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

OAKLAND DIVISION

FRANCIE MOELLER, et al.,

Plaintiffs,

vs.

TACO BELL CORP.,

Defendant.

CASE NO. C 02-5849 PJH JL

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

[Declaration of Steve Elmer, Sabrina Wright, Dawn L. Bennyhoff, Richard H. Hikida filed concurrently herewith]

DATE: December 16, 2009
TIME: 9:00 a.m.
CTRM: 3
JUDGE: Hon. Phyllis J. Hamilton

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Taco Bell Corp. ("Taco Bell") has undertaken an unprecedented ADA remediation program to comprehensively modify numerous features at approximately 200 California company-owned stores at a cost in excess of $8 million. Taco Bell suspects that no company has ever undertaken as comprehensive a program. Every Taco Bell store was surveyed, and thousands of imperceptible hyper technical variations were addressed.

Plaintiffs contend that this lawsuit is about fixing stores. Taco Bell has asked for, but has not received cooperation from plaintiffs as to what stores/features have been resolved and what, if anything, is remaining to be performed. Most of the alleged "violations" plaintiffs raise are minuscule variations from the ADAAG standards (such as service counters that are ¼ to ½ too high). Nevertheless, Taco Bell has committed to bring all of its California company-owned stores into strict compliance with the ADAAG. Until recently, all the guidance Taco Bell had on the injunctive relief plaintiffs sought was the Special Master's Interim Survey Reports and plaintiffs' Meet and Confer Charts. Taco Bell has spent over $8 million fixing virtually all the features identified in these Reports that were within Taco Bell's ownership or control. Plaintiffs' have been unwilling to meet and confer on what has been fixed and remove features or stores from their demand for injunctive relief. Without plaintiffs' cooperation, Taco Bell had to document all of its thousands of fixes for the Court, this resulted in the massive number of exhibits in support of Taco Bell's motion. Taco Bell believes that only a handful of features are properly at issue for determining injunctive relief under the ADA. Taco Bell continues to seek plaintiffs' cooperation in attempting to narrow the scope of fixes so that this Court does not have to hold a trial on the compliance of more than 100,000 features at issue (the survey form used by the Special Master included 638 elements per store).

Rather than narrowing the scope of this litigation, the work that Taco Bell has done has resulted in plaintiffs' expanding this litigation. As recently as May 1, 2009, plaintiffs were expanding and changing their claims for injunctive relief via their expert reports. Taco Bell now must go back to stores and document compliance for the new allegations by plaintiffs. Taco Bell has committed to making all feasible corrections regardless of how minor they may be in order to provide effective

access. Taco Bell's fixes based on plaintiffs' most recent allegations will be completed and documented before January 29th, 2010.

Plaintiffs asked this Court to overrule the Magistrate Judge and allow plaintiffs to conduct additional secret site inspections of Taco Bell's stores. Taco Bell opposed the secret inspections by plaintiffs, in part, because Taco Bell would be kept in the dark as to what, if any, fixes remained to be made. Plaintiffs were allowed additional inspections to determine compliance, however, **Plaintiffs have not conducted or asked for a single inspection allowed by the Court**. The purpose of plaintiffs' surprise inspections was to try to "catch" some feature that had fallen out of compliance and ask the Court to rule on that feature without any effort to resolve it with Taco Bell first.

Plaintiffs sought certification of their class based on common injunctive relief for ADA violations. Plaintiffs told this Court that the primary relief sought in this action was to fix the stores. However, plaintiffs' changing demands, and their refusal to work with Taco Bell to reduce the stores and features in dispute, are tactics designed to delay and impair the resolution of ADA injunctive relief claims.

II. ARGUMENT

A. The Vast Majority of Fixes Have Been Completed.

Plaintiffs claim that Taco Bell's motion reflects a "fundamental misunderstanding of this case" because plaintiffs intend at trial not to seek an injunction addressing--item by item--the elements that remain out of compliance or that--at that moment--have fallen out of compliance." (Opp'n at 14:12; 14:16-20.) This is news to Taco Bell given plaintiffs' prior item-by-item allegations set forth in plaintiffs' expert Eric McSwain's May 1, 2009 420-page expert report as well as plaintiffs' thousands of pages of Meet and Confer charts provided to Taco Bell in April-June 2006. (Hikida decl. ¶ 3 Ex. 2.)

Taco Bell has completed the vast majority of modifications requested by plaintiffs' retained experts via their May 1, 2009 expert reports.[1] (*See* Supplemental Declaration of Steve Elmer of

[1] Plaintiffs complain that over 280 items in Exhibit 18 to Elmer's declaration are blank. (Opp'n at 18:6-7.) Taco Bell has concurrently-filed an updated version of Exhibit 18 (renumbered as Exhibit 1 to Elmer's Supplemental Declaration), which fills in the previously omitted items. Given that Taco Bell's remediation work via Maintco and other contractors was still ongoing at the time of the filing of the

11/25/09 ("Elmer Supp. Decl.") ¶¶ 2-389 Exs. 1, 2, 5, 14; Declaration of Sabrina Wright ¶ 2 Ex. 1; Declaration of Dawn Bennyhoff ¶ 2 Ex. 1.) Indeed, Taco Bell has addressed each of the items that are highlighted in plaintiffs' opposition as to store #3498. (Opp'n at 19:4-16; Wright decl. ¶ 2 Ex. 1.)

Under these circumstances, injunctive relief should be denied because it is clearly not the "only" means of ensuring compliance. *Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 05CV1660-J (WMc), 2008 WL 111052, at *24 (S.D. Cal. Jan. 10, 2008) (Jones, J.).

The likelihood of recurrence is nil as to structural modifications. Plaintiffs have provided no evidence that Taco Bell would attempt to undo its costly remediation of alleged architectural barriers if the Court refrained from granting injunctive relief. For example, plaintiffs have provided no evidence that Taco Bell has or will undo brand new curb ramps, ramps, concrete parking areas, drink tables, modified condiment modules reduced in height, lowered service counters, or countless other features. It is well established that an injunction should not be granted as punishment for past acts where it is unlikely that they will recur. *Donald v. Café Royale, Inc.*, 218 Cal. App. 3d 168, 184 (Cal. Ct. App. 1990). The good faith of Taco Bell's expressed intent to comply similarly weighs against issuance of an injunction.

1. Taco Bell Has Submitted Photographs Verifying the Work Performed.

Plaintiffs argue in their opposition that Taco Bell's assertions as to modifications are unsupported by "evidence" and not in compliance with Rule 56. (Opp'n at 13:3; 14:7.)

