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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FRANCIE E. MOELLER, et al. Plaintiffs, v. TACO BELL CORP., Defendant.	Case No. C 02 5849 MJJ ADR DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CONDITIONAL CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT Date: December 7, 2004 Time: 9:30 a.m. Courtroom: 11

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

JEFFREY H. DASTEEL (State Bar No. 110405)
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ISSUES TO BE DECIDED

1. Whether Plaintiffs' motion is premature in light of the agreed schedule for resolution of injunctive relief issues and discovery?

2. Whether Plaintiffs' motion for partial summary judgment, which purports to seek a determination of liability, fails because it (i) merely seeks a determination that some of the accessibility elements at 19 Taco Bell restaurants deviate from ADAAG or Title 24 and not a determination of liability, (ii) is unsupported by admissible evidence, and (iii) fails to allege or prove intent to violate Title 24 for those elements that comply with ADAAG but allegedly do not comply with Title 24?

3. Whether material issues of fact in dispute preclude granting summary judgment?

4. If the Court determines partial summary judgment is appropriate at this stage of the proceedings, whether Defendant is entitled to partial summary judgment that the elements listed in

Exhibits A and B to the Declaration of Ronda J. McKaig comply with ADAAG and both ADAAG and Title 24, respectively?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

There are approximately 220 company-owned Taco Bell restaurants in California (the "Restaurants"). Even though Plaintiffs based this class action on the alleged existence of company-wide discriminatory policies, Plaintiffs have insisted that a survey be conducted of each and every public accessibility element in each and every company-owned restaurant. To make this process practicable, with the Court's approval, the parties agreed that a Special Master would survey all the Restaurants using an agreed form. By July 2005, the Court-appointed Special Master will have surveyed over 132,000 individual elements. To date, the Special Master has surveyed approximately 7,000 individual elements as part of a pilot program to survey 20 of Taco Bell's corporate-owned restaurants in California (the "Pilot Stores").

The parties agreed that following completion of the survey in June 2005, they would meet and confer regarding the results in an effort to reach agreement on which elements at which restaurants need to be modified. The goal of this survey and meet and confer program was to bring to the Court's attention for decision only those individual accessibility elements that the parties remain in disagreement about after the meet and confer process is concluded. Based on the parties' cooperation to date, Taco Bell expects the number of elements the Court ultimately will be called on to decide will be very few, if any. To the extent disputes remain after the meet and confer, the parties agreed to "meet and confer on a procedure to resolve any disputes concerning the restaurants, which may include proceedings before the Special Master, summary judgment proceedings before the Court, or a bench trial." Joint Supplemental Case Management Statement and [Proposed] Order ("Joint Statement") at 4:3-5.

Notwithstanding the Court-approved procedure for adjudication of injunctive relief regarding the elements at each individual Restaurant, Plaintiffs have brought a Motion for Partial Summary Judgment ("Plaintiffs' Motion") seeking a piecemeal determination that a subset of

elements at only a fraction of the approximately 220 Restaurants do not comply with federal and state accessibility statutes. Plaintiffs' Motion should be denied for four independent reasons:

- Plaintiffs' Motion, brought over 8 months before the start of the agreed meet and confer process, is premature. Instead, Plaintiffs should be ordered to abide by the agreed schedule in the Joint Statement for the adjudication of the individual accessibility elements.[1]
- Expert and fact discovery regarding each of the Pilot Stores' construction, remodel, renovation, and maintenance records is necessary to determine which accessibility standards apply to each element at each of the Restaurants. However, such discovery – which has not yet taken place – as to each of the more than 7,000 elements at the Pilot Stores and over 120,000 elements at the remaining Restaurants is unnecessary and a waste of the parties' resources if, after the scheduled meet and confer process, there is no dispute about compliance or a proposed solution.
- Although styled as a motion seeking a determination of "liability," Plaintiffs' Motion does no such thing. Plaintiffs do not and cannot assert that a determination that certain elements at the Pilot Stores deviate from the ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG") or Title 24 of the California Code of Regulations ("Title 24") (i) establishes any deviations at other Restaurants, or (ii) establishes class-wide company policies in violation of the ADA or Title 24. Indeed, all that Plaintiffs' Motion has done is draw a cross-motion based on the hundreds of findings of compliance at the very same Pilot Stores. In the end, exactly contrary to the agreed proceedings for adjudication of injunctive relief, Plaintiffs' Motion will require the Court to make individual findings as to most of the more than 132,000 individual elements despite the fact that agreement may have been reached as part of the meet and confer process.

[1] See, e.g., United States v. Amoco Oil Co., 580 F. Supp. 1042, 1052 (W.D. Mo. 1984) (denying summary judgment and noting that "[a]lthough it would be permissible to grant the government a partial summary judgment on the issue of liability . . . I doubt that any benefit would accrue from fragmenting the claim in that fashion.").

- Finally, Plaintiffs' summary judgment motion should be denied because a substantial number of material issues of triable fact are in dispute.

Plaintiffs' Motion will do nothing to resolve any of Plaintiffs' claims in this action. Instead, Plaintiffs' Motion will require the Court and the parties to unnecessarily waste their resources. However, should this Court determine Plaintiffs' summary judgment motion is not premature, Taco Bell moves, in what is likely just the first of a series of summary adjudication motions as the remaining Restaurants are surveyed, for an order granting partial summary judgment in its favor on those elements at the Pilot Stores that complied with ADAAG and/or Title 24 as of the date of the Special Master's site visits.

II. PROCEDURAL POSTURE

A. Plaintiffs' Class Action Complaint

On December 17, 2002, four Taco Bell customers filed a class action complaint against Taco Bell alleging violations of the Americans with Disabilities Act, 42 U.S.C.A. § 12101 et seq. (the "ADA"), and the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq. (the "Unruh Act"), at a handful of the Restaurants. On August 4, 2003, Plaintiffs filed a First Amended Class Action Complaint (the "Complaint"), which added an additional claim under the California Disabled Persons Act ("CDPA"), but was otherwise substantively identical to the original complaint.

B. Plaintiffs' Class-Wide Allegations And Motion For Class Certification

Plaintiffs filed their Motion for Class Certification on September 16, 2003, seeking certification of a proposed mandatory injunctive relief class under Rule 23(b)(2). Plaintiffs alleged that various architectural barriers at the Restaurants resulted from Taco Bell's purported "centralized policies governing the design, construction and maintenance of its restaurants." Pls.' Mot. for Class Cert. ("Cert. Mot.") at 11-13, 19-21, 23. Specifically, Plaintiffs claimed that Taco Bell's system-wide policies operate in three ways to result in accessibility problems at the Restaurants.

