

1 JEFFREY H. DASTEEL (State Bar No. 110405)
T. JEAN MOONEY (State Bar No. 211747)
2 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
3 300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
4 Telephone: (213) 687-5000
Facsimile: (213) 687-5600

5 Attorneys for Defendant
TACO BELL CORP.

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN FRANCISCO DIVISION

11 FRANCIE E. MOELLER, et al.) Case No. C 02 5849 MJJ ADR
12 Plaintiffs,)
13 v.) DEFENDANT'S REPLY BRIEF IN
SUPPORT OF CONDITIONAL CROSS
14 TACO BELL CORP.,) MOTION FOR PARTIAL SUMMARY
JUDGMENT
15 Defendant.) Date: December 7, 2004
Time: 9:30 a.m.
16) Courtroom: 11

1 JEFFREY H. DASTEEL (State Bar No. 110405)
T. JEAN MOONEY (State Bar No. 211747)
2 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue, Suite 3400
3 Los Angeles, California 90071-3144
Telephone: (213) 687-5000
4 Facsimile: (213) 687-5600

5 Attorneys for Defendant
TACO BELL CORP.

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

10 FRANCIE E. MOELLER, et al.) Case No. C 02 5849 MJJ ADR
11)
Plaintiffs,) DEFENDANT'S REPLY BRIEF IN
12) SUPPORT OF CONDITIONAL CROSS
v.) MOTION FOR PARTIAL SUMMARY
13) JUDGMENT
TACO BELL CORP.,)
14)
Defendant.) Date: December 7, 2004
15) Time: 9:30 a.m.
Courtroom: 11

16 **ISSUES TO BE DECIDED**

17 See Opposition to Plaintiffs' Partial Motion for Summary Judgment and Conditional
18 Cross Motion for Partial Summary Judgment at pages 1 and 2.

19 **I. INTRODUCTION**

20 This Conditional Cross Motion for Partial Summary Judgment concerns over 2,500
21 accessibility elements that the undisputed facts establish are in compliance with the ADAAG and
22 Title 24. Notwithstanding that compliance is undisputed, this Cross Motion is conditional because
23 any summary judgment motion concerning compliance of particular elements at the 220 company-
24 owned Taco Bell restaurants is premature.

25 Although Plaintiffs' claims are premised on the alleged existence of company-wide
26 discriminatory policies, Plaintiffs have insisted that the Court-appointed Special Master survey
27 over 132,000 individual elements at 220 corporate-owned Taco Bell Restaurants (the
28

1 "Restaurants"). To date, the Special Master has surveyed approximately 7,000 individual elements
2 as part of a pilot program surveying 20 Restaurants in California (the "Pilot Stores"). The parties
3 agreed that following the survey of all 220 Restaurants in June 2005 they will meet and confer
4 regarding the results in an effort to reach agreement on which elements at which Restaurants need
5 to be modified. The survey and meet and confer process was intended to eliminate discovery,
6 reduce unnecessary litigation, and make efficient use of this Court's time and resources as to
7 elements over which there remains a disagreement after the meet and confer process. In light of
8 the parties' cooperation to date, Taco Bell had expected this Court would be called on to decide
9 very few, if any, disputes.

10 Notwithstanding the Court-approved procedure for discovery and adjudication of
11 Plaintiffs' claims regarding the individual elements at each Restaurant, Plaintiffs brought a Motion
12 for Partial Summary Judgment ("Plaintiffs' Motion") seeking a piecemeal determination that 494
13 elements (of over 7,000 elements surveyed) do not comply with federal and state accessibility
14 statutes. Plaintiffs' Motion requires the Court and the parties to litigate the very matters the meet
15 and confer process is designed to resolve. Taco Bell brought its Cross Motion as to over 2,500 of
16 the 7,000 surveyed elements in the event the Court determines that Plaintiffs' Motion is not
17 premature.

18 Plaintiffs are now in the untenable position of arguing on the one hand they are
19 entitled to partial summary judgment as to Taco Bell's "liability" for 497 elements at 19 of the 20
20 surveyed Restaurants, while Taco Bell is not entitled to the same determination as to 2,551
21 elements at those same Restaurants.¹ Plaintiffs offer two arguments in support of their self-
22 contradicting position, both of which fail as a matter of law.

23 First, Plaintiffs argue there are material issues of genuine fact as to these compliant
24 elements because, due to changeability in the elements, finding a dimension in compliance on the
25 date of the survey does not establish whether that dimension was in compliance during the class
26 period or will be in the future. See Opp'n to Cross-Motion at p. 3. However, changeability applies

27 ¹ Taco Bell submits concurrently herewith the declaration of T. Jean Mooney with amended
28 Exhibits A and B, which correct errors identified by Plaintiffs in their Opposition to the Cross
Motion.

