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

Attorneys for Defendant
TACO BELL CORP.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FRANCIE E. MOELLER, et al.,

Plaintiffs,

vs.

TACO BELL CORP.,

Defendant.

CASE NO. C 02-5849 PJH JL

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page**

Federal Statutes

Federal Regulations

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs can't have it both ways. On one hand, they seek to argue that a continuing ADA violation exists based upon the "readily achievable" barrier removal legal standard, 42 U.S.C. § 12182(b)(2)(A)(iv), which is a very low standard that even plaintiffs' brief admits as only requiring "modest expenditures," (Opp'n at 18:17). On the other hand, they seek to assert two additional legal theories: (i) "failure to design and construct" claims pursuant to 42 U.S.C. § 12183(a)(1) applicable only to "new construction"; and (ii) "alterations" claims pursuant to 42 U.S.C. § 12183(a)(2), even though both groups of latter claims accrued beyond the one-year limitations period applicable at the commencement of this action. Simply put, plaintiffs seek to impermissibly bootstrap the continuing violation theory as the predicate for asserting "new construction" and "alterations" claims.

Given the undisputed fact as to when the instant action was filed, the class representatives' knowledge of purported violations years earlier, and the alleged construction dates of approximately 203 California Taco Bell company-owned stores that plaintiffs allege to be subject to either the "new construction" or "alterations" legal standards, this Court can and should rule as a matter of law that the ADA claims premised upon either "new construction" claims beyond the 1-year limitations period (i.e., after January 26, 1993 and before December 17, 2001) or "alterations" claims (i.e., after January 26, 1992 and before December 17, 2001) are time-barred. A contrary ruling would effectively eviscerate the intent requirement of the ADA as to "new construction" and "alterations" claims.

II. ARGUMENT

A. Plaintiffs Ignore the U.S. Supreme Court's Guidance in *Ledbetter v. Goodyear Tire*.

Although plaintiffs' response purports to rely upon and analyze the U.S. Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), plaintiffs' response totally ignores the key distinction drawn there between when a *discrete act* of alleged intentional discrimination occurred versus when the *effects* of an alleged discriminatory practice were felt. Thus, a comprehensive analysis of *Ledbetter* is as follows.

1. "Discrete Acts" Are Different From Adverse Effects.

In *Ledbetter*, the U.S. Supreme Court faced the question whether it should deviate from

established precedent by permitting the petitioner, Lilly Ledbetter, a Title VII employment discrimination claimant who had alleged sex discrimination in her pay,[1] to be subject to a different rule as to the time for filing a charge of discrimination with the Equal Employment Opportunity Commission.[2]

Ledbetter's Title VII claim was as follows. "Ledbetter introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment." *Id.* at 2165-66. In other words, "she argues that the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period." *Id.* at 2167. "In essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period." *Id.* at 2167.

The Court disagreed and held that there was no basis to deviate from the rule that the period for filing an EEOC charge begins when the discrete act of discrimination occurs.[3] *Id.* at 2165. The Court

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[1] "Title VII of the Civil Rights Act of 1964 makes it an 'unlawful employment practice' to discriminate 'against any individual with respect to his compensation . . . because of such individual's . . . sex.' 42 U.S.C. § 2000e-2(a)(1)." 127 S. Ct. at 2166.

[2] "An individual wishing to challenge an employment practice under this provision must first file a charge with the EEOC. § 2000e-5(e)(1)." 127 S. Ct. at 2166. "Such a charge must be filed within a specified period (either 180 or 300 days, depending on the State) 'after the alleged unlawful employment practice occurred,' ibid., and if the employee does not submit a timely EEOC charge, the employee may not challenge that practice in court, § 2000e-5(f)(1)." 127 S. Ct. at 2166-67.

It is beyond dispute that the EEOC charging period constitutes a statute of limitations, which explains why the Court addressed the policy rationale underlying a statute of limitations. "Statute of limitations serve a policy of repose." *Id.* at 2170. "They '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.'" *Id.*

[3] "Ledbetter's petition presents a question important to the sound application of Title VII: What activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation. One answer identifies the pay-setting decision, and that decision alone, as the unlawful practice. Under this view, each particular salary-setting decision is discrete from prior and subsequent decisions, and must be challenged within 180 days on pain of forfeiture. Another response counts both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices. Under this approach, each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice; prior decisions, outside the 180-day charge-filing period, are not

began its analysis by noting the significance of identifying "with care" the *specific* employment practice at issue. *Id.* at 2167 ("In addressing the issue whether an EEOC charge was filed on time, we have stressed the need to identify with care the specific employment practice that is at issue.").

