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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 FERN McEWEN,

11 Plaintiff,

12 v.

13 SLACK AND WINZLER PROPERTIES, a
14 California Limited Partnership, THRIFTY
15 PAYLESS, INC., a California corporation,
16 dba RITE AID; and DOES ONE to FIFTY,
17 inclusive,

18 Defendants.

) Case No. C-03-0975 VRW

) Civil Rights

) COMPLAINT FOR INJUNCTIVE RELIEF
) AND DAMAGES: DENIAL OF CIVIL
) RIGHTS OF A DISABLED PERSON IN
) VIOLATION OF THE AMERICANS WITH
) DISABILITIES ACT OF 1990; VIOLATION
) OF CALIFORNIA'S CIVIL RIGHTS
) STATUTES; GENERAL NEGLIGENCE

) JURY TRIAL REQUESTED

19 Plaintiff **FERN McEWEN** complains of defendants **SLACK AND WINZLER**
20 **PROPERTIES, a California Limited Partnership, THRIFTY PAYLESS, INC., a California**
21 **corporation, dba RITE AID; and DOES ONE to FIFTY, inclusive,** and alleges as follows:

22 **JURISDICTION AND VENUE**

23
24 1. The Court has jurisdiction of this action pursuant to 28 **USC** § 1331 for
25 violations of the **Americans with Disabilities Act of 1990**, (42 **USC** § 12101, *et seq.*)
26 Pursuant to pendant jurisdiction, attendant and related causes of action, arising from the
27 same facts, are also brought under California law, including, but not limited to, violations of
28

1 **California Health & Safety Code** § 19955, *et seq.*, including **California Code of**
2 **Regulations**, Title 24, § 19959, **California Civil Code** §§ 51, 51.5, 52(a), 52.1, 54, 54.1,
3 54.3 and 55.

4 2. Venue is proper in this court pursuant to 28 **USC** § 1391(b) and is founded on
5 the fact that the real property which is the subject of this action is located in this district, at
6 Eureka, Humboldt County, California, and that Plaintiff's causes of action arose in this
7 district.

8 INTRODUCTION

9
10 3. **"RITE AID"** is located at 411 Harris Street, Eureka, Humboldt County,
11 California. Said store is owned and operated by defendants **SLACK AND WINZLER**
12 **PROPERTIES**, a California Limited Partnership, **THRIFTY PAYLESS, INC.**, a California
13 corporation, dba **RITE AID**; and **DOES ONE to FIFTY, inclusive**.

14
15 Defendants **SLACK AND WINZLER PROPERTIES**, a California Limited
16 Partnership, **THRIFTY PAYLESS, INC.**, a California corporation, dba **RITE AID**; and
17 **DOES ONE to FIFTY, inclusive**, operate an establishment for services to the public and at
18 which Defendants failed to provide barrier free access to said establishment in conformity
19 with both Federal and California legal requirements. Further, Defendants failed to provide
20 compliance as follows:

21 **A. PARKING**

- 22
- 23 1. The Rite Aid lot had 60 parking spaces, 3 of these were painted blue;
24 none had signage designating them as van accessible in violation of
California Title 24 § 1129B.4.
 - 25 2. The accessible parking spaces were only 16' long in violation of
26 **California Title 24 § 1129B.4**
 - 27 3. Two of the spaces painted blue required travel behind a car not their
28 own in violation of **California Title 24 § 1129B.4**

1 **NOTE:** There is a light pole in the access aisle of one of the accessible
2 spaces. This negates the value of the access aisle.

3 4. None of the painted blue spaces had signage designating them as van
4 accessible in violation of **California Title 24 § 1129.B.5.**

5 5. No signage was found at any of the 5 entrances, nor adjacent to the
6 accessible spaces in violation of **California Title 24 § 1129.B.5.**

7 **B. CASHIER COUNTERS:**

8 6. The inside cashier counters were less than 36" wide in violation of
9 **California Title 24 § 1110B.1.3**

10 The above barriers interfered with Plaintiff's access of the facilities and continue to deter
11 Plaintiff from visiting said facilities, and as a legal result, Plaintiff **FERN McEWEN** suffers
12 violations of her civil rights to full and equal enjoyment of goods, services, facilities and
13 privileges, and has and will suffer embarrassment and humiliation.

14 **FACTUAL ALLEGATIONS**

15 4. Plaintiff **FERN McEWEN** is, and at all times relevant to this Complaint is, a
16 "physically handicapped person, "physically disabled person," and a "person with a
17 disability," as these terms are used under California law and under federal laws including,
18 but not limited to, Title III of the ***Americans with Disabilities Act of 1990***. (The terms
19 "physically handicapped person," "physically disabled person," and a "person with a
20 disability" will be used interchangeably throughout this Complaint.) Plaintiff is a "person with
21 a disability," as defined by all applicable California and United State's laws. Plaintiff **FERN**
22 **McEWEN** is mobility impaired.

23 5. Defendants **SLACK AND WINZLER PROPERTIES, a California Limited**
24 **Partnership, THRIFTY PAYLESS, INC., a California corporation, dba RITE AID; and**
25 **DOES ONE to FIFTY, inclusive,** at all times relevant herein were and are the owners and
26 operators; lessors and/or lessees, franchisers and/or franchisees, of public facilities known
27 as the "**RITE AID**" store, located at Eureka, California, subject to the requirements of
28

1 California state law requiring full and equal access to public facilities pursuant to **California**
2 **Health & Safety Code** § 19955, *et seq.*, **California Civil Code** §§ 51, 51.5, 52(a), 52.1, 54,
3 54.1, 54.3 and 55, and subject to Title III of the **Americans with Disabilities Act of 1990**,
4 and to all other legal requirements referred to in this Complaint. Plaintiff does not know the
5 relative responsibilities of defendants in the operation of the facilities herein complained of,
6 and alleges a joint venture and common enterprise by all such defendants.

