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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

DEFENDANT TACO BELL CORP.'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF AUGUST 8, 2007 ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

[Declarations of Steve Elmer and Richard H. Hikida filed concurrently herewith]

DATE: n/a [submitted]
TIME: n/a [submitted]
CTRM: 11
JUDGE: Hon. Martin J. Jenkins

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant Taco Bell Corp. hereby moves for reconsideration of the Court's August 8, 2007 order granting in part plaintiffs' motion for partial summary judgment [docket #307]. Taco Bell submits that as addressed below, it has satisfied at least one of the three disjunctive requirements set forth in Local Rule 7-9(b). Upon the completion of the briefing schedule, the matter shall be submitted as ordered by the Court.

GREENBERG TRAURIG, LLP

Dated: September 21, 2007

By: /s/
RICHARD H. HIKIDA
Attorneys for Defendant TACO BELL CORP.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

A. The Court Failed to Consider Admissible Evidence of Numerous Additional Modifications in Existence Prior to the Hearing on the Motion.

The Court stated on page 12 of its August 8, 2007 Order that "a review of the undisputed factual record demonstrates that *a number of* Defendant's restaurants continue to have architectural elements that remain non-ADA compliant." (8/8/07 Order at 12:2-3 [docket #307]) (emphasis added). Given that plaintiffs' Motion was limited to a very narrow list of architectural elements addressed in Exhibits 1-8 of the Fox Declaration dated February 23, 2007, Taco Bell presumes that the Court was referring solely to the specific elements at issue in plaintiffs' Motion, namely, exterior door opening force, interior door opening force, queue lines, and accessible indoor seating.

The Court's order misstates the undisputed factual record with respect to exactly how many of the elements raised in plaintiffs' Motion have already been modified by Taco Bell. In particular, the Court's citations on page 10 of the Order are literally a verbatim copy of the citations contained on page 2 of Taco Bell's March 23, 2007 opposition. Such information excludes the subsequent information provided via Taco Bell's May 10, 2007 sur-reply and supporting documentation, which was expressly for the purpose of providing the Court with supplemental information as to additional modifications at stores not addressed in Taco Bell's opposition papers because such modifications either did not exist and/or could not be documented firsthand in time via sworn declarations in order to be included within Taco Bell's opposition due on March 23. (Tr. of 5/2/07 H'rg at 11:17-12:5; 18:19-23 [docket #309].)

As explained during the May 2, 2007 telephonic conference, a sur-reply was warranted to address the changed circumstances affecting Taco Bell's mootness defense,[1] namely, the fact that Taco

[1] Although plaintiffs claimed at the May 2, 2007 telephonic status conference that they had "no idea" that Taco Bell intended to rely upon the mootness doctrine in opposition to plaintiffs' Motion, (Tr. of H'rg of 5/2/07 at 17:5-6), such assertion is difficult to fathom given that plaintiffs' counsel inspected three comprehensively modified stores (283, 3579, 16812) on October 24, 2006, and were provided with an opportunity to inspect a fourth comprehensively modified store (21000) that same day, but declined. (R. Hikida Decl. of 5/10/07 ¶ 5 [docket #284]; R. Hikida Decl. of 9/21/07 ¶ 2.) *Each of the foregoing stores would later be subject to their Motion*. Under these circumstances, plaintiffs were obligated to address the mootness doctrine within their initial moving papers in order to satisfy their initial burden of demonstrating the absence of any genuine issue of material fact, but failed to do so.

Bell's project managers were in the process of inspecting firsthand recent modification work at numerous stores, which work was either incomplete or unverified as of the due date for Taco Bell's opposition papers. (Tr. of 5/2/07 H'rg at 11:17-12:5; 18:19-23.) As Taco Bell explained, Taco Bell took very seriously the requirement that declarations averring to such modifications be made under penalty of perjury, which is why such modifications needed to be personally verified by the project managers in charge of such modifications. (Tr. of 5/2/07 H'rg at 18:19-23) (noting that declarations needed to be carefully reviewed by the declarants so that they were "100 percent accurate"). The Court responded by granting leave to file a sur-reply by May 10, 2007, (Order of 5/4/07 [docket #279]), which is precisely what Taco Bell did, with supporting declarations demonstrating that numerous additional modifications had been made. (S. Ford Supp. Decl. of 5/10/07 ¶¶ 5-28 [docket #283]; A. Kane Supp. Decl. of 5/10/07 ¶¶ 6-38 [docket #285]; J. De Bella Decl. of 5/10/07 ¶¶ 7-8 [docket #282].)

