

1 FOX & ROBERTSON, P.C.
Timothy P. Fox, Cal. Bar No. 157750
2 Amy F. Robertson, pro hac vice
910 - 16th Street
3 Suite 610
Denver, Colorado 80202
4 Tel: (303) 595-9700
Fax: (303) 595-9705
5
6 LAWSON LAW OFFICES
Antonio M. Lawson, Cal. Bar No. 140823
835 Mandana Blvd.
7 Oakland, CA 94610
Tel: (510) 419-0940
8 Fax: (510) 419-0948

Mari Mayeda, Cal. Bar No. 110947
PO Box 5138
Berkeley, CA 94705
Tel: (510) 917-1622
Fax: (510) 841-8115

THE IMPACT FUND
Brad Seligman, Cal. Bar No. 83838
Jocelyn Larkin, Cal. Bar No. 110817
125 University Ave.
Berkeley, CA 94710
Tel: (510) 845-3473
Fax:(510) 845-3654

9 Attorneys for Plaintiffs

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

14 FRANCIE E. MOELLER et al,
15 Plaintiffs,
16 v.

Case No. C 02 5849 MJJ ADR

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S CONDITIONAL
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT**

17 TACO BELL CORP.,
18 Defendant.

Date: December 7, 2004
Time: 9:30 a.m.

19
20 **ISSUE TO BE DECIDED**

21 Whether Defendant is entitled to partial summary judgment concerning dimensions of
22 20 corporate Taco Bell restaurants that were in compliance when surveyed.

23 **FACTS**

24 Plaintiffs bring this class action lawsuit alleging violations of Title III of the Americans
25 with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), the Unruh Civil Rights Act, Cal.
26 Civ. Code § 51 et seq. ("Unruh" or "the Unruh Act"), and/or the California Disabled Persons
27
28

1 Act, Cal. Civ. Code § 54 et seq. (the “CDPA”) in corporate-owned Taco Bell restaurants in
2 California.

3 The parties have stipulated to the dimensions of certain elements in 20 of those
4 restaurants. Plaintiffs have moved for summary judgment on a subset of those elements which
5 the stipulated dimensions demonstrate are out of compliance with applicable standards. (See
6 generally Pls.’ Mot. for Partial Summ. J.) In response, Defendant has submitted to this Court
7 two lists of dimensions relating to various elements at the 20 corporate restaurants: a list of
8 those dimensions that allegedly comply with the Department of Justice Standards for
9 Accessible Design (“DOJ Standards” or “DOJ Stds.”), 28 C.F.R. pt. 36, app. A (see McKaig
10 Decl. Ex. B); and the subset of the dimensions in McKaig Exhibit B that allegedly comply with
11 both the DOJ Standards and Title 24 of the California Regulatory Code (the “California
12 Standards” or “Cal. Stds.”). (See McKaig Decl. Ex. A.) With the exception of the dimensions
13 set forth in the charts attached as Exhibits 1 and 2 to the Third Declaration of Amy F.
14 Robertson in Opposition to Defendant’s Conditional Cross-Motion for Summary Judgment,
15 Plaintiffs agree that Defendant has accurately transcribed the dimensions from the survey
16 reports, and those dimensions were accurate on the dates each survey was taken.

17 Plaintiffs have demonstrated with respect to 11 of the restaurants at issue that
18 Defendant has repeatedly altered its restaurants in ways that violate access regulations. (See
19 Robertson Decl. Exs. 1, 3-7, 10-13, 15.) In addition, Defendant has provided evidence that its
20 restaurants change constantly, including changes that may render compliant dimensions
21 noncompliant. (See Decl. of Jaime deBeers ¶ 6; see also Def.’s Mot. for Modification of Class
22 Definition at 3; Def.’s Opp’n to Pls.’ Mot. for Partial Summ. J. and Conditional Cross Mot. for
23 Partial Summ. J. at 3.¹)

24
25
26
27 ¹ This Court has discretion to consider statements made in Defendant’s brief as
28 judicial admissions. Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 227 (9th Cir. 1988).

ARGUMENT

THERE ARE GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR DEFENDANT.

