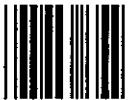


USDC SCAN INDEX SHEET



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3:02-CV-02497 HUBBARD V. RITE AID CORPORATION

\*75\*

\*M.\*

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FILED

05 MAR -7 PM 3:22

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY: [Signature] DEPUTY

9 Attorneys for Defendants RITE AID CORPORATION and  
10 ARTHUR CIUFFO, JR. and EVELYN EMMERSON,  
11 Trustees of the CIUFFO FAMILY TRUST B erroneously  
12 Sued as THE CIUFFO FAMILY TRUST B, ET AL.

NUNC PRO TUNC

MAR 04 2005

13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA

15 LYNN J. HUBBARD, BARBARA J.  
16 HUBBARD,

17 Plaintiff,

18 v.

19 RITE AID CORPORATION; THE  
20 CIUFFO FAMILY TRUST B, ET AL;  
21 AVOCADO PLAZA, L.L.C. and DOES 1  
22 through 20,

23 Defendant.

Case No.: 02CV2497-WQH (BLM)

Judge: William Q. Hayes

NOTICE OF MOTION AND MOTION TO  
DISMISS PLAINTIFFS' FIRST CAUSE  
OF ACTION UNDER AMERICANS  
WITH DISABILITIES ACT FOR LACK  
OF SUBJECT MATTER JURISDICTION  
AND FOR FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF CAN BE  
GRANTED; REQUEST TO DECLINE  
SUPPLEMENTAL JURISDICTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF;  
DECLARATIONS AND EXHIBITS IN  
SUPPORT THEREOF; [PROPOSED]  
ORDER

Date: April 1, 2005  
Time: 11:00 a.m.  
Ctrm.: 4

Complaint Filed: December 18, 2002  
Trial Date: None

24 TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE that on April 1, 2005, at 11:00 a.m. or as soon thereafter  
26 as this matter may be heard in Courtroom 4 of the above-entitled Court, Defendants RITE  
27 AID CORPORATION and ARTHUR CIUFFO, JR. and EVELYN EMMERSON, Trustees

HART, KING & COLDREN  
A PROFESSIONAL CORPORATION  
200 EAST SANDPOINTE, FOURTH FLOOR  
SANTA ANA, CALIFORNIA 92707

ORIGINAL

75

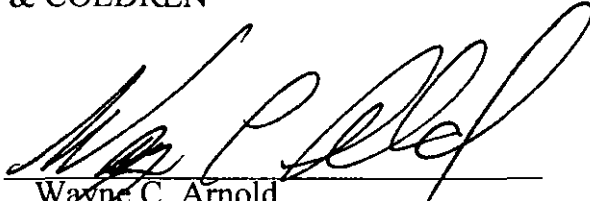
HART, KING & COLDREN  
A PROFESSIONAL CORPORATION  
200 EAST SANDPOINTE, FOURTH FLOOR  
SANTA ANA, CALIFORNIA 92707

1 of the CIUFFO FAMILY TRUST B (collectively "RITE AID"), will and hereby do move  
2 the Court pursuant to Rule 12(b)(1) and/or Rule 12(b)(6) for an order dismissing plaintiffs  
3 LYNN J. HUBBARD and BARBARA J. HUBBARD's (collectively "plaintiffs") First  
4 Cause of Action contained in their complaint for lack of subject matter jurisdiction and/or  
5 failure to state a claim upon which relief can be granted as plaintiffs' demands for injunctive  
6 relief are now moot.<sup>1</sup> RITE AID also requests that this Court decline to exercise  
7 supplemental jurisdiction over plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(c)(3)  
8 and dismiss the complaint in its entirety.

9 This motion will be based upon this notice of motion and motion, on the  
10 memorandum of points and authorities in support of motion and declarations filed herewith,  
11 the pleadings and papers filed herein, and upon such other matters as may be presented to the  
12 Court at the time of trial or hearing.

