GREENBERG TRAURIG, LLP
GREGORY F. HURLEY (SBN 126791)
RICHARD H. HIKIDA (SBN 196149)
3161 Michelson Drive, Suite 1000
Irvine, California 92612
Telephone: (949) 732-6500
Facsimile: (949) 732-6501
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

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

[Appendix of Case Authorities filed concurrently herewith]

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

MEMORANDUM OF POINTS AND AUTHORITIES

A. Plaintiffs Have Failed to Successfully Distinguish the *Sharp* Decision.

Plaintiffs' attempt to distinguish the decision in *Sharp v. Rosa Mexicano, D.C.*, LLC, 2007 WL 2137301 (D.D.C. July 26, 2007) is unavailing. First and foremost, plaintiffs' opposition avoids the key question of whether the alleged disability discrimination is *reasonably* expected to recur. (Opp'n at 6:14, 7:18, 9:1.) Plaintiffs ignore the fact that the *Sharp* decision, which relies on two district court decisions within the Ninth Circuit, makes it clear that structural modifications "'are unlikely to be altered in the future.'" 2007 WL 2137301, 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). Plaintiffs have failed to distinguish this key holding, which is telling.

Second, the purported evidence of "frequent change", i.e., Taco Bell's legal brief,[1] is not a judicial admission as addressed in Taco Bell's initial memorandum. Indeed, plaintiffs concede that no such judicial admission exists. (Opp'n at 8:24-25.) Any evidentiary value of Taco Bell's legal brief, which Taco Bell disputes, is legally trumped *as a matter of law* by *Sharp*'s holding that structural modifications "'are unlikely to be altered in the future.'" 2007 WL 2137301, at *4.

Moreover, plaintiffs recently argued in support of their bellwether trial proposal that "many of the elements may not have changed" over the "short period of time between the beginning of the damages statute of limitations (December 2001) and the survey of the restaurants (2004 to 2005)." (Joint Status Conference Statement at 7:25-27 [docket #323].) Taco Bell submits that given plaintiffs have been successful in obtaining essentially the form of relief they sought by making such statement to the Court, plaintiffs are judicially estopped from maintaining their former position that elements are subject to frequent change. *New Hampshire v. Maine*, 532 U.S. 747, 750-51 (2001) (addressing judicial estoppel factors). Plaintiffs cannot have it both ways. They cannot take the position that injunctive relief is necessary because of frequent changes and at the same time argue that alleged changes aren't so frequent after all. Plaintiffs would derive an unfair advantage or impose an unfair detriment on Taco Bell if they are not estopped. *Id.* at 751.

Third, the contention that "many" of the alleged accessibility barriers have not been remedied is

[1] Plaintiffs conveniently ignore that this Court did *not* rely upon Jamie de Beers's declaration.

misleading given that the vast majority of the 180 stores at issue in plaintiffs' Motion have been modified. That plaintiffs no longer attempt to analyze the percentage of stores that have been modified as to the issues raised in plaintiffs' Motion is the most telling indication that plaintiffs, themselves, believe any request for injunctive relief is now moot.

Fourth, plaintiffs' reliance upon alleged events occurring in *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, No. 97-cv-2135-LTB (D. Colo.) (Opp'n at 5:28-6:3), is, as addressed in Taco Bell's Sur-Reply, a transparent attempt to bias the Court against Taco Bell. (Sur-Reply of 5/10/07 at 14:8-22 [docket #280]; Fed. R. Evid. 402, 403.) If the Court relied on such information, which was not cited by the Court in its August 8, 2007 decision, then the Court committed clear error by resolving a credibility question that should have been resolved at trial.

Fifth, plaintiffs make no attempt to distinguish *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995) (holding that a restaurant franchisor did not "operate" franchised restaurants), *cert. denied*, 516 U.S. 1045 (1996).

Sixth, plaintiffs' criticism of Taco Bell for voluntarily providing updated information as to the status of a mere four stores out of the 180 stores at issue in plaintiffs' Motion (Opp'n at 5:20-28) is not well taken, and ignores the undisputed expense (over $6 million) spent to modify the remainder.

Seventh, the absence of state law damages claims in *Sharp* is irrelevant for purposes of whether injunctive relief claims should have been dismissed as moot. Indeed, Taco Bell's position is that even plaintiffs' state law injunctive relief claims should be dismissed as moot.

