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BY:



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

Case No. **'03 CV 1588 L**

AJB

**ORGANIZATION FOR ACCESSIBLE
RIGHTS IN THE NEW MILLENNIUM
SUING ON BEHALF OF THE ESTATE
OF WALTER LEE DEGROOTE,
DOROTHY DEGROOTE, AND ITS
MEMBERS; THE ESTATE OF WALTER
LEE DEGROOTE; and DOROTHY
DEGROOTE, An Individual,**

Plaintiffs,

v.

**TOYS ETC; TOYS ETC., INC;
DAVID L JOHNSTON; MARTHA
LYMAN TR (Widow/Widower);**

And

DOES 1 THROUGH 10, Inclusive.

Defendants.

CIVIL COMPLAINT:

**DISCRIMINATORY PRACTICES IN
PUBLIC ACCOMMODATIONS**

[42 U.S.C. 12182(a) ET. SEQ;
CIVIL CODE 51, 52, 54, 54.1;
HEALTH & SAFETY CODE 19995;
BUSINESS & PROFESSIONS CODE
17200 et. seq.]

NEGLIGENCE

[CIVIL CODE 1714(a), 2338,
3333, 3294; EVIDENCE CODE
669(a)]

DEMAND FOR JURY TRIAL

[F.R.Civ.P. rule 38(b); L.R.
38.1

INTRODUCTION

Plaintiffs, herein complain, by filing this Civil Complaint
in accordance with rule 8 of the Federal Rules of Civil Procedure

1 in the Judicial District of the United States District Court of
2 the Southern District of California, that Defendants have in the
3 past, and presently are, engaging in discriminatory practices
4 against individuals with disabilities, specifically including
5 minorities with disabilities. Plaintiffs allege this civil action
6 and others substantial similar thereto are necessary to compel
7 access compliance because empirical research on the effectiveness
8 of Title III of the Americans with Disabilities Act indicates the
9 Title has failed to achieve full and equal access simply by the
10 executive branch of the Federal Government funding and promoting
11 voluntary compliance efforts. Further, empirical research shows
12 when individuals with disabilities give actual notice of potential
13 access problems to places of public accommodation without a
14 federal civil rights civil action, the public accommodations do
15 not remove the access barriers. Therefore, Plaintiffs make the
16 following allegations in this federal civil rights action:
17

18 **JURISDICTION AND VENUE**

19 1. The federal jurisdiction of this action is based on the
20 Americans with Disabilities Act, 42 United States Code 12101-
21 12102, 12181-12183 and 12201, et seq. Venue in the Judicial
22 District of the United States District Court of the Southern
23 District of California is in accordance with 28 U.S.C. § 1391(b)
24 because a substantial part of Plaintiffs' claims arose within the
25 Judicial District of the United States District Court of the
26 Southern District of California.

27 **SUPPLEMENTAL JURISDICTION**

28 2. The Judicial District of the United States District Court of

1 the Southern District of California has supplemental jurisdiction
2 over the state claims as alleged in this Complaint pursuant to 28
3 U.S.C. § 1367(a). The reason supplemental jurisdiction is proper
4 in this action is because all the causes of action or claims
5 derived from federal law and those arising under state law, as
6 herein alleged, arose from common nucleus of operative facts. The
7 common nucleus of operative facts, include, but are not limited
8 to, the incidents where deceased Plaintiff's Member WALTER LEE
9 DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE
10 were denied full and equal access to Defendants' facilities,
11 goods, and/or services in violation of both federal Defendants'
12 facilities as described within paragraphs 7 through 19 of this
13 Complaint. Further, due to this denial of full and equal access
14 Plaintiff's Member WALTER LEE DEGROOTE, Plaintiff's Member and
15 Plaintiff DOROTHY DEGROOTE, and others with disabilities were
16 injured. Based upon the said allegations the state actions, as
17 stated herein, are so related to the federal actions that they
18 form part of the same case or controversy, and the actions would
19 ordinarily be expected to be tried in one judicial proceeding.

20
21 **NAMED DEFENDANTS AND NAMED PLAINTIFFS**

22 3. Defendants are, and, at all times mentioned herein, were, a
23 business or corporation or franchise organized and existing and/or
24 doing business under the laws of the State of California.
25 Defendant TOYS ETC is located at 7836 Herschel Avenue, La Jolla,
26 California, 92038. Plaintiffs are informed and believe and
27 thereon allege that Defendants TOYS ETC., INC; and DAVID L
28 JOHNSTON are the owners, operators, franchisers, franchisees,

1 and/or lessors of the TOYS ETC. Defendants TOYS ETC; TOYS ETC.,
2 INC; and DAVID L JOHNSTON are located at 8820 Raejean Avenue, San
3 Diego, California 92123. Plaintiffs are informed and believe and
4 thereon allege that Defendant MARTHA LYMAN TR (Widow/Widower) is
5 the owner, operator, and/or lessor of the property located at 7836
6 Hershel, La Jolla, California, 92038, Assessor's Parcel Number
7 350-181-10. Defendant MARTHA LYMAN TR (Widow/Widower) is located
8 at P.O. Box 1011, La Jolla, California, 92038.