7
8 6. Defendants **SLACK AND WINZLER PROPERTIES, a California Limited**
9 **Partnership, THRIFTY PAYLESS, INC., a California corporation, and DOES ONE to**
10 **FIFTY, inclusive** (hereinafter alternatively referred to collectively as “defendants”), at all
11 times relevant herein were and are owners, possessors, builders and keepers of the “**RITE**
12 **AID**” in Eureka, California.

13
14 7. Defendants **SLACK AND WINZLER PROPERTIES, a California Limited**
15 **Partnership, THRIFTY PAYLESS, INC., a California corporation, and DOES ONE to**
16 **FIFTY, inclusive** are the owners and operators of the subject “**RITE AID**” store, at all times
17 relevant to this Complaint. Plaintiff is informed and believes that each of the defendants
18 herein is the agent, employee or representative of each of the other defendants, and
19 performed all acts and omissions stated herein within the scope of such agency or
20 employment or representative capacity and is responsible in some manner for the acts and
21 omissions of the other defendants in legally causing the damages complained of herein, and
22 have approved or ratified each of the acts or omissions of each other defendant, as herein
23 described.

24
25 8. Plaintiff **FERN McEWEN** does not know the true names and capacities of
26 defendants **SLACK AND WINZLER PROPERTIES, a California Limited Partnership,**
27 **THRIFTY PAYLESS, INC., a California corporation, and DOES ONE to FIFTY, inclusive,**
28

1 their business capacities, their ownership connection to the property and business, nor their
2 relative responsibilities in causing the access violations herein complained of, and alleges a
3 joint venture and common enterprise by all such defendants. Plaintiff is informed and
4 believes that each of the defendants herein, including DOES ONE to FIFTY, inclusive, is the
5 agent, ostensible agent, master, servant, employer, employee, representative, franchiser,
6 franchisee, joint venturer, partner, and associate, or such similar capacity, of each of the
7 other defendants, and was at all times acting and performing, or failing to act or perform,
8 with the authorization, consent, permission or ratification of each of the other defendants,
9 and is responsible in some manner for the acts and omissions of the other defendants in
10 legally causing the violations and damages complained of herein, and have approved or
11 ratified each of the acts or omissions of each other defendant, as herein described. Plaintiff
12 will seek leave to amend this Complaint when the true names, capacities, connections and
13 responsibilities of defendants **SLACK AND WINZLER PROPERTIES, a California Limited**
14 **Partnership, THRIFTY PAYLESS, INC., a California corporation, dba RITE AID; and**
15 **DOES ONE to FIFTY, inclusive**, are ascertained.

18 9. Plaintiff is informed and believes that all named defendants, including DOES
19 ONE to FIFTY, inclusive, conspired to commit the acts described herein, or alternatively,
20 aided and abetted one another in the performance of the wrongful acts hereinafter alleged.

21 10. Defendants **SLACK AND WINZLER PROPERTIES, a California Limited**
22 **Partnership, THRIFTY PAYLESS, INC., a California corporation, dba RITE AID; and**
23 **DOES ONE to FIFTY, inclusive**, are the owners and operators of “RITE AID” store, located
24 at Eureka, California. This store, including, but not limited to, parking spaces and access
25 aisles and access routes, are each a part of a “public accommodation or facility” subject to
26 the requirements of **California Health & Safety Code § 19955, et seq.**, and of **California**
27
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1 **Civil Code** §§ 51, 52(a), 54, 54.1, *et seq.* On information and belief, this "RITE AID" store
2 was constructed after 1990 which has subjected the "RITE AID" store to handicapped
3 access requirements per **California Health & Safety Code** § 19959, and applicable
4 portions of **California Code of Regulations**, Title 24, (the State Building Code).

5 11. On or about January 9, 2003, Plaintiff **FERN McEWEN**, visited the "RITE AID"
6 store in Eureka, California, for the purpose of purchasing a prescription. Defendants
7 **SLACK AND WINZLER PROPERTIES, a California Limited Partnership, THRIFTY**
8 **PAYLESS, INC., a California corporation, dba RITE AID; and DOES ONE to FIFTY,**
9 **inclusive**, interfered with Plaintiff's access to the "RITE AID" store as set forth in Paragraph
10 3 above.
11

12 Said acts and omissions denied Plaintiff legal handicapped access to the "RITE AID"
13 store according to federal and state law.
14

15 12. Plaintiff encountered and/or is informed and believes that the following
16 architectural barriers, which violate the requirements of the **California Code of Regulations**
17 Title 24 and **ADAAG**, existed and continue to exist thereby denying Plaintiff and those
18 similarly situated full and equal access to the subject public facility as set forth in Paragraph
19 3 above.
20

21 13. Defendants, and each of them, discriminated against Plaintiff **FERN McEWEN**
22 on the basis of her physical disability, and interfered with her access to the "RITE AID"
23 establishment, in violation of both California law including, but not limited to, **California Civil**
24 **Code** §§ 51, 51.5, 54, 54.1, and a violation of Title III, §302, the "Prohibition of
25 Discrimination" provision and §503, the "Prohibition Against Retaliation or Coercion"
26 provision of the **Americans with Disabilities Act of 1990**.
27

28 14. As a result of the actions and failure to act of defendants, and each of them,

1 and as a result of the failure to provide appropriate handicapped parking, proper
2 handicapped signage, proper handicapped accessible entryways, and handicapped
3 accommodations, Plaintiff **FERN McEWEN** suffered and will suffer a loss of her civil rights to
4 full and equal access to public facilities, and further suffered and will suffer emotional
5 distress, mental distress, mental suffering, mental anguish, which includes shame,
6 humiliation, embarrassment, anger, chagrin, disappointment and worry, expectedly and
7 naturally associated with a person with a physical disability being denied access to a public
8 accommodation, all to her damages as prayed hereinafter in an amount within the
9 jurisdiction of this court.

