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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02 5849 PJH JL

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT TACO BELL CORP.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: December 16, 2009
Time: 9:00 a.m.

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INTRODUCTION

Defendant Taco Bell Corp. ("TBC") cannot satisfy its "heavy burden" to show that its undisputed violations of the Americans with Disabilities Act cannot "reasonably be expected to recur." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted). To the contrary, there is substantial evidence that ADA violations commonly recur in TBC's restaurants and that TBC has not taken the steps or implemented the policies necessary to remedy and prevent them.

TBC's repeated, failed attempts to comply with decades-old law forms a proper basis for the issuance of injunctive relief. As in any civil rights pattern and practice case, the liability trial in this matter will focus on TBC's general policies and conduct, not on individual victims or individual items in each restaurant. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977). If Plaintiffs prevail in proving this pattern and practice at trial, then the injunction will need to address changes in corporate policies, training, and culture. One reason such changes will be necessary is because TBC -- by its repeated, unsuccessful attempts to make changes to its restaurants in order to gain a litigation advantage -- has proven itself unwilling and incapable of complying with state and federal law. For this reason, an injunction under the ADA remains necessary and Plaintiffs' ADA claims are not moot.

ISSUE TO BE DECIDED

Has TBC rendered moot Plaintiffs' request for injunctive relief under the Americans with Disabilities Act?

FACTS

Plaintiffs filed this case in December, 2002, alleging that TBC's California corporate-owned restaurants contained barriers to individuals who used wheelchairs or scooters in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"), the California Disabled Persons Act, Cal. Civ. Code § 54 *et seq*. (the "CDPA"), and/or California's Unruh Civil Rights Act, *id.* § 51 *et seq.* ("Unruh"). In February, 2004, the court certified a class of individuals who used wheelchairs or scooters who had encountered

barriers at the covered Taco Bell restaurants since December 17, 2001. *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004).

1. TBC's Pattern of Changing and Recurring Barriers.

In the summer of 2004, with its genesis in amicable but ultimately unsuccessful settlement negotiations, the parties jointly retained Bob Evans of Equal Access, Inc., to survey 20 of the stores at issue. Robertson Decl. ¶ 2.[1] In October of that year, pursuant to the parties' joint request, the Court appointed Mr. Evans special master. Docket No. 101. The Court, after setting forth the duties of the Special Master, required the parties to meet and confer concerning, among other things, whether there were violations of federal or state law and how to resolve them. *Id.* at 10.

Between the fall of 2004 and June 30, 2005, the Special Master surveyed the stores and reported back to the parties. *See* Docket Nos. 216-40. In the summer of 2005, the parties got together and devised a system for addressing the findings of the Special Master. The parties agreed that Plaintiffs would prepare "Meet and Confer Charts," identifying the elements that Plaintiffs asserted -- for the purpose of the meet and confer process -- were out of compliance and the applicable standard. *See, e.g.,* Robertson Decl. ¶ 6; Ex. 9 at 1. TBC committed to go through all of the elements and provide its position on each. Robertson Ex. 9 at 2.[2]

Despite this commitment, TBC never made any serious attempt to work with Plaintiffs to narrow the issues. Rather, as TBC asserts in the present motion, it started attempting to fix things "without waiting for resolution of such matters." Def. Taco Bell Corp.'s Notice of Motion and Motion for Partial Summary Judgment ("MPSJ," Docket No. 458) at 2. In fact, TBC repeatedly made clear that its goal was not to work with Plaintiffs to resolve the litigation

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[1] All declarations submitted by the parties in support of and opposition to the present motion will be referred to by the declarant's last name and the abbreviation "Decl." Exhibits to declarations will be referred to by the declarant's last name and "Ex."

[2] Because this was part of a settlement process, Plaintiffs made clear that they were not conceding for purposes of litigation that elements excluded from the meet and confer charts were compliant, Robertson Ex. 7 at 1, and the parties agreed that the charts and the meet and confer process would be protected by Rule 408 of the Federal Rules of Evidence. Robertson Exs. 8 at 2 & 10 at 1.

or even narrow the issues, but rather to moot out Plaintiffs' claims. For example, in-house counsel for TBC asserted that "[t]he purpose of [TBC's] comprehensive modifications was to render the federal and state injunctive relief claims in the instant action subject to the mootness doctrine." Decl. of Richard L. Deleissegues (Docket No. 363-1) ¶ 3; Docket No. 363 at 2.

Toward this end, when Plaintiffs moved for partial summary judgment in 2007, TBC argued that Plaintiffs' claims as to the challenged elements were moot. Docket No. 260 at 34-39. The Court rejected this argument holding that, even if certain elements were in compliance, the Court could "order effective relief as to those elements in the form of an injunction requiring TBC to (1) remedy the remainder of these elements that are out of compliance; (2) maintain those elements in a compliant state; and (3) ensure that those elements comply in any new or acquired restaurants." *Moeller v. Taco Bell Corp.*, 2007 WL 2301778, at *8 (N.D. Cal. Aug. 8, 2007). TBC moved for reconsideration, raising many of the arguments it now raises in its MPSJ. Docket No. 319. The Court denied that motion as well. Docket No. 367.

In late 2007 and throughout 2008, TBC once again began informing Plaintiffs that it had remedied its stores. It did this by sending charts prepared by its contractor, Alianza International ("Alianza"). Robertson Decl. ¶ 7. Plaintiffs' expert Eric McSwain surveyed nineteen of the stores in March, 2008, and another 172 between September, 2008, and April of 2009. McSwain Ex. 2.[3]

Plaintiffs began sending TBC copies of Mr. McSwain's site visit notes, his photographs, and lists of the violations he was finding in the stores in early December, 2008, and served Mr. McSwain's and Mr. Terry's expert reports on May 1, 2009, Robertson Decl. ¶ 8, the deadline the Court had set for expert reports in the Case Management and Scheduling Order of June 27, 2008. Docket No. 386 at 2. Exhibit 3 to Mr. McSwain's report was a 420-page document detailing over 2,400 violations of the ADA and state law that Mr. McSwain

[3] Mr. McSwain was accompanied by expert James L.E. Terry for the March, 2008, surveys and Mr. Terry surveyed one of those stores, 17576, without Mr. McSwain. *See* Terry Ex. 6.

found in the stores he surveyed. McSwain Decl. ¶ 5 and Ex. 3. These violations included a number of elements Alianza claimed to have remedied that had fallen out of compliance just a few months later. Robertson Ex. 21.

On May 1, 2009, TBC served one nine-page report by an expert who had not been to a single restaurant at issue, had not looked at any photographs, and had not reviewed any of the Special Master surveys. Blackseth Dep. at 30 (Fox Ex. 1.) There were no measurements in that report, and it had nothing to do with Defendant's attempts to fix its restaurants. *See generally* Taco Bell Corp.'s Expert Report (Fox Ex. 2).

And instead of rebutting Mr. McSwain's and Mr. Terry's reports on June 1, 2009, as the Court's scheduling order required, Docket No. 386 at 2, on May 29, TBC moved for an extension of 90 days on the expert disclosure and dispositive motion deadlines, Docket No. 421. This Court granted the motion, setting a new expert rebuttal deadline of July 16, 2009. Docket No. 435 at 2. On that date, however, TBC still did not serve an expert report, and to this day, has not rebutted any of Mr. McSwain's or Mr. Terry's expert opinions concerning the conditions in the stores. Robertson Decl. ¶ 9. Instead, TBC apparently retained yet another contractor -- Maintco Corp., this time, instead of Alianza -- to take another run at making its stores compliant. Elmer Decl. ¶ 5.

It is the result of this now third effort at mootness that forms the basis for TBC's current motion. Yet even still -- and even according to TBC's papers -- many elements remain out of compliance or in dispute. In addition, as explained below, TBC policies are inadequate to achieve and maintain compliance with applicable standards.

2. TBC's Changing and Ineffective Policies

TBC has asserted that there are a number of architectural elements in its restaurants that are "subject to frequent change," including: door force, which can change on a daily basis, Elmer 2005 Dep. at 66 (Robertson Ex. 12); utensils, condiment and lid dispensers, which can be placed out of reach by employees, *id.* at 67; and various items in the dining area and restrooms, which must be replaced after they break, or are vandalized or stolen. *See generally*

de Beers Decl. (Docket No. 113) ¶ 6 (Copy provided at Robertson Ex. 5).

The ADA has accessibility requirements covering each of these elements, and thus it is crucial that TBC have effective policies ensuring that when elements in a particular restaurant are moved, modified, or replaced, they continue to comply with these requirements. TBC claims to address maintenance of accessibility in two ways: restaurant-level policies that are supposed to govern day-to-day operations in restaurants ("Operations Policies"); and twice-yearly access inspections by Maintco. As demonstrated below, these measures utterly fail to ensure that access is maintained at TBC's restaurants.

a. Operations Policies.

TBC's ADA Operations Policies have been inconsistent and contradictory over time, are not being used in TBC's restaurants, and are facially deficient. In one case, TBC's most recent policy actually instructs its stores to violate the California Retail Food Code.

i. TBC's Operations Policies are Inconsistent and Contradictory.

In 2005, TBC's accessibility consultant at the time, National Access Consultants ("NAC"), prepared a document listing steps that restaurant employees should take to avoid access problems typically encountered at restaurants and similar facilities. *See* Elmer 2005 Dep. at 71 & Ex. D81. TBC provided this list to its facilities leaders as an "informal reference" to help them train restaurant employees. *Id.* at 71-72.

In December 2006, TBC issued another set of ADA operations guidelines to its restaurant general managers. *See* Elmer 2008 Dep. at 18-21 & Ex. 7 (Robertson Ex. 13). Although the 2006 policy, like the 2005 policy, purported to identify the steps that restaurant employees should take to maintain access, the two policies were substantially different. Many of the steps set forth in the 2005 policy were omitted from the 2006 policy, and the 2006 policy included steps not found in the 2005 policy.[4] The 2006 operations guidelines were reissued in

[4] For example, the following tasks were deleted from the 2006 policy: "Fix broken or raised asphalt and concrete along pedestrian routes," "Ensure that drop-offs adjacent to walkways are filled with soil or other materials," "Ensure that the insulation under lavatories completely covers hot water lines and drain pipes," and "Replace toilet partition doors that will (continued...)

September 2008, and again in April 2009. *See* Elmer 2009 Dep. at 16-17, 22-23, 26-27 (Robertson Ex. 14); Elmer Ex. 4.

In October 2009 -- just days before it filed its MPSJ -- TBC sent a new set of ADA operations guidelines to its restaurant general managers that, once again, had wholesale changes from its previous guidelines issued less than six months earlier. *See* Elmer Ex. 1. Many tasks from the April 2009 checklist were gone, and a number of new tasks were added.[5]

ii. TBC's Operations Policies Are Not Being Used In Its Restaurants.

Although TBC claims to have issued ADA Operations Policies, it fails to provide any facts showing that it has taken any steps to make sure that those policies are actually being used in its restaurants. *See* Elmer Decl. ¶¶ 6-12. In fact, the evidence demonstrates to the contrary.

In September 2009, Plaintiffs deposed the general managers of four restaurants at issue. TBC's ADA Operations Policies in effect at the time of these depositions consisted of a checklist of eleven items, several of which required periodic inspections of the restaurant to ensure, for example, that "entrance doors are kept clear of obstructions," that "the route to accessible tables is kept clear of obstructions," and that condiment and other dispensers are arranged so that their contents are within reach of a person using a wheelchair. Elmer Decl. ¶ 9 & Ex. 4. These depositions demonstrated that managers were not even aware of the existence of many of the ADA Operations Policies purportedly issued by TBC, much less prepared to

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[4](...continued)
no longer self-close completely." The following was added: "Ensure that the disabled parking stalls are kept open for use by disabled customers ONLY."

[5] The following tasks were deleted from the April 2009 checklist: "Ensure that the path of travel from the public sidewalk to the store entrance(s) is kept clear of any obstructions (trash cans, potted plants, pay phones, newspaper dispensers, etc.)," "Ensure that the path of travel from the disabled parking stalls to the store entrance(s) is kept clear of obstructions (trash cans, potted plants, pay phones, newspaper dispensers, etc.)," "Ensure that the disabled parking stalls are kept open for use by disabled customers ONLY." The following tasks were added: "Do not replace any restroom door closers that have been removed: by our ADA contractors," "Do not store bulk drink carriers on the beverage counter, unless a short stack of no more than 30 carriers is placed near the front edge of the counter so that it can be reached by someone in a wheelchair," "Do not place any new dispensers (such as nutrition brochure or job application dispensers) on the walls without consulting with your AC, Facility Leader or myself."

ensure that those policies were followed in their restaurants. For example, three of the four managers testified that they had never seen any policy or other document relating to the use of the restaurant by people who use wheelchairs or scooters. Solis Dep. at 19;[6] Fike Dep. at 19; Malik Dep. at 20, 22.

