FOX & ROBERTSON, P.C.
Timothy P. Fox, Cal. Bar No. 157750
Amy F. Robertson, Pro Hac Vice
Ari Krichiver, Pro Hac Vice
910 - 16th Street, Suite 610
Denver, Colorado 80202
Tel: (303) 595-9700
Fax: (303) 595-9705
Email: tfox@foxrob.com

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

LAWSON LAW OFFICES
Antonio M. Lawson, Cal. Bar No. 140823
835 Mandana Blvd.
Oakland, CA 94610
Tel: (510) 419-0940
Fax: (501) 419-0948
Email: tony@lawsonlawoffices.com

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
Email: bseligman@impactfund.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02 5849 MJJ ADR

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

Hearing Date: May 17, 2007
Time: 9:30 a.m.

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NOTICE

On May 17, 2007, at 9:30 a.m., or as soon thereafter as this motion may be heard, before the Honorable Martin J. Jenkins, Plaintiffs will, and hereby do, move for an order granting partial summary judgment in the above-captioned action. This motion is based on this Notice of Motion, and all accompanying attachments hereto.

RELIEF SOUGHT

Plaintiffs seek a determination that Defendant has violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), the California Disabled Persons Act, Cal. Civ. Code § 54 et seq. (the "CDPA"), and/or California's Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq. ("Unruh" or "the Unruh Act").

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

ISSUES TO BE DECIDED

Whether Plaintiffs are entitled to partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as to three architectural issues found in 180 restaurants that are out of compliance with new construction standards applicable at the time each restaurant was built.

SUMMARY OF ARGUMENT

Plaintiffs seek partial summary judgment on three discrete architectural issues that have a significant impact on the overall accessibility of the Taco Bell corporate restaurants at issue in this litigation: (1) the dimensions of queue lines, which are the barriers that are put in place to cause customers to form a single line as they approach the counter, order, and pick up their food; (2) the force necessary to open interior and exterior doors; and (3) the number of, and knee clearance at, accessible seating positions at indoor dining areas in Defendant's restaurants.

The architectural barriers targeted by this Motion affect the great majority of restaurants at issue in this case. Plaintiffs seek summary judgment as to the queue lines in 77 restaurants, the door force in 171 restaurants, and indoor accessible seating in 54 restaurants. (See Declaration of Timothy P. Fox ("Fox Decl.") at ¶¶ 4, 8 & 12.) Of the approximately 220

restaurants involved in this case, 180 have one or more of the architectural violations covered by this Motion. (See id. at ¶ 13.)

This Motion relies on a limited set of access regulations. Although both the ADA and California access regulations have certain requirements applicable to alterations to existing architectural elements, and the ADA requires readily achievable barrier removal of unaltered facilities constructed prior to January 26, 1993, this Motion does not rely on either the alterations or readily achievable regulations.

Rather, this motion is limited to architectural elements that are in violation of applicable new construction standards, that is, violations in restaurants that were built: (1) after January 26, 1993 and were thus subject to the "new construction" regulations under the ADA; and/or (2) after December 31, 1981 and thus were subject to California access regulations in affect at the time of construction. In addition, Plaintiffs' argument that the force necessary to open interior and exterior doors at Defendant's restaurants exceeds state and federal limits relies in part on the requirement that public accommodations maintain accessible features in operable working condition.

As set forth below, because the undisputed facts demonstrate that these architectural elements are in violation of state and/or federal access regulations, Plaintiffs are entitled to summary judgment.

FACTS

The instant Motion is based on the measurements reported by the Special Master in his Interim Survey Reports. Pursuant to the Court's September 19, 2006 Order, these reports were filed with the Court on December 14, 2006, and Exhibits 1 through 8 to the Fox Declaration[1] reference the exhibit, store and line number from that filing.

Defendant has had the opportunity to object to these reports. It has not objected to or otherwise challenged any of the Special Master's queue line measurements or the number of

[1] All references to exhibit numbers throughout the brief refer to Exhibits to the Declaration of Timothy P. Fox, filed concurrently with this motion.

accessible seating positions in any restaurant. (See generally Def. Taco Bell Corp.'s Objections to Special Master's Interim Survey Reports (filed Jan. 12, 2007).) Defendant objected to the knee clearance measurement at a single restaurant. (Id. at 103.) Plaintiffs do not move for summary judgment as to this measurement.

