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

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02 5849 MJJ ADR

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: December 7, 2004
Time: 9:30 a.m.

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ISSUES TO BE DECIDED

Whether, based on stipulated dimensions, elements in 19 corporate-owned Taco Bell restaurants in California violate Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq. ("Unruh"), and/or the California Disabled Persons Act, Cal. Civ. Code § 54 et seq. (the "CDPA").

INTRODUCTION

In accordance with the schedule set forth in the Joint Supplemental Case Management Statement and [Proposed] Order ("Joint Statement"), on October 19, 2004, Plaintiffs filed their Motion for Partial Summary Judgment. In that motion, Plaintiffs demonstrated that the stipulated measurements of certain architectural elements at 19 of Defendant's stores violate accessibility standards in effect at the time that the restaurants were constructed and/or altered.

The burden then shifted to Defendant, under Rule 56(e), to "set forth specific facts showing that there is a genuine issue for trial." Defendant has provided specific evidence challenging only 16 of the over 400 items in Plaintiffs' Motion. For the sake of simplicity, Plaintiffs are withdrawing those items from their Motion.

The remainder of Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment and Conditional Cross-Motion for Partial Summary Judgment ("Opp.") consists of: (a) conclusory assertions not supported by specific facts as required by Rule 56(e); (b) requests under Rule 56(f) for additional discovery that do not meet the requirements of that rule; and (c) legal arguments (incorrect, Plaintiffs demonstrate below, but perfectly appropriate for disposition on summary judgment). Defendant has failed to meet its burden under Rule 56, and Plaintiffs' Motion should be granted.

FACTS

The exhibits to Plaintiffs' Motion provided undisputed facts relating to (1) the dates of construction of, and alterations to, 19 Taco Bell restaurants; and (2) dimensions of certain elements at each of those restaurants. (See Robertson Decl. Exs. 1-19.) Defendant has not

disputed any of the specific facts in the first category,[1] and only 16 of the dimensions in the second. (See Opp. at 19; McKaig Decl. Ex. E.) Plaintiffs hereby withdraw those 16 items. While Plaintiffs do not necessarily agree with Defendant, because similar dimensions remain covered by this Motion, omission of these 16 will not affect its primary benefit: resolution of common legal questions concerning claims and defenses. Plaintiffs submit a Revised Appendix to their [Revised Proposed] Order Granting Plaintiffs' Motion for Partial Summary Judgment from which these 16 items have been deleted.

ARGUMENT

I. Plaintiffs' Motion is Timely and Will Assist the Meet and Confer Process.

The parties' Joint Statement provided for both a meet and confer process -- scheduled for next summer -- in which the parties will attempt to reach resolution on as many stores and elements as they can, and for a motion by Plaintiffs "for summary judgment as to liability relating to a subset of stores," including the present briefing schedule. (Id. at 3-4, 7.) This schedule permits resolution of a number of common legal questions that will apply to many of the other restaurants, and thus provides guidance to the parties in their meet and confer process.

Specifically, the Court's resolution of the following legal questions -- at issue in this Motion -- will be helpful to the parties in their future discussions: (1) What standards apply to restaurants based on dates of construction or alteration? (2) What standards apply to elements commonly found in Taco Bell restaurants, for example, parking spaces, doors, queue lines, dining rooms, and restrooms? (3) When is it appropriate to apply certain defenses? (4) Are "de minimis" or "technical" violations considered violations of applicable standards? and (5) May Defendant assert that a violation of applicable standards constitutes "equivalent facilitation"?

[1] Plaintiffs supported these facts with documents produced by Taco Bell and others obtained from building departments. Defendant concedes that its own documents are authentic, but suggests that some of the building department documents may not be properly authenticated. (Opp. at 21 & n. 20.) Defendant does not dispute any specific facts in those documents. Although Plaintiffs believe the documents are either self-authenticating or properly authenticated in the Robertson Declaration, Plaintiffs submit herewith the Declaration of Kendra L. Tanacea, the person responsible for obtaining the building department documents, authenticating those documents.

