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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FRANCIE E. MOELLER, et al.,

Plaintiffs,

vs.

TACO BELL CORP.,

Defendant.

CASE NO. C 02-5849 MJJ ADR

DEFENDANT TACO BELL CORP.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONSE IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

DATE: May 17, 2007
TIME: 9:30 a.m.
CTRM: 11
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF THE ISSUES TO BE DECIDED

Defendant Taco Bell Corp. ("Taco Bell") submits that the following issues are to be decided by the instant motion:

(1) Whether plaintiffs' motion for partial summary judgment should be denied as a matter of law to the extent that plaintiffs are relying upon a non-ADA legal standard to determine compliance determinations especially with respect to exterior door opening force, which is not the subject of an ADA standard.

(2) Whether plaintiffs' motion for partial summary judgment should be denied because even under the California Building Code standards that plaintiffs seek to invoke, Taco Bell has created a genuine issue of material fact.

(3) Whether plaintiffs' motion for partial summary judgment should be denied because the purported issues have been rendered moot by Taco Bell's recent modifications.

II.

STATEMENT OF RELEVANT FACTS

There are 107 California company-owned Taco Bell stores that were constructed prior to January 26, 1993 and at issue in this action, which are identified below. As addressed below, the significance of such date of construction is that a different legal standard applies to such stores, which plaintiffs do not seek to meet via the instant Motion.

The legal standard is significant because in the case of exterior doors, the Department of Justice has refused to issue a precise standard, which is probably because of the inherent difficulty in testing and maintaining door opening force especially at exterior doors due to atmospheric and weather-related conditions. (Declaration of Kim Blackseth of 3/22/07 ¶¶ 10-12; Declaration of Joseph M. De Bella of 3/22/07 ¶¶ 2-3.)

In addition, as for the issue of queue lines, Taco Bell currently has a policy to provide customer assistance to all of its customers, and intends to soon install indoor signage communicating such policy expressly to all of its customers, signage which is very similar to signage that plaintiffs' counsel agreed

to as part of a recent ADA class action settlement with Kmart. (Declaration of Mike Harkins of 3/23/07 ¶ 7 Ex. 6; Declaration of Richard H. Hikida of 3/23/07 ¶ 3.) Indeed, Taco Bell's retained expert, who is mobility impaired and uses a wheelchair, has benefited from such customer assistance policy. (Blackseth Decl. ¶¶ 1, 8, 9.)

Further, beginning in the summer and fall of 2006, subsequent to the Special Master's site visits in 2004 and 2005, Taco Bell has performed substantial modification of the issues raised in the instant Motion as follows:

- Taco Bell inspected and replaced door closers at 95 company-owned stores to within the tolerances for exterior and interior doors that plaintiffs rely upon in the Motion. (Declaration of Sabrina Ford of 3/23/07 ¶¶ 6-70; Declaration of Aaron Kane of 3/23/07 ¶¶ 6-39.)
- Taco Bell removed queue lines at 46 company-owned stores and modified them at 10 stores. (Declaration of Sabrina Ford of 3/23/07 ¶¶ 6-70; Declaration of Aaron Kane of 3/23/07 ¶¶ 6-39.)
- Taco Bell installed additional designated accessible indoor seating at 31 company-owned stores as requested by plaintiffs in the Motion and modified existing accessible seating at 40 stores. (Declaration of Sabrina Ford of 3/23/07 ¶¶ 6-70; Declaration of Aaron Kane of 3/23/07 ¶¶ 6-39.)

In addition, Taco Bell intends to implement soon a policy to inspect on a quarterly basis door opening force at all exterior and interior doors intended for use by customers and to retain a qualified outside vendor to make necessary adjustments, as needed. (Harkins Decl. ¶¶ 2-3.) Further, Taco Bell intends to replace additional door closers and remove or modify queue lines voluntarily at stores scheduled for major remodeling in 2008 by no later than May 1, 2007 and replace, remove, or modify door closers and queue lines at all other stores by January 1, 2008. (Declaration of Joseph M. De Bella of 3/23/07 ¶¶ 4-7.)

III.

INTRODUCTION

Taco Bell submits that plaintiffs can't have it both ways. On one hand, they have commenced a class action lawsuit whose subject matter jurisdiction is premised under the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181 *et seq.*, seeking injunctive relief relating to not only stores that were constructed after the January 26, 1993 effective date for new construction specified in the ADA, 42

U.S.C. § 12183(a)(1), but also against older stores that would need to be retrofitted at tremendous cost in order to meet current ADA accessibility standards. Congress made it clear when it enacted the ADA that existing facilities would be subject to new construction standards only if such work was "readily achievable", i.e., "easily accomplishable and able to be carried out without much difficulty or expense." In other words, as a compromise, Congress intended to impose only a *limited* cost on businesses and to *balance* the need for accessibility by people with disabilities against the costs attendant to altering facilities. Notwithstanding Congress's clear intent, plaintiffs in the instant action seek to distort the careful balance struck by Congress by ignoring the protections afforded by the ADA designed to protect businesses against unlimited remediation costs and the extensive retrofitting of facilities. Plaintiffs do so by rejecting reliance upon the ADA as the basis for their claims for relief pertaining to stores constructed prior to January 26, 1993 ("pre-1993 stores"). For the 107 pre-1993 stores at issue in this action, plaintiffs rely instead upon a non-ADA statutory scheme under the California Health and Safety Code and Title 24 of the California Code of Regulations otherwise known as the California Building Code, which does not require the same evidentiary burden upon plaintiffs as the ADA does. Thus, in essence, plaintiffs seek to evade the limitations imposed by Congress upon businesses to retrofit older facilities by relying upon a non-ADA legal standard and, at the same time, use the vehicle of federal subject matter jurisdiction to accomplish this. Principles of fairness and equity dictate that the Court not permit plaintiffs to achieve this result, which would undoubtedly encourage other and future ADA plaintiffs to use the same tactic.

In order to thwart such tactic from becoming commonplace, the Court should apply exclusively an ADA legal standard to the entirety of the instant action including the 107 stores that were constructed prior to January 26, 1993. Assuming that the Court applies the readily achievable standard to the instant action, plaintiffs have not attempted to satisfy their initial burden of suggesting readily achievable barrier removal via competent evidence such as expert witness declarations. Plaintiffs have also failed to satisfy the five-part test to demonstrate the existence of "alterations" within the meaning of the ADA, and cannot overcome the time-bar as to purported "alterations" occurring prior to December 17, 2001. Thus, the Court should deny plaintiffs' motion as to the 107 stores that were constructed prior to January 26, 1993.

As for the stores that were constructed after January 26, 1993 that are the subject of the instant Motion (as well as for stores constructed before January 26, 1993), Taco Bell submits that such issues have been rendered moot due to Taco Bell's recent remediation efforts and implementation of appropriate policies designed to provide plaintiffs with "full and equal" enjoyment of Taco Bell's facilities.

Alternatively, if the Court proceeds to apply California accessibility standards and regulations to the instant action, then Taco Bell respectfully submits that the Court should enter judgment in favor of Taco Bell as to plaintiffs' ADA claim relating to the 107 stores constructed prior to January 26, 1993. After all, plaintiffs appear either unwilling or incapable of satisfying their threshold initial burden of demonstrating readily achievable barrier removal or "alterations" as to the 107 pre-1993 stores and have apparently abandoned their ADA claim.

In addition, even if the Court applies California accessibility standards and regulations to the instant action in lieu of the ADA standards, the discretionary issuance of certificates of occupancy by the local building official charged with enforcing the accessibility requirements of the California Building Code constitutes prima facie evidence that Taco Bell's facilities were in compliance at the time such facilities were first open for business, thereby creating a genuine issue of material fact that precludes plaintiffs from being granted partial summary judgment. Given that the California Health and Safety Code and the California Building Code itself expressly provide local building officials with the ability to exercise discretion to apply various exceptions to the accessibility standards based upon "practical difficulty", "unreasonable hardship," and other grounds, Taco Bell submits that the trier of fact should be allowed to weigh the significance of such certificates of occupancy and determine whether the local building officials exercised their discretion in favor of certifying compliance with all California Building Code accessibility requirements or implicitly determining that an exemption applied to excuse strict compliance.

IV.

ARGUMENT

A. Plaintiffs Have Failed to Satisfy Their Initial Burden of Proof as to Door Opening Force.

1. There Is No Required Standard under the DOJ Standards for Exterior Door Opening Force.

It is undisputed that there is no maximum *exterior* door opening force standard set forth within the DOJ Standards.[1] Indeed, plaintiffs have cited no standard within the DOJ Standards.[2] In *Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1124 (D. Or. Mar. 26, 1998) (Ashmanskas, Mag. J.), the district court held that "the Access Board and DOJ have never promulgated any force standard for exterior doors." *Id.* at 1155.

The DOJ's reluctance to impose an exterior door opening force standard is not surprising. The Access Board, which is "the specialized board that Congress entrusted with ensuring agency compliance" with the ADA,[3] *Toomer v. City Cab*, 443 F.3d 1191, 1196 (10th Cir. 2006), has published A Guide to ADAAG Provisions and, in particular, Scoping and Technical Requirements, which address exterior door opening force. In particular, the Access Board stated:

> "A maximum opening force is not specified for exterior swing doors because the closing force required by building codes usually exceeds an 'accessible' resistance. Factors that affect closing force are the weight of the door, wind and other exterior conditions, gasketing, air pressure, HVAC systems, energy conservation, etc. Research sponsored by the Board ("Automated Doors" by Adaptive Environments Laboratory (1993)) indicates that a force of 15 lb is probably the most practicable as a specified maximum. Considering that closing force is 60% efficient, a 15 lb maximum for opening force provides 9 lb for closure and latching, which may be sufficient for most doors."

(A Guide to ADAAG Provisions and, in particular, Scoping and Technical Requirements, 4.13.11; Blackseth Decl. ¶¶ 10-12; De Bella Decl. ¶¶ 2-3.) In fact, the Appendix to the ADAAG expressly recognizes the potential effect of air-pressure differential on the ability to measure door opening force in

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[1] The Department of Justice ("DOJ") has adopted the Architectural and Transportation Barriers Compliance Board's ("ATBCB" or "Access Board") guidelines as the DOJ's own Standards for New Construction and Alterations. 28 C.F.R. § 36.406(a); 28 C.F.R. Part 36, App. A.

[2] Plaintiffs' reliance upon defense counsel's proposal is misleading. (Hikida Decl. ¶ 2.) If plaintiffs are so supportive of all of the construction tolerances articulated by the Orange Empire Chapter of ICBO, then plaintiffs should agree to a 4% cross-slope tolerance for a walk that is up to 30 feet in length as recommended by such chapter of the ICBO.