Defendant posed several general objections concerning door force. (See id. at 77-80, 89, 117-19, 289-92.) However, most of these objections raised legal issues, for example, whether exterior door force -- a standard that appears only in California and not federal access regulations -- can be raised in this litigation (see, e.g., id. at 77-78, 117-18, 289-90), and whether concerns raised by the federal Access Board are applicable to this California state standard. (See, e.g., id. at 78-79, 118-19, 290-91.) The only ostensibly factual objection Defendant made was that the Special Master's methodology was uncertain, but Defendant concluded that this meant that "an appropriate tolerance should be taken into consideration." (Id. at 79, 119, 291.) In compiling the lists of restaurants with door force violations, Plaintiffs have applied tolerances that were either stipulated by the parties or were based on Defendant's suggestion. See infra at 12, 20-22.

The only specific objections Defendant raised as to door force concerned the women's restrooms in Stores 112, 1603 and 3071. (See id. at 291-92.) Plaintiffs do not move for summary judgment as to the door force in the women's restroom at the those restaurants.

As explained in greater detail below, the date on which each restaurant was constructed dictates the new construction standard applicable to that restaurant. The parties have stipulated to those construction dates. (See generally attachment to Pls.' Submission of Agreements Reached by the Parties ("Agreements Reached") , filed December 14, 2006.)

ARGUMENT

I. Applicable Legal Standards

A. Partial Summary Judgment.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A plaintiff may move for summary judgment in his favor "upon all or any part" of his claim. Id. Rule 56(a). "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Id. Rule 56(c); see also id. Rule 56(d) (permitting the Court, when not rendering judgment upon the whole case, to issue an order "specifying the facts that appear without substantial controversy").

A number of courts have held that partial summary judgment is appropriate where a plaintiff has demonstrated -- through undisputed facts -- violations of accessibility standards applicable under the ADA . See, e.g., Long v. Coast Resorts, Inc., 267 F.3d 918, 921-24, 926 (9th Cir. 2001) (affirming in part district court's decision granting partial summary judgment to plaintiffs based on an application of ADA accessibility standards to stipulated facts); United States v. AMC Entm't, Inc., 245 F. Supp. 2d 1094, 1101 (C.D. Cal. 2003) (granting partial summary judgment to plaintiffs based on an application of ADA accessibility standards to undisputed dimensional information in plaintiffs' expert's report); Sapp v. MHI P'ship, Ltd., 199 F. Supp. 2d 578, 583 (N.D. Tex. 2002) (granting partial summary judgment to plaintiffs based on an application of ADA accessibility standards to undisputed facts).

B. The Americans with Disabilities Act.

Title III of the ADA prohibits disability discrimination by those who own or operate places of public accommodation -- such as Taco Bell restaurants[2] -- "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of that public accommodation. 42 U.S.C. § 12182(a). Title III requires that Taco Bell provide its goods and services to persons with disabilities in an integrated setting, id. § 12182(b)(1)(B), and that such persons be provided with equal opportunity to participate in and benefit from its stores. Id. §§ 12182(b)(1)(A)(i) - (iii).

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[2] See 42 U.S.C. § 12181(7)(B) (restaurants are places of public accommodation under title III).

Title III also addresses architectural accessibility. All facilities built for first occupancy after January 26, 1993 are required to be "readily accessible to and usable by" individuals with disabilities. Id. § 12183(a)(1). To comply with section 12183(a)(1), a facility must be built in conformance with the Department of Justice Standards for Accessible Design ("DOJ Standards" or "DOJ Stds.").[3] 28 C.F.R. pt. 36, app. A; see 28 C.F.R. § 36.406(a) (requiring conformance with the Standards).[4] The DOJ Standards contain detailed design specifications for public accommodations covering a variety of architectural elements, including, as relevant here, queue lines, accessible seating areas, and the force necessary to open interior doors. See generally 28 C.F.R. pt. 36, app. A; see also Moeller v. Taco Bell Corp., 220 F.R.D. 604, 606 (N.D. Cal. 2004). In addition, a public accommodation must "maintain in operable working condition those features of facilities and equipment that are required to be" accessible under the ADA. 28 C.F.R. § 36.211(a).