The parties' views on these legal questions differ, and without this Motion, the meet and confer process could devolve into a frustrating exchange of opposing legal views. It is far more efficient -- and consistent with the goals of the Joint Statement -- to address these questions in advance, so as to guide the parties' discussions. Contrary to Defendant's speculation (see Opp. at 4), Plaintiffs do not anticipate filing additional motions for summary judgment unless necessary to address a legal question not resolved through this Motion.

Finally, this Motion requests rulings only as to liability. Plaintiffs propose to address remedies for the violations established through their Motion during the meet and confer process. Any disputes concerning remedies that remain after that process will then be addressed in accordance with the Joint Statement. (See id. at 4.)

II. Defendant Has Not Satisfied the Requirements of Rule 56.

A. Defendant Has Not Satisfied the Requirements of Rule 56(e).

Rule 56(e) requires a party opposing summary judgment to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). "The party opposing summary judgment may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial." Leer v. Murphy, 844 F.2d 628, 631 (9th Cir. 1988). The opposing party's "burden of contradicting [the movant's] evidence is not negligible . . ." UA Local 343 of the United Ass'n of Journeymen & Apprentices v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1995) (citation omitted). Defendant has not carried this burden. Instead, its opposition is based on conclusory references to potential but unidentified or unsupported factual issues. This is not sufficient to defeat Plaintiffs' Motion.

B. Defendant Has Not Satisfied the Requirements of Rule 56(f).

Defendant argues that Plaintiff's Motion should be denied as premature under Rule 56(f) "because Taco Bell has not yet had the benefit of full discovery." (Opp. at 11.) Yet the general categories of facts it claims remain undiscovered are all (1) within its control; (2) in the public record; or (3) legal questions, inappropriate for expert testimony.

Rule 56(f) "requires more than a perfunctory assertion that the party cannot respond

because it needs to conduct discovery. Rather, the Rule requires affidavits setting forth with particularity (1) why the party opposing summary judgment cannot respond [and] (2) the particular facts that the party reasonably expects to obtain in further discovery . . ." Lahey v. Contra Costa County Dep't. of Children & Family Servs., No. C01-1075 MJJ, 2004 WL 2055716, *13 n.9 (N.D. Cal. Sept. 2, 2004). Rule 56(f) does not apply when the facts necessary to oppose summary judgment are in the control of the non-moving party, see, e.g., In re Marine Asbestos Cases, 265 F.3d 861, 869 (9th Cir. 2001), or where the requested discovery is a matter of public record. See, .e.g., Sage Realty Corp. v. Ins. Co. of North Am., 34 F.3d 124, 128 (2d Cir. 1994). Failure to comply with Rule 56(f) is grounds for denying discovery and proceeding to summary judgment. Calif. v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998).

The declaration submitted in support of Defendant's Rule 56(f) request identifies only two reasons why it cannot respond to Plaintiffs' Motion: (1) that it needs time to designate an expert to testify concerning applicable standards; and (2) that it needs time to discover evidence from third parties concerning liability for common areas at its restaurants. (Mooney Decl. ¶ 6.) Neither of these reasons justifies the application of Rule 56(f).

Defendant's first reason is improper because "matters of law [are] for the court's determination [and are] inappropriate subjects for expert testimony." Aguilar v. Int'l Longshoremen's Union Local No. 10, 966 F.2d 443, 447 (9th Cir. 1992). Specifically, expert testimony concerning the legal standards under the ADA is inadmissible. Meineker v. Hoyts Cinemas Corp., 154 F. Supp. 2d 376, 379 (N.D.N.Y. 2001) ("[e]xpert opinion as to the legal standard to apply is inadmissible, as it usurps the role of the judge and is outside the expert's area of expertise."); see also Sapp v. MHI P'ship, Ltd., 199 F. Supp. 2d 578, 589 (N.D. Tex. 2002) (striking expert testimony on ADA compliance). It is proper to deny a Rule 56(f) request where the requested discovery consists of unnecessary expert testimony. See Wellman v. Writers Guild of Am, West, Inc., 146 F.3d 666, 674 (9th Cir. 1998).

