

USDC SCAN INDEX SHEET



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3:02-CV-02497 HUBBARD V. RITE AID CORPORATION  
\*90\*  
\*RPLY.\*

ORIGINAL

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**FILED**  
 APR - 8 - 2005  
 CLERK, U.S. DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA  
 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.**

13 UNITED STATES DISTRICT COURT  
 14 SOUTHERN DISTRICT OF CALIFORNIA

**BY FAX**

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

Plaintiff,

v.

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

Defendant.

Case No.: 02CV2497-WQH (BLM)

**DEFENDANTS' REPLY TO  
 OPPOSITION TO MOTION TO DISMISS  
 PLAINTIFFS' FIRST CAUSE OF  
 ACTION UNDER THE AMERICANS  
 WITH DISABILITIES ACT FOR LACK  
 OF SUBJECT MATTER JURISDICTION  
 AND FOR FAILURE TO STATE A  
 CLAIM UPON WHICH RELIEF CAN BE  
 GRANTED AND REQUEST TO  
 DECLINE SUPPLEMENTAL  
 JURISDICTION**

Date: April 22, 2005  
 Time: 3:00 p.m.  
 Ctrm.: 4

Complaint Filed: December 18, 2002  
 Trial Date: None

21 Defendants RITE AID CORPORATION and ARTHUR CIUFFO, JR. and EVELYN  
 22 EMMERSON, Trustees of the CIUFFO FAMILY TRUST B (collectively "RITE AID")  
 23 hereby submit its Reply To Opposition To Motion To Dismiss Plaintiffs' First Cause Of  
 24 Action Under The Americans With Disabilities Act For Lack Of Subject Matter Jurisdiction  
 25 And For Failure To State A Claim A Claim Upon Which Relief Can Be Granted and Request

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1 To Decline Supplemental Jurisdiction.<sup>1</sup>

2 **I. PLAINTIFFS' BURDEN:**

3 Plaintiffs concede that injunctive relief is moot if "it is absolutely clear that the  
4 wrongful behavior could not reasonably be expected to occur." See Plaintiff's opposition at  
5 page 16. However, Plaintiffs maintain they have created a triable issue of fact as to whether  
6 the store is complaint. *Id.* The issue in this case is not whether there is a triable issue of fact.  
7 As indicated in RITE AID'S motion, where there is a factual issue in a motion which goes to  
8 the Court's subject matter jurisdiction, the existence of material disputed facts does not  
9 preclude the trial court from evaluating the merits of the jurisdictional claims. The Court  
10 may weigh evidence to confirm its jurisdiction. And once jurisdiction is challenged, the  
11 party asserting jurisdiction has the burden of proving it existence. W. Schwarzer, A.  
12 Tashima, J. Wagstaffe; California Practice Guides: Federal Civil Procedure Before Trial  
13 (Rutter 2003) Section 9:77, pg. 9-18. See also *Kokkenen v. Guardian Life Ins. Co. of*  
14 *America* (1994) 511 U.S. 375.

15 The evidence in this case is clear. RITE AID has remedied any issues raised by  
16 Plaintiffs' expert which are under its control. Further, to the extent that RITE AID is made  
17 aware of any other deficiencies under its control, it will address those as well. The  
18 "wrongful behavior" alleged by Plaintiffs could not be reasonably expect to reoccur and  
19 there is no effective relief which can be granted by the Court.

20 **II. STATUS OF THE RITE AID STORE:**

21 RITE AID has made its intent to make modifications to the store to ensure its  
22 compliant clear at least since the pre-trial conference in October 2004.<sup>2</sup> On January 20,  
23 2005, at a status conference, RITE AID'S counsel represented that the modifications were in  
24

25 <sup>1</sup> RITE AID will properly present this Reply To Opposition To Motion To Dismiss and a separate  
26 Reply To Opposition To Motion To Declare Plaintiffs Vexatious Litigants despite the fact that  
27 plaintiffs have chosen to submit their Opposition to both motions as one document. In submitting  
28 separate replies, RITE AID will attempt to sort through plaintiffs' assertions by applying them to  
proper motion.

<sup>2</sup> RITE AID'S counsel recalls advising Plaintiff's counsel in the summer of 2004, which Plaintiff's  
counsel does not recall.

1 progress, but completion had been delayed by the rains. Still, RITE AID'S counsel believed  
 2 that the modifications would be completed shortly thereafter. On February 2, 2005, Rite  
 3 Aid's counsel invited Plaintiff's counsel to inspect the store. As of March 4, 2005,  
 4 Plaintiff's counsel had not responded to the invitation, and Rite Aid's counsel filed this  
 5 motion. Even then, Plaintiff's counsel did not arrange for an inspection until a few days  
 6 before Plaintiffs' response was due causing a delay in the hearing on this motion.

7 Plaintiffs' expert re-inspected the store on March 17, 2005. During the inspection,  
 8 Plaintiff's expert pointed out some issues to RITE AID'S counsel. On March 23, 2005, in a  
 9 letter to Plaintiffs' counsel and Plaintiff's expert, RITE AID'S counsel addressed the issues  
 10 which were raised during the inspection. See Exhibit C, Declaration of Wayne C. Arnold, ¶  
 11 2. See also Exhibit F, letter to opposing counsel dated March 23, 2005. The letter is  
 12 evidence of RITE AID'S willingness to address and remedy, if necessary, any issue within  
 13 its control.

14 Plaintiffs attach their expert's report, without any supporting declaration from the  
 15 expert, as evidence that the store is not in compliance. A review of the report shows that a  
 16 large number of the issues originally raised have been resolved. An analysis of the evidence  
 17 shows that all issues raised by Plaintiff's expert have now been addressed. A couple of the  
 18 issues raised by Plaintiffs' expert (path of travel and distribution of parking spaces) are  
 19 beyond RITE AID'S control. Several issues are already in compliance under the prevailing  
 20 standards (grab bars, ice cream pass through, and exterior pay phones). A couple of issues  
 21 related to adjusting items previously modified (door pressure and grade of parking), which  
 22 have been completed. A couple of modifications were not complete (sign issues), but are  
 23 now complete. And a couple of corrections were needed (bathroom sink height and  
 24 placement of door handles), which have now been corrected.

25 The following is an analysis of Plaintiffs' expert's report and any subsequent  
 26 corrections.

27 **A. Path of Travel – BEYOND RITE AID'S CONTROL**

28 As indicated in RITE AID's motion, these issues extend beyond RITE AID'S

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1 leasehold, and since RITE AID does not exercise control over that path of travel, RITE AID  
2 cannot provide a compliant path of travel as suggest by Plaintiffs' expert in Sections 2.1 -  
3 2.6 of his report. *Alford v. City of Cannon Beach, et al.* (Dist. Or. 2002) 2002 U.S. Dist.  
4 LEXIS 2257; *Pickern v. Pier 1 Imports, Inc.* (E.D. Cal. 2004) 339 F. Supp. 2d 1081.