Apart from the declarations of Steve Elmer and Robert Reeves previously submitted by Taco Bell, (Elmer decl. ¶¶ 18-58; docket #458-1; Reeves decl. ¶¶ 3-165; docket #458-2), Taco Bell has concurrently-submitted literally thousands of photographs taken by a combination of either its own Taco Bell personnel, its project manager, Newport CM, or Maintco Corp., a general contractor with whom Taco Bell has contracted for the bulk of the ADA-related modifications performed over the summer and fall of 2009. (Elmer Supp. Decl. ¶¶ 2-389 Exs. 1, 2, 5, 14.) Taco Bell had previously submitted the vast majority of such photographs to plaintiffs as part of Taco Bell's continuing discovery obligations and supplementation of its Rule 26(a)(1) initial disclosures before plaintiffs filed their response in opposition

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instant motion, Taco Bell felt it was appropriate to omit addressing such items until it could verify with photographic documentation that the modification work was, in fact, complete. (Elmer Supp. Decl. ¶ 2.)

to Taco Bell's instant motion. (Supplemental Declaration of Richard H. Hikida of 11/25/09 ("Hikida Supp. Decl.") ¶ 11.)

2. Taco Bell Has Made Improvements Beyond Those Proposed by the Special Master.

Taco Bell's commitment to accessibility is evidenced by its willingness to improve stores beyond what was required by the reports of the Special Master. Taco Bell has made numerous modifications that went far beyond the Special Master's proposed solutions. For example, at store #2918 and #5513 and other stores, the Special Master proposed that Taco Bell install directional signage from the inaccessible entrance to the accessible entrance. (Hikida Supp. Decl. ¶ 12 Ex. 6.) Although Taco Bell performed the Special Master's proposed solution, Taco Bell recently also modified the path of travels to the other entrances (not required by the Special Master to be accessible) at significant expense, thereby rendering every entrance fully accessible. (Elmer Supp. Decl. ¶ 104.)

(a) Plaintiffs Are Raising Numerous New Alleged Barriers Not Disclosed in Their 2006 Meet and Confer Charts.

Plaintiffs argue that a "large number of violations" were found by McSwain "six years into this litigation", (Opp'n at 8:1-3; *id.* at 14:14), which implies that plaintiffs had previously requested the removal of these alleged architectural barriers and Taco Bell did not do the work identified.

Plaintiffs' argument ignores that plaintiffs' Meet and Confer charts omitted these McSwain barriers *that were raised for the first time by plaintiffs either in December 2008 or throughout the spring of 2009*. In fact, the Special Master did not note certain alleged barriers during his 2004-2005 surveys, which implies that he did not find such barriers to exist. Plaintiffs knew that Taco Bell was trying to resolve all the injunctive issues in this case, and in an attempt to defeat the narrowing of injunctive relief claims, plaintiffs used McSwain's expert report to assert brand new issues after Taco Bell's surveys and fixes.

By way of example only, plaintiffs' expert, Eric McSwain, challenges for the first time the following alleged barriers, each of which could have been raised by plaintiffs via their 2006 Meet and Confer Charts, but was omitted:

- emergency exit door maneuvering clearances at store numbers 2961 and 2968;

- the distance from the edge of the lavatory to the side wall at the water closet as less than 36 inches minimum at store #526;
- the lack of a warning sign inside a store if an entrance door is permitted to be inaccessible at stores #2778;
- the side wall grab bar not extending 54 inches from the rear wall at stores #2930, #15379;
- a ½ inch change in level at the bottom of a curb ramp at store #20646;
- the distance of toilet paper dispensers from the rear wall at all stores.

(Hikida decl. ¶ 3 Ex. 2.) In addition, plaintiffs failed to meet and confer with Taco Bell for features in dispute in their 2006 M&C chart. (Hikida decl. ¶ 3 Ex. 2) ("Plaintiffs would like to meet and confer with Taco Bell concerning the restroom in this restaurant.").

Thus, it is extremely misleading to suggest that purported barriers were communicated by either the Special Master or plaintiffs to Taco Bell years ago and that Taco Bell has refused to correct them.

3. Plaintiffs' Waited 10 Months After This Court Ordered Plaintiffs to Conduct Inspections to Provide Taco Bell With The May 1, 2009 List of Alleged Barriers As to 80 Stores.

Plaintiffs' have offered no explanation as to why they waited until May 1, 2009 to supplement their list of alleged architectural barriers for 80 stores. On June 27th, 2008 this Court ordered plaintiffs to commence their site inspections "immediately" in order to provide the parties with "plenty of time" to "meet and confer" and allow Taco Bell an opportunity to "take further corrective action," (Order of 6/27/08 at 2:12-16; docket #386). Taco Bell did not get this list of plaintiffs' expert's delay in disclosing new barriers as to 80 stores until 10 months later. This delay thwarted the intent of the Court's Scheduling Order and substantially delayed Taco Bell's remediation efforts.

4. The Predecessor Judge's Prior Ruling Is Not Subject to Law of the Case.

Plaintiffs' implicit reliance upon the law of the case doctrine to attack Taco Bell's mootness defense is misplaced. (Opp'n at 17:4-13; 18:15-17; 18:21; 23:22-24:6; 25:26-28.) As an initial matter, Judge Jenkins did not award *any* injunctive relief against Taco Bell in ruling upon plaintiffs' motion for partial summary judgment filed on February 23, 2007. (*See* Order of 8/8/07.)

Moreover, the law of the case doctrine is an appellate doctrine. *Jeffries v. Wood*, 114 F.3d 1484,

1488-89 (9th Cir. 1997) (en banc) ("Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal.").

In *Wilson v. PFS, LLC*, 493 F. Supp. 2d 1122 (S.D. Cal. 2007) (Hayes, J.), the court rejected application of the law of the case doctrine. *Id.* at 1125 n.1. The district court stated, "[A] court may review its past decisions notwithstanding the law of the case doctrine where the law and or relevant circumstances have changed." *Id.* at 1125 n.1. Taco Bell's remediation efforts have changed the relevant circumstances. (Elmer Supp. Decl. ¶¶ 2-389 Exs. 1, 2, 5, 14.)

B. The "Mop Up" Remaining Work that Taco Bell Intends to Perform Shall Be Completed in the Near Future.

The remaining modification work that Taco Bell still intends to perform shall be completed in the near future. In particular, Taco Bell has already retained its project manager, Newport CM, to oversee the contractors who shall perform the remaining "mop up" ADA modification work on or before January 29, 2010. (Elmer Supp. Decl. ¶ 18.)

