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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TRIPPLE AAA ASSOCIATION FOR
CHILDREN AND ADULTS WITH
DEVELOPMENTAL DISABILITIES,
SUING ON BEHALF OF ITS
MEMBERS;**

Plaintiffs,

v.

**JACK'S - LA JOLLA; WELLINGTON,
INC.; HERSCHEL PLAZA, LLC
And DOES 1 THROUGH 10, Inclusive**

Defendants.

Case No. **07CV 0349 L - BLM**

CLASS ACTION

**CIVIL COMPLAINT:
DISCRIMINATORY PRACTICES IN
PUBLIC ACCOMMODATIONS
[42 U.S.C. 12182(a) ET. SEQ; CIVIL
CODE 51, 52, 54, 54.1]**

**DEMAND FOR JURY TRIAL
[F.R.Civ.P. rule 38(b)]**

INTRODUCTION

Plaintiffs herein complain, by filing this Civil Complaint in accordance with rule 8 of the Federal Rules of Civil Procedure in the Judicial District of the United States District Court of the Southern District of California, that Defendants have in the past, and presently are, engaging in discriminatory practices against individuals with disabilities, specifically including minorities with disabilities. Plaintiffs allege this civil action and others substantial similar thereto are necessary to compel access compliance because empirical research on the effectiveness of Title III of the

1 Americans with Disabilities Act indicates this Title has failed to achieve full and equal access
2 simply by the executive branch of the Federal Government funding and promoting voluntary
3 compliance efforts. Further, empirical research shows when individuals with disabilities give
4 actual notice of potential access problems to places of public accommodation without a federal
5 civil rights action, the public accommodations do not remove the access barriers. Moreover,
6 although there has been substantial litigation and enforcement of the barrier removal requirements,
7 there no enforcement of the auxiliary aid requirements. A public accommodation is required to
8 provide auxiliary aids and services that are necessary to ensure equal access to the goods, services,
9 facilities, privileges, or accommodations that it offers, unless an undue burden or a fundamental
10 alteration would result. This obligation extends only to individuals with disabilities who have
11 physical or mental impairments, such as vision, hearing, or speech impairments, that substantially
12 limit the ability to communicate. In order to provide equal access, a public accommodation is
13 required to make available appropriate auxiliary aids and services where necessary to ensure
14 effective communication. The type of auxiliary aid or service necessary to ensure effective
15 communication will vary in accordance with the length and complexity of the communication
16 involved. Public accommodations should consult with individuals with disabilities wherever
17 possible to determine what type of auxiliary aid is needed to ensure effective communication. In
18 many cases, more than one type of auxiliary aid or service may make effective communication
19 possible. While consultation is strongly encouraged, the ultimate decision as to what measures to
20 take to ensure effective communication rests in the hands of the public accommodation, provided
21 that the method chosen results in effective communication. Signing and interpreting are not the
22 same thing. Being able to sign does not mean that a person can process spoken communication into
23 the proper signs, nor does it mean that he or she possesses the proper skills to observe someone
24 signing and change their signed or fingerspelled communication into spoken words. The interpreter
25 must be able to interpret both receptively and expressively. Auxiliary aids and services include a
26 wide range of services and devices that promote effective communication. Examples of auxiliary
27 aids and services for individuals who are deaf or hard of hearing include qualified interpreters,
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1 notetakers, computer-aided transcription services, written materials, telephone handset amplifiers,
2 assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open
3 and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays,
4 and exchange of written notes. Examples for individuals with vision impairments include qualified
5 readers, taped texts, audio recordings, Brailled materials, large print materials, and assistance in
6 locating items. **TRIPPLE AAA ASSOCIATION FOR CHILDREN AND ADULTS WITH**
7 **DEVELOPMENTAL DISABILITIES** advocates for the provision of auxiliary aids. Therefore,
8 Plaintiffs make the following allegations in this federal civil rights action:

9 **JURISDICTION AND VENUE**

10 1. The federal jurisdiction of this action is based on the Americans with Disabilities Act, 42
11 United States Code 12101-12102, 12181-12183 and 12201, et seq. Venue in the Judicial District
12 of the United States District Court of the Southern District of California is in accordance with 28
13 U.S.C. § 1391(b) because a substantial part of Plaintiffs' claims arose within the Judicial District of
14 the United States District Court of the Southern District of California.