Finally, plaintiffs' criticism of the purported delay in making modifications, (Opp'n at 9:18), is amazing given plaintiffs' counsel's recent threat to characterize such modifications as spoliation. (Hikida Decl. of 5/10/07 ¶ 5 [docket #284].) Plaintiffs can't have it both ways and should be estopped especially given their role in stipulating to the Special Master survey procedure, which took more than a year and is still being addressed to date. (Order of 9/24/07 [docket #326].) To sum up, the analysis in *Sharp* as to structural modifications being unlikely to be altered in the future remains good law, is not an aberration, and is directly applicable here. Plaintiffs' analysis suggests nothing to the contrary.

B. The Applicability of the Readily Achievable Barrier Removal Standard to State Law Claims Should Be Decided in the First Instance by the California Courts.

It is axiomatic that a judge is the sole arbiter of the law and its application to the facts. *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). Thus, plaintiffs' assertion that they are not seeking to apply the "readily achievable" legal standard to their application of claims brought under state law, (Opp'n at 3:3-5), is insignificant.

Plaintiffs admit in their opposition that "a showing that barrier removal in an existing facility is 'readily achievable' constitutes a violation of the ADA *and thus now Unruh and the CDPA*." (Opp'n at 4:10-12) (emphasis added). Thus, for stores that were constructed before January 26, 1993, viewed as existing facilities, plaintiffs are arguing that the readily achievable standard applies to establish liability under the *Unruh Act and the CDPA*. Thus, plaintiffs are freely relying upon the readily achievable standard in order to demonstrate Taco Bell's liability under not only federal law (i.e., the ADA), but also under California law (e.g., the Unruh Act and the CDPA). Presumably, plaintiffs are drawing a distinction between cases involving the ADAAG versus Title 24 of the California Building Standards Code. As courts have noted, however, the ADAAG provides "valuable guidance" "for determining whether an existing facility contains architectural barriers." *Pascuiti v. New York Yankees*, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999). Plaintiffs fail to address, however, what *weight*, if any, Title 24 provides "for determining whether an existing facility contains architectural barriers" particularly given that California accessibility law expressly provides for exceptions to rigid adherence to the literal requirements of Title 24.[2] Indeed, Title 24 expressly contains a disproportionality analysis for alterations that is virtually identical to the disproportionality analysis applicable under the ADA.[3] Thus, the question is to what degree, if any, did the California Legislature incorporate the cost-benefit analysis

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[2] *Compare* Cal. Health & Safety Code § 19957 (In cases of *practical difficulty*, *unnecessary hardship*, or extreme differences, a building department responsible for the enforcement of this part may grant exceptions to the literal requirements of the standards and specifications required by this part . . .") (emphasis added) *with Pascuiti v. New York Yankees*, No. 98 CIV. 8186(SAS), 1999 WL 1102748, at *4 (S.D.N.Y. Dec. 6, 1999) (noting the cost/benefit analysis for analyzing "undue hardship" employment disability discrimination claims under the federal Rehabilitation Act and the "similar approach" for Title III ADA claims regarding the removal of an architectural barrier).

[3] Compare Title 24, § 1134B.2.1, exception 1, with 28 C.F.R. § 36.403(a) ("An alteration . . . shall be made so as to ensure that . . . the path of travel to the altered area and the restrooms . . . are readily accessible to and usable by individuals with disabilities . . . unless the cost and scope of such alterations is *disproportionate* to the cost of the overall alteration."); 28 C.F.R. § 36.403(f)(1) ("Alterations . . . will be deemed *disproportionate* to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area.") (emphasis added).

of the readily achievable barrier removal standard, a key component of the compromise struck in the ADA's passage, by amending the Unruh Act and the CDPA in 1992 and 1996, respectively. Taco Bell submits that plaintiffs failed to answer that question and made no attempt to engage in any analysis of the legislative history of such amendments. Taco Bell submits that Judge Burrell correctly exercised restraint in *Sanford v. Del Taco, Inc.*, 2006 WL 2669351, at *5 (E.D. Cal. Sept. 18, 2006), by refusing to decide this state law question. Given that plaintiffs have expressed that "a showing that barrier removal in an existing facility is 'readily achievable' constitutes a violation of the ADA *and thus now Unruh and the CDPA*," (Opp'n at 4:10-12) (emphasis added), that legal question should be decided in the first instance by the California courts.

