

JUDGE SULLIVAN

12 CIV 7687

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

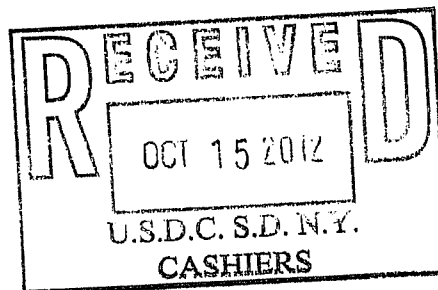
UNITED STATES OF AMERICA

Plaintiff,

v.

ROSA MEXICANO COMPANY, WEST 62
OPERATING LLC, FENIX RESTAURANT, INC.,
and ROSA MEXICANO USQ LLC,

Defendants.



COMPLAINT

12 Civ. ____ ()

ECF CASE

Plaintiff the United States of America (the "United States"), by its attorney Preet Bharara, United States Attorney for the Southern District of New York, alleges as follows:

1. This is a civil action to redress discrimination on the basis of disability in violation of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 *et seq.* ("ADA"), and its implementing regulation, 28 C.F.R. Part 36.

2. The defendants own and/or operate the three New York City locations of Rosa Mexicano, a national restaurant chain: 61 Columbus Avenue, New York, New York 10023 ("Rosa Mexicano Lincoln Center"); 1063 First Avenue, New York, New York 10022 ("Rosa

Mexicano First Avenue”); and 9 East 18th Street, New York, New York 10003 (“Rosa Mexicano Union Square”) (collectively, the “Restaurants”).

3. On September 19, 2011, the United States Attorney’s Office for the Southern District of New York announced an ADA compliance review of certain restaurants in this District pursuant to 42 U.S.C. § 12188(b)(1)(A)(i). As part of this compliance review, the United States Attorney’s Office obtained survey forms concerning ADA compliance from each of the Restaurants, and a Department of Justice (“DOJ”) architect specializing in ADA compliance conducted on-site inspections of the Restaurants.

4. As set forth more fully below, the United States Attorney’s Office’s investigation of the Restaurants revealed numerous violations of the ADA.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 12188(b)(1)(B) and 28 U.S.C. §§ 1331 and 1345.

6. Venue lies in this District pursuant to 28 U.S.C. § 1391(b). The acts of discrimination alleged in this complaint occurred in this District, and the Restaurants that are the subject of this action are situated in this District.

PARTIES

7. Plaintiff is the United States of America.

8. Defendant West 62 Operating LLC (“West 62”) is a New York corporation located at 846 Seventh Avenue, New York, New York 10023. Upon information and belief, West 62 operates Rosa Mexicano Lincoln Center, a restaurant located at 61 Columbus Avenue, New York, New York 10023. Rosa Mexicano Lincoln Center is a “place of public accommodation” within the meaning of Title III of the ADA because its operations affect

commerce and, among other things, it is “a restaurant, bar or other establishment serving food or drink.” 42 U.S.C. § 12181(7)(B); *see* 28 C.F.R. § 36.104. West 62 is therefore a “public accommodation” within the meaning of Title III of the ADA. *See* 42 U.S.C. §§ 12181(7)(B), 12182(a); 28 C.F.R. § 36.104.

9. Defendant Fenix Restaurant, Inc. (“Fenix”) is a New York corporation located at 846 Seventh Avenue, New York, New York 10019. Upon information and belief, Fenix operates Rosa Mexicano First Avenue, a restaurant located at 1063 First Avenue, New York, New York 10022. Rosa Mexicano First Avenue is a “place of public accommodation” within the meaning of Title III of the ADA because its operations affect commerce and, among other things, it is “a restaurant, bar or other establishment serving food or drink.” 42 U.S.C. § 12181(7)(B); *see* 28 C.F.R. § 36.104. Fenix is therefore a “public accommodation” within the meaning of Title III of the ADA. *See* 42 U.S.C. §§ 12181(7)(B), 12182(a); 28 C.F.R. § 36.104.