Defendant's second Rule 56(f) reason -- to take discovery from third parties concerning responsibility for common areas -- is also insufficient because Defendant has failed to identify

any "particular facts" that it expects to obtain through such discovery. This omission is important because, as a matter of common sense, Defendant should have in its possession any documents -- leases, for example -- concerning its liability for common area violations, and it has not explained what other documents would provide necessary information.

In its brief, Defendant argues that it needs additional time for discovery not discussed its Rule 56(f) declaration, including, for example, the alterations history of each restaurant. (See, e.g., Opp. at 3, 21.) Because "'[r]eferences in memoranda . . . to a need for discovery do not qualify as motions under Rule 56(f),'" Campbell, 138 F.3d at 779 (citation omitted), these reasons should be disregarded. These general references in the brief are, in any event, to facts in Taco Bell's possession or in the public record, for example, at local building departments.

Defendant also has not complied with Rule 56(f) because it "has failed diligently to pursue" the discovery it now says it needs. Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995). Despite knowing the identity of the Pilot Program stores since June, and Plaintiffs' intent to file this Motion since August at the latest, Defendant has not explained why it has been unable: (1) to review its own files for leases and other common area information; (2) to review these files and publicly available documents at building departments to obtain construction and alterations information; or (3) to hire a putative "DOJ / California Standards expert," the last despite the fact that it had time to hire two experts to conduct detailed studies of its 20 stores for its motion to redefine the class.[2] Discovery in this case has been underway for almost two years and, with respect to Defendant's complaint that it needs information concerning store construction and remodeling (see, e.g. Opp. at 3, 21), Plaintiffs requested much of this information from Defendant over a year ago. (See Second Robertson Decl. Exs. 2 & 3.) "While presenting no evidence of its own 'diligence,' [the non-moving party] may not also seek this Court's indulgence, and further delay summary judgment." Cybiotronics, Ltd.v. Golden Source Elecs, Ltd., No. 99CV10522, 2001 WL 327826, *7 (C.D.Cal. Feb. 26, 2001).

[2] See Def.'s Mot. for Modification of Class Definition at 10-11.

III. Plaintiffs' Motion for Summary Judgment as to Liability is Proper.

A. This Court May Grant Summary Judgment on Liability and Reserve the Question of Appropriate Injunctive Relief for Future Proceedings.

Plaintiffs respectfully request this Court to do as the court did in United States v. AMC Entm't, Inc., 245 F. Supp. 2d 1094, 1100 n.13, 1101 (C.D. Cal. 2003): grant summary judgment holding that the undisputed dimensions of certain elements at Defendant's facilities are in violation of applicable accessibility standards, while reserving the question of what remedies are appropriate. Several other courts have taken this approach in cases brought under the ADA. Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698, 713, 770 n. 100 (D. Or. 1997) (ruling on violations in arena while reserving remedies questions); Deck v. Toledo, 76 F. Supp.2d 816, 823-24 (N.D. Ohio 1999) (granting plaintiffs' motion for summary judgment on liability, but holding that " issuance of . . . an injunction at this juncture, on a motion for summary judgment, would be premature"); Sapp, 199 F. Supp.2d at 589 (granting plaintiffs' motion for summary judgment on liability while ordering further briefing on relief).

