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TACO BELL CORP.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FRANCIE MOELLER, et al.,

Plaintiffs,

vs.

TACO BELL CORP.,

Defendant.

CASE NO. C 02-5849 PJH JL

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT OF TACO BELL CORP.; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

DATE: October 29, 2008
TIME: 9:00 a.m.
CTRM: 3, 17th Floor
JUDGE: Hon. Phyllis J. Hamilton

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 29, 2008, at 9:00 a.m., or as soon thereafter as the motion may be heard before the Honorable Phyllis J. Hamilton in Courtroom 3 of this Court, 450 Golden Gate Avenue, San Francisco, California, defendant Taco Bell Corp. hereby moves for partial summary judgment.

This motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in support thereof, the concurrently-filed Declarations of Steve Elmer and Richard H. Hikida, all other

papers and pleadings on record with this Court, and upon such other arguments and items as may be presented to the Court at the hearing of this matter.

DATED: September 3, 2008

GREENBERG TRAURIG, LLP

By /s/
Gregory F. Hurley
Attorneys for Defendant
TACO BELL CORP.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page**

State Cases

Federal Statutes

State Statutes

Federal Regulations

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Taco Bell Corp.'s ("Taco Bell") motion, if granted, would significantly narrow the scope and complexity of the case given that approximately half of the stores at issue are "new construction" because they were constructed after January 26, 1993. Taco Bell's motion would also clarify that plaintiffs have to meet the "readily achievable" legal standard for approximately 110 stores that were constructed before January 26, 1993 instead of the potentially complex "alterations" legal standard and its 20% disproportionality analysis. 28 C.F.R. § 36.403(a) & (f)(1).

II

STATEMENT OF THE ISSUES TO BE DECIDED

Is plaintiffs' ADA claim premised upon violation of "new construction" standards subject to dismissal based upon the statute of limitations?

Is plaintiffs' ADA claim premised upon alleged "alterations" standards subject to dismissal based upon the statute of limitations?

III

STATEMENT OF FACTS

A. Plaintiffs Commenced This Action on December 17, 2002.

Plaintiffs commenced the instant action on December 17, 2002. (Original Compl. of 12/17/02; Docket #1; Declaration of Richard H. Hikida of 9/3/08 ("Hikida decl.") ¶ 3 Ex. 2.) The original Complaint alleged that Taco Bell discriminated against plaintiffs and members of the putative class, *inter alia*, based upon the following:

> "d. Failing to design and/or construct restaurants built for first occupancy after January 26, 1993 so that they are readily accessible to and usable by individuals with disabilities;
> e. Failing to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the restaurants are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs;
> f. Failing to make alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities . . . ."

(Original Compl. of 12/17/02 ¶ 53.) On February 5, 2003, Taco Bell filed an Answer to the original Complaint, which included the third affirmative defense of statute of limitations. (Answer of 2/5/03 at 6:1-3; Docket #12; Hikida decl. ¶ 4 Ex. 3.) On August 4, 2003, plaintiffs pled the foregoing same allegations in their First Amended Complaint, which added a state law claim under section 54.3 of the California Disabled Persons Act (Cal. Civ. Code § 54.3). (First Am. Compl. of 8/4/03 ¶ 54; docket #36; Hikida decl. ¶ 5 Ex. 4.) On December 21, 2004, Taco Bell filed its First Amended Answer to the Plaintiffs' First Amended Complaint, which included the second affirmative defense of statute of limitations. (Answer of 12/21/04 at 5:14-16; Docket #155; Hikida decl. ¶ 6 Ex. 5.)

B. Plaintiffs Have Alleged the Existence of "Alterations" at 85 Stores Between January 27, 1992 and December 16, 2001 at Stores Constructed Before January 26, 1993.

In April through June 2006, plaintiffs produced to Taco Bell as part of the litigation in this action various Meet and Confer charts setting forth store-specific contentions for approximately 220 stores.[1] (Hikida decl. ¶ 7.) Plaintiffs alleged in their Meet and Confer charts numerous purported "alterations" that occurred between January 27, 1992 and December 16, 2001 at Taco Bell company-owned stores constructed before January 26, 1993. In particular, plaintiffs have alleged the existence of "alterations" that occurred during this time period at 85 stores, that is, store numbers 112, 137, 176, 283, 526, 567, 829, 863, 955, 991, 1034, 1827, 2241, 2297, 2423, 2700, 2755, 2756, 2778, 2801, 2812, 2848, 2861, 2910, 2914, 2915, 2918, 2930, 2933, 2961, 2968, 2971, 2984, 3027, 3046, 3064, 3070, 3078, 3089, 3090, 3096, 3119, 3125, 3132, 3184, 3196, 3207, 3208, 3209, 3222, 3390, 3398, 3420, 3471, 3498, 3555, 3579, 3904, 3948, 4027, 4034, 4054, 4168, 4192, 4204, 4211, 4284, 4311, 4325, 4342, 4343, 4355, 4356, 4466, 4510, 4518, 4558, 4578, 4617, 4704, 4799, 4951, 5019, 5081, 5138. (Hikida decl. ¶ 8 Ex. 7.)

