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3:03-CV-00190 MANTIC ASHANTIS V. MARKOS RESTAURANT

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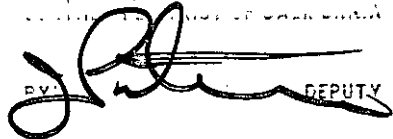
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MANTIC ASHANTI'S CAUSE, SUING
ON BEHALF OF THEODORE A.
PINNOCK AND ITS MEMBERS; and
THEODORE A. PINNOCK, An
Individual,
Plaintiffs,

v.

MARKOS RESTAURANT BAR AND
GRILL a.k.a. ANTHONY J.
FLEMING AND KEVIN J.
GALLAGHER d.b.a. MARKOS
RESTAURANT BAR AND GRILL
f.k.a. MARKOS VOULGARIS and
MELPO VOULGARIS d.b.a. MARKOS
RESTAURANT BAR AND GRILL;
ANTHONY J. FLEMING; KEVIN J.
GALLAGHER; MARKOS VOULGARIS;
MELPO VOULGARIS; MARKOS
VOULGARIS AND MELPO VOULGARIS
FAMILY TRUST; MARKOS
VOULGARIS, TRUSTEE; MELPO
VOULGARIS, TRUSTEE; And
DOES 1 THROUGH 10, Inclusive
Defendants.

Case No. '03 CV 0190 W (LSP)

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; EVIDENCE CODE 669(a)]

DEMAND FOR JURY TRIAL

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

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INTRODUCTION

Plaintiffs MANTIC ASHANTI'S CAUSE SUING ON BEHALF OF THEODORE A. PINNOCK AND ITS MEMBERS and THEODORE A. PINNOCK, An Individual, herein complain, by filing this Civil Complaint in accordance with rule 8 of the Federal Rules of Civil Procedure in the Judicial District of the United States District Court of the Southern District of California, that Defendants have in the past, and presently are, engaging in discriminatory practices against individuals with disabilities, specifically including minorities with disabilities. Plaintiffs allege this civil action and others substantial similar thereto are necessary to compel access compliance because empirical research on the effectiveness of Title III of the Americans with Disabilities Act indicates this Title has failed to achieve full and equal access simply by the executive branch of the Federal Government funding and promoting voluntary compliance efforts. Further, empirical research shows when individuals with disabilities give actual notice of potential access problems to places of public accommodation without a federal civil rights action, the public accommodations do not remove the access barriers. Therefore, Plaintiffs make the following allegations in this federal civil rights action:

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JURISDICTION AND VENUE

1. The federal jurisdiction of this action is based on the Americans with Disabilities Act, 42 United States Code 12101-12102, 12181-12183 and 12201, et seq. Venue in the Judicial District of the United States District Court of the Southern District of California is in accordance with 28 U.S.C. § 1391(b)

1 because a substantial part of Plaintiffs' claims arose within the
2 Judicial District of the United States District Court of the
3 Southern District of California.

4 **SUPPLEMENTAL JURISDICTION**

5 2. The Judicial District of the United States District Court of
6 the Southern District of California has supplemental jurisdiction
7 over the state claims as alleged in this Complaint pursuant to 28
8 U.S.C. § 1367(a). The reason supplemental jurisdiction is proper
9 in this action is because all the causes of action or claims
10 derived from federal law and those arising under state law, as
11 herein alleged, arose from common nucleus of operative facts. The
12 common nucleus of operative facts, include, but are not limited
13 to, the incidents where Plaintiff's Member Theodore A. Pinnock was
14 denied full and equal access to Defendants' facilities, goods,
15 and/or services in violation of both federal and state laws when
16 they attempted to enter, use, and/or exit Defendants' facilities
17 as described below within this Complaint. Further, due to this
18 denial of full and equal access, Theodore A. Pinnock and other
19 persons with disabilities were injured. Based upon the said
20 allegations, the state actions, as stated herein, are so related
21 to the federal actions that they form part of the same case or
22 controversy and the actions would ordinarily be expected to be
23 tried in one judicial proceeding.

24 **NAMED DEFENDANTS AND NAMED PLAINTIFFS**

25 3. Defendants are, and, at all times mentioned herein, were, a
26 business or corporation or franchise organized and existing and/or
27 doing business under the laws of the State of California.
28

1 Defendant MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY J.
2 FLEMING AND KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND
3 GRILL f.k.a. MARKOS VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS
4 RESTAURANT BAR AND GRILL is located at 4935 Newport Avenue, San
5 Diego, California, 92107-3112. Plaintiffs are informed and
6 believe and thereon allege that Defendants ANTHONY J. FLEMING and
7 KEVIN J. GALLAGHER are the owners, operators, and lessors of the
8 MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY J. FLEMING AND
9 KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND GRILL f.k.a.
10 MARKOS VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS RESTAURANT BAR
11 AND GRILL and have been since November 26, 2002. Defendants
12 ANTHONY J. FLEMING and KEVIN J. GALLAGHER are located at 4935
13 Newport Avenue, San Diego, California, 92107.