Other than general customer service training applicable to all customers, the managers had not received any training relating specifically to the use of the restaurant by people who use wheelchairs or scooters. Carlos Dep. at 11-12; Malik Dep. at 15-16. Other than instructing their employees to treat all customers with courtesy, the managers had not provided their employees with any training relating to the use of the restaurant by people who use wheelchairs or scooters. Solis Dep. at 19; Fike Dep. at 19. Finally, although pursuant to TBC's ADA policy, managers were supposed to contact their superior before replacing any restroom signage or equipment (apparently to make sure that replaced items were installed in a manner that complied with the ADA), the managers testified that they believed they had the authority to replace such items without consulting their superiors. Solis Dep. at 10-11; Fike Dep. at 12-14; Carlos Dep. at 9-10; Malik Dep. at 12-14.

Several times each shift, managers conduct "customer satisfaction" walks using a Manager In Charge card ("MIC Card"). During these walks, managers try to "see [themselves] as a customer . . . what a customer might see." Solis Dep. at 15; *see also* Malik Dep. at 21. The MIC Card instructs managers to check on items that are important to customers, for example, ensuring that the restaurant is clean, that condiments and other items are stocked, and that the lighting is in working order. Boothby Ex. 132. Significantly the MIC Card omits the vast majority of items on the ADA guidelines checklist, simple measures necessary to allow disabled customers to independently patronize TBC's restaurants. *Compare id. with* Elmer Ex. 4. Yet the MIC Card is the only document these managers used to guide their customer satisfaction walks; none testified he or she used the ADA guidelines.

[6] Excerpts of these depositions are attached as Exhibits 16 through 19 to the Robertson Declaration.

Ultimately, the large number of violations found by Mr. McSwain six years into this litigation and class member experiences demonstrate that whatever policies TBC has are ineffective. *See generally* McSwain Ex. 3; Corbett Decl. ¶¶ 3-4; Delara Decl ¶ 4; Evans Decl. ¶¶ 4-5; Frederickson Decl. ¶¶ 4-5; Grassi Decl. ¶¶ 4-7; Hall Decl. ¶¶ 4-5; Hardnett Decl. ¶¶ 7-9; Mortimer Decl. ¶¶ 4-9; Pliska Decl. ¶¶ 4-5; Ross Decl. ¶¶ 4-6; Wilkie Decl. ¶ 4-5; Yates Decl. ¶¶ 3-5.

iii. TBC's Operations Policies Are Facially Deficient.

TBC's current ADA Operations Policy, issued on October 14, 2009, does not address many architectural elements that -- according to TBC's own testimony -- are subject to frequent change and thus can easily fall out of compliance with accessibility requirements. For example, TBC's current Operations Policy does nothing to ensure that parking spaces and access aisles remain compliant; parking lot signage that is vandalized or stolen is properly replaced; tableware, condiment and lid dispensers are kept within reach of people who use wheelchairs or scooters; the force necessary to open restroom doors remains compliant; and restroom grab bars are installed correctly when they are replaced. *Compare* de Beers Decl. ¶ 6 *with* Elmer Ex. 1.

iv. TBC's Most Recent Policies Violate the California Retail Food Code.

TBC's most recent policy instructs stores: "Do not replace any restroom door closers that have been removed by our ADA contractors." Elmer Ex. 1. The California Retail Food Code, however, requires door closers in restaurant bathrooms. Cal. Health & Safety Code § 114276(c); *see also infra* Section III.B.62.

b. Maintco's Semi-Annual Inspections.

Earlier this year, TBC entered into a one-year contract with Maintco to conduct semi-annual surveys of its California restaurants. Reeves Dep. at 13, 30 & Ex. 4 (Robertson Ex. 15). The items that Maintco inspects during these surveys are set forth in TBC's ADA Maintenance Checklist. Elmer Decl. ¶ 8 & Ex. 3. There are a number of architectural elements that change frequently that are entirely omitted from TBC's Operational Policies and

Maintenance Checklist, or that should be inspected much more frequently than twice a year.

For example, the ADA requires that doors take at least three seconds to close. ADAAG § 4.13.10.[7] There is no dispute that door closing time changes frequently; indeed, Mr. Elmer testified that HVAC and other forces can affect doors on a daily basis. Elmer 2005 Dep. at 66:4-21; *see also* de Beers Decl. ¶ 6. Mr. McSwain found numerous doors in violation of this requirement. *See* Robertson Ex. 22. Yet neither TBC's Operational Policies nor its Maintenance Checklist addresses door closing time.

The ADAAG also governs reach ranges. *Id.* §§ 4.2.5, 4.2.6. Many of TBC's tableware, condiment, and other dispensers are movable, and Mr. Elmer testified that restaurant employees may place these beyond the reach of a person using a wheelchair or scooter. Elmer 2005 Dep. at 67:4-20. Mr. McSwain found numerous movable dispensers outside of ADAAG reach ranges. *See* Robertson Ex. 23. Although the Maintenance Checklist purports to address this issue, TBC's current Operations Policies do not. Thus at best, the reach range of dispensers -- which can change daily -- will be surveyed only twice a year.

c. TBC's New Construction Policy.

The only policy concerning the accessibility of newly constructed restaurants identified by TBC in its MPSJ papers is a two-page document entitled "ADA General Checklist for Construction Managers." *See* Elmer Decl. ¶ 12 & Ex. 7. This short document is deficient in a number of ways. First, TBC does not require construction managers to use or comply with this document. According to Mr. Elmer, whether construction managers use this document is purely at their discretion. Elmer 2008 Dep. at 15. Second, this document entirely omits important accessibility requirements, including for example: entrance door closing time; restroom door force or closing time; door hardware; reach height, depth and clear floor space at dispensers; and maneuvering clearances at restroom doors. Taco Bell has submitted no

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[7] The ADA requires new construction and alterations to comply with the Americans With Disabilities Act Accessibility Guidelines ("ADAAG"), 28 C.F.R. § 36.406(a). These standards also provide *prima facie* evidence of a barrier in existing facilities. *See, e.g., Johnson v. Kriplani*, 2008 WL 2620378, at *4 n.3 (N.D. Cal. July 2, 2008); *Heinemann v. Copperhill Apartments*, 2007 WL 4249842, at *3 (E.D. Cal. Nov. 30, 2007).

evidence showing that it has policies in place ensuring that these elements are compliant in newly constructed restaurants. Accordingly, the four new stores Mr. McSwain surveyed contained a significant number of violations. *See* McSwain Ex. 3 at 408-420.

d. TBC's Customer Service Policies.

TBC asserts that its customer service policies make up for ADAAG violations in its restaurants. MPSJ at 8-9. As discussed *infra* Section III.B.1, as a matter of law, the ADA does not permit TBC to use customer service to avoid architectural accessibility requirements. In any event, as a factual matter, TBC has a long history of deficient customer service with respect to customers with disabilities. Since at least June 2006, Defendant has relied on customer service in lieu of making all of the elements in its restaurants accessible. *See* Decl. of Mike Harkins (Docket No. 263) ¶ 4. The experiences of customers with disabilities during this time, however, demonstrate the deficiencies of Defendant's customer service policies.

For example, as is true with TBC's other access policies described above, employees have not been trained effectively (or at all) concerning Defendant's customer service policy, and thus some Class Members have never been offered assistance, and others have been completely ignored. *See, e.g.*, Pliska Decl. ¶¶ 4-5; Mortimer Decl. ¶ 7; Frederickson Decl. ¶ 4; Yates Decl. ¶ 4; Grassi Decl. ¶¶ 4, 6; Ross Decl. ¶ 4. Many times when Class Members need assistance, employees simply cannot see them, for example, when the disabled customer cannot open a heavy door to get in the restaurant. *See, e.g.*, Wilkie Decl. ¶ 4; Hardnett Decl. ¶ 8; Hall Decl. ¶ 4; Evans Decl. ¶ 4. Finally, employees often are too busy to assist Class Members. Hall Decl. ¶¶ 4-5; Frederickson Decl. ¶ 5; Evans Decl. ¶ 5; Grassi Decl. ¶ 6; Ross Decl. ¶ 5.

PROCEDURAL STATUS

This Court bifurcated this case into two phases: the first to address Plaintiffs' ADA claims; the second to address Plaintiffs' claims under Unruh and the CDPA. Docket No. 386 at 2-3. The parties are currently in Phase One addressing ADA claims only. As such, TBC's MPSJ does not purport to render this case moot. Rather, it addresses only injunctive relief under the ADA. Plaintiffs' claims for injunctive relief and damages under Unruh and the

CDPA are unaffected by TBC's motion.

OVERVIEW OF PLAINTIFFS' EXHIBITS

Plaintiffs' opposition to the MPSJ is supported by a number of declarations and exhibits. Mr. McSwain's declaration includes the full list of violations that was served with his expert report on May 1, 2009. McSwain Ex. 3. TBC responded to this list through Exhibit 18 to the Elmer Declaration ("Elmer Exhibit 18"). Robertson Exhibit 1 is Plaintiffs' response to Elmer Exhibit 18. Robertson Exhibit 1 sets forth -- with respect to the elements at issue in the present motion -- the store and item numbers and item description, the violation found by Mr. McSwain, and TBC's position as reflected in Elmer Exhibit 18. In separate columns, it provides "Plaintiffs' Substantive Response" and "Plaintiffs' Procedural Response." The former column sets forth item-specific information relevant to TBC's mootness argument or one of its other defenses, *see* MPSJ at 8-50; the latter column sets forth the reasons why it would be appropriate to strike the information or why it is in violation of Rule 56.

Plaintiffs thus submit two large charts: McSwain Exhibit 3 includes all of the violations he observed; Robertson Exhibit 1 includes only those at issue at this time, along with Plaintiffs' responses to TBC's arguments. McSwain Exhibits 4 through 252 are photographs and notes that he took during his surveys. Exhibits 1 through 12 of the Terry Declaration are photographs and notes that he took during the surveys in which he participated. The declaration of Ashley Boothby contains copies of discovery documents received from TBC cited herein and in exhibits to the Robertson Declaration. The declaration of Darryl Collins contains copies of unpublished cases cited herein. Exhibits 2 through 34 of the Robertson Declaration consist of other documents referenced herein, including a number of charts summarizing entries in Robertson Exhibit 1 or Elmer Exhibit 18. Finally, Plaintiffs submit the declarations of Representative Plaintiffs Katherine Corbett and Craig Yates, and Class Members Enrique Delara, James Evans, Elaine Frederickson, Mary Grassi, Nancy Hall, Arnetta Hardnett, Carmen Mortimer, Sharon Pliska, Mary Ross, and Roger Wilkie testifying to their personal experiences.

ARGUMENT

I. Standard of Review: Taco Bell's MPSJ Does Not Satisfy Rule 56

TBC, as the moving party, "has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). "The initial burden of production refers to the burden of producing evidence, or showing the absence of evidence, on the motion for summary judgment." *Id.* "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything." *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970)).

Affidavits supporting a motion for summary judgment "must be made on personal knowledge [and] set out facts that would be admissible in evidence . . .." Fed. R. Civ. P. 56(e)(1). A decision to grant summary judgment can be made only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* Rule 56(c). The Ninth Circuit has held that these rules "mean, taken together, that whatever establishes a genuine issue of fact must *both* be in the district court file *and* set forth in the response." *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (emphasis in original). Because neither rule differentiates between the evidence of the moving and non-moving parties, this principle is equally applicable to TBC here.

TBC moves for summary judgment but has largely not produced the evidence necessary to support its motion. As demonstrated in Plaintiffs' Motion to Strike, many of the assertions in the Elmer and Reeves Declarations are not made on personal knowledge and constitute expert testimony lacking foundation and not disclosed as required by Rule 26(a)(2).[8] Those

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[8] *See, e.g.,* MPSJ at 13 (no expert testimony to rebut Mr. McSwain's opinion concerning the requirements for handrails); 14 (arguing that a feature analyzed by Mr. McSwain as a ramp (continued...)

arguments are incorporated herein by reference, and demonstrate TBC's failure to satisfy Rule 56(e)(1). On a more basic level, TBC's MPSJ makes many assertions that it does not even attempt to support with evidence,[9] and refers to documents and photographs that it did not file with the Court, contrary to the requirements of Rule 56(c).[10] TBC is asking this Court to spend a great deal of time and effort addressing arguments that require consideration of documents or photographs without bothering to submit the relevant documents or photographs.

In addition to these shortcomings, even where supporting assertions -- although inadmissible -- may exist in one of TBC's declarations, TBC generally does not attempt to reference those assertions in its MPSJ. So, for example, there are no references to TBC's supporting declarations after page 8 of its 50-page brief, nor to Elmer Exhibit 18 -- the compilation of TBC's responses to Mr. McSwain's report -- after page 7. The reader is left to guess at the location or even existence of support for the last 42 pages of TBC's brief. This is, at the very least, a violation of Local Rule 7-5, which requires that "[f]actual contentions made in support of . . . any motion must be supported by . . . appropriate references to the record." "The court . . . is not required to consider evidence that is buried in a two-foot-tall stack of paper, where the parties do not specifically direct the court's attention to the exact page where the evidence is to be found and do not explain the significance of the evidence in their memoranda of points and authorities." *Mannick v. Kaiser Found. Health Plan, Inc.*, 2006 WL 2168877, at *18 (N.D. Cal. July 31, 2006); *see also Mendez-Aponte v. Puerto Rico*, --- F. Supp.2d ---, 2009 WL 3063400, at *2 (D. P.R. Sept. 16, 2009) ("When a party makes

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[8](...continued)
was "better characterized as a curb ramp" without expert support); 16-17 (same; diagonal parking spaces); 24 (challenging Mr. McSwain's methodology without expert testimony).

