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11
 12 **IN THE UNITED STATES DISTRICT COURT**
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 THE DEPARTMENT OF FAIR EMPLOYMENT) Case No. CV 12-1830-EMC
 15 AND HOUSING, an agency of the State of)
 16 California,)

17) **THIRD AMENDED COMPLAINT**
 18) **SEEKING GROUP OR CLASS RELIEF,**
 19) **IN THE ALTERNATIVE GROUP AND**
 20) **CLASS ACTION COMPLAINT FOR**
 21) **DAMAGES AND INJUNCTIVE RELIEF**
 22) [FEHA, Cal. Gov. Code § 12900 et seq. and
 23) Unruh Civil Rights Act, Cal. Civ. Code § 51
 24) et seq.]

17 vs.
 18
 19 LAW SCHOOL ADMISSION COUNCIL, INC.,)
 20 a Delaware tax exempt corporation,)
 21 Defendant.)

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Real Parties in Interest.

1 Plaintiff DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING (Department or
2 DFEH) alleges the following against defendant LAW SCHOOL ADMISSION COUNCIL, INC.
3 (LSAC), a Delaware tax exempt corporation:

4 **PARTIES**

5 1. DFEH is the state agency charged with enforcing the right of all Californians under
6 the Unruh Civil Rights Act (Unruh Act) (Cal. Civ. Code §§ 51 et seq.) “to the full and equal
7 accommodations, advantages, facilities, privileges, or services in all business establishments of every
8 kind whatsoever.” Cal. Civ. Code § 51 (a) (West 2013). Government Code section 12948 makes a
9 violation of the Unruh Act a violation of the Fair Housing and Employment Act (FEHA) Cal. Gov’t
10 Code §§ 12900 et seq. (West 2013). The FEHA empowers the DFEH to investigate and prosecute
11 Unruh Act claims within the state, including those that adversely affect, in a similar manner, a group
12 or class. Cal. Gov’t Code §§ 12961, 12965. The Government Code authorizes DFEH to prosecute
13 actions in state and federal court. Cal. Gov’t Code §§ 12930(h), 11180.

14 A. California’s public policy against discrimination on the basis of disability is
15 “substantial and fundamental.” City of Moorpark v. Super. Ct. of Ventura
16 Cnty., 18 Cal. 4th 1143, 1161 (1998); see also Cal. Civ. Code § 51 (“All
17 persons within the jurisdiction of this state are free and equal, and no matter
18 their . . . disability, medical condition . . . are entitled to the full and equal
19 accommodations . . . or services in all business establishments of every kind
20 whatsoever”); Cal. Gov’t Code § 12920 (“It is hereby declared as the public
21 policy of this state that it is necessary to protect and safeguard the right and
22 opportunity of all persons to seek, obtain, and hold employment without
23 discrimination or abridgement on account of . . . physical disability [or] mental
24 disability[.]”); Cal. Gov’t Code § 12921 9 (“The opportunity to seek, obtain and
25 hold employment without discrimination because of . . . physical disability [or]
26 mental disability . . . is hereby recognized as and declared to be a civil right.”).



1 Similarly, the ADA provides a mandate for “the elimination of bias against
2 individuals with disabilities.”) 42 U.S.C. § 12101.

3 B. DFEH commenced this suit as an exercise of the police power, based on its
4 determination that defendant, Law School Admission Council (LSAC)
5 engaged in discrimination on the basis of disability.

6 C. DFEH acts as a public prosecutor testing a public right. The interest of DFEH
7 in the law school admissions process was articulately summarized by the
8 United States Supreme Court:

9 In order to cultivate a set of leaders with legitimacy in the eyes of
10 the citizenry, it is necessary that the path to leadership be visibly
11 open to talented and qualified individuals All members of
12 our heterogeneous society must have confidence in the openness
13 and integrity of the educational institutions that provide this
14 training. As we have recognized, law schools “cannot be
15 effective in isolation from the individuals and institutions with
16 which the law interacts.” Access to legal education (and thus the
17 legal profession) must be inclusive of [all] talented and qualified
18 individuals . . . so that all members of our heterogeneous society
19 may participate in the educational institutions that provide the
20 training and education necessary to succeed in America. *Grutter*
21 *v. Bollinger*, 539 U.S. 306, 333 (citations omitted).

22 D. The LSAT is required for admission to any ABA accredited law school. The
23 State of California, through the DFEH, has an interest in ensuring that
24 gateways to education and employment are open to individuals with
25 disabilities. The State of California also has an interest in eliminating bias and
26 enhancing diversity in the legal profession, and in furtherance of this interest,
27 the testing process for entry into law school should not be an obstacle to the



1 full and equal participation of individuals with disabilities in the legal
 2 profession. Ensuring that law school admissions reflect the diversity of our
 3 society not only affects students with disabilities, but also their would-be
 4 classmates who benefit from the presence of those perspectives in the
 5 classroom. The legal profession as a whole, and the society which it serves,
 6 stands to be negatively affected by practices that result in the unfair exclusion
 7 of individuals with disabilities.

8
 9 2. Each real party in interest, John Doe, Jane Doe, Peter Roe, Raymond Banks, Kevin
 10 Collins, Rodney Decomo-Schmitt, Elizabeth Hennessey-Severson, Otilia Ioan, Alex Johnson,
 11 Nicholas Jones, Caroline Lee, Andrew Quan, Stephen Semos, Gazelle Taleshpour, Kevin Vielbaum,
 12 and Austin Whitney, applied to LSAC for testing accommodations¹ on the Law School Admissions
 13 Test (LSAT) between January 19, 2009 and the present. Each real party was denied a testing
 14 accommodation, either in whole or in part, within this same time frame. At the time of applying for
 15 testing accommodations, each real party resided in California.

16 3. Real parties in interest John Doe, Jane Doe, and Peter Roe wish to participate in this
 17 litigation anonymously. Each real party seeks to retain their privacy interest in the details of their
 18 disability and need for testing accommodation. Each of these real parties has expressed a legitimate
 19 fear of negative professional ramifications should their true names be associated with this litigation.
 20 A motion requesting the court's permission to proceed under fictitious names for these two real
 21 parties is filed concurrently with this complaint.

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 25 ¹ The Third Amended Complaint substitutes the common term 'testing accommodation' for the
 26 technical phrase 'modification, accommodation, or auxiliary aid or service.' Both terms denote those
 27 modifications, accommodations, or auxiliary aids or services that a testing entity must provide in
 order to make an examination accessible to people with disabilities under the ADA. 42 U.S.C. §
 12189; 28 U.S.C. § 36.309.



4. At all times relevant to this complaint, LSAC was a business establishment as defined by Civil Code section 51, subdivision (b). LSAC offers and administers its LSAT at multiple locations in the State of California several times a year.

GROUP RELIEF ALLEGATIONS

5. The DFEH brings this case on behalf of a group of 16 named individuals.

CLASS RELIEF AND IN THE ALTERNATIVE CLASS ACTION ALLEGATIONS

6. **Class Definition:** The DFEH may bring a government enforcement action for group or class relief without meeting the requirements for class certification. The DFEH brings this case for class wide relief and in the alternative as a class action, on behalf of: *all disabled individuals in the State of California who requested a testing accommodation for the Law School Admission Test (LSAT) from January 19, 2009 to the present.* The DFEH alleges that everyone within this class was subjected to LSAC's unlawful policies, patterns, or practices of discouraging requests for testing accommodation, requiring excessive documentation, and requesting unlawful information about mitigation measures. Within this class is a subclass of people who took the LSAT with the condition of extended time and were thereafter subjected to unlawful policies or practices of discriminatory treatment and retaliation because of this testing accommodation. These two classes are defined as follows:

a. Unlawful Discouragement and Consideration of Mitigation Measures: All disabled individuals in the State of California who requested a testing accommodation for the LSAT from January 19, 2009 to the present.

b. Differential Treatment and Retaliation Against Examinees Granted Extended Time: All disabled individuals in the State of California who took the LSAT with the testing accommodation of extra time from January 19, 2009 to the present.

