

**FILED**

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CLERK, U.S. DISTRICT COURT

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11  
12 IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

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14 FRANCIE E. MOELLER et al,

15 Plaintiffs,

Case No. C 02 5849 MJJ ADR

16 v.

~~PROPOSED~~ ORDER APPOINTING  
SPECIAL MASTER

17 TACO BELL CORP.,

18 Defendant.

19 Plaintiffs Francie Moeller, Katherine Corbett, and Craig Yates, on behalf of a class of  
20 similarly situated individuals ("Plaintiffs"), and Defendant Taco Bell Corp. ("Taco Bell"), by  
21 and through their respective counsel of record, hereby jointly submit this [Proposed] Order  
22 Appointing Special Master, and respectfully request the Court to adopt it and appoint a special  
23 master as set forth herein.  
24

25 Case No. C 02 5849 MJJ ADR  
[PROPOSED] ORDER APPOINTING SPECIAL MASTER  
26

**COPY**

1           1.     Appointment of Special Master. The Court hereby confirms its appointment of  
2 Bob Evans of Equal Access, 862 Ballow Way, San Marcos, California, as Special Master  
3 pursuant to Federal Rule of Civil Procedure 53.

4           2.     Scope of Duties.

5           a.     The Special Master will conduct site visits of all of the company-owned  
6 Taco Bell outlets in California (the "California Outlets"), except for  
7 those identified in Exhibit A. The purpose of the site visits is for the  
8 Special Master to use his expertise under the Department of Justice  
9 Standards for Accessible Design ("DOJ Standards"), 28 C.F.R. pt. 36,  
10 app. A, and Title 24 of the 2002 California Building Code ("Title 24") to  
11 determine the dimensions, values and measurements of the customer  
12 accessible elements at the California Outlets under the DOJ Standards  
13 and/or Title 24 at the time of the site visit and to make recommendations  
14 as he sees fit for bringing into compliance those elements whose  
15 dimensions, values or measurements do not comply with DOJ Standards  
16 and/or Title 24. The parties expressly acknowledge and agree that the  
17 Special Master's determinations of dimensions, values and  
18 measurements and any statements regarding whether such dimensions,  
19 values or measurements do or do not comply with DOJ Standards and/or  
20 Title 24 on the date of the site visit do not constitute legal  
21 determinations that Taco Bell has or has not violated the Americans with  
22 Disabilities Act, the Unruh Civil Rights Act, or the California Disabled  
23 Persons Act. The parties further understand and agree that the Special  
24 Master's determinations regarding compliance do not take into

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consideration whether the current DOJ Standards and/or Title 24 applied to a particular restaurant at the time of construction or alteration,<sup>1</sup> whether removal of architectural barriers in facilities existing before January 26, 1993 is readily achievable, or whether full compliance with DOJ Standards and/or Title 24 is otherwise not required by law.

b. The Special Master shall survey the California Outlets, except for those identified in Exhibit A, using the form attached hereto as Exhibit B.<sup>2</sup> For each of the California Outlets surveyed, the Special Master's duties include: (a) identifying the dimensions, values, measurements or other necessary quantifications relating to each element listed in Exhibit B on the date of the site visit; (b) taking photographs of certain elements at each store sufficient to illustrate existing conditions on the date of the site visit; (c) identifying whether each element complies with the DOJ Standards and/or Title 24 on the date of the site visit (without regard to whether the readily achievable standard or some other standard may

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<sup>1</sup> An "alteration" is "a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof." 28 C.F.R. § 36.402(b). "Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, re-roofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility." Id. § 36.402(b)(1).

<sup>2</sup> Citations to DOJ Standards and/or Title 24 in the "Element" column of Exhibit B are provided for reference only. Citations of DOJ Standards and/or Title 24 for particular elements do not mean that the cited standards govern the element at issue or that other standards (whether DOJ Standards or Title 24) are not applicable.