14 4. Plaintiffs are informed and believe and thereon allege that
15 Defendants MARKOS VOULGARIS and MELPO VOULGARIS were the owners,
16 operators, and/or lessors of MARKOS RESTAURANT BAR AND GRILL
17 a.k.a. ANTHONY J. FLEMING AND KEVIN J. GALLAGHER d.b.a. MARKOS
18 RESTAURANT BAR AND GRILL f.k.a. MARKOS VOULGARIS and MELPO
19 VOULGARIS d.b.a. MARKOS RESTAURANT BAR AND GRILL at the date of
20 incident of this Civil Complaint, February 1, 2002. Plaintiffs
21 are further informed and believe and thereon allege that
22 Defendants MARKOS VOULGARIS AND MELPO VOULGARIS FAMILY TRUST;
23 MARKOS VOULGARIS, TRUSTEE; and MELPO VOULGARIS, TRUSTEE, were and
24 are the owners, operators, and/or lessors of the property located
25 at 4935 through 4937 Newport Avenue, San Diego, California, 92107,
26 Assessor Parcel Number 448-182-17-00. Defendants MARKOS
27 VOULGARIS; MELPO VOULGARIS; MARKOS VOULGARIS AND MELPO VOULGARIS
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1 FAMILY TRUST; MARKOS VOULGARIS, TRUSTEE; and MELPO VOULGARIS,
2 TRUSTEE, are located at 4769 Niagara Avenue, San Diego,
3 California, 92107.

4 5. The words "Plaintiffs" and "Plaintiff's Member" as used herein
5 specifically include the organization MANTIC ASHANTI'S CAUSE, its
6 Members, its member Theodore A. Pinnock and persons associated
7 with its Members who accompanied Members to Defendants'
8 facilities, as well as THEODORE A. PINNOCK, An Individual.

9 6. Defendants Does 1 through 10, were at all times relevant
10 herein subsidiaries, employers, employees, agents, of MARKOS
11 RESTAURANT BAR AND GRILL a.k.a. ANTHONY J. FLEMING AND KEVIN J.
12 GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND GRILL f.k.a. MARKOS
13 VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS RESTAURANT BAR AND
14 GRILL; ANTHONY J. FLEMING; KEVIN J. GALLAGHER; MARKOS VOULGARIS;
15 MELPO VOULGARIS; MARKOS VOULGARIS AND MELPO VOULGARIS FAMILY
16 TRUST; MARKOS VOULGARIS, TRUSTEE; and/or MELPO VOULGARIS, TRUSTEE.
17 Plaintiffs are ignorant of the true names and capacities of
18 Defendants sued herein as Does 1 through 10, inclusive, and
19 therefore sues these Defendants by such fictitious names.

20 Plaintiffs will pray leave of the court to amend this complaint to
21 allege the true names and capacities of the Does when ascertained.

22 7. Plaintiffs are informed and believe, and thereon allege, that
23 Defendants and each of them herein were, at all times relevant to
24 the action, the owner, lessor, lessee, franchiser, franchisee,
25 general partner, limited partner, agent, employee, representing
26 partner, or joint venturer of the remaining Defendants and were
27 acting within the course and scope of that relationship.
28

1 Plaintiffs are further informed and believe, and thereon allege,
2 that each of the Defendants herein gave consent to, ratified,
3 and/or authorized the acts alleged herein to each of the remaining
4 Defendants.

5 **CONCISE SET OF FACTS**

6 8. Plaintiff MANTIC ASHANTI'S CAUSE is an organization that
7 advocates on the behalf of its members with disabilities when
8 their civil rights and liberties have been violated. Plaintiff's
9 member THEODORE A. PINNOCK is a member of Plaintiff Organization
10 and has an impairment in that he has Cerebral Palsy and due to
11 this impairment he has learned to successfully operate a
12 wheelchair.

13 9. On February 1, 2002, Plaintiff's member THEODORE A. PINNOCK
14 went to Defendants' MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY
15 J. FLEMING AND KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND
16 GRILL f.k.a. MARKOS VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS
17 RESTAURANT BAR AND GRILL facilities to utilize their goods and/or
18 services. When Plaintiff's member patronized Defendants' MARKOS
19 RESTAURANT BAR AND GRILL a.k.a. ANTHONY J. FLEMING AND KEVIN J.
20 GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND GRILL f.k.a. MARKOS
21 VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS RESTAURANT BAR AND
22 GRILL facilities, he was unable to use and/or had difficulty using
23 the public accommodations' entrance, interior path of travel, and
24 men's restroom facilities at Defendants' business establishment
25 because they failed to comply with ADA Access Guidelines For
26 Buildings and Facilities (hereafter referred to as "ADAAG") and/or
27 California's Title 24 Building Code Requirements. Defendants
28

1 failed to remove access barriers within the entrance, interior
2 path of travel, and men's restroom facilities of Defendants'
3 MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY J. FLEMING AND
4 KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND GRILL f.k.a.
5 MARKOS VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS RESTAURANT BAR
6 AND GRILL establishment.