9
10 4. The words "Plaintiffs" and "Plaintiff" as used herein
11 specifically include ORGANIZATION FOR ACCESSIBLE RIGHTS SUING ON
12 BEHALF OF THE ESTATE OF WALTER LEE DEGROOTE, DOROTHY DEGROOTE, AND
13 ITS MEMBERS; THE ESTATE OF WALTER LEE DEGROOTE; and DOROTHY
14 DEGROOTE, An Individual, and persons associated with its Members
15 who accompanied Members to Defendants' facilities. The words
16 "Plaintiff's Members" and "Plaintiff's Member" as used herein
17 specifically include ORGANIZATION FOR ACCESSIBLE RIGHTS SUING ON
18 BEHALF OF THE ESTATE OF WALTER LEE DEGROOTE, DOROTHY DEGROOTE, AND
19 ITS MEMBERS; THE ESTATE OF WALTER LEE DEGROOTE; and DOROTHY
20 DEGROOTE, An Individual, and persons associated with its Members
21 who accompanied Members to Defendants' facilities.

22 5. Defendants Does 1 through 10, were at all times relevant
23 herein subsidiaries, employers, employees, and/or agents of TOYS
24 ETC; TOYS ETC., INC; DAVID L JOHNSTON; and MARTHA LYMAN TR
25 (Widow/Widower). Plaintiffs are ignorant of the true names and
26 capacities of Defendants sued herein as Does 1 through 10,
27 inclusive, and therefore sues these Defendants by such fictitious
28 names. Plaintiffs will pray leave of the court to amend this

1 complaint to allege the true names and capacities of the Does when
2 ascertained.

3 6. Plaintiffs are informed and believe, and thereon allege,
4 that Defendants and each of them herein were, at all times
5 relevant to the action, the owner, franchisee, lessee, general
6 partner, limited partner, agent, employee, representing partner,
7 or joint venturer of the remaining Defendants and were acting
8 within the course and scope of that relationship. Plaintiffs are
9 further informed and believe, and thereon allege, that each of the
10 Defendants herein gave consent to, ratified, and/or authorized the
11 acts alleged herein to each of the remaining Defendants.
12

13 **CONCISE SET OF FACTS**

14 7. Deceased Plaintiff's Member WALTER LEE DEGROOTE had a
15 physical impairment and due to this impairment he had learned to
16 successfully operate a wheelchair. Plaintiff's Member and
17 Plaintiff DOROTHY DEGROOTE is the wife of deceased Plaintiff's
18 Member WALTER LEE DEGROOTE and served in the capacity of caregiver
19 to deceased Plaintiff's Member WALTER LEE DEGROOTE.

20 8. On August 11, 2002, deceased Plaintiff's Member WALTER LEE
21 DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE
22 went to Defendants' TOYS ETC establishment to utilize their goods
23 and/or services.

24 9. When deceased Plaintiff's Member WALTER LEE DEGROOTE and
25 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE patronized
26 Defendants' TOYS ETC establishment, they had difficulty using the
27 disabled parking, exterior path of travel, entrance, ramp,
28 interior path of travel and restroom facilities at Defendants'

1 establishment because they failed to comply with ADA Access
2 Guidelines For Buildings and Facilities (hereafter referred to as
3 "ADAAG") and/or California's Title 24 Building Code Requirements.
4 Defendants failed to remove obstructions in the disabled parking,
5 exterior path of travel, entrance, ramp; interior path of travel
6 and restroom facilities at Defendants' TOYS ETC establishment.

7
8 10. Deceased Plaintiff's Member WALTER LEE DEGROOTE and
9 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE personally
10 experienced difficulty with said access barriers in Defendants'
11 TOYS ETC establishment. For example, the driveway entrance fails
12 to provide driveway signage; the requirement is to provide
13 appropriate driveway signage placed conspicuously at each entrance
14 to off street parking or immediately adjacent to, and visible
15 from, each stall or space, indicating that automobiles illegally
16 parking in disabled parking spaces will be towed. Additionally,
17 the facility is located in a strip mall that provides pay public
18 parking that contains twenty-six (26) parking spaces, none of
19 which are designated as accessible; the requirement for a parking
20 lot of this size is to provide a minimum of one (1) accessible
21 space. Additionally, this space must be designated as "Van
22 Accessible" and provide an access aisle on the passenger side of
23 the vehicle.

24 11. The exterior path of travel throughout this facility is not
25 accessible. For example, there is a lack of an accessible route
26 of travel leading from the parking lot to the building entrance;
27 the requirement is for an accessible route of travel to the
28 entrance of all buildings. A crosswalk should be painted showing

1 a safe and accessible way from the parking space designated as
2 accessible to the building walkway.

