JEFFREY H. DASTEEL (State Bar No. 110405)
T. JEAN MOONEY (State Bar No. 211747)
RONDA J. McKAIG (State Bar No. 216267)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
Telephone: (213) 687-5000
Facsimile: (213) 687-5600

Attorneys for Defendant Taco Bell Corp.

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' REVISED MOTION FOR PARTIAL SUMMARY JUDGMENT Date: June 3, 2005 Time: 9:30 a.m. Courtroom: 11

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T. JEAN MOONEY (State Bar No. 211747)
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SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
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ISSUES TO BE DECIDED

1. Whether deviations from applicable accessibility standards establish liability where such deviations are de minimis and there is no effect on accessibility?

2. Whether deviations from applicable accessibility standards establish liability where such deviations constitute equivalent facilitation and there is no effect on accessibility?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

If the Court were to accept Plaintiffs' position on the issues of equivalent facilitation and de minimis deviations, *the actual accessibility of Taco Bell restaurants would become wholly irrelevant.* Instead, all that would matter is literal adherence to selected provisions of disability access regulations. This was not the intent of the Americans with Disabilities Act of 1990 (the

"ADA") or its progeny, and such a holding would result in the absurd situation in which an entity providing access to disabled individuals equal to or greater than provided by the suggested construction standards in the ADA guidelines could be found in violation of the ADA.

The ADA was enacted "to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities . . . [and] to provide enforceable standards addressing discrimination against individuals with disabilities." Senate Rep. Nos. 111-116, at 2 (1989). As this Court previously stated, the ADA "recognizes that the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." Moeller v. Taco Bell Corp., 220 F.R.D. 604, 606 (N.D. Cal. 2004) (internal citations omitted). To that end, the focus of Title III of the ADA is to facilitate the accessibility of public accommodations to individuals with disabilities. In that regard, all facilities built for first occupancy after January 26, 1993 are required to be "readily accessible to and usable by" individuals with disabilities, except when it is structurally impracticable to do so. 42 U.S.C. § 12183(a)(1). Similarly, any alteration to a place of public accommodation after January 26, 1992 shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are "readily accessible to and usable by" individuals with disabilities. 28 C.F.R. § 36.402(a)(1).

The term "readily accessible to or usable by" is "intended to enable people with disabilities . . . to get to, enter, and use a facility." Senate Rep. No. 111-116, at 69. "While the term does not necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility." Id. The Department of Justice Standards for Accessible Design (the "DOJ Standards") are intended to "provide guidance to those in the building industry as to how to provide minimum levels of accessibility." U.S. Dept. of Justice, Technical Assistance Letter, DJ 202-PL-341; DJ 202-PL-409, at 3 (June 14, 1993) (hereinafter, "DOJ Opinion Letter").

The DOJ has recognized that the DOJ Standards "do not constitute a strict formula for design." Id. Without a doubt, the dimensions set forth in the DOJ Standards and Title 24 do not, and are not meant to, assure that all persons confined to wheelchairs or scooters will have complete

access to fully compliant facilities. For example, the DOJ Standards require a lavatory sink to have a minimum of 27 inches clearance for knees. According to an anthropometric survey, the knee clearance mandated by the DOJ Standards accommodates only 64.8% of individuals confined to wheelchairs. See Bradtmiller Decl. Ex. C at 2.[1] As a consequence, 35.2% of the wheelchair population would be hindered in their use and enjoyment of the lavatory even if it were fully compliant with the DOJ Standards. Similarly, under the DOJ Standards and Title 24, the maximum height of the bottom of a mirror in a restroom is 40 inches. Approximately 50% of those confined to wheelchairs probably would not be able to fully use the mirror (i.e., would be unable to see some part of their face) even if the mirror had been fully compliant. See id.

The legislative intent behind the ADA and Title 24, its state law analogue, was to provide maximum access, not rigid and unwavering standards of accessibility. Where particular elements in a Taco Bell restaurant deviate from the applicable accessibility standards and there is no effect on accessibility, such elements would satisfy the underlying purpose of the ADA – maximum access. Whether such deviations are characterized as de minimis or equivalent facilitation, the end result is the same: the ADA's goal to provide facilities accessible to individuals with disabilities would be met.

For their part, Plaintiffs ask this Court to adopt a rule that would not increase accessibility by so much as a single individual, but would cost businesses huge amounts of money modifying facilities to adhere precisely to DOJ Standards and Title 24, despite the fact that doing so would provide absolutely no benefit to the disabled. Taco Bell urges the Court to reject this mechanistic approach to a statute expressly designed for flexibility.