5 Plaintiff acknowledges that RITE AID only leases Parcel 2 at this shopping center  
6 leaving Parcels 1, 3, 5, 6, 7, 8, 9 and 10 owned by Terra West Investments ("Terra West").  
7 See also Exhibit A, Declaration of Karen Altemose, ¶ 2. Parcel One is owned by Terra  
8 West. A path of travel from the RITE AID store to the public street (Chase Street) must  
9 cross Parcel One. See Exhibit A to RITE AID's Motion To Dismiss, plot map of shopping  
10 center. RITE AID cannot just rip up the sidewalk on property which it neither leases or  
11 owns. Similarly RITE AID cannot change the private sidewalk just in front of its own store  
12 without causing a dangerous situation when RITE AID's sidewalk meets the adjacent  
13 property parcels, again by way of an internal private sidewalk connecting the stores in the  
14 shopping center. See Exhibit G to RITE AID's Motion To Dismiss, Decl. of Musser, ¶¶ 13.  
15 This type of renovation requires cooperation from the other property owners and RITE AID  
16 has requested that cooperation.

17 RITE AID has requested that the owner of these parcels provide such a path of travel.  
18 See Exhibit A, Decl. of Altemose, ¶ 3. Terra West has requested copies of expert reports and  
19 pictures, which have been provided and has told RITE AID that it is evaluating a plan of  
20 action. See Exhibit A, Decl. of Altemose, ¶ 4.

21 In addition, RITE AID'S counsel provided Plaintiffs' counsel with Terra West's name  
22 and address on January 21, 2005. These public records were always available to opposing  
23 counsel by doing their own public records search. If Plaintiffs want this path of travel  
24 addressed by the Court, they should do so in a proceeding in which Terra West is a party.

25 Even though the facts are very similar to the instant case, Plaintiffs do not attempt to  
26 distinguish the *Alford v. City of Cannon Beach, et al* case cited by RITE AID in its Motion.  
27 2002 U.S. Dist. Lexis 2257. Plaintiffs also do not distinguish the facts in *Pickern v. Pier 1*  
28 *Imports, Inc.* (E.D. Cal. 2004) 339 F. Supp. 2d 1081 from the facts of this case. This is

1 probably because the facts are so similar that, like in *Alford*, they are indistinguishable from  
 2 this case. Instead, Plaintiffs merely indicate that *Pickern* is on appeal. At this point, it is still  
 3 good law.

4 Plaintiffs then turn to *Disabled Rights Action Comm. V. Las Vegas Events, Inc.* (9<sup>th</sup>  
 5 Cir. 2004) 375 F. 3d 861. However, a reading of the *Disabled Rights v. Las Vegas Events*  
 6 case clearly shows that its facts are much different than this case. *Disabled Rights* dealt with  
 7 a private entity that took over a publicly owned arena to stage a rodeo. 375 F. 3d 861. They  
 8 took over the whole arena and exercised control over the whole center! The court held a  
 9 private entity that stages an event for a limited time period at a facility owned by a third  
 10 party is covered by Title III of the ADA. *Id.* at 873-874. This is quite a different situation  
 11 than a retail tenant who only occupies a portion of the shopping center. While RITE AID is  
 12 obligated to make its store ADA compliant, it does not own or control or occupy the entire  
 13 shopping center.

14 Next, plaintiffs point to a series of California Street and Highway Codes section 5880,  
 15 et seq. under the Improvement Act of 1911 to stand for the proposition that it is the duty of  
 16 owners of lots fronting on a public street to construct sidewalks upon notice to do so by the  
 17 superintendent of streets. See plaintiffs' opposition, pg. 17. These codes are simply not  
 18 applicable to this case for the following reasons:

- 19 • The internal sidewalk does not front a public street
- 20 • These code sections deal with construction of new public curbs and sidewalks
- 21 • These laws do not deal with the reconstruction of existing sidewalks and curbs
- 22 in the public right of way to bring them into compliance with current
- 23 accessible codes
- 24 • The superintendent of streets (not private plaintiffs) order construction of
- 25 public sidewalks

26 It seems that plaintiffs are confusing two concepts: RITE AID's obligations to  
 27 change the public sidewalks<sup>3</sup> (which it cannot do as stated above) and RITE AID's

28 <sup>3</sup> *Pickern v. Pier 1 Imports, Inc.* (E.D. Cal. 2004) 339 F. Supp. 2d 1081

1 obligations to change the private internal sidewalks and parking lot in the shopping center<sup>4</sup>  
 2 which it does not own or control but is merely one of several participants.

3 **B. Parking Distribution – BEYOND RITE AID'S CONTROL**

4 RITE AID store is part of a larger complex of stores which share common areas  
 5 including a parking lot. The required number of parking spaces for that common parking lot  
 6 are for the lot as a whole, not some subsection of that lot, and RITE AID cannot change the  
 7 parking configuration for the entire shopping center. As stated in RITE AID's Motion,  
 8 disabled parking spaces are distributed throughout the entire shopping center, of which RITE  
 9 AID is one of several tenants. See Exhibit G to RITE AID's Motion To Dismiss, Decl. of  
 10 Musser, ¶ 14. Again, this type of renovation requires cooperation from the other property  
 11 owners and RITE AID has requested this cooperation.

12 As a final attempt to make RITE AID solely responsible for the common areas of the  
 13 entire shopping center, plaintiffs finally turn to the Amendment and Restatement of  
 14 Declarations of Establishment of Protective Covenants, Conditions and Restrictions and  
 15 Grants of Easements, section 5.7(a). See plaintiffs' opposition, pg. 18. This section  
 16 specifically states:

17 "Should either one or all of the owners or occupants of Parcel 2,  
 18 or the owners or occupants of Parcel 4 (if it is not then the  
 19 Operator), or the owners of Parcel 5 (if it is not then the  
 20 Operator) notify the operator that said owner or owners or  
 21 occupant or occupants desire to assume, in regard to the entire  
 22 Common Area, the duties, obligations, rights and remedies of the  
 23 Operator, respecting said proceeding provisions of Section 5,  
 said owner or owners or occupant or occupants shall have the  
 right to do so upon ninety (90) day written notice to said  
 Operator"

24 From this clause, plaintiffs argue that RITE AID should be obligated to take over the  
 25 operation of the entire shopping center! The financial and organizational impact of such an  
 26 undertaking would be enormous and go far beyond renovations to comply with the ADA.

27 \_\_\_\_\_  
 28 <sup>4</sup> *Alford v. City of Cannon Beach, et al.* (January 15, 2002) 2002 U.S. Dist. Lexis 2257.

1 RITE AID has requested that the operator of the common area make renovations to the  
2 common areas. If plaintiffs really wanted the entire shopping center and its common areas to  
3 be compliant, it would have brought Terra West into the lawsuit.

4 **C. Parking Stall Signage – NOW COMPLIANT**

5 Disabled parking signs have been placed at accessible spaces in front of the RITE  
6 AID store. See Settle Report Section 3.5.2; see Exhibit B, Declaration of David Musser, ¶¶  
7 5-6.

8 **D. Accessible Parking Stall Slope – NOW COMPLIANT**

9 Mr. Settle indicated that the slopes at the rear of the spaces exceed 2%. See Settle  
10 Report Sections 3.6 – 3.9. The contractor has provided a letter to RITE AID's counsel  
11 stating that when the asphalt was installed it was compliant. See Exhibit C, Decl. of Arnold,  
12 ¶ 2. See also Exhibit F with attached letter from asphalt subcontractor. However, the asphalt  
13 had since settled slightly increasing the slopes. The areas which settled have now been  
14 corrected making the parking stalls compliant. See Exhibit B, Decl. of Musser, ¶ 7.