Defendant has, for the most part,² accurately transcribed various dimensions from the survey forms and applied the DOJ and California Standards to them. According to its own testimony, however, there are genuine issues of material fact concerning both whether these dimensions will remain in compliance in the future, and whether they have been in compliance for the entire class period. As such, the class will be entitled to an injunction covering these dimensions, and individual class members may be entitled to damages.

In addition, while Defendant has shown that certain dimensions of various architectural elements comply with applicable standards, it has not succeeded in demonstrating that any particular element at any store is in compliance. Because Defendant has not demonstrated -- and will not be able to demonstrate -- that any particular dimension is no longer at issue in the case, it is not entitled to summary judgment.

Plaintiffs seek an injunction in this case that (with respect to architectural elements) (1) requires noncompliant elements to be brought into compliance, (2) requires compliant elements to be maintained in compliance, and (3) requires future new construction and alterations to be performed in a compliant manner. Plaintiffs do not seek an order that requires Defendant to alter any element in its restaurants that is fully in compliance with applicable statutes. Thus, not only are there genuine issues of material fact concerning the past and future compliance of the dimensions in Exhibits A and B, but -- to the extent Defendant is merely asking to be relieved from having to alter compliant elements -- it is asking for relief from an injunction Plaintiffs have not requested.

A. Legal Standard.

In moving for summary judgment, “[t] moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. . . . If the moving party shows the absence of a

² But see Third Robertson Decl. Exs. 1 and 2.

1 genuine issue of material fact, the non-moving party must go beyond the pleadings and ‘set
2 forth specific facts’ that show a genuine issue for trial.” Leisek v. Brightwood Corp., 278 F.3d
3 895, 898 (9th Cir. 2002) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

4 Plaintiffs here provide specific facts from the Declaration of Jaime deBeers,
5 Defendant’s briefs and the exhibits to the Robertson Declaration that demonstrate that genuine
6 issues remain for trial concerning the dimensions covered by Exhibits A and B.

7 **B. There are Genuine Issues of Material Fact Concerning Whether The**
8 **Dimensions in Defendant’s Exhibits A and B Will Remain in Compliance**
9 **Through Future Changes & Alterations.**

9 Defendant is required under Title 24 of the California Regulatory Code (“Cal. Stds.”)
10 and the ADA to comply with access regulations when it alters its restaurants,³ and it is also
11 required to maintain those features of facilities and equipment that are required to be readily
12 accessible to and usable by persons with disabilities. Moeller v. Taco Bell Corp., 220 F.R.D.
13 604, 606-07 (N.D. Cal. 2004) (citing 28 C.F.R. § 36.211 & Cal. Stds. § 1101B.3). Plaintiffs
14 have demonstrated -- with respect to 11 of the restaurants at issue⁴ -- and intend to demonstrate
15 with respect to many of the remainder, that Defendant has repeatedly altered its restaurants in
16 ways that violate access regulations, and has failed to maintain the accessibility of various
17 architectural elements. In addition, Defendant has repeatedly asserted that its restaurants
18 change constantly, including changes that may render compliant dimensions noncompliant.
19 (See supra at 2.)

20 This evidence would be sufficient for this Court to issue an injunction requiring
21 Defendant in the future to engage in alterations to, and to maintain, architectural elements in a
22 manner that complies with access regulations, and this would include any dimensions (such as
23 those in McKaig Exhibits A and B) that were in compliance on the date they were surveyed.
24 See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132 (1969) (“In exercising
25 its equitable jurisdiction, ‘[a] federal court has broad power to restrain acts which are of the

26
27 ³ 42 U.S.C. § 12183(a)(2); Cal. Stds. (2002) § 1134B.2.

28 ⁴ See Robertson Decl. Exs. 1, 3-7, 10-13, 15.

1 same type or class as unlawful acts which the court has found to have been committed or
2 whose commission in the future unless enjoined, may fairly be anticipated from the defendant's
3 conduct in the past.” (Citation omitted.); Orantes-Hernandez v. Thornburgh, 919 F.2d 549,
4 564 (9th Cir. 1990) (same). Thus, although many of the dimensions in Exhibits A and B
5 currently comply with applicable standards, there are genuine issues appropriate for trial as to
6 whether Defendant will maintain these dimensions in compliance in the future.