II. AN ELEMENT IN TECHNICAL NON-COMPLIANCE WITH APPLICABLE ACCESSIBILITY STANDARDS DOES NOT ESTABLISH LIABILITY WHERE SUCH DEVIATIONS CONSTITUTE EQUIVALENT FACILITATION AND THERE IS SUBSTANTIALLY EQUAL OR GREATER ACCESSIBILITY

The DOJ Standards provide – as Plaintiffs concede – that "[d]epartures from particular technical and scoping requirements of this guideline by the use of other designs and technologies

[1] The Bradtmiller Decl. was filed concurrently in support of Taco Bell's Motion to Modify the Class Definition.

are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." 28 C.F.R. § 36 app. A § 2.2 ("Section 2.2"); see Plaintiffs' Revised Motion For Partial Summary Judgment ("Pls.' Mot.") at 12:2-6. As the Third Circuit has recognized, "[p]roperly read, the 'Equivalent Facilitation' provision does not allow facilities to deny access under certain circumstances, but instead allows facilities to bypass the technical requirements laid out in the Standards when alternative designs will provide 'equivalent or greater access to and usability of the facility.'" Caruso v. Blockbuster-Sony Music Entm't Ctr., 193 F.3d 730, 739 (3d Cir. 1999) (emphasis added).[2]

Section 2.2 Is Not Limited To "New Technology"

Plaintiffs argue that the equivalent facilitation exception only applies where new technology provides the alternative access. See Pls.' Mot. at 12: 2-19. Thus, Plaintiffs would insert into the equivalent facilitation exception a requirement that a defendant somehow prove the design used to permit accessibility was a new technology unknown to the DOJ at the time it established the relevant standard. This position is not supported by the language of Section 2.2, which simply allows for *alternative* designs and technologies.[3] Indeed, "[t]he equivalent facilitation exception is an acknowledgement 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. v. Oregon Arena Corp., 982 F. Supp. 698, 727 (D. Or. 1997); see also DOJ Opinion Letter at 3 ("[T]he Standards do not constitute a strict formula for design, nor are they intended to constrain design innovations that provide equal or greater access.").[4] As the legislative history of the DOJ

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[2] "A few commenters, citing the Senate report . . . and the Education and Labor report . . . , asked the Department to include in the regulations a provision stating that departures from particular technical and scoping requirements of the accessibility standards will be permitted so long as the alternative methods used will provide substantially equivalent or greater access to and utilization of the facility. Such a provision is found in ADAAG 2.2 and by virtue of that fact is included in these regulations." Final Rule, 56 Fed. Reg. 35586 (July 26, 1991).

[3] See Merriam-Webster Online Dictionary (alternative: "different from the usual or conventional"; "offering or expressing a choice") (www.Merriam-Webster.com 2005); Webster's Ninth New Collegiate Dictionary (alternative: "offering or expressing a choice") (1983).

[4] A 2003 law review article addressing this issue noted that "if a restaurant's alleged van accessible handicapped parking space has an access aisle that is 95 inches wide, it has technically violated the Accessibility Standards, which require a 96-inch wide access aisle. A defendant has a

Standards make clear, "Generally, alternative methods will satisfy the requirement if in material respects the access is substantially equivalent to that which would be provided by the guidelines in such respects as ease, safety, convenience and independence of movement." Notice of Fed. Rules, 56 Fed. Reg. 2300 (Jan. 22, 1991). Accordingly, there are only two requirements for an equivalent facilitation: (i) it is different from the DOJ Standards, and (ii) it provides equal or greater access to the subject facilities.

For example, the Title III Technical Assistance Manual ("TAM") provides that "[r]ather than install a text telephone next to a pay phone, hotels may keep portable text telephones at the desk, if they are available 24 hours per day . . . ." TAM III-7.2100(2). This is not a new technology or special design, but rather, an alternative that provides equivalent access for disabled individuals. TAM gives several equivalent facilitation examples and then asks "*Are these the only places where equivalent facilitation can be used?*" TAM III-7.2100. The answer – according to the DOJ – is "No. Departures from any provision in ADAAG are permitted as long as equivalent facilitation is provided." Id. (emphasis added). There is no requirement that equivalent facilitation must be provided via new technology or special design.