1. A Comprehensive Plan to Bring a Facility Into Compliance Suffices for Mootness.

Plaintiffs argue that "TBC does not claim to have remedied all ADA violations in its California stores." (Opp'n at 17:13-14; 17:22-23.) Taco Bell submits that plaintiffs are applying the wrong legal standard.

This action is analogous to *Access 4 All, Inc. v. Casa Marina Owner*, LLC, 458 F. Supp. 2d 1359 (S.D. Fla. 2006) (King, J.). In that case, the district court held that there was a comprehensive plan put into place to remodel the entire facility at issue, a hotel, and bring it up to compliance with the ADA. *Id.* at 1363. An architectural firm was retained regarding renovations. The firm had the duty to prepare drawings and submit them to the proper authorities to help obtain building permits and to certify such plans are in compliance with accessibility statutes and regulations. *Id.* at 1363-64. The court held, "Defendant's remedial plan . . . renders Plaintiffs' claims moot, as a matter of law, and subjects Plaintiffs' Complaint to dismissal." *Id.* at 1364-65. The district court criticized the plaintiff for continuing the litigation after learning of the renovation plans including an investment of approximately $38 million. *Id.* at 1365. "If an ADA 'plaintiff [has] already . . . received everything to which [he] would be entitled', i.e., the challenged conditions have been remedied, then these particular claims are

moot absent any basis for concluding that plaintiff will again be subjected to the same wrongful conduct by this defendant." *Id.* at 1365 (quoting *Parr v. L & L Drive-Inn Rest.*, *supra*). "Plaintiffs have not, nor can they present any competent or reasonable evidence whatsoever to suggest that they will again be subjected to the same ADA violations by this Defendant." *Id.* at 1366. The court also found the lawsuit was frivolous, unreasonable, and groundless because the defendant notified the plaintiff of its plan to renovate the hotel, but the plaintiff insisted upon pursuing its claims. *Id.* at 1367-68. The court noted the defendant's voluntary decision to remedy any alleged barriers. *Id.* at 1368.

In *Association of Disabled Americans, Inc., v. Key Largo Bay Beach, LLC*, 407 F. Supp. 2d 1321 (S.D. Fla. 2005) (King, J.), the district court relied upon the defense testimony that a handheld shower head in a particular guest room was in the process of being fixed. *Id.* at 1347.

In *Schonfeld v. City of Carlsbad*, 978 F. Supp. 2d 1329 (S.D. Cal. 1997) (Gonzalez, J.), the district court held that the City's schedule for future curb ramp construction is non-discriminatory. Id. at 1341.

In *Colorado Cross Disability Coalition v. Hermanson Family Limited Partnership I*, Nos. Civ.A. 96-WY-2490-A, Civ.A. 96-WY-2491-A, Civ.A. 96-WY-2492-A, Civ.A. 96-WY-2493-A, 1997 WL 1523960 (D. Colo. Aug. 12, 1997) (Johnson, J.), the plaintiff sought the installment of a portable ramp proposed by plaintiffs for a front entrance to an office building with a single 7.5 inch step at the front entrance. The court denied the plaintiff's motion for summary judgment. In support, the court cited defendant's intention to build a new permanent entrance elsewhere in the next year. "While undoubtedly a portable ramp could provide access to the building, it is also equally clear that defendant's longer-term plans will also provide effective and safe access to the building for those required to use wheelchairs for mobility." *Id.* at *1.

C. McSwain's Expert Report Is Grossly Overinclusive Because It Addresses Alleged Non-ADA Standards and Liability.

Plaintiffs argue that Taco Bell has not claimed to have remediated "all of the violations identified by Mr. McSwain." (Opp'n at 17:21-25; 18:4-5.) McSwain's list of purported architectural barriers is grossly overinclusive and does not comport with the Court's directive to exchange expert reports "on ADA liability."

On June 27, 2008, the Court issued its Rule 16 Scheduling Order, which set May 1, 2009 as the deadline for the parties to exchange "expert reports *on ADA liability*." (Order of 6/27/08 at 2:23; docket #386) (emphasis added). In other words, the Court did not authorize the submission of expert reports on non-ADA liability including any liability under state law claims.

Nevertheless, McSwain's expert report exchanged on May 1, 2009, which plaintiffs have filed in support of their opposition, is riddled with literally hundreds of non-ADA standards addressed at length in Taco Bell's initial moving papers and Exhibit 18 to Elmer's declaration. Indeed, plaintiffs allege that McSwain found over 2,400 ADA violations and state law violations, but the number drops to "over 1,900" if only alleged ADA violations are counted. (Opp'n at 19 n.12.) Thus, plaintiffs admit that between 400 and 600 alleged architectural barriers set forth in McSwain's expert report are not alleged ADA violations. (Opp'n at 19:1; 19 n.12.) Plaintiffs' counsel conceded under oath that plaintiffs' expert reports included items that were "premature at this stage" insofar as they referenced Title 24 of the California Code of Regulations. (A. Robertson decl. ¶ 12.) Indeed, to date, neither plaintiffs nor their retained expert, McSwain, has made any attempt to specifically identify which alleged barriers were ADA issues versus state law issues within plaintiffs' expert reports. (Hikida Supp. Decl. ¶ 13.) Rather, plaintiffs apparently expect this Court to review their 1325 page chart attached as Exhibit 1 to Amy Robertson's declaration, compare it against McSwain's 420 page report, and try to discern which elements were omitted from the 1325 page chart.[2] Taco Bell was forced to undertake an extremely time-consuming analysis through McSwain's 420 page report, which could have been avoided had plaintiffs complied with the Court's Scheduling Order by providing an expert report that was limited to ADA liability only.