11 **I. FIRST CAUSE OF ACTION:**
12 VIOLATION OF ***THE AMERICANS WITH DISABILITIES ACT OF***
13 (42 ***USC*** §12101 *et seq.*)

14 15. Plaintiff repleads and incorporates by reference, as if fully set forth again
15 herein, the allegations contained in paragraphs 1 through 14 of this Complaint and
16 incorporates them herein as if separately repled.

17 16. Pursuant to law, in 1990 the United States Congress made findings per 42
18 ***USC*** § 12101 regarding persons with physical disabilities, finding that laws were needed to
19 more fully protect 43 million Americans with one or more physical or mental disabilities;
20 [that] historically society has tended to isolate and segregate individuals with disabilities;
21 [that] such forms of discrimination against individuals with disabilities continue to be a
22 serious and pervasive social problem; [that] the nation's proper goals regarding individuals
23 with disabilities are to assure equality of opportunity, full participation, independent living
24 and economic self-sufficiency for such individuals; [and that] the continuing existence of
25 unfair and unnecessary discrimination and prejudice denies people with disabilities the
26 opportunity to compete on an equal basis and to pursue those opportunities for which our
27
28

1 free society is justifiably famous.

2 17. Congress stated as its purpose in passing the **Americans with Disabilities**
3 **Act of 1990** (42 **USC** § 12102):

4 It is the purpose of this act (1) to provide a clear and comprehensive
5 national mandate for the elimination of discrimination against individuals with
6 disabilities; (2) to provide clear, strong, consistent, enforceable standards
7 addressing discrimination against individuals with disabilities; (3) to ensure
8 that the Federal government plays a central role in enforcing the standards
9 established in this act on behalf of individuals with disabilities; and (4) to
invoke the sweep of Congressional authority, including the power to enforce
the 14th Amendment and to regulate commerce, in order to address the
major areas of discrimination faced day to day by people with disabilities.

10 18. As part of the **Americans with Disabilities Act of 1990**, Public Law 101-336
11 (hereinafter the “ADA”), Congress passed “Title III - Public Accommodations and Services
12 Operated by Private Entities” (42 **USC** § 12181 *et seq.*). Among the public accommodations
13 identified for purposes of this title were “a bakery, grocery store, clothing store, hardware
14 store, shopping center, or other sales or rental establishment”

15 19. Pursuant to 42 **USC** § 12182,

16 “No individual shall be discriminated against on the basis of disability in
17 the full and equal enjoyment of the goods, services, facilities, privileges,
18 advantages, or accommodations of any place of public accommodation by
19 any person who owns, leases (or leases to), or operates a place of public
20 accommodation.”

21 20. Among the general prohibitions against discrimination were included in 42
22 **USC** §12182(b)(1)(A)(i):

23 **Denial of participation.** It shall be discriminatory to subject an
24 individual or class of individuals on the basis of a disability or disabilities of
25 such individual or class, directly, or through contractual, licensing, or other
26 arrangements, to a denial of the opportunity of the individual or class to
participate in or benefit from the goods, services, facilities, privileges,
advantages, or accommodations of an entity.

27 21. Among the general prohibitions against discrimination were included in 42
28 **USC** §12182(b)(1)(E):

1 **Association** -- It shall be discriminatory to exclude or otherwise deny
2 equal goods, services, facilities, privileges, advantages, accommodations, or
3 other opportunities to an individual or entity because of the known disability of
an individual with whom the individual or entity is known to have a relationship
or association.

4 The acts of defendants set forth herein were a violation of Plaintiff's rights under the ADA,
5 Public Law 101-336, and the regulations promulgated thereunder, 28 **CFR** Part 36 et seq.

6 22. Among the general prohibitions against discrimination were included in 42
7 **USC** § 12182(b)(2)(A)(i) and 42 **USC** § 12182(b)(2)(A)(ii):

8 **Discrimination.** For purposes of subsection (a), discrimination
9 includes -

10 (i) the imposition or application of eligibility criteria that screen out or
11 tend to screen out an individual with a disability or any class of individuals
12 with disabilities from fully and equally enjoying any goods, services, facilities,
13 privileges, advantages, or accommodations, unless such criteria can be
14 shown to be necessary for the provision of the goods, services, facilities,
privileges, advantages, or accommodations being offered;

15 (ii) a failure to make reasonable modifications in policies, practices, or
16 procedures, when such modifications are necessary to afford such goods,
17 services, facilities, privileges, advantages, or accommodations to individuals
18 with disabilities, unless the entity can demonstrate that making such
modifications would fundamentally alter the nature of such goods, services,
facilities, privileges, advantages, or accommodations.

19 23. Plaintiff alleges that constructing the eligibility requirements, policies, practices
20 and procedure for entry to the "**RITE AID**" facility by persons with disabilities and their
21 companions as established by the defendants can be simply modified to eliminate disparate
22 and discriminatory treatment of persons with disabilities by properly constructing barrier free
23 handicapped access for safe and full and equal enjoyment of the "**RITE AID**" store as that
24 enjoyed by other people.

25 24. The specific prohibition against retaliation and coercion is included in the
26 **Americans With Disabilities Act of 1990** § 503(b) and the *Remedies and Procedures* in §
27 503(c):
28

1 (b) Interference, Coercion, or Intimidation. - It shall be unlawful to
2 coerce, intimidate, threaten, or interfere with any individual in the exercise or
3 enjoyment of, or on account of his or her having exercised or enjoyed, or on
4 account of his or her having aided or encouraged any other individual in the
5 exercise or enjoyment of, any right granted or protected by this Act.

6 (c) Remedies and Procedure. - The remedies and procedures
7 available under sections 107, 203, and 308 of this Act shall be available to
8 aggrieved persons for violations of subsections (a) and (b), with respect to
9 Title I, Title II and Title III, respectively.

