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7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 EASTERN DIVISION

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CENTRAL DISTRICT OF CALIF.  
SAN DIEGO

11 EDCV04-174 VAP (SGLX)

12 ISMAEL RIVERA ) Case No.:  
13 )  
14 Plaintiff, ) COMPLAINT FOR DAMAGES RE:  
vs. ) VIOLATION OF CIVIL RIGHTS ON  
15 TACOS MEXICO, INC, FILBERTO ) BASIS OF DISCRIMINATION IN  
RUIZ, HAROLD WILLIS AND DOES 1- ) PUBLIC ACCOMMODATIONS; UNFAIR,  
16 10 Inclusive, ) UNLAWFUL AND FRAUDULENT BUSINESS  
17 ) PRACTICES; NEGLIGENT INFLICTION  
Defendants. ) OF EMOTIONAL DISTRESS;  
18 ) INTENTIONAL INFLICTION OF  
19 ) EMOTIONAL DISTRESS; DEMAND FOR  
JURY TRIAL  
20 )  
21 )  
22 )

3/20

I

JURISDICTION AND VENUE

23 1. (a) Jurisdiction of this action is invoked on the basis of 28  
24 USC 1331 and 1343, 42 USC 12101-12102, 12181-12183 and 12201, et.  
25 seq., which is applicable to causes of action where persons with  
26 disabilities have been denied their civil rights. Venue in the  
27 Central Judicial District of California (Eastern Division) in the  
28 United States District Court is in accord with 28. U.S.C. section  
1391(b) because a substantial part of plaintiff's claims arose

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(1)

1 within the Judicial District of the United States District Court  
2 of the Central District of California.

3 (b) Supplemental Jurisdiction. The Judicial District of the  
4 United States District Court of the Central District of California  
5 has supplemental jurisdiction over the state claims alleged in  
6 this Complaint pursuant to 28 U.S.C. section 1367(a).  
7 Supplemental jurisdiction is appropriate in this action on the  
8 basis that all the causes of action or claims derived from federal  
9 law and those arising under state law, as herein alleged, arose  
10 from a common nucleus of operative facts. The common nucleus of  
11 operative facts, include, but are not limited to, the incidents  
12 whereby plaintiff was denied full and equal access to Defendant's  
13 facilities, goods, and/or services in violation of both federal  
14 and state laws when plaintiff attempted to enter, use, and/or exit  
15 Defendant's facilities as described within this Complaint.  
16 Further, due to this denial of full and equal access Plaintiff and  
17 other person's with disabilities were injured. Based upon such  
18 allegations the state actions, as stated herein, are so related to  
19 the federal actions that they form part of the same case or  
20 controversy, and the actions would ordinarily be expected to be  
21 tried in one judicial proceeding.

## 22 II

### 23 PARTIES

24 2. Defendants Tacos Mexico, Inc. and Filberto Ruiz were and at all  
25 times herein mentioned were duly organized businesses,  
26 associations, or corporations duly authorized to exist and operate  
27 within the State of California and County of San Bernardino and  
28

1 the owner, lessee, or tenant of the premises located at 1059  
2 Waterman Avenue San Bernardino, California.

3 3. Plaintiff is informed and believes and thereon alleges that  
4 defendant Harold Willis is the owner and/or landlord of the  
5 subject property upon which defendant business is sited.

6 4. Plaintiff is informed and believes and thereon alleges that  
7 each of the named defendants herein operates a business and  
8 or/facility of public accommodation as defined and described  
9 within 42 USC 12181(7)(B) of the American with Disabilities Act  
10 [ADA] and as such must comply with the ADA under provisions of  
11 Title III therein.

12 5. Plaintiff is ignorant of the defendants sued as Does 1-10  
13 herein, and therefore sues them in their fictitious names as Doe  
14 defendants. Plaintiff is informed and believes and thereon alleges  
15 that Does 1-10 are the owners, operators, lessees or tenants of  
16 the subject property and each of the Doe defendants at all times  
17 herein was acting as the agent and or representative of each other  
18 and thereby are responsible in some manner for the injuries and  
19 damages complained of herein. Plaintiff will seek leave of court  
20 to amend this complaint to name Doe defendants when the same is  
21 ascertained.

### 22 III

#### 23 GENERAL ALLEGATIONS COMMON TO ALL CLAIMS

24 6. Plaintiff is a male who is disabled and confined to a  
25 wheelchair. He has no control over his lower extremities and must  
26 use a wheelchair to transport himself and to affect the basic  
27 necessities of his everyday existence. Plaintiff's disability  
28 substantially limits one or more of life's major activities and

1 therefore he is disabled as defined under 42 USC

2 12102(2) (A) (B) (C).

