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6 Attorneys for Defendant
 TOYS 'R' US – DELAWARE, INC. and
 7 TRU 2005 RE I, LLC

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

11 THERESA WALLEN,

12 Plaintiff,

13 v.

14 TOYS 'R' US – DELAWARE, INC., TRU 2005
 15 RE I, LLC, and Does 1-10,

16 Defendants.

Case No. **C09-04742**

**DEFENDANTS TOYS 'R' US –
 DELAWARE, INC. AND TRU 2005
 RE I, LLC'S ANSWER TO
 COMPLAINT**

Complaint Filed: October 5, 2009
 Trial Date: None Set

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 19 Defendant TOYS 'R' US – DELAWARE, INC. and TRU 2005 RE I, LLC (hereinafter
 20 collectively referred to as "Defendants"), answer Plaintiff THERESA WALLEN'S Complaint as
 21 follows:

22 1. To the extent Paragraph 1 of the Complaint consists of legal conclusions, no
 23 response is required. To the extent Paragraph 1 consists of additional factual allegations,
 24 Defendants admit they own and operate a Toys 'R' Us store located at 751 S. Winchester Blvd,
 25 San Jose, California. Except as expressly admitted herein, Defendants deny the remaining
 26 allegations made in Paragraph 1 of the Complaint.

27 2. To the extent Paragraph 2 of the Complaint consists of legal conclusions, no
 28 response is required. To the extent Paragraph 2 consists of additional factual allegations,

1 Defendants deny the allegations made in Paragraph 2 of the Complaint.

2 JURISDICTION

3 3. In response to Paragraph 3 of the Complaint, Defendants admit that this Court has
4 jurisdiction over the federal claims alleged by Plaintiff under 28 U.S.C. §§ 1331 and 1343 for
5 ADA claims.

6 4. To the extent Paragraph 4 of the Complaint consists of legal conclusions, no
7 response is required. To the extent Paragraph 4 consists of additional factual allegations,
8 Defendants admit that this Court has supplemental jurisdiction over the claims brought under
9 California law which are alleged to arise from the same nucleus of operative facts. Except as
10 expressly admitted herein, Defendants deny the remaining fact allegations in this paragraph.

11 5. To the extent Paragraph 5 of the Complaint consists of legal conclusions, no
12 response is required. To the extent Paragraph 5 consists of additional factual allegations,
13 Defendants deny the allegations made in Paragraph 5 of the Complaint.

14 VENUE

15 6. In response to Paragraph 6 of the Complaint, Defendants admit that venue is
16 proper in this Court.

17 PARTIES

18 7. In response to Paragraph 7 of the Complaint, Defendants admit that they own and
19 operate a Toys 'R' Us store located at 751 S. Winchester Blvd, San Jose, California. Except as
20 expressly admitted herein, Defendants deny the remaining fact allegations in this paragraph.

21 8. In response to Paragraph 8 of the Complaint, Defendants lack information
22 sufficient to form a belief as to the truth of the allegations set forth therein and on that basis deny
23 each and every allegation contained therein.

24 FACTS

25 9. To the extent Paragraph 9 of the Complaint consists of legal conclusions, no
26 response is required. To the extent Paragraph 9 consists of additional factual allegations,
27 Defendants lack information sufficient to form a belief as to the truth of the allegations set forth
28 therein and on that basis deny each and every allegation contained therein.

1 allegation contained therein.

2 Failure to Remove Architectural Barriers in an Existing Facility

3 19. To the extent Paragraph 19 of the Complaint consists of recitation of statutes
4 and/or legal conclusions, no response is required. To the extent Paragraph 19 consists of
5 additional factual allegations, Defendants lack information sufficient to form a belief as to the
6 truth of the allegations set forth therein and on that basis deny each and every allegation
7 contained therein.

8 20. To the extent Paragraph 20 of the Complaint consists of recitation of statutes
9 and/or legal conclusions, no response is required. To the extent Paragraph 20 consists of
10 additional factual allegations, Defendants lack information sufficient to form a belief as to the
11 truth of the allegations set forth therein and on that basis deny each and every allegation
12 contained therein.

13 21. In response to Paragraph 21 of the Complaint, Defendants lack information
14 sufficient to form a belief as to the truth of the allegations set forth therein and on that basis deny
15 each and every allegation contained therein.

