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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL CASTANEDA, KATHERINE CORBETT, and JOSEPH WELLNER, on behalf of themselves and others similarly situated, Plaintiffs, vs. BURGER KING CORPORATION, Defendant.	Case No. C 08-04262 WHA (JL) **DEFENDANT BURGER KING CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO RESTAURANT #2055** **Date:** **March 18, 2010** **Time:** **8:00 a.m.** **Before:** **Hon. William H. Alsup** **Location:** **Courtroom 9, 19th Floor**

Defendant Burger King Corporation ("BKC"), by the undersigned, submits this Memorandum of Points and Authorities and the accompanying Declaration of Catherine Van Horn ("Van Horn Decl.") in Opposition to Plaintiffs' Motion for Partial Summary Judgment as to Restaurant No. 2055.

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I. INTRODUCTION

Plaintiffs ask this Court for summary adjudication that certain elements at Burger King® Restaurant #2055 in El Cerrito, California, "are or were during some portion of the class period out of compliance with applicable disability access standards." (Pltf. Motion [Docket No. 302] at 1). Specifically, Plaintiffs assert that surveys conducted by BKC's non-testifying accessibility consultants in 2008 and 2009, after this lawsuit was filed, demonstrate "that specified architectural elements at Restaurant 2055 did not comply with state and/or ADA requirements in effect when that restaurant was constructed [in 1977] or altered [in 1997]." (Docket No. 302 at 2).

Plaintiffs' motion must be denied because the purportedly undisputed facts on which it is based not only are highly disputed, but, upon closer examination, are not "facts" at all.

Plaintiffs' motion fails as to their federal law claims, first, because their assertion that certain 1997 restaurant alterations triggered federal accessibility requirements is contradicted by the deposition testimony of the franchisee operating the restaurant, that any such changes were part of a required "re-imaging" that did not implicate accessibility requirements. Moreover, the documents Plaintiffs submit as "evidence" that the restaurant was altered in 1997 cannot provide such evidence, as they pre-date the claimed alterations. Plaintiffs' assertion that non-compliant "alterations" were made in 1997 also is refuted by an independent architect's certification that the restaurant was fully compliant with federal requirements in January 1998, immediately after Plaintiffs' claim such alterations occurred. Accordingly, there are clear issues of fact precluding summary adjudication of Plaintiffs' federal law claims, including whether the restaurant was altered in 1997, whether any such alterations triggered federal accessibility requirements, and, if so, whether the restaurant remained "out of compliance" from 1997 until 2008, when BKC's consultants first surveyed the restaurant.

Plaintiffs' motion for summary adjudication under state law fares no better. The state law requirements on which Plaintiffs rely are triggered when the cost of post-construction alterations to the restaurant exceed a certain annually-adjusted dollar amount. However, Plaintiffs' only "evidence" of the cost of the 1997 re-imaging is pre-construction estimates that provide no evidence of the actual cost of any alterations and, therefore, fail to show that state accessibility standards were triggered. In

addition, as set forth in BKC's summary judgment motion (Docket No. 299), even if Plaintiffs could show that state law accessibility standards were violated, they still would not be entitled to judgment as a matter of law against BKC on those claims, because they cannot show that BKC discriminated against them, as required by state law.

Thus, there are numerous disputed issues of material fact that preclude summary judgment in favor of Plaintiffs, including questions as to the scope of the 1997 re-imaging; whether the 1997 re-imaging constituted an "alteration" under federal or state law; the actual cost of the 1997 re-imaging and whether that cost was sufficient to trigger state-law accessibility requirements; and whether BKC can be held liable under state law for the alleged failure of a franchisee to meet accessibility requirements. Additional disputed facts include whether construction industry tolerances or defenses such as equivalent facilitation and technical infeasibility preclude liability; and whether Plaintiffs have addressed all of the elements on which they carry the burden of proof.

Finally, Plaintiffs' motion suffers from a fundamental defect that Plaintiffs cannot overcome: All of the claims on which Plaintiffs seek summary judgment are time-barred. Accordingly, Plaintiffs' motion for partial summary judgment must be denied.

