GREENBERG TRAURIG, LLP
GREGORY F. HURLEY (SBN 126791)
RICHARD H. HIKIDA (SBN 196149)
650 Town Center Drive, Suite 1700
Costa Mesa, California 92626
Telephone: (714) 708-6500
Facsimile: (714) 708-6501
Email: hurleyg@gtlaw.com, hikidar@gtlaw.com
Attorneys for Defendant
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

SUR-REPLY IN SUPPORT OF 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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs are not entitled to partial summary judgment because they have failed to meet *their* burden of proof to satisfy the elements for Article III standing to obtain injunctive relief as to the three issues raised in the instant Motion (door opening force, queue lines, and indoor seating). In particular, given the modifications made by Taco Bell Corp. ("Taco Bell") to the vast majority of the 180 stores at issue in the instant Motion,[1] plaintiffs have failed to demonstrate that they are in imminent danger of future injury as to the three aforesaid issues, as required, or that injunctive relief ordered in this case would redress such injury given the extent of the modifications already made and scheduled to be made immediately.

In addition, Taco Bell has rebutted the mere evidentiary presumption that voluntary cessation of conduct does not make a claim moot. Given that it would be *unreasonable* to assume that Taco Bell would undertake the tremendous effort and incur great expense to modify the vast majority of the stores at issue in the instant Motion and continue to engage in the challenged practices at issue here, Taco Bell submits that its actions have rendered the claims at issue in the instant Motion moot.

Finally, plaintiffs' supplemental state law claims relating to the three issues are required to be dismissed given plaintiffs' lack of standing to obtain injunctive relief as to such issues. Indeed, even if the Court determines that such claims are not required to be dismissed, comity and fairness principles compel the Court to decline to exercise supplemental jurisdiction to avoid the tail of state law damages wag the dog of federal court original jurisdiction.

II. ARGUMENT

[1] For ease of reference, Taco Bell has submitted to the Court a color-coded chart attached as Exhibit "2" to the Declaration of Steve Elmer depicting: (1) plaintiffs' allegations as to the three issues raised in the instant Motion (exterior or interior door opening force, queue lines, and accessible indoor seating) at the 180 stores addressed in the Motion; (2) Taco Bell's modifications that were completed as of the filing of Taco Bell's March 23, 2007 Opposition and Taco Bell's modifications completed thereafter; and (3) Taco Bell's asset strategy for other stores that shall be subject to remodeling or replacement in the near future. Not only does Taco Bell have an asset strategy in place to address and respond to each of the alleged violations relating to the allegations at issue in the instant Motion, but also as to additional violations claimed throughout the stores.

A. Plaintiffs Have Failed to Satisfy Their Burden of Proof to Show Why They Have Standing to Obtain Permanent Injunctive Relief as to the Three Issues Raised in Their Motion.

1. Applicable Standard

Despite having the burden of proof to establish standing *throughout the entirety of the litigation*, plaintiffs' initial moving and reply papers are completely bereft of the applicable legal standard for establishing Article III standing and for obtaining a permanent mandatory injunction, which is the only relief available under the ADA given that damages are not available under the ADA. *Wander v. Kaus*, 304 F.3d 856, 857 (9th Cir. 2002) ("Congress intended that there be no federal cause of action for damages for violation of Title III of the ADA."). Given that standing to sue for equitable relief is an issue that affects the invocation of federal jurisdiction, and is an issue that "*can be raised at any time*, including by the court *sua sponte*," *United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) (emphasis added); *see also ACLU of Nevada v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006) (holding that the Ninth Circuit had an "independent obligation" to consider standing and mootness issues *sua sponte*), Taco Bell addresses such legal standards below.

(a) Article III Standing

Standing "is a threshold jurisdictional requirement, derived from the 'case or controversy' language of Article III of the Constitution." *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 (D.N.J. 2003). "[T]he party invoking jurisdiction must allege and support each element of standing." *Animal Legal Defense Fund v. Espy*, 23 F.3d 496, 506 n.3 (D.C. Cir. 1994) (Williams, J., concurring). The party invoking federal jurisdiction bears the burden of establishing standing in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "[A]t successive stages in the litigation, [plaintiff] may be required to submit additional evidence in order to support his standing." *Organization for the Advancement of Minorities with Disabilities Suing on Behalf of Its Members v. Brick Oven Restaurant*, 406 F. Supp. 2d 1120, 1126 n.5 (S.D. Cal. 2005). "*Lujan* establishes that the burden of proving standing increases at each stage of the proceedings." *Arkansas Acorn Fair Housing, Inc. v. Greystone Limited Corp.*, 992 F. Supp. 1064, 1068 (E.D. Ark. 1998). "The burden of establishing Article III standing remains at all times with the

party invoking federal jurisdiction." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 655 (9th Cir. 2002). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 185 (2000); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief).

"First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal citations and quotation marks omitted). "As part of establishing standing, the Plaintiff must demonstrate that he has suffered or is threatened with a 'concrete and particularized' legal harm, coupled with 'a sufficient likelihood that [he] will again be wronged in a similar way[.]'" *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115, 1119 (S.D. Cal. Mar. 29, 2006) (Hayes, J.) (quoting *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1019 (9th Cir. 2002) (internal citations omitted)). "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8 (emphasis in original). "Abstract injury is not enough." *Id.* at 101.

(b) Test for Injunctive Relief

"According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. Mercexchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006); Whitefield v. California, 2007 WL 496342, at *4 (E.D. Cal. Feb. 13, 2007) (Burrell, J.) (holding

that to establish standing for injunctive relief, a plaintiff must allege not only a likelihood of future injury, but also show an imminent threat of irreparable harm).