C. Plaintiffs Have Alleged That 91 Stores Were Constructed After January 26, 1993 and Before December 17, 2001.

Plaintiffs have claimed via Meet and Confer Charts that 91 stores were constructed after January 26, 1993 and before December 17, 2001 (i.e., store numbers 99, 5512, 5513, 5539, 5570, 5636, 5641,

[1] The "meet and confer" process was contemplated by paragraphs 7(d) and 7(e) of the Order Appointing Special Master filed on October 5, 2004. (Docket #101.)

9407, 9414, 9417, 9427, 9454, 9489, 15319, 15362, 15379, 15455, 15507, 15508, 15570, 15573, 15614, 15625, 15723, 16140, 16276, 16336, 16370, 16381, 16478, 16520, 16534, 16812, 16819, 16909, 17181, 17224, 17243, 17363, 17435, 17471, 17473, 17529, 17556, 17572, 17576, 17751, 17984, 17997, 18003, 18112, 18315, 18377, 18577, 18606, 18687, 18701, 18808, 18901, 19289, 19298, 19344, 19389, 19413, 19498, 19509, 19515, 19532, 19591, 19744, 19950, 20052, 20175, 20180, 20190, 20204, 20241, 20310, 20353, 20566, 20578, 20635, 20646, 20676, 20690, 20758, 20893, 21000, 21018, 21047, 21226.) (Hikida decl. ¶ 9 Ex. 8.) This is supported by certificates of occupancy issued by respective local municipalities. (Declaration of Steve Elmer of 9/3/08 ("Elmer decl.") ¶ 2 Ex. 1.)

D. A Number of So-Called "New Construction" Taco Bell Stores Were Previously Owned or Operated by Former Owners or Operators Such That They Are "Existing Facilities" Whose Elements Were Constructed By Non-Taco Bell Owners or Operators.

Plaintiffs have also claimed via Meet and Confer Charts that 13 additional stores are subject to "new construction" standards because they were allegedly constructed after January 26, 1993 and before December 17, 2001 (i.e., store numbers 124, 459, 1934, 3049, 3053, 3079, 3083, 3112, 3117, 3136, 3137, 3145, 3152), (Hikida decl. ¶ 10 Ex. 9), but they are, in reality, "existing facilities" that were constructed *before* January 26, 1993 and were, in any event, previously owned and/or operated by non-Taco Bell owners or operators.[2] (Elmer decl. ¶ 3 Exs. 7-18.)

In addition, plaintiffs have also claimed via Meet and Confer Charts that 14 additional stores are subject to "new construction" standards because they were allegedly constructed after January 26, 1993 and before December 17, 2001 (i.e., store numbers 15507, 15508, 15723, 16534, 17473, 17984, 18315, 18577, 19515, 19532, 19950, 20241, 20310, 20676), (Hikida decl. ¶ 12 Ex. 11), but they are, in reality, subject to "existing facilities" standards because they were previously owned and/or operated by non-Taco Bell owners or operators who presumably constructed the allegedly non-compliant elements at issue.[3] (Elmer decl. ¶ 5 Exs. 22-23.)

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[2] Similarly, store numbers 1687, 2007, 3007, which plaintiffs characterize as having been constructed either within the 1 year limitations period or after the commencement of this action, (Hikida decl. ¶ 11 Ex. 10), are "existing facilities" as well. (Elmer decl. ¶ 4 Exs. 19-21.) Such stores were previously owned and/or operated by non-Taco Bell owners or operators. *Id.*

[3] Indeed, separate and apart from the 30 stores mentioned above, there were 60 prior operators at Taco Bell store numbers 158, 176, 567, 1034, 1496, 2241, 2297, 2423, 2755, 2756, 2812, 2848, 2861,

E. Each of the Four Class Representatives Claim to Have Visited Taco Bell Stores and to Have Noticed Alleged ADA Violations Before the Applicable One-Year Limitations Period.

1. Katherine Corbett

Named plaintiff and class representative Katherine Corbett has been a Taco Bell customer for a long time. (Corbett Dep. of 7/2/03 at 28-29; Hikida decl. ¶ 13 Ex. 12.) At the time of her July 2003 deposition, Corbett had used a wheelchair for mobility for 22 years. (Corbett Dep. at 13.) At the time of her July 2003 deposition, Corbett had visited Taco Bell stores 2-3 times per month over the past 5 years. (Corbett Dep. at 29.) Corbett estimated that she frequently stopped off to get a drink at store #4951, located in Novato, California, between 1990 and 1995, and continued to stop by that store 1-2 times per year since 1995. (Corbett Dep. at 103.) Corbett claims that store #4951 is not easy to get around in. (Corbett Dep. at 103.)

2. Francie Moeller

As of her June 2003 deposition, named plaintiff Francie Moeller had patronized Taco Bell stores since the 1970s and had visited on a fairly regular basis. (Moeller Dep. of 6/11/03 at 15; Hikida decl. ¶ 14 Ex. 13.) Moeller estimated that she visited Taco Bell stores about 4-5 times per year, at minimum. (Moeller Dep. at 15.)