15 **E. Public Telephone On Exterior Of Store – COMPLIANT**

16 Mr. Settle noted that no changes had been made to exterior pay phones. See Settle  
17 Report Section 4.1 – 4.2. RITE AID's expert David Musser indicates that exterior  
18 telephones do not need to have a listening device and therefore signage. See Exhibit B,  
19 Decl. of Musser, ¶ 8. Mr. Musser indicates that both the CalDAG and the Building Code  
20 (section 1117B.2.8) make reference to phones "in a building or facility." See Exhibit B,  
21 Decl. of Musser, ¶ 8. As such, exterior telephones do not require the amplification device.<sup>5</sup>

22 As an added measure of good faith, despite RITE AID's belief that the telephones do  
23 not require an amplification device, RITE AID has asked the vendor who controls the  
24 telephone to upgrade the telephones or remove them. See Exhibit D, Declaration of Tracy  
25 Landis, ¶ 3. The vendor has agreed that they will either upgrade these phones or remove

26  
27 <sup>5</sup> It has also been Mr. Musser's experience that amplification devices are not placed on exterior  
28 telephones for one simple reason – they do not work with the exterior noise present. See Exhibit  
G to RITE AID's Motion To Dismiss, Decl. of Musser, ¶ 9.

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1 them. See Exhibit D, Decl. of Landis, ¶ 3.

2 **F. Men's and Women's Restroom Door Pressure – NOW COMPLIANT**

3 Mr. Settle indicated in his report that door pressure exceeded the requisite five (5)  
4 pounds. See Settle Report Sections 5.2 – 5.3. Door pressure had previously been adjusted,  
5 however, the door mechanisms were old and did not hold the adjustment. See Exhibit B,  
6 Decl. of Musser, ¶ 9. These door closing mechanisms have now been replaced with new  
7 ones and the door pressure has been set at the requisite five (5) pounds. See Exhibit B, Decl.  
8 of Musser, ¶ 9.

9 **G. Men's and Women's Lavatory Height and Knee and "P" Trap Clearance**  
10 **– NOW COMPLIANT**

11 Mr. Settle indicated in his report that knee clearance/"P" trap clearance and lavatory  
12 height were inadequate. See Settle Report Section 6.3 – 6.6. New ADA compliant  
13 lavatories have been installed which allow adequate knee clearance and "P" trap clearances  
14 and they are mounted at the correct heights. See Exhibit D, Decl. of Musser, ¶ 10.

15 **H. Men's and Women's Restroom Water Closet Grab Bars – COMPLIANT**

16 Mr. Settle indicated that grab bars are not mounted at correct height around water  
17 closet. See Settle Report Section 7.2. Grab bars with "tank" type toilets can be mounted at  
18 36" inches – therefore the grab bars are in fact compliant. See Exhibit B, Decl. of Musser, ¶  
19 11 with attached photograph. See also pertinent excerpt from ADAAG.

20 **I. Men's and Women's Restroom Accessible Stall Door "U" Shaped**  
21 **Hardware – NOW COMPLIANT**

22 Mr. Settle indicated that the accessible restroom stalls did not have proper "U" shaped  
23 handles immediately below the latch on the inside and outside of the stall door. See Settle  
24 Report Sections 9.4 – 9.5, 9-10. These "U" shaped handles have been installed at heights  
25 and in proper locations. See Exhibit B, Decl. of Musser, ¶ 12.

26 **J. Men's and Women's Restroom Stall Doors – Automatic Closers – NOW**  
27 **COMPLIANT:**

28 Mr. Settle indicated that the restrooms did not have the proper automatic door closers.

1 See Settle Report Section 9.6 – 9.7. Upon investigation, RITE AID’s expert David Musser  
 2 discovered that the mechanism on one door had worn out and the other door needed to be  
 3 reversed so that it was an automatic closer (not an automatic opener). New proper automatic  
 4 door closers have been installed. See Exhibit B, Decl. of Musser, ¶ 13.

5 **K. Fire Exit Doors Tactile Signs – NOW COMPLIANT**

6 Mr. Settle indicated that proper signs were not placed at the fire exit door. See Settle  
 7 Report Section 10.4. The installation of new signs had been started, but apparently not  
 8 completed at the time of the inspection. New tactile exit signs which are fully ADA  
 9 compliant have now been mounted at the proper height and at the proper location.<sup>6</sup> See  
 10 Exhibit B, Decl. of Musser, ¶ 14.

11 **L. Ice Cream Counter Pass Through – COMPLIANT**

12 Mr. Settle stated that the ice cream counter pass through area is not compliant because  
 13 there needs to be a 36 inch wide counter at this location. See Settle Report Section 11.1.  
 14 RITE AID’s expert David Musser states such a counter needs to be provided where there is a  
 15 full service register and a patron would need the space to handle a check or credit card  
 16 transaction. Since this is a cash only register and a smaller, but still compliant pass through  
 17 has been added. This counter complies with the ADA and Title 24. See Exhibit B, Decl. of  
 18 Musser, ¶ 15. This solution at ice cream counters has been acceptable to plaintiffs’ counsel  
 19 as part of settlements with other Law Offices of Lynn Hubbard clients. See Exhibit B, Decl.  
 20 of Musser, ¶ 15.

21 **III. INJUNCTIVE RELIEF AND PURPOSES OF THE ADA:**

22 The purpose of the ADA is to promote accessibility. The remedy of injunctive relief  
 23 is offered to enforce compliance with that purpose. RITE AID has done what it can to make  
 24 the store complaint and has shown willingness to make further changes where necessary.  
 25 Plaintiffs are litigating this case with a clear strategy to “catch” RITE AID out of

26 \_\_\_\_\_  
 27 <sup>6</sup> RITE AID points out that Braille signage does not relate to plaintiffs’ alleged disability, however,  
 28 because RITE AID wants its store to be completely compliant, these signs were added at proper  
 height and locations.

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1 compliance, even if it is a technical violation which the company would be willing to  
 2 remedy. That is not consistent with promoting increasing accessibility. Nothing would be  
 3 gained by entering an injunction in this case. While Plaintiffs might still look for a "gotcha"  
 4 violation so that it can still have a trial and continue to generate attorneys fees, there is no  
 5 reasonable expectation that Plaintiffs would suffer immediate and irreparable harm should  
 6 they return to the store. Injunctive relief is moot and the Plaintiffs have not met their burden  
 7 of establishing subject matter jurisdiction. With injunctive relief an idle act in this case, the  
 8 Court should dismiss Plaintiffs first cause of action.

9 **IV. THIS COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL**  
 10 **JURISDICTION**

11 The court may decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. §  
 12 1367 (c)(3). Plaintiffs do not address why they should be afforded supplemental jurisdiction  
 13 at all in their opposition. Again, RITE AID requests that this Court decline to exercise  
 14 supplemental jurisdiction when all of plaintiffs' claims for injunctive relief have been  
 15 rendered moot as described above.

16 **V. CONCLUSION**

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

21  
 22 Dated: April 8, 2005

HART, KING & COLDREN

23  
 24 By: 

Wayne C. Arnold

Lisa D. Herzog

Attorneys for Defendants RITE AID  
 CORPORATION and ARTHUR  
 CIUFFO, JR. and EVELYN  
 EMMERSON, Trustees of the  
 CIUFFO FAMILY TRUST B

# EXHIBIT "A"

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EXHIBIT "A"

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2 Lisa D. Herzog, Bar No. 194123  
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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.