II. BACKGROUND FACTS

A. Plaintiffs' Claims

In this lawsuit, three mobility-impaired plaintiffs assert, individually and on behalf of ten certified classes, that ten Burger King® restaurants that BKC leases to independent franchisees contain access barriers that discriminate against individuals who use wheelchairs and scooters for mobility. (*See* Docket No. 302 at 1; Docket No. 72). Although BKC does not operate these restaurants, Plaintiffs have sued BKC for these alleged barriers, claiming disability discrimination under Title III of the federal Americans With Disabilities Act (the "ADA"), 42 U.S.C. §§ 12181 *et seq.*, and two California state statutes, the Unruh Civil Rights Act (the "Unruh Act"), Cal. Civ. Code § 51 and the California Disabled Persons Act (the "CDPA"), Cal. Civ. Code § 54. (*Id.*)

B. The Applicable Laws

Title III of the ADA imposes three different accessibility standards on places of public accommodation such as restaurants, depending on the age and construction history of the building: (i) "new construction" standards applicable to buildings constructed after January 26, 1993, 42 U.S.C. § 12183(a)(1); (ii) an "alteration" standard applicable to pre-existing buildings "altered" in certain ways after January 26, 1992, 42 U.S.C. § 12183(a)(2); and (iii) a "barrier removal" standard imposing an on-going obligation on buildings constructed before January 23, 1996, to remove access barriers when doing so is "readily achievable," even if the area containing the barrier has not been altered, 42 U.S.C. § 12182(b)(2)(A)(iv). The specific accessibility standards applicable to newly constructed and altered buildings are set forth in regulations promulgated by the Department of Justice, commonly referred to as the DOJ Standards or "ADAAG" (the Americans With Disabilities Act Access Guidelines). *See* 28 C.F.R. Part 36 App. A. These standards are entitled to deference when determining whether the ADA has been violated, *see Bragdon v. Abbott*, 524 U.S. 624, 646 (1998), and, in the words of this Court, provide "safe harbors" for public accommodations that comply with them. *Cherry v. City College of San Francisco*, No. C 04-04981 WHA, at 7 (N.D. Cal. Jan. 12, 2006) (Van Horn Dec. Ex. "F").

However, the mere failure to meet a specific DOJ Standard does not, by itself, constitute a violation of the ADA, because, among other things, "[d]epartures from particular … requirements … are permitted where the alternative … will provide substantially equivalent or greater access." 28 C.F.R. Part 36 App. A § 2.2. The standards also "are subject to conventional building industry tolerances for field conditions." 28 C.F.R. Part 36 App. A § 3.2; *see also Access Now, Inc v. Ambulatory Surgery Ctr. Group, Ltd.*, No. 99109 Civ, 2001 WL 617529, at *3 (S.D. Fla. May 2, 2001). Accordingly, "[s]ailing outside" the "safe harbors" provided by the DOJ Standards may "put[] a ship at risk, but does not necessarily sink it" because tolerances or"[s]ubstantial equivalence may allow clear sailing." *Cherry, supra* (Van Horn Dec. Ex. "F") at 7 (holding that plaintiffs bear the burden to show that any asserted discrepancy from DOJ Standards exceeds acceptable tolerances because "the standards expressly include such tolerances as part of the dimensional specifications

themselves"). *See also Cherry, supra,* Order Re: Parties' Motions in Limine (Van Horn Dec. Ex. "G") at 2-3 (stating that, with respect to existing facilities, "ADAAG is only a guide" and "the Court can take into account the degree of the violation of ADAAG when determining whether an item is a barrier to access in existing facilities, or not").

Detailed state accessibility standards have been set forth in Title 24 of the California Building Code ("Title 24" or the "CBC") since January 1, 1982. Those standards have been repeatedly amended; therefore, buildings subject to those standards must comply with the version in effect at the time they were constructed or altered. (Docket No. 302 at 6). Buildings constructed between July 1, 1970 and January 1, 1982 were required to comply with the 1961 version of the American National Standards Institute Standards ("ANSI-61"). (*Id.* at 6). The ANSI-61 Standards, which contain only five pages of general guidelines, lack the specificity of the DOJ and CBC Standards. (*See* Van Horn Decl. Ex. "A").

C. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs' summary judgment motion relates to only one of the ten restaurants at issue in this case, Restaurant #2055 in El Cerrito, California. Plaintiffs assert that the results of investigatory surveys of the restaurant conducted by an accessibility consultant at BKC's request in 2008 and 2009 demonstrate that six specific elements of the restaurant were in violation of applicable accessibility laws during the class period. (Docket No. 302 at 3-4).[1] Although Plaintiffs seek summary adjudication that six specific violations existed during the class period, Plaintiffs do not base that request on the results of the surveys conducted by BKC's accessibility consultant. Nor do Plaintiffs claim that any of these alleged violations constitute access barriers that must be removed under the ADA's "readily achievable" standard. Instead, Plaintiffs claim that it is undisputed that violations existed in the listed areas during the class period because alterations allegedly made to the restaurant in 1997 failed to comply with the ADA and CBC "alteration" requirements in effect at that time.