7
8 10. Plaintiff's member personally experienced difficulty with
9 said access barriers at Defendants' MARKOS RESTAURANT BAR AND
10 GRILL a.k.a. ANTHONY J. FLEMING AND KEVIN J. GALLAGHER d.b.a.
11 MARKOS RESTAURANT BAR AND GRILL f.k.a. MARKOS VOULGARIS and MELPO
12 VOULGARIS d.b.a. MARKOS RESTAURANT BAR AND GRILL facilities. For
13 example, the front entrance to the restaurant fails to have the
14 required disability signage. Plaintiff's Member and Plaintiff
15 THEODORE A. PINNOCK had extreme difficulty in accessing the men's
16 restroom within Defendants' restaurant, as the interior path of
17 travel leading to the men's restroom was blocked with highchairs.

18 11. The men's restroom within the restaurant is completely
19 inaccessible. The men's restroom entrance door requires too much
20 force to operate, as the entrance door requires twelve pounds (12
21 lbs.) of pressure to operate. Also, the handles and locking
22 mechanisms on the men's restroom entrance door fails to be
23 accessible, as the handles require tight grasping and/or twisting
24 of the wrist to operate. The men's restroom entrance door fails
25 to have sufficient disability signage. The strike edge clearance
26 within the men's restroom is a mere three inches (3") when it
27 should be a minimum of eighteen inches (18"). The men's restroom
28 fails to have sufficient clear floor space, as the clear floor

1 space is only thirty-eight inches (38") in diameter, when it
2 should be sixty inches (60") in diameter. The path of travel
3 leading to the urinal in the men's restroom is inaccessible, as
4 the path of travel is a mere twenty-two inches (22") wide. The
5 path of travel should be thirty-two inches (32") wide. The urinal
6 is also inaccessible, as the lip on the urinal is twenty-seven
7 inches (27") high, when it should be a maximum of seventeen inches
8 (17") high.

9 12. The commode stall is inaccessible in the men's restroom. The
10 commode stall fails to have the required self-closing mechanism on
11 the stall door. The commode blocks the commode seat protective
12 cover dispenser. The distance from the centerline of the commode
13 to the farthest wall is only twenty-one inches (21") when it
14 should be a minimum of thirty-two inches (32"). Further, the
15 distance from the centerline of the commode to the closest wall is
16 only fourteen inches (14") when it should be a minimum of eighteen
17 inches (18"). The commode is also mounted too low to be
18 accessible, as it is a mere fourteen inches (14") above the floor.
19 The commode should be seventeen inches to nineteen inches (17" to
20 19") high.

21 13. The lavatory sink within the men's restroom fails to have the
22 required knee clearance of twenty-nine inches (29"). The lavatory
23 sink blocks the operable parts of the soap dispenser. Also, the
24 operable parts of the paper towel dispenser are mounted too high
25 to be accessible, as the operable parts are sixty-three inches
26 (63") above the finished floor. The operable parts of the paper
27 towel dispenser should be a maximum of forty inches (40") high.
28

1 14. Pursuant to federal and state law, Defendants are required to
2 remove barriers to their existing facilities. Further, Defendants
3 had actual knowledge of their barrier removal duties under the
4 Americans with Disabilities Act and the Civil Code before January
5 26, 1992. Also, Defendants should have known that individuals
6 with disabilities are not required to give notice to a
7 governmental agency before filing suit alleging Defendants failed
8 to remove architectural barriers.

9 15. Plaintiffs believe and herein allege Defendants' facilities
10 have access violations not directly experienced by Plaintiff's
11 Member which preclude or limit access by others with disabilities,
12 including, but not limited to, Space Allowance and Reach Ranges,
13 Accessible Route, Protruding Objects, Ground and Floor Surfaces,
14 Parking and Passenger Loading Zones, Curb Ramps, Ramps, Stairs,
15 Elevators, Platform Lifts (Wheelchair Lifts), Windows, Doors,
16 Entrances, Drinking Fountains and Water Coolers, Water Closets,
17 Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage,
18 Handrails, Grab Bars, and Controls and Operating Mechanisms,
19 Alarms, Detectable Warnings, Signage, and Telephones. Accordingly,
20 Plaintiffs allege Defendants are required to remove all
21 architectural barriers, known or unknown. Also, Plaintiffs allege
22 Defendants are required to utilize the ADA checklist for Readily
23 Achievable Barrier Removal approved by the United States
24 Department of Justice and created by Adaptive Environments.

25 16. Based on these facts, Plaintiffs allege Plaintiff's Member
26 and Plaintiff Theodore A. Pinnock was discriminated against each
27 time he patronized Defendants' establishments. Plaintiff's Member
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1 and Plaintiff Theodore A. Pinnock was extremely upset due to
2 Defendants' conduct. Further, Plaintiff's Member and Plaintiff
3 THEODORE A. PINNOCK experienced pain in hid legs, back, arms,
4 shoulders and wrists when he attempted to enter, use, and exit
5 Defendants' establishment.

