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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02-05849 PJH JL

JOINT CASE MANAGEMENT STATEMENT

Pursuant to this Court's April 10, 2008 Order Setting Case Management Conference, the parties hereby submit this Joint Case Management Statement.

1. Jurisdiction and Service.

a. Plaintiffs' Statement.

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343, and pursuant to its supplemental jurisdiction over Plaintiffs' claims brought under the laws of the State of California. Defendant was served in December, 2002.

b. Defendant's Statement.

The parties dispute whether the Court should exercise supplemental jurisdiction over the pendent state law monetary claims because of the novelty or complexity of trying such state law claims, the substantial predominance of the state law claims over the ADA claim, and the dismissal of all claims over which the Court has original jurisdiction.

Although Taco Bell submits that plaintiffs must join as a party the landlords of stores at which Taco Bell is the tenant or franchisee operators of stores that are not operated by Taco Bell, plaintiffs have, to date, not served or attempted to join such parties pursuant to Fed. R. Civ. P. 19.

2. Facts.

a. Plaintiffs' Statement.

Plaintiffs provided their portion of this Statement to Defendant, and then received Defendant's portion. To avoid burdening the Court, Plaintiffs have not responded to each assertion made by Defendant, but would like to note that they respectfully disagree with a number of such assertions.

This is a disability access class action, filed in December 2002, alleging that there are architectural barriers and discriminatory policies in place at the approximately 220 corporate California Taco Bell restaurants that deny full and equal access to members of class of customers who use wheelchairs or scooters, in violation of title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 et seq., California's Unruh Civil Rights Act ("Unruh"), Cal. Civ. Code § 51, and the California Disabled Persons Act ("CDPA"), Cal. Civ. Code § 54.

The architectural barriers include, for example: (1) access violations in parking lots, such as parking spaces and access aisles that are too narrow, and paths of travel to the restaurant with significant slopes and cross slopes; (2) entry and restroom doors that are too heavy for class members to open on their own; (3) queue lines – the U-shaped lines in which customers line up to place their orders – that are too narrow for people who use wheelchairs or scooters to navigate; (4) seating areas with no, or too few, accessible seating positions; (5) condiment, napkin, beverage and utensil dispensers that are not accessible; and (6) restrooms that do not comply with accessibility regulations. By Order dated August 8, 2007, the Court granted in part, and denied in part, Plaintiffs' motion for partial summary judgment, holding that seating areas, restroom door forces and certain entrance door forces at specified restaurants were in violation of state and/or federal accessibility regulations. (Docket No. 307)

Construction and alteration dates.

The dates that the restaurants at issue were constructed or altered are important facts in this case. The standard applicable to evaluate the accessibility of each restaurant depends on the date it was constructed and the dates of any alterations. Under the ADA, all buildings constructed after January 26, 1993, and any portion of an older building that was altered after January 26, 1992, must comply with design specifications promulgated by the Department of Justice (the "DOJ Standards"). Moeller v. Taco Bell Corp., 220 F.R.D. 604, 606 (N.D. Cal. 2004). Buildings constructed before 1993 and not altered after 1992 must be made accessible to the extent that it is "readily achievable" to do so. Id. Likewise, under California law, all buildings constructed or altered after July 1, 1970, must comply with design specifications governing the accessibility of various architectural elements. Id. at 607. From December 31, 1981 until the present, comprehensive and detailed standards, very similar to the DOJ Standards, have been set forth in Title 24 of the California regulatory code ("Title 24"). Id.

The parties have stipulated to the construction dates of the vast majority of restaurants at issue in this case (approximately 200 restaurants were constructed after 1970 and thus must comply with regulations in effect at the time of their construction). In addition, in response to

Plaintiffs' Requests for Admissions, Defendant has admitted to many alterations in this case, although there is a legal dispute as to the relevance of these alterations.

Measurement of Architectural Elements in Defendant's Restaurants.

A second set of facts concerns the measurement of the architectural elements in the restaurants at issue. This is important to determine whether the restaurants comply with accessibility regulations in effect at the time they were constructed or altered.

To determine these measurements, in 2004, the parties jointly requested, and the Court ordered, the appointment of a Special Master to survey all of the restaurants at issue in this case. (See Order Appointing Special Master (Docket No. 101).) During the surveys of the first 20 restaurants -- often referred to as the "pilot program" -- counsel for the parties and Taco Bell operational personnel accompanied the Special Master to observe how he measured and evaluated the elements at issue. Based on the experiences during the pilot program, the parties jointly drafted the survey instrument that the Special Master used to survey the remainder of the restaurants. (Id. Ex. B.) These surveys involved detailed measurements of various architectural elements throughout each restaurant. The survey process took approximately a year and was completed in June, 2005.

The Special Master surveys revealed literally thousands of violations in the 220 restaurants at issue here. (See Docket Nos. 216-240.)

The Experiences of Class Members

Plaintiffs have been contacted by almost 2,000 class members, who have reported significant problems with access at Defendant's restaurants.

Disputed Facts

Defendant disputes the methodology used by the Special Master to take certain measurements.

Under both the ADA and state access regulations, certain architectural elements that do not comply with a measurement specified in the regulations may nevertheless comply if they fall within a construction "tolerance" of the measurement. DOJ Standards § 3.2. The parties

have reached stipulations with respect to a number of construction tolerances, but others remain in dispute.

Defendant has argued that by fixing some of its restaurants, and by promising to fix others in the future, Plaintiffs' claims for injunctive relief are moot. There is a factual dispute as to the adequacy of Defendant's remedial efforts. This dispute is now largely irrelevant because the Court has rejected Defendant's mootness argument even as to injunctive relief, holding that even if Defendant had adequately fixed various architectural barriers, "this Court may order effective relief as to those elements in the form of an injunction requiring Defendant to (1) remedy the remainder of these elements that are out of compliance; (2) maintain those elements in a compliant state; and (3) ensure that those elements comply in any new or acquired restaurants." Moeller v. Taco Bell Corp., 2007 WL 2301778, *8 (N.D. Cal. Aug. 8, 2007) (Docket No. 307.) In any event, even assuming Plaintiffs' injunctive claims became moot, Plaintiffs' damages claims would not.

A factual dispute exists as to whether Defendant's policies concerning queue lines provide equivalent facilitation to people who use wheelchairs or scooters for mobility. In its August 8, 2007 Order Denying in Part and Granting in Part Plaintiffs' Motion For Partial Summary Judgment, the Court held that these queue lines, which are too narrow for people who use wheelchairs or scooters to get through, do not comply with the architectural specifications of California and federal accessibility guidelines. Id. at *9-10. Taco Bell contends that people who use wheelchairs or scooters can approach the service counter via a separate "auxiliary access" to the side of the queue line, which Plaintiffs asserted was not appropriate because it is was segregated, and because other customers waiting in the queue line often got angry at what they perceived as a disabled person "cutting" in line. Based on the declaration of Defendant's expert, who uses a wheelchair, asserting that he personally did not have a problem with using the auxiliary line, the Court held that a disputed issue of fact exists as to whether the auxiliary access provided equivalent facilitation. Id. at *12. Class members who have communicated with class counsel report that attempting to deal with the queue line and the experience of being shunted off to the side is discriminatory and humiliating.

b. Defendant's Statement.

Plaintiffs' recitation of the facts omits to mention that the majority of the approximately 220 California company-owned stores at issue have been recently modified comprehensively by Taco Bell voluntarily to enhance their accessibility, and that many of the remaining stores over which Taco Bell currently operates and has control shall be modified in the near future.

In addition, the Court found a genuine issue of material fact as to whether queue lines at Taco Bell's California company-owned stores violate either federal or state law and whether exterior door opening force at stores constructed before April 1, 1994 violated state law. (Order of 8/8/07 at 36; docket #307.) Significantly, as to the remaining elements addressed in such motion, the Court did not impose any injunctive relief. Indeed, plaintiffs' motion for partial summary judgment expressly refrained from seeking such relief. (Pls.' MPSJ at 1:7-10; docket #255; Pls.' Reply in Supp. MPSJ at 1:18-21; docket #271.)

Disputed Facts

Plaintiffs challenge the "adequacy" of Taco Bell's voluntary modification efforts to comprehensively enhance the accessibility of the majority of its current California company-owned stores.

