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

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02 5849 PJH JL

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT OF TACO BELL CORP.

Hearing Date: October 29, 2008
Hearing Time: 9:00 a.m.

Honorable Phyllis J. Hamilton
Courtroom 3, 17th Floor

Plaintiffs hereby submit their Brief in Opposition to Motion for Partial Summary Judgment of Taco Bell Corp.

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NOTICE

On October 29, 2008, at 9:00 a.m., or as soon thereafter as the Motion for Partial Summary Judgment of Taco Bell Corp. ("Defendant's Motion") may be heard, before the Honorable Phyllis J. Hamilton, Plaintiffs will, and hereby do, move for an order denying Defendant's Motion.

ISSUES TO BE DECIDED

What impact, if any, the Ninth Circuit's decision in *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) -- which addressed the statute of limitations on certain claims brought under the Fair Housing Act, 42 U.S.C. § 3601 *et seq*. -- has on Plaintiffs' claims brought under the new construction and alteration provisions of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*[1]

Although the Court limited the scope of Defendant's Motion to the issue of the statute of limitations,[2] Defendant went well beyond this by arguing -- in footnote 8 of its Memorandum of Points and Authorities ("Opening Brief" or "Opening Br.") -- that it is not responsible for violations of the ADA requirements governing new construction in restaurants built by third parties and subsequently acquired by Defendant. This argument is completely unrelated to the statute of limitations. Although Plaintiffs respond to this argument below, they object to Defendant's Opening Brief to the extent that it asserts facts or arguments beyond the scope permitted by the Court.

SUMMARY OF ARGUMENT

The Ninth Circuit in *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136-37 (9th Cir. 2002) -- a case not mentioned in Defendant's Opening Brief -- addressed the precise

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[1] Defendant's argument based on *Garcia* is relevant only to Plaintiffs' claims under the new construction and alteration provisions of the ADA. This argument is irrelevant to Defendant's obligation to comply with the new construction and alterations provisions of state law, Cal. Code Regs. tit. 24, or to its obligation under the ADA to make its stores accessible where it is readily achievable to do so. 42 U.S.C. § 12182(b)(2)(A)(iv).

[2] *See* Case Management and Scheduling Order at 1 (docket no. 386, June 27, 2008).

issue before this Court and requires denial of Defendant's Motion. *Pickern* held that the continuing violation doctrine applies to claims brought under Title III of the ADA, and thus "when a plaintiff who is disabled . . . has actual knowledge of illegal barriers at a public accommodation to which he or she desires access [and] seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief . . . by the statute of limitations . . ." *Id.* at 1135. The *Pickern* decision was based on the clear language of the enforcement provision of Title III, providing a cause of action to "any person who *is being subjected to* discrimination on the basis of disability in violation of this subchapter." 42 U.S.C. § 12188(a)(1) (emphasis added), *cited in Pickern*, 293 F.3d at 1136.

In *Garcia*, in contrast, the Ninth Circuit construed the Fair Housing Act, which uses statutory language materially different than the ADA. Based on the language of the Fair Housing Act, the court held that the continuing violation doctrine does not apply to accessibility claims brought under that statute. *Garcia*, 526 F.3d at 461.

Garcia does not purport to limit or modify *Pickern* -- indeed, the decisions are entirely consistent. In both cases, the Ninth Circuit analyzed the language of the statutes to determine whether the continuing violation doctrine applied. The different results reached in the two cases simply reflect the fact that the two statutes use very different language. Further, even assuming *arguendo* that *Garcia* casts doubt on *Pickern*, a district court is obligated to follow *Pickern* until it is expressly overruled by the Ninth Circuit.

Finally, Defendant argues in footnote 8 that it is not liable for violations of the ADA's new construction provisions in restaurants constructed by third parties and subsequently acquired by Defendant. This argument should be rejected because: (1) it exceeds the scope of the motion permitted by this Court, which is limited to the impact (if any) of *Garcia* on Plaintiffs' ADA claims; (2) it rests on assertions of fact that are demonstrably misleading, incorrect or disputed; and (3) as a matter of law, Defendant is liable for violations of the ADA's new construction provisions in restaurants it acquires from others.

FACTS

On page three and footnotes two and three of its Opening Brief, Defendant makes a number of misleading, incorrect and/or disputed factual assertions concerning (i) the construction dates of thirteen restaurants, and (ii) whether certain of its restaurants were constructed by third parties. It is not clear why Defendant did this, as these factual assertions are not necessary to decide the purely legal question of whether the analysis of the Fair Housing Act set forth in *Garcia* applies to Title III of the ADA. Nevertheless, Plaintiffs below and in the Declaration of Timothy P. Fox in Opposition to Motion for Partial Summary Judgment of Taco Bell Corp. ("Fox Declaration" or "Fox Decl.") respond to these inaccurate factual assertions.