[3] "The Architectural and Transportation Barriers Compliance Board ('ATBCB') is comprised of the twelve executive cabinet members and thirteen members of the public, appointed by the President and of whom at least a majority are persons with disabilities. 29 U.S.C. § 792(a)(1)(A) and (B). The ATBCB conducts investigations, holds public hearings and issues any order it deems necessary to ensure ADA compliance. *Id.* at (e). Among the purposes of the ATBCB is to establish and maintain minimum guidelines for ADA compliance and to promote accessibility through all segments of society. 29 U.S.C. § 792(a)(2)(B)(b)." *Toomer*, 443 F.3d at 1196.

at least one specific context. (DOJ Standards, A4.13.11) (high-rise buildings). Thus, whether the HVAC systems are operating properly on a particular day and their effect upon air pressure differentials have much to do with the door opening force that exists on a particular day that a measurement is taken, as recognized by the Access Board. *Cherry, et al. v. The City College of San Francisco, et al.*, No. C 04-04981 WHA (N.D. Cal. slip op. filed Jan. 12, 2006) (Alsup, J.) (holding that the plaintiffs failed to meet their burden of proving via a motion for summary judgment that a obstruction was not temporary or isolated); *Chapman v. Pier 1 Imports*, No. CIV. S-04-1339 LKK CMK, 2006 WL 1686511, at *10 (E.D. Cal. June 19, 2006) (granting summary judgment to an ADA defendant due to the isolated or temporary nature of alleged barriers); 28 C.F.R. § 36.211(b). Indeed, the difficulty in reliably closing and latching a door in light of reduced opening force requirements can potentially create health and safety challenges relating to pest control.

There is nothing in the record to indicate that plaintiffs have satisfied their prima facie burden of showing that they cannot open the exterior doors unassisted at the stores at issue and therefore plaintiffs have not shown that the doors in question created a barrier to their effective access. Thus, Taco Bell submits that the Special Master's measurements do not indicate that Taco Bell is in violation of the ADA. Summary judgment should be denied as to the stores listed in Exhibits 3-5 to the Fox declaration. If anything, the Court should grant Taco Bell summary judgment as a matter of law given the lack of an applicable ADA standard for exterior door opening force. *See Chapman v. Pier 1 Imports*, No. CIV. S-04-1339 LKK CMK, 2006 WL 1686511, at *11 (E.D. Cal. June 19, 2006) (granting summary judgment to an ADA defendant because the force required to open the entrance door was merely a potential California Building Code violation only) ("Plaintiff fails to cite to any section of ADAAG.").

The federal courts have repeatedly and consistently held that "the ADA's general non-discrimination language must be considered in light of the regulatory context of the ADA, rather than evaluated in a vacuum." *White v. Cinemark USA, Inc.*, No. 04-cv-00397-GEB-CMK, 2005 WL 1865495, at *4 (E.D. Cal. Aug. 3, 2005) (Burrell, J.). That is, the ADA's general "full and equal" enjoyment language is not a basis for an ADA claim. *Id.*; *Colorado Cross-Disability Coalition v. Too (Delaware), Inc.*, 344 F. Supp. 2d 707, 710 (D. Colo. Nov. 10, 2004) (Babcock, J.) (declining to interpret the ADA "generally" under the "full and equal enjoyment" language of 42 U.S.C. § 12182).

In *Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1124 (D. Or. Mar. 26, 1998) (Ashmanskas, Mag. J.), the district court refused to require the owner of a sports arena to modify parking spaces because the deviations "do not materially impair usage of the parking spaces." *Id.* at 1153. More recently, in *Association for Disabled Americans, Inc., v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. Aug. 20, 2001) (Highsmith, J.), the district court held that even if there is not a full eight inches of clearance underneath an accessible lavatory because there was only approximately 6 ½", there was no evidence that increasing the clearance to 8" would make the lavatories significantly more usable by the plaintiffs. *Id.* at 1368-69. Based thereon, the court found that the plaintiffs failed to satisfy their initial burden of showing readily achievable barrier removal. *Id.* at 1369.

Here, plaintiffs have failed to satisfy their burden of demonstrating that a door opening force of 8.5 pounds for exterior doors or 5 pounds for interior doors deprives the plaintiffs class members of effective access. Indeed, the Access Board's publication of a proposal for a 15 pound maximum is indicative why there remains no maximum door opening force requirement under the DOJ Standards to date nor is there any such maximum in the future edition of the DOJ Standards that is currently proceeding through the rulemaking process.

3. Plaintiffs Have Failed to Satisfy Their Prima Facie Readily Achievable Burden of Proof for 107 Stores Constructed Prior to January 26, 1993.

(a) Readily Achievable Barrier Removal Should Be Easily Accomplishable and Able to Be Carried Out Without Much Difficulty or Expense.

"Existing facilities . . . must comply with the ADA, but that obligation is governed by the barrier removal provision." *Regents of Mercersburg College v. Republic Franklin Ins. Co.*, 458 F.3d 159, 169 (3d Cir. 2006).

"To prevail in a claim of discrimination based on an architectural barrier, a plaintiff must show in addition that (1) the existing facility presents an architectural barrier prohibited under the ADA, and (2) the removal of the barrier is 'readily achievable.'" *Mannick v. Kaiser Foundation Health Plan, Inc.*, No. C 03-5905 PJH, 2006 WL 1626909, at *6 (N.D. Cal. June 9, 2006) (Hamilton, J.). "A finding of noncompliance is not tantamount to finding an ADA violation; plaintiff carries the additional burden of

showing that removal of the barriers is readily achievable." *Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1368 (S.D. Fla. 2001).

Discrimination under the ADA includes "a failure to remove architectural barrier" "in existing facilities" "where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9) (emphasis added). In determining whether an action is readily achievable, factors to be considered include--

> (A) the nature and cost of the action needed under this chapter;
> (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
> (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(42 U.S.C. § 12181(9).) In *Association for Disabled Americans, Inc. v. Claypool Holdings LLC*, 2001 WL 1112109 (S.D. Ind. Aug. 6, 2001) (Tinder, J.), the district court noted that section 12181(9)'s reference to "factors to be considered" "indicates that consideration of all of these factors is required." *Id.* at *27.

(b) The ADA Plaintiff Bears the Initial Burden of Proof to Suggest a Method of Barrier Removal That Is Easily Accomplishable and Able to Be Carried Out Without Much Difficulty or Expense.

Plaintiffs have the initial burden of proof to demonstrate that their proposed solution is readily achievable (i.e., easily accomplishable and able to be carried out without much difficulty or expense) under the particular circumstances. *Colorado Cross Disability Coalition v. Hermanson Family Ltd.*, 264 F.3d 999, 1009 (10th Cir. 2001) (holding that plaintiff could not prevail because it had made no showing that installing a ramp would be financially or physically readily achievable); *see also Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1273 (11th Cir. 2006) (expressly following the Tenth Circuit's *Colorado Cross Disability* decision with respect to the initial burden of production being imposed upon the plaintiff); *id.* at 1274 (noting that the plaintiffs failed to provide any detailed cost

analysis, address economically or operationally the impact on the facility at issue, provide expert testimony to assure the feasibility of the proposed modifications, or address the engineering and structural concerns associated with their proposals).[4] "Under the standard enunciated in *Colorado Cross*, a plaintiff must present *sufficient evidence* so that a defendant can evaluate the proposed solution to a barrier, the difficulty of accomplishing it, the cost implementation, and the economic operation of the facility. Without evidence on these issues, a defendant cannot determine if it can meet its subsequent burden of persuasion." *Gathright-Dietrich*, 452 F.3d at 1273 (emphasis added). "[T]he plaintiffs' evidence of a barrier, by itself, is not enough to establish a meritorious claim." *Compliance Now, Inc. v. Newbury Comics, Inc.*, 2003 WL 21649937, at *3 (D. Mass. July 10, 2003). In *Newbury Comics*, the district court found that the plaintiffs had not demonstrated that they were likely to succeed in their claim that barrier removal is readily achievable. "[Plaintiffs' expert] offers no opinion of how the ramp could be modified to correct the slope, nor does she estimate the cost or feasibility of remediating the ramp. By failing to offer any evidence regarding the ease with which the interior ramp's alleged shortfalls can be remedied, the plaintiffs have not demonstrated that they can prevail on their claim that a cure is 'readily achievable.'" *Id.* at *3.

Plaintiffs are undoubtedly familiar with the burden shifting framework articulated in *Colorado Cross* given that plaintiffs' lead counsel at Fox & Robertson were on the losing end in that case. Numerous district courts within the Ninth Circuit have followed *Colorado Cross*, in this regard. *Mannick v. Kaiser Foundation Health Plan, Inc.*, No. C 03-5905 PJH, 2006 WL 1626909, at *7 (N.D. Cal. June 9, 2006) (Hamilton, J.) ("The plaintiff bears the burden of proving the existence of an architectural barrier and suggesting a method of removing the barrier that is readily achievable, or 'easily accomplishable and able to be carried out without much difficulty or expense.'"); *see also Wilson*

[4] There is a dearth of Ninth Circuit and other appellate court case authority as to the ADA for a simple reason. As explained by Chief Judge Gonzalez of the Southern District of California, the predominant reason why new law is not created in accessibility law concerning public accommodations is because plaintiffs "use the ADA, and its California counterparts, as a [sic] tools of extortion. Rarely, if ever, do ADA cases filed in the federal court proceed past the discovery stage because experienced ADA plaintiffs have honed their litigation strategies so that it is usually cheaper and more efficient for defendants to settle than fight these, often meritless, cases." *Organization for the Advancement of Minorities with Disabilities Suing on Behalf of its Members and David Singletary v. Brick Oven Restaurant*, 406 F. Supp. 2d 1120, 1130 n.8 (S.D. Cal. Sept. 15, 2005) (Gonzalez, C.J.).

v. Pier 1 Imports, Inc., 439 F. Supp. 2d 1054, 1067 (E.D. Cal. July 14, 2006), *cited in Sanford v. Del Taco, Inc.*, No. 04-cv-2154-GEB-EFB, 2006 WL 2669351, at *4 (E.D. Cal. Sept. 18, 2006) (Burrell, J.); *Chapman v. Pier 1 Imports*, 2006 WL 1686511, at *7 (E.D. Cal. June 19, 2006) (Karlton, J.); *White v. Cinemark USA, Inc.*, No. 04-cv-00397-GEB-CMK, 2005 WL 1865495, at *6 (E.D. Cal. Aug. 3, 2005) (Burrell, J.).

The readily achievable analysis must be determined on a case by case basis under the particular circumstances. *Colorado Cross Disability Coalition v. Hermanson Family Ltd.*, 264 F.3d 999 (10th Cir. Aug. 29, 2001); *Guzman v. Denny's Inc.*, 40 F. Supp. 2d 930 (S.D. Ohio Feb. 4, 1999) (Dlott, J.) ("the Department of Justice recommends that determinations of whether an action is readily achievable should be done on a case by case basis."); 56 Fed. Reg. 35544, 35568 ("Whether or not any of these measures is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in the definition of readily achievable")).

(c) Congress Intended to Balance the Need to Provide Access for Persons With Disabilities and the Desire to Impose Only "Limited Cost" on Businesses.

Significantly, "Congress chose not to mandate full accessibility to existing facilities." *Regents of Mercersburg College v. Republic Franklin Ins. Co.*, 458 F.3d 159, 169 (3d Cir. 2006) ("*Regents*").