In addition, the Court's Order does not address the percentage of specific modifications made by Taco Bell of the overall total number of modifications to exterior doors, interior doors, queue lines, and indoor seating requested by plaintiffs. Thus, for example, the Order ignores the fact that:

(1) Of the 180 stores specifically called out in plaintiffs' Motion,[2] **11 stores** are currently operated by franchisees (i.e., store numbers 2910, 4192, 4204, 4355, 4586, 4611, 5570, 9407, 9454, 17529, 20690) and are therefore beyond Taco Bell's ability to control, **1 store** is a tenant of the Discovery Science Center (store number 20310) and so Taco Bell lacks control over exterior and interior door opening force and restrooms at issue, which are located in common areas,[3] **1 store** has already closed (i.e., 2812) and **1 store's** closure in 2007 is imminent (i.e., 2848);

(2) Of the remaining **166** stores specifically called out in plaintiffs' Motion that are within Taco Bell's control, as conceded by plaintiffs, (Hikida decl. of 9/21/07 ¶ 4), plaintiffs failed to cite correctly

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[2] For the Court's convenience, Table 1 in the concurrently-filed Hikida declaration contains a global chart of the 180 stores depicting their current status. (Hikida decl. of 9/21/07 ¶ 8.)

[3] In the declaration of Steve Elmer filed on May 10, 2007 [docket #281], Mr. Elmer explained that exterior door and interior restroom door pressure issues at store number 20310 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 located in common areas and the responsibility of the Discovery Science Center. (S. Elmer Decl. of 5/10/07 ¶ 11.) Mr. Elmer's declaration attached the relevant portion of the lease agreement as Exhibit 1 to his declaration.

the Special Master's measurement of exterior door opening force (element 210) at **1 store**[4] (store number 2007, which is currently renumbered as store number 21455);

(3) Of the remaining **165** stores specifically called out in plaintiffs' Motion that are within Taco Bell's control and that are free of the above-mentioned error, Taco Bell has made physical modifications at a cost of **over $6 million** at **147** of such stores to date, (Elmer decl. of 9/14/07 ¶ 3) which is equivalent to **89%**, and Taco Bell has concrete plans to comprehensively modify the **18** remaining stores;

(4) Of the 111 stores over which Taco Bell had control at the time of filing of plaintiffs' motion as reflected by Exhibit 5 of the Tim Fox declaration of February 23, 2007 [docket #256-6], Taco Bell has made exterior door opening force modifications at **100** of such stores to date, which is equivalent to **90%**;[5]

(5) Of the 128 stores over which Taco Bell had control at the time of filing of plaintiffs' motion as reflected by combining Exhibits 3 and 4 of the Fox declaration of February 23, 2007 [docket #256-4 and #256-5], Taco Bell has made interior door opening force modifications at **115** of such stores to date, which is equivalent to **90%**;[6]

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[4] Although plaintiffs made a similar error regarding element 210 at store number 2778, (Hikida decl. of 9/21/07 ¶ 5), a significant distinction exists between the two stores warranting their different treatment. Unlike store number 2007 in which plaintiffs only asserted the erroneous exterior door opening force issue within their motion (i.e., no issue was raised as to interior door opening force, queue lines, or indoor seating), at store number 2778, plaintiffs raised additional issues as to interior door opening force at the women's restroom and the queue lines, both of which Taco Bell modified.

[5] Of the 127 stores specifically called out in Exhibit 5 to Tim Fox's declaration filed on February 23, 2007 as to exterior door opening force, 11 of the stores were operated by franchisees (store numbers 2910, 4192, 4355, 4586, 4611, 5570, 9407, 9454, 15319, 17529, 20690) and beyond Taco Bell's ability to control as of the filing of plaintiffs' motion, and two of the stores (store numbers 2812 and 2848) are either closed or shall close by the end of 2007. In addition, one store, store number 20310, concerned common areas beyond Taco Bell's ability to control, and two stores (store numbers 2007 and 2778) concerned allegations that were clearly erroneous. Of the remaining **111 stores**, Taco Bell has modified **100 stores**, which is equivalent to **90%**, and the 11 remaining stores (store numbers 2241, 2700, 2984, 3160, 3184, 3207, 3208, 3555, 4027, 4034, 4622) are currently scheduled to be modified in 2008 or shortly thereafter.

Curiously, although plaintiffs proffered detailed analyses as to interior door opening force, indoor seating, and queue lines, (A. Robertson Decl. of 4/13/07 ¶¶ 11, 14, 17 [docket #272]), plaintiffs failed to set forth a similar analysis within Amy Robertson's April 13, 2007 declaration as to exterior door opening force.