1 with equal force to Plaintiffs' Motion for partial summary judgment. If partial summary judgment
 2 is appropriate for changeable elements that were non-compliant on the date of the Special Master's
 3 visit, partial summary judgment also is appropriate for elements that were compliant on the date of
 4 the Special Master's visit.

5 Second, Plaintiffs argue that Taco Bell is seeking relief from an injunction that
 6 Plaintiffs have not yet requested. See id. However, Plaintiffs have insisted that over 600 elements
 7 at every corporate-owned Taco Bell Restaurant be surveyed to determine compliance or non-
 8 compliance with applicable statutes, resulting in the survey of over 130,000 elements. Plaintiffs
 9 cannot be heard to claim that only those elements that turn out to be non-compliant are relevant.
 10 This "heads I win, tails you lose" approach to litigation does not work, especially if, as has proven
 11 to be the case for the 20 pilot Restaurants, the vast majority of accessibility elements at Taco Bell
 12 Restaurants comply with ADAAG and Title 24. See, e.g., Disabled Rights Action Comm. v.
 13 Fremont St. Experience LLC, 44 Fed. Appx. 100, 102 (9th Cir. 2002), cert. denied, 537 U.S. 1107
 14 (2003) (minor technical violations "in the face of numerous instances of compliance. . . . cannot be
 15 construed to show a discriminatory pattern, practice or policy.").

16 **II. STATEMENT OF FACTS**

17 See Taco Bell's Opposition to Plaintiffs' Partial Motion for Summary Judgment and
 18 Conditional Cross Motion for Partial Summary Judgment at pages 8 through 12.

19 **II. ARGUMENT**

20 **A. Plaintiffs Agree With Taco Bell That Elements Change Over Time.**

21 The thrust of Plaintiffs' Opposition is that summary judgment is precluded because
 22 "there are genuine issues of material fact concerning whether the dimensions . . . have been [or will
 23 remain] in compliance." Opp'n to Cross-Motion p. 5. But the reverse is also true, and this is
 24 exactly the point Taco Bell made in its opposition to Plaintiffs' Motion.² If elements at the Taco

25 _____
 26 ² An additional question of fact is the existence of construction tolerances. Section 3.2 of
 27 ADAAG states that "all dimensions are subject to conventional building industry tolerances for
 28 field conditions." This section means that the standards set forth in ADAAG do not strictly give
 rise to liability – an element in technical violation of an ADAAG standard may in fact be compliant
 if permitted variations from given dimensions, locations, or alignments, based on field, material,
 manufacturing, and workmanship conditions are commonly understood and accepted in the

1 Bell Restaurants are subject to changes over time (and Plaintiffs agree that they are), a
2 determination that an element is out of compliance on one date will not dictate whether that same
3 element is out of compliance on another date. Plaintiffs admit that this is true, but insist that a
4 liability determination can somehow be made as to the elements they have identified as non-
5 compliant. If compliance on a single day cannot be determinative of compliance throughout the
6 class period, then non-compliance on a single day cannot be determinative of a violation
7 throughout the class period. If partial summary judgment cannot be granted for compliance, then it
8 cannot be granted for non-compliance.

9 **B. Plaintiffs' Claim That A Determination of "Liability" Cannot Be Made**
10 **Without Consideration of Whether Plaintiffs May Be Entitled To Damages or**
11 **Injunctive Relief.**

12 In moving for partial summary judgment on "liability" as to elements that were not
13 in compliance on the date of the Special Master's site visit, Plaintiffs attempted to divorce a finding
14 of "liability" from any requirement to establish a right to the remedies they will ultimately seek,
15 namely, damages and injunctive relief. Apparently forgetting the arguments in their own Motion,
16 Plaintiffs now claim that Taco Bell is not entitled to partial summary judgment as to elements that
17 were in compliance on the date of the Special Master's site visit without a determination as to
18 whether Plaintiffs ultimately will be entitled to injunctive relief or damages as to these compliant
19 elements. Opp'n to Cross Motion p. 4-5. Plaintiffs thus admit that a determination of "liability"
20 based on the stipulated dimensions of the Special Master is *meaningless* unless the Court also
21 considers and rules on the issues of law and fact required to support injunctive relief or damages –
22 something not at issue in Plaintiffs' Motion or in Taco Bell's Cross Motion.³

23 building industry. See Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd., No. 99-109-
24 CIV, 2001 U.S. Dist. LEXIS 6660 (S.D. Fla. May 2, 2001) (granting defendant's partial summary
25 judgment for elements in technical violation of ADAAG standards but in compliance with accepted
26 construction tolerances). It is premature for this Court to grant summary judgment when
27 construction tolerances have not been considered, and when technical violations cited by Plaintiffs
28 may fall within accepted construction tolerances.