The court in Independent Living Resources v. Oregon Arena Corp. specifically rejected the argument that "the equivalent facilitation exception is limited to 'new' technologies." 982 F. Supp. at 727. The Court noted that defendant's equivalent facilitation argument regarding the use of folding chairs to provide companion seats "appear[ed] to be an eleventh-hour argument conceived by lawyers." Id. at 728 n.36. However, "[r]egardless of why defendant originally decided to use folding chairs, the question before the court is whether that is a permissible means to satisfy the requirement for provision of a companion seat." Id.

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legitimate concern that a "professional plaintiff" might measure the parking space and then bring a lawsuit against the restaurant, alleging that the one-inch deviation from the Accessibility Standards was an architectural barrier. However, the defendant may rebut the presumption by proving, by a preponderance of evidence, that the plaintiff's full and equal enjoyment of the facility was not impaired by the 1-inch deviation. If the violation did not impede or hamper the disabled person's full and equal enjoyment of the facility, the defendant has successfully rebutted the presumption and there is no architectural barrier." R. Russell Hymas and Brett R. Parkinson, Architectural Barriers Under the ADA: An Answer to the Judiciary's Struggle with Technical Non-Compliance, 39 Cal. W. L. Rev. 349, 375 (2003).

If an alternate set up or design allows substantially equivalent or greater access, it falls within the equivalent facilitation exception.[5] Whether equivalent access is provided by a design or set up that differs from the DOJ Standards or Title 24 is a matter of expert testimony.[6] For example, a survey conducted by the Special Master revealed that on the date of the survey, the height of the side and rear grab bars in the women's restroom of Restaurant No. 2423 was 37 inches, whereas the maximum allowed height is 33 inches (or 36 inches for the rear grab bar if a tank impedes placement at 33 inches). 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% of wheelchair users access, a greater percentage. See Bradtmiller Decl. Ex. C at 4. Directly contrary to their stated goals for this litigation, Plaintiffs insist this Court adopt a rule that would require Taco Bell to lower the grab bar so that fewer wheelchair users will have access. That result not only does not make sense, it is contrary to the equivalent access rule expressly set forth in the DOJ Standards.

In Restaurant No. 2801, the height of the lavatory rim in the men's restroom was measured at 35 ½ inches, whereas the maximum allowed height is 34 inches. While a lavatory rim height of 34 inches permits more than 99% of wheelchair users access, a lavatory rim height of 35 ½ inches also permits more than 99% of all wheelchair users access. See id. at 2. Here, Plaintiffs ask the Court to adopt a rule that even though there is equal access, Taco Bell and all other businesses similarly situated should be required to spend money to change the lavatory rim height even though there will be absolutely no increase in accessibility. Plaintiffs' position that a violation exists

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[5] Indeed, the legislative history indicates that something *less* than exactly equivalent access may be provided. Section 2.2 "requires that the alternative methods provide substantially equivalent or greater access, in order to clarify that the alternative access need not be precisely equivalent to that afforded by the guidelines." 56 Fed. Reg. at 2300 (emphasis added).

[6] As shown in Taco Bell's original Cross-Motion for Summary Judgment filed in October 2004, Taco Bell is prepared to submit evidence to this Court from Bruce Bradtmiller, a physical anthropologist who specifically works in the area of anthropometry. Dr. Bradtmiller designs and carries out task-oriented anthropometric research, which is the study of the measurement of the size and proportions of the human body, as well as parameters such as reach and visual range capabilities. These studies allow Dr. Bradtmiller to provide evidence to the Court regarding the percentage of disabled persons who can access certain features in a restaurant as compared to DOJ Standards and Title 24 guidelines. This evidence will allow the Court to determine whether or not "equivalent facilitation" has been achieved.

despite equal access is nonsensical and contrary to the purpose of the ADA and the plain language and purpose of Section 2.2.[7]

In support of their argument that literal adherence to the DOJ standards is required, Plaintiffs cite to United States v. AMC Entertainment, Inc., 245 F. Supp. 2d 1094 (C.D. Cal. 2003). However, the only reason the AMC court could not apply AMC's asserted defenses (which included construction tolerances and equivalent facilitation) was that AMC failed to provide any evidence regarding whether a feature provided equivalent access or fell within an applicable tolerance. As the court noted, "AMC may not sit idly by and merely criticize [the DOJ's expert] without gathering evidence to rebut his conclusions." Id. at 1100-01. Here, Taco Bell has and will continue to submit expert testimony to rebut any findings of non-compliance when a feature is equally accessible, and the Court will then make the final determination.