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15 LYNN J. HUBBARD, BARBARA J.  
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17 Plaintiff,

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21 AVOCADO PLAZA, L.L.C. and DOES 1  
22 through 20,

23 Defendant.

Case No.: 02CV2497-WQH (BLM)

Judge: William Q. Hayes

DECLARATION OF KAREN  
SHRINER ALTEMOSE IN SUPPORT  
OF DEFENDANTS' REPLY TO  
OPPOSITION TO MOTION TO  
DISMISS

Date: April 22, 2005

Time: 3:00 p.m.

Ctrm.: 4

Complaint Filed: December 18, 2002

Trial Date: None

24 I, KAREN SHRINER ALTEMOSE, declare as follows:

25 1. I am an attorney and serve as Contracts Manager for Rite Aid Corporation at  
26 its corporate headquarters in Camp Hill, Pennsylvania. The facts set forth herein are true of  
27 my own personal knowledge and if called as a witness I could and would competently  
28 testify thereto.

2. Terra West Investments ("Terra West") is the owner of Parcels 1, 3, 5, 6, 7, 8,  
9 and 10 and also manages all common area maintenance for the shopping center where Rite  
Aid store #5625 is located.

3. On January 6, 2005, I requested that Terra West renovate the private sidewalk and parking lot of the shopping center based on plaintiffs' allegations.

4. In response, Terra West requested copies of expert reports and photographs, which have been produced to them, and has informed me that it is evaluating a plan of action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8<sup>th</sup> day of April 2005, at Camp Hill, Pennsylvania.

*Karen Shriner Altemose*  
Karen Shriner Altemose, Declarant

*Heather L. Leininger*

NOTARIAL SEAL  
HEATHER L. LEININGER, NOTARY PUBLIC  
CAMP HILL BORO, GUMBERLAND CO  
MY COMMISSION EXPIRES 1/23/07

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# EXHIBIT "B"

14

EXHIBIT "B"

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**Sued as THE CIUFFO FAMILY TRUST B, ET AL.**

UNITED STATES DISTRICT COURT  
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Case No.: 02CV2497-WQH (BLM)

Judge: William Q. Hayes

**DECLARATION OF DAVID C.  
MUSSEY IN SUPPORT OF  
DEFENDANTS' REPLY TO  
OPPOSITION TO MOTION TO  
DISMISS**

Date: April 22, 2005  
Time: 3:00 p.m.  
Ctm.: 4

Complaint Filed: December 18, 2002  
Trial Date: None

I, DAVID C. MUSSEY declare as follows:

1. I am a licensed architect familiar with the ADA, Title 24 and accessibility requirements. I have been an architect for 20 years and I am the president of Mussey Architects, Inc. I have also been retained as an expert in the above-captioned matter. The facts set forth herein are true of my own personal knowledge and if called as a witness I could and would competently testify thereto.

2. I have reviewed Reed Settle's March 19, 2005 report. Since that report was written, I have inspected the store several times with my latest trip to the store being on

1 April 7, 2005. During this time, I worked with Rite Aid's contractor with respect to the  
2 issues raised by Mr. Settle and have the following comments.

3 **PATH OF TRAVEL**

4 3. With respect to the path of travel, I defer to my prior declaration.

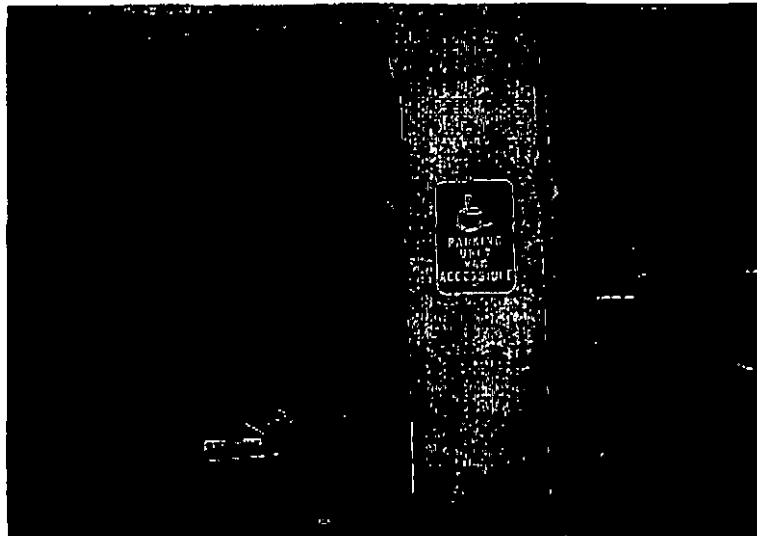
5 **DISTRIBUTION OF PARKING SPACES**

6 4. With respect to the distribution of parking spaces, I defer to my prior  
7 declaration.

8 **PARKING STALL SIGNAGE**

9 5. When I inspected the store on March 22, 2005, I noticed that the contractor had  
10 installed many of the signs, but had not completed installing the all the required signs as  
11 previously requested. When I returned on April 7, 2005. The signs had been installed.

12 6. The following photographs are pictures which I took which show the parking  
13 stall signage in front of the store which is installed at the proper height. There are two  
14 stalls. One sign is mounted on the pillar in front of the stall:

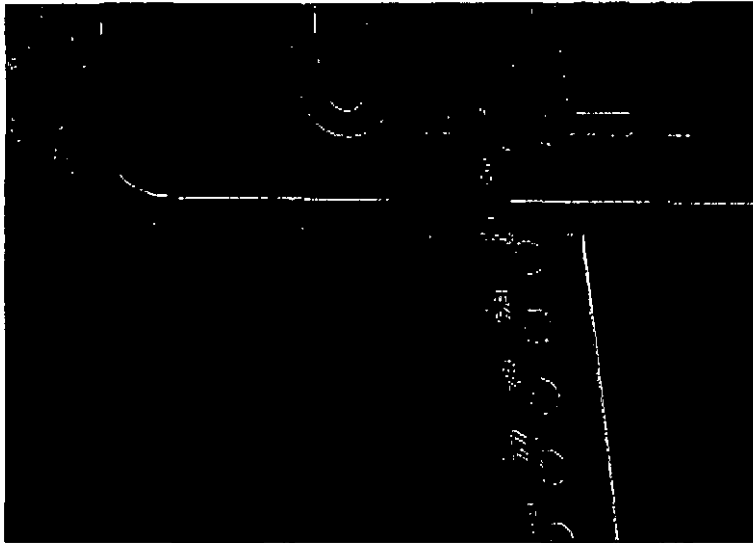


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27 The other space does not have a pillar in front of the stall. Therefore a pole has been  
28 installed in front of the space, and the sign has been mounted at the proper height:

HART, KING & COLDREN  
A PROFESSIONAL CORPORATION  
2100 EAST SANDHURST, FOURTH FLOOR  
SANTA ANA, CALIFORNIA 92707

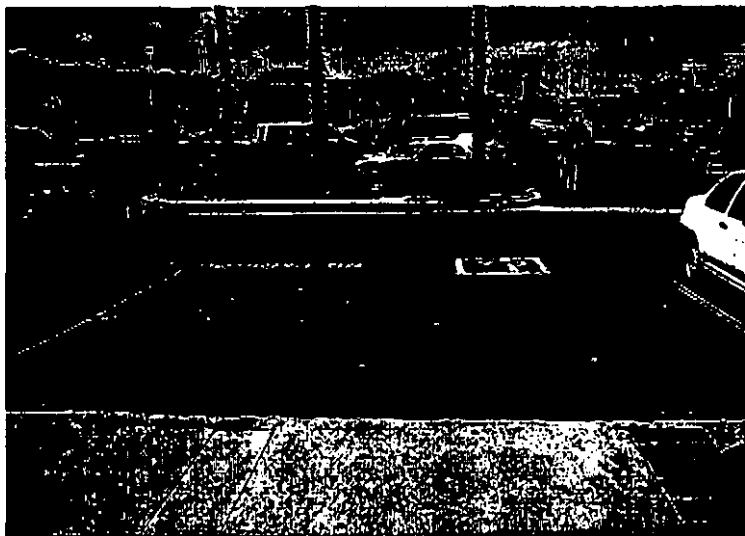
HART, KING & COLDREN  
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SANTA ANA, CALIFORNIA 92707