C. California State Law Claims.

1. The California Disabled Persons Act.

The CDPA was enacted in 1968 and generally prohibits discrimination on the basis of disability by public accommodations. See Cal. Civ. Code § 54.1. Plaintiffs are not required to prove intent to establish a violation of the CDPA. See, e.g., Donald v. Café Royale, Inc., 266 Cal. Rptr. 804, 811 (Cal. Ct. App. 1990) ("section 54.3 contains no intent element"); Org. for Advancement of Minorities with Disabilities v. Brick Oven Rest., 406 F. Supp. 2d 1120 1129-30 (S.D. Cal.2005); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 459 (N.D. Cal. 1994).

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[3] The Americans with Disabilities Act Architectural Guidelines ("ADAAG"), promulgated by the Architectural and Transportation Barriers Compliance Board, were adopted by the DOJ as its Standards for Accessible Design. See Fortyune v. American Multi-Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004). As a result, many cases applying the DOJ Standards refer to them as "the ADAAG."

[4] The DOJ's Title III regulations are "entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 646 (1998).

A violation of the ADA constitutes a violation of the CDPA. Cal. Civ. Code §§ 54(c) & 54.1(d). As such, Plaintiffs are entitled to summary judgment under the CDPA as to those elements that violate the ADA, which are discussed in sections II.B, III.A and IV.A below, and listed in Exhibits 2, 3, 6 and 7.

Plaintiffs' CDPA claims are also based in part on Defendant's violations of Title 24 of the California Code of Regulations ("Title 24").[5] Title 24, like the DOJ Standards, sets forth detailed accessibility design specifications, the purpose of which is "to make all public and private buildings accessible to physically handicapped persons." Café Royale, Inc., 266 Cal. Rptr. at 809; see also People ex rel. Deukmejian v. CHE, Inc., 197 Cal. Rptr. 484, 491 (Cal. Ct. App. 1983). Title 24 also requires public accommodations to maintain in operable working condition those features of facilities and equipment that are required to be accessible to and usable by persons with disabilities. Title 24 at § 1101B.3 (2001).

Defendant has asserted that a violation of Title 24 does not constitute a violation of the CDPA. Defendant is incorrect.

The very purpose of Title 24, which was promulgated pursuant to section 19955 et seq. of the California Health & Safety Code, was "[t]o give meaning" to the CDPA. Donald v. Sacramento Valley Bank, 260 Cal. Rptr. 49, 53 (Cal. Ct. App. 1989); see also People ex rel. Deukmejian, 197 Cal. Rptr. at 491 (Holding that Title 24 "provide[s] substance to the full and equal access right of the handicapped" established by the CDPA.).

Indeed, the CDPA explicitly provides individuals with a private right of action for injunctive relief to enforce Title 24. Cal. Civ. Code § 55 ("Any person who is aggrieved or potentially aggrieved by a violation of . . . Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation."); see also Cal. Health & Safety Code § 19953 (same); Café Royale, Inc., 266 Cal. Rptr. at 813 ("A

[5] The provisions from the DOJ Standards and Title 24 cited in this Motion are included in the attached Appendix to Plaintiffs' Motion for Partial Summary Judgment.

designated public agency or an individual may initiate an action to enforce compliance with" Title 24.).

Further, every case that has addressed the issue has concluded that an individual can bring a CDPA claim for injunctive relief and damages based on a violation of Title 24. These cases include, for example:

- Café Royale, Inc., 266 Cal. Rptr. at 813: Holding that plaintiff was entitled to an award of damages under the CDPA based on the defendant's violation of the accessible seating provisions of Title 24.
- Sacramento Valley Bank, 260 Cal. Rptr. at 56: Holding that plaintiff could pursue monetary and injunctive claims under the CDPA for defendant's violations of Title 24 governing ATMs.
- Pickern v. Best Western Timber Cove Lodge Marina Resort, 194 F. Supp. 2d 1128, 1131 n.4 (E.D. Cal. 2002): "State claims may be premised on violations of the California Building Code, as well as violations of the ADA."
- Mannick v. Kaiser Foundation Health Plan, Inc., C 03-5905 PJH, 2006 WL 2168877, *16 (N.D. Cal. July 31, 2006): "Under the CDPA, a plaintiff can show either that the ADA was violated, or that the facility in question does not comply with the California Building Code requirements for disabled access . . ."
- Arnold, 158 F.R.D. at 447: "Both injunctive relief and damages are available under § 54.1 to disabled persons aggrieved by violations of the Title 24 disability access standards."
- Arnold v. United Artists Theatre Circuit, Inc., 866 F. Supp. 433, 439 (N.D. Cal. 1994): "The Court therefore holds that where a plaintiff can prove that violations of applicable California disability access standards deterred her on a particular occasion from attempting to attend a place of public accommodation, that plaintiff states a claim for relief under . . . [the CDPA]."