3 7. On or about September 19, 2003 plaintiff patronized the  
4 premises of defendants to utilize goods and/or services offered by  
5 defendants. When Plaintiff attempted to gain access to the goods  
6 and/or services offered by defendants he encountered access  
7 barriers because the premises failed to comply with federal ADA  
8 Access Guidelines For Building and Facilities [hereinafter  
9 "ADAAG"]; Department of Justice [DOJ] regulations at 28 CFR.  
10 36.201; 36.304 and/or the State of California's Title 24 Building  
11 Code Requirements.

12 8. The specific difficulty Plaintiff had in entering and utilizing  
13 Defendants' facility and which amount to a violation of ADAAG, DOJ  
14 regulations and Title 24 of the California Building Code are:

- 15 (a) Lack of site entrance signage as required by Title 24  
16 1129B.5
- 17 (b) Lack of access aisle (NO PARKING) warning sign as required  
18 by Title 24 1129B.4.1&2.
- 19 (c) Lack of designated van accessible parking space as required  
20 by ADAAG 4.1.2(5)(b) and Title 24 1129B.4.2.; ADAAG  
21 4.1.2(5)(a) and Title 24 1129B.1.
- 22 (d) Lack of van accessible aisle as required by ADAAG 4.6.3 and  
23 Title 24 1129B.4.2.
- 24 (e) No signage in accord with ADAAG 4.6.4 and Title 24 1129B.5.
- 25 (f) No parking space emblem as required by ADAAG 4.7.6.
- 26 (g) Entrance signage is not at every entrance/exit as required  
27 by ADAAG 4.1.3(16)(b) and Title 241127B.3.

28

- 1 (h) Bathroom lacks international symbol of accessibility as  
2 required by ADAAG 4.30.6 and Title 24 1117B.5.9
- 3 (i) Lack of raised Braille characters per ADAAG 4.30.4 and  
4 Title 24 1117B.5.6.1&2.
- 5 (j) Wall mount signage is lacking as required by ADAAG  
6 4.1.2(7)(d) and Title 24 1117B.5.1.1 and 5.6.3
- 7 (k) Wall mount signage is not located at 60 inches height as  
8 required by ADAAG 4.30.6 and Title 24 1117B.5.9.
- 9 (l) Door mount signage does not comply with Title 24 1115B.5
- 10 (m) Door signage (color distinctively contrast w/door color) -  
11 Title 24 1115B.5
- 12 (n) Faucet/fixtures do not comply with ADAAG 4.27.4 and title  
13 24 1508.1&2.
- 14 (o) Accessories/fixtures do not comply with ADAAG 4.23.7 and  
15 title 24 1115B.9.2
- 16 (p) Knee clearance does not comply with ADAAG 4.19.2.; 4.24.3  
17 and Title 24 1504.2.1.
- 18 (q) Toe clearance does not meet requirements of ADAAG 4.19.2  
19 and Title 24 1504.2.1.
- 20 (r) Hardware does not comply with ADAAG 4.13.9 and Title 24  
21 1115B.7.1.4.
- 22 (s) Drain and hot water pipes are not insulated or covered as  
23 required by ADAAG 4.24.6
- 24 (t) Kick plate at doors does not comply with Title 24  
25 1133B.2.6.

26 9. Based upon the above facts, Plaintiff as been discriminated  
27 against and will continue to be discriminated against unless and  
28 until Defendants are enjoined and forced to cease and desist from

1 continuing to discriminate against Plaintiff and others similarly  
2 situated.

3 10. Pursuant to federal [ADA], Title 28 CFR 36.201; 36.203;  
4 36.304; 36.305 and state law [California Title 24], Defendants are  
5 required to remove barriers to their existing facilities.

6 Defendants have been put on notice pursuant to the ADA and  
7 California Civil Codes [51,52] prior to the statutory effect of  
8 the ADA on January 26, 1992 that Defendants and each of them had a  
9 duty to remove barriers to persons with disabilities such as  
10 plaintiff. Defendants also knew or should have known that  
11 individuals such as plaintiff with a disability are not required  
12 to give notice to a governmental agency prior to filing suit  
13 alleging Defendants' failure to remove architectural barriers.