3 12. The curb ramp located at the front entrance is too steep to
4 be accessible, as the slope is 12.2%; the requirement is for the
5 slope not to exceed 8.33%.

6 13. The Main Entrance lacks signage indicating that assistance
7 for people with disabilities is available; this signage is
8 recommended for sites that are not fully accessible. There is a
9 loose mat on the exterior side of the door; the requirement is for
10 loose mats to be secured on all four sides or be removed.

11 14. The interior path of travel fails to be accessible, as the
12 aisles are as narrow as twenty inches (20") in some areas; the
13 requirement is to provide a continuous path of travel of at least
14 thirty-six inches (36") throughout. Also, if items are displayed
15 on both sides of the aisle, the requirement is to provide a path
16 of travel that is at least forty-two inches (42"). Lastly, the
17 path of travel leading to the restroom is only thirty inches (30")
18 wide.

19 15. The unisex restroom located within the facility fails to be
20 accessible. For example, the signage on the entrance door of the
21 restroom fails to be complaint. The entrance door has hardware
22 installed that fails to be accessible, as it requires tight
23 grasping and twisting of the wrist to operate; the requirement is
24 to install hardware that does not require tight grasping and/or
25 twisting of the twist to operate. Within the restroom, the faucet
26 handles of the sink also require tight grasping and twisting of
27 the wrist to operate. The sink also lacks the appropriate
28

1 insulation on the drain or hot water pipes of the sink to protect
2 against contact; this is a requirement. There fails to be grab
3 bars on the side and the rear of the commode; these are required.

4 The light switch within the restroom is mounted too high at
5 fifty-three inches (53"); the requirement is to mount light
6 switches at a maximum height of forty-eight inches (48"). The
7 mirror is mounted too high at fifty-three inches (53) and the
8 paper towel dispenser is mounted too high at sixty-two inches
9 (63"); the requirement is for these to be mounted so that the
10 operable parts are no higher than forty inches (40") from the
11 finished floor. The locking mechanism on the door fails to be
12 complaint. The commode is mounted too low to be accessible, as
13 the seat is fifteen inches (15") high; the requirement is for the
14 seat of the commode to be between seventeen (17") to nineteen
15 inches (19") high. The toilet paper dispenser is mounted nineteen
16 inches (19") from the edge of the commode; the requirement is for
17 this dispenser to be mounted no more than twelve inches (12") from
18 the edge of the commode. The flush mechanism of the commode is
19 not accessible as it is located on the wrong side of the commode.

20 The commode is located fourteen inches (14") from the wall; the
21 requirement is to provide at least a thirty-six inches (36")
22 distance between the edge of the commode and the wall.

23 Additionally, there is a cabinet placed in front of the commode
24 that blocks the clear floor space required; the requirement is to
25 provide at least forty-eight inches (48") of clear floor space
26 from the front edge of the commode to the front wall. Lastly, the
27 coat hook is mounted too high at seventy-eight inches (78"); the
28

1 requirement is to mount the coat hook no higher than forty-eight
2 inches from the floor.

3 16. Based on these facts, Plaintiffs allege deceased Plaintiff's
4 Member WALTER LEE DEGROOTE and Plaintiff's Member and Plaintiff
5 DOROTHY DEGROOTE were discriminated against each time they
6 patronized Defendants' establishment.

7 17. Pursuant to federal and state law, Defendants are required
8 to remove barriers to their existing facilities. Further,
9 Defendants had actual knowledge of their barrier removal duties
10 under the Americans with Disabilities Act and the Civil Code
11 before January 26, 1992. Also, Defendants should have known that
12 individuals with disabilities are not required to give notice to a
13 governmental agency before filing suit alleging Defendants failed
14 to remove architectural barriers. Plaintiffs believes and herein
15 allege Defendants' facilities have access violations not directly
16 experienced by deceased Plaintiff's Member WALTER LEE DEGROOTE and
17 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE which preclude
18 or limit access by others with disabilities, including, but not
19 limited to, Space Allowance and Reach Ranges, Accessible Route,
20 Protruding Objects, Ground and Floor Surfaces, Parking and
21 Passenger Loading Zones, Curb Ramps, Ramps, Stairs, Elevators,
22 Platform Lifts (Wheelchair Lifts), Windows, Doors, Entrances,
23 Drinking Fountains and Water Coolers, Water Closets, Toilet
24 Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage,
25 Handrails, Grab Bars, and Controls and Operating Mechanisms,
26 Alarms, Detectable Warnings, Signage, and Telephones. Accordingly,
27 Plaintiffs allege Defendants are required to remove all
28

1 architectural barriers, known or unknown. Also, Plaintiffs allege
2 Defendants are required to utilize the ADA checklist for Readily
3 Achievable Barrier Removal approved by the United States
4 Department of Justice and created by Adaptive Environments.

5 18. Plaintiffs and Plaintiff's Member and Plaintiff DOROTHY
6 DEGROOTE desire to return to Defendants' place of business in the
7 immediate future.

