technical. *See Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 945-46 (9th Cir., 2011) ("[T]he standard of full and equal enjoyment established by the ADA is often a matter of inches".) However, even in cases where compliance has been achieved through voluntary removal of barriers, a miniscule but litigious minority of defendants continue their attempts to chill our clients' efforts.

Some defendants erroneously theorize that even where an ADA violation is clearly established and documented, swift voluntary compliance would moot the injunctive relief. If such were true, then competent counsel would *never* take representation of a case and a defendant would be free to violate disabled American's rights unabated.

Such defendants are often surprised by the standards of voluntary cessation and mootness. In *Friends of the Earth Inc. v Laidlaw Environmental Serv.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (U.S., 2000), the Supreme Court set the standard for voluntary cessation and burden of proof:

> A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a … court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289. If it did, courts would be compelled to leave the defendant free to return to its old ways. Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. Ibid.
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> The appellate court erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, albeit after commencement of the litigation, has come into compliance. In directing dismissal of the suit on grounds of mootness, the Court of Appeals incorrectly conflated our case law on initial standing to bring suit, see, e.g., *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998), with our case law on post-commencement mootness, see, e.g., *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. The Court of Appeals also misperceived the remedial potential of civil penalties. Such penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.

Here, Plaintiff and Plaintiff's agents have invested considerable time, money and effort in investigating, documenting and assuring that only those places of public accommodation that violate the ADA are subject to litigation. With this in mind it would be foolhardy to simply dismiss the case upon request by a defendant even if a defendant assures or promises corrective action and future ADA compliance. In fact, your client has been served with discovery requests which obligate him to affirmatively disclose *all* ADA violations so that the Plaintiff may thereafter amend the Complaint and list *all* other deficiencies which are *required to be admitted* to by your client. Additionally, once these disclosures have been made, Plaintiff will exercise the procedural right to review the entire premises for additional violations pursuant to Rule 34. *See Doran v. 7-Eleven*, 524 F.3d 1034 9th Cir. 2008) (plaintiff need only allege one instance of ADA violation to achieve standing, but is permitted to then challenge other ADA violations found in the course of discovery).

Respectfully, your client has no defenses to this lawsuit, and if your client decides to fight this litigation, it will surely incur significant risk in a clear case. First, we have documented that your client was factually and legally in violation of Title III and the 2010 Standards of Accessible Design at the time of the lawsuit; whether or not your client has belatedly complied with the ADA will be determined through the disclosure and discovery process. Second, any such late compliance is not grounds for dismissal. Third, my client is entitled to fees whereas your client will not be. In a civil rights case such as this, when the Plaintiff prevails in an ADA suit,"[t]he court should award attorneys' fees and costs to a prevailing plaintiff under the ADA, 42 U.S.C. § 12205, unless special circumstances render the award unjust." *Hohlbein v. Utah Land Resources LLC*, 2012 WL 313613, * 1 (9th Cir. 2012) On the other hand, the Ninth Circuit has interpreted the statute to mean that attorneys' fees may *only* be awarded to a prevailing defendant in an ADA case where the plaintiff's claims are frivolous, unreasonable, or without foundation. *Hubbard v. SoBreck, LLC*, 554 F.3d, 744 (9th Cir. 2008) (citing *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1154 (9th Cir. 1997). The *Hohlbein* factors prevail while the *Hubbard* factors do not apply here.

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On the third point, it is important to note the Court's feelings about decisions to litigate clear ADA violations. In an ADA matter very similar to this case, *Hernandez v. El Grullense* (N.D. Cal. 2014), the defendants decided to litigate. In assessing over $60,000.00 in lawyer's fees, the Court noted "***the defendants chose to contest liability instead of promptly conceding that their premises violated the ADA...I will not protect defendants from the consequences of their litigation decisions.***" (Emphasis supplied). Additionally, you should be aware that any ADA violations discovered pursuant to a Rule 34 inspection can and will be added to the complaint pursuant to current Ninth Circuit law.

Economically, then, it is in everyone's interest to reach a fair and amicable resolution. On the one hand, our client will achieve the goal of ensuring your client's compliance with the ADA and on the other, your client will prudently limit its exposure to significant additional costs and fees.

If your client is willing to, in a timely manner, agree to remedy the violations alleged in the Complaint and to inspect and address *all* other potential ADA violations on its premises by [redacted], 2016, whether these violations have been alleged or whether they would be alleged by amendment, my client would be willing to settle this matter in exchange for damages, costs, expenses and attorney's fees in the amount of $7,500.00 per case and a filing of a voluntary dismissal with prejudice. This offer remains open until your next Court filing.

Please forward a copy of this letter to your client and advise whether this resolution makes sense.

Sincerely,

Peter Strojnik, Esq.