15 **SUPPLEMENTAL JURISDICTION**

16 2. The Judicial District of the United States District Court of the Southern District of
17 California has supplemental jurisdiction over the state claims as alleged in this Complaint pursuant
18 to 28 U.S.C. § 1367(a). The reason supplemental jurisdiction is proper in this action is because all
19 the causes of action or claims derived from federal law and those arising under state law, as herein
20 alleged, arose from common nucleus of operative facts. The common nucleus of operative facts,
21 include, but are not limited to, the incidents where Plaintiffs were denied full and equal access to
22 Defendants' facilities, goods, and/or services in violation of both federal and state laws when they
23 attempted to enter, use, and/or exit Defendants' facilities as described below within this Complaint.
24 Further, due to this denial of full and equal access, **TRIPPLE AAA ASSOCIATION FOR**
25 **CHILDREN AND ADULTS WITH DEVELOPMENTAL DISABILITIES, SUING ON**
26 **BEHALF OF ITS MEMBERS;** and other persons with disabilities were injured. Based upon the
27 said allegations, the state actions, as stated herein, are so related to the federal actions that they
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1 form part of the same case or controversy and the actions would ordinarily be expected to be tried
2 in one judicial proceeding.

3 **NAMED DEFENDANTS AND NAMED PLAINTIFF**

4 3. Defendants are, and, at all times mentioned herein, were, a business or corporation or
5 franchise organized and existing and/or doing business under the laws of the State of California.

6 Plaintiffs are further informed and believe and thereon allege that Defendants JACK'S - LA
7 JOLLA; WELLINGTON, INC.; HERSCHEL PLAZA, LLC are the owners, operators, and/or
8 lessors of the real property, as well as the business operated thereon. JACK'S - LA JOLLA
9 [BUSINESS]

10 7863 GIRARD AVENUE

11 LA JOLLA, CA 92037

12
13
14 Company Name: WELLINGTON, INC.

15
16 Mailing Address:

17 6512 PASEO DELICIAS

18 RANCHO SANTA FE, CA 92067

19
20
21 Type: ARTICLES OF INCORPORATION (DOMESTIC)

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23 Status: ACTIVE

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25 FTB Status:

26 Suspension Code: NOT SUSPENDED (IN GOOD STANDING)

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Date of Incorporation/Qualification: 1/30/2003

Registered Agent: WILLIAM J BERKLEY

Registered Office:
6512 PASEO DELICIAS
RANCHO SANTA FE, CA 92067

HERSCHEL PLAZA, LLC

Business Address:
100 HARBOR DR STE 3405
SAN DIEGO, CA 92101

Mailing Address:
100 HARBOR DR STE 3405
SAN DIEGO, CA 92101

Type: DOMESTIC FILING

Status: ACTIVE

Filing Date: 6/1/2001

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State or Country of Incorporation: CALIFORNIA

Business Description: REAL ESTATE INVESTMENT

Registered Agent: EDWARD L BUSHOR

Registered Office:

12780 HIGH BLUFF DR, STE 100

SAN DIEGO, CA 92130

4. The words "Plaintiffs" and "Plaintiff's Member" as used herein specifically include the organization and TRIPPLE AAA ASSOCIATION FOR CHILDREN AND ADULTS WITH DEVELOPMENTAL DISABILITIES , SUING ON BEHALF OF ITS MEMBERS; and persons associated with its Members who accompanied Members to Defendants' facilities. Defendants Does 1 through 10, were at all times relevant herein subsidiaries, employers, employees, agents, of. JACK'S - LA JOLLA; WELLINGTON, INC.; HERSCHEL PLAZA, LLC Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as Does 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiffs will pray leave of the court to amend this complaint to allege the true names and capacities of the Does when ascertained.

5. Plaintiffs are informed and believe, and thereon allege, that Defendants and each of them herein were, at all times relevant to the action, the owner, lessor, lessee, franchiser, franchisee, general partner, limited partner, agent, employee, representing partner, or joint venturer of the remaining Defendants and were acting within the course and scope of that relationship. Plaintiffs are further informed and believe, and thereon allege, that each of the Defendants herein gave consent to, ratified, and/or authorized the acts alleged herein to each of the remaining Defendants.

