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OAKLAND

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10 Attorneys for Plaintiff  
11 TERRY COCHRELL

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA

15 TERRY COCHRELL,  
16 Plaintiff,

CASE NO. **C11-03395** JCS  
Civil Rights

17 v.

18 BERKELEY UNIFIED SCHOOL  
19 DISTRICT; CITY OF  
20 BERKELEY; DOES 1through 10,  
21 Inclusive,  
22 Defendants.

**COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF; DENIAL OF  
DISABLED ACCESS TO PUBLIC  
FACILITIES; TITLE II OF THE  
AMERICANS WITH DISABILITIES  
ACT; VIOLATION OF REHAB. ACT  
OF 1973, SECTION 504; CALIFORNIA  
GOVERNMENT CODE § 11135 ;  
VIOLATION OF CALIFORNIA  
GOVERNMENT CODE §§ 4450 ET.  
SEQ.; VIOLATION OF CALIFORNIA  
CIVIL CODE §§ 51, 52, 54 AND 54.1;  
AND RELATED CODES AND  
REGULATIONS**

**DEMAND FOR JURY TRIAL**

25  
26 Plaintiff TERRY COCHRELL complains of defendants BERKELEY  
27 UNIFIED SCHOOL DISTRICT; CITY OF BERKELEY; and DOES 1-10,  
28 inclusive, and each of them, and alleges as follows:

1           1.     **INTRODUCTION:** Plaintiff TERRY COCHRELL is a qualified  
2 physically disabled person who suffers from multiple disabling conditions,  
3 including but not limited to neuropathy, rendering him mobility disabled, and  
4 requiring him to use a motorized wheelchair for mobility. Plaintiff is a  
5 “qualified” disabled person under all of California’s disabled rights access  
6 statutes and regulations and under the statutes and regulations of the Americans  
7 with Disabilities Act of 1990. Plaintiff brings this action to require that  
8 defendants BERKELEY UNIFIED SCHOOL DISTRICT; CITY OF  
9 BERKELEY; and Does 1-10, make their “warm swimming pool” and related  
10 facilities accessible to mobility-impaired disabled persons and provide their  
11 “programs, services and activities” in a “full and equal” non-discriminatory  
12 manner to persons with disabilities. The buildings and facilities which are the  
13 subject of this action are owned, operated and/or leased by or to all named  
14 defendants. Defendants’ obligations also include but are not limited to providing  
15 “programs, services or activities” for persons with disabilities such as plaintiff.  
16           2.     At all times relevant herein, and continuing, plaintiff was denied  
17 equal protection of the law and was denied civil rights under state and federal  
18 law. As set forth in detail hereinbelow, plaintiff was denied his rights to “full and  
19 equal” access to various public facilities at the public “warm swimming pool”  
20 facilities located at 2246 Milvia Street, Berkeley (hereinafter also “Warm Pool”),  
21 owned and operated by defendants Berkeley Unified School District and City of  
22 Berkeley, and suffered severe physical, mental and emotional injury, and property  
23 damage. Plaintiff was also denied the benefits of “programs services and  
24 activities” offered by defendants because they were not maintained in a manner  
25 “accessible to and useable by” persons with disabilities, such as plaintiff, who  
26 require the use of accessible facilities. The denial continued despite defendants  
27 having actual notice of the inaccessible conditions, demonstrating defendants’  
28 deliberate indifference and/or intentional discrimination toward plaintiff. Plaintiff

1 seeks injunctive relief to require defendants to make their specified facilities  
2 accessible to disabled persons and to ensure that the “programs, services and  
3 activities” offered by defendants be provided in a non-discriminatory manner to  
4 mobility disabled persons, including but not limited to: maintaining “warm pool”  
5 facilities needed by many disabled persons so long as swimming pool facilities  
6 are provided for able-bodied persons who are able to use swimming pools at a  
7 significantly lower temperature. Plaintiff seeks to enjoin defendants, who have  
8 threatened closure of the Warm Pool rather than removing the barriers to access at  
9 the Warm Pool and providing persons with mobility impairments with the  
10 accessibility features required under state laws that mandate public  
11 accommodations be made “accessible to and useable by” persons with disabilities.  
12 Plaintiff also seeks recovery of damages for his physical, mental, and emotional  
13 personal injuries and discriminatory experiences, and seeks recovery of  
14 reasonable attorney fees, litigation expenses and costs, according to statute.

15       **3. JURISDICTION:** This Court has jurisdiction of this action  
16 pursuant to 28 USC 1331 for violations of the Americans with Disabilities Act of  
17 1990 (hereinafter “ADA”), 42 USC 12101 *et seq.* Pursuant to supplemental  
18 jurisdiction, attendant and related causes of action arising from the same facts are  
19 also brought under California law, including but not limited to violations of  
20 California Government Code § 4450 *et seq.*, and Government Code § 11135;  
21 California Civil Code §§ 51, 52, 54, 54.1, and 54.3; and California Code of  
22 Regulations, Title 24-2.