7. **Class Representative:** The DFEH may bring a government enforcement action seeking relief for a group or class of persons without being certified as the class representative. In the alternative, this lawsuit meets the criteria for class certification. The Director of the DFEH, with the assistance of the 16 named real parties in interest, will fairly and adequately represent the class.



1 8. **Manageability:** The DFEH may bring a government enforcement action seeking relief
 2 for a group or class of persons without meeting the requirements for class certification. In the
 3 alternative, class treatment of this dispute would save time and money by bringing all like claims
 4 before this court. For LSAC policies that affect a large group of applicants in a similar fashion, such
 5 as subjecting applicants to unlawful inquiries and flagging certain scores, treatment as a class is a
 6 superior method of adjudication, as compared to multiple individual suits where each plaintiff would
 7 allege an identical harm. Class treatment would neatly aggregate these claims, preventing duplicative
 8 litigation and potential inconsistencies in the ultimate findings.

9 9. **Numerosity:** The DFEH may bring a government enforcement action without meeting
 10 the requirements for class certification. In the alternative, the class is estimated to include hundreds of
 11 LSAT applicants. It would be impracticable to join each of these applicants who requested testing
 12 accommodation during the three-year time frame and to bring them individually before the court for
 13 adjudication. The members of this class are fully ascertainable and there exists a probability that the
 14 individual members will ultimately be available to come forward to prove their separate damage-
 15 related claims to a portion of the total class recovery, if any.

16 10. **Commonality:** The DFEH may bring a government enforcement action without
 17 meeting the requirements for class certification. In the alternative, there exists for the class a well-
 18 defined community of interest such that common questions of both law and fact predominate over
 19 individual interests or claims.

20 11. **Typicality:** The DFEH may bring a government enforcement action without meeting
 21 the requirements for class certification. In the alternative, class claims raised by the real parties in
 22 interest are typical of those held by other members of the class. Each applicant for testing
 23 accommodation was subject to an unlawful inquiry about mitigation measures, and each test-taker,
 24 who was granted extra time, had his or her test score segregated and flagged.

25 12. **Adequacy of Representation:** The DFEH may bring a government enforcement
 26 action without meeting the requirements for class certification. In the alternative, with the assistance
 27



1 of the real parties in interest, the DEFH will fairly and adequately represent the interests of all
2 members of the class in the adjudication of their similar legal claims.

3 JURISDICTION AND VENUE

4 13. The DFEH realleges and incorporates by reference each and every allegation
5 contained in paragraphs 1 through 12, inclusive, as if fully set forth herein.

6 14. This action arises under the FEHA, specifically Government Code section 12948,
7 which incorporates the Unruh Act into the enforcement structure of the FEHA, giving the DFEH
8 jurisdiction over Unruh Act violations occurring within the state. By virtue of its incorporation into
9 the Unruh Act, a violation of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§
10 12101 et seq.) also constitutes a violation of the Unruh Act. Cal. Civ. Code § 51(f).

11 15. At all times relevant to this complaint, LSAC was a business establishment as defined
12 by Civil Code section 51, subdivision (b). LSAC offers and administers its LSAT at multiple
13 locations in the State of California several times a year.

14 16. At all times relevant to this complaint, real parties in interest John Doe, Jane Doe,
15 Peter Roe, Raymond Banks, Kevin Collins, Rodney Decomo-Schmitt, Elizabeth Hennessey-
16 Severson, Otilia Ioan, Alex Johnson, Nicholas Jones, Caroline Lee, Andrew Quan, Stephen Semos,
17 Gazelle Taleshpour, Kevin Vielbaum, Austin Whitney, and all other similarly situated individuals,
18 were "persons" within the meaning of Government Code section 12925, subdivision (d), and Civil
19 Code section 51, subdivision (b).

20 17. On May 9, 2010, Jane Doe filed a verified complaint of discrimination in writing with
21 the Department pursuant to Government Code section 12960, alleging that LSAC unlawfully denied
22 her full and equal access to the LSAT within the preceding one year, in violation of the FEHA and
23 Unruh Act. A redacted copy of this complaint is attached hereto as Exhibit 1.

24 18. On January 12, 2010, Nicholas Jones filed a verified complaint of discrimination in
25 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
26 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation



1 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
2 2.

3 19. After receiving the complaints of Jane Doe and Mr. Jones, and beginning an
4 investigation into their allegations, the Department came to believe that LSAC's policies and
5 practices toward disabled applicants requesting testing accommodation were affecting a larger group
6 or class of applicants in a similar manner.

7 20. On July 22, 2010, the Department issued a document entitled "Notice of Class Action
8 Complaint and Director's Complaint" describing the affected group or class as "all disabled
9 individuals in the State of California who have or will request a testing accommodation for the Law
10 School Admission Test (LSAT), administered by the LSAC, and who have or will be unlawfully
11 denied such request from January 19, 2009 to the conclusion of the Department's investigation of this
12 complaint." A redacted copy of this complaint is attached hereto as Exhibit 3.

13 21. During its investigation of the class action and Director's complaint, the DFEH
14 propounded administrative discovery to determine whether other people had been harmed by LSAC's
15 discriminatory practices within the state. The DFEH's efforts to obtain this information from
16 defendant included the filing of a superior court petition to compel LSAC to respond to its discovery
17 requests. Although Government Code section 12960, subdivision (d), provides that the DFEH has
18 one year from the date of the filing of its complaint until the filing of its accusation, this time is
19 extended by the pendency of a court action to enforce administrative discovery. Cal. Gov't Code §
20 12963.5(f). Therefore, this action is timely filed.

21 22. With the court's assistance, the DFEH was able to discover and notify other persons
22 who were harmed by defendant's discriminatory practices, to wit:

23 A. While applicants with disabilities may seek testing accommodations on the LSAT,
24 LSAT's policies, practices or procedures impose restrictions that are inconsistent
25 with the ADA, FEHA and Unruh;
26
27



1 B. Under LSAC's policies, practices or procedures, applicants with disabilities must
 2 complete and submit an extensive portfolio of current and historical materials
 3 including medical and/or psychological documentation by a stated deadline;

4 C. Depending on the applicant's disability, individuals are also required to complete
 5 additional forms and medical reports. Then, even after so doing, LSAC requires
 6 even further additional documentation or medical reports.

7 D. LSAC's burdensome documentation requests "may cost [a test taker] over \$3,000,
 8 a cost that bars low-income individuals from access." Assembly Third Reading,
 9 AB 2122 (2011-2012);

10 E. LSAC's policies or practices are so burdensome that some applicants have had to
 11 secure legal counsel in pursuit of their testing accommodation request;

12 F. When LSAC grants applicants the testing accommodation of extended time, it
 13 specially marks or "flags" the test scores as having been taken under non-standard
 14 conditions and advises law schools to "[c]arefully evaluate LSAT scores earned
 15 under accommodated or nonstandard conditions." See LSAC's Cautionary Policies
 16 Concerning LSAT Scores and Related Services (Rev. 2005). LSAC segregates all
 17 such test scores so that when it submits scores to law schools, it does not report a
 18 percentile ranking for those applicants.