STATEWIDE CLASS ACTION ALLEGATIONS UNDER FED.R.CIV.P. 23(b) AS TO ALL DEFENDANTS

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2 6. Plaintiffs are members of a group within the State of California composed of persons with a
3 wide range of disabilities, limited to persons who use wheelchairs for mobility, who must be able to
4 access retail merchandise establishments, like Defendants' establishments located within the
5 facility in which **JACK'S - LA JOLLA; WELLINGTON, INC.; HERSCHEL PLAZA, LLC** is
6 located. Plaintiffs are precluded from equal access to Defendants' establishment so meaningfully
7 because the establishment fails to provide access for members of the disability community who use
8 a wheelchair for mobility to disabled parking facilities, exterior path of travel facilities, entrance
9 facilities, interior path of travel facilities, and display facilities. The Supreme Court of the United
10 States has held as long as the class representative provides adequate representation for the class'
11 interests, the court has the power to adjudicate the rights and obligations of all class members –
12 even those who would otherwise be beyond the reach of its personal jurisdiction. Phillips
13 Petroleum Co. v. Shutts, 472 US 797 (1985). This case stands for the proposition that minimum
14 contacts are not required with nonresident members of a plaintiff class because, "the burdens
15 placed by a State upon absent class action plaintiff are not of the same order or magnitude as those
16 it places on an absent defendant." Id. Plaintiffs allege they will insure class members shall receive
17 adequate notice of the proceedings and the opportunity to "opt out," if required. Defendants have
18 conducted themselves such as to establish a pattern and practice of architectural discrimination.
19 Plaintiffs allege that Defendants have control over each and every facility, establishment, and/or
20 business located within the Defendant Landlords' facilities in which Defendant **JACK'S - LA**
21 **JOLLA; WELLINGTON, INC.; HERSCHEL PLAZA, LLC** is located. Accordingly, Plaintiffs
22 allege Defendants are responsible for removing architectural barriers at Defendants' facilities and
23 the establishment/business contained therein. For the aforementioned reasons, Plaintiffs allege they
24 are proper class representatives for members of the disability community who use a wheelchair for
25 mobility because the members of the disability community who use a wheelchair for mobility are
26 so numerous that joinder is impracticable due to the fact more than one hundred (100) persons fall
27 within the membership description. Also, the questions of law or fact are so common because the
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1 members of the disability community who use a wheelchair for mobility are being denied their civil
2 rights under federal and state laws – that is, each member of the disability community who use a
3 wheelchair for mobility suffered substantially similar violations relating to exterior path of travel
4 facilities, entrance facilities, restrooms, interior path of travel facilities, and display facilities.

5 Further, the claims or defenses of the representative parties are typical – Plaintiffs have the right to
6 access facilities, establishments, and businesses like those within the facility in which Defendant
7 **JACK'S - LA JOLLA; WELLINGTON, INC.; HERSCHEL PLAZA, LLC** is located for many
8 reasons such as the purchase of retail merchandise. Defendants' facilities are open to the general
9 public and Plaintiffs have been denied access because of violations, as outlined above and
10 specifically addressed elsewhere within this Complaint. Additionally, Plaintiffs, as the named
11 representatives, will fairly and adequately represent the interests of the class because Plaintiffs and
12 the members of the disability community in the State of California who use a wheelchair for
13 mobility have suffered substantially similar violations. Finally, a pattern and practice exists on the
14 part of Defendants, and each of them, of architectural discrimination at their public facilities
15 located within the State of California. On information and good faith belief, Plaintiffs thereon
16 allege that Defendants, prior to the passing of the Americans With Disabilities Act in 1992,
17 conceived, commissioned, designed, and implemented among other things, a design for their public
18 facilities, including, but not limited to disabled parking facilities, exterior path of travel facilities,
19 restroom, entrance facilities, interior path of travel facilities, and display facilities, which do not
20 meet the minimal standards outlined under the federal regulations known as the Americans With
21 Disabilities Act Accessibility Guidelines ("ADAAG") and state regulations, also known as Title 24
22 of the California Building Code, and to which non-compliant plan they continue to utilize to the
23 injury of the members of the class. For these reasons and the facts as stated herein, Plaintiffs have
24 the right to maintain this statewide class action pursuant to Fed.R.Civ.P. Rule 23(b).

25
26 **CONCISE SET OF FACTS**

27 7. Plaintiff's Members went to the **JACK'S - LA JOLLA; WELLINGTON, INC.;**
28 **HERSCHEL PLAZA, LLC.** As Said Members are unable to walk Plaintiff's Members uses a

1 walker or wheelchair. Plaintiff alleges its visually and hearing impaired members desire to go to
2 Defendants' facility but cannot because of lack of auxiliary aids. Defendants failed to provide
3 auxiliary aids and services that are necessary to ensure equal access to the goods, services,
4 privileges, or accommodations that it offers. Title 28, part 36.303 of Code of Federal Regulations
5 states:

6 (a) General. A public accommodation shall take those steps that may be necessary
7 to ensure that no individual with a disability is excluded, denied services, segregated
8 or otherwise treated differently than other individuals because of the absence of
9 auxiliary aids and services, unless the public accommodation can demonstrate that
10 taking those steps would fundamentally alter the nature of the goods, services,
11 facilities, privileges, advantages, or accommodations being offered or would result
12 in an undue burden, i.e., significant difficulty or expense.

13 (b) Examples. The term "auxiliary aids and services" includes:

14 (1) Qualified interpreters, notetakers, computer-aided transcription services, written
15 materials, telephone handset amplifiers, assistive listening devices, assistive
16 listening systems, telephones compatible with hearing aids, closed caption decoders,
17 open and closed captioning, telecommunications devices for deaf persons (TDD's),
18 videotext displays, or other effective methods of making aurally delivered materials
19 available to individuals with hearing impairments;

20 (2) Qualified readers, taped texts, audio recordings, Brailled materials, large print
21 materials, or other effective methods of making visually delivered materials
22 available to individuals with visual impairments;

23 (3) Acquisition or modification of equipment or devices; and

24 (4) Other similar services and actions.

