IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-B-2135

COLORADO CROSS-DISABILITY COALITION

and

JULIE REISKIN and DEBBIE LANE, for themselves and all others similarly situated,

Plaintiffs,

v.

TACO BELL CORPORATION,

Defendant.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Colorado Cross-Disability Coalition, Julie Reiskin and Debbie Lane, by and through their attorneys, Fox & Robertson, P.C. and Kevin W. Williams, Esq., hereby submit this Memorandum in Support of their Motion for Partial Summary Judgment. For the reasons set forth below, Plaintiffs request that this Court declare that two of the restaurants at issue in this litigation -- those at 7221 Pecos Street, Denver, Colorado ("Pecos") and at 12480 W. 64th Avenue, Arvada, Colorado ("64th Avenue") -- are in violation of Title III of the Americans with Disabilities Act and order such stores to be brought into compliance with that statute.

INTRODUCTION

The Americans with Disabilities Act ("ADA" or "Act") was passed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It is "a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of

exclusion and segregation." H. Rep. 101-485, Pt. 3, 101st Cong., 1st Sess. 26, reprinted in 1990 U.S.C.C.A.N. 445, 449. To effect these goals, the Act, passed on July 26, 1990, requires that facilities constructed after a designated date be readily accessible to people with disabilities and in full compliance with Justice Department standards. Despite this mandate and lead time, the newly-constructed Taco Bell restaurants at Pecos and at 64th Avenue maintain "hospitality lines" or "queue lines"[1] -- a "stress-free" system for lining up to receive service -- that are narrower than required by Justice Department regulations and that exclude many patrons who use wheelchairs. Instead of using the hospitality lines, such patrons are expected to access the counter to the side of the line, through an entrance that is -- by design -- blocked by a chain during the busiest hours. This system illegally segregates people who use wheelchairs from other patrons and denies them the benefits of the hospitality line. Because the restaurants are new construction, the lines must be modified to comply with the ADA.

STATEMENT OF UNDISPUTED FACTS

Taco Bell sells fast food through counter service. It also provides various other services (for example, a drive-through window) and facilities (for example, tables and restrooms) that are beneficial to its customers. One such service, facility and benefit that Taco Bell provides is the "queue line" or "hospitality line," a path bordered by rails leading to the service counter that permits customers to form a single line. Carlos Azalde, speaking on behalf of Taco Bell,[2] stated that queue lines

> provide[ ] for . . . a stress-free ordering system for the customer. . . . If you don't have queue lines, the customers spend an inordinate amount of time jumping from line to line. And typically by the time they get to the front of the line, they don't even know what they want. So in the queue, they don't have to worry about what line they are in, they can concentrate on what they want to order. It is a perris

[1] Taco Bell uses these terms interchangeably. Deposition of Carlos Azalde ("Azalde Depo.") at 23 (Tab 1).

[2] Azalde Depo. at 6 (Tab 1) and Exh. 1 (Tab 5); see also id. at 12-13 (Mr. Azalde is in charge of ADA compliance for Taco Bell).

[sic, probably "fairer"] system.

Azalde Depo. at 40 (Tab 1); see also Taco Bell's Answers to Plaintiffs' First Set of Interrogatories ("Ans. to Ig.") 1 (Tab 2) ("the purpose Taco Bell seeks to achieve through utilizing queue lines in serving its customers . . . includes, but is not limited to, faster and fairer service, crowd control, better security (with only one person approaching the register at a time), customer preference and flexibility (during times that are not busy, all customers may approach the counter through the alternative access.)").