19 Some of the people harmed by LSAC's policies or practices elected to file individual complaints as
 20 follows.

21 23. On August 29, 2011, Alex Johnson filed a verified complaint of discrimination in
 22 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
 23 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
 24 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
 25 4.

26 24. On August 31, 2011, John Doe filed a verified complaint of discrimination in writing
 27 with the Department pursuant to Government Code section 12960, alleging that LSAC unlawfully



1 denied him full and equal access to the LSAT within the preceding one year, in violation of the
2 FEHA and Unruh Act. A redacted copy of this complaint is attached hereto as Exhibit 5.

3 25. On September 26, 2011, Elizabeth Hennessey-Severson filed a verified complaint of
4 discrimination in writing with the Department pursuant to Government Code section 12960, alleging
5 that LSAC unlawfully denied her full and equal access to the LSAT within the preceding one year, in
6 violation of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as
7 Exhibit 6.

8 26. On October 3, 2011, Caroline Lee filed a verified complaint of discrimination in
9 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
10 unlawfully denied her full and equal access to the LSAT within the preceding one year, in violation
11 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
12 7.

13 27. On October 6, 2011, Raymond Banks filed a verified complaint of discrimination in
14 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
15 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
16 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
17 8.

18 28. On October 7, 2011, Gazelle Taleshpour filed a verified complaint of discrimination in
19 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
20 unlawfully denied her full and equal access to the LSAT within the preceding one year, in violation
21 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
22 9.

23 29. On October 11, 2011, Peter Roe filed a verified complaint of discrimination in writing
24 with the Department pursuant to Government Code section 12960, alleging that LSAC unlawfully
25 denied him full and equal access to the LSAT within the preceding one year, in violation of the
26 FEHA and Unruh Act. A redacted copy of this complaint is attached hereto as Exhibit 10.



1 30. On October 11, 2011, Stephen Semos filed a verified complaint of discrimination in
2 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
3 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
4 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
5 11.

6 31. On October 14, 2011, Rodney DeComo-Schmitt filed a verified complaint of
7 discrimination in writing with the Department pursuant to Government Code section 12960, alleging
8 that LSAC unlawfully denied him full and equal access to the LSAT within the preceding one year,
9 in violation of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto
10 as Exhibit 12.

11 32. On October 17, 2011, Andrew Grossman filed a verified complaint of discrimination
12 in writing with the Department pursuant to Government Code section 12960, alleging that LSAC
13 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
14 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
15 13. Andrew Grossman directly entered into a settlement agreement with LSAC. The DFEH is not a
16 party to the settlement agreement between Andrew Grossman and LSAC.

17 33. On October 19, 2011, Kevin Collins filed a verified complaint of discrimination in
18 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
19 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
20 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
21 14.

22 34. On October 24, 2011, Otilia Ioan filed a verified complaint of discrimination in
23 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
24 unlawfully denied her full and equal access to the LSAT within the preceding one year, in violation
25 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
26 15.



1 35. On October 28, 2011, Andrew Quan filed a verified complaint of discrimination in
2 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
3 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
4 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
5 16.

6 36. On October 28, 2011, Austin Whitney filed a verified complaint of discrimination in
7 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
8 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
9 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
10 17.

11 37. On November 7, 2011, Kevin Vielbaum filed a verified complaint of discrimination in
12 writing with the Department pursuant to Government Code section 12960, alleging that LSAC
13 unlawfully denied him full and equal access to the LSAT within the preceding one year, in violation
14 of the FEHA and Unruh Act. A true and correct copy of this complaint is attached hereto as Exhibit
15 18.

16 38. On February 6, 2012, the DFEH issued a Group and Class Accusation before the
17 California Fair Employment and Housing Commission (Commission), charging LSAC with
18 violations of the Unruh Act. The Group and Class Accusation was properly served on LSAC by
19 certified mail.

20 39. On February 17, 2012, the DFEH issued a First Amended Group and Class Accusation
21 before the Commission. This accusation was properly served on the LSAC by certified mail.

22 40. Pursuant to Government Code section 12965, subdivision (c)(1), LSAC elected to
23 have this dispute heard in civil court in lieu of a hearing before the Commission, and so notified the
24 Department in writing, on or about February 22, 2012. A true and correct copy of "Respondent's
25 Notice of Transfer of Proceedings to Court" is attached hereto as Exhibit 19.

26 41. The Department has withdrawn its accusation and timely filed a civil complaint in
27 Alameda County Superior Court pursuant to Government Code section 12965, subdivision (c)(2).



1 A. LSAC removed this case to the United States District Court, Northern District of
 2 California on April 12, 2012 on both federal question and diversity grounds.
 3 Docket No. 1.

4 B. DFEH sought and received leave to amend and file a First Amended Complaint,
 5 deemed filed February 6, 2013. DFEH sought and received leave to amend to file a
 6 Second Amended Complaint, filed March 27, 2013.

7 42. The harm that is the subject of this complaint occurred throughout the State of
 8 California. Three of the real parties in interest lived in the County of Alameda at the time that they
 9 were denied full and equal accommodations in the testing process.

10 43. The amount of damages sought by this complaint exceeds the minimum jurisdictional
 11 limits of this court, and is estimated to exceed \$5 million.

12 FACTUAL ALLEGATIONS

13 The Law School Admissions Test (LSAT)

14 44. The LSAT is a half-day, standardized test administered four times each year at
 15 designated testing centers throughout the State of California. It purports to provide a standard
 16 measure of acquired reading and verbal reasoning skills that law schools use to assess applicants.
 17 Applicants to all ABA accredited law schools are required to take the LSAT in order to be eligible for
 18 admission to law school.

19 45. The test consists of five 35-minute sections of multiple-choice questions. A 35-minute
 20 writing sample is administered at the end of the test. Defendant does not score the writing sample, but
 21 sends it on to the law schools with the scores.

22 46. The LSAT is designed to measure reading and comprehension skills, the ability to
 23 organize and manage information, and analytical skills such as evaluation and criticism.

24 47. The three multiple-choice question types in the LSAT are labeled reading
 25 comprehension, analytical reasoning, and logical reasoning. All candidates take one additional
 26 multiple-choice section, which is experimental.

27 LSAC Business within the State



1 48. LSAC offers and administers its LSAT at multiple locations in the State of California
 2 four times a year, typically at law schools and universities. Applicants pay a test registration fee of
 3 \$139 after creating an online account and filling out the online application form. Additional fees
 4 charged by LSAC include \$68 for late registration and \$35 to change the test date.

5 49. LSAC pays local proctors to administer the exam on site. LSAC also pays for
 6 accommodations at the site, such as readers or scribes.

7 50. LSAC offers a Credential Assembly Service to law schools and law school applicants,
 8 which streamlines the law school admission process by allowing transcripts, recommendations and
 9 evaluations to be sent one time to LSAC. LSAC, in turn, summarizes and combines a law school
 10 applicant's LSAT score, writing samples, transcripts, recommendations, and evaluations into a report
 11 to an applicant's prospective law schools. The Credential Assembly Service also includes access
 12 through an applicant's LSAC account to electronic applications for all ABA-approved law schools.
 13 Applicants are charged \$124 to register for the Credential Assembly Service and \$16 for law school
 14 reports.