"In striking a *balance* between guaranteeing access to individuals with disabilities and recognizing the *legitimate cost concerns of businesses* and other private entities, the ADA establishes *different* standards for existing facilities and new construction." ADA Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, Pt. 36, App. B, at 645 (emphasis added), *quoted in Regents*, 458 F.3d at 168 n.12.

"Because it costs far less to incorporate accessible design into the planning and construction of new buildings and of alterations [as compared to retrofitting existing structures], a higher standard of 'readily accessible to and usable by' persons with a disability has been adopted in the ADA for new construction and alterations." H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 3, at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 483 (emphasis added), *quoted in Regents*, 458 F.3d at 168.

In *Toomer v. City Cab*, 443 F.3d 1191 (10th Cir. 2006), the Tenth Circuit recently reiterated that notwithstanding the ADA's broad, general purpose to eliminate discrimination against people with

disabilities, "the ADA does not seek to equalize without exception." *Id.* at 1195. "The ADA does not require *all* accommodation at *any* cost for *all* disabilities."[5] *Id.* (emphasis in original). The court added, "Witness testimony before Congress preceding the passage of the ADA recognized that *costs were a consideration* in determining which facilities had to be accessible, and what changes had to be made, and Congress *balanced* accordingly." *Id.* (emphasis added). In support, apart from citing the ADA's readily achievable barrier removal provision, the Tenth Circuit also cited a portion of the ADA's legislative history, which reads as follows: "Witnesses recognized that it is probably not feasible to require that existing facilities be *completely* retrofitted to be made accessible. However, it is appropriate to require *modest* changes. Numerous *inexpensive* changes can be made to make a facility accessible, including installing a permanent or portable ramp over an entrance step; installing offset hinges to widen a doorway; relocating a vending machine to clear an accessible path; and installing signage to indicate accessible routes and features within facilities." H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 2, at 35-36 (1990) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 303, 317, *cited in Toomer*, 443 F.3d at 1195.

"The Act recognizes a balance between the right of disabled persons to enjoy access to public accommodations free of discrimination and the costs attendant to altering facilities constructed before its

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[5] As explained in *Toomer*, the ADA's purpose is to provide "accommodation with certain limitations." *Toomer*, 443 F.3d at 1197. For example, in *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217 (10th Cir. 2003), the Tenth Circuit affirmed the denial of a motion for a preliminary injunction brought by the plaintiff, a paratransit rider, to prevent her state transit authority from enforcing a new rule, which terminated the eligibility of otherwise eligible paratransit riders under the ADA whose mobility devices exceeded the dimensions and weight of a "common wheelchair." The plaintiff's electric wheelchair weighed 612 pounds when occupied and was longer than 48 inches when leg rests were included in the length because the plaintiff was unable to bend her knees. *Id.* at 1218. In agreeing with the district court's determination that the plaintiff had no reasonable expectation of success on the merits of her case, the Tenth Circuit relied upon the United States Department of Transportation's (DOT) "common wheelchair" definition developed by the Access Board, which indicates that a common wheelchair has a wheelchair/occupant combination weight of up to 600 pounds and whose size dimensions are 30 x 48 inches. *Id.* at 1218 n.3, 1219, 1222 (citing 49 C.F.R. § 37.3 (2002)). The court held that the interpretive guidance provided by the DOT, which indicated that oversized wheelchairs did not have to be carried on public transit, was not arbitrary or capricious or manifestly contrary to Title II of the ADA. *Id.* at 1219, 1222 (citing 49 C.F.R. § 37, App. D). Thus, the Tenth Circuit held that the implementing regulations of the ADA and accessibility standards promulgated thereunder were not designed to achieve universal accessibility under all possible scenarios. The Tenth Circuit cited the *Keirnan* decision with approval in *Toomer v. City Cab*, 443 F.3d 1191, 1195 (10th Cir. 2006).

enactment." Consistent with this compromise, Title III requires only that a private entity 'take remedial measures that are (a) effective, (b) practical, and (c) fiscally manageable.'" *Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1369 (S.D. Fla. Sept. 10, 2001) (emphasis added).

In *Association for Disabled Americans, Inc., v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. Aug. 20, 2001) (Highsmith, J.), the district court held, "The compromise that Title III makes is to require only reasonable modifications and readily achievable barrier removals or alternative methods, when the disabled are subjected to de facto discrimination in places of public accommodation." *Id.* at 1362 n.4 (first emphasis added). "[A] reasonable modification is one that would not require fundamental alterations to a program, policy, or facility . . . ." *Id.* at 1362. "[T]he determination of whether a particular modification is 'reasonable' involves a fact specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it." *Id.* "In sum, with respect to de facto violations, Title III only requires that places of public accommodation take remedial measures that are (a) effective, (b) practical, and (c) fiscally manageable." *Id.* at 1363.

In *Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1124 (D. Or. Mar. 26, 1998) (Ashmanskas, Mag. J.), the district court refused to require the owner of a sports arena to modify the accessible route (cross-slopes and curb cuts only) to the arena even though there were de minimis and inadvertent violations because the costs associated with remedying violations greatly outweighed potential benefits. *Id.* at 1151. The court refused to order relief regarding excessive slopes and cross-slopes, finding that those slopes "are largely dictated by the slope of the adjacent street, the sidewalk and the overall design of the site." *Id.* at 1151-52. "The court found that slope deviations do not materially impair use of this area for its intended purpose, nor do they pose any apparent danger to persons with disabilities." *Id.* at 1152. Addressing additional numerous technical violations of the slope standards along accessible routes, the violations were found to be insubstantial and were viewed as not materially affecting the usability of those routes. *Id.* at 1156. Significantly, the district court was addressing "new construction" because the Rose Garden sports arena was designed for first occupancy after January 26, 1993 and the last building permit or permit extension was certified after January 26,

1992. 28 C.F.R. § 36.401(a)(2). *Independent Living* Resources *v. Oregon Arena Corp.*, 982 F. Supp. 2d 698, 706 (D. Or. Nov. 12, 1997) (Ashmanskas, Mag. J.).

In *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 2d 698, 727 (D. Or. Nov. 12, 1997) (Ashmanskas, Mag. J.), the district court stated, "There is a vast gulf between the two standards" i.e., ADAAG and standards for existing facilities. Id. at 770 n.98. "The court further observes that the ADA applies different standards to new construction than for existing buildings." Id. at 773.

In *Eckert v. Westfield Corp.*, 2002 WL 32986571 (E.D. Cal. Dec. 20, 2002) (Karlton, J.), the district court stated, "Far less stringent is the demand upon preexisting facilities that are not deemed altered." *Id.* at *4 (emphasis added).

In *Mannick v. Kaiser Foundation Health Plan, Inc.*, No. C 03-5905 PJH, 2006 WL 1626909 (N.D. Cal. June 9, 2006) (Hamilton, J.), the district court held, "Although existing facilities are not required to comply with the ADAAG (unless they have been altered), the ADAAG nevertheless provides guidance for determining whether an existing facility contains architectural barriers." *Id.* at *6. "However, deviations from the ADAAG are not necessarily determinative in establishing barriers to access." *Id.* at *6 (citing ADAAG 2.2 on equivalent facilitation). The district court also held, "The demand upon preexisting facilities that are not deemed altered is much less stringent." *Id.* at *5. The examples of steps to remove barriers provided by the applicable regulations include repositioning shelves, rearranging tables, chairs, vending machines, display racks, and other furniture. 28 C.F.R. § 36.304(b).

In *Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357 (S.D. Fla. Sept. 10, 2001), the district court made reference to the "'substantially less rigorous' standard of compliance contemplated for existing facilities under the Act." *Id.* at 1368 (emphasis added) (citing 28 C.F.R. part 36, App. B (commentary)). Indeed, Appendix B to Part 36, constituting the Preamble to the final regulation on nondiscrimination on the basis of disability by public accommodations states, "The ADA's requirements for readily achievable barrier removal in existing facilities are intended to be substantially less rigorous than those for new construction and alterations." It also states, "Congress

intended that the requirements for barrier removal in existing facilities be substantially less rigorous than those required for new construction and alterations . . . ."

In *Colorado Cross-Disability Coalition v. Too (Delaware), Inc.*, 344 F. Supp. 2d 707 (D. Colo. Nov. 10, 2004) (Babcock, J.), the district court noted that while Congress contemplated the costs to businesses to retrofit existing buildings and decided that the more flexible readily achievable standard was warranted instead of the readily accessible standard. The district court stated, "Because it costs far less to incorporate accessible design into the planning and construction of new buildings and of alterations, a higher standard of 'readily accessible to and usable by' persons with a disability has been adopted in the ADA for new construction and alterations." H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 3, at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 483.

"This section [12182(b)(2)(A)(iv)] reflects the balance between the need to provide access for persons with disabilities and the desire to impose limited cost on businesses. Because retrofitting existing structures to make them fully accessible is costly, a far lower standard of accessibility has been adopted for existing structures--a standard of 'readily achievable.' Because it costs far less to incorporate accessible design into the planning and constructing of new buildings and of alterations, a higher standard of 'readily accessible to and usable by' persons with disabilities has been adopted in the ADA for new construction and alterations." H.R. Rep. No. 485(III) at 60. *Id.* at 711.

The district court added: "The purpose of [12182(b)(2)(A)(iv)] is to provide individuals with disabilities access to a representative selection of merchandise available in a department. . . . A public accommodation would not be required to provide physical access if there is a flight of steps which would require extensive ramping or an elevator. The readily achievable standard only requires physical access that can be achieved without extensive restructuring or burdensome expense." H.R. Rep. No. 485(II) at 110. *Id.* at 712 (emphasis added). The district court also added, "When built-in and "fixed" structures are designed to be accessible before the building is constructed, the costs are readily ascertainable and can be assimilated into the overall budget. *Id.* at 711. "It makes sense that when an older building has to 'retrofit' to comply with ADA standards that became law after the building was constructed, retrofitting costs are unexpected, and often are a burden to the existing building owner or business operator."

A higher standard applies to new construction and alterations because it costs "far less" than retrofitting existing structures. *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 2d 698, 713 (D. Or. Nov. 12, 1997) (Ashmanskas, Mag. J.) (H.R. Rep. No. 101-485(III) at 60, reprinted at 1990 U.S.C.C.A.N. 445, 483).

(d) The Defendant's Financial Resources Are Not Dispositive.

In *Sanford v. Del Taco, Inc.*, No. 04-cv-2154-GEB-EFB, 2006 WL 2669351 (E.D. Cal. Sept. 18, 2006) (Burrell, J.), the district court found a factual dispute as to whether the barrier removal is readily achievable even though the plaintiff cited the defendant Del Taco, Inc.'s alleged profits of over $35 million over the past year and the cost of removal of "all barriers" as approximately $14,000. Id. at *5. Significantly, the district court found a factual dispute based on combining the entire cost of "all" barriers instead of segregating them one by one. *Id.* at *5.