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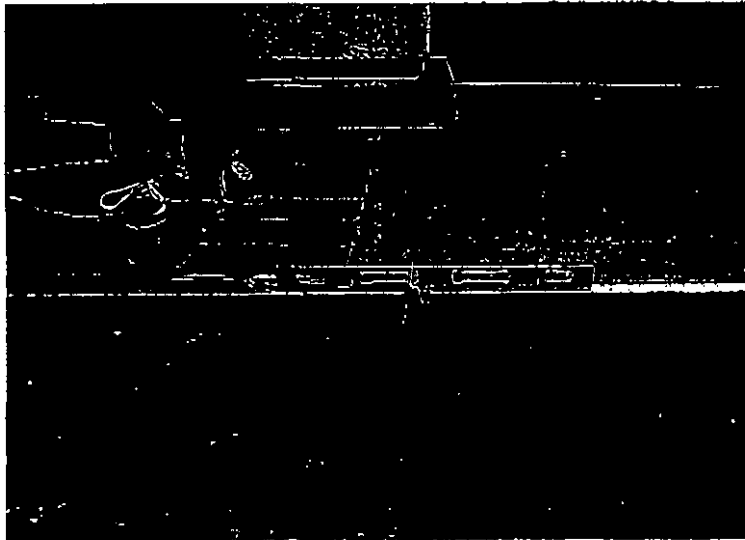
**ACCESSIBLE PARKING STALL SLOPE**

7. Rite Aid's contractor installed two disabled parking spaces, one of which is van accessible. Asphalt was used to create a level space. The following is a photograph I took of that area:



Using a Smart Level, Mr. Settles indicates that the grade exceeds 2%. The subcontractor believes that the asphalt previously installed has settled. Additional asphalt has been added.

1 On April 7, 2005, I tested the slope in all directions. The grade did not exceed 2%. I used a  
 2 level attached to a 100 inch long stud to test the slope. With respect to each measurement,  
 3 the stud did not need to be raised by 2 inches at either end to be level. Therefore, the slope did  
 4 not exceed 2% in any direction. I believe this method of measurement to be more accurate  
 5 than the shorter Smart Level. The following is a photograph I took on April 7, 2005 of the  
 6 level:



17  
 18 **PUBLIC TELEPHONE ON EXTERIOR OF STORE**

19 8. With respect to the pay phones outside the store, I defer to my earlier  
 20 declaration. In addition, the CalDAG and the Building Code (section 1117B.2.8) make  
 21 reference to phones "in a building or facility." These phones are outside a building and  
 22 the requirement does not apply to them.

23 **RESTROOM DOOR PRESSURE**

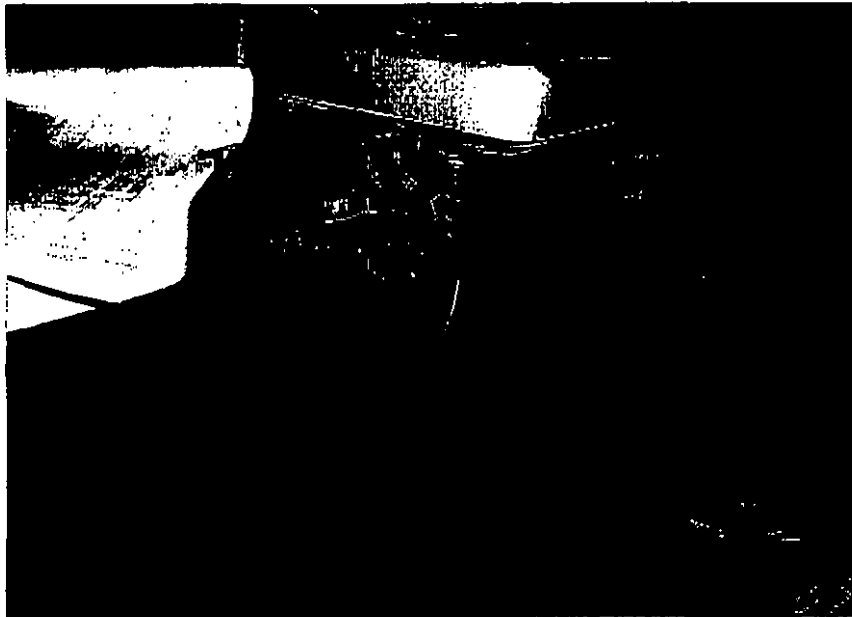
24 9. Rite Aid's contractor had adjusted the restroom doors such that the door  
 25 pressure did not exceed 5 pounds. Apparently, when Mr. Settle tested them, the door  
 26 pressure exceeded 5 pounds. The door mechanism was old and would not hold the  
 27 adjustment over time. Rite Aid's contractor has since ordered and installed a new  
 28

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 A PROFESSIONAL CORPORATION  
 200 EAST SANDRONIE FOURTH FLOOR  
 SANTA ANA, CALIFORNIA 92707

1 mechanism. I tested both doors on April 7, 2005 and both were properly adjusted so that  
2 the pressure needed to open the door did not exceed 5 pounds.

3 **LAVATORY HEIGHT AND P TRAP CLEARANCE**

4 10. When I inspected the store on March 22, 2005, I found that the lavatories in  
5 both restrooms had not been installed as instructed. Rite Aid's contractor has reinstalled  
6 them. I inspected them both on April 7, 2005 with a template I use to test height and  
7 clearance. They are at the proper height and have sufficient clearance underneath the  
8 lavatory. The following is a photograph I took on April 7, 2005 one one of the lavatories.  
9 The photograph depicts a template I use to test the height and clearance:



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22 The lavatory is 34 inches high and all of the necessary clearances under the lavatory are  
23 maintained. The other lavatory had an identical measurement.