[6] Of the 79 stores specifically called out in Exhibit 3 to Tim Fox's declaration filed on February 23, 2007 as to interior door opening force, 6 of the stores were operated by franchisees (store numbers

(6) Of the 49 stores over which Taco Bell had control at the time of filing of plaintiffs' motion as reflected by combining Exhibits 6, 7 and 8 of the Fox declaration of February 23, 2007 [docket #256-7, #256-8 and #256-9], Taco Bell has made indoor seating modifications at **40 stores**, which is equivalent to **82%**;[7]

(7) Of the 66 stores over which Taco Bell had control at the time of filing of plaintiffs' motion as reflected by combining Exhibits 1 and 2 of the Fox declaration of February 23, 2007 [docket #256-2 and #256-3], Taco Bell has made queue line modifications at **62 stores**, which is equivalent to **94%**;[8] and

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5570, 9407, 9454, 15319, 17529, and 20690) and beyond Taco Bell's ability to control as of the filing of plaintiffs' motion, and one of the stores (store number 20310) involved common areas that were beyond Taco Bell's ability to control. Of the remaining **72 stores**, Taco Bell has modified **72 stores**, which is equivalent to **100%**.

Of the 62 stores specifically called out in Exhibit 4 to Tim Fox's declaration filed on February 23, 2007 as to interior door opening force, 5 of the stores were operated by franchisees (store numbers 2910, 4204, 4355, 4586, 4611) and beyond Taco Bell's ability to control as of the filing of plaintiffs' motion, and one of the stores (store number 2848) shall close by the end of 2007. Of the remaining 56 stores, Taco Bell has modified **43 stores**, which is equivalent to **77%**, and the 13 remaining stores (store numbers 2700, 2968, 3184, 3196, 3209, 3390, 3471, 3498, 3555, 4027, 4034, 4054, 4622) are currently scheduled to be modified in 2008 or shortly thereafter.

[7] Of the 24 stores specifically called out in Exhibit 7 to Tim Fox's declaration filed on February 23, 2007 as to indoor seating, one of the stores was operated by a franchisee (store numbers 15319) and beyond Taco Bell's ability to control as of the filing of plaintiffs' motion. Of the remaining 23 stores, Taco Bell has modified **23 stores**, which is equivalent to **100%**.

Of the 30 stores (not counting store number 15614 to avoid double counting that store, which also appears in Exhibit 7) specifically called out in Exhibit 8 to Tim Fox's declaration filed on February 23, 2007 as to indoor seating, four of the stores were operated by franchisees (store numbers 2910, 4355, 4586, 4611) and beyond Taco Bell's ability to control as of the filing of plaintiffs' motion. Of the remaining 26 stores, Taco Bell has modified **20 stores**, which is equivalent to **77%**, and the six remaining stores (store numbers 2700, 2933, 3471, 3473, 4284, 4622) are currently scheduled to be modified in 2008 or shortly thereafter.

[8] Of the 40 stores specifically called out in Exhibit 1 to Tim Fox's declaration filed on February 23, 2007 as to queue lines, four of the stores were operated by franchisees (store numbers 2910, 4355, 4586, 4611) and beyond Taco Bell's ability to control as of the filing of plaintiffs' motion, and two of the stores (store numbers 2812, 2848) are either closed or shall close by the end of 2007. Of the remaining 34 stores, Taco Bell has modified **30 stores**, which is equivalent to **88%**, and the four remaining stores (store numbers 2968, 3184, 3471, 4054) are currently scheduled to be modified in early 2008.

Of the 37 stores specifically called out in Exhibit 2 to Tim Fox's declaration filed on February 23, 2007 as to queue lines, five of the stores were operated by franchisees (store numbers 5570, 9407, 9454, 15319, 17529) and beyond Taco Bell's ability to control as of the filing of plaintiffs' motion, and of remaining 32 stores, Taco Bell made physical modifications at **32** stores to date, which is equivalent to **100%**.

(8) Taco Bell has also made extra modifications regarding queue lines, door opening force, and/or indoor seating *that were not even requested by plaintiffs* at a total of **120 stores** including at **27 stores** that *plaintiffs did not even address within their Motion* (store numbers 18, 124, 158, 176, 567, 757, 991, 1034, 1496, 3007, 3055, 3070, 3077, 3078, 3079, 3089, 3119, 3125, 3130, 3132, 3137, 3398, 16520, 17435, 19298, 19498, 20204).

Thus, by apparently not considering at all the lengthy declarations submitted with Taco Bell's sur-reply filed on May 10, 2007, the Court considered a materially incomplete portion of the factual record in this case, which presumably affected the outcome of Taco Bell's mootness defense. It is a far cry between the 50%-65% percentages cited by plaintiffs in Amy Robertson's declaration, (A. Robertson Decl. of 4/13/07 ¶¶ 11, 14, 17 [docket #272]), and the **100%** percentage, addressed above, that Taco Bell has demonstrated to date with respect to the stores genuinely at issue in Exhibits 2, 3, 6, 7 to the Fox declaration of February 23, 2007.