1 apply to the particular element); (d) where an element does not currently  
2 comply with the DOJ Standards and/or Title 24, without determining  
3 whether the readily achievable or feasible standards apply to the  
4 particular outlet or element, providing the parties with a proposed  
5 solution to bring the particular element into compliance with the DOJ  
6 Standards and/or Title 24; (e) where applicable, noting whether in his  
7 opinion a proposed solution is structurally impracticable<sup>3</sup> or technically  
8 infeasible;<sup>4</sup> (f) if a proposed solution is noted as structurally  
9 impracticable or technically infeasible, as defined herein, any proposed  
10 alternative solution that would provide access to the maximum extent  
11 feasible<sup>5</sup> and/or to the extent it is not structurally impracticable;<sup>6</sup> and (g)  
12 where applicable, providing the parties with non-binding cost estimates  
13 for any proposed solutions. The Special Master will not make  
14 recommendations as to whether a particular proposed solution is readily  
15 achievable. For the 20 stores listed on Exhibit A, the Special Master  
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17 <sup>3</sup> “Structurally impracticable” means “only ... those rare circumstances when the unique  
18 characteristics of terrain prevent the incorporation of accessibility features.” 28 C.F.R.  
§ 36.401(c)(1).

19 <sup>4</sup> “Technically infeasible” means, “with respect to an alteration of a building or facility,  
20 that it has little likelihood of being accomplished because existing structural conditions  
21 would require removing or altering a load-bearing member which is an essential part of  
22 the structural frame; or because other existing physical or site constraints prohibit  
modification or addition of elements, spaces, or features which are in full and strict  
compliance with the minimum requirements for new construction and which are  
necessary to provide accessibility.” DOJ Standards § 4.1.6(1)(j); Title 24 (2002) § 221.

23 <sup>5</sup> See DOJ Standards § 4.1.6(1)(j).

24 <sup>6</sup> See 28 C.F.R. § 36.401(c)(2).

1 shall complete the form attached hereto as Exhibit B using the  
2 information he obtained in the previously completed Pilot Program.

3 3. Limits on Special Master's Authority Under Rule 53(c). The Special Master  
4 shall have all authority set forth in Rule 53(c), except he shall not have the power: (a) to  
5 impose sanctions provided by Rule 37 or 45; (b) to recommend sanctions; (c) to conduct  
6 formal hearings; (d) to issue orders; or (e) to resolve disputes other than those necessary to  
7 complete the Interim Survey Reports or Final Survey Reports.

8 4. Ex Parte Communications. With the exception of non-substantive  
9 communications (e.g., scheduling), the Special Master shall not communicate ex parte with  
10 either party. Each party shall be afforded the opportunity to participate in all communications  
11 that take place between the Special Master and (1) either party, (2) the Court, or (3) any third  
12 party the Special Master decides to contact in connection with this matter. Each party retains  
13 the right to forego its participation in a particular communication for any reason and shall state  
14 this intent to the Special Master and the other participating party. To the extent the Special  
15 Master considers in his sole judgment that it is necessary for him to communicate directly with  
16 Taco Bell's non-legal employees regarding cost estimates or proposed solutions, the Special  
17 Master may do so either (1) in writing, provided that a copy of the written communication, and  
18 any response from Taco Bell's non-legal employee(s), is copied to all counsel, or (b) by  
19 telephone, provided that all counsel have been given a reasonable opportunity to participate in  
20 the call.

21 5. Preservation of Materials. All writings of any nature whatsoever created by the  
22 Special Master or those employed by him in performing his duties under the terms of this Order  
23 shall be preserved by the Special Master. "Writings" include, but are not limited to,  
24 correspondence, memoranda, records, reports, summaries or records of telephone

1 conversations, work papers, drafts, copies, notes, marginal notations, bills, invoices, checks,  
2 photographs, computer tapes, disks, emails, or other computer storage media, electronic or  
3 magnetic storage media, and all other matter, printed, recorded or photographic matter or sound  
4 reproductions. The Court and either party may request that any of these writings be produced  
5 for inspection. The Final Survey Reports, as defined in Paragraph 7(e) below, shall be the only  
6 document filed as the record of the Special Master's activities.

7 6. Procedures Relating to Surveying Restaurants.