D. The Ninth Circuit's *Martinez v. Longs Drug Stores Corp.* Decision Is On Point.

Plaintiffs' attempt to distinguish *Martinez v. Longs Drug Stores Corp.*, No. 05-17142, 281 Fed. Appx. 712, 2008 WL 2329712 (9th Cir. Mar. 5, 2008), is misplaced. The Ninth Circuit noted that some

[2] Plaintiffs' counsel have prepared and submitted numerous charts that they created in support of their Opposition, (A. Robertson decl. Exs. 21-37), so the Court can and should assume that plaintiffs' omission in submitting a chart identifying the precise nature and scope of the hundreds of non-ADA issues set forth in McSwain's 420 page expert report on ADA liability was intended to obfuscate the extent of their action.

of the ADA violations at the store at issue "were capable of complete and irrevocable remediation." *Id.* at *1. Although the Ninth Circuit noted that other items such as the placement of the garbage can and aisle displays could recur and *although the plaintiff argued that the defendant store operator lacked a policy to maintain accessible features*, the Ninth Circuit affirmed the district court's refusal to impose injunctive relief because the "district court clearly understood the problem with regard to the possibility of recurrence, was satisfied that injunctive relief was not an appropriate means to ensure ADA compliance, and accordingly exercised its discretion not to impose such relief." *Id.* at *1. In so doing, the Ninth Circuit rejected the plaintiff's invocation of the "voluntary cessation" exception to the mootness doctrine by clarifying that that exception merely "allows a court to determine the legality of a challenged practice where the defendant has voluntarily ended that practice", but that the issue at hand before the district court was "the proper remedy." *Id.* at *1 n.1.

Like the plaintiff in *Martinez*, plaintiffs' reliance upon the voluntary cessation exception to the mootness doctrine, (Opp'n at 23:12-13), ignores the crucial question as to "the proper remedy" for the alleged ADA claim for relief. Given the lack of evidence that Taco Bell would undo over $8 million worth of ADA enhancements and Taco Bell's current accessibility-related policies, the Court should exercise its discretion to not impose injunctive relief. *Martinez, supra*, at *1 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 193, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (holding that the district court may "conclude that an injunction would be an excessively intrusive remedy")).[3]

E. Plaintiffs Have Failed to Meet Their Burden of Demonstrating That New Stores Are Not in Compliance with the ADA.

Although plaintiffs question whether certain recently constructed stores are in compliance with the ADA, (Opp'n at 21:22-25), plaintiffs ignore that it is *their* burden to demonstrate that Taco Bell's stores are currently not in compliance with applicable accessibility standards. *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1048 (9th Cir. 2008); *Chapman v. Pier 1 Imports*, 571 F.3d 853, 859 (9th Cir. 2009) (holding that an ADA plaintiff lacks standing to pursue "unencountered alleged barriers").

[3] Plaintiffs' contention that Taco Bell did not discuss or distinguish *Friends of the Earth*, (Opp'n at 23:15-16), is wrong. (*See* TBC's Mot. at 6:8-10.)

Plaintiffs refused to survey any newly constructed stores. (Hikida Supp. Decl. ¶ 6.) Plaintiffs also conveniently ignore that Taco Bell has retained an outside accessibility consulting firms, since 2006, to survey and inspect all newly constructed stores for ADA compliance. (Elmer Supp. Decl. ¶¶ 15, 16.)

F. The Omission of the Challenged Elements Referenced in Plaintiffs' 2006 Meet and Confer Charts From Plaintiffs' 2009 Expert Reports Indicates That Such Elements Are No Longer at Issue In This Action.

The omission of the previously challenged elements that were referenced in plaintiffs' 2006 Meet and Confer charts from plaintiffs' experts May 1, 2009 reports is telling. The Court can and should draw the inference that such elements are no longer at issue in this action with respect to plaintiffs' ADA claim for injunctive relief.

G. Plaintiffs' Shifting Injunctive Relief Demands.

Plaintiffs' refusal to identify precisely which features are at issue over the course of the instant action is demonstrated by plaintiffs' current position that the Court should not consider their Meet and Confer Charts as evidence of their former positions, which have continuously shifted over time.

1. Plaintiffs Waived Their Reliance Upon Fed. R. Evid. 408 By Relying Upon Their Meet and Confer Charts in Formal Discovery Requests.

Although plaintiffs contend that their Meet and Confer charts are subject to Federal Rule of Evidence 408,[4] (Opp'n at 28:15-16), plaintiffs conveniently ignore that they have affirmatively relied upon their Meet and Confer Charts in formal discovery requests propounded against Taco Bell in the instant action. In particular, on July 7, 2008, plaintiffs propounded numerous Interrogatories against Taco Bell that expressly relied upon and incorporate by reference "Meet and Confer Charts" "provided in electronic form by Plaintiffs to Defendant in or about April through June, 2006". (Hikida Supp. Decl.

[4] Plaintiffs' reliance upon former defense counsel's letter dated July 19, 2005, (A. Robertson decl. Ex. 8), is misplaced. That letter expressly contemplated adding four columns to the Special Master Interim Survey Reports to create a "Final Special Master Form" including two columns that would be labeled as "SASMF Comments" and "F&R Comments". That proposed Form was never used by the parties. (Hikida Supp. Decl. ¶ 2.) No such columns exist in plaintiffs' M&C charts. (Hikida decl. of 10/20/09 ¶ 3 Ex. 2.)

¶ 2 Ex. 1.) Such Interrogatories are Interrogatories Nos. 11, 12, 13, 14, 15, and 16 to Plaintiffs' July 7, 2008 Interrogatories. *Id.* at 6:7-7:10. Plaintiffs selectively rely upon their "Meet and Confer Charts".

Indeed, if a discovery dispute erupts in the future as to plaintiffs' Interrogatories Nos. 11, 12, 13, 14, 15, and 16, the Court will necessarily have to consider plaintiffs Meet and Confer Charts given that plaintiffs' Interrogatories are expressly premised upon such Charts. Indeed, such discovery requests become meaningless if the Meet and Confer Charts upon which they are premised are ignored.

H. Plaintiffs Should Inform Taco Bell Which Modifications Completed by Taco Bell Over the Past Year Are Adequate and Which Are Not.

If plaintiffs' real concern is full and equal access, then plaintiffs should inform Taco Bell precisely which modifications completed by Taco Bell over the past six months following the apparent completion of plaintiffs' expert site inspections as of April 7, 2009 are adequate and which are not. Plaintiffs have chosen not to do so. Instead, plaintiffs focus upon past alleged barriers.

1. Plaintiffs Have Apparently Not Inspected a Single Modification Made By Taco Bell in Response to Plaintiffs' Experts' Reports.

The plaintiffs raised a discovery dispute with the magistrate judge and this Court regarding their demand to conduct unsupervised and unannounced site inspections at Taco Bell's stores. (Joint Statement of 9/15/09; docket #452; Order Re Docket #452; docket #453; Pls.' Objection of 9/25/09; docket #454.) This Court granted plaintiffs the opportunity to conduct an unlimited number of site inspections on a mere 48 hours notice before the filing of plaintiffs' response in opposition filed on November 10, 2009. (Order of 10/22/09 at 1:26-2:4; docket #461.) However, plaintiffs failed to request or conduct a single site inspection to verify any of the modifications or advise Taco Bell of any fixes that they did not agree with. (Hikida Supp. Decl. ¶ 5.)