I. Incorrect, Misleading or Disputed Factual Assertions Concerning the Construction Dates of Restaurants.

On page three of its Opening Brief, Defendant contends that thirteen restaurants that Plaintiffs assert were constructed after January 26, 1993, and thus must comply with the ADA's new construction provisions, were actually constructed before that date.[3] It does not explain the relevance of this contention to the issue of whether the *Garcia* analysis applies here. In any event, Defendant's contention that the restaurants were built before January 26, 1993 is directly contradicted by its own interrogatory responses, stipulations and documents.

Early in the case, Defendant responded to an interrogatory with a list of its California restaurants that provided, for many, the "date of construction for first occupancy" and the "date the restaurant became a Taco Bell operated restaurant." (*See* Fox Decl. ¶ 7, Ex. 1 at 4 and Attachment A thereto at 18-25.) Later, the parties entered a series of stipulations as to the construction dates of most of the restaurants at issue. (Fox Decl. ¶ 5 & Exs. 2-5.) For every one of the thirteen restaurants that Defendant now contends was built before January 26, 1993, it earlier stipulated to have been built after that time. (*See* Fox Decl. at ¶ 12 & Exs. 2-5.)

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[3] These are restaurants 124, 459, 1934, 3049, 3053, 3079, 3083, 3112, 3117, 3136, 3137, 3145 and 3152.

In support of its assertion that these restaurants were built before January 26, 1993, Defendant provides documentation showing that each restaurant was in operation in the 1970s or 1980s. (Decl. of Steve Elmer in Supp. of Taco Bell Corp.'s Motion. for Partial Summ. J. ("Elmer Decl.") ¶ 3, Exs. 7-18 thereto (dock. no. 404-2 filed Sept. 3, 2008).) However, Defendant's own documents -- which it did not provide the Court -- demonstrate that after January 26, 1993, it demolished and re-built each of these restaurants. (*See* Fox Decl. ¶ 12 and Exs. 2-8, 12-14, 20-44.)

For example, restaurant 3117 was initially constructed in the early 1970s, and to establish this, Defendant submits a Notice of Sublease of Real Property from 1973 for that restaurant (as well as a subsequent document referencing that Notice of Sublease). (*See* Elmer Decl. ¶ 3 & Ex. 14 thereto.) On that basis, Defendant contends that restaurant 3117 was constructed before January 26, 1993. (Opening Br. at 3.) Defendant, however, does not inform the Court that in 1998, it tore down that restaurant, and built a new restaurant in its place. This is demonstrated by: (1) Defendant's stipulation that restaurant 3117 was constructed in 1998;[4] (2) Defendant's interrogatory responses, stating that restaurant 3117 first opened in 1998;[5] (3) an October 1997 contract between Defendant and a contractor for the construction of a Taco Bell restaurant;[6] (4) a building permit dated October 1, 1997 for "new restaurant (Taco Bell)";[7] (5) a February 1998 certificate of occupancy for this restaurant;[8] and (6) a Taco Bell document entitled "New Construction Final Inspection" that states that the "Date Opened" for this restaurant was February 5, 1998.[9]

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[4] *See* Fox Decl. at ¶ 12(I) & Ex. 3 p. 31.

[5] Ex. 1 to Fox Decl. at 20.

[6] Ex. 31 to Fox Decl. at 84 ¶ 1.

[7] Ex. 32 to Fox Decl. at 88.

[8] Ex. 33 to Fox Decl.

[9] Ex. 34 to Fox Decl.

As set forth in the Fox Declaration, Defendant's assertions concerning the construction dates of the remaining twelve restaurants suffer from similar deficiencies. (*See* Fox Decl. ¶ 12 and Exs. 2-8, 12-14, 20-44.)

II. Irrelevant, Incorrect and Disputed Factual Assertions Concerning Prior Ownership of the Restaurants at Issue.

In footnote 8 of its Opening Brief, based only on a Florida district court decision, Defendant makes an argument completely unrelated to *Garcia* or to the statute of limitations -- Defendant asserts that it is not liable under Title III's new construction provisions for restaurants that were built by a third party and subsequently acquired by Defendant. (Opening Br. at 14-15 n.8.) To support this argument, Defendant asserts that seventeen restaurants at issue may have been built after January 26, 1993, but were built by third parties, and thus should be considered "existing facilities" subject to the ADA's readily achievable provisions regardless of when they were actually built.[10] Defendant is simply incorrect -- the evidence demonstrates that it did construct many of the restaurants it now claims it did not.