8 19. Deceased Plaintiff's Member WALTER LEE DEGROOTE and
9 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE were extremely
10 upset due to Defendants' conduct. Further, deceased Plaintiff's
11 Member WALTER LEE DEGROOTE experienced pain in his legs, back,
12 arms, shoulders and wrists when he attempted to enter, use, and
13 exit Defendants' establishment.

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

15 20. TOYS ETC; TOYS ETC., INC; and DAVID L JOHNSTON are the
16 commercial tenants of the subject property. MARTHA LYMAN TR
17 (Widow/Widower) is the commercial landlord of the subject
18 property.

19 21. Plaintiffs aver that the Defendants are liable for the
20 following claims as alleged below:
21

22 **DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS**

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

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

26 22. Based on the facts plead at ¶¶ 7-19 above and elsewhere
27 in this complaint, deceased Plaintiff's Member WALTER LEE DEGROOTE
28

1 and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE were denied
2 full and equal access to Defendants' goods, services, facilities,
3 privileges, advantages, or accommodations. Plaintiffs allege
4 Defendants are a public accommodation owned, leased and/or
5 operated by Defendants. Defendants' existing facilities and/or
6 services failed to provide full and equal access to Defendants'
7 facility as required by 42 U.S.C. § 12182(a). Thus, deceased
8 Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's Member and
9 Plaintiff DOROTHY DEGROOTE were subjected to discrimination in
10 violation of 42 United States Code 12182(b)(2)(A)(iv) and 42
11 U.S.C. § 12188 because Plaintiffs were denied equal access to
12 Defendants' existing facilities.

13
14 23. Deceased Plaintiff's Member WALTER LEE DEGROOTE had physical
15 impairments as alleged in ¶ 7 above because his conditions
16 affected one or more of the following body systems: neurological,
17 musculoskeletal, special sense organs, and/or cardiovascular.
18 Further, his said physical impairments substantially limited one
19 or more of the following major life activities: walking. In
20 addition, deceased Plaintiff's Member WALTER LEE DEGROOTE could
21 not perform one or more of the said major life activities in the
22 manner, speed, and duration when compared to the average person.
23 Moreover, deceased Plaintiff's Member WALTER LEE DEGROOTE had a
24 history of or was classified as having a physical impairment as
25 required by 42 U.S.C. § 12102(2)(A).

26 CLAIM II: Failure To Make Alterations In Such A Manner That The
27 Altered Portions Of The Facility Are Readily Accessible And Usable
28 By Individuals With Disabilities

1 24. Based on the facts plead at ¶¶ 7-19 above and elsewhere in
2 this complaint, deceased Plaintiff's Member WALTER LEE DEGROOTE
3 and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE were denied
4 full and equal access to Defendants' goods, services, facilities,
5 privileges, advantages, or accommodations within a public
6 accommodation owned, leased, and/or operated by Defendants.
7 Defendants altered their facility in a manner that affects or
8 could affect the usability of the facility or a part of the
9 facility after January 26, 1992. In performing the alteration,
10 Defendants failed to make the alteration in such a manner that, to
11 the maximum extent feasible, the altered portions of the facility
12 are readily accessible to and usable by individuals with
13 disabilities, including individuals who use wheelchairs, in
14 violation of 42 U.S.C. §12183(a)(2).
15

16 25. Additionally, the Defendants undertook an alteration that
17 affects or could affect the usability of or access to an area of
18 the facility containing a primary function after January 26, 1992.
19 Defendants further failed to make the alterations in such a manner
20 that, to the maximum extent feasible, the path of travel to the
21 altered area and the bathrooms serving the altered area, are
22 readily accessible to and usable by individuals with disabilities
23 in violation 42 U.S.C. §12183(a)(2).
24

25 26. Pursuant to 42 U.S.C. §12183(a), this failure to make the
26 alterations in a manner that, to the maximum extent feasible, are
27 readily accessible to and usable by individuals with disabilities
28 constitutes discrimination for purposes of 42 U.S.C. §12183(a).
Therefore, Defendants discriminated against deceased Plaintiff's

1 Member WALTER LEE DEGROOTE and Plaintiff's Member and Plaintiff
2 DOROTHY DEGROOTE in violation of 42 U.S.C. § 12182(a).

3 27. Thus, deceased Plaintiff's Member WALTER LEE DEGROOTE and
4 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE were subjected
5 to discrimination in violation of 42 U.S.C. § 12183(a), 42 U.S.C.
6 §12182(a) and 42 U.S.C. §12188 because said Members and deceased
7 Plaintiff WALTER LEE DEGROOTE was denied equal access to
8 Defendants' existing facilities.