Significantly, the Court then drew a sharp distinction between the alleged discriminatory acts that occurred prior to the EEOC charging period and the continuing effects during such charging period. *Id.* at 2167 ("In essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period. This argument is squarely foreclosed by our precedents."). In support, the Court cited its prior decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), for the proposition that "the critical question [was] whether any present violation exist[ed]." 127 S. Ct. at 2167-68 (quoting 431 U.S. at 558). The Court "concluded that the continuing effects of the precharging period discrimination did not make out a present violation." *Id.* at 2168. Quoting *United*, the Court stated: "United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). 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." *Id.* at 2168 (quoting 431 U.S. at 558).

The Court also cited its prior decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), for the proposition that the EEOC charging period ran from the time that the discriminatory act was made and communicated to the plaintiff, not later when one of the effects of the discriminatory act occurred. *Id.* at 2168. Significantly, in *Ricks*, the Court, in turn, cited a Ninth Circuit decision, *Abramson v. University of Hawaii*, 594 F.2d 202 (9th Cir. 1979), for the proposition that "[t]he proper focus is on the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." 449 U.S. at 258.

The Court also cited its prior decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), for the proposition that "as in *Evans* and *Ricks*, we held that the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt." *Id.* at 2168. Although after *Lorance* was decided, Congress amended

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themselves actionable, but they are relevant in determining the lawfulness of conduct within the period. The Court adopts the first view . . . ." *Id.* at 2179 (Ginsburg, J., dissenting).

Title VII to expand its scope to a discriminatory seniority system at the time of its application (not just when it was adopted), the Court noted that the amendment did not affect other types of employment discrimination at issue in *Evans* and *Ricks*. *Id.* at 2169 n.2.

The Court also cited its decision in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), wherein the Court "explained that the statutory term 'employment practice' generally refers to 'a discrete act or single 'occurrence'' that takes place at a particular point in time." 127 S. Ct. at 2169.

Having reviewed its prior precedents, the Court then concluded, "The instruction provided by *Evans*, *Ricks*, *Lorance*, and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 2169.

Although the Court recognized that a fresh violation can take place if an employer engages in a series of intentionally discriminatory acts, *id.* at 2169 ("But, of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed."), even if such acts are unrelated to each other, *id.* at 2174 ("a freestanding violation may always be charged within its own charging period regardless of its connection to other violations"), the Court held that Ledbetter was making what amounted to a bootstrapping argument premised upon related acts that were not independently discriminatory. *Id.* at 2169 (quoting 431 U.S. at 558) ("Instead, she argues simply that Goodyear's conduct during the charging period gave present effect to discriminatory conduct outside of that period. But current effects alone cannot breathe life into prior, uncharged discrimination; as we held in *Evans*, such effects in themselves have 'no present legal consequences.'"); *id.* at 2174 ("The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.") (quoting *Morgan*, 536 U.S. at 113). Indeed, the Court clarified that the mere fact that an action is "related to" some past act of discrimination does not make it actionable. *Id.* at 2174.

The Court held that "a pay-setting decision is a discrete act that occurs at a particular point in time." *Id.* at 2165. "Because a pay-setting decision is a 'discrete act,' it follows that the period for

filing an EEOC charge begins when the act occurs." *Id.* at 2165. "Ledbetter's cause of action was fully formed and present at the time that the discriminatory employment actions were taken against her, at which point she could have, and should have, sued. *Id.* at 2171 n.3. "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure." *Id.* at 2169. "A discrete act of discrimination is an act that in itself 'constitutes a separate actionable 'unlawful employment practice'' and that is temporally distinct." *Id.* at 2175. "*Morgan* is perfectly clear that when an employee alleges 'serial violation,' i.e., a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation."[4] *Id.* at 2175.