First, Defendant's argument is based on its factual assertion that the first time it had anything to do with these restaurants was when it acquired them from third parties on the dates set forth in the Elmer Declaration and exhibits, and thus these restaurants were "presumably" built by these third parties. (*See* Opening Br. at 3.) With respect to thirteen of these seventeen restaurants, however, Defendant stated in its interrogatory responses that it operated the restaurants before the date it acquired the restaurants from third parties. (*See* Fox Decl. at ¶¶ 16(d) - (o), (q) & Ex. 1.) In many cases, the evidence demonstrates that Defendant constructed the restaurants, transferred the restaurants to a third party, then later re-acquired the

[10] *See* Opening Br. at 3 & n. 2. In footnote 3, Defendant identifies 46 additional restaurants that both parties agree were built before January 26, 1993 and thus both parties agree are "existing facilities" under the ADA. These restaurants are: 158, 176, 567, 1034, 1496, 2241, 2297, 2423, 2755, 2756, 2812, 2848, 2861, 2910, 2914, 2915, 2933, 2961, 2971, 3027, 3046, 3064, 3070, 3071, 3077, 3078, 3089, 3090, 3096, 3119, 3125, 3128, 3129, 3130, 3132, 3160, 3207, 3208, 3241, 3390, 3398, 3420, 3471, 3473, 4168, and 4204. *See* Fox Decl. at ¶ 17-18.

restaurant from the third party. In its Opening Brief, it submits evidence of the re-acquisition of the restaurants, but does not inform the Court that it initially constructed the restaurants.

For example, Defendant asserts that it acquired thirteen restaurants from Golden West Tacos ("Golden West") in 2001. (Elmer Decl. ¶ 5, Ex. 22 thereto.) On this basis, Defendant claims that these restaurants were "presumably constructed" by Golden West. (Opening Br. at 3.) Defendant's own documents -- not provided to the Court -- demonstrate that several years before the 2001 transaction, Defendant constructed these restaurants, transferred them to Golden West, and then re-acquired them from Golden West in 2001. (*See* Fox Decl. at ¶¶ 16(d) - (o), (q) & Exs. 1, 46-53, 56-58.) This, of course, refutes Defendant's claim that Golden West "presumably" constructed these restaurants.

In addition, Defendant's evidence that an additional three of the seventeen restaurants were operated by third parties pre-dates Defendant's demolition and re-construction of those restaurants. (*See* Fox Decl. at ¶¶ 16(a)-(c) & Exs. 2-4, 9-11, 15-19.). For example, based on documents from the 1970s, Defendant claims that restaurant 3007 was constructed and operated by a third party before January 26, 1993. (*See* Elmer Decl. ¶ 4 & Ex. 21.) While it is true that an old version of this restaurant was operated by a third party in the 1970s, according to documents produced in this litigation but not submitted by Defendant, it demolished and rebuilt this restaurant in or about 2002. (*See* Fox Decl. at ¶ 16(c) and Exs. 2, 17-19.)

ARGUMENT

Defendant's Motion should be denied because: (1) the Ninth Circuit, in *Pickern*, held that the continuing violation doctrine applies to claims brought under Title III of the ADA, and *Garcia* does not explicitly or implicitly modify the holding in *Pickern*; and (2) Defendant's argument that it is not liable for violations of the ADA's new construction provisions in restaurants that it has acquired from third parties is beyond the scope of the motion permitted by this Court, is based on inaccurate and disputed facts, and is wrong as a matter of law.

I. Defendant's Statute of Limitations Argument Should Be Rejected.

Defendant's statute of limitations argument fails because: (1) the Ninth Circuit in *Pickern* has already held that the continuing violation doctrine applies to claims brought under Title III of the ADA;[11] (2) the holdings in *Pickern* and *Garcia* are entirely consistent; and (3) under *stare decisis*, even assuming *arguendo* that *Garcia* raises doubts about the holding in *Pickern*, because *Garcia* does not expressly overrule *Pickern*, that decision remains binding on lower courts.

A. The Ninth Circuit's Decision in *Pickern* Resolves The Issue Before This Court: The Continuing Violation Doctrine Applies To Claims Under Title III And Thus Plaintiffs' Claims Are Not Time Barred.

In *Pickern*, an individual who used a wheelchair brought suit under Title III of the ADA against the owner and operator of a chain of supermarkets. 293 F.3d at 1135. The lower court held that the applicable statute of limitations on the plaintiff's ADA claim was one year, and because he had waited more than a year to file his complaint after he first became aware of barriers in the stores, his claims were barred by the statute of limitations. *Id.* at 1136.

