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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

**TRIPPLE AAA ASSOCIATION FOR
CHILDREN AND ADULTS WITH
DEVELOPMENTAL DISABILITIES**

Plaintiffs,

v.

**FIG HOSPITALITY INC DBA BANANA
BUNGALOW; SECURITY TITLE
INSURANCE (CO TR) NO P T 1480; And
DOES 1 THROUGH 10, Inclusive**

Defendants.

Case No.: **06 CV 2785**

BEN BLM

CLASS ACTION

CIVIL COMPLAINT:
DISCRIMINATORY PRACTICES IN
PUBLIC ACCOMMODATIONS

**[42 U.S.C. 12182(a) ET. SEQ; CIVIL CODE
51, 52, 54, 54.1]**

DEMAND FOR JURY TRIAL
[F.R.Civ.P. rule 38(b)]

INTRODUCTION

Plaintiffs 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

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1 funding and promoting voluntary compliance efforts. Further, empirical research shows when individuals
2 with disabilities give actual notice of potential access problems to places of public accommodation without
3 a federal civil rights action, the public accommodations do not remove the access barriers. Therefore,
4 Plaintiffs make the following allegations in this federal civil rights action:

5 **JURISDICTION AND VENUE**

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

11 **SUPPLEMENTAL JURISDICTION**

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

24 **NAMED DEFENDANTS AND NAMED PLAINTIFF**

25 3. Defendants are, and, at all times mentioned herein, were, a business or corporation or franchise
26 organized and existing and/or doing business under the laws of the State of California. Plaintiffs are further
27 informed and believe and thereon allege that Defendants **FIG HOSPITALITY INC DBA BANANA**
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1 **BUNGALOW; SECURITY TITLE INSURANCE (CO TR) NO P T 1480** are the owners, operators,
2 and/or lessors of the real property, as well as the business operated thereon. As to Defendants and the
3 property the public record reveals:

4 **FIG HOSPITALITY INC DBA BANANA BUNGALOW AKA BANANA BUNGALOW HOSTEL SAN**
5 **DIEGO**

6 **858-273-3060**

7 **707 REED AVENUE**

8 **SAN DIEGO CA 92109**

9
10 **COMPANY NAME: FIG HOSPITALITY, INC.**

11
12 **MAILING ADDRESS:**

13 **724 OLIVER AVE**

14 **SAN DIEGO, CA 92109**

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17 **TYPE: ARTICLES OF INCORPORATION (DOMESTIC)**

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19 **STATUS: ACTIVE**

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21 **FTB STATUS:**

22 **SUSPENSION CODE: NOT SUSPENDED (IN GOOD STANDING)**

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25 **DATE OF INCORPORATION/QUALIFICATION: 8/31/2004**

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27 **REGISTERED AGENT: FRANCES I. GARCIA**
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REGISTERED OFFICE:

724 OLIVER AVE

SAN DIEGO, CA 92109

OWNER: SECURITY TITLE INSURANCE (CO TR) NO P T 1480

MAILING ADDRESS: P O BOX 121589, SAN DIEGO, CA 92112

PROPERTY ADDRESS: 707 REED AVE, SAN DIEGO, CA 92109-3961

ASSESSOR'S PARCEL NUMBER: 423-211-21

4. The words "Plaintiffs" and "Plaintiff's Member" as used herein specifically include the organization and TRIPPLE AAA ASSOCIATION FOR CHILDREN WITH DEVELOPMENTAL DISABILITIES and persons associated with its Members who accompanied Members to Defendants' facilities. Defendants Does 1 through 10, were at all times relevant herein subsidiaries, employers, employees, agents, of **FIG HOSPITALITY INC DBA BANANA BUNGALOW; SECURITY TITLE INSURANCE (CO TR) NO P T 1480**. Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as Does 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiffs will pray leave of the court to amend this complaint to allege the true names and capacities of the Does when ascertained.