Plaintiffs are thus entitled to summary judgment on their CDPA claims as to those elements that violate Title 24, which are discussed in sections II.A, III.B, III.C and IV.B below, and listed in Exhibits 1, 4, 5 and 8.

2. The Unruh Civil Rights Act.

California's long-standing Unruh Act was amended in 1987 to prohibit discrimination on the basis of disability by business establishments. See Cal. Civ. Code § 51(b) & accompanying Historical and Statutory Notes (discussing 1987 Amendment).

A violation of either Title 24[6] or the ADA[7] constitutes a violation of Unruh. It is unclear whether a plaintiff who bases an Unruh claim on a violation of Title 24 must establish intentional discrimination. Thus, in this Motion, Plaintiffs do not seek summary judgment on their Unruh claims based on Defendant's violations of Title 24.

Where an element violates Unruh by dint of the fact that it violates the ADA, however, it is not necessary for Plaintiffs to prove intent. The Unruh Act was amended in 1992 to add what is now section 51(f): "A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section." In Lentini v. California Center for the Arts, 370 F.3d 837, 847 (9th Cir. 2004), the Ninth Circuit (Pregerson, J.), relying on the plain language of this1992 amendment, held: "no showing of intentional discrimination is required where the Unruh Act violation is premised on an ADA violation. This is mandated by the Unruh Act's language, which states that a violation of the ADA is, per se, a violation of the Unruh Act." Although one court has held that intent is required in an Unruh case predicated upon a violation of the ADA,[8] under the plain language of the statute, the legislative history, and the Ninth Circuit's decision in Lentini, a showing of intent is not required, and plaintiffs are entitled to summary judgment under the Unruh Act as to those elements predicated on a violation of the ADA. These elements are discussed below in sections II.B. III.A and IV.A, and listed in Exhibits 2, 3, 6 and 7.[9]

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[6] See, e.g., Boemio v. Love's Rest., 954 F. Supp. 204, 207-09 (S.D. Cal.1997) (Holding that "[a]n individual may initiate an action to enforce compliance with the [California state] handicapped access standards," and awarding damages under Unruh for defendant's violations of Title 24 regulations governing restrooms.); Wilson v. Pier 1 Imports (US), Inc., 439 F. Supp. 2d 1054, 1065 (E.D. Cal. 2006) (Holding that "as a general matter, a plaintiff may rely on both the ADAAG and [California Building Code] when pursuing an Unruh claim . . .").

[7] Cal. Civ. Code § 51(f).

[8] See Gunther v. Lin, 144 Cal. App. 4th 223 (Cal. Ct. App. 2006).

[9] The Ninth Circuit's decision, which rests on the plain language of the statute was correctly decided and is directly supported by the legislative history to the 1992 amendment to the Unruh Act. See Assembly Committee on Judiciary, Report on AB1077 (as amended January 6, 1992, p.2) stating that the bill would "make a violation of the ADA a (continued...)

D. Tolerances.

The DOJ Standards and -- beginning in 1999 -- Title 24 provide that "[a]ll dimensions are subject to conventional building industry tolerances for field conditions." DOJ Stds. § 3.2; Title 24-1999 § 1101B.4. Although Taco Bell has stipulated that the question of what constitutes a tolerance under this provision is an affirmative defense on which Taco Bell bears the burden of proof,[10] for purposes of this Motion, Plaintiffs are seeking relief only with respect to architectural elements that are either (1) outside of tolerances to which the parties have stipulated, or (2) so far out of compliance as to be beyond any reasonable tolerance based on field conditions.