The Pecos and 64th Avenue Taco Bell restaurants do not provide the service, facility and benefit of their hospitality lines to many of their customers who use wheelchairs -- despite the fact that they were built after the effective date of the ADA[3] -- because the lines are too narrow to permit passage by a wheelchair. A hospitality line consists of two parallel lanes open at one end and joined at the other. Customers enter the line, proceed along one lane, make a 180-degree turn, and traverse the second lane, the end of which opens toward the cashier. At the Pecos restaurant, the two lanes measure approximately 36 and 37 inches wide, respectively (in any event, less than 42 inches each) and the point where the turn is made measures approximately 42½ inches (in any event, less than 48 inches). Declaration of Dale Stephens ¶¶ 3-4 (Tab 3). At the 64th Avenue restaurant, the two lanes measure approximately 36½ and 36 inches wide, respectively (in any event, less than 42 inches each) and the point where the turn is made measures approximately 34 inches (in any event, less than 48 inches). Declaration of Dale Stephens ¶¶ 6-7 (Tab 3); see also Azalde Depo. at 48, 54 (Tab 1)(Pecos and 64th Avenue stores are of the M90H model, which has 36-inch wide queue lines). These queue lines are not accessible to many people in wheelchairs. See, e.g., Deposition of Debbie Lane at 24-28 (Tab 4).

Taco Bell expects customers who use wheelchairs to go to the side of the line and approach the service counter through an opening adjacent to the counter. See Ans. to Ig. 6 (Tab

[3] See Ans. to Ig. 5 (Tab 2) and 28 C.F.R. § 36.401(a)(1) & (2).

2). This opening is, however, obstructed by a chain that is in place during "busy rush hours when needed for handling heavy customer traffic." Ans. to Ig. 9 (Tab 2), see also Azalde Depo. at 44-45 (Tab 1). That is, the chain obstructs access to the counter during precisely the times when the most people -- including, logically, the most people in wheelchairs -- patronize a Taco Bell. Furthermore, Mr. Azalde testified that he would not be surprised to learn that the chain was in place -- obstructing access to the counter -- at other times as well. Azalde Depo. at 45 (Tab 1).

Taco Bell claims that their system is designed so that people who use wheelchairs will simply "go in the front of the line" and, if the chain is in place, remove the chain. Azalde Depo. at 41-42 (Tab 1). However, Mr. Azalde conceded that:

- If a customer using a wheelchair does not have the manual dexterity to open the chain, he or she would have to get the attention of an employee to unlock the chain. Id. at 42.
- He did not know what other customers -- who had been waiting a longer time -- would think about wheelchair users going to the front. Id. at 40.
- There was no sign stating that customers in wheelchairs were to proceed to the front of the line. Id. at 44.
- He did not know how a customer in a wheelchair would keep track of his or her place in line. Id. at 44.
- When asked how mixed groups of customers in wheelchairs and able-bodied customers should handle the hospitality lines, he responded that he "had never thought through that particular situation." Id. at 44.
- It "would be easier if people in wheelchairs could go through the queue with everybody else." Id. at 45-46.

As such, far from being a stress-free system in which customers can concentrate on their orders rather than the line they are in, Taco Bell's system is stressful and confusing for people who use wheelchairs, requiring them to focus on whether the line is accessible, where to go if not,

whether it is permissible to remove the chain, how to get the attention of the cashier -- during "busy rush hours" -- to unlock the chain, whether it is appropriate to cut in front of others who have been there longer and, if not, how to tell where they are in line. Finally, of course, it is uncontested that the system segregates people in wheelchairs from other patrons and imposes this confusion only on the former.

ARGUMENT

Plaintiffs' Motion for Partial Summary Judgment should be granted because the testimony of Defendant's representative, Carlos Azalde, and the undisputed dimensions of the hospitality lines at issue in this motion demonstrate that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c). The ADA, like other civil rights laws, should be liberally construed to effect its remedial purpose. Tyler v. City of Manhattan, 849 F. Supp. 1429, 1441 n.20 (D. Kan. 1994); see also Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996) (Holding that "[a] statute which is remedial in nature should be liberally construed." (Citations omitted.)); Deavenport v. MCI Telecommunications Corp., 973 F. Supp. 1221, 1224 (D. Colo. 1997) (same)).