16 22. In response to Paragraph 22 of the Complaint, Defendants lack information
17 sufficient to form a belief as to the truth of the allegations set forth therein and on that basis deny
18 each and every allegation contained therein.

19 Failure to Design and Construct an Accessible Facility

20 23. To the extent Paragraph 23 of the Complaint consists of legal conclusions, no
21 response is required. To the extent Paragraph 23 consists of additional factual allegations,
22 Defendants deny that its store located at 751 S. Winchester Blvd, San Jose, California was
23 designed and constructed after January 26, 1992. Except as expressly admitted herein,
24 Defendants deny the remaining fact allegations in this paragraph.

25 24. To the extent Paragraph 24 of the Complaint consists of recitation of statutes
26 and/or legal conclusions, no response is required. To the extent Paragraph 24 consists of
27 additional factual allegations, Defendants lack information sufficient to form a belief as to the
28 truth of the allegations set forth therein and on that basis deny each and every allegation

1 contained therein.

2 25. In response to Paragraph 25 of the Complaint, Defendants deny each and every
3 allegation contained therein.

4 Failure to Make an Altered Facility Accessible

5 26. To the extent Paragraph 26 of the Complaint consists of legal conclusions, no
6 response is required. To the extent Paragraph 26 consists of additional factual allegations,
7 Defendants admit that its store located at 751 S. Winchester Blvd, San Jose, California was
8 remodeled after January 26, 1992. Except as expressly admitted herein, Defendants deny the
9 remaining fact allegations in this paragraph.

10 27. To the extent Paragraph 27 of the Complaint consists recitation of statutes and/or
11 legal conclusions, no response is required. To the extent Paragraph 27 consists of additional
12 factual allegations, Defendants lack information sufficient to form a belief as to the truth of the
13 allegations set forth therein and on that basis deny each and every allegation contained therein.

14 28. In response to Paragraph 28 of the Complaint, Defendants deny each and every
15 allegation contained therein.

16 Failure to Modify Existing Policies and Procedures

17 29. To the extent Paragraph 29 of the Complaint consists recitation of statutes and/or
18 legal conclusions, no response is required. To the extent Paragraph 29 consists of additional
19 factual allegations, Defendants lack information sufficient to form a belief as to the truth of the
20 allegations set forth therein and on that basis deny each and every allegation contained therein.

21 30. To the extent Paragraph 30 of the Complaint consists recitation of statutes and/or
22 legal conclusions, no response is required. To the extent Paragraph 30 consists of additional
23 factual allegations, Defendants lack information sufficient to form a belief as to the truth of the
24 allegations set forth therein and on that basis deny each and every allegation contained therein.

25 31. To the extent Paragraph 31 of the Complaint consists of recitation of statutes
26 and/or legal conclusions, no response is required. To the extent Paragraph 31 consists of
27 additional factual allegations, Defendants lack information sufficient to form a belief as to the
28 truth of the allegations set forth therein and on that basis deny each and every allegation

1 contained therein.

2 32. To the extent Paragraph 33 of the Complaint consists of legal conclusions, no
3 response is required. To the extent Paragraph 32 consists of additional factual allegations,
4 Defendants deny each and every allegation contained therein.

5 SECOND CLAIM

6 Disabled Persons Act

7 33. In response to Paragraph 33 of the Complaint, Defendants incorporate by reference
8 its responses to paragraphs 1 to 32.

9 34. To the extent Paragraph 34 of the Complaint consists of recitation of statutes
10 and/or legal conclusions, no response is required. To the extent Paragraph 34 consists of
11 additional factual allegations, Defendants lack information sufficient to form a belief as to the
12 truth of the allegations set forth therein and on that basis deny each and every allegation
13 contained therein.

14 35. To the extent Paragraph 35 of the Complaint consists of recitation of statutes
15 and/or legal conclusions, no response is required. To the extent Paragraph 35 consists of
16 additional factual allegations, Defendants lack information sufficient to form a belief as to the
17 truth of the allegations set forth therein and on that basis deny each and every allegation
18 contained therein.