First, Plaintiffs argued that certain architectural barriers "result directly from Taco Bell's policies." Id. at 11. For example, Plaintiffs alleged that inaccessible queue rails "result from centralized policies and prototypes." Id. at 12. Second, Plaintiffs alleged that certain accessibility

problems result from Taco Bell's "failure to include various accessibility requirements in its company-wide policies." Id. Plaintiffs alleged that the American with Disabilities Act Facilities Compliance Guide used by Taco Bell omits certain requirements, such as the maximum door opening force allowed for exterior doors and the requirement of "Van Accessible" signs and towing signs in parking lots. Id. at 13. Third, Plaintiffs alleged that some accessibility problems result from a "policy" of not enforcing its own accessibility policies. Id.

The Court found that a class was proper under Rule 23(b)(2) based on Plaintiffs' allegations that architectural barriers existing at the Restaurants "result from [Taco Bell's] discriminatory policies concerning the design and accessibility of its restaurants." Order Granting Pls.' Mot. for Class Cert. at 13. The Court certified a Rule 23(b)(2) class of "[a]ll individuals with disabilities who use wheelchairs or electric scooters for mobility who, at any time on or after December 17, 2001, were denied, or are currently being denied, on the basis of disability, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [the Restaurants]." Id. at 15.

C. Taco Bell's Motion To Modify The Class Definition

On October 19, 2004, Taco Bell moved to modify the class definition to exclude damages claims. Taco Bell's motion establishes that claims for damages are not proper for class certification for three reasons. First, the evidence shows that with regard to damages determinations, there are no common issues of fact. Second, the class representatives' damages claims are not typical of the class and therefore cannot be used to adjudicate the damages claims of other class members. Third, the damages issues overwhelm the injunctive relief so that it is inappropriate to include the damages claims in the Rule 23(b)(2) class. See Mot. to Modify Class Def'n (Mot. to Modify") at 25-28. Taco Bell's motion will be heard on December 7, 2004.

D. Bifurcation Of Action Into Equitable Relief And Damages Stages

The parties agreed and the Court ordered that the proceedings and any trial of this matter should be bifurcated so that stage one will resolve Plaintiffs' claims for equitable relief and stage two will resolve Plaintiffs' claims for damages. The Joint Statement filed by the parties sets forth a schedule for the two stages of litigation. See Joint Statement ¶¶ 3-7, 9-10.

During the first stage of the litigation, a Special Master will survey each Restaurant for accessibility. Pursuant to the Order Appointing Special Master ("Order"), the Special Master will complete surveys of approximately 200 Restaurants by June 30, 2005. See Order ¶¶ 2, 7(a). The Special Master must inspect up to 638 elements for each restaurant, and the survey form includes the measurement of dimensions relating to 30 specific areas of each restaurant. The survey is limited to the condition of the elements at the time of the survey and does not attempt to perform a historical survey for each element. In addition to determining the dimensions of each of the elements, the Special Master will specifically *identify whether each element complies with current ADAAG and Title 24 guidelines on the date of the site visit*, which is among the determinations that Plaintiffs ask the Court to make now, without the benefit of discovery.[2] Id. ¶ 2(b). The parties have not stipulated or agreed as to which standards under ADAAG or Title 24 apply to each element at each Restaurant. See Joint Statement ¶ 4; Order ¶ 2(a).

Following completion of the surveys, the parties have agreed to "meet and confer . . . to reach agreement on (i) whether there are violations of [ADAAG] or Title 24 at each surveyed outlet; (ii) if there are violations of [ADAAG] or Title 24, a proposed resolution to the violations; (iii) where applicable, whether the proposed solution is structurally or technically impracticable or unfeasible; (iv) where applicable, whether the proposed resolution is readily achievable; and (v) a proposed implementation schedule for any agreed resolutions." Id. ¶ 7(e). Following the meet and confer process regarding individual elements, the parties agreed that they "shall meet and confer on a procedure to resolve any disputes concerning the [Restaurants], which may include proceedings before the Special Master, summary judgment proceedings before the Court, or a bench trial." Joint Statement at 4:3-5. The purpose of the meet and confer process is to allow the parties to narrow the scope of the litigation so that discovery requests, expert testimony, motions, and Court involvement will be limited to disputed issues. This process minimizes the need for the Court's

[2] The Special Master will also (a) provide a proposed solution to bring non-compliant elements into compliance with ADAAG and Title 24, (b) note whether a proposed solution is structurally impracticable or technically infeasible, and in such cases, propose an alternative solution to provide access to the maximum extent feasible and/or to the extent it is not structurally impracticable, and (c) provide non-binding cost estimates of proposed solutions. See Order ¶ 2(b).

involvement and reduces costs for both parties by eliminating unnecessary litigation regarding undisputed issues.

E. Status Of Discovery

In connection with the survey of the Pilot Stores, at Plaintiffs' request, Taco Bell voluntarily produced to Plaintiffs construction files for the Pilot Stores. The documents produced did not include any documents relating to routine maintenance or repair of the Pilot Stores. Plaintiffs have propounded discovery regarding the frequent changes that occur at all 220 Restaurants, including the building, remodeling, and maintenance history for each Restaurant.

Although initial responses to this discovery are not due until December 17, 2004, at this stage of the proceedings, discovery regarding the history of each of the more than 7,000 elements of the Pilot Stores surveyed by the Special Master and the approximately 120,000 elements at the remaining 200 Restaurants that will be surveyed is premature.[3] Such discovery is only necessary if, after the meet and confer process scheduled to begin in July 2005, the parties dispute which standards and/or defenses may apply to a specific element.

F. Plaintiffs' Motion To Adjudicate Facts

Despite the schedule in this action for surveying and resolving issues relating to the Restaurants, Plaintiffs have moved for partial summary judgment seeking a determination that 497 specified elements at 19 of the Pilot Stores violate the ADA, the Unruh Act, and/or the CDPA. See Pls.' Mot. at 2. Using informal discovery and some of the stipulations of fact regarding dimensions of the accessibility elements at the Pilot Stores, Plaintiffs contend that "liability" should be adjudged as to the allegedly non-compliant elements.