[1] The specific elements that Plaintiffs claim were "out of compliance" with applicable standards during the class period are: the slope of accessible parking spaces, the path of travel to the front entrance, the dining area seating, the doors to both restrooms (one based on the force to open and the other based on the maneuvering clearance), and the toilet stalls in both restrooms. (Docket No. 302 at 1, 12).

(Docket No. 302 at 5).

Plaintiffs base their claim that the restaurant underwent "alterations" sufficient to trigger federal and state "alteration" standards on: (i) a building permit issued in 1997 for expansion of a storeroom and new signage, listing the estimated cost of the permitted work as $230,000;[2] (ii) a report of an inspection of the restaurant by BKC, known as a Facility Inspection Report or "FIR," recommending that the parking lot, restrooms and dining room tables be "replaced;" and (iii) two bid proposals collectively providing estimates of the costs for a restroom remodel, parking lot repairs and the replacement of tables and chairs. (Docket No. 302 at 2-3; Robertson Dec. [Docket No. 300] Exs. 3-6). None of these documents demonstrate that any alterations to the parking lot, the restrooms or the dining room tables or chairs were actually completed. In fact, Plaintiffs have submitted no evidence whatsoever that any of the alleged alterations to the restrooms, the parking lot or the dining area actually occurred. Nonetheless, Plaintiffs assert that these documents demonstrate that "[t]he 1997 alterations included alterations to the restrooms and parking lots as well as dining room tables" (Docket No. 302 at 2) and that each of these "altered areas of the restaurant" therefore were required to "comply with the state and federal accessibility requirements in place in 1997." (Docket No. 302 at 7).

III. DISCUSSION

A. Summary Judgment Standard

It is well-settled that summary judgment may not be granted where there are "genuine factual issues that properly can be resolved only by a finder of fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); Fed. R. Civ. P. 56(a). In determining whether there are genuine issues of material fact that preclude judgment as a matter of law to the moving party, the Court must view the motion in the light most favorable to the non-movant, must accept the non-movant's evidence as true and must draw all reasonable inferences in favor of the non-moving party – here, BKC. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 256. The

[2] Plaintiffs do not submit the building permit at issue, but instead rely on a summary of the building permit history for the El Cerrito restaurant included in a report prepared by BKC's testifying expert Kim Blackseth.

burden of showing the absence of any "genuine issues" is imposed on the moving party. *Celotex Corp. v. Catrett*, 47 U.S. 317, 323 (1986) (*citing* Fed. R. Civ. P. 56(c)).

That determination is unusually straight-forward here, given Plaintiffs' failure to demonstrate that any alterations to the restaurant's parking lot, restrooms or dining area actually took place in 1997, as Plaintiffs claim. Absent those alleged alterations to public areas of the restaurant, Plaintiffs cannot demonstrate that those areas of the restaurant were required to meet the ADA or CBC standards in effect in 1997. (*See* Docket No. 302 at 5, expressly limiting their motion to the "alteration" standard). Moreover, Plaintiffs neglected to advise the Court of an independent certification attesting that the restaurant complied with applicable ADA standards in January 1998. (*See* Van Horn Dec. Ex. "B"). That certification directly contradicts Plaintiffs' assertion that the alleged 1997 alterations resulted in the existence of violations ten years later, during the class period. (*See* Docket No. 3 02 at 2).

Even without those defects in Plaintiffs' motion, the entry of summary adjudication that specific restaurant elements were "out of compliance" with applicable standards during the class period would be improper, for several reasons. First, as discussed above, a mere failure to comply with an accessibility standard does not, by itself, constitute a violation of accessibility laws, both because the regulations expressly permit the use of alternative guidelines. *See Cherry*, *supra* (Van Horn Dec. Ex. "F") at 7-8. Accordingly, as discussed *infra*, the determination that a restaurant element violates accessibility laws cannot be made based on raw measurements, divorced from consideration of the context in which the alleged violation arose, the amount of the variation from regulatory standards, and consideration of any applicable exceptions, defenses or tolerances, including the question under state law of whether the defendant before the Court committed the alleged violation. *See, e.g.*, 28 C.F.R. Part 36 App. A §§ 2.2, 3.2; *Access Now*, 2001 WL 617529, at *3; *Cherry*, *supra* (Van Horn Dec. Ex. "F") at 7-8; (Van Horn Dec. Ex. "G") at 2-3.

Finally, both the federal and the state "alterations" standards on which Plaintiffs base their motion are subject to a two-year statute of limitations. *See* Cal. Civ. Proc. Code § 335.1 (discussed below). Because the "alterations" at issue here allegedly were completed in 1997, those claims have been time-barred for more than a decade. Accordingly, Plaintiffs' motion must be denied.