25 (c) Effective communication. A public accommodation shall furnish appropriate
26 auxiliary aids and services where necessary to ensure effective communication with
27 individuals with disabilities.
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Defendants failed to comply with Title 28, part 36.303 of Code of Federal Regulations as it failed to provide Qualified readers, taped texts, audio recordings, Brailled materials, or large print materials. Plaintiffs specifically allege that Defendants knew, to a substantial certainty, that the architectural barriers precluded wheelchair access. First, Plaintiffs will prove that Defendants had actual knowledge that the architectural barriers precluded wheelchair access - that it would be hard to believe that noncompliance with ADAAG as to accessible entrances could be other than intentional. Second, due to the abundance of ADA information and constant news covers of ADA lawsuits, Defendants had actual knowledge of the ADA and decided deliberately not to remove architectural barriers. Third, Defendants have no plans to remodel. Fourth, it would be hard to believe that Defendants did not have actual knowledge of ADA given all the ADA public awareness campaigns, the abundance of free ADA information and the media's constant ADA coverage. Fifth, a human being acting for the defendants made a conscious decision as to how to proceed given the presence of the architectural barriers. Plaintiffs allege any alternative methods preclude integration of wheelchair patrons, as it requires them to use a second-class entrance. Also, expert testimony will show the facility contained inaccessible features. Plaintiffs allege businesses often state that they have few customers with disabilities. Plaintiffs allege such customers avoid patronizing inaccessible business and are deterred from patronizing such businesses. The courts have recognized deterrence-based damage claims under Civil Code 54.3 and 52. Since California courts have held that the California disability access laws manifest an intent on the part of the legislature that they be interpreted in a manner that maximizes incentives for compliance, (see Donald, 266 Cal. Rptr. at 808-11) the courts conclude that application of this canon of construction requires that 54.1 and 51, and their respective damages provisions, 54.3 and 52, be interpreted as extending to claims based on incidents of deterrence. The courts therefore hold that where a plaintiff can prove that violations of applicable California disability access standards deterred her on a particular occasion from attempting to attend a place of public accommodation, that plaintiff states a claim for relief under California Civil Code 54.1 and 51 and, in particular, for damages, under 54.3 and 52. Plaintiffs allege people with disabilities still face systemic discrimination each

1 and every day. One of the most debilitating forms of discrimination is segregation imposed by
2 others. Discrimination also includes exclusion, or denial of benefits, services, or other
3 opportunities that are as effective and meaningful as those provided to others. Discrimination
4 results from actions or inactions that discriminate by effect as well as by intent or design.
5 Discrimination also includes harms resulting from the construction of transportation, architectural,
6 and communication barriers and the adoption or application of standards and criteria and practices
7 and procedures based on thoughtlessness or indifference-of benign neglect. Discrimination also
8 includes harms affecting individuals with a history of disability, and those regarded by others as
9 having a disability as well as persons associated with such individuals that are based on false
10 presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and
11 pernicious mythologies. Discrimination also includes the effects a person's disability may have on
12 others. The ADA aim is: (1) To provide a clear and comprehensive national mandate for the
13 elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong,
14 consistent, enforceable standards addressing discrimination against individuals with disabilities.
15 (42 U.S.C. § 12101(b)(1), (2) (Supp. II 1990)) Plaintiffs allege the legislative history of the Act,
16 which reflects congressional concerns over the deleterious effects of discrimination against people
17 with disabilities. As a result, Congress incorporated within Title II of the ADA the remedial
18 provision in Section 504 of the Rehabilitation Act of 1973. (As amended 29 U.S.C. § 794a)(42
19 U.S.C. § 12133)(See *Smith v. Barton*, 914 F.2d 1330, 1336 (9th Cir. 1990), cert. denied, 111 S.Ct.
20 2825 (1991)) Much has been written recently about the ADA and its mechanisms of enforcement.
21 (See e.g., *Doran v. Del Taco, Inc.*, --- F.Supp.2d ---- (C.D. Cal. June 9, 2005); *Molski*, 347
22 F.Supp.2d at 862-63; *Parr v. L & L Drive-Inn Restaurant*, 96 F.Supp.2d 1065, 1070-71
23 (D.Haw.2000)) For purposes of this suit, it is sufficient to note that the statute creates a private
24 right of action through which a litigant may seek injunctive relief as well as attorneys' fees and
25 costs. (42 U.S.C. § 2188(a)) Plaintiffs allege that it cannot be said that because an attorney has
26 chosen to specialize in an area, which provides statutory attorneys fees his practice is necessarily
27 suspect. Class actions, antitrust, and consumer protection statutes are just some of the examples
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1 where the legislature has made a determination that society will benefit from private attorneys
2 general. The ADA is but another example. Plaintiff TRIPPLE AAA ASSOCIATION FOR
3 CHILDREN AND ADULTS WITH DEVELOPMENTAL DISABILITIES , SUING ON BEHALF
4 OF AND ITS MEMBERS; is an organization that advocates on the behalf of children and others
5 with disabilities specifically including adults who use wheelchairs when their civil rights and
6 liberties have been violated. Plaintiff's Member visited the place in 2006 and plans on returning to
7 the place and he encountered architectural barriers there. Association standing requires that (1) its
8 members would otherwise have standing to sue in their own right, (2) the interests the association
9 seeks to protect are germane to the organization's purpose and (3) neither the claim asserted nor the
10 relief requested requires the participation of individual members. *Hunt v. Washington Apple*
11 *Advertising Commission*, 432 U.S. 333, 343; *Greater Los Angeles Council On Deafness, Inc. v.*
12 *Baldrige*, 827 F.2d 1353, 1358 (9th Cir. 1987). Plaintiffs have standing to bring this action.
13 Plaintiff Association has at least four members who use wheelchairs as they cannot walk at all. The
14 purpose of the Association is to fight to remove access and architectural barriers.