This Court has already expressed its unwillingness to provide an advisory opinion as to hypothetical issues in the absence of a live case or controversy. "Federal courts do not 'sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before [them].'" *Moeller v. Taco Bell Corp.*, No. C 02-5849 MJJ, 2005 WL 1910925, at *3 (N.D. Cal. Aug. 10, 2005) (Jenkins, J.) (quotation omitted)). "To proceed in the absence of a case or controversy would involve the Court in rendering a forbidden advisory opinion." *Id.* at *3 (citation omitted).

B. Additional Modifications Have Taken Place Subsequent to the Hearing on Plaintiffs' Motion.

As Taco Bell alluded to in its sur-reply papers filed on May 10, 2007, additional modifications have taken place at several stores subsequent to the May 17, 2007 hearing date. For example, additional modifications have taken place at store numbers 3136, 9417, 18901. In particular, a new door closer at the women's restroom was installed at store number 3136. In addition, store number 9417 was demolished beginning on July 5, 2007, and is projected to reopen in October 2007 with new indoor seating. New door closers have been installed at the men's restroom and women's restroom at store number 18901. The circumstances of such modifications, which occurred before the issuance of the

August 8, 2007 order, was not known to defense counsel until after the May 17, 2007 hearing on plaintiffs' Motion. (Hikida decl. of 9/21/07 ¶ 7.)

C. The Court Failed to Consider Evidence that Many Stores Are Beyond Taco Bell's Control.

As mentioned above, although Taco Bell specified in its May 10, 2007 court papers exactly which stores addressed in plaintiffs' Motion were currently operated by franchisees and, therefore, beyond Taco Bell's ability to control, *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1068-69 (5th Cir. 1995) (Garza, J.) (holding that a restaurant franchisor did not "operate" franchised restaurants), *cert. denied*, 516 U.S. 1045 (1996), and which stores were currently closed, and which store lacks control over common areas, the Court's August 8, 2007 decision makes no such reference to such stores.

Needless to say, injunctive relief as to stores that are beyond Taco Bell's ability to control is a nullity. *Roberts v. Royal Atlantic Corp.*, 445 F. Supp. 2d 239, 246 (E.D.N.Y. 2006) (Wexler, J.) (noting that construction of a switch back ramp to a private resort involved the use of public property, which proposal was flawed). As recognized by the Ninth Circuit, "after the noncompliant building has already been built, . . . injunctive relief is only meaningful against the person *currently* in control of the building." *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001) (emphasis added).

D. The Court Failed to Consider a Post-Hearing Decision Entitled *Sharp v. Rosa Mexicano, D.C., LLC*, Which Is Squarely Relevant to the Mootness Defense.

In *Sharp v. Rosa Mexicano, D.C., LLC*, No. 06-1693 (JDB), 2007 WL 2137301, at *4 (D.D.C. July 26, 2007) (Bates, J.), the district court held as a matter of law that structural modifications at a restaurant rendered ADA issues moot because they could not "reasonably" be expected to recur. *Id.*

In *Sharp*, the plaintiff brought an ADA action alleging an inaccessible wash basin fixture in the men's restroom at the restaurant at issue. The three barriers at issue related to a bar under the washstand preventing a wheelchair from rolling underneath, the height of the washbasin, and noncompliant hardware on the faucet apparatus. *Id.* at *1. The defendant submitted evidence showing that the men's restroom included a private stall that was accessible to the disabled and free of the alleged barriers. The district court dismissed the case based on mootness grounds.

The district court initially addressed the legal standard for applying the mootness doctrine. "The subject matter jurisdiction of the Court is *constitutionally limited*, and the Court has an obligation under

these constitutional limits to address its jurisdiction to hear a case, raising the issue sua sponte if necessary." *Id.* at *3 (emphasis added). "A case is moot when 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Id.* at *3. "Mootness deprives the Court of its ability to take remedial action because 'there is nothing for [the court] to remedy, *even if [it] were inclined to do so*.'" *Id.* at *3 (emphasis added).

The district court then explicitly examined the "voluntary cessation" exception to the mootness doctrine and concluded, nevertheless, that the alleged unlawful conduct could not reasonably be expected to recur because the accessible sink-equipment at issue was a "fixture" within the restaurant. *Id.* at *4. Quoting from one federal district court decision within the Ninth Circuit and citing another, the district court held, "The alleged discrimination cannot reasonably be expected to recur because 'structural modifications . . . are unlikely to be altered in the future.'" *Id.* at *4 (quoting *Indep. Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 774 (D. Or. 1997)); *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1130-31 (C.D. Cal. 2005) (Snyder, J.) (holding that installation of grab bars by restaurant rendered moot plaintiff's ADA complaint requesting installation of such bars, finding no basis to conclude the challenged conduct would be repeated).