8 a. Survey. The Special Master will survey each California Outlet, except  
9 for those identified in Exhibit A, using the survey form in Exhibit B. On  
10 or before October 8, 2004, Taco Bell will provide to the Special Master  
11 and Class counsel a list of all California Outlets, including addresses and  
12 store numbers. Taco Bell will supplement that list from time to time as  
13 necessary. If the Special Master elects to employ others to assist with  
14 the surveys, counsel for the parties may elect to accompany the Special  
15 Master and any such assistant during the assistant's first several surveys  
16 to ensure that such assistant understands and correctly implements the  
17 survey form created by the parties. If either party intends to accompany  
18 the Special Master on any of the site visits of the California Outlets, it  
19 shall inform opposing counsel of such intention at least seven days prior  
20 to the site visit.

21 b. Procedure Relating to California Outlet Closings and Acquisitions. If  
22 any of the California Outlets, except for those identified in Exhibit A,  
23 are scheduled to be closed permanently, Taco Bell will provide as much  
24 notice as is practicable of such scheduled closing. If Taco Bell acquires

1 or opens a Taco Bell outlet in California before June 1, 2005 that was  
2 not previously company-owned, it shall be considered a California  
3 Outlet after the date of its acquisition or opening by Taco Bell and shall  
4 be subject to the provisions of this Order.

- 5 c. Procedure Relating to Alterations. From the date of entry of this Order  
6 until the Special Master completes his site visits at each of the California  
7 Outlets, except for those identified in Exhibit A, Taco Bell shall provide  
8 fourteen (14) days advance notice to Class counsel and the Special  
9 Master of any planned remodels, renovations or programs communicated  
10 from Taco Bell's corporate offices to any as-of-that-date unsurveyed  
11 California Outlets instructing that alterations affecting accessibility of  
12 the California Outlets be made. Taco Bell shall have no obligation to  
13 notify Class counsel or the Special Master of normal maintenance  
14 activities at the California Outlets; provided, however, that if Taco Bell  
15 employees Ed Medina, Jamie DeBeers, or another employee in the same  
16 position makes, orders or arranges for any of the following measures at  
17 any of the California Outlets, except for those identified in Exhibit A,  
18 where feasible he or she shall record and (through counsel) report to  
19 Class counsel the existing conditions prior to taking the measure in  
20 question: (1) adjusting the door opening force of entrance or restroom  
21 doors; (2) moving bathroom fixtures or fixed amenities; (3) moving or  
22 replacing a queue line; (4) moving or replacing fixed tables or fixed  
23 chairs; (5) restriping parking lots; or (6) adding signage. Where it is not  
24 feasible to record existing conditions, Taco Bell will report to Class

1 counsel the measure taken and the reason it was not feasible to record  
2 existing conditions.

- 3 d. Access to Restaurants for Class Counsel. From the date of entry of this  
4 Order through the deadline to submit briefs addressing any objections or  
5 modifications to the Special Master's Report, Class counsel and/or their  
6 expert(s) or consultant(s) may have access to the public areas of the  
7 California Outlets during non-peak service periods to confirm any of the  
8 data in the Interim Survey Reports. Class counsel shall provide at least  
9 five days advance notice to Taco Bell's counsel of their intention to  
10 access a particular California Outlet if Class counsel or their experts or  
11 consultants intend to take measurements, photographs or otherwise  
12 engage in activities at the outlet other than viewing the public areas of  
13 the outlet. Class counsel and/or their expert(s) or consultant(s) will take  
14 care not to disrupt Taco Bell's business operations during any such visit.

15 7. Schedule for Preparing Reports and Conferring Among the Parties.

- 16 a. Deadline. The Special Master will complete all surveys by June 30,  
17 2005. The parties shall provide a report to the Court at the January 4,  
18 2005 status conference concerning the progress of the Special Master  
19 towards meeting the goal to complete the surveys by June 30, 2005.
- 20 b. Benchmarks. To ensure the Special Master meets the deadline set forth  
21 in Paragraph 7(a), the Special Master will complete at least 23 surveys  
22 and Interim Survey Reports each month. If the Special Master has not  
23 completed 57 surveys and Interim Survey Reports by December 31,  
24 2004, the parties will meet and confer to discuss whether to seek the



1 appointment of a different individual as Special Master or an additional  
2 Special Master. If the parties elect not to seek the appointment of a new  
3 Special Master, they may, at that time, set additional deadlines for the  
4 Special Master, and a later date to meet and confer to discuss whether to  
5 seek the appointment of a new Special Master.