10. Defendant Rosa Mexicano USQ LLC (“Rosa Mexicano USQ”) is a New York corporation located at 846 Seventh Avenue, New York, New York 10003. Upon information and belief, Rosa Mexicano USQ operates Rosa Mexicano Union Square, a restaurant located at 9 East 18th Street, New York, New York 10003. Rosa Mexicano Union Square is a “place of public accommodation” within the meaning of Title III of the ADA because its operations affect commerce and, among other things, it is “a restaurant, bar or other establishment serving food or drink.” 42 U.S.C. § 12181(7)(B); *see* 28 C.F.R. § 36.104. Rosa Mexicano USQ is therefore a “public accommodation” within the meaning of Title III of the ADA. *See* 42 U.S.C. §§

12181(7)(A), 12182(a); 28 C.F.R. § 36.104.

11. Defendant Rosa Mexicano Company is a New York corporation located at 846 Seventh Avenue, New York, New York 10019. Upon information and belief, Rosa Mexicano

Company owns the Restaurants. Rosa Mexicano Company is therefore a “public accommodation” within the meaning of Title III of the ADA, because the Restaurants are places of public accommodation. *See* 42 U.S.C. §§ 12181(7)(A), 12182(a); 28 C.F.R. § 36.104.

FACTUAL ALLEGATIONS

Rosa Mexicano Lincoln Center

12. Rosa Mexicano Lincoln Center is a two-story restaurant. The bar and a dining area are located on the lower level. A dining area and the toilet rooms are located on the upper level. The lower and upper levels are connected by stairs within the restaurant.

13. Numerous architectural barriers at Rosa Mexicano Lincoln Center prevent or restrict access by individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 36.304. Rosa Mexicano Lincoln Center’s services, features, elements, and spaces are not readily accessible to, or usable by, individuals with disabilities, as specified by the regulations promulgated under the ADA. *See* 1991 ADA Standards for Accessible Design, 28 C.F.R. Part 36, App. A (the “1991 Standards”).

14. Barriers to access that exist within Rosa Mexicano Lincoln Center include, but are not limited to, the following:

- (a) The main entrance to Rosa Mexicano Lincoln Center is on Columbus Avenue. The space between the two hinged doors in series at the Columbus Avenue entrance is insufficient. *See* 1991 Standards §§ 4.1.3(7)(a), 4.1.3(8), 4.13.7.
- (b) The route from the Columbus Avenue entrance to the upper level of the restaurant (where the toilet rooms are located) is via a flight of stairs. Patrons who cannot use the stairs are directed out of

the restaurant and around the corner to an adjacent building on 62nd Street, the Harmony Atrium, through which there is a route to the upper level of the restaurant. There is no directional signage at the Columbus Avenue entrance indicating the route to the Harmony Atrium alternate entrance. *See* 1991 Standards §§ 4.1.2(7)(c), 4.1.6(1)(h), 4.30.1, 4.30.2, 4.30.3, 4.30.5.

- (c) The elevator hoistway entrances in the Harmony Atrium do not have raised and Braille floor designations on both jambs. *See* 1991 Standards §§ 4.1.3(5), 4.10.5.
 - (d) The designated accessible entrances along the route from the Harmony Atrium to the upper level of the restaurant are not identified with the International Symbol of Accessibility. *See* 1991 Standards §§ 4.1.2(7)(c), 4.30.7.
 - (e) The door maneuvering clearances along the route from the Harmony Atrium to the upper level of the restaurant are inadequate. *See* 1991 Standards §§ 4.1.3(7)(a), 4.13.6 & Fig. 25(a).
 - (f) The bar on the lower level of the restaurant lacks either a sufficient amount of lowered counter space or an accessible table. *See* 28 C.F.R. § 36.302(a); 1991 Standards §§ 5.1, 4.1.3(18), 4.32, 4.2.4 & Fig. 45.
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- (g) The stairway between the lower and upper levels of the restaurant has open risers. *See* 1991 Standards §§ 4.1.3(4), 4.9.2. Moreover, the

stairway flight from the lower level to the first landing does not have a handrail on both sides. *See* 1991 Standards §§ 4.1.3(4), 4.9.4, 4.26.