Plaintiffs do not and cannot assert that a non-compliant element at one restaurant says anything about compliance of the same element at any other restaurant. Accordingly, nothing in Plaintiffs' Motion addresses or attempts to adjudicate the class-wide issues asserted in Plaintiffs' Complaint.

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[3] In addition to the elements already surveyed at the Pilot Stores, Plaintiffs have requested that the Special Master complete surveys of additional elements at the Pilot stores. See Order at 4-5. Between the elements already surveyed at the Pilot Stores, the elements that remain to be surveyed at the Pilot Stores, and the elements that remain to be surveyed at the other Restaurants, there will be 132,000 findings of fact with respect to the surveyed elements.

G. Taco Bell's Conditional Cross Motion For Partial Summary Judgment

Should the Court decide that Plaintiffs' motion is not premature in light of the schedule in this action and ongoing discovery, Taco Bell brings this cross-motion for partial summary judgment seeking an order finding that the 2567 elements listed in Exhibit A comply with ADAAG and the 2503 elements in Exhibit B comply with both ADAAG and Title 24. (Both exhibits are attached to the Declaration of Ronda J. McKaig ("McKaig Decl.").)

III. STATEMENT OF FACTS

The Pilot Program for 20 Restaurants

Pursuant to an agreement between the parties, the Special Master surveyed and recorded the dimensions of more than 7,000 elements at 20 Pilot Stores during June and July 2004. As a part of the memorandum of understanding entered into between counsel for the Plaintiff class and counsel for Taco Bell, the parties agreed that the dimensions, and only the dimensions, recorded by the neutral ADA expert would become stipulations of fact that may be used for any purpose as to the individual restaurants surveyed, but not as exemplars or other statistical use for any other Taco Bell restaurants.[4] Accordingly, a determination that one element did or did not comply with ADAAG or Title 24 standards on the date of the survey at a particular restaurant says nothing about Taco Bell's overall policies and practices. Thus, as of this date, the only undisputed facts are the more than 7,000 dimensions determined by the Special Master for the Pilot Stores, as set forth in the Special Master's reports.

The Special Master Survey of 200 Restaurants

From October 2004 through June 2005, the Special Master will survey approximately 120,000 elements at the remaining 200 Restaurants and record their dimensions on the date of survey.[5] The Special Master also will supplement the surveys at the Pilot Stores to include additional elements agreed between the parties. The Special Master survey will include an initial determination of whether a surveyed element complies with ADAAG and/or Title 24 on the date of

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[4] The neutral ADA expert who performed the surveys of the Pilot Stores was later appointed as Special Master by the Court. See Order ¶ 1.

[5] During this time, the Special Master will also complete surveys on an additional approximately 5,000 elements at the Pilot Stores. See Order at 4-5.

survey and, if there are violations of the statutes at surveyed restaurants, a proposed resolution to the violation. After an opportunity to meet and confer, the dimensions determined by the Special Master will become stipulations of fact in this case. As of this date, there are no stipulations of fact from the surveys of non-Pilot Stores.

Plaintiffs' Allegations Concerning 497 Elements

In their Motion, Plaintiffs allege that 497 elements at 19 of the 20 Pilot Stores do not comply with the standards set forth in ADAAG and/or Title 24. Specifically, Plaintiffs have alleged that (a) 93 elements violate ADAAG only, (b) 246 elements violate a particular version or versions of Title 24, and (c) 158 elements violate both ADAAG and a particular version or versions of Title 24.[6]

Taco Bell disputes that certain of the violations alleged by Plaintiffs do not comply with the applicable statute. Although Plaintiffs' Motion purportedly is based on "undisputed" "existing dimensions" and "undisputed information concerning dates of construction and alteration," certain of the dimensions listed by Plaintiffs in the exhibits to the Robertson Declaration differ from the dimensions actually recorded by the Special Master.[7] In addition, Taco Bell disputes the standards applied by Plaintiffs to certain elements and certain of Plaintiffs' conclusions of non-compliance based on those standards.

The Compliant Elements at the Pilot Program Restaurants

In contrast to disputes regarding some of the 497 elements in 19 of the 20 Pilot Stores that are the subject of Plaintiffs' Motion, there can be no dispute that the 2567 elements listed in Exhibit A are compliant with ADAAG, and the 2503 elements listed in Exhibit B are compliant with both ADAAG and Title 24. The compliant elements relate to all areas of the Pilot Stores, including but not limited to accessible routes, ramps, parking, doors, dining areas, queue rails, and restrooms.

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[6] One of the elements Plaintiffs seek summary judgment upon does not even identify an applicable standard. See Robertson Decl. Ex. 9, p. 2. Exhibits to the Robertson Decl. are hereinafter referred to as "Robertson Ex. __."

[7] These discrepancies are detailed infra at Section VI.A.

IV. PLAINTIFFS' PREMATURE MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED

A. Plaintiffs' Motion Is Procedurally Premature

As part of the Joint Statement, the parties agreed and the Court approved a specific plan to survey and adjudicate individual accessibility elements at each Restaurant, including discovery related to those proceedings. See Joint Statement ¶¶ 4-6, 9. Plaintiffs' Motion is a blatant attempt to pre-empt the agreed procedures set forth in the Joint Statement. By their Motion, Plaintiffs have (i) refused to wait until the scheduled meet and confer process to determine whether there are in fact disputes that must be resolved by the Court, (ii) refused to wait for necessary discovery to be completed to determine whether elements that are not in compliance with ADAAG or Title 24 must be modified, and (iii) refused to wait until the parties have met and conferred about the appropriate methods to resolve any disputes that remain after the scheduled meet and confer process.

Plaintiffs' attempt to gain some sort of tactical advantage through this premature motion should be rejected so that the parties may proceed to adjudicate the individual accessibility elements as previously agreed by the parties and approved by the Court. The alternative would defeat the whole purpose of the procedure and require the Court to make thousands of unnecessary determinations based on an incomplete record.

B. Plaintiffs' Motion Is Substantively Premature

In addition to being procedurally premature, Plaintiffs' Motion is substantively premature because it does not and cannot dispose of any claim in this case. It is well-established that summary judgment motions cannot be used as a "vehicle for fragmented adjudication of non-determinative issues." SEC v. Thrasher, 152 F. Supp. 2d 291, 295 (S.D.N.Y. 2001) (denying as procedurally improper a motion that sought resolution of a non-dispositive issue, even though the issue in the motion would have expedited resolution of the action). For this reason alone, Plaintiffs' Motion should be denied.

