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SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

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

**'07 CV 346 BTM POR**

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

**Plaintiffs,**

**v.**

**SIXTH AVENUE PHARMACY; JOHN  
J. CHAPPEL**

**And DOES 1 THROUGH 10, Inclusive**

**Defendants.**

Case No.

**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

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

10 **JURISDICTION AND VENUE**

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

16 **SUPPLEMENTAL JURISDICTION**

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

4 **NAMED DEFENDANTS AND NAMED PLAINTIFF**

5 3. Defendants are, and, at all times mentioned herein, were, a business or corporation or  
6 franchise organized and existing and/or doing business under the laws of the State of California.  
7 Plaintiffs are further informed and believe and thereon allege that Defendants SIXTH AVENUE  
8 PHARMACY; JOHN J. CHAPPEL

9 are the owners, operators, and/or lessors of the real property, as well as the business operated  
10 thereon.

11 Owner: CHAPPEL JOHN J; DBA SIXTH AVE PHARMACY

12  
13 Mailing Address: 2121 5TH AVE, SAN DIEGO, CA 92101

14  
15 Property Address: 2121 5TH AVE, SAN DIEGO, CA 92101

16 4. The words "Plaintiffs" and "Plaintiff's Member" as used herein specifically include the  
17 organization and TRIPPLE AAA ASSOCIATION FOR CHILDREN AND ADULTS WITH  
18 DEVELOPMENTAL DISABILITIES , SUING ON BEHALF OF ITS MEMBERS; and persons  
19 associated with its Members who accompanied Members to Defendants' facilities. Defendants  
20 Does 1 through 10, were at all times relevant herein subsidiaries, employers, employees, agents, of.  
21 SIXTH AVENUE PHARMACY; JOHN J. CHAPPEL

22 Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as Does 1  
23 through 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiffs will  
24 pray leave of the court to amend this complaint to allege the true names and capacities of the Does  
25 when ascertained.

26  
27 5. Plaintiffs are informed and believe, and thereon allege, that Defendants and each of them  
28 herein were, at all times relevant to the action, the owner, lessor, lessee, franchiser, franchisee,

1 general partner, limited partner, agent, employee, representing partner, or joint venturer of the  
2 remaining Defendants and were acting within the course and scope of that relationship. Plaintiffs  
3 are further informed and believe, and thereon allege, that each of the Defendants herein gave  
4 consent to, ratified, and/or authorized the acts alleged herein to each of the remaining Defendants.

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

7 6. Plaintiffs are members of a group within the State of California composed of persons with a  
8 wide range of disabilities, limited to persons who use wheelchairs for mobility, who must be able to  
9 access retail merchandise establishments, like Defendants' establishments located within the  
10 facility in which **SIXTH AVENUE PHARMACY; JOHN J. CHAPPEL**  
11 is located. Plaintiffs are precluded from equal access to Defendants' establishment so  
12 meaningfully because the establishment fails to provide access for members of the disability  
13 community who use a wheelchair for mobility to disabled parking facilities, exterior path of travel  
14 facilities, entrance facilities, interior path of travel facilities, and display facilities. The Supreme  
15 Court of the United States has held as long as the class representative provides adequate  
16 representation for the class' interests, the court has the power to adjudicate the rights and  
17 obligations of all class members – even those who would otherwise be beyond the reach of its  
18 personal jurisdiction. Phillips Petroleum Co. v. Shutts, 472 US 797 (1985). This case stands for the  
19 proposition that minimum contacts are not required with nonresident members of a plaintiff class  
20 because, “the burdens placed by a State upon absent class action plaintiff are not of the same order  
21 or magnitude as those it places on an absent defendant.” Id. Plaintiffs allege they will insure class  
22 members shall receive adequate notice of the proceedings and the opportunity to “opt out,” if  
23 required. Defendants have conducted themselves such as to establish a pattern and practice of  
24 architectural discrimination. Plaintiffs allege that Defendants have control over each and every  
25 facility, establishment, and/or business located within the Defendant Landlords' facilities in which  
26 Defendant **SIXTH AVENUE PHARMACY; JOHN J. CHAPPEL**  
27 is located. Accordingly, Plaintiffs allege Defendants are responsible for removing architectural  
28 barriers at Defendants' facilities and the establishment/business contained therein. For the



1 to utilize to the injury of the members of the class. For these reasons and the facts as stated herein,  
2 Plaintiffs have the right to maintain this statewide class action pursuant to Fed.R.Civ.P. Rule 23(b).