Moeller has claimed to have encountered barriers at store #3948, which is located in Santa Rosa, California for as long as she has visited that store, which she estimates as commencing in 1996 as soon as she moved to the Santa Rosa area of California. (Moeller Dep. at 22-23.) Moeller claimed to have encountered a barrier to access at store #3948 more than 2 years before her June 11, 2003 deposition. As of the time of her June 2003 deposition, Moeller claimed to have visited store #4211, which is also located in Santa Rosa, California, 4-6 times per year for at least 5-6 years. (Moeller Dep. at 63.)

2910, 2914, 2915, 2933, 2961, 2971, 3027, 3046, 3064, 3070, 3071, 3077, 3078, 3089, 3090, 3096, 3119, 3125, 3128, 3129, 3130, 3132, 3160, 3207, 3208, 3241, 3390, 3398, 3420, 3471, 3473, 4168, 4204, 15507, 15508, 15723, 16534, 17473, 17984, 18315, 18577, 19515, 19532, 19950, 20241, 20310, 20676. (Elmer decl. ¶ 6.) Plaintiffs have offered no explanation as to why they did not pursue timely claims against such prior operators.

3. Edward Muegge

As of the time of his June 2003 deposition, named plaintiff Edward Muegge had been a Taco Bell customer for 10-15 years or probably more. (Muegge Dep. of 7/3/03 at 52; Hikida decl. ¶ 15 Ex. 14.) Muegge began to use a scooter to visit Taco Bell stores as of 1999. (Muegge Dep. at 52.) Muegge's first visit to store #4211, which is located in Santa Rosa, California, was in 1999. (Muegge Dep. at 65.) Muegge states that he first visited #4558 probably in 1999 and perhaps in the year 2000. (Muegge Dep. at 81-82, 92.) Muegge has visited Taco Bell stores 2-3 per month since he began to use a scooter for mobility. (Muegge Dep. at 73.) Muegge has "frequented Taco Bell quite a bit." (Muegge Dep. at 73.)

4. Craig Yates

Named plaintiff Craig Yates has been a Taco Bell patron since 1972. (Yates Dep. of 6/12/03 at 22; Hikida decl. ¶ 16 Ex. 15.) Yates has visited Taco Bell stores for once a month, at minimum, for 31 years. (Yates Dep. at 22.) Yates claims to have become disabled on or about May 21, 1995. (Yates Dep. at 6.) As of Yates' June 2003 deposition, Yates had visited store #4951, which is located in Novato, California, for at least 6 years. (Yates Dep. at 23.) Although Yates complains about the accessibility of the queue line at store #4951, he acknowledged at the time of his June 2003 deposition that he was not able to make it through the queue line at that store "a couple of years ago." (Yates Dep. at 27, 29.) Yates has admitted that he goes to the exit of the queue line to place his order once a month for six years. (Yates Dep. at 34.)

Yates became a plaintiff because he heard about the opportunity to sue Taco Bell via a newsletter about a year before his June 2003 deposition (i.e., approximately June 2002). (Yates Dep. at 13.)

At the time of his 2003 deposition, Yates had been a licensed contractor for over 25 years. (Yates Dep. at 9.) As a contractor, Yates has worked on light industrial/commercial office complexes. (Yates Dep. at 21.)

F. Plaintiffs Can Easily Find Out the Identity of the Owner and Operator of a Particular Store By Contacting the County Assessor's Office.

An ADA litigant can easily learn the identity of an owner or operator of a particular store by contacting the County Assessor's Office. (Hikida decl. ¶ 17 Ex. 16.) Indeed, that is precisely how ADA litigants learn which proper defendants including the owner or landlord of the premises to sue at the outset of a Title III ADA action. *Id.* Indeed, plaintiffs in the instant action appear to have obtained literally thousands of pages of building permit and related documents pertaining to the California company-owned Taco Bell stores maintained by local municipalities without the issuance of a subpoena, thereby demonstrating the ease in which such information is publicly available. (Hikida decl. ¶ 18 Exs. 17-21.)

G. Taco Bell's Employees or Witnesses Such as Ed Medina Have Passed Away or Are No Longer Available to Testify.

Taco Bell's Facility Manager throughout the 1990s, Ed Medina, has passed away and is unavailable to testify at trial on Taco Bell's behalf. (Elmer decl. ¶ 7.) Similarly, additional Taco Bell employees who are potential witnesses because they participated in Taco Bell's accessibility modifications are no longer employed by Taco Bell and so Taco Bell can no longer compel them to testify on its behalf (albeit the subpoena process remains available to the extent that Taco Bell can determine their current address). *Id.*

IV

ARGUMENT

A. Legal Standard

1. The Policies Underlying the Statute of Limitations Promote Justice By Encouraging Litigants to Promptly File Suit to Prevent Unfair Litigation on Stale and Forgotten Matters.

The Supreme Court of the United States has addressed the policies underlying the statute of limitations as follows:

> "Statute of limitations, which 'are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is *unjust* to fail to put the adversary on notice to defend within a specified period of time and that 'the

> right to be free of stale claims in time comes to prevail over the right to prosecute them.' These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."

United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal citations omitted and emphasis added), *quoted in United States v. Marolf*, 173 F.3d 1213, 1217-18 (9th Cir. 1999), *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991), and *Landreth v. United States*, 850 F.2d 532, 535 (9th Cir. 1988). The U.S. Supreme Court similarly explained:

> "Statutory limitation periods are: 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.'"