First, as a result of the parties' agreement regarding the Pilot Stores, compliance or non-compliance cannot be used to support claims regarding Taco Bell's company-wide policies or

practices or even whether identical elements at Restaurants outside the Pilot Program comply or do not comply with the applicable laws. Indeed, Plaintiffs specifically agreed they would not use non-compliance of certain elements in the Pilot Stores as exemplars of violations for any other Taco Bell Restaurants.

Second, an adjudication that a particular element does not comply with the ADA or Title 24 does not resolve any of the causes of action in the Complaint. Indeed, as shown below, the mere fact of a deviation from the standard does not mean that liability is established under either the ADA or Title 24 (1) if an exception excuses full compliance, or (2) unless Plaintiffs show that injunctive relief is appropriate under the circumstances.

Regardless of whether Plaintiffs lose or win their Motion, a judgment as to the compliance of a small percentage of the elements in 19 Restaurants will not determine the fate of the claims asserted by Plaintiffs. See, e.g., Nickert v. Puget Sound Tug & Barge Co., 480 F.2d 1039, 1041 (9th Cir. 1973) (rejecting an opinion characterized as a "partial summary judgment" that was "nothing more nor less than [a] hypothetical, advisory opinion."); Mendenhall v. Barber-Greene Co., 531 F. Supp. 947, 948 (N.D. Ill. 1981) (summary judgment motion seeking adjudication of non-dispositive factual issues would require the court to render an advisory opinion). Indeed, Plaintiffs' request will not even disperse with the need for the Court to evaluate elements at these 19 Restaurants, since Plaintiffs have only moved on certain elements for which they anticipated no affirmative defenses. Moreover, Plaintiffs have requested additional elements be surveyed at these same stores. See Order pp. 4-5. Consequently, a decision granting Plaintiffs' motion cannot streamline the litigation in any way.

C. The Court Should Deny Plaintiff's Motion As Premature Pursuant To F.R.C.P. 56(f) Because Taco Bell Has Not Had The Benefit of Full Discovery

"Although Rule 56(f) facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the non-moving party has not had the opportunity to discover information that is essential to its opposition.'" Metabolife

Int'l v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986)).[8]

As discussed in the Rule 56(f) Declaration of T. Jean Mooney (filed concurrently herewith), the parties agreed to a discovery schedule. Discovery in this case has the potential to be extremely burdensome due to the number of restaurants (approximately 220) and the number of elements Plaintiffs insisted be surveyed for each restaurant (approximately 600), resulting in over 130,000 elements requiring discovery to establish dimensions, applicability of standards, compliance, accessibility, structural impracticability, and technical infeasibility. This discovery would raise material issues as to the facts set forth in Plaintiffs' Motion.

The enormous burden of investigating and producing discovery concerning each of the more than 130,000 accessibility elements at the 220 Restaurants will, in all likelihood, be unnecessary to the extent the parties reach agreement during the meet and confer process. Plaintiffs' premature motion for partial summary judgment thus places Taco Bell in the untenable position of either (i) conducting vast volumes of likely unnecessary discovery ten months before the discovery cut off and before the mandatory meet and confer process has even begun or (ii) permitting Plaintiffs' Motion to be adjudicated on an incomplete record. Taco Bell should not be required to make this Hobson's choice, and Plaintiffs' Motion should be denied. See Fed. R. Civ. P. 56(f).[9]

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[8] See also Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303 (2d Cir.), cert. denied, 124 S. Ct. 153 (2003) ("'Fed.R.Civ.P. 56(f) provides, as interpreted by court opinions, that when a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion.'") (citing Comm. Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 386 (2d Cir. 2001)); cf. Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506, 511 (2d Cir. 1989) ("Under Rule 56(f), summary judgment may be inappropriate where the party opposing it shows . . . that he cannot at the time present facts essential to justify his opposition. The nonmoving party should not be 'railroaded' into his offer of proof in opposition to summary judgment. The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment.") (citations omitted).

[9] See also Antonios A. Alevizopoulos & Assoc. v. Comcast Int'l Holdings, Inc., 100 F. Supp. 2d 178, 185 (S.D.N.Y. 2000) (denying summary judgment under Rule 56(f) based on incomplete discovery to date); Davis v. Cole-Hoover, No. 03CV550, 2004 WL 1574649, at **11-12 (W.D.N.Y. June 14, 2004) (same).

V. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT FAILS AS A MATTER OF LAW

A. Legal Standard For Summary Judgment

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If a fact may affect the outcome of a claim, it is material. Id. at 248. Moreover, the Court construes all evidence and reasonable inferences drawn therefrom in favor of the non-moving party, in this case Taco Bell. Anderson, 477 U.S. at 255.

Although "[t]he existence of undisputed facts is a necessary precondition to entry of summary judgment, [it] will not suffice in and of itself. The movant must also show he is 'entitled to judgment as a matter of law'. . . . because 'undisputed facts do not always point unerringly to a single, inevitable conclusion.'" Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 424 (D.N.H. 1996) (citing Desmond v. Varrasso (In re Varrasso), 37 F.3d 760 (1st Cir. 1994)).

B. Plaintiffs' Motion Cannot Result In A Finding Of Liability

Plaintiffs propose that if they can show accessibility elements deviate from ADAAG and/or Title 24, they have established Taco Bell's "liability." Plaintiffs specifically "reserv[e] for later proceedings the question of appropriate remedies – declaratory, injunctive and monetary – for such liability." Pls.' Mot. at 2. However, Plaintiffs' use of the term "liability" is fundamentally flawed because liability cannot be determined without a concurrent determination as to the appropriate remedy. See, e.g., Burton v. City of Belle Glade, 178 F.3d 1175, 1199 (11th Cir. 1999) (discussing voting rights and noting that "[t]he inquiries into remedy and liability ... cannot be separated: A district court must determine . . . whether it can fashion a permissible remedy in the particular context of the challenged system . . . . The absence of an available remedy is not only relevant at

the remedial stage of the litigation but also precludes, under the totality of the circumstances inquiry, a finding of liability.").[10]

Where, as here, the relief sought by Plaintiffs includes injunctive relief, remedy and liability cannot be separated. Thus, the Court cannot make a determination of liability without considering whether the relief sought is appropriate. See San Francisco Baykeeper, Inc. v. Browner, 147 F. Supp. 2d 991, 996 (N.D. Cal. 2001) ("Plaintiffs' present motion for summary judgment deals only with the issues of liability, and not with remedies. But because the claims of the complaint . . . seek equitable relief, the issues of liability and remedy are not so neatly divided."). It is well-established that injunctive relief "is not a remedy which issues as of course," or "to restrain an act the injurious consequences of which are merely trifling." Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-312 (1982) (citations omitted).