Significantly, all three of the issues raised in plaintiffs' Motion relate to items that are built into the restaurants at issue and thereby constitute "fixtures", i.e., door closers and doors, queue lines, and dining room tables. Indeed, by definition, an object that is moveable such as a dining room table that is not built-in is not governed by the ADAAG. "Neither the ADA nor the ADAAG addresses movable objects." *Eiden v. Home Depot USA, Inc.*, No. CIV. S-04-977 LKK/CMK, 2006 WL 1490418, at *12 (E.D. Cal. May 26, 2006) (Karlton, J.).

Although Taco Bell notified the Court as to the *Sharp* decision on August 1, 2007, Notice of Supp. Auth. of 8/1/07 at 1:5-2:8 Ex. 1 [docket #303], prior to the Court's August 8, 2007 ruling, it is unclear whether the Court considered such decision prior to ruling on plaintiffs' Motion. Thus, Taco Bell submits that the Court should consider the *Sharp* decision and its effect upon the mootness defense.

E. The Court Failed to Consider the Significance of Taco Bell's Door Opening Force Maintenance Policy.

Accessibility elements may need repair or replacement over time due to vandalism, improper customer usage, or other problems that Taco Bell did not affirmatively create.

Although Taco Bell proffered evidence of its door opening force maintenance policy to the Court via paragraphs 2 and 3 of the declaration of Michael Harkins filed on March 23, 2007 [docket #263], the Court failed to recognize its evidentiary value or significance. In *Foley v. City of Lafayette, Ind.*, 359 F.3d 925 (7th Cir. 2004) (Kanne, J.), the Seventh Circuit relied upon a similar long-term service contract with an elevator repair company as the basis for implicitly finding that any future interruptions in access by the mobility-impaired patrons of the train service would be temporary or isolated. *Id.* at 929-30. The fact that an item does not provide equal access due to maintenance or repairs has been expressly recognized by a regulation implemented by the U.S. Department of Justice as *not* an accessibility violation. 28 C.F.R. § 36.211(b); *Foley*, 359 F.3d at 931 (holding that an inoperable elevator and snow-covered ramp did not create a viable ADA claim because they were temporary or isolated and occurred during unusual circumstances, namely, heavy snowfall). Indeed, plaintiffs did not make any objections to Taco Bell's evidence of such policy or criticize it as somehow inadequate or less than what they would request as a form of injunctive relief. Plaintiffs' silence is telling.

Thus, to the extent that the Court has determined that Taco Bell is incapable of voluntarily complying with accessibility standards *going forward* as to door opening force on a long-term, permanent basis, such determination is improper as a matter of law. As a matter of law, any such temporary or isolated interruptions in equal access do *not* violate either the ADA or state law.

F. The Court Should Not Have Exercised Its Discretion to Treat Prior Defense Counsel's Statement in a Brief as a Judicial Admission.

Instead of pointing to a factual statement in Taco Bell's answer or in a pretrial order (there has been no pretrial order to date), this Court appears on page 12, lines 7-11, of its Order to have characterized a statement in Taco Bell's brief authored by prior defense counsel several years ago as a binding judicial admission notwithstanding that *plaintiffs never even argued the existence of a binding judicial admission in their moving papers*!

The statement at issue taken verbatim from Taco Bell's brief is as follows:

> "Due to regular maintenance, remodels, repairs, and normal wear and tear, virtually every accessibility element is subject to change *over time* so that evidence that an element is or is not in compliance today (for purposes of determining injunctive relief) is not dispositive of whether that same element was in compliance at the time a class member visited the restaurant during the class period for determination of an individual class member's damages claim."

(Def.'s Mot. for Mod. of Class Def. of 10/19/04 at 3:13-18 [docket #110]) (emphasis added).

"Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1998). The Ninth Circuit has held that "statements of fact contained in a brief *may* be considered admissions of the party in the discretion of the district court." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1998) (emphasis in original). In *American Title*, the Ninth Circuit ultimately affirmed the district court's refusal to treat the statement at issue contained in a *trial* brief as a binding judicial admission, however, because the proponent of the purported admission failed to oppose or object to the introduction of conflicting evidence at the subsequent trial and thereby waived the argument that the issue was "conclusively settled". *Id.* at 227. Significantly, the Ninth Circuit noted that the first time that the proponent of the alleged admission first argued that the statement constituted a binding admission was in a post-trial motion for a new judgment. *Id.* at 226.