19 36. To the extent Paragraph 36 of the Complaint consists of recitation of statutes
20 and/or legal conclusions, no response is required. To the extent Paragraph 36 consists of
21 additional factual allegations, Defendants lack information sufficient to form a belief as to the
22 truth of the allegations set forth therein and on that basis deny each and every allegation
23 contained therein.

24 37. In response to Paragraph 37 of the Complaint, Defendants deny each and every
25 allegation contained therein.

26 38. To the extent Paragraph 38 of the Complaint consists of recitation of statutes
27 and/or legal conclusions, no response is required. To the extent Paragraph 38 consists of
28 additional factual allegations, Defendants lack information sufficient to form a belief as to the

1 truth of the allegations set forth therein and on that basis deny each and every allegation
2 contained therein.

3 39. To the extent Paragraph 39 of the Complaint consists of recitation of statutes
4 and/or legal conclusions, no response is required. To the extent Paragraph 39 consists of
5 additional factual allegations, Defendants lack information sufficient to form a belief as to the
6 truth of the allegations set forth therein and on that basis deny each and every allegation
7 contained therein.

8 THIRD CLAIM

9 Unruh Civil Rights Act

10 40. In response to Paragraph 40 of the Complaint, Defendants incorporate by reference
11 its responses to paragraphs 1 to 39.

12 41. To the extent Paragraph 41 of the Complaint consists of recitation of statutes
13 and/or legal conclusions, no response is required. To the extent Paragraph 41 consists of
14 additional factual allegations, Defendants lack information sufficient to form a belief as to the
15 truth of the allegations set forth therein and on that basis deny each and every allegation
16 contained therein.

17 42. To the extent Paragraph 42 of the Complaint consists of recitation of statutes
18 and/or legal conclusions, no response is required. To the extent Paragraph 42 consists of
19 additional factual allegations, Defendants lack information sufficient to form a belief as to the
20 truth of the allegations set forth therein and on that basis deny each and every allegation
21 contained therein.

22 43. To the extent Paragraph 43 of the Complaint consists of recitation of statutes
23 and/or legal conclusions, no response is required. To the extent Paragraph 43 consists of
24 additional factual allegations, Defendants lack information sufficient to form a belief as to the
25 truth of the allegations set forth therein and on that basis deny each and every allegation
26 contained therein.

27 44. In response to Paragraph 44 of the Complaint, Defendants deny each and every
28 allegation contained therein.

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AFFIRMATIVE DEFENSES

By way of affirmative defense to the allegations of the Complaint herein, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint, and each and every claim therein, fails to state a claim upon which relief may be granted against Defendants.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's prayer for injunctive relief is barred because Plaintiff has an adequate remedy at law.

THIRD AFFIRMATIVE DEFENSE

At all times relevant to this action, Defendants acted honestly and in good faith to ensure full compliance with Title III of the ADA and all other applicable federal and state disability laws, to the extent readily achievable and/or required by law.

FOURTH AFFIRMATIVE DEFENSE

Defendants are relieved of any liability whatsoever as to Plaintiff's claims for damages to the extent that Plaintiff seeks redress for physical and/or emotional injuries arising from preexisting physical or mental conditions.

FIFTH AFFIRMATIVE DEFENSE

Defendants are relieved of any liability whatsoever as to Plaintiff's claims for damages set forth in the Complaint to the extent said claims arise solely from acts or omissions for which these answering Defendants are not responsible.

SIXTH AFFIRMATIVE DEFENSE

On information and belief, to the extent that Defendants own or control a place of public accommodation, it is an existing facility and the removal of any barrier therein is not readily achievable.

SEVENTH AFFIRMATIVE DEFENSE

On information and belief, the removal of any barriers by Defendants is structurally infeasible.

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EIGHTH AFFIRMATIVE DEFENSE

On information and belief, any work required for accessibility would be disproportionate in cost and scope to any alterations Defendants has undertaken to any place of public accommodation.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's Complaint, and each and every claim for relief therein, fails to allege facts sufficient to obtain an award of treble damages against Defendants.

TENTH AFFIRMATIVE DEFENSE

On information and belief, any changes Plaintiff advocates are practically difficult, pose an unnecessary hardship and/or extreme so that such changes are not required and/or are subject to exception.