15 8. Plaintiff's Member and Plaintiff(s) have physical impairments because their conditions
16 affect one or more of the following body systems: neurological, musculoskeletal, special sense
17 organs, and/or cardiovascular. Further, Plaintiff's Member and Plaintiff(s) said physical
18 impairments substantially limits one or more of the following major life activities: walking and
19 sight. In addition, Plaintiff's Member and Plaintiff(s) cannot perform one or more of the said major
20 life activities in the manner, speed, and duration when compared to the average person. Moreover,
21 Plaintiff's Member and Plaintiff(s) has a history of or has been classified as having a physical
22 impairment as required by 42 U.S.C. § 12102(2)(A).

23 9. Plaintiff's Members expressly intend to patronize the establishment and the property that is
24 the subject of this Complaint in the immediate future.

25 10. Defendants failed to remove access barriers within the parking, exterior path of travel and
26 entrance public accommodations of Defendants' establishment. Plaintiff's Member was deterred
27 from patronizing the facility.
28

1 11. The architectural regulations or "design standards" implemented by the federal ADA are
2 often referred to in the literature as "ADAAGs," which is an acronym for "ADA Architectural
3 Guidelines." (See *Independent Living I*, 982 F. Supp. at pp. 707-708 ["The guidelines issued by the
4 Access Board are denominated the 'ADA Accessibility Guidelines' ('ADAAG.'). The design
5 standards enacted by the Attorney General are identical to the ADAAGs, but are denominated as
6 'Standards.' Despite the technical distinction, the two terms are often used interchangeably."];
7 *Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd.* (S.D. Fla. 2001) 146 F. Supp. 2d
8 1334, 1336 ["These guidelines are called ... ("ADAAG")"].) The "ADAAGs" are found in
9 Appendix A to Part 36 of title 28 of the Code of Federal Regulations. The ADAAG violations
10 alleged here are basically so intuitive that it would be hard to believe that noncompliance with them
11 could be other than intentional.

12 12. Plaintiff(s) was deterred from patronizing the facility due to the alleged ADA violations
13 and/or alleged architectural barriers outlined in Paragraphs 10 through 11 above.

14 13. While Plaintiff's Member expressly wants to patronize Defendant's establishment and the
15 property that is the subject of this Complaint in the immediate future, Plaintiff and Plaintiff's
16 Member is expressly deterred from returning to the establishment and the property that is the
17 subject of this Complaint due to the existence of the architectural barriers outlined above in
18 Paragraphs 10 through 11.

19 14. Pursuant to federal and state law, Defendants are required to remove barriers to their
20 existing facilities. Further, Defendants had actual knowledge of their barrier removal duties under
21 the Americans with Disabilities Act and the Civil Code before January 26, 1992. Also, Defendants
22 should have known that individuals with disabilities are not required to give notice to a
23 governmental agency before filing suit alleging Defendants failed to remove architectural and sight
24 barriers.

25 15. Plaintiffs believe and herein allege Defendants' facilities have access violations not
26 directly known by Plaintiff which preclude or limit access by other members of Plaintiff
27 organization or other persons with disabilities.
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1 16. Based on these facts, Plaintiffs allege Plaintiff's Member and Plaintiff(s) were
2 discriminated against each time he patronized Defendants' establishment. Plaintiff's Member was
3 extremely upset due to Defendants' conduct.

4 **NOTICE**

5 17. Plaintiffs are not required to provide notice to the defendants prior to filing a complaint.
6 (See *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir 2000)) However, a member made
7 an auxiliary aid request.
8

9 **WHAT CLAIMS ARE PLAINTIFFS ALLEGING AGAINST EACH NAMED**
10 **DEFENDANT**

11 18. **JACK'S - LA JOLLA; WELLINGTON, INC.; HERSCHEL PLAZA, LLC;** and Does
12 1 through 10 will be referred to collectively hereinafter as "Defendants."