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

STATEWIDE CLASS ACTION ALLEGATIONS UNDER FED.R.CIV.P. 23(b) AS TO ALL DEFENDANTS

6. Plaintiffs are members of a group within the State of California composed of persons with a wide

1 range of disabilities, limited to persons who use wheelchairs for mobility, who must be able to access retail
2 merchandise establishments, like Defendants' establishments located within the facility in which **FIG**
3 **HOSPITALITY INC DBA BANANA BUNGALOW; SECURITY TITLE INSURANCE (CO TR) NO**
4 **P T 1480** is located. Plaintiffs are precluded from equal access to Defendants' establishment so
5 meaningfully because the establishment fails to provide access for members of the disability community
6 who use a wheelchair for mobility to disabled parking facilities, exterior path of travel facilities, entrance
7 facilities, interior path of travel facilities, and display facilities. The Supreme Court of the United States
8 has held as long as the class representative provides adequate representation for the class' interests, the
9 court has the power to adjudicate the rights and obligations of all class members – even those who would
10 otherwise be beyond the reach of its personal jurisdiction. Phillips Petroleum Co. v. Shutts, 472 US 797
11 (1985). This case stands for the proposition that minimum contacts are not required with nonresident
12 members of a plaintiff class because, “the burdens placed by a State upon absent class action plaintiff are
13 not of the same order or magnitude as those it places on an absent defendant.” Id. Plaintiffs allege they
14 will insure class members shall receive adequate notice of the proceedings and the opportunity to “opt out,”
15 if required. Defendants have conducted themselves such as to establish a pattern and practice of
16 architectural discrimination. Plaintiffs allege that Defendants have control over each and every facility,
17 establishment, and/or business located within the Defendant Landlords' facilities in which Defendant **FIG**
18 **HOSPITALITY INC DBA BANANA BUNGALOW; SECURITY TITLE INSURANCE (CO TR) NO**
19 **P T 1480** is located. Accordingly, Plaintiffs allege Defendants are responsible for removing architectural
20 barriers at Defendants' facilities and the establishment/business contained therein. For the aforementioned
21 reasons, Plaintiffs allege they are proper class representatives for members of the disability community who
22 use a wheelchair for mobility because the members of the disability community who use a wheelchair for
23 mobility are so numerous that joinder is impracticable due to the fact more than one hundred (100) persons
24 fall within the membership description. Also, the questions of law or fact are so common because the
25 members of the disability community who use a wheelchair for mobility are being denied their civil rights
26 under federal and state laws – that is, each member of the disability community who use a wheelchair for
27 mobility suffered substantially similar violations relating to exterior path of travel facilities, entrance
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1 facilities, restrooms, interior path of travel facilities, and display facilities. Further, the claims or defenses
2 of the representative parties are typical – Plaintiffs have the right to access facilities, establishments, and
3 businesses like those within the facility in which Defendant **FIG HOSPITALITY INC DBA BANANA**
4 **BUNGALOW; SECURITY TITLE INSURANCE (CO TR) NO P T 1480** is located for many reasons
5 such as the purchase of retail merchandise. Defendants’ facilities are open to the general public and
6 Plaintiffs have been denied access because of violations, as outlined above and specifically addressed
7 elsewhere within this Complaint. Additionally, Plaintiffs, as the named representatives, will fairly and
8 adequately represent the interests of the class because Plaintiffs and the members of the disability
9 community in the State of California who use a wheelchair for mobility have suffered substantially similar
10 violations. Finally, a pattern and practice exists on the part of Defendants, and each of them, of
11 architectural discrimination at their public facilities located within the State of California. On information
12 and good faith belief, Plaintiffs thereon allege that Defendants, prior to the passing of the Americans With
13 Disabilities Act in 1992, conceived, commissioned, designed, and implemented among other things, a
14 design for their public facilities, including, but not limited to disabled parking facilities, exterior path of
15 travel facilities, restroom, entrance facilities, interior path of travel facilities, and display facilities, which
16 do not meet the minimal standards outlined under the federal regulations known as the Americans With
17 Disabilities Act Accessibility Guidelines (“ADAAG”) and state regulations, also known as Title 24 of the
18 California Building Code, and to which non-compliant plan they continue to utilize to the injury of the
19 members of the class. For these reasons and the facts as stated herein, Plaintiffs have the right to maintain
20 this statewide class action pursuant to Fed.R.Civ.P. Rule 23(b).