American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) (quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944)), *quoted in United States v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996); *see also Marolf*, 173 F.3d at 1218; *Jordache*, supra, 18 Cal. 4th, at 756 (same).

"The rationale for limitations periods is to encourage persons promptly to file legal claims in order to prevent unfair litigation on stale and forgotten matters." *N.L.R.B. v. Cal. Sch. of Prof. Psych.*, 583 F.2d 1099, 1101 (9th Cir. 1978) (citing *American Pipe* and *Order of Railroad Telegraphers*).

California law is consistent with federal law in interpreting the purposes underlying a statute of limitations. *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 197 (Cal. 1910) ("[I]mportant public policy lies at their foundation; they stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, [statutes of limitation] supply its place by a presumption which renders proof unnecessary.") (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). The California Supreme Court has emphasized that "the fundamental purpose of [the statutes of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1112 (Cal. 1988). Although a statute of limitations might work a seemingly harsh result, the California Supreme Court has justified it in three ways. "First, the rule encourages people to

bring suit to change a rule of law with which they disagree, fostering growth and preventing legal stagnation. Second, the statute of limitations is not solely a punishment for slow plaintiffs. It serves the important function of repose by allowing defendants to be free from stale litigation, especially in cases where evidence might be hard to gather due to the passage of time. Third, to hold otherwise would allow virtually unlimited litigation every time precedent changed." *Jolly*, 44 Cal. 3d at 1117. "Limitations statutes are intended to enable defendants to marshal evidence while memories and facts are fresh and to provide defendants with repose for past acts." *Jordache Enter., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 755 (Cal. 1998). "[T]he legislative goal" "is to require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh." *Id.* at 756. "[A] plaintiff's unilateral control of the statute's commencement can undermine these legislative goals." *Id.*

2. The Applicable Statute of Limitations at Issue in the Instant Action Is One Year.

Although the ADA statute does not expressly specify a statute of limitations, federal courts have applied the most appropriate state law limitations period. *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (42 U.S.C. § 1983 claim); *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622, 634 (D. Md. 2002) (Garbis, J.) ("The statute at issue, the ADA, does not specify a limitations period. In the absence of a statutory limitations provision, the Court should apply the most appropriate state law limitations period.").

In California, the current two-year personal injury statute, Cal. Civ. Proc. Code § 335.1, became effective on January 1, 2003. Before then, the statute of limitations was a mere one year period. *See* former Cal. Civ. Proc. Code § 340.3. The Ninth Circuit has held that the current two-year personal injury statute is not retroactive. *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004). Thus, for purposes of this action, California's one year statute of limitations is applicable. "The statute of limitations for bringing a claim under the ADA . . . is one year." *Pickern v. Best Western Timber Cove Lodge Marina Resort*, No. CIV. S-00-1637 WBS/DA, 2002 WL 202442, at *5 (E.D. Cal. Jan. 18, 2002) (Shubb, J.).

B. The ADA Claim Against "New Construction" Stores that Were Constructed After January 26, 1993 and Before December 17, 2001 Is Time-Barred.

1. *Garcia v. Brockway*

The instant motion is premised upon a recent Ninth Circuit *en banc* decision, *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (Kozinski, C.J.) (*en banc*), *petition for cert. filed*, 77 U.S.L.W. 3075 (U.S. July 31, 2008) (No. 08-140). In *Garcia*, the Ninth Circuit recently decided consolidated appeals involving Fair Housing Act claims relating to the existence of alleged architectural barriers within multifamily housing units.[4]

The facts at issue in the first appeal (No. 05-35647) involving plaintiff Garcia are as follows. In 1993, defendant Brockway, the original builder of the South Pond apartment complex, constructed the complex and sold the last unit in 1994. *Id.* at 459. In 2001, plaintiff Garcia, who uses a wheelchair for mobility, rented a unit there and resided there until 2003. *Id.* Garcia's apartment did not comply with the design-and-construction requirements of the Fair Housing Act. *Id.* Garcia's requests to the management that accessibility improvements be made were ignored. *Id.* Within two years of leasing the apartment, Garcia sued two groups of defendants: (1) the original builder, defendant Brockway, and architect; and (2) the current owners and management of the apartment complex. *Id.* The district court granted summary judgment in favor of defendant Brockway and the architect because Garcia's design-and-construction claim was not filed within the limitations period. *Id.* at 459-60. Garcia appealed.[5] *Id.* at 460.

The facts at issue in the second appeal (No. 06-15042) involving plaintiff Thompson are as follows. In 1997, Gohres Construction built condominium or apartment units in North Las Vegas at the Villas at Rancho del Norte (the "Villas"). *Id.* at 460. Shortly thereafter, the Villas were issued a final certificate of occupancy. *Id.* at 460. In 2004, plaintiff Thompson, a member of the Disabled Rights Action Committee ("DRAC"), "tested" the Villas and found discriminatory conditions. *Id.* Within a year of Thompson's inspection, Thompson and the DRAC sued Gohres Construction, Marc Gohres, and

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[4] "The FHA prohibits the design and construction of multifamily dwellings that do not have certain listed accessibility features." 526 F.3d at 460 (citing 42 U.S.C. § 3604(f)(3)(C)).