13 19. Plaintiffs aver that the Defendants are liable for the following claims as alleged below:
14

15 **DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS**

16 **FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS- Claims Under The Americans**
17 **With Disabilities Act Of 1990**

18 **Claim I**

19 19. Based on the facts stated above, Defendants discriminated against Plaintiffs on the basis of
20 disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or
21 accommodations of any place of public accommodation as Defendants own, lease (or lease to), or
22 operate a place of public accommodation in violation of 42 U.S.C. §12182.
23

24 **Claim II**

25 20. Based on the facts stated above, Defendants discriminated against Plaintiffs directly, or
26 through contractual, licensing, or other arrangements, to a denial of the opportunity of the
27 individual or class to participate in or benefit from the goods, services, facilities, privileges,
28 advantages, or accommodations of an entity in violation of 42 U.S.C. §12182.

1 Claim III

2 21. Based on the facts stated above, Defendants discriminated against Plaintiffs as it is
3 discriminatory to afford an individual or class of individuals, on the basis of a disability or
4 disabilities of such individual or class, directly, or through contractual, licensing, or other
5 arrangements with the opportunity to participate in or benefit from a good, service, facility,
6 privilege, advantage, or accommodation that is not equal to that afforded to other individuals in
7 violation of 42 U.S.C. §12182.

8 Claim IV

9 22. Based on the facts stated above, Defendants discriminated against Plaintiffs as it is
10 discriminatory to provide an individual or class of individuals, on the basis of a disability or
11 disabilities of such individual or class, directly, or through contractual, licensing, or other
12 arrangements with a good, service, facility, privilege, advantage, or accommodation that is different
13 or separate from that provided to other individuals.

14 Claim V

15 23. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants
16 failed to afforded to an individual with a disability in the most integrated setting appropriate to the
17 needs of the individual in violation of 42 U.S.C. §12182.

18 Claim VI

19 24. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants
20 utilized standards or criteria or methods of administration that have the effect of discriminating on
21 the basis of disability; or that perpetuate the discrimination of others who are subject to common
22 administrative control in violation of 42 U.S.C. §12182.

23 Claim VII

24 25. Based on the facts stated above, Defendants discriminated against Plaintiffs as it is
25 discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages,
26 accommodations, or other opportunities to an individual or entity because of the known disability
27 of an individual with whom the individual or entity is known to have a relationship or association
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1 in violation of 42 U.S.C. §12182. See Niece v. Fitzner 922 F. Supp. 1208 (1996)

2 Claim VIII

3 26. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants
4 engaged in the following specific prohibitions: (i) the imposition or application of eligibility criteria
5 that screen out or tend to screen out an individual with a disability or any class of individuals with
6 disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or
7 accommodations, unless such criteria can be shown to be necessary for the provision of the goods,
8 services, facilities, privileges, advantages, or accommodations being offered; (ii) a failure to make
9 reasonable modifications in policies, practices, or procedures, when such modifications are
10 necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to
11 individuals with disabilities;

12 27. (iii) a failure to take such steps as may be necessary to ensure that no individual with a
13 disability is excluded, denied services, segregated or otherwise treated differently than other
14 individuals because of the absence of auxiliary aids and services; (iv) a failure to remove
15 architectural barriers, and communication barriers that are structural in nature, in existing facilities
16 in violation of 42 U.S.C. §12182.

17 Claim IX

18 28. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendant
19 failed to demonstrate that the removal of a barrier is not readily achievable, and made such goods,
20 services, facilities, privileges, advantages, or accommodations available through alternative
21 methods in a segregated manner in violation of 42 U.S.C. §12182.

22 Claim X

23 29. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants
24 altered the use of their establishment in a manner that affected or could have affected the usability
25 of the facility or part thereof and failed to make alterations in such a manner that, to the maximum
26 extent feasible, the altered portions of the facility are readily accessible to and usable by individuals
27 with disabilities, including individuals who use wheelchairs in violation of 42 U.S.C. §12183.
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30. WHEREFORE, Plaintiffs pray for judgment and relief as hereinafter set forth.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS - CLAIMS UNDER CALIFORNIA ACCESSIBILITY LAWS