The parties currently disagree as to the accuracy of many of the dimensions, values and measurements of customer accessibility-related elements recorded by the Special Master after he was appointed by the Court on October 5, 2004 to survey and record dimensions, values, and measurements at virtually all California Taco Bell company-owned restaurants, which he conducted in 2004 and 2005. (Order of 10/5/04; docket #101.) In particular, the parties disagree as to the Special Master's measurement methodology as to a number of elements.

The parties also disagree as to applicable construction tolerances for numerous elements. As plaintiffs have previously acknowledged, all dimensions are subject to

conventional building industry tolerances for field conditions.[1] (ADA Standards for Accessible Design ("ADAAG"), 3.2; *see* 28 C.F.R. Part 36, App. A.)

The parties also disagree as to whether the alleged architectural barriers at issue actually hinder or otherwise deprive mobility-impaired class members of full and equal treatment under the ADA.[2] *Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1368 (S.D. Fla. 2001) (Moore, J.) ("Deviation from the standards is relevant but not determinative; it is one consideration from which the court may conclude that noncompliance impedes access. At trial, a defendant may be able to rebut this evidence by showing that despite the technical noncompliance, the challenged accommodation in fact allows disabled persons effective access.") (emphasis added); *Wilson v. Pier 1 Imports (US), Inc.*, 439 F. Supp. 2d 1054, 1067 (E.D. Cal. 2006) ("[N]on-compliance with ADAAG standards can demonstrate a prima facie barrier, which the defendants may rebut by demonstrating that, despite the non-conformance with the guidelines, the alleged barrier is not actually hindering equal access by the plaintiff.") (emphasis added).

The parties also disagree as to whether the removal of the alleged architectural barriers would be "readily achievable" or "easily accomplishable and able to be carried out without much difficulty or expense" within the meaning of 42 U.S.C. § 12181(9).

The parties also disagree as to whether the so-called "alterations" that plaintiffs claim Taco Bell has allegedly admitted in response to plaintiffs' second set of requests for admissions

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[1] The burden of proving a tolerance for particular measurements is on plaintiffs. *Cherry, et al. v. The City College of San Francisco, et al.*, No. C 04-04981 WHA, slip op. at 8:8-9:13 (N.D. Cal. Jan. 12, 2006) (Alsup, J.); *Torres v. Rite Aid Corp.*, 412 F. Supp. 2d 1025, 1037 & n.5 (N.D. Cal. 2006) (Alsup, J.) (holding that the plaintiff was not entitled to summary judgment because it was his burden to "introduce evidence that the industry *disallows* any deviation.") ("At trial, the plaintiff will have the burden of proving that [the defendant] exceeded such tolerances.").

[2] *Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1369 (S.D. Fla. 2001)("injunctive relief would not be appropriate for *de minimis* violations that 'do not materially impair the use of an area for its intended purpose, . . . [or] pose any apparent danger to persons with disabilities.'") (quoting *Parr v. L & L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1086 n.26 (D. Haw. May 16, 2000) (Yamashita, Mag. J.)); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 2d 698, 783 (D. Or. 1997) (Ashmanskas, Mag. J.) (court "will not require defendant to re-mount the alarms a few inches lower").

propounded on January 9, 2008 are, in fact, "alterations" within the meaning of the ADA or whether they are mere modifications that did not trigger an "alteration" legal standard. Indeed, contrary to plaintiffs' assertion, Taco Bell's discovery responses dated March 7, 2008 expressly disavowed making any "admission" that any "alterations" under the ADA or Title 24 were made.

The parties also disagree as to whether the requested alterations to the path of travel to the altered area and the restrooms serving such area are *disproportionate* to the overall alleged "alterations." In this regard, the parties disagree as to whether plaintiffs can satisfy their burden of demonstrating that all of the requested modifications can be made without exceeding 20% of the cost of the actual alleged "alterations". 28 C.F.R. § 36.403(f)(1). Such disproportionality analysis applies to both plaintiffs' ADA claim as well as to plaintiffs' state law claims. (Cal. Code of Regs., Title 24, § 1134B.2.1, Exception 1.)

To the extent that the Court chooses to exercise supplemental jurisdiction over plaintiffs' state law claims for money damages, the parties also dispute whether plaintiffs can demonstrate that each and every class member was individually denied equal access on a particular occasion during a particular store visit that occurred within the limitations period. *Donald v. Cafe Royale, Inc.*, 218 Cal. App. 3d 168, 183, 266 Cal. Rptr. 804 (Cal. Ct. App. Feb. 23, 1990) (Merrill, J.) ("[T]o maintain an action for damages pursuant to section 54 et seq. an individual must take the additional step of establishing that he or she was denied equal access *on a particular occasion*.")(emphasis added). Without such proof, individual class members are not entitled to recover statutory minimum damages under state law.

The parties also disagree as to whether each and every individual class member seeking monetary relief under California law qualifies as having a "physical disability" within the meaning of applicable state law and uses a wheelchair or electronic scooter for mobility. (Cal. Gov't Code § 12926.)

The parties also disagree as to whether California had any binding accessibility standards existing prior to the July 1, 1982 effective date of the original version of Title 24. Indeed, this Court has not recognized any applicable accessibility standards preceding Title 24's

original 1982 version. *Mannick v. Kaiser Found. Health Plan*, No. C 03-5905 PJH, 2006 WL 2168877, at *16 (N.D. Cal. July 31, 2006) (Hamilton, J.) ("Buildings existing at the time of Title 24's enactment in 1982 are exempt from compliance unless 'alterations . . . are made to such buildings or facilities.'").

3. Legal Issues.

a. Plaintiffs' Statement.

Under Unruh, a violation of the ADA constitutes a violation of Unruh. There exists a legal issue as to whether proof of intentional discrimination is necessary for Unruh claims that are premised on violations of the ADA. The Ninth Circuit in Lentini v. California Center for the Arts, 370 F.3d 837 (9th Cir. 2004) held that such proof is not needed, while a California Court of Appeal reached the opposite conclusion in Gunther v. Lin, 144 Cal. App. 4th 223 (Cal. Ct. App. 2006). The Ninth Circuit recently certified this question to the California Supreme Court. See Munson v. Del Taco, Inc., --- F.3d ----, 2008 WL 1700525 (9th Cir. Apr. 14, 2008).

b. Defendant's Statement.

The parties dispute whether Taco Bell's voluntary comprehensive accessibility-related modifications at the majority of company-owned California Taco Bell stores have rendered plaintiffs' request for injunctive relief subject to dismissal based upon the mootness doctrine. *Jones v. Taco Bell Corp.*, No. S-04-1030 GEB GGH, 2005 WL 1406098, at *2 (E.D. Cal. June 14, 2005) (Burrell, J.) (dismissing ADA claims based upon conditions that were fixed even after commencement of the action); *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 alleged discrimination cannot reasonably be expected to recur because 'structural modifications . . . are unlikely to be altered in the future.'") (quoting *Indep. Living Resources v. Oregon Arena*, 982 F. Supp. 698, 774 (D. Or. 1997)); *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1130-31 (C.D. Cal. 2005) (holding that installation of grab rails by restaurant rendered moot plaintiff's ADA complaint requesting installation of such rails, finding no basis to conclude the challenged conduct would be

repeated); *see also Pereira v. Ralphs*, No. 07-841 PA (FFMx), slip op. at 3-7 (C.D. Cal. Oct. 25, 2007) (Anderson, J.) [docket #91].[3]

The parties dispute whether Taco Bell's comprehensive remedial plan as to the remaining unmodified stores that shall be modified in the near future renders plaintiffs' injunctive relief claims moot. *Access 4 All, Inc. v. Casa Marina Owner, LLC*, 458 F. Supp. 2d 1359, 1364-65 (S.D. Fla. Oct. 3, 2006) (King, J.) ("Defendant's remedial plan [to remodel the entire facility at issue, a hotel, and bring it up to compliance with the ADA] . . . renders Plaintiffs' claims moot, as a matter of law, and subjects Plaintiffs' Complaint to dismissal.").

The parties also dispute whether the Court should exercise supplemental jurisdiction over the pendent state law monetary claims because of the novelty or complexity of trying such state law claims, the substantial predominance of the state law claims over the ADA claim, and the dismissal of all claims over which the Court has original jurisdiction.[4] *See, e.g., Yates v.*

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[3] Given that plaintiffs have previously cited what appeared at the time to be a favorable court ruling in *Pereira v. Ralphs*, No. 07-841 PA (FFMx) (C.D. Cal. July 2, 2007) (Anderson, J.), *see* (Pls.' Submission of Recent Decision Pursuant to Local Rule 7-3(D) filed on 8/6/07, docket #306), it is worth noting that Judge Anderson ultimately dismissed that action based upon the mootness doctrine.