"In general, injunctive relief is 'to be used *sparingly*, and only in a clear and plain case.'" *Gomez v. Vernon*, 255 F.3d 1118, 1128 (9th Cir. 2001) (emphasis added). "Injunction is an equitable remedy which *should not be lightly indulged in*, but used *sparingly* and only in a *clear* and *plain* case." *Plain Dealer Publishing Co. v. Cleveland Typographical Union*, 520 F.2d 1220, 1230 (6th Cir. 1975) (emphasis added). "Permanent injunctive relief is an *extraordinary* remedy which should be granted only *sparingly* and only for *compelling* reasons." *Ghandi v. Police Department of City of Detroit*, 747 F.2d 338, 343 (6th Cir. 1984) (emphasis added). "There is no question but that mandatory injunctions are to be *sparingly* issued and upon a *strong* showing of *necessity* and upon equitable grounds which are *clearly* apparent." *Fox v. City of West Palm Beach*, 383 F.2d 189, 194 (5th Cir. 1967) (emphasis added).

"[I]njunctive relief must be used sparingly, *to prevent future harm, and not to punish past violations*." *United States v. Barr Labs., Inc.*, 812 F. Supp. 458, 487-88 (D.N.J. 1993) (emphasis added) (citing *SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980)). "Permanent injunctive relief" "is not available to prevent hypothetical injuries feared as liable to occur at some indefinite time in the future." *Newhouse v. Probert*, 608 F. Supp. 978, 984 (W.D. Mich. 1985) (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1930)). "The injury complained of must be of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Newhouse*, 608 F. Supp. at 984 (citation omitted).

"[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Friends of the Earth*, 528 U.S. at 192. "Injunctive relief . . . is granted or withheld in the exercise of a sound judicial *discretion* and in conformity with settled equitable principles and considerations." *Singleton v. Anson County Bd. of Educ.*, 283 F. Supp. 895, 899 (W.D.N.C. 1968) (emphasis added). Courts are more reluctant to impose a mandatory injunction than a prohibitory injunction because a mandatory injunction "is not regarded with judicial favor and is used only with caution and in cases of great necessity." *Id.* "[F]ederal courts should aim to ensure 'the framing of relief no broader than required by the precise facts.'" *Friends of the Earth*, 528 U.S. at 193.

2. Plaintiffs' Motion Should Be Denied for Failing to Even Address or Apply the Applicable Legal Standards for Proving Article III Standing and Obtaining Permanent Injunctive Relief.

Plaintiffs have failed to articulate anywhere in their initial moving papers or reply the foregoing tests for establishing Article III standing and for obtaining a permanent injunction, which are both plaintiffs' burden to satisfy. Given that plaintiffs move for partial summary judgment, plaintiffs cannot rely upon mere allegations and must instead set forth by affidavit or other evidence "specific facts" to support their alleged standing. *Lujan*, 504 U.S. at 561; *Friends of the Earth*, 528 U.S. at 198 (Scalia, J., dissenting); (Fed. R. Civ. P. 56(e)). Thus, on this basis alone, plaintiffs' motion should be denied because plaintiffs have failed to address or apply the correct legal standards for the instant Motion.

3. Plaintiffs Have Failed to Demonstrate an Irreparable Injury.

(a) Subsequent to Taco Bell's March 23, 2007 Filing of Its Opposition Papers, Taco Bell Has Continued to Modify a Substantial Number of Its Stores.

Subsequent to Taco Bell's March 23, 2007 filing of its opposition papers, Taco Bell has continued to modify a substantial number of its stores at issue in the instant Motion (approximately 58 stores and more are scheduled to occur in the immediate future), rendering the claims relating to such stores moot.

In particular, Taco Bell's project managers at Alianza Development International, LLC have collectively personally verified that modifications were made at the following 42 stores as to door opening force, queue line removal, and/or the addition of accessible indoor seating: store numbers 459, 1687, 2755, 2756, 2914, 2961, 3049, 3208, 3948, 4211, 4343, 4518, 4578, 4617, 4633, 4799, 5138, 5259, 5539, 15362, 15379, 15614, 16140, 16370, 16478, 16909, 17181, 17224, 17576, 17751, 17997, 18377, 18606, 18901, 19389, 19509, 19515, 19532, 20310, 20635, 21018, 21343. (Ford Supp. Decl. of 5/7/07 ¶¶ 9-28; Kane Supp. Decl. of 5/10/07 ¶¶ 11-36.) In addition, Taco Bell undertook to make modifications at 14 additional stores that are at issue in the instant Motion: store numbers 137, 1827, 2297, 2861, 2933, 2971, 3046, 3083, 3136, 3473, 3904, 4284, 4311, 4356. (De Bella Supp. Decl. of 5/4/07 ¶¶ 7-8.)

In particular, the door opening force was modified via new or adjusted door closers at the following 52 stores subsequent to March 23, 2007, which are at issue in the instant Motion:[2] store numbers 137, 459 (exterior and interior), 1687 (interior), 2297, 2755 (exterior and interior), 2756 (exterior and interior), 2861, 2914 (exterior and interior), 2933, 2961 (interior), 2971, 3046, 3049 (interior), 3083, 3208 (exterior and interior), 3473, 3904, 3948 (exterior and interior), 4211 (exterior and interior), 4284, 4311, 4342, 4343 (exterior), 4356, 4518 (exterior and interior), 4578 (exterior and interior), 4617 (exterior and interior), 4633 (exterior and interior), 4799 (interior), 5138 (exterior and interior), 5259 (exterior and interior), 5539 (exterior and interior), 15362 (exterior), 15379 (exterior and interior), 15614 (exterior and interior), 16140 (interior), 16370 (interior), 16478 (interior), 16909, 17181 (exterior and interior), 17576 (interior), 17751 (exterior), 17797 (exterior and interior), 18377 (exterior and interior), 18606 (exterior), 18901 (exterior and interior), 19389 (interior), 19509 (exterior and interior), 19515 (exterior and interior), 19532 (interior), 21018 (exterior and interior), 21343 (exterior and interior). (Ford Supp. Decl. ¶¶ 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26; Kane Supp. Decl. ¶¶ 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 31, 32, 33, 34, 35, 36; De Bella Supp. Decl. ¶ 7.)