CLAIM I: Denial Of Full And Equal Access

31. Based on the facts plead at ¶¶ 6-16 above and elsewhere in this complaint, Plaintiff's Member and Plaintiff(s) was denied full and equal access to Defendants' goods, services, facilities, privileges, advantages, or accommodations within a public accommodation owned, leased, and/or operated by Defendants as required by Civil Code Sections 54 and 54.1. Defendants' facility violated California's Title 24 Accessible Building Code by failing to provide access to Defendants' facilities due to violations pertaining to the Space Allowance and Reach Ranges, Accessible Route, Protruding Objects, Ground and Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains and Water Coolers, Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and Controls and Operating Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones. These violations denied Plaintiff's Member and Plaintiff(s) full and equal access to Defendants' facility. Thus, Plaintiff's Member and Plaintiff(s) was subjected to discrimination pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff's Member and Plaintiff(s) was denied full, equal and safe access to Defendants' facility, causing severe emotional distress. The Disabled Persons Act is found in *sections 54* of the Civil Code, and has been around in some form on the statute books since the late 1960's--more than 20 years before the federal ADA. (See Stats. 1968, ch. 461.) The Disabled Persons Act begins with the statement in *subdivision (a) of section 54* that "Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of ... public facilities, and other public places." (*β 54, subd. (a).*) *Section 54* is immediately followed by *section 54.1, subdivision (a)(3)* of which--in contrast to the more spartan reference to the ADA in *section 51*--specifically incorporates ADA regulations. The enforcement of *section 54* is to be found in *section 54.3. Subdivision (a)(3) of*

1 section 54.1 provides: " 'Full and equal access,' for purposes of this section in its application to
2 transportation, means access that meets the standards of Titles II and III of the Americans with
3 Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto,
4 except that, if the laws of this state prescribe higher standards, it shall mean access that meets those
5 higher standards." *Subdivision (a) of section 54.3* provides in its entirety: "Any person or persons,
6 firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities
7 as specified in *Sections 54* and *54.1* or otherwise interferes with the rights of an individual with a
8 disability under *Section 54, 54.1, and 54.2* is liable for each offense for the actual damages and any
9 amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of
10 three times the amount of actual damages but in no case less than one thousand dollars (\$ 1,000),
11 and attorney's fees as may be determined by the court in addition thereto, suffered by any person
12 denied any of the rights provided in *Sections 54, 54.1, and 54.2*. 'Interfere' for purposes of this
13 section, includes, but is not limited to, preventing or causing the prevention of a guide dog, signal
14 dog, or service dog from carrying out its functions in assisting a disabled person." *Section 54.3* was
15 construed in the 1990 *Cafe Royale* decision as providing for strict liability--that is, liability without
16 any need for intentional conduct--prior to the 1992 legislation which added both *subdivision (f) to*
17 *section 51* and *subdivision (c) of section 54* (back then in the context of the minimum penalty under
18 *section 54.3* which was \$ 250; now it is \$ 1,000). *Cafe Royale* was a case decided prior to the
19 enactment of the ADA, and contains not a word about federal law. It was also decided exclusively
20 under *Civil Code section 54 et seq.*, and contains not one word on the **Unruh** Act. In *Cafe Royale*,
21 a wheelchair user (a former deputy Attorney General and member of the Attorney General's task
22 force on **disability**) discovered that he could not reach the main dining area of a tiered restaurant on
23 his own, though the restaurant offered to lift him up the stairs. He declined an offer of help because
24 it would attract attention and because he might be dropped in the process of being bodily picked up
25 and moved. He sued the restaurant under *section 54.3* because of the absence of ramps or elevators
26 to the second-tiered area. The restaurant thought that it had complied with the law because its
27 architect thought, based on an informal conversation with an employee of the San Francisco
28

1 building department, that a certain number of handicapped seating places was "all that was needed
2 for compliance." (See *id. at p. 174.*) The building department employee, however, gave the
3 restaurant architect erroneous advice. In fact, the State Building Standards Code (required by
4 *Government Code section 4450 et seq*) provided that all floors of a restaurant be on a common level
5 or else accessible by either ramps or elevators. While a hardship exemption might be obtained, 75
6 percent of the main dining area would still need to be handicap accessible, and the Cafe Royale's
7 option of seating wheelchair patrons in the bar or having them carried to the common area was a
8 violation. On appeal, the fact of the violation was understood by all parties: "All parties agreed that
9 Cafe Royale's seating capacity was in violation of the handicap access requirements." (*Cafe Royale,*
10 *supra, 218 Cal. App. 3d at p. 174.*) Hence issue was joined as to whether the restaurant's "good
11 faith" belief that it was "in compliance" (*ibid.*) was sufficient to deny the patron recovery under
12 *section 54.3*. The trial court thought so, but the appellate court disagreed. The appellate court
13 reasoned thusly: the fact that *section 54.3* said a person who "denies or interferes with admittance
14 to or enjoyment of the public facilities as specified in *section 54* and *54.1* ... is liable for each
15 offense ... but in no case less than two hundred fifty dollars (\$ 250)" The court said: "The plain
16 meaning of this language is that ordinarily minimum statutory damages in the amount of \$ 250
17 must be awarded for a denial of equal access in violation of *section 54 et seq., notwithstanding the*
18 *defendant's intent.*" (*Id. at p. 177.*) The *Cafe Royale* court reasoned that an interpretation of *section*
19 *54.3* that included an element of intentional violation would, because the level of compliance
20 would diminish, yield "a result that is clearly repugnant to the statutory purpose." Further, the
21 *Donald* case held a Plaintiff need not visit the facility to sue for compliance. (*Id. at pp. 179-180.*) So
22 the trial court reversed the trial court judgment awarding the plaintiff nothing, and concluded that
23 he was entitled to the \$ 250 statutory minimum. (See *id. at pp. 180-181.*) Café Royale applies here.
24 Thus, Defendants' good faith efforts, if any, are irrelevant as is any reliance on a city building
25 inspector.