[4] In *Executive Software North America, Inc. v. United States District Court for the Central District of California*, 24 F.3d 1545 (9th Cir. 1994), a decision previously cited by plaintiffs, the Ninth Circuit held, "'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.'" *Executive Software*, 24 F.3d at 1552 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)) (emphasis added); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-27 (1966) ("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.")(emphasis added); *id.* at 726 ("*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*.")(emphasis added). 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. At the Court's invitation, (Tr. of H'rg of 9/27/07 at 7:9-12; docket #330), Taco Bell has cited examples of cases wherein pendent state law claims were dismissed even after extensive federal court proceedings had occurred. (TBC's Reply of 10/12/07 at 4:11-5:3; docket #335.) For example, 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 *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*

(continued...)

Union Square, No. C 07-04087 JSW, 2008 WL 346418, at *3 (N.D. Cal. Feb. 7, 2008) (White, J.) (declining to exercise supplemental jurisdiction over pendent state law accessibility claims filed by Craig Yates, one of the four named plaintiffs in the instant action, based upon the "persuasive" "reasoning" of the "majority of judges in the California district courts" who cited the conflict between the California intermediate appellate court decision in *Gunther v. Lin*, 144 Cal. App. 4th 223, 50 Cal. Rptr. 3d 317 (2006) (holding that intentional discrimination was required to recover under the Unruh Act) and the prior Ninth Circuit decision in *Lentini v. California Center for the Arts*, 370 F.3d 837 (9th Cir. 2004)); *see also Jones*, 2005 WL 1406098, at *2 (dismissing pendent state law claims against Taco Bell because the district court had dismissed all claims over which it had original jurisdiction). Indeed, even the Ninth Circuit has recently certified the question as to the meaning of the Unruh Act to the California Supreme Court because of its own uncertainty as to whether the Unruh Act requires intentional discrimination. *Munson v. Del Taco, Inc.*, No. 06-56208, 2008 WL 1700525, at *1 (9th Cir. Apr. 14, 2008) ("Comity and federalism counsel that the California Supreme Court, rather than this court, should answer these [certified] questions.").

The parties also dispute whether the Court should be applying multiple sets of legal standards, e.g., both federal and state accessibility standards, in the instant action. Although plaintiffs claim that California's Title 24 standards are "very similar" to the DOJ Standards,

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[4](...continued)
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: "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.

they are in many instances materially different than federal ADA standards especially as to facilities constructed before January 26, 1993, which are, in general, subject to the "readily achievable" legal standard. Otherwise, why have plaintiffs been so insistent upon applying such non-ADA standards, which only apply at most to plaintiffs' pendent state law claims for injunctive relief and monetary damages and not to any of plaintiffs' ADA federal claims? Recent federal court decisions have clarified that the ADAAG should apply to ADA claims as to "new construction" and not a set of non-ADA standards such as California's Building Standards Code. *Sanford v. Roseville Cycle, Inc.*, No. Civ. 04-1114 DFL CMK, 2007 WL 512426, at *1 (E.D. Cal. Feb. 12, 2007) (Levi, J.) (holding that the California Building Code is "irrelevant for ADA purposes" because "[t]he ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) are the exclusive standards for judging compliance with the ADA"); *Chapman v. Pier 1 Imports*, 2006 WL 1686511, at *7 (E.D. Cal. June 19, 2006) (Karlton, J.) ("[T]he court adopts by reference the analysis articulated in *Eiden* with respect to the ADAAG and the CBC. As in *Eiden*, I conclude that compliance with the ADAAG, and not another standard, constitutes compliance with the ADA requirements for new construction."); *id*. at *7 n.11 ("[T]he court notes that because Congress directed that the Department of Justice, in conjunction with the Architectural and Transportation Barriers Compliance Board ("Access Board"), issue the ADAAG, and that these standards constitute binding regulation, the court is not authorized to evaluate Title III disability discrimination claims under any other standard, and to determine what engineering or architectural modifications are necessary, or whether such modifications would be feasible and desirable."); *id*. at *7 ("[T]he court concludes that the ADAAG constitutes the exclusive standards under Title III of the ADA".); *Sanford v. Del Taco, Inc.*, No. 04-cv-2154-GEB-EFB, 2006 WL 2669351, at *2 (E.D. Cal. Sept. 18, 2006) (Burrell, J.) ("The ADA Accessibility Guidelines ('ADAAG') provides the standard for determining a violation of the ADA.").

Indeed, plaintiffs' reliance upon a complex analysis of their state law claims, which requires the historical review of prior versions of Title 24 dating back to the original version

that went into effect on July 1, 1982, is an additional reason why this Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims.

To the extent that the Court does not apply the mootness doctrine, the parties also dispute whether plaintiffs can satisfy their burden of demonstrating via expert testimony[5] that the removal of alleged architectural barriers at the numerous Taco Bell stores that were constructed before January 26, 1993 is "readily achievable" insofar as the nature and cost of the action needed are "easily accomplishable" and "able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). As this Court has previously recognized, the evidentiary burden of production falls squarely upon the ADA plaintiff. *Mannick v. Kaiser Foundation Health Plan, Inc.*, No. C 03-5905 PJH, 2006 WL 1626909, at *12 (N.D. Cal. June 9, 2006)("In view of plaintiff's failure to meet his burden of coming forward with evidence to show that creating an accessible patient room was readily achievable, defendants are under no obligation to prove the affirmative defense that barrier removal is not readily achievable." (emphasis added). Placing such burden upon the ADA plaintiff is consistent with F.R.E. Rule 407.

Taco Bell anticipates that plaintiffs will argue that the "readily achievable" legal standard does not apply to "existing facilities" constructed before January 26, 1993 because they were "altered" sometime after January 26, 1992. 42 U.S.C. § 12183(a)(2). Taco Bell submits, however, that plaintiffs' reliance upon an "alteration" legal standard is flawed because an exception applies to the "alteration" standard if the requested alterations to the path of travel to the altered area and the restrooms serving such area are *disproportionate* to the overall alleged "alterations." In this regard, the parties also dispute whether plaintiffs can satisfy their

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[5] The "readily achievable" barrier removal standard is the subject of expert testimony, which is premature at this juncture. *Pascuiti v. New York Yankees*, 1999 WL 1102748, at *4 (S.D.N.Y. Dec. 6, 1999) ("The plaintiffs in this case must consider the four factors identified in § 12181(9) and proffer evidence, including <u>*expert testimony*</u>, as to the ease and inexpensiveness of their proposed method of barrier removal.") (emphasis added); *Colorado Cross Disability Coalition v. Hermanson Family Ltd.*, 264 F.3d 999, 1009 (10th Cir. 2001) ("Perhaps most importantly, Plaintiff's expert testimony failed to demonstrate that under the particular circumstances installing a ramp would be readily achievable."). Indeed, on November 30, 2007, plaintiffs themselves objected to their required production of specific architectural drawings and precise cost estimates, *see Colorado Cross*, 264 F.3d at 1007-09, based upon their own need for expert testimony.

burden of demonstrating that all of the requested modifications can be made without exceeding 20% of the cost of the actual "alterations". 28 C.F.R. § 36.403(f)(1). Such disproportionality analysis applies to both plaintiffs' ADA claim as well as to plaintiffs' state law claims. (Cal. Code of Regs., Title 24, § 1134B.2.1, Exception 1.) Although Taco Bell anticipates that plaintiffs shall argue that the disproportionality analysis does not apply to plaintiffs' state law claims premised upon non-ADA standards because Taco Bell did not apply for a unreasonable hardship exemption from the local building department charged with enforcing accessibility standards, such reasoning ignores that by suing to obtain injunctive relief under state law, plaintiffs have affirmatively taken on the enforcement role typically held by local building officials such that a neutral arbiter, i.e., the Court, can and should be equipped to conduct the disproportionality analysis consistent with Taco Bell's right to due process. Indeed, the analogous disproportionality analysis under the regulations implementing the ADA countenance that the Court shall conduct such disproportionality analysis, not a local building official.