13  
14 Dated: March 4, 2005

HART, KING & COLDREN

15  
16 By:   
17 Wayne C. Arnold  
18 Lisa D. Herzog  
19 Attorneys for Defendants RITE AID  
20 CORPORATION and ARTHUR  
21 CIUFFO, JR. and EVELYN  
22 EMMERSON, Trustees of the  
23 CIUFFO FAMILY TRUST B  
24  
25  
26

27 <sup>1</sup> Alternatively, RITE AID requests that the Court treat its Motion To Dismiss as a Motion For  
28 Summary Judgment (pursuant to Fed. Rule of Civil Procedure 56) so that the Court can consider  
the documentary evidence and declarations presented in support of its motion.

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28

HART, KING & COLDREN  
A PROFESSIONAL CORPORATION  
200 EAST SANDPOINTE, FOURTH FLOOR  
SANTA ANA, CALIFORNIA 92707

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND FACTUAL BACKGROUND

3 On December 18, 2002, plaintiffs sued RITE AID alleging that RITE AID's store  
4 located at 1135 Avocado Avenue, El Cajon, California violated the Americans With  
5 Disabilities Act ("ADA") 42 U.S.C. § 12101, et seq, California disabled Persons Act,  
6 California Unruh Act, California Health and Safety Code, California Unfair Business  
7 Practices Act and Negligence. Plaintiffs' "form style" complaint consisted of allegations  
8 that the RITE AID store had barriers making the store inaccessible to persons with  
9 disabilities. Plaintiffs state:

10 "26. Plaintiffs were denied equal access to the Store because  
11 Defendants failed to provide access to the Store from public  
12 sidewalks, parking, or public transportation. This failure may  
13 include, but is not limited to, installing an entrance ramp,  
14 widening entrances, reducing door pressure, and providing  
15 accessible parking spaces.

16 27. Plaintiffs were also denied access to the Store, because  
17 Defendants failed to provide access to those areas of the Store  
18 where goods and services are made available to the public. This  
19 failure may include, but is not limited to, adjusting the layout of  
20 display racks, widening of doors, rearranging furniture, providing  
21 Braille and raised character signage, providing visual alarms,  
22 adding an accessible check-out counter, and installing ramps.

23 28. Plaintiffs were also denied equal access to the Store,  
24 because Defendants failed to provide access to restroom facilities  
25 at the Store. This failure may include, but is not limited to,  
26 removal of obstructing furniture or vending machines, widening  
27 of doors, installation of ramps, providing accessible signage,  
28 widening of toilet stalls and installation of grab bars."

See Plaintiffs' Complaint, pg. 6, lines 11-26.

The RITE AID store was remodeled in or around 1998. RITE AID admits that the  
RITE AID store (store # 5625) located at 1135 Avocado Avenue, El Cajon, California is a  
place of public accommodation as defined in 42 U.S.C. § 12181 and used in 42 U.S.C. §

1 12182 to which members of the public are invited.<sup>2</sup>

2 Defendant RITE AID CORPORATION leases the RITE AID store along with a  
3 portion of the parking lot directly in front of the RITE AID store from defendants ARTHUR  
4 CIUFFO, JR. and EVELYN EMMERSON, Trustees of the CIUFFO FAMILY TRUST B  
5 referred to in lease documents as "Parcel 2". See Exhibit A, copy of shopping center plot  
6 map showing outline portion of property leased by RITE AID and owned by the CIUFFO  
7 FAMILY TRUST B. See also Exhibit F, Declaration of Wayne C. Arnold, ¶ 2.

8 Neither RITE AID nor the CIUFFO FAMILY TRUST B own, lease or control the  
9 parking lot and common areas for the remaining portions of the shopping center. Defendant  
10 CIUFFO FAMILY TRUST B leases its entire interest at this location to defendant RITE AID  
11 CORPORATION. In fact, according to Public records compared to property descriptions,  
12 Parcels 1, 3, 5, 6, 7, 8, 9 and 10 are owned by Terra West Investments. See Exhibit C, copy  
13 of public records of parcel ownership obtained from Lexis. See also Exhibit D, Declaration  
14 of Melanie Knupp, ¶ 2-4. See also Exhibit A, copy of plot map attached to relevant lease  
15 document previously produced to plaintiffs and included with RITE AID's letter to opposing  
16 counsel (Exhibit C). See also Exhibit B, Lease Agreement For Subject Property (previously  
17 produced to plaintiffs). See also Exhibit F, Decl. of Arnold, ¶ 3.