3 **CONCISE SET OF FACTS**

4 7. Plaintiff's Members went to the **SIXTH AVENUE PHARMACY; JOHN J. CHAPPEL**  
5 . As Said Members are unable to walk Plaintiff's Members uses a walker or wheelchair. Plaintiff  
6 alleges its visually and hearing impaired members desire to go to Defendants' facility but cannot  
7 because of lack of auxiliary aids. Defendants failed to provide auxiliary aids and services that are  
8 necessary to ensure equal access to the goods, services, privileges, or accommodations that it  
9 offers. Title 28, part 36.303 of Code of Federal Regulations states:

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

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

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

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

27 (3) Acquisition or modification of equipment or devices; and  
28

1 (4) Other similar services and actions.

2 (c) Effective communication. A public accommodation shall furnish appropriate  
3 auxiliary aids and services where necessary to ensure effective communication with  
4 individuals with disabilities.

5 Defendants failed to comply with Title 28, part 36.303 of Code of Federal Regulations as it failed  
6 to provide Qualified readers, taped texts, audio recordings, Brailled materials, or large print  
7 materials. Plaintiffs specifically allege that Defendants knew, to a substantial certainty, that the  
8 architectural barriers precluded wheelchair access. First, Plaintiffs will prove that Defendants had  
9 actual knowledge that the architectural barriers precluded wheelchair access - that it would be hard  
10 to believe that noncompliance with ADAAG as to accessible entrances could be other than  
11 intentional. Second, due to the abundance of ADA information and constant news covers of ADA  
12 lawsuits, Defendants had actual knowledge of the ADA and decided deliberately not to remove  
13 architectural barriers. Third, Defendants have no plans to remodel. Fourth, it would be hard to  
14 believe that Defendants did not have actual knowledge of ADA given all the ADA public  
15 awareness campaigns, the abundance of free ADA information and the media's constant ADA  
16 coverage. Fifth, a human being acting for the defendants made a conscious decision as to how to  
17 proceed given the presence of the architectural barriers. Plaintiffs allege any alternative methods  
18 preclude integration of wheelchair patrons, as it requires them to use a second-class entrance. Also,  
19 expert testimony will show the facility contained inaccessible features. Plaintiffs allege businesses  
20 often state that they have few customers with disabilities. Plaintiffs allege such customers avoid  
21 patronizing inaccessible business and are deterred from patronizing such businesses. The courts  
22 have recognized deterrence-based damage claims under Civil Code 54.3 and 52. Since California  
23 courts have held that the California disability access laws manifest an intent on the part of the  
24 legislature that they be interpreted in a manner that maximizes incentives for compliance, (see  
25 Donald, 266 Cal. Rptr. at 808-11) the courts conclude that application of this canon of construction  
26 requires that 54.1 and 51, and their respective damages provisions, 54.3 and 52, be interpreted as  
27 extending to claims based on incidents of deterrence. The courts therefore hold that where a  
28