7 **C. There are Genuine Issues of Material Fact Concerning Whether The**
8 **Dimensions in Defendant's Exhibits A and B Have Been In Compliance**
9 **Throughout the Class Period.**

10 In this case, Plaintiffs seek damages on behalf of the following class:

11 All individuals with disabilities who use wheelchairs or electric scooters for mobility
12 who, at any time on or after December 17, 2001, were denied, or are currently being
13 denied, on the basis of disability, full and equal enjoyment of the goods, services,
14 facilities, privileges, advantages, or accommodations of California Taco Bell corporate
15 restaurants.

16 Moeller, 220 F.R.D. at 613-14. Based on Defendant's repeated assertions that its restaurants
17 change constantly, see supra at 2, dimensions in compliance when surveyed may have been out
18 of compliance at some time between December 17, 2001 and the time of the survey. A class
19 member who was aggrieved by such an inaccessible dimension would be entitled to damages.
20 As such, there are genuine issues of material fact concerning whether the dimensions covered
21 by Exhibits A and B have been in compliance throughout the class period.

22 **D. Defendant's Motion Does Not Establish That Any Element is in**
23 **Compliance with Applicable Standards.**

24 Defendant offers two lists of dimensions of various elements in 20 of its restaurants that
25 complied with applicable standards on the day they were measured. Dimensions, however, are
26 different from elements. Each element at issue in this litigation has a number of different
27 dimensions that are relevant to compliance with applicable standards. Compare DOJ Standards
28 § 3.5 (defining “element” to include “curb ramp”) with id. § 4.7 (providing the measurements
of at least eight dimensions necessary for a curb ramp to comply with the DOJ Standards). The
fact that one dimension of an element is in compliance does not render the entire element
compliant. On the other hand, the fact that one dimension is out of compliance renders the

1 entire element out of compliance and therefore in need of remediation. As such, the
2 dimensions in Defendant's lists do not establish that any particular element is in compliance,
3 and thus do not excuse Taco Bell from its duty to remedy any such noncompliant elements.

4 For example, Defendant lists a number of accessible parking spaces that are of the
5 proper length. The fact that an accessible parking space is the proper length, however, does not
6 make it compliant if it is too narrow; the space will still need to be restriped. The fact that a
7 ramp has the proper surface does not make it compliant if it has too much cross slope; the ramp
8 will still need to be altered to remove the cross slope. The fact that a door is of the proper
9 width does not make it compliant if it is too heavy to open; the door will still have to be
10 adjusted to provide the proper weight.

11 Similarly, a compliant dimension may become academic in light of the need to effect a
12 solution to a noncompliant dimension. For example, a restroom soap or paper towel dispenser
13 that is at the correct height but has no clear floor space will still have to be moved, making its
14 original height academic. A toilet flush handle that is at the correct height but in the wrong
15 location will still have to be moved, again, making its original height academic. Where one
16 lane of a queue line is too narrow, the entire set of rails may need to be rearranged to provide a
17 fully compliant path.

18 Ultimately, Defendant's evidence does not succeed in demonstrating that any particular
19 element at any store is in compliance with the DOJ or California Standards.

20
21
22
23
24
25
26
27
28

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

CONCLUSION

Plaintiffs have demonstrated that there are genuine issues of material fact remaining for trial concerning the dimensions listed in Exhibits A and B to the McKaig Declaration. As such, Plaintiffs respectfully request that this Court deny Defendant's Conditional Cross-Motion for Partial Summary Judgment.

Respectfully submitted,
FOX & ROBERTSON, P.C.

By: /s/ Amy F. Robertson
Amy F. Robertson, pro hac vice
Timothy P. Fox, Cal. Bar No. 157750
910 - 16th Street
Suite 610
Denver, Colorado 80202
Tel: (303) 595-9700
Fax: (303) 595-9705

November 16, 2004

Attorneys for Plaintiffs