B. Plaintiffs Are Not Entitled to Partial Summary Judgment Because There Are Questions of Material Fact With Respect to Whether the So-Called "1997 Alterations" to the Restrooms, Parking Lot and Dining Area Actually Occurred

Plaintiffs readily admit that, because Restaurant #2055 was built in 1977, before the ADA was enacted, the "new construction" standard applicable to buildings constructed after January 26, 1993 do not apply to this restaurant. (Docket No. 302 at 5). Plaintiffs also expressly state that they are not seeking summary judgment based on the ADA's "barrier removal" standard. (*Id.*) Instead, Plaintiffs' motion for summary judgment under federal law relies solely on the "alteration" standard imposed by the ADA upon existing buildings that were altered after January 26, 1992. (*Id.*) However, Plaintiffs misstate that standard in two very significant ways.

First, in order to constitute an "alteration" under this standard, the alteration must be a "change … that affects or could affect the usability of the building or facility or any part thereof" and therefore includes remodeling, renovation, rehabilitation, reconstruction, historic restoration, and changes or rearrangement of structural parts or elements of the plan configuration of walls and full-height partitions. 28 C.F.R. § 36.402(b); 28 C.F.R. § 36.402(b)(1). Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not considered to be "alterations" *unless* they affect the usability of the building. 28 C.F.R. § 36.402(b)(1). Under this standard, none of the work reflected on building permits issued in 1997 – with the possible exception of the expansion of the storage area – constitutes an "alteration." (*See* Docket No. 300 at Ex. 3).

Second, under the ADA, if a building has been altered during the applicable time period, "the path of travel to the altered portion, and the restrooms that serve the altered area must be brought into compliance" if not "disproportionate." (Docket No. 302 at 5 n.4).[3] However, Plaintiffs omit the crucial, express distinction made by the statute that limits the applicability of this so-called "path of

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[3] In general, alterations necessary to provide a path of travel to an altered area are deemed to be "disproportionate" when the cost of the alterations to the path of travel exceed 20% of the cost of the main alteration. *See* 28 C.F.R. § 36.403(f) (also listing costs that can be considered in making such determinations).

travel" requirement to those instances where "the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a **primary function**." 42 U.S.C. § 12183(a)(2)(emphasis added). A "primary function" is a "major activity for which the facility is intended" such as the dining area of a cafeteria or restaurant, but does not include employee restrooms or lounges, locker rooms, storage rooms, and similar areas. 28 C.F.R. § 36.403(b). Since "storage" is not considered to be a "primary function" of a quick-service restaurant, *id.*, the 1997 expansion of the storage area – even if it did constitute an "alteration" – would not have triggered this "path of travel" requirement. 42 U.S.C. § 12183(a)(2).

Plaintiffs similarly rely on the "alteration" standards imposed by the applicable state laws. (Docket No. 302 at 6). Under the CBC, when an area of an existing building is altered, both the altered area itself, and the path of travel to, and restrooms that serve, the altered area, must be brought into compliance with the version of the CBC in effect at the time, if the cost of the alteration exceeds an annually-adjusted valuation threshold and no exceptions, such as unreasonable hardship, apply. (Docket No. 302 at 6-7; CBC § 3112A(a) (1994)). Like the federal "path of travel" requirement, the CBC "path of travel" requirement does not include an obligation to upgrade a facility's parking area at the time an "alteration" is made.

As previously discussed, Plaintiffs claim that the third-party franchisee operator of the restaurant made "alterations" sufficient to trigger these standards in 1997 (Docket No. 302 at 2) based solely on (i) a building permit for a storage room extension at an estimated cost of $230,000, (ii) an FIR report from BKC requesting that the franchisee repair or upgrade certain features of the restrooms, the parking lot and the dining room décor; and (iii) two bid proposal forms by which the franchisee sought to obtain estimates as to the costs of the repairs listed in the FIR. (Docket No. 302 at 2-3). All of these documents were created before any alleged "alterations" to the restaurant took place. Therefore, none of them constitute evidence that any such alterations were actually completed. Nor can they demonstrate the actual cost of any such alterations.