18 Counsel for plaintiffs was informed of the ownership of the various parcels contained  
19 in this shopping center verbally on January 20, 2005 and subsequently in a letter from RITE  
20 AID's counsel on January 21, 2005. See Exhibit E, copy of January 21, 2005 letter sent to  
21 Adam Sorrells and Lynn Hubbard regarding ownership of the shopping center. See also  
22 Exhibit F, Decl. of Arnold, ¶ 4-5.

23 Plaintiffs' expert Reed Settle produced an expert report outlining his opinion about  
24 ADA and Title 24 barriers that existed at the RITE AID store. See Exhibit L, expert report  
25 by Reed Settle dated February 24, 2004. See also Exhibit F, Decl. of Arnold, ¶ 8. Mr.

26 \_\_\_\_\_  
27 <sup>2</sup> The RITE AID store is a place of public accommodation as that term is used in California Civil  
28 Code section 54.1 and California Health and Safety Code section 19955, to which members of the  
public are invited.



1 Settle's findings were addressed in RITE AID's renovations. During the time period  
2 between March 19, 2004 and February 9, 2005, Mr. Musser supervised changes to the  
3 interior of the store that addressed all of the accessibility issues raised in Mr. Settle's report.  
4 See Exhibit G, Declaration of David Musser, ¶ 4. As a result, the store is now compliant  
5 with respect to all of the issues raised by plaintiffs' expert except for the common parking  
6 lot, which is beyond the control of RITE AID. See Exhibit G, Decl. of Musser, ¶ 4.

7 On February 2, 2005, counsel for plaintiff was informed that renovations were  
8 completed and the store could be inspected with RITE AID's counsel present.<sup>3</sup> See Exhibit  
9 H. See also Exhibit F, Decl. of Arnold, ¶ 6. No response to this invitation was received until  
10 February 19, 2005, when counsel for plaintiff suggested mediation and their willingness to  
11 waive certain repairs if the matter settled. See Exhibit I, copy of February 19, 2005 letter  
12 from Adam Sorrells. See also Exhibit F, Decl. of Arnold, ¶ 7.

13  
14 **II. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF ARE MOOT AND**  
15 **THEREFORE PLAINTIFFS LACK STANDING TO BRING THESE CLAIMS:**

16  
17 **A. Plaintiffs' Claims Are Moot Because The Federal Courts Will Not Order**  
18 **Injunctive Relief When Renovations Were Already Completed:**

19 To establish standing under the ADA, 42 U.S.C. § 12101, et seq., a plaintiff must  
20 establish that they face a real and immediate threat of harm that can be addressed through  
21 injunctive relief. *D'Lil v. Stardust Vacation Club* (E.D. Cal. 2001) 2001 U.S. Dist. LEXIS  
22 23309, 9. A person must show that she suffered a distinct and palpable injury to herself that

23  
24  
25 <sup>3</sup> This letter also indicated that RITE AID did not own the remaining portions of the shopping  
26 center and could not alter the path of travel off of its property without consent of the owners of  
27 these parcels, however, RITE AID had contacted the management company/property owner and  
28 requested that they make renovations to the path of travel. Additional items disputed between  
plaintiff's expert and RITE AID's expert were also enumerated. See Section II below for an  
explanation of these differences.

1 is likely to be redressed if the requested relief is granted. *Parr v. L&L Drive-Inn Restaurant*  
2 (Dist. Hawaii 2000) 96 F. Supp. 2d 1065, 1082-83.