In *Mannick v. Kaiser Foundation Health Plan, Inc.*, No. C 03-5905 PJH, 2006 WL 1626909 (N.D. Cal. June 9, 2006) (Hamilton, J.), the district court found that the plaintiff had not satisfied his burden of showing that the requested barrier removal was readily achievable. The district court noted that "[t]he amount of Kaiser's overall financial resources is only one of the factors to be considered and noted, "Plaintiff has failed to incorporate the other factors into the calculus, such as the expense and difficulty of removing the barriers, the impact of barrier removal on Kaiser's ability to provide medical care to its patients, and whether the existing facility's alterations were made solely for the purpose of removing accessibility barriers." *Id.* at *12 (emphasis added).

(e) Plaintiffs Have Failed to Satisfy Their Initial Burden.

There are 107 stores that were constructed prior to January 26, 1993 that are at issue in this action.[6] Taco Bell has asserted that the requested barrier removal is not readily achievable as its Fifth Affirmative Defense. (*See* First Amended Answer of 12/21/04 at 5:22-24.)

[6] Those stores are store numbers 18, 30, 76, 106, 112, 137, 158, 176, 283, 526, 567, 829, 863, 955, 991, 1034, 1496, 1603, 1827, 2241, 2297, 2423, 2700, 2755, 2756, 2778, 2801, 2812, 2848, 2861, 2910, 2914, 2915, 2918, 2930, 2933, 2961, 2968, 2971, 2984, 3027, 3046, 3055, 3064, 3071, 3077, 3078, 3089, 3090, 3096, 3119, 3125, 3128, 3129, 3130, 3132, 3160, 3184, 3207, 3208, 3209, 3222, 3241, 3390, 3398, 3420, 3471, 3473, 3498, 3555, 3579, 3904, 3948, 4027, 4034, 4054, 4168, 4192, 4204, 4211, 4284, 4311, 4325, 4342, 4343, 4355, 4356, 4466, 4510, 4518, 4558, 4578, 4586, 4611, 4617, 4622, 4633, 4661, 4704, 4799, 4862, 4951, 5019, 5081, 5138, 5223, 5259.

Here, in many instances, especially in the case of interior doors, plaintiffs request the installation of automatic door openers, which are expensive and subject to potentially frequent maintenance problems due to both vandalism and wear and tear. In addition, there is nothing in the record to indicate that the installation of automatic door openers is "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). Thus, plaintiffs have failed to meet their initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

4. Plaintiffs Have Failed to Satisfy Their Prima Facie Burden of Proof to Demonstrate "Alterations" for 107 Stores Constructed Prior to January 26, 1993.

(a) Plaintiffs' Alterations Inquiry Requires a Five-Part Factual Inquiry.

Plaintiffs also seek to escape from a complex inquiry as to whether any of the existing facilities were altered within the meaning of the ADA. The regulations implementing the ADA provide:

> "Alterations include . . 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, reroofing, 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."

28 C.F.R. § 36.402(b)(1).

> "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*, the entity shall also make the alterations in such a manner that, *to the maximum extent feasible*,[7] the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities *where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope* (as determined under criteria established by the Attorney General."

42 U.S.C. § 12183(a)(2) (emphasis added). "Alterations made to provide an accessible path of travel to the altered area will be deemed *disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area*." 28 C.F.R. § 36.403(f)(1). "Only alterations undertaken *after January 26, 1992*, shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations." 28 C.F.R. §

[7] The phrase "to the maximum extent feasible" "applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration." 28 C.F.R. § 36.402(c).

36.403(g)(2)(i) (emphasis added). Thus, it is a prerequisite to analyze whether the potential cost of providing an accessible path of travel or restroom serving the altered area is disproportionate to the overall cost of the alterations undertaken after January 26, 1992. Based on the foregoing, it is clear that the alteration analysis under the ADA is not so simple as plaintiffs make it appear to be. First, the Court would need to determine whether an "alteration" within the meaning of the ADA, occurring after January 26, 1992, has taken place. Second, assuming that an "alteration" has taken place, the Court would need to determine whether the location of the "alteration" constitutes an area containing a primary function.[8] Third, the Court would need to analyze whether, in fact, such area has been altered without providing an accessible path of travel or accessible restroom. Fourth, the Court would need to determine whether the facility has been altered "to the maximum extent feasible." Fifth, the Court would need to undertake a disproportionality analysis, requiring information as to the costs of the requested alterations to the path of travel to the altered area or the restrooms as well as information as to the overall cost of the alterations to the primary function area. It is, therefore, not surprising that plaintiffs have evaded the foregoing five-part alterations test in the instant Motion.

(b) Alterations Between January 27, 1992 and December 16, 2001 Are Time-Barred.

In *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622 (D. Md. 2002) (Garbis, J.), the district court held that alterations claims were subject to a statute of limitations and applied the most analogous state law statute of limitations to find that certain 1994 alleged "alterations" were time-barred. *Id.* at 634-35. "The statute of limitations for bringing a claim under the ADA, the California Disabled Persons Act, or the Unruh Act is one year." *Pickern v. Best Western Timber Cove Lodge Marina Resort*, No. CIV. S-00-1637 WBS/DA, 2002 WL 202442, at *5 (E.D. Cal. Jan. 18, 2002) (Shubb, J.).

In California, the current personal injury statute, Cal. Civ. Proc. Code § 335.1, became effective on January 1, 2003. The Ninth Circuit has held that it is not retroactive. *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004). Thus, before then, the statute of limitations was a mere 1 year period. (former

[8] The DOJ's regulations expressly exclude restroom modifications from constituting an area containing a "primary function." 28 C.F.R. § 36.403(b). Thus, the numerous references to purported restroom "alterations" cited by plaintiffs throughout the meet and confer process are meaningless for purposes of determining what constitutes an "alteration" within the meaning of the ADA.

Cal. Civ. Proc. Code § 340.3.) Thus, given that the instant action was filed on December 17, 2002, while the former one year limitations period was still in effect in California, only "alterations" within the meaning of the ADA that occurred on or after December 17, 2001 to existing facilities are at issue. In other words, assuming *arguendo* that Taco Bell made "alterations" to existing facilities between January 27, 1992 and December 16, 2001, those alterations are time-barred.

5. The Court Should Not Allow Plaintiffs to Evade Their Evidentiary Burden of Demonstrating Readily Achievable Barrier Removal or the Existence of Alterations For Stores Constructed Prior to January 26, 1993 By Applying a Non-ADA Standard Such as the California Building Code to the Instant Action.

(a) Plaintiffs Should Not Be Allowed to Bootstrap Non-ADA Standards and Evade the Careful Balance Struck By Congress in Enacting ADA Standards Including Limitations on Accessibility.

Instead of addressing plaintiffs' burden to satisfy the readily achievable barrier removal provisions of the ADA and the requirements for demonstrating an "alteration" for stores that were constructed prior to January 26, 1993, plaintiffs seek to *evade* such evidentiary burden by relying instead upon California Building Code provisions as the predicate for their claims relating to 107 stores constructed prior to January 26, 1993. Simply put, plaintiffs' attempt to apply California's Title 24 legal standards in lieu of the federal ADA requirements is a transparent attempt to bootstrap federal subject matter jurisdiction while at the same time evade federal evidentiary burdens that were carefully designed to avoid businesses from falling victim to extreme remediation measures. The Court should not tolerate this evasion of the careful balance struck by Congress in enacting the ADA standards with certain limitations on accessibility in order to ensure swift passage.

The Court's consideration of non-ADA standards applying different legal standards would contradict Congressional intent underlying the ADA. One of the express purposes of the ADA is to provide "*clear*, strong, *consistent*, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2) (emphasis added). Another express purpose of the ADA is "to ensure that the Federal Government plays a central role in enforcing *the standards established in this chapter* on behalf of individuals with disabilities." *Id.* § 12101(b)(3) (emphasis added). Significantly,

the purpose of the ADA is not to ensure that the Federal Government, including the federal judiciary, plays a central role in enforcing *any* and *all* accessibility standards. Applying a non-ADA standard here would do precisely that. Indeed, the DOJ has yet to certify the California Building Code as meeting or exceeding the DOJ Standards. (Blackseth Decl. ¶ 15.)

Plaintiffs can't have it both ways. If federal court subject matter jurisdiction is premised upon the ADA, then the Court should apply ADA standards only. Otherwise, the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims or apply state accessibility law to avoid creating a perverse incentive by rewarding plaintiffs (and future ADA plaintiffs who will undoubtedly seek guidance from the rulings in the instant action and flood the federal courts with similar bootstrapping lawsuits) with a federal court venue to raise purely state law claims that ignore federal standards designed to balance competing interests. Thus, notwithstanding plaintiffs' affirmative election to disavow their evidentiary burden of proof to demonstrate readily achievable barrier removal or alterations, the Court should hold plaintiffs to such burden as to the 107 stores that were constructed prior to January 26, 1993 at issue in this action and decline to exercise supplemental jurisdiction over plaintiffs' state law claims, at minimum, to the extent that injunctive relief is being sought.

(b) Several Recent Published Federal District Court Decisions Reflect that the DOJ Standards Are the Only Standards that Should Be Considered.

Plaintiffs rely upon California Building Code standards in lieu of the DOJ Standards with respect to applying an exterior door opening force standard. Plaintiffs' reliance is misplaced. In recent years, as addressed below, multiple federal district courts have held in published decisions that there is no architectural barrier that violates the ADA that can be premised upon a proffered non-ADA standard.

For example, in *Wilson v. Pier 1 Imports (US), Inc.*, 439 F. Supp. 2d 1054 (E.D. Cal. July 14, 2006) (Karlton, J.),[9] the district court issued an amended order that is highly significant because it eliminated any and all analysis of California's Title 24 accessibility standards (California Building Code) in contrast to the original published order issued on April 12, 2006. *Wilson v. Pier 1 Imports*

[9] The *Wilson* amended order incorporates by reference the analysis in *Eiden v. Home Depot USA, Inc.*, No. CIV. S-04-977 LKK/CMK, 2006 WL 1490418 (E.D. Cal. May 26, 2006) (Karlton, J.), a published opinion in which Taco Bell's lead defense counsel was lead defense counsel in that case as well.

(U.S.), Inc., 2006 WL 947709 (E.D. Cal. Apr. 12, 2006). The district court held, "I conclude that compliance with the ADAAG, and not another standard, constitutes compliance with the ADA requirements." Id. at 1066. The court also held that "the court concludes that the ADAAG constitutes the exclusive standards under Title III of the ADA." Id.; Chapman v. Pier 1 Imports, No. CIV. S-04-1339 LKK CMK, 2006 WL 1686511, at *7 (E.D. Cal. June 19, 2006) (Karlton, J.) (same); Eiden v. Home Depot USA, Inc., No. CIV S04-977 LKK/CMK, 2006 WL 1490418, at *8 (E.D. Cal. May 26, 2006) (Karlton, J.) (same). Thus, there is no mistake as to the meaning of Judge Karlton's amended published order.