For example, what Plaintiffs characterize as a "determination" by BKC's expert that alterations costing $230,000 were made to the restaurant (Docket No. 302 at 2) is, in fact, simply an entry in the

building permit history for the restaurant referring to a 1997 building permit for a "storeroom addition" and signs with an estimated cost of $230,000. (*See* Docket No. 300 at Ex. 3 at Blackseth 000015). A third party franchisee's request for permission to construct a "storeroom addition" clearly does not constitute evidence that the parking lot, restrooms or dining area was altered.[4] Likewise, not only do the "bid documents" on which Plaintiffs rely suggest that no such work was ever completed, they instead demonstrate the converse. The first "bid document" was dated January 23, 1997 and was based on "plans … dated 10-22-96." (Docket No. 300 at Ex. 5 at BKCPP 000850). That bid apparently did not mature into a construction contract, as it was not signed and the work listed on it had not been completed at the time of the FIR, which is dated February 25, 1997. (*See* Docket No. 300 at Ex. 4 at BKCPP 000781). Moreover, the only logical inference that can be drawn from the February 25, 1997 FIR is that BKC had repeatedly asked this franchisee to complete the work listed in the FIR, without success, as it indicates that it was a revision of an inspection report dated July 18, 1996, and that the July 18, 1996 report "supercede[d]" an earlier report dated March 17, 1995. (*Id.*) Moreover, the only "bid document" dated after the February 25, 1997 FIR is for a "Seating & Décor Quotation," and totaled only $15,283. (Docket No. 300 at Ex. 6). It is not signed or accepted, indicating that it, too, failed to mature into a contract.

Thus, none of the documents on which Plaintiffs rely constitute evidence that any of the work to the parking lot, restrooms or dining area that Plaintiffs characterize as the "1997 alterations" ever took place.[5] Moreover, the franchisee of this restaurant, Willie Cook, testified that the only work done

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[4] Moreover, a resolution issued by the city's Design Review Board approving this "storage expansion" and other "cosmetic and sign changes" including a "change in roofing material" demonstrates that the permit did not include any alterations to the parking lot, restrooms or dining area, as it expressly stated that the work being approved did not involve any change in the number of restaurant seats, that changes to the balance of the restaurant "are minimal" and that no substantial change was being made to the site plan or landscaping or circulation (traffic) pattern for the restaurant. (Van Horn Decl. Ex. "D").

[5] The building permit history also compels the conclusion that no alterations were made to the parking lot, restrooms or dining area in 1997, as it does not include any permits or permit applications dated in or around 1997 for alterations to the parking lot, the restrooms, or the dining area, nor does it include any permits for the construction of a drive-through or any of the other "big-ticket" items mentioned in the FIR and bid documents on which Plaintiffs rely. (*See* Docket No. 300 at Ex. 3 at Blackseth 000015).

to the restaurant during 1997 and 1998 was a "reimaging," which he defined as "bringing a building décor, equipment up to current Burger King specifications." (Van Horn Decl. Ex. "C" at 10, 23-24). He further testified that the 1997-98 reimaging was "essentially a décor package." (*Id.* at 119-20). He expressly distinguished a "reimaging" from a "remodeling" by explaining that: "Reimaging involves bringing equipment and décor packages up to current standards. Remodeling could mean any major structural changes to the building." (Van Horn Decl. Ex. "C" at 31).

Despite questioning Mr. Cook extensively about alterations allegedly made to the restaurant during 2008 and 2009, Plaintiffs' counsel never asked him what changes were made to the restaurant during 1997 or 1998, nor did they show him the documents on which they rely here, or ask whether the parking lot, restrooms or dining area of the restaurant were altered in 1997. Rather than seek - or provide - testimony from the franchisee with the most knowledge of any alterations that might have been made to the restaurant, Plaintiffs instead seek summary judgment based on rank speculation and the mischaracterization of documents created before the supposed alterations purportedly took place.

Thus, at minimum, there are disputed questions of fact as to whether such alterations occurred that preclude Plaintiffs' claims for summary judgment under the ADA and CBC "alterations" standards as to those restaurant elements. Moreover, the absence of evidence that those purported alterations took place defeats Plaintiffs' claims that those areas of the restaurant were required to meet DOJ Standards in effect in 1997.[6]

C. Plaintiffs Are Not Entitled to Summary Judgment As to State-Law Standards Because There are Questions of Fact as to Whether the Cost of the Alteration to the Storage Area Was Sufficient to Trigger the CBC's "Path of Travel" Requirements

Plaintiffs' claim that elements of the restaurant are or were "out of compliance" with state law is based on their conclusion that a $230,000 alteration to the restaurant in 1997 implicated the CBC's "path of travel" requirement and therefore required that the restrooms and the path of travel to the altered area be brought into full compliance with state accessibility laws. (Docket No. 302 at 7). Here, as above, Plaintiffs have failed to carry their burden of demonstrating the existence of

[6] Plaintiffs have expressly disclaimed any reliance on the ADA's path of travel requirements. *See* Docket No. 302 at 5 n.4.