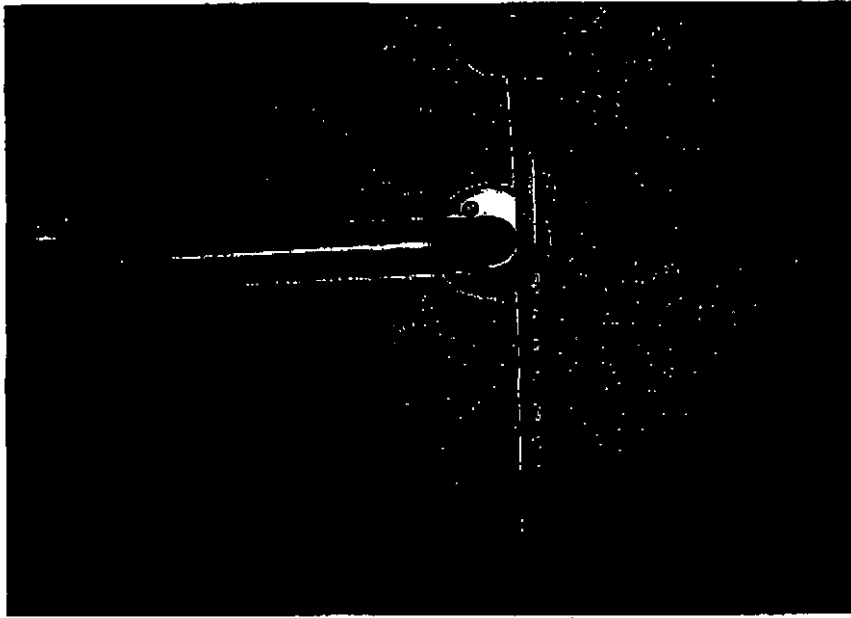
24 **RESTROOM GRAB BARS**

25 11. The restrooms have tank toilets. Where tank toilet are used the grab bars may  
26 be 36 inches high. Section 1115 B.8.1 of the California Building Code and 4.17.6 of the  
27 ADAAG. These grab bars are compliant. The following is a photograph which I took on  
28 April 7, 2005 which shows that the grab bars do not exceed 36 inches:

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

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

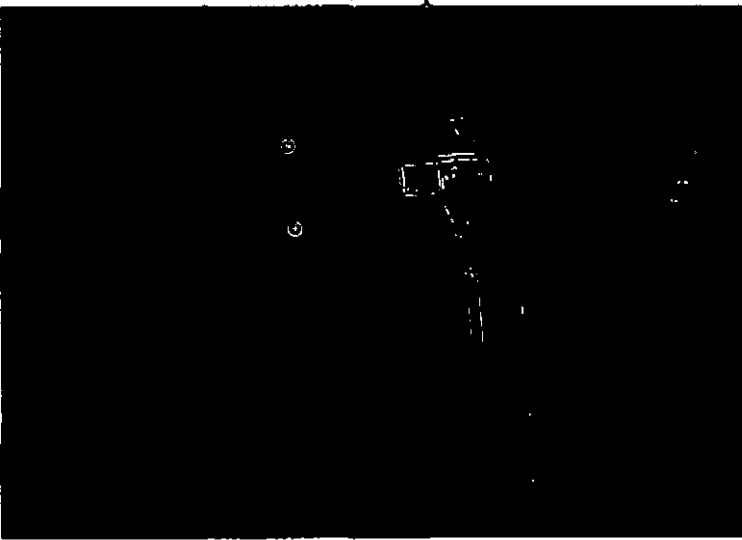
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Reed Settle noted that the ice cream counter should be lowered. This has been resolved, is now ADA and Title 24 compliant and is no longer an issue.

**BATHROOM STALL HARDWARE**

12. Rite Aid's contractor installed compliant "U" shaped handles on the bathroom stall doors, but they were installed in the wrong location. They have been moved to the correct position. The following is a photograph which I took on April 7, 2005 showing the handle installed in the correct position:



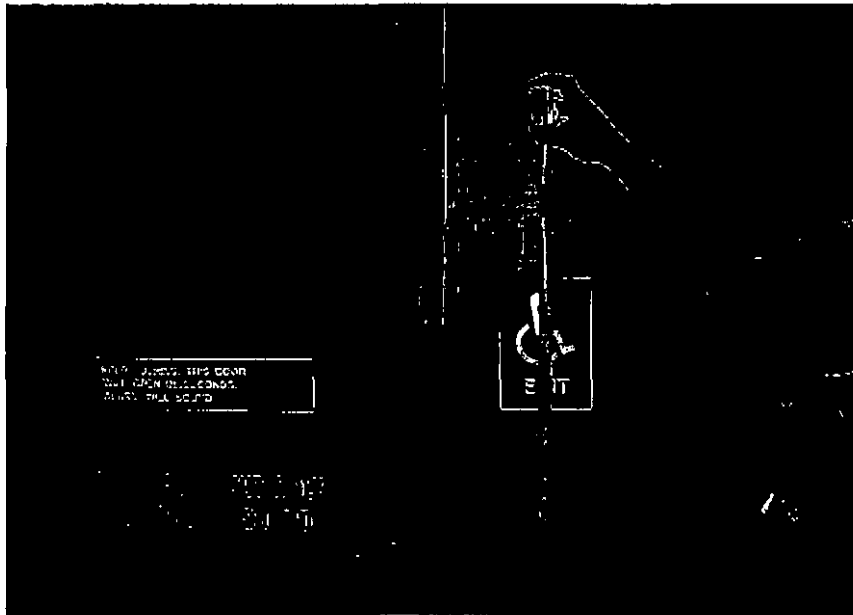
**RESTROOM DOORS - AUTOMATIC CLOSERS**

13. The accessible stalls in both restrooms had automatic closing devices. The

1 hardware for these devices were installed upside down so that the doors automatically  
 2 opened instead of closed. In addition, one of the devices was defective. Rite Aid's  
 3 contractor has installed proper automatic closing devices. When I inspected the store on  
 4 April 7, 2005, the doors were operating correctly.

5 **FIRE DOOR TACTILE SIGNS**

6 14. These are part of the sign package which was not complete when Mr. Settle  
 7 inspected the store. They have now been installed. The following is a photograph which I  
 8 took on April 7, 2005 depicting the installation of one of fire door signs:



23 **ICE CREAM COUNTER PASS THROUGH**

24 15. A 36 inch counter is required where a customer might need to write a check or  
 25 make a purchase with a credit card. The RITE AID store uses a "cash only" counter for its  
 26 ice cream. Rite Aid installed a 12 inch pass through so that the ice cream and cash can be

27 ///

28 ///

HART, KING & COLDREN  
 A PROFESSIONAL CORPORATION  
 2010 EAST SANDROUNTE, FOURTH FLOOR  
 SANTA ANA, CALIFORNIA 92707

1 passed through. This is compliant. Plaintiff's agreed to such an installation for the Rite Aid  
2 store in the O'Campo matter which is located in Chico, California.

3  
4 I declare under penalty of perjury that the foregoing is true and correct.  
5 Executed on this 8th day of April 2005, at Costa Mesa, California.

6  
7  
8   
9 David C. Musser, Declarant

HART, KING & COLDREN  
A PROFESSIONAL CORPORATION  
200 EAST SAN ANTONIO AVE. SUITE 100  
SANTA ANA, CALIFORNIA 92707

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DECLARATION OF DAVID C. MUSSER IN SUPPORT OF REPLY TO  
OPPOSITION TO MOTION TO DISMISS

714 546 7457

APR.08'2005 12:48 RECEIVED FROM: 17142418797

#7642-002

# EXHIBIT "C"

23

EXHIBIT "C"

1 **Wayne C. Arnold, Bar No. 103194**  
 2 **Lisa D. Herzog, Bar No. 194123**  
 3 **HART, KING & COLDREN**  
 4 **A PROFESSIONAL CORPORATION**  
 5 **200 East Sandpointe, Fourth Floor**  
 6 **Santa Ana, California 92707**  
 7 **Telephone: (714) 432-8700**  
 8 **Facsimile: (714) 546-7457**

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.**

13 **THE UNITED STATES DISTRICT COURT**  
 14 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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

17 **Plaintiff,**

18 **v.**

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

22 **Defendants.**

Case No.: 02CV2497-WQH (BLM)

**DECLARATION OF WAYNE C.**  
**ARNOLD IN SUPPORT OF**  
**DEFENDANTS' REPLY TO**  
**OPPOSITION TO MOTION TO**  
**DISMISS**

Date: April 22, 2005  
 Time: 3:00 p.m.  
 Ctrm.: 4

Complaint Filed: December 18, 2002  
 Trial Date: None

23 I, WAYNE C. ARNOLD declare as follows:

24 1. I am an attorney duly licensed to practice law before all courts of the State of  
 25 California and in the United States District Court for the Southern District of California, and  
 26 am an attorney with the law firm of Hart, King & Coldren, attorneys of record for  
 27 Defendants RITE AID CORPORATION and ARTHUR CIUFFO, JR. and EVELYN  
 28 EMMERSON, Trustees of the CIUFFO FAMILY TRUST B (collectively "RITE AID") in  
 this matter. The facts set forth herein are true of my own personal knowledge and if called  
 as a witness I could and would competently testify thereto.