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22 **CONCISE SET OF FACTS**

23 7. In 2006, Plaintiff’s Member went to the **FIG HOSPITALITY INC DBA BANANA**
24 **BUNGALOW; SECURITY TITLE INSURANCE (CO TR) NO P T 1480**. As Said Member is unable
25 to walk Plaintiff’s Member uses a wheelchair. Plaintiff’s Member experienced architectural barriers at the
26 place at which impeded his access. Plaintiff can prove these barriers as Plaintiff conducted a survey of
27 Defendants’ facility and Plaintiff’s counsel will provide it to competent defense counsel. Plaintiff’s
28 Members allege its visually and hearing impaired members desire to go to Defendants’ facility but cannot

1 because of lack of auxiliary aids. Plaintiffs specifically allege that Defendants knew, to a substantial
2 certainty, that the architectural barriers precluded wheelchair access. First, Plaintiffs will prove that
3 Defendants had actual knowledge that the architectural barriers precluded wheelchair access - that it would
4 be hard to believe that noncompliance with ADAAG as to accessible entrances could be other than
5 intentional. Second, due to the abundance of ADA information and constant news covers of ADA lawsuits,
6 Defendants had actual knowledge of the ADA and decided deliberately not to remove architectural barriers.
7 Third, Defendants have no plans to remodel. Fourth, it would be hard to believe that Defendants did not
8 have actual knowledge of ADA given all the ADA public awareness campaigns, the abundance of free
9 ADA information and the media's constant ADA coverage. Fifth, a human being acting for the defendants
10 made a conscious decision as to how to proceed given the presence of the architectural barriers. Plaintiffs
11 allege any alternative methods preclude integration of wheelchair patrons, as it requires them to use a
12 second-class entrance. Also, expert testimony will show the facility contained inaccessible features.
13 Plaintiffs allege businesses often state that they have few customers with disabilities. Plaintiffs allege such
14 customers avoid patronizing inaccessible business and are deterred from patronizing such businesses. The
15 courts have recognized deterrence-based damage claims under Civil Code 54.3 and 52. Since California
16 courts have held that the California disability access laws manifest an intent on the part of the legislature
17 that they be interpreted in a manner that maximizes incentives for compliance, (see Donald, 266 Cal. Rptr.
18 at 808-11) the courts conclude that application of this canon of construction requires that 54.1 and 51, and
19 their respective damages provisions, 54.3 and 52, be interpreted as extending to claims based on incidents
20 of deterrence. The courts therefore hold that where a plaintiff can prove that violations of applicable
21 California disability access standards deterred her on a particular occasion from attempting to attend a place
22 of public accommodation, that plaintiff states a claim for relief under California Civil Code 54.1 and 51
23 and, in particular, for damages, under 54.3 and 52. Plaintiffs allege people with disabilities still face
24 systemic discrimination each and every day. One of the most debilitating forms of discrimination is
25 segregation imposed by others. Discrimination also includes exclusion, or denial of benefits, services, or
26 other opportunities that are as effective and meaningful as those provided to others. Discrimination results
27 from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also
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1 includes harms resulting from the construction of transportation, architectural, and communication barriers
2 and the adoption or application of standards and criteria and practices and procedures based on
3 thoughtlessness or indifference-of benign neglect. Discrimination also includes harms affecting individuals
4 with a history of disability, and those regarded by others as having a disability as well as persons associated
5 with such individuals that are based on false presumptions, generalizations, misperceptions, patronizing
6 attitudes, ignorance, irrational fears, and pernicious mythologies. Discrimination also includes the effects a
7 person's disability may have on others. The ADA aim is: (1) To provide a clear and comprehensive
8 national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to
9 provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with
10 disabilities. (42 U.S.C. § 12101(b)(1), (2) (Supp. II 1990)) Plaintiffs allege the legislative history of the Act,
11 which reflects congressional, concerns over the deleterious effects of discrimination against people with
12 disabilities. As a result, Congress incorporated within Title II of the ADA the remedial provision in Section
13 504 of the Rehabilitation Act of 1973. (As amended 29 U.S.C. § 794a)(42 U.S.C. § 12133)(See *Smith v.*
14 *Barton*, 914 F.2d 1330, 1336 (9th Cir. 1990), cert. denied, 111 S.Ct. 2825 (1991)) Much has been written
15 recently about the ADA and its mechanisms of enforcement. (See e.g., *Doran v. Del Taco, Inc.*, ---
16 F.Supp.2d ---- (C.D. Cal. June 9, 2005); *Molski*, 347 F.Supp.2d at 862-63; *Parr v. L & L Drive-Inn*
17 *Restaurant*, 96 F.Supp.2d 1065, 1070-71 (D.Haw.2000)) For purposes of this suit, it is sufficient to note
18 that the statute creates a private right of action through which a litigant may seek injunctive relief as well as
19 attorneys' fees and costs. (42 U.S.C. § 2188(a)) Plaintiffs allege that it cannot be said that because an
20 attorney has chosen to specialize in an area, which provides statutory attorneys fees his practice is
21 necessarily suspect. Class actions, antitrust, and consumer protection statutes are just some of the examples
22 where the legislature has made a determination that society will benefit from private attorneys general. The
23 ADA is but another example. Plaintiff TRIPPLE AAA ASSOCIATION FOR CHILDREN WITH
24 DEVELOPMENTAL DISABILITIES is an organization that advocates on the behalf of children and others
25 with disabilities specifically including adults who use wheelchairs when their civil rights and liberties have
26 been violated. Plaintiff's Member visited the place in 2006 and plans on returning to the place and he
27 encountered architectural barriers there. Association standing requires that (1) its members would otherwise
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1 have standing to sue in their own right, (2) the interests the association seeks to protect are germane to the
2 organization's purpose and (3) neither the claim asserted nor the relief requested requires the participation
3 of individual members. *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343; *Greater*
4 *Los Angeles Council On Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1358 (9th Cir. 1987). Plaintiffs have
5 standing to bring this action. Plaintiff Association has at least four members who use wheelchairs as they
6 cannot walk at all. The purpose of the Association is to fight to remove access and architectural barriers.