For example, Plaintiffs have applied a seven pound tolerance for interior door forces, a tolerance to which the parties have stipulated. (See "Chart of Acceptable Measurements for the DOJ Standards for New Construction and Alterations" ("Stipulated Tolerances") at 1, attached to Stipulation Concerning Acceptable Measurements (Fox Decl. Ex. 9).) Plaintiffs have applied a tolerance of 3.9 inches to queue line dimensions, based on the testimony of Carlos

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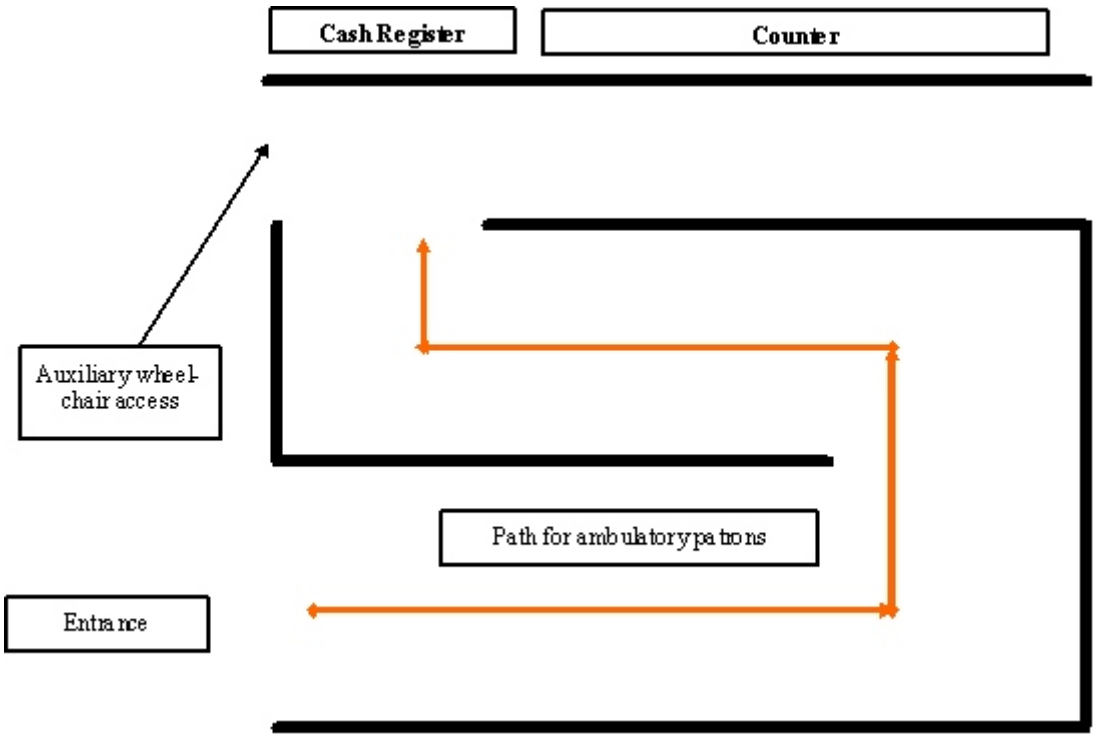
[9](...continued)
violation of the Unruh Act. Thereby providing persons injured by a violation of the ADA with the remedies provided by the Unruh Act (e.g., right of private action for damages.)". The bill was described in almost identical terms by the Senate Committee of Judiciary report on AB 1077 as amended June 1, 1992, p.5 ([T]his bill would make a violation of the ADA a violation of the Unruh Act. Thereby providing persons injured by a violation of the ADA with the remedies provided by the Unruh Act (e.g. right of private action for damages, including punitive damages.) The Court in Gunther cites none of this language, and apparently was unaware of its existence. As there is no decision of the California Supreme Court on the impact of the 1992 amendment to Unruh, state intermediate court opinions are pertinent to the extent that their reasoning is persuasive. See Gen. Motors Corp. v. Doupnik, 1 F.3d 862, 865 n.4 (9th Cir. 1993) ("Lower state court decisions may provide guidance as to the direction of the State Supreme Court's probable decisionmaking. We are not bound, however, to follow such decisions." (Citations omitted.)). As the Court in Gunther missed critical passages in the legislative history, it's reading of the statute is unpersuasive.