- (h) Wall sconces in the upper level corridor where the toilet rooms are located are between 27 inches and 80 inches above the finish floor to the leading edge, and project more than 4 inches into the circulation path. *See* 1991 Standards §§ 4.1.3(2), 4.4.1.
- (i) The men's and women's multi-user toilet rooms within the restaurant lack signs in raised characters and Braille. *See* 1991 Standards §§ 4.1.3(16)(a), 4.30.1, 4.30.4, 4.30.5, 4.30.6. A directional sign indicating the location of the nearest accessible restroom is also not provided. *See id.* §§ 4.1.3(16)(b), 4.30.2, 4.30.3, 4.30.5. In addition, the tactile sign identifying the unisex toilet room located in the Harmony Atrium upper elevator lobby is not mounted at 60 inches to the centerline of the sign above the finish floor. *See id.* §§ 4.1.3(16)(a), 4.30.6.
- (j) The unisex toilet room located in the Harmony Atrium upper elevator lobby lacks clear floor space at the toilet seat cover dispenser. *See* 1991 Standards §§ 4.1.3(11), 4.22.7, 4.27.2, 4.2.4.

15. It would be readily achievable for defendants Rosa Mexicano Company and West 62 to remove some or all of the barriers to access at Rosa Mexicano Lincoln Center.

16. Rosa Mexicano Company and West 62 have failed to remove some or all of the barriers to access at Rosa Mexicano Lincoln Center.

17. By failing to remove the barriers to access and by failing to bring Rosa Mexicano Lincoln Center into compliance with the Standards where it is readily achievable to do so, Rosa Mexicano Company and West 62 have discriminated against individuals with disabilities in violation of sections 302(a) and 302(b)(2)(A)(iv) of the ADA, 42 U.S.C. § 12182(a), (b)(2)(A)(iv), and in violation of 28 C.F.R. § 36.304.

18. Rosa Mexicano Company's and West 62's failure to remove the barriers to access constitutes a pattern or practice of discrimination within the meaning of 42 U.S.C. § 12188(b)(1)(B)(i) and 28 C.F.R. § 503(a).

19. Rosa Mexicano Company's and West 62's failure to remove the barriers to access constitutes unlawful discrimination that raises an issue of general public importance within the meaning of 42 U.S.C. § 12188(b)(1)(B)(ii) and 28 C.F.R. § 36.503(b).

20. Moreover, upon information and belief, Rosa Mexicano Company and West 62 have altered areas of Rosa Mexicano Lincoln Center since January 26, 1992. Such alterations must be readily accessible to persons with disabilities to the maximum extent feasible. *See* 42 U.S.C. § 12183(a)(2). Notwithstanding the alterations undertaken by Rosa Mexicano Company and West 62, the altered areas and paths of travel to those altered areas do not comply with the requirement that they be readily accessible.

Rosa Mexicano First Avenue

21. Numerous architectural barriers at Rosa Mexicano First Avenue prevent or restrict access to Rosa Mexicano First Avenue by individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 36.304. Rosa Mexicano First Avenue's services, features, elements and spaces are not readily accessible to, or usable by, individuals with disabilities, as specified by the 1991 Standards.

22. Barriers to access that exist within Rosa Mexicano First Avenue include, but are not limited to, the following:

- (a) There is a 4-inch step at the main First Avenue entrance. Although an alternate entrance is provided on 58th Street, there is no directional signage at the First Avenue entrance indicating the route to the 58th Street alternate entrance. *See* 1991 Standards §§ 4.1.2(7)(c), 4.1.6(1)(h), 4.30.1, 4.30.2, 4.30.3, 4.30.5.
- (b) The clear opening width of each single leaf of the double leaf door at the 58th Street alternate entrance is less than 32 inches. *See* 1991 Standards §§ 4.1.3(8), 4.1.3(7)(a), 4.13.4, 4.13.5 & Fig. 24(a).
- (c) Accessible door hardware is not provided on the exterior side of the door at the 58th Street alternate entrance. *See* 1991 Standards §§ 4.1.3(8), 4.1.3(7)(a), 4.13.9.
- (d) The change in level at the door threshold at the 58th Street alternate entrance exceeds $\frac{3}{4}$ inch and is not beveled. *See* 1991 Standards §§ 4.1.3(8), 4.1.3(7)(a), 4.1.6(3)(d)(ii), 4.13.8, 4.5.2.
- (e) The men's toilet room is not accessible and is located down a flight of stairs. *See* 1991 Standards §§ 4.1.3(5), 4.1.3(11), 4.22. In addition, the stairway to the men's toilet room does not have a handrail on both sides. *See* 1991 Standards §§ 4.1.3(4), 4.9.4, 4.26.
- (f) Signs in raised characters and Braille identifying the men's and women's toilet rooms are not provided. *See* 1991 Standards §§ 4.1.3(16)(a), 4.30.1, 4.30.4, 4.30.5, 4.30.6.