I. Plaintiffs Cannot Prevail Based Upon a Reasonable Modification of Policy or Practice Theory.

Plaintiffs fail to address the legal standard as to an alleged discriminatory policy or practice.

"An individual alleging discrimination under Title III must show that: (1) he is disabled as that term is defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant employed a discriminatory policy or practice; and (4) the

defendant discriminated against the plaintiff based upon the plaintiff's disability by (a) failing to make a *requested* reasonable modification that was (b) necessary to accommodate the plaintiff's disability." *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004) (Wardlaw, J.) (emphasis added).

"'Although neither the ADA nor the courts have defined the precise contours of the test for reasonableness, it is clear that the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.'" *Id.* at 1083 (citation omitted).

1. Taco Bell Has an Appropriate Maintenance Policy.

It is undisputed that items in Taco Bell's stores including restroom fixtures may need to be replaced at some point in the future due to breakage from customer use, vandalism, or theft. The fact that such items may need to be replaced and repaired at some point in the future does not, however, render the necessary modifications as ADA violations.

In *Eiden v. Home Depot USA, Inc.*, No. CIV. S-04-977 LKK/CMK, 2006 WL 1490418 (E.D. Cal. May 26, 2006) (Karlton, J.), the district court held that ADA defendants are not liable for "isolated" or "temporary" movable objects that temporarily restrict access where the barrier is caused by maintenance or repair. *Id.* at *12. The court held that the DOJ has determined that an isolated instance of placement of an object in an accessible route is not a violation if the object is promptly removed. *Id.* at *12.

In *Cherry, et al. v. The City College of San Francisco, et al.*, No. C 04-04981 WHA, slip op. (N.D. Cal. Jan. 12, 2006) (Alsup, J.), the district court held that temporary or isolated interruptions are not violations, and that the burden is on plaintiffs to show that the blockage is persistent. *Id.* at 13:1-5.

Pursuant to *Cherry*, plaintiffs have failed to meet their burden of demonstrating that specific interruptions in accessibility at specific stores are persistent. What plaintiffs' opposition ignores are the current policies and practices implemented by Taco Bell to ensure that controls or dispensers or fixtures used by disabled customers, that wind up breaking or needing repair, are handled in a compliant manner consistent with the ADA. (Elmer decl. ¶¶ 5-12 Exs. 1-7.)

In *Foley v. City of Lafayette, Ind.*, 359 F.3d 925 (7th Cir. 2004) (Kanne, J.), the Seventh Circuit cited the defendant's long-term service contract with an elevator repair company as evidence of a proper maintenance policy. *Id.* at 929. The Seventh Circuit held that "occasional elevator malfunctions, unaccompanied by systemic problems of poor maintenance policy or frequent denials of access, do not constitute violations". *Id.* at 930. "[Plaintiff] alleges, at worst, individual, isolated instances of employee negligence and not a systemic problem with the policies of the City of Lafayette regarding the structure and operation of the train station." *Id.* at 930.

Similarly, Taco Bell's service contract with Maintco is evidence of a proper maintenance policy. (A. Robertson decl. of 11/10/09 Ex. 15) (TBGT217654-TBGT217656); (Elmer decl. ¶ 5; Reeves decl. ¶ 2).

2. Plaintiffs Failed to Request a Reasonable Modification of Taco Bell's Maintenance Policy.

A plaintiff must demonstrate that he or she affirmatively requested an accommodation that was tied to his disability. *Bodley v. Macayo Rest., LLC*, 546 F. Supp. 2d 696, 699-700 (D. Ariz. Mar. 2008) (Campbell, J.) (citing *Fortyune*, 364 F.3d at 1082).

In *Massachusetts v. E*Trade Access, Inc.*, 464 F. Supp. 2d 52 (D. Mass. 2006) (Lasker, J.), a case in which Tim Fox and Amy Robertson served as plaintiffs' counsel, the district court held, "[A] *plaintiff bears the burden* of establishing that he requested a specific reasonable accommodation to a policy which, if granted, would afford him access to the desired goods or services. Once the plaintiff meets that burden of showing that a modification is reasonable in a general sense, the defendant must make the modification unless he can show that such a change would work a fundamental alteration." *Id.* at 58 (emphasis added).

Plaintiffs have failed to meet *their burden* of establishing that they requested a specific reasonable accommodation to Taco Bell's maintenance policy which, if granted, would afford them access to the desired goods or services. *E*Trade*, 464 F.2d at 58.

3. Plaintiffs' Apparent Position that Taco Bell's Accessibility Policies Should Remain Static and Unchanged Is Wrong.

Plaintiffs criticize Taco Bell's accessibility-related policies because Taco Bell has modified its policies over time. (Pls.' Opp'n at 5:14-6:6; 20:15-16.) This criticism is bizarre and demonstrates that Taco Bell can't win either way. If Taco Bell had not modified its policies over time, plaintiffs surely would have argued that Taco Bell was oblivious to the issues that they sought to challenge and that its policies should not remain static and unchanged. On the other hand, plaintiffs challenge Taco Bell's modifications to its policies over time regardless of whether such modifications are intended to enhance the accessibility of its stores. By highlighting the policy changes that Taco Bell has made over time, plaintiffs are making precisely Taco Bell's point.

Moreover, plaintiffs' comparison between the informal list of duties assigned to facilities leaders in 2005 with the subsequent checklists provided to store-level employees is akin to comparing apples and oranges. (Pls.' Opp'n at 5:14-6:6.) Facilities leaders have oversight over a number of stores and are not store-level employees. In other words, the duties of a facilities leader are different from duties of a store-level employee. (Elmer Supp. Decl. ¶ 17.)

4. The Four Depositions of Restaurant General Managers Took Place Before Taco Bell's ADA Director Issued a Memorandum Reminding RGMs To Focus on Certain Accessibility-Related Items on a Daily Basis.