[10] Joint Status Conference Statement (filed Feb. 1, 2005) ¶ 18; see also Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698, 782 (D. Or. 1997) (Holding that the question of what constitutes "conventional building industry tolerances" is "an affirmative defense upon which the defendant bears the burden of proof."); AMC Entm't, Inc., 245 F. Supp. 2d at 1100 (Granting summary judgment to the plaintiff and rejecting the defendant's argument that small deviations should be excused as tolerances on the grounds that the defendant had "provided no evidence regarding any applicable conventional building industry tolerances. . .").

Azalde, Taco Bell's Rule 30(b)(6) designee on queue line issues in both the Colorado litigation[11] and the case at bar, who stated that a four inch deviation from the design of queue lines would be beyond construction tolerances. (Colorado Cross Disability Coalition v. Taco Bell Corp., Civil Action No. 97-B-2135 (D. Colo.) ("CCDC v. Taco Bell"), Dep. of Carlos Azalde at 33-34 (Ex. 10 to Fox Decl.) ("Azalde Colo. Dep.").)[12]

II. The Queue Lines in the Restaurants Listed in Exhibits 1 and 2 Are In Violation of Applicable New Construction Standards.

At Taco Bell restaurants, queue lines are generally arranged like this:



[11] Prior to the commencement of the case at bar, a class action was brought against Taco Bell in Colorado based on queue lines and service counters in corporate restaurants that allegedly violated the ADA. See Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354 (D. Colo. 1999). Taco Bell's pleadings, discovery responses and Rule 30(b)(6) testimony from the Colorado case are admissible here as evidentiary admissions. See, e.g., Williams v. Union Carbide Corp., 790 F.2d 552, 556 (6th Cir. 1986) ("Pleadings in a prior case may be used as evidentiary admissions.").

[12] Plaintiffs believe that four inches is too large to constitute a "conventional building industry tolerance for field conditions." See DOJ Stds. § 3.2; Title 24-1999 § 1101B.4. However, to avoid any alleged factual disputes, they have applied tolerance endorsed by Taco Bell's Rule 30(b)(6) deponent.

These lines are too narrow for many customers who use wheelchairs or scooters to navigate (See, e.g., Dep. of Francie Moeller ("Moeller Dep.") at 23 (Ex. 12 to Fox Decl.); Dep. of Craig Thomas Yates ("Yates Dep.") at 28 (Ex. 13 to Fox Decl.).) Taco Bell knows this, and it expects such customers to approach the counter via the auxiliary access to the side of the line. (Azalde Colo. Dep. at 40-41.)

As demonstrated below, Plaintiffs are entitled to summary judgment as to the queue lines listed in Exhibits 1 and 2 because: (1) queue lines in restaurants built between December 31, 1981 and January 26, 1993 -- those listed in Exhibit 1 -- are in violation of applicable Title 24 regulations in effect since at least 1981 governing the width of cafeteria lines and circulation aisles; (2) queue lines in restaurants built after January 26, 1993 -- those listed in Exhibit 2 -- are in violation of the DOJ Standards; and (3) Taco Bell's segregated auxiliary access for persons who use wheelchairs or scooters violates the requirements of both California law and the ADA.

A. The Queue Lines In Exhibit 1 Are in Buildings Built Between December 31, 1981 and January 26, 1993, and Are In Violation of Title 24 and thus the CDPA.

Since at least 1981, two Title 24 regulations have required queue lines to be at least 36 inches wide. First, these regulations require cafeteria lines to be at least 36 inches wide.[13] In addition, circulation aisles[14] must be "be sized according to functional requirements and in no case shall be less than 36 inches in clear width."[15]

Mr. Azalde testified that prior to approximately 1993, it was Taco Bell's policy to design queue lines that were less than 36 inches wide. (Dep. of Carlos Azalde ("Azalde Calif.

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[13] Title 24-1981 § 2-611(c)(4); Title 24-1984 § 2-611(d)(4); Title 24-1987 § 2-611(d)(4); Title 24-1989 § 611(d)(4). Mr. Azalde agreed that Taco Bell's queue lines were "food service lines." Azalde Colo. Dep. at 35.

[14] An "aisle" is defined as a "circulation path between objects such as seats, tables, merchandise equipment, displays, shelves, desks, etc." Title 24-1981 § 2-402(d); Title 24-1984 § 2-402(d); Title 24-1987 § 2-402; Title 24-1989 § 402(h).