Similarly, in Chapman v. Pier 1 Imports, 2006 WL 1686511 (E.D. Cal. June 19, 2006) (Karlton, J.), the district court granted summary judgment to the defendant as to the claim that the entrance door opening force was excessive because the court held that it was only subject to the California Building Code. The court held, "Plaintiff fails to cite to any section of ADAAG." Id. at *11.

Judge Karlton's trilogy of published decisions are not alone in rejecting consideration of California Building Code standards.

Recently, in *Sanford v. Roseville Cycle, Inc.*, No. Civ. 04-1114 DFL CMK (E.D. Cal. Feb. 12, 2007) (Levi, J.), Chief Judge Levi denied in part an ADA plaintiff's motion for summary judgment, despite accepting as true the plaintiff's factual allegations, because several alleged barriers were premised upon non-ADA regulations such as the California Building Code, which "are *irrelevant* for ADA purposes." Id. at *1 (emphasis added). The district court added, "The ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) are the *exclusive* standards for judging compliance with the ADA." Id. at *1 (emphasis added). Thus, with respect to the allegation that there was a lack of tow-away signs at the parking lot entrance, the district court held, "The absence of tow-away signs at the parking lot entrance does not violate the ADA." Id. at *2. Thus, instead of applying the California Building Code requirement for tow-away signage,[10] the district court applied only the ADAAG as the standard even for violations of the Unruh Civil Rights Act, Cal. Civ. Proc. Code §§ 51-52.

In Sanford v. Del Taco, Inc., No. 04-cv-2154-GEB-EFB, 2006 WL 2669351 (E.D. Cal. Sept. 18,

[10] Title 24 of the California Building Code requires tow-away signage either at the parking entrance to a public accommodation or visible from parking spaces themselves. (Cal. Code of Regs., Title 24, § 1129B.5 (2002).)

2006) (Burrell, J.), the district court rejected the claim that the exterior door was governed by an ADA standard. "The ADAAG places a five pound limit on force required to open interior doors; however, there is no similar restriction placed on exterior doors." *Id.* at *3 (citing ADAAG 4.13.11) (emphasis added). The district court then quoted from page *2 of *Sanford v. Del Taco, Inc.*, No. CIV-S-04-1337-DFL/CMK, 2006 WL 1310318 (E.D. Cal. May 12, 2006) (Levi, J.), "Because the ADAAG does not define the requirement for exterior door pressure, [plaintiff] has the burden to show that the door created a barrier to his access." *Id.* at *2. The court then held, "Plaintiff admits he was able to open the entrance door unassisted and therefore he has not shown the door created a barrier to his access." *Id.* at *3; *see also Wilson v. Norbreck LLC*, No. Civ. S-04-690 DFL JFM, slip. op. at 9 (E.D. Cal. Sept. 15, 2006) (Levi, J.) (finding that the effective date of the 2001 California Building Code is November 2002 and so the 8.5 pounds standard was controlling under state law, but addressing the federal standard, finding that the plaintiff's "disability is not so severe that a door pressure in this range presents a barrier to him.").

In *Harris v. Costco Wholesale Corp.*, 389 F. Supp. 2d 1244 (S.D. Cal. 2005) (Lorenz, J.), the district court held that the lack of path of travel signs did not violate the ADA regardless of whether such signs were required by California law. *Id.* at 1051.

Despite the fact that Taco Bell addressed most of the foregoing recent published decisions in Taco Bell's January 12, 2007 submission to the Court, plaintiffs failed to address any such decisions despite their obvious relevance to the issues at hand. Given the clear trend in the federal district courts located in the Ninth Circuit towards applying only the ADAAG standards to an ADA action, the Court should follow the clear trend as well by not applying a non-ADA standard to the instant action.

(c) There Are Numerous Discrepancies Between the DOJ Standards and the California Building Code.

The discrepancy between the DOJ Standards and the California Building Code with respect to exterior door opening force is just one example of numerous discrepancies between the two sets of standards. The following is a non-exhaustive summary of significant distinctions between the DOJ Standards and Title 24:

- Title 24 requires a 48" wide path of travel in an exterior walk, (Cal. Code of Regs., Title 24, § 1133B.7.1 (2002), but requires a 36" minimum width aisle in a building. (Cal. Code of Regs., Title 24, § 1133B.6.2 (2002).) Elements 3 of the Special Master's Interim Survey Report addresses such issue. The DOJ Standards require a minimum of 36" minimum width. (DOJ Standards, 4.3.3.)
- Title 24 requires tow-away signage either at the parking entrance to a public accommodation or visible from parking spaces themselves. (Cal. Code of Regs., Title 24, § 1129B.5 (2002).) Element 103 of the Special Master's Interim Survey Report addresses such issue. The DOJ Standards contain no such requirement or any equivalent analogue.
- Title 24 requires a ½ inch beveled lip at the lower end of each curb ramp. (Cal. Code of Regs., Title 24, § 1127B.5.5 (2002).) In contrast, the DOJ Standards do not require such lip to exist or any equivalent analogue.
- Title 24 requires restroom grab bars to be located precisely 33" above the floor (unless the toilet tank obstructs the rear wall grab bar), but the DOJ standards provide instead a 33" to 36" range. (Cal. Code of Regs., Title 24, § 1115B.8.1 (2002)); DOJ Standards, Fig. 29(a) & (b), 30(c) & (d).) Elements 452, 453, 584, 585 of the Special Master's Interim Survey Report address such issues.
- Title 24 requires the front end of the side wall grab bar to be positioned precisely 24" in front of the water closet. (Cal. Code of Regs., Title 24, § 1115B.8.1 (2002).) In contrast, the DOJ Standards do not require such measurement, but instead require that the front end of the side grab bar be positioned a minimum of 54" from the rear wall in a water closet. (DOJ Standards, Fig. 29(b).) Elements 447 and 579 of the Special Master's Interim Survey Report address the front end of the side wall grab bar to the front of the water closet.
- Title 24 allows a clear T-shaped wheelchair turning space to be "56 inches by 63 inches" in size. (Cal. Code of Regs., Title 24, § 1115B.7.1.1 (2002).) In contrast, the DOJ standards provide that a clear T-shaped turning space have arms that are 60" long and the base be 60" long if one includes the length of the "T". (DOJ Standards, Fig. 3(b).) Elements 418, 438, 550, and 570 address the turning space inside a restroom.

In addition, Title 24 expressly recognizes that either a lateral or front transfer toilet stall provides equivalent facilitation. (Cal. Code of Regs., Title 24, § 2-1711, Fig. 17-1C.) Thus, as long as a stall has

48" minimum distance at the front end of the toilet to the front of the stall and 32" minimum clear space from the side edge of the toilet to the furthest wall, such space provides equivalent facilitation under Title 24. (Cal. Code of Regs., Title 24, Fig. 11B-1C.)

Thus, if the Court was to only apply the ADAAG instead of Title 24 standards, *the scope of the instant action would be significantly narrowed*.

(d) Section 19957 of the Health and Safety Code Provides Local Building Departments With Discretion to Enforce the California Building Code.

Part 5.5 of Division 13 of the California Health and Safety Code addresses access to public accommodations by persons with disabilities. Section 19956 of the California Health and Safety Code provides in relevant part that "[a]ll public accommodations constructed in this state shall conform to the provisions of Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code." (Cal. Health & Safety Code § 19956.) Section 19958 provides that "[t]he building department of every city, county, or city and county shall enforce this part within the territorial area of its city, county, or city and county." (Cal. Health & Safety Code § 19958.) Section 19957 of the California Health and Safety Code, however, provides, "In cases of *practical difficulty*, *unnecessary hardship*, or extreme differences, a building department responsible for the enforcement of this part *may* grant exceptions from the literal requirements of the standards and specifications required by this part or permit the use of other methods or materials, but only when it is clearly evident that equivalent facilitation and protection are thereby secured." (Cal. Health & Safety Code § 19957) (emphasis added). In addition, section 19957.5 of the California Health and Safety Code provides the authority for a city to appoint a local appeals board to hear written appeals brought by any person regarding action taken by the building department of any city in enforcement of Part 5.5 of Division 13 of the California Health and Safety Code, which addresses access to public accommodations by persons with disabilities. Such appeals board "may approve or disapprove *interpretations* of this part" and enforcement actions taken by the building department of the city. (Cal. Health & Safety Code § 19957.5(c)) (emphasis added).) The use of the term "interpretations" implies the exercise of discretion. Further, such approvals or disapprovals are final as to the building department in the absence of fraud or prejudicial "abuse of *discretion*." *Id.* (emphasis added).

Thus, section 19957 makes it clear that the local building officials of the respective municipalities in California have *discretion* to apply the California Building Code and to grant exceptions to such standards.

(e) Title 24 Itself Provides Local Building Departments With Discretion to Enforce the California Building Code.

Title 24 itself provides local building officials with discretion to enforce Title 24. For example, an analysis of a cross-slope of a walk or sidewalk constructed under the original version of Title 24 in effect in 1982 requires an analysis as to whether the local building official determined that there was an unreasonable hardship based on local conditions thereby allowing the cross slope of a walk or sidewalk to be a maximum ½ inch per foot or 4.167% for distances not to exceed 20 feet. (Cal. Code of Regs., Title 24, § 2-3323(a) (1982).) Similarly, the 1982 edition of Title 24 provides an exception to the general requirement that sanitary facilities shall conform to certain accessibility requirements. (See, e.g., Cal. Code of Regs., Title 24, § 2-1711 (1982).) In particular, Title 24 provided:

> "In existing buildings or facilities, when the enforcing agency determines that compliance with any building standard under this section [applicable to sanitary facilities] would create an unreasonable hardship, an exception to such standard shall be granted when equivalent facilitation is provided."

Id. Similarly, the current version of Title 24 provides, "In existing buildings, the provisions of this section [1134B] shall not apply when legal or physical constraints will not allow compliance with these building standards or equivalent facilitation without creating an *unreasonable hardship*." (Cal. Code of Regs., Title 24, § 1134B.3.1.2 (2002) (emphasis added).) Courts have recognized that the exercise of *discretion* is inherent in order to find an unreasonable hardship in other contexts. *See, e.g.*, *CFM Communications, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1239-40 (E.D. Cal. 2005) (holding that under California law, specific performance is a *discretionary* remedy that may be refused if granting it would cause *unreasonable hardship* or loss to the party in breach or to third persons) (Coyle, J.).

Similarly, the 1982 version of Title 24 provided that the determination of whether ramps located at the front of disabled parking spaces provide equivalent facilitation requires an analysis of the local building official. (Cal. Code of Regs., Title 24, § 2-7102(b) (1982).)

The 1982 version of the California Building Code also expressly provided, "It is not the intent of this section that every existing occupancy within the scope of the State Fire Marshal's jurisdiction, mandatorily conform or be made to conform to the new construction requirements relative to fire, panic and explosion safety. *Reasonable judgment* must be exercised by the enforcing agency in the application of these building standards to existing occupancies." (Cal. Bldg. Code § 2-102(a) (1981) (emphasis added)). The requirement that "reasonable judgment" be exercised by the enforcing agency has remained in Title 24 to the present. (Cal. Code of Regs., Title 24, § 101.3.1 (2002).)