[5] The current owners and management settled their portion of the case. 526 F.3d at 460. Thus, no appeal was taken.

Michael Turk, an officer of both Gohres Construction Rancho del Norte Villas, Inc., asserting an FHA design-and-construction claim. *Id.* The district court granted the defendants' motion to dismiss because of the statute of limitations. *Id.* The plaintiffs appealed, but only with respect to defendant Turk (plaintiffs voluntarily dismissed their appeal as to Gohres Construction and Gohres). The Ninth Circuit consolidated the appeals of Garcia, Thompson, and DRAC.

On appeal, the Ninth Circuit, in an *en banc* published decision, affirmed the district court orders. The Ninth Circuit noted that the FHA enforcement mechanism to commence a private civil action provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 526 F.3d at 460-61 (quoting 42 U.S.C. § 3613(a)(1)(A)). The Ninth Circuit noted that the alleged discriminatory housing practice at issue was the "failure to design and construct" a multifamily dwelling according to FHA standards. 526 F.3d at 461 (citing 42 U.S.C. § 3604(f)(3)(C)).[6] The Ninth Circuit held that the statute of limitations "is thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued." *Id.* at 461. "[A]n aggrieved person must bring a private civil action under the FHA for a failure to properly design and construct within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued." *Id.* at 466. In both cases on appeal, the Ninth Circuit held that the triggering event occurred "long before plaintiffs brought suit." *Id.* at 461.

The *en banc* court addressed three theories advanced by the plaintiffs as to why the limitations period should be extended to cover their lawsuits. First, the *en banc* court rejected the plaintiffs' continuing violation theory because the plaintiffs confused "a continuing violation with the continuing effects of a past violation." *Id.* at 462. In support, the *en banc* court repeatedly cited the recent U.S.

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[6] Section 3604(f)(3)(C) of Title 42 provides, in relevant part, that "discrimination includes-- . . . in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, *a failure to design and construct* those dwellings in such a manner that--(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive design . . . ." 42 U.S.C. § 3604(f)(3)(C) (emphasis added).

Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007). For example, the *en banc* court noted that the *Ledbetter* decision "'stressed the need to identify with care the specific [discriminatory] practice that is at issue.'" *Id.* at 462 (quoting *Ledbetter*, 127 S. Ct. at 2167). The *en banc* court also distinguished between the "'discrete act of alleged . . . discrimination'" with the "'date when the effects of this practice were felt.'" *Id.* at 462 n.4 (quoting *Ledbetter*, 127 S. Ct. at 2168). The *en banc* court also noted that the Supreme Court "reiterated the distinction between a continuing violation and continual effects when it held that 'current effects alone cannot breathe life into prior, unchanged discrimination; as we held in *Evans*, such effects in themselves have 'no present legal consequences.'" 526 F.3d at 463 (quoting *Ledbetter*, 127 S. Ct. at 2169 (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977))). "'A discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequences.'" 526 F.3d at 464 (quoting *Ledbetter*, 127 S. Ct. at 2168 (quoting *Evans*, 431 U.S. at 558)); *see also* 526 F.3d at 463-64 ("'The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect [defendants] from the burden of defending claims arising from . . . decisions that are long past.'") (quoting *Del. State College v. Ricks*, 449 U.S. 250, 256-57, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980)).

The *en banc* court then noted that the practice at issue in the consolidated appeals was "a failure to design and construct," "which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Id.* at 462. "The failure to design and construct the unit according to FHA standards is the 'underlying' discrete act of discrimination." *Id.* at 462 n.4 (citation omitted). "And the date of this underlying act 'governs the limitations period.'" *Id.* (citation omitted). The *en banc* court held:

> "Although the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct. Here, this occurred long before plaintiffs brought suit. Were we to now hold the contrary, the FHA's statute of limitations would provide little finality for developers, who would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers."

Id. at 463. The *en banc* court noted that it could not "ignore the statute of limitations to help an aggrieved person who suffers from the *effects* of such violation decades after construction." *Id.* at 463.

Second, the *en banc* court rejected the plaintiffs' "encounter" theory, which was premised upon the argument that the statute of limitations did not begin to run until plaintiff Thompson tested the Villas, which occurred within two years of filing suit. *Id.* at 464. In essence, the *en banc* court held that the plaintiffs were conflating the Article III standing to sue requirement with the accrual of the claim for relief:

> "The FHA's limitations period does not start when a particular disabled person is injured by a housing practice, but by 'the occurrence or the termination of an alleged discriminatory housing practice.' 42 U.S.C. § 3613(a)(1)(A). Under the FHA, the ability to privately enforce the 'new legal duty' thus only lasts for two years from the time of the violation, and the violation here is 'a failure to design and construct.' *Id.* § 3604(f)(3)(C). Plaintiff's injury only comes into play in determining whether she has standing to bring suit. *Id.* §§ 3602(i)(1), 3604(f)(2). Some aggrieved persons may not encounter this violation until decades after the limitations period has run and thus will be unable to file a civil action, even though they have standing to raise the claim. However, '[i]t goes without saying that statute of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. *United States v. Kubrick*, 444 U.S. 111, 125, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979)."