Although plaintiffs make reference to the deposition testimony of four depositions of Restaurant General Managers, such depositions occurred on September 3, 2009, (A. Robertson decl. Exs. 16, 17, 18, 19), which was before Taco Bell's ADA Director recently circulated a memorandum to all California company-owned store restaurant general managers reminding them to focus on certain accessibility-related items to ensure compliance with the ADA on a daily basis. (S. Elmer decl. ¶ Ex. 1.) Thus, such RGMs did not have the benefit of the guidance of the policy memorandum issued on October 14, 2009, which stated in relevant part:

> "*Generally speaking*, **you should not replace any restroom signs, dispensers (paper towel, soap, toilet paper, seat covers), mirrors, sinks, toilets, urinals, faucets, hand dryers, coat hooks or door handles/latches/locks without consulting with your Area Coach or Facility Leader** to ensure that an ADA compliant replacement item is used and installed in a compliant manner. You may also contact me directly with any questions in this regard."

(Elmer decl. Ex. 1) (first emphasis added) (italics only). Moreover, the policy memorandum recognizes that there may be extenuating circumstances in which the RGM may need to make emergency repairs to

a restroom in order to comply with local Health and Safety Code requirements. For example, if a broken water closet is left untouched for an extended period of time, the store might be shut down by the local Health Department. Plaintiffs' characterization of Taco Bell's policy memorandum ignores the existence of such exception.

Moreover, the specific question posed to deponent Fike was whether he had received accessibility-related documents over the "last year". (A. Robertson decl. Ex. 17; depo. tr. at 19:13-14.) Thus, the specific question was much narrower than implied by plaintiffs.

Further, plaintiffs mischaracterize Taco Bell's manager-in-charge card as somehow mutually exclusive of Taco Bell's store-level training and guidance of store general managers as to accessibility issues.

Finally, even assuming that plaintiffs elicited favorable testimony from the four RGMs that they deposed, plaintiffs' reliance upon the testimony of four RGMs out of approximately 200 California company-owned stores that currently exist is not in any way representative of the personal knowledge of the other RGMs. Plaintiffs make no evidentiary proffer that the testimony of four RGMs is statistically significant or representative of the approximately 200 other California stores at issue.

J. Plaintiffs Ignore the Vast Case Authority Recognizing Equivalent Facilitation Via Customer Service.

Plaintiffs ignore the vast case authority recognizing equivalent facilitation via customer service. In *Lieber v. Macy's West, Inc.*, 80 F. Supp. 2d 1065 (N.D. Cal. 1999) (Patel, J.), the district court held that the defendant operator of a department store had violated the ADA's readily achievable barrier removal standard by failing to make *any* effort to improve access within its merchandise pads via customer service as an alternative accommodation. *Id.* at 1080 ("the court concludes that, at the time of trial, Macy's had not adequately provided access to merchandise pads through readily achievable 'alternative methods' such as customer service. 42 U.S.C. 12182(b)(2)(v)."). The district court held, "The explicit language of the ADA, Department of Justice ("DOJ") ADA regulations, and the legislative history of the ADA uniformly indicate that the statute does not contemplate that customers in wheelchairs will have 100% physical access to merchandise at Macy's or at any other retail store." *Id.* at 1077. The court further explained, "The ADA requires the merchant to provide sales assistance to

retrieve merchandise that is physically inaccessible." *Id.* at 1080. "Also, DOJ regulations state that '[e]xamples of alternatives to barrier removal include . . . [r]etrieving merchandise from inaccessible shelves or racks.'" *Id.* at 1080 (quoting 28 C.F.R. § 36.305(b)(2)). The court added, "Under the readily achievable standard, Macy's is specifically obligated to provide service to people with disabilities as an alternative to access in any areas where it does not provide actual physical access to the merchandise offered for sale to the public." *Id.* at 1080 (citing 28 C.F.R. § 36.305(b)(2)). The district court noted that Macy's had taken insufficient steps at the time of trial to ensure that shoppers with disabilities actually receive adequate assistance from sales clerks. *Id.* at 1081. No special training had been provided for sales clerks to assist disabled customers. *Id.* at 1081. Thus, the court rejected the customer service defense and ordered a plan for effective customer service for customers with mobility disabilities, including signage informing such patrons of the availability of such service. *Id.* at 1082.

In *Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 05CV1660-J (WMc), 2008 WL 111052 (S.D. Cal. Jan. 10, 2008) (Jones, J.), the district court held, following a bench trial, that even policies and practices can constitute a form of equivalent facilitation. "Policies and practices that provide substantially equivalent or greater access to and usability of a facility constitute a form of equivalent facilitation." *Id.* at *21. In that case, the alleged barrier was a 44 inch high wall in front of two restaurants' food preparation counters, which obstructed the wheelchair-bound plaintiff's view of the counters and the ability to see the food ingredients for purposes of customizing his food order. After the lawsuit was filed, the defendant implemented a nationwide written policy setting forth methods to continue to provide excellent customer service to all its customers including the disabled. *Id.* at *13. Since implementing the new written policy, the defendant did not receive any complaints from any customer in a wheelchair regarding the accessibility of the 2 restaurants. *Id.* at *17. The district court held that the written policy constituted a form of equivalent facilitation because it allowed disabled customers to see the food ingredients by other means even if the food preparation wall continued to obstruct their view of the ingredients. The district court held, "[T]he ADA does not require that establishments provide *exactly the same experience* for disabled customers as they do for non-disabled customers." *Id.* at *27 (emphasis added). The defendant's written policy was a form of "accommodation" or equivalent facilitation that provided disabled and non-disabled customers who

can't see over a wall behind which food items were being prepared with a substantially similar opportunity to enjoy the "Chipotle experience." *Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 05CV1660 J (WMc), 2008 WL 1805828, at *3 (S.D. Cal. Apr. 21, 2008) (Jones, J.).

In *Hubbard v. 7-Eleven, Inc.*, 433 F. Supp. 2d 1134 (S.D. Cal. 2006) (Lorenz, J.), the district court rejected the assertion that coffee pots at the coffee counter and other merchandise in a convenience store were too high for disabled customers to reach. *Id.* at 1148. In support, the court noted, "Finally, Defendant has a policy of assisting disabled customers, and has installed ADA-compliant signage stating, 'If you require any assistance, please notify one of your friendly team members.'" *Id.* The court held, "Signs such as the one posted by Defendant constitute a reasonable modification under the ADA." *Id.* In support, the court cited the following federal ADA regulation, which provides that "[e]xamples of alternatives to barrier removal include, but are not limited to, . . . [r]etrieving merchandise from inaccessible shelves or racks." 28 C.F.R. § 36.305(b)(2). The court also cited *Adelman v. Acme Markets Corp.*, No. 95-4037, 1996 WL 156412 (E.D. Pa. Apr. 3, 1996) (Waldman, J.), which held that "retrieving an item from a shelf may be a 'reasonable modification' to a store's self-service policy." *Id.* at *1. The court also held that "[p]roviding a clerk to retrieve inaccessible merchandise would also be a readily achievable alternative to removal of architectural barriers." *Id.* at *1 n.2.