15 51. LSAC provides a series of LSAT preparatory guides, manuals and compilations of
 16 sample LSATs for purchase via its Web site, which materials range in price from \$8 to \$39.96. LSAC
 17 also sells a guide to ABA-approved law schools for \$26 and a skill readiness inventory for \$29.95.

18 The LSAC Accommodation Request Process

19 52. LSAC requires candidates requesting a testing accommodation to utilize its standard
 20 forms and procedures. Applicants making a testing accommodation request for a so-called cognitive
 21 or psychological impairment are required to provide psychoeducational/ neuropsychological testing
 22 and a full diagnostic report, including comprehensive aptitude and achievement testing.

23 53. LSAC requires each applicant to disclose whether he or she took prescribed
 24 medication during the evaluation process and to provide an explanation for any failure or refusal to
 25 take the medication.

26 54. LSAC has a policy whereby examinees who complete the LSAT under a disability-
 27 related testing accommodation involving additional test time receive a notation on their score report



1 indicating that their exam scores were earned under non-standard time conditions. When reporting
 2 these LSAT scores to the law schools, defendant advises the schools that these examinees' scores
 3 "should be interpreted with great sensitivity and flexibility."

4 55. In addition, scores from tests taken under extended time conditions are not averaged
 5 with other scores to produce a percentile ranking as are other test scores. Instead, extended time
 6 scores are reported individually.

7 **John Doe**

8 56. John Doe, a resident of Rancho Santa Fe (San Diego County), requested that
 9 defendant make testing accommodations for the December 2010 LSAT at Saddleback College.

10 57. Mr. Doe was diagnosed with attention deficit disorder (ADD) at age 13. In addition, in
 11 2010 he became extremely ill with a bacterial infection and was hospitalized for approximately two
 12 months, spending several weeks in the Intensive Care Unit in a medically-induced coma. During this
 13 illness he suffered a severe brain edema, which left him with residual neurological impairments.

14 58. Mr. Doe requested time and a half (150 percent) on the multiple choice and writing
 15 sections for the December 2010 LSAT.

16 59. In support of his request, Mr. Doe submitted medical documentation verifying his
 17 hospitalization, and a complete psychoeducational assessment, which reported multiple diagnoses:
 18 ADD, a learning disability (spelling), and a "[r]ecent bacterial infection with sustained induced coma
 19 and residual impairments."

20 60. LSAC refused to grant Mr. Doe's requested accommodation and instead asked for "a
 21 detailed explanation regarding the nature, severity, treatment, and extent of [his] disorder at the
 22 present time and it [sic] impact on your ability to take the LSAT."

23 61. Mr. Doe then submitted additional medical documentation indicating that he had
 24 "suffered a serious illness and developed marked weaknesses and encephalopathy. He continues to
 25 have fatigability and impaired concentration." His doctor recommended that Mr. Doe be granted
 26 increased time to complete the LSAT.



64. LSAC granted Mr. Doe nine additional minutes for the multiple choice and writing sample sections (125 percent), with an additional 15 minutes of break time between sections three and four, for the February and June 2011 LSAT.

Jane Doe

65. Jane Doe, a resident of Oakland (Alameda County), requested that defendant provide her with testing accommodations on each of two administrations of the LSAT examination, one in February 2010 and a second in June 2010.

66. Ms. Doe has attention deficit disorder (ADD). Her condition makes it difficult to retain attention and focus, and significantly impairs her ability to conceptually organize and sequence abstract ideas.

67. Ms. Doe requested that LSAC accommodate her with time and a half (150 percent) on the multiple choice and writing sample sections of the LSAT.

68. In support of her request, Ms. Doe submitted medical documentation, verification that she had received the testing accommodation of time and a half (150 percent) as an undergraduate university student, and proof that she had received extended time (150 percent) on the Graduate Record Exam (GRE).

69. On January 15, 2010, LSAC denied Ms. Doe's testing accommodation requests, explaining that her documentation did not demonstrate that she had a disability, which affected her ability to take the LSAT.

1 documentation he had submitted did not demonstrate a limitation of a major life activity which
2 affected his ability to take the LSAT.

3 95. Mr. DeComo-Schmitt requested reconsideration of LSAC's decision, submitting a
4 letter from his psychologist contending that LSAC had misinterpreted the psychological testing.

5 96. LSAC stood by its denial of testing accommodation, informing Mr. DeComo-Schmitt
6 that he was registered for the December 2010 LSAT as a standard test taker.

7 **Elizabeth Hennessey-Severson**

8 97. Elizabeth Hennessey-Severson, a resident of San Francisco (San Francisco County),
9 requested that defendant make testing accommodations for the June 2011 LSAT at University of
10 California, Hastings College of the Law.

11 98. Ms. Hennessey-Severson has reading, written expression and mathematics disorders,
12 and ADHD. These conditions impair her working memory and her ability to plan, organize, and
13 devote sustained attention to language-based tasks, particularly reading.

14 99. Ms. Hennessey-Severson requested that LSAC accommodate her on the LSAT with a
15 minimum of time and a half (150 percent) extra testing time, and by allowing her short breaks of 10
16 to 15 minutes between sections of the exam.

17 100. In support of her request, Ms. Hennessey-Severson submitted psychoeducational
18 assessment reports from 2002 and 2009. She also submitted proof that she had been accommodated
19 with time and a half (150 percent) on the SAT, and while she was a student at Dartmouth College.

20 101. Defendant denied all of Ms. Hennessey-Severson's requests for accommodation,
21 contending that she scored in the "very superior" and "high average" range in her psychoeducational
22 testing, and that her 2002 evaluation noted that she demonstrated a remarkable ability to compensate
23 for her learning disabilities, such that she was able to take honors courses and play high school sports.

24 102. Ms. Hennessey-Severson and her psychologist requested that LSAC reconsider its
25 decision to deny testing accommodation. Her psychologist wrote: "It is my professional opinion
26 based on all available evidence including comprehensive history, diagnostic interview, well
27 established history of early diagnosis, remediation, and later accommodations throughout high school



1 and college, that Ms. Hennessey has a standard learning disability that has a substantial impact on a
 2 major life function, namely, her ability to read, write, and calculate efficiently, and that extended time
 3 for formal testing is a reasonable accommodation for her disability.”

4 103. After reconsideration, LSAC stood by its prior decision to deny Ms. Hennessey-
 5 Severson any testing accommodation.

6 **Otilia Ioan**

7 104. Otilia Ioan, a resident of San Jose (Santa Clara County), requested testing
 8 accommodation for the December 2010 LSAT offered at Santa Clara University.

9 105. Ms. Ioan is quadriplegic. She is paralyzed in all four limbs and is unable to physically
 10 write without using a brace.

11 106. Ms. Ioan requested that LSAC provide her with double time on all sections of the test,
 12 an alternate answer sheet, the use of a scribe, and an additional break of 30 minutes between sections
 13 3 and 4 of the test.

14 107. In support of her request, Ms. Ioan submitted verification that she had received the
 15 testing accommodation of double time on tests while a student at De Anza College, and double time
 16 when taking the GRE.

17 108. LSAC asked Ms. Ioan to submit additional information from her doctor before it could
 18 consider her request for testing accommodation. LSAC wrote: “Your evaluator needs to provide
 19 detailed information regarding the nature, extent, severity, and treatment of your disorder and its
 20 functional limitation on your ability to take the LSAT.”