A PROFESSIONAL CORPORATION  
 200 EAST SANDPOINTE, FOURTH FLOOR  
 SANTA ANA, CALIFORNIA 92707

1           2.     Attached to RITE AID's Reply To Motion To Dismiss as Exhibit F is a true  
 2 and correct copy of the letter that I wrote to opposing counsel on March 23, 2005. Attached  
 3 to this letter is a true and correct copy of the letter that I received from the asphalt  
 4 subcontractor on March 22, 2005.

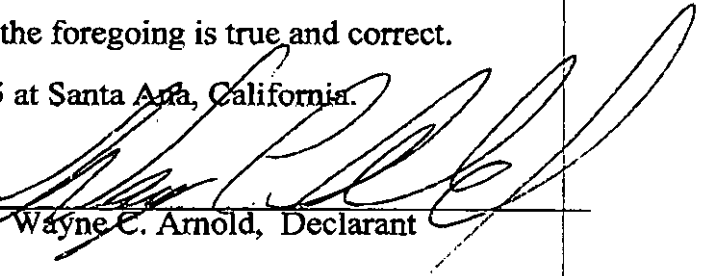
5           3.     In Mr. Sorrells declaration, complains about use of a letter which he wrote to  
 6 me. I did not solicit that letter, and I believe that my interpretation and use of that letter is  
 7 fair and accurate

8           4.     In addition, Mr. Sorrells sated a number of generalizations in his declaration  
 9 which were unsupported by facts. Interestingly, Mr. Sorrells states on the one hand that he  
 10 has only recently come to this litigation, and yet he speaks for several paragraphs in his  
 11 declaration as if he has a long history dealing with Herzog and me on a number of cases  
 12 which would lead him to conclude how we "habitually" handle a case.

13          5.     In all cases in which we have handled, we have attempted to have the client  
 14 make changes where needed. We have represented to the court that the stores would be  
 15 compliant by the time of trial, but we have not tried to delay or drag out the trial of the  
 16 matter. In fact, this is the first case in which we have filed such a motion to dismiss.

17           I declare under penalty of perjury that the foregoing is true and correct.

18           Executed on this 8th day of April 2005 at Santa Ana, California.



Wayne C. Arnold, Declarant

A PROFESSIONAL CORPORATION  
 200 EAST SANDPOINTE, FOURTH FLOOR  
 SANTA ANA, CALIFORNIA 92707

# EXHIBIT "D"

26

EXHIBIT "D"

1 **Wayne C. Arnold, Bar No. 103194**  
 2 **Lisa D. Herzog, Bar No. 194123**  
 3 **HART, KING & COLDREN**  
 4 **A PROFESSIONAL CORPORATION**  
 5 **200 East Sandpointe, Fourth Floor**  
 6 **Santa Ana, California 92707**  
 7 **Telephone: (714) 432-8700**  
 8 **Facsimile: (714) 546-7457**

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.**

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.**

24 **Case No.: 02CV2497-WQH (BLM)**

25 **Judge: William Q. Hayes**

26 **DECLARATION OF TRACY LANDIS**  
 27 **IN SUPPORT OF DEFENDANTS'**  
 28 **REPLY TO OPPOSITION TO**  
 29 **MOTION TO DISMISS**

30 **Date: April 22, 2005**  
 31 **Time: 3:00 p.m.**  
 32 **Ctrm.: 4**

33 **Complaint Filed: December 18, 2002**  
 34 **Trial Date: None**

35 **I, TRACY LANDIS, declare as follows:**

36 **1. I am a paralegal and serve as Manager, Litigation Support for Rite Aid**  
 37 **Corporation at its corporate headquarters in Camp Hill, Pennsylvania. The facts set forth**  
 38 **herein are true of my own personal knowledge and if called as a witness I could and would**  
 39 **competently testify thereto.**

40 **2. Praeses Corporation is a management company that handles the payphones that**  
 41 **are located outside the Rite Aid store located at 1135 Avocado, El Cajon, CA.**

HART, KING & COLDREN  
 A PROFESSIONAL CORPORATION  
 200 East Sandpointe, Fourth Floor  
 SANTA ANA, CALIFORNIA 92707

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3. I have been in direct contact with a representative of Praeses about the issue of the payphones being considered ADA complaint. Praeses has agreed to evaluate the subject phones and either upgrade them or have them removed altogether.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7<sup>th</sup> day of April 2005, at Camp Hill, Pennsylvania.

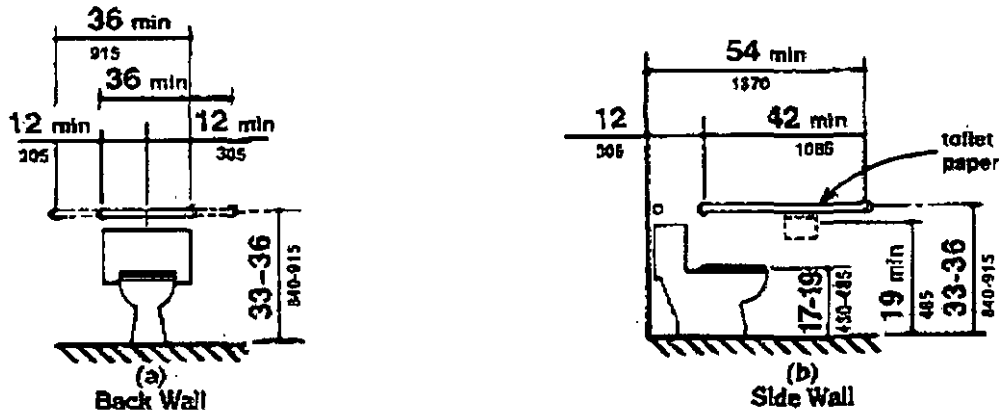
  
Tracy Landis, Declarant

HART, KING & COLDREN  
A PROFESSIONAL CORPORATION  
200 EAST SANDROSTE EIGHTH FLOOR  
SANTA ANA, CALIFORNIA 92707

# EXHIBIT "E"

29

EXHIBIT "E"



**Figure 29  
Grab Bars at Water Closets**

Fig. 29(a) Back Wall. A 36 inch (915 mm) minimum length grab bar is required behind the water closet mounted at a height between 33 and 36 inches (840-915 mm). The grab bar must extend a minimum of 12 inches (305) beyond the center of the water closet toward the side wall and a minimum of 24 inches (610 mm) toward the open side for either a left or right side approach.

