

1 FOX & ROBERTSON, P.C.
2 Timothy P. Fox, Cal. Bar No. 157750
3 910 - 16th Street
4 Suite 610
5 Denver, Colorado 80202
6 Tel: (303) 595-9700
7 Fax: (303) 595-9705
8 Attorneys for Plaintiffs

9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 FRANCIE E. MOELLER et al,

13 Plaintiffs,

14 v.

15 TACO BELL CORP.,

16 Defendant.

Case No. C 02 5849 MJJ ADR

**PLAINTIFFS' MOTION TO STRIKE
DEFENDANT'S SECOND DEFENSE**

Date: April 22, 2003
Time: 9:30 a.m.

17
18 **NOTICE**

19 On April 22, 2003, at 9:30 a.m., or as soon thereafter as this motion may be heard,
20 before the Honorable Martin J. Jenkins, Plaintiffs will, and hereby do, move for an order
21 striking Defendant's Second Defense.

22 This motion is based on this Notice of Motion, and all accompanying attachments
23 hereto.

24
25
26 Case No. C 02 5849 MJJ ADR
Plaintiffs' Motion to Strike Defendant's Second Defense

1 **RELIEF SOUGHT**

2 Pursuant to Fed. R. Civ. P. 12(f), Plaintiffs seek an order striking Defendant's Second
3 Defense.

4 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

5 **I. Summary of Argument.**

6 Defendant's Second Defense should be stricken because it has been explicitly rejected
7 by the Ninth Circuit in Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (2000).

8 **II. Background.**

9 Plaintiffs filed their Class Action Complaint in this case on December 17, 2002. The
10 complaint alleges that Defendant, which owns and operates Taco Bell restaurants in California,
11 has violated the Americans with Disabilities Act, 42 U.S.C. § 12181, et seq., ("ADA") and the
12 Unruh Civil Rights Act, Cal. Civ. Code, § 51, et seq. ("the Unruh Act") by maintaining
13 architectural barriers in its restaurants that prevent customers who use wheelchairs or scooters
14 from the full, independent and equal enjoyment of Defendant's goods and services. Defendant
15 filed its Answer to Complaint on February 5, 2003, and the Answer included a number of
16 defenses. Defendant's Second Defense states:

17 On information and belief, this Court lacks subject matter jurisdiction over Plaintiffs'
18 Complaint because of their failure to exhaust administrative remedies in compliance
19 with 42 U.S.C. § 2000a-3(c) made applicable to the ADA pursuant to 42 U.S.C.
20 § 12188(a)(1).

21 By letter dated February 14, 2003, undersigned counsel informed Defendant's counsel
22 that the Ninth Circuit had rejected this defense in Botosan v. Paul McNally Realty, 216 F.3d
23 827, 832 (2000), and requested that Defendant withdraw the defense. See exhibit 1. On
24 February 19, 2003, defense counsel called undersigned counsel and stated that Defendant
25 would not withdraw the defense because the possibility existed that the Supreme Court might,

1 at some future date, rule that the defense is proper.

2 **III. Argument.**

3 A motion to strike a defense under Rule 12(f) should be granted when the defense is
4 insufficient as a matter of law. See, e.g., Chiron Corp. v. Abbott Labs., 156 F.R.D. 219, 220
5 (N.D. Cal. 1994) (“Although motions to strike a defense are generally disfavored, a Rule 12(f)
6 motion to dismiss a defense is proper when the defense is insufficient as a matter of law.”
7 (citation omitted)). In this case, Defendant’s Second Defense has been rejected by the Ninth
8 Circuit in Botosan and thus is insufficient as a matter of law and should be stricken.