3 The equitable remedy of injunctive relief is unavailable absent a showing of  
4 irreparable injury, a requirement that cannot be met where there is no showing of any real or  
5 immediate threat that plaintiff will be wronged again. *Parr v. L&L Drive Inn Restaurant*  
6 (Dist. Hawaii 2000) 96 F. Supp. 2d 1065, 1078. A claim is moot if it has lost its character as  
7 a present and live controversy. *Id.* at 1087.

8 The court **cannot take jurisdiction** over a claim to which no effective relief can be  
9 granted. *Parr v. L&L Drive Inn Restaurant* (Dist. Hawaii 2000) 96 F. Supp. 2d 1065, 1078,  
10 1087 [emphasis added]. If an ADA plaintiff has already received everything to which she  
11 would be entitled, i.e., the challenged conditions have been remedied, then these particular  
12 claims are moot absent any basis for concluding that this plaintiff will again be subject to the  
13 same wrongful conduct of this defendant. *Id.* See also *Donald v. Café Royale, Inc.* (1990)  
14 218 Cal. App. 3d 168, 183-184 (stating that in dealing with California statutory claims, a  
15 change in circumstances rendering injunctive relief moot or unnecessary, justifies the denial  
16 of an injunction). See also *Mallon v. City of Long Beach* (1958) 164 Cal. App. 2d 178, 190.

17 Injunctive relief may be denied where changed circumstances would render injunctive  
18 relief to be an idle act because a facility has already been brought into compliance with both  
19 the ADA and Title 24. *Donald v. Café Royale, Inc.* (1990), supra, 218 Cal. App. 3d at 184.  
20 A claim for injunctive relief is moot if “it is absolutely clear that the alleged wrongful  
21 behavior could not reasonably be expected to occur.” *Friends of the Earth, Inc. v. Laidlaw*  
22 *Environmental Services* (2000) 528 U.S. 167, 190, 120 S. Ct. 693. In *Dowling v. MacMarin,*  
23 *Inc. et al.* (1998) 1998 U.S. App. Lexis 15146, the court held that a customer’s complaint  
24 alleging a violation of the ADA was moot because the customer was a private plaintiff who  
25 could only obtain injunctive relief and attorneys’ fees and the restaurant had made  
26 renovations bringing it into compliance with the ADA.<sup>4</sup>

27 <sup>4</sup> In *Dowling*, the Court also dismissed plaintiff’s state law claims. *Dowling v. MacMarin, Inc. et*  
28 *al.* supra, at 7-8.

1 In this case, RITE AID has presented evidence that it has addressed all of the alleged  
2 barriers claimed by plaintiffs' expert Reed Settle. RITE AID has presented evidence that it  
3 has either done remediation to address all of the alleged violations in plaintiffs' expert report  
4 or that RITE AID's own expert refutes the appropriateness and feasibility of the suggested  
5 remediation. See Exhibit G, Decl. of Musser, ¶¶ 4-17.

6 The RITE AID store is now completely ADA compliant – rendering plaintiffs' claims  
7 for injunctive relief moot. RITE AID has invited plaintiffs' counsel and/or expert to revisit  
8 the RITE AID store to see that it is now compliant. See Exhibit H.

9 **B. Plaintiffs May Attempt To Argue Barriers Still Exist Which Are RITE**  
10 **AID's Responsibility – However, No Barriers Attributable To RITE AID**  
11 **Exist:**

12 Plaintiffs may claim that the following items are not ADA and/or Title 24 compliant:

- 13 • Path of travel across "Parcel One" to Chase Street
- 14 • Path of travel in front of RITE AID store extending toward Vons
- 15 • Distribution of parking spaces

16 Except for these items disputed by the parties' experts, all other items mentioned by  
17 plaintiffs and or their expert Reed Settle have been addressed by RITE AID. See Exhibit G,  
18 Decl. of Musser, ¶ 4. As this Court stated in the January 20, 2005 Status Conference with  
19 counsel, the Court would disfavor plaintiff bringing up additional items of non-compliance  
20 not previously mentioned in pleadings, discovery or depositions. (Any additional small  
21 claims of non-compliance would merely be introduced to keep RITE AID from claiming  
22 plaintiffs' claims are moot and allowing this Court to dismiss plaintiffs claims for lack of  
23 subject matter jurisdiction in the federal courts).