In particular, the queue line was removed at the following 35 stores subsequent to March 23, 2007, which are at issue in the instant Motion: store numbers 1827, 2297, 2755, 2914, 2933, 3046, 3208, 3948, 4284, 4311, 4342, 4343, 4356, 4518, 4617, 4633, 4799, 5138, 5259, 5539, 15362, 15379, 16140, 16370, 16478, 16909, 16478, 16909, 17181, 17224, 17576, 17751, 18377, 19515, 19532. (Ford Supp. Decl. ¶¶ 13, 16, 17, 18, 19, 20, 21, 23; Kane Supp. Decl. ¶¶ 12, 14, 16, 18, 19, 20, 21, 22, 23, 24, 26, 28, 29, 30, 31, 33, 34; De Bella Supp. Decl. ¶ 8.)

In particular, accessible indoor seating was installed in a number satisfying plaintiffs' most recent demands at the following 13 stores subsequent to March 23, 2007, which are at issue in the

[2] Although plaintiffs complain about the exterior door opening force as requiring 10 pounds of force for element 210 at store number 2007, the Special Master's Interim Survey Report reflects a measurement of only 5 pounds of force for this element. (Docket #218, attachment #7, filed 12/14/06.) Indeed, it does not appear within plaintiffs' Meet and Confer chart as a disputed issue. Thus, plaintiffs never met and conferred as to this element at this particular store. (Hikida Supp. Decl. of 5/10/07 ¶ 2.)

instant Motion: store numbers 459, 1687, 2756, 2961, 3208,[3] 4343, 4518, 4617, 15614, 18377, 18901, 20310, 20635. (Ford Supp. Decl. ¶¶ 9, 10, 11, 13, 23, 25, 28; Kane Supp. Decl. ¶¶ 13, 18, 19, 20, 25.)

Thus, while plaintiffs have raised issues as to either door opening force, queue lines, or accessible indoor seating at 180 stores in the instant Motion, at least 137 have been modified as to the elements at issue in this Motion including store number 3222[4] which was remodeled in 2006 so that there is no issue as to any of the three issues raised in the instant Motion.[5] An additional eight stores have been modified as to at least one of the three issues raised in the instant Motion (if not more).[6] Additional modifications at other stores are imminent. (Elmer Decl. ¶¶ 4, 6.)

(b) Taco Bell Intended to Modify the Stores That Are the Subject of This Sur-Reply Literally Months Before Plaintiffs Filed The Instant Motion.

Given that the Court expressed concern at the recent telephonic further status conference on May 2, 2007 that Taco Bell may have decided to perform additional modifications to certain of its stores in response to plaintiffs' filing of their reply memorandum, Taco Bell would like to take the opportunity to directly respond to the Court's concern. Taco Bell commenced the process of comprehensively modifying approximately 140 stores during the fall of 2006. (Ford Supp. Decl. ¶ 5; Kane Supp. Decl. ¶ 6.) Notwithstanding Taco Bell's efforts to expedite the completion of such work, the shortest timetable

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[3] An accessible seat shall be installed within the next two weeks at store number 3208 to supplement the two existing accessible seats. (Ford Supp. Decl. ¶ 13.)

[4] Store number 3222 was remodeled in 2006 as supervised by Alianza. (Ford Supp. Decl. ¶ 14; Elmer Decl. ¶ 3.) The interior door closer was replaced as part of the remodel and the door opening force is now within the 7 pound tolerance proposed by plaintiffs in this Motion. (Ford Supp. Decl. ¶ 14.)

[5] Those stores are 99, 137, 283, 459, 829, 955, 1687, 1827, 1934, 2007, 2423, 2755, 2756, 2778, 2914, 2915, 2930, 2961, 2971, 3046, 3049, 3053, 3064, 3071, 3083, 3112, 3117, 3145, 3152, 3222, 3579, 3904, 3948, 4168, 4211, 4311, 4325, 4342, 4343, 4466, 4510, 4518, 4558, 4578, 4617, 4633, 4661, 4704, 4799, 4862, 4951, 5019, 5081, 5138, 5223, 5259, 5512, 5513, 5539, 5636, 5641, 9414, 9427, 9489, 15362, 15379, 15455, 15507, 15508, 15570, 15573, 15614, 15625, 15723, 16140, 16276, 16336, 16370, 16381, 16478, 16534, 16812, 16819, 16909, 17181, 17224, 17243, 17363, 17471, 17473, 17556, 17572, 17576, 17751, 17984, 17997, 18003, 18112, 18315, 18377, 18577, 18606, 18687, 18808, 18901, 19289, 19344, 19389, 19413, 19509, 19515, 19532, 19591, 19744, 19950, 20052, 20175, 20180, 20190, 20241, 20353, 20566, 20578, 20635, 20646, 20676, 20893, 21000, 21018, 21047, 21220, 21226, 21261, 21295, 21343, 21453.

[6] Those stores are store numbers 2297, 2861, 2933, 3208, 3473, 4284, 4356, 9417, 20310. Store number 3208 shall be further modified within two weeks via the installation of an additional interior accessible seat in addition to the two existing accessible seats. (Ford Supp. Decl. ¶ 13.)

extended through May 2007. *Id.* This was due to the sheer volume of stores located throughout the State of California that were modified. *Id.* Thus, the stores that were ultimately modified after March 23, 2007, which are the subject of the supplemental declarations of Sabrina Ford and Aaron Kane, were intended to be modified literally months before plaintiffs filed the instant Motion on February 23, 2007.

