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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 TACO BELL CORP.'S RESPONSE TO PLAINTIFFS' SUBMISSION OF RECENT DECISION PURSUANT TO LOCAL RULE 7-3(D) [DOCKET #339] DATE: N/A [SUBMITTED] TIME: N/A CTRM: N/A JUDGE: Hon. Martin J. Jenkins

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On October 25, 2007, plaintiffs submitted to the Court a recent Eleventh Circuit decision entitled
3 *Sheely v. MRI Radiology Network, P.A.*, __ F.3d __, 2007 WL 3087215 (11th Cir. Oct. 24, 2007) (2-1
4 decision) (Marcus, J.) [docket #339], as a decision allegedly relevant to the issue of mootness raised in
5 Taco Bell Corp.'s motion for reconsideration of the August 8, 2007 order granting in part plaintiffs'
6 motion for partial summary judgment. Such majority decision is not only distinguishable, if anything, it
7 actually supports Taco Bell's position that the Court erred in granting partial summary judgment in
8 favor of plaintiffs.

9 **I. The Majority Decision in *Sheely v. MRI Radiology Network, P.A.* Is Distinguishable.**

10 In *Sheely*, the plaintiff, who is legally blind and aided by a guide dog, commenced a Title III
11 ADA action against an entity that owned and operated a diagnostic imaging facility at which her minor
12 son had an appointment to receive an MRI. The plaintiff accompanied her minor son to the facility.
13 The plaintiff was not permitted to take her dog beyond the main waiting room even though other parents
14 who wished to accompany their minor children were allowed to accompany their children to a holding
15 area at the end of a hallway beyond the main waiting room. At the time of the incident, the defendant
16 had an unwritten "policy" that service animals were permitted only in the main waiting room area. *Id.* at
17 *2. The record also indicated that a similar incident involving an alleged service animal had previously
18 occurred at the same facility, and that the service animal issue had arisen previously. *Id.* at *3.

19 After the federal ADA action was filed, the defendant moved for summary judgment almost nine
20 months into the lawsuit and announced that it had implemented a new, written service animal policy two
21 days earlier that rendered all of the plaintiff's claims moot. *Id.* at *3.

22 The plaintiff cross-moved for summary judgment. The district court held that the plaintiff's
23 claims for declaratory and injunctive relief under the ADA were moot because of the defendant's
24 voluntary cessation of the allegedly wrongful conduct. *Id.* at *4. On appeal, the panel majority reversed
25 and remanded the mootness ruling.

26 The panel majority held that the district court failed to acknowledge or apply the "basic factors"
27 that the Eleventh Circuit and the U.S. Supreme Court found to be important in determining mootness
28

1 wherein a private defendant has voluntarily ceased the conduct at issue. The Eleventh Circuit then
2 proceeded to announce three specific factors, *without citation to any specific case authority* as follows:

> 3 (1) whether the challenged conduct was isolated or *unintentional*, as opposed to a
> 4 continuing and *deliberate* practice; (2) whether the defendant's cessation of the offending
> 5 conduct was *motivated* by a genuine change of heart or timed to anticipate suit; and (3)
> 6 whether, in ceasing the conduct, the defendant has acknowledged liability."

7 *Id.* at *6 (emphasis added). Applying the foregoing factors to the "undisputed record," *id.* at *6, which
8 the panel majority took in the light most favorable to the plaintiff, *id.* at *1, even though the plaintiff
9 cross-moved for summary judgment, *id.* at *4, the panel majority found that the case was not moot, *id.*
10 at *6.

11 First, the panel majority found that the "undisputed" testimony of the defendant's employees
12 strongly suggested that the plaintiff's treatment was the result of a years-long policy created by the
13 defendant's owner, communication through the defendant's ranks, and enforced on multiple occasions,
14 sometimes vehemently. *Id.* at *7. Thus, the panel majority, in essence, held that the defendant's
15 unwritten policy to exclude service animals from the facility at issue was a deliberate or intentional
16 practice to discriminate against visually-impaired persons.

17 Second, the panel majority found that the defendant failed to even make any profession not to
18 revive the challenged practice. *Id.* at *8. This omission was important because the panel majority
19 recognized that a defendant's assertion that it has no intention of reinstating the challenged practice is
20 "one of the factors to be considered in determining the appropriateness of granting an injunction against
21 the now-discontinued acts." *Id.* at *6 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633
22 (1953)). The panel majority also noted that the record "does suggest" that the defendant was motivated
23 by a desire to avoid liability. *Id.* at *8.