[Back to ADAAG](#)

[List of Figures](#)

# EXHIBIT "F"

31

EXHIBIT "F"

# HK&C

HART, KING & COLDREN

Wayne C. Arnold  
wamold@hkclaw.com

March 23, 2005

Our File Number: 55001.036/277

**VIA FACSIMILE AND U.S. MAIL**

Scott Hubbard  
Law Offices of Lynn Hubbard  
12 Williamsburg Lane  
Chico, CA 95926

Adam Sorrells  
Law Offices of Lynn Hubbard  
12 Williamsburg Lane  
Chico, CA 95926

Re: *Hubbard v. Rite Aid, et al.*  
U.S.D.C. Case No. 02CV 2497 WQH BLM

Gentlemen:

On February 2, 2005, I wrote to you and informed you that Rite Aid had made renovations to the subject store addressing complaints by plaintiffs and the items listed in your expert Reed Settle's report. As you know, Rite Aid is committed to making its stores more accessible to all of its customers and has been open to considering Mr. Settle's recommendations. Changes to this store were made with Mr. Settle's report in mind except where our expert David Musser disagreed with Mr. Settle.

During Reed Settle's inspection of the store on March 17, 2005, he raised certain issues, and I had agreed to provide certain information to him. The purpose of this letter is to provide that information, and indicate how we have addressed the issues which were raised by Mr. Settle in his March 17, 2005 inspection. As those issues are being addressed, Rite Aid maintains its position that this store is ADA and Title 24 compliant.

1. Telephone

Mr. Settle noted that no changes had been made to exterior pay phones. Our expert has indicated that the telephones do not need to have a listening device and therefore signage, because they are outdoor phones. He indicates that both the CalDAG and the Building Code (section 1117B.2.8) make reference to phones "in a building or facility." Although we believe that the telephones are in fact compliant, Rite Aid has asked the vendor to upgrade the phones. The vendor has indicated that they will either upgrade these phones or remove them.

2. Parking Lot

Mr. Settle indicated that there are not enough compliant spaces in the vicinity of Rite Aid. Our expert takes the position that the center itself must have the required number of spaces and that they should be distributed throughout the

A Professional Corporation

200 East Sandpointe, Fourth Floor, Santa Ana, California 92707 | Mailing Address: PO BOX 2507  
Ph 714.432.8700 | www.hkclaw.com | Fx 714.546.7457

32



March 23, 2005  
Page 2

parking facility for the entire center. Therefore this issue goes beyond that which is in Rite Aid's control. There are two spaces which have been added directly in front of the store, one of which is van accessible. Mr. Settle indicated that the slopes at the rear of the spaces exceed 2%. I have attached a letter from the subcontractor indicating that when the asphalt was installed it was compliant. However, the asphalt has since settled slightly increasing the slopes. The areas which have settled are being corrected immediately.

3. Ice Cream Counter

It is my understanding that Mr. Settle believes there needs to be a 36 inch wide counter here. According to our expert, such a counter needs to be provided where there is a full service register. This is a cash only register and a compliant pass through has been added. Since there is no need for the disabled person to use a point of sale machine or for that person to write a check, the counter does not need to be 36 inches wide. An appropriate pass through has been provided. It is also my understanding that Mr. Hubbard approved such a modification in the O'Campo matter.

4. Exit Signage

The proper exit signage at was not installed when he inspected the store, but has been ordered and will be installed immediately upon receipt.

5. Restroom Door Pressure

Mr. Settle noted that the door pressure on both the men's room and the women's room was greater than five pounds. Prior to Mr. Settle's inspection, our contractor correctly adjusted those doors, but apparently the mechanism is old and will not hold the setting. Therefore new closing mechanisms have been ordered and will be installed immediately upon receipt.

6. Self-Closing Door on Restroom Stalls

Mr. Settle noted that the stalls need self-closing doors. These stall doors do in fact have the proper mechanism. However, hinges were installed upside down so that the doors are "self-opening". The hinges are being reversed so that the doors are self-closing.

7. U-Shaped Stall Door Handle

Mr. Settle noted that a compliant U-shaped door stall handle had been added but was in the incorrect position. It is being moved.



March 23, 2005  
Page 3

8. Grab Bar Height

Mr. Settle indicated that the grab bars in the restroom stalls should be 33 inches high. These grab bars are 33 1/4 inches high. Our expert indicates that where stall contains a tank toilet, the grab bars may be as high as 36 inches. See ADDAG section 3.2 and Building Code section 1115B.8.1. These grab bars are compliant.

9. Restroom Sink Height

Mr. Settle noticed that the sinks were mounted a couple of inches too low. This is being corrected. We believe that the change in sink height will correct any problems with the C-trap and sufficient clearance will then be provided.

I cannot give you a specific date upon which all of these changes will be made because we are awaiting the delivery of some parts. However, all will be made as soon as possible.

Very truly yours,

HART, KING & COLDREN



Wayne C. Arnold

WCA\dr

cc: Reed Settle

Mar 23 2005 10:26AM RC CORE MAINTENANCE

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Mar 23 05 08:57a

619-562-1082

p.1

**The Striping Company**  
 10769 Woodside Ave. Suite 205  
 : Santee, CA 92071  
 : (619) 448-2877  
 : (619) 562-1082 FAX  
 : Cont. Lic. 813316 (C-32)

**FAKED** *PS*

**facsimile transmittal**

To: **Richard Sr.** Fax: <sup>8978</sup> ~~951-733-9878~~

---

From: **Mike** Date: **3-22-05**

---

Re: **ADA Ramp Rite-Aid** Pages: **1**

---

CC:

---

Urgent     For Review     Please Comment     Please Reply     Please Recycle

As Per our conversation on Tuesday the 22<sup>nd</sup>, we will be out to do the needed repairs for the ADA Ramp at the Rite-Aid on Avocado Ave. in El Cajon on the 29<sup>th</sup> of March. We also believe that the settling of materials over time is the reason for this needed repair due to the thickness of the asphalt. This work, as is all our work, is guaranteed for a one-year period.

*Rite Aid 5625  
 1135 Avocado  
 El Cajon*

*35*

# RC

## STORE MAINTENANCE, INC.

569 Bateman Circle  
Corona, CA 92880  
(951) 738-9701 • Fax (951) 738-8978

## WORK ORDER No 75869

SERVICEMAN <i>Richard</i>	DATE <i>3-23-05</i>
MAP PAGE #	<input type="checkbox"/> BID JOB <input type="checkbox"/> NIGHT WORK
	<input type="checkbox"/> EMERGENCY <input type="checkbox"/> DAY WORK
JOB LOCATION <i>River Rd 5625</i>	
<i>1135 Avocado</i>	
<i>El Cerrito</i>	
JOB PHONE	WORK ORDER NUMBER

Signature of Work Ordered *Art Wayne Arnold*

### DESCRIPTION OF WORK

*Restroom door closers with -*

*Emergency EXIT SIGNS on Order will be in  
within 5-7 working days or sooner  
parts ordered on 3-23-05 & will be  
installed no later than 3-30-05*

*2 Norton 7500 Series  
Door Closers ADA  
Compliant 15615A45*

Equipment

Sub Contractor

Permits

TOTAL OTHER

START

ARRIVE

DEPART

Customer Initial

TOTAL LABOR

TOTAL MATERIALS

TOTAL TRAVEL

TAX

TOTAL

JOB COMPLETED?  YES  NO

TOTAL MATERIALS

NAME

SIGNATURE

I hereby acknowledge the satisfactory completion of the above described work.

WHITE • OFFICE  
YELLOW • WAREHOUSE  
PINK • CUSTOMER

*36*