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8 8. Plaintiff's Member has a physical impairment and due to this impairment he has learned to
9 successfully operate a wheelchair. Plaintiff's Member and Plaintiff(s) has physical impairments because her
10 conditions affect one or more of the following body systems: neurological, musculoskeletal, special sense
11 organs, and/or cardiovascular. Further, Plaintiff's Member and Plaintiff(s) said physical impairments
12 substantially limits one or more of the following major life activities: walking. In addition, Plaintiff's
13 Member and Plaintiff(s) cannot perform one or more of the said major life activities in the manner, speed,
14 and duration when compared to the average person. Moreover, Plaintiff's Member and Plaintiff(s) has a
15 history of or has been classified as having a physical impairment as required by 42 U.S.C. § 12102(2)(A).

16 9. Plaintiff's Members expressly intend to patronize the establishment and the property that is the
17 subject of this Complaint in the immediate future.

18 10. When Plaintiff's Member researched Defendants' facilities, he discovered he would be unable to
19 use the public accommodations' at Defendants' business establishment because they failed to comply with
20 ADA Access Guidelines For Buildings and Facilities (hereafter referred to as "ADAAG") and/or
21 California's Title 24 Building Code Requirements as specified herein. Defendants failed to remove access
22 barriers within the parking, exterior path of travel and entrance public accommodations of Defendants'
23 establishment. Plaintiff's Member was deterred from patronizing the facility because he experienced
24 difficulty using the parking, exterior path of travel and entrance access barriers at Defendants' facility.

25 11. The architectural regulations or "design standards" implemented by the federal ADA are often
26 referred to in the literature as "ADAAGs," which is an acronym for "ADA Architectural Guidelines." (See
27 *Independent Living I*, 982 F. Supp. at pp. 707-708 ["The guidelines issued by the Access Board are
28 denominated the 'ADA Accessibility Guidelines' ('ADAAG.') The design standards enacted by the Attorney

1 General are identical to the ADAAGs, but are denominated as 'Standards.' Despite the technical distinction,
2 the two terms are often used interchangeably."]; *Access Now, Inc. v. Ambulatory Surgery Center Group,*
3 *Ltd. (S.D. Fla. 2001) 146 F. Supp. 2d 1334, 1336* ["These guidelines are called ... ("ADAAG")"].) The
4 "ADAAGs" are found in Appendix A to Part 36 of title 28 of the Code of Federal Regulations. The
5 ADAAG violations alleged here are basically so intuitive that it would be hard to believe that
6 noncompliance with them could be other than intentional.