1 plaintiff can prove that violations of applicable California disability access standards deterred her  
2 on a particular occasion from attempting to attend a place of public accommodation, that plaintiff  
3 states a claim for relief under California Civil Code 54.1 and 51 and, in particular, for damages,  
4 under 54.3 and 52. Plaintiffs allege people with disabilities still face systemic discrimination each  
5 and every day. One of the most debilitating forms of discrimination is segregation imposed by  
6 others. Discrimination also includes exclusion, or denial or benefits, services, or other  
7 opportunities that are as effective and meaningful as those provided to others. Discrimination  
8 results from actions or inactions that discriminate by effect as well as by intent or design.  
9  
10 Discrimination also includes harms resulting from the construction of transportation, architectural,  
11 and communication barriers and the adoption or application of standards and criteria and practices  
12 and procedures based on thoughtlessness or indifference-of benign neglect. Discrimination also  
13 includes harms affecting individuals with a history of disability, and those regarded by others as  
14 having a disability as well as persons associated with such individuals that are based on false  
15 presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and  
16 pernicious mythologies. Discrimination also includes the effects a person's disability may have on  
17 others. The ADA aim is: (1) To provide a clear and comprehensive national mandate for the  
18 elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong,  
19 consistent, enforceable standards addressing discrimination against individuals with disabilities.  
20 (42 U.S.C. § 12101(b)(1), (2) (Supp. II 1990)) Plaintiffs allege the legislative history of the Act,  
21 which reflects congressional, concerns over the deleterious effects of discrimination against people  
22 with disabilities. As a result, Congress incorporated within Title II of the ADA the remedial  
23 provision in Section 504 of the Rehabilitation Act of 1973. (As amended 29 U.S.C. § 794a)(42  
24 U.S.C. § 12133)(See *Smith v. Barton*, 914 F.2d 1330, 1336 (9th Cir. 1990), cert. denied, 111 S.Ct.  
25 2825 (1991)) Much has been written recently about the ADA and its mechanisms of enforcement.  
26 (See e.g., *Doran v. Del Taco, Inc.*, --- F.Supp.2d ---- (C.D. Cal. June 9, 2005); *Molski*, 347  
27 F.Supp.2d at 862-63; *Parr v. L & L Drive-Inn Restaurant*, 96 F.Supp.2d 1065, 1070-71  
28 (D.Haw.2000)) For purposes of this suit, it is sufficient to note that the statute creates a private

1 right of action through which a litigant may seek injunctive relief as well as attorneys' fees and  
2 costs. (42 U.S.C. § 2188(a)) Plaintiffs allege that it cannot be said that because an attorney has  
3 chosen to specialize in an area, which provides statutory attorneys fees his practice is necessarily  
4 suspect. Class actions, antitrust, and consumer protection statutes are just some of the examples  
5 where the legislature has made a determination that society will benefit from private attorneys  
6 general. The ADA is but another example. Plaintiff TRIPPLE AAA ASSOCIATION FOR  
7 CHILDREN AND ADULTS WITH DEVELOPMENTAL DISABILITIES , SUING ON BEHALF  
8 OF AND ITS MEMBERS; is an organization that advocates on the behalf of children and others  
9 with disabilities specifically including adults who use wheelchairs when their civil rights and  
10 liberties have been violated. Plaintiff's Member visited the place in 2006 and plans on returning to  
11 the place and he encountered architectural barriers there. Association standing requires that (1) its  
12 members would otherwise have standing to sue in their own right, (2) the interests the association  
13 seeks to protect are germane to the organization's purpose and (3) neither the claim asserted nor the  
14 relief requested requires the participation of individual members. *Hunt v. Washington Apple*  
15 *Advertising Commission*, 432 U.S. 333, 343; *Greater Los Angeles Council On Deafness, Inc. v.*  
16 *Baldrige*, 827 F.2d 1353, 1358 (9th Cir. 1987). Plaintiffs have standing to bring this action.  
17 Plaintiff Association has at least four members who use wheelchairs as they cannot walk at all. The  
18 purpose of the Association is to fight to remove access and architectural barriers.

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

28 9. Plaintiff's Members expressly intend to patronize the establishment and the property that is

1 the subject of this Complaint in the immediate future.

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

5 11. The architectural regulations or "design standards" implemented by the federal ADA are  
6 often referred to in the literature as "ADAAGs," which is an acronym for "ADA Architectural  
7 Guidelines." (See *Independent Living I*, 982 F. Supp. at pp. 707-708 ["The guidelines issued by the  
8 Access Board are denominated the 'ADA Accessibility Guidelines' ('ADAAG.'). The design  
9 standards enacted by the Attorney General are identical to the ADAAGs, but are denominated as  
10 'Standards.' Despite the technical distinction, the two terms are often used interchangeably."];  
11 *Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd.* (S.D. Fla. 2001) 146 F. Supp. 2d  
12 1334, 1336 ["These guidelines are called ... ("ADAAG") ... ."].) The "ADAAGs" are found in  
13 Appendix A to Part 36 of title 28 of the Code of Federal Regulations. The ADAAG violations  
14 alleged here are basically so intuitive that it would be hard to believe that noncompliance with them  
15 could be other than intentional.