In *Jones v. Wild Oats Markets, Inc.*, No. 04-1018-WQH (WMc), slip op. (S.D. Cal. Nov. 29, 2005) (Hayes, J.); (Collins decl. Ex. 7), the district court held that self-service shelves and displays need not be lowered within the reach ranges of individuals based upon TAM III-7.5150.[5] *Id.* at 9:5-8. Even assuming that such elements were, in fact, within the scope of the ADA, the district court noted that the plaintiff failed to meet her burden as to reach ranges given that she could have requested and received assistance in reaching the produce scales and bags. *Id.* at 9:17-20.

In *Peters v. Winco Foods, Inc.*, No. S02-2010 (E.D. Cal. Dec. 18, 2003) (Damrell, J.), the district court implicitly found that equivalent facilitation was provided under ADAAG 7.2(2)(iii) insofar as

[5] In *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004) (Berzon, J.), the Ninth Circuit held that the Title III Technical Assistance Manual's guidance is an interpretation of the DOJ's regulation and is entitled to "significant weight" as to the meaning of the regulation. *Id.* at 875-76.

employees could use pass-through space along counters to bring food items from high meat or deli counters to disabled customers. *Id.* at 7:18-22; RJN Ex. 1.

In *Colorado Cross-Disability Coalition v. Too (Delaware), Inc.*, 344 F. Supp. 2d 707 (D. Colo. 2004) (Babcock, J.), the district court held, "The purpose of [section 12182(b)(2)(A)(iv)] is to provide individuals with disabilities access to a representative selection of merchandise available in a department. The Committee does not intend that a department store separate each and every display fixture in order to provide wheelchair clearance maneuverability. It is sufficient if a customer who uses a wheelchair is able to determine, once in a department, that the store offers, for example, black leather jackets. Once that is determined, the customer can rely upon a salesperson to retrieve a black leather jacket in the customer's size." *Id.* at 712 (quoting H.R. Rep. No. 485(II) at 110) (emphasis added). Thus, the district court relied upon the customer service defense in refusing to find an ADA violation. *Id.* at 715 ("If Plaintiffs encounter movable displays in their way, they may ask for help from salespeople who, under [the store operator's] own policies, will assist them by 'graciously' moving the display.").

In *Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001) (Highsmith, J.), the district court held that restaurant service on the first deck of a cruise ship via wait staff was a reasonable alternative method of providing restaurant service to those on the second and third decks. *Id.* at 1365. The court also held that bar service via the ship's wait staff was a reasonable alternative method to the bar counter being too high. *Id.* at 1365-66.

In *Access 4 All, Inc. v. Atlantic Hotel Condominium Ass'n*, No. 04-61740-CIV, 2005 WL 5643878 (S.D. Fla. Nov. 23, 2005) (Cohn, J.), the district court held that a staff person who personally accommodates a disabled person either at the couch seating area near a high registration desk or at the concierge desk inside a hotel constitutes equivalent facilitation and complies with the ADA. *Id.* at *6, *14.

In *Brother v. CPL Investments, Inc.*, 317 F. Supp. 2d 1358 (S.D. Fla. 2004) (Martinez, J.), the district court found that the claims were moot in part because of a record of accommodating the disabled and policies to ensure ADA compliance. *Id.* at 1372-73.

Numerous other courts have applied equivalent facilitation in other contexts. *See, e.g.*, *National Fed. of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1195 (N.D. Cal. 2007) (Patel, J.) (holding that in-store assistance or a 1-800 customer service number provided accommodations that constituted an affirmative defense); *Alford v. City of Cannon Beach*, No. CV-00-303-HU, 2000 WL 33200554, at *10 (D. Or. Jan. 17, 2000) (holding that lifting the wheelchair itself, with the disabled patron seated in it, up a flight of stairs is an *adequate alternative measure*, which is distinct from carrying the disabled patron independent of the wheelchair itself); *Association of Disabled Americans, Inc., v. Key Largo Bay Beach, LLC*, 407 F. Supp. 2d 1321, 1339 (S.D. Fla. 2005) (King, J.) (holding that a hotel did not discriminate, in part, against its mobility-impaired patrons by not installing a canopy over outdoor paths of travel such as a ramp because the hotel staff was willing to assist its patrons with umbrellas); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 2d 698, 726-27 (D. Or. 1997) (holding that folding chairs that were not "fixed" or new technology were still deemed to be equivalent facilitation); *Jones v. Dollar Tree Stores, Inc.*, No. 204CV2002MCEKJM, 2006 WL 1408667, at *7 (E.D. Cal. May 19, 2006) (England, J.) (holding that a plaintiff, who uses a wheelchair for mobility, was not entitled to recover for interior signage identifying a women's restroom posted ¼ inch at variance with the strict terms of the ADAAG based on the equivalent facilitation doctrine).

As suggested by Judge Patel in *Lieber*, Taco Bell has installed customer service signage at each of its California corporate-owned stores. (Elmer decl. ¶ 13 Ex. 8); *Lieber*, 80 F. Supp. 2d at 1082 (ordering a plan for effective customer service for disabled patrons via signage); *id.* at 1080 ("[T]he methods used by other stores are relevant as examples of alternative approaches."). The Special Master expressly proposed customer service as a solution in his Interim Survey Report for store #3078 by proposing that "only Taco Bell staff can operate the exterior key lock for each restroom and staff must assist all guests in opening the restroom doors." (Hikida Supp. Decl. ¶ 14 Ex. 7.) Taco Bell has trained its store-level employees to offer assistance to any customer, including the mobility-impaired. (Elmer Decl. ¶ 14 Ex. 10.) Indeed, the four recently-deposed restaurant general managers testified as to their customer assistance for the disabled.

Plaintiffs omit that deponent Aashish Malik testified that he received training to assist customers with disabilities as follows:

Q. Okay. Have you received any training concerning accessibility issues?
A. Well, we have ongoing training, so we keep in the store. We receive if we get some sort of information in the store, we get a training paper in our restaurant.
Q. Okay. And I want to know have you received any training in that form or any other form concerning accessibility issues?
A. We have a Taco Bell orientation. We always help the customers, so basically, this is part of the training system we use in the store, so ongoing, and we teach everybody if the customer needed help and the dining room area or offside area, we are go and help them. If they don't need help, we still ask for help, mostly somebody's in wheelchair.
Q. Okay. So one subject of training that you have received concerns assisting customers including customers with disabilities? Is that right?
A. Yes, sir.