21 109. Ms. Ioan’s doctor supplied the additional information that LSAC requested.

22 110. Ms. Ioan wrote to LSAC requesting reconsideration of its decision to deny her double
 23 testing time. LSAC stood by its previous decision.

24 **Alex Johnson**

25 111. Alex Johnson, a resident of Lake San Marcos (San Diego County), requested testing
 26 accommodations for the October 2010 LSAT offered at the University of Southern California.



1 112. Mr. Johnson is quadriplegic. He is unable to write or turn pages because his fingers are
2 paralyzed. He is unable to draw diagrams, underline text, or use a standard Scantron answer sheet.

3 113. Mr. Johnson requested 15 minutes of extra break time between each section of the
4 LSAT, and 120 additional minutes (more than triple time) on the multiple choice and writing sample
5 sections.

6 114. In support of his request, Mr. Johnson submitted medical documentation of his
7 condition and need for testing accommodation, as well as verification from the University of
8 Southern California that he had received double time on his exams while a student there.

9 115. At first, LSAC refused to consider Mr. Johnson's accommodation request, because he
10 was not registered to take the LSAT. Later, it granted Mr. Johnson time and a half (150 percent) on
11 the multiple choice and writing sample sections, and 10 minutes of break time between each section.
12 It agreed to provide Mr. Johnson with a scribe, and permitted him to use a computer for the writing
13 sample.

14 116. Mr. Johnson requested that LSAC reconsider his request for double time. His doctor
15 wrote, "Double time is the least amount of time I should be allocated. It is also very hard to use a
16 scribe because of time limitations."

17 117. LSAC responded that it did not offer an untimed test, and that the documentation
18 submitted did not support Johnson's request.

19 **Nicholas Jones**

20 118. Nicholas Jones, a resident of Palm Desert (Riverside County), requested that
21 defendant provide him with a testing accommodation for the December 2009 LSAT offered at the
22 University of Laverne (Ontario).

23 119. Mr. Jones suffers from two distinct eye conditions. First, he has amblyopia or "lazy
24 eye" in his left eye, which impairs his visual processing. Second, he has posterior vitreous
25 detachments in his right eye, meaning that he has persistent floaters or spots, which obstruct his field
26 of vision. These conditions together impair Mr. Jones' reading speed and ability.



1 120. Mr. Jones requested time and a half (150 percent) on the multiple choice and writing
2 sample sections of the exam and five-minute breaks between each section.

3 121. In support of his request, Mr. Jones submitted medical forms filled out by his doctor,
4 an eye specialist.

5 122. LSAC refused to provide any accommodation to Mr. Jones, informing him that "[t]he
6 documentation provided did not reflect an impairment related to taking the Law School Admission
7 Test."

8 123. Mr. Jones requested that LSAC reconsider its decision denying him testing
9 accommodations, and asked it to provide further explanation. Mr. Jones' doctor wrote a letter
10 supporting his request for reconsideration, asserting that Jones' eye condition "substantially limits
11 him in at least one major life activity, reading."

12 124. After reconsideration, defendant stood by its prior decision to deny testing
13 accommodation.

14 **Caroline Lee**

15 125. Caroline Lee, a resident of Oakland (Alameda County), requested that defendant make
16 testing accommodations for the December 2010 LSAT offered in the City of Oakland.

17 126. Ms. Lee suffers from ADHD and a reading disorder, causing her reading to be labored
18 and excessively slow, and impairing her short-term memory.

19 127. Ms. Lee requested time and a half (150 percent) on the LSAT multiple choice and
20 writing sample, as well as extended breaks during the exam, a quiet testing environment, and the use
21 of a laptop to compose all written work.

22 128. In support of her request, Ms. Lee submitted proof that she had received extended
23 testing time of 150 percent while a student at City College of San Francisco (CCSF) and that she had
24 taken the SAT and ACT with testing accommodations. She also submitted a psychoeducational
25 assessment that had been performed while she was a student at CCSF.

26 129. LSAC replied in writing to Ms. Lee that she needed to submit additional
27 documentation in order for her request to be considered, asking for: "[t]esting results and a full



1 diagnostic report from a comprehensive up-to-date psychoeducational/neuropsychological assessment
 2 that comply with the Law School Admissions Council, Inc. Guidelines for Documentation of
 3 Cognitive Impairments.”

4 130. Ms. Lee then obtained and submitted a full psychoeducational evaluation in February
 5 2011, which documented her ADHD and reading disorder. Her psychologist recommended that she
 6 receive 150 percent extended time, as well as the other previously requested accommodations.

7 131. LSAC then requested that Ms. Lee submit several additional documents and reports.
 8 Ms. Lee did so.

9 132. In April 2011, defendant denied all of Ms. Lee’s requested testing accommodations,
 10 informing her that: her performance on academic measures was commensurate with her ability,
 11 negating a finding of impairment; her documentation failed to support the diagnosis of an attention
 12 disorder; and her request for additional time on the writing sample was not considered because her
 13 psychologist had not administered the right tests.

14 133. Ms. Lee requested that LSAC reconsider its denial of accommodation. This request
 15 was accompanied by a letter from her psychologist, who contended that LSAC had misinterpreted the
 16 psychoeducational assessment.

17 134. After reconsideration, LSAC stood by its initial decision to deny testing
 18 accommodations.

19
 20 **Andrew Quan**

21 135. Andrew Quan, a resident of Hayward (Alameda County), requested testing
 22 accommodation for the October 2011 LSAT offered at the University of California, Santa Cruz.

23 136. Mr. Quan has ADHD, a visual-motor integration deficit with slow processing speed,
 24 hypotonia, and dysgraphia.

25 137. Mr. Quan requested that LSAC provide him with the accommodations of double time
 26 on the multiple choice and writing sample portions of the exam, 10-minute breaks between each
 27 section of the test, and the use of a computer for the writing sample.



1 while a student at the University of California, Irvine, of time and a half (150 percent) on tests; and a
2 complete psychoeducational assessment by his doctor, a neuropsychologist.

3 146. LSAC's first response was to ask Mr. Semos to provide additional documentation in
4 order to consider his testing accommodation request, including a full report of two particular tests for
5 cognitive disabilities, the Nelson-Denny Reading Test (NDRT) and the Conner's Continuous
6 Performance Test-II. LSAC also informed Mr. Semos that the deadline for the December 2010 LSAT
7 had passed, but that he could request accommodation for future exams.

8 147. Mr. Semos then submitted his documentation for the February 2011 LSAT.

9 148. In response, LSAC denied all of Mr. Semos' requests for testing accommodation on
10 the basis that his test scores were generally commensurate with his abilities and thus did not
11 demonstrate a learning disability.

12 149. Mr. Semos' neuropsychologist requested that LSAC reconsider its denial. Mr. Semos'
13 doctor wrote: "Your denial letter written to Mr. Semos selectively highlighted the above average
14 scores and thereby masked the patterns of deficits in processing speed and fine motor speed noted in
15 my neuropsychological report."

16 150. LSAC responded that the letter from Mr. Semos' neuropsychologist had arrived too
17 late to be considered for the February 2011 LSAT. LSAC wrote: "You remain registered to test as a
18 standard test taker. No accommodations have been granted."

19 **Gazelle Taleshpour**

20 151. Gazelle Taleshpour, a resident of San Diego (San Diego County), requested that
21 defendant make testing accommodations for the October 2010 LSAT offered at the University of San
22 Diego.