23       **4.** This Court has subject matter jurisdiction of this action pursuant to 28  
24 USC § 1343(3) and for claims arising under § 504 of the Rehabilitation Act of  
25 1973. Additionally, this Court has jurisdiction over the public accommodations  
26 named in this action pursuant to 28 USC § 1331 for violations of the Americans  
27 with Disabilities Act of 1990, 42 USC §§ 12101 *et seq.*

28       **5. VENUE AND INTRADISTRICT:** Venue is proper in this court

1 pursuant to 28 USC § 1391(b), and is founded on the fact that the real property  
2 which is the subject of this action is located in this district and that plaintiff's  
3 causes of action arose in this district.

4       6.     **PARTIES:** Plaintiff is and at all time relevant to this Complaint was  
5 a "physically disabled person" and a "person with disabilities" as these terms are  
6 used under California law and under federal laws, including but not limited to  
7 § 504 of the Rehabilitation Act of 1973 and Title II of the Americans with  
8 Disabilities Act of 1990 ("ADA"). (The terms a "physically disabled person" and  
9 a "person with disabilities" will be used interchangeably throughout this  
10 Complaint.)

11       7.     Defendants BERKELEY UNIFIED SCHOOL DISTRICT; CITY OF  
12 BERKELEY; and defendants Does 1-5 are public entities subject to Title II of the  
13 ADA, the Rehabilitation Act of 1973, and to all other legal requirements referred  
14 to in this complaint. Defendants Does 6-9 are employees and/or agents of  
15 defendants BERKELEY UNIFIED SCHOOL DISTRICT and CITY OF  
16 BERKELEY. On information and belief, all such Doe Defendants wrongfully  
17 discriminated against plaintiff on the basis of his disability as part of a joint  
18 venture and common enterprise with the named defendants.

19       8.     Plaintiff does not know the identities of Does 1-10 at this time and  
20 prays leave to substitute the true names of each such defendant when they have  
21 been ascertained. Plaintiff does not know the relative responsibilities of  
22 defendant and Does 1-5 in the ownership and operation of the facilities herein  
23 complained of, and alleges a joint venture and common enterprise by defendants  
24 Berkeley Unified School District, City of Berkeley and Does 1-5 in the ownership  
25 and operation of each such facility. On information and belief, plaintiff also  
26 alleges that each such defendant was and is an owner and operator, lessor and  
27 lessee of the public facilities complained about herein.

28       9.     **GOVERNMENT CLAIMS FILED** - On or about January 24, 2011,

1 plaintiff made a timely public entity claim (1) to the Berkeley Unified School  
2 District, which claim was denied by a certified mail letter dated March 14, 2011  
3 from the Berkeley Unified School District; and (2) on or about January 24, 2011,  
4 plaintiff made a timely public entity claim to the City of Berkeley, which claim  
5 was deemed denied by operation of law 45 days later.

6       10.   **FACTUAL BASES FOR COMPLAINT:** At all times herein  
7 relevant, plaintiff Terry Cochrell was and is a physically disabled person, who  
8 suffers from multiple disabling conditions, including neuropathy, requiring him to  
9 use a wheelchair for mobility. Defendants Berkeley Unified School District, City  
10 of Berkeley and Does 1-10, have denied plaintiff his rights to full and equal  
11 access to the public facilities and educational programs, services and activities  
12 offered by defendants to the general public as required under federal and state  
13 law, including California Government Code §§ 4450 *et seq.*, Title II of the  
14 Americans With Disabilities Act of 1990, Section 504 of the Rehabilitation Act of  
15 1973, and Civil Code §§ 51, 54 and 54.1, on every occasion when he has made or  
16 attempted to make use of facilities, services, programs and activities, or has been  
17 deterred from further attempts, during the last two years and continuing until the  
18 present, unless otherwise specified herein.

19       11.   Commencing more than six months prior to his serving the above-  
20 noted government claims, and continuing to the date of filing of this complaint,  
21 plaintiff Terry Cochrell has regularly encountered barriers to his full and free  
22 access to the Berkeley “warm swimming pool” and many of its facilities,  
23 experiences that have unnecessarily caused him significant physical, mental and  
24 emotional injury, damage, and distress. He has repeatedly encountered physical  
25 and programmatic barriers which have caused him difficulty, discomfort and  
26 embarrassment.

27       12.   On or about July 25, 2010, plaintiff attempted to leave the Warm  
28 Pool facilities in his wheelchair, using the ramp provided by defendants. Due to a

1 lack of required safety handrails and/or edge guards, due to defendants' failure to  
2 properly maintain accessible facilities, plaintiff and his wheelchair went off the  
3 side of the ramp, throwing plaintiff from his wheelchair and causing him  
4 significant physical injuries, including but not limited to a broken left tibia and  
5 sprained knees. Further, over the past two years, plaintiff has also been denied  
6 full and equal access and programmatic access to the Warm Pool facilities  
7 because they were and are inaccessible to plaintiff and other disabled persons in  
8 multiple additional respects. These facilities include, but are not limited to:  
9 public restrooms, toilet rooms, changing rooms, sinks, showers and shower  
10 facilities, drinking fountains, parking facilities, paths of travel from the adjoining  
11 public sidewalks, paths of travel within the facility, thresholds on paths of travel,  
12 and multiple elements of the paths of travel inside of and throughout the subject  
13 premises. On information and belief, defendants provide two designated but not  
14 properly ADA compliant disabled parking spaces, but then put up signage that  
15 these "accessible spaces" are reserved only for use by "employees" only and deny  
16 use and access to plaintiff and other disabled persons. All such facilities must be  
17 brought into compliance with state and federal legal requirements.