Garcia, 526 F.3d at 464.

Third, the *en banc* court rejected both the plaintiffs' discovery rule and equitable tolling doctrine arguments. The *en banc* court, noting the similarity between the discovery rule and the plaintiffs' encounter theory, explained, "Holding that each individual plaintiff has a claim until two years after he discovers the failure to design and construct would contradict the text of the FHA, as the statute of limitations for private civil actions begins to run when the discriminatory act occurs-not when it's encountered or discovered." 526 F.3d at 465.

Addressing the equitable tolling doctrine,[7] the *en banc* court rejected plaintiff Garcia's contention that it would be inequitable not to allow him to bring a civil lawsuit. 526 F.3d at 465-66.

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[7] "'Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim.'" *Garcia*, 526 F.3d at 465 (citation omitted). "'Equitable tolling is frequently confused . . . with the discovery rule . . . . It differs from the [discovery rule] in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant.'" *Id.* (citation omitted).

"Fairness, without more, is not sufficient justification to invoke equitable tolling." *Id.* at 466. The *en banc* court also noted that "this is not a case where the plaintiff was injured within the limitations period yet unable to determine the source of his injury." *Id.* at 465 n.8.

Finally, the *en banc* court addressed the fact that the plaintiffs still had recourse to report the violation to the Attorney General who can seek to enforce the defendants' legal duty to design and construct if there's "a pattern or practice of resistance" or if "any group of persons has been denied any [FHA] rights . . . and such denial raises an issue of general public importance." 526 F.3d at 461 (quoting 42 U.S.C. § 3614(a)).

2. The FHA and the ADA Use the Same Language to Describe a Discriminatory Act.

The discrimination language in the FHA is identical to that contained in the ADA. Both statutes contain the phrase "a failure to design and construct" as a basis for alleging disability discrimination. *Compare* FHA, 42 U.S.C. § 3604(f)(3)(C) ("a failure to design and construct") *with* Title III of the ADA, 42 U.S.C. § 12183(a)(1)("a failure to design and construct"). Disability discrimination under the ADA includes "a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities . . . ." 42 U.S.C. § 12183(a)(1).

3. The *Garcia* Rule Applies Equally to ADA Actions Including the Instant Action.

Based upon the identical statutory language between the FHA and the ADA and the identical policy implications underlying the statute of limitations for both statutes, Taco Bell submits that the recent *Garcia* rule applies equally to ADA actions. *See Frame v. City of Arlington, Texas*, No. 4:05-cv-470-Y, slip op. at 7-8 (N.D. Tex. Mar. 31, 2008) (Means, J.) (dismissing an action premised upon Title II of the ADA alleging inaccessible or nonexistent curb ramps and inaccessible public sidewalks because the complaint failed to plead any alleged "alterations" within the limitations period); *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622, 634 (D. Md. 2002) (Garbis, J.) (holding that the plaintiffs would not be entitled to injunctive relief pursuant to Title III of the ADA because the claim based on 1994 renovations was time-barred at the time the suit was filed in 1999).

The violation alleged in an ADA action such as the instant action is "a failure to design and construct" a public accommodation in accordance with ADA standards. Therefore, the statute of

limitations in the instant action "is thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued." 526 F.3d at 461. "[A]n aggrieved person must bring a private civil action under the [ADA] for a failure to properly design and construct within [one] year[] of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued." *Id.* at 466. Based thereon, the triggering event occurred "long before plaintiffs brought suit." *Id.*

(a) Plaintiffs Have Alleged That 91 Stores Were Constructed After January 26, 1993 and Before December 17, 2001.

Plaintiffs have claimed via Meet and Confer Charts that 91 stores were constructed by Taco Bell after January 26, 1993 and before December 17, 2001. (Hikida decl. ¶ 9.) This is supported by certificates of occupancy issued by respective local municipalities. (Elmer decl. ¶ 2.)

The foregoing tally does not include the 13 additional stores that plaintiffs have mischaracterized as "new construction" even though they are, in reality, "existing facilities" because they were owned and operated prior to January 26, 1993 by "persons" other than Taco Bell.[8] (Elmer decl. ¶ 3.) Nor does

[8] Plaintiffs have cited in their Meet and Confer charts what appear to be numerous accessibility issues at so-called "new construction" stores, which is intended to give the impression that Taco Bell constructed such elements in a non-compliant manner. The reality, however, is that numerous Taco Bell stores that plaintiffs characterize as "new construction" were previously owned and/or operated by non-Taco Bell owners or operators who presumably constructed the allegedly non-compliant elements. (Elmer decl. ¶ 3 Exs. 7-18.)

"[T]he basic prohibition of the ADA is that an owner, lessee (or lessor), or operator of a place of public accommodation shall not discriminate, on the basis of disability, against any individual 'in the full and equal enjoyment of the . . . facilities . . . or accommodations of any place of public accommodation." *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1282 (M.D. Fla. 2004) (quoting 42 U.S.C. § 12182(a)). "As to facilities built for first occupancy after January 26, 1993, the ADA's plain language, therefore, makes it unlawful for *a person* to design and construct a place of public accommodation that fails to meet ADA accessibility guidelines." *Rodriguez*, 305 F. Supp. 2d at 1282 (citing 42 U.S.C. §§ 12182(a), 12183(a)(1)).