[9] *See, e.g.,* MPSJ at 19 (assertion concerning position of trash can at store 137 not supported); 22 (assertion concerning left leaf of door not supported); 28 (measurement of shelves not supported). This is also true throughout Exhibit 18 to the Elmer Declaration.

[10] *See, e.g.*, MPSJ at 9 (City of La Mirada building permits not provided). Throughout the brief, TBC refers to photographs that it did not file with the Court. *See, e.g.*, MPSJ at 12, 13, 14, 24, 26, 28, 32, 36, 37, 44. Over 100 line items in Elmer Exhibit 18 cite to photographs or documents that TBC did not file with the Court. *See* Robertson Ex. 24.

numerous conclusory allegations and assertions of fact for which they offer no support, a district court is not required to ferret through sloppy records in search of evidence supporting the party's case.").

Plaintiffs address the substance of TBC's legal arguments below, and -- where it was possible to discern the stores, elements, or other evidence on which TBC was relying -- Plaintiffs rebut that evidence. However, Plaintiffs respectfully request that this Court deny TBC's MPSJ for the simple reason that it did not comply with Rule 56. *See Nissan Fire & Marine*, 210 F.3d at 1102-03 (where the non-moving party does not carry its burden of persuasion, "the nonmoving party may defeat the motion for summary judgment without producing anything").

II. Plaintiffs' Claims are Not Moot.

TBC's motion reflects a fundamental misunderstanding of this case. This is a multi-facility class action with evidence of changing and recurring barriers -- and changing and ineffective policies -- stretching over a period of more than five years. Although in the single-facility/single-plaintiff cases on which TBC generally relies it may be appropriate to treat the ADA like a contractor's punchlist, that is not proper here. Rather, at trial, Plaintiffs intend to request -- and demonstrate that they are entitled to -- an injunction requiring policy change, training, and other systemic measures designed to ensure that barriers do not recur in the future not an injunction addressing -- item by item -- the elements that remain out of compliance or that -- at that moment -- have fallen out of compliance.[11]

The evidence now before this Court of recurring and unremedied barriers and

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[11] *Cf. Teamsters*, 431 U.S. at 361 (holding that injunction following showing of a pattern and practice of discrimination "might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights'" protected by the statute); *Armstrong v. Davis*, 275 F.3d 849, 869-70 (9th Cir. 2001) ("[s]ystem-wide relief is required if the injury is the result of violations of a statute or the constitution that are attributable to policies or practices pervading the whole system . . .."); *Celano v. Marriott Int'l, Inc.*, 2008 WL 239306, at *21 (N.D. Cal. Jan 28, 2008) (stating that injunction remedying discrimination relating to golf carts would not have to reach "all of the features and precise parameters" of the carts).

ineffective policies demonstrates that Plaintiffs would be entitled to such an injunction -- or at the very least, that they have raised genuine issues of material fact on that question -- and thus the case is not moot.

A. Legal Standard: TBC Has A Heavy Burden to Demonstrate that it is Absolutely Clear That Its Allegedly Wrongful Behavior Will not Recur.

It is well established that TBC's "'voluntary cessation of a challenged practice'" cannot moot Plaintiffs' claim unless "'subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted); *United States v. W.T. Grant*, 345 U.S. 629, 632 (1953); *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009). TBC has the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189 (citations omitted; alteration in original).

To render a claim for injunctive relief moot, "'the reform of the defendant must be irrefutable and total.'" *Funai Elec. Co., Ltd. v. Daewoo Elecs. Corp.*, 593 F. Supp. 2d 1088, 1110-11 (N.D. Cal. 2009) (quoting *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135 (9th Cir. 1986)). "The possibility that [the defendant] may change its mind in the future is sufficient to preclude a finding of mootness." *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983); *see also W.T. Grant Co.*, 345 U.S. at 632 (Holding that if voluntary cessation could render an action moot, "[t]he defendant is free to return to his old ways").

Ultimately, "[i]t is no small matter to deprive a litigant of the rewards of its efforts . . .. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that is sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). "Once a defendant has engaged in conduct the plaintiff contends is unlawful and the courts have devoted resources to determining the dispute, there is Article III jurisdiction to decide the case as long as 'the parties [do not] plainly lack a continuing interest . . .'" *Demery v. Arpaio*, 378 F.3d 1020, 1026 (9th Cir. 2004).

As the facts discussed in this brief and supporting papers demonstrate, Plaintiffs still

need the protection of an injunction to ensure compliance.

B. The Ninth Circuit Has Held that The Voluntary Cessation Doctrine Bars Mootness In a Case Almost Identical to This One.

The Ninth Circuit has applied the voluntary cessation standard to reject mootness in a case virtually identical to the present but with far stronger evidence favoring mootness. The plaintiff class in *Pereira v. Ralph's Grocery Co.*, 07-cv-00841-PA-FFM (C.D. Cal. Oct. 25, 2007) (Robertson Ex. 3), alleged a variety of violations of the ADAAG at 23 of the defendant's grocery stores. *Id.*, slip op. at 3. The defendant moved for summary judgment on mootness grounds, asserting that it had remedied all of the alleged violations; crucially, the plaintiffs did not dispute that the defendant had done this. *Id.* at 4. The district court explicitly distinguished the present case on the grounds that there was no evidence -- as there is here -- that elements change frequently. *Id.* at 5 (citing the August 8, 2007 order in this case reprinted at 2007 WL 2301778). On these grounds, the district court granted the defendant's motion for summary judgment on mootness grounds. *Id.* at 7.

The Ninth Circuit reversed in a one-sentence opinion, holding that "[t]he defendant's 'voluntary cessation of allegedly illegal conduct' did not moot this case." *Pereira v. Ralph's Grocery Co.*, 329 Fed. Appx. 134 (9th Cir. 2009) (quoting *W.T. Grant Co.*, 345 U.S. at 632). If the voluntary cessation doctrine applies to prevent mootness in a Title III class action where the plaintiff concedes that all remedies have been made, it applies with that much greater force here, where many of the violations remain contested and where there is strong evidence that even those elements that may have been remedied will change frequently in the future.

C. Because Elements in Taco Bell Restaurants Change Frequently, TBC Cannot Satisfy the Heavy Burden to Show That Violations Will Not Recur.

TBC has previously informed this Court that, "[d]ue to regular maintenance, remodels, repairs, and normal wear and tear, virtually every accessibility element [in a Taco Bell restaurant] is subject to change over time so that evidence that an element is or is not in compliance today (for purposes of determining injunctive relief) is not dispositive of whether the same element was in compliance" at the time of any class member visit. Docket No. 110,

at 3, *see also id.* at 9-10. This assertion was supported by the testimony of TBC's then-Northern California Facility Leader, Jaime de Beers, listing 37 categories of elements in Taco Bell restaurants that are "subject to frequent change." de Beers Decl. ¶¶ 2, 6.

The Court, in evaluating TBC's mootness argument in 2007, considered TBC's assertions and concluded that, indeed, "evidence of the current compliant status of certain elements is not dispositive of whether the elements will continue to be compliant in the future." *Moeller*, 2007 WL 2301778, at *8. As a result, the Court held that TBC could not "satisfy its heavy burden to show that the past and existing ADA violations will not recur." *Id.* Even if certain elements were in compliance at one point in time, the Court could "order effective relief as to those elements in the form of an injunction requiring TBC to (1) remedy the remainder of these elements that are out of compliance; (2) maintain those elements in a compliant state; and (3) ensure that those elements comply in any new or acquired restaurants." *Id.*

This reasoning is as powerful and applicable today as it was in 2007. TBC does not claim to have remedied all ADA violations in its California stores. It presents no evidence that Ms. de Beers's testimony is no longer the case. Substantiating that testimony, Mr. McSwain's surveys revealed a number of items that TBC claimed were fixed by Alianza that had already fallen out of compliance just a few months later. *See* Robertson Ex. 21. And TBC provides no evidence that new construction will comply.

D. An Injunction Continues to Be Necessary for the Same Reasons Listed in The 2007 Mootness Ruling.

1. TBC Has Not Remedied All ADA Violations.

TBC does not claim to have remedied all of the ADA violations in its California restaurants. Rather, it claims that it has "modified the vast majority of features" identified in Plaintiffs' expert reports. MPSJ at 7. Putting aside the evidentiary and legal shortcomings of TBC's asserted remedies, TBC does not claim that its California stores are now in compliance with the ADA or even that all of the violations identified by Mr. McSwain have been remedied.

Instead, TBC submits Elmer Exhibit 18, which addresses each of the items identified by Mr. McSwain. The Elmer, Reeves and Hikida Declarations include additional assertions

relating to various elements. Plaintiffs respond systematically to Elmer Exhibit 18 in Robertson Exhibit 1. This latter document shows that there are few if any elements currently at issue that TBC has demonstrated -- with admissible evidence in the record -- that it has remedied. Even, putting aside TBC's comprehensive failure to comply with Rule 56, many of the elements in Robertson Exhibit 1 remain unresolved.

As an initial matter, the "TBC's Position" column in over 280 of the items in Elmer Exhibit 18 is simply blank. Robertson Ex. 25. With respect to a number of others, TBC has refused to remedy the violations or described a remedy that is improper. For example, TBC refuses to remedy a number of parking spaces in which the access aisle does not parallel the space it serves. Plaintiffs demonstrate below that TBC's legal reasons for this refusal are incorrect. *See infra* Section III.B.11. TBC attempted to remedy 51 restroom door clearances by removing the door closer. However, this measure was improper under the California Retail Health Code. *See infra* Section III.B.62. Those parking spaces and doors remain at issue.

2. TBC Has Not Demonstrated that It Can Maintain Compliance.

TBC's conduct over the past two years has underscored the court's Conclusion that an injunction remains necessary to ensure that TBC maintains its stores in compliance with the ADA. *See Moeller*, 2007 WL 2301778, at *8.

TBC received the Special Master's reports in June 2005 showing widespread violations of the ADA and Title 24. *See* Robertson Decl. ¶ 3; Docket Nos. 216 through 240. In April, 2006, it retained Alianza to begin attempting to remedy its stores. After this initial attempt -- and the Court's rejection of its mootness argument in 2007 -- in 2008, TBC once again began informing Plaintiffs that it had remedied its stores. Robertson Decl. ¶ 7. In response, Plaintiffs' expert, Eric McSwain, surveyed the stores between the fall of 2008 and the spring of 2009. These surveys demonstrated conclusively that TBC is incapable of bringing its stores into compliance and maintaining them in that condition. Two years after this court's ruling on

mootness, Mr. McSwain still found over 1,900 violations of the ADA.[12] In many cases, measures that TBC's contractor performed only a few months before had slipped back into violation. *See* Robertson Ex. 21.

Store 3498 provides an excellent example of TBC's failure to ensure ongoing compliance with the ADA. While generally Mr. McSwain surveyed the stores after Alianza had attempted to remedy them, in the case of 3498, the order was reversed. When Mr. McSwain surveyed that store in February, 2009, he discovered that, since the Special Master's survey in December, 2004 -- almost four years previously -- *nothing* had been done about the following violations: the lack of a van accessible parking space; noncompliant ramp in the access aisle; the door force at the men's and women's restrooms; the maneuvering clearances at the restroom doors; the flush controls on the toilets; urinal height; and height of the women's room lavatory. *Compare generally* Docket No. 225-3 (Special Master report for store 3498) at 11-12, 36-37, 44, 45, 51-52, 59-60 *with* McSwain Ex. 3 at 147-53. While TBC had claimed, in conjunction with its 2007 mootness argument, to have policies in place to address such things as door force, *see* Docket No. 260 at 36-37; Decl. of Mike Harkins (Docket No. 263) ¶ 2, this survey makes it clear that they were ineffective.

In a number of stores, elements that Alianza alleged were in compliance had fallen out of compliance when observed by Mr. McSwain, demonstrating that TBC cannot ensure that store-level modifications will be done in compliance with the ADA. *See generally* Robertson Ex. 21. For example, in store 15614, the water closet in the women's restroom was in compliance when surveyed by Alianza, but was replaced between the Alianza and McSwain surveys. *Compare* Boothby Ex. 83 at TBGT007341 *with* McSwain Ex. 161 at EM03438. The new water closet seat was too low, McSwain Ex. 3 at 273. *Compare also* Boothby Ex. 53 *with* McSwain Ex. 120A (flush handle moved to wide side (ADAAG § 4.16.5) by Alianza in 2007; tank replaced with flush handle on narrow side before McSwain visit in April 2008).

[12] Mr. McSwain found over 2,400 violations of the ADA and state law. Of those, over 1,900 were ADA violations. *See* Robertson Decl. ¶ 11 and Ex. 1.