24 Third, the panel majority held that the defendant's failure to acknowledge wrongdoing ensured
25 that a live dispute between the parties remained. *Id.* at *8. The panel majority noted that the defendant
26 had created a "discretionary policy" and might revert to the old policy. *Id.* at *10.

27 *Sheely* is distinguishable. First, unlike the circumstances in *Sheely* wherein the Eleventh Circuit
28 made improper findings of fact on appeal, this Court has made no factual finding that Taco Bell has a

policy to discriminate against mobility-impaired customers. Indeed, plaintiffs oppose the application of a legal standard premised upon *intentional* discrimination notwithstanding *Gunther v. Lin*, 144 Cal. App. 4th 223, 50 Cal. Rptr. 3d 317 (Cal. Ct. App. 2006) (holding that intentional discrimination was required to recover under the Unruh Act). Second, unlike the defendant in *Sheely* who apparently made no disclaimer or profession not to revive its challenged practice, Taco Bell has affirmatively asserted in its various papers submitted to the Court that it has no intention of subjecting itself to future litigation by reinstalling the offending store elements such as allegedly inaccessible queue lines, entrance doors, and indoor seating. (*See, e.g.,* Def.'s Sur-Reply of 5/10/07 at 11:16-19; 13:14-16; 14:4-6; 14:11-13 ("Obviously, Taco Bell has engaged in expensive modifications and has no desire whatsoever to encounter yet another ADA class action.") [docket #280]; Mot. Reconsideration of 9/21/07 at 13:6-7; 13:14-23 [docket #319]; Reply in Supp. of Mot. Reconsideration of 10/12/07 at 1:14-15, 2:24-26 [docket #335]. Third, unlike the circumstances in *Sheely*, the facts at hand indicate long-term modifications made to fixtures at significant expense. Thus, the concern expressed in *Sheely* that the defendant in that case might revert back to its former unwritten policy excluding service animals has no application in the instant action. Plaintiffs' reliance upon *Sheely* is akin to comparing apples and oranges.

II. <u>The *Sheely* Majority Opinion and Its Dissenting Opinion Both Support the Proposition that This Court Erred by Granting Partial Summary Judgment in Plaintiffs' Favor</u>.

The dissenting opinion's analysis as well as the panel majority's recognition that a defendant's assertion that it has no intention of reinstating the challenged practice is "one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts," *Id.* at *6 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)), both suggest the flaw in this Court's granting of partial summary judgment in favor of plaintiffs.

The dissenting opinion in *Sheely* correctly points out that improper fact-finding and credibility determinations by the panel majority affected the outcome in *Sheely*. Significantly, the dissenting opinion in *Sheely* noted that the panel majority had engaged in improper fact-finding on appeal by finding that the defendant was likely to renew its challenged conduct in the future, a factual determination that was within the sole province of the district court. *Sheely*, 2007 WL 3087215, at *24.

In particular, the dissenting opinion noted that the panel majority effectively granted summary judgment to the plaintiff on the issue of mootness by denying the defendant the opportunity to resolve in its favor disputed issues of fact regarding its new policy. *Id.* at *24. For example, whether the challenged conduct was the result of a "years-long policy" or an isolated incident is a disputed issue of fact. *Id.* at *25. In addition, the dissenting opinion noted that the panel majority made a ***credibility*** determination regarding the defendant's motivation for implementing a new policy toward service animals. *Id.* at *25. The dissenting opinion viewed the evidence as to defendant's motivation as suggesting a genuine motivation for enacting the new policy (i.e., to come into compliance with the ADA). *Id.* at *25-*26. The dissenting opinion viewed the defendant's motivation as an issue of fact to be resolved by the district court. *Id.* at *26. Further, the dissenting opinion noted that the panel majority questioned the sincerity of the defendant's intentions to adhere to its new policy, which constituted a credibility finding within the sole province of the trial court. *Id.* The dissenting opinion suggested that the case should have been remanded with instructions to "either try the case or, at a minimum, conduct an evidentiary hearing to make findings of fact on the issue of future harm." *Id.* at *25.