On appeal, the Ninth Circuit reversed. The court based its decision on the language of 42 U.S.C. § 12188(a)(1), the enforcement provision of Title III, which provides in relevant part that injunctive relief is available to "any person who *is being subjected to* discrimination on the basis of disability" or who has "reasonable grounds for believing that such person *is about to be subjected to* discrimination." *Pickern*, 293 F.3d at 1136 (quoting § 12188(a)(1)) (emphasis in original). Based on this statutory language, the court held:

> By employing the phrases "is being subjected to" and "is about to be subjected to," the statute makes clear that either a continuing or a threatened violation of the ADA is an injury within the meaning of the Act. A plaintiff is therefore entitled to injunctive relief to stop or to prevent such injury.
>
> . . .

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[11] The parties agree that California's personal injury statute of limitations applies to Plaintiffs' ADA claims. However, although California law determines the length of the limitations period, federal law determines whether the continuing violation doctrine applies to Plaintiffs' ADA claims. *See Chung v. Pomona Valley Cmty. Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982).

> Thus, under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury. So long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues.
>
> A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury. [Plaintiff] states that he is currently aware of barriers to access that now exist at the Paradise store, and that these barriers currently deter him. Indeed, he states that the barriers deterred him from entering the store just before filing suit, when he needed something from the store and was obliged to remain in the parking lot. [Plaintiff's] suit for injunctive relief is therefore not time-barred.

Id. at 1136-37 (citations omitted). The court broadly held that "that when a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access [and] seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief either by the statute of limitations or by lack of standing." *Id.* at 1135; *see also Stringer v. White*, NO. C-07-5516 SI, 2008 WL 344215, at *6 (N.D. Cal. Feb. 6, 2008) ("The phrases 'is being subjected to' and 'is about to be subjected to,' makes clear that either a continuing or a threatened violation of the ADA is an injury within the meaning of the Act.").

Pickern addressed and rejected the precise argument made by Defendant here. Like the defendant in *Pickern*, Defendant argues that because the named plaintiffs knew of the accessibility barriers at Taco Bell restaurants outside of the statute of limitations, their claims are barred. (*See* Opening Br. at 15.) For the reasons set forth in *Pickern*, this argument fails.

B. The *Garcia* Decision Is Entirely Consistent With *Pickern*.

In *Garcia*, the Ninth Circuit, based on the statutory language of the Fair Housing Act, held that the continuing violation doctrine does not apply to certain claims brought under that statute. The decisions in *Pickern* and *Garcia* are entirely consistent.

1. The Analysis Of The Statute of Limitations Must Focus on the Language of the Statute.

Before turning to *Garcia*, it is important to understand how the Supreme Court has instructed courts to analyze statutes of limitation.

The Court spoke to this issue in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and *Ledbetter v. Goodyear Tire & Rubber Co.,* 127 S. Ct. 2162 (2007). Both cases addressed whether the plaintiffs' employment discrimination claims were barred under the enforcement provision of Title VII, which provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged *unlawful employment practice occurred*." 42 U.S.C. § 2000e-5(e)(1) (emphasis added).

The Court in both cases recognized that the analysis must focus on the language of the enforcement provision. *See Morgan*, 536 U.S. at 109 (Holding that the "most salient source for guidance is the statutory text."); *Ledbetter*, 127 S. Ct. at 2177 (Holding that in addressing the statute of limitations, "[w]e apply the statute as written . . ."). Based on the language found in section 2000e-5(e)(1) emphasized above, the Court held that "[t]he critical questions . . . are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Morgan*, 536 U.S. at 110.

To determine what constituted an "unlawful employment practice," the Court turned to 42 U.S.C. § 2000e-2, which specifically identified the "unlawful employment practices" prohibited by Title VII. *Morgan*, 536 U.S. at 111; *Ledbetter*, 127 S. Ct. at 2166. The Court found that what constituted an "unlawful employment practice" varied based on the type of discrimination alleged. For example, discrete acts such as termination, failure to promote, refusal to hire, or discriminatory pay decisions each constitute a separate actionable "unlawful employment practice," and thus a charge must be filed within the specified time period after each such act. *See Morgan*, 536 U.S. at 114; *Ledbetter*, 127 S. Ct. at 2171-72. Hostile environment claims, on the other hand, "are different in kind from discrete acts. Their very nature involves repeated conduct." *Morgan*, 536 U.S. at 115. As a result, "[p]rovided that an act contributing to the [hostile environment] claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.* at 117.