For stores that were constructed after January 26, 1993 and previously owned or operated by a "person" within the meaning of the ADA other than Taco Bell, Taco Bell, as the subsequent "purchaser is not in the position of the person who designed and built the facility and, in doing so, could have avoided creating barriers to access without much difficulty or expense." *Rodriguez*, 305 F. Supp. 2d at 1283 n.16. "[T]he ADA's plain language does not purport to impose potentially astronomical liability or confiscatory burdens on someone who simply purchases an existing non-compliant facility." *Id.* Indeed, in *Rodriguez*, the district court, following a bench trial, refused to apply the "new construction" ADA standards upon a purchaser of a hotel, intended to be converted into a time-share facility, who did not originally design or construct the facility even though such facility was constructed *after* January 26,

this tally include the 14 additional stores that plaintiffs claim to be subject to "new construction" standards even though they are, in reality, subject to "existing facilities" standards because they were previously owned and/or operated by non-Taco Bell owners or operators. (Elmer decl. ¶ 5 Exs. 22-23.) The stores that have been mischaracterized as "new construction" by plaintiffs are subject to the instant Motion to the extent that plaintiffs continue to insist that they are "new construction."

(b) Plaintiffs Have Known About Alleged Architectural Barriers at Taco Bell Stores Beyond the Applicable One-Year Limitations Period.

Plaintiffs testified during their depositions that they have visited Taco Bell stores for years prior to the commencement of this action and that they detected what they perceived to be barriers during such store visits. (Hikida decl. ¶¶ 13-16 Exs. 12-15.)

(c) Plaintiffs Could Have Obtained Information as to Owner, Operator, Lessor and Lessee Information via Public Records Searches.

Plaintiffs could have easily obtained information as to current and previous owner, operator, lessor, and lessee information via public records searches. In particular, plaintiffs could have requested such information via the appropriate County Assessor's Office, which is what ADA litigants commonly do in order to file suit against the correct parties. (Hikida decl. ¶ 17.) Plaintiffs have offered no explanation as to why they did not pursue timely claims against any of the 60 prior operators of Taco Bell stores, not including the 30 stores mentioned above. (Elmer decl. ¶¶ 3-6 Exs. 7-23.)

(d) Given that Article III Standing Exists Based on One Alleged Barrier, There Was Nothing to Preclude the Class Members From Seeking Injunctive Relief as to Any of the Alleged Barriers Prior to the Commencement of This Action.

"An ADA plaintiff who has Article III standing as a result of at least one barrier at a place of public accommodation may, in one suit, permissibly challenge all barriers in that public accommodation that are related to his or her specific disability." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 1993. *Id.* at 1282-83. "In light of the ADA's plain language, the intentional discrimination evidenced when one fails to abide by ADA accessibility guidelines can only be the intentional discrimination of a person who designs and constructs a place of public accommodation or causes that design or construction to be done." *Rodriguez*, 305 F. Supp. 2d at 1283 (citing 42 U.S.C. §§ 12182(a), 12183(a)(1)).

2008) (Gould, J.). "[A] disabled person has Article III standing to bring a claim for injunctive relief under the ADA because of at least one alleged statutory violation of which he or she has knowledge and which deters access to, or full use and enjoyment of, a place of public accommodation . . . ." *Id.* at 1043-44. Thus, there was nothing to preclude the class members in the instant action from seeking injunctive relief as to any of the alleged barriers prior to the commencement of this action.

(e) The Ninth Circuit Seeks to Avoid Piecemeal Compliance with the ADA by Broadly Construing Article III Standing, Which Means that All Claims Should Have Been Brought Without Delay.

The Ninth Circuit has expressed concern as to how limitations on Article III standing might "burden businesses and other places of public accommodation with more ADA litigation, encourage piecemeal compliance with the ADA, and ultimately thwart the ADA's remedial goals of eliminating widespread discrimination against the disabled and integrating the disabled into the mainstream of American life." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 2008) (Gould, J.) (2-1 decision). Thus, any and all claims should have been brought without delay to avoid piecemeal compliance with the ADA.

(f) Public Policy Counsels Against Stale Claims Being Delayed, Which Results in Stale Evidence.

(1) Taco Bell's Employees or Witnesses Such as Ed Medina Have Passed Away or Are No Longer Available to Testify.

The public policy reasons underlying the statute of limitations are directly implicated in the instant action. For example, Taco Bell's Facility Manager throughout the 1990s, Ed Medina, has passed away and is unavailable to testify at trial on Taco Bell's behalf. (Elmer decl. ¶ 7.) Similarly, additional Taco Bell employees who are potential witnesses because they participated in Taco Bell's accessibility modifications are no longer employed by Taco Bell such that they can no longer be compelled to testify (albeit the subpoena process remains available to the extent that Taco Bell can determine their current address). *Id.*

(2) Taco Bell Has Been Deprived of the Opportunity to Elicit Testimony from Disabled Individuals Who Otherwise Would Have Been Class Members Had They Not Passed Away During the 1990s and the Early Portion of This Decade.