14 11. Plaintiff believes and thereon allege that Defendants'  
15 facilities, as described herein, have other access violations not  
16 directly experienced by Plaintiff, which preclude or limit access  
17 by others with disabilities, including, but not limited to, Space  
18 Allowances, Reach Ranges, Accessible Routes, Protruding Objects,  
19 Ground and Floor Surfaces, Parking and Passenger Loading Zones,  
20 Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts (Wheelchair  
21 Lifts), Windows, Doors, Entrances, Drinking Fountains, and Water  
22 Coolers, Water Closets, Toilet Stalls, Urinals, Lavatories and  
23 Mirrors, Sinks, Storage, Handrails, Grab Bars, Telephones,  
24 Controls and Operating Mechanisms, Alarms, Detectable Warnings and  
25 Signage. Accordingly, Plaintiff alleges Defendants are required to  
26 remove all architectural barriers, known or unknown. Also,  
27 Plaintiff alleges Defendants are required to utilize the ADA  
28 checklist for Readily Achievable Barrier Removal approved by the

1 United States Department of Justice and created by Adaptive  
2 Environments.

3 12. Plaintiff desires to return to Defendants' places of business  
4 and utilize their facilities without being discriminated against  
5 in the immediate future.

6 **IV**

7 **FIRST CAUSE OF ACTION**

8 **(Violation of Civil Rights-American With Disabilities Act)**

9 13. Plaintiff realleges the allegations in paragraphs 1 through 12  
10 as though set forth fully herein.

11 **Claim 1: Denial of Full and Equal Access**

12 14. Based on the facts asserted above Plaintiff has been denied  
13 full and equal access to Defendants' goods, services, facilities,  
14 privileges, advantages, or accommodations. Defendant business is a  
15 public accommodation owned, leased and/or operated by Defendants  
16 and each of them. Defendants' existing facilities and/or services  
17 failed to provide full and equal access to Defendants' facility as  
18 required by 42 U.S.C. section 12182(a). Thus, Plaintiff was  
19 subjected to discrimination in violation of 42 U.S.C.  
20 12182(b)(2)(A)(ii)(iv) and 42 U.S.C. section 12188 because  
21 Plaintiff was denied equal access to Defendants' existing  
22 facilities.

23 15. Plaintiff has a physical impairment as alleged herein because  
24 his condition affects one or more of the following body systems:  
25 neurological, musculoskeletal, special sense organs, and/or  
26 cardiovascular. Further, his physical impairments substantially  
27 limits one or more of the following major life activities:  
28 [walking]. In addition, Plaintiff cannot perform one or more of

1 the said major life activities in the manner speed, and duration  
2 when compared to the average person. Moreover, Plaintiff has a  
3 history of or has been classified as having a physical impairment  
4 as required by 42 U.S.C. section 12102(2) (A).

5 **Claim 2: Failure To Remove Architectural Barriers**

6 16. Based upon the facts alleged herein, Plaintiff was denied  
7 full and equal access to Defendants' goods, services, facilities,  
8 privileges, advantages, or accommodations within a public  
9 accommodation owned leased, and/or operated by the named  
10 Defendants. Defendants individually and collectively failed to  
11 remove barriers as required by 42 U.S.C. 12182(a) and 28 CFR  
12 36.304. Plaintiff is informed and believes, and thus alleges that  
13 architectural barriers which are structural in nature exist at the  
14 following physical elements of Defendants' facilities:

15 Space Allowance and Reach Ranges, Accessible Route, Protruding  
16 Objects, Ground and Floor Surfaces, Parking and Passenger Loading  
17 Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts  
18 (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains  
19 and Water Coolers, Water Closets, Toilet Stalls, Urinals,  
20 Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and  
21 Controls and Operating Mechanisms, Alarms, Detectable Warnings,  
22 Signage, and Telephones. Pursuant to 42 USC section  
23 12182(b) (2) (iv) and 28 CFR 36.304 Title III requires places of  
24 public accommodation to remove architectural barriers that are  
25 structural in nature within existing facilities. Failure to remove  
26 such barriers and disparate treatment against a person who has a  
27 known association with a person with a disability are forms of  
28 prohibited discrimination. Accordingly, Plaintiff was subjected to



1 discrimination in violation of 42 USC 12182(b)(2)(A)(iv) and 42  
2 USC 12182 (b)(2)(A)(iv) and 42 USC 12188.

3 **Claim 3: Failure To Modify Practices, Policies And Procedures**

4 17. Based on the facts alleged in this Complaint Defendants failed  
5 and refused to provide a reasonable alternative by modifying its  
6 practices, policies and procedures in that they failed to have a  
7 scheme, plan, or design to assist Plaintiff and/or others  
8 similarly situated in entering and utilizing Defendants' services,  
9 as required by 42 U.S.C. section 12188(a). Thus, Plaintiff was  
10 subjected to discrimination in violation of 42 U.S.C. section  
11 12182(b)(2)(A)(iv); 28 CFR 36.302 and 42 U.S.C. section 12188  
12 because Plaintiff was denied equal access to Defendants' existing  
13 facilities.

14 18. As a result of the wrongful and discriminatory practices of  
15 defendants, plaintiff has suffered actual damages consisting of  
16 special damages and general damages in an amount to be determined  
17 at time of trial herein.