Restroom door closers present an especially troubling example of the lack of effective policies at the store level. TBC built a number of stores without sufficient push side clearance at one restroom door. Robertson Ex. 26. Rather than installing an automatic door, which would have solved the problem, TBC removed the door closers. This, as noted above, is illegal under the Retail Food Code. *See* Cal. Health & Safety Code § 114276(c). Initially, Alianza did this in 13 stores. *See* Robertson Ex. 27. Whether store managers were out of touch with TBC's attempted remedies, anxious to comply with applicable heath and safety standards, or both, a number of the closers had been reinstalled by the time Mr. McSwain surveyed the stores. *See id*. TBC then compounded the problem by issuing a policy prohibiting the reinstallation of door closers, Elmer Ex. 1, that is, mandating a violation of the Retail Food Code. Accordingly, Taco Bell recently removed the closers on 51 doors. Robertson Ex. 28.

TBC has a duty to ensure that its stores are maintained in compliance with the ADA. *See* 28 C.F.R. § 36.211 (requiring places of public accommodation to be maintained readily accessible to and usable by individuals with disabilities); *see also infra* at 42-45. TBC claims to have policies in place to ensure that this happens; however, these policies have changed repeatedly over the course of the litigation and are apparently not actually promulgated to store employees. *See Longstreth v. Maynard*, 961 F.2d 895, 900 (10th Cir. 1992) (rejecting mootness where policy "varied considerably"). Ultimately, Plaintiffs' evidence shows that these policies are ineffective.

Most importantly -- for mootness purposes -- these deficient policies cannot satisfy TBC's heavy burden to demonstrate that the challenged conduct -- the illegal barriers in its restaurants -- will not recur. TBC's history of failure "is probative of the likelihood of future [violations]." *Rosemere*, 581 F.3d at 1175. Indeed, a number of ADA cases have held that policy changes do not moot a claim for injunctive relief under that statute. In *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007), the Eleventh Circuit held that a medical office that changed its service animal policy in response to a lawsuit did not moot the plaintiff's claims. It held that it was "more likely to find a reasonable expectation of recurrence

when the challenged behavior constituted a 'continuing practice' or was otherwise deliberate." *Id.* at 1184-85. Here, Plaintiffs have demonstrated a continuing practice of ADA violations over many years, and TBC continues to defend those practices.

In *Clavo v. Zarrabian*, 2004 WL 3709049 (C.D. Cal. May 17, 2004), the court rejected the defendant's mootness argument on the grounds that the claimed new wheelchair access policy did "not eliminate the possibility of future violations" when the problems were "entrenched," and the defendant "failed to change [its] policy until after [the] case was filed." *Id.* at *4; *see also Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1084 (N.D. Cal.1997) (holding that BART's actual and planned upgrades in physical facilities and a new preventive maintenance program did not moot the plaintiffs' claims); *Watanabe v. Home Depot USA, Inc.*, 2003 WL 24272650, at *4 n.2 (C.D. Cal. July 14, 2003) (holding that a memo circulated to the defendant's employees concerning preserving access to parking spaces was not sufficient to render ADA claims moot: "Defendant has wholly failed to meet its heavy burden. . . . Defendant provides no evidence or persuasive argument that its unlawful conduct will not continue"); *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362, 1382 (N.D. Ga. 2002) ("Improvements in service will not preclude injunctive relief where there has been a clearly established pattern of failing to provide an acceptable level of service to the disabled.").

3. TBC Has Not Demonstrated That it Can Ensure Compliance in New and Acquired Stores.

The third ground on which the Court held, in 2007, that an injunction was necessary was to "ensure that those elements comply in any new or acquired restaurants." *Moeller*, 2007 WL 2301778, at *8. This, too, remains as necessary as it was in 2007.

TBC has provided the Court with no evidence or argument that the six new stores it recently opened are in compliance. *See* Robertson Decl. ¶ 20 (April 10, 2009 letter from R. Hikida stating that stores 24199, 24256, 24304, 24399, and 24440 were recently constructed); *see also* Elmer Decl. ¶ 4 (store 24424 recently constructed). The former five stores are not mentioned anywhere in TBC's MPSJ or supporting papers; there is no evidence that any of the six recently-constructed stores is in compliance. The only mention of a policy relating to new

stores is in Mr. Elmer's declaration, where he states merely that TBC provides a checklist to construction managers. Elmer Decl. ¶ 12. As explained above, this is something construction managers use at their discretion, Elmer 2008 Dep. at 15, and it omits important accessibility requirements. Ultimately, for the reasons discussed in Section III.D.2 immediately above, this policy cannot satisfy TBC's heavy burden to show that violations will not occur in newly constructed restaurants.

The inadequacy of any policy covering new construction was underscored by Mr. McSwain's surveys of four stores -- 22460, 22691, 22692, 22871 -- that had presumably been constructed since the Special Master served his reports. *See* Robertson Decl. ¶ 10. These stores contained a wide variety of violations, *see* McSwain Ex. 3 at 408-20, ranging from door closing time, *id.* at 408, 411, 412, to an improperly constructed ramp, *id.* at 410.

In light of the complete lack of evidence of compliance in the six recent stores, and the long list of violations found in the four new stores surveyed by Mr. McSwain, TBC cannot satisfy the heavy burden to show that violations will not occur in new stores.

E. TBC Still Contests Liability and Only Attempted Reform Long After Being Sued.

Where a litigant attempts to remedy a problem during litigation while continuing to assert the legality of its original conduct, this weighs in favor of finding that the conduct is likely to resume and the case is not moot. *See, e.g., Sheely*, 505 F.3d at 1186-87 (holding that a "defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains"); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 430 F. Supp. 2d 996, 1006 (N.D. Cal. 2006) (holding that the defendant's persistent representations that the challenged operations were legal "are an additional factor suggesting that there is a likelihood that [the defendant] will resume the challenged activity."); *Blue Ocean Pres. Soc'y v. Watkins*, 767 F. Supp. 1518, 1525 (D. Haw. 1991) (holding that "the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct." (citing *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43

(1944)).). With respect to many of the items in Exhibit 18 that TBC claims to have remedied, TBC simultaneously contests liability.[13] Nowhere does it recognize the initial illegality of its conduct; instead, it has asserted repeatedly that the only motivation for the changes was a desire to avoid liability through application of the mootness doctrine. *See supra* at 3.

It is also suspect that TBC waited four years after the filing of this case before even starting to remedy the challenged conduct. The Supreme Court has cautioned that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952); *see also Armster v. United States Dist. Court*, 806 F.2d 1347, 1357 (9th Cir. 1986) (holding that "[a] change of activity by a defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy [under the voluntary cessation exception to mootness].").

F. Cases Cited by TBC Cannot Overcome The Force of Supreme Court and Ninth Circuit Precedent Demonstrating Plaintiffs' Claims Are Not Moot.

TBC does not discuss or distinguish the Supreme Court and Ninth Circuit precedents that govern this case -- *Friends of the Earth*; *Rosemere*; *Pereira* -- nor does it acknowledge -- much less attempt to satisfy -- its "heavy burden" to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189 (citation omitted). Instead, TBC relies almost entirely on unpublished, single-facility, single-plaintiff cases in many of which the plaintiff had conceded mootness or even summary judgment.

Similarly, nowhere does TBC acknowledge the Court's prior decision rejecting its

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[13] For example, *compare* Elmer Ex. 18 at 36, 62, 92-93, 109, 124, 133, 149 and other examples in which TBC claims to have replaced floor mats, *with* MPSJ at 25 (arguing that floor mats are not covered by the ADAAG); *compare* Elmer Ex. 18 at 3, 35, 46, 96, 103 and other examples in which TBC claims to have removed a portable trash can *with* MPSJ at 40-42 (arguing that these elements are not covered by the ADAAG). (Plaintiffs are not confident that their version of Elmer Exhibit 18 has the same pagination as that before the Court. *See* Docket Nos. 476 & 477. Page references within Exhibit 18 are thus approximate.)

mootness argument or attempt to explain why injunctive relief would not be still necessary to "(1) remedy the remainder of these elements that are out of compliance; (2) maintain those elements in a compliant state; and (3) ensure that those elements comply in any new or acquired restaurants." *Moeller*, 2007 WL 2301778, at *8. Instead, TBC relies largely on unpublished -- and quite distinguishable -- cases addressing when injunctive relief is appropriate, with no attempt to tie them to the circumstances of this case.

1. TBC's Single-Store Mootness Cases Are Distinguishable.

The cases TBC recites in support of its mootness argument are all single-facility, generally single-plaintiff cases, in many of which the plaintiff conceded mootness. These cases are not apposite here.

TBC's lead mootness case, *Bleakly v. Sierra Cinemas, Inc.*, 2008 WL 109377 (E.D. Cal. Jan. 8, 2008) (cited in MPSJ at 5), involved a single plaintiff challenging conditions in a single theater. The plaintiff "concede[d] that as a result of the modifications defendant ha[d] made to the movie theater her ADA claim [was] now moot. The parties [did] not dispute that summary judgment on plaintiff's ADA claim in favor of defendants [was] warranted." *Id.* at *1; *see also Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 05CV1660-J (WMc), slip op. at 22 (S.D. Cal. June 14, 2007) (Collins Ex. 1) ("Plaintiff concedes that Defendant has modified the restrooms to comply with the law."); *Sanford v. Del Taco, Inc.*, 2006 WL 2669351, at *4 (E.D. Cal. Sept. 18, 2006) (noting that the plaintiff had agreed that certain barriers had been remedied and were therefore moot). *Hubbard v. Kayo Oil Co.*, No. 05CV2076 BEN (BLM) (S.D. Cal. Dec. 22, 2006) (Collins Ex. 2), *cited in* MPSJ at 5 -- a one-paragraph decision stating that the plaintiffs did not oppose the defendants' motion for summary judgment on mootness grounds -- was reversed on appeal by the Ninth Circuit. *Hubbard v. Kayo Oil Co.,* 304 Fed. Appx. 515, 516 (9th Cir. 2008).

In *Rodriguez v. Ralph's Grocery Co.*, No. 07-CV-02311-R (PLAx) (C.D. Cal. Nov. 7, 2007) (Collins Ex. 3), two plaintiffs challenged a total of three barriers in a single facility. *Id.*, slip op. at 2-3. When the defendant remedied those three barriers, the court held the case moot.

Id. at 4; *see also Sharp v. Rosa Mexicano, D.C., LLC*, 496 F. Supp. 2d 93, 95 (D.D.C. 2007) (holding that when the single feature at issue in single restaurant was remedied, the claim was moot); *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1130 (C.D. Cal. 2005) (single plaintiff sought injunctive relief as to a single element in a single facility; court held case was moot because element had been remedied); *Ostendorf v. Dawson County Corrections Bd.*, 2002 WL 31085085, at *6 (D. Neb. Sept. 18, 2002) (no immediate threat of harm because prisoner plaintiff had been transferred out of the challenged facility).

In *Molski v. Foster Freeze Paso Robles*, No. CV 04-03780 DDP (JWJx) (C.D. Cal. May 10, 2007) (Collins Ex. 4), the plaintiff admitted that all of the barriers he challenged had been removed. *Id.* slip op. at 11. Nevertheless, he argued that the "voluntary cessation" doctrine applied. *Id.* In granting the defendant's motion, however, the court found that "[t]here is no indication that Defendants would attempt to undo those remedies if the Court refrained from granting injunctive relief." *Id.* at 12. That is in sharp contrast to the present case, in which there is ample evidence of frequent change and impermanent remedies.

The only Ninth Circuit case on which Defendant relies is not relevant here. In *Martinez v. Longs Drug Stores Corp.*, 281 Fed. Appx. 712 (9th Cir. 2008) -- another single, plaintiff single facility case, *see id.* at 713 -- the Ninth Circuit held that the district court had not abused its discretion in declining to order injunctive relief. That court specifically stated that the district court's decision was not based on mootness and that, as a result, the "voluntary cessation" doctrine did not apply. *Id.* at 713 n.1.

None of these cases involved a class action. None involved multiple facilities. And in none was there evidence -- as there is here, in abundance -- that the facilities at issue change frequently and that violations have recurred and will continue to recur. The cases TBC cites are simply not relevant to the present case.

2. TBC Bears the Burden to Show That No Effective Relief can be Ordered.

Plaintiffs have demonstrated that injunctive relief is necessary for the same categories of reasons this Court found applicable in 2007. *See Moeller*, 2007 WL 2301778, at *8. TBC

does not argue or present evidence to the contrary. Instead, it cites to a series of cases that are completely disconnected from the present motion. For example, its lead case is *Antoninetti v. Chipotle Mexican Grill, Inc.*, 2008 WL 111052 (S.D. Cal. Jan. 10, 2008), which addressed the question whether injunctive relief was proper in light of the fact that the plaintiff did not appear to have a sincere plan to return to the two restaurants at issue, *id.* at *25, a question not at issue in the present litigation. Because the question was before the court for findings of fact and conclusions of law following a bench trial, *see id.* at *1, the court properly placed the burden of proof on the plaintiff to establish entitlement to injunctive relief, *id.* at *24.

