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3:04-CV-00096 HUBBARD V. DEL TACO INC

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CMP.

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Attorney for Plaintiffs

DEPUTY

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

LYNN J HUBBARD and BARBARA J. HUBBARD,

Plaintiffs,

VS.

DEL TACO INC.; DEL'S FOOD-BARSTOW, INC. dba DEL TACO; CLAIREMONT RENTAL PROPERTIES; and DOES 1 through 10,

Defendants.

No. '04 CV 0096

J (AUB)

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MONETARY RELIEF:

- Americans With Disabilities Act
- Disabled Persons Act
- Unruh Civil Rights Act
- Health and Safety Code Part 5.5
- Unfair Business Practices Act
- Negligence

Plaintiffs' Complaint

Page 1

Hubbard v. Del Taco Inc., et al.

I. INTRODUCTION

1. This is a civil rights action by Plaintiffs, LYNN J
HUBBARD and BARBARA J. HUBBARD ("Plaintiffs") for
discrimination at the building, structure, facility, complex, property,
land, development, and/or surrounding business complex known as:

DEL TACO 3896 Clairemont Drive San Diego, CA 92117

(the "Restaurant")

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- Plaintiffs seek compensatory and punitive damages, injunctive and declaratory relief, attorney fees and costs, against DEL TACO INC.; DEL'S FOOD-BARSTOW, INC. dba DEL TACO; CLAIREMONT RENTAL PROPERTIES; and DOES 1 through 10, ("Defendants") pursuant to:
 - The Americans With Disabilities Act of 1990;1
 - Health and Safety Code Part 5.5;²
 - The Unruh Act;³
 - The Disabled Persons Act:4
 - The Unfair Business Practices Act;⁵ and
 - Negligence.⁶

42 USC §12101 et seq.

Plaintiffs' Complaint

California Health and Safety Code §§19955 et seq.

California Civil Code §§51 et seq.

California Civil Code §§54 et seq.

California Business and Professions Code §§17200 et seq.
 California Civil Code §1714.

II. JURISDICTION

3. This Court has original jurisdiction under 28 U.S.C. 9: 56 \$\\$1331 and 1343 for ADA claims.

FILED

DEPUTY

- 4. Supplemental jurisdiction for claims brought under parallel California Law—arising from the same nucleus of operative facts—is predicated on 28 U.S.C. §1367.
- 5. Plaintiffs claims are authorized by 28 U.S.C. §§2201 and 2202.

III. VENUE

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Southern District of California. Accordingly, venue is invoked pursuant to 28 U.S.C. §1391(b), (c).

IV. PARTIES

- 7. Plaintiffs have multiple conditions that affect one or more major life functions. Plaintiffs require the use of motorized wheelchairs and a mobility-equipped vehicle, when traveling about in public.
- 8. Consequently, Plaintiffs are "physically disabled," as defined by all applicable California and United States laws, and members of the public, whose rights are protected by these laws.
- 9. Defendants are owners, operators, lessors and/or lessees of the Restaurant.
- 10. Defendants are, or consist of, a person or persons, firm or corporation.
- 11. On information and belief, Plaintiffs allege a joint venture and common enterprise by all defendants.

- 12. On information and belief, Plaintiffs allege each defendant conspired to commit the acts described herein.
- 13. On information and belief, Plaintiffs alternatively allege that each defendant aided and abetted one another in the wrongful acts hereinafter alleged.
- 14. On information and belief, Plaintiffs allege each defendant is the agent, ostensible agent, master, servant, employer, employee, representative, franchisor, franchisee, joint venturer, alterego, partner and associate, or such similar capacity of other defendants. Accordingly, each defendant was acting, or failing to act, within the scope of their authority.