I. Taco Bell Has Discriminated Against Plaintiffs by Denying Them the Full and Equal Enjoyment of its Goods, Services, Facilities, Privileges, Advantages, and Accommodations.

Title III of the ADA prohibits discrimination on the basis of disability by public accommodations "in the full and equal enjoyment of [its] goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(a). Prohibited discrimination specifically includes

- failing to design and construct new facilities so that they are "readily accessible to

and usable by individuals with disabilities," § 12183(a)(1),[1] that is, built in compliance with the ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG"), 28 C.F.R. Part 36, Appendix A;

- segregating people with disabilities or providing them with facilities or services that are separate from those of others, § 12182(b)(1)(A)(ii), (B) & (C); and
- denying people with disabilities the opportunity to benefit from a service or facility or providing a service or facility that is not equal to that provided others. § 12182(b)(1)(A)(i) & (ii).

The hospitality lines in the newly-constructed Pecos and 64th Avenue restaurants do not comply with the ADAAG and are designed to segregate customers who use wheelchairs from others and to deny such customers the benefits of the hospitality line. These restaurants are in violation of the Americans with Disabilities Act.

A. Taco Bell Discriminates Against People Who Use Wheelchairs Through its Failure to Design and Construct New Facilities in Compliance with the ADAAG

It is uncontested that the two Taco Bell restaurants at issue in this motion are new construction.[2] At the instruction of Congress, the Department of Justice ("DOJ") promulgated the ADAAG as the standards all newly constructed facilities must meet in order to be considered readily accessible to and usable by individuals with disabilities.[3] See 42 U.S.C. § 12186(b) and

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[1] This provision excepts situations in which "an entity can demonstrate that it is structurally impracticable" to comply. § 12183(a)(1). Because Taco Bell has designed stores with 42-inch and wider queue lines, Azalde Depo. at 29-31 (Tab 1), it cannot contend that it is structurally impracticable to comply with ADA and its regulations.

[2] See supra note 3.

[3] The Supreme Court has held, that, "[a]s the agency directed by Congress to issue implementing regulations," the DOJ's Title III regulations are "entitled to deference." Bragdon v. Abbott, 118 S.Ct. 2196, 2209 (1998) (citing § 12186(b)).

28 C.F.R. § 36.406(a). The ADAAG requires that, within each Taco Bell, "[a]t least one accessible route shall connect accessible buildings, facilities, elements, and spaces." § 4.3.2(2). An "accessible route" is

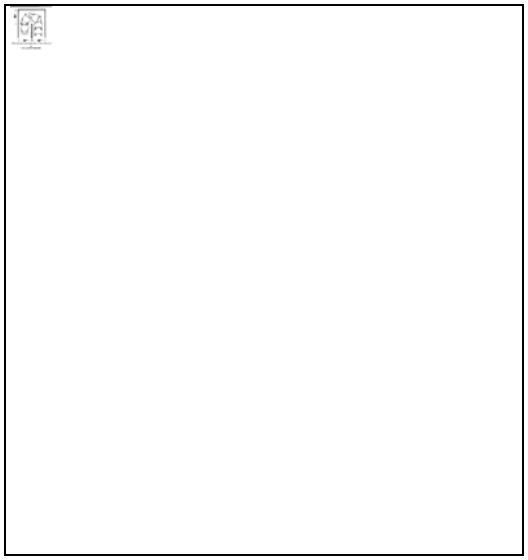
> A continuous unobstructed path connecting all accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures.

ADAAG § 3.5 (emphasis added). Doors and counters are "elements" under the ADAAG. See id. (defining element), § 4.3.9 (doors), §§ 5.2 & 7.2 (counters). Thus there must be at least one accessible route connecting the doors of the Pecos and 64th Avenue restaurants to their service counters. As set forth below, the only two routes from the doors to the service counters at these restaurants -- the hospitality lines and the side access for wheelchair users -- do not comply with the ADAAG and thus Defendant is in violation of the ADA.