9 **CLAIM III: Failure To Remove Architectural Barriers**

10 28. Based on the facts plead at ¶¶ 7-19 above and elsewhere in
11 this complaint, deceased Plaintiff's Member WALTER LEE DEGROOTE
12 and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE were denied
13 full and equal access to Defendants' goods, services, facilities,
14 privileges, advantages, or accommodations within a public
15 accommodation owned, leased, and/or operated by Defendants.
16 Defendants failed to remove barriers as required by 42 U.S.C. §
17 12182(a). Plaintiffs are informed and believe, and thus allege
18 that architectural barriers which are structural in nature exist
19 at the following physical elements of Defendants' facilities:
20 Space Allowance and Reach Ranges, Accessible Route, Protruding
21 Objects, Ground and Floor Surfaces, Parking and Passenger Loading
22 Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts
23 (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains
24 and Water Coolers, Water Closets, Toilet Stalls, Urinals,
25 Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and
26 Controls and Operating Mechanisms, Alarms, Detectable Warnings,
27 Signage, and Telephones. Title III requires places of public
28

1 accommodation to remove architectural barriers that are structural
2 in nature to existing facilities. [See, 42 United States Code
3 12182(b)(2)(A)(iv).] Failure to remove such barriers and
4 disparate treatment against a person who has a known association
5 with a person with a disability are forms of discrimination. [See
6 42 United States Code 12182(b)(2)(A)(iv).] Thus, deceased
7 Plaintiff's Member WALTER LEE DEGROOTE Plaintiff's Member and
8 Plaintiff DOROTHY DEGROOTE were subjected to discrimination in
9 violation of 42 United States Code 12182(b)(2)(A)(iv) and 42
10 U.S.C. § 12188 because said Members and deceased Plaintiff's
11 Member WALTER LEE DEGROOTE were denied equal access to Defendants'
12 existing facilities.

13
14 CLAIM IV: **Failure To Modify Practices, Policies And Procedures**

15 29. Based on the facts plead at ¶¶ 7-19 above and elsewhere in
16 this complaint, Defendants failed and refused to provide a
17 reasonable alternative by modifying its practices, policies and
18 procedures in that they failed to have a scheme, plan, or design
19 to assist Plaintiff's Member and Plaintiff WALTER LEE DEGROOTE
20 and/or others similarly situated in entering and utilizing
21 Defendants' services, as required by 42 U.S.C. § 12188(a). Thus,
22 said Member and Plaintiff WALTER LEE DEGROOTE was subjected to
23 discrimination in violation of 42 United States Code
24 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because said Member and
25 Plaintiff WALTER LEE DEGROOTE was denied equal access to
26 Defendants' existing facilities.

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

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

2 30. Based on the facts plead at ¶¶ 7-19 above and elsewhere in
3 this complaint, Plaintiff's Member and Plaintiff WALTER LEE
4 DEGROOTE was denied full and equal access to Defendants' goods,
5 services, facilities, privileges, advantages, or accommodations
6 within a public accommodation owned, leased, and/or operated by
7 Defendants as required by Civil Code Sections 54 and 54.1.
8 Defendants' facility violated California's Title 24 Accessible
9 Building Code by failing to provide access to Defendants'
10 facilities due to violations pertaining to the Space Allowance and
11 Reach Ranges, Accessible Route, Protruding Objects, Ground and
12 Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps,
13 Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts),
14 Windows, Doors, Entrances, Drinking Fountains and Water Coolers,
15 Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors,
16 Sinks, Storage, Handrails, Grab Bars, and Controls and Operating
17 Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.

18 31. These violations denied deceased Plaintiff's Member WALTER
19 LEE DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE
20 full and equal access to Defendants' facility. Thus, said Members
21 and deceased Plaintiff's Member WALTER LEE DEGROOTE was subjected
22 to discrimination pursuant to Civil Code §§ 51, 52, and 54.1
23 because Plaintiffs were denied full, equal and safe access to
24 Defendants' facility, causing severe emotional distress.

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

26 32. Based on the facts plead at ¶¶ 7-19 above and elsewhere
27 herein this complaint, Defendants failed and refused to provide a
28

1 reasonable alternative by modifying its practices, policies, and
2 procedures in that they failed to have a scheme, plan, or design
3 to assist deceased Plaintiff's Member WALTER LEE DEGROOTE and
4 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE and/or others
5 similarly situated in entering and utilizing Defendants' services
6 as required by Civil Code § 54.1. Thus, said deceased Member
7 WALTER LEE DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY
8 DEGROOTE 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 ¶¶ 7-19 above and elsewhere
12 herein this complaint and because Defendants violated the Civil
13 Code § 51 by failing to comply with 42 United States Code
14 12182(b)(2)(A)(iv), Defendants did and continue to discriminate
15 against deceased Plaintiff's Member WALTER LEE DEGROOTE and
16 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE and persons
17 similarly situated in violation of Civil Code §§ 51, 52, and 54.1.
18

19 **Treble Damages Pursuant To Claims I, II, III Under The California**
20 **Accessibility Laws**

21 34. Defendants, each of them, at times prior to and including
22 during the month of August, 2002, respectively, and continuing to
23 the present time, knew that persons with physical disabilities
24 were denied their rights of equal access to all portions of this
25 public facility. Despite such knowledge, Defendants, and each of
26 them, failed and refused to take steps to comply with the
27 applicable access statutes; and despite knowledge of the resulting
28 problems and denial of civil rights thereby suffered by deceased