10 25. Among the specific prohibitions against discrimination were included, in 42
11 **USC** § 12182(b)(2)(a)(iv), "A failure to remove architectural barriers, and communications
12 barriers that are structural in nature, in existing facilities...where such removal is readily
13 achievable;" and (v) "where and entity can demonstrate that the removal of a barrier under
14 clause (iv) is not readily achievable, a failure to make such goods, services, facilities,
15 privileges, advantages, or accommodations available through alternative methods if such
16 methods are readily achievable." The acts of Defendants set forth herein were a violations
17 of Plaintiff's rights under the "ADA," Public Law 101-336, and the regulations promulgated
18 thereunder, 28 **CFR** Part 36, *et seq.*

19 26. The removal of the barriers complained of by Plaintiff as hereinabove alleged
20 were at all times after 1990 "readily achievable." On information and belief, if the removal of
21 all the barriers complained of here together were not "readily achievable," the removal of
22 each individual barrier complained of herein was "readily achievable."

23 27. Per 42 **USC** § 12181(9), "The term 'readily achievable' means easily
24 accomplishable and able to be carried out without much difficulty or expense." The statute
25 and attendant regulations define relative "expense" in relation to the total financial resources
26 of the entities involved, including any "parent" companies. Plaintiff alleges that properly
27 repairing each of the items that Plaintiff complains of herein is readily achievable, including,
28 but not limited to, correcting and repairing the items set forth in Paragraph 3 above.

1 The changes needed to remove barriers to access for the disabled were and are
2 “readily achievable” by the defendants under standards set forth under 42 **USC** § 12181 of
3 the **Americans with Disabilities Act of 1990**. (Further, if it was not “readily achievable” for
4 defendants to remove all such barriers, defendants have failed to make the required
5 services available through alternative methods, although such methods are achievable as
6 required by 42 **USC** §12181(b)(2)(a)(iv), (v).)

7
8 28. Pursuant to the **Americans with Disabilities Act of 1990**, §308 (42 **USC** §
9 12188 *et seq.*), Plaintiff is entitled to the remedies and procedures set forth in the **Civil**
10 **Rights Act of 1964** §204(a), (42 **USC** § 2000a-3(a)), as Plaintiff is being subjected to
11 discrimination on the basis of disability in violation of this title and/or Plaintiff has reasonable
12 grounds for believing that she is about to be subjected to discrimination in violation of
13 **Americans With Disabilities Act of 1990** §302. Plaintiff cannot return to or make use of
14 the public facilities complained of herein for the purpose of entry and provision of goods and
15 service so long as defendants continue to apply eligibility criteria, policies, practices and
16 procedures to screen out and refuse to allow entry and service to persons with disabilities
17 such as Plaintiff’s.

18
19 29. Defendants’, and each of their acts and omissions of failing to provide barrier
20 free handicapped access for Plaintiff, were tantamount to interference, coercion or
21 intimidation pursuant to **Americans With Disabilities Act of 1990** §503(b) (now 42 **USC** §
22 12203):

23
24 It shall be unlawful to coerce, intimidate, threaten, or interfere with any
25 individual in the exercise or enjoyment of, or on account of his or her having
26 encouraged any other individual in the exercise or enjoyment of, any right
granted or protected by this Act.

27 30. Per **Americans With Disabilities Act of 1990** § 308(a)(1) (now 42 **USC** §
28 12188), “Nothing in this section shall require a person with a disability to engage in a futile

1 gesture if such person has actual notice that a person or organization covered by this title
2 does not intend to comply with its provisions.” Pursuant to this last section, Plaintiff, on
3 information and belief, alleges that defendants have continued to violate the law and deny
4 the rights of Plaintiff and other disabled persons to access this public accommodation for
5 the purpose of lodging. Therefore, Plaintiff seeks injunctive relief pursuant to §308(a)(2),

6 “...Where appropriate, injunctive relief shall also include requiring the
7 provision of an auxiliary aid or service, modifications of a policy, or provision
8 of alternative methods, to the extent required by this title.”

9 31. Plaintiff seeks relief pursuant to remedies set forth in § 204(a) of the **Civil**
10 **Rights Act of 1964** (42 **USC** § 2000a-3(a), and pursuant to federal regulations adopted to
11 implement the **Americans with Disabilities Act of 1990**, including, but not limited to, an
12 order granting injunctive relief and attorneys’ fees. Such attorneys’ fees, “including litigation
13 expenses and costs,” are further specifically provided for by §505 of Title III.

14 **II. SECOND CAUSE OF ACTION**

15 BREACH OF STATUTORY PROTECTIONS FOR PERSONS WITH
16 PHYSICAL DISABILITIES (**California Health & Safety Code** § 19955, *et*
17 *seq.*)

18 32. Plaintiff repleads and incorporates by reference, as if fully set forth again
19 herein, the allegations contained in paragraphs 1 through 31 of this Complaint and
20 incorporate them herein as if separately repled.

21 33. **California Health & Safety Code** § 19955 provides in pertinent part:

22 The purpose of this part is to insure that public accommodations or
23 facilities constructed in this state with private funds adhere to the provisions of
24 Chapter 7 (commencing with Sec. 4450) of Division 5 of Title 1 of the
25 *Government Code*. For the purposes of this part “public accommodation or
26 facilities” means a building, structure, facility, complex, or improved area
27 which is used by the general public and shall include auditoriums, hospitals,
28 theaters, restaurants, hotels, motels, stadiums, and convention centers.
When sanitary facilities are made available for the public, clients or
employees in such accommodations or facilities, they shall be made available
for the handicapped.