1. **Taco Bell's Hospitality Lines Do Not Comply with the ADAAG**

In order to comply with the ADAAG, the hospitality line could have been designed in one of two ways. Viewed as an accessible route that makes a turn around an obstruction, the two lanes would have to be at least 42 inches wide while the point of the turn would have to be 48 inches wide. Viewed as a food service line in which a person in a wheelchair makes a 180-degree turn, the two lanes could be 36 inches wide if the point of the turn provides a 60-inch diameter turning radius. Taco Bell's hospitality lines satisfy neither standard.

An accessible route that makes a turn around an obstruction -- as the hospitality line does when it requires a patron to make a 180-degree turn around the center barrier -- is required by ADAAG § 4.3.3 to comply with Figure 7(b):



That is, the two lanes are required to be 42 inches wide and the point of the turn, 48 inches. Because the lanes of the queue lines at issue in this motion are less than 42 inches wide and the turns, less than 48 inches wide, see Stephens Decl. at ¶¶ 3-4, 6-7 (Tab 3), neither of the stores at issue in this motion have queue lines that comply with this provision of the ADAAG.

In the alternative, the hospitality line could comply with the ADAAG through § 5, which prescribes the standards for restaurants, or § 4.2, which prescribes general space allowances for wheelchairs. Section 5.5 of the ADAAG requires that food service lines have a minimum clear width of 36 inches with a preferred clear width of 42 inches to permit passage around a person in a wheelchair. See also § 4.2.1 (prescribing 36 inches for continuous passage of a single wheelchair). Taco Bell's Mr. Azalde affirmed that the food service provision applied to queue lines and that he designed them accordingly. Azalde Depo. at 35 (Tab 1).

To use the hospitality line, however, a person in a wheelchair is required to make a 180-degree turn at the point where the two lanes meet. Section 4.2.3 of the ADAAG requires a clear space 60 inches in diameter for a wheelchair to make a 180-degree turn.[4] This standard is not met in either of the two restaurants at issue in this motion. See Stephens Decl. at ¶¶ 4 & 7. As such, neither store complies with these provisions of the ADAAG.

1. **The Side Access for Persons Who Use Wheelchairs Violates the ADAAG.**

[4] Section 4.2.3 also permits a "T-shaped space" for such turns. Because no T-shaped space is available in a queue line, the point where a wheelchair makes a 180-degree turn must have a 60-inch diameter.

As set forth above, there must be at least one accessible route from the doors at the Pecos and 64th Avenue restaurants to their service counters. ADAAG § 4.3.2(2). Because the hospitality lines do not meet ADAAG standards, they do not constitute accessible routes. The alternative access suggested by Taco Bell -- that people in wheelchairs enter through a side opening near the counter -- also does not satisfy this requirement. By its express terms, the ADAAG requires an accessible route to be "unobstructed." ADAAG § 3.5 (quoted above). The undisputed facts demonstrate that Defendant's side access for persons in wheelchairs is purposefully obstructed by a chain during the "busy rush hours," Ans. to Ig. 9 (Tab 2), and Taco Bell's Mr. Azalde concedes he would not be surprised to learn that it is so obstructed at other times as well. Azalde Depo. at 45 (Tab 1). Thus neither the hospitality lines nor the side access at the Pecos and 64th Avenue restaurants comply with the ADAAG and no accessible route currently exists.

1. **Taco Bell's System Does Not Provide Substantially Equivalent or Greater Access.**

Section 2.2 of the ADAAG permits "equivalent facilitation," that is, "[d]epartures from particular technical and scoping requirements . . . 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." (Emphasis added.) The burden is on Taco Bell to demonstrate that their alternative method qualifies as an equivalent facilitation. Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 727 (D. Or. 1997).