In addition, as discussed in paragraphs 5 and 7 of Joseph De Bella's declaration dated March 22, 2007, Taco Bell intended to make modifications by May 1, 2007 to door opening force and to remove queue lines at 25 stores intended for remodeling in 2008. (De Bella Supp. Decl. ¶¶ 2, 3.) Thus, it should come as no surprise that Taco Bell seeks to report on the successful completion of such modification work, which would render any injunctive relief as to such work a nullity. *Id.* ¶¶ 7, 8.

Finally, Taco Bell has not made its intent and desire to perform modification work a secret. Indeed, at the January 24, 2007 Status Conference, lead defense counsel for Taco Bell stated on the record that "we're going to go ahead and do the work." The Court acknowledged that Taco Bell was "going to go on and do the work". (Hikida Supp. Decl. ¶ 4; 1/24/07 H'rg Tr. at 27:20-21; 28:10-11.) In addition, on October 24, 2006, at Taco Bell's invitation, plaintiffs' counsel met with defense counsel and inspected three fully modified stores in Orange County (store numbers 283, 3579, 16812) and declined to visit a fourth fully modified store (or additional unmodified stores) even though the opportunity to do so was available. (Hikida Supp. Decl. ¶ 5.) Thus, Taco Bell has made its position transparently clear.

(c) Other Stores at Issue Are Either Scheduled for Modification in the Remainder of 2007 or 2008 or Are Not Subject to Injunctive Relief Because They Are Closed, Now Operated By a Franchisee, or Otherwise Beyond Taco Bell's Control.

Other stores at issue in the instant Motion are either scheduled for modification in the remainder of 2007 or 2008 or are not subject to injunctive relief because they are closed, now operated by a franchisee, or otherwise beyond Taco Bell's control. The current circumstances of those other stores are as follows:

- Store number 2918 is scheduled for comprehensive ADA remediation work to take place by the end of May 2007. (Elmer Decl. ¶ 4; Kane Supp. Decl. ¶ 37.)

- Store numbers 137, 567, 1034, 3027, 3096, 3132, 3136 are scheduled for comprehensive ADA remediation work to be completed by June 2007. (Elmer Decl. ¶ 4; Kane Supp. Decl. ¶ 38.)
- An additional 18 stores are scheduled for a 2007 remodel or replacement (store number 2241, 2700, 2968, 2971, 2984, 3160, 3184, 3196, 3207, 3209, 3390, 3471, 3498, 3555, 4027, 4034, 4054, 4622). (Elmer Decl. ¶ 5.)
- An additional 15 stores are scheduled for a 2008 remodel or replacement (store numbers 1827, 2297, 2801, 2861, 2933, 2971, 3046, 3083, 3473, 3904, 4284, 4311, 4342, 4356, 9417). (Elmer Decl. ¶¶ 6, 7.)
- An additional 12 stores are currently operated by franchisees and are beyond Taco Bell's ability to control (store numbers 2910, 4192, 4204, 4355, 4586, 4611, 5570, 9407, 9454, 15319, 17529, 20690). (Elmer Decl. ¶ 10.)
- An additional store, store number 20310, has exterior door and interior restroom door pressure issues that are beyond Taco Bell's control given that this particular store is a tenant of and located inside the Discovery Science Center and so the exterior door opening force and restrooms are common areas and the responsibility of the Discovery Science Center. (Elmer Decl. ¶ 11.)
- An additional store was closed as of February 28, 2006 (store number 2812) and another is scheduled to be closed in 2007 (store number 2848). (Elmer Decl. ¶ 9.)

(d) Plaintiffs' Inference That Taco Bell's Project Managers Surveyed the Bulk of the Modifications in the Summer of 2006 Is Misleading.

Contrary to the inference that plaintiffs wish the Court to draw from the March 23, 2007 declarations of Taco Bell's project managers, Sabrina Ford and Aaron Kane, such project managers have only recently visited, inspected, and verified modifications made to the stores. (Ford Supp. Decl. 6; Kane Supp. Decl. ¶ 8.) Indeed, Mr. Kane was not even employed by Alianza until October 2006 and began to provide project management services to Taco Bell beginning in or about November 2006. (Kane Supp. Decl.¶ 5.)

As for plaintiffs' assumption that the modification work was undertaken mostly in the summer of 2006, that assumption is also mistaken. As plaintiffs are well aware, plaintiffs' counsel Amy Robertson and Mari Mayeda visited and inspected three comprehensively modified stores on October 24, 2006

(declining to visit a fourth store with defense counsel). (Hikida Supp. Decl. ¶ 5.) Following such store visits by plaintiffs' counsel, Taco Bell's project managers began in earnest to undertake store modifications of the elements at issue in this Motion. (Ford Supp. Decl. ¶ 5; Kane Supp. Decl. 6.)

(e) Taco Bell's Modifications Are Not Limited to the Elements At Issue in the Present Motion.

As plaintiffs are well aware from having visited three of the stores in October 2006 (and had an opportunity to visit a fourth store, but declined), the modifications made at such stores were comprehensive and were not at all limited to the few issues that are the subject of the instant Motion. Thus, it is disingenuous for plaintiffs to claim that the Court should not rely upon Taco Bell's evidence of its modifications because they are "only within a universe carefully circumscribed to include only the types of elements at issue in the present motion." (Reply at 35:2-4.) The reality is that Taco Bell has undertaken comprehensive modifications of both exterior and interior elements throughout approximately 140 stores and is planning to modify additional stores in the immediate future. (Ford Decl. ¶¶ 8-70; Ford Supp. Decl. ¶¶ 5-7, 9-28; Kane Decl. ¶¶ 5-39; Kane Supp. Decl. ¶¶ 6-38; Elmer Decl. ¶¶ 3-6, 12 Ex. 2.)