Of import here is that in both *Morgan* and *Ledbetter*, the Court employed a two-step process: First, it analyzed the language of section 2000e-5(e)(1), the enforcement provision of Title VII. Second, because that provision explicitly triggered the statute of limitations on the occurrence of an "unlawful employment practice," the Court turned to section 2000e-2 to determine what constituted an unlawful employment practice.

2. The *Garcia* Decision.

Garcia involved an appeal of two consolidated actions, in which persons with disabilities brought suit based on violations of the provisions of the Fair Housing Act requiring certain multifamily housing to be accessible. 526 F.3d at 459-60. By the time the case reached the Ninth Circuit, the only defendants consisted of the entities that had designed and constructed the apartment buildings, which had been completed well outside of the statute of limitations. *Id.* The appellees had no on-going role in the buildings. They thus argued that the plaintiffs' claims were time barred. *Id.* at 460.

As required by *Morgan* and *Ledbetter*, the Ninth Circuit first analyzed the language of the enforcement provision of the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), which provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." *Garcia*, 526 F.3d at 460-61. Thus just as the statute of limitations in Title VII was triggered by the occurrence of an unlawful employment practice, the statute of limitations in the Fair Housing Act was triggered by the occurrence or termination of a discriminatory housing practice.

To determine what constitutes a discriminatory housing practice, the Ninth Circuit -- consistent with the approach taken in *Morgan* and *Ledbetter* -- turned to 42 U.S.C. § 3604, which identified the housing practices prohibited by the Fair Housing Act. *Id.* at 461. The discriminatory practice at issue in *Garcia* was a failure to design and construct a multifamily dwelling according to Fair Housing Act standards. *Id.* The court held that this practice "terminated" -- thus commencing the limitations period set forth in section 3613(a)(1)(A) -- at

the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued. *Id.*

3. *Pickern* and *Garcia* are in Harmony.

Consistent with the Court's approach in *Morgan* and *Ledbetter*, the Ninth Circuit in both *Pickern* and *Garcia* based its analysis on the statutory language of the enforcement provisions of Title III and the Fair Housing Act, respectively, which is the "most salient source for guidance." *See Morgan*, 536 U.S. at 109. The fact that the *Garcia* court determined that the continuing violation doctrine did not apply under the Fair Housing Act, while the *Pickern* court held that the continuing violation doctrine did apply under Title III of the ADA, simply results from the material difference in the language of the enforcement provisions of these two statutes.

As set forth above, the Fair Housing Act explicitly provides that an action must be commenced "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice," which the Ninth Circuit concluded meant that a design and construct case must be brought within two years of the date the last certificate of occupancy was issued. *Garcia*, 526 F.3d at 466.

In contrast, the enforcement provision of Title III provides that an action may be commenced by a person with a disability who "is being subjected to discrimination" or who has reasonable grounds for believing that she is "about to be subjected to discrimination." 42 U.S.C. § 12188(a)(1). The Ninth Circuit concluded that this language "makes clear that either a continuing or a threatened violation of the ADA is an injury within the meaning of the Act." *Pickern*, 293 F.3d at 1136.

Thus the Ninth Circuit in both *Pickern* and *Garcia* used the analysis required by the Supreme Court. The difference in the results of the two cases simply stems from the differences in the statutory language at issue in the cases.

This was the conclusion reached in *United States v. Pacific Northwest Electric, Inc.*, No. CV-01-019-S-BLW, 2003 WL 24573548, *1 (D. Idaho Mar. 21, 2003), in which persons

with disabilities brought suit for violations of the design and construct provisions of the Fair Housing Act. Citing *Pickern*, the plaintiffs argued that the continuing violation doctrine applied, and thus their claims were not barred by the statute of limitations. The court found that the *Pickern* decision turned on the fact that the ADA provides injunctive relief to any person who "is being subjected to," or who "is about to be subjected to," discrimination. *Id.* at *4. The court held that because the Fair Housing Act provision at issue did not use this language, the continuing violation doctrine did not apply. *Id.* This decision further demonstrates that the difference in statutory language between the ADA and Fair Housing Act harmonizes the different results reached in *Pickern* and *Garcia*.