Taco Bell's alternative system provides side access that is not remotely equivalent to, much less greater than, that of its hospitality line. Defendant contends that its hospitality lines provide non-disabled customers with a "stress-free" ordering experience. In contrast, patrons who use wheelchairs must figure out access, unhook a chain or find someone to do it for them, keep track of where they are in line or deal with the consequences of cutting in line, and quickly

determine what they want to order at the end of the ordeal. Most significantly, as demonstrated in Sections I.B and I.C below, the system illegally segregates people in wheelchairs and denies them the ability to benefit from the queue lines. See generally Small v. Dellis, No. Civ. AMD 96-3190, 1997 WL 853515 (D. Md. Dec. 18, 1997) (stating that, generally, under ADAAG goods and services must be provided in an integrated setting).

A good example of "substantially equivalent or greater access" is provided by the Oregon Arena case. Addressing arena seating for people who use wheelchairs and their companions, that court held that "a high quality folding companion seat is permissible because it provides 'substantially equivalent or greater access to and usability of the' Rose Garden as compared to a companion seat that is bolted to the floor." Id., 982 F. Supp. at 726. By substituting one type of seat for another, the arena did not change the location or sight lines of the seats nor -- significantly for the present case -- did it segregate people who use wheelchairs from others. In fact, the use of a different type of chair made it easier for the arena to provide integrated seating. See id., 982 F. Supp. at 725. Similarly, in Caruso v. Blockbuster-Sony Music Entertainment Centre, 968 F. Supp. 210, 218 (D. N.J. 1997), the court held that providing higher quality seating at lower prices in an arena was "equivalent facilitation" to providing an accessible route to the arena's lawn seating. While the alternative system affected the location of the seating, it did so to improve it and -- in contrast to the present case -- neither segregated people in wheelchairs from others nor offered such people inferior, obstructed, access. Id.

The Oregon Arena case rejected the equivalent facilitation defense with respect to a system that required a person in a wheelchair to request help, make "special arrangements" or "make a fuss." Id., 982 F. Supp. at 764. The defendant arena -- built after the effective date of the ADA -- had failed to make its suites accessible, but offered to reconfigure any particular suite upon request. The arena argued that this was an "equivalent facilitation," permissible under § 2.2. The court explicitly and emphatically rejected this defense:

> What defendant proposes is not an "alternative design or technology" that provides equivalent or greater access. Rather, defendant proposes a design that

> creates less access than is required, but -- if given advance notice that a wheelchair user is in route -- defendant will remove some of the barriers and temporarily comply with the ADA. That is unacceptable. . . . Congress has served notice through the ADA that [improvised] solutions no longer are acceptable. In new construction, the facility must be designed to be accessible from day one.

Id.

Like the "special arrangements" found unacceptable in Oregon Arena, Defendant's alternative side access for persons who use wheelchairs requires such persons to depend on employees or other customers to simply get to the counter to order their food and potentially to cut in line -- in other words, to "improvise" and "make a fuss." Further, the side access segregates persons who use wheelchairs from everyone else. This system simply does not provide access that is substantially equivalent to or greater than accessible, ADAAG-compliant queue lines which would permit persons who use wheelchairs to independently access the service counter in the same way that everyone else does.

A. Taco Bell Discriminates Against Patrons Who Use Wheelchairs by Segregating Them from Nondisabled Patrons.

The Americans with Disabilities Act makes it illegal for public accommodations to segregate persons with disabilities from other persons. It does this by providing that:

- "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." § 12182(b)(1)(B)(emphasis added); see also 28 C.F.R. § 36.203(a).
- it is illegal discrimination to provide a person with a disability "a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals." § 12182(b)(1)(A)(iii)(emphasis added); see also 28 C.F.R. § 36.202(c).

- when separate or different programs are provided for persons with disabilities, such persons "shall not be denied the opportunity to participate in such programs or activities that are not separate or different." (§ 12182(b)(1)(C)(emphasis added); see also 28 C.F.R. § 36.203(b).