Historically, the local building department has been designated as the enforcing agency tasked with the responsibility of ensuring compliance with applicable Building Code standards. (Cal. Bldg. Code § 2-105(b)(6) & (11)(C)(3) (1981).) This remains in effect to date. (Cal. Code of Regs., Title 24, § 101.17.11.4.3.) Thus, the judgment, expertise and discretion of the local building officials and their staff are expressly required to evaluate whether existing occupancies comply with the California Building Code.

(i) In Practice, Local Building Officials Grant Unreasonable Hardship Exemptions Retroactively.

To the extent that plaintiffs assume that Taco Bell has not received unreasonable hardship exemptions from local building officials and so Taco Bell is forever barred from being deemed exempt, this assumption is mistaken. Taco Bell's expert witness, a former Commissioner of the California Building Standards Commission, has opined that in his personal experience as an ADA consultant, he has prepared and local building officials have granted hardship exemptions retroactively. (*See* Blackseth Decl. 3/22/07 ¶ 14.) Thus, even assuming that the Court determines that Taco Bell has not received hardship exemptions to date, Taco Bell is entitled to seek and obtain such exemption retroactively.

(ii) As a Practical Matter, the Local Building Official Might Not Issue Formal Hardship Determinations to Both Municipalities and Public Accommodations.

To illustrate the local building official's discretion to "determine" the applicability of a hardship exemption, Title 24 provides the local building official with discretion to avoid the 48" minimum width

standard for a sidewalk and reduce the standard to only 36" if the local building official "determines" that compliance would create an "unreasonable hardship" because of right-of-way restrictions, natural barriers or other existing conditions. (Cal. Code of Regs., Title 24, § 1133B.7.1.3 (2002).) Such restrictions or obstructions are so common along a public sidewalk such that one can literally pick a random sidewalk adjoining a curb ramp at the corner intersection of a street at virtually any municipality and probably find that there is not 48" minimum width for a sidewalk adjoining the curb ramp due to an obstruction posed by either the street light itself or by the right-of-way restrictions or other barriers limiting the width of the public sidewalk. Indeed, Taco Bell has determined that several municipalities in which it operates company-owned stores do not appear to be familiar with the issuance of hardship exemptions by local building officials. (Hikida Decl. ¶ 5.) The Court can and should take judicial notice of the fact that local building officials do not necessarily make a formal "determination" of "unreasonable hardship" that is documented prior to or even after construction on such sidewalk has been performed. If such local building officials do not make such formal determination for municipalities, then it follows that such formal determination is typically not made for public accommodations prior to the issuance of a certificate of occupancy.

(f) The Issuance of Certificates of Occupancy by the Local Building Officials Tasked with Enforcing the California Building Code Indicates That Such Officials Exercised Their Discretion to Determine that the Stores In Question Complied with the California Building Code.

Even assuming that this Court were to analyze the instant Motion under Title 24 standards (which are not applicable for the reasons explained above), plaintiffs fail to appreciate that the certificates of occupancy[11] issued by the local building officials charged with enforcement of the accessibility provisions of the California Building Code as well as other requirements constitute prima facie evidence that each of the stores were constructed in compliance with the California Building Code. (*See* Request for Judicial Notice Exs. 1-38.) The Court can and should infer that the issuance of certificates of occupancy by the local building officials tasked with enforcing the California Building

[11] "The Legislature often uses 'certificate' to mean an official statement." *Sonoma AG Art, LLC v. Department of Food and Agriculture*, 125 Cal. App. 4th 122, 126, 22 Cal. Rptr. 3d 468, 470 (Cal. Ct. App. 2004). "Issuing a certificate is generally discretionary." *Id.* at 128.

Code indicates that such officials either determined that the stores in question complied with the California Building Code or determined that some type of exemption warranted some deviation from the California Building Code. *Bringle v. Board of Supervisors*, 54 Cal. 2d 86, 89 (1960) (noting presumption that official duty was performed and that necessary facts were found to exist to grant variance).

The analysis in *Thompson v. City of Lake Elsinore*, 18 Cal. App. 4th 49 (Cal. Ct. App. 1993), regarding the nature and scope of a certificate of occupancy and the process whereby it is issued, is instructive. In *Thompson*, the plaintiff, the owner of a building that had been renovated, sued the City of Lake Elsinore, California, the building department, and various city officials for damages resulting at least in part from the City's failure to issue a certificate of occupancy for the owner's renovated building despite having received final approval of the renovation. *Id.* at 51-52. The plaintiff alleged that the defendants refused to issue the certificate of occupancy in an attempt to cause the plaintiff to comply with the defendants' demands concerning the plaintiff's other properties. *Id.* at 53.

The defendants demurred based upon their statutory immunity for their decisions in issuing or not issuing requested building permits, certificates of occupancy, or licenses pursuant to section 815.6 of the California Government Code, which provides as follows:

> "Where a public entity is under a *mandatory* duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

(Cal. Gov't Code § 815.6) (emphasis added). The trial court sustained the defendants' demurrer (the state law equivalent of a Rule 12(b)(6) motion to dismiss for failure to state a claim). *Id.* at 52.

On appeal, the Court of Appeal reversed as to the failure to issue the certificate of occupancy. As an initial matter, under California law, the Court of Appeal noted that a public entity that is under a *mandatory* duty designed to protect against the risk of a particular kind of injury is liable for an injury proximately caused by the public entity's failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty. (*See* Cal. Gov't Code § 815.6.[12])

[12] According to the California Supreme Court, "As used in section 815.6, the term 'mandatory' refers to an obligatory duty which a governmental entity is required to perform, as opposed to a permissive power which a governmental entity *may exercise or not as it chooses*." *Morris v. County of*

The Court of Appeal then analyzed whether or not the Uniform Building Code, as adopted by the City ordinance, prescribed a *mandatory* duty to issue a building permit or a certificate of occupancy.[13] The Court of Appeal agreed with the defendants' argument that the Uniform Building Code provisions did not prescribe a *mandatory* duty to issue a *building permit* and so such provisions were deemed to be a discretionary decision covered by governmental immunity provisions. On the other hand, in response to the defendants' argument that the Uniform Building Code did not prescribe a mandatory duty to issue a *certificate of occupancy*, the Court of Appeal disagreed with the defendants' analysis. Significantly, the Court of Appeal explored the process whereby a certificate of occupancy is issued. First, the Court of Appeal noted that section 307 of the Uniform Building Code in effect during the relevant time frame[14] (i.e., the 1985 edition of the Uniform Building Code[15]) provided as follows:

> "(a) Use or Occupancy. No building or structure . . . shall be used or occupied . . . until the building official has issued a Certificate of Occupancy therefor as provided herein . . . .
>
> . . .
>
> (c) Certificate Issued. After the final inspection *when it is found that the building or structure complies with the provisions of this code and other laws which are enforced by the code enforcement agency*, the building official shall issue the Certificate of Occupancy . . . ."

Marin, 18 Cal. 3d 901, 908, 136 Cal. Rptr. 251 (Cal. 1977) (emphasis added), *quoted in Fox v. County of Fresno*, 170 Cal. App. 3d 1238, 1242, 216 Cal. Rptr. 879 (Cal. Ct. App. 1985). "[A]pplication of section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken." *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 498, 993 P.2d 983, 93 Cal. Rptr. 2d 327 (2000). "It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the *exercise of discretion*." *Id.* (emphasis added).

[13] "Whether an enactment creates a mandatory duty is a question of law: 'Whether a particular statute is intended to impose a mandatory duty, rather than *a mere obligation to perform a discretionary function*, is a question of statutory interpretation for the courts.'" *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 499, 993 P.2d 983, 93 Cal. Rptr. 2d 327 (2000) (quoting *Creason v. State Department of Health Servs.*, 18 Cal. 4th 623, 631, 957 P.2d 1323 (1998) (emphasis added).

[14] Plaintiff initially applied for a building permit in 1986 and such permit was issued in 1987 as was a "Final Inspection Okay". *Thompson*, 18 Cal. App. 4th at 53.

[15] To Taco Bell's knowledge, the two certificate of occupancy provisions cited in *Thompson* in the 1985 edition of the Uniform Building Code remained intact, as slightly modified, in subsequent editions in 1988, 1991, 1994, (Uniform Building Code § 307(a) & (c) (1988); Uniform Building Code § 308(a) & (c) (1991); Uniform Building Code §§ 109.1, 109.3 (1994)), and presumably in the 1997 and 2000 editions as well.

Thompson, 18 Cal. App. 4th at 56 (quoting Uniform Building Code § 307(a) & (c) (1985)) (emphasis added). Second, the Court of Appeal recognized that some *discretion* is, in fact, exercised by a building official before a certificate of occupancy is issued (even if such discretion is not as broad the discretion exercised to issue a building permit). The Court of Appeal addressed such discretion as follows:

> "Section 307 of the Uniform Building Code, as adopted by City ordinance, is a part of the same statutory scheme that covers issuance of building permits. When section 307 is considered in context, it is clear that the building official is 'authorized to determine' (see Gov. Code, §§ 818.4, 821.2) whether or not a particular project satisfies all the conditions of its building permit, as well as applicable code and other requirements, before issuing the certificate of occupancy. *Obviously, the building official must be allowed great latitude (i.e., discretion) in making this determination*. Generally speaking, therefore, if the certificate of occupancy is not issued because the building official has determined that the building or structure has not satisfied the applicable requirements-even if the determination is negligent or erroneous-the building official and the public entity are immune from tort liability, under Government Code sections 818.4 and 821.2, for the failure to do so, just as they are with respect to the decision to issue a building permit in the first place."

Thompson, 18 Cal. App. 4th at 57 (emphasis added). The Court of Appeal proceeded to clarify that while the discretion to issue a certificate of occupancy was not as broad as the discretion to issue a building permit, such circumstance did not *automatically* entitle the holder of a building permit to a certificate of occupancy. That is, the building official did not have a *mandatory* duty to issue one. Instead, the Court of Appeal explained:

> "The building permit holder must first satisfy the building official, *in the exercise of official discretion*, that the project meets the requirements contained in the applicable statutes, codes, and regulations, and in the permit itself."

Thompson, 18 Cal. App. 4th at 58 (emphasis added). The Court of Appeal then drew a distinction between a scenario in which the building official makes a "*discretionary* act"[16] in determining whether or not the certificate of occupancy should be issued (i.e., that the building complies with the relevant requirements) and a scenario in which the building official had, in fact, already approved the owner's building via a final inspection that found that the building complied with applicable requirements. In the latter scenario, the Court of Appeal determined that "the building official retained *no further*

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[16] "Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. Discretion has also been defined as meaning equitable decision of what is just and proper under the circumstances." *Burgdorf v. Funder*, 246 Cal. App. 2d 443, 449, 54 Cal. Rptr. 805 (Cal. Ct. App. 1966), *cited in Creason v. State Department of Health Servs.*, 18 Cal. 4th 623, 633, 957 P.2d 1323 (Cal. 1998).

discretion to withhold the certificate of occupancy." *Id.* at 58 (emphasis added). Based thereon, the Court of Appeal held that the defendant building officials were not subject to governmental immunity based upon the plaintiff's allegations and could be sued for not timely issuing a certificate of occupancy.