Plaintiffs Would Not Be Entitled To Injunctive Relief For De Minimis Violations. Plaintiffs' Motion asks the Court to ignore the policy behind the ADA and Title 24 – providing substantial access to a majority of the affected population[11] – and to issue a ruling even when an alleged violation is de minimis. However, de minimis violations cannot support an order for injunctive relief as a matter of law. See, e.g., Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698, 783 (D. Or. 1997) (denying injunctive relief requiring a defendant to remount an alarm that was two inches too high); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1369-70 (S.D. Fla. 2001) ("injunctive relief would not be appropriate for *de minimis* violations that 'do not materially impair the use of an area for its intended purpose, . . . [or] pose any apparent danger to persons with disabilities.") (citations omitted).

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[10] Cf. Armstrong v. Turner Indus., Inc., 141 F.3d 554, 562 (5th Cir. 1998) ("[D]amages liability under [Title II of the ADA] must be based on something more than a mere violation of that provision," thereby precluding summary judgment on the issue of liability); Tice v. Centre Area Trans. Auth., 247 F.3d 506, 520 (3rd Cir. 2001) ("there is no indication in either the text of the ADA or in its history that a technical violation . . . was intended to give rise to damages liability" under Title I of the ADA).

[11] "Our recommendations encompass the people with a range of abilities who clearly would be benefited by standardized design features. This means that such recommendations would be most convenient to the broadest range of individuals." Edward Steinfeld, Steven Schroeder & Marilyn Bishop, Accessible Buildings for People with Walking and Reaching Limitations (U.S. Dep't of Housing and Urban Dev., Office of Policy Dev.) (1979) at 5.

For example, in Restaurant No. 2423, Plaintiffs allege that the height of the side and rear grab bars in the women's restroom are mounted at 37 inches, whereas the maximum allowed is 33 inches or 36 inches for the rear grab bar if a tank impedes placement at 33 inches. See Robertson Ex. 4, p. 3. While a side or rear grab bar height of 33-36 inches allows 95% of wheelchair users access, a height of 37 inches actually allows 96.7%, a greater percentage, of wheelchair users access. See Bradtmiller Decl., Ex. C at 4.[12] In Restaurant No. 2801, Plaintiffs allege the height of the lavatory rim in the men's restroom is 35 ½ inches, whereas the maximum allowed height is 34 inches. See Robertson Ex. 7, p. 3. A lavatory rim height of 34 inches permits more than 99% of wheelchair users access, and a lavatory rim height of 35 ½ inches also permits more than 99% of all wheelchair users access. See Bradtmiller Decl., Ex. C at 2.[13] These types of de minimis violations would not support an order for injunctive relief. Indeed, injunctive relief would reduce accessibility in the case of the grab bars at Restaurant No. 2423.

Determinations Of Non-Compliance Are Meaningless If Relief Has Become Moot. Because elements at the Restaurants are subject to frequent change from routine maintenance, customer use, or remodels, the stipulated dimensions are valid only on the date of the survey. A determination that an element was not compliant on the date of the survey does not establish that injunctive relief is appropriate or necessary. For example, one of the Pilot Stores, Restaurant No. 2778, is currently undergoing a remodel that includes removing walls from restrooms, remounting hardware and fixtures in compliance with applicable regulations, remodeling the dining room to remove queue rails and other modifications. See Declaration of R. David Allen ("Allen Decl.") at ¶ 4. Thus, any findings regarding that restaurant likely will be mooted by the planned remodel.[14]

With respect to damages, as shown in Taco Bell's motion to modify the class definition, any finding of liability would require significant factual discovery and evidence establishing that individual class members were actually hindered in their use and enjoyment of a Restaurant by the

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[12] The Bradtmiller Decl. was filed concurrently in support of Taco Bell's Motion to Modify.

[13] See also United States v. AMC Entm't, Inc., 245 F. Supp. 2d 1094, 1100-01 (C.D. Cal. 2003) (expert testimony establishing tolerances for de minimis violations can be used to rebut motion for summary judgment).

[14] Store No. 2801 is also scheduled to begin remodeling in early 2005. See Allen Decl. ¶ 5.

existence of a barrier and that the barrier existed at the time the class member visited the restaurant, rather than the date the Special Master visited the restaurant.

Determinations Of Non-Compliance Are Limited To The Pilot Stores. Contrary to Plaintiffs' suggestion that the Court's decision on "the[] legal questions [in their Motion] will also apply to many or all of the remaining approximately 200 [Restaurants]," in fact each element at each of the remaining 200 Restaurants must be evaluated separately to determine the applicable standard and defenses available to Taco Bell and appropriate injunctive relief, if any. By express agreement of the parties, the factual basis for the determinations Plaintiffs seek from the Court are limited to the 497 elements specified by Plaintiffs at the Pilot Stores, and will not shed any light on the dimensions or compliance of any of the approximately 120,000 elements at the other 200 Restaurants. In any event, injunctive relief may not be applied to the remaining Restaurants where Plaintiffs fail to establish a pattern or practice of discrimination by Taco Bell. See Disabled Rights Action Comm. v. Fremont St. Experience LLC, 44 Fed. Appx. 100, 102 (9th Cir. 2002), cert. denied, 537 U.S. 1107 (2003) (minor technical violations "in the face of numerous instances of compliance. . . . cannot be construed to show a discriminatory pattern, practice or policy.").

Plaintiffs' Cases Do Not Help. Plaintiffs cite three cases – Long v. Coast Resorts, Inc., United States v. AMC Entm't, Inc., and Sapp v. MHI P'ship, Ltd. – for the proposition that partial summary judgment is appropriate based on application of ADA standards to undisputed facts. Each of these cases is readily distinguishable from the present case. First, the only undisputed facts here are the stipulated dimensions as reported by the Special Master. As shown below, there are significant disputed facts, including Plaintiffs' recitation of those dimensions and whether the underlying circumstances at each Restaurant require modifications. Second, because the parties' stipulation limits the use of the agreed dimensions to the surveyed Restaurants, Plaintiffs' attempt to generalize liability from the Pilot Stores does not work. Third, none of Plaintiffs' cases involved a class action with an express procedure for resolution of Plaintiffs' injunctive relief and damages claims. Thus, none of the cases relieves Plaintiffs from the agreed procedures as approved by the Court. Fourth, none of the cases involved a class action with multiple facilities where the plaintiffs

seek to impose liability over a class period and where the existence of a violation may have changed over time.