24 **1. Path Of Travel:**

25 In RITE AID's letter to plaintiffs' counsel (See Exhibit H), RITE AID explained  
26 RITE AID does not own or lease "Parcel Two" at this location and the owner of "Parcel  
27 Two" Terra West was not named as a defendant in plaintiffs' action, either initially or after  
28 receiving the assessors records indicating ownership of "Parcel Two". The path of travel

1 across "Parcel Two" to Chase Street and the public sidewalk was mentioned by plaintiffs and  
2 plaintiffs' expert as being non-compliant with the ADA. In its February 2, 2005 letter, RITE  
3 AID explained that, although it had requested that Terra West make any required changes, it  
4 could not force Terra West to make the changes as RITE AID was not the owner of this  
5 property and Terra West was not a defendant in plaintiffs' action. Karen Altemose spoke to  
6 Terra West representatives asking them to make renovations to common areas and sending  
7 Terra West representatives' photographs of subject site. See also Exhibit K, photographs of  
8 subject site. See also Exhibit G, Decl. of Musser, ¶¶ 12-16 (authenticating photographs and  
9 stating the expert opinion that because the RITE AID store is a part of a larger complex of  
10 stores, all accessed from the public sidewalks surrounding the property by an internal private  
11 sidewalk and this private sidewalk is not controlled by RITE AID for its entire length and  
12 specifically where the private sidewalk connects to the public sidewalk, the entire retail  
13 center (not owned or controlled by RITE AID) must undergo repairs and redesigns of the  
14 private sidewalks in order to provide public access – the property controlled by RITE AID  
15 alone cannot provide this access).

16 According to *Alford v. City of Cannon Beach, et al.* (Dist. Or. 2002) 2002 U.S. Dist.  
17 LEXIS 2257, where a wine shop and bistro along with other businesses shared a common  
18 area including a public sidewalk, the court held that even though plaintiffs came up with a  
19 feasible and financially readily achievable proposal to fix a barrier which traveled across  
20 property not owned or leased by defendant, the plaintiffs were not entitled to the relief they  
21 sought without having brought the action against the landlord and anyone else with rights to  
22 the common areas. According to the court, the defendant was not required to build the  
23 access ramps when to do so would create a safety hazard because the ramps would have to  
24 extend into the common areas in order to maintain the prescribed slope. *Id.*

25 RITE AID is in the exact same position in this case. Plaintiffs failed to bring Terra  
26 West or any other tenants and/or owners of the shopping center into the instant litigation. As  
27 such, plaintiffs cannot require RITE AID to fix a barrier on property that it does not lease or  
28 ///

1 own. As was the case in *Alford*, RITE AID also cannot change the slope of the sidewalk in  
2 front of its store without altering the slope and/or installing ramps which would need to  
3 extend into the common areas. See Exhibit G, Decl. of Musser, ¶¶ 12-14.

4 Similarly, in *Pickern v. Pier 1 Imports, Inc.* (E.D. Cal. 2004) 339 F. Supp. 2d 1081, a  
5 case where the plaintiff was also represented by opposing counsel in this case, a retailer was  
6 sued for ADA violations, including path of travel across a city owned grass strip. In *Pickern*,  
7 the plaintiff proposed a path of travel solution including ramps across the city owned  
8 property. *Id.* The court held that because the grass strip was owned by the city, and the  
9 defendant did not exercise control over the land, defendant had no duty under the ADA to  
10 install ramps on the grass strip. *Id.* Defendant's motion for summary judgment was granted  
11 as to the federal claims and the court dismissed the state law claims for lack of jurisdiction.  
12 *Id.*