In the end, Plaintiffs are forced to concede that Section 2.2 was intended to provide the possibility of a "more flexible solution." Pls.' Mot. at 12:22-24. Plaintiffs' concession recognizes that the ADA was intended to strike a balance between access and the cost of doing business. See 28 C.F.R. § 36.304 (2002) ("In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction."). The ADA's goal of equal access for the disabled is met when a facility, though deviating from strict adherence to DOJ Standards or Title 24, nonetheless provides access equal to or greater than that provided by strict adherence to DOJ Standards or Title 24. On the other hand, the ADA's goal to prevent excessive costs to business is not met if a business is required to spend money to make construction changes when the changes would provide no greater access than existing construction.

[7] Section 2.2 "would provide flexibility in what business owners are required to remove as architectural barriers in existing facilities so long as there is equivalent facilitation. Thus, if an owner of an existing facility can show that, although a condition on his premises may technically violate the Accessibility Standards, it is not a barrier because it provides equivalent facilitation to the facility." Hymas and Parkinson, *Architectural Barriers Under the ADA*, 39 Cal. W. L. Rev. 349, fn. 151.

This Court Has Jurisdiction To Resolve Section 2.2 Disputes

Lacking an equitable or legal argument, Plaintiffs spend a great deal of time explaining why the Section 2.2 defense would "improperly require this Court to substitute its judgment for that of responsible regulatory agencies and rewrite the standards." Pls.' Mot. at 13:12-13. Plaintiffs claim that applying Section 2.2 will (1) "force this court to reinvent the regulatory wheel"; (2) "produce inconsistent and unpredictable conditions"; and (3) cause a "weaker set of standards" to be created. Id. at 13:14-15, 14:1. Plaintiffs are wrong.

Section 2.2 is part of the DOJ Standards, not a "reinvention." Taco Bell simply asks the Court to enforce existing regulations. Existing regulations provide for an equivalent access exception to the DOJ Standards. Unless Plaintiffs write that exception out of the law, it is precisely this Court's duty to determine whether in a particular situation a facility satisfies the equivalent facilitation exception provided by law. Rather than "reinvent[ing] the regulatory wheel," Taco Bell asks the Court to apply existing regulations.

Nor will application of Section 2.2 result in "inconsistent and unpredictable conditions." By definition, Section 2.2 applies only to facilities providing substantially equal or greater access to the disabled. There is nothing inconsistent or unpredictable about that result. Although there may be differences in how that result is achieved, Section 2.2 exists because the DOJ expressly permitted such variances to achieve the desired result. There is nothing in the ADA or the DOJ Standards that puts a premium on having access achieved through exactly the same facility dimensions. To the contrary, putting substance over form, the ADA and the DOJ Standards take great pains to allow for variation so long as substantially equal or greater access is achieved.

Finally, application of Section 2.2 will not result in a "weaker set of standards." First, Section 2.2 is a part of the DOJ Standards. Eliminating Section 2.2 – as urged by Plaintiffs – would weaken the DOJ Standards. Conversely, applying Section 2.2 would provide substantially equal or greater access. Plaintiffs do not and cannot explain how providing equal or greater access to the disabled weakens the goals of the ADA.

Next, Plaintiffs appear to argue that the Court somehow lacks authority to determine whether a feature qualifies under the equivalent facilitation exception. Instead, Plaintiffs contend that only the regulatory agencies are qualified to determine whether Section 2.2 should be applied to a particular facility. Plaintiffs are wrong. There is no regulatory process to determine whether Section 2.2 applies to a particular facility. "Neither the Department of Justice, nor any other Federal agency, functions as a 'building department' to review plans, to issue building permits or occupancy certificates, or to provide 'interpretations' of the Standards in that context. The ADA, like all other Federal civil rights laws, requires each covered entity to use its best professional judgment to comply with the statute and the implementing regulations." DOJ Opinion Letter, at 3. Accordingly, as they have done, courts must apply the law on a case-by-case basis considering the evidence provided by the parties.

Finally, Plaintiffs claim that the Court "would have to consider – with respect to each of the elements at issue in this litigation – Defendant's experts statistics . . . ." Pls.' Mot. at 14:4-6. Section 2.2 applies only to elements that deviate from the standards and for which Taco Bell provides evidence that the element provides substantially equal or greater access as built. Although Taco Bell will not be able to mount this statutorily authorized defense to every non-compliant element in this case, Taco Bell is permitted to raise the defense to each element where it is appropriate. Plaintiffs have elected to challenge over 130,000 elements as part of their class action. Plaintiffs cannot be heard now to complain that Taco Bell might avail itself of its right to assert, and have the Court take evidence and rule on, a codified defense even if such a defense requires the Court to rule on many specific elements.