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

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

23 14. Pursuant to federal and state law, Defendants are required to remove barriers to their  
24 existing facilities. Further, Defendants had actual knowledge of their barrier removal duties under  
25 the Americans with Disabilities Act and the Civil Code before January 26, 1992. Also, Defendants  
26 should have known that individuals with disabilities are not required to give notice to a  
27 governmental agency before filing suit alleging Defendants failed to remove architectural and sight  
28

1 barriers.

2 15. Plaintiffs believe and herein allege Defendants' facilities have access violations not  
3 directly known by Plaintiff which preclude or limit access by other members of Plaintiff  
4 organization or other persons with disabilities.

5 16. Based on these facts, Plaintiffs allege Plaintiff's Member and Plaintiff(s) were  
6 discriminated against each time he patronized Defendants' establishment. Plaintiff's Member was  
7 extremely upset due to Defendants' conduct.

8 **NOTICE**

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

12  
13 **WHAT CLAIMS ARE PLAINTIFFS ALLEGING AGAINST EACH NAMED**  
14 **DEFENDANT**

15 18. **SIXTH AVENUE PHARMACY; JOHN J. CHAPPEL**  
16 ; and Does 1 through 10 will be referred to collectively hereinafter as "Defendants."

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

18  
19 **DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS**

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

22  
23 Claim I

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

28 Claim II

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

5 Claim III

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

12 Claim IV

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

18 Claim V

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

22 Claim VI

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

27 Claim VII

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

6 Claim VIII

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

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

21 Claim IX

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

26 Claim X

27 29. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants  
28

1 altered the use of their establishment in a manner that affected or could have affected the usability  
2 of the facility or part thereof and failed to make alterations in such a manner that, to the maximum  
3 extent feasible, the altered portions of the facility are readily accessible to and usable by individuals  
4 with disabilities, including individuals who use wheelchairs in violation of 42 U.S.C. §12183.  
5

6 30. WHEREFORE, Plaintiffs pray for judgment and relief as hereinafter set forth.  
7