6 c. Interim Survey Reports. From October 2004 through June 2005, on the  
7 last business day of each month, the Special Master shall provide the  
8 parties with a copy of each survey report completed during that month.  
9 These survey reports will be labeled and referred to hereinafter as the  
10 “Interim Survey Reports.” The Special Master will provide the parties  
11 with the first set of Interim Survey Reports on October 29, 2004, and  
12 will continue to provide Interim Survey Reports on the schedule set forth  
13 in Subparagraph 7(b) above. The Special Master will provide Interim  
14 Survey Reports to the parties by email in PDF format and as a Word  
15 document. The Special Master shall provide the last set of Interim  
16 Survey Reports to the parties on or before June 30, 2005.

17 d. Meet and Confer Concerning Dimensions, Values or Measurements.  
18 Once each month, the parties shall meet and confer to determine whether  
19 there are any disputes regarding the dimensions, values or measurements  
20 recorded by the Special Master for the outlets for which the Special  
21 Master issued reports in the preceding month. If there are any disputes  
22 remaining after the meet and confer, the parties shall notify the Special  
23 Master of the dispute within three days. Within 30 days after  
24 notification, the Special Master shall redetermine the dimension, value

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or measurement in question by performing a site visit. The parties shall be given seven days advance notice of such site visit so that they may attend the redetermination. If, after the redetermination site visit, the parties remain in disagreement over the dimension, value or measurement at issue, the positions of the parties shall be recorded and shall be subject to the meet and confer and objection processes referred to in Paragraphs 7(e) and 8(b) below.

- e. Meet and Confer Concerning Compliance, Solutions, Costs, Readily Achievable Issues, and Feasibility. As soon as is practicable after June 30, 2005 or the date of receipt of the reports for all the California Outlets, whichever date is earlier, the parties shall meet and confer with each other and any applicable third party defendants to reach agreement on (i) whether there are violations of DOJ Standards or Title 24 at each surveyed outlet; (ii) if there are violations of DOJ Standards or Title 24, a proposed resolution to the violations; (iii) where applicable, whether the proposed resolution is structurally or technically impracticable or unfeasible; (iv) where applicable, whether the proposed resolution is readily achievable; and (v) a proposed implementation schedule for any agreed resolutions. The parties shall have ninety days following completion of all the Interim Survey Reports (currently set as June 30, 2005) to complete the meet and confer process concerning all California Outlets. Any agreements achieved during the meet and confer process shall be provided to the Special Master for inclusion in his Final Report as stipulations of the parties. Based on the meet and confer process, the

1 Special Master shall alter, make additions to, or otherwise revise the  
2 Interim Survey Reports as agreed by the parties, provided that the  
3 Special Master may not delete any "Elements" (i.e., line items) from any  
4 Interim Survey Report.

5 f. Final Survey Reports. Following the processes described in Paragraphs  
6 7(d) and (e) above, the Special Master will use each Interim Survey  
7 Report to prepare a "Final Survey Report" for each California Outlet.  
8 The Final Survey Report shall include (1) the dimensions, values and  
9 measurements for each California Outlet as determined or redetermined  
10 by the Special Master; (2) any stipulations of agreement reached by the  
11 parties during the meet and confer process, with a notation that the  
12 parties have so stipulated; and (3) all other information gathered by the  
13 Special Master in the Interim Survey Report. From July 2005 until the  
14 meet and confer process is completed, on the last business day of each  
15 month, the Special Master shall provide the parties with a copy of each  
16 Final Survey Report for each California Outlet that the parties jointly  
17 have notified the Special Master has been the subject of a completed  
18 meet and confer process. The Special Master will provide signed copies  
19 of each Final Survey Report to each party by mail (in hard copy) and by  
20 email (in PDF format). The Special Master and the parties, including  
21 any third party defendants, shall use their best efforts to complete the  
22 meet and confer process so that the Special Master can send to the  
23 parties all Final Survey Reports within 90 days after the final date for  
24 completion of the Interim Survey Reports.