V. FACTS

- 15. The Restaurant is a commercial facility, place of public accommodation, public facility, and/or other place that the general-public is invited, which was constructed with private funds.
- 16. Defendants and Plaintiffs know that areas of the Restaurant are inaccessible to the physically disabled.
- 17. Defendants have the financial resources to make the Restaurant accessible to the physically disabled without much difficulty or expense by removing architectural barriers and modifying policies and procedures.
- 18. Plaintiffs visited the Restaurant and actually encountered architectural barriers that denied them full and equal access.
- 19. For example, Defendants violated the law by failing to provide access to the Restaurant from public sidewalks, parking, or public transportation. On information and belief, this failure may include, installing an entrance ramp, reducing door pressure,

providing accessible parking spaces, and an accessible route of travel.

- 20. Defendants also violated the law by failing to provide access to those areas of the Restaurant where goods and services are made available to the public. On information and belief, this failure may include, adjusting the layout of display racks, rearranging furniture, adding an accessible check-out counter, and installing ramps.
- 21. On information and belief, Defendants also violated the law by failing to provide access to restroom facilities at the Restaurant. This failure may include removing obstructing furniture or vending machines, installing ramps, providing accessible signage, widening of toilet stalls and installation of grab bars.
- 22. Plaintiffs were denied the full and equal access (as required by United States and California statutes) during each visit to the Restaurant.
- 23. Despite these visits, Plaintiffs were also deterred from visiting the Restaurant, because of actual knowledge that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations at the Restaurant was not available to physically disabled patrons.
- 24. Plaintiffs have suffered, or anticipate suffering, emotional and physical harm during each actual visit to the Restaurant, or incident of deterrence.
- 25. Plaintiffs would visit the Restaurant, but for the future threat of discrimination by Defendants.

- 26. Because of Defendants' acts and omissions, Plaintiffs suffered physical discomfort and injury, emotional distress, and mental suffering and distress.
- 27. All injuries suffered by Plaintiffs are expectedly and naturally associated with the denial of equal access to the Restaurant due to Defendants' acts and omissions.

VI. FIRST CLAIM

Americans with Disabilities Act of 1990

- 28. Plaintiffs incorporate the allegations contained in paragraphs 1 through 27 for this claim.
- 29. Title III of the ADA holds as a 'general rule' that: No individual shall be discriminated against on the basis of disability by any person who owns, leases (or leases to), or operates a place of public accommodation.
- 30. Defendants discriminated against Plaintiffs by denying full and equal enjoyment to goods, services, facilities, or accommodations, during every visit to the Restaurant.
- 31. To date, Defendants have not made the Restaurant readily accessible under Title III of the ADA.⁷

Readily Achievable Barrier Removal/ Alternative Methods

42 U.S.C. §§12182(b)(2)(A)(iv),(v)

32. The ADA specifically prohibits failing to remove architectural barriers, which are structural in nature, in existing facilities where such removal is readily achievable.⁸

⁷ 42 U.S.C. §12181 et seq.

⁴² U.S.C. §12182(b)(2)(A)(iv).

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- 33. When an entity can demonstrate that removal of a barrier is not readily achievable, a failure to make goods, services, facilities, or accommodations available through alternative methods is also specifically prohibited if these methods are readily achievable.
- Readily achievable is defined as, "easily accomplishable and able to be carried out without much difficulty or expense."9
- Plaintiffs allege that it is readily achievable for Defendants 35. to remove the architectural barriers at the Restaurant under the standards set forth in the ADA.
- 36. Defendants violated the ADA by failing to remove the architectural barriers that were present at the Restaurant, when it was readily achievable to do so.
- In the alternative, if it was not "readily achievable" for 37. Defendants to remove the architectural barriers at the Restaurant, then Defendants violated the ADA by failing to make the required services available through alternative methods, which were readily achievable.

Design and Construction

42 U.S.C. §12183(a)(1)

- The ADA also prohibits: A failure to design and construct 38. facilities for first occupancy after January 26, 1993, that are readily accessible to, and usable by, individuals with disabilities when it is structurally practicable to do so. 10
- 39. On information and belief, the Restaurant was designed or constructed (or both) after January 26, 1992—independently triggering access requirements under Title III of the ADA.