18 19. Pursuant to the provisions of 42 USC 12188 plaintiff seeks  
19 injunctive relief and an order directing defendants to cease and  
20 desist from discriminating against plaintiff and others similarly  
21 situated and for an order that defendants comply with the  
22 Americans With Disabilities Act forthwith.

23 20. Under the provisions of 42 USC 12205 plaintiff is entitled to  
24 an award of reasonably attorneys fees and requests that the court  
25 grant such fees as are appropriate.

26 //

27 //

28 //

1 VI

2 SECOND CAUSE OF ACTION

3 **(Violation Of Civil Rights Under California Accessibility Laws)**

4 21. Plaintiff realleges the allegations of the First Cause of  
5 Action as though set forth fully herein.

6 **(a) Denial Of Full And Equal Access**

7 22. Plaintiff has been denied full and equal access to Defendants'  
8 goods services, facilities, privileges, advantages, or  
9 accommodations within a public accommodation owned, leased, and/or  
10 operated by Defendants in violation of California Civil Code  
11 Sections 54 and 54.1; California Health and Safety Code Section  
12 19955 and California Government Code Section 12948. The actions of  
13 Defendants also violate the provisions of Title 24 of the State of  
14 California Building Codes with regard to accessibility for persons  
15 with disabilities by failing to provide access to Defendants  
16 facilities due to violations pertaining to accessible routes,  
17 ground and floor surfaces, parking and passenger loading zones,  
18 curb ramps, ramps, stairs, elevators, platform lifts (wheelchair  
19 lifts), windows, doors, toilet stalls, urinals, lavatories and  
20 mirrors, sinks, storage, handrails, grab bars, controls and  
21 operating mechanisms  
22 alarms, detectable warnings, signage and telephones.  
23 23. On the above basis Plaintiff has been wrongfully discriminated  
24 against.

25 **(b) Failure To Modify Practices, Policies And Procedures**

26 24. Defendants have failed and refused and continue to fail and  
27 refuse to provide a reasonable alternative to allow plaintiff  
28 equal access to their facility by modifying their practices,

1 policies, and procedures in that that they failed to have s  
2 scheme, plan, or design to assist Plaintiff and others similarly  
3 situated in entering and utilizing Defendants' goods or services  
4 as required by California Civil Code section 54 and 54.1.  
5 Accordingly Defendants have wrongfully discriminated against  
6 Plaintiff.

7 **VII**

8 **THIRD CAUSE OF ACTION**

9 **(Violation of The Unruh Civil Rights Act)**

10 25. Plaintiff realleges the allegations of the Second Cause of  
11 Action as though set forth fully herein.

12 26. Section 51(b) of the Cal. Civ. Code [The Unruh Civil Rights  
13 Act], provides in pertinent part:

14 "All persons within the jurisdiction of this state are  
15 free and equal, and no matter what their sex, race, color,  
16 religion, ancestry, national origin, disability, or medical  
17 condition is entitled to the full and equal accommodations,  
18 advantages, facilities, privileges, or services in all  
19 business establishments of every kind whatsoever."

20 27. Defendants have violated the provisions of Civ. Code 51 (b) by  
21 failing and refusing to provide free and equal access to Plaintiff  
22 to their facility on the same basis as other persons not disabled.  
23 By their failure to provide equal access to Plaintiff as herein  
24 alleged, Defendants have also violated 42 U.S.C. section  
25 12182(b) (2) (A) (iv) as provided in Cal. Civ. Codes section 51(f).

26 28. By reason of their acts and denial of Plaintiff's civil rights  
27 Defendants also violated the provisions of Cal. Civ. Code section  
28 52, which makes a person or entity in violation of Cal.Civ. Code

1 51 liable for the actual damages to a Plaintiff including treble  
2 damages where appropriate.

3 29. Defendants and each of them, at all times prior to and  
4 including September 2003, respectively and continuing to the  
5 present time, knew that persons with physical disabilities were  
6 denied their rights of equal access to all portions of this public  
7 facility. Despite such knowledge, Defendants, and each of them,  
8 failed and refused to take steps to comply with the applicable  
9 access statutes and despite knowledge of the resulting problems  
10 and denial of civil rights suffered by Plaintiff and other  
11 similarly situated persons with disabilities.  
12

13  
14 30. Defendants and each of them have failed and refused to take  
15 action to grant full and equal access to person with physical  
16 disabilities. Defendants have carried out a course of conduct of  
17 refusing to respond to, or correct complaints about unequal access  
18 and have refused to comply with their legal obligations to make  
19 the subject facility accessible pursuant the ADAAG and the  
20 California Building Code [Title 24 of the California Code of  
21 Regulations]. Such actions and continuing course of conduct by  
22 Defendants, and each of them, evidence despicable conduct in  
23 conscious disregard of the rights and/or safety of Plaintiff and  
24 those similarly situated and thus justify an award of treble  
25 damages pursuant to section 52(a) and 54.3(a) of the Cal.Civ. Code  
26  
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1 or alternatively an award of punitive damages in an appropriate  
2 amount.