- (g) An accessible lavatory is not provided in the two women's toilet rooms. *See* 1991 Standards §§ 4.1.3(11), 4.22.6, 4.19.
- (h) The clear opening width of the doors to the women's toilet rooms is insufficient. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.5 & Fig. 24(a).
- (i) The maneuvering clearance for the women's toilet rooms is insufficient. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.6 & Fig. 25(a).
- (j) The doors to the women's toilet rooms have knob hardware. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.9.
- (k) The women's toilet rooms lack a 60 inch diameter or t-shaped turning space. *See* 1991 Standards §§ 4.1.3(11), 4.22.3, 4.2.3 & Fig. 3.
- (l) The women's toilet rooms lack a 60-inch wide accessible toilet stall. *See* 1991 Standards §§ 4.1.3(11), 4.22.4, 4.16, 4.17.
- (m) The bar in the dining area lacks a lowered portion of the drink rail. *See* 1991 Standards §§ 5.1, 4.1.3(18), 4.32, 4.2.4 & Fig. 45.
- (n) The headroom under the dropped ceiling surrounding the tortilla station is less than 80 inches above the finish floor. *See* 1991 Standards §§ 4.1.3(2); 4.4.2.

23. It would be readily achievable for Rosa Mexicano Company and Fenix to remove some or all of the barriers to access at Rosa Mexicano First Avenue.

24. Rosa Mexicano Company and Fenix have failed to remove some or all of the barriers to access at Rosa Mexicano First Avenue.

25. By failing to remove the barriers to access and by failing to bring Rosa Mexicano First Avenue into compliance with the Standards where it is readily achievable to do

so, Rosa Mexicano Company and Fenix have discriminated against individuals with disabilities in violation of sections 302(a) and 302(b)(2)(A)(iv) of the ADA, 42 U.S.C. § 12182(a), (b)(2)(A)(iv), and in violation of 28 C.F.R. § 36.304.

26. Rosa Mexicano Company's and Fenix's failure to remove the barriers to access constitutes a pattern or practice of discrimination within the meaning of 42 U.S.C. § 12188(b)(1)(B)(i) and 28 C.F.R. § 503(a).

27. Rosa Mexicano Company's and Fenix's failure to remove the barriers to access constitutes unlawful discrimination that raises an issue of general public importance within the meaning of 42 U.S.C. § 12188(b)(1)(B)(ii) and 28 C.F.R. § 36.503(b).

28. Moreover, upon information and belief, Rosa Mexicano Company and Fenix have altered areas of Rosa Mexicano First Avenue since January 26, 1992. Such alterations must be readily accessible to persons with disabilities to the maximum extent feasible. *See* 42 U.S.C. § 12183(a)(2). Notwithstanding the alterations undertaken by Rosa Mexicano Company and Fenix, the altered areas and paths of travel to those altered areas do not comply with the requirement that they be readily accessible.

Rosa Mexicano Union Square

29. Numerous architectural barriers at Rosa Mexicano Union Square prevent or restrict access to Rosa Mexicano Union Square by individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 36.304. Rosa Mexicano Union Square's services, features, elements and spaces are not readily accessible to, or usable by, individuals with disabilities, as specified by the 1991 Standards.