Under the circumstances, Taco Bell submits that the Court should have declined to find that the statement in Taco Bell's 10/19/04 brief constitutes a judicial admission for several reasons.

First, assuming that the Court construed Taco Bell's statement in a prior brief as an admission, this begs the question as to exactly what material fact the Court construes Taco Bell's statement as conceding. Taco Bell's lengthy statement can be broken into two discrete observations. First, Taco Bell's statement points out that evidence that a particular element at a particular store is or is not in compliance on a particular day for purposes of determining injunctive relief is not dispositive of whether that same element at that particular store was in compliance at the time that a class member actually visited the store during the class period for determination of an individual class member's state law damages claim. Taco Bell submits that this portion of its statement is not an admission on which the Court is relying upon to deny application of the mootness doctrine. After all, even the Court appears to agree with Taco Bell's statement insofar as the Court has recognized via its citation of the decision in

Donald v. Café Royale, 218 Cal. App. 3d 168 (Cal. Ct. App. 1990), that state law damages claims are contingent upon the class member demonstrating a denial of equal access on a particular occasion. (8/8/07 Order at 26-27.)

The other component of Taco Bell's statement makes the unremarkable observation that virtually every accessibility element is subject to change *over time*. Given that it is stipulated that some of Taco Bell's stores were constructed as early as the 1960s, it is unremarkable to draw the inference that at some point in a store's 40-year history, some or many accessibility elements may be subject to change at some point during its operating history. Such statement does not admit that virtually all accessibility elements "change frequently" as alluded to by the Court. Indeed, plaintiffs' reference to items that frequently change noticeably omits queue lines. (Pls.' Reply at 26:17-21.) Thus, at minimum, the Court's assumption as to the frequency of the changing of queue lines goes even beyond plaintiffs' argument.

Moreover, assuming *arguendo* that Taco Bell's statement could somehow be construed to mean that the majority of 638 accessibility elements at issue in the instant action "change frequently" based on past experience, the Court has improperly drawn a *double inference*[9] or more aptly a double admission and construed Taco Bell's statement out of context by inferring that Taco Bell has somehow *admitted* that it is incapable of voluntarily complying with accessibility standards *going forward* as to the specific elements at issue in plaintiffs' Motion on a long-term, permanent basis. Taco Bell's statement makes no such admission.

Taco Bell's statement makes reference to "regular maintenance," "repairs," and "normal wear and tear." (Def.'s Mot. for Modification of Class Def. at 3:13.) The fact that an item does not provide equal access due to maintenance or repairs has been expressly recognized by a regulation implemented by the U.S. Department of Justice as *not* an accessibility violation. 28 C.F.R. § 36.211(b); *Foley v. City of Lafayette, Indiana*, 359 F.3d 925, 931 (7th Cir. 2004) (holding that an inoperable elevator and snow-covered ramp did not create a viable ADA claim because they were temporary or isolated and occurred during unusual circumstances, namely, heavy snowfall) (2-1 decision). Accessibility elements may

[9] Courts have exercised caution regarding multiple and successive inferences. *United States v. Michel*, 446 F.3d 1122, 1128 (10th Cir. 2006); *see also* Fed. R. Evid. 403.

need repair or replacement over time due to vandalism, improper customer usage, or other problems that Taco Bell did not affirmatively create. Thus, to the extent that the Court has determined that Taco Bell is incapable of voluntarily complying with accessibility standards *going forward* as to the specific elements at issue in plaintiffs' Motion on a long-term, permanent basis based upon the assumption that Taco Bell has somehow admitted the possibility of temporary interruptions in equal access due to maintenance or repairs, such determination is improper. As a matter of law, any such temporary or isolated interruptions in equal access do *not* violate either the ADA or state law.

Indeed, Taco Bell has proffered evidence of its door opening force maintenance policy to the Court via paragraphs 2 and 3 of the declaration of Michael Harkins filed on March 23, 2007 [docket #263]. The existence of such maintenance policy is highly significant. In *Foley v. City of Lafayette, Ind.*, 359 F.3d 925 (7th Cir. 2004) (Kanne, J.), the Seventh Circuit relied upon a similar long-term service contract with an elevator repair company as the basis for implicitly finding that any future interruptions in access by the mobility-impaired patrons of the train service would be temporary or isolated. *Id.* at 929-30. Indeed, plaintiffs did not make any objections to Taco Bell's evidence of such policy or criticize it as somehow inadequate or less than what they would request as a form of injunctive relief. Plaintiffs' silence is telling.