Defendant argues that "liability cannot be determined without a concurrent determination as to the appropriate remedy." (Opp. at 13.) The cases it cites do not support that proposition. In Burton v. Belle Glade, 178 F.3d 1175 (11th Cir. 1999),[3] the court addressed a voting rights claim under the governing standard of Thornburg v. Gingles, 478 U.S. 30 (1986). That standard explicitly "requir[ed] a plaintiff to demonstrate the existence of a proper remedy." Burton, 178 F.3d at 1199. In this context, the court made the statement quoted by Defendant. That statement is reproduced below, with text omitted by Defendant underlined and in bold demonstrating that it was limited to the Gingles standard:

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[3] None of Defendant's cases address the propriety of resolving liability separate from injunctive relief. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 315 (1982) (upholding district court decision finding liability and issuing an injunction narrower than requested by the plaintiffs); Tice v. Centre Area Transp. Auth., 247 F.3d 506, 520 (3d Cir. 2001) (holding plaintiff must show harm to recover damages under Title I of the ADA); Armstrong v. Turner Indus., Inc., 141 F.3d 554, 562 (5th Cir. 1998) (same); San Francisco Baykeeper, Inc. v. Browner, 147 F. Supp. 2d 991, 996, 1001 (N.D. Cal. 2001) (expressing concern that "the issues of liability and remedy are not so neatly divided," but ultimately denying plaintiffs' motion for summary judgment on the merits).

> The inquiries into remedy and liability . . . cannot be separated: A district court must determine **as part of the *Gingles* threshold inquiry** whether it can fashion a permissible remedy in the particular context of the challenged system.

Id. There is no indication that the court intended this holding to apply outside the substantive requirement of the Gingles standard.

B. There is No Exception for "De Minimis" Violations.

Defendant argues that Plaintiffs would not be entitled to injunctive relief for "de minimis" violations. (Opp. at 14.) The Ninth Circuit in Long v. Coast Resorts, Inc. rejected this precise argument, holding that there is no exception for "substantial compliance" or "technical violations" in the application of the Department of Justice Standards for Accessible Design ("DOJ Standards" or "DOJ Stds.").[4] 267 F.3d 918, 923 (9th Cir. 2001). The district court in Long had found that the width of bathroom doors in a hotel were out of compliance but refused to order injunctive relief because of "'the near absence of hardship and . . . minimal inconvenience to wheelchair users.'" Id. (quoting district court decision). The Ninth Circuit disagreed, holding that "there is no room for discretion" under 42 U.S.C. § 12182(a). Id.; see also Ability Ctr. of Greater Toledo v. Sandusky, 133 F. Supp. 2d 589, 592 (N.D. Ohio 2001) (holding that a one and one-half inch lip on a curb cut made it noncompliant despite the defendant's assertion that it caused "slight inconvenience to the user" because "[t]here are no exceptions allowed to [the] requirements" of the DOJ Standards).

Defendant asserts that the AMC case held that "expert testimony establishing tolerances for de minimis violations can be used to rebut [a] motion for summary judgment." (Opp. at 15 n.13.) This is incorrect. The AMC court rejected the defendant's evidence concerning tolerances, and held that "arguments regarding building industry tolerances are better suited to the remedies phase of this litigation." Id., 245 F. Supp. 2d at 1100. Defendant's attempt to excuse noncompliance as de minimis should be rejected or the question should be addressed during the remedies phase.

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[4] 28 C.F.R. pt. 36, app. A.

C. Plaintiffs' Claims are Not Moot.

Defendant argues that some of Plaintiffs' claims may be moot because its restaurants "are subject to frequent change from routine maintenance, customer use, or remodels." (Opp. at 15.) This is precisely why Plaintiffs' claims are not moot. Indeed, Defendant has argued elsewhere that, because of these changes, "evidence that an element is or is not in compliance today . . . is not dispositive of whether that same element was in compliance at the time a class member visited the restaurant." (Def.'s Mot. for Modification of Class Definition at 3.) In addition, Plaintiffs provided extensive evidence -- undisputed by Defendant -- that Defendant has remodeled its stores without bringing them into compliance with applicable standards.[5] In light of this evidence, none of Plaintiffs' claims is moot.