6 **WHAT CLAIMS ARE PLAINTIFFS ALLEGING AGAINST EACH NAMED DEFENDANT**
7

8 17. MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY J. FLEMING AND
9 KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND GRILL f.k.a.
10 MARKOS VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS RESTAURANT BAR
11 AND GRILL; ANTHONY J. FLEMING; KEVIN J. GALLAGHER; MARKOS
12 VOULGARIS; MELPO VOULGARIS; MARKOS VOULGARIS AND MELPO VOULGARIS
13 FAMILY TRUST; MARKOS VOULGARIS, TRUSTEE; MELPO VOULGARIS, TRUSTEE;
14 and Does 1 through 10 will be referred to collectively hereinafter
15 as "Defendants."

16 18. Plaintiffs aver that the Defendants are liable for the
17 following claims as alleged below:
18

19 **DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS**

20 FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS- **Claims Under The**
21 **Americans With Disabilities Act Of 1990**
22

23 CLAIM I AGAINST ALL DEFENDANTS: **Denial Of Full And Equal**
24 **Access**

25 19. Based on the facts plead at ¶¶ 8 - 16 above and elsewhere in
26 this complaint, Plaintiff's Member was denied full and equal
27 access to Defendants' goods, services, facilities, privileges,
28 advantages, or accommodations. Plaintiffs allege Defendants are a

1 public accommodation owned, leased and/or operated by Defendants.
2 Defendants' existing facilities and/or services failed to provide
3 full and equal access to Defendants' facility as required by 42
4 U.S.C. § 12182(a). Thus, Plaintiff's Member was subjected to
5 discrimination in violation of 42 United States Code
6 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff's
7 Member was denied equal access to Defendants' existing facilities.

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

21 CLAIM II AGAINST ALL DEFENDANTS: **Failure To Make Alterations In**
22 **Such A Manner That The Altered Portions Of The Facility Are**
23 **Readily Accessible And Usable By Individuals With Disabilities**

24 21. Based on the facts plead at ¶¶ 8 - 16 above and elsewhere in
25 this complaint, Plaintiff's Member and Plaintiff Theodore A.
26 Pinnock was denied full and equal access to Defendants' goods,
27 services, facilities, privileges, advantages, or accommodations
28 within a public accommodation owned, leased, and/or operated by

1 Defendants. Defendants altered their facility in a manner that
2 affects or could affect the usability of the facility or a part of
3 the facility after January 26, 1992. In performing the alteration,
4 Defendants failed to make the alteration in such a manner that, to
5 the maximum extent feasible, the altered portions of the facility
6 are readily accessible to and usable by individuals with
7 disabilities, including individuals who use wheelchairs, in
8 violation of 42 U.S.C. §12183(a)(2).

9 22. Additionally, the Defendants undertook an alteration that
10 affects or could affect the usability of or access to an area of
11 the facility containing a primary function after January 26, 1992.
12 Defendants further failed to make the alterations in such a manner
13 that, to the maximum extent feasible, the path of travel to the
14 altered area and the bathrooms, telephones, and drinking fountains
15 serving the altered area, are readily accessible to and usable by
16 individuals with disabilities in violation 42 U.S.C. §12183(a)(2).

17 23. Pursuant to 42 U.S.C. §12183(a), this failure to make the
18 alterations in a manner that, to the maximum extent feasible, are
19 readily accessible to and usable by individuals with disabilities
20 constitutes discrimination for purposes of 42 U.S.C. §12183(a).
21 Therefore, Defendants discriminated against Plaintiff's Member and
22 Plaintiff Theodore A. Pinnock in violation of 42 U.S.C. §
23 12182(a).

24 24. Thus, Plaintiff's Member Theodore A. Pinnock was subjected to
25 discrimination in violation of 42 U.S.C. § 12183(a), 42 U.S.C.
26 §12182(a) and 42 U.S.C. §12188 because said Member and Plaintiff
27 Theodore A. Pinnock was denied equal access to Defendants'
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1 existing facilities.

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3 CLAIM III AGAINST ALL DEFENDANTS: **Failure To Remove**
4 **Architectural Barriers**

5 25. Based on the facts plead at ¶¶ 8 - 16 above and elsewhere in
6 this complaint, Plaintiff's Member was denied full and equal
7 access to Defendants' goods, services, facilities, privileges,
8 advantages, or accommodations within a public accommodation owned,
9 leased, and/or operated by Defendants. Defendants failed to
10 remove barriers as required by 42 U.S.C. § 12182(a). Plaintiffs
11 are informed, believe, and thus allege that architectural barriers
12 which are structural in nature exist within the following physical
13 elements of Defendants' facilities: Space Allowance and Reach
14 Ranges, Accessible Route, Protruding Objects, Ground and Floor
15 Surfaces, Parking and Passenger Loading Zones, Curb Ramps, Ramps,
16 Stairs, Elevators, Platform Lifts (Wheelchair Lifts), Windows,
17 Doors, Entrances, Drinking Fountains and Water Coolers, Water
18 Closets, Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks,
19 Storage, Handrails, Grab Bars, and Controls and Operating
20 Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.
21 Title III requires places of public accommodation to remove
22 architectural barriers that are structural in nature to existing
23 facilities. [See, 42 United States Code 12182(b)(2)(A)(iv).]
24 Failure to remove such barriers and disparate treatment against a
25 person who has a known association with a person with a disability
26 are forms of discrimination. [See 42 United States Code
27 12182(b)(2)(A)(iv).] Thus, Plaintiff's Member was subjected to
28 discrimination in violation of 42 United States Code

1 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because said Member was
2 denied equal access to Defendants' existing facilities.