(f) Taco Bell Has Modified Virtually All of the Disputed Elements At Issue in the Instant Motion Rendering the Likelihood of Future Irreparable Injury Speculative and the Instant ADA Claims for Injunctive Relief Moot.

Case or controversy considerations "'obviously shade into those determining whether the complaint states a sound basis for equitable relief.'" *Lyons*, 461 U.S. at 103. Even if a complaint alleges an existing case or controversy, an adequate basis for equitable relief is not necessarily demonstrated. *Id.* at 103. The issue is not whether a damages claim meeting all Article III requirements[7] "has become moot but whether [the plaintiff] meets the preconditions for asserting an injunctive claim in a federal forum." *Id.* at 109.

The Supreme Court has emphasized that "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *Lyons*, 461 U.S. at 103. Plaintiffs' standing to seek the injunction requested "depend[s] on whether [they] [are] likely to suffer

[7] As addressed below, plaintiffs' state law damages claims do not satisfy Article III requirements.

future injury." *Lyons*, 461 U.S. at 105 (emphasis added). "If [the plaintiff] has made no showing that he is *realistically* threatened by a repetition of [the alleged wrongdoing], then he has not met the requirements for seeking an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice." *Id.* at 109 (emphasis added).

Plaintiffs have failed to demonstrate an irreparable injury. An irreparable injury cannot be demonstrated "where there is no showing of any *real* or *immediate* threat that the plaintiff will be wronged *again*." *Lyons*, 461 U.S. at 111 (emphasis added). Notwithstanding plaintiffs' characterizations, plaintiffs have made no showing of any "real" or "immediate threat" that plaintiffs will be allegedly wronged again as to the three issues raised in plaintiffs' instant Motion given the extensive nature of Taco Bell's modifications across the vast majority of the 180 stores at issue in the Motion, which is the only motion before this Court. Elmer Decl. Ex. 2. The color-coded chart attached to Mr. Elmer's declaration makes it clear that Taco Bell has an asset strategy in place to address and respond to each of the alleged violations not only relating to the allegations at issue in the instant Motion, but also as to additional violations claimed throughout the stores. It is safe to assume that there is no other corporate business that has as extensive of a comprehensive plan in place to address ADA issues as does Taco Bell. Given that it would be *unreasonable* to assume that Taco Bell would engage in such tremendous effort and incur such great expense to modify approximately 140 stores comprehensively and as many as 166 stores as to the issues currently raised in the instant Motion with still more planned, and continue to engage in the challenged practices at issue here, Taco Bell submits that plaintiffs cannot satisfy their burden to show irreparable injury and that Taco Bell's evidence renders the injunctive relief claims in the instant Motion moot.

Although plaintiffs cite *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, *supra*, for the proposition that Taco Bell has the heavy burden of persuading the court that the challenged conduct cannot "reasonably" be expected to start up again, (Reply at 30, 32[8]), the foregoing evidence amply satisfies what amounts to an evidentiary presumption as clarified in Justice Scalia's dissenting opinion in that same decision. 528 U.S. at 213 (stating that the "voluntary cessation" doctrine is

[8] Plaintiffs' citation of the Syllabus (page 170 of the decision; Reply at 32:16) is improper as it constitutes no part of the opinion of the Court.

"nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist") (Scalia, J., dissenting). Taco Bell submits that it has amply met such evidentiary presumption, and that plaintiffs' subjective apprehensions ignore the objective reality of the threat of repeated injury that is relevant to the standing and mootness inquiries. Simply put, plaintiffs' subjective apprehensions are *unreasonable* given the current set of facts.

Indeed, even assuming that the Court somehow finds that the possibility of future injury is not speculative enough to establish mootness, the Court should find that plaintiffs have failed to meet their evidentiary burden to support standing. *Scott*, 306 F.3d at 656 (quoting *Friends of the Earth*, 528 U.S. at 190 ("The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.")).

Given Taco Bell's Herculean efforts to comprehensively modify approximately 140 stores and to modify now elements at issue in the instant Motion at an additional 25 stores, this Court should not issue an injunction as to the few elements at the few stores that have not been modified to date. Simply put, such stores that are slated for major remodeling or replacement in either the remainder of 2007 or 2008 should be handled in a manner to avoid duplicative work and/or expense that will become a nullity once the major remodeling or demolition and rebuilding of a store has been completed. After all, the reality is that Taco Bell needs a reasonable amount of time to undertake modifications, *in some instances requiring local building permits which can take many months or as much as one year to obtain*. (Elmer Decl. ¶ 8.) In addition, major remodeling work is handled by outside contractors who must submit to a competitive bidding process to ensure that only qualified contractors who perform quality work at reasonable rates are ultimately selected. Thus, given that any injunctive relief would most likely require a reasonable timeframe for Taco Bell to modify the remainder of its California stores, Taco Bell submits that its evidentiary submission to the Court should, at minimum, suffice to create a genuine issue of material fact as to Taco Bell's mootness defense. Alternatively, the Court should grant partial summary judgment in favor of Taco Bell as to the elements at the stores that have been modified.

(g) Plaintiffs Offer Mere Speculation or "Subjective Apprehensions" About Future Injuries.

"[I]njunctive relief must be used sparingly, to prevent future harm, and not to punish past violations." *United States v. Barr Labs., Inc.*, 812 F. Supp. 458, 487-88 (D.N.J. 1993) (emphasis added) (citing *SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980)). "Permanent injunctive relief" "is not available to prevent hypothetical injuries feared as liable to occur at some indefinite time in the future." *Newhouse v. Probert*, 608 F. Supp. 978, 984 (W.D. Mich. 1985) (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1930)).