Even assuming that an "alterations" standard has been triggered within the meaning of the ADA or state law, the parties dispute whether plaintiffs can demonstrate that the requested modification would be "readily achievable". *See Mannick v. Kaiser Foundation Health Plan, Inc.*, No. C 03-5905 PJH, 2006 WL 1626909, at *11 (N.D. Cal. June 9, 2006) (Hamilton, J.) (holding that even assuming that remodeling of a hospital patient room triggered the alteration standard, the sought-after renovation was not readily achievable) ("Moreover, even if it [(i.e., remodeling at the hospital at issue)] had [triggered an obligation to provide an accessible patient room on the medical-surgical floors], the undisputed evidence shows that a renovation of a medical-surgical patient room to include a fully accessible bathroom was not 'readily achievable,' given the cost of the renovation and the impact on hospital operations.").

The parties also dispute whether Taco Bell has already made so-called alterations "to the maximum extent feasible." 28 C.F.R. § 36.402(a)(1); 42 U.S.C. § 12183(a)(2).

As for the stores that are considered "new construction" because they were constructed after January 26, 1993, 42 U.S.C. § 12183(a)(1), the parties also dispute whether Taco Bell will

show that departures from particular scoping standards set forth in the ADAAG are permissible because they provide equivalent facilitation in the form of substantially equivalent access to and usability of the facility. (ADAAG, 2.2.)

As for stores that plaintiffs claim as being subject to the version of Title 24 in effect at the time of store construction,[6] the parties dispute whether Taco Bell will show, *inter alia*, that departures from particular scoping standards set forth in the Title 24 are permissible because they provide equivalent facilitation in the form of substantially equivalent access to and usability of the facility. Title 24, § 1127B.1, Exception 1 (exterior features); Title 24, § 1129B.4, Item 3, Exception 1 (exterior parking features); Title 24, § 1133B.1.1.1.1, Exception 3 (entrances, exits, and paths of travel); Title 24, § 1133B.3.2, Exception 1 (entrances, exits, and paths of travel); Title 24, § 1104B.5, Item 1, Exception 1 (dining facilities); Title 24, § 1115B.1, Exception (restroom facilities). For example, merely because a store does not satisfy the version of Title 24 in effect at the time of store construction does not preclude reliance upon technical guidelines contained in the ADAAG, which constitute "other designs" within the meaning of ADAAG, 2.2. Thus, Taco Bell challenges plaintiffs' assumption that they can demonstrate liability via noncompliance with Title 24 standards even if analogous ADA standards are "lower" or nonexistent.

The parties also dispute whether the imposition of punitive damages as requested by Plaintiffs would violate the United States Constitution, including but not limited to, the Fifth, Eighth, and Fourteenth Amendments, and the corresponding provisions of the California Constitution. In addition, because of the imposition of unclear standards, the imposition of punitive damages is unconstitutionally vague or overbroad in violation of the United States and California Constitutions.

[6] Plaintiffs' assumption that the first version of Title 24 went into effect on December 31, 1981 is inaccurate. The first version of Title 24 did not go into effect until July 1, 1982.

4. Motions.

a. Plaintiffs' Statement.

In February 2004, the Court certified the proposed class, setting the beginning of the statute of limitations period for damages at December 2001. (Docket No. 84).

On December 7, 2004, the Court denied Defendant's motion to modify the definition of the class to exclude class damages claims. (Docket No. 148).

On October 5, 2004, the Court granted the parties' joint request to appoint a Special Master to survey all of the restaurants at issue in this case. (Docket No. 101).

On August 10, 2005, the Court issued its first summary judgment decision, addressing several disputed legal issues. (Docket No. 188.)

On August 8, 2007, the Court granted in part, and denied in part, Plaintiffs' motion for partial summary judgment, holding that seating areas, restroom door forces and certain entrance door forces at specified restaurants were in violation of state and/or federal accessibility regulations. (Docket No. 307).

By order dated March 24, 2008, the Court denied Defendant's motion to reconsider the decision granting in part, and denying in part, Plaintiffs' motion for partial summary judgment. (Docket No. 367.)

Plaintiffs' motion to compel Taco Bell's production of correspondence with the contractor it retained to make alterations in its stores is currently pending. (See Docket No. 361.)

The parties have submitted to Judge Larson a Joint Statement of Issues in connection with Plaintiffs' efforts to compel Defendant to state the reasons why it contends that certain measures it has already taken to remove architectural barriers were not readily achievable. (Docket No. 373.)

b. Defendant's Statement.

On October 19, 2004, plaintiffs filed a motion for partial summary judgment, addressing only 20 of the approximately 220 stores at issue, which the Court refused to rule upon because the Court deemed it premature (plaintiffs later withdrew such motion).

Subsequently, the parties submitted legal briefs to the Court as to certain disputed legal issues. (Docket ##161, 178.) On August 10, 2005, the Court issued a published order holding that the currently-defined class does not have standing to challenge the accessibility of various elements such as inaccessible hardware such as locks and flush controls and toilet paper rollers because such elements do not fall within the scope of the mobility-impaired class members. (Order of 8/10/05 at 5:13-6:28; Docket #188; *see also Moeller v. Taco Bell Corp.*, No. C 02-5849 MJJ, 2005 WL 1910925, at *3-*4 (N.D. Cal. Aug. 10, 2005).) The Court refrained from ruling as to the "de minimis" exception until further development of the factual record. *Id*. at 5:11-12. As for the "equivalent facilitation" exception, (ADAAG 2.2), the Court clarified that such exception was not intended to apply to only "new technology" as asserted by plaintiffs. *Id*. at 4:7-8.

Subsequently, on February 23, 2007, plaintiffs once again moved for partial summary judgment, but this time addressed only a small sample of elements (exterior and interior door opening force, queue lines, and indoor seating) at approximately 180 stores, but expressly refrained from seeking injunctive relief. (Pls.' MPSJ at 1:7-10; docket #255; Pls.' Reply in Supp. MPSJ at 1:18-21; docket #271.)

On August 8, 2007, the Court granted plaintiffs' motion in part and denied it in part, and expressly found a genuine issue of material fact as to whether queue lines at Taco Bell's California company-owned stores violate either federal or state law and whether exterior door opening force at stores constructed before April 1, 1994 violated state law.[7] (Order of 8/8/07 at 36; docket #307.) Significantly, as to the remaining elements addressed in such motion, the Court did not award any injunctive relief. Thus, the Court's observations, cited by plaintiffs, about the mere potential for issuing an injunction, (Order of 8/8/07 at 12:15-19; docket #307), without actually doing so constitutes *obiter dictum*. Indeed, the Court subsequently reiterated that he had not imposed any injunctive relief via his August 8, 2007 ruling. (Tr. of H'rg of

[7] Notwithstanding plaintiffs' counsel's hearsay reference to their alleged communications with unidentified class members, plaintiffs failed to proffer in support of their motion any admissible evidence from any class member averring to the alleged hindrance posed by Taco Bell's customer service alternative facilitation.

9/18/07 at 5:2-4; docket #340) ("Clearly, I didn't make any resolution . . . regarding the question of injunctive relief on the motion that I already heard.").

On September 21, 2007, Taco Bell moved for reconsideration of such order, (Docket #319), which the Court had granted leave to file. (Tr. of H'rg of 9/18/07; docket #340.) On March 24, 2008, the Court denied the motion without any explanation before resigning on April 4, 2008. (Order of 3/24/08 at 1; docket #367.)

On February 15, 2008, plaintiffs moved to compel the production of correspondence between Taco Bell's defense attorneys in the instant action and Taco Bell's in house counsel, on one hand, and Taco Bell's consultant, Alianza Development International, LLC ("Alianza"), on the other hand, despite Taco Bell's invocation of the attorney-client privilege and attorney work-product doctrine. (Docket ##363-364.) Alianza has provided project management services to Taco Bell and specifically overseen virtually all of the comprehensive modifications[8] made by contractors[9] to the majority of Taco Bell's California company-owned stores between 2006 and the present, which are intended to voluntarily enhance the accessibility of such stores. Such motion is currently pending.

On April 30, 2008, the parties filed a Joint Statement of Issues regarding a discovery dispute as to whether Taco Bell must further supplement its response to an interrogatory seeking the basis for Taco Bell's position that the removal of certain alleged architectural barriers at certain Taco Bell company-owned stores at issue is not "readily achievable" within

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[8] Taco Bell disagrees with plaintiffs' characterization of such modifications as "alterations" presumably within the technical definition of an "alteration" in the ADA. 28 C.F.R. § 36.402.

[9] Given that Taco Bell has never described or represented that Alianza is a general contractor, Taco Bell is uncertain as to why plaintiffs have characterized Alianza as a "contractor."

the meaning of the ADA.[10] To date, the magistrate judge assigned to hear discovery disputes in this action has not requested formal briefing.