3 CLAIM IV AGAINST ALL DEFENDANTS: **Failure To Modify Practices,**
4 **Policies And Procedures**

5 26. Based on the facts plead at ¶¶ 8 - 16 above and elsewhere in
6 this complaint, Defendants failed and refused to provide a
7 reasonable alternative by modifying its practices, policies and
8 procedures in that they failed to have a scheme, plan, or design
9 to assist Plaintiff's Member and/or others similarly situated in
10 entering and utilizing Defendants' services, as required by 42
11 U.S.C. § 12188(a). Thus, said Member was subjected to
12 discrimination in violation of 42 United States Code
13 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because said Member was
14 denied equal access to Defendants' existing facilities.

15 27. Based on the facts plead at ¶¶ 8 - 16 above, Claims I, II,
16 and III of Plaintiffs' First Cause Of Action above, and the facts
17 elsewhere herein this complaint, Plaintiffs will suffer
18 irreparable harm unless Defendants are ordered to remove
19 architectural, non-architectural, and communication barriers at
20 Defendants' public accommodation. Plaintiffs allege that
21 Defendants' discriminatory conduct is capable of repetition, and
22 this discriminatory repetition adversely impacts Plaintiffs and a
23 substantial segment of the disability community. Plaintiffs
24 allege there is a national public interest in requiring
25 accessibility in places of public accommodation. Plaintiffs have
26 no adequate remedy at law to redress the discriminatory conduct of
27 Defendants. Plaintiff's Member desires to return to Defendants'
28

1 places of business in the immediate future. Accordingly, the
2 Plaintiffs allege that a structural or mandatory injunction is
3 necessary to enjoin compliance with federal civil rights laws
4 enacted for the benefit of individuals with disabilities.

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

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

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

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

27 30. These violations denied Plaintiff's Member full and equal
28 access to Defendants' facility. Thus, said Member was subjected

1 to discrimination pursuant to Civil Code §§ 51, 52, and 54.1
2 because Plaintiff's Member was denied full, equal and safe access
3 to Defendants' facility, causing severe emotional distress.

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

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

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

14 32. Based on the facts plead at ¶¶ 8 - 16 above and elsewhere
15 herein this complaint and because Defendants violated the Civil
16 Code § 51 by failing to comply with 42 United States Code §
17 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did and
18 continue to discriminate against Plaintiff's Member and persons
19 similarly situated in violation of Civil Code §§ 51, 52, and 54.1.

20 33. Based on the facts plead at ¶¶ 8 - 16 above, Claims I, II,
21 and III of Plaintiffs' Second Cause Of Action above, and the facts
22 elsewhere herein this complaint, Plaintiffs will suffer
23 irreparable harm unless Defendants are ordered to remove
24 architectural, non-architectural, and communication barriers at
25 Defendants' public accommodation. Plaintiffs allege that
26 Defendants' discriminatory conduct is capable of repetition, and
27 this discriminatory repetition adversely impacts Plaintiffs and a
28

1 substantial segment of the disability community. Plaintiffs
2 allege there is a state and national public interest in requiring
3 accessibility in places of public accommodation. Plaintiffs have
4 no adequate remedy at law to redress the discriminatory conduct of
5 Defendants. Plaintiff's Member desires to return to Defendants'
6 places of business in the immediate future. Accordingly, the
7 Plaintiffs allege that a structural or mandatory injunction is
8 necessary to enjoin compliance with state civil rights laws
9 enacted for the benefit of individuals with disabilities.

10 34. Wherefore, Plaintiffs pray for damages and relief as
11 hereinafter stated.
12

13 **Treble Damages Pursuant To Claims I, II, III Under The California**
14 **Accessibility Laws**

15 35. Defendants, each of them respectively, at times prior to and
16 including, the month of February, 2002, and continuing to the
17 present time, knew that persons with physical disabilities were
18 denied their rights of equal access to all portions of this public
19 facility. Despite such knowledge, Defendants, and each of them,
20 failed and refused to take steps to comply with the applicable
21 access statutes; and despite knowledge of the resulting problems
22 and denial of civil rights thereby suffered by Plaintiff's Member
23 and Plaintiff THEODORE A. PINNOCK and other similarly situated
24 persons with disabilities. Defendants, and each of them, have
25 failed and refused to take action to grant full and equal access
26 to persons with physical disabilities in the respects complained
27 of hereinabove. Defendants, and each of them, have carried out a
28 course of conduct of refusing to respond to, or correct complaints