An irreparable injury cannot be demonstrated "where there is no showing of any *real* or *immediate* threat that the plaintiff will be wronged *again*." *Lyons*, 461 U.S. 95 at 111 (emphasis added). Notwithstanding plaintiffs' characterizations, plaintiffs have made no showing of any "real" or "immediate threat" that plaintiffs will be allegedly wronged again as to the three issues raised in plaintiffs' instant Motion. Plaintiffs merely offer speculation in the form of legal argument and not a single declaration from any representative class member about the mere possibility that they might suffer future injury even after Taco Bell's recent modifications to the vast majority of its stores. Plaintiffs' expressed concern that Taco Bell will reinstall queue lines, remove accessible seating, and reinstall door closers that do not maintain allegedly compliant door opening force amounts to rank speculation, which does not satisfy the "irreparable injury" prerequisite of equitable relief. "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's *subjective* apprehensions." *Lyons*, 461 U.S. at 107 n.8 (first emphasis in original). Thus, on this basis, alone, plaintiffs' motion should be denied. *Lyons*, 461 U.S. at 111.

Even assuming that items such as door opening force is subject to frequent change, the question that plaintiffs fail to address is if Taco Bell's door opening force maintenance policy is inadequate, then what relief does plaintiffs suggest instead? Obviously, plaintiffs must have some maintenance policy in mind given that door opening force is obviously subject to maintenance and adjustment of door closers over time.

Plaintiffs' reliance upon *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (Henderson, J.), is misplaced. In that case, the court held that it was convinced that the constitutional violations at issue would not be fully redressed absent intervention by the Court because the defendants showed no indication that they were committed to finding permanent solutions to "problems of serious

constitutional dimension." *Id.* at 1281. The court expressed concern that the "practices" may be reinstated as swiftly as they were suspended. In contrast, in *Moeller*, the purported architectural barriers at issue, which are not constitutional issues, have been removed at significant burden and expense to Taco Bell. There is no evidence from which to draw the inference that Taco Bell is going to re-install queue lines or non-accessible indoor seating in place of the recent modifications made to the majority of company-owned facilities. In other words, unlike the situation in *Madrid*, injunctive relief is not necessary to ensure an effective remedy in the instant action based upon Taco Bell's voluntary actions.

(h) The Court Should Disregard Plaintiffs' Transparent and Improper Attempt to Bias the Court By Referring to Allegations of Taco Bell's "Past Behavior".

Plaintiffs' reference to Taco Bell's "past behavior," (Reply at 34:5), is a transparent attempt to bias the Court against Taco Bell that should not be countenanced by the Court. Obviously, Taco Bell has engaged in expensive modifications and has no desire whatsoever to encounter yet another ADA class action. Thus, the Court can and should reject such purported new facts raised in the reply for the first time as irrelevant. (Fed. R. Evid. 402) ("Evidence which is not relevant is not admissible."). Even if such information was relevant (it is not), such information is not admissible because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and as a waste of time. (Fed. R. Evid. 403.) Indeed, the personal attack and unsubstantiated innuendo against Taco Bell's in-house counsel, Richard Deleissegues, without a shred of evidence is outrageous and unseemly.

If the Court questions Taco Bell's "sincerity," then this is a credibility question that should be resolved at trial. If anything, the Court should not grant plaintiffs' motion by finding Taco Bell's credibility to be lacking on a motion for partial summary judgment without any live witnesses.

(i) Plaintiffs' Criticism of Taco Bell For Not Acting Sooner, But Their Threat to Assert Spoliation Arising From the Modifications Made Rings Hollow.

Incredibly, notwithstanding the fact that plaintiffs criticize Taco Bell for not making modifications earlier, plaintiffs have the temerity to claim that Taco Bell may suffer the consequences of spoliation arguments based upon such modifications. (Hikida Decl. ¶ 5.) As any experienced ADA attorney ought to know, subsequent remedial measures such as the modifications sought by plaintiffs are

not admissible to prove negligence or culpable conduct. (Fed. R. Evid. 407.) Plaintiffs can't have it both ways. Plaintiffs' inference that Taco Bell acted prematurely by engaging in modifications without plaintiffs' blessing, but that such modifications apparently should have been made years ago rings hollow.

In addition, the existence of sunk costs to the judicial system "does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest". *Friends of the Earth*, 528 U.S. at 192 & n.5; *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) ([R]easonable caution is needed to be sure that mooted litigation is not pressed forward . . . solely in order to obtain reimbursement of sunk costs"). "Because the requirement of a continuing case or controversy derives from the Constitution, it may not be ignored when inconvenient . . . ." *Friends of the Earth*, 528 U.S. at 213 (Scalia, J., dissenting) (internal citation omitted); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (moot question cannot be decided "[h]owever convenient it might be"). Similarly, "courts should use caution to avoid carrying forward a moot case solely to vindicate a plaintiff's interest in recovering attorneys' fees." *Friends of the Earth*, 528 U.S. at 192 n.5. Indeed, the Supreme Court has rejected the catalyst theory and an analysis as to the defendant's subjective motivations in changing its conduct in awarding attorney's fees under the ADA's fee-shifting provision. *Buckhannon Bd. and Care Home, Inc., v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 609-10 (2001).

(j) The Class Is Limited to California Wheelchair-Bound Patrons.