"[A] new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.'" *Id.* at 2174. "The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period." *Id.* at 2174. "Because Ledbetter did not file timely EEOC charges relating to her employer's discriminatory pay decisions in the past, she cannot maintain a suit based on that past discrimination at this time." *Id.*

Significantly, the Court noted that under Ledbetter's approach, the discriminatory intent element of Title VII would be eviscerated. "A disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent." *Id.* at 2171. "Ledbetter asserted disparate treatment, the central element of which is discriminatory intent." *Id.* at 2167. "In an effort to circumvent the need to prove discriminatory intent during the charging period, Ledbetter relies on the intent associated with other decisions made by other persons at other times." *Id.* at 2169. "Ledbetter's attempt to take the intent associated with the prior pay decisions and shift it to the 1998 pay decision is unsound. "It would shift intent from one act (the act that consummates the discriminatory employment practice) to a later

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[4] Plaintiffs' fleeting reference to hostile environment claims, (Opp'n at 9:21-26), is misleading. In *Ledbetter*, the Court rejected the proposed hostile salary environment claim because each of the discrete acts were "independently identifiable and actionable". 127 S. Ct. at 2175 & n.7. Similarly, the "failure to design and construct" and "alterations" claims at issue here were independently actionable.

act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent." *Id.* at 2170. "Ledbetter's argument [would] effectively eliminate the defining element of her disparate-treatment claim." *Id.*

"[E]vidence relating to intent may fade quickly with time." *Id.* at 2171. "In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial." *Id.* In a case involving an old performance evaluation, the issue of whether an inference of discriminatory intent can be drawn "can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." *Id.* The Court noted that the supervisor whose alleged misconduct was at issue died by the time of trial. *Id.* at 2171 n.4.

The Court held, "We therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period. Ledbetter's claim is, for this reason, untimely." *Id.* at 2172.

Finally, the Court rejected the dissenting opinion's attempt to draw a distinction between pay disparity as "significantly different" from adverse actions that are easy to identify as discriminatory. *Id.* at 2179.

Ledbetter is directly applicable here.[5] As in *Ledbetter*, the focus of the instant Motion is not on a current violation (premised upon a "readily achievable" barrier removal standard), but rather the impropriety of the "carrying forward of a past [alleged] act of discrimination . . . ." *Id.* at 2173 n.5.

Asking the parties to reconstruct the record as to which stores are truly "new construction" versus "alterations" and as to which features were constructed as "alterations" or otherwise and by whom (i.e., either Taco Bell or some prior or subsequent operator[6]) going back literally decades is

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[5] That *Ledbetter* is an employment discrimination decision is of no moment. Federal courts including the Ninth Circuit have relied upon employment discrimination cases to interpret Title III of the ADA. *See, e.g., Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002) (recognizing that the "futile gesture" provision in the ADA, 42 U.S.C. § 12188(a)(1), originated from the "futile gesture" reasoning of the U.S. Supreme Court in *Teamsters v. United States*, 431 U.S. 324, 366 (1977), an employment discrimination case premised upon Title VII of the Civil Rights Act of 1964).

[6] Plaintiffs freely acknowledge that certain disputed stores were operated by non-Taco Bell entities in the 1990s, (Opp'n at 6:7-8; 17:1-2), but they are silent as to what features were constructed, if any, by such operators.

precisely why the statute of limitations should be given effect in the instant case especially given that Taco Bell's facilities leader, Ed Medina, has passed away. *Id.* at 2171 n.4; S. Elmer decl. of 9/3/08 ¶ 7.

2. Plaintiffs' Argument Effectively Eliminates the Intent Requirement of the ADA.

In *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278 (M.D. Fla. 2004) (Presnell, J.), the Middle District of Florida recognized that Title III of the ADA is intended to target intentional discrimination in violation of 42 U.S.C. § 12183. "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*." 305 F. Supp. 2d at 1283 (emphasis added). Similarly, in *Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001) (Highsmith, J.), the Southern District of Florida drew a sharp distinction between *de facto* discrimination, which is subject to the lower "readily achievable" barrier removal standard, *id.* at 1362, and *de jure* discrimination, which is subject to strict compliance, *id.* at 1362 n.5. Significantly, the court held, "Rather, the failure to comply with promulgated regulations, which must go through a considerable vetting process before they take effect, may be viewed as *intentional* discrimination." *Id.* (emphasis added). Thus, like Title VII, the ADA targets intentional discrimination.