13 As was the case for defendants in both *Pickern* and *Alford*, RITE AID cannot remedy  
14 the path of travel issues to the public sidewalks and into common areas that it does not own  
15 or lease because it cannot make Terra West construct these ramps, even though RITE AID  
16 has requested their cooperation. If plaintiffs were really concerned about making sure that  
17 these ramps and path of travel issues were addressed, plaintiffs would have named Terra  
18 West as a defendant in their action, particularly because plaintiffs counsel represented the  
19 plaintiff in the *Pickern* action dealing with an analogous situation. Certainly, plaintiffs could  
20 access ownership records of all parcels in the shopping center just as RITE AID had done.<sup>5</sup>

## 21 2. Distribution Of Parking Spaces:

22 RITE AID has made renovations to the parking spaces on the property which it  
23 controls (Parcel 2), however, the entire retail center is obligated to provide accessible  
24 parking distributed throughout the site. See Exhibit G, Decl. of Musser, ¶ 14. (also stating  
25 that contrary to plaintiffs' expert Reed Settle's report, all accessible parking for the entire  
26 shopping center should not be concentrated just in front of the RITE AID store).

27 \_\_\_\_\_  
28 <sup>5</sup> Furthermore, although not required, RITE AID even provided this information to plaintiffs.

1 **III. AS INJUNCTIVE RELIEF IS NOW MOOT, THIS COURT SHOULD**  
2 **DISMISS PLAINTIFFS' FIRST CAUSE OF ACTION RELATED TO**  
3 **FEDERAL ADA LAW:**

4 Plaintiffs only bring one claim under federal law – their claim First Claim of  
5 Violation OF The Americans With Disabilities Act of 1990 (42 U.S.C. § 12182, et seq.).  
6 Plaintiffs' own complaint states "This Court has original jurisdiction under 28 U.S.C.  
7 §§1331 and 1343 for ADA claims and supplemental jurisdiction under 28 U.S.C. § 1367 for  
8 claims brought under parallel California law, arising from the same nucleus of operative  
9 facts and transactions." See plaintiffs' Complaint, pg. 4, lines 7-10.

10 The ADA only offers the remedy of injunctive relief and attorneys fees. Monetary  
11 damages are not available to a private plaintiff under the ADA. *Boemio v. Love's Restaurant*  
12 (S.D. Cal. 1997) 954 F. supp. 204, 207 (referencing Section 204(a) of the Civil Rights Act of  
13 1964 allowing for remedies of injunctive relief and attorneys fees). See also *Jankey v.*  
14 *Twentieth Century Fox Film Corp.* (C.D. Cal. 1998) 14 F. Supp. 2d 1174, 1179 (holding that  
15 when injunctive relief was no longer needed, the sole remedy available to plaintiff for his  
16 federal claims (violations of the ADA) had already been provided, rendering plaintiff's  
17 claims under the ADA moot).

18 **A. Dismissal For Lack Of Subject Matter Jurisdiction (Rule 12(b)(1):**

19 A motion for dismissal based on a lack of subject matter jurisdiction made by made at  
20 any time in a case (either by a party or by the court) pursuant to Fed. Rule of Civil Procedure  
21 12(b)(1). 2 Moores Fed. Practice (3<sup>rd</sup> ed.) § 12.30[1]. The district court must determine  
22 questions of subject matter jurisdiction first, before determining the merits of the case. *Id.*  
23 The court need not confine its evaluation to the face of the pleadings, but may review or  
24 accept any evidence, such as affidavits, or it may hold an evidentiary hearing. *Id.* at §  
25 12.30[3]. A district court may hear evidence and make findings of fact necessary to rule on  
26 the subject matter jurisdiction before trial, if the jurisdictional facts are not intertwined with  
27 the merits. *Id.* See also *Rosales v. United States* (9<sup>th</sup> Cir. 1990) 824 F. 2d 799, 803 (district  
28 court may hear evidence to rule on subject matter jurisdiction before trial). When the

1 jurisdictional facts are too intertwined with the merits to permit determination to be made  
2 independently, the court should either employ the standard applicable to a motion for  
3 summary judgment (if the material jurisdictional facts are undisputed) or leave the  
4 jurisdictional determination to trial.