Obviously, the instant action is limited to California company-owned stores and the surveyed stores had to have been company-owned as of May 31, 2005 in order to be part of the Special Master's store surveys. (*See* 10/5/04 Order at 6:24-7:4.) Thus, there is nothing nefarious about Taco Bell's commitment to providing accessibility to its mobility-impaired patrons in the instant class action, which is limited to stores located geographically throughout the State of California. The class certified in the instant action is limited to "[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 <u>*California*</u> Taco Bell corporate restaurants." (Order of 2/23/04 at

15:14-17) (emphasis added). Taco Bell submits that it is inappropriate for plaintiffs to apparently wish in hindsight that they had moved for nationwide class certification. Thus, frankly, plaintiffs' apparent request for nationwide relief is irrelevant, (Fed. R. Evid. 402), and any purported facts relating to such nationwide request for relief is not admissible because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and as a waste of time, (Fed. R. Evid. 403).

Plaintiffs offer mere speculation about the possibility that they might suffer future injury. Such speculation, however, does not satisfy the "irreparable injury" prerequisite of equitable relief. Thus, on this basis, alone, plaintiffs' motion should be denied. *Lyons*, 461 U.S. at 111.

4. Plaintiffs Have Failed to Meet Their Burden of Demonstrating that Remedies Available At Law Are Inadequate.

Plaintiffs have failed to demonstrate that remedies available at law, such as monetary damages, are inadequate to compensate for plaintiffs' purported injuries. Interestingly, plaintiffs have completely avoided that topic in their moving papers and for good reason. Plaintiffs have affirmatively pled several state law claims for damages relating to claimed injuries resulting from the same conduct at issue in plaintiffs' ADA claim. Regardless of whether the Court exercises supplemental jurisdiction over such state law claims or declines to exercise such jurisdiction and dismisses such claims without prejudice for re-filing in state court, it remains undisputed that the injuries plaintiffs allegedly suffered will not go unrecompensed because there exists an adequate remedy at law in the form of state law claims for damages.

5. Plaintiffs Have Failed to Address or Satisfy Their Burden of Demonstrating That the Balance of Hardships Tips in Favor of Plaintiffs.

Plaintiffs have made no effort to address the balance of hardships in their moving papers. If anything, such balance tips sharply in favor of Taco Bell, which would be burdened by a potentially onerous injunction that would potentially require constant monitoring by the Court indefinitely as to changes to Taco Bell's new door opening force maintenance policy or Taco Bell's remodeling efforts affecting door opening force, queue lines, and the number of and accessibility of accessible indoor seating. Federal courts are ill-equipped to serve this monitoring function. *See Friends of the Earth*, 528 U.S. at 193 (holding that an injunction "would be an excessively intrusive remedy, because it could

entail continuing superintendence of the permit holder's activities by a federal court-a process burdensome to court and permit holder alike").

6. Plaintiffs Have Failed to Address or Satisfy Their Burden as to Whether the Public Interest Would Be Disserved By a Permanent Injunction.

Plaintiffs have made no attempt to address whether the public interest would be disserved by a permanent injunction. Indeed, Taco Bell submits that by granting a permanent injunction in the instant action, the Court would discourage other businesses sued for alleged ADA violations from voluntarily modifying their facilities in hopes of rendering the injunctive relief sought moot. Indeed, the Supreme Court has expressly sought to encourage voluntary changes to an ADA defendant's conduct, "conduct that may not be illegal." *Buckhannon*, 532 U.S. at 608. In so doing, the public interest would ultimately suffer in the form of the delayed completion of modifications providing greater accessibility to mobility-impaired customers or fewer modifications altogether. Thus, while a permanent injunction might appear superficially to serve the public interest, the reality is that businesses sued for Title III ADA violations will think twice about voluntarily modifying their facilities if their comprehensive efforts to remediate their facilities and render moot purported ADA violations are deemed to be insufficient to avoid permanent injunctive relief.

B. Plaintiffs Confuse the Constitutional Mootness Doctrine With Whether the Court Can Grant Any Effectual Relief Regarding Plaintiffs' State Law Claims for Damages.

At the May 2, 2007 telephonic status conference, plaintiffs' counsel asserted that plaintiffs' state law claims for damages were not "moot" regardless of whether injunctive relief can or should be granted.[9] Plaintiffs' reference to their supplemental state law claims for damages as not "moot" confuses the mootness doctrine raised by Taco Bell, which is based upon the case or controversy requirement of Article III, section 2 of the U.S. Constitution. *ACLU of Nevada v. Lomax*, 471 F.3d 1010, 1016 (9th Cir. 2006). Taco Bell is raising the mootness doctrine within its constitutional context. Plaintiffs cannot seriously argue that their supplemental state law claims, which do not provide a basis for the Court's exercise of its original jurisdiction, ought to be considered in determining whether the

[9] Needless to say, Taco Bell's modifications render plaintiffs' Title 24 claims for injunctive relief moot as well. Thus, plaintiffs' contention that Taco Bell's position is that it does not have to bring any of the challenged elements into compliance with Title 24 is simply wrong.

case or controversy requirement of Article III has been met. Indeed, the Ninth Circuit has expressly stated "the rule that supplemental jurisdiction cannot exist without original jurisdiction." *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001) ("supplemental jurisdiction may only be invoked when the district court has a hook of original jurisdiction on which to hang it"). Thus, if this Court determines that it lacks subject matter jurisdiction to entertain plaintiffs' ADA claims relating to the three issues raised in the instant Motion, then the Court has no discretion to retain supplemental jurisdiction over plaintiffs' state law claims especially those claims relating to the same issues. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 664 (9th Cir. 2002).