These provisions are designed to redress one of the primary findings motivating passage of the ADA: "historically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). As the legislative history of the Act makes clear, "Providing services in the most integrated setting is a fundamental principle of the ADA." H. Rep. 101-485, Pt. 2, 101st Cong., 1st Sess. 102, reprinted in 1990 U.S.C.C.A.N. 303, 385. With respect to the integration requirement of Title II, which applies to public services, the legislative history states that,

> The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under this title. Nor is the fact that the separate service is equal to or better than the service offered to others sufficient justification for involuntary different treatment for persons with disabilities.

H. Rep. 101-485, Pt. 3, 101st Cong., 1st Sess. 50, reprinted in 1990 U.S.C.C.A.N. 445, 473.[5]

The primacy of integration is recognized by the DOJ as well. In its Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities with Section-by-Section Analysis and Response to Comments, the DOJ states that:

> Section 36.203 [of Title 28] addresses the integration of persons with disabilities. The ADA recognizes that the provision of goods and services in an integrated manner is a fundamental tenet of nondiscrimination on the basis of disability. Providing segregated accommodations and services relegates persons with

[5] The regulations implementing Title II are to be consistent with those of Title III. See 42 U.S.C. § 12134(c).

> disabilities to the status of second-class citizens. For example, it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant . . .

28 C.F.R. Part 36, Appendix B at 593-94 (Jul. 1, 1998 ed.) (quoted in Pinnock v. Int'l House of Pancakes, 844 F. Supp. 574, 582 (S.D. Cal. 1993)(holding that § 12182(b)(1)(B) was not unconstitutionally vague)); see also Small v. Dellis, No. Civ. AMD 96-3190, 1997 WL 853515 (D. Md. Dec. 18, 1997) (quoting 28 C.F.R. § 36.203(a)).

Taco Bell's system segregates people who use wheelchairs from others in violation of § 12182(b)(1)(B). It provides customer access to its service counter for such persons in a fashion that is separate and different from others, in violation of § 12182(b)(1)(A)(iii). And while it provides separate access to the counter, it denies persons who use wheelchairs access that is not separate or different, in violation of § 12182(b)(1)(C).

A. Taco Bell Discriminates Against Patrons Who Use Wheelchairs by Denying Them the Opportunity to Benefit from its Hospitality Lines and by Providing Counter Access That Is Not Equal to That Provided Others.

The ADA also makes it illegal to deny persons with disabilities the opportunity to participate in or benefit from a service or facility of a public accommodation, § 12182(b)(1)(A)(i), or to provide such persons with services or facilities that are not equal to those provided others. Id., § 12182(b)(1)(A)(ii). Through its queue lines, Taco Bell provides a "stress-free ordering system for the customer." Azalde Depo. at 40 (Tab 1). It does this by causing all patrons to form a single line so "they don't have to worry about what line they are in, they can concentrate on what they want to order." Id. It claims that this system provides "faster and fairer service" and is based on "customer preference." Ans. to Ig. 1 (Tab 2).

Yet Taco Bell denies the benefits of this facility and service to customers in wheelchairs who are unable to access the narrow queue lines. Again, for such customers, the entire purpose is defeated as they are required to go through a side entrance -- which is by design blocked by a

chain during the busiest periods, Azalde Depo. at 44-45 (Tab 1), Ans. to Ig. 9 (Tab 2). Once there, rather than enjoying the stress-free experience of non-disabled patrons, wheelchair-using patrons must (1) figure out whether it is appropriate to remove the chain, (2) remove the chain if able or get the attention of the employee behind the cash register at what is, again, the busiest time -- and then (3) do precisely what the queue lines are supposed to prevent: worry about where they are in line. As an alternative, Taco Bell suggests such patrons should proceed to the front of the line. Yet if the queue line is "fairer," it must be because those who arrive first are served first. So a wheelchair-using patron who attempts to cut in line will, by Taco Bell's own logic, be acting unfairly and thereby subjecting himself to the opprobrium of his fellow customers. A person who cuts ahead of a line full of hungry people will not have a "stress-free" ordering experience.