Taco Bell anticipates filing a motion for summary judgment or, in the alternative, summary adjudication based upon the mootness doctrine and other arguments. Taco Bell intends to seek leave of court to file an oversized brief and permission to file a separate statement of facts. The Court remarked, "I certainly would be of a mind to hear such a motion. I think it's a question of when." (Tr. of H'rg of 9/27/07 at 5:20-21; docket #330.) Indeed, the Court, referring expressly to Taco Bell's contemplated "mootness motion", noted, "I may have to embrace some of those questions in this particularized proceeding [i.e., the mini trial] we're talking about." *Id*. at 11:7-8. Thus, contrary to plaintiffs' assertion, the mootness question is not "largely irrelevant" even according to the predecessor judge assigned to hear this action.

5. Amendment of Pleadings.

a. Plaintiffs' Statement.

The deadline to move for leave to join third parties was February 28, 2007. (Order to Continue Deadline to File Motion for Leave to Join Third Parties and Stay Remainder of Pretrial Dates, Oct. 3, 2006, Docket No. 213).

b. Defendant's Statement.

Plaintiffs have failed to join as a party the landlords of stores at which Taco Bell is the tenant or franchisee operators of stores that are not operated by Taco Bell. Plaintiffs have, to date, not served or attempted to join such parties pursuant to Fed. R. Civ. P. 19.

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[10] To date, Taco Bell has already provided to plaintiffs the names of multiple witnesses, produced a mountain of relevant documents addressing both the "nature and cost" of the modifications voluntarily made by Taco Bell, 42 U.S.C. § 12181(9), and specifically addressed the fact that the requested actions sought by plaintiffs would not be "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). Taco Bell has also offered to supplement its response to clarify its reliance upon the disruption to store operations as an example of the difficult nature of the requested modifications. Plaintiffs continue to seek relief from the Court.

6. Evidence Preservation.

a. Plaintiffs' Statement.

Plaintiffs' Counsel have retained and preserved all hard-copy and electronic documents and other materials in their possession relevant to this litigation.

b. Defendant's Statement.

Taco Bell has internally circulated memoranda to its restaurant general managers and/or other employees specifically identified by Taco Bell as potentially having relevant documents, and insisted upon strict compliance with Taco Bell's document preservation policy including electronically-stored data or other evidence that may be potentially relevant to the instant action.

7. Disclosures

a. Plaintiffs' Statement

Plaintiffs have fully and timely complied with the initial disclosure requirements of Fed. R. Civ. P. 26 and have repeatedly supplemented those disclosures. Plaintiffs's disclosures include the following types of documents and information: names and addresses of class members (over 1,600); photographs of Taco Bell stores; and documents relating to Taco Bell restaurants obtained from building departments.

b. Defendant's Statement.

Taco Bell has fully and timely complied with the initial disclosure requirements and has repeatedly supplemented those disclosures. The disclosures made have included potential witnesses and the identity of relevant documents. For example, Taco Bell has provided photographs of modified elements at numerous Taco Bell California company-owned stores and detailed written explanations addressing how and why plaintiffs' modification requests have become moot.

8. Discovery.

a. Plaintiffs' Statement

The parties have exchanged a good deal of discovery since the case was filed in 2002. In September, 2007, Judge Jenkins ordered that the parties prepare for a "bellwether" trial of 20 stores, see infra ¶ 15; since that time, discovery has focused on matters relevant to that trial.

The Pretrial Order dated September 28, 2007 (Docket No. 329) provided that each party would have 20 depositions, 100 interrogatories, 100 document requests, and unlimited requests for admission.

Plaintiffs respectfully request that they be permitted to propound an additional 25 interrogatories. By way of background, in a set of interrogatories dated December 11, 2007, Plaintiffs requested that Defendant provide its position and defenses with respect to each of the elements in the 20 bellwether stores that Plaintiffs had identified as being in violation of applicable standards. Although it required only six interrogatories to make the request, those interrogatories addressed approximately 1,500 violations. Both parties and the court acknowledged that it was likely reasonable to count it as more than six requests. (See Tr. of Proceedings (1/9/2008) at 16-31 (Docket No. 358.) Plaintiffs argued that the information was essential for them to prepare for trial. Judge Jenkins agreed, and permitted Plaintiffs to propound those six interrogatories in full. (Id. at 31.)

However it may have been appropriate to count those interrogatories, Defendant has objected to any further interrogatories since that time as being over the allotted number. For example, Defendant has challenged the methodology of the jointly-selected Special Master; Plaintiff propounded an interrogatory asking the grounds for such challenges. Defendant refused to respond on the grounds that Plaintiffs were over the numerical limit. Plaintiffs respectfully request the flexibility to inquire into additional matters without having to request leave of court each time, and thus request an additional 25 interrogatories.

Finally, Plaintiffs have pending before Magistrate Judge Larson a motion to compel originally briefed before Judge Jenkins as well as a Joint Statement of Issues concerning a second discovery matter.

b. Defendant's Statement

The scope of discovery already taken in this action has been affected by the bifurcation of the trial in this action into two different stages. Stage I is intended to address injunctive relief and Stage II is intended to address damages under the state law claims. On February 25, 2005, the Court adopted the Joint Pre-Trial Order submitted jointly by the parties wherein the parties stated that they "agree that Stage I of these proceedings will determine *equitable relief* for the class in this case." (Joint Pre-Trial Briefing Schedule and Order of 2/25/05 at 3:4-5; docket #169) (emphasis added).

Although this Court subsequently further limited the scope of a Stage I trial by ordering a mini trial currently scheduled for November 10, 2008, (Pretrial Order of 9/28/07; docket #329), as to a limited number of stores at issue in this action, (Order of 10/18/07; docket #338), the fact remains that such so-called "Bellwether" mini trial shall address only plaintiffs' injunctive relief claims (pertaining to 20 stores only) and not plaintiffs' state law damages claims.

Consistent with the foregoing distinction, plaintiffs have thus far refused to answer Taco Bell's discovery requests addressing their damages claims. For example, plaintiffs have objected to discovery as to whether class members have a "disability" within the meaning of the ADA that renders them mobility-impaired on the ground that it is premature during Stage I. (Pls.' Response to TBC's Second Set of Interrogatories of 1/10/05 at 2:15-16) (objecting to interrogatory No. 1 because "the information it seeks is not relevant to Stage 1 proceedings in this case"). Plaintiffs have objected to Taco Bell's interrogatories and document inspection requests based on the ground that such discovery is beyond the scope of Stage I. (Pls.' Response to TBC's Second Set of Interrogatories of 1/10/05 at 3:15-16, 3:25-26, 4:7-8, 4:15-16) (objecting to interrogatory Nos. 2, 3, 4, 5); (Pls.' Response to TBC's Second Request for Production of Documents of 1/10/05 at 3:7-8, 3:14-15, 4:3-4, 5:7-8) (objecting to inspection demands Nos. 4, 5, 7, 11). Indeed, this Court has recently precluded discovery as "unripe" on the basis that it pertained to damages claims. (Order of 1/11/08 at 1:24-25; docket #354; order of 1/18/08 at 3:13-14; docket #359; Tr. of H'rg of 1/9/08 at 10:2; 11:16-23; 35:24; 36:3-4;

37:22-23; 42:12; 43:12; docket #358; *see also* Minutes of 1/9/08; docket #353.) Presumably, such discovery shall be permissible in Stage II. Thus, the parties will need an opportunity to conduct discovery as to plaintiffs' damages claims after Stage I proceedings have been completed.

As for discovery relating to plaintiffs' injunctive relief claims to be resolved during Stage I, plaintiffs have propounded over the years 11 sets of interrogatories, 9 sets of document inspection demands, and 3 sets of requests for admissions. Plaintiffs have received in response a mountain of information and documents addressing Taco Bell's modifications at its California company-owned stores.[11] Plaintiffs have also taken numerous depositions including multiple PMK depositions of Taco Bell's corporate designees as to numerous topics. In addition, plaintiffs' counsel have conducted site inspections of four comprehensively modified stores in October 2006 and more recently of 13 comprehensively modified stores with their retained expert in March 2008. Thus, plaintiffs' counsel have firsthand knowledge of the extent of comprehensive modifications to numerous Taco Bell stores, but have inexplicably refused to withdraw their injunctive relief claims as to such stores to date. If anything, despite the mountain of information within plaintiffs' possession to evaluate the fact that plaintiffs' injunctive relief claims are moot, plaintiffs have recently engaged in what appear to be questionable discovery tactics, which appear vexatious and intended to manufacture discovery disputes to bias the Court against Taco Bell and its counsel.