1 Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's Member and
2 Plaintiff DOROTHY DEGROOTE and other similarly situated persons
3 with disabilities. Defendants, and each of them, have failed and
4 refused to take action to grant full and equal access to persons
5 with physical disabilities in the respects complained of
6 hereinabove. Defendants, and each of them, have carried out a
7 course of conduct of refusing to respond to, or correct complaints
8 about, denial of disabled access and have refused to comply with
9 their legal obligations to make the subject TOYS ETC facility
10 accessible pursuant to the Americans With Disability Act Access
11 Guidelines (ADAAG) and Title 24 of the California Code of
12 Regulations (also known as the California Building Code). Such
13 actions and continuing course of conduct by Defendants, and each
14 of them, evidence despicable conduct in conscious disregard of the
15 rights and/or safety of deceased Plaintiff's Member WALTER LEE
16 DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE and
17 of other similarly situated persons, justifying an award of treble
18 damages pursuant to sections 52(a) and 54.3(a) of the California
19 Civil Code.

20
21 35. Defendants, and each of their, actions have also been
22 oppressive to persons with physical disabilities and of other
23 members of the public, and have evidenced actual or implied
24 malicious intent toward those members of the public, such as
25 Plaintiffs and other persons with physical disabilities who have
26 been denied the proper access to which they are entitled by law.
27 Further, Defendants, and each of their, refusals on a day-to-day
28 basis to correct these problems evidence despicable conduct in

1 conscious disregard for the rights of deceased Plaintiff's Member
2 WALTER LEE DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY
3 DEGROOTE and other members of the public with physical
4 disabilities.

5 36. Plaintiffs pray for an award of treble damages against
6 Defendants, and each of them, pursuant to California Civil Code
7 sections 52(a) and 54.3(a), in an amount sufficient to make a more
8 profound example of Defendants and encourage owners and operators
9 of other public facilities from willful disregard of the rights of
10 persons with disabilities. Plaintiffs do not know the financial
11 worth of Defendants, or the amount of treble damages sufficient to
12 accomplish the public purposes of section 52(a) of the California
13 Civil Code and section 54.3 of the California Civil Code.

14 37. Wherefore, Plaintiffs pray for damages and relief as
15 hereinafter stated.
16

17
18 **THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS - Violation of**
19 **Business and Professions Code section 17200 et seq.**

20 38. Plaintiffs incorporate by reference herein the facts plead
21 at ¶¶ 7-19 above and elsewhere in this complaint.

22 39. Defendants failed to remove obstructions in the disabled
23 parking, exterior path of travel, access ramp, entrance, interior
24 path of travel and restroom facilities in Defendants' TOYS ETC
25 establishment. Pursuant to federal law, Defendants are required
26 to remove barriers to their existing facilities. Title III of the
27 Americans With Disabilities Act requires places of public
28 accommodation to remove architectural barriers that are structural

1 in nature to existing facilities. [42 United States Code
2 12182(b)(2)(A)(iv).] Failure to remove such barriers and
3 disparate treatment against a person who has a known association
4 with a person with a disability are forms of discrimination. [See
5 42 United States Code 12182(b)(2)(A)(iv).] Thus, deceased
6 Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's Member and
7 Plaintiff DOROTHY DEGROOTE were subjected to discrimination in
8 violation of 42 United States Code 12182(b)(2)(A)(iv) and 42
9 U.S.C. § 12188 because said Members and deceased Plaintiff's
10 Member WALTER LEE DEGROOTE were denied equal access to Defendants'
11 existing facilities. Also, Defendants' facilities failed to
12 provide full and equal access to Defendants' facility as required
13 by 42 U.S.C. § 12182(a). Thus, deceased Plaintiff's Member WALTER
14 LEE DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE
15 were subjected to discrimination in violation of 42 United States
16 Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because deceased
17 Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's Member and
18 Plaintiff DOROTHY DEGROOTE were denied equal access to Defendants'
19 existing facilities. Additionally, as a result of said access
20 barriers, Defendants failed and refused to provide a reasonable
21 alternative by modifying its practices, policies and procedures in
22 that they failed to have a scheme, plan, or design to assist
23 deceased Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's
24 Member and Plaintiff DOROTHY DEGROOTE and/or others similarly
25 situated in entering and utilizing Defendants' services, as
26 required by 42 U.S.C. § 12188(a). Thus, said Members and deceased
27 Plaintiff's Member WALTER LEE DEGROOTE were subjected to
28

1 discrimination in violation of 42 United States Code
2 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because said Members and
3 deceased Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's
4 Member and Plaintiff WALTER LEE DEGROOTE were denied equal access
5 to Defendants' existing facilities.