The Act's legislative history stresses that "nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability." H. Rep. 101-485, Pt. 3, 101st Cong., 1st Sess. 57, reprinted in 1990 U.S.C.C.A.N. 445, 480. Thus even if Taco Bell believes it is providing a "service" by permitting people who use wheelchairs to go to the head of the line, the overall treatment is unequal and denies such persons the benefits of its hospitality lines. It is therefore prohibited by the ADA.

I. Taco Bell Should Be Ordered to Provide Queue Lines in its Newly Constructed Restaurants That Complies with the ADAAG.

The ADA treats buildings constructed after the effective date of the ADA differently from buildings that existed before that date. Compare 42 U.S.C. § 12182(b)(2)(A)(iv) with 42 U.S.C. § 12183(a). As demonstrated above, buildings designed and constructed for first occupancy after January 26, 1993, must comply with the ADAAG. And they must do so regardless of the burden of correcting improperly constructed buildings. See Anderson v. Department of Pub. Welfare, 1 F. Supp. 2d 456, 464 (E.D. Pa. 1998) ((“Because ‘architectural

barriers can be avoided at little or no cost' during the construction or alteration of buildings, the provisions applicable to new construction and alterations do not provide an undue burden defense . . ." (citations omitted)); Kinney v. Yerusalim, 9 F.3d 1067, 1071 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994) ("This obligation of accessibility for alterations does not allow for non-compliance based upon undue burden."). As one court has recognized,

> The plain language of [§ 12183] states that new construction of commercial facilities must be "readily accessible to and usable by individuals with disabilities." If newly constructed commercial facilities are not accessible then those who designed and constructed them are in violation of the law

United States v. Days Inn of America, 997 F. Supp. 2d. 1080, 1083 (C.D. Ill. 1998); see also United States v. Ellerbe Becket, 976 F. Supp. 1262, 1266 (D. Minn. 1997) (Holding that new construction must comply with the ADAAG in order to satisfy the ADA). Indeed, courts have ordered significant remodeling to remedy violations of the ADA in new construction. See, e.g., Oregon Arena, 982 F. Supp. at 786 (ordering suites in arena to be made accessible). In Small v. Dellis, No. Civ. AMD 96-3190, 1997 WL 853515 (D. Md. Dec. 18, 1997), for example, a restaurant had built a new addition after the effective date of the ADA which did not have accessible restrooms. Despite the availability of accessible restrooms in the original restaurant, the court held that the ADA required the defendant to build its new addition with accessible restrooms and stated that:

> the defendants' obdurate refusal to give credence to the plain wording and the manifest intent of the regulations is antithetical to Congress's intent in adopting the ADA. "The ADA is geared to the future -- the goal being that, over time, access will be the rule rather than the exception. Thus the [ADA] only requires modest expenditures to provide access in existing facilities, while requiring all new construction, [including alterations], to be accessible." H.R. Rep. No. 101-485 Pt. III at 91 (1990).

Id., 1997 WL 853515 at *5 (insertions in original).

Because the Pecos and 64th Avenue restaurants were designed and constructed for first occupancy after January 26, 1993, see Ans. to Ig. 5, they must comply with the ADAAG. The

parties do not dispute the dimensions of the queue lines in these stores. As demonstrated in Section I.A above, these dimensions do not comply with the ADAAG and Defendant is not entitled to the "equivalent facilitation" defense. As the court did in Oregon Arena and Small, this Court should find Taco Bell in violation of the Americans with Disabilities Act with respect to the Pecos and 64th Avenue restaurants and order that it bring these restaurants into compliance with the ADA.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant their motion for partial summary judgment, declare the Pecos and 64th Avenue Taco Bell restaurants to be in violation of the Americans with Disabilities Act and order Defendant Taco Bell to bring such restaurants into compliance with the standards set forth in the Americans with Disabilities Act Accessibility Guidelines.

Respectfully submitted,

FOX & ROBERTSON, P.C.

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Dated: January 26, 1999