The *Thompson* decision is significant for several reasons. First, the *Thompson* decision goes to great lengths to point out the *discretion* utilized by local building officials in determining whether a building complies with the applicable building code requirements. Subsequent court decisions have relied upon *Thompson* for this proposition. *See, e.g.*, *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 502, 993 P.2d 983 (2000) (noting that the defendant city had discretion to determine whether a completed project met building permit requirements in order to issue a certificate of occupancy); *Inland Empire Health Plan v. Superior Court*, 108 Cal. App. 4th 588, 594, 133 Cal. Rptr. 2d 735, 740 (Cal. Ct. App. 2003) (holding that a building official called upon to determine whether a renovation project meets the requirements of the local building code is making a discretionary decision). The *Thompson* decision is also consistent with *Fox v. County of Fresno*, 170 Cal. App. 3d 1238 (Cal. Ct. App. 1985), wherein the California Court of Appeal construed section 17980 of the California Health and Safety Code[17], applicable to housing, as providing the enforcement agency a choice or discretion to choose which course of action would be appropriate when a violation of the building standards published by the State Building Standards Code is found notwithstanding that such statute makes several references to the seemingly obligatory term "shall". *Id.* at 1243-44. Thus, local building officials have discretion to decide how the applicable building code should be applied. *Cf. Sutherland v. City of Fort Bragg*, 86 Cal. App. 4th 13, 24, 102 Cal. Rptr. 2d 736, 742-43 (Cal. Ct. App. 2000) (holding that the fire chief "exercises considerable *discretion* in deciding how [the fire code] *should be applied*") (emphasis

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[17] Section 17980, subdivision (a), of the California Health and Safety Code provides in relevant part:

"(a) If any building is constructed, altered, converted, or maintained in violation of any provision of, or in violation of any order or notice that gives a reasonable time to correct that violation issued by an enforcement agency pursuant to this part, *the building standards in the California Building Standards Code*, or other rules and regulations adopted pursuant to this part, or if a nuisance exists in any building or upon the lot on which it is situated, the enforcement agency *shall*, after 30 days' notice to abate the nuisance or violation, or a notice to abate with a shorter period of time if deemed necessary by the enforcement agency to prevent or remedy an immediate threat to the health and safety of the public or occupants of the structure, institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance." (Cal. Health & Safety Code § 17980) (emphasis added).)

added); ("Aware of a violation of the [fire] code's exit provisions, the chief has an array of remedies at his disposal under the code, all involving the exercise of official *discretion*. These enforcement remedies include orders requiring an offending use to cease, declaring a building a public nuisance to be abated or, *in his discretion, declining any enforcement measures at all*.") (emphasis added). Indeed, if local building officials lacked the discretion to apply the California Building Code, then the careful distinction drawn in *Thompson* would be nullified and local building officials throughout the State of California would be exposed to liability for failing to issue certificates of occupancy despite the existence of building code violations. Similarly, the entire statutory scheme to ensure compliance with the California Building Code would be subverted if local building officials had a mandatory duty to automatically issue certificates of occupancy. This was clearly not the California Legislature's intent in drafting California's governmental immunity provisions.

In addition, the *Thompson* court's determination that local building officials have discretion to determine how the applicable building code should be applied makes sense given the ever changing information as to building code requirements. Indeed, California issues updated building code standards every three years or on a triennial basis. Such "changing information" makes it likely that the Legislature and local municipalities expected the local building officials to exercise discretion in enforcing California Building Code standards. *Cf.* *Creason v. State Dep't of Health Servs.*, 18 Cal. 4th 623, 633, 957 P.2d 1323 (Cal. 1998) (holding that the Legislature intended that the Department of Health Services would exercise discretion in selecting necessary and appropriate testing and reporting standards after considering the ever-increasing and changing information concerning heritable and congenital defects).

Second, the *Thompson* decision makes it clear that the issuance of a certificate of occupancy should not occur unless and until the local building official has found the inspected building to be in compliance. This, of course, includes the various hardship or equivalent facilitation exemptions recognized by the California Building Code from the inception of Title 24 in 1982. Thus, the issuance of certificates of occupancy for each of the stores at issue in the instant action is prima facie evidence that the respective local building officials charged with enforcement of the California Building Code and other requirements determined that such facilities complied with the provisions of the California

Building Code and other applicable requirements at the time such certificates were issued or were exempt based upon local conditions. Thus, plaintiffs have failed to demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

(g) Plaintiffs Have Failed to Satisfy Their Prima Facie Burden of Demonstrating that the Primary Entrance Was Not Accessible.

Plaintiffs assume that *all* of the store entrances were required to be made accessible at the 127 stores that allegedly have noncompliant door opening force at exterior doors. This assumption is misleading.

Even assuming that Title 24 was applicable (which it is not), Title 24 provided at one time that accessibility should be provided to the primary entrance (any entrance to a facility which has a substantial flow of pedestrian traffic to any specific major function of the facility). The original version of Title 24 provided several exceptions to the general rule that "[a]ll primary entrances to buildings and facilities shall be made accessible to the physically handicapped." (See, e.g., Cal. Code of Regs., Title 24, § 2-3301(m) (1982) (emphasis added).) "Access to these [dining] facilities shall be provided at primary entrances." (Title 24, § 2-611(c)(1) (1982) (emphasis added). Similarly, according to the 1989 California Building Code, access to a Group A occupancy (at least 50 occupants) "shall be provided at primary entrances," which is, in turn, defined as "any entrance to a facility which has a substantial flow of pedestrian traffic." (Title 24, §§ 417-418, 611(d)(1) (1989)). Elsewhere, the 1989 California Building Code provides, "All primary entrances to buildings and facilities shall be made accessible to the physically handicapped/people with physical disabilities." (Title 24, § 3301(f)) (emphasis added). Both sections are amendments to the Uniform Building Code and, therefore, were intentionally intended to modify the Uniform Building Code.

In particular, one exception applies if there is at least one accessible entrance and another exception applies if there are legal or physical constraints preventing compliance. "In existing buildings where the enforcing agency determines that compliance with the building standards of this subsection would create an unreasonable hardship, an exception shall be granted when equivalent facilitation is provided. Equivalent facilitation would require at least one entrance to be accessible to and usable by physically handicapped persons." (See, e.g., Cal. Code of Regs., Title 24, § 2-3301(m) (1982)

(emphasis added).) Another exception provides, "These building standards shall not apply to existing buildings when legal or physical constraints will not allow compliance with these building standards or equivalent facilitation without creating an unreasonable hardship." *Id.*

Thus, assuming that a particular entrance that is allegedly noncompliant at a two-entrance store is not a "primary" entrance, then such entrance need not be made accessible under Title 24. Given that Title 24 did not eliminate the reference to "primary" entrance in section 3301 until April 1, 1994, the accessibility of the "primary" entrance at Taco Bell's company-owned stores is a key issue at 65 of the stores at issue.[18] Taco Bell submits that the primary entrance to company-owned facilities that were constructed prior to April 1, 1994 were, in fact, accessible based upon the 9.5 pound tolerance standard addressed in plaintiffs' Motion. As such, the door opening force at doors that were not required to be accessible because they were not primary entrances is irrelevant. Of course, if the Court did not apply Title 24 standards to the instant action, then the foregoing inquiry could be avoided by the Court.

Plaintiffs' Motion fails to conduct any type of analysis as to the primary entrance to any of the stores at issue. The location of the primary entrance to a building and its accessibility are discretionary determinations that presumably the local building official made in the course of issuing a certificate of occupancy to Taco Bell or its predecessor in interest to the premises at issue. Without such analysis, it remains possible that plaintiffs are insisting upon injunctive relief as to a store entrance that is not required under the applicable version of the California Building Code to be made accessible and usable by persons with disabilities. Thus, plaintiffs have failed to demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

6. The Door Opening Force Claims Are Moot.

A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001). "'Past exposure to illegal conduct does not in itself show a present case or controversy . . . if

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[18] The store numbers are 18, 76, 106, 283, 526, 829, 955, 1827, 2241, 2423, 2700, 2778, 2801, 2812, 2915, 2961, 2968, 2971, 2984, 3027, 3046, 3064, 3078, 3089, 3160, 3184, 3209, 3222, 3241, 3390, 3398, 3420, 3471, 3473, 3498, 3555, 3579, 4027, 4034, 4054, 4168, 4192, 4204, 4211, 4284, 4342, 4343, 4466, 4510, 4518, 4558, 4633, 4799, 4862, 4951, 5019, 5259, 5512, 5513, 9407, 9414, 9417, 9454, 15379, 15507. It is worth noting that store numbers 76, 106, 2812 are currently closed.

unaccompanied by any continuing, present adverse effects.'" *Renne v. Geary*, 501 U.S. 312, 320-21 (1991) (citation omitted). "This requisite ensures that the courts are able to grant effective relief, rather than rendering advisory opinions." *Medical Society of New Jersey v. Herr*, 191 F. Supp. 2d 574, 581 (D.N.J. Mar. 21, 2002). "The question is whether there can be *any* effective relief." *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000); *Brother v. CPL Invts., Inc.*, 317 F. Supp. 2d 1358, 1372 (S.D. Fla. Mar. 22, 2004) (Martinez, J.) ("An issue is moot when actions subsequent to the commencement of a lawsuit create an environment in which the Court can no longer give meaningful relief."). "[*P*]*art* or all of a case may become moot if (1) 'subsequent events [have] made it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur,' and (2) 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1130 (C.D. Cal. Oct. 31, 2005) (Snyder, J.) (citations omitted) (emphasis added).

Mootness is a jurisdictional defect that can be raised at any time by the parties or the court sua sponte. *Barilla v. Ervin*, 886 F.2d 1514, 1519 (9th Cir. 1989) ("this court cannot be divested of its obligation to consider the issue of mootness on the grounds that the timing or manner in which a party has raised the issue is somehow procedurally improper").

