

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jamerson C. Allen (State Bar No. 132866)
JACKSON LEWIS LLP
199 Fremont St., 10th Floor
San Francisco, CA 94105
Telephone: (415) 394-9400
Facsimile: (415) 394-9401

Gregory A. Eurich, Pro Hac Vice
Jim Goh, Pro Hac Vice
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, Colorado 80202-3200
Telephone: (303) 295-8000
Facsimile: (303) 295-8261

Attorneys for DEFENDANT
Taco Bell Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANCIE E. MOELLER, EDWARD
MUEGGE, KATHERINE CORBETT and
CRAIG THOMAS YATES

Plaintiffs,

v.

TACO BELL CORPORATION

Defendant.

Case No. C 02 5849 MJJ ADR

**RESPONSE TO PLAINTIFF'S
MOTION TO STRIKE**

Defendant Taco Bell Corp. ("Taco Bell"), by its attorneys, hereby responds to Plaintiffs' Motion to Strike Taco Bell's Second Defense ("Motion to Strike"), and states as follows:

INTRODUCTION

1
2 In its Answer, Taco Bell pleaded as its Second Defense that this Court lacks subject
3 matter jurisdiction over Plaintiffs' Complaint because Plaintiffs failed to exhaust their
4 administrative remedies in compliance with the Americans with Disabilities Act, 42 U.S.C.
5 §12181, *et. seq.* ("ADA"). Plaintiffs have moved to strike this defense based on *Botosan v. Paul*
6 *McNally Realty*, 216 F. 3d 827, 830 (9th Cir. 2000). Because Plaintiffs are not prejudiced in any
7 way by allowing Taco Bell to continue to preserve this defense and further rulings from the 9th
8 Circuit and elsewhere may provide support for the exhaustion requirement, the Court should deny
9 Plaintiffs' Motion to Strike.
10

ARGUMENT

11
12 Motions to strike affirmative defenses are disfavored. Before a motion to strike a defense
13 may be granted, "the Court must be convinced that there are no questions of fact, that any
14 questions of law are clear and not in dispute, and that under no set of circumstances could the
15 defenses succeed. [Citations omitted.] Moreover, a motion to strike defenses should not be
16 employed as a vehicle for determining 'disputed and substantial questions of law.'" *Levin-*
17 *Richmond Terminal Corp. v. International Longshoremen's & Warehousemen's Union, Local 10*,
18 751 F. Supp. 1373, 1375 (N.D. Cal. 1990).
19

20
21 At issue is whether Plaintiffs are required, at least 30 days prior to filing a private lawsuit
22 under Title III of the ADA, to notify the state or local agency charged with enforcing the
23 applicable state civil rights laws pursuant to 42 U.S.C. § 2000a-3(c). There is a clear division of
24 authority on this issue. In addition to a panel of the 9th Circuit in *Botosan, supra*, several other
25 courts have not required exhaustion of administrative remedies as a condition precedent to filing a
26 ADA action, including *Iverson v. Comsage, Inc.*, 132 F. Supp. 2d 52 (D. Mass. 2001); *Guzman v.*
27 *Denny's, Inc.*, 40 F. Supp. 2d 930, 934 (S.D. Ohio 1999); *Lewis v. Aetna Life Insurance Co.*, 993
28

1 F. Supp. 382, 387 (E.D. Va. 1998); *Doukas v. Metropolitan Life Ins. Co.*, 1997 U.S. Dist. LEXIS
2 21757, No. CIV. 4-478- SD, 1997 WL 833134 (D.N.H. Oct. 21, 1997) and *Bercovitch v. Baldwin*
3 *Sch.*, 964 F. Supp. 597, 604 (D. Puerto Rico 1997).

4 However, a number of other courts, including decisions in this Circuit predating *Botosan*,
5 have required that ADA plaintiffs exhaust their administrative remedies before filing a federal
6 court action. *See, e.g., Burkhart v. Asean Shopping Center, Inc.*, 55 F. Supp. 2d 1013 (D. Ariz.
7 1999); *Snyder v. San Diego Flowers*, 21 F. Supp. 2d 1207, 1210 (S.D. Cal. 1998); *Mayer v.*
8 *Allison*, 983 F. Supp. 923, 925 (D. Nev. 1997); *Daigle v. Friendly Ice Cream Corp.*, 957 F. Supp.
9 8, 9 (D. N.H. 1997); *Howard v. Cherry Hills Cutters, Inc.*, 935 F. Supp. 1148, 1149 (D. Colo.
10 1996); *Grubbs v. Medical Facilities of Am., Inc.*, 1994 U.S. Dist. LEXIS 15511, 1994 WL
11 791708 (W.D. Va. 1994).

12
13
14 Taco Bell acknowledges that the controlling authority in the 9th Circuit at the present time
15 is the panel decision in *Botosan, supra*. However, it cannot be said that “under no circumstances
16 could [Taco Bell’s] defense[] succeed.” *Levin-Richmond Terminal Corp., supra*. The issue of
17 statutory construction upon which Taco Bell’s defense rests continues to be a matter of dispute in
18 the courts. As a result, there is every reason to expect that another panel of the 9th Circuit may
19 disagree with *Botosan* or that it may be reversed by an *en banc* decision of the circuit and/or by
20 the U.S. Supreme Court.