undisputed facts showing that any alterations to the restaurant actually were completed in 1997, because the documents on which they rely all are pre-construction documents. (*See* Docket No. 300 at Exs. 3-6). Moreover, Plaintiffs are not entitled to summary judgment on their state law claims even if we assume, *arguendo,* that the alteration to the storage area reflected on the 1997 building permit was completed in 1997, as Plaintiffs sole evidence of the cost of that alteration – the cost estimate listed on the building permit – does not constitute undisputed evidence of the cost of the completed alteration. As a result, Plaintiffs also have failed to demonstrate the existence of undisputed facts showing that the factual predicate necessary to trigger the CBC's "path of travel" requirement has been met. *See* CBC § 3112A(a) (1994) (reflecting the valuation threshold necessary to trigger the "path of travel" requirements).

Finally, even if we assume, *arguendo,* that the cost of the assumed alteration was sufficient to trigger the CBC's "path of travel" requirement, the only restaurant areas that would have needed to be brought into compliance with the 1997 CBC standards based on that alteration would be the restrooms, as the ramp to the front door that Plaintiffs complain of (Docket No. 302 at 8) does not serve the storeroom that was remodeled (*see* Docket No. 302 at 6-7, admitting that the "path of travel" requirement in CBC § 3112A(a) (1994) required only that the "path of travel to, and restrooms that serve, the altered area" were required to be brought into compliance with the then-effective CBC requirements). Accordingly, the alleged expansion of the storage area did not require any alterations to the dining area, the parking lot or the ramp to the front door.

Thus, Plaintiffs have failed to meet their burden of demonstrating the existence of undisputed facts showing that they are entitled to judgment as a matter of law on their state law claims.

D. Plaintiffs Are Not Entitled to Partial Summary Judgment Because Their Claim that Violations Existed in 1997 Is Directly Contradicted by a 1998 Certificate from an Independent Professional Certifying That the Restaurant Complied with Applicable ADA Standards

Plaintiffs' summary judgment motion is based on the theory that alterations made to the El Cerrito restaurant in 1997 failed to comply with applicable standards for alterations, and that those violations continued at least until the beginning of the class period in April 2006. (Docket No. 302 at

1, 3, 12). That claim is flatly contradicted by an ADA Certificate of Inspection signed by a California-licensed independent architect on January 28, 1998, certifying that Restaurant #2055 in El Cerrito is "In substantial compliance with Title III of the ADA and the ADAAG." (Van Horn Decl. Ex. "E"). At minimum, this certificate raises a genuine issue of fact that precludes summary judgment on each of Plaintiffs' grounds for partial summary judgment.

E. The Entry of Partial Summary Judgment That Certain Restaurant Elements Are "Out of Compliance" with Accessibility Standards Would Be Improper Here Absent Consideration of Context and Applicable Defenses

Even if Plaintiffs could show that the so-called "1997 alterations" actually took place, and that they triggered the "path of travel" requirements, they still would not be entitled to partial summary judgment because it is impossible to conclude, in a vacuum, that an allegedly "out of compliance" element constitutes an actual barrier to access that resulted in discrimination against a disabled person.

As discussed above, this Court previously analyzed in detail the question of whether a mere failure to meet a specific accessibility standard was sufficient to support a finding that the accessibility laws have been violated, concluding that, because the applicable regulations both contemplated the possible reliance on other guidelines and expressly incorporate construction industry tolerances, the mere failure to meet a standard does not, without more, constitute a violation of accessibility laws. (*See* Sec. II.B, *infra*). Instead, the Court concluded that, at a minimum, the plaintiff bore the burden of showing that any alleged failure to comply with standards exceeded applicable tolerances. *Id.*

Plaintiffs here have failed to carry their burden of showing that the six elements on which they seek summary adjudication exceeded applicable tolerances. On the contrary, Plaintiffs do not even discuss any tolerances that might be applicable to four of the six elements: (i) the ramp to the front door (Docket No. 302 at 8); (ii) the maneuvering clearance for the door to the men's restroom (*id.* at 9-10); (iii) the toilet stalls in the men's and women's restrooms (*id.* at 11); and (iv) the dining area seating (*id.* at 12). Accordingly, based on this Court's own precedents, Plaintiffs have failed to carry their burden as to these elements.