5 When a court reviews a complaint under a factual attack (in this case whether or not  
6 injunctive relief per the ADA is moot), the allegations have no presumptive truthfulness, and  
7 the court must weigh the evidence and has discretion to allow affidavits, documents, and  
8 even a limited evidentiary hearing to resolve disputed jurisdictional facts. *Id.* at § 12.30[4].

9 When the attack is factual “the trial court may proceed as it never could under [Rule]  
10 12(b)(6) or [Rule] 56. *Id.* Because a factual Rule 12(b)(1) motion involves the court’s “very  
11 power to hear the case” the court may weigh the evidence to confirm its jurisdiction. *Id.*  
12 “No presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed  
13 material facts does not preclude the trial court from evaluating for itself the merits of  
14 jurisdictional claims. *Id.* (citing *Biotics Research Corp. v. Heckler* (9<sup>th</sup> Cir. 1983) 710 F. 2d  
15 1375, 1379 (consideration of matters outside pleadings does not covert Fed. R. Civ. P.  
16 12(b)(1) motion into one for summary judgment”). Once challenged, the party asserting  
17 subject matter jurisdiction has the burden of proving its existence. *Id.* at § 12.30[5].

18 Because plaintiffs’ claims under federal law are now moot (i.e., RITE AID is n ADA  
19 compliance), this court now lacks jurisdiction to hear plaintiffs’ ADA claims.

20 **B. Dismissal For Failure To State A Claim Upon Which Relief Can Be**  
21 **Granted (Rule 12(b)(6)):**

22 A motion to dismiss for failure to state a claim upon which relief can be granted is  
23 provided in Fed. Rule of Civ. Proc. 12(b)(6). 11.Moores Fed. Practice (3<sup>rd</sup> ed.) § 56.30 [4].  
24 When a party moves pursuant to Rule 12(b)(6) for dismissal for failure to state a claim and  
25 invokes material outside the four corners of plaintiff’s complaint, the court converts the Rule  
26 12(b)(6) motion to a Rule 56 motion for summary judgment. *Id.*

27 If the Court is unable to grant RITE AID’s motion to dismiss pursuant to Rule  
28 12(b)(1), RITE AID requests that the Court consider its motion to dismiss pursuant to Rule

1 12(b)(6) by converting it to a motion for summary judgment so that the Court can consider  
2 evidence presented by RITE AID that the store has been renovated and no other injunctive  
3 relief should be or could be ordered by this Court, rendering plaintiffs' claims for injunctive  
4 relief pursuant to the ADA moot. In such a conversion, RITE AID acknowledges that this  
5 Court must give all parties reasonable opportunity to present all material made pertinent to  
6 such a motion by Rule 56. See 11 Moores Fed. Practice (3<sup>rd</sup> ed.) § 56.30 [4].  
7

8 **IV. THIS COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL**  
9 **JURISDICTION OVER PLAINTIFFS' STATE LAW CLAIMS:**

10 Once this Court determines that plaintiffs' First Cause Of Action pursuant to the ADA  
11 for injunctive relief is now moot and should be dismissed, this Court can decline to exercise  
12 supplemental jurisdiction over plaintiffs' California state law claims pursuant to 28 U.S.C. §  
13 1367(c)(3).

14 The fact that an Americans With Disabilities Act (ADA) 42 U.S.C. § 12101, et seq.,  
15 violation may serve as an element of a state law claim does not automatically confer federal  
16 question jurisdiction. *Pickern v. Best W. Timber Cove Marina Resort* (E.D. Cal. 2002) 194  
17 F. Supp. 2d 1128, 1131. "Unlike the California Disabled Persons Act and the Unruh Civil  
18 Rights Act, both of which provide damages for violations, the only remedy available to a  
19 private plaintiff under the ADA is injunctive relief." 42 U.S.C. § 12188(a)(2). *Id.*