6 40. Pursuant to state law, Defendants are also required to remove
7 barriers to their existing facilities. These violations denied
8 deceased Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's
9 Member and Plaintiff DOROTHY DEGROOTE full and equal access to
10 Defendants' facilities. Thus, said Members and deceased
11 Plaintiff's Member WALTER LEE DEGROOTE were subjected to
12 discrimination pursuant to Civil Code §§ 51, 52, and 54.1 because
13 deceased Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's
14 Member and Plaintiff DOROTHY DEGROOTE were denied full, equal and
15 safe access to Defendants' facility. Further, Defendants'
16 facility, and other goods, services, and/or facilities provided to
17 the public by Defendants are not accessible to and usable by
18 persons with disabilities as required by Health and Safety Code §
19 19955 which requires private entities to make their facility
20 accessible before and after remodeling, and to remove
21 architectural barriers on and after AB 1077 went into effect.
22 Additionally, Defendants failed and refused to provide a
23 reasonable alternative by modifying its practices, policies, and
24 procedures in that they failed to have a scheme, plan, or design
25 to assist deceased Plaintiff's Member WALTER LEE DEGROOTE and
26 Plaintiff's Member and Plaintiff DOROTHY DEGROOTE and/or others
27 similarly situated in entering and utilizing Defendants' services
28

1 as required by Civil Code § 54.1. Thus, said Members and deceased
2 Plaintiff's Member WALTER LEE DEGROOTE were subjected to
3 discrimination in violation of Civil Code § 54.1. Also, under the
4 Unruh Act, Defendants violated the Civil Code § 51 by failing to
5 comply with 42 United States Code 12182(b)(2)(A)(iv), Defendants
6 did and continue to discriminate against deceased Plaintiff's
7 Member WALTER LEE DEGROOTE and Plaintiff's Member and Plaintiff
8 DOROTHY DEGROOTE and persons similarly situated in violation of
9 Civil Code §§ 51, 52, and 54.1. Further, Defendants had actual
10 knowledge of their barrier removal duties under the Americans with
11 Disabilities Act, the California Civil Code, and the California
12 Health & Safety Code before January 26, 1992.

13 41. Business and Professions Code section 17200 defines "unfair
14 competition" and prohibited activities as, ". . . **any unlawful,**
15 **unfair or fraudulent business act or practice** and unfair,
16 deceptive, untrue or misleading advertising and any act prohibited
17 by Chapter 1 (commencing with Section 17500) of Part 3 of Division
18 7 of the Business and Professions Code." (emphasis added).

19 Defendants' acts and omissions alleged herein are violations of
20 the above-enumerated federal and state statutory requirements and
21 public policy and therefore constitute unfair competition and/or
22 prohibited activities as such violations are *unlawful, unfair or*
23 *fraudulent business acts or practices*. Defendants' alleged
24 unlawful, unfair, or fraudulent business acts or practices are
25 specifically prohibited by the specific introductory language of
26 B&P section 17200 that is stated in the conjunctive.
27

28 Consequently, Plaintiffs allege that Defendants' acts and

1 omissions constitute a violation specifically of this section
2 17200 of the Business and Professions Code.

3 42. Plaintiffs seek injunctive relief requiring Defendants to
4 remedy the disabled access violations present at the Defendants'
5 facilities. Ancillary to this injunctive relief, Plaintiffs also
6 request restitution for amounts paid by deceased Plaintiff's
7 Member WALTER LEE DEGROOTE and Plaintiff's Member and Plaintiff
8 DOROTHY DEGROOTE who attempted to visit and patronize Defendants'
9 facilities during the time period that the subject premises have
10 been in violation of the disabled access laws of the State of
11 California.

12 43. Plaintiffs seek, on behalf of the general public, injunctive
13 relief requiring Defendants to comply with the disabled access
14 laws of the State of California at facilities throughout the State
15 of California built, owned, operated, and/or controlled by
16 Defendants.

17 44. WHEREFORE, Plaintiffs pray for judgment as hereinafter set
18 forth.

19
20 FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS- Negligence

21 45. Based on the facts plead at ¶¶ 7-19 above and elsewhere in
22 this complaint, Defendants owed deceased Plaintiff's Member WALTER
23 LEE DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE
24 a statutory duty to make their facility accessible and owed
25 deceased Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's
26 Member and Plaintiff DOROTHY DEGROOTE a duty to keep deceased
27 Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's Member and
28 Plaintiff DOROTHY DEGROOTE reasonably safe from known dangers and

1 risks of harm. This said duty arises by virtue of legal duties
2 proscribed by various federal and state statutes including, but
3 not limited to, ADA, ADAAG, Civil Code 51, 52, 54, 54.1 and Title
4 24 of the California Administrative Code and applicable 1982
5 Uniform Building Code standards as amended.

6 46. Title III of the ADA mandates removal of architectural
7 barriers and prohibits disability discrimination. As well,
8 Defendants' facility, and other goods, services, and/or facilities
9 provided to the public by Defendants are not accessible to and
10 usable by persons with disabilities as required by Health and
11 Safety Code § 19955 which requires private entities to make their
12 facility accessible before and after remodeling, and to remove
13 architectural barriers on and after AB 1077 went into effect.