18 13. Further, during the above-noted time periods, plaintiff has repeatedly  
19 had difficulties, as a disabled person, in locating and using accessible restroom  
20 facilities at the Warm Pool facilities, including toilets, sinks and showers.  
21 Although he repeatedly has requested that such facilities' access barriers be  
22 removed, and has repeatedly complained to representatives of both defendants  
23 BUSD and CITY OF BERKELEY, access has not been improved, in violation of  
24 plaintiff's rights and in disregard for defendants' obligations. Further, despite  
25 defendants' knowledge that the lack of accessible facilities has continued to have  
26 a disparate and discriminatory effect on plaintiff and other similarly situated  
27 persons, defendants have ignored plaintiff's needs and have delayed promptly  
28 fixing and making the subject facilities accessible, causing continued damages

1 thereby to plaintiff, and causing him difficulty, discomfort and embarrassment on  
2 each of his visits to the subject facilities.

3 14. In addition to the lack of access described above, plaintiff is  
4 informed and believes that other aspects of the subject facilities do not comply  
5 with the Americans With Disabilities Act of 1990 ("ADA") and related  
6 Americans With Disabilities Act Administrative Guidelines (ADAAG)  
7 Regulations and/or California statutes and Title 24 Regulations, including but not  
8 limited to defendants continuing to provide services to able-bodied persons in  
9 other public swimming pools but not providing such services to plaintiff and  
10 other similarly situated persons. Finally, rather than make the specified public  
11 facilities accessible to physically disabled persons, defendants have threatened to  
12 close the Warm Pool facilities altogether, without providing alternative accessible  
13 facilities for the use of plaintiff and other similarly situated disabled persons who  
14 require warm pool facilities because of their disabilities and medical conditions.  
15 Such threats constitute a violation of § 503 of the ADA. At all times herein  
16 relevant, § 503 of the ADA has prohibited retaliatory action:

17 **SEC. 503. PROHIBITION AGAINST RETALIATION AND COERCION**

18 (a) RETALIATION. - No person shall discriminate against an  
19 individual because such individual has opposed any act or practice  
20 made unlawful by this Act or because such individual made a charge,  
21 testified, assisted, or participated in any manner in an investigation,  
22 proceeding, or hearing under this Act.

23 (b) INTERFERENCE, COERCION, OR INTIMIDATION. - It  
24 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  
26 having exercised or enjoyed, or on account of his or her having aided  
27 or encouraged any other individual in the exercise or enjoyment of,  
28 any right granted or protected by this Act.

(c) REMEDIES AND PROCEDURES - The remedies and  
procedures available under sections 107, 203 and 308 of the Act  
shall be available to aggrieved persons for violations of subsections  
(a) and (b), with respect to title I, title II and title III, respectively.

On information and belief, the actions of defendants, and each of them in  
threatening to close the Warm Pool altogether, and any action they take to do so,

1 were and are retaliatory, and are in violation of § 503(a) and (b) as to both  
2 plaintiff Terry Cochrell and other disabled persons, and have violated and will  
3 continue to violate plaintiff's rights and cause him damage, and will continue to  
4 cause him damage until defendants' threats and the threatened action of closing  
5 the Warm Pool premises have been enjoined or discontinued.

6 15. On information and belief, as of the dates of plaintiff's visits to and  
7 efforts to access the Warm Pool, the premises have denied and continue to deny  
8 full and equal access to plaintiff and to other disabled persons, including but not  
9 limited to wheelchair users, in other respects, which violated plaintiff's rights to  
10 full and equal access and which discriminated against plaintiff on the basis of his  
11 disability, thus wrongfully denying to plaintiff the full and equal enjoyment of the  
12 goods, services, facilities, privileges, advantages and accommodations, in  
13 violation of § 302 of the ADA, 42 USC § 12182.

14 16. As a result of the actions and failures to act of defendants, as a result  
15 of the failure to provide disabled access, and as a result of defendants' intentional  
16 discrimination and deliberate indifference, plaintiff has suffered denial of his civil  
17 rights, physical injury, psychological and emotional discomfort, pain and  
18 suffering, general and special damages, and denial of his rights to full and equal  
19 access to public facilities, and programmatic access, all to his general, special and  
20 statutory damages.

21  
22 **FIRST CAUSE OF ACTION:**  
23 **DISCRIMINATION IN VIOLATION OF TITLE II**  
24 **OF THE AMERICANS WITH DISABILITIES ACT OF 1990**

25 17. Plaintiff repleads and incorporates by reference, as if fully set forth  
26 hereafter, the factual allegations contained in Paragraphs 1 through 16 of this  
27 Complaint and incorporates them herein.