1 34. **California Health & Safety Code** § 19956, which appears in the same
2 chapter as §19955, provides in pertinent part, “accommodations constructed in this state
3 shall conform to the provisions of Chapter 7 (commencing with Sec. 4450) of Division 5 of
4 Title 1 of the *Government Code*...” **California Health & Safety Code** § 19956 was
5 operative July 1, 1970, and is applicable to all public accommodations constructed or altered
6 after that date. On information and belief, portions of “**RITE AID**” and/or of its buildings,
7 were constructed and/or altered after July 1, 1970, and substantial portions of said building
8 had alterations, structural repairs, and/or additions made to such public accommodations
9 after July 1, 1970, thereby requiring said public accommodations and/or buildings to be
10 subject to the requirements of Part 5.5, **California Health & Safety Code** § 19955, *et seq.*,
11 upon such alteration, structural repairs or additions per **California Health & Safety Code** §
12 19959.
13

14 35. Pursuant to the authority delegated by **California Government Code** § 4450,
15 *et seq.*, the State Architect promulgated regulations for the enforcement of these provisions.
16 Effective January 1, 1982, Title 24 of the **California Administrative Code** adopted the
17 California State Architect’s Regulations and these regulations must be complied with as to
18 any alterations and/or modifications of the “**RITE AID**” occurring after that date.
19 Construction changes occurring prior to this date but after July 1, 1970 triggered access
20 requirements pursuant to the “ASA” requirements, the **American Standards Association**
21 **Specifications**, A117.1-1961. On information and belief, at the time of the construction and
22 modification of said building, all buildings and facilities covered were required to conform to
23 each of the standards and specifications described in the **American Standards**
24 **Association Specifications** and/or those contained in Title 24 of the **California**
25 **Administrative Code**, (now known as Title 24, **California Code of Regulations**.)
26
27
28

1 36. Public facilities, such as “**RITE AID**” are public accommodations or facilities
2 within the meaning of **California Health & Safety Code** § 19955, *et seq.*

3 37. It is difficult or impossible for persons with physical disabilities who use
4 wheelchairs, canes, walkers and service animals to travel about in public to use a store with
5 the defects set forth in Paragraph 3 above as required by Title 24 of the **California Code of**
6 **Regulations** and the **Americans with Disabilities Act Access Guidelines (ADAAG)**.
7 Thus, when public accommodations fail to provide handicap accessible public facilities,
8 persons with physical disabilities are unable to enter and use said facilities, and are denied
9 full and equal access to and use of that facility that is enjoyed by other members of the
10 general public.
11

12 38. Plaintiff **FERN McEWEN** and other similarly situated persons with physical
13 disabilities whose physical conditions require the use of wheelchairs, canes, walkers and
14 service animals are unable to use public facilities on a “full and equal” basis unless each
15 such facility is in compliance with the provisions of the **California Health & Safety Code** §
16 19955, *et seq.* Plaintiff is a member of that portion of the public whose rights are protected
17 by the provisions of **California Health & Safety Code** § 19955, *et seq.*
18

19 39. The **California Health & Safety Code** was enacted “[t]o ensure that public
20 accommodations or facilities constructed in this state with private funds adhere to the
21 provisions of Chapter 7 (commencing with §4450) of Division 5 of Title 1 of the *Government*
22 *Code.*” Such public accommodations are defined to include stores.
23

24 40. Plaintiff is further informed and believes that as of the date of filing this
25 Complaint, Defendants have not made accessible the facilities at the subject store as set
26 forth in Paragraph 3 above.
27

28 41. Plaintiff **FERN McEWEN** is informed and believes, and therefore alleges, that

1 Defendants **SLACK AND WINZLER PROPERTIES**, a California Limited Partnership,
2 **THRIFTY PAYLESS, INC.**, a California corporation, dba **RITE AID**; and **DOES ONE to**
3 **FIFTY, inclusive**, and each of them, caused the subject buildings constituting “**RITE AID**” to
4 be constructed, altered and maintained in such a manner that persons with physical
5 disabilities were denied full and equal access to, within and throughout said buildings and
6 were denied full and equal use of said public facilities, and despite knowledge and actual
7 and constructive notice to such Defendants that the configuration of the store and/or
8 buildings was in violation of the civil rights of persons with physical disabilities, such as
9 Plaintiff. Such construction, modification, ownership, operation, maintenance and practices
10 of such public facilities are in violation of law as stated in Part 5.5, **California Health &**
11 **Safety Code** § 19955, *et seq.*, and elsewhere in the laws of California.

13 42. On information and belief, the subject building constituting the public facilities
14 of “**RITE AID**” denied full and equal access to Plaintiff and other persons with physical
15 disabilities in other respects due to non-compliance with requirement of Title 24 of the
16 **California Code of Regulations** and **California Health & Safety Code** § 19955, *et seq.*

18 43. The basis of Plaintiff’s aforementioned information and belief is the various
19 means upon which Defendants must have acquired such knowledge, including, but not
20 limited to, this lawsuit, other access lawsuits, communications with operators of other stores
21 and other property owners regarding denial access, communications with Plaintiff and other
22 persons with disabilities, communications with other patrons who regularly visit there,
23 communications with owners of other businesses, notices and advisories they obtained from
24 governmental agencies through the mails, at seminars, posted bulletins, television, radio,
25 public service announcements, or upon modification, improvement, alteration or substantial
26 repair of the subject premises and other properties owned by these Defendants, newspaper
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1 articles and trade publications regarding the **Americans with Disabilities Act of 1990** and
2 other access law, and other similar information. The scope and means of the knowledge of
3 each defendant is within each defendant's exclusive control and cannot be ascertained
4 except through discovery.

5 44. As a result of Defendants' acts and omissions in this regard, Plaintiff has been
6 required to incur legal expenses and hire attorneys in order to enforce her civil rights and
7 enforce provisions of the law protecting access for persons with physical disabilities and
8 prohibiting discrimination against persons with physical disabilities, and to take such action
9 both in her own interests and in order to enforce an important right affecting the public
10 interest. Plaintiff, therefore, seeks damages in this lawsuit for recovery of all reasonable
11 attorneys' fees incurred, pursuant to the provisions of the **California Code of Civil**
12 **Procedure** § 1021.5. Plaintiff additionally seeks attorneys' fees pursuant to **California**
13 **Health & Safety Code** § 19953 and **California Civil Code** §§ 54.3 and 55.