7 12. Plaintiff(s) was deterred from patronizing the facility due to the alleged ADA violations and/or
8 alleged architectural barriers outlined in Paragraphs 10 through 11 above.

9 13. While Plaintiff's Member expressly wants to patronize Defendant's establishment and the property
10 that is the subject of this Complaint in the immediate future, Plaintiff and Plaintiff's Member is expressly
11 deterred from returning to the establishment and the property that is the subject of this Complaint due to the
12 existence of the architectural barriers outlined above in Paragraphs 10 through 11.

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

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

2 16. Based on these facts, Plaintiffs allege Plaintiff's Member and Plaintiff(s) were discriminated
3 against each time he patronized Defendants' establishment. Plaintiff's Member was extremely upset due to
4 Defendants' conduct.

5 **NOTICE**

6 17. Plaintiffs are not required to provide notice to the defendants prior to filing a complaint. (See
7 *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir 2000))
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9 **WHAT CLAIMS ARE PLAINTIFFS ALLEGING AGAINST EACH NAMED DEFENDANT**

10 18. **FIG HOSPITALITY INC DBA BANANA BUNGALOW; SECURITY TITLE INSURANCE**
11 **(CO TR) NO P T 1480**; and Does 1 through 10 will be referred to collectively hereinafter as "Defendants."

12 19. Plaintiffs aver that the Defendants are liable for the following claims as alleged below:
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14 **DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS**

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

17 **Claim I**

18 19. Based on the facts stated above, Defendants discriminated against Plaintiffs on the basis of
19 disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or
20 accommodations of any place of public accommodation as Defendants own, lease (or lease to), or operate
21 a place of public accommodation in violation of 42 U.S.C. §12182.
22

23 **Claim II**

24 20. Based on the facts stated above, Defendants discriminated against Plaintiffs directly, or through
25 contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to
26 participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of
27 an entity in violation of 42 U.S.C. §12182.

28 **Claim III**

1 21. Based on the facts stated above, Defendants discriminated against Plaintiffs as it is discriminatory
2 to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual
3 or class, directly, or through contractual, licensing, or other arrangements with the opportunity to
4 participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not
5 equal to that afforded to other individuals in violation of 42 U.S.C. §12182.

6 Claim IV

7 22. Based on the facts stated above, Defendants discriminated against Plaintiffs as it is discriminatory
8 to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual
9 or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility,
10 privilege, advantage, or accommodation that is different or separate from that provided to other individuals.

11 Claim V

12 23. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants failed to
13 afforded to an individual with a disability in the most integrated setting appropriate to the needs of the
14 individual in violation of 42 U.S.C. §12182.

15 Claim VI

16 24. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants utilized
17 standards or criteria or methods of administration that have the effect of discriminating on the basis of
18 disability; or that perpetuate the discrimination of others who are subject to common administrative control
19 in violation of 42 U.S.C. §12182.

20 Claim VII

21 25. Based on the facts stated above, Defendants discriminated against Plaintiffs as it is discriminatory
22 to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or
23 other opportunities to an individual or entity because of the known disability of an individual with whom
24 the individual or entity is known to have a relationship or association in violation of 42 U.S.C. §12182. See
25 *Niece v. Fitzner* 922 F. Supp. 1208 (1996)

26 Claim VIII

27 26. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants engaged
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1 in the following specific prohibitions: (i) the imposition or application of eligibility criteria that screen out
2 or tend to screen out an individual with a disability or any class of individuals with disabilities from fully
3 and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such
4 criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges,
5 advantages, or accommodations being offered; (ii) a failure to make reasonable modifications in policies,
6 practices, or procedures, when such modifications are necessary to afford such goods, services, facilities,
7 privileges, advantages, or accommodations to individuals with disabilities;

8 27. (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is
9 excluded, denied services, segregated or otherwise treated differently than other individuals because of the
10 absence of auxiliary aids and services; (iv) a failure to remove architectural barriers, and communication
11 barriers that are structural in nature, in existing facilities in violation of 42 U.S.C. §12182.