9 In Botosan, the Ninth Circuit considered the precise argument raised by Defendant in
10 this case -- whether 42 U.S.C. § 12188(a)(1) incorporates the requirements of 42 U.S.C.
11 § 2000a-3(c). Botosan, 216 F.3d at 831-32. Section 12188(a)(1) provides that “[t]he remedies
12 and procedures set forth in section 2000a-3(a) of [Title VII] are the remedies and procedures
13 this subchapter provides to any person who is being subjected to discrimination on the basis of
14 disability....” The Ninth Circuit held that section 12188(a)(1) does not incorporate the
15 requirements of 42 U.S.C. § 2000a-3(c):

16 The plain language of § 12188(a)(1) is clear and unambiguous, and it can be
17 understood without reference to any other statutory provision. Section
18 12188(a)(1) is devoid of any reference to § 2000a-3(c). Yet, Congress
19 explicitly incorporated subsection (a) of § 2000a-3 into § 12188(a)(1). The
20 incorporation of one statutory provision to the exclusion of another must be
21 presumed intentional under the statutory canon of *expressio unius*. Surely,
22 “Congress obviously knew how to adopt provisions of Title VII because it
23 expressly adopted subsection (a) ... [and it is] unlikely that Congress would
24 absentmindedly forget to adopt a provision that appears a mere two paragraphs
25 below the subsection it adopted.” [Botosan v. Fitzhugh, 13 F. Supp. 2d 1047,
26 1050 (S.D. Cal. 1998); see also Guzman v. Denny’s Inc., 40 F. Supp. 2d 930,
934 (S.D. Ohio 1999).] Even if incorporation of all subsections of § 2000a-3
into § 12188(a)(1) did not render the explicit reference to § 2000a-3(a)
superfluous or redundant, the statute’s legislative history, the Code of Federal

1 Regulations, see 28 C.F.R. § 26.501(a), and the Department of Justice's
2 Technical Assistance Manual generally support the conclusion that Title III
3 actions do not require state notification. Thus, we hold that § 12188(a)(1) does
4 not implicitly incorporate § 2000a-3(c).

5 Id. at 832.

6 Defendant's Second Defense asserts that section 12188(a)(1) incorporates the
7 requirements of 42 U.S.C. § 2000a-3(c). Because the Ninth Circuit rejected this assertion in
8 Botosan, Defendant's Second Defense is insufficient as a matter of law and should be stricken.

9 **CONCLUSION**

10 For the reasons set forth above, Plaintiffs respectfully request that their Motion to
11 Strike Defendant's Second Defense be granted.

12 Respectfully submitted,

13 FOX & ROBERTSON, P.C.

14 By: /s/ Timothy P. Fox
15 Timothy P. Fox, Cal. Bar No. 157750
16 910 - 16th Street
17 Suite 610
18 Denver, CO 80202
19 303.595.9700

20 Dated: February 20, 2003

21 Attorneys for Plaintiffs

PROOF OF SERVICE VIA U.S. MAIL

STATE OF COLORADO

CITY AND COUNTY OF DENVER

I am employed in the City and County of Denver, State of Colorado, am over the age of 18, and not a party to the within action; my business address is 910 - 16th Street, Suite 610, Denver, CO 80202. On the date below indicated, I served on the interested parties in this action the within document(s) described as:

Plaintiffs' Motion to Strike Defendant's Second Defense

Declaration of Timothy P. Fox in Support of Plaintiffs' Motion to Strike Defendant's Second Defense

Order Granting Plaintiffs' Motion to Strike Defendant's Second Defense

X (BY MAIL) by placing the true copies thereof enclosed in sealed envelopes, postage prepaid, addressed as noted below:

Gregory A. Eurich, Esq.
Jim Goh, Esq.
Holland & Hart, LLP
P. O. Box 8749
Denver, CO 80201

I caused such envelopes to be deposited in the mail at Denver, Colorado 80202. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with our firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction service was made.

I declare under penalty of perjury under the laws of the State of Colorado that the above is true and correct, and that this declaration was executed on February 20, 2003.

/s/ Elizabeth Miot
Elizabeth Miot