In contrast, "[t]o establish mootness, a defendant must show that the court cannot order any effective relief." *San Francisco Baykeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1159 (9th Cir. 2002). That is, in a context such as the present -- a defense motion for summary judgment on mootness -- the burden is on TBC to show that the court cannot order effective relief, not on Plaintiffs to establish entitlement to an injunction. Furthermore, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (internal quotations omitted).[14]

The remainder of TBC's cases are equally inapposite. For example, in *Blake v. Southcoast Health System, Inc.*, 145 F. Supp. 2d 126, 132 (D. Mass. 2001), the only plaintiff was deceased. In *Adelman v. Acme Markets Corp.*, 1996 WL 156412, at *2 (E.D. Pa. Apr. 3, 1996), and *Stringer v. White*, 2008 WL 344215, at *6-7 (N.D. Cal. Feb. 6, 2008), the plaintiffs were not seeking injunctive relief. In *Donald v. Café Royale, Inc.*, 218 Cal. App. 3d 168, 184 (Cal. Ct. App. 1990), the defendant had ceased operating the restaurant in question. In *Harris v. Stonecrest Care Auto Center, LLC*, 472 F. Supp. 2d 1208, 1218 (S.D. Cal. 2007), the only

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[14] TBC cites *Long v. United States Internal Revenue Service*, 693 F.2d 907, 909 (9th Cir. 1982) for the proposition that the court should consider "the likelihood of recurrence, weighing the good faith of any expressed intent to comply, the effectiveness, if any, of the discontinuance and the character of past violations." MPSJ at 4. This case predated *Friends of the Earth* and *San Francisco Baykeeper*, which set forth the governing standards assigning the burden to the defendant to prove mootness and the lack of need for an injunction in that context.

question was whether the single plaintiff intended to return to the challenged facility.[15]

In *Gasper v. Marie Callender Pie Shops, Inc.*, No. CV 05-1435 CBM (Ssx) (C.D. Cal. June 27, 2006) (Collins Ex. 5), the plaintiff admitted that the barriers she challenged had been remedied, and that the policy she challenged complied with the ADA and had not affected her the only time she made use of it. *Id.*, slip op. at 2. The defendant was able to produce evidence that a compliant policy had been in effect since before the lawsuit. *Id.* at 5. This is again in stark contrast to the present case, in which TBC has adopted a series of changing policies which it has not promulgated to its stores, and which Plaintiffs contend do not satisfy its obligations under the ADA.

3. TBC's Citation to *Doran* Is an Impermissible Attempt to Shift the Burden of Demonstrating Mootness.

The last case cited -- again without explanation -- in TBC's mootness argument is *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1048 (9th Cir. 2008), for the proposition that Plaintiffs bear the burden of proof to defeat summary judgment as to each of the elements at issue. MPSJ at 7. TBC did not, however, move for summary judgment on the merits as to each of the elements at issue. Indeed, TBC does not challenge any of the Special Master's findings, documented in the reports filed at Docket Nos. 216 through 240. Nor -- with one exception[16] -- does it challenge the accuracy of the measurements documented in Plaintiffs' expert reports.

Because TBC has not provided evidence or argument on the merits of Plaintiffs' claims, Plaintiffs do not -- at this juncture -- bear the burden of proof assigned in *Doran*. *See Nissan Fire & Marine*, 210 F.3d at 1102-03 (where the non-moving party does not carry its burden of persuasion, "the nonmoving party may defeat the motion for summary judgment without

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[15] TBC also cited *Dowling v. MacMarin, Inc.*, No. C-94-2899 WHO (N.D. Cal. Sept. 6, 1996). MPSJ at 4. This case was decided before the advent of the electronic case filing (ECF) system in the Northern District of California, and is thus unavailable to Plaintiffs electronically. Plaintiffs requested that TBC provide a copy but this did not happen. Robertson Decl. ¶ 15.

[16] Mr. Elmer disputes a single measurement taken by Mr. McSwain. *See* Elmer Decl. ¶ 35. Mr. Elmer's assertion is based on photographs that TBC does not provide the court, in violation of Rule 56(c). There are thus no grounds to accept Mr. Elmer's assertion; at most, it is a disputed issue of fact. *Compare* Elmer Decl. ¶ 35 *with* McSwain Ex. 3 at 223 and Ex. 138 at EMP002169-72.

producing anything"). Rather, this argument "impermissibly attempts to shift the burden to [Plaintiffs] to defeat mootness." *Rosemere*, 581 F.3d at 1173. By moving for summary judgment on the theory that it has remedied all alleged violations, TBC has for all purposes related to this motion the "heavy burden" to show that these violations will not recur. *Id.*[17] It has not satisfied that burden.

III. Plaintiffs' Responses To TBC's Non-Mootness Defenses.

The section of the MPSJ entitled "Taco Bell's Defenses Other than The Mootness Doctrine" contains 84 subsections -- ranging from one sentence to several pages long -- raising a variety of non-mootness issues. MPSJ at 8-50. These will be referred to as the "Non-Mootness Defenses."

As an initial matter, these Non-Mootness Defenses suffer from the inadequacies noted in Section I of the Argument: they are completely unsupported by expert evidence; largely unsupported by any other type of admissible evidence; and rife with unsupported assertions of fact and references to documents and photographs that were not submitted to the Court. Throughout its Non-Mootness Defenses, TBC improperly relies on Plaintiffs' Meet and Confer Charts, which reliance is barred by both Rule 408 of the Federal Rules of Evidence and by the parties' previous agreement.

A. Any References To Or Attempts to Draw Inferences from Plaintiffs' Meet and Confer Charts Are Improper and in Violation of Rule 408.

Throughout the Non-Mootness Defenses, TBC asks the Court to draw various inferences from the fact that various elements were or were not included in Plaintiffs' "Meet and Confer Charts." As described above, these charts are protected by Rule 408. Robertson Exs. 8, 10; *see also* Pls.' Mot. to Strike, sec. II. In addition, Plaintiffs informed TBC that they

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[17] TBC also cites two cases for the proposition that a plaintiff only has standing with respect to barriers of which he had knowledge. MPSJ at 6 (citing *Wilson v. Haria and Gogri Corp.*, 2007 WL 851744, at *3 (E.D. Cal. Mar. 22, 2007) and *Brother v. CPL Investments, Inc.*, 317 F. Supp. 2d 1358, 1368 (S.D. Fla. 2004)). TBC does not explain the relevance of these citations to this class action case. In any event, the governing law in the Ninth Circuit is that a plaintiff has standing to challenge all barriers at a facility that affect his or her disability. *See Doran*, 524 F.3d at 1044.

"cannot agree that those items that are left off the charts [they sent] were in compliance on the date of the Special Master's survey." Robertson Ex. 7. In any event, as is common in a settlement process, each decision to omit a violation from Plaintiffs' settlement position was an individualized decision. No further inferences can be drawn from it. Thus, the many occasions on which TBC asks this Court to make inferences from the an omission from an M&C chart are not only improper but logically and factually unsupported.[18]

B. Many of TBC's Non-Mootness Defenses Are Meritless

The arguments below are meritless for the reasons provided. Plaintiffs retain the numbering used in TBC's MPSJ for ease of reference.

1. Customer Service Cannot Excuse Violations of the ADAAG.

Customer service cannot constitute "equivalent facilitation" under Section 2.2 of the ADAAG and cannot otherwise excuse violations of ADAAG standards. Section 2.2 permits "[d]epartures from particular technical and scoping requirements of this guideline by the use of other designs and technologies . . . where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." This Court has previously held that "there are only two requirements for an equivalent facilitation: 1) it is an alternative design or technology; and 2) it provides equal or greater access to subject facilities." *Moeller v. Taco Bell Corp.*, 2005 WL 1910925, at *3 (N.D. Cal. Aug. 10, 2005). "Indeed, when '[p]roperly read, the "Equivalent Facilitation" provision does not allow facilities to deny access under certain circumstances, but instead allows facilities to bypass the technical requirements laid out in the [Accessibility] Standards when alternative designs will provide "equivalent or greater access to and usability of the facility."'" *Id.* at *3 n.1 (quoting *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 739 (3d. Cir. 1999)).

TBC ignores this limitation and attempts to use customer service -- which is neither an

[18] *See* MPSJ, Section IV.B, Subsections 5, 6, 7, 8, 9, 15, 16, 17, 18, 23, 26, 29, 30, 32, 34, 37, 41, 43, 45, 46(a), 46(b), 46(c), 55, 59, 61, 62, 67, 70, and 77.

alternative design nor an alternative technology -- to excuse its violations of the ADAAG.[19] This is improper both under this Court's prior ruling and in light of the ADA's purposes of "full participation, independent living, and economic self-sufficiency" for individuals with disabilities, 42 U.S.C. § 12101(a)(7). The District of Columbia Circuit recently held that the same goals of the Rehabilitation Act, 29 U.S.C. § 794, "ensure[ ] that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons." *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008) (citations omitted); *see also Clavo*, 2004 WL 3709049, at *3 (holding that defendant could not require plaintiff to ask employee to unlock gate in front of grocery store or request that accessible check-out lane be opened. "Although Plaintiff was ultimately able to purchase merchandise at the [store], the manner in which he was able to make his purchases was neither 'full' nor 'equal' in comparison to non-disabled patrons.").

Not only is customer service by definition not a design or technology, it does not "provide[ ] equal or greater access to subject facilities," in violation of this Court's second requirement. *Moeller*, 2005 WL 1910925, at *3. A review of the circumstances in which TBC attempts to invoke this defense demonstrates the unequal and ultimately humiliating experience it would create. TBC suggests that instead complying with the ADAAG, it can insist that customers rely on assistance to enter the restaurant -- including being bumped over a noncompliant threshold, *see* MPSJ at 24 -- and having to ask for help moving obstructions in paths of travel and on counters, retrieving drinks, condiments, tableware, and brochures, opening the door to get into the restroom and again to get back out. *See generally* Robertson Decl. Ex. 37; Corbett Decl. ¶ 5. This experience can be "diminishing," and undermines the ADA's promise of independence. *Id.*; *see also* Frederickson Decl. ¶¶ 4-5; Hall Decl. ¶¶ 4-5; Hardnett Decl. ¶ 8; Mortimer Decl. ¶ 7; Pliska Decl. ¶¶ 4-5; Wilkie Decl. ¶¶ 4-5; Yates ¶ 4.

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[19] In its MPSJ and throughout Elmer Exhibit 18, TBC also uses the phrase "assisting disabled customers . . . constitutes a reasonable modification of its self-service policy." *See, e.g.,* MPSJ at 8; Elmer Ex. 18 at 2 and *passim*. Nowhere in the ADAAG, the ADA, or its implementing regulations does a reasonable modification of policy excuse compliance with the ADAAG.

2. TBC Does Not Provide Any Evidence Concerning The Position of the City of La Mirada.

TBC asserts that, at store 5636, the City of La Mirada refused to permit certain measures. MPSJ at 9. This assertion is not accompanied by a citation to the record and Plaintiffs were unable to find any support for it in the Hikida, Reeves or Elmer Declaration, much less documentary proof from the City of La Mirada. In the absence of such evidence, it is impossible -- and unnecessary -- for Plaintiffs to respond. *See Nissan Fire & Marine*, 210 F.3d at 1102-03.

3, 60 & 63. TBC Has Not Satisfied its Burden of Proof to Demonstrate that Remedies are Technically Infeasible.

With respect to alterations, the ADAAG provides a defense where compliance is "technically infeasible." *Id.* § 4.1.6(1)(j). A measure is "technically infeasible" if it would require alteration of a load-bearing member or because "other existing physical or site constraints" prohibit full compliance. *Id.* TBC has stipulated that it has the burden of proof of demonstrating that compliance was technically infeasible. Joint Status Conference Statement (Docket No. 157) at 6. TBC invokes the "technically infeasible" defense in three subsections: 3, 60 and 63. In no case does it satisfy its burden to show that compliance would require altering a load-bearing member or that other site constraints prohibit compliance.

In subsection 3, TBC makes the bare assertion that compliance with respect to the ramp landings at store 829 was technically infeasible. MPSJ at 10. It provides no evidence whatsoever for this assertion, or even a description of how it believes the defense applies. It has not satisfied its burden of proof as to technical infeasibility.

In subsections 60 and 63, TBC claims that compliance with respect to the maneuvering clearance at restroom doors in 20 stores was technically infeasible. MPSJ at 37-38, 40. As an initial matter, seven of those stores (5512, 5636, 5641, 19344, 19509, 20180, and 20353) were stipulated as built after January 26, 1993. *See* Docket No. 241 at 5, 8. As such, the "technically infeasible" defense does not apply to these stores. *See* ADAAG § 4.1.6(1)(j) (defense applies to alterations). With respect to the remainder, TBC has not provided any

evidence that compliance is technically infeasible. In each case, the problem is insufficient room on the pull side of a restroom door. In each, compliance could be achieved by the use of automatic door openers. TBC does not provide any explanation -- much less evidence -- of why such a solution would be technically infeasible.

Its references to the Special Master's reports are equally unavailing. With respect to store 829, the Special Master provided a feasible solution -- installing a new lavatory -- merely noting that the alternative solution of moving the walls was technically infeasible. Docket No. 217-5 at 63. The restroom door maneuvering clearance at the men's room in store 3112 was not addressed by Plaintiffs' expert, so it is not clear why it is included in subsection 60. *Compare* MPSJ at 38 *with* McSwain Ex. 3 at 103. The Special Master made no commentary about feasibility whatsoever with respect to the restroom doors in store 3390. Docket No. 224-7 at 59-65, 80-85. With respect to the remainder of the stores, the Special Master noted that it was technically infeasible to alter the walls; he did not address the feasibility of installing automatic door openers.[20]

4. In New Construction, TBC Is Required to Provide An Accessible Route Within the Boundary of the Site from Public Transportation and Public Streets or Sidewalks.