1 about, denial of disabled access and have refused to comply with
2 their legal obligations to make Defendants' MARKOS RESTAURANT BAR
3 AND GRILL a.k.a. ANTHONY J. FLEMING AND KEVIN J. GALLAGHER d.b.a.
4 MARKOS RESTAURANT BAR AND GRILL f.k.a. MARKOS VOULGARIS and MELPO
5 VOULGARIS d.b.a. MARKOS RESTAURANT BAR AND GRILL facilities
6 accessible pursuant to the Americans With Disability Act Access
7 Guidelines (ADAAG) and Title 24 of the California Code of
8 Regulations (also known as the California Building Code). Such
9 actions and continuing course of conduct by Defendants, and each
10 of them, evidence despicable conduct in conscious disregard of the
11 rights and/or safety of Plaintiff's Member and of other similarly
12 situated persons, justifying an award of treble damages pursuant
13 to sections 52(a) and 54.3(a) of the California Civil Code.

14 36. Defendants', and each of their, actions have also been
15 oppressive to persons with physical disabilities and of other
16 members of the public, and have evidenced actual or implied
17 malicious intent toward those members of the public, such as
18 Plaintiff's Member and other persons with physical disabilities
19 who have been denied the proper access to which they are entitled
20 by law. Further, Defendants', and each of their, refusals on a
21 day-to-day basis to correct these problems evidence despicable
22 conduct in conscious disregard for the rights of Plaintiff's
23 Member THEODORE A. PINNOCK and other members of the public with
24 physical disabilities.
25

26 37. Plaintiffs pray for an award of treble damages against
27 Defendants, and each of them, pursuant to California Civil Code
28 sections 52(a) and 54.3(a), in an amount sufficient to make a more

1 profound example of Defendants and encourage owners, lessors, and
2 operators of other public facilities from willful disregard of the
3 rights of persons with disabilities. Plaintiffs do not know the
4 financial worth of Defendants, or the amount of damages sufficient
5 to accomplish the public purposes of section 52(a) of the
6 California Civil Code and section 54.3 of the California Civil
7 Code.

8 38. Wherefore, Plaintiffs pray for damages and relief as
9 hereinafter stated.

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

12 39. Plaintiffs incorporate by reference herein the facts plead
13 at ¶¶ 8 - 16 above and elsewhere in this complaint.

14 40. Defendants failed to remove access barriers within the
15 entrance, interior path of travel, and men's restroom facilities
16 of Defendants' MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY J.
17 FLEMING AND KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND
18 GRILL f.k.a. MARKOS VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS
19 RESTAURANT BAR AND GRILL establishment. Business and Professions
20 Code section 17200 defines "unfair competition" and prohibited
21 activities as, ". . . any unlawful, unfair or fraudulent business
22 act or practice and unfair, deceptive, untrue or misleading
23 advertising and any act prohibited by Chapter 1 (commencing with
24 Section 17500) of Part 3 of Division 7 of the Business and
25 Professions Code." Defendants' acts and omissions alleged herein
26 are violations of the below-enumerated federal and state statutory
27 requirements and public policy and therefore constitute unfair
28

1 competition and/or prohibited activities as such violations are
2 *unlawful, unfair or fraudulent business acts or practices.*
3
4 41. Pursuant to federal law, Defendants are required to remove
5 barriers to their existing facilities. Title III of the Americans
6 With Disabilities Act requires places of public accommodation to
7 remove architectural barriers that are structural in nature to
8 existing facilities. [42 United States Code 12182(b)(2)(A)(iv).]
9 Failure to remove such barriers and disparate treatment against a
10 person who has a known association with a person with a disability
11 are forms of discrimination. [See 42 United States Code
12 12182(b)(2)(A)(iv)]. Defendants failed to remove obstructions in
13 the disabled parking, paths of travel, and restroom facilities
14 from Defendants' establishment. Thus, Plaintiffs were subjected
15 to discrimination in violation of 42 United States Code
16 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff's
17 Member was denied equal access to Defendants' existing facilities.
18 Also, Defendants' facilities failed to provide full and equal
19 access to Defendants' facility as required by 42 U.S.C. §
20 12182(a). Thus, Plaintiffs were subjected to discrimination in
21 violation of 42 United States Code 12182(b)(2)(A)(iv) and 42
22 U.S.C. § 12188 because Plaintiff's Member was denied equal access
23 to Defendants' existing facilities. Additionally, as a result of
24 said access barriers, Defendants failed and refused to provide a
25 reasonable alternative by modifying its practices, policies and
26 procedures in that they failed to have a scheme, plan, or design
27 to assist Plaintiff's Member and/or others similarly situated in
28 entering and utilizing Defendants' services, as required by 42