28 18. At all times herein mentioned, plaintiff was entitled to the  
protections of the "Public Services" provisions of Title II of the ADA, Subpart A,

1 which prohibits discrimination by any public entity as defined by 42 USC  
2 § 12131. Pursuant to 42 USC 12132, § 202 of Title II, no qualified individual  
3 with a disability shall, by reason of such disability, be excluded from participation  
4 in or be denied the benefits of the “services, programs or activities” of a public  
5 entity, or be subjected to discrimination by such entity. Plaintiff was at all times  
6 relevant herein a qualified individual with a disability for all purposes under the  
7 ADA.

8 19. In violation of Title II of the ADA, defendants have failed to ensure  
9 that individuals with physical disabilities such as plaintiff are not excluded from  
10 “services, programs and activities” at the subject facilities and property. By  
11 reason of defendants’ failure to remove architectural barriers to access at the  
12 subject facilities so as to render them “accessible to and useable by” mobility  
13 impaired persons, despite actual notice of the inaccessible conditions, as more  
14 specifically set forth hereinabove, and by their policy decisions and threats of  
15 future closures of (partially) accessible facilities as above-described, defendants  
16 have intentionally discriminated against plaintiff in violation of Title II of the  
17 ADA and the regulations adopted to implement the ADA. On information and  
18 belief, such discrimination also includes defendants’ construction and  
19 maintenance of new facilities during the period that ADA Title II and other  
20 specified laws have been in effect, without compliance with 28 CFR part 41,  
21 including § 41.58, which requires, *inter alia*, that “new facilities shall be designed  
22 and constructed to be readily accessible to and usable by handicapped persons.”

23 20. As a result of such intentional discrimination, in violation of § 202 of  
24 the ADA, plaintiff is entitled to the remedies, procedures and rights set forth in  
25 § 505 of the Rehabilitation Act of 1973 (29 USC 794a), as provided by § 203 of  
26 the ADA.

27 21. On information and belief, to the date of filing of this Complaint,  
28 defendants have failed to make the facilities and property as described herein

1 accessible to and usable by physically disabled persons, as required by law, and  
2 have failed to maintain existing facilities in a properly accessible condition.

3 22. Plaintiff requests that an injunction be ordered requiring that  
4 defendants make all such facilities and property herein described accessible to  
5 and usable by mobility impaired disabled persons, and maintain such facilities in  
6 an accessible condition, and open and useable by disabled members of the public  
7 including plaintiff. Plaintiff also requests that defendants be enjoined from  
8 closing the Warm Pool facilities to public use, either as retaliation against  
9 plaintiff and other disabled persons because of their complaints about the  
10 condition of the premises and how the condition of the premises discriminates  
11 against disabled persons, including plaintiff, or otherwise; and prohibit  
12 defendants from closing the Warm Pool facilities to public use unless there are  
13 other "warm pool" facilities of similar size, convenience and features available for  
14 use by disabled persons, so long as there are swimming pool facilities available  
15 for able-bodied persons.

16 23. Plaintiff also requests an award of appropriate general, special and  
17 statutory damages, and of litigation expenses, costs, and reasonable attorney fees,  
18 all as provided by law.

19 WHEREFORE, plaintiff prays that this Court grant relief as  
20 requested hereinbelow.

21  
22 **SECOND CAUSE OF ACTION:**  
23 **VIOLATION OF § 504 OF THE REHABILITATION ACT OF 1973**

24 24. Plaintiff repleads and incorporates by reference, as if fully set forth  
25 hereafter, the factual allegations contained in Paragraphs 1 through 23 of this  
26 Complaint and incorporates them herein.

27 25. Defendants Berkeley Unified School District, City of Berkeley and  
28 Does 1-5 are each a government agency existing under the laws of the State of

1 California with responsibility for, *inter alia*, owning, operating and maintaining  
2 the property and the facilities described hereinabove. Plaintiff is informed and  
3 believes and thereon alleges that defendants Berkeley Unified School District,  
4 City of Berkeley and Does 1-5, and each of them, has been a recipient of federal  
5 financial assistance and that part of that financial assistance was and is used to  
6 fund the construction, alteration, and operations of the subject entranceways,  
7 Warm Pool, parking facilities, buildings and other functions and activities which  
8 take place within such buildings and premises.

9 26. By reason of their actions or inactions in failing to make their  
10 programs, services, and activities readily accessible to disabled persons, despite  
11 actual notice, defendants have acted with deliberate indifference and have  
12 intentionally discriminated against plaintiff, thereby violating plaintiff's rights  
13 under § 504 of the Rehabilitation Act of 1973, 29 USC § 794, and the regulations  
14 promulgated thereunder.

15 27. Plaintiff has a need to, and wishes to return to and use each of the  
16 facilities complained of herein, and is deterred from more frequent use of these  
17 facilities until they are made accessible. Plaintiff has no adequate remedy at law,  
18 and unless the relief requested herein is granted, plaintiff and other similarly  
19 disabled persons who have cause to visit and use the buildings and facilities will  
20 suffer irreparable injury by the deprivation of accessible facilities outside of and  
21 within these public facilities and buildings.

22 28. Plaintiff requests that an injunction be ordered requiring that  
23 defendants make all such facilities herein described accessible to and usable by  
24 disabled persons and modify its policies and practices to ensure that plaintiff and  
25 other mobility disabled persons are not denied the use of defendants' facilities or  
26 denied the benefit of its "programs, services and activities" because of disability,  
27 and maintain such facilities in an accessible condition and open to and available  
28 for use by physically disabled persons.