29 ³ To establish entitlement to injunctive relief, a class member must, at the least, establish that
30 "he faces a real or immediate threat of substantial or irreparable injury." Midgett v. Tri-County
31 Metro. Trans., 254 F.3d 846, 850 (9th Cir. 2001). To establish entitlement to damages, Plaintiffs
32 must show that he or she (1) has a qualifying disability, (2) visited a Taco Bell company-owned
33 restaurant in California during the class period, (3) encountered a non-compliant accessibility

1 Once again, Plaintiffs cannot have it all ways at once. If Plaintiffs' premature
2 motion can be granted, so can Taco Bell's conditional Cross Motion. If Taco Bell's conditional
3 Cross Motion cannot be granted, neither can Plaintiffs' Motion.

4 C. **A Determination of Liability, If One Can Be Made, Can Be Made For Elements**
5 **In Compliance As Well As Elements Not In Compliance.**

6 Plaintiffs make two final arguments for why summary judgment can only be
7 rendered as to dimensions that *do not* comply with an applicable standard and not dimensions that
8 *do* comply with those same standards. Neither argument works.

9 First, without citing any authority, Plaintiffs argue that "the fact that one dimension
10 is out of compliance renders the entire element out of compliance." Opp'n to Cross-Motion pp. 5-
11 6. Plaintiffs cannot and do not cite any authority for the proposition that if one dimension is out of
12 compliance, other dimensions that were in compliance are deemed to be out of compliance. For
13 example, if an accessible parking space is 10 inches too narrow, and the required depth, slope and
14 location of the space are fully in compliance, the one non-compliant element does not somehow
15 render all the other elements out of compliance. In the end, Taco Bell expects to show, as it has
16 with the 20 Pilot Restaurants, that the overwhelming number of accessibility elements at Taco Bell
17 Restaurants are in compliance with ADAAG and Title 24. Overwhelming compliance is highly
18 relevant both to damages and injunctive relief.

19 Second, Plaintiffs argue that granting summary judgment on compliant elements
20 somehow is inappropriate because it amounts to an attempt to get relief from remedies Plaintiffs
21 have not requested. See Opp'n to Cross-Motion p. 3. This argument is belied by the remainder of
22 Plaintiffs' opposition, which argues that 1) compliant elements may not remain in compliance, thus
23 requiring injunctive relief, and 2) compliant dimensions can still give rise to damages claims. See
24 id. pp. 4 & 5. There is no logical reconciliation of these arguments. Moreover, rather than focus
25 on a narrow set of alleged non-compliant elements, Plaintiffs have placed in issue every one of
26 more than 600 elements at Taco Bell's 220 company-owned Restaurants. The consequence of
27 placing in issue every single accessibility element in every Restaurant is that Plaintiffs take the risk
28 element during the visit, and (4) was hindered in his or her use or enjoyment of the restaurant by
the non-compliant element.

1 they will lose on the merits of many or most of those elements. It is indeed significant that, at least
2 as to the first 20 Restaurants surveyed, the vast majority of surveyed elements are in compliance –
3 something Taco Bell will be entitled to have recorded in a judgment at some point in these
4 proceedings.

5 **III. CONCLUSION**

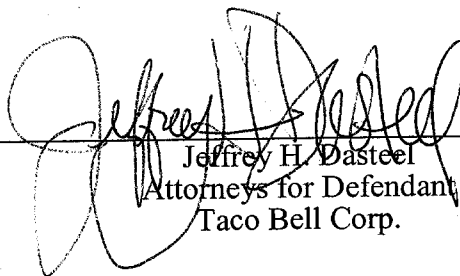
6 As set forth in Taco Bell's Opposition to Plaintiffs' Motion, any motion for summary
7 judgment is premature at this time and should be denied by the Court. Such motions run counter to
8 the express agreement of the parties, and if granted, encourage piecemeal resolution of the claims
9 for injunctive relief. In addition, as recognized by Plaintiff, the existence of several questions of
10 material fact, not the least of which is the dynamic nature of each element, make granting summary
11 judgment as to any element – compliant or non-compliant – inappropriate. However, if the Court
12 believes partial summary judgment is appropriate for Plaintiffs, then for the very same reasons
13 partial summary judgment is appropriate for Taco Bell. For all the foregoing reasons, Taco Bell
14 requests that the Court deny Plaintiffs' Motion for partial summary judgment, or alternatively, grant
15 Taco Bell's conditional Cross Motion for partial summary judgment.

16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: November 19, 2004

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By:

 by RJM
Jeffrey H. Dasteel
Attorneys for Defendant
Taco Bell Corp.