The goal of the ADA is to provide full and equal access to disabled individuals with due regard for the cost to businesses. The Section 2.2 equivalent access exception to the DOJ Standards is designed to meet both the goal of full and equal access and regard for costs to businesses. When, as here, a facility that deviates from the DOJ Standards provides equal or greater access to the disabled, there is no ADA violation, and it makes no sense to require a

business to spend money and resources to alter the facility where there would be absolutely no increase in accessibility.

III. THERE IS NO LIABILITY WHERE A DEVIATION FROM AN APPLICABLE STANDARD IS *DE MINIMIS* AND THERE IS NO EFFECT ON ACCESSIBILITY

When arguing that this Court should not apply a de minimis exception to the applicable accessibility standards, Plaintiffs misconstrue the purpose for such an exception, and ask the Court to ignore not only the purpose of disability access laws, but also the practice and holdings of several sister courts. The de minimis exception applies only when there is no material effect on accessibility. Thus, applying a de minimis exception would be consistent with the purpose of the ADA to provide access to individuals with disabilities.

The provisions of the ADA provide broad principles for the elimination of discrimination against persons with disabilities. The ADA itself does not contain any specific measurements, rather it more generally requires that "[n]o individual ... be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ." 42 U.S.C. 12182(a). To emphasize the ADA's focus on access, Congress chose to delegate responsibility to develop regulations that "carry out the provisions of this [title]" to the Department of Justice. 42 U.S.C. 12186(b). Similarly, as this Court has recognized, the Unruh Act and the CDPA also contain only a broad prohibition of "discrimination on the basis of disability in the full and equal access to the services, facilities and advantages of public accommodations." Moeller, 220 F.R.D. at 607. The purpose of these statutes is to ensure access for the disabled, not to require a slavish devotion to articulated standards when minimal variations from those standards do not affect accessibility.

For example the mirror in the men's restroom in Store No. 2755 was mounted at 40 ½ inches above the floor, ½ inch above the 40 inch DOJ Standard. The ½ inch discrepancy is de minimis because there is no material effect on accessibility. Whether hung at 40 inches above the floor or 40 ½ inches above the floor, approximately 50% of those confined to wheelchairs would be able to fully use the mirror. See Bradtmiller Decl. Ex. C at 2. Requiring Taco Bell to lower the

mirror by ½ inch would not make it more accessible and would not advance any purposes of the ADA or Title 24. See also supra at 6 (examples of equivalent facilitation).

Plaintiffs argue that the Court should ignore the overarching policy behind the ADA and Title 24 (to provide substantial access to a majority of the disabled population), and instead require precise adherence to a regulation that does not provide for absolute accessibility. Courts have previously rejected this position, holding that de minimis violations should not serve as the basis for liability. See, e.g., Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698, 783 (D. Or. 1997) (denying injunctive relief requiring defendant to remount technically noncompliant visual alarms when fact of noncompliance did not cause harm); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1369-70 (S.D. Fla. 2001) ("[I]njunctive relief would not be appropriate for de minimis violations that 'do not materially impair the use of an area for its intended purpose . . . .'") (citations omitted). Moreover, requiring literal adherence is contrary to the legislative intent. "The Department is convinced that ADAAG as adopted in its final form is appropriate for these purposes. The final guidelines, adopted here as standards, will ensure the high level of access contemplated by Congress, consistent with the ADA's balance between the interests of people with disabilities and the business community." 56 Fed. Reg. at 35586.

The Independent Living court underscored the importance of the de minimis exception in a subsequent opinion in which the court again refused to grant injunctive relief for de minimis violations. Indep. Living Res. v. Oregon Arena Corp., 1 F. Supp. 2d 1124 (D. Or. 1998). In discussing claims relating to curb cuts and slopes, the court stated that after considering "the extent to which the slopes deviate from the permissible standards, ... the danger (or lack thereof) that might result from the violations, the expense of remedying the violations [and] the potential for creating new violations or safety concerns as a result of efforts to modify these conditions ... the court concludes that the violations are mostly de minimis and inadvertent, and the costs (and other problems) associated with remedying them greatly outweigh the potential benefits to plaintiffs." Id. at 1150-51. With respect to the slope of van accessible parking spaces, the court "[found] that the deviations in these particular slopes are mostly de minimis and do not materially impair usage

of the parking spaces. Moreover, in the court's opinion, any modifications made to correct those deficiencies could create new (and potentially more serious) problems." Id. at 1153.