14 45. Defendants, and each of them, at times prior to and including January 9, 2003,
15 and continuing to the present time, knew that persons with physical disabilities were denied
16 their rights of equal access to all portions of this public facility. Despite such knowledge,
17 Defendants failed and refused to take steps to comply with the applicable access statutes;
18 and despite knowledge of the resulting problems and denial of civil rights thereby suffered
19 by Plaintiff **FERN McEWEN** and other similarly situated persons with disabilities, including
20 the specific notices referred to in paragraph 43 of this Complaint. Defendants have failed
21 and refused to take action to grant full and equal access to persons with physical disabilities
22 in the respects complained of hereinabove. Defendants and each of them have carried out
23 a course of conduct of refusing to respond to, or correct complaints about, denial of
24 handicap access. Such actions and continuing course of conduct by Defendants, evidence
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1 despicable conduct in conscious disregard for the rights or safety of Plaintiff and of other
2 similarly situated persons, justifying an award of exemplary and punitive damages pursuant
3 to **California Civil Code** § 3294.

4 46. Defendants' actions have also been oppressive to persons with physical
5 disabilities and of other members of the public, and have evidenced actual or implied
6 malicious intent toward those members of the public, such as Plaintiff and other persons
7 with physical disabilities who have been denied the proper access they are entitled to by
8 law. Further, Defendants' refusals on a day-to-day basis to correct these problems
9 evidence despicable conduct in conscious disregard for the rights of Plaintiff and other
10 members of the public with physical disabilities.
11

12 47. Plaintiff prays for an award of punitive damages against Defendants, and each
13 of them, pursuant to **California Civil Code** § 3294 in an amount sufficient to make a more
14 profound example of Defendants and discourage owners, operators, franchisers and
15 franchisees of other public facilities from willful disregard of the rights of persons with
16 physical disabilities. Plaintiff does not know the financial worth of Defendants, or the
17 amount of punitive damages sufficient to accomplish the public purposes of **California Civil**
18 **Code** § 3294 and seeks leave to amend this Complaint when such facts are known.
19

20 48. As a result of the actions and failure of Defendants, and each of them, and as
21 a result of the failure to provide proper accessible public facilities, Plaintiff **FERN McEWEN**
22 was denied her civil rights, including her right to full and equal access to public facilities, was
23 embarrassed and humiliated, suffered physical, psychological and mental injuries and
24 emotional distress, mental distress, mental suffering, mental anguish, which includes
25 shame, humiliation, embarrassment, anger, chagrin, disappointment and worry, expectedly
26 and naturally associated with a person with a physical disability being denied access to a
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1 public accommodation.

2 WHEREFORE, Plaintiff prays for damages as hereinafter stated.

3 **III. THIRD CAUSE OF ACTION**
4 **VIOLATION OF CALIFORNIA'S CIVIL RIGHTS ACTS**
5 **(California Civil Code §§ 54, 54.1 and 54.3)**

6 49. Plaintiff repleads and incorporates by reference as if fully set forth again
7 herein, the allegations contained in paragraphs 1 through 48 of this Complaint and
8 incorporates them herein as if separately repled.

9 50. The public facilities above-described constitute public facilities and public
10 accommodations within the meaning of **California Health & Safety Code** § 19955 *et seq.*
11 and were facilities to which members of the public are invited. The aforementioned acts and
12 omissions of defendants, and each of them, constitute a denial of equal access to and use
13 and enjoyment of these facilities by persons with disabilities, including Plaintiff **FERN**
14 **McEWEN**. Said acts and omissions are also in violation of provisions of Title 24 of the
15 **California Code of Regulations**.

16 51. The rights of Plaintiff, the entitlement of Plaintiff to full and equal access and
17 the denial by defendants of such rights and entitlements are set forth in **California Civil**
18 **Code** §§ 54, 54.1 and 54.3, to wit:

19
20
21 Individuals with disabilities shall have the same right as the...general
22 public to full and free use of the streets, highways, sidewalks, walkways,
23 public buildings, public facilities, and other public places. **California Civil**
24 **Code** § 54(a).

25
26 Individuals with disabilities shall be entitled to full and equal access, as
27 other members of the general public, to accommodations, advantages,
28 facilities, and privileges of all common carriers, airplanes, motor vehicles,
railroad trains, motor buses, streetcars, boats, or any other public
conveyances or modes of transportation (whether private, public, franchised,
licensed, contracted, or otherwise provided), telephone facilities, adoption
agencies, private schools, hotels, lodging places, places of public
accommodation, amusement or resort, and other places to which the general
public is invited, subject only to the conditions and limitations established by

1 law, or state or federal regulation, and applicable alike to all persons.
2 **California Civil Code** § 54.1(a).

3 52. On or about January 9, 2003, Plaintiff **FERN McEWEN** suffered
4 violations of **California Civil Code** §§ 54 and 54.1 in that she was denied full and equal
5 enjoyment of the goods, services, facilities and privileges of said "**RITE AID**", as set forth in
6 paragraph 3 above. Plaintiff was also denied full and equal access to other particulars,
7 including, but not limited to, those described hereinabove. Plaintiff was also denied use of
8 facilities that she was entitled to under Title III of the **Americans with Disabilities Act of**
9 **1990**.