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

10 **CLAIM I: Denial Of Full And Equal Access**

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

1 right as the general public to the full and free use of ... public facilities, and other public places." (*β*  
2 54, subd. (a).) Section 54 is immediately followed by section 54.1, subdivision (a)(3) of which--in  
3 contrast to the more spartan reference to the ADA in section 51--specifically incorporates ADA  
4 regulations. The enforcement of section 54 is to be found in section 54.3. Subdivision (a)(3) of  
5 section 54.1 provides: " 'Full and equal access,' for purposes of this section in its application to  
6 transportation, means access that meets the standards of Titles II and III of the Americans with  
7 Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto,  
8 except that, if the laws of this state prescribe higher standards, it shall mean access that meets those  
9 higher standards." Subdivision (a) of section 54.3 provides in its entirety: "Any person or persons,  
10 firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities  
11 as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a  
12 disability under Section 54, 54.1, and 54.2 is liable for each offense for the actual damages and any  
13 amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of  
14 three times the amount of actual damages but in no case less than one thousand dollars (\$ 1,000),  
15 and attorney's fees as may be determined by the court in addition thereto, suffered by any person  
16 denied any of the rights provided in Sections 54, 54.1, and 54.2. 'Interfere' for purposes of this  
17 section, includes, but is not limited to, preventing or causing the prevention of a guide dog, signal  
18 dog, or service dog from carrying out its functions in assisting a disabled person." Section 54.3 was  
19 construed in the 1990 *Cafe Royale* decision as providing for strict liability--that is, liability without  
20 any need for intentional conduct--prior to the 1992 legislation which added both subdivision (f) to  
21 section 51 and subdivision (c) of section 54 (back then in the context of the minimum penalty under  
22 section 54.3 which was \$ 250; now it is \$ 1,000). *Cafe Royale* was a case decided prior to the  
23 enactment of the ADA, and contains not a word about federal law. It was also decided exclusively  
24 under *Civil Code section 54 et seq.*, and contains not one word on the **Unruh** Act. In *Cafe Royale*,  
25 a wheelchair user (a former deputy Attorney General and member of the Attorney General's task  
26 force on **disability**) discovered that he could not reach the main dining area of a tiered restaurant on  
27 his own, though the restaurant offered to lift him up the stairs. He declined an offer of help because  
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1 it would attract attention and because he might be dropped in the process of being bodily picked up  
2 and moved. He sued the restaurant under *section 54.3* because of the absence of ramps or elevators  
3 to the second-tiered area. The restaurant thought that it had complied with the law because its  
4 architect thought, based on an informal conversation with an employee of the San Francisco  
5 building department, that a certain number of handicapped seating places was "all that was needed  
6 for compliance." (See *id. at p. 174.*) The building department employee, however, gave the  
7 restaurant architect erroneous advice. In fact, the State Building Standards Code (required by  
8 *Government Code section 4450 et seq*) provided that all floors of a restaurant be on a common level  
9 or else accessible by either ramps or elevators. While a hardship exemption might be obtained, 75  
10 percent of the main dinning area would still need to be handicap accessible, and the Cafe Royale's  
11 option of seating wheelchair patrons in the bar or having them carried to the common area was a  
12 violation. On appeal, the fact of the violation was understood by all parties: "All parties agreed that  
13 Cafe Royale's seating capacity was in violation of the handicap access requirements." (*Cafe Royale,*  
14 *supra, 218 Cal. App. 3d at p. 174.*) Hence issue was joined as to whether the restaurant's "good  
15 faith" belief that it was "in compliance" (*ibid.*) was sufficient to deny the patron recovery under  
16 *section 54.3*. The trial court thought so, but the appellate court disagreed. The appellate court  
17 reasoned thusly: the fact that *section 54.3* said a person who "denies or interferes with admittance  
18 to or enjoyment of the public facilities as specified in *section 54* and *54.1* ... is liable for each  
19 offense ... but in no case less than two hundred fifty dollars (\$ 250) ... ." The court said: "The plain  
20 meaning of this language is that ordinarily minimum statutory damages in the amount of \$ 250  
21 must be awarded for a denial of equal access in violation of *section 54 et seq., notwithstanding the*  
22 *defendant's intent.*" (*Id. at p. 177.*) The *Cafe Royale* court reasoned that an interpretation of *section*  
23 *54.3* that included an element of intentional violation would, because the level of compliance  
24 would diminish, yield "a result that is clearly repugnant to the statutory purpose." Further, the  
25 Donald case held a Plaintiff need not visit the facility to sue for compliance. (*Id. at pp. 179-180.*) So  
26 the trial court reversed the trial court judgment awarding the plaintiff nothing, and concluded that  
27 he was entitled to the \$ 250 statutory minimum. (See *id. at pp. 180-181.*) Café Royale applies here.  
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1 Thus, Defendants' good faith efforts, if any, are irrelevant as is any reliance on a city building  
2 inspector.

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

4 32. Based on the facts plead at ¶¶ 6-16 above and elsewhere herein this complaint, Defendants  
5 failed and refused to provide a reasonable alternative by modifying its practices, policies, and  
6 procedures in that they failed to have a scheme, plan, or design to assist Plaintiffs and/or others  
7 similarly situated in entering and utilizing Defendants' services as required by Civil Code § 54.1.  
8 Thus, Plaintiff's Member and Plaintiff(s) were subjected to discrimination in violation of Civil  
9 Code § 54.1.