In *Ledbetter*, the Court rejected Ledbetter's statute of limitations argument because it would effectively eliminate the intent requirement of her disparate treatment claim. 127 S. Ct. at 2170 ("Ledbetter's argument effectively [would] eliminate the dining element of her disparate-treatment claim[.]"). Similarly, plaintiffs' position would eliminate the intent requirement as to "new construction" and "alterations" by imposing liability in the absence of the requisite intent.

The distinction drawn in *Concorde* as to the compromise resulting in the passage of the ADA is strikingly similar to the distinction drawn in *Ledbetter* as to the passage of Title VII. *Compare Concorde*, 158 F. Supp. 2d at 1362 ("The compromise that Title III makes is to require only *reasonable* modifications and *readily achievable* barrier removals or alternative methods, when the disabled are subjected to de facto discrimination in places of public accommodation."), *with Ledbetter*, 127 S. Ct. at 2170 ("We have previously noted the legislative compromises that preceded the enactment of Title VII . . . ."). Indeed, in *Ledbetter*, the Court expressly followed such legislatively prescribed balance. *Id.*

("Respectful of the legislative process that crafted this scheme, we must 'give effect to the statute as enacted,' and we have repeatedly rejected suggestions that we extend or truncate Congress' deadlines."); *id.* at 2177 ("[I]t is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination,' and the interest in repose.") (internal citation omitted).

3. Federal District Courts Are Bound to Follow U.S. Supreme Court Precedent.

This Court is bound by the doctrine of *stare decisis* to decisions of the United States Supreme Court. *See, e.g.*, *Gilbert v. National Employee Benefit Cos., Inc.*, 466 F. Supp. 2d 928, 933 (N.D. Ohio 2006); *United States v. Poitra*, 359 F. Supp. 2d 837, 841 (D.N.D. 2004); *Blair v. Deboo*, No. Civ. A 304CV1357CFD, 2004 WL 3052022, at *2 (D. Conn. Dec. 30, 2004). Thus, regardless of whether *Garcia v. Brockway*, 526 F.3d 458 (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), or *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133 (9th Cir. 2002), is directly applicable, this Court is bound to apply *Ledbetter*.

B. The Ninth Circuit's Decision in *Pickern v. Holiday Quality Foods Inc.* Did Not Have the Benefit of the U.S. Supreme Court's Recent Guidance in *Ledbetter* and Is Distinguishable.

Plaintiffs' reliance upon *Pickern* is misplaced. In *Pickern*, the district court dismissed an ADA case based upon the applicable one-year statute of limitations because the plaintiff had delayed filing his complaint for more than one year after he first became aware of barriers at a particular store. On appeal, the Ninth Circuit reversed. The *Pickern* panel held:

> "A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury. Doran states that he is currently aware of barriers to access that now exist at the Paradise store, and that these barriers currently deter him. Indeed, he states that the barriers deterred him from entering the store just before filing suit, when he needed something from the store and was obliged to remain in the parking lot. Doran's suit for injunctive relief is therefore not time-barred."

Id. at 1137.

The Ninth Circuit's decision in *Pickern* did not have the benefit of the recent guidance provided by the U.S. Supreme Court in *Ledbetter*, which was heavily relied upon in *Garcia*.

Moreover, in *Pickern*, the Ninth Circuit addressed the "readily achievable" barrier removal standard only. *Id.* at 1135 ("Title III defines 'discrimination' as, among other things, a failure to remove 'barriers . . . where such removal is readily achievable.'"). Put differently, the Ninth Circuit failed to address the "new construction" or "alterations" legal standards, which were not at issue in *Pickern*. Thus, the Ninth Circuit's statute of limitations analysis in *Pickern* is limited to the "readily achievable" barrier removal context only, and has no application to the "new construction" or "alterations" contexts.[7]

C. Whether Taco Bell Corp. Has Owned and/or Operated All of the Stores at Issue Within the One Year Limitations Period Is Irrelevant to Applying *Garcia* and *Speciner* to "New Construction" and "Alteration" Claims, Respectively.