10 53. As a result of the denial of full and equal enjoyment of the goods, services,
11 facilities and privileges of defendants' "**RITE AID**" store due to the acts and omissions of
12 defendants, and each of them, in owning, operating and maintaining this subject public
13 facility, Plaintiff suffered violations of her civil rights, including, but not limited to, rights under
14 **California Civil Code** §§ 54, 54.1, and 54.3, and has and will suffer physical injury,
15 emotional distress, mental distress, mental suffering, mental anguish, which includes
16 shame, humiliation, embarrassment, anger, chagrin, disappointment and worry, expectedly
17 and naturally associated with a disabled person's denial of full and equal enjoyment of
18 goods, services, privileges, etc. all to her damages as prayed hereinafter in an amount
19 within the jurisdiction of the court. Defendants' actions and omissions to act constituted
20 discrimination against Plaintiff on the sole basis that Plaintiff was physically disabled.
21

22 54. Plaintiff seeks damages for the violation of her rights as a disabled person on
23 or about January 9, 2003, according to proof, pursuant to **California Civil Code** § 54.3,
24 including a trebling of all statutory and actual damages, general and special, available
25 pursuant to **California Civil Code** § 54.3(a).
26

27 55. As a result of defendants' acts and omissions in this regard, Plaintiff **FERN**
28

1 **McEWEN** has been required to incur legal expenses and hire attorneys in order to enforce
2 her rights and enforce provisions of the law protecting the full and equal enjoyment of
3 goods, services, facilities, privileges of public facilities by the disabled, and those individuals
4 associated with or accompanied by a person with disabilities, and prohibiting discrimination
5 against the disabled. Plaintiff, therefore, seeks recovery in this lawsuit for all reasonable
6 attorneys' fees incurred pursuant to the provisions of **California Civil Code** § 54.3.
7 Additionally, Plaintiff's lawsuit is intended not only to obtain compensation for damages to
8 Plaintiff, but also to compel the defendants to make their goods, services, facilities and
9 privileges available and accessible to all members of the public with physical disabilities,
10 justifying public interest attorneys' fees pursuant to the provisions of **California Code of**
11 **Civil Procedure** § 1021.5.

13 56. The acts and omissions of defendants in failing to provide the required
14 accessible facilities subsequent to the enactment date and compliance date of the
15 **Americans with Disabilities Act of 1990**, and refusal to make remedial modifications and
16 alterations to its handicapped parking, handicapped signage, pathways, and other elements
17 as hereinabove stated, after being notified by patrons before and after the time of Plaintiff's
18 visit and injuries, on or about January 9, 2003, and all times prior thereto with the knowledge
19 that persons with disabilities would enter defendants' premises, the reason given therefor,
20 was an established policy, practice and procedure of refusing and denying entry, thereby
21 denying lodging and other services to a person with disabilities and the companions thereof,
22 evidence malice and oppression toward Plaintiff and other disabled persons.

25 57. Such despicable conduct, as that incorporated herein by reference and
26 specifically set forth in Paragraph 11, was carried out by defendants with a willful and
27 conscious disregard for the law and the rights of Plaintiff and of other disabled persons, and
28

1 was oppressive in that such conduct subjected Plaintiff “to cruel and unjust hardship in
2 conscious disregard” for the law and Plaintiff’s rights, and justifies exemplary and punitive
3 damages pursuant to **California Civil Code** § 3294, in amounts sufficient to make an
4 example of defendants and to punish defendants and to carry out the purposes of
5 **California Civil Code** § 3294.

6 58. Defendants have failed to establish a nondiscriminatory criteria, policy,
7 practice and procedure for entry into said **"RITE AID"** store as hereinabove described.
8

9 59. As a result of defendants’ continuing failure to provide for the full and equal
10 enjoyment of goods, services, facilities and privileges of said **"RITE AID"** as hereinabove
11 described, Plaintiff has continually been denied her rights to full and equal enjoyment of the
12 subject store, as it would be a “futile gesture” to attempt to patronize said **"RITE AID"** with
13 the discriminatory policy in place as hereinabove described.
14

15 60. The acts and omissions of defendants as complained of herein in failing to
16 provide the required accessible facilities subsequent to the enactment date and compliance
17 date of the **Americans with Disabilities Act of 1990** and refusal to make remedial
18 modifications and alternations to the architectural barriers as stated herein and in failing to
19 establish practices, policies and procedures to allow safe access by persons who are
20 disabled are continuing on a day-to-day basis to have the effect of wrongfully and willfully
21 excluding Plaintiff and other members of the public who are physically disabled, from full
22 and equal enjoyment of the subject **"RITE AID"** as hereinabove described. Such acts and
23 omissions are the continuing cause of humiliation and mental and emotional suffering of
24 Plaintiff in that these actions continue to treat Plaintiff as an inferior and second class citizen
25 and serve to discriminate against her on the sole basis that she is a physically disabled.
26 Plaintiff is unable, so long as such acts and omissions of defendants continue, to achieve
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1 full and equal enjoyment of the goods and services of said "RITE AID" as described
2 hereinabove. The acts of defendants have legally caused and will continue to cause
3 irreparable injury to Plaintiff if not enjoined by this court.

4 61. Wherefore, Plaintiff asks this court to preliminarily and permanently enjoin any
5 continuing refusal by defendants to permit entry to said "RITE AID" and to serve Plaintiff or
6 others similarly situated, and to require defendants to comply forthwith with the applicable
7 statutory requirements relating to the full and equal enjoyment of goods and services as
8 described hereinabove for disabled persons. Such injunctive relief is provided by **California**
9 **Civil Code** § 55. Plaintiff further requests that the court award statutory costs and
10 attorneys' fees to Plaintiff pursuant to **California Civil Code** § 55 and **California Code of**
11 **Civil Procedure** § 1021.5, all as hereinafter prayed for.

12
13 WHEREFORE, Plaintiff prays for compensatory damages, reasonable attorneys' fees
14 and costs of suit, as allowed by statute and according to proof, and appropriate exemplary
15 damages.
16

17 **IV. FOURTH CAUSE OF ACTION**
18 **VIOLATIONS OF UNRUH CIVIL RIGHTS ACT**
19 **(California Civil Code §§ 51 and 51.5)**

20 62. Plaintiff repleads and incorporates by reference, as if fully set forth again
21 herein, the allegations contained in paragraphs 1 through 61 of this Complaint and
22 incorporates them herein as if separately repled.