4. Defendant Erroneously Focuses On Title III's "Design and Construct" Language, Ignoring Its Enforcement Provision.

In its Opening Brief, Defendant argues that the *Garcia* interpretation of the Fair Housing Act should be applied to Title III of the ADA because both statutes "use the same language to describe a discriminatory act"[12] -- that is, a failure to design and construct in compliance with accessibility standards. Defendant, however, ignores the very different enforcement provisions of the two statutes. This is contrary to the analysis conducted in *Morgan*, *Ledbetter*, *Garcia* and *Pickern*. In every one of those cases, the courts began their analysis with the text of the enforcement provisions of the statutes at issue. In *Morgan*, *Ledbetter* and *Garcia*, the enforcement provisions had limitations periods triggered by a discriminatory act, and thus the reason these cases discuss other provisions defining discrimination -- such as a failure to design and construct in compliance with accessibility standards -- is to determine what constitutes a discriminatory act triggering the limitations period. The enforcement provision of Title III, however, does not set a limitations period that commences with a discriminatory act. Rather, it allows an action to be brought by anyone who "is" experiencing discrimination. 42 U.S.C. § 12188(a)(1).

[12] Opening Br. at 13-14.

5. The ADA and the Fair Housing Act are Significantly Different in Several Other Respects.

In addition to the material differences between the enforcement provisions of the Fair Housing Act and ADA, there are several other differences that explain the holdings of *Pickern* and *Garcia*.

a. Defendant Has Owned and/or Operated All of the Restaurants at Issue within the Limitations Period.

By the time *Garcia* reached the Ninth Circuit, the only remaining defendants consisted of the entities that had designed and constructed the apartment buildings, which had been completed well outside of the statute of limitations. *See Garcia*, 526 F.3d at 459-60. The defendants were not the current owners or operators of the buildings. The court expressed concern that applying the continuing violation doctrine would leave these and similar defendants "on the hook years after they cease having any association with a building. . ." *Id.* at 463. Here, Defendant has owned and/or operated every restaurant at issue within the limitations period.

A similar issue was considered in *Kuchmas v. Towson University*, 553 F. Supp. 2d 556 (D. Md. 2008), in which persons with disabilities brought suit against the architects and current operators of a residential hall used for student housing. The court had previously dismissed the claims against architects as time barred on the identical basis as *Garcia* -- that with respect to the architects, the statute of limitations began to run when the building was constructed, and the continuing violation doctrine did not apply to these defendants. *See Id.* at 562.

The current operators then moved for summary judgment on the ground that the plaintiffs' claims against them were also time barred. The court rejected this argument:

> Unlike PGAL Architects, which took no action after it designed Millennium Hall sometime in 1999-2000, the current Defendants . . . continue to be involved in the leasing of noncompliant apartments. Thus, even if the true cause of the noncompliance was mere neglect or oversight during the design and construction phases, the remaining Defendants continue to benefit from that oversight by renting inaccessible units while PGAL Architects ceased all involvement with the building in 2000.

Id. at 562-63 (footnote omitted).[13]

b. The ADA, Unlike the Fair Housing Act, Contains a Continuing Obligation to Maintain Access.

The ADA regulations -- in contrast to the Fair Housing Act -- contain a provision requiring the maintenance of accessible features. The standard of accessibility for new construction and alterations is "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a)(1) - (2). The regulations require that "[a] public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." 28 C.F.R. § 36.211(a). This continuing obligation further supports application of the continuing violation doctrine to Title III claims.

c. The Requirements of the ADA Result in Trials Long After Restaurants are Constructed.

Defendant asserts that as a matter of public policy, Plaintiffs' new construction claims should be time barred because one of its employees has passed away and others are "no longer available to testify" because they no longer work for Defendant. (Opening Br. at 6, 16.) As an initial matter, and as Defendant notes in a parenthetical, former employees can be subpoenaed. (*Id.*) In addition, Defendant does not explain what evidence relevant to the new construction provision -- consisting of the date of construction, and whether compliance was impossible based on the stringent "structural impossibility" standard[14] -- could be obtained uniquely from these witnesses that is not available through other witnesses and/or documents.

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[13] For similar reasons, Defendant's reliance on *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622 (D. Md. 2002) is misplaced. (Opening Br. at 17-18.) The court in *Speciner* held that certain claims under the alterations standard of the ADA were time barred. *Id.* at 634. A subsequent decision by the same court, however, found that *Speciner* did not apply where, as here, ADA violations continued into the limitations period. *See Kuchmas v. Towson University*, 553 F. Supp. 2d 556, 564 (D. Md. 2008) (Holding *Speciner* inapplicable where ADA claims are based on "the *continued* inaccessibility"of an element.).

[14] 42 U.S.C. § 12183(a)(1). The structural impracticability defense is unlikely to apply to a Taco Bell restaurant; it applies "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. § 36.401(c)(1).