3 31. Plaintiff has suffered emotional and physical damage and  
4 continues to suffer such damages all in an amount to be determined  
5 at time of trial.

7 32. Under the provisions of Cal. Civ. Code section 55 Plaintiff  
8 seeks an award of reasonable attorney's fees and costs as a result  
9 of having to bring this action. Plaintiff requests the court to  
10 award such fees in an appropriate amount.

12 **VIII**

13 **FOURTH CAUSE OF ACTION**

14 **(Unfair And Unlawful Business Practice)**

15 33. Plaintiff realleges the allegations of the Third Cause of  
16 Action as though set forth fully herein.

17 34. California Business and Professions Code Section 17200 states  
18 in pertinent part:

19 "As used in this chapter, unfair competition shall mean and  
20 include any unlawful, unfair or fraudulent business act..."

21 35. Defendants, as alleged herein, are in violation of the  
22 Americans With Disabilities Act and Title 24 of the California  
23 Building Code, in that they have denied equal access to their  
24 places of public accommodation to Plaintiff and others similarly  
25 situated to Plaintiff. Defendants have failed and refused and  
26 continue to refuse to comply with equal access laws all in  
27 violation of 42 USC 12181-12183; 28 CFR 36.304 and 42 USC 12188.  
28

1 In addition the complained of acts are in violation of California  
2 Civil Code Sections 51,52, 54,and 54.1,; California Health and  
3 Safety Code section 19955 all of which require Defendants to  
4 provide equal access to their facility to disabled persons such as  
5 plaintiff. Defendants are also in violation of the indicated  
6 statutes because of their failure to remove architectural  
7 barriers, which prevent equal access to their facility by disabled  
8 persons and because of their failure to modify their practices,  
9 policies and procedures to have a scheme, plan, or design to  
10 assist Plaintiff and others similarly situated to enter and  
11 utilize Defendants' services as required by the Unruh Act.  
12

13  
14 36. Defendants' acts are unlawful and unfair and are therefore in  
15 violation of California Business and Professions Code section  
16 17200.  
17

18 37. Pursuant to the provisions of California Business and  
19 Professions Code section 17201 Plaintiff is a person as identified  
20 within said section and therefore allowed to bring this action on  
21 behalf of himself and the general public to effectuate California  
22 Business and Professions Code 17200 as provided for within  
23 Business and Professions Code section 17204.  
24

25 38. Thus, Plaintiff, under Bus & Prof. Code section 17200 seeks  
26 injunctive relief, on behalf of himself and the general public,  
27 requiring Defendants to remedy the disabled access violations  
28 present within Defendants' facility and that Defendants be ordered

1 to cease and desist from continuing in noncompliance with disabled  
2 access statutes and regulations.

3  
4 **IX**

5 **FIFTH CAUSE OF ACTION**

6 **(Negligent Infliction of Emotional Distress)**

7 39. Plaintiff relleges the allegations of the Fourth Cause of  
8 Action as though set forth fully herein.

9 40. Defendants and each of them owed a duty to Plaintiff to make  
10 their facility accessible and to keep Plaintiff reasonably safe  
11 from known dangers and risks of harm. This duty arises by virtue  
12 of the legal duties proscribed by various federal and state  
13 statutes including, but not limited to, ADA, ADAAG, California  
14 Civil Code sections 51, 52, 54, 54.1 and Title 24 of the  
15 California Code of Regulations. Defendants had a duty of due care  
16 not to do or cause anything to happen that would subject Plaintiff  
17 to undue stress, embarrassment, chagrin, and discouragement.

18 41. Defendants breached their duty of care to Plaintiff by the  
19 actions and inaction complained of herein and as a result thereof  
20 Plaintiff was shocked, discouraged, embarrassed and outraged at  
21 the callousness and disregard of Defendants. Defendants knew or  
22 had reason to know that by denying Plaintiff equal access to their  
23 facility and failing and refusing to remove architectural  
24 barriers, Plaintiff would suffer emotional and/or mental distress  
25 because of such discrimination and disparate treatment. Defendants  
26  
27  
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1 breached their duty of care to plaintiff by the perpetration of  
2 the acts outlined herein.

3 42. As a proximate result of the actions of Defendants Plaintiff  
4 did suffer emotional and mental stress and pain and suffering all  
5 in an amount to be determined at time of trial.  
6

7 **X**

8 **SIXTH CAUSE OF ACTION**

9 **(Intentional Infliction of Emotional Distress)**

10 43. Plaintiff realleges the allegations of the Fifth Cause of  
11 Action as though set forth fully herein.