23 152. Ms. Taleshpour has ADHD. She also suffers from osteopenia (bone loss) and chronic
24 pain in her neck and back as a result of treatment she had received for leukemia, a bone marrow
25 transplant, radiation, and chemotherapy.



1 153. Ms. Taleshpour requested that LSAC accommodate her with 30 extra minutes on the
2 multiple choice and writing sample portions of the exam, breaks of two to five minutes every half
3 hour so that she could stretch and alleviate pain, a high table, and a comfortable chair.

4 154. In support of her request, Ms. Taleshpour submitted documentation from her treating
5 medical doctor, her chiropractor, and her psychologist. She also provided LSAC with verification that
6 she had received time and a half (150 percent) on all tests and exams while a student at the University
7 of San Diego.

8 155. LSAC requested that Ms. Taleshpour provide additional documentation in support of
9 her testing accommodation request, including “[t]esting results and a full diagnostic report from a
10 psychoeducational/neuropsychological assessment that comply with Guidelines for Documentation of
11 Cognitive Impairments.”

12 156. Ms. Taleshpour obtained and submitted the additional documentation that LSAC
13 requested. Her psychiatrist performed a full psychoeducational assessment, which diagnosed her with
14 ADHD, a reading disorder, and a learning disability (dyslexia). Her psychiatrist supported Ms.
15 Taleshpour’s request for double time and other testing accommodations.

16 157. LSAC only partially granted Ms. Taleshpour’s request for testing accommodation,
17 allowing her to sit or stand at a podium while taking the exam, and to bring a seat cushion or an
18 adjustable chair.

19 158. Ms. Taleshpour then resubmitted a request for accommodation for the December 2010
20 LSAT: double time on multiple choice and writing sample; an alternate, non-Scantron answer sheet;
21 use of a reader; an additional 15 minutes of rest time; and 15-minute breaks between sections.

22 159. LSAC denied the request for additional accommodations beyond the two it had
23 already granted, explaining to Ms. Taleshpour that her intelligence test scores were average and
24 commensurate with her ability, meaning that no cognitive disability was apparent.

25 160. Ms. Taleshpour requested that LSAC reconsider its denial of testing accommodation
26 for extra time. Her psychologist supported the reconsideration request, contending that LSAC failed
27 to recognize significant discrepancies in her reading speed and comprehension. “These significant



1 difficulties provide psychometric evidence of the presence of a Learning Disability as described by
2 the ADA,” he wrote.

3 161. LSAC stood by its prior decision to limit the testing accommodations made for Ms.
4 Taleshpour: permission to sit or stand with a podium and to bring a seat cushion or an adjustable
5 chair.

6 **Kevin Vielbaum**

7 162. Kevin Vielbaum, a resident of San Mateo (San Mateo County), requested that
8 defendant make testing accommodations for him in taking the June 2011 LSAT at the University of
9 California, Hastings College of the Law.

10 163. Mr. Vielbaum has a reading disorder (dyslexia), characterized by a significant
11 difficulties with perceptual reasoning, working memory, and cognitive processing speed.

12 164. Mr. Vielbaum requested that defendant accommodate him with time and a half (150
13 percent) on the multiple choice section of the LSAT, double time on the writing sample, and
14 permission to use a computer for the writing sample.

15 165. In support of his request, Mr. Vielbaum submitted extensive records from his primary
16 education at a special school for students with dyslexia, where he was granted accommodations of
17 extended time and the use of a laptop and calculator.

18 166. LSAC granted Mr. Vielbaum only the accommodation of using a computer, printer
19 and spell check for the writing sample. LSAC denied the accommodation of extra time, noting that
20 Mr. Vielbaum had not requested accommodation on the SAT, and that he had scored well on the tests
21 involved in his psychoeducational assessment. Defendant went on to explain that: “[y]our evaluator
22 notes you have difficulties with logical reasoning. Inasmuch as the Law School Admission Test is
23 designed to measure these skills, the testing accommodations requested (extended time on all
24 examinations that involve the solving of logic problems), would not be appropriate.”

25 **Austin Whitney**

26 167. Austin Whitney, a resident of Contra Costa County, first requested testing
27 accommodations for the September 2009 LSAT offered at San Diego State University.



1 168. Mr. Whitney is paraplegic due to a spinal cord injury in 2007.

2 169. Mr. Whitney requested that defendant accommodate his disability with time and a half
3 (150 percent) on the multiple choice and writing sample sections of the LSAT, and a wheelchair
4 accessible testing location.

5 170. In support of his request, Mr. Whitney submitted medical records pertaining to his
6 2007 injury, verification from the University of California at Berkeley that he had received time and a
7 half (150 percent) for all exams and quizzes during his undergraduate studies, and a form filled out
8 by his doctor indicating that, because of his injury and surgeries, he suffered from "severe chronic
9 pain and radiating radicular nerve pain" for which Whitney took prescription medication that caused
10 drowsiness.

11 171. LSAC responded that Mr. Whitney's request for testing accommodation had been
12 submitted too late for the September 2009 test, and therefore he was registered as a standard test
13 taker.

14 172. Mr. Whitney next requested testing accommodations for the June 2010 LSAT offered
15 in Berkeley at the California Ballroom. This time he requested that LSAC accommodate him with
16 five- minute breaks between sections, in addition to providing time and a half (150 percent) on the
17 multiple choice and writing sample sections and a wheelchair accessible testing site.

18 173. In support of this request, Mr. Whitney submitted medical forms from four different
19 doctors, each of whom supported his need for extra testing time. Dr. Larry Snyder explained:
20 "Patient has significant fatigue due to medications taken for previous spinal injury - this will affect
21 his performance in TIMED conditions." Dr. Carol Jessop wrote that, due to Mr. Whitney's spinal
22 cord injury with chronic, nueropathic pain, he needed extra time to compensate for the effects of the
23 pain medication which cause fatigue. Dr. Jessop explained: "This is a significant problem for Austin
24 Whitney as he is taking medications . . . that cause him to be sleepy and fatigued. This drowsiness
25 makes him slower in his response to test questions. If an exam has a time limit, he will definitely
26 need extra time to complete it."

27



1 174. LSAC then granted Mr. Whitney the extra break time that he requested, and agreed to
 2 provide a wheelchair accessible testing site, but denied his request for extra testing time. "If you
 3 choose to have your cognitive disorder (alluded to by Carol Jessop, MD) considered," defendant
 4 wrote, "you must provide a current psychoeducational/neuropsychological assessment or
 5 neuropsychological evaluation as per our Guidelines for Documentation of Cognitive Impairments."

6 175. Mr. Whitney asked defendant to reconsider its decision to deny additional testing time,
 7 and three of his doctors wrote to LSAC in support of his request.

8 a. Dr. Snyder wrote, "His pain and spacticity are a constant distraction and put
 9 him at a significant disadvantage as a test taker. In addition, the medication he is taking causes
 10 significant fatigue and makes it difficult to concentrate. The medication side effects do not impair
 11 cognition but can slow processing speed. For these reasons, he should be afforded extra time when
 12 taking this standardized test."

13 b. Dr. Jessop wrote, "I would like to emphasize that the nature of Mr. Whitney's
 14 condition is physiological (pain issues) and NOT cognitive or due to a learning disorder. Our request
 15 for extra time on the exam is based solely on physiological effects of chronic, severe neuropathic
 16 pain, and the fatiguing side effects of pharmaceutical pain killers. Thus, because he doesn't have a
 17 learning disability, I feel strongly that neuropsychological or psychoeducational testing would be
 18 irrelevant in his case."