21
22 Indeed, as no doubt occurs in many circuit courts of appeals, panel decisions of the 9th
23 Circuit have often been the subject of later contrary rulings within the circuit by other panels or
24 *en banc* decisions. The following is a sampling of recent occasions in which the Ninth Circuit
25 overruled a prior holding:

- 26 • *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (overruling
27 *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991));

- 1 • *United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (*en banc*) (overruling *United*
2 *States v. Nordby*, 225 F.3d 1053, 1061 n. 6 (9th Cir. 2000));
- 3 • *In re Watts v. Watts*, 298 F.3d 1077, 1083 (9th Cir. 2002) (overruling *Jones v. Heskett*,
4 106 F.3d 923 (9th Cir. 1997));
- 5 • *United States v. Ruiz*, 257 F.3d 1030, 1032 (9th Cir. 2001) (*en banc*) (overruling *United*
6 *States v. Ramos*, 923 F.2d 1346, 1357-58 (9th Cir. 1991));
- 7 • *United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (*en banc*) (overruling
8 *United States v. Lara-Aceves*, 183 F.3d 1007 (9th Cir. 1999), *United States v. Estrada-*
Torres, 170 F.3d 776 (9th Cir. 1999), and *United States v. Lomas*, 30 F.3d 1191 (9th Cir.
1994));
- 9 • *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931, 941-42 (9th Cir. 2001)
10 (overruling *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285 (9th Cir. 1988) and
Bayma v. Smith Barney, Harris Upham and Co., 784 F.2d 1023 (9th Cir. 1986));
- 11 • *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Insurance Program*, 222 F.3d
12 643, 645 (9th Cir. 1986) (*en banc*) (overruling *Williams v. UNUM Life Insurance Co.*, 113
13 F.3d 1108 (9th Cir. 1997) and *Nikaido v. Centennial Life Insurance Co.*, 42 F.3d 557 (9th
Cir. 1994));
- 14 • *Hodgers-Durgin v. de La Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999) (*en banc*) (overruling
15 *Nava v. City of Dublin*, 121 F.3d 453 (9th Cir. 1997));
- 16 • *Rand v. Rowland*, 154 F.3d 952, 954 (9th Cir. 1998) (*en banc*) (overruling *Arreola v.*
Mangaong, 65 F.3d 801 (9th Cir. 1995))
- 17 • *United States v. Nishimura*, 131 F.3d 1325, 1329 (9th Cir. 1997) (*en banc*) (overruling
18 *United States v. Abrahams*, 905 F.2d 1276 (9th Cir. 1990), *United States v. Zolin*, 809
19 F.2d 1411 (9th Cir. 1987), and *United States v. Author Services*, 804 F.2d 1520 (9th Cir.
1986));
- 20 • *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*) (overruling
21 *McGuckin v. Smith*, 974 F.2d 1050, 1062 (9th Cir. 1992));
- 22 • *Fisher v. Immigration and Naturalization Service*, 79 F.3d 955, 963 (9th Cir. 1997) (*en*
23 *banc*) (overruling *Ubau-Marengo v. INS*, 67 F.3d 750, 759 (9th Cir. 1995), *Nasseri v.*
Moschorak, 34 F.3d 723, 727 (9th Cir. 1994), *Shirazi-Parsa v. INS*, 14 F.3d 1424, 1428
24 (9th Cir. 1994), and *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987));
- 25 • *In re Catli v. Catli*, 999 F.2d 1405, 1408 (9th Cir. 1993) (overruling *In re Pederson*, 875
26 F.2d 781, 782 (9th Cir. 1989));
- 27 • *United States v. Fine*, 975 F.2d 596, 597 (9th Cir. 1992) (*en banc*) (reconsidering and
28 overruling *United States v. Fine*, 946 F.2d 650 (9th Cir. 1991));

- 1 • *United States v. Hardesty*, 977 F.2d 1347, 1349 (9th Cir. 1992) (*en banc*) (overruling
- 2 *United States v. Terrovona*, 785 F.2d 767 (9th Cir. 1986));
- 3 • *White v. McGinnis*, 903 F.2d 699, 700 (9th Cir. 1990) (*en banc*) (overruling *Palmer v.*
- 4 *United States*, 652 F.2d 893 (9th Cir. 1981));
- 5 • *Townsend v. Holman Consulting Corporation*, 929 F.2d 1358, (9th Cir. 1990) (*en banc*)
- 6 (overruling *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir.
- 7 1988)).

8 As Taco Bell pointed out to Plaintiffs' counsel when asked to withdraw the

9 defense at issue here, allowing preservation of this defense so as to protect Taco Bell in

10 the event of such a change in the law does not prejudice Plaintiffs in any way. Clearly

11 Taco Bell would not ask this Court to dismiss Plaintiffs' case for failure to exhaust

12 administrative remedies unless new authority supported such an argument; nor would the

13 court grant such a motion at this time. But there is no reason to strike the defense and

14 deny the opportunity of Taco Bell to preserve the issue since subsequent legal

15 developments may support Taco Bell's reading of the ADA provisions in question.

16 CONCLUSION

17 Because Taco Bell has demonstrated that there are circumstances under which its defense

18 of exhaustion of administrative remedies "could succeed," Plaintiffs' Motion to Strike

19 Defendant's Second Defense should be denied.

20 Dated this 7th day of April, 2003.

21

22

23 RESPECTFULLY SUBMITTED,

24 JACKSON LEWIS LLP

25 /s/

26 BY: Jamerson C. Allen

27 Attorneys for Defendant

28 TACO BELL CORP.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28