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8. Submission to the Court, Objections and Motions

- a. Submission to the Court. All of the Final Survey Reports shall be filed as one document with the Court within 14 days after all Final Survey Reports have been sent to the parties. The Final Survey Reports, collectively, will be labeled and referred to herein as the “Special Master’s Report.”
- b. Objections and Motions. Except as to dimensions, values and measurements that were not challenged or that were resolved during the monthly meet and confer process above, any party may file objections or move to adopt or modify the Special Master’s Report, or any portion thereof, no later than 20 days after the Report is filed with the Court; provided, however, that a third-party<sup>7</sup> that was not a party to this action at the time of the monthly meet and confer process for determination of dimensions, values and measurements may challenge dimensions, values and measurements for elements at issue in the third party defendant complaint. Any portion of the Special Master’s Report that is not the subject of a timely objection or motion to modify shall be adopted by the Court as a finding of fact. In the event a third party challenges dimensions, values and/or measurements that were not challenged by Plaintiffs or Defendant Taco Bell Corp. during the monthly meet and confer process, Plaintiffs and Defendant Taco Bell Corp. agree they will

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<sup>7</sup> Taco Bell has expressed its intent to move to join certain third parties. Plaintiffs reserve their right to oppose such motion.

1 jointly support the findings of the Special Master as to such dimensions,  
2 values and/or measurements in the challenge proceeding before the  
3 Court; provided, however, that the final determination of the Court as to  
4 such challenge shall be binding on all parties to this proceeding,

5 9. Standard for Reviewing the Special Master's Report Any portion of the Special  
6 Master's Report that is the subject of an objection or motion to modify shall be reviewed de  
7 novo by the Court pursuant to procedures to be adopted by the Court.

8 10. Admissibility. The Special Master's Report, and any portion thereof, shall be  
9 admissible as evidence in any proceeding in this action only.

10 11. Basis, Terms, and Procedure for Fixing Master's Compensation. The Special  
11 Master shall be compensated at a rate of \$1,200 per store plus out-of-pocket costs, for each of  
12 the approximately 200 stores to be surveyed. During the meet and confer process, the Special  
13 Master shall be compensated at an hourly rate of \$180 per hour for his services. Details of the  
14 Special Master's compensation are set forth in the letter attached as Exhibit C hereto. The  
15 Special Master shall submit a bill for his services, as directed by Paragraph 12 below, on a  
16 monthly basis.

17 12. Payment of Master's Compensation. The Special Master's compensation shall  
18 be allocated equally between Plaintiffs and Taco Bell. Each party shall pay one-half of each  
19 invoice. Each party reserves the right to move to amend this Paragraph to provide for a  
20 different allocation of costs.

21 13. No Grounds for Disqualification. The parties are not aware of any grounds for  
22 disqualification of the Special Master pursuant to 28 U.S.C. § 455. The Affidavit of Bob  
23 Evans, attached hereto as Exhibit D, states that there are no grounds for disqualification under  
24 28 U.S.C. § 455.

25 Case No. C 02 5849 MJJ ADR  
26 [PROPOSED] ORDER APPOINTING SPECIAL MASTER

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RESPECTFULLY SUBMITTED,  
FOX & ROBERTSON, P.C.

Date: September 28, 2004

BY: /s/ Timothy P. Fox  
Timothy P. Fox

Attorneys for Plaintiffs

LAWSON LAW OFFICES

Attorneys for Plaintiffs

SKADDEN, ARPS, SLATE, MEAGHER &  
FLOM LLP

Date: September 28, 2004

BY: /s/ Jeffrey H. Dasteel

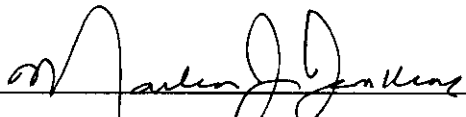
Jeffrey H. Dasteel

Attorneys for Defendant Taco Bell Corp.

**ORDER APPOINTING SPECIAL MASTER**

1           The Order Appointing Special Master is hereby adopted by the Court as an Order of the  
2 Court and the parties are order to comply therewith.  
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15 THE HONORABLE MARTIN J. JENKINS  
16 United States District Judge  
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25 Case No. C 02 5849 MJJ ADR  
26 [PROPOSED] ORDER APPOINTING SPECIAL MASTER