19 c. Dr. Hedelman wrote, "Patient's significant impacts on concentration, reading,
 20 writing, ability to attend class is secondary to his unpredictable, severe neuropathic pain and the
 21 associated pain management medications. Patient does not have an underlying cognitive impairment
 22 requiring neuropsych[ological] testing."

23 176. LSAC refused to reconsider its decision, responding: "We have no objective evidence
 24 to support Dr. Carol Jessop, MD's conclusion that your thought processes are not as fast as they
 25 could be without medication."
 26
 27



177. In 2011, at LSAC's behest, Mr. Whitney was evaluated by a psychologist, who determined that he required double time on examinations due to the effect that his pain medication was having on his cognitive abilities.

178. In response to a second accommodation request by Mr. Whitney with the psychologist's report as supporting documentation, LSAC awarded him 10 additional minutes on each section of the exam. LSAC provided no rationale for denying his request for double time.

FIRST CLASS CAUSE OF ACTION

Unlawful Consideration of Mitigation Measures

(42 U.S.C. § 12102(4)(E)(1)(i)(I))

179. The DFEH realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 178, inclusive, as if fully set forth herein.

180. The ADA, 42 U.S.C. § 12102(4)(E)(1)(i)(I), requires that "any determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication." The ADA is incorporated into the Unruh Act by Civil Code section 51, subdivision (f).

181. By requiring applicants to take the medication prescribed for their disabilities while being evaluated for testing accommodations or explain their failure or refusal to do so, LSAC violates the rights of class members under the FEHA, Unruh Act, and ADA,

182. As a direct result of the unlawful practices of defendants as alleged herein, class members have incurred out of pocket losses, including test registration fees and medical bills, in an amount to be proven at trial.

183. As a further and direct result of the unlawful practices of defendants as alleged herein, class members have suffered emotional distress, anxiety, lost opportunity, frustration, humiliation, and loss of dignity and self-esteem, in an amount to be proven at trial.

184. Defendants have engaged in, and by their refusal to comply with the law, have demonstrated that they will continue to engage in, the pattern or practice of unlawful discrimination described herein unless and until they are enjoined, pursuant to the police power granted by



Government Code sections 12920 and 12920.5, and pursuant to section 12974, from failing or refusing to comply with the mandates of the FEHA, Unruh Act, and the ADA. Unless and until defendants are enjoined from failing or refusing to comply with the mandates of these laws, class members' right to full and equal access to places of public accommodation will continue to be violated. Plaintiff lacks any plain, speedy, adequate remedy at law to prevent such harm, injury and loss, which will continue until the court enjoins the complained of unlawful conduct and grants other affirmative relief as prayed for herein.

SECOND CLASS CAUSE OF ACTION

Failure to Ensure that Exam Measures Ability Rather than Disability

(42 U.S.C. § 12189 and 28 C.F.R. § 36.309)

185. The DFEH realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 178, inclusive, as if fully set forth herein.

186. The ADA requires that any person offering examinations related to post-secondary education or profession "shall offer such examinations or courses in a place and manner accessible to persons with disabilities." 42 U.S.C. § 12189. Regulations interpreting this section impose an obligation on the entity offering such an examination that "[t]he examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills." 28 C.F.R. § 36.309.

187. By adhering to a blanket policy of annotating scores taken under extended time conditions, defendant is communicating to law schools that it does not know whether or not the applicants' exam results accurately reflect aptitude or achievement. Therefore, LSAC is breaching its duty under the FEHA, Unruh Act, and ADA to ensure that the examination results accurately reflect the individual's aptitude or achievement level. 28 C.F.R. § 36.309(b)(1)(i).



188. As a direct result of the unlawful practices of defendants as alleged herein, class members have incurred out of pocket losses, including test registration fees and medical bills, in an amount to be proven at trial.

189. As a further and direct result of the unlawful practices of defendants as alleged herein, class members have suffered emotional distress, anxiety, lost opportunity, frustration, humiliation, and loss of dignity and self-esteem, in an amount to be proven at trial.

190. Defendants have engaged in, and by their refusal to comply with the law, have demonstrated that they will continue to engage in, the pattern or practice of unlawful discrimination described herein unless and until they are enjoined, pursuant to the police power granted by Government Code sections 12920 and 12920.5, and pursuant to section 12974, from failing or refusing to comply with the mandates of the FEHA, Unruh Act, and the ADA. Unless and until defendants are enjoined from failing or refusing to comply with the mandates of these laws, class members' right to full and equal access to places of public accommodation will continue to be violated. Plaintiff lacks any plain, speedy, adequate remedy at law to prevent such harm, injury and loss, which will continue until the court enjoins the complained of unlawful conduct and grants other affirmative relief as prayed for herein.

THIRD CLASS CAUSE OF ACTION

Coercion, Intimidation, Threats, or Interference with ADA Rights - Flagging

(42 U.S.C. § 12203)

191. The DFEH realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 178, inclusive, as if fully set forth herein.

192. The ADA makes it unlawful to "coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, any right granted or protected by this Act." 42 U.S.C. § 12203.

193. LSAC's policy of annotating tests scores administered under extended time conditions discourages applicants from seeking such a testing accommodation, and punishes those who receive it, in violation of the FEHA, Unruh Act, and ADA.



194. As a direct result of the unlawful practices of defendants as alleged herein, class members have incurred out of pocket losses, including test registration fees and medical bills, in an amount to be proven at trial.

195. As a further and direct result of the unlawful practices of defendants as alleged herein, class members have suffered emotional distress, anxiety, lost opportunity, frustration, humiliation, and loss of dignity and self-esteem, in an amount to be proven at trial.

196. Defendants have engaged in, and by their refusal to comply with the law, have demonstrated that they will continue to engage in, the pattern or practice of unlawful discrimination described herein unless and until they are enjoined, pursuant to the police power granted by Government Code sections 12920 and 12920.5, and pursuant to section 12974, from failing or refusing to comply with the mandates of the FEHA, Unruh Act, and the ADA. Unless and until defendants are enjoined from failing or refusing to comply with the mandates of these laws, class members' right to full and equal access to places of public accommodation will continue to be violated. Plaintiff lacks any plain, speedy, adequate remedy at law to prevent such harm, injury and loss, which will continue until the court enjoins the complained of unlawful conduct and grants other affirmative relief as prayed for herein.

FOURTH CAUSE OF ACTION – REAL PARTIES IN INTEREST ONLY

Denial of Reasonable Accommodation

(42 U.S.C. § 12189 and 28 C.F.R. § 36.309(b)(1)(iv))

197. The DFEH realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 178, inclusive, as if fully set forth herein.

198. The ADA requires that any person offering examinations related to post-secondary education or profession "shall offer such examinations or courses in a place and manner accessible to persons with disabilities." 42 U.S.C. § 12189. As part of this duty to make an examination accessible, the regulations require that any documentation requested be "reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested." 28 C.F.R. § 36.309(b)(1)(iv).



1 199. LSAC breached its duty to make the LSAT accessible to people with disabilities by
 2 requiring excessive amounts of documentation and denying a testing accommodation to each real
 3 party in interest, in violation of the FEHA, Unruh Act, and ADA.

4 200. As a direct result of the unlawful practices of defendants as alleged herein, real parties
 5 have incurred out of pocket losses, including test registration fees and medical bills, in an amount to
 6 be proven at trial.