30. Barriers to access that exist within Rosa Mexicano Union Square include, but are not limited to, the following:

- (a) The main entrance to Rosa Mexicano Union Square is located five risers above the sidewalk. An alternate entrance is provided at 9-13 East 18th Street, which requires assistance in opening the exterior building door and the Rosa Mexicano side door, as well as installing two portable ramps—one from the sidewalk to the exterior building door, and another through the Rosa Mexicano side door. The slope of the portable ramp from the sidewalk to the exterior building door at the 9-13 East 18th Street entrance exceeds 1:12. Similarly, a route with a slope greater than 1:20 is considered a ramp, and the slope of the route from the exterior building door to the Rosa Mexicano side door exceeds 1:12. *See* 28 C.F.R. §§ 36.302(a), 36.304(e); 1991 Standards §§ 4.1.2(1), 4.1.3(1), 4.3.7, 4.8.2.
- (b) Both portable ramps have a width of less than 36 inches. *See* 28 C.F.R. §§ 36.302(a), 36.304(e); 1991 Standards §§ 4.1.2(1), 4.3.7, 4.8.3.
- (c) The portable ramp from the sidewalk to the exterior building door lacks a 60-inch long level landing at the top and bottom of the ramp run. *See* 28 C.F.R. §§ 36.302(a), 36.304(e); 1991 Standards §§ 4.1.2(1), 4.3.7, 4.8.3.
- (d) The portable ramp from the sidewalk to the exterior building door has a rise greater than 6 inches and does not have handrails on both sides. Handrails also are not provided on both sides of the ramp between the exterior building door and the Rosa Mexicano side entrance. *See* 28

C.F.R. §§ 36.302(a), 36.304(e); 1991 Standards §§ 4.1.2(1), 4.1.3(1), 4.3.7, 4.8.5.

- (e) The edge protection along the drop off for both portable ramps is less than 2 inches high. *See* 28 C.F.R. §§ 36.302(a), 36.304(e); 1991 Standards §§ 4.1.2(1), 4.3.7, 4.8.7 & Fig. 17.
 - (f) The top of the handrail gripping surface between the exterior building door and the Rosa Mexicano side entrance is between 30 and 32 inches above the ramp surface. *See* 1991 Standards §§ 4.1.3(1), 4.3.7, 4.8.5(5).
 - (g) The restaurant's waiting area lacks a clear floor space for an individual in a wheelchair. *See* 1991 Standards §§ 4.1.3(18), 4.32.2 & Fig. 45.
 - (h) Door hardware is not provided on the upper level platform lift door. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.9.
 - (i) Neither a 60-inch minimum portion of the main bar counter located between 28 inches and 34 inches above the finish floor nor an accessible table is provided in the bar area. A low counter is provided in the bar area, but the counter is less than 30 inches wide and only provides seating space for one individual. *See* 28 C.F.R. § 36.302(a); 1991 Standards §§ 5.1, 4.1.3(18), 4.32, 4.2.4 & Fig. 45.
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- (j) For the women's multi-user toilet room, the pull side maneuvering clearance perpendicular to the door is less than 54 inches for a latch

side approach. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.6 & Fig. 25(c).

- (k) For the men's multi-user toilet room, the force required to open the toilet room door exceeds 5 pounds. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.11(2)(b).
- (l) The rim of a typical urinal in the men's multi-user toilet rooms exceeds 17 inches above the finish floor. *See* 1991 Standards §§ 4.1.3(11), 4.22.5, 4.18.2.
- (m) Clear floor space at a typical lavatory in the women's multi-user toilet room is less than 30 inches wide. *See* 1991 Standards §§ 4.1.3(11), 4.22.6, 4.19.3 & Fig. 32.
- (n) Clearance underneath the lavatory aprons in the men's and women's multi-user toilet rooms is less than 29 inches above the finish floor. *See* 1991 Standards §§ 4.1.3(11), 4.22.6, 4.19.2 & Fig. 31.
- (o) The rim of a typical lavatory in the men's and women's multi-user toilet rooms exceeds 34 inches above the finish floor. *See* 1991 Standards §§ 4.1.3(11), 4.22.6, 4.19.2 & Fig. 31.
- (p) The hot water and drain pipe under a typical lavatory in the men's and women's multi-user toilet rooms are not insulated or otherwise configured against contact. *See* 1991 Standards §§ 4.1.3(11), 4.22.6, 4.19.4.
- (q) The mirror above the lavatories in the men's multi-user toilet room is mounted with the bottom edge of the reflecting surface more than 40

inches above the finish floor. *See* 1991 Standards §§ 4.1.3(11), 4.22.6, 4.19.6 & Fig. 31.