1 U.S.C. § 12188(a). Thus, Plaintiffs were subjected to
2 discrimination in violation of 42 United States Code
3 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff's
4 Member was denied equal access to Defendants' existing facilities.
5 42. Pursuant to California state law, Defendants are also
6 required to remove barriers to their existing facilities.
7 Defendants' failure to remove barriers to their existing
8 facilities denied Plaintiff's Member full and equal access to
9 Defendants' facilities. Thus, Plaintiffs were subjected to
10 discrimination pursuant to Civil Code §§ 51, 52, and 54.1 because
11 Plaintiff's Member was denied full, equal and safe access to
12 Defendants' facility. Further, Defendants' facility, and other
13 goods, services, and/or facilities provided to the public by
14 Defendants are not accessible to and usable by persons with
15 disabilities as required by Health and Safety Code § 19955 which
16 requires private entities to make their facility accessible before
17 and after remodeling, and to remove architectural barriers.
18 Additionally, Defendants failed and refused to provide a
19 reasonable alternative by modifying its practices, policies, and
20 procedures in that they failed to have a scheme, plan, or design
21 to assist Plaintiff's Member and/or others similarly situated in
22 entering and utilizing Defendants' services as required by Civil
23 Code § 54.1. Thus, Plaintiffs were subjected to discrimination in
24 violation of Civil Code § 54.1. Also, under the Unruh Act,
25 Defendants violated Civil Code § 51 by failing to comply with 42
26 United States Code 12182(b)(2)(A)(iv), Defendants did and continue
27 to discriminate against Plaintiffs and persons similarly situated
28

1 in violation of Civil Code §§ 51, 52, and 54.1. Further,
2 Defendants had actual knowledge of their barrier removal duties
3 under the Americans with Disabilities Act, the California Civil
4 Code, and the California Health & Safety Code before January 26,
5 1992.

6 43. Defendants' alleged unlawful, unfair, or fraudulent business
7 acts or practices are specifically prohibited by the specific
8 introductory language of B&P section 17200 that is stated in the
9 conjunctive. Consequently, Plaintiffs allege that Defendants'
10 acts and omissions constitute a violation specifically of this
11 section 17200 of the Business and Professions Code.

12 44. Plaintiffs seek injunctive relief requiring Defendants to
13 remedy the disabled access violations present at the Defendants'
14 facilities. Ancillary to this injunctive relief, Plaintiffs also
15 request restitution for amounts paid by Plaintiff's Member who
16 attempted to visit and patronize Defendants' facilities during the
17 time period that the subject premises have been in violation of
18 the disabled access laws of the State of California.

19 45. Plaintiffs seek, on behalf of the general public, injunctive
20 relief requiring Defendants to comply with the disabled access
21 laws of the State of California at facilities throughout the State
22 of California built, owned, operated, and/or controlled by
23 Defendants.

24 46. WHEREFORE, Plaintiffs pray for judgment and relief as
25 hereinafter set forth.
26

27 ///

28 ///

1 PLAINTIFF THEODORE A. PINNOCK'S FOURTH CAUSE OF ACTION AGAINST
2 ONLY DEFENDANTS MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY J.
3 FLEMING AND KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND
4 GRILL f.k.a. MARKOS VOULGARIS and MELPO VOULGARIS d.b.a. MARKOS
5 RESTAURANT BAR AND GRILL; MARKOS VOULGARIS; MELPO VOULGARIS;
6 MARKOS VOULGARIS AND MELPO VOULGARIS FAMILY TRUST; MARKOS
7 VOULGARIS, TRUSTEE; MELPO VOULGARIS, TRUSTEE - Negligence as to
8 Plaintiff THEODORE A. PINNOCK only

9 47. Based on the facts plead at ¶ 8 - 16 above and elsewhere in
10 this complaint, Defendants owed Plaintiff Theodore A. Pinnock a
11 statutory duty to make their facility accessible and owed
12 Plaintiff Theodore A. Pinnock a duty to keep Plaintiff Theodore A.
13 Pinnock reasonably safe from known dangers and risks of harm.
14 This said duty arises by virtue of legal duties proscribed by
15 various federal and state statutes including, but not limited to,
16 ADA, ADAAG, Civil Code 51, 52, 54, 54.1 and Title 24 of the
17 California Administrative Code and applicable 1982 Uniform
18 Building Code standards as amended.

19 48. Title III of the ADA mandates removal of architectural
20 barriers and prohibits disability discrimination. As well,
21 Defendants' facility, and other goods, services, and/or facilities
22 provided to the public by Defendants are not accessible to and
23 usable by persons with disabilities as required by Health and
24 Safety Code § 19955 which requires private entities to make their
25 facility accessible before and after remodeling, and to remove
26 architectural barriers.
27