With respect to the two allegedly "out of compliance" elements as to which Plaintiffs do at least mention a potentially applicable tolerance, they have failed to carry their burden of showing that

the purported tolerances on which they rely are the correct tolerances. The "tolerances" on which Plaintiffs rely came from a chart of "Acceptable Measurements" submitted by BKC in response to a discovery request from Plaintiffs. (*See* Docket No. 300 at Ex. 12). BKC objected to being required to opine as to the acceptable tolerances for the 65 restaurant elements included in that discovery request on the grounds that "the question of the maximum acceptable deviation from a standard that would qualify as a conventional building industry tolerance for field conditions is the subject of expert testimony." (*Id.* at Ex. 12 at 6-7). Moreover, BKC's expert, Kim Blackseth, testified during his deposition that he had seen a draft of BKC's chart but had not commented on any of the proposed tolerances contained in that chart. (Van Horn Decl. Ex. "F" [Blackseth Dep. at 181-82]).

The scope of conventional building industry tolerances is properly a subject of expert testimony. Accordingly, by relying on the non-expert opinion of BKC's counsel, rather than submitting expert testimony as to the proper tolerances, Plaintiffs have failed to carry their burden of showing that the alleged deviations from accessibility standards exceed applicable tolerances. *See U.S. v. AMC Ent., Inc.*, 245 F. Supp. 2d 1094, 1097 n.9 (C.D. Cal. 2003) (stating that the defendant's counsel was not competent to provide evidence as to measurements and tolerances).

The mere existence of a measurement that allegedly is "out of compliance" also does not necessarily result in liability because there are a number of defenses that could apply to the various measurements, including the question of whether an equivalent facilitation exists and is acceptable and the question of whether a given alteration would be technically feasible.

Finally, for the reasons discussed in BKC's summary judgment motion, BKC is not liable for any violations of state law because it has not discriminated against Plaintiffs or aided others in doing so. Given that fact, and the lack of any other defendants in this litigation, Plaintiffs are not entitled to summary judgment as to liability under state law.

Thus, there are questions of fact as to whether the alleged failures to comply with federal or state standards constitute violations of applicable accessibility laws, that cannot be resolved on the meager record Plaintiffs have submitted to the Court. For this reason, too, Plaintiffs' summary judgment motion must be denied.

F. Plaintiffs Are Not Entitled to Partial Summary Judgment Because Claims Based on a 1997 Alteration Are Time Barred

Finally, Plaintiffs would not be entitled to summary judgment as to whether certain restaurant elements were "out of compliance" even if they could solve all of the problems with their motion discussed above, because any claims based on alterations that were completed in 1997 would be time-barred.

The Ninth Circuit has expressly recognized that "[a] plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period." *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1137 (9th Cir. 2002). However, the ADA itself does not contain a statute of limitations. *Id.* at 1137 n.2. In such cases, courts are directed to apply the most analogous state law limitations period. *Id. See also* 42 U.S.C. § 1988(a); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (applying the California personal injury statute of limitations in a discrimination action brought under Section 1983 of the Civil Rights Act). Most federal courts faced with this question under the ADA have applied the personal injury statute of limitations recognized by the state in which they sit. 1 AMDISPCM § 4:171 (listing cases). Similarly, as noted by the Ninth Circuit in *Pickern*, "[m]ost district courts [in California] have applied California's … limit for personal injury actions to federal disability discrimination claims brought in California." *Pickern*, 293 F.3d at 1137 n.2 (assuming without deciding that the California limitations period for personal injury actions applied to Title III ADA claims).[7]

California currently has a two-year statute of limitations for personal injury claims, *see* Cal. Civ. Proc. Code § 335.1, which the Ninth Circuit has expressly held to be applicable to discrimination claims brought under Section 1983 of the Civil Rights Act. *See Maldonado*, 370 F.3d at 954. *See also Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1136 n.8 (9th Cir. 2001) (citing cases

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[7] Neither of the two California state laws most analogous to the ADA (the Unruh Civil Rights Act, Cal. Civ. Code § 51, and the California Disabled Persons Act, Cal. Civ. Code § 54.1) include their own statute of limitations. Accordingly, both state and federal courts in California previously have held that the California personal injury statute of limitations also applies to discrimination claims made those statutes. *See, e.g.*, *Mitchell v. Sung*, 816 F. Supp. 597 (N.D. Cal. 1993); *Gatto v. County of Sonoma*, 120 Cal. Rptr. 2d 550 (Cal. Ct. App. 2002).

holding, but not itself deciding, that California's personal injury limitations period applied to a disability discrimination claim brought under Section 1983). Since the ADA is an anti-discrimination civil rights statute like Section 1983, and both statutes apply to discrimination claims based on disability, the same statute of limitations logically should apply to both statutes. *See Pickern*, 293 F.3d at 1137 n.2. Accordingly, California's two-year statute of limitations period for personal injury claims applies to Title III ADA claims brought in California federal courts.

The only remaining question, then, is when that two-year limitations period begins to run.