23 63. Defendants' acts and omissions as specified with regard to the discriminatory
24 treatment of Plaintiff **FERN McEWEN** on the basis of her physical disabilities, have been in
25 violation of **California Civil Code** §§ 51 and 51.5, the **Unruh Civil Rights Act**, and have
26 denied to Plaintiff her rights to "full and equal accommodations, advantages, facilities,
27 privileges or services in all business establishments of every kind whatsoever."
28

1 64. **California Civil Code** § 51 also provides that “[a] violation of the right of any
2 individual under the **Americans with Disabilities Act of 1990** (Public Law 101-336) shall
3 also constitute a violation of this section.”

4 65. **California Civil Code** § 51.5 also provides that

5 “[n]o business establishment of any kind whatsoever shall discriminate
6 against, boycott, or blacklist, refuse to buy from, sell to, or trade with any
7 person in this state because of the race, creed, religion, color, national origin,
8 sex, disability of the person or of the person’s partners, members,
9 stockholders, directors, officers, managers, superintendents, agents,
10 employees, business associates, suppliers, or customers.”

11 66. As a result of the violation of Plaintiff’s civil rights protected by **California Civil**
12 **Code** §§ 51 and, 51.5, Plaintiff is entitled to the rights and remedies of **California Civil**
13 **Code** § 52, including a trebling of actual damages (defined by **California Civil Code** § 52(h)
14 to mean “special and general damages”), as well as reasonable attorneys’ fees and costs,
15 as allowed by statute, according to proof. Further, pursuant to paragraphs 11, 12, 13, 35
16 and 43, Plaintiff seeks appropriate exemplary damages under **California Civil Code** §
17 3294.

18 WHEREFORE, Plaintiff prays for relief against defendants, and each of them, as
19 follows.

20 **V. FIFTH CAUSE OF ACTION**
21 **GENERAL NEGLIGENCE**

22 67. Plaintiff repleads and incorporates by reference, as if fully set forth again
23 herein, the allegations contained in paragraphs 1 through 66 of this Complaint and
24 incorporates them herein as if separately repled.

25 68. Defendants, and each of them, are in the business of operating a department
26 store and pharmacy to the general public.

27 69. Plaintiff is disabled and was at the time of her visit to Defendant's premises
28

1 with the purpose of obtaining a prescription from the pharmacy.

2 70. On or about January 9, 2003, Plaintiff was upon Defendant's property arriving
3 in an automobile operated by her husband and parking in an "accessible" parking space. As
4 Mrs. McEwen exited her car and started to walk across the parking lot, she tripped over a
5 concrete block at the head of the "accessible parking space" and fell to the concrete parking
6 lot. Mrs. McEwen suffered physical injuries when she struck her face, breaking her glasses,
7 cutting her face, injuring her knee, and other physical and emotional injuries.

8
9 71. As a proximate result of the negligence of the defendant(s), and each of them,
10 Plaintiff was hurt and injured in her health, strength, and activity, sustaining injury to her
11 nervous system and person, all of which injuries have caused, and continue to cause,
12 Plaintiff great mental, physical, and nervous pain and suffering. Plaintiff is informed and
13 believes and based thereon alleges that such injuries will result in some permanent
14 disability. As a result of such injuries, Plaintiff has suffered general damages in an amount
15 to be determined according to proof at trial.

16
17 72. As a further proximate result of the negligence of the defendants and each of
18 them, Plaintiff has incurred and will incur medical and related expenses in an amount to be
19 determined according to proof at trial.

20 WHEREFORE, Plaintiff prays that this court award damages and provide relief as
21 follows:

22
23 **PRAYER FOR RELIEF**

24 Plaintiff prays that this court award damages and provide relief as follows:

25 1. Grant injunctive relief requiring that defendants establish a non-discriminatory
26 criteria policy, practice and procedure permitting entry into the **RITE AID** store in Eureka,
27 California, for the purpose of services according to **California Civil Code** §§ 51, 51.5, 52,
28

1 54, 54.1, 54.3, *et seq.*, and Title III of the **Americans with Disabilities Act of 1990**, and
2 grant injunctive relief requiring that Defendants repair and render safe to handicapped
3 persons, and otherwise make handicapped-accessible, all public areas of the store and
4 make such facilities “readily accessible to and usable by individuals with disabilities,”
5 according to the standards of Title 24 of the **California Administrative Code, California**
6 **Health & Safety Code** § 19955 *et seq.*, and Title III of the **Americans with Disabilities Act**
7 **of 1990** and the standards of **ADAAG**; and prohibiting operation of the “RITE AID”, located
8 in Eureka, California, as a public facility until Defendants provide full and equal enjoyment of
9 goods and services as described hereinabove to physically disabled persons, including
10 Plaintiff;

11
12 2. General damages according to proof;

13 3. Statutory and “actual” damages, including general damages and special
14 damages, according to proof, pursuant to **California Civil Code** §§ 52, and 54.3, and that
15 these damages be trebled;

16
17 4. Prejudgment interest on all compensatory damages;

18 5. Punitive and exemplary damages pursuant to the standards and purposes of
19 **California Civil Code** § 3294;

20 6. Remedies and Procedures available under **Americans with Disabilities Act**
21 **of 1990** §§ 107, 203 and 308;

22
23 7. Award Plaintiff all litigation expenses, all costs of this proceeding and all
24 reasonable attorneys’ fees as provided by law, including, but not limited to, those
25 recoverable pursuant to the provisions of **California Civil Code** §§ 52, 54.3, and 55,
26 **California Code of Civil Procedure** § 1021.5, and **Americans with Disabilities Act of**
27 **1990** §308 of Title III; and
28