Plaintiffs contend that "Defendant has owned and/or operated every restaurant at issue within the limitations period." (Opp'n at 13:13-14.) Although that contention might have significance to the extent that plaintiffs seek to argue that all of the so-called "new construction" or "alteration" stores are subject to the far less stringent "readily achievable" barrier removal standard, *Mannick v. Kaiser Foundation Health Plan, Inc.*, No. C 03-5905 PJH, 2006 WL 1626909, at *5 (N.D. Cal. June 9, 2006) (Hamilton, J.) ("The demand upon preexisting facilities that are not deemed altered is *much less stringent*.") (emphasis added); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 2d 698, 770 n.98 (D. Or. 1997) (Ashmanskas, Mag. J.) ("There is a vast gulf between the two standards," i.e., ADAAG and standards for existing facilities.), plaintiffs' contention ignores the fact that they are time-barred with respect to proceeding via either a "new construction" legal standard or "alteration" legal standard as to the stores at issue in the instant Motion. That is the extent of the guidance provided by *Garcia* and *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622 (D. Md. 2002).[8]

D. Plaintiffs' Opposition Confirms That Additional Stores Are Subject to the Instant Motion.

Plaintiffs' apparent attempt to create a genuine issue of material fact as to the construction dates

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[7] Plaintiffs' reliance upon *Stringer v. White*, No. C-07-5516 SI, 2008 WL 344215 (N.D. Cal. Feb. 6, 2008) (Illston, J.), is also misplaced. *Stringer* did not address the statute of limitations at all and only addressed the plaintiff's "injury" in the context of the plaintiff's lack of Article III standing. *Id.* at *7.

[8] Plaintiffs' reliance upon *Kuchmas v. Towson Univ.*, 553 F. Supp. 2d 556 (D. Md. 2008), is misplaced. Although the court in *Kuchmas* did distinguish *Speciner*, *id.* at 564, the court analyzed a portion of *Speciner* that addressed "additional ADA claims" subject to the "existing facilities standards," i.e., the "readily achievable" barrier removal standard. 215 F. Supp. 2d at 630. In other words, the *Kuchmas* court made no attempt to distinguish *Speciner*'s alterations analysis.

of certain 27 stores, (Opp'n at 3:11-6:18; TBC's Mot. at 3:12-24), misses the mark. Taco Bell expressly made reference to such so-called "new construction" stores as "subject to the instant Motion to the extent that plaintiffs continue to insist that they are 'new construction.'" (TBC's Mot. Part. Summ. J. of 9/3/08 at 15:4-5.) In other words, assuming *arguendo* that plaintiffs' characterization of certain stores as "new construction" is correct,[9] that means that such additional 27 stores (in addition to the 91 "new construction" stores and the 85 so-called "alteration" stores) are also subject to the instant Motion as well. Thus, the factual dispute does not prevent the Court from deciding the instant Motion in Taco Bell's favor.[10]

DATED: October 8, 2008 GREENBERG TRAURIG, LLP

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

[9] The fundamental flaw in plaintiffs' analysis is their failure to recognize that the disputed stores at issue are, at most, subject to either an "alteration" legal standard or an even lower "readily achievable" legal standard versus a much higher "new construction" standard. It is undisputed that the ADAAG distinguishes between what is "new construction" and what constitutes an "alteration". (ADAAG, 4.1.2, 4.1.3, 4.1.6.) Plaintiffs' analysis wrongly assumes that the opening of a Taco Bell restaurant on an existing site that had been operated as another type of business for perhaps decades constitutes "new construction" as to the entirety of the "facility" including both the building and all exterior elements, notwithstanding the fact that the building pad, parking lot, and walkways may have been designed, graded, and constructed literally decades earlier, thereby imposing significant construction constraints. Not surprisingly, the ADAAG takes into account such site constraints at "existing" buildings and facilities by setting forth special technical provisions for "alterations". (ADAAG, 4.1.6(3)(a)(i) & (ii).) Even assuming that a building itself has been modified before it opens for business as a Taco Bell store, that does not necessarily mean that all exterior elements including the parking lot and walkways have been constructed anew.

[10] Similarly, the parties' dispute as to the applicable legal standard governing the scenario wherein a prior operator constructed a facility *after* January 26, 1993 need not be resolved at this time. Taco Bell notes though that plaintiffs' reliance upon *Hodges v. El Torito Restaurants, Inc.*, No. C-96-2242 VRW, 1998 WL 95398 (N.D. Cal. Feb. 23, 1998) (Walker, J.), is misplaced. In *Hodges*, the court decided a motion for an award of attorney's fees by analyzing *under California law only* whether the plaintiffs would have been the prevailing party had the case gone to trial. That is why the court referred to "California's accessibility laws", *id.* at *4, and made no attempt to address the ADA.