42 U.S.C. §12183(a)(1).

²⁸ C.R.F. §36.304(a).

40. Defendants violated the ADA by designing or constructing (or both) the Restaurant in a manner that was not readily accessible to the physically disabled public (including Plaintiffs) when it was structurally practical to do so.

Alterations

42 U.S.C. §12183(a)(2)

- 41. The ADA also requires that: When a facility (or part thereof) is altered in a manner that affects (or could affect) its usability it must be altered in a manner that is readily accessible to individuals with disabilities to the maximum extent feasible.¹¹
- 42. If the alteration affects (or could affect) access to a primary function at the facility, then the responsible entity shall ensure that the path of travel, bathrooms, telephones, and drinking fountains serving the altered area are readily accessible the maximum extent feasible.¹²
- 43. On information and belief, the Restaurant was modified after January 26, 1992, independently triggering access requirements under the ADA.
- 44. Defendants violated the ADA by altering the Restaurant in a manner that was not readily accessible to the physically disabled public (including Plaintiffs) to the maximum extent feasible.

Policy and Practices

42 U.S.C. §12182(b)(2)(A)(ii)

45. The ADA also specifically prohibits: A failure to make reasonable modifications in policies, practices, or procedures, when

^{11 42} U.S.C. §12183(a)(2). 12 42 U.S.C. §12183(a)(2).

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necessary to afford such goods, services, facilities, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter their nature.¹³

- 46. Defendants violated the ADA by failing to make reasonable modifications in policies, practices, or procedures (e.g.—placement of movable displays) when these modifications were necessary to afford, and would not fundamentally alter the nature of, these goods, services, facilities, or accommodations.
- 47. Plaintiffs seek all relief available under the ADA (i.e.— permanent or temporary injunction, restraining order, or other order) to address these violations.¹⁴
- 48. Plaintiffs also seeks a finding from this Court—declaratory relief—that Defendants violated the ADA in order to pursue damages under California's Unruh Civil Rights Act or Disabled Persons Act.
- 49. Plaintiffs also seek attorney fees and costs under the ADA.

VII. SECOND CLAIM

Disabled Persons Act

Civil Code §§54 et seq.

- 50. Plaintiffs incorporate the allegations contained in paragraphs 1 through 46 for this claim.
- 51. California Civil Code §54 states, in part, that: Individuals with disabilities have the same right as the general public to the full

¹³ 42 U.S.C. §12182(b)(2)(A)(ii).

⁴² U.S.C. §12205 (incorporating the remedies under 42 U.S.C. §2000a-3(a)).

and free use of the streets, sidewalks, walkways, public buildings and facilities, and other public places.¹⁵

- 52. California Civil Code §54.1 also states, in part, that: Individuals with disabilities shall be entitled to full and equal access to accommodations, facilities, telephone facilities, places of public accommodation, and other places to which the general public is invited.¹⁶
- 53. Both sections specifically incorporate (by reference) an individual's rights under the ADA.¹⁷
- 54. Defendants discriminated against the physically disabled public (including Plaintiffs) by denying them full and equal access to the Restaurant.
- 55. Thus, Plaintiffs rights under the Disabled Persons Act were infringed upon and/or violated by Defendants.
- 56. Defendants also violated the Disabled Persons Act by infringing upon and/or violating Plaintiffs rights under the ADA.
- 57. For each offense, Plaintiffs seek actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars (\$1,000).
- 58. Plaintiffs also seek general and special damages, declaratory relief and any other remedy available under California Civil Code §54.3.
- 59. Plaintiffs also seek to enjoin Defendants from violating the Disabled Persons Act (and ADA) under California Civil Code §55.

¹⁷ Civil Code §54(c), §54.1(d).