Although the Court's September 28, 2007 Pretrial Order allowed plaintiffs to propound 100 interrogatories, (Docket #329), plaintiffs exhausted such limit via their 13 interrogatories propounded on October 17, 2007, their allegedly "6" interrogatories propounded on December

[11] On February 25, 2005, the Court adopted the Joint Pre-Trial Order submitted by the parties wherein the parties stated that they "agree that Stage I [of these proceedings] will not require a determination of the history of changes that each element at Taco Bell restaurant may have undergone during the class period, except to the extent necessary to resolve any dispute regarding the accessibility standard that applies to a particular element at a particular restaurant." (Doc. #169 at 3:5-8.)

11, 2007,[12] and their 2 interrogatories propounded on December 20, 2007. To make matters worse, as of January 4, 2008, which is when Taco Bell provided plaintiffs with its portion of an Update to the Joint Status Conference Statement ultimately filed on January 5, 2008 (docket #350), which briefed the discovery dispute as to the counting of plaintiffs' interrogatories, *plaintiffs had failed to offer any extension of time to respond to the December 11, 2008 interrogatories*, which was literally 10 days before Taco Bell's responses were then due.

On January 9, 2008, the Court conducted a Status Conference and addressed the precise issue of whether plaintiffs had exceeded the 100 interrogatory limit. The Court repeatedly acknowledged, on the record, that plaintiffs had, in fact, exceeded such limit,[13] but that the Court would allow the "augmentation" of such limit conditioned upon an extension of time for Taco Bell to respond by March 10, 2008. (Tr. of H'rg of 1/9/08 at 18:1-5; 19:12-19; 20:14-16; 30:21-31:20; 43:19-20; 58:2-4; 58:4-7; 58:8-10; 59:3-6; docket #358.)

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[12] On December 11, 2007, plaintiffs propounded by e-mail what purported to be ***six*** interrogatories, but which were, in reality, far more. Such interrogatories incorporated by reference **267 pages of documents** addressing approximately 1,500 measurements of the elements taken by the Special Master as part of his Interim Survey Reports regarding the so-called 20 Bellwether stores. The bulk of the documents consist of 266 pages of so-called Bellwether charts e-mailed to Taco Bell on November 30, 2007. The additional document incorporated by reference is page 4 of plaintiffs' November 30, 2007 response to Taco Bell's Interrogatory No. 2.

Arguably, plaintiffs propounded approximately 8,000 interrogatories via their December 11, 2007 interrogatories. The December 11th Interrogatories Nos. 1-5 each pertained to 1,492 elements [1,492 x 5 = 7,460]. Interrogatory No. 6 pertained to 415 elements. Thus, 7,460 + 415 = 7,875. *Collaboration Properties, Inc. v. Polycom, Inc.*, 224 F.R.D. 473, 475 (N.D. Cal. 2004) (Chen, Mag. J.) (single interrogatory seeking information about 26 separate products in a patent case held to contain 26 discrete subparts), *cited in* The Rutter Group, *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 11:1689 (2007). Based upon a pragmatic approach to counting plaintiffs' December 11, 2007 interrogatories, there is little doubt that each element that is the subject of the six interrogatories introduces a line of inquiry that is separate and distinct from the inquiry made by the element that preceded it so that the 8,000 subparts "must be considered" "separate interrogator[ies]" "no matter how [the six interrogatories are] designated." *Willingham v. Ashcroft*, 226 F.R.D. 57, 59 (D.D.C. 2005) (Facciola, Mag. J.). Noting that the responses would require addressing over 1,400 elements, the Court remarked at the January 9, 2008 Status Conference that "that's quite a response." (Tr. of H'rg of 1/9/08 at 28:14-15; docket #358.)

[13] (Tr. of H'rg of 1/9/08 at 16:14-16; docket #358) ("it's hard form me to see where you could argue that those -- that's one interrogatory. You know, I think you've got trouble here."); *id.* at 16:22-23 ("you clearly have more than one interrogatory with respect to each of these matters").

Despite Taco Bell's efforts to convince plaintiffs that they had exceeded the 100 interrogatory limit via their October 17, 2007, December 11 and 20, 2007 interrogatories, plaintiffs steadfastly refused to acknowledge such position, let alone, acknowledge that they had exceeded propounding "6" interrogatories via their December 11, 2007 interrogatories until the January 9, 2008 Status Conference itself after the Court had already stated, on the record, its position that plaintiffs had exceeded the 100 interrogatory limit. (Tr. of H'rg of 1/9/08 at 21:14-17) ("Ms. Robertson: I think the Court is exactly right. They're trying to figure out -- you know, yes, it's absolutely more than one interrogatory. It's more than six interrogatories. And I think the way to go about it is as the Court suggested.").

During such January 9, 2008 Status Conference, the Court also expressly granted leave for plaintiffs to *augment* their interrogatory limit to propound discovery as to allegedly "2" interrogatories,[14] (Tr. of H'rg of 1/9/08 at 58:4-7), which plaintiffs had been threatening to propound since December 20, 2007, but once again the Court ensured that Taco Bell would receive a reasonable extension of time to respond by March 10, 2008. (Tr. of H'rg of 1/9/08 at 34:9-13; 59:24-25; Order of 1/18/08 at 2:20-24; docket #359.) Following the issuance of the January 18, 2008 order containing the Court's augmentation rulings, (Order of 1/18/08 at 2:20-24, 3:9-10; docket #359), plaintiffs ultimately served their modified "2" interrogatories *with leave of Court* on January 22, 2008.

Despite all of the foregoing, two days later, on January 24, 2008, plaintiffs inexplicably proceeded to serve "3" additional interrogatories, which appear to be once again far more than the stated number of interrogatories in reality, *without seeking leave of court*. Taco Bell objected to such interrogatories on February 28, 2008, inter alia, noting the violation of the 100

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[14] One of the interrogatories sought the factual basis for construction tolerances relating to more than 67 elements. The other interrogatory incorporated by reference plaintiffs' second set of requests for admissions seeking 100 admissions, and sought the factual basis for potential denials of such requests. The Court held such RFA-related interrogatory to be overbroad and refused to allow "contention" interrogatories pertaining to requests for admissions 1-22 and 98-100. (Tr. of H'rg of 1/9/08 at 58:8-10) ("I am not allowing augmentation as to the goings-on in the parties in the draft order. Take those off the table."); *see also id.* at 18:14-22; 58:16-19. The Court also noted the impropriety of using interrogatories premised upon requests for admissions in order to avoid the interrogatory limit. *Id.* at 17:5-25; 18:14-22; 22:20-23:2; 23:4-6.

interrogatory limit. Thereafter, plaintiffs failed to meet and confer at all in response to any of Taco Bell's objections.

Upon reading plaintiffs' portion of the JCMS received via e-mail on the morning of May 7, 2008 (one day before the JCMS was due), Taco Bell learned for the first time that plaintiffs now seek a blanket request for 25 additional unspecified interrogatories. As an initial matter, plaintiffs have not made a genuine effort to meet and confer as to such request prior to seeking relief from the Court. Moreover, plaintiffs seek to avoid satisfying the good cause standard for such augmentation of the interrogatory limit, and seek to avoid having to request leave of court "each time". With all due respect, requesting leave of court is not a meaningless gesture. Given that the interrogatory limit has already been subject to abuse, Taco Bell objects to such request. If plaintiffs seek further augmentation of the 100 interrogatory limit, then they should be required to identify the precise interrogatory they intend to propound, satisfy the good cause standard by demonstrating why they need to further exceed the 100 interrogatory limit, and provide Taco Bell with a reasonable opportunity to respond including an appropriate extension of time, if necessary. Thus, Taco Bell submits that the Court should insist that plaintiffs comply with the good cause standard each and every time they seek to propound any additional interrogatories.

9. Class Actions.

a. Plaintiffs' Statement.

On February 23, 2004, the Court certified the following class:

> All 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 California Taco Bell corporate restaurants.

Moeller, 220 F.R.D. at 613-14 (Docket No. 84).

b. Defendant's Statement.

On February 24, 2004, the Court certified a class under Rule 23(b)(2).[15] Notice has not been provided to any class members providing them with an opportunity to opt out of Stage II, i.e., the damages stage, of this action.