Defendant's "'voluntary cessation of a challenged practice'" cannot moot Plaintiffs' claims unless "'subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (citations omitted). Defendant has the "'heavy burden of persua[ding]' the court" that this is the case. Id. (citations omitted). A holding of mootness is justified only if it is "absolutely clear that the litigant no longer ha[s] any need of the judicial protection that it sought." Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000); see also Cupolo v. Bay Area Rapid Transit, 5 F. Supp. 2d 1078, 1084 (N.D. Cal. 1997) (holding that remedy of certain ADA violations did not make claims moot).

In light of Defendant's repeated assertions that its restaurants change often, and the undisputed evidence that it has remodeled stores without bringing them into compliance, its reference to two restaurants scheduled for future remodeling does not satisfy Defendant's "heavy burden" of establishing that the elements covered by Plaintiffs ' Motion will not, in the future, continue to be out of compliance with applicable standards. Indeed, Plaintiffs "need . . . the judicial protection" they seek with respect to all of the elements covered by their

[5] See, e.g., Robertson Decl. Exs. 1, 3-7, 10-13, 15.

Motion to ensure they are brought into compliance and remain so through future changes.

D. Plaintiffs are Not Required to Prove Intent to Prevail on this Motion.

Defendant argues that Plaintiffs' motion should be denied as to elements only in violation of the Title 24 of the California Regulatory Code ("California Standards" or "Cal. Stds.") because they have not established the element of intent under Unruh.[6] However, Plaintiffs bring their California Standards claims under the CDPA as well. See Moeller v. Taco Bell Corp., 220 F.R.D. 604, 607 (N.D. Cal. 2004) (violation of California Standards is violation of CDPA). A plaintiff alleging violation of the CDPA is not required to prove intent. Donald v. Café Royale, Inc., 266 Cal. Rptr. 804, 808-11 (Cal. App. 1990); Boemio v. Love's Rest., 954 F. Supp. 204, 208 n.4 (S.D. Cal. 1997). Thus, Defendant's argument that a violation of Unruh based solely on the California Standards requires a showing of intent, even if true, is irrelevant to the present Motion: the elements at issue are in violation of the California Standards and thus of the CDPA, regardless of such a showing.

IV. There Is No Genuine Issue as to Any Material Fact and Plaintiffs Are Entitled to Judgment as a Matter of Law.

A. There are No Remaining Disputed Issues of Fact.

Defendant asserted specific issues of fact concerning 16 of the items covered by Plaintiffs' Motion. Plaintiffs have withdrawn those items from their Motion. See supra at 2.[7]

Although Defendant asserts that there are disputed issues concerning the dates of construction and alteration, it provides no specific facts, as required by Rule 56(e), to

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[6] Defendant concedes, as it must, that intent is not required to prove a violation of the ADA, or of Unruh based on a violation of the ADA. (Opp. at 18.)

[7] There are also no disputes concerning either the facts or law applicable to tables. (See Opp. Br. at 20.) Plaintiffs agree with Defendant's legal interpretation. Some confusion has resulted from two typographical errors on Plaintiffs' part, which have been corrected in the Revised Appendix to Proposed Order. In both of the entries referenced by Defendant, the word "tables" should read "seats." Thus, in Store 18687, there are 52 total seats and in Store 19509, 50 total seats. In both stores, by operation of section 4.1.3(18) of the DOJ Standards, three accessible seats are required while only two are provided.

contradict any of the dates established by Plaintiffs' evidence.[8] Because the information it claims it would need -- the "complete construction, maintenance, and repair history of each Restaurant" (Opp. at 21) -- is either in its possession or in the public record, and was, in any event, not addressed in its Rule 56(f) declaration, it has failed to satisfy Rule 56(f) as well.