With respect to claims under the ADA for a failure of existing facilities to remove architectural barriers under 42 U.S.C. § 12182(b)(2)(A)(iv), the Ninth Circuit has recognized that, because public accommodations have an on-going obligation to remove architectural barriers when doing so is readily achievable, a disabled person who is aware of such barriers, and is deterred from patronizing the establishment because of the failure to remove such barriers within the limitations period, his claim for barrier removal is not time-barred. *Id.* at 1136-37. This conclusion is based on the express language of the ADA providing that a disabled person need not engage in a futile gesture (such a patronizing a store with a known barrier) when that person has actual notice of the barrier. *See Pickern*, 293 F.3d at 1136; 42 U.S.C. § 12188(a)(1). *See also Speciner v. NationsBank, N.A.*, 215 F. Supp. 2d 622, 630 (D. Md. 2002) (holding that there is no statute of limitations issue with respect to a claim based on a failure to remove barriers because "the Bank has a continuing duty to meet the existing facilities standards").

However, with respect to claims based on the "new construction" and "alterations" provisions of Title III of the ADA, both found in 42 U.S.C. § 12183(a), the alleged violation is based on an action that occurred at a specific point in time. *See Speciner*, 215 F. Supp. 2d at 634 (finding that the plaintiff's "alterations" claim, which was "based upon action taken in 1994" was time barred). Accordingly, the statute of limitations begins to run when the construction or alteration work at issue is completed. *Id.*

The Ninth Circuit recently reached a similar conclusion in the context of a "construction" claim under the Fair Housing Act (the "FHA"). In *Garcia v. Brockway*, 526 F.3d 456, 460 (9th Cir.

2008) (*en banc*), *cert. denied sub nom Thompson v. Turk*, 129 S. Ct. 724 (2008), the Ninth Circuit held that, under the FHA, which, like the ADA, prohibits the "failure to design and construct" facilities that do not comply with accessibility standards, the statute of limitations for a "construction" claim is "triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued." *Garcia*, 526 F.3d at 466. The same conclusion would apply to a "construction" claim under the ADA, since the operative language of the two statutes is virtually identical.[8]

Moreover, in *Garcia*, the Ninth Circuit expressly rejected the application of any type of "continuing violation" or "encounter" or "discovery" theory to extend that statute of limitations, expressly distinguishing between a continuing violation, in which the violative acts are continuing, and a continuing impact from a previous violation, in which the effect of the prior violation continues to be felt long after the violation occurs. *Id.*, 526 F.3d at 462-65 (holding that the statute of limitations on a "failure to design and construct" violation begins to run when the discriminatory act occurs, which is at the time of construction, and not when the violation is encountered or otherwise discovered by a disabled person). Therefore, in *Garcia*, the Court held that the statute of limitations had run on the plaintiffs' claims, which were brought many years after the buildings at issue were constructed.

Because both the ADA and the FHA use the same "failure to design and construct" language to describe the prohibited disability discrimination, the conclusion that the statute of limitations begins to run at the conclusion of the construction period logically should apply to both Acts.

Similarly, and for the same reasons, the statute of limitations has expired with respect to any alterations that were completed in 1997. Under the reasoning of *Garcia*, if the statute of limitations on a construction claim begins to run when construction is completed, the statute of limitations on an alterations claim similarly would begin to run when the alteration is completed. Indeed, that is exactly

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[8] The provision of the FHA at issue in *Garcia* applies to "multifamily dwellings," while the ADA applies to "public accommodations and commercial facilities." 42 U.S.C. § 12183(a). However, the operative "failure to design and construct" language is otherwise identical. *Compare* 42 U.S.C. § 3604(f)(3)(C) (FHA) *with* 42 U.S.C. § 12183(a)(1) (ADA).

what the district court held in *Speciner*, 215 F. Supp. 2d at 634 (finding ADA "alteration" claim bassed on 1994 alterations to be time-barred based on state limitations period). Moreover, one of the factors relied upon by the district court in *Speciner* in concluding that the "alterations" claims were time barred also is present here – the passage of more than ten years since the completions of the alterations at issue here has "resulted in the loss of detailed documentation and understandably unreliable memories as to details" that have made it difficult to determine what work was actually done during the course of the subject "alterations." *Id.* at 633 n.13. Accordingly, here, Plaintiffs' claims based on alterations completed in 1997 are time-barred and Plaintiffs' summary judgment motion based on those claims must be denied.

IV. CONCLUSION

For all of these reasons, Plaintiffs have failed to demonstrate the existence of undisputed facts entitling them to partial summary judgment as a matter of law on their claims based on the alleged 1997 "alterations" to the El Cerrito restaurant. Accordingly, Plaintiffs' motion must be denied.

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