- (r) The storage shelves for paper towels in the men's and women's multi-user toilet rooms exceed 48 inches above the finish floor for a forward reach. *See* 1991 Standards §§ 4.1.3(12)(a), 4.25.3, 4.2.5 & Fig. 5.
- (s) A directional sign indicating the location of the nearest accessible restroom is not provided. *See* 1991 Standards §§ 4.1.3(16)(b), 4.30.2, 4.30.3, 4.30.5.
- (t) Men's and women's unisex toilet rooms are located within each multi-user toilet room. For the men's unisex toilet room, the pull side maneuvering clearance on the latch side of the door is less than 18 inches for a depth of 60 inches for a forward approach. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.6 & Fig. 25(a).
- (u) The locks for the men's and women's unisex toilet room doors require tight pinching and twisting to operate. *See* 1991 Standards §§ 4.1.3(7)(b), 4.13.9.
- (v) The rear toilet grab bar in the men's unisex toilet room is less than 36 inches long. *See* 1991 Standards §§ 4.1.3(11), 4.22.4, 4.16.4 & Fig. 29(a).
- (w) No clear floor space is provided at the toilet seat cover dispensers in either the men's or women's unisex toilet rooms. *See* 1991 Standards §§ 4.1.3(11), 4.22.7, 4.27.2, 4.2.4.

- (x) The coat hooks in the men's and women's unisex toilet rooms exceed 54 inches above the finish floor for a side reach. *See* 1991 Standards §§ 4.1.3(12)(a), 4.25.3, 4.2.6 & Fig. 6.

31. It would be readily achievable for Defendants Rosa Mexicano USQ and Rosa Mexicano Company to remove some or all of the barriers to access at Rosa Mexicano Union Square.

32. Defendants Rosa Mexicano USQ and Rosa Mexicano Company have failed to remove some or all of the barriers to access at Rosa Mexicano Union Square.

33. By failing to remove the barriers to access and by failing to bring Rosa Mexicano Union Square into compliance with the Standards where it is readily achievable to do so, Defendants Rosa Mexicano USQ and Rosa Mexicano Company have discriminated against individuals with disabilities in violation of sections 302(a) and 302(b)(2)(A)(iv) of the ADA, 42 U.S.C. § 12182(a), (b)(2)(A)(iv), and in violation of 28 C.F.R. § 36.304.

34. Defendants Rosa Mexicano USQ's and Rosa Mexicano Company's failure to remove the barriers to access constitutes a pattern or practice of discrimination within the meaning of 42 U.S.C. § 12188(b)(1)(B)(i) and 28 C.F.R. § 503(a).

35. Defendants Rosa Mexicano USQ's and Rosa Mexicano Company's failure to remove the barriers to access constitutes unlawful discrimination that raises an issue of general public importance within the meaning of 42 U.S.C. § 12188(b)(1)(B)(ii) and 28 C.F.R. § 36.503(b).

36. Moreover, upon information and belief, Rosa Mexicano Company and Rosa Mexicano USQ have altered areas of Rosa Mexicano Union Square since January 26, 1992. Such alterations must be readily accessible to persons with disabilities to the maximum extent

feasible. *See* 42 U.S.C. § 12183(a)(2). Notwithstanding the alterations undertaken by Rosa Mexicano Company and Rosa Mexicano USQ, the altered areas and paths of travel to those altered areas do not comply with the requirement that they be readily accessible.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this Court enter judgment:

A. Declaring that Defendants have violated Title III of the ADA and its implementing Regulations;

B. Ordering Defendants to remove all violations of Title III of the ADA at Rosa Mexicano Lincoln Center, Rosa Mexicano First Avenue, and Rosa Mexicano Union Square, including, but not limited to, the violations set forth above;

C. Assessing a civil penalty against Defendants in an amount authorized by 42 U.S.C. § 12188(b)(2)(C); 28 C.F.R. § 36.504(a)(3), to vindicate the public interest; and

D. Granting such other relief as the interests of justice may require.

Dated: New York, New York
~~September~~ 15, 2012
October

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