Finally, none of the facts established by Plaintiffs constitutes improper testimony by counsel. While the Robertson Declaration summarized certain dates for the reader's convenience -- perfectly appropriate under Rule 1006 of the Federal Rules of Evidence -- the information was drawn from the attached documents or from explanations offered by Defendant's representatives. This is a far cry from the situation in AMC -- cited by Defendant -- in which an attorney attempted to offer substantive testimony as to the measurements at issue in the motion. Id., 245 F. Supp. 2d at 1097 n.9. In any event, again, Defendant does not challenge any of the facts established by the documents attached to the Robertson Declaration.

B. Defendant Is Not Entitled to Rely On The Defenses of "Structurally Impracticable," "Technically Infeasible," "Unreasonable Hardship," or "Limited to Actual Work."

Defendant invokes four defenses to its obligations with respect to alterations: that the alterations were "structurally impracticable" or "technically infeasible," constituted an "unreasonable hardship," or should be "limited to the actual work." (Opp. at 20-23.) With respect to each, Defendant misstates the applicable law, presents no evidence -- or Rule 56(f) testimony -- justifying reliance on the defense, or both.[9]

1. The "Structurally Impracticable" and "Technically Infeasible" Defenses under the ADA.

Under the ADA, the only defense to full compliance in new construction is that it is

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[8] Defendant misstates the holding of Brother v. CPL Invs., Inc., 317 F. Supp.2d 1358 (S.D. Fla. 2004). The court did not "declin[e] to apply [the new construction] standard based on the undisputed fact that a portion of the facility had undergone new construction." (See Opp. at 21.) Rather, the court applied the alterations standard to the altered portion of the hotel based on evidence of alterations, but declined to apply the new construction standard because the facility was built in the 1970s. Brother, 317 F. Supp. 2d at 1370.

[9] Defendant also never pleaded any of these defenses. See generally Answer to Am. Compl.; First Am. Answer to Pls.' First Am. Class Action Compl.

"structurally impracticable." 42 U.S.C. § 12183(a)(1), Long, 267 F.3d at 923. None of the other defenses asserted by Defendant apply to new construction. The "structurally impracticable" defense applies "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. § 36.401(c)(1). Although Defendant references this defense, it does not apply it to any elements at issue in Plaintiffs' Motion. (See McKaig Decl., Ex. F.)

The defense of technical infeasibility[10] only applies to alterations under the ADA[11] -- not to new construction -- and only goes to remedies. The DOJ Standards state that where compliance is "technically infeasible, the alteration shall provide accessibility to the maximum extent feasible." Id. § 4.1.6(1)(j). Thus, it would be appropriate in this case to determine that an element is out of compliance, and then -- if a "technical infeasibility" defense is properly raised -- to address during the remedies phase how to provide access "to the maximum extent feasible."

2. The "Unreasonable Hardship" and "Limited to Actual Work" Defenses Under the California Standards.

As a general matter, the California Standards require that, when facilities are altered, the altered portion -- including a primary entrance to the building, the primary path of travel to the altered area, and restrooms serving the altered area -- must be brought into compliance with the then-applicable standards.[12] "These requirements apply to all remodeling jobs regardless of the valuation of the job." Office of the State Architect & Department of Rehabilitation, California State Accessibility Standards - Title 24 CAC - Interpretive Manual ("Title 24

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[10] "Technically infeasible" is defined to include such "physical or site constraints" as the need to "remov[e] or alter[ ] a load-bearing member which is an essential part of the structural frame." DOJ Stds. § 4.1.6(1)(j).

[11] Title 24 did not contain a "technical infeasibility" defense until 2002, and even then was severely limited. See Cal. Stds. (2002) § 1134B.2.2. Because Plaintiff's Motion does not rely on the 2002 California Standards -- all of the 19 restaurants were built or altered before those standards became applicable -- that defense (and Defendant's citation to it, see McKaig Decl., Ex. F at 1 n.2) is irrelevant.

[12] See, e.g., Cal. Stds. (1989) § 110A(b)(11)(B)(4).