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

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

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

DEMAND FOR JUDGMENT FOR RELIEF:

- A. For injunctive relief pursuant to 42 U.S.C. § 12188(a).
- B. For damages pursuant to Cal. Civil Code § 52 or 54.3
- C. For attorneys fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 12205, and Cal. Civil Code § 51, 52; 54.3;
- D. A Jury Trial and;
- E. For such other further relief as the court deems proper.

Respectfully submitted:

**PINNOCK & WAKEFIELD, A.P.C.**



Dated: February 13, 2007

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

CIVIL COVER SHEET

(Rev. 07/89)

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 AND ADULTS WITH DEVELOPMENTAL DISABILITIES, SUING ON BEHALF OF ITS MEMBERS;

DEFENDANTS SIXTH AVENUE PHARMACY; JOHN J. CHAPPEL and does 1 through 10, Inclusive, Defendants.

FILED

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(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, CA CALIFORNIA (IN U.S. PLAINTIFF CASES ONLY)

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Theodore A. Pinnock, Esq. SBN 153434 Michelle L. Wakefield, Esq. SBN 200424 David C. Wakefield, Esq. SBN:185736 Pinnock & Wakefield; 3033 Fifth Avenue, Suite 410 San Diego, California 92103 Telephone: (619) 858-3671; Facsimile: (619) 858-3646

ATTORNEYS (IF KNOWN) '07CV 346 BTM POR

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

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

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

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
1 Incorporated or Principal Place of Business in This State
2 Incorporated and Principal Place of Business in Another State
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 checkboxes for various legal categories like 110 Insurance, 310 Airplane, 362 Personal Injury-Medical Malpractice, etc.

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 JURY DEMAND: YES NO

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

DATE January 18, 2007 SIGNATURE OF ATTORNEY OF RECORD

PAID \$350 BH RLPH135303 2/22/07

(rev. 07/89)

Date and Attorney Signature. Date and sign the civil cover sheet.

VIII. Related Cases. This section of the JS-44 is used to reference pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

VII. Requested in Complaint. Class Action. Place an "X" in the appropriate box for each of the following class actions under Rule 23, F.R.C.P.

Appeal to District Judge from Magistrate Judgment

Multidistrict Litigation. (6) Check this box when this box is checked, do not check (5) above.

Transferred from Another District. (5) For cases transferred from another district.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened.

Remanded from Appellate Court. (3) Check this box for cases remanded from appellate court.

Removed from State Court. (2) Proceedings initiated in state court, removal is granted, check this box.

Original Proceedings. (1) Cases which originate in state court.

VI. Origin. Place an "X" in one of the seven boxes.

V. Nature of Suit. Place an "X" in the appropriate box to indicate the nature of the suit, select the most definitive.

IV. Cause of Action. Report the civil statute directory for each principal party.

III. Residence (citizenship) of Principal Parties. Report the residence (citizenship) of each principal party.

Diversity of citizenship. (4) This refers to suits involving parties of different citizenships. (See Section 1792.)

Federal question. (3) This refers to suits under the Constitution, an act of Congress or a treaty of the United States.

United States defendant. (2) When the plaintiff is a United States plaintiff.

United States plaintiff. (1) Jurisdiction is based on the basis of jurisdiction.

(c) Attorneys. Enter firm name, address, telephone number, and e-mail address.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. In U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the county of residence of the "plaintiff".)

(a) Plaintiffs - Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**UNITED STATES DISTRICT COURT**  
Southern District of California  
San Diego Division

# 135303 - A1  
February 22, 2007

Code	Case #	Att	Amount
CV000000	03-07-CV-0346		00.00 CC
CV000000	03-07-CV-0346		00.00 CC
CV000000	03-07-CV-0346		00.00 CC
<b>Total</b>			<b>00.00</b>

FROM: CIVIL FILING  
TRIPPLE AAA ASSOC. V.  
SIXTH AVE. PHARMACY ET AL  
VISA AUTH#026316 BH

list them on an attachment, noting in this section where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the county of residence of the "plaintiff".)

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. In U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the county of residence of the "plaintiff".)

(c) Attorneys. Enter firm name, address, telephone number, and e-mail address.

(a) Plaintiffs - Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.