¹⁵ California Civil Code §54(a).

California Civil Code §54.1(a)(1).

- 60. Plaintiffs also seek recovery for all reasonable attorneys' fees incurred under California Civil Code §54.3, and §55.
- 61. Finally, this lawsuit will benefit the public by compelling Defendants to make the Restaurant accessible to the physically disabled public—thus, justifying attorneys' fees under California Code of Civil Procedure §1021.5.

VIII. THIRD CLAIM

Unruh Civil Rights Act

Civil Code §§51 et seq.

- 62. Plaintiffs incorporate the allegations contained in paragraphs 1 through 46 for this claim.
- 63. The Unruh Act states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.¹⁸
- 64. The Unruh Act also states, in part, that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.¹⁹
- 65. The Unruh Act also specifically incorporates (by reference) an individual's rights under the ADA.²⁰
- 66. Defendants' aforementioned acts and omissions denied the physically disabled public (including Plaintiffs) full and equal accommodations, advantages, facilities, privileges and services in a business establishment (because of their physical disability) in violation of the Unruh Act.

¹⁸ California Civil Code §51.

California Civil Code §51.5.

²⁰ California Civil Code §51.

- 67. These aforementioned acts and omissions (including the ones that violate the ADA) denied, aided or incited a denial, or discriminated against Plaintiffs by violating the Unruh Act.
- 68. Plaintiffs were damaged by Defendants' wrongful conduct, and seek all available relief under Civil Code §52.
- 69. This relief includes actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than four thousand dollars (\$4,000) for each offense.²¹
- 70. Plaintiffs also seek to enjoin Defendants from violating the Unruh Act (and ADA), and recover reasonable attorneys' fees and costs incurred under California Civil Code §52(a).
- 71. Finally, Plaintiffs lawsuit is intended to compel
 Defendants to make the Restaurant accessible to all members of the
 physically disabled public—justifying attorneys' fees under California
 Code of Civil Procedure §1021.5.

IX. FOURTH CLAIM

Denial of Full and Equal Access to a Person with Physical Disabilities in a Public Facilities

Health and Safety Code Part 5.5

- 72. Plaintiffs incorporate the allegations contained in paragraphs 1 through 27 for this claim.
- 73. Health and Safety Code §19955(a) states, in part, that: California public accommodations or facilities (built with private funds) shall adhere to the provisions of Government Code §4450.

California Civil Code §52(a); this relief includes statutory minimum damages for each actual visit and incident of deterrence.

- 74. Health and Safety Code §19959 states, in part, that: Every existing (non-exempt) public accommodation constructed prior to July 1, 1970, which is altered or structurally repaired, is required to comply with this chapter.
- 75. On information and belief, Plaintiffs allege the Restaurant was constructed prior to July 1, 1970, and that areas were altered or structurally repaired in a manner that violates Part 5.5 of the Health and Safety Code.
- 76. In the alternative, on information and belief, Plaintiffs allege the Restaurant was constructed after July 1, 1970, in a manner that violates Part 5.5 of the Health and Safety Code or Government Code §4450 (or both).
- 77. The Restaurant is a public accommodation or facility (as defined by Part 5.5 of the Health and Safety Code),²² which is not exempted by Health and Safety Code §19956.
- 78. Defendants' non-compliance with these requirements at the Restaurant aggrieved (or potentially aggrieved) Plaintiffs and other persons with physical disabilities.
- 79. Accordingly, Plaintiffs seeks injunctive relief under Health and Safety Code §19953.
- 80. Plaintiffs also incurred legal expenses in order to enforce Government Code §§4450 *et seq.* or Health & Safety Code §§19955 *et seq.*
- 81. Therefore, Plaintiffs seeks attorneys' fees under to Health and Safety Code §19953.

Health and Safety Code §19955(a).