12 Claim IX

13 28. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendant failed to
14 demonstrate that the removal of a barrier is not readily achievable, and made such goods, services,
15 facilities, privileges, advantages, or accommodations available through alternative methods in a segregated
16 manner in violation of 42 U.S.C. §12182.

17 Claim X

18 29. Based on the facts stated above, Defendants discriminated against Plaintiffs as Defendants altered
19 the use of their establishment in a manner that affected or could have affected the usability of the facility or
20 part thereof and failed to make alterations in such a manner that, to the maximum extent feasible, the
21 altered portions of the facility are readily accessible to and usable by individuals with disabilities, including
22 individuals who use wheelchairs in violation of 42 U.S.C. §12183.

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25 30. WHEREFORE, Plaintiffs pray for judgment and relief as hereinafter set forth.

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

28 CLAIM I: Denial Of Full And Equal Access

1 31. Based on the facts plead at ¶¶ 6-16 above and elsewhere in this complaint, Plaintiff's Member and
2 Plaintiff(s) was denied full and equal access to Defendants' goods, services, facilities, privileges,
3 advantages, or accommodations within a public accommodation owned, leased, and/or operated by
4 Defendants as required by Civil Code Sections 54 and 54.1. Defendants' facility violated California's Title
5 24 Accessible Building Code by failing to provide access to Defendants' facilities due to violations
6 pertaining to the Space Allowance and Reach Ranges, Accessible Route, Protruding Objects, Ground and
7 Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform
8 Lifts (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains and Water Coolers, Water
9 Closets, Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and Controls
10 and Operating Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones. These violations
11 denied Plaintiff's Member and Plaintiff(s) full and equal access to Defendants' facility. Thus, Plaintiff's
12 Member and Plaintiff(s) was subjected to discrimination pursuant to Civil Code §§ 51, 52, and 54.1 because
13 Plaintiff's Member and Plaintiff(s) was denied full, equal and safe access to Defendants' facility, causing
14 severe emotional distress. The Disabled Persons Act is found in *sections 54* of the Civil Code, and has been
15 around in some form on the statute books since the late 1960's--more than 20 years before the federal ADA.
16 (See Stats. 1968, ch. 461.) The Disabled Persons Act begins with the statement in *subdivision (a) of section*
17 *54* that "Individuals with disabilities or medical conditions have the same right as the general public to the
18 full and free use of ... public facilities, and other public places." (*β 54, subd. (a).*) *Section 54* is immediately
19 followed by *section 54.1, subdivision (a)(3)* of which--in contrast to the more spartan reference to the ADA
20 in *section 51*--specifically incorporates ADA *regulations*. The enforcement of *section 54* is to be found in
21 *section 54.3. Subdivision (a)(3) of section 54.1* provides: " 'Full and equal access,' for purposes of this
22 section in its application to transportation, means access that meets the standards of Titles II and III of the
23 Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant
24 thereto, except that, if the laws of this state prescribe higher standards, it shall mean access that meets those
25 higher standards." *Subdivision (a) of section 54.3* provides in its entirety: "Any person or persons, firm or
26 corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in
27 *Sections 54 and 54.1* or otherwise interferes with the rights of an individual with a disability under *Section*
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1 54, 54.1, and 54.2 is liable for each offense for the actual damages and any amount as may be determined
2 by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages
3 but in no case less than one thousand dollars (\$ 1,000), and attorney's fees as may be determined by the
4 court in addition thereto, suffered by any person denied any of the rights provided in *Sections 54, 54.1, and*
5 *54.2.* 'Interfere' for purposes of this section, includes, but is not limited to, preventing or causing the
6 prevention of a guide dog, signal dog, or service dog from carrying out its functions in assisting a disabled
7 person." *Section 54.3* was construed in the 1990 *Cafe Royale* decision as providing for strict liability--that
8 is, liability without any need for intentional conduct--prior to the 1992 legislation which added both
9 *subdivision (f) to section 51 and subdivision (c) of section 54* (back then in the context of the minimum
10 penalty under *section 54.3* which was \$ 250; now it is \$ 1,000). *Cafe Royale* was a case decided prior to the
11 enactment of the ADA, and contains not a word about federal law. It was also decided exclusively under
12 *Civil Code section 54 et seq.*, and contains not one word on the Unruh Act. In *Cafe Royale*, a wheelchair
13 user (a former deputy Attorney General and member of the Attorney General's task force on disability)
14 discovered that he could not reach the main dining area of a tiered restaurant on his own, though the
15 restaurant offered to lift him up the stairs. He declined an offer of help because it would attract attention
16 and because he might be dropped in the process of being bodily picked up and moved. He sued the
17 restaurant under *section 54.3* because of the absence of ramps or elevators to the second-tiered area. The
18 restaurant thought that it had complied with the law because its architect thought, based on an informal
19 conversation with an employee of the San Francisco building department, that a certain number of
20 handicapped seating places was "all that was needed for compliance." (See *id. at p. 174.*) The building
21 department employee, however, gave the restaurant architect erroneous advice. In fact, the State Building
22 Standards Code (required by *Government Code section 4450 et seq*) provided that all floors of a restaurant
23 be on a common level or else accessible by either ramps or elevators. While a hardship exemption might be
24 obtained, 75 percent of the main dining area would still need to be handicap accessible, and the *Cafe*
25 *Royale's* option of seating wheelchair patrons in the bar or having them carried to the common area was a
26 violation. On appeal, the fact of the violation was understood by all parties: "All parties agreed that *Cafe*
27 *Royale's* seating capacity was in violation of the handicap access requirements." (*Cafe Royale, supra, 218*
28