C. Supplemental Jurisdiction Should Not Be Exercised.

In *Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904 (7th Cir. 2007) (Posner, J.), the Seventh Circuit recently affirmed the dismissal of a state law claim because of the existence of unresolved issues of state law[4] *even though the state law claim had been tried once before in federal district court and had to be tried again on remand, which suggested substantial federal judicial and party resources had already been expended to resolve the state law claim*. *Id.* at 906-08.

In *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556 (2d Cir.), *cert. denied*, 501 U.S. 1218 (1991), the Second Circuit held, "The judicial economy factor should not be the controlling factor, and it may be appropriate for a court to relinquish jurisdiction over pendent claims *even where the court has invested considerable time in their resolution*." *Id.* at 564 (emphasis added); *see also Dunton v. County of Suffolk*, 729 F.2d 903, 910 (2d Cir. 1984) ("Even if the federal claims are discovered to be patently meritless only *after the trial begins*, once that discovery is made the state claims must be dismissed along with the federal ones.") (emphasis added).

In *Farley v. Williams*, No. 02-CV-0667C(SR), 2005 WL 3579060 (W.D.N.Y. Dec. 30, 2005) (Curtin, J.), the district court, citing the *Kidder, Peabody* decision, held that:

[4] Judge Posner's analysis implicitly relied upon the "compelling" nature of an unresolved issue of state law, 28 U.S.C. § 1367(c)(1), *Williams Electronics*, 479 F.3d at 907, which the Ninth Circuit has recognized as reason in and of itself to remand pendent claims. *Executive Software North America v. United States District Court*, 24 F.3d 1545, 1557 n.9 (9th Cir. 1994). Plaintiffs rely heavily upon the *Executive Software* decision in their opposition. (Opp'n at 10:22-11:2; 15:2-4; 15:16.)

> "Although the case has been pending with this court for some time, and considerable effort has been expended to bring the proper parties before the court and to oversee the scheduling of discovery, *very little of the court's time or resources have been devoted to the resolution of these claims*."

Id. at *6 (emphasis added). Similarly, to date, this Court has refrained from deciding whether to apply *Gunther v. Lin*, 144 Cal. App. 4th 223 (Cal. Ct. App. 2006) to this case. Thus, the reality is that the Court has not expended a significant effort to resolve pending state law questions.

Plaintiffs' assertions that the ADA and state claims are "thoroughly intertwined" and that "much of the same evidence" shall be required in trying them are misleading. In *Martinez v. Longs Drug Stores, Inc.*, 2005 WL 3287233 (E.D. Cal. Nov. 28, 2005) (Levi, J.), the district court held that sixteen unsuccessful accessibility claims were *not related* to the five on which the ADA plaintiff succeeded because "each is a *distinct* alleged violation requiring *separate evidence*". *Id.* at *3 (emphasis added). Similarly, in *Hooper v. Calny Inc.*, No. CIV-S-03-0167 DFL/GGH, slip op. (E.D. Cal. Apr. 25, 2005) (Levi, J.), Judge Levi, in awarding prevailing party attorney's fees to the ADA plaintiff, held that each of the 24 alleged violations "represent *different* and *unrelated* 'objectives' or 'claims'" and "are premised on *different facts* and require the application of *different sections of the [ADAAG] and the CBC* to determine liability." *Id.* at 10:18-23 (emphasis added); *see also White v. GMRI, Inc.*, No. CIV. S-04-0465 DFL CMK, slip op. at 12:10-14 (E.D. Cal. Aug. 22, 2005) (Levi, J.); *White v. Save Mart Supermarkets*, 2005 WL 2675040, at *4 (E.D. Cal. Oct. 20, 2005) (England, J.). In addition, plaintiffs effectively admitted to the requirement of separate evidence in their portion of the Joint Case Management Statement filed on January 19, 2007 by admitting 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." (JCMS filed 1/19/07 at 4, ¶ 6 [docket #249]) (emphasis added).

Finally, "no reasons have been advanced as to why the litigation could not proceed in state court with very little duplication of effort." *Farley*, 2005 WL 3579060, at *6. "The discovery done here can be used there." *Applewhite v. Jernberg Industries, Inc.*, 1995 WL 733414, at *2 (N.D. Ill. Dec. 5, 1995). Plaintiffs' fear of duplication of effort amounts to pure speculation and nothing more.

GREENBERG TRAURIG, LLP

Dated: October 12, 2007

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