As for comprehensive modifications resulting from remodeling or renovations including the replacement of stores, such modifications are likely to be subject to scrutiny from local municipalities as part of the process to obtain building permits and certificates of occupancy. As previously disclosed to the Court, Taco Bell's parent entity, Yum! Brands, Inc., currently employs a Director of ADA Compliance, Steve Elmer, whose responsibility is to ensure that the remodeling or complete replacement of Taco Bell company-owned California stores takes into account federal and state accessibility requirements. (S. Elmer Decl. of 5/10/07 ¶ 1 [docket #281].) Thus, to the extent that the Court has determined that Taco Bell is incapable of voluntarily complying with accessibility standards *going forward* as to the specific elements at issue in plaintiffs' Motion on a long-term, permanent basis based upon the assumption that Taco Bell has somehow admitted that it is incapable of ensuring equal access to its stores following the remodeling or complete replacement of such stores, such determination is improper. To the contrary, Taco Bell has previously explained that it is more than up for the task, as

demonstrated by the recent comprehensive modification of more than 140 stores!

Indeed, Taco Bell's evidentiary submission to the Court demonstrates that Taco Bell's professed interest in maintaining accessibility at its California company-owned stores is not mere "talk" as demonstrated by more than $6 million in accessibility-related expenses incurred over the past year. (S. Elmer decl. of 9/14/07 ¶ 3.)

In addition, as explained in Taco Bell's sur-reply, the issue is not "conclusively settled" as to how frequently the specific elements addressed in plaintiffs' Motion, in fact, are *likely to change in the future* given the current circumstances at issue in the instant action. That is, given that Taco Bell clearly faces the risk of additional litigation at substantial expense if it were to reinstall purportedly noncompliant indoor seating or queue lines or door closers at great expense, Taco Bell has already explained that it has no intention of reinstalling purportedly noncompliant fixtures given the heavy price Taco Bell has already paid to modify its stores to enhance their accessibility, and has affirmatively and voluntarily implemented measures to ensure that door opening force is consistently maintained at its California company-owned stores. The sheer volume of recent modifications costing over $6 million is ample evidence from which the Court can and should infer that Taco Bell is taking its obligation to ensure the accessibility of its stores very seriously, and that Taco Bell has no intention of changing modified features so that they are once again even arguably noncompliant and literally buy itself another class action lawsuit. The idea that Taco Bell is going to remove a queue line entirely and then reinstall it surreptitiously after the conclusion of this action and risk further exposure to significant litigation is unreasonable on its face. This is precisely why the district court in a recent decision decided as a matter of law that structural modifications at a restaurant rendered ADA issues moot because they could not "reasonably" be expected to recur. *Sharp v. Rosa Mexicano, D.C., LLC*, No. 06-1693 (JDB), 2007 WL 2137301, at *4 (D.D.C. July 26, 2007) (Bates, J.).

Thus, Taco Bell's statement in its prior brief as to changes occurring at its stores does not constitute an admission that Taco Bell lacks the ability to ensure compliance with ADA or California accessibility requirements at its California company-owned stores on a long-term, permanent basis.

It does not follow logically that because changes to accessibility (temporary, isolated or more substantial in time) have occurred in the past and may continue to occur over time due to maintenance,

repairs, or more substantial changes such as major remodeling or replacement altogether of a store, that Taco Bell is not capable of ensuring the competent performance of future modifications via licensed California contractors who are required by law to know accessibility requirements. The best evidence is its comprehensive modification of **140+** stores over the past year. Taco Bell is not admitting its inability to do so at all and does not need indefinite Court supervision or monitoring in the form of a permanent injunction to ensure future compliance. The mere threat of another class action lawsuit and its attendant costs is ample incentive to ensure future compliance.

Significantly, plaintiffs made no attempt to object to the presentation of Taco Bell's evidence confirming the permanent, long-term nature of Taco Bell's recent modifications, and essentially waived the argument that the issue was conclusively settled. Indeed, *plaintiffs failed to even argue the existence of a judicial admission anywhere in their moving papers* including page 26 of their reply brief in support of their Motion wherein plaintiffs raised for the first time the argument that accessibility elements at Taco Bell's stores change over time.

If the Court has serious qualms about Taco Bell's ability to ensure the long-term accessibility of the store elements at issue in plaintiffs' Motion given Taco Bell's recent modifications to door opening force, queue lines, and/or indoor seating, then the Court should conduct a trial on this factual question instead of *sua sponte* withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Otherwise, the Court should decide as a matter of law that Taco Bell has demonstrated via its recent modifications to door opening force, queue lines, and/or indoor seating that it is capable of making and has made long-term modifications and has demonstrated its ability to make accessibility repairs and modifications, and that plaintiffs cannot satisfy their burden to prove they are at risk of irreparable harm because of a lack of showing of "a real or immediate threat that the plaintiff[s] will be wronged again." *Deck v. American Hawaii Cruises, Inc.*, 121 F. Supp. 2d 1292, 1297 (D. Haw. 2000).