1 *Cal. App. 3d at p. 174.*) Hence issue was joined as to whether the restaurant's "good faith" belief that it was
 2 "in compliance" (*ibid.*) was sufficient to deny the patron recovery under *section 54.3*. The trial court
 3 thought so, but the appellate court disagreed. The appellate court reasoned thusly: the fact that *section 54.3*
 4 said a person who "denies or interferes with admittance to or enjoyment of the public facilities as specified
 5 in *section 54* and *54.1* ... is liable for each offense ... but in no case less than two hundred fifty dollars (\$
 6 250)" The court said: "The plain meaning of this language is that ordinarily minimum statutory damages
 7 in the amount of \$ 250 must be awarded for a denial of equal access in violation of *section 54 et seq.*,
 8 *notwithstanding the defendant's intent.*" (*Id. at p. 177.*) The *Cafe Royale* court reasoned that an
 9 interpretation of *section 54.3* that included an element of intentional violation would, because the level of
 10 compliance would diminish, yield "a result that is clearly repugnant to the statutory purpose." Further, the
 11 *Donald* case held a Plaintiff need not visit the facility to sue for compliance. (*Id. at pp. 179-180.*) So the trial
 12 court reversed the trial court judgment awarding the plaintiff nothing, and concluded that he was entitled to
 13 the \$ 250 statutory minimum. (See *id. at pp. 180-181.*) *Café Royale* applies here. Thus, Defendants' good
 14 faith efforts, if any, are irrelevant as is any reliance on a city building inspector.

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

16 32. Based on the facts plead at ¶¶ 6-16 above and elsewhere herein this complaint, Defendants failed
 17 and refused to provide a reasonable alternative by modifying its practices, policies, and procedures in that
 18 they failed to have a scheme, plan, or design to assist Plaintiffs and/or others similarly situated in entering
 19 and utilizing Defendants' services as required by Civil Code § 54.1. Thus, Plaintiff's Member and
 20 Plaintiff(s) were subjected to discrimination in violation of Civil Code § 54.1.