Interpretive Manual")[13] at 9 (1987) (emphasis in original). There are two exceptions to this requirement. See, e.g., Cal. Stds. (1989) § 110A(b)11A, Exceptions 1 & 2.

The first exception to the alterations requirement is where costs exceed a certain level "and the enforcing agency finds that compliance . . . creates unreasonable hardship." See, e.g., Cal. Stds. (1989) § 110A(b)11A, Exception 1. The law is clear that this exception only applies where a request was made to -- and granted by -- the enforcing agency for a determination of unreasonable hardship at the time of the alteration; in the absence of such a request, the exception does not apply. "[A]n unreasonable hardship determination must be made in order to execute an exemption. To do this there is a specific procedure to follow." Title 24 Interpretive Manual at 10; see also Donald, 266 Cal. Rptr. at 807 (refusing to apply exception where "[i]t was undisputed . . . that [the defendant] had never made a hardship request").

Under the second exception, where an alteration is made to meet accessibility requirements, compliance is limited to the actual work performed, that is, only compliance in related entrances, paths of travel and restrooms is excused. See, e.g., Cal. Stds. (1989) § 110A(b)11A, Exception 2. This exception -- on its face -- only applies where the purpose of the alteration is to bring the altered portion into compliance with accessibility requirements.

3. Defendant Has Not Satisfied Rule 56 With Respect to These Defenses.

Defendant does not provide any evidence that any of the alterations at issue in Plaintiffs' motion were structurally impracticable or technically infeasible, that an unreasonable hardship request was made (much less granted) with respect to any of those the alterations, or that the purpose of any of the alterations was compliance with accessibility standards. It has thus not satisfied Rule 56(e) with respect to any of these defenses.

In addition, none of these defenses is mentioned specifically in Defendant's Rule 56(f) declaration, so it is not entitled to rely on that Rule in requesting additional discovery on them. In any event, the information necessary to invoke these defenses is all in Defendant's

[13] Appendix, Exhibit D.

possession or in the public record, making a Rule 56(f) request inappropriate. See supra at 4. The alterations on which Plaintiffs rely in applying the California Standards alterations requirements were all performed by Taco Bell. (See Robertson Decl. Exs. 1, 3-7, 10-13, 15.) The information necessary to determine the purpose of any of these alterations would thus be in Defendant's files and any information concerning an "unreasonable hardship" request would be either in those files or in the publicly available records of the relevant building department.[14] Technical infeasibility and structural impracticability depend on physical conditions at Defendant's restaurants, so Defendant would have ready access to that information.[15]

C. Equivalent Facilitation Was Meant to Encourage Alternative Designs and Technologies, Not to Excuse Violations.

The DOJ Standards provide that "[d]epartures from particular technical and scoping requirements . . . by the use of other designs and technologies are permitted where . . . [they] will provide substantially equivalent or greater access to and usability of the facility." Id. § 2.2 (emphasis added). "This provides flexibility for new technologies and innovative designs [sic] solutions that may not have been taken into account when ADAAG was developed." Architectural and Transportation Barriers Compliance Board, ADAAG Manual: a guide to the Americans with Disabilities Act Accessibility Guidelines (1998) ("ADAAG Manual") at 7 (Second Robertson Decl., Ex. 4). While this is not limited to new technology, it is not intended to excuse simple noncompliance. Such an interpretation would run contrary to the Ninth Circuit holding in Long that there is no exception to the DOJ Standards for de minimis violations. See id., 267 F.3d at 923. The case cited by Defendant is a good example of an alternative design, rather than a post hoc justification for noncompliance: there, the court endorsed the use of folding chairs, instead of fixed seats, in arena seating as a flexible solution for companions of persons who use wheelchairs. Indep. Living Res., 982 F. Supp. at 726.