In *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), the seminal U.S. Supreme Court decision on the voluntary cessation exception to the mootness doctrine, the U.S. Supreme Court held that despite the voluntary cessation of allegedly illegal conduct, "[t]he case may nevertheless be moot if the defendant can demonstrate that 'there is no *reasonable* expectation that the wrong will be repeated.'"[1] *Id.* at 633 (emphasis added). The Supreme Court went beyond addressing a federal court's power to hear and determine a case (i.e., mootness) and also addressed a federal court's power to grant injunctive relief given that injunctive relief was the relief sought in the case. As to the latter power, the Supreme Court clarified that the "moving party must satisfy the court that [injunctive] relief is needed." *Id.* "The necessary determination is that there exists *some cognizable danger of recurrent violation*, something more than the *mere possibility* which serves to keep the case alive." *Id.* (emphasis added).

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[1] In *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), the U.S. Supreme Court clarified the two prongs that must be met before a case can be declared moot: First, if it "can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur" and, second, if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 631.

Although the Supreme Court noted that a disclaimer of an intention to revive the alleged wrong is not, alone, sufficient to render a case moot, "*it is one of the factors to be considered* in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.* (emphasis added).

In *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), the Ninth Circuit explored the mootness doctrine and, in particular, what must be shown to establish that a plaintiff will likely be injured again. Although the Ninth Circuit noted there had been "scant analysis" on this topic, the Ninth Circuit held, "There must be a 'demonstrated probability' that plaintiff will again be among those injured." *Id.* at 1340. The Ninth Circuit added, "The likelihood of the injury recurring must be calculable and if there is no basis for predicting that any future repetition would affect the present plaintiffs, there is no case or controversy." *Id.* "The Supreme Court has stated that plaintiffs must demonstrate that a 'credible threat' exists that they will again be subject to the specific injury for which they seek injunctive or declaratory relief." *Id.* Significantly, the Ninth Circuit held that regardless of judicial economy or the importance of the question presented, "a court is without jurisdiction if there is not a sufficient likelihood of recurrence with respect to the party now before it." *Id.* at 1342. The Ninth Circuit then addressed the degree of probability required to be shown by the plaintiff as to the likely recurrence of injury and held that "demonstrated probability" required "a very significant possibility." *Id.* at 1343. Further, the Ninth Circuit squarely placed "the burden for showing a likelihood of recurrence firmly on the plaintiff." *Id.* at 1342. In support, the plaintiffs cited *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), wherein the U.S. Supreme Court emphasized that it is the plaintiff's burden to demonstrate a case or controversy that would justify equitable relief. *Id.* at 105. Finally, the Ninth Circuit held that the plaintiff's burden "can not be met with a merely subjective showing." 771 F.2d at 1343. "An attestation of plaintiff's fear that the injury might recur will not suffice to demonstrate the capability of repetition of an injury." *Id.* "[T]he 'essential showing' is objective, i.e. directly or inferentially statistical." *Id.*; *City of Los Angeles*, 461 U.S. at 107 n.8 ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.").

Thus, the Ninth Circuit's decision in *Sample v. Johnson* thoroughly analyzed the mootness doctrine and its interplay with a federal court's power to impose injunctive relief. Subsequently, the Ninth Circuit noted that the "cognizable danger" that the moving party must demonstrate in predicting

the likelihood of future violations must be based on appropriate findings supported by the record. Factors that a district court may consider in making this finding include:

> "*the degree of scienter involved*; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the extent to which the defendant's professional and personal characteristics might enable or tempt him to commit future violations; *and the sincerity of any assurances against future violations*."

Federal Election Comm'n v. Furgatch, 869 F.2d 1256, 1263 n.5 (9th Cir. 1989) (emphasis added).

Given that Taco Bell was the nonmovant with respect to plaintiffs' motion for partial summary judgment, all inferences to be drawn from the record should have been drawn in Taco Bell's favor especially as to the sincerity of Taco Bell's assurances against future alleged violations, which were supported by evidence of accessibility enhancements costing over $6 million over the past year alone. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Shoom, Inc. v. Electronic Imaging Systems of America, Inc.*, No. C 05-03434 MJJ, 2006 WL 1529983, at *4 (N.D. Cal. June 1, 2006) (Jenkins, J.) ("If the pleadings and other submitted materials raise issues of credibility or disputed questions of fact, the court may, in its discretion, order a preliminary hearing to resolve the contested issues. . . . Likewise, where the jurisdictional facts are 'intertwined with the merits' of the action, it is preferable that determination of jurisdiction be made at trial.") (quoting *Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 & n.2 (9th Cir. 1977)). Thus, the Court should not have granted partial summary judgment in favor of plaintiffs because the Court apparently made credibility determinations, weighed evidence, and did not draw all reasonable inferences from the record in Taco Bell's favor as the nonmovant.

DATED: November 12, 2007 GREENBERG TRAURIG, LLP

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