The ADAAG requires that, in new construction, "[a]t least one accessible route . . . shall be provided within the boundary of the site from public transportation stops, . . . and public streets or sidewalks, to an accessible building entrance." *Id.* § 4.1.2(1). In 43 stores, Mr. McSwain opined that no such accessible route was provided because the public sidewalk contained excessive slope or cross slope where it crossed the driveway. *See* Robertson Ex. 29. TBC argues that it "does not have the ability to make modifications within the public right-of-way." *See, e.g.*, Elmer Ex. 18 at 1, 8, 14, 48. This is irrelevant with respect to any stores built

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[20] *See* Docket No. 217-7 at 88 (store 955); Docket No. 223-7 at 84 (store 3145); Docket No. 223-10 at 60 (store 3184); Docket No. 226-9 at 83 (store 4325); Docket No. 227 at 85 (store 4343); Docket No. 227-6 at 88 (store 4558); Docket No. 228 at 84 (store 4617); Docket No. 228-2 at 78 (store 4622); Docket No. 228-7 at 85 (store 4799); Docket No. 229 at 84 (store 5081); Docket No. 229-6 at 81 (store 5512); Docket No. 229-10 at 83 (store 5636); Docket No. 230 at 82 (store 5641); Docket No. 235-8 at 53 (store 19344); Docket No. 237-1 at 57, 74 (store 19509); Docket No. 238 at 64 (store 20180); and Docket No. 238-6 at 62 (store 20353).

after January 26, 1993.[21] If TBC was unable to modify the public right-of-way, it had the obligation to provide an accessible route through some other means. The only defense to full compliance in new construction is that it is "structurally impracticable" to do so. 42 U.S.C. § 12183(a)(1); *see also Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001) (holding that "structural impracticability" is the only defense to compliance in new construction). TBC has made no argument and provided no evidence that it was structurally impracticable to provide an accessible route from the sidewalk to the front door in each of these restaurants.

Because -- since 1981 -- Title 24 has required that "[s]ite development and grading shall be designed to provide access to primary entrances . . .," *id.* (1981) § 2-7101(a), discussion of the remaining restaurants, built prior to January 26, 1993, is premature. *See infra* at 50.

5. TBC's Assertions with Respect to One Element Each At Stores 4622 and 20310 Are Disputed Issues of Fact.

TBC argues that the east ramp at store 4622 and the turn knobs on the patio doors at store 20310 are not for use by customers with disabilities. MPSJ at 12. It was Mr. McSwain's opinion that the former was required to be accessible. *See* McSwain Ex. 3 at 205. TBC provides no expert opinion to rebut this; it is at most a disputed issue of fact.

TBC's assertion that the turn knobs on the patio doors at store 20310 are "used only by building security," is incorrect. MPSJ at 12. When Mr. McSwain surveyed the store, he had to turn the turn knob in photo EMP031351 to get from the patio back into the restaurant. McSwain Decl. ¶ 2 and Ex. 222 at EMP031351 & EMP031353.

6 & 7. The Parties Agreed That a Maximum 6.6% Running Slope and 3% Cross Slope Would Be Acceptable.

The ADAAG limits the running slope of an accessible route to 1:20 or 5%; cross slope is limited to 1:50 or 2%. *Id.* § 4.3.7. The parties stipulated that they would accept a slope up to a maximum of 6.6% running slope and 3% cross slope. *See* Robertson Ex. 2.

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[21] The following stores -- as to which TBC asserted this defense -- were stipulated as built after January 26, 1993: 99, 3079, 3152, 5513, 9489, 15573, 16140, 16812, 17363, 17471, 17751, 18606, 18687, 19289, 19344, 19591, 19744, 20180, and 20578. *See* Docket No. 241 at 1, 3, 5-8.

While the citation to the Meet and Confer Charts in subsection 6 is inappropriate, *see supra* at 28-29, it is not necessary to establish that a 6% running slope is acceptable, in light of the agreement that 6.6% will be acceptable. This does not, however, indicate that "such *cross-slope* in accessible walkways," MPSJ at 12 (emphasis added), is acceptable. Although the reference to "cross-slope" in this subsection of the MPSJ may have been a typographical error, it is clear that the agreement to 6.6% as an acceptable measurement was limited to slope and not cross-slope. *See* Robertson Ex. 2. TBC's attempt, in subsections 6 and 7, to justify cross-slopes greater than 3% is improper because it deviates from the parties' stipulation.

11 & 12. The ADAAG Requires Handrail Extensions At the Top and Bottom of Ramps In the Direction of The Ramp.

Wherever handrails are not continuous, they must extend 12 inches beyond the top and bottom of the ramp. ADAAG § 4.8.5(2). Mr. McSwain opined that the ramps at stores 4622 and 17572 violated this provision. *See* McSwain Ex. 3 at 205, 317. TBC argues that this is incorrect, but does not provide either factual evidence that the handrails have proper extensions or expert evidence that Mr. McSwain's opinion is incorrect.

13. Plaintiffs' Expert Used the Proper Method to Measure Ramp Landings.

The ADAAG requires that ramp landings be at least 60 inches long. ADAAG § 4.8.4(2). TBC challenges Mr. McSwain's measurement of the bottom ramp landing at store 22691 on the theory that he measured only to the expansion joint. MPSJ at 14. There are two problems with this argument. First, TBC is incorrect concerning Mr. McSwain's measurement methodology: he measured the relevant slopes rather than stopping at an expansion joint. McSwain Decl. ¶ 7. In any event, TBC is attempting to rebut Mr. McSwain's expert opinion that the landing -- properly measured -- was 56½ inches long by simply asserting that portions of the landing beyond that length were "between 2.2% and 2.7% running slope." MPSJ at 14. TBC does not provide expert testimony to support this assertion, and the testimony they purport to provide -- apparently paragraph 57 of the Elmer Declaration, though this is not cited in the MPSJ -- is not based on personal knowledge. In the absence of such support, this is, at

the very least, a disputed issue of fact.

15. The Ramp At Store 22691 Requires A Handrail.

The ADAAG requires that ramps have handrails under certain conditions. *Id.* § 4.8.5. Mr. McSwain opined that the upper portion of the ramp at store 22691 required handrails. McSwain Ex. 3 at 410. TBC argues that this ramp is "better characterized as a curb ramp," MPSJ at 14, but offers no support -- expert, photographic, or otherwise -- for this assertion. In the absence of such support, this is at the very least a disputed issue of fact.

17. The ADAAG Requires that Accessible Parking Be On the Shortest Route of Travel from Adjacent Parking to an Accessible Entrance.

The ADAAG requires that "[a]ccessible parking spaces serving a particular building shall be located on the shortest accessible route of travel from adjacent parking to an accessible entrance." *Id.* at 4.6.2. At store 17984, Mr. McSwain opined that "[t]he accessible parking spaces, located beyond the southwest corner of the building, are not located on the shortest route to the building entrance." McSwain Ex. 3 at 321. TBC does not dispute this, nor does it provide any expert opinion concerning the application of Section 4.6.2, nor does it provide any evidence of any kind relating to store 17984 -- the only store at which Mr. McSwain found a violation of this provision. TBC's argument consists merely of stating generally that adjacent parking "could be quite a distance away from the store entrance." MPSJ at 16. Mr. McSwain's finding is undisputed; this is at least a disputed issue of fact precluding summary judgment.

18. The ADA Requires Access Aisles to Extend the Full Length of Accessible Parking Spaces.

The ADAAG requires van accessible parking spaces to be "served by an access aisle 96 [inches] . . . wide." *Id.* 4.1.2(5)(b). TBC disputes Mr. McSwain's application of this provision to diagonal parking spaces. *See* MPSJ at 16-17. While the ADAAG does not directly address the question of diagonal parking spaces and does not require any particular length, it clearly requires that the access aisle extend the entire length of the parking space provided. *See id.* Fig. 9. The Department of Justice has issued a publication describing how van accessible parking is used. ADATA: Americans with Disabilities Technical Assistance (No. 1, Aug.

1996).[22] This publication provides excellent illustrations of van-users exiting their vans into the access aisle. *See id.* at 13-15. These illustrations make clear that, in order to be useable, the access aisle must serve the entire van accessible parking space, whether in the ordinary parallel configuration or in a diagonal or sawtooth configuration.

Because, in a number of stores, TBC's diagonal parking did not provide an access aisle the full length of van accessible spaces, Mr. McSwain opined that they were in violation of the ADAAG. *See* McSwain Ex. 3 at 8, 17, 53, 86, 101, 106, 110, 117, 326. TBC offers no expert rebuttal of this opinion or of Mr. McSwain's methodology. *See* MPSJ at 16-17. It asserts that "the ADAAG does not endorse such methodology," MPSJ at 17, but provide no citations in support of this assertion.

23. The ADAAG Requires that Parking Signs Be Visible Over Parked Vehicles.

The ADAAG requires that signs at accessible parking spaces "be located so they cannot be obscured by a vehicle parked in the space." *Id.* § 4.6.4. TBC asserts that the ADAAG does not provide a minimum parking sign height, MPSJ at 18, but does not cite -- either in the MPSJ or Exhibit 18 -- to any examples of signs from Mr. McSwain's expert report that it believes were compliant with Section 4.6.4. TBC does not identify the stores to which this applies; however, in each case in which Mr. McSwain notes that the height of a parking sign is in violation, it is because it is likely not visible over parked cars. McSwain Ex. 3 at 9, 52, 202, 208, 210, 304.

37. The Threshold at the Doorway in Store 176 Violates the ADAAG.

Thresholds at doorways and other changes in level are limited to half an inch and must be beveled. ADAAG §§ 4.5.2, 4.13.8. The parties have agreed that changes in level may only be ⅜" if unbeveled, and that thresholds may be up to ¾ " if beveled. Robertson Ex. 2 at 1. Mr. McSwain opined that, at restaurant 176, there was a "2" gap at main entrance threshold with [a] 1/2" unbeveled change in level." McSwain Ex. 3 at 5. This violates the parties' agreed

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[22] *Available at* http://www.usdoj.gov/crt/ada/adata1.pdf (last visited Nov. 3, 2009) (attached as Exhibit 4 to the Robertson Declaration).

acceptable measurements. Mr. McSwain also provided several photos, showing a side view of the threshold, in one case with a level and a tape measure that show the depth of the change in level. *See* McSwain Ex. 8 at EM01075, EM01077.

TBC counters that its photographs "depict little to no change in level." MPSJ at 24. As an initial matter, it did not provide these photographs to the Court, so under Rule 56(c) and (e), summary judgment would be inappropriate. In addition, it offers no expert testimony to rebut Mr. McSwain's opinion. Ultimately, too, it is interesting to observe the photographs that TBC believes prove its point: both are taken from above, looking directly down on the change in level, with no attempt to measure it. *See* Boothby Ex. 2.

38. The Parties Agreed to the Applicable Standard for Floor Mats.

TBC argues that "the ADAAG does not contain any enforceable standard as to floor mats." MPSJ at 25. While Plaintiffs disagree as a legal matter, this is irrelevant: TBC has stipulated to the applicable standard. The ADAAG requires that floor surfaces be "stable, firm and slip-resistant." *Id.* § 4.5.1. TBC agreed with Plaintiffs that "floor mats that are rubberized and have beveled edges will be considered to provide a stable, firm and slip-resistant surface, provided that they are maintained in such a condition that they do not otherwise violate the requirement by having frayed edges or edges that are curled up." Robertson Ex. 11 at 4 (R. Hikida letter dated Dec. 15, 2006). The floor mats cited by Mr. McSwain as violations were in violation of the agreed standard. *See* Robertson Ex. 30.

39. Self-Service Items Must be Accessible to People with Disabilities.

Apparently because they were stored in an inaccessible alcove in one store, TBC has announced that, because they weigh up to 20 pounds, high chairs are "full service item[s] for the mobility impaired." MPSJ at 26. That is, while individuals without disabilities can retrieve high chairs on their own, even those individuals with disabilities who would have no problem lifting 20 pounds may be denied independent access. TBC provides no legal or expert support for this inequality -- for good reason: Title III requires that individuals with disabilities be provided equal accommodations. *See, e.g.,* 42 U.S.C. § 12182(b)(1)(A)(ii). While individuals

with disabilities who cannot lift 20 pounds should be able to request assistance, those who are able to retrieve the high chairs on their own should not be prevented from doing so. There is no excuse for TBC's practice of storing high chairs in inaccessible locations.

42. Accessible Counters Must Remain Unobstructed.

The ADAAG requires that counters with cash registers have a portion that is at least 36 inches long that is at most 36 inches high. *Id.* § 7.2(1). In many restaurants, although such a counter was present, it was covered with obstructions such as advertising placards, donation banks, and other objects. *See* Robertson Ex. 31. This violates the requirement that features that are required to be accessible be "maintained in operable working condition." 28 C.F.R. § 36.211. The DOJ's interpretive guidance makes it clear that this requires that "accessible routes are properly maintained and free of obstructions," 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 720 (2009) ("Preamble"), so they can be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 36.211(a); *see also infra* at 42-45. Mr. McSwain opined that these obstructed counters were in violation; TBC provides no expert testimony to rebut this opinion.