ELEVENTH AFFIRMATIVE DEFENSE

On information and belief, reasonably equivalent alternatives are provided and/or Defendants' property is accessible to the maximum extent feasible.

TWELFTH AFFIRMATIVE DEFENSE

On information and belief, to the extent Plaintiff comes to this Court with unclean hands, Plaintiff is barred from recovery under this Complaint or any claim for relief therein.

THIRTEENTH AFFIRMATIVE DEFENSE

On information and belief, Plaintiff's claims are barred to the extent she lacks standing to sue upon the matters asserted in the Complaint.

FOURTEENTH AFFIRMATIVE DEFENSE

On information and belief, to the extent that Plaintiff was not a bona fide consumer for services provided at Defendants' alleged place of public accommodation, Plaintiff lacks standing to pursue each and every claim for relief alleged in the Complaint.

EIGHTEENTH AFFIRMATIVE DEFENSE

On information and belief, the Complaint, and each purported claim for relief alleged therein, is barred in that any construction or modification of the subject property was privileged because it was undertaken pursuant to the terms of the applicable laws, regulations, orders, and

1 approvals relating to building construction, renovation and/or remodeling.

2 **NINETEENTH AFFIRMATIVE DEFENSE**

3 On information and belief, the Complaint, and each purported claim for relief alleged
4 therein, is barred by reason of the issuance by local building authorities of appropriate building
5 permits and Certificates of Occupancy for the Subject Premises, and Defendants reasonably and
6 in good faith relied upon same.

7 **TWENTIETH AFFIRMATIVE DEFENSE**

8 Because Plaintiff's complaint is couched in broad and conclusory terms, Defendants
9 cannot fully anticipate all defenses that may be applicable to the within action. Accordingly, the
10 right to assert additional defenses, if and to the extent that such defenses are applicable, is
11 hereby reserved.

12 WHEREFORE, Defendants pray as follows:

- 13 1. That Plaintiff takes nothing;
- 14 2. For reasonable attorney's fees;
- 15 3. For costs of suit; and
- 16 4. For such other and further relief as the Court may deem just and proper.

17
18 Dated: October 27, 2009

JACKSON LEWIS LLP

19
20 By:



21 Mark S. Askanas
22 Rebecca Benhuri
23 Attorneys for Defendants
24 DEFENDANTS TOYS 'R' US –
25 DELAWARE, INC., TRU 2005 RE I, LLC
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27
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1 **CERTIFICATE OF SERVICE**

2 Case Name: *Theresa Wallen v Toys "R"Us- Delaware et al/*
3 Case No.: USDC-ND/San Jose; C09-4742RS
4 Matter No.: 149821

5 I, Marilou R. Barairo, declare that I am employed with the law firm of Jackson
6 Lewis LLP, whose address is 199 Fremont Street, 10th Floor, San Francisco, California 94105; I
7 am over the age of eighteen (18) years and am not a party to this action.

8 On October 27, 2009, I served the attached **DEFENDANTS TOYS 'R' US -**
9 **DELAWARE, INC. AND TRU 2005 RE I, LLC'S ANSWER TO COMPLAINT**, in this
10 action by placing a true and correct copy thereof, enclosed in a sealed envelope addressed as
11 follows:

11 K. Randolph Moore, Esq.
12 MOORE LAW FIRM, P.C.
13 332 N. Second Street
14 San Jose, CA 95112
15 Tel. (408) 271-6600
16 Fax (408) 298-6046
17 *Attorneys for Plaintiff Theresa Wallen*

- 18 **BY MAIL:** United States Postal Service by placing sealed envelopes with the postage
19 thereon fully prepaid, placed for collection and mailing on this date, following ordinary
20 business practices, in the United States mail at San Francisco, California. [*Courtesy*
21 *copy by fax to (408) 298-6046.*]
22 **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the above
23 address.
24 **BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered to the above
25 address within 24 hours by overnight delivery service.
26 **BY FACSIMILE:** I caused such document to be transmitted by facsimile from our fax
27 number (415) 394-9401 to the fax number indicated above (by written agreement,
28 confirming letter dated and signed MM/DD/YY

I declare that I am employed in the office of a member of the bar of this Court at
whose direction the service was made.

Executed on October 27, 2009, at San Francisco, California.


Marilou R. Barairo

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