C. Plaintiffs Ignore the "Fairness" and "Comity" Values in Addressing the Exercise of Supplemental Jurisdiction.

Plaintiffs' reliance upon *Executive Software North America, Inc. v. United States District Court for the Central District of California*, 24 F.3d 1545 (9th Cir. 1994), is misplaced especially given that, if anything, that decision supports Taco Bell's position. In that case, the Ninth Circuit stated that "whether pendent jurisdiction should be exercised in a given circumstance should be exercised in a given circumstance depended on the district court assessing whether doing so 'would most sensibly accommodate' the values of 'economy, convenience, *fairness*, and *comity*." 24 F.3d at 1554 (emphasis added). Plaintiffs' Reply, however, neglects to mention the statutory factors that Congress intended courts to consider in declining jurisdiction. Section 1367(c) provides four categories in which a court can decline to exercise supplemental jurisdiction. Those include whether "the claim raises a novel or complex issue of State law" or whether "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(1)-(2). Significantly, the Ninth Circuit noted, "The § 1367(c)(1)-(3) categories are instead best characterized as describing circumstances that ordinarily present 'compelling' reasons *in and of themselves* for remanding pendent claims." *Id.* at 1557 n.9 (emphasis added). In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the Supreme Court provided, "Similarly, if it appears that the state issues *substantially predominate*, whether in terms of proof, of *the scope of the issues raised*, or of the *comprehensiveness of the remedy sought*, the state claims may be dismissed without prejudice and left for resolution to state tribunals." *Id.* at 726-27 (emphasis added). Significantly, the *Gibbs* Court cautioned, "*Needless*

decisions of state law should be avoided both as a matter of *comity* and to *promote justice between the parties*, *by procuring for them a surer-footed reading of applicable law*." *Id.* at 726 (emphasis added).

The Ninth Circuit also cited the Supreme Court decision in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), for the following proposition, "Under *Gibbs*, a federal court should consider and weigh in each case, *and at every stage of the litigation*, the values of judicial economy, convenience, *fairness*, and *comity* in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *Id.* at 350 (emphasis added), *quoted in Executive Software*, 24 F.3d at 1552. Thus, a federal district court's consideration of whether to exercise supplemental jurisdiction is a continuing inquiry that remains open throughout every stage in a case.

Plaintiffs' analysis in footnote 8 is flawed because they completely ignore the value of comity that is part of the balance of factors that either point against or in favor of retaining jurisdiction. In addition, plaintiffs' analysis ignores the value of fairness insofar as there is no analysis as to the value "*to promote justice between the parties*, *by procuring for them a surer-footed reading of applicable law*." *Gibbs*, 383 U.S. at 726 (emphasis added), *quoted in Executive Software*, 24 F.3d at 1552. Indeed, whether a claim raises a novel or complex issue of state law or whether a state law claim substantially predominates over a federal claim over which a district court has original jurisdiction are in and of themselves compelling reasons to remand pendent state law claims. *Executive Software*, 24 F.3d at 1557 n.9.

The fact that California access regulations will affect the proof required at trial and the scope of the issues raised has effectively been conceded by plaintiffs. In attempting to persuade the Court to entertain plaintiffs' motion for partial summary judgment, plaintiffs admitted that whether the California access regulations are applicable in this case "will have a significant effect on the *amount and type of discovery* necessary to try the case." (Hikida Supp. Decl. ¶ 3; Joint Case Management Statement filed 1/19/07 at 4, ¶ 6) (emphasis added). Thus, whether California access regulations are applicable in this case will have a significant impact as to the facts at issue going forward, which demonstrates that state issues substantially predominate. *Gibbs*, 383 U.S. at 726-27.

Thus, if plaintiffs continue to rely upon non-ADA standards and claims for relief forcing this Court to engage in "needless decisions of state law" that the Supreme Court has admonished federal

courts to avoid both as a matter of comity and to promote justice between the parties by procuring for them a surer-footed reading of applicable law, *Gibbs*, 383 U.S. at 726, then the underlying *Gibbs* values and the concerns about addressing novel or complex issues of state law codified by the supplemental jurisdiction statute are best served by declining jurisdiction in this particular case.[10]

Plaintiffs contend that there would be "significant inefficiencies" based upon the position attributed to Taco Bell that "federal courts addressing ADA claims should not enforce state access statutes." (Reply at 6:4.) Plaintiffs fail to address the Ninth Circuit's concern about the expansion of federal subject matter jurisdiction to address state law claims that clearly contradict the relief intended to be provided by Congress. In *Wander v. Kaus*, 304 F.3d 856 (9th Cir. 2002), the Ninth Circuit stated, "We hold today that there is no federal-question jurisdiction over a lawsuit for damages brought under California's Disabled Person's Act, even though the California statute makes a violation of the federal Americans with Disabilities Act a violation of state law. Congress intended that there be no federal cause of action for damages for a violation of Title III of the ADA. To exercise federal-question jurisdiction in these circumstances would circumvent the intent of Congress." *Id.* at 857. In support, the Ninth Circuit cited *Pickern v. Best Western Timber Cove Lodge Marina Resort*, 194 F. Supp. 2d 1128 (E.D. Cal. 2002) (Shubb, J.), a published district court decision for the proposition that the question of damages under California state law would necessarily involve issues outside of the scope of Title III of the ADA. 304 F.3d at 860. For example, in *Pickern*, the district court explained, "Thus, *the question of damages becomes the tail that wags the dog of the ADA issues*." *Wander*, 304 F.3d at 860 (quoting *Pickern*, 194 F. Supp. 2d at 1132) (emphasis added).

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GREENBERG TRAURIG, LLP

By /S/ _____
Richard H. Hikida
Attorneys for Defendant TACO BELL CORP.

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[10] Taco Bell requests an opportunity to further brief the import of *Wilson v. Haria and Gogri*, 2007 WL 851744 (E.D. Cal. Mar. 22, 2007), which purports to cite as legislative history a letter from an advisor to the California Chamber of Commerce to the bill's author. *Id.* at *8. The statements of a representative of a special interest group are "ordinarily an unreliable indication of the purpose of a statute." Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 48:11 (6th ed. updated Oct. 2006).