12 44. The actions of Defendants and each of them are despicable,  
13 intentional and done with conscious disregard of the rights and  
14 safety of Plaintiff and as such should be regarded as outrageous.

15 45. As a proximate result of Defendants' actions Plaintiff has  
16 suffered severe emotional and mental distress all to his damage in  
17 an amount to be determined at time of trial.

18 46. Plaintiff seeks an award of punitive damages for this claim as  
19 the actions of Defendants are tantamount to outrageous conduct and  
20 subject them to exemplary damages.

21 WHEREFORE PLAINTIFF PRAYS:

- 22 1. For general damages according to proof;
- 23 2. For special damages according to proof;
- 24 3. For damages pursuant to Cal. Civil Code section 52, in the  
25 amount of \$4,000 for each and every offense of California Civil  
26 Code section 51, Title 24 of the California Building Code and the  
27 Americans With Disabilities Act.



- 1 4. For Injunctive relief pursuant to 42 U.S.C. 12188(a) and  
2 California Business and Professions Code section 17200  
3 5. For an award of attorney's fees pursuant to 42 U.S.C. 1988, 42  
4 U.S.C. 12205 and Cal. Civ. Code section 55;  
5 6. For treble damages pursuant to Cal. Civ. Code 52 (a);  
6 7. For punitive damages according to proof;  
7 8. For a Jury Trial;  
8 9. For costs of suit incurred herein and;  
9 10. For such other and further relief as the court deems proper.

10 Respectfully submitted,

11 **DEMAND FOR JURY**

12 Plaintiff respectfully requests that the claims made herein be  
13 heard and determined by a jury.

14 Dated: 1/28/04

15 *Roy L. Landrum*  
16 Attorney for Plaintiff, Ismael Rivera  
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## Beyond the Pod

ROSIE'S REVIEWS

The iPod does much more than hold the awful music of twentysomethings.

**PERVERSITY IS A GREAT PLAYMATE—NO, NOT THAT KIND.** Maybe I should say *resistance* instead of *perversity*, but who above the age of three plays with rebellion? Nah, *perversity*. It has a nice ring to it.

What does this have to do with the price of gas or document-management systems? Nothing. But it has a lot to do with the way I use many of the popular gadgets out today.

A while back I suggested using Creative Labs' NOMAD Jukebox as a working tool. Well, Apple's lovely and euphonious iPod music player has replaced the NOMAD in my right ventricle. When you hold an iPod in your hand, you know you're holding some finely engineered machine—substantial, every edge and corner rounded, agleam with shiny stainless steel and white enamel. And yes, the sound is the clearest and fullest of any portable music gadget I've ever heard. I have the 40-gigabyte (GB) hard drive Windows version. So far I've transferred almost 9,000 songs to it.

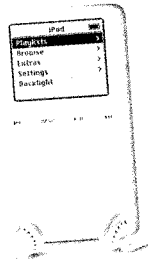
And, yes, I know it would hold another 29 gigs of music if I let it. But, I reasoned, 9,000 songs should be enough for anyone besides a record producer. So, why not take advantage of that space by filling it with photos uploaded from the flash card in my digital camera or downloaded from my PC? That meant that I needed a Belkin's Media Reader for iPod, which handles Secure Digital (SD), SmartMedia, MultiMediaCard, Memory Stick, and CompactFlash media cards. Now I don't have to take bunches of flash media cards or a computer on every trip I take. \$109.99, [www.belkin.com](http://www.belkin.com).

The same is true for storing audio recordings of interviews, depositions, CLE seminars, and memos to self. For this, I needed Griffin Technology's iTalk voice recorder (\$39.99), a two-inch-long cylinder I plug into the iPod. Man, I wish I had had it for my long-ago 8 A.M. embryology class that I got a C in because it actually began at 7 A.M. Best of all, iTalk has a built-in speaker so you don't have to be tethered to headphones in order to listen to your memos. One last invaluable Griffin accessory: iTrip FM transmitter (\$35). It plays your iPod's music through any FM radio. [www.griffintechnology.com](http://www.griffintechnology.com).

I have only two complaints about my iPod. I can't read the monochrome display in bright light, which is what I get during commute hours. And I find the flat circular dial difficult to control. Maybe I have small hands.


California Lawyer

So, you see, I'm perverse with a purpose: I can deduct about two-thirds of the cost of a very expensive iPod and still hear my favorite music anywhere. \$399 for the 40GB model; other models starting at \$299, [www.apple.com/ipod/](http://www.apple.com/ipod/).