14 47. Therefore, Defendants engaged in discriminatory conduct in
15 that they failed to comply with known duties under the ADA, ADAAG,
16 Civil Code 51, 52, 54, 54.1, ADAAG, and Title 24, and knew or
17 should have known that their acts of nonfeasance would cause
18 deceased Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's
19 Member and Plaintiff DOROTHY DEGROOTE emotional, bodily and
20 personal injury. Plaintiffs allege that there was bodily injury
21 in this matter because when deceased Plaintiff's Member WALTER LEE
22 DEGROOTE and Plaintiff's Member and Plaintiff DOROTHY DEGROOTE
23 attempted to enter, use, and exit Defendants' establishment,
24 deceased Plaintiff's Member WALTER LEE DEGROOTE experienced pain
25 in his legs, back, arms, shoulders, and wrists. Plaintiffs
26 further allege that such conduct was done in reckless disregard of
27 the probability of said conduct causing deceased Plaintiff's
28

1 Member WALTER LEE DEGROOTE to suffer bodily or personal injury,
2 anger, embarrassment, depression, anxiety, mortification,
3 humiliation and distress. Plaintiffs allege that such conduct
4 caused deceased Plaintiff's Member WALTER LEE DEGROOTE and
5 Plaintiff's Member and Plaintiff DORORTHY DEGROOTE to suffer the
6 injuries of mental and emotional distress, including, but not
7 limited to, anger, embarrassment, depression, anxiety,
8 mortification, humiliation, distress, and fear of physical injury.
9 Plaintiffs additionally allege that such conduct caused deceased
10 Plaintiff's Member WALTER LEE DEGROOTE and Plaintiff's Member and
11 Plaintiff DORORTHY DEGROOTE to suffer damages as a result of these
12 injuries.
13

14 DEMAND FOR JUDGMENT FOR RELIEF:

- 15 A. For general damages pursuant to Cal. Civil Code §§ 52, 54.3,
16 3281, and 3333;
17
18 B. For \$4,000 in damages pursuant to Cal. Civil Code § 52 for
19 each and every offense of Civil Code § 51, Title 24 of the
20 California Building Code, ADA, and ADA Accessibility Guidelines;
21
22 C. In the alternative to the damages pursuant to Cal. Civil
23 Code § 52 in Paragraph B above, for \$1,000 in damages pursuant to
24 Cal. Civil Code § 54.3 for each and every offense of Civil Code §
25 54.1, Title 24 of the California Building Code, ADA, and ADA
26 Accessibility Guidelines;
27
28 D. For injunctive relief pursuant to 42 U.S.C. § 12188(a) and
Cal. Civil Code § 55. Plaintiffs request this Court enjoin

1 Defendants to remove all architectural barriers in, at, or on
2 their facilities related to the following: Space Allowance and
3 Reach Ranges, Accessible Route, Protruding Objects, Ground and
4 Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps,
5 Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts),
6 Windows, Doors, Entrances, Drinking Fountains and Water Coolers,
7 Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors,
8 Sinks, Storage, Handrails, Grab Bars, and Controls and Operating
9 Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.

11 E. For attorneys' fees pursuant to 42 U.S.C. § 1988, 42 U.S.C.
12 § 12205, and Cal. Civil Code § 55;

13 F. For treble damages pursuant to Cal. Civil Code §§ 52(a),
14 and 54.3(a);

15 G. For Restitution pursuant to Business and Professions section
16 17200;

17 H. A Jury Trial and;

18 I. For such other further relief as the court deems proper.
19

20

21 Respectfully submitted:

22

23 Dated: August 8, 2003

24

By:

PINNOCK & WAKEFIELD, A.P.C.

25

THEODORE A. PINNOCK, ESQ.
MICHELLE L. WAKEFIELD, ESQ.
Attorneys for Plaintiffs

26

27

28

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.)

FILED
03 AUG -8 PH 3:58
TOYS ETC.; TOYS ETC.; DAVID L JOHNSTON; MARTHA LYMAN
TR (Widow/Widower)
CLERK, DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

I. PLAINTIFFS
ORGANIZATION FOR ACCESSIBLE RIGHTS IN THE NEW MILLENNIUM SUING ON BEHALF OF THE ESTATE OF WALTER LEE DEGROOTE, DOROTHY DEGROOTE, AND ITS MEMBERS; THE ESTATE OF WALTER LEE DEGROOTE; and DOROTHY DEGROOTE, An Individual

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

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

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

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

ATTORNEYS (IF KNOWN)
03 CV 1508 L AJB

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 (For Diversity Cases Only))

- 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
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 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATUTES. Includes checkboxes for various legal categories like 110 Insurance, 310 Airplane, 610 Agriculture, 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
DEMANDS 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 August 8, 2003
OB \$150 08/08/03 96317

SIGNATURE OF ATTORNEY OF RECORD