20 In *Merrell Dow Pharmaceuticals, Inc. v. Thompson* (1986) 478 U.S. 804, 814, 106  
21 S.Ct. 3229, the Supreme Court Reasoned that a determination by Congress that there should  
22 be no federal remedy for the violation of a federal statute "is tantamount to a congressional  
23 conclusion that the presence of a claimed violation of the statute as an element of a state  
24 cause of action is insufficiently "substantial" to confer federal-question jurisdiction." *Id.*  
25 See also *Pickern v. Stanton's Restaurant & Woodsman* (N.D. Cal. 2002) 2002 U.S. Dist.  
26 Lexis 1587, 3 (extending the reasoning in *Merrell* to circumstances where the parties settled  
27 their ADA claim, leaving the state law claims for damages and attorneys fees outstanding  
28 and the court concluded that the allegations of ADA violations as an element of a state claim



1 for damages were insufficient to support federal question jurisdiction). In *Pickern v. Best W.*  
2 *Timber*, the court concluded that it had supplemental, not federal question, jurisdiction over  
3 the state law claims for damages pursuant to 28 USC § 1367(a) and declined to exercise  
4 supplemental jurisdiction. *Pickern v. Best W. Timber Cove Marina Resort*, supra, 194 F.  
5 Supp. 2d at 1133.

6 In *Wander v. Kaus* (9<sup>th</sup> Cir. 2002) 304 F. 3d 856, a matter where opposing counsel  
7 Lynn Hubbard III and Scottlyn Hubbard also represented the plaintiff, the Ninth Circuit  
8 Court upheld the United States District Court for the Eastern District of California's decision  
9 dismissing plaintiff's claim for injunctive relief under Title III of the ADA as moot and  
10 dismissing the remaining claims under the California Disabled Persons Act for lack of  
11 subject matter jurisdiction. *Id.* In *Wander*, the court held that damages are not recoverable  
12 under the ADA, only injunctive relief. *Id.* at 858. The court also held that federal-question  
13 jurisdiction over a state-law claim is not created just because a violation of federal law is an  
14 element of the state law claim. *Id.*

15 Under 28 U.S.C. § 1367(c)(3), the court has discretion to dismiss state law claims  
16 when it has dismissed all of plaintiff's federal claims. *Id.* Factors for the court to consider in  
17 deciding whether to dismiss supplemental state claims include economy, convenience,  
18 fairness, and comity. *Id.* (citing *Imagineering, Inc. v. Kiewit Pacific Co.* (9<sup>th</sup> Cir. 1992) 976  
19 F. 2d 1303, 1309. "In the usual case in which federal law claims are eliminated before trial,  
20 the balance of factors . . . will point toward declining to exercise jurisdiction over the state  
21 law claims." *Id.* (citing *Reynolds v. County of San Diego* (9<sup>th</sup> Cir. 1996) 84 F. 3d 1162,  
22 11171, overruled on other grounds by *Acri v. Varian Assoc.'s, Inc.* (9<sup>th</sup> Cir. 1997) 114 F. 3d  
23 999, 1000).

24 Even plaintiffs' counsel admitted in the January 20, 2005 appearance before this  
25 Court that the Court could decline to exercise supplemental jurisdiction over their case if the  
26 Court found plaintiffs' ADA claims for injunctive relief moot. RITE AID respectfully  
27 requests that the Court decline supplemental jurisdiction and dismiss plaintiffs' remaining  
28 state law causes of action.

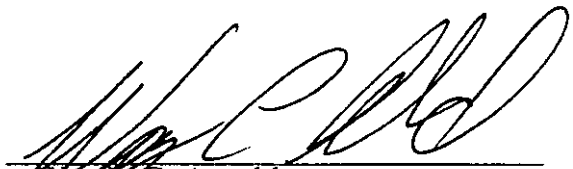
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V. CONCLUSION:

For all of the foregoing reasons, RITE AID respectfully requests that this Court dismiss plaintiffs' first cause of action related to the ADA and decline to exercise supplemental jurisdiction over plaintiffs' remaining state law causes of action thereby dismissing plaintiffs' entire complaint.

Dated: March 9, 2005

HART, KING & COLDREN

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