1           29. Pursuant to the Americans with Disabilities Act, 42 USC 12188 *et*  
 2 *seq.*, § 308, plaintiff Terry Cochrell is entitled to the remedies and procedures set  
 3 forth in § 204(a) of the Civil Rights Act of 1964, 42 USC 2000(a)-3(a), as  
 4 plaintiff is being subjected to discrimination on the basis of disability in violation  
 5 of this title or has reasonable grounds for believing that he is about to be  
 6 subjected to discrimination in violation of § 302 and § 303. Plaintiff is also  
 7 entitled to the rights and remedies of § 503(c). On information and belief,  
 8 defendants have continued to violate the law and deny the rights of plaintiff and  
 9 other disabled persons access to this public accommodation since on or before  
 10 plaintiff's encounters, as previously noted. Pursuant to § 308(a)(2),

11           In cases of violations of § 302(b)(2)(A)(iv) and § 303(a)... injunctive  
 12 relief shall include an order to alter facilities to make such facilities  
 13 readily accessible to and usable by individuals with disabilities to the  
 14 extent required by this title. Where appropriate, injunctive relief  
 shall also include requiring the provision of an auxiliary aid or  
 service, modification of a policy, or provision of alternative methods,  
 to the extent required by this title.

15           30. Plaintiff seeks relief pursuant to remedies set forth in § 204(a) of the  
 16 Civil Rights Act of 1964 (42 USC 2000(a)-3(a)), and pursuant to Federal  
 17 Regulations adopted to implement the Americans with Disabilities Act of 1990.  
 18 Plaintiff is a qualified disabled person for purposes of § 308(a) of the ADA who  
 19 is being subjected to discrimination on the basis of disability in violation of Title  
 20 III and who has reasonable grounds for believing he will be subjected to such  
 21 discrimination each time that he may attempt to use the subject premises and  
 22 facilities.

23           31. Plaintiff requests appropriate damages, litigation expenses and costs,  
 24 and reasonable attorney fees as provided by statute.

25           WHEREFORE, plaintiff prays that this Court grant relief as  
 26 requested hereinbelow.

27 //

28 //

1 **THIRD CAUSE OF ACTION:**  
2 **VIOLATION OF CALIFORNIA LAW INCLUDING: THE UNRUH ACT,**  
3 **CIVIL CODE SECTIONS 51 AND 52, AND THE AMERICANS WITH**  
4 **DISABILITIES ACT AS INCORPORATED BY**  
5 **CIVIL CODE SECTION 51(f)**

6 32. Plaintiff repleads and incorporates by reference, as if fully set forth  
7 hereafter, the factual allegations contained in Paragraphs 1 through 31 of this  
8 Complaint and incorporates them herein.

9 33. At all times relevant to this complaint, California Civil Code § 51  
10 has provided that physically disabled persons are free and equal citizens of the  
11 state, regardless of medical condition or disability:

12 All persons within the jurisdiction of this state are free and equal,  
13 and no matter what their sex, race, color, religion, ancestry, national  
14 origin, disability, or medical condition are entitled to the full and  
15 equal accommodations, advantages, facilities, privileges, or services  
16 in all business establishments of every kind whatsoever.  
17 Cal. Civ. C. § 51(b).

18 Civil Code § 52 provides that the discrimination by defendants against plaintiff  
19 on the basis of his disability constitutes a violation of the general anti-  
20 discrimination provision of §§ 51 and 52. The Warm Pool and its facilities,  
21 which are open to the public for a financial charge, are business establishments  
22 subject to the provisions of California Civil Code §§ 51 and 52 (the "Unruh  
23 Act").

24 34. Defendants' discrimination constitutes a separate and distinct  
25 violation of Civil Code § 52, which provides that:

26 Whoever denies, aids or incites a denial, or makes any discrimination or  
27 distinction contrary to section 51, 51.5, or 51.6 is liable for each and every  
28 offense for the actual damages, and any amount that may be determined by a  
jury, or a court sitting without a jury, up to a maximum of three times the  
amount of actual damage but in no case less than four thousand dollars  
(\$4,000), and any attorney's fees that may be determined by the court in  
addition thereto, suffered by any person denied the rights provided in  
Section 51, 51.5, or 51.6.

Each visit upon which plaintiff has suffered a discriminatory denial of access may  
constitute a separate violation of the Unruh Act.

1           35. The actions and omissions of defendants as herein alleged constitute  
2 a denial of access to and use of the described public facilities by physically  
3 disabled persons within the meaning of California Civil Code §§ 51 and 52. As a  
4 proximate result of defendants' action and omissions, defendants have  
5 discriminated against plaintiff in violation of Civil Code §§ 51 and 52.

6           36. Any violation of the Americans With Disabilities Act of 1990 (as  
7 pled in the First Cause of Action) also constitutes a violation of California Civil  
8 Code § 51(f), thus independently justifying an award of damages and injunctive  
9 relief pursuant to California law. Per § 51(f), "A violation of the right of any  
10 individual under the Americans With Disabilities Act of 1990 (Public Law 101-  
11 336) shall also constitute a violation of this section."