Taco Bell submits that the individualized proof required for class members to recover state law damages is not suited for class action treatment, and that the Court should revisit Judge Jenkins' class certification of the damages claims in this action (order of 2/24/04; docket #84), which is ambiguous because it is silent as to whether it includes deterrence claims.[16] *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 444 (N.D. Cal. 1994) (Henderson, C.J.) ("a federal court has the discretion to revisit at any time all or any part of a class certification order in an action pending before it").

10. Related Cases.

a. Plaintiffs' Statement.

It is Plaintiffs' understanding that a number of individual disability access cases against Taco Bell have been stayed pending the resolution of the present litigation. The only case Plaintiffs believe is technically related to this one is Saldana-Neily v. Taco Bell of America, Inc., Case No. C 04-04571-PJH (N.D. Cal.).

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[15] The class consists of: "All 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 California Taco Bell corporate restaurants." (Order of 2/23/04 at 15; docket #84.)

[16] In *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994) (Henderson, C.J.), then-Chief Judge Henderson refused to certify for class treatment monetary claims based upon a deterrence theory of liability:

> "[T]he fact that [deterrence] claims are actionable is not dispositive of the question of whether they ought properly to be certified as part of a class action. Unlike claims based on actual theater visits, claims alleging incidents of deterrence are not susceptible to clear, direct proof. As a consequence, 'deterrence' claims raise individual-specific issues that would substantially increase the complexity of the case, were they certified as part of this class action."

Id. at 453. "Exercising this discretion, the Court rules that plaintiffs' deterrence claims are inappropriate for class certification." *Id.* at 453.

b. Defendant's Statement.

Numerous cases including a case captioned *Saldana-Neily v. Taco Bell of America, Inc.*, et al., No. C 04-04571 PJH (N.D. Cal. filed Oct. 28, 2004), have either been stayed or dismissed without prejudice subsequent to the inception of this action.

11. Relief.

a. Plaintiffs' Statement.

The class seeks an injunction requiring Taco Bell to bring its corporate stores in California into compliance with Title III of the ADA, Unruh, and the CDPA, including but not limited to achieving and maintaining compliance with the DOJ Standards and Title 24 and implementing policies sufficient to ensure that class members do not experience discrimination on the basis of disability. The class seeks minimum statutory damages of $4,000 (under Unruh, see Cal. Civ. Code § 52(a)) or $1,000 (under the CDPA, see Cal. Civ. Code § 54.3) for each instance on which a class member was denied equal access to a Taco Bell corporate restaurant in California from December 17, 2001 to the date of that class member's damages trial. Finally, the class seeks its reasonable attorneys' fees and costs.

b. Defendant's Statement.

The complaint seeks injunctive relief under the federal ADA claim and pendent state law claims. The complaint also seeks monetary damages under the state law claims. If liability is established, "to maintain an action for damages pursuant to section 54 et seq. an individual must take the additional step of establishing that he or she was denied equal access *on a particular occasion*." *Donald v. Cafe Royale, Inc.*, 218 Cal. App. 3d 168, 183, 266 Cal. Rptr. 804 (Cal. Ct. App. Feb. 23, 1990) (Merrill, J.) (emphasis added). Without such proof, individual class members are not entitled to recover statutory minimum damages under California law.

12. Settlement and ADR.

a. Plaintiffs' Statement.

The parties have attempted mediation on three occasions: a four-day mediation (two two-day sessions) with the assistance of Judge Edward Infante (JAMS) in the summer of 2004;

a one-day meeting among the parties in January 2006; and a half-day mediation in March 2008 with the assistance of Judge William Cahill (JAMS). None of these sessions was successful. Plaintiffs remain open to future opportunities to discuss settlement, but do not believe it would be productive to delay the litigation toward such end.

b. Defendant's Statement.

The parties have participated unsuccessfully in mediation on two separate occasions first in or about May and July 2004 and more recently in March 2008.

13. Consent to Magistrate Judge For All Purposes.

a. Plaintiffs' Statement.

Plaintiffs do not consent to a magistrate for all purposes.

b. Defendant's Statement.

Defendant does not consent to have a magistrate judge conduct all further proceedings.

14. Other References.

a. Plaintiffs' Statement.

Plaintiffs understand that the Court has referred discovery issues to Magistrate Judge Larson. In addition, as noted above, Judge Jenkins appointed a Special Master to survey the stores at issue in the litigation.

b. Defendant's Statement.

On October 5, 2004, the Court appointed a Special Master, Bob Evans, to conduct surveys of approximately 220 Taco Bell California company-owned stores (less 20 stores previously inspected by Mr. Evans that were part of an initial Pilot Program), and prepare written interim survey reports reflecting his dimensions, values, or measurements to be completed by June 30, 2005. The Special Master surveyed the stores and determined whether an element was compliant or non-compliant based solely on the new construction standards of the ADAAG and the then-most recent version of the California Building Standards Code set forth in Title 24 of the California Code of Regulations. Thus, any determination of non-compliance by the Special Master did not take into consideration any defenses or exceptions provided under the ADA or state law. Similarly, the Special Master did not

determine whether any particular element was compliant or non-compliant at any time other than during his visit to a particular store.

Pursuant to section 7(d) of the order appointing the Special Master, the parties were supposed to meet and confer once a month to discuss disputes regarding dimensions, values, or measurements in the interim survey reports, but such meet and confer process did not occur because of delays in receiving the Special Master's interim survey reports. Indeed, plaintiffs expressly requested that the parties hold off on sending disputed issues to the Special Master so that he could complete the surveys on time. In a letter to defense counsel dated June 17, 2005, plaintiffs expressed their desire to "start our meet and confer process" after the final batch of Special Master reports were scheduled to be received on or about June 30, 2005. In the summer of 2005, Taco Bell requested plaintiffs' permission to confer with the Special Master about how measurements for various elements were taken. Plaintiffs refused. Ultimately, the Court granted Taco Bell permission to inquire as to the Special Master's measurement methodology as to certain elements, which the Special Master provided in December 2007. Because Taco Bell has invoked paragraph 7(d), the Court has refused to entertain the Special Master's measurements as findings of fact. (Order of 9/24/07; docket #324.)

Plaintiffs' recitation omits to mention that plaintiffs unilaterally filed without leave of Court the Special Master's *Interim* Survey Reports and not the *Final* Survey Reports that were expressly contemplated by the order appointing the Special Master.[17] (Order of 10/5/04 at 11:5-12:6; docket #101.) On January 12, 2007, Taco Bell responded, with leave of court, by filing 379 pages of objections. (Objections of 1/12/07; docket #247.) As mentioned above, the Court has refused to enter any findings of fact to date. (Order of 9/24/07; docket #324.)

[17] In April through June 2006, plaintiffs provided Taco Bell with approximately 220 "meet and confer" charts. Taco Bell responded with specific written chart responses corresponding with approximately 20 specific stores, but due to the redundancy of certain issues, subsequently served approximately 248 pages of responses on October 18, 19, 2006 and December 7, 2006. To the extent plaintiffs assert that Taco Bell never provided such responses, as appears to be the case at the January 9, 2008 Status Conference, (Tr. of H'rg of 1/9/08 at 23:12; Docket #358), such contention is misleading.

15. Narrowing of Issues.

a. Plaintiffs' Statement.

Judge Jenkins had bifurcated the trial into a liability phase and a remedial phase. The liability phase was to establish whether there were violations of the ADA or California law in the restaurants at issue during the class period. It was not to address relief, whether injunctive or monetary. (See Tr. of Proceedings (9/27/07) at 19 (Docket No. 330); Tr. of Proceedings (1/9/08) at 10-11 (Docket No. 358).) A second, remedial, phase was to address both injunctive relief and class damages.

In September, 2007, Judge Jenkins ordered that the liability phase was to be addressed first through a "bellwether" trial of 20 stores. This will provide an opportunity to resolve legal and factual issues common to all 220 stores in the course of a more limited and efficient trial. The parties met and conferred and have selected the 20 stores, which was memorialized by order of Judge Jenkins. (Docket No. 338.) Since that time, discovery has gone forward relating to issues to be tried during the bellwether trial.

In addition, Plaintiffs believe that the issues for trial can be significantly narrowed through a dispositive motion addressing a number of remaining elements as to which the law and facts are either undisputed or may be resolved as a matter of law.

Following the bellwether trial, Plaintiffs have proposed that the parties meet and confer and present to the Court their proposals for applying the results of that trial to the remaining restaurants, which should also considerably streamline the remaining issues.

b. Defendant's Statement.