28 49. Therefore, Defendants engaged in discriminatory conduct in

1 that they failed to comply with known duties under the ADA, ADAAG,
2 Civil Code 51, 52, 54, 54.1, ADAAG, and Title 24, and knew or
3 should have known that their acts of nonfeasance would cause
4 Plaintiff Theodore A. Pinnock emotional, bodily and personal
5 injury. Plaintiffs allege that there was bodily injury in this
6 matter because when Plaintiff's Member and Plaintiff THEODORE A.
7 PINNOCK attempted to enter, use, and exit Defendants'
8 establishment, Plaintiff's Member and Plaintiff THEODORE A.
9 PINNOCK experienced pain in his legs, back, arms, shoulders, and
10 wrists. Plaintiffs further allege that such conduct was done in
11 reckless disregard of the probability of said conduct causing
12 Plaintiff Theodore A. Pinnock to suffer bodily or personal injury,
13 anger, embarrassment, depression, anxiety, mortification,
14 humiliation, distress, and fear of physical injury. Plaintiff
15 THEODORE A. PINNOCK, An Individual, alleges that such conduct
16 caused THEODORE A. PINNOCK, An Individual, to suffer the injuries
17 of mental and emotional distress, including, but not limited to,
18 anger, embarrassment, depression, anxiety, mortification,
19 humiliation, distress, and fear of physical injury. Plaintiff
20 THEODORE A. PINNOCK, An Individual, additionally alleges that such
21 conduct caused THEODORE A. PINNOCK, An Individual, to
22 suffer damages as a result of these injuries.

23
24 50. Wherefore, Plaintiffs pray for damages and relief as
25 hereinafter stated.

26
27 DEMAND FOR JUDGMENT FOR RELIEF:

28 A. For general damages pursuant to Cal. Civil Code §§ 52, 54.3,

1 3281, and 3333;

2 B. For \$4,000 in damages pursuant to Cal. Civil Code § 52 for
3 each and every offense of Civil Code § 51, Title 24 of the
4 California Building Code, ADA, and ADA Accessibility Guidelines;

5 C. In the alternative to the damages pursuant to Cal. Civil
6 Code § 52 in Paragraph B above, for \$1,000 in damages pursuant to
7 Cal. Civil Code § 54.3 for each and every offense of Civil Code §
8 54.1, Title 24 of the California Building Code, ADA, and ADA
9 Accessibility Guidelines;

10
11 D. For injunctive relief pursuant to 42 U.S.C. § 12188(a) and
12 Cal. Civil Code § 55. Plaintiffs request this Court enjoin
13 Defendants to remove all architectural barriers in, at, or on
14 their facilities related to the following: Space Allowance and
15 Reach Ranges, Accessible Route, Protruding Objects, Ground and
16 Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps,
17 Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts),
18 Windows, Doors, Entrances, Drinking Fountains and Water Coolers,
19 Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors,
20 Sinks, Storage, Handrails, Grab Bars, and Controls and Operating
21 Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.

22
23 E. For attorneys' fees pursuant to 42 U.S.C. § 1988, 42 U.S.C.
24 § 12205, and Cal. Civil Code § 55;

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

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

H. A Jury Trial and;

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

Respectfully submitted:

PINNOCK & WAKEFIELD

Dated: January 28, 2003

By: *Michelle L. Wakefield*
MICHELLE L. WAKEFIELD, ESQ.
DAVID C. WAKEFIELD, ESQ.
Attorneys for Plaintiffs

ATTACHMENT TO CIVIL COVER SHEET

DEFENDANTS:

MARKOS RESTAURANT BAR AND GRILL a.k.a. ANTHONY J. FLEMING
AND KEVIN J. GALLAGHER d.b.a. MARKOS RESTAURANT BAR AND
GRILL f.k.a. MARKOS VOULGARIS and MELPO VOULGARIS d.b.a.
MARKOS RESTAURANT BAR AND GRILL; ANTHONY J. FLEMING; KEVIN
J. GALLAGHER; MARKOS VOULGARIS; MELPO VOULGARIS; MARKOS
VOULGARIS AND MELPO VOULGARIS FAMILY TRUST; MARKOS
VOULGARIS, TRUSTEE; MELPO VOULGARIS, TRUSTEE; And
DOES 1 THROUGH 10, Inclusive

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.)

1 (a) PLAINTIFFS

MANTIC ASHANTI'S CAUSE, SUING ON BEHALF OF THEODORE A. PINNOCK AND ITS MEMBERS; And THEODORE A. PINNOCK, An Individual

DEFENDANTS

PLEASE SEE ATTACHMENT

FILED 03 JAN 29 AM 11:22

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

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) San Diego DEPUTY NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

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

Michelle L. Wakefield, Esq. SBN: 200424 David C. Wakefield, Esq. SBN: 185736 Pinnock & Wakefield; 7966 Arjons Drive, Suite 119 San Diego, CA 92126 Telephone: (858) 689-1750; Facsimile: (858) 689-1950

ATTORNEYS (IF KNOWN)

03 CV 0190 W (LSP)

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

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

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

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
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 various legal categories and checkboxes.

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

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

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

To Be Determined At Trial

Check YES only if demanded in complaint:

JURY DEMAND: YES X NO

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

JUDGE

Docket Number

DATE January 28, 2003

SIGNATURE OF ATTORNEY OF RECORD

#070861 \$150.00 BLD

Michelle L. Wakefield