12           37. Plaintiff has no adequate remedy at law and, unless the relief  
13 requested herein is granted, plaintiff and other disabled persons will continue to  
14 suffer irreparable harm as a result of defendants' failure to fulfill their obligations  
15 to provide meaningful access to the subject public facilities.

16           38. Wherefore plaintiff asks this Court to preliminarily and permanently  
17 enjoin any continuing refusal by defendants to grant full and equal access to  
18 plaintiff in the respects complained of and to require defendants to comply  
19 forthwith with the applicable statutory requirements relating to access for disabled  
20 persons. Such injunctive relief is provided for a violation of California  
21 Government Code §§ 4450 *et seq.*, for causing a denial of rights by disabled  
22 persons, by California Civil Code §§ 51 *et seq.*, including § 52(c). Civil Code  
23 § 52 provides that whoever discriminates contrary to § 51 is liable for "each and  
24 every offense" for the actual damages and any amount as may be determined by a  
25 court or jury up to a maximum of three times the amount of actual damage, but in  
26 no case less than \$4,000 and such attorney fees that may be determined by the  
27 Court in addition thereto. Plaintiff alleges that defendants failed to provide  
28 legally required access at the Berkeley Warm Pool and its related facilities on

1 each visit to the facilities by plaintiff, and further requests that the Court award  
2 damages pursuant to Civil Code § 52 and attorney fees, litigation expenses and  
3 costs pursuant to Government Code §§ 4450 *et seq.*, Civil Code § 52(a), Code of  
4 Civil Procedure § 1021.5 and other law, all as hereinafter prayed for.

5       **39. DAMAGES:** As a result of the denial of equal access to these  
6 facilities and due to the acts and omissions of defendants in owning, operating,  
7 leasing, constructing, altering and maintaining the subject facilities, plaintiff  
8 suffered multiple violations of his civil rights, including but not limited to rights  
9 under Civil Code §§ 51 and 52, all to his damages per Civil Code § 52(a), as  
10 hereinafter stated. Defendants' actions and omissions to act constitute  
11 discrimination against plaintiff on the sole basis that he was and is physically  
12 disabled and unable, because of the architectural barriers and policies created  
13 and/or maintained by defendants in violation of the subject laws, to use these  
14 public facilities on a full and equal basis as other persons. As a result, plaintiff  
15 also suffered severe personal injuries, including a broken leg on July 25, 2010,  
16 causing general, special and statutory damages.

17       **40. FEES AND COSTS:** As a result of defendants' acts, omissions and  
18 conduct, plaintiff has been required to incur attorney fees, litigation expenses and  
19 costs as provided by statute in order to enforce plaintiff's rights and to enforce  
20 provisions of the law protecting access for disabled persons and prohibiting  
21 discrimination against disabled persons. Plaintiff therefore seeks recovery of all  
22 reasonable attorney fees, litigation expenses and costs pursuant to the provisions  
23 of California Civil Code § 52 and California Government Code §§ 4450 *et seq.*  
24 Additionally, plaintiff's lawsuit is intended to require that defendants make their  
25 facilities and policies accessible to all disabled members of the public, justifying  
26 "public interest" attorney fees, litigation expenses and costs pursuant to the  
27 provisions of California Code of Civil Procedure § 1021.5 and other applicable  
28 law.

1 WHEREFORE, plaintiff prays the Court grant relief as requested,  
2 herein below.

3  
4 **FOURTH CAUSE OF ACTION:**  
5 **VIOLATION OF CALIFORNIA LAW INCLUDING: SECTIONS 54, 54.1,**  
6 **and 55, GOVERNMENT CODE §§ 4450 *et seq.*, AND THE AMERICANS**  
7 **WITH DISABILITIES ACT AS INCORPORATED BY CALIFORNIA**  
8 **CIVIL CODE SECTIONS 54(c) AND 54.1(d)**

9 41. Plaintiff repleads and incorporates by reference, as if fully set forth  
10 hereafter, the factual allegations contained in Paragraphs 1 through 40 of this  
11 Complaint and incorporates them herein.

12 42. At all times relevant to this Complaint, California Civil Code § 54(a)  
13 has provided that:

14 (a) Individuals with disabilities or medical conditions have the same  
15 right as the general public to the full and free use of the streets,  
16 highways, sidewalks, walkways, public buildings..., public facilities  
17 and other public places.

18 43. At all times relevant to this Complaint, California Civil Code § 54.1  
19 has provided that physically disabled persons are not to be discriminated against  
20 because of physical handicap or disability in the use of a public accommodation:

21 . . . [P]hysically disabled persons shall be entitled to full and equal  
22 access, as other members of the general public, to accommodations,  
23 advantages, facilities and privileges of all common carriers,  
24 airplanes, motor vehicles. . . or any other public conveyances or  
25 modes of transportation, telephone facilities, hotels, lodging places,  
26 places of public accommodation, and amusement or resort, and other  
27 places to which the general public is invited, subject only to the  
28 conditions or limitations established by law, or state or other federal  
regulations, and applicable alike to all other persons.