The common sense approach adopted by the Independent Living court evidences that the bright line rule set forth by Plaintiffs is impractical and improvident. Instead of a bright line rule requiring strict adherence, courts should consider factors such as safety, cost and the potential for future violations before requiring alterations to be made to elements that (1) deviate from applicable standards by minimal amounts, and (2) do not materially affect accessibility.

The cases cited by Plaintiffs do not help their position. Plaintiffs contend that the Ninth Circuit in Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001), held there could be no "de minimis" exceptions to the DOJ Standards. (Pls' Mot. at 10-11.) The Ninth Circuit did no such thing. In Long, plaintiffs alleged violations of the standards for bathroom doorway width in defendant's standard rooms. 267 F. 3d at 921. In these rooms, the doorways were 28-inches wide instead of 32-inches wide as required by the DOJ Standards. Id. at 922. The Ninth Circuit found that the 28-inch wide doors – a more than 10% variance from the standard – in fact denied access to disabled persons who would have had access to the rooms had they met the DOJ Standards. The Ninth Circuit specifically stated that the Court "need not decide whether the ADA forecloses the possibility that a court might exercise its equitable discretion in fashioning relief for violations of § 12183(a) . . . because there is no room for discretion here even if it exists. This violation resulted in the very discrimination the statute seeks to prevent: it denied individuals with disabilities access to public accommodations." Id. at 923. Thus, the Long holding depended on the fact that the non-compliant width of the bathroom doors denied individuals with disabilities any and all access to the bathrooms. The Court did not consider in Long truly de minimis violations – where there is no material effect on access.

The second case cited by Plaintiffs is no more persuasive. In citing to Ability Center of Greater Toledo v. Sandusky, 133 F. Supp. 2d 589 (N.D. Ohio 2001), Plaintiffs mischaracterize that court's holding as rejecting a de minimis exception. Ability Center did not even address the de minimis issue. Instead, the defendant in that case argued that the noncompliant curb ramps caused

only a "slight inconvenience" because other, compliant ramps were located nearby. Id. at 592. The defendant in Ability Center therefore was not arguing for a de minimis exception for the non-compliant curb ramps, but rather that the plaintiff need not use them.

Plaintiffs' citation to United States v. AMC Entertainment, Inc, 245 F. Supp. 2d 1094 (C.D. Cal. 2003), similarly mischaracterizes a decision that did not discuss the de minimis exception. In AMC, the court specifically stated that it considered the small deviation argument as part of "AMC's position regarding building industry tolerances" and disregarded that position, in part, because "AMC has provided no evidence regarding any applicable conventional building industry tolerances." 245 F. Supp. 2d at 1100. The court never addressed a de minimis exception in its holding, because the defendant in that case appeared not to have asserted the exception.

Although the de minimis exception is not codified in the same manner as the equivalent facilitation exception, courts have used such an exception in a variety of contexts to ensure Constitutional requirements are satisfied. See, e.g., Dixey v. Idaho First Nat'l Bank, 677 F.2d 749, 753 (9th Cir. 1982) ("The judiciary must not be used as a mechanical device for enforcing sanctions when no real harm has been done. . . . If a violation is de minimis, to insist that statutory penalties be awarded may contravene the constitutional rule that our jurisdiction is limited to case or controversy.") (Judge Kennedy, concurring); Repp v. Anadarko Mun. Hosp., 43 F.3d 519, 523 (10th Cir. 1994) (holding that codified standards "do[] not mean that any slight deviation by a hospital from its standard screening policy violates [the statute]. Mere de minimis variations from the hospital's standard procedures do not amount to violation of hospital policy. To hold otherwise would impose liabilities on hospitals for purely formalistic deviations when policy had been effectively followed."). As made clear by the court in Independent Living, courts have an obligation to consider all of the ramifications of the relief crafted. In this case, it does not make sense for the Court to order Taco Bell to fix an element where the deviation is de minimis and there is no material effect on accessibility.

CONCLUSION

In the end, whether called de minimis or equivalent facilitation, when a deviation from the DOJ Standards or Title 24 results in equal or greater accessibility, there can be no violation of the ADA or Title 24. To hold otherwise would both put form over substance and cause businesses to incur needless costs with absolutely no benefit to the disabled population. For all the foregoing reasons, Taco Bell respectfully requests that this Court deny Plaintiffs' Revised Motion for Partial Summary Judgment.

Dated: April 15, 2005

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: _____
Jeffrey H. Dasteel
Attorneys for Defendant
Taco Bell Corp.