(A. Robertson decl. Ex. 18; depo. tr. at 15:19-16:13.)

In addition, plaintiffs omit the fact that deponent Greg Carlos recalled receiving accessibility-related documents concerning the use of the Taco Bell restaurant by people who use wheelchairs or scooters. (A. Robertson decl. Ex. 16; depo. tr. at 10:13-25.) Carlos testified that he was trained not to discriminate against customers with a "handicap". (A. Robertson decl. Ex. 16; depo. tr. at 11:19.) Carlos noted his duties as a RGM was to be a "customer maniac" so that if customers in wheelchairs need help, "we help them." (A. Robertson decl. Ex. 16; depo. tr. at 12:13-15.) Carlos noted that one of his duties as a general manager was to provide customer service to people who use wheelchairs or scooters. (A. Robertson decl. Ex. 16; depo. tr. at 12:16-19.)

Plaintiffs mischaracterize the foregoing "customer service" equivalent facilitation as providing merely treating customers with "courtesy". The deposition excerpt of Maria Solis cited by plaintiffs, page 19 (no line numbers cited), says nothing about treating customers merely with "courtesy". As for Eric Fike's deposition testimony, plaintiffs conveniently ignore the "customer maniac" reference in his deposition testimony, (A. Robertson decl. Ex. 17; depo. tr. at 19:21-25), which is intended to convey the "customer service" equivalent facilitation provided by Taco Bell's employees. Thus, even assuming that certain controls or dispensers are out of compliance with the ADAAG, Taco Bell has provided equivalent facilitation in the form of customer service.

K. The ADAAG Does Not Require a Separate Route Other Than the Parking Lot.

McSwain challenges at several stores the fact that the intended exterior accessible route to an accessible store entrance requires traveling in the parking lot, which he challenges as hazardous. In *Wilson v. Pier 1 Imports (US), Inc.*, No. S-04-633-LKK/CMK, 439 F. Supp. 2d 1054 (E.D. Cal. July 14,

2006) (Karlton, J.), the district court rejected precisely such argument and found that there is no separate route required other than via the parking lot. *Id.* at 1071.

L. There Is No ADA Violation Premised Upon the California Retail Food Code.

Plaintiffs contend that Taco Bell is committing an ADA violation by removing door closers from certain of its stores in order to provide door maneuvering clearances that meet current ADAAG standards. In support, plaintiffs rely upon the California Retail Food Code. (Opp'n at 20:4-5; 41:19-42:5.) Plaintiffs' argument is simply wrong. Taco Bell believes that its solution of using gravity door closers complies with both the ADA and California law.

Plaintiffs cannot use California state Health and Safety regulations to establish a violation of the ADA. Compliance with the ADAAG is compliance with the ADA. In *Chapman v. Pier 1 Imports*, No. CIV. S-04-1339 LKK CMK, 2006 WL 1686511 (E.D. Cal. June 19, 2006) (Karlton, J.), the district court stated, "[T]he court adopts by reference the analysis articulated in *Eiden*[6] 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. "[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." *Chapman, id.* at *7 n.11. "[T]he court concludes that the ADAAG constitutes the exclusive standards under Title III of the ADA". *Id.* at *7; *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."); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 2d 698, 746 (D. Or. 1997) ("The implication is that the [ADAAG] standards are the exclusive source for design requirements."). Indeed, the ADAAG's architectural design standards are even exclusive to the "general non-discrimination provisions in Title

[6] *Eiden v. Home Depot USA, Inc.*, No. CIV S04-977 LKK/CMK, 2006 WL 1490418, at *8 (E.D. Cal. May 26, 2006) (Karlton, J.).

III itself." *Id.* at 746, 758.

More recently, in *Sanford v. Roseville Cycle, Inc.*, No. Civ. 04-1114 DFL CMK, 2007 WL 512426 (E.D. Cal. Feb. 12, 2007), Judge Levi held that the California Building Code is "irrelevant for ADA purposes." *Id.* at *1. "The ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) are the exclusive standards for judging compliance with the ADA." *Id.* at *1.

In *White v. Divine Invs., Inc.*, No. 05-17077, slip op., 286 Fed. Appx. 344, 2008 U.S. App. LEXIS 12221 (9th Cir. June 5, 2008), the plaintiff argued unsuccessfully that she could maintain an ADA claim under Title III for a violation of her "full and equal enjoyment" irrespective of ADAAG violations. The Ninth Circuit held that reliance upon violations of state building codes to prove deprivation of "full and equal enjoyment" is wrong. *Id.* at *3. "No court has ever held that a Title III discrimination action based on the design of a public accommodation may be maintained in the absence of an ADAAG violation, nor does the text of the statute support such a reading." *Id.* at *3. "In Title III design cases, the ADAAG define discrimination, and absent an ADAAG violation, no discrimination has occurred." *Id.* at *3.

M. Plaintiffs Ignore the Documentary Evidence Produced to Plaintiffs Confirming the City of La Mirada's Refusal to Allow an Accessible Route from the Public Sidewalk to Be Constructed at Store #5636.

Plaintiffs ignore Taco Bell's previously produced evidence demonstrating that the City of La Mirada has precluded Taco Bell from constructing an accessible route from the public sidewalk at store #5636. (Elmer Supp. Decl. ¶ 14 Ex. 4; Hikida Supp. Decl. ¶ 10 Ex. 5.)

N. The Special Master Expressly Stated That He Does Not Measure Lateral Reach to the Back End of Condiment Bins.

Plaintiffs contend in their Opposition that Taco Bell's assertion that the Special Master used a different method than Eric McSwain's measurement methodology of lateral reach all the way to the back of each condiment bin is "unsubstantiated". (Opp'n at 39:19-20.) Plaintiffs ignore Taco Bell's express citation and quotation from the Special Master's letter to both parties in response to the Court-ordered questions allowed to be posed to the Special Master on September 24, 2007. (See Letter of Special Master Bob Evans to Tim Fox et al. dated 12/19/07 at 4 (stating that the Special Master

measured condiment dispenser bins "laterally to the center of each bin"). (Hikida Supp. Decl. ¶ 9 Exs. 3 & 4.)

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GREENBERG TRAURIG, LLP

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