On August 10, 2005, the Court held that the currently-defined class does not have standing to challenge the accessibility of various elements such as locks and flush controls because such elements do not fall within the scope of the mobility-impaired class members. (Order of 8/10/05 at 5:13-6:28; Docket #188.)

Pursuant to the parties' request, this Court has already bifurcated the action so that Stage I pertains to injunctive relief claims and Stage II pertains to the state law damages claims. (Joint Pre-Trial Briefing Schedule and Order of 2/25/05 at 3:4-5; docket #169) (adopting the

Joint Pre-Trial Order submitted jointly by the parties wherein the parties stated that they "agree that Stage I of these proceedings will determine *equitable relief* for the class in this case") (emphasis added). This Court has further bifurcated the Stage I trial by ordering a mini trial as to 20 stores only to be conducted on November 10, 2008 at 8:30 a.m. (Docket #338.)

Taco Bell contends that Stage I will include a determination of which elements surveyed by the Special Master were in compliance with applicable accessibility standards on the date surveyed.

Taco Bell believes that a Stage I liability determination will not result in any presumptions of liability for damages in Stage II because even if a class member with a qualifying disability were to show that he or she visited a Taco Bell restaurant at which an architectural element was found to have been out of compliance with applicable standards at the time such element was surveyed during Stage I of these proceedings, the class member nonetheless would have the burden to show (1) the architectural element was out of compliance with applicable standards at the time of the class member's visit to the restaurant; (2) the class member, in fact, attempted to access the out-of-compliance element; and (3) the class member was hindered or obstructed in his or her access to or enjoyment of the restaurant as a result of the failure of the element to comply with applicable standards. Taco Bell contends, however, that a Stage I determination that a particular architectural element was in compliance with the applicable standards will establish that there was no violation during Stage II for all class members who encountered the architectural element in the same condition as when it was surveyed.

Although plaintiffs argue that the upcoming mini trial shall merely address "liability" without regard to injunctive relief, liability cannot be determined without a concurrent determination as to the appropriate remedy. The Court cannot make a determination of liability without considering whether the relief sought is appropriate. *San Francisco Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 996 (N.D. Cal. 2001) (Legge, J.) ("Plaintiffs' present motion for summary judgment deals only with the issues of liability, and not with remedies. But

because the claims of the complaint . . . seek equitable relief, the issues of liability and remedy are not so neatly divided.").

Given that it is black letter law that a Title III ADA claim can only provide injunctive relief and no monetary damages, a so-called Bellwether trial as to 20 stores only makes sense if such trial addresses plaintiffs' injunctive relief claims. Otherwise, such a limited trial would not materially advance the resolution of the claim over which this Court has original jurisdiction. After all, if the Court determines that no injunctive relief should be awarded to plaintiffs, then plaintiffs' ADA claim should be dismissed, and the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims for monetary damages because of the novelty or complexity of trying such state law claims, the substantial predominance of the state law claims over the dismissed ADA claim, and because of the dismissal of all claims over which the Court had original jurisdiction.

Although plaintiffs appear to argue, as before, that a Stage I trial shall establish evidentiary presumptions that will apply during Stage II, it is worth noting that this Court consistently refused to adopt plaintiffs' position despite having various opportunities to do so. The preclusive effect, if any, of the mini trial should await the outcome of such trial.

Finally, plaintiffs' assumption that legal and factual issues "common to all 220 stores" shall be resolved via the mini trial is overly optimistic. As for the approximately half of the stores at issue that are subject to the "readily achievable" legal standard because they were constructed before January 26, 1993, it is black letter law that barrier removal is decided on a case-by-case basis in light of the particular circumstances at the facility at issue. *Colorado Cross Disability Coalition v. Hermanson Family Ltd.*,[18] 264 F.3d 999, 1009 (10th Cir. 2001) (holding that the ADA regulations state that whether removal of a barrier is readily achievable is subject to a case by case inquiry and applying such requirement "in light of the particular

[18] Plaintiffs' lead counsel in the instant action was also lead counsel in *Colorado Cross-Disability*.

circumstances").[19] In this regard, during the Court-ordered selection of up to 20 stores subject to the mini trial, Taco Bell expressly noted that it did not believe that the 20 stores selected for the mini trial would be representative of the issues to be litigated at trial as to other stores. (Letter from G. Hurley to Court of 10/8/07 at 1; Docket #332.)

16. Expedited Schedule.

a. Plaintiffs' Statement.

The bellwether approach described in paragraph 15, supra, will expedite the resolution of common issues.

b. Defendant's Statement.

This action should not be handled on an expedited basis.

17. Scheduling.

a. Plaintiffs' Statement.

Judge Jenkins had set this case for a two-week trial to the bench starting November 10, 2008. It is Plaintiffs' understanding that this date is not available as a first setting on this Court's calendar.

Plaintiffs respectfully propose the following deadlines.

Designation of experts and expert reports:	September 11, 2008
Designation of supplemental or rebuttal expert and reports	October 1, 2008
Expert and fact discovery cutoff	November 28, 2008
Dispositive motion deadline	December 19, 2008
Dispositive motion hearing	To be discussed at Case Management Conference.
Pretrial conference	To be discussed at Case Management Conference.

[19] 28 C.F.R. Pt. 36, App. B, at 647; *see also Panzica v. Mas-Maz, Inc.*, No. CV 05-2595 (ARL), 2007 WL 1732123, at *8 (E.D.N.Y. June 11, 2007) (Lindsay, Mag. J.) ("Whether the removal of an architectural barrier is readily achievable is to be decided on a case-by-case basis utilizing all of the statutory factors."); *Guzman v. Denny's Inc.*, 40 F. Supp. 2d 930, 935 (S.D. Ohio Feb. 4, 1999) (Dlott, J.) (quoting 56 Fed. Reg. 35544, 35568) ("Whether or not any of these measures is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in the definition of readily achievable") (DOJ final rule).

Trial: Plaintiffs respectfully request that the bellwether trial be commenced as soon as possible. Since this case was filed in December 2002, several class members have died. Further, there are several significant legal and factual disputes between the parties, and one of the purposes of the bellwether trial is to resolve these disputes. Until that occurs, there is no realistic chance of settlement. Finally, because the bellwether trial is to the Court, it does not need to be tried in one setting, but rather can be tried a week at a time as the Court's schedule permits.

b. Defendant's Statement.

On September 28, 2007, this Court issued a Pretrial Order (docket #329) setting forth cut-off dates for non-expert discovery (June 27, 2008), designation of experts (July 11, 2008), expert reports (July 18, 2008), designation of supplemental/rebuttal experts (August 1, 2008), expert discovery cut-off (August 22, 2008), the hearing of dispositive motions (October 7, 2008 at 9:30 a.m.), the pretrial conference date (November 4, 2008 at 3:30 p.m.), and trial date (November 10, 2008 at 8:30 a.m.). Given that the current pretrial dates are premised upon the predecessor judge's calendar, if this Court is unable to conduct such mini trial on November 10, 2008, then Taco Bell is amenable to such mini trial on whatever subsequent date is available to the Court.

18. Trial.

a. Plaintiffs' Statement.

The bellwether trial will be to the Court. Plaintiffs predict it will take two to three weeks. Because it is to the Court, Plaintiffs respectfully propose that if more time is needed than is available on the Court's docket starting on August 10, 2009, the trial be adjourned and reconvened at a later date.

b. Defendant's Statement.

As previously mentioned in headings 8 and 15, *supra*, pursuant to the parties' agreement, this Court bifurcated the trial with Stage I to address injunctive relief and Stage II to address damages. Although this Court subsequently further limited the scope of a Stage I trial by ordering a mini trial currently scheduled for November 10, 2008 as to only 20 stores at issue

in this action, the fact remains that such so-called "Bellwether" trial shall address only plaintiffs' injunctive relief claims (pertaining to 20 stores only) and not plaintiffs' state law damages claims.

19. Disclosure of Non-party Interested Entities or Persons.

a. Plaintiffs' Statement.

The parent company of defendant Taco Bell Corporation is Yum! Brands, Inc. Plaintiffs are not aware of any other party that has either (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

b. Defendant's Statement.

Taco Bell Corp. and Taco Bell's parent, Yum! Brands, Inc., have a financial interest.

20. Such Other Matters as May Facilitate the Just, Speedy and Inexpensive Disposition of this Matter.

a. Plaintiffs' Statement.

Nothing at this time.

b. Defendant's Statement.

None.

Respectfully submitted,

FOX & ROBERTSON, P.C.

May 8, 2008

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May 8, 2008

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