### I WILL CONTROL MYSELF NO LONGER

I've held my fingers as long as I can—I've got to review two exemplary leather cases for the Pocket PC (PPC). Sena Cases in Santa Clara sent me its elegant all-black leather case for the Dell Axim X3i. This slip-on fits the Axim as if it were its skin, with precisely aligned cutouts for headphones, control keys, and recessed reset button. The only time you'll have to remove the PPC from this case is when you must put the gadget itself into its cradle for charging and synchronizing. However, you can sync and charge it in the case if you use the Axim travel cable. Best of all, Sena cases self-heal; you'd have to gouge them deeply for the scratch mark to show. \$39.99, [www.senacases.com](http://www.senacases.com).

Because Krusell International's Handit Multidapt case is made of napa leather, which is a bit thicker than split hides, and it's dyed all the way through the leather, it too doesn't show scratches. In addition, Krusell, of Mölnlycke, Sweden, maintains the same very high level of craftsmanship that Sena does. Stitches are in to stay. Cutouts provide good access no matter what your PDA—there is a case for almost every PDA, cell phone, and music player. On the back of every Krusell case is the unobtrusive half of a multidapt clip. Even though I rarely go for belt clips, as belt clips go, the multidapt is extremely versatile (swivels, miniclips, large clips, neck and wrist straps, car and bicycle holders ... sounds sort of S&Mish, don't it?). From about \$16 to \$28, [www.krusell.se](http://www.krusell.se). 

## TIPS & TRICKS

### THE ONLY GOOD FLASHER IS A HOTEL VACANCY SIGN

If you're as sick of those flickering Web banner ads as I am, just turn them off (and, for desirable content, back on). Open the Run command box. (If that is meaningless jargon to you, here's how: Click on the Start button, then click the Run command on the Start menu.) In the command window, type `regsvr32 c:\windows\system32\Macromed\Flash\swflash.ocx /u` and hit Enter. (That /u switch means *unload*.) To reload the Flash viewer, go to the Run window again and delete the /u. Both times, note the space between `regsvr32` and `c:` as well as the hyphen before the /u switch.

In the absence of a clear legislative directive in a statute regulating oral argument, courts will consider whether the statutory scheme—read as a whole, in context, and taking into account its nature and purpose—encompasses an oral hearing. That may include analyzing whether the judge acts as a fact finder or adjudicates any issues at the hearing, as well as whether any procedural remedies, such as making evidentiary objections or orally moving to continue, are provided for during the hearing. (*Titmas*, 87 Cal. App. 4th at 741; *TJX Cos.*, 87 Cal. App. 4th at 751; *Marriage of Dunn-Kato & Dunn*, 103 Cal. App. 4th 345, 348 (2002).)

Additionally, courts may consider whether the proceedings involve critical pretrial matters that are of considerable significance to the parties, such as summary judgment, and that mandate a hearing. (See, *Mediterranean*, 66 Cal. App. 4th at 266–7.)

Finally, courts may look to whether the motion or other pretrial proceeding involves a real and genuine dispute or whether oral argument would simply amount to an “empty gesture.” (See, *Lewis*, 19 Cal. 4th at 1258–9.)

The right to oral argument has been explicitly recognized in the following types of matters:

1. motions to quash or dismiss for lack of jurisdiction (*Marriage of Lemen*, 113 Cal. App. 3d 769, 784 (1980))
2. summary judgment motions (*Brannon v. Superior Court*, 114 Cal. App. 4th 1203, 1208–13 (2004); *Mediterranean*, 66 Cal. App. 4th at 265)
3. demurrers (see, *Medix*, 97 Cal. App. 4th at 113–15 (sexual harassment complaint against employer); *TJX Cos.*, 87 Cal. App. 4th at 755 (whether suit should proceed as a class action))
4. discovery motions involving attorney-client privilege (*Titmas*, 87 Cal. App. 4th at 744–5)
5. motions to treat a party as vexatious litigant (*Bravo v. Ismaj*, 99 Cal. App. 4th 211, 225 (2002))
6. motions for pretrial writs of attachment (*Hobbs v. Weiss*, 73 Cal. App. 4th 76, 77–8 (1999)) and

7. motions for appointment of a receiver (see *Cal-American*, 138 Cal. App. 3d at 273, fn. 3).

Furthermore, as a matter of good practice, courts should allow oral argument whenever they are in doubt about any relevant matter “because that is precisely when oral argument may be most beneficial.” (*TJX Cos.*, 87 Cal. App. 4th at 755.) As Yogi Berra said, “You observe a lot by watching.” (*The Jurisprudence of Yogi Berra*, 46 Emory L.J. 697, 701 (1997).)

Oral argument should also be allowed when a substitute judge is filling in for the judge to whom the matter is regularly assigned. “Hearing oral argument is one of the best ways for substitute judges to demonstrate to the satisfaction of the parties and the public that judicial responsibility has been exercised rather than abdicated.” (*TJX Cos.*, 87 Cal. App. 4th at 755.)