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

22 33. Based on the facts plead at ¶¶ 6-16 above and elsewhere herein this complaint and because
 23 Defendants violated the Civil Code § 51 by failing to comply with 42 United States Code §
 24 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did and continue to knowingly discriminate
 25 against Plaintiffs and persons similarly situated in violation of Civil Code §§ 51, 52, and 54.1. Plaintiffs
 26 allege the access violations alleged here are so obvious as to implicate at least a prima facie case of
 27 discriminatory intent.
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34. Based on the facts plead at ¶¶ 6-16 above, Claims I, II, and III of Plaintiffs' Second Cause Of Action above, and the facts elsewhere herein this complaint, Plaintiffs will suffer irreparable harm unless Defendants are ordered to remove architectural, non-architectural, and communication barriers at Defendants' public accommodation. Plaintiffs allege that Defendants' discriminatory conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiffs and a substantial segment of the disability community. Plaintiffs allege there is a state and national public interest in requiring accessibility in places of public accommodation. Plaintiffs have no adequate remedy at law to redress the discriminatory conduct of Defendants. Plaintiffs desire to return to Defendants' places of business in the immediate future. Accordingly, the Plaintiffs allege that a structural or mandatory injunction is necessary to enjoin compliance with state civil rights laws enacted for the benefit of individuals with disabilities.

35. Wherefore, Plaintiffs pray for damages and relief as hereinafter stated.

DEMAND FOR JUDGMENT FOR RELIEF:

- A. For injunctive relief pursuant to 42 U.S.C. § 12188(a). Plaintiffs request this Court enjoin Defendants to remove all architectural barriers in, at, or on their facilities related to the following: Space Allowance and Reach Ranges, Accessible Route, Protruding Objects, Ground and Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains and Water Coolers, Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and Controls and Operating Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.
- B. For damages pursuant to Cal. Civil Code § 52 or 54.3
- C. For attorneys fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 12205, and Cal. Civil Code § 51, 52; 54.3;
- D. A Jury Trial and;
- E. For such other further relief as the court deems proper.

Respectfully submitted:

PINNOCK & WAKEFIELD, A.P.C.

1
2 Dated: DECEMBER 26, 2006

3 By: 

4 THEODORE A. PINNOCK, ESQ.
5 MICHELLE L. WAKEFIELD, ESQ.
6 Attorneys for Plaintiffs
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CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS TRIPPLE AAA ASSOCIATION FOR CHILDREN AND ADULTS WITH DEVELOPMENTAL DISABILITIES

DEFENDANTS FIG HOSPITALITY INC DBA BANANA BUNGALOW; SECURITY TITLE INSURANCE (GO TO) NAFFO: 146; and does 1 through 10, Inclusive, Defendants.

FILED

06 DEC 27 AM 10:46

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

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

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

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

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Theodore A. Pinnock, Esq. SBN 153434 Michelle L. Wakefield, Esq. SBN 200424 David C. Wakefield, Esq. SBN:185736 Pinnock & Wakefield; 3033 Fifth Avenue, Suite 410 San Diego, California 92103 Telephone: (619) 858-3671; Facsimile: (619) 858-3646

ATTORNEYS (IF KNOWN)

06 CV 2785 BEN BLM

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 1 Incorporated or Principal Place of Business in This State 2 Incorporated and Principal Place of Business in Another State 3 Foreign Nation 4 5 6

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, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes checkboxes for various legal categories like 110 Insurance, 210 Land Condemnation, 362 Personal Injury-Medical Malpractice, etc.

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

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

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 DEMAND \$ TO BE DETERMINED AT TRIAL Check YES only if demanded in complaint: JURY DEMAND: YES NO

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

DATE December 26, 2006

SIGNATURE OF ATTORNEY OF RECORD

133233 \$350 sec 12/27/06

UNITED STATES
DISTRICT COURT
Southern District of California
San Diego Division

133233 - A3
December 27, 2006

Code	Case #	Qty	Amount
CV086900	3-06-CV-2785		60.00 CC
Judge	- BENETIZ		
CV086400			100.00 CC
CV510000			190.00 CC
Total ->			350.00

FROM: CIVIL FILING AAA ASSOC. FOR
CHILDREN W/ DISABILITIES ET AL
V. FIG HOSPITALITY ET AL
VISA AUTH# 010473 SH