46. When A Side Reach is Over an Obstruction, the Height of the Obstruction is Limited to 34 Inches.

The ADAAG governs the height of objects that individuals with disabilities must reach to retrieve or operate. Objects that can be reached from a side approach can be no higher than 54 inches from the floor. *Id.* § 4.2.6. If the individual must reach over an obstruction that is deeper than 10 inches back, the obstruction is limited in height to 34 inches and the reach height is limited to 46 inches. *Id.* and Fig. 6(c). When the item to be reached is an automatic teller machine ("ATM"), the ADAAG provides a separate sliding scale of reach height and depth; however, nothing in that scale or the other ATM provisions changes the 34-inch limit on the obstruction. *Id.* at 4.34, specifically 4.34.3(2)(b).

TBC attempts to avoid the requirements of Section 4.2.6 and Figure 6(c) in several ways. First, it argues that Figure 54 shows a 54-inch reach over an obstruction that exceeds 34

inches in height. MPSJ at 29. Figure 54, however, does not provide a dimension for the obstruction, so TBC's assertion is apparently based simply on eyeballing the diagram and guessing at the height. Using this approach, it appears equally clear that the item reached for -- the napkin holder -- is less than ten inches back, which would not constitute a reach over obstruction pursuant to Figure 6.

TBC next argues that the ATM reach ranges are applicable to other items as well, but provides no legal or expert support for this. *See* MPSJ at 29-30. To the contrary, it is hard to explain why the drafters of the ADAAG would have provided a separate scale of reach ranges for a specific type of device -- ATMs -- if they intended it to supercede the clearly-articulated general standard in Section 4.2.6 and Figure 6. Finally, TBC again attempts to justify its approach based on positions Plaintiffs took in settlement negotiations, *see* MPSJ at 29, an approach Plaintiffs have demonstrated is improper. *See supra* at 28-29.

47. Plaintiffs' Expert Properly Measured Reach Ranges at Condiment and Tableware Dispensers.

Since the purpose of reaching condiment and tableware bins is to be able to reach the condiments and tableware they contain, Mr. McSwain measured to the back of each of the bins, to ensure that individuals with disabilities would be able to reach items even if only a few items remained. McSwain Decl. ¶ 8. TBC asserts that it "challenges such measurement methodology," MPSJ at 32, but provides no expert or other support for the proposition that this methodology is improper. Its assertion that the Special Master used a different method is also unsupported.

49. All of the Site Inspections Were Planned at Least A Week In Advance And Were Accompanied by TBC Personnel.

TBC argues that "[m]any of Mr. McSwain's inspections occurred before stores were open for business to the general public and had restocked" various bins. MPSJ at 33. However, all of Mr. McSwain's surveys were scheduled ahead of time, generally at least a week in advance, McSwain Decl. ¶ 4, so TBC had ample opportunity to restock before the surveys. In addition, Mr. McSwain was accompanied on every survey by a representative of

TBC, *id.*, yet TBC provides no support for the assertion that Mr. McSwain's surveys addressed bins that had not yet been filled for the day and indeed identifies no specific bins to which it believes this argument applies.

50. Tray Slides at Drink Dispensers are Limited to 34 Inches in Height.

Tray slides at food service lines are limited to 34 inches in height. ADAAG § 5.5. Mr. McSwain has the opinion that tray slides at drink dispensers fall into this category. McSwain Decl. ¶ 9. TBC argues that drink dispensers are subject to ADAAG § 5.6. MPSJ at 33. While Section 5.6 governs the height of the drink dispensers themselves, it does not address the height of the tray slides that serve them, an item addressed only in Section 5.5, and in that section, limited to 34 inches. TBC provides no expert testimony to rebut Mr. McSwain's opinion that the tray slides at drink dispensers are governed by Section 5.5.

TBC appears to argue that the California Retail Health Code prevents it from complying with this requirement. MPSJ at 33. TBC does not explain which tray slides it believes this applies to, and it is belied by the instances in which TBC claims to have installed a 34-inch-high tray slide at its drink machines. *See, e.g.,* Elmer Ex. 18 at 184, 195, 562-63.

57. Plaintiffs Have Standing to Challenge the Force Required to Use Doors and Hardware.

TBC argues that the Court has already ruled that Plaintiffs "lack standing to litigate hardware." MPSJ at 36. Although the MPSJ does not provide any examples of the elements this argument addresses, Elmer Exhibit 18 cites "standing" as grounds to challenge door force, *id.* at 95, 389, 517, 678, and the force necessary to operate faucets and flush controls, *id.* at 512, 626, 907.

In August, 2005, the Court held that Plaintiffs lacked standing to address two discrete elements: continuous toilet paper rolls; and hardware useable with one hand. Docket No. 188 at 5. The ruling addressing hardware was limited to the question whether controls were "'operable with one hand' and [did] not . . . "require tight grasping, pinching or twisting of the wrist.'" *Id.* at 5 n.2; *see also* Def.'s Opening Br. on Issues 1(c) and 1(d) of the Joint Pre-Trial Briefing Schedule (Docket No. 161) at 14 (challenging only standing as to hardware that was

not "useable with one hand without tight grasping, pinching or twisting;" no mention of force necessary to operate doors, faucets or flush handles); Robertson Ex. 6 at 2-3 (J. Dasteel 2/15/2005 letter listing "those elements . . . that Taco Bell contends do not affect the Plaintiff class" and limiting hardware challenge to "[h]ardware usable with one hand."). Thus Plaintiffs have standing to challenge the force necessary to open doors or use faucet and flush handle hardware.

58. Plaintiffs' Expert Properly Measured the Force Necessary to Open Doors and Operate Bolts.

The ADAAG limits the amount of force that must be exerted to open an interior door, such as the restroom doors at TBC restaurants, to five pounds, *id.* § 4.13.11(2)(b). In a separate section, it limits the amount of force required to operate "controls and operating mechanisms" to five pounds as well. *Id.* 4.27.4. TBC's argument that the former section does not address the force needed to retract a bolt, MPSJ at 36, ignores the separate section (4.27.4) that governs mechanisms such as bolts. Although the MPSJ does not list any elements to which this argument applies, the elements in which Mr. McSwain addressed bolts are all examples of a failure to maintain such mechanisms, *see infra* Section III.B.65/83, so that they can be used with less than five pounds of force. *See* McSwain Ex. 3 at 34, 158, 217, 294.

62. The California Health Code Does not Permit TBC to Remove Restroom Door Closers; the Required Clearance is 48 Inches.

When a door that pushes into a restroom must be approached from the latch side, if that door has a closer, it is required to have 48 inches of depth perpendicular to the face of the door. ADAAG § 4.13.6, Fig. 25(c). In a number of restrooms, in Mr. McSwain's opinion, TBC did not provide maneuvering clearance that complied with this standard. Robertson Ex. 26. TBC argues in its MPSJ that, where the door does not have a closer, the clearance is permitted to be only 42 inches. *Id.* at 39. In Exhibit 18, it asserts -- with respect to at least 50 restroom doors -- that TBC has removed the door closer. Robertson Ex. 28.

The California Retail Food Code, however, prohibits TBC from removing door closers in its restaurants. Section 114276(c) of that Code governs toilet rooms at permanent food

facilities and requires that "[t]oilet rooms shall be separated by well-fitted, self-closing doors that prevent the passage of flies, dust, or odors," and that "[t]oilet room doors shall be kept closed except during cleaning and maintenance operations." Cal. Health & Safety Code § 114276(c). With the state law-required closer, the ADAAG-required push side clearance is 48 inches; these elements remain out of compliance.

65 & 83. Moveable Objects May Not Obstruct Required Accessible Routes and Clear Floor Space and TBC Is Required to Maintain the Accessibility of its Restaurants.

TBC argues that "moveable objects such as trash cans are not architectural barriers" and are therefore not governed by the ADA, MPSJ at 40-42, and that "maintenance issues cannot trigger ADA liability." *Id.* at 49. This is incorrect. Where moveable objects consistently obstruct required clear floor space and accessible routes, they are governed -- and prohibited -- by the ADA, because ADA regulations require that required accessible features be maintained in an accessible state.

The Department of Justice ("DOJ") regulations implementing Title III require that a public accommodation "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." 28 C.F.R. § 36.211(a); *see also Moeller*, 220 F.R.D. at 606 (quoting 28 C.F.R. § 36.211(a)). In the DOJ's interpretation -- which is entitled to deference[23] -- this regulation

> recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or "accessible" routes that are obstructed by *furniture, filing cabinets, or potted plants* are neither "accessible to" nor "usable by" individuals with disabilities.

Preamble at 720 (emphasis added). While isolated or temporary obstructions are not prohibited, allowing obstructions to persist or "[f]ailure . . . to ensure that accessible routes are properly maintained and free of obstructions . . . would also violate this part." *Id.*; *see also*

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[23] "As the agency directed by Congress to issue implementing regulations, *see* 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department's views are entitled to deference." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

ADA Technical Assistance Manual, § III-3.7000.[24]

In addition, while it is true that the Access Board drafted the ADAAG to apply to fixed elements, *Colorado Cross-Disability Coalition v. Too (Delaware), Inc.*, 344 F. Supp. 2d 707, 712 (D. Colo. 2004), the ADAAG does require, for example, clear floor space in restrooms. *See, e.g., id.* § 4.22.3 "Clear floor space" is defined by the ADAAG as "[t]he minimum *unobstructed* floor or ground space required to accommodate a single, stationary wheelchair and occupant." *Id.* § 3.5 (emphasis added); *see also* Terry Decl ¶ 3 ("Movable objects are not allowed to obstruct door maneuvering clearances, clear floor spaces, accessible routes, or any other required accessible spaces or elements").

Most important, the ADA itself and its regulations address how the elements mandated by the ADAAG are to be used and maintained. The Ninth Circuit made this relationship explicit in *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004). In that case, a theater with ADAAG-compliant accessible seating did not have a policy requiring non-disabled patrons to give precedence to disabled patrons in the use of that seating. *Id.* at 1078. The defendant argued that its compliance with the ADAAG was sufficient; that nothing more was required. *Id.* at 1083-84. The Ninth Circuit disagreed, holding that while the ADAAG governed the design of the facility, "in cases such as Fortyune's, which concern a public accommodation's policy regarding the use of that design . . . the provisions of the ADAAG are not controlling." *Id.* at 1085. Rather, the provision of the statute requiring "full and equal enjoyment" of places of public accommodation governs. *See id.* (citing 42 U.S.C. § 12182). Furthermore, "[p]olicies effectuating the ADAAG may be required to fulfill the statutory purpose of 42 U.S.C. § 12182." *Id.* at 1085 n.4; *see also Celano*, 2008 WL 239306, at *11-12 (citing *Fortyune* for the proposition that it is not necessary to prove a violation of the ADAAG to prove a violation of the ADA; in the absence of the former, the latter governs).

One of the cases on which TBC relies explicitly applied Section 36.211 to moveable objects obstructing required accessible routes, and denied the defendant's motion for summary

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[24] *Available at* http://www.ada.gov/taman3.html (last visited Nov. 8, 2009).

judgment on the grounds that "disputed facts remain[ed] as to whether [the defendant] had a practice of failing to remove obstructions from accessible routes of travel or parking spaces." *Eiden v. Home Depot USA, Inc.*, 2006 WL 1490418, at *13 (E.D. Cal. May 26, 2006); *see also Cherry v. City Coll. of San Francisco*, No. C 04-04981 WHA, slip op. at 13 (N.D. Cal. Jan. 12, 2006) ("Any blockage beyond a reasonable period of time is actionable."), *both cited in* MPSJ at 41.

In the present case, Plaintiffs have presented extensive evidence that TBC has a practice of failing to remove obstructions from required clear floor spaces and other accessible elements: moveable trash cans that obstruct restroom clear floor space; loose toilet paper rolls that obstruct grab bars; and advertising placards, donation banks and other objects that obstruct accessible counters. *See* Robertson Ex. 35. Indeed, many of the moveable trash cans were noted by the Special Master, were removed by Alianza, and were back in place when surveyed by Mr. McSwain. *See id.* Ex. 36. Class members make clear that these moveable obstructions pose real barriers to the "full and equal enjoyment" of TBC restaurants. For example, while TBC appears to argue that moveable trash cans are light enough to be pushed out of the way, *see* Elmer Decl. ¶ 31, Named Plaintiff Katherine Corbett explains that, when she tries to do this, "[m]ost often what happens is that the trash can tips over and becomes a larger barrier than before because it falls on its side." Corbett Decl. ¶ 3. Named Plaintiff Craig Yates explains that, with a restroom trash, the result can be disgusting: after the trash can tips over, there is no room to maneuver except over the spilled trash, which then gets stuck in the wheels and driveshaft of the wheelchair. Yates Decl. ¶ 3; *see also* Pliska Decl. ¶ 5; Mortimer Decl. ¶¶ 8-9; Grassi Decl. ¶ 7.