7 201. As a further and direct result of the unlawful practices of defendants as alleged herein,
 8 real parties have suffered emotional distress, anxiety, lost opportunity, frustration, humiliation, and
 9 loss of dignity and self-esteem, in an amount to be proven at trial.

10 202. Defendants have engaged in, and by their refusal to comply with the law, have
 11 demonstrated that they will continue to engage in, the pattern or practice of unlawful discrimination
 12 described herein unless and until they are enjoined, pursuant to the police power granted by sections
 13 12920 and 12920.5, and pursuant to section 12974, from failing or refusing to comply with the
 14 mandates of the FEHA, Unruh Act, and the ADA. Unless and until defendants are enjoined from
 15 failing or refusing to comply with the mandates of these laws, class members' right to full and equal
 16 access to places of public accommodation will continue to be violated. Plaintiff lacks any plain,
 17 speedy, adequate remedy at law to prevent such harm, injury and loss, which will continue until the
 18 court enjoins the complained of unlawful conduct and grants other affirmative relief as prayed for
 19 herein.

20 **FIFTH CAUSE OF ACTION – REAL PARTIES IN INTEREST ONLY**

21 **Coercion, Intimidation, Threats, or Interference with ADA Rights**

22 **(42 U.S.C. § 12203)**

23 203. The DFEH realleges and incorporates by reference each and every allegation
 24 contained in paragraphs 1 through 178, inclusive, as if fully set forth herein.

25 204. The ADA makes it unlawful to “coerce, intimidate, threaten, or interfere with any
 26 individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed,
 27 any right granted or protected by this Act.” 42 U.S.C. § 12203.



1 210. Government Code, section 12902 expressly makes Government Code, 11150 et seq.
 2 applicable to the DFEH. Under Government Code, section 11180, the DFEH is authorized to
 3 investigate and prosecute actions “relating to ... subjects under the jurisdiction of the department.”
 4 The activities prohibited by the Education Code, section 99161.5 relate to subjects under the
 5 jurisdiction of the DFEH.

6 211. California’s Education Code, section 99161.5(a)(1), states: “The test sponsor of the
 7 Law School Admission Test shall provide testing accommodations to a test subject with a disability
 8 who makes a timely request to ensure that the Law School Admission Test accurately reflects the
 9 aptitude, achievement levels, or other factors that the test purports to measure and does not reflect the
 10 test subject’s disability. This paragraph does not constitute a change in, but is declaratory of, existing
 11 law.”

12 212. California’s Education Code, section 99161.5, further states that, when determining
 13 whether to grant a testing accommodation to the test subject, “the test sponsor of the Law School
 14 Admission Test shall, consistent with existing law, give considerable weight to the documentation of
 15 past modifications, accommodations, or auxiliary aids or services received by the test subject in
 16 similar testing situations[.]” Cal. Educ. Code § 99161.5(b).

17 213. California’s Education Code, section 99161.5, further states that the decision of
 18 whether or not to approve a request for a testing accommodation on the LSAT shall be conveyed to
 19 the requester within a reasonable amount of time. When a testing accommodation is denied, the test
 20 sponsor shall state the reasons for the denial in writing, and shall provide a timely appeals process.
 21 Cal. Educ. Code § 99161.5(a)(2), (3).

22 214. California’s Education Code, section 99161.5, further prohibits the practice of
 23 “flagging” LSAT scores by prohibiting the test sponsor from “notify[ing] a test score recipient that
 24 the score of any test subject was obtained by a subject who received an accommodation pursuant to
 25 this section,” or from “withhold[ing] any information that would lead a test score recipient to deduce
 26 that a score was earned by a subject who received an accommodation[.]” Cal. Educ. Code §
 27 99161.5(c).



215. In violation of their rights under the California Education Code, Defendant LSAC imposed upon Real Parties in Interest, and continues to impose on California test takers, onerous and unnecessary documentation requirements to support requests for testing accommodations, and subjected them to arbitrary, ineffective, and unpredictable evaluation and appeals procedure. In violation of their rights under the California Education Code, Defendant LSAC refused to provide Real Parties in Interest with the testing modifications they needed to take the LSAT on an equal basis with other nondisabled test takers. In violation of the rights of Real Parties in Interest and other California test takers under the California Education Code, Defendant LSAC failed to give considerable weight to their documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations. In violation of their rights under the California Education Code, Defendant LSAC refused to provide Real Parties in Interest and other California test takers with a test score in an equivalent format as their nondisabled peers.

216. In taking the above-described actions and inactions, Defendant LSAC failed to make any good faith effort or attempt to comply with state and federal laws. Defendant LSAC's unlawful actions were intentional, willful, malicious and/or done with reckless disregard to Real Parties in Interest's rights under the California Education Code. As a direct and proximate result of the unlawful acts described herein, Real Parties in Interest have suffered and continue to suffer injuries including emotional injuries.

217. Plaintiff DFEH and Real Parties in Interest are entitled to appropriate relief as determined by this Court which may include declaratory relief and/or a civil penalty not to exceed seven hundred fifty dollars (\$750) for each violation and/or other appropriate relief.

PRAYER FOR RELIEF

WHEREFORE, the DFEH prays that the court issue a judgment in favor of the DFEH, real parties in interest, classwide relief, and order defendants to provide the following relief:



AS TO REAL PARTIES IN INTEREST

218. Provide free and accommodated testing at the next available testing date in each real party's area, with accommodations as initially requested by that real party;

219. Provide a letter to each real party explaining that their LSAT scores used for their law school applications during the relevant period may not have provided accurate measures of their acquired reading and verbal reasoning skills, because LSAC did not provide testing accommodations.

**CLASSWIDE RELIEF,
INCLUDING THE REAL PARTIES IN INTEREST**

220. Cease and desist from consideration of mitigation measures such as medication when making a determination as to whether an applicant needs a testing accommodation.

221. Cease and desist from specially annotating LSAT scores tests scores administered under extended time conditions.

222. Include all test scores in the percentile ranking process and provide a ranked percentile to each test taker.

223. Immediately undertake a validation study to determine if LSAC scores under accommodation of extra time for cognitive disabilities are an equal measure of aptitude or achievement as compared to non-accommodated scores.

224. Reduce to a discrete and reasonable amount the documentation required to verify an applicant's need for a testing accommodation, especially for so-called cognitive disabilities, consistent with the ADA's requirement that such documentation be "reasonable" and Congress' mandate that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." (28 C.F.R. § 36.309(b)(1)(iv); 42 U.S.C. § 1201 [Pub. L. No. 110-325 § 2(b)(5) (Sept. 25, 2008) 122 Stat. 3553].)

225. Create a more streamlined and user-friendly process for considering testing accommodation requests, that includes notice to applicants, within a reasonable period of time, whether or not requested testing accommodations have been granted, and provides a fair process for timely reconsideration of any denial of requested testing accommodations.



226. Pay actual damages according to proof for each Unruh Act violation up to a maximum of three times the actual damages but in no case less than \$4,000 per violation.

227. Pay the DFEH's attorneys' fees and costs, pursuant to California Government Code § 12965(b) and California Civil Code § 52(a), in an amount according to proof, plus annual interest, as required by law.

228. Provide written proof to the Department of the nature and extent of LSAC's compliance with all requirements of the court's order within 100 days of its effective date.

229. Award penalties pursuant to California Education code, section 99161; and,

230. Provide such other relief as the Court deems to be just and proper.

Dated: September 27, 2013

DEPARTMENT OF FAIR EMPLOYMENT
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