26
27 **CLAIM II: Failure To Modify Practices, Policies And Procedures**

28 32. Based on the facts plead at ¶¶ 6-16 above and elsewhere herein this complaint, Defendants

1 failed and refused to provide a reasonable alternative by modifying its practices, policies, and
2 procedures in that they failed to have a scheme, plan, or design to assist Plaintiffs and/or others
3 similarly situated in entering and utilizing Defendants' services as required by Civil Code § 54.1.
4 Thus, Plaintiff's Member and Plaintiff(s) were subjected to discrimination in violation of Civil
5 Code § 54.1.

6 **CLAIM III: Violation Of The Unruh Act**

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8 33. Based on the facts plead at ¶¶ 6-16 above and elsewhere herein this complaint and because
9 Defendants violated the Civil Code § 51 by failing to comply with 42 United States Code §
10 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did and continue to knowingly
11 discriminate against Plaintiffs and persons similarly situated in violation of Civil Code §§ 51, 52,
12 and 54.1. Plaintiffs allege the access violations alleged here are so obvious as to implicate at least a
13 prima facie case of discriminatory intent.

14 34. Based on the facts plead at ¶¶ 6-16 above, Claims I, II, and III of Plaintiffs' Second Cause
15 Of Action above, and the facts elsewhere herein this complaint, Plaintiffs will suffer irreparable
16 harm unless Defendants are ordered to remove architectural, non-architectural, and communication
17 barriers at Defendants' public accommodation. Plaintiffs allege that Defendants' discriminatory
18 conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiffs and
19 a substantial segment of the disability community. Plaintiffs allege there is a state and national
20 public interest in requiring accessibility in places of public accommodation. Plaintiffs have no
21 adequate remedy at law to redress the discriminatory conduct of Defendants. Plaintiffs desire to
22 return to Defendants' places of business in the immediate future. Accordingly, the Plaintiffs allege
23 that a structural or mandatory injunction is necessary to enjoin compliance with state civil rights
24 laws enacted for the benefit of individuals with disabilities.

25 35. Wherefore, Plaintiffs pray for damages and relief as hereinafter stated.

26 **DEMAND FOR JUDGMENT FOR RELIEF:**

27
28 A. For injunctive relief pursuant to 42 U.S.C. § 12188(a).

- 1 B. For damages pursuant to Cal. Civil Code § 52 or 54.3
- 2 C. For attorneys fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 12205, and Cal. Civil Code §
- 3 51, 52; 54.3;
- 4
- 5 D. A Jury Trial and;
- 6 E. For such other further relief as the court deems proper.

7 Respectfully submitted:


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PINNOCK & WAKEFIELD, A.P.C.

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Dated: February 13, 2007

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By: /S/ THEODORE A. PINNOCK, ESQ.
MICHELLE L. WAKEFIELD, ESQ.
Attorneys for Plaintiffs

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JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS TRIPPLE AAA ASSOCIATION FOR CHILDREN WITH DEVELOPMENTAL DISABILITIES, SUING ON BEHALF OF ITS MEMBERS

DEFENDANTS JACK'S - LA JOLLA; WELLINGTON, INC.; HERSHEL PLAZA, LLC; and does 1 through 10, inclusive Defendants

FILED

2007 FEB 22 PM 1:29

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego, CA (EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT San Diego, CALIFORNIA (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

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Michelle L. Wakefield, Esq. SBN 200424
David C. Wakefield, Esq. SBN:185736
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ATTORNEYS (IF KNOWN)

07CV 0349 L BLM

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff
3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) (For Diversity Cases Only)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PT DEF 1 Incorporated or Principal Place of Business in This State
PT DEF 2 Incorporated and Principal Place of Business in Another State
PT DEF 3 Foreign Nation

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

42 U.S.C. Sections 12101-12102, 12181-12183, and 12201, Et. Seq.

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories and checkboxes.

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- 1 Original Proceeding
2 Removal from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$ TO BE DETERMINED AT TRIAL

Check YES only if demanded in complaint: JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE

Docket Number

DATE February 22, 2007

SIGNATURE OF ATTORNEY OF RECORD

PAID \$350 2/22/07 BH RCPH135308

UNITED STATES
DISTRICT COURT
Southern District of California
San Diego Division

135308 - A1
February 22, 2007

Code	Case #	Qty	Amount
CV086900	3-07-CV-0349		60.00 CC
	Judge - LORENZ		
CV086400			100.00 CC
CV510000			190.00 CC
Total ->			350.00

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