As underscored by this testimony, the ADA's requirement of "full and equal enjoyment," 42 U.S.C. § 12182(a), the regulatory requirement that accessible features be maintained accessible and obstruction-free, 28 C.F.R. § 36.211, and the ADAAG requirement that clear floor space be "unobstructed," all require that TBC have policies in place preventing obstructions of accessible elements, including trash cans in restroom clear floor space and

placards and the like on accessible counters. Plaintiffs' evidence demonstrates that any such policies are ineffective.

TBC did not address Section 36.211, the DOJ's interpretation, the Technical Assistance Manual, or *Fortyune*. *See generally* MPSJ at 40-42. TBC's interpretation -- that the ADA in no way addresses moveable objects -- is not only contrary to the letter of the statute, the regulations, the DOJ's interpretation, and governing Ninth Circuit precedent, it would also completely frustrate the goals of the ADA that facilities be "readily accessible to and useable by individuals with disabilities." *See, e.g.,* 42 U.S.C. § 12183(a). It would permit TBC to place an advertising stand -- or even the potted plant explicitly addressed in the DOJ interpretation, *see* Preamble at 720 -- directly in the path of travel to the counter, completely preventing customers in wheelchairs from ordering food.

The cases on which TBC relies are either factually or legally inapposite. As noted above, *Eiden* actually favors Plaintiffs, having denied summary judgment on the grounds that the defendant's access-maintenance policies were disputed issues of fact. Others simply fail to address the governing regulation and Ninth Circuit precedent. *Massachusetts v. E*Trade Access, Inc.*, 464 F. Supp. 2d 52 (D. Mass. 2006); *Martinez v. Home Depot USA, Inc.*, 2007 WL 926808, at *4-*5 (E.D. Cal. Mar. 27, 2007); *Wilson v. Norbreck LLC*, 2006 WL 2651139 (E.D. Cal. Sept. 15, 2006); *Hubbard v. Sobreck, LLC*, No. 04cv1129 WQH (S.D. Cal. Aug. 7, 2006) (Collins Ex. 6); *Ass'n of Disabled Ams., Inc. v. Key Largo Bay Beach, LLC*, 407 F. Supp. 2d 1321 (S.D. Fla. 2005). Two are distinguishable by the fact that the plaintiff -- a single plaintiff addressing a single barrier in a single facility -- did not provide evidence that the barrier was anything other than isolated and temporary. *Chapman v. Pier 1 Imports*, 2006 WL 1686511, at *9 (E.D. Cal. June 19, 2006); *Jones v. Wild Oats Mkts, Inc.*, No. 04-1018-WQH (WMc), slip op. at 19 (S.D. Cal. Nov. 29, 2005) (Collins Ex. 7).

66 & 81. Forward Reach is Not Permitted To Extend Beyond the Available Toe Space.

The ADAAG governs the location and dimensions of reach ranges. Forward reaches are governed by Section 4.2.5 and Figure 5. Figure 5 specifically limits forward reach to a

distance less than the available toe space. This is indicated by the fact that the available toe clearance is denominated as "z" in Figure 5 and the forward reach as "x." The note under Figure 5 states that "z shall be ≥ x," or toe clearance shall be greater than or equal to the forward reach. In spite of this clear language, TBC argues in subsection 81 that forward reach can extend beyond available toe space and offers in support a figure from the appendix, *see* MPSJ at 49, which the ADAAG itself cautions "contains materials of an advisory nature." ADAAG Appx. at A1. It also relies on the manufacturer's recommendation for its wall-mounted trash cans; such a recommendation cannot overrule the applicable ADAAG standard in Figure 5. The wall-mounted trash can in store 526 -- the subject of MPSJ subsection 66 -- violates this standard. *See* McSwain Ex. 3 at 10 and Ex. 12 at EM05080; EM05083; EM05088-93.

67. Restroom Floors May Have a Maximum Slope of 2%.

TBC is correct that the general standards for accessible routes apply to restroom floors. MPSJ at 43. Its application of that principle to the required slope is, however, incorrect. There are two kinds of slope: "running slope," which is slope parallel to the direction of travel; and "cross slope," which is perpendicular to the direction of travel. *See* ADAAG § 3.5. Accessible routes may have a running slope of up to 5%, *id.* § 4.3.7, or up to 8.33% in the case of a ramp, *id.* § 4.8.2. Cross slope is, however, limited to 2%. *Id.* § 4.3.7. Because individuals who use wheelchairs may turn and move at various angles throughout a restroom, any slope may, at any time, be perpendicular to the user's direction of travel, that is, cross slope. Because of this, slope of restroom floors is limited to 2%. McSwain Decl. ¶ 11. Mr. McSwain included in his report restroom floors near floor drains the slope of which exceeded 3%, the parties' acceptable measurement for cross slope of an accessible route. *See* Robertson Ex. 32.

70. The ADAAG Only Permits Lavatories to Encroach in the Clear Floor Space Around Toilets.

TBC argues that Plaintiffs misapply Figure 28 of the ADAAG, which sets out the minimum clear floor space that must surround a toilet. TBC states that the figure permits "fixtures *such as* lavatories" to encroach. MPSJ at 44 (emphasis added). That is inaccurate.

Figure 28 shows one permissible type of object encroaching in the far corner of the clear floor space: a lavatory. There is no indication that other types of fixtures or objects may encroach. Thus, for example, in restaurant 3027, a loose trash can encroaches. McSwain Ex. 3 at 77; *see also id.* at 184 (urinal encroaches in store 4343); 197 (same at store 4578). These obstructions to the clear floor space are not permitted.

72. The ADAAG Requires The Front End of Side Grab Bars To Be A Minimum of 54 Inches from the Rear Wall.

TBC argues that the ADAAG does not require the front end of the side grab bar to be "exactly 24 inches in front of the front end of the water closet." MPSJ at 46. That is correct; that requirement is in Title 24. *See id.* (2008) § 1115B.4.3.1. However, the ADAAG does require that the front end of the side grab bar be a minimum of 54 inches from the rear wall. *See id.* Fig. 29. While a number of side grab bars violate only the Title 24 standard -- and it is thus premature to address them in this phase of the case, *see infra* at 50 -- a number of side grab bars violate the ADAAG standard as well. McSwain Ex. 3 at 32, 60, 149, 264, 322.

73 & 74. The ADAAG Requires The Dispensing Point of Toilet Paper Dispensers to Be A Maximum of 36 Inches from the Rear Wall.

Toilet paper dispensers must be installed within 36 inches of the wall behind the toilet. *See* ADAAG Fig. 30(d). TBC argues that this only applies to toilet paper dispensers mounted on the walls of toilet stalls, but not to those mounted on the walls of single-user toilet rooms. MPSJ at 46-47. Mr. Terry offered his opinion concerning how to measure toilet paper dispensers, concluding that "[t]he requirement is clearly intended to put the entire area where dispensing might occur within 36 inches of the rear wall." Terry Decl. ¶ 4. This principle applies in both toilet rooms and toilet stalls. ADAAG § 4.16.6 -- applicable to water closets generally -- requires that toilet paper dispensers be "within reach." The ability to reach the toilet paper is unrelated to the type of wall surface -- masonry wall or metal stall -- on which the toilet paper dispenser is mounted. Terry Decl. ¶ 4. As a result, when determining what satisfies the "within reach" standard of Section 4.16.6, architects and facility managers would look to the requirement set forth in Figure 30, that is, the maximum of 36 inches from the rear

wall. *Id.* As such, the 36 inch limitation in Figure 30 applies to all toilet paper dispensers. *Id.*

TBC offers no expert evidence in support of its position. It asserts that the defendants in *White v. Divine Investments, Inc.*, 2005 WL 2491543 (E.D. Cal. Oct. 7, 2005), "successfully argued" that the provision applicable to toilet stalls was not applicable to water closets without stalls. MPSJ at 46. This is incorrect. In fact, the court in *White* granted the defendants' motion based on the fact that the plaintiff conceded she did not have standing to sue concerning this element. *Id.* at *7. In footnote 18 of that decision, the court recited the defendants' argument concerning the applicable provision, but did not decide the matter. The courts in *Martinez v. Home Depot USA, Inc.*, 2007 WL 926808, at *5 (E.D. Cal. Mar. 27, 2007) and *Wilson v. Norbreck*, LLC, 2005 WL 3439714, at *4 (E.D. Cal. Dec. 14, 2005), apparently agreed with TBC here, but did so without the benefit of expert evidence concerning the interpretation of the phrase "within reach" in Section 4.16.6.

Furthermore, as Mr. Terry makes clear, the proper method to measure toilet paper dispensers is so that the *dispensing point* is at most 36 inches from the rear wall. Terry Decl. ¶ 5. When attempting to remediate its many noncompliant toilet paper dispensers, however, TBC moved them to a point where the *centerline* is 36 inches from the rear wall. *See* Robertson Ex. 33. Because the front dispensing point can be several inches farther from the rear wall than the centerline, this is not compliant, and TBC's attempt to remedy this element has uniformly failed.

78 & 79. The ADAAG Requires That Hot Water and Drain Pipes Be Insulated or Configured to Prevent Contact.

Mr. McSwain opined that the hot water pipes and drain pipes in a number of stores were in violation of ADAAG Section 4.19.4, which requires that drains and hot water pipes be insulated or configured to protect against contact. *See* Robertson Ex. 34. TBC's MPSJ merely recites this provision, but does not indicate how it applies in this case. *See id.* at 48. At several locations in Elmer Exhibit 18, TBC asserts that the pipes have been "configured to prevent contact," *see id.* at 24-25, 87, 90, 100, 167, 169, 230, but provides no evidence -- expert, photographic, declaration or otherwise -- to support this assertion. As such, this argument fails

under Rule 56(c) and (e)(1).

C. TBC's Arguments That Do Not Contain Reference to the Elements to Which They Apply Are Improper Requests for Advisory Opinions.

TBC makes arguments in subsections 6, 7, 17, 23, 26, 27, 29, 30, 32, and 34 of its Non-Mootness Defenses, but does not identify which stores or elements they apply to, and Plaintiffs were unable to locate examples in Exhibit 18. It is thus impossible to say whether these argument have any relevance to this case and they should be denied as improper requests for an advisory opinion. *See Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009) ("The role of the courts is 'neither to issue advisory opinions nor to declare rights in hypothetical cases . . .."') (citation omitted).

D. Many of TBC's Single-Store/Single-Element Arguments Suffer from the Same Legal and Procedural Shortcomings As Discussed Above.

TBC makes a number of single-store and/or single-element arguments that have many of the same shortcomings as discussed above. For example, TBC does not offer expert testimony to rebut Mr. McSwain's analysis of the following: the table at store 137 (subsection 25); the queue line at store 3904 (subsection 40); the counter in store 955 (subsection 41); the counter in store 22691 (subsection 44); the floor sinks discussed in subsection 45; the job application brochures in store 2918 (subsection 48); or the door maneuvering clearance at store 4633 (subsection 84).

According to Ms. de Beers, a number of elements are subject to frequent change; these elements thus still require an injunction, for example: the directional signage in store 5223[25] (subsection 28), *see* de Beers Decl. ¶ 6(d)(i); the high chairs in store 18901 (subsection 31), *see id.* ¶ 6(c)(ii); the tables in stores 18003 and 18808 (subsections 51 and 54), *see id.* ¶ 6(c)(vi).

The ADAAG requires insulation of hot water and drain pipes; TBC is correct that it does not require insulation of cold water lines. *See* MPSJ at 48. This only came up when Mr. McSwain observed that both supply lines were uninsulated, *see, e.g.,* McSwain Ex. 3 at 36,

[25] The MPSJ lists store 5523. *See id.* at 21. Plaintiffs do not know of a California corporate store with this number. It is likely a typographical error for store 5223.

104, 257, or where pre-existing insulation had come loose. *Id.* at 363, 407. In each case, the hot water supply line identified in that same item was in violation.

Finally, in subsection 61, TBC admits that the doors in question are in violation, but argues that the violation is a "small shortfall." *See* MPSJ at 38. However, a violation of the ADAAG provides *prima facie* evidence of a barrier in existing facilities. *See, e.g., Johnson*, 2008 WL 2620378, at *4 n.3.

E. TBC's Arguments That Address Title 24 Standards Are Premature.

Plaintiffs bring claims for injunctive relief under both the ADA and state law, and for damages under state law. The current phase of the case addresses only ADA claims. Docket No. 386 at 2-3. The Non-Mootness Defenses addressed in the following sections are not moot, but, because they are addressed only by state law, any discussion of them at this stage is premature: Section IV.B, subsections 4 (pre-1993 stores 137, 283, 863, 2423, 2918, 2961, 3027, 3055, 3070, 3160, 3196, 3209, 3222, 3471, 3579, 4325, 4510, 4578, 5223, and 5259 only), 8, 9, 10, 14, 16, 19, 20, 21, 22, 24, 33, 35, 36, 43, 52, 53, 55, 56, 59, 64, 68, 69, 71, 72 (stores 124, 991, 4799, 16819, 18377 and 22691), 75, 76, 77, and 82. These items are not included in Robertson Exhibit 1.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny TBC's motion for partial summary judgment.

Respectfully submitted,

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