Although parties have a right to oral argument in connection with certain types of motions, courts retain substantial discretion to impose reasonable limitations, including limiting the time of argument. (*Brannon*, 114 Cal. App. 4th at 1211; *Mediterranean*, 66 Cal. App. 4th at 265.)

### TIPS FOR STRONG ARGUMENTS

As the California Supreme Court has noted, “Any experienced lawyer who has doggedly waited through a tedious law-and-motion calendar understands the need, when his or her turn finally comes, to get to the point. There is no time for a leisurely exposition of the facts or the law; it is necessary to speak out about what is important and to be silent about what is not.” (*Mediterranean*, 66 Cal. App. 4th at 264.)

Here are some basic tips for getting to the point while making an effective oral argument.

#### Pay attention to the paperwork.

Ninety percent of law and motion matters are won or lost on the papers submitted. Your oral presentation will be smoother, better received, and more articulate if you have laid the proper

groundwork by presenting the best papers possible.

**Be prepared.** Familiarizing yourself with a motion while walking from the courthouse parking lot to the courtroom guarantees an ineffective oral argument. Always take the time, well before the hearing, to review the applicable facts, law, and arguments.

**Be organized.** Avoid fumbling for documents during the precious few minutes available for oral argument. Know the precise location of the moving and opposing papers in your file, as well as any other relevant documents. Those materials should be organized so that you can put your finger on them instantly. When you are arguing multiple motions, a separate file containing the relevant documents for each can be especially helpful.

**Keep notes brief.** Preparing notes for your oral presentation is a good idea, but keep them to a page or two. Though having pages of detailed notes may make you feel more prepared, they will be of little practical use at the hearing.

**Review tentative rulings.** Though not all courts issue written tentative rulings, many do make them available the day before, or just prior to, the hearing. Reviewing the ruling will enable you to focus your argument on issues that the court believes are most troubling or determinative.

**Arrive early.** The focus of your attention should not be getting to court but on making the best oral presentation possible. You will do a much better job if you get to court early, review your materials, and relax.

**Learn about the judge.** Talk with other lawyers who have appeared before the judge who is hearing your motion, or look up his or her biography in one of the publications compiling judicial profiles. Knowing the background, attitudes, and personal style of the judge you will be appearing before will help you gear your presentation for maximum effectiveness.

**Start strong.** When you approach the counsel table, stand on the appropriate side of the table. The tables are often

# Self-Assessment Test

## The Rites and Rights of Oral Arguments

1. Oral argument must always be allowed on motions for the appointment of a receiver.  
 True                       False
2. Experienced attorneys never give ground on any point during oral argument.  
 True                       False
3. Because of due process concerns, courts are always "on shaky ground" when they do not permit oral argument.  
 True                       False
4. Despite the burden of heavy caseloads, courts must respect the right of parties to "have their day in court."  
 True                       False
5. California courts have long held that parties do not have an automatic right to present oral argument on every kind of motion brought before a court.  
 True                       False
6. When a statute provides for a "hearing," oral argument must be permitted on a motion brought under that statute.  
 True                       False
7. When parties have a right to present oral argument, a court may not put limitations on the time of argument.  
 True                       False
8. Reviewing a tentative ruling just before oral argument may cause counsel to become confused and lose focus on the really important points.  
 True                       False
9. Parties have a right to orally argue summary judgment motions.  
 True                       False
10. Arriving early to court before oral argument is typically a waste of time; the courtroom doors are usually locked.  
 True                       False
11. Proper etiquette mandates the person on the bench during oral argument be referred to as "Judge."  
 True                       False
12. One court has compared oral argument to a "seismic converter."  
 True                       False
13. Interruptions are a normal part of oral argument and are welcomed when the discussion is getting off track.  
 True                       False
14. Oral argument is never permitted on motions to treat a party as a vexatious litigant.  
 True                       False
15. Ninety percent of law and motion matters are won or lost on the papers submitted—not on the basis of oral argument.  
 True                       False
16. Oral argument should be allowed when a substitute judge is filling in for the judge to whom the matter is regularly assigned.  
 True                       False
17. The party who has a tentative ruling in his or her favor should generally say as little as possible at the beginning of oral argument.  
 True                       False
18. Oral argument must be allowed for proceedings that involve critical pretrial matters of significance to the parties.  
 True                       False
19. In deciding whether to allow oral argument, courts should look to whether the motion or other pretrial proceeding involves a genuine dispute or would simply amount to an empty gesture.  
 True                       False
20. One of the purposes of oral argument is to enhance the accountability of the judicial process.  
 True                       False

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