Plaintiffs have also noted recently that certain class members are now deceased. (Joint Case Mngt. Statement of 5/8/08 at 35:2; docket #374) ("Since this case was filed in December 2002, several class members have died."). This raises an issue as to those who would have qualified as class members had this action been brought sometime between January 26, 1993 and December 16, 2002, who have passed away in the interim. None of those individuals are available to testify as adverse witnesses for Taco Bell especially as to whether the alleged architectural barrier deprived such individuals of effective access.

C. Plaintiffs' "Alteration" Claims Are Time-Barred.

1. *Speciner v. Nationsbank, N.A.*

In *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622 (D. Md. 2002) (Garbis, J.), the plaintiffs commenced an action against a Baltimore bank seeking an accessible route for wheelchair users to the Banking Hall area of a building constructed in 1929. In particular, the plaintiffs sought wheelchair access through the Baltimore Street entrance even though there was a 13 inch rise from the public sidewalk to the entrance door. *Id.* at 632. The plaintiffs requested the construction of a ramp between the sidewalk and the entrance door. *Id.* The plaintiffs also requested an automatic door. *Id.* The plaintiffs argued that renovations performed to the Banking Hall area of the building in 1994 constituted "alterations" to an area of the building that contained a "primary function" such that bank was required to make the path of travel to the altered area readily accessible to and usable by individuals with disabilities to the maximum extent feasible. *Id.* at 633. After conducting a bench trial, *id.* at 624, the district court held that even if the entirety of the 1994 project constituted "alterations" under the ADA, the plaintiffs would not be entitled to relief because the claim based on alterations is time-barred. *Id.* at 634.

While noting that the question of whether an "alterations" claim can be time-barred was one of first impression, the district court noted that the question was not "a difficult one" because the "statute,

the regulations thereunder, and common sense all indicate quite strongly that a three year period of limitations is applicable." *Id.* at 634.

The district court began its analysis by noting that it should apply the most appropriate state law limitations period given that the ADA statute itself does not specify a limitations period. *Id.* The district court held that the three year limitation period provided by the Maryland statute applicable to general civil actions is the most appropriate in the context of an ADA claim. *Id.* The district court then drew a sharp distinction between claims premised upon alleged continuing violations premised upon existing facilities standards and the "alterations" claim, the latter of which was based upon action taken in 1994, which allegedly established a path of travel obligation in connection with the purported "alterations". The court held, "The three year limitations period for a claim based on the 1994 renovations expired well before the 1999 filing of the instant lawsuit. Accordingly, Plaintiffs' 'alterations' based claim is time barred." *Id.*

2. *Frame v. City of Arlington, Texas*

More recently, in *Frame v. City of Arlington, Texas*, No. 4:05-cv-470-Y, slip op. (N.D. Tex. Mar. 31, 2008) (Means, J.),[9] which dismissed an action premised upon Title II of the ADA alleging inaccessible or nonexistent curb ramps and inaccessible public sidewalks. The district court held that the complaint failed to plead any alleged "alterations" within the limitations period. *Id.* at 7-8.

3. Alterations Between January 27, 1992 and December 16, 2001 Are Time-Barred.

As an initial matter, alleged "alterations" that occurred before January 26, 1992 are not actionable under the ADA. 28 C.F.R. § 36.402(a)(1).

Given that the instant action was filed on December 17, 2002, while the former one year limitations period was still in effect in California, only "alterations" within the meaning of the ADA that occurred on or after December 17, 2001 to existing facilities are actionable. In other words, assuming *arguendo* that Taco Bell made "alterations" to existing facilities between January 27, 1992 and December 16, 2001, those alterations are time-barred.

[9] The *Frame* decision is attached as Exhibit "1" to the concurrently-filed Hikida declaration. (Hikida decl. ¶ 2 Ex. 1.)

Plaintiffs have alleged numerous alleged alterations that occurred between January 27, 1992 and December 16, 2001 in their Meet and Confer charts. In particular, plaintiffs have alleged the existence of "alterations" that occurred during this time period at 85 stores, that is, store numbers 112, 137, 176, 283, 526, 567, 829, 863, 955, 991, 1034, 1827, 2241, 2297, 2423, 2700, 2755, 2756, 2778, 2801, 2812, 2848, 2861, 2910, 2914, 2915, 2918, 2930, 2933, 2961, 2968, 2971, 2984, 3027, 3046, 3064, 3070, 3078, 3089, 3090, 3096, 3119, 3125, 3132, 3184, 3196, 3207, 3208, 3209, 3222, 3390, 3398, 3420, 3471, 3498, 3555, 3579, 3904, 3948, 4027, 4034, 4054, 4168, 4192, 4204, 4211, 4284, 4311, 4325, 4342, 4343, 4355, 4356, 4466, 4510, 4518, 4558, 4578, 4617, 4704, 4799, 4951, 5019, 5081, 5138. (Hikida decl. ¶ 8.)

V

CONCLUSION

Based upon the foregoing, it is respectfully requested that the motion be granted and that this Court award such other and further relief as it deems appropriate.

DATED: September 3, 2008

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