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TACO BELL CORP.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FRANCIE E. MOELLER, et al.,

Plaintiffs,

vs.

TACO BELL CORP.,

Defendant.

CASE NO. C 02-5849 MJJ ADR

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT TACO BELL CORP.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

DATE: May 17, 2007
TIME: 9:30 a.m.
CTRM: 11
JUDGE: Hon. Martin J. Jenkins

Defendant Taco Bell Corp. ("Taco Bell") respectfully submits that the following supplemental authority, copies of which are attached, should be considered in connection with Taco Bell's response in opposition to plaintiffs' motion for partial summary judgment.

1. *Martinez v. Home Depot USA, Inc.*, No. Civ. S-04-2272 DFL DAD, 2007 WL 926808 (E.D. Cal. Mar. 27, 2007) (Levi, J.). In this published decision,[1] which follows on the heels of another recently published decision, *Sanford v. Roseville Cycle, Inc.*, No. Civ. 04-1114 DFL CMK, 2007 WL 512426, at *1 (E.D. Cal. Feb. 12, 2007) (Levi, J.), cited on page 21 of Taco Bell's Memorandum in opposition to the instant Motion, Chief Judge Levi once again held that the ADAAG provides the only regulations that are relevant to an ADA claim: "[I]n determining whether [plaintiff] states a federal claim, the court considers only the ADA and the ADAAG." *Martinez*, 2007 WL 926808, at *3. In so doing, Chief Judge Levi expressly relied upon one of the three 2006 published decisions issued by Judge Karlton and cited on pages 20-21 of Taco Bell's Memorandum in opposition that refused to apply non-ADA standards to a federal ADA action. *Chapman v. Pier 1 Imports*, No. Civ. S-04-1339, 2006 WL 1686511, at *7 (E.D. Cal. June 19, 2006) (Karlton, J.). Chief Judge Levi also relied upon the published decision in *Sanford v. Del Taco*, 2006 WL 2669351, at *2 (E.D. Cal. Sept. 18, 2006) (Burrell, J.), which was cited on pages 21-22 of Taco Bell's Memorandum. Based thereon, Chief Judge Levi refused to consider other standards including the California Building Code. *Martinez*, 2007 WL 926808, at *3.

2. *Cross v. Pacific Coast Plaza Invts., L.P.*, 2007 WL 951772 (S.D. Cal. Mar. 6, 2007) (Miller, J.). In this action,[2] Judge Miller declined to exercise supplemental jurisdiction over state law claims including the Unruh Act and the California Disabled Persons Act because of the novelty and complexity of state law in light of the teaching of the California Court of Appeal in *Gunther v. Lin*, 144 Cal. App. 4th 223 (2006) (holding that the Unruh Act required proof of intent to discriminate against disabled persons), which stood in stark contrast to the Ninth Circuit's decision in *Lentini v. California Center for the Arts*, 370 F.3d 837 (9th Cir. 2004) (holding that a plaintiff may recover under a supplemental Unruh Act claim without proof of intentional discrimination even though a successful Unruh Act claim adjudicated separately would have required proof of intent). Judge Miller stated,

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[1] Taco Bell's lead defense counsel was defense counsel in the *Martinez* action.

[2] Taco Bell's lead defense counsel is defense counsel in the *Cross* action.

"Essentially, the California state courts, through the *Gunther* case, which the California Supreme Court has declined to hear, has told the federal courts, 'you got it wrong,' when *Lentini* was decided." *Cross*, 2007 WL 951772, at *6. Noting the "irreconcilable tension between the ADA and the Unruh Act", *Cross*, 2007 WL 951772, at *5, Judge Miller, relying upon comity interests, found that "federal and state interpretation of the Unruh Act have diverged to such a degree that declining supplemental jurisdiction is appropriate in this case." *Id.* at *5. Plaintiffs have addressed both *Gunther v. Lin* and *Lentini v. California Center for the Arts* in their Memorandum. (Pls.' Mem. of 2/23/07 at 8:9-17; 8-9 nn.8 & 9.) Thus, in fairness, the *Cross* decision bears relevance to the instant Motion.

3. *Molski v. M.J. Cable, Inc.*, __ F.3d __, No. 05-55347, 2007 WL 865532 (9th Cir. Mar. 23, 2007) (Ferguson, J.). In this decision, the Ninth Circuit, while ordering a retrial on the question of whether the requested barrier removal was "readily achievable" within the meaning of the ADA, which the Ninth Circuit expressly refused to decide on appeal in the first instance, *id.* at *6 n.6, cited with approval a specific portion of Appendix B to Part 36 of Title 28 of the Code of Federal Regulations for the proposition that "[t]he Department of Justice has referred to these examples[3] as 'the types of *modest measures* that may be taken to remove barriers and that are likely to be readily achievable.'" 2007 WL 865532, at *4 (emphasis added) (quoting Appendix B to Part 36--Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,546 (July 26, 1991) (attached)). Taco Bell expressly cited certain portions of Appendix B on pages 14:24-15:2 of its Memorandum.

DATED: April 11, 2007 GREENBERG TRAURIG, LLP

By /S/
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Attorneys for TACO BELL CORP.

[3] The Ninth Circuit's reference to "these examples" was a reference to examples in 28 C.F.R. § 36.304, which include "installing grab bars in toilet stalls, rearranging toilet partitions to increase maneuvering space, insulating lavatory pipes under sinks to prevent burns, installing raised toilet seats, installing full-length bathroom mirrors, and repositioning paper towel dispensers, 28 C.F.R. § 36.304(b)(12)-(17)." *Molski*, 2007 WL 865532, at *4.