The singular vice of Plaintiffs' Motion is that it jumps the gun. Plaintiffs' Motion does not and cannot resolve any issues of liability either individually or on a class-wide basis. In the end, Plaintiffs' attempt in advance of the agreed meet and confer process to gain a Court adjudication that a small subset of the surveyed elements do not comply with ADAAG or Title 24 does nothing to advance this litigation and should be rejected.

C. Plaintiffs Fail To Establish The Requisite Element Of Intent For Determinations Of Non-Compliance With Title 24

Plaintiffs seek partial summary judgment on the issue of liability as to 246 elements that allegedly violate Title 24, California's accessibility standards, but comply with ADAAG. The Unruh Act, amended in 1987 to cover persons with disabilities, states that "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5 or 51.6 is liable for each and every offense . . . ." Cal. Civ. Code § 52(a). In Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142 (1991), the California Supreme Court clearly held that only intentional acts of discrimination are actionable under the Unruh Act:

> Several aspects of the [] language [of the Unruh Act] point to an emphasis on intentional discrimination. The references to 'aiding' and 'inciting' denial of access to public accommodations, to making discriminations . . . and to the commission of an 'offense' imply willful, affirmative misconduct on the part of those who violate the Act. . . . [W]e hold that a plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination.

Id. at 1172, 1175 (emphasis added). Thus, the Unruh Act was not intended to address arbitrary or negligent acts of discrimination in access to public accommodations.

Following Harris, the Unruh Act was amended in 1992 to provide that "[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 . . . shall also constitute a violation of this section." Cal. Civ. Code § 51(f). In considering a plaintiff's claims for discrimination in violation of both the ADA and Unruh Act, the court in Presta v. Peninsula Corridor Joint Powers, 16 F. Supp. 2d 1134 (N.D. Cal. 1998), held that "[b]ecause the Unruh Act has adopted the full expanse of the ADA, it must follow, that the same standards for liability apply

under both Acts. Accordingly, if [a] [p]laintiff need not demonstrate discriminatory intent to prove a claim under the ADA, she similarly need not show such intent to prevail under the Unruh Act." Presta, 16 F. Supp. 2d at 1135-36. Presta thus established an exception to the intent requirement for Unruh Act claims based on a violation of the ADA. However, Presta did not address whether an intent requirement exists for Unruh Act claims alleging disability discrimination solely in violation of California state law and not in violation of the ADA.[15]

The Ninth Circuit adopted the exception noted in Presta, but made clear that the intent requirement may still exist for claims under the Unruh Act that are not based on an underlying ADA violation:

> [T]he question arises whether, by virtue of the 1992 amendment to the Unruh Act, *Harris's* requirement of intentional discrimination still exists in a suit such as this. Apparently no binding authority addresses this question. . . . *Harris* may continue to have relevance to other Unruh Act suits, [but] no showing of intentional discrimination is required where the Unruh Act violation is premised on an ADA violation.

Lentini v. Cal. Ctr. for the Arts, 370 F.3d 837, 847 (9th Cir. 2004).

Thus, neither the 1992 amendment nor the ruling in Presta have done away with the intent requirement of the Unruh Act for non-ADA cases. Cf. Grier v. Brown, 230 F. Supp. 2d 1108, 1120 (N.D. Cal. 2002) (dismissing plaintiffs' Unruh Act claims on basis of gender for failure to demonstrate intent). As a result, with respect to the 246 violations alleged by Plaintiffs to violate only California state law and not the ADA, Plaintiffs must plead intent. However, Plaintiffs have not even pled, let alone established, intent to discriminate on the part of Taco Bell. Accordingly, at a minimum, Plaintiffs should be denied summary judgment on each of the 246 alleged violations based solely on California's accessibility standards.[16]

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[15] There has not been a decision that directly addresses this issue. This lack of authority was recognized in Pickern v. Best Western Timber Cove Lodge Marina Resort, No. Civ. S-00-1637 WBS/DAD, 2002 U.S. Dist. LEXIS 1709 (E.D. Cal. Jan. 17, 2002). In Pickern, the Court applied the Presta exception, but noted that it was "unaware of any California case decided after the amendment[] to [the Unruh Act] that has ruled on the issue of whether a plaintiff must prove intentional discrimination or a violation of Title 24 to prevail on a state claim for disability discrimination." Pickern, 2002 U.S. Dist. LEXIS 1709 at *27 n.4.

[16] A list of these 246 alleged violations is attached to the McKaig Decl. as Exhibit C.

VI. SUBSTANTIAL MATERIAL FACTS IN DISPUTE PRECLUDE SUMMARY JUDGMENT

Summary judgment is also inappropriate because there are numerous material facts in dispute. First, some of the "stipulated facts" upon which Plaintiffs base their Motion are in dispute because Plaintiffs have misrepresented some of the final determinations made by the Special Master. Second, because the parties never agreed as to which standards (including which version of the standards) apply to each of the allegedly non-compliant elements, there are factual disputes subject to expert testimony. Finally, there are disputes as to whether certain elements alleged to be non-compliant are in fact non-compliant.

A. Material Facts In Dispute Regarding Store Dimensions

Taco Bell disputes whether the dimensions for various elements in the 19 Pilot Stores are accurate as represented in Plaintiffs' moving papers.[17] Taco Bell and Plaintiffs stipulated that dimensions in the Special Master's final reports for the Pilot Stores would be stipulations of fact in this case. In support of their Motion, Plaintiffs' counsel prepared 19 exhibits, which purport to represent the dimensions determined by the Special Master. However, in certain instances, the exhibits prepared by counsel do not accurately reflect the dimensions recorded by the Special Master. For example, for Restaurant No. 3132, Plaintiffs claim there is only one accessible seating position. Robertson Ex. 11, p.3. However, the final report prepared by the Special Master indicates there are 3 accessible seating positions, which satisfies the standard that Plaintiffs applied to this element. See McKaig Decl., Ex. D, p. 2 (Excerpts of Special Master's Report). These types of discrepancies in the Exhibits prepared by Plaintiffs' counsel present material issues of fact that preclude summary judgment.[18]

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[17] Plaintiffs identify the stipulated dimensions for the Pilot Stores as "Stipulated Existing Dimensions." The Special Master's findings are of the conditions at the time of his visit to the particular restaurant. The parties dispute whether in the normal course of events any alleged deviations from ADAAG or Title 24 will in fact exist after completion of the meet and confer process next Summer. As discussed in Taco Bell's Motion to Modify, elements at the Restaurants are subject to change due to maintenance, repair, or remodeling, such that many elements will not have the same dimension as measured on the date of survey. See Mot. to Modify at 9, 16-18. Accordingly, a number of the dimensions as reported by Plaintiffs may have changed or will be changed, making a liability determination as to particular restaurants inappropriate, or in the event that certain elements that were non-compliant are now compliant, moot.