Further, even assuming *arguendo* that Plaintiffs' claims under the ADA's new construction provisions were time barred, those claims would still go forward under the ADA's readily achievable provisions, which do not exist under the Fair Housing Act. Thus a finding that Plaintiffs' new construction claims are time barred would do nothing to alleviate Defendant's perceived witness problems.

C. Even If *Garcia* And *Pickern* Conflict, *Pickern* is Binding Precedent With Respect to Title III Claims.

Assuming *arguendo* that *Pickern* conflicts with *Garcia*, a district court is obligated under the doctrine of *stare decisis* to follow *Pickern* unless it is "expressly overruled" by *Garcia*. *See, e.g.*, *United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006) (Holding that a lower court must apply controlling authority until it is "explicitly overruled" by the higher court.); *United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005) (same). According to the Supreme Court, "'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted).

This same principle requires a district court to follow on-point precedent of its appellate court, notwithstanding subsequent appellate decisions that may call doubt on the original decision. *See, e.g.*, *United States v. Rivera*, NO. CIV. A. 06-3781, CRIM. A. 83-349-04, 2007 WL 954725, at *3 (E.D. Pa. Mar. 28, 2007) (Holding that a district court is obligated to follow circuit court precedent until that precedent is "expressly overrule[d]" by the circuit court.); *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 749 (W.D. Tex. 2007) (same); *Napoles v. I.N.S.*, 278 F. Supp. 2d 272, 277 (D. Conn. 2003) (same). A district must follow on-point precedent from its appellate court even if a subsequent appellate decision "casts doubt"

on the original decision, and even if the district court believes that the original decision will eventually be overturned.[15]

Garcia does not expressly overrule *Pickern*. Indeed, *Garcia* does not even mention *Pickern*, and the decisions address two different statutes and (as set forth above) interpret materially dissimilar statutory language. As a result, a district court must follow *Pickern* even if it believes that the two cases are in conflict.

II. Defendant Is Liable For ADA Violations In Restaurants It Operates Regardless Of Whether The Restaurants Were Constructed By Others.

In footnote 8, beginning on page 14 of its Opening Brief, Defendant -- based on one Florida district court decision -- argues that it is not liable for violations of the ADA's new construction provisions in restaurants constructed by third parties and subsequently acquired by Defendant. As an initial matter, this argument should not be considered because it exceeds the scope of the motion permitted by this Court, which was limited to the statute of limitations issue. (*See* Case Management and Scheduling Order at 1 (docket no. 386, June 27, 2008).)

Further, this argument should be rejected because: (1) a number of factual assertions made by Defendant in support of this argument are demonstrably false; and (2) as a matter of law, Defendant is liable for violations of the ADA's new construction requirements in restaurants that it has acquired from others.

A. Many Of The Factual Assertions Relied On By Defendant Are Incorrect.

Defendant contends that it is not liable under the ADA's new construction provisions for restaurants built by third parties and then acquired by Defendant. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant must identify the undisputed, accurate facts that support this argument. As set forth above, Defendant's factual assertions on this point are replete with inaccuracies. (*See* supra pp. 3-6.) For example, it identifies a group of restaurants that it purchased from Golden West in 2001 that it claims were "presumably constructed" by Golden West. (*See* Opening Br. at 3.) There is substantial evidence that these same

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[15] *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000).

restaurants, however, were originally constructed by Defendant and then sold to Golden West in the 1990's, facts not presented by Defendant to the Court. (*See* supra pp. 5-6.) For these reasons, Defendant has not met its burden under Rule 56 of showing that its argument is based on undisputed, accurate facts, and on that basis, Defendant's argument should be rejected.

B. Defendant Is Liable for Violations of the ADA's New Construction Requirements in Restaurants That it Has Acquired from Others.

Based solely on *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278 (M.D. Fla. 2004), Defendant argues that it is not liable for violations of the ADA's new construction provisions in restaurants built after January 26, 1993 by third parties and subsequently acquired by Defendant. (Opening Br. at 14-15 n.8.) *Rodriguez* is contrary to a decision from this district, *Hodges v. El Torito Restaurants, Inc.*, No. C-96-2242 VRW, 1998 WL 95398 (N. D. Cal. Feb. 23, 1998).

In *Rodriguez*, the defendant purchased a hotel -- out of bankruptcy -- that had been built by a third party after January 26, 1993. Although the hotel had several ADA violations, the new owner immediately commenced renovations to remedy these violations. Despite this, the plaintiff sued soon after the renovations started. 350 F. Supp. 2d at 1279-80. The court found that the defendant was not in violation of the ADA's new construction provisions. *Id.* at 1282-83.