Generally, a defendant's remedial efforts will render a plaintiff's ADA claim for injunctive relief moot. *See, e.g.*, *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1286 (11th Cir. 2004) (holding that a defendant County's subsequent voluntary installation of audio devices in all voting precincts rendered the ADA class action by visually-impaired registered voters moot); *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1131 (C.D. Cal. Oct. 31, 2005) (Snyder, J.) (holding that the plaintiff's ADA claim to install grab bars in the women's restroom was moot); *Brother v. CPL Invts., Inc.*, 317 F. Supp. 2d 1358, 1372 (S.D. Fla. Mar. 22, 2004) (Martinez, J.) (holding that a hotel's modifications made after it was notified of alleged barriers via the ADA lawsuit rendered the claims moot); *Pickern v. Best Western Timber Cove Lodge Marina Resort*, 194 F. Supp. 2d 1128, 1130 (E.D. Cal. Apr. 1, 2002) (Shubb, J.) ("Plaintiff concedes, as she must, that defendants' latest remedial efforts have rendered her ADA claim for injunctive relief moot."); *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1087 (D. Haw. 2000) (dismissing plaintiff's ADA claims predicated on alleged violations that

had been corrected as moot); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 771 (D. Or. 1997) ("If plaintiffs already have received everything to which they would be entitled, i.e., the challenged conditions have been remedied, then these particular claims are moot absent any basis for concluding that these plaintiffs will again be subjected to the same alleged wrongful conduct by this defendant."). In *Hickman v. State of Missouri*, 144 F.3d 1141 (8th Cir. 1998), the Eighth Circuit held that an ADA action brought by state prison inmates against state and various governmental entities was moot notwithstanding the voluntary cessation of illegal conduct doctrine. The Eighth Circuit noted that the "*defendants' compliance with the ADA, including structural changes* such as installation of ramps, pull and grab bars, and chair lifts, is *far 'more than a mere voluntary cessation of alleged illegal conduct*, where we would leave [t]he defendant[s] . . . free to return to [their] old ways.'" *Id.* at 1144 (emphasis added). The Eighth Circuit also held that in federal courts, there is no public interest exception to mootness. *Id.* ("'[A]lthough state law may save [a] case from mootness based on public interest, federal courts require litigants' rights be affected.'") (citation omitted).

"Monetary relief is not an option for private individuals under Title III of the ADA." *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000). "As a result, a plaintiff who files an ADA claim can at most hope to improve access through an injunction." *Id.*; 42 U.S.C. § 12188(a)(1). In addition, the prospect of attorneys fees does not affect whether the underlying claim is justiciable. *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1269 (10th Cir. 2004). As the Supreme Court has stated, the "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

"'A claim for equitable relief is moot 'absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again.'" *Ostendorf v. Dawson County Corrections Bd.*, No. 4:98CV3038, 2002 WL 31085085, at *6 (D. Neb. Sept. 18, 2002) (citation omitted).

Here, Taco Bell has taken significant steps to ensure that plaintiffs will not suffer any future alleged disability discrimination relating to door opening force. Taco Bell has replaced door closers

with compliant ADA door closers at 95 California company-owned stores.[19] (Ford Decl. ¶¶ 6-70; Kane Decl. ¶¶ 6-39.) Taco Bell has expressed its intent via a sworn declaration to replace additional door closers at additional remaining stores in the very near future. (De Bella Decl. ¶¶ 4-5.) Effective April 6, 2007, Taco Bell shall implement a policy to inspect on a quarterly basis door opening force for all exterior and interior doors at all California company-owned stores and to maintain or adjust force if such inspections reveal a noncompliant force. (Harkins Decl. ¶¶ 2-3 Exs. 1-2.) Unless plaintiffs can come forward with admissible evidence creating a reasonable expectation that Taco Bell's expressed intent is disingenuous and that its purported actions are always so short as to evade review,[20] plaintiffs' ADA claim regarding door opening force is moot. *Brewer v. Wisconsin Bd. of Bar Examiners*, 2007 WL 527484, at *4-*5 (E.D. Wis. Feb. 14, 2007) ("It is no secret that defendants are interested in ending this litigation, but neither the timing of defendants' offer nor the fact that it might work a benefit in their favor (i.e., result in dismissal of this case) suggests the offer itself is disingenuous."). Simply put, the Court can no longer give meaningful relief. *Brother*, 317 F. Supp. 2d at 1372. This is not the exceptional case warranting application of the "capable of repetition, yet evading review" exception to the mootness doctrine. *Medical Society*, 191 F. Supp. 2d at 581 (holding that it was the plaintiff's burden to demonstrate that the challenged action was in its duration too short to be fully litigated prior to its cessation and that there is a reasonable likelihood that the same complaining party would be subjected to the same action again). At minimum, Taco Bell has created a genuine issue of material fact

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[19] To date, door closers have been replaced at store numbers 99, 283, 757, 829, 955, 1934, 2700, 2423, 2915, 2930, 3053, 3064, 3071, 3079, 3112, 3117, 3145, 3152, 3579, 4168, 4325, 4466, 4510, 4558, 4578, 4661, 4704, 4862, 4951, 5019, 5081, 5223, 5512, 5513, 5636, 5641, 9414, 9427, 9489, 15362, 15455, 15507, 15508, 15570, 15573, 15625, 15723, 16276, 16336, 16381, 16520, 16534, 16812, 16819, 17243, 17363, 17435, 17471, 17473, 17556, 17572, 17751, 17984, 18003, 18112, 18315, 18577, 18687, 18808, 19289, 19298, 19344, 19413, 19591, 19744, 19950, 20052, 20175, 20180, 20190, 20204, 20241, 20353, 20566, 20578, 20646, 20676, 20893, 21000, 21047, 21220, 21226, 21261, 21295, 21453.

[20] In *Spencer v. Kemna*, 523 U.S. 1 (1998), the Supreme Court held that the capable of repetition, yet evading review exception to the mootness doctrine applies only in "exceptional situations" in which the two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Id.* at 17; *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (holding that under the voluntary cessation doctrine, a case becomes moot if (1) there is no *reasonable* expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation).

as to whether plaintiffs have a reasonable expectation that they will be subject to future alleged disability discrimination.

B. Plaintiffs Have Failed to Satisfy Their Prima Facie Burden of Proof as to Queue Lines.

1. Taco Bell Has Provided Equivalent Facilitation in the Form of Customer Service as to Its Queue Lines.

Even if Title 24 standards are deemed to be applicable, both the federal DOJ Standards and Title 24 both allow for equivalent facilitation as the basis for departing from particular technical and scoping requirements. The DOJ Standards provide, "Departures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." (DOJ Standards, 2.2.)

Taco Bell has an effective customer assistance policy that provides mobility-impaired patrons with the effective opportunity to order via the auxiliary access lane instead of via the queue line. (Blackseth Decl. ¶ 9; Harkins Decl. ¶¶ 4-7.) They are, however, expected to wait and place their order after the person ahead of them in the queue line has been served first, which allows them to avoid resentment or hostility from able-bodied customers waiting in the queue line. This presents the least risk of harm, injury, or other hazard to the disabled person. Contrary to plaintiffs' bald allegation, Taco Bell's expert witness, Kim R. Blackseth, who is mobility-impaired and a former Commissioner of the California Building Standards Commission, which is responsible for updating and approving Title 24, the California Building Code, has averred that he has been the beneficiary of such policy and was not at all offended by such policy. (Blackseth Decl. ¶ 9.) Thus, at minimum, Taco Bell has created a genuine issue of material fact as to each of the queue lines at issue in the instant Motion. Indeed, Taco Bell has a general customer service policy designed for store employees to provide assistance to any Taco Bell customer. (Harkins Decl. ¶¶ 4-5 Exs. 3-6.) In addition, Taco Bell intends to soon install indoor signage communicating such policy expressly to all of its customers. Such signage is very similar to signage that plaintiffs' counsel agreed to as part of a recent ADA class action settlement with Kmart and constitutes an alternative approach. (Harkins Decl. ¶ 7 Ex. 6; Hikida Decl. ¶ 3); *Colorado Cross-Disability Coalition v. Too (Delaware), Inc.*, 344 F. Supp. 2d 707, 714 (D. Colo. 2004) (applying the

customer service defense and noting that if the plaintiffs' access to merchandise was obstructed by moveable display units, they could ask for help from salespeople).

Given that the measurements of the queue lines taken by the Special Master do not address whether disabled patrons received substantially equivalent access to the stores with queue lines, plaintiffs' Motion should be denied.

2. The Queue Line Claims Are Moot.

Taco Bell has removed queue lines at 46 stores and modified them at 10 additional California company-owned stores. (Ford Decl. ¶¶ 6-70; Kane Decl. ¶¶ 6-39.) Taco Bell has expressed its intent via a sworn declaration to remove additional queue lines at additional remaining stores. (De Bella Decl. ¶¶ 6-7.) Unless plaintiffs can come forward with admissible evidence creating a reasonable expectation that Taco Bell's expressed intent is disingenuous and that its purported actions are always so short as to evade review,[21] plaintiffs' ADA claim regarding queue lines is moot.

C. Plaintiffs Have Failed to Satisfy Their Burden of Proof as to Accessible Indoor Seating.

1. The Indoor Accessible Seating Claims Are Moot.

Taco Bell has either added additional indoor accessible seating at 31 stores or modified the existing accessible seating to ensure ADA compliance at 40 California company-owned stores.[22] (Ford Decl. ¶¶ 6-70; Kane Decl. ¶¶ 6-39.) Unless plaintiffs can come forward with admissible evidence creating a reasonable expectation that Taco Bell's expressed intent to serve all of its customers regardless of physical disability, (Harkins Decl. ¶ 5), is disingenuous and that its purported actions are always so short as to evade review,[23] plaintiffs' ADA claim regarding indoor accessible seating is

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[21] In *Spencer v. Kemna*, 523 U.S. 1 (1998), the Supreme Court held that the capable of repetition, yet evading review exception to the mootness doctrine applies only in "exceptional situations" in which the two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Id.* at 17; *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (holding that under the voluntary cessation doctrine, a case becomes moot if (1) there is no *reasonable* expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation).

[22] Plaintiffs do not request additional seating for store number 19950, but nevertheless make reference to store number 19950 in Exhibit 6, pertaining to the number of accessible indoor seats.

[23] In *Spencer v. Kemna*, 523 U.S. 1 (1998), the Supreme Court held that the capable of repetition, yet evading review exception to the mootness doctrine applies only in "exceptional situations" in which the two circumstances are simultaneously present: (1) the challenged action is in its duration too short

moot.[24]

2. There Is No Centerline Measurement for Accessible Seating.

Taco Bell's position is that there is no requirement that the table top at an indoor accessible seating position needs to be measured from its centerline with respect to the 30" knee space width requirement specified in the ADAAG. (DOJ Standards, 4.32.3.)

For stores in which the Special Master determined that there was noncompliant knee space, Taco Bell seeks clarification from the Special Master as to whether the Special Master measured from the centerline of table tops or from some other measurement location. For example, at store number 2910, Taco Bell seeks clarification as to whether the Special Master measured from the centerline of the table top depicted in photo #47. Taco Bell submits that there is nothing in the ADAAG that requires knee space to be centered on the table top or that the table top itself be at least 30" wide. Indeed, Taco Bell's expert witness confirms that there is no centerline measurement required. (Blackseth Decl. ¶ 13.) Without clarification from the Special Master as to whether he measured the length of the table top or the knee space underneath it or whether he measured from its centerline, Taco Bell submits that it cannot fully respond to the instant Motion regarding the width of knee space measurements taken by the Special Master and requests a Rule 56(f) continuance based thereon so that the parties may receive clarification from the Special Master.

DATED: March 23, 2007 GREENBERG TRAURIG, LLP

By /S/
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[24] For accessible indoor seating, it is worth noting that notwithstanding the demands made by plaintiffs via their Meet and Confer Charts in April through June of 2006, plaintiffs request less accessible seating following the January 2007 joint submission.