[18] Additional discrepancies are described in Exhibit E to the McKaig Decl.

B. Material Facts In Dispute Regarding Applicable Standards

Taco Bell disputes whether the standards Plaintiffs apply to the various elements at each of the 19 Restaurants are correct and objects to Plaintiffs' counsel's inadmissible testimony that certain accessibility standards apply based on their own analysis of a handful of documents and their own reading of the statutes. See Puliafico v. County of San Bernardino, 42 F. Supp. 2d 1000, 1004 n.7 (C.D. Cal. 1999) ("Counsel's characterizations of evidence are not, themselves, evidence"); AMC Entm't, Inc., 245 F. Supp. 2d at 1097 n.9 ("counsel of record is not competent to give evidence on substantive matters at issue in this case.").

For example, in alleging violations at Restaurant Nos. 18687 and 19509, Plaintiffs misstate the standard they are applying by referring to the number of total tables and the number of accessible tables at each restaurant. See Robertson Ex. 17, p. 2 & Ex. 18, p. 3. The numbers provided by the Special Master, on the other hand, represent the number of total seats and accessible seats at these restaurants. Plaintiffs' choice of words is seemingly an effort to argue that the number of tables as opposed to seats is the applicable standard. The ADAAG section cited by Plaintiffs, however, does not support their claim. That section states that "at least five percent (5%), but not less than one, of the fixed or built-in seating areas or tables shall comply with" accessibility standards. 28 C.F.R. § 36 app. 4.1.3(18) (emphasis added).

In asserting their claims, Plaintiffs attempt to read an "and" into the statute where none should exist. At the appropriate time, if necessary, Taco Bell intends to present expert testimony that, as applied by experts in the field, ADAAG requires that five percent of either the tables or seats be accessible. Such questions about the terms and provisions of ADAAG requiring expert testimony further highlight why Plaintiffs' Motion is premature because there has been no meet and confer and the parties are not required to designate their experts until October 30, 2005. See Joint Statement ¶ 9.

As another example, Plaintiffs allege that "alterations" in 1993 to the dining room of Restaurant No. 3132 required that the restrooms be brought into compliance with the 1989 California Standards. See Robertson Ex. 11, p. 1. But the California Standards provide an exception to this requirement "[w]hen the total construction cost of alterations, structural repairs or

additions does not exceed a valuation threshold of $50,000 . . . and the enforcing agency finds that compliance with this code creates an unreasonable hardship, compliance shall be limited to the actual work of the project." Cal. Code Regs. tit. 24 § 110A(b)11A (Exception 1) (1989).

Determining whether an "unreasonable hardship" exists in turn depends on several factors, including the cost of providing access, the cost of all construction, and the nature of the accessibility that would be gained or lost. Cal. Code Regs. tit. 24 § 422 (1989). If this issue is one that the parties cannot resolve during the meet and confer process, then discovery and expert testimony will be required to determine whether an unreasonable hardship existed and whether the hardship was recorded by the enforcing agency. At this stage of the proceedings, a determination of "unreasonable hardship" cannot be made, and Taco Bell disputes that it was required to comply with the 1989 California Standards.[19]

Moreover, without the complete construction, maintenance, and repair history of each Restaurant, the parties and the Court cannot determine the appropriate standards to apply to each element.[20] See Brother v. CPL Invs., Inc., 317 F. Supp. 2d 1358, 1370 (S.D. Fla. 2004) (noting that "Plaintiffs [must] establish[] that the new construction standard applies" and declining to apply standard based on the undisputed fact that a portion of the facility had undergone new construction). Although Taco Bell does not dispute the authenticity of the documents Taco Bell produced to Plaintiffs during informal discovery, the documentation does not reflect a complete picture of the construction, maintenance, and remodel history of each of the Pilot Stores. In that regard, the meet and confer process agreed to by the parties and approved by the Court should eliminate the need to perform such exhaustive discovery into each element at each Restaurant, leaving only those matters in dispute after the meet and confer process to the discovery process.

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[19] "Technical infeasibility" and "limiting alterations to actual work" are other exceptions that may apply; however, discovery is required before such determinations can be made. See McKaig Decl., Ex. F for additional examples.

[20] Although some of the seemingly relevant documents incorporated in Plaintiffs' Exhibits may be subject to judicial notice, the documents are not self-authenticating and require testimony to explain their contents. Plaintiffs provide none.

C. **Material Facts In Dispute Regarding Compliance**

1. Taco Bell disputes whether certain elements, although not in technical compliance, still provide equal or greater access.

ADAAG specifically provides that "[d]epartures from particular technical and scoping requirements . . . are permitted where the alternative designs . . . will provide substantially equivalent . . . access to and usability of the facility. 28 C.F.R. § 36 app. 2.2. Exceptions to ADAAG have been explained as "an acknowledgment that the federal government does not enjoy a monopoly on good ideas, and that there may be more than one means to accomplish a particular objective." Indep. Living Res., 982 F. Supp. at 727.

Here, a number of the dimensions cited by Plaintiffs permit equivalent access such that there is no ADA violation. For example, Plaintiffs identify Restaurant No. 2423's women's restroom rear grab bar height as being non-compliant because it is 37 inches as opposed to in the range of 33 to 36 inches as permitted by the standards Plaintiffs cite. See Robertson Ex. 4, p. 3. A rear grab bar height within the "acceptable" range permits 95% of wheelchair users access. See Bradtmiller Decl., Ex. C at 4. By comparison, a rear grab bar height of 37 inches (like the one in Restaurant No. 2423's women's restroom) permits 96.7% of all wheelchair users access. See id.