82. Finally, Plaintiffs lawsuit is intended to compel
Defendants to make the Restaurant accessible to all members of the
physically disabled public—justifying attorneys' fees under California
Code of Civil Procedure §1021.5.

X. FIFTH CLAIM

Unfair Business Practices Act

Business and Professions Code §§17200 et seq.

- 83. Plaintiffs incorporate the allegations contained in paragraphs 1 through 82 for this claim.
- 84. California Business and Professions Code §17203 states, in part, that: Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction.
- 85. "Unfair competition" includes any unlawful business act or practice.²³
- 86. Defendants' business practices were "unlawful" in that they violated applicable California and United States laws (identified above).
- 87. Defendants' unlawful business practices denied the physically disabled public (including Plaintiffs) full and equal access to the Restaurant.
- 88. Accordingly, Plaintiffs seek an order for injunctive relief and restitution to end Defendants' unlawful business practices.

California Business and Professions Code §17200.

XI. SIXTH CLAIM

Negligence Per Se

California Civil Code §1714

- 89. Plaintiffs incorporate the allegations contained in paragraphs 1 through 88 for this claim.
 - 90. Defendants had a duty to comply with the aforementioned California and United States laws or regulations (or both).
- 91. These aforementioned laws and regulations, violated by Defendants, were adopted to protect the class of physically disabled persons (including Plaintiffs) from injury.
- 92. This violation was the proximate cause of Plaintiffs aforementioned injuries.
- 93. Plaintiffs suffered physical and emotional injuries resulting from an occurrence (the nature of which) these laws or regulations were designed to prevent.²⁴
- 94. Defendants knew (or should have known) that the physically disabled individuals (including Plaintiffs) were denied full and equal access to the Restaurant.
- 95. Despite this knowledge, Defendants refused to comply with the aforementioned laws and regulations to make the Restaurant accessible.
- 96. Defendants' acts and omissions evince oppressive, fraudulent, or malicious conduct in conscious disregard for the rights or safety of Plaintiffs (and the physically disabled public).
- 97. Thus, Plaintiffs, in addition to the actual damages, seek damages for the sake of example and by way of punishing Defendant

²⁴ <u>Hudge v. Seiler</u>, 558 F.2d 284 (5th Cir. 1977).

1	under California Civil Code §3294 in a sufficient amount to										
2	accomplish that purpose.										
3		98. Plaintiffs seek interest under California Civil Code §3291									
4	too.										
5		XII. PRAYER FOR RELIEF									
6	WHE	EREFORE, Plaintiffs pray judgment against the Defendants for:									
7	1.	Injunctive relief, preventive relief, or any other relief the Court									
8		deems proper under:									
9		• 42 U.S.C. §12205;									
0		California Civil Code §52;									
1		California Civil Code §55; and									
2		 California Health and Safety Code §19953; 									
3	2.	Declaratory relief that Defendants violated the ADA for the									
4		purposes of Unruh Act or Disabled Persons Act damages;									
5	3.	Statutory minimum damages under either California Civil Code									
6		§52(a) or California Civil Code §54.3(a), but not both, for each									
7		actual visit or incident of deterrence (according to the proof);									
8	4.	General and special damages in the amount of \$100,000.00;									
9	5.	For attorneys' fees, litigation expenses and costs of sui									
20		pursuant to:									
!1		• 42 U.S.C. §12205;									
2		California Civil Code §52;									
3		California Civil Code §54.3;									
24		California Civil Code §55;									
25		California Code of Civil Procedure §1021.5; and									
6		California Health and Safety Code §19953;									
7	6.	Interest at the legal rate from the date of the filing of this action;									
8	7.	Punitive damages pursuant to Civil Code §3294;									

9. Such other and further relief as the court may deem proper.

DATED: January 14, 2004 LAW OFFICES OF LYNN HUBBARD



Plaintiffs' Complaint

Page 17

Hubbard v. Del Taco Inc., et al.

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filling 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 in required for the use of the Clerk

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