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[14] For privately funded buildings such as Taco Bell restaurants, the "enforcing agency" is the local building department. See, e.g., Cal. Stds. (2002) § 101.17.11.4.3.

[15] In addition to the complete lack of factual support for these defenses, the exhibit in which Defendant set forth the 39 elements as to which it believes these defenses apply contained a number of errors. See Second Robertson Decl., Ex. 1.

Defendant points to two noncompliant dimensions -- the height of the grab bars in the women's restroom in Store 2423, and the height of the lavatory rim in the men's restroom in Store 2801 (Opp. at 22) -- but offers no evidence that it designed its grab bars or lavatory rims to be higher than permitted by the DOJ Standards in order to provide equal or greater access. See AMC, 245 F. Supp. 2d at 1101 (rejecting equivalent facilitation argument both because there was no evidence of greater access and because "[t]here is no evidence that the documented violations were the result of designs and technologies that were implemented in order to provide substantially equivalent or greater access to and usability of the facility."). This Court should reject Defendant's attempt to use the equivalent facilitation provision as an excuse for its failure to comply with the DOJ Standards.

D. Plaintiffs Have Standing To Address Floor Mats and Handrails.

Defendant argues that Plaintiffs do not have standing to address handrails and floor mats because they do not pertain to Plaintiffs' mobility impairments. (Opp. at 24.) Defendant provides no support -- legal or factual -- for this assertion, sufficient reason to disregard it. In any event, the California Standards make clear that noncompliant floor mats can be a hazard to people who use wheelchairs, see, e.g., Cal. Stds. (1999) Fig. 11B-25 (Appendix, Ex. G), and the ADAAG Manual states that "[h]andrails alone do not necessarily provide effective edge protection for people who use wheelchairs," suggesting that handrails provide part of the system for ensuring that such people do not fall off the side of the ramp. Id. at 44.

E. Defendant Is Responsible for Violations in its Parking Lots.

Title III of the ADA imposes an obligation on any entity that "owns, leases (or leases to) or operates a place of public accommodation." 42 U.S.C. § 12182(a). While a lessor and lessee may allocate responsibility for violations between themselves, any such allocation "is only effective as between the parties, and both . . . remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation." U.S. Dep't. of Justice, Title III of the Americans with Disabilities Act: Technical Assistance Manual, III-1.2000 (1992) (available at http://www.usdoj.gov/crt/ada/taman3.html#III-1.2000.)

In any event, Taco Bell's Rule 30(b)(6) witness has made clear that Taco Bell has control over the parking lots at its stores. Its prototypes and remodeling policies include parking lots. In the mid-1990s, Taco Bell instituted its "zero defects program," which was "a program to take care of all the long-deferred maintenance that had been in our stores, and that meant fixing parking lots . . ." including "mak[ing] sure they were all sealed and, if need be, paved, repaved." Taco Bell "issued the standards" that "should have been used to restripe" its parking lots. (Azalde Dep. at 34-35, 87, 108-10.)[16]

At best, Defendant has produced evidence -- one lease -- concerning Store 3579. Because its leases are all in its control, Defendant had an obligation, under Rule 56(e), to come forward with specific disputed facts with respect to each restaurant at issue in Plaintiffs' Motion. Its failure is in stark contrast to the case on which it relies. In Pickern v. Pier 1 Imports, Inc., No. CIV S 03-121 FCD JFM, 2004 WL 2252079 (E.D. Cal. 2004), the court declined to hold the defendant responsible for a strip of land that was not within the defendant's site because "defendants submit[ted] evidence that they [did] not maintain the grass, make repairs or otherwise improve to the strip of land." Id. at * 6. Defendant here has submitted no such evidence, and the testimony of their own witness is directly to the contrary.

Conclusion

For the reasons set forth above and in Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs respectfully request that this Court grant their Motion.

Respectfully submitted,

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[16] Excerpts from the Azalde Deposition are attached as Exhibit 5 to the Second Robertson Declaration.