The discrimination by defendants against plaintiff on the basis of his disability  
constitutes a violation of the general anti-discrimination provision of Civil Code  
§§ 54 and 54.1.

44. Plaintiff is informed and believes and therefore alleges that the  
specified public facilities are structures or related facilities within the meaning of  
California Government Code §§ 4450 and 4451 *et seq.* Plaintiff is further

1 informed and believes and therefore alleges that the defendants have constructed,  
2 altered, or repaired parts of the subject public property, structure and facilities  
3 since 1968 within the meaning of Government Code §§ 4450 *et seq.*, including  
4 § 4456, thereby requiring provision of access to persons with disabilities, as  
5 required by law. The actions and omissions of defendants as herein alleged  
6 constitute a denial of access to and use of the described public facilities by  
7 physically disabled persons within the meaning of Government Code §§ 4450 *et*  
8 *seq.* As a proximate result of defendants' action and omissions, defendants have  
9 discriminated against plaintiff in violation of Government Code §§ 4450 *et seq.*,  
10 and of Title 24-2 regulations adopted to implement § 4450. A violation of  
11 §§ 4450 *et seq.* constitutes a violation of Civil Code §§ 54 and 54.1. Further,  
12 Civil Code § 55 allows an action for injunctive relief for any person who is  
13 aggrieved or is potentially aggrieved by a violation of Civil Code §§ 54 or 54.1,  
14 or of Government Code §§ 4450 *et seq.*

15 45. Any violation of the Americans With Disabilities Act of 1990 (as  
16 pled in the First Cause of Action) also constitutes a violation of §§ 54 (c) and  
17 54.1(d) of the California Civil Code, thus independently justifying an award of  
18 damages and injunctive relief pursuant to California law. Plaintiff alleges that he  
19 has been denied such full and equal access as required by California law which  
20 incorporates Title II of the ADA, including but not limited to § 204.

21 46. Plaintiff has no adequate remedy at law and, unless the relief  
22 requested herein is granted, plaintiff and other disabled persons will continue to  
23 suffer irreparable harm as a result of defendants' failure to fulfill their obligations  
24 to provide meaningful access to the subject public facilities.

25 47. Wherefore plaintiff asks this Court to preliminarily and permanently  
26 enjoin any continuing refusal by defendants to grant full and equal access to  
27 plaintiff in the respects complained of and to require defendants to comply  
28 forthwith with the applicable statutory requirements relating to access for disabled

1 persons. Such injunctive relief is provided for a violation of California  
2 Government Code §§ 4450 *et seq.*, for causing a denial of rights by disabled  
3 persons, by California Civil Code §§ 54 *et seq.* Civil Code § 54.3 provides that  
4 any person or corporation who denies or interferes with admittance to or  
5 enjoyment of the public facilities as specified in §§ 54 and 54.1 or otherwise  
6 interferes with the rights of an individual with a disability is liable for each  
7 offense for the actual damage and any amount as may be determined by a court or  
8 jury up to a maximum of three times the amount of actual damage but in no case  
9 less than \$1,000 and such attorney fees that may be determined by the Court in  
10 addition thereto. Plaintiff alleges that defendants failed to provide legally  
11 required access at the Berkeley Warm Pool and its related facilities on multiple  
12 occasions, and further requests that the Court award damages pursuant to Civil  
13 Code § 54.3 and attorney fees, litigation expenses and costs pursuant to  
14 Government Code §§ 4450 *et seq.*, Civil Code §§ 54.3 and 55, California Code of  
15 Civil Procedure § 1021.5 and other law, all as hereinafter prayed for.

16       **48. DAMAGES:** As a result of the denial of equal access to these  
17 facilities and due to the acts and omissions of defendants in owning, operating,  
18 leasing, constructing, altering and maintaining the subject facilities, plaintiff  
19 suffered multiple violations of his civil rights, including but not limited to rights  
20 under Civil Code §§ 54 and 54.1, all to his physical, mental and emotional  
21 damages per Civil Code § 54.3, including general, special, statutory and treble  
22 damages, as hereinafter stated. Defendants' actions and omissions to act  
23 constitute discrimination against plaintiff on the sole basis that he was and is  
24 physically disabled and unable, because of the architectural barriers created  
25 and/or maintained by defendants in violation of the subject laws, and/or due to  
26 defendants' multiple policy violations of Civil Code §§ 54 and 54.1, to use these  
27 public facilities on a full and equal basis as other persons.

28       **49. FEES AND COSTS:** As a result of defendants' acts, omissions and

1 conduct, plaintiff has been required to incur attorney fees, litigation expenses and  
 2 costs as provided by statute in order to enforce plaintiff's rights and to enforce  
 3 provisions of the law protecting access for disabled persons and prohibiting  
 4 discrimination against disabled persons. Plaintiff therefore seeks recovery of all  
 5 reasonable attorney fees, litigation expenses and costs pursuant to the provisions  
 6 of California Civil Code §§ 54.3 and 55 and California Government Code  
 7 §§ 4450 *et seq.* Additionally, plaintiff's lawsuit is intended to require that  
 8 defendants make their facilities and policies accessible to all disabled members of  
 9 the public, justifying "public interest" attorney fees, litigation expenses and costs  
 10 pursuant to the provisions of California Code of Civil Procedure § 1021.5 and  
 11 other applicable law.