Even assuming that the Court correctly characterized former defense counsel's statement as a judicial admission (which Taco Bell disputes), Taco Bell explained its statement via its sur-reply, via the September 12, 2007 Joint Status Conference Statement, and via the instant motion by making it clear that Taco Bell has every intention of performing future maintenance and repair work and more substantial remodeling or renovations in a compliant manner. Taco Bell has no intention of reinstalling

purportedly noncompliant features especially given the tremendous expense of more than $6 million already incurred to comprehensively modify its California stores and the attendant future risk of additional litigation and the additional expenses that would create. As explained by the Ninth Circuit, this Court was required to accord Taco Bell's explanation due weight. *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995) ("Where . . . the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court ***must*** accord the explanation due weight.") (emphasis added).

G. The Court Failed to Consider the Novel Question of Whether the Readily Achievable Analysis Is Equally Applicable Under State Law Accessibility Claims.

Although the Court assumed that it did not need to engage in a readily achievable analysis by relying exclusively upon state law standards, this begs the question of whether the readily achievable analysis is equally applicable in litigating Unruh Act and CDPA claims. In *Sanford v. Del Taco, Inc.*, No. 04-cv-2154-GEB-EFB, 2006 WL 2669351 (E.D. Cal. Sept. 18, 2006) (Burrell, J.), the plaintiff argued that the Legislature adopted the ADA's readily achievable standard in the Title 24 context. *Id.* at *5. The district court stated, "Plaintiff concludes the alteration requirement in Title 24 is no longer California law, because 'the California Legislature intended to adopt the same requirement of 'readily achievable' barrier removal for current [Title 24] violations (as the ADA requires for ADAAG violations) . . . ." *Id.* at *6. "Plaintiff cites no California case law holding that the ADA's readily achievable standard changes when the Title 24 standard applies to barriers, and independent research has found none. Plaintiff's state claims based on this interpretation of California law, therefore, raise *issues of first impression*. Since the interpretation of state law on these issues should be left to the state courts, these state claims will be dismissed." *Id.* at *6 (emphasis added).

Similarly, in *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134, 1135-36 (N.D. Cal. 1998), the district court held, "Because the Unruh Act has adopted the full expanse of the ADA, it must follow, that the same standards for liability apply under both Acts."

In *Bass v. County of Butte*, 458 F.3d 978 (9th Cir. 2006) (Graber, J.), the Ninth Circuit, addressing the 1992 amendment of the Unruh Act and the 1996 amendment of the DPA, held, "[W]e hold that those amendments incorporate into the Unruh Act and the DPA only those provisions of the

ADA that are *germane* to the statutes' original subject matter." *Id.* at 983 (emphasis added).

Thus, if this Court is going to address the Unruh Act and CDPA claims, then this Court should address the question whether the readily achievable standard recognized in federal ADA actions is equally applicable when analyzing Unruh Act and CDPA claims. Alternatively, the Court should decline to exercise supplemental jurisdiction over such claims so that such novel and complex state law questions can be addressed in the first instance by California courts.

H. Subsequent Case Authority Confirms that the Issuance of Certificates of Occupancy Is Prima Facie Evidence of Compliance with Accessibility Requirements and Provides an Equitable Bar to Liability.

Subsequent to the May 17, 2007 hearing in this action, a federal district court in the Southern District of California addressed the evidentiary value of the issuance of certificates of occupancy as prima facie evidence of compliance with applicable accessibility regulations. *See Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 05CV1660 J (WMc), slip op. at 19:7-8, 19:11-13 (S.D. Cal. June 14, 2007) (Jones, J.) ("[c]ompliance with a state building code creates a rebuttable presumption of compliance with the ADA.").

I. The Court Failed to Consider Material Facts and Taco Bell's Legal Arguments As to Why the Court Should Not Exercise Supplemental Jurisdiction.

Although the parties have engaged in an extensive analysis of why the Court should exercise supplemental jurisdiction over plaintiffs' state law claims, the Court's order is silent on that issue. The Court has not articulated its reasons for exercising supplemental jurisdiction including any conclusions of law, making the Court's decision difficult for appellate review. *Kolari v. New York-Presbyterian Hospital*, 455 F.3d 118, 123 (2d Cir. 2006) (Feinberg, J.) ("we are left to guess almost entirely at what federal interest, if any, is at stake" because "[t]he district court's discussion [regarding the exercise of supplemental jurisdiction] is too limited to supply that interest").

GREENBERG TRAURIG, LLP

Dated: September 21, 2007

By: /s/
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