As another example, Plaintiffs identify the lavatory rim height in Restaurant No. 2801's mens' restroom as being non-compliant because it is 35 ½ inches as opposed to the maximum of 34 inches permitted by the standards Plaintiffs cite. See Robertson Ex. 7, p. 3. A lavatory rim height of 34 inches permits more than 99% of wheelchair users access. See Bradtmiller Decl., Ex. C at 2. Similarly, a lavatory rim height of 35 ½ inches (like the one in Restaurant No. 2801's men's restroom) permits more than 99% of all wheelchair users access. See id.

2. Taco Bell disputes whether certain elements are required to be in technical compliance with standards because of applicable exceptions under the standards.

The ADA provides that full compliance with the new construction provisions is not required where the public accommodation or commercial facility demonstrates that it is structurally impracticable or technically infeasible to comply. See 28 C.F.R. §§ 36.401(c), 36 app. 4.1.6(j). Whether these exceptions apply to the violations alleged by Plaintiffs present another issue of fact.

For example, for Restaurant No. 2778, Plaintiffs allege that the restrooms were remodeled in 1998 and therefore required to comply with ADAAG's minimum requirements for new construction, which require 54 inches depth of clear floor area on the pull side for a hinge approach. See Robertson Ex. 6, pp. 1, 2. On this basis, Plaintiffs ask the Court to rule that this element violates ADAAG. However, § 4.1.6(j) of ADAAG specifically provides that "[i]n alteration work, if compliance with [the minimum requirements for new construction] is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible." 28 C.F.R. § 36 app. 4.1.6(j). Alterations that are "technically infeasible" include those that "ha[ve] little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame." Id. To provide the depth required for new construction, walls that are essential to the structural frame would need to be moved and thus this alteration is technically infeasible. In this example, discovery would be required to determine (1) whether work done during the 1998 "remodel" to the restroom constituted alterations requiring the restroom to comply with the new construction requirements, and (2) whether compliance would require moving load-bearing walls. These questions of fact are disputed, subject to discovery and expert testimony, and therefore preclude granting summary judgment for Plaintiffs on this element.

3. Taco Bell disputes whether certain alleged violations pertain to Plaintiffs' disabilities.

It is axiomatic that Plaintiffs do not have standing to assert claims as to items that do not pertain to their disabilities. See Access Now, Inc. v. Walt Disney World Co., 211 F.R.D. 452, 455 (M.D. Fla. 2001) ("Plaintiffs may not, through the vehicle of a class action . . . seek relief for alleged ADA violations which the individual Plaintiff ... could not have experienced."); Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1083 (D. Haw. 2000) ("[T]his Court finds that Plaintiff's claims not specifically related to non-mobility must be denied."). It is Plaintiffs' burden to establish that they have standing to assert their claims. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); Brother, 317 F. Supp. 2d at 1368 ("Plaintiffs do not have standing to complain about alleged barriers which are not related to their respective disabilities.").

Plaintiffs' class is limited to individuals who use wheelchairs or scooters for mobility. However, Plaintiffs seek summary judgment on elements that would have no affect on wheelchair-bound individuals. Such alleged barriers include handrails and floor mats. For example, Plaintiffs cite a number of Pilot Stores as violating standards because of the lack of handrails, despite the fact that a wheelchair-bound individual would not in the ordinary course use a handrail.[21] Plaintiffs do not have standing to seek judgment on such claims. Plaintiffs have failed to establish standing for their claims with any kind of admissible evidence, and consequently, the Court cannot make determinations of liability with respect to elements that do not relate to Plaintiffs' alleged disabilities.

4. Taco Bell disputes whether certain allegedly non-compliant elements are under Taco Bell's control.

In Pickern v. Pier 1 Imports, Inc., a California federal court denied summary judgment as to the issue of liability where the defendant did not have control over adjoining land, and thereby was not required to construct a ramp connecting the public sidewalk over that land and to the store. No. CIV. S 03-121 FCD JFM, 2004 WL 2252079, *6 (E.D. Cal. Sept. 30, 2004). In this case, Plaintiffs allege parking lot violations for all 19 of the Pilot Stores referred to in their Motion. However, it has never been established that Taco Bell has control or management over the parking lots. Indeed, the Special Master indicated that Restaurant Nos. 15614, 16909 and 19509 have parking lots which appear to be common areas and for which it has not been determined who owns or maintains the lots. See McKaig Decl., Ex. D pp. 17-19 (Excerpts of Special Master's Report).

Moreover, documents produced to Plaintiffs in conjunction with the Pilot Program include a lease signed by the Landlord for Restaurant No. 3579. Plaintiffs allege five parking lot violations at this Restaurant for which it seeks determinations of non-compliance by Taco Bell, but the lease for this Restaurant expressly grants Taco Bell a "non-exclusive right to use the Common Facilities in the Shopping Center for ingress, egress, and parking of motor vehicles subject to the exclusive rights of control and operation reserved to Landlord." See McKaig Decl., Ex. G (emphasis added).

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[21] See, e.g., Robertson Ex. 2, p. 1; Ex. 3, p. 1; Ex. 4, p. 1; Ex. 5, p. 2; Ex. 7, p. 2; (identifying violations for floor mats and handrails).

Such language clearly suggests that the Landlord, not Taco Bell, is in control of the parking lot at this Restaurant. Thus, Taco Bell cannot be held to be in violation of the applicable standards for the parking lot which it does not control.

VII. TACO BELL'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

As set forth above, Taco Bell believes that any motion for partial summary judgment is premature and should be denied by this Court. Such motions run counter to the express agreement of the parties and the case management procedures approved by the Court. However, should the Court decide that Plaintiffs' Motion is not premature, pursuant to Federal Rule of Civil Procedure 56, Taco Bell requests partial summary judgment that the elements listed in Exhibit A to the McKaig Decl. comply with ADAAG and that the elements listed in Exhibit B to the McKaig Decl. comply with both ADAAG and Title 24.

Exhibits A and B are charts that include the stipulated dimensions for all the elements that comply with (1) the current ADA standards; and (2) both the current ADA standards and current version of Title 24. These charts show that 2567 of the elements measured comply with ADAAG and 2503 elements comply with both ADAAG and Title 24. Because each of these elements are in compliance with the applicable standards, Plaintiffs' claims regarding these elements should be extinguished and Taco Bell should be granted summary judgment.

CONCLUSION

For all the foregoing reasons, Taco Bell requests that this Court deny Plaintiffs' Motion for Partial Summary Judgment. In the alternative, should this Court grant, in part or in full, Plaintiffs' Motion, Taco Bell requests that this Court grant Taco Bell's conditional cross-motion for partial summary judgment.

Dated: November 9, 2004

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