12 WHEREFORE, plaintiff prays the Court grant relief as requested,  
 13 herein below.

14  
 15 **FIFTH CAUSE OF ACTION:**  
 16 **VIOLATION OF CALIFORNIA GOVERNMENT CODE § 11135,**  
 17 **DISCRIMINATION UNDER PROGRAM RECEIVING**  
**FINANCIAL ASSISTANCE FROM THE STATE**

18 50. Plaintiff repleads and incorporates by reference, as if fully set forth  
 19 hereafter, the factual allegations contained in Paragraphs 1 through 49 of this  
 20 Complaint and incorporates them herein.

21 51. On information and belief, the administration, supervision and  
 22 maintenance by defendants of the property, structure and facilities that are the  
 23 subject of the action are funded in part by the State of California.

24 52. Defendants have failed to make its programs, services and activities  
 25 readily accessible to and useable by disabled persons in violation of California  
 26 Government Code §§ 11135 *et seq.* Government Code § 11135 states:

27 § 11135. Programs or activities funded by state; discrimination on  
 28 basis of ethnic group identification, religion, age, sex, color, or  
 disability; federal act; definition.

1 No person in the State of California shall, on the basis of ethnic  
 2 group identification, religion, age, sex, color, or disability, be  
 3 unlawfully denied the benefits of, or be unlawfully subjected to  
 4 discrimination under, any program or activity that is funded directly  
 5 by the state or receives any financial assistance from the state. With  
 6 respect to discrimination on the basis of disability, programs and  
 7 activities subject to subdivision (a) shall meet the protections and  
 8 prohibitions contained in Section 202 of the Americans With  
 9 Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules  
 10 and regulations adopted in implementation thereof, except that if the  
 11 laws of this state prescribe stronger protections and prohibitions, the  
 12 programs and activities subject to subdivision (a) shall be subject to  
 13 the stronger protections and prohibitions.

14 53. Plaintiff has no adequate remedy at law and, unless the requested  
 15 relief is granted, plaintiff and other disabled persons will suffer irreparable harm  
 16 in that they will continue to be discriminated against and denied access to and  
 17 accommodation within the subject facilities, and denied the benefits of the  
 18 "programs, services and activities" offered to the general public. Further, plaintiff  
 19 suffered damages, as specified, as the result of denial of his civil rights when he  
 20 tried to use these facilities, according to proof. Because plaintiff seeks  
 21 improvement of access for similarly situated physically disabled persons, which  
 22 will benefit a significant portion of the public, plaintiff seeks attorney fees and  
 23 costs pursuant to California Code of Civil Procedure § 1021.5, as to this cause of  
 24 action and as to all causes of action in this complaint that seek injunctive relief.

25 WHEREFORE, plaintiff prays the Court grant relief as requested  
 26 herein below.

### 27 PRAYER FOR RELIEF

28 WHEREFORE, plaintiff prays that this Court:

1. Issue a preliminary and permanent injunction directing that  
 defendants, as current owners, operators, lessors and/or lessees of the subject  
 premises, to modify the above described facilities at the property and other  
 non-conforming facilities and related described facilities so that plaintiff and  
 similarly situated persons with disabilities may obtain the benefits of, and access

1 to, defendants” programs, services and activities” in a “full and equal” manner as  
2 required by law; and to maintain such facilities is an accessible condition, as to  
3 facilities and policies; and to continue to maintain adequate “warm pool” facilities  
4 for use by disabled persons so long as any swimming pools are maintained for the  
5 use of able-bodied persons who do not have a medical need for “warm pool”  
6 facilities;

7 2. Retain jurisdiction over defendants until such time as the Court is  
8 satisfied that defendants’ unlawful policies, practices, acts and omissions, and  
9 maintenance of inaccessible public facilities as complained of herein no longer  
10 occur, and will not recur;

11 3. Award to plaintiff all appropriate damages, including but not limited  
12 to statutory damages, special damages, treble damages and general damages in an  
13 amount within the jurisdiction of the Court, according to proof;

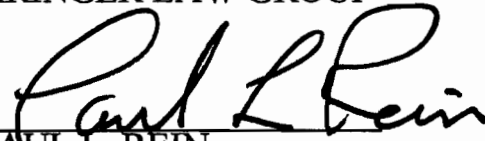
14 4. Award to plaintiff all litigation expenses and costs of this  
15 proceeding, and all reasonable statutory attorney fees as provided by law;

16 5. Award prejudgment interest pursuant to Civil Code § 3291; and

17 6. Grant such other and further relief as this Court may deem just and  
18 proper.

19  
20 Dated: July 7, 2011

LAW OFFICES OF PAUL L. REIN  
GEARINGER LAW GROUP



by PAUL L. REIN  
Attorneys for Plaintiff  
TERRY COCHRELL

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**DEMAND FOR JURY**

Plaintiff hereby demands a jury for all claims for which a jury is permitted.

Dated: July <sup>7<sup>th</sup></sup>, 2011

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by PAUL L. REIN  
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