Judge Walker of this District reached the opposite result in *Hodges*, in which the court considered, under the new construction and alteration provisions of California's accessibility statutes, whether the current owner of a building can be held liable for the previous owner's failure to make the building accessible. The court held that the current owner is liable for such violations:

> If courts were to adopt El Torito's position, businesses would be able to circumvent California's accessibility requirements through sham sales and transfers. Furthermore, businesses that chose not to comply with California's various accessibility requirement would not lose any resale value in their buildings. Surely, the legislature did not intend to enact such a self-eviscerating law.
>
> Indeed, the case at bar provides a good example of why El Torito's position must fail. If plaintiffs had to sue the now defunct El Caballo for violations that allegedly first appeared while El Caballo occupied the building, it is unlikely that plaintiffs could

> obtain money damages. Furthermore, because El Caballo no longer has control over the building, plaintiffs could not achieve the ultimate goal of the various state laws at issue - an accessible restaurant. It is therefore clear that the best way to effectuate the goals of California's accessibility laws is to hold the current owners of buildings liable for existing violations.
>
> El Torito may argue that it is unfair to hold it liable for the wrongs of the previous owner, but El Torito had the opportunity to address these issues when it purchased the building. Much like the situation with a non-latent defect or a cloud on title, El Torito had constructive notice of these violations. El Torito could have demanded that El Caballo either bring the building into compliance or reduce the sale price to reflect the costs of such repairs. Of course, if El Torito did not have constructive notice of the violations, it can seek redress from El Caballo. Such an approach is not uncommon within the law regarding successors in interest: companies assume the liabilities of other companies they acquire and land buyers assume responsibility for hazards on the real estate they purchase. In fact, the court imagines that El Torito was aware of the pertinent accessibility issues when it purchased the building, but concluded that it was not liable under the relevant California laws for reasons discussed below. The court therefore finds that plaintiffs could pursue an action against El Torito even though El Caballo was initially responsible for the alleged failure to make the restaurant accessible.

1998 WL 95398, at *3-4.[16]

The result in *Hodges* is also supported by the text and legislative history of the ADA. In enacting the ADA, Congress struck a balance between the access required in existing buildings versus newly constructed buildings. "The ADA is geared to the future -- the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible." (H.R. Rep. No. 101-485, pt. 3, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 486.) To ensure that new construction is accessible, the ADA provides that "[i]n the case of violations of [the new construction and other architectural accessibility

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[16] California law supports the holding in *Hodges*. California courts have long held that a current possessor of property is liable for any defects on the property, and this is true even if the defects were created by a previous owner. *See, e.g.*, *Preston v. Goldman*, 227 Cal. Rptr. 817, 820 (Cal. 1986). California has codified this principle in Cal. Civ. Code § 3483, which provides that "[e]very successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it." The statutory definition of nuisance "appears to be broad enough to encompass almost any conceivable type of interference with the enjoyment or use of land or property." *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194, 201 (Cal. App. 1980). A violation of a building code, for example, constitutes a nuisance. *See, e.g.*, *City of San Francisco v. Grant Co.,* 227 Cal. Rptr. 154, 156 (Cal. App. 1986); *Sturges v. Charles L. Harney, Inc.*, 165 Cal. App. 2d 306, 324 (Cal. App. 1959).

requirements] of this title, injunctive relief *shall include* an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities . . ." 42 U.S.C. § 12188(a)(2) (emphasis added). According to the Department of Justice, whose views on Title III are entitled to deference,[17] "'an order to make a facility readily accessible to and usable by individuals with disabilities is mandatory' under this standard." "Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. pt. 36, app. B at 732-33 (2005) (citing H.R. Rep. No. 485, pt. 4, at 64 (1990)).

Here, as set forth in *Hodges*, it is appropriate to hold Defendant liable for new construction violations committed by previous possessors. Defendant had the opportunity to address the violations when it first took control of the property -- it could have, for example, required that the violations be fixed before it took possession, or it could have (and perhaps did) pay a lower lease or purchase price because the violations decreased the value of the property. Further, it is benefitting from its current use of the property.

Requiring Defendant to remedy new construction violations in restaurants acquired by it from third parties is mandated by 42 U.S.C. § 12188(a)(2), which requires an injunction bringing non-compliant elements into compliance with the ADA. It also serves the intent of the ADA that "over time, access will be the rule rather than the exception." Finally, as emphasized in *Hodges*, allowing subsequent purchasers to avoid the ADA's new construction requirements creates an incentive for "sham sales" whereby the entity that constructed a building immediately sells it to a second entity, which would not be subject to those requirements.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendant's Motion be denied.

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[17] *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

Respectfully submitted,

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