[15] Title 24-1981 § 2-710(a)(7)(A); Title 24-1984 § 2-710(b)(7)(A); Title 24-1987 § 2-712(b)(7)(A) ; Title 24-1989 § 712(b)(7)(A).

Dep.") at 93 (Ex. 15 to Fox Decl.).) He also testified that a variation of four inches or more would be outside of a construction tolerance for queue lines. (Azalde Colo. Dep. at 33-34.) Exhibit 1 sets forth restaurants constructed between December 31, 1981 and January 26, 1993[16] that have queue lines in which at least one lane or turn is 32 inches or less in width and thus clearly in violation of Title 24, even subject to the tolerance endorsed by Taco Bell's Rule 30(b)(6) designee. Because these queue lines violate Title 24, they also violate the CDPA. See, e.g., Arnold, 158 F.R.D. at 447.

B. The Queue Lines in Exhibit 2 Are In Buildings Built After January 26, 1993 And Are In Violation of the ADA, the CDPA and Unruh.

1. The Department of Justice has Concluded that Taco Bell's Queue Lines Violate the DOJ Standards.

In the Colorado action, the Department of Justice submitted an amicus brief setting forth its view that Taco Bell's queue lines, and auxiliary access for wheelchair-users, violates the DOJ Standards. (CCDC v. Taco Bell, Memo. of United States as Amicus Curiae in Opp. to Taco Bell's Summ. J. Mot. at 15-20 (Jan. 27, 1999) (ex. 14 to Fox Decl.).) Because this is an agency's interpretation of its own regulations, the interpretation is "controlling" unless it is "'plainly erroneous or inconsistent with the regulation,'" which is clearly not the case here. Basiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).[17]

2. Taco Bell's Queue Lines Violate the DOJ Standards.

Queue lines in restaurants built after January 26, 1993 are required to comply with the "accessible route" requirements of the DOJ Standards. An "accessible route" is "[a] continuous unobstructed path connecting all accessible elements and spaces of a building or

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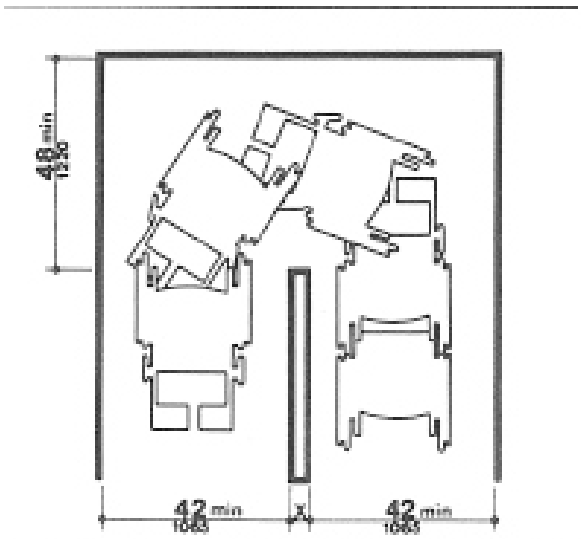
[16] For stipulated construction dates, see generally Agreement Reached.

[17] The fact that the agency interpretation is set forth in an amicus brief does not lessen the deference owed to that interpretation. See Basiri, 463 F.3d at 930 (agency interpretation owed deference "even if through an informal process"); Zurich American Ins. Co. v. Whittier Props. Inc., 356 F.3d 1132, 1137 n.27 (9th Cir. 2004) (Citing Auer for proposition that "agency's position set forth in a legal brief, in a case in which the agency is not a party, is entitled to deference.").

facility." DOJ Stds. § 3.5. Doors and counters are "elements" under the DOJ Standards. See id. (defining element), §§ 4.3.9 (doors), 5.2 & 7.2 (counters). As part of the route that customers are expected to follow from the door to the counter, the queue line must comply with the requirements governing such routes.

The DOJ Standards governing accessible routes prescribe specific measurements where a route makes a 180-degree turn around an obstruction, as the queue line does where patrons make a 180-degree turn around the post in the middle. DOJ Stds. § 4.3.3 ("If a person in a wheelchair must make a turn around an obstruction, the minimum clear width of the accessible route shall be as shown in Fig. 7(a) and 7(b).")[18] Figure 7(b) dictates that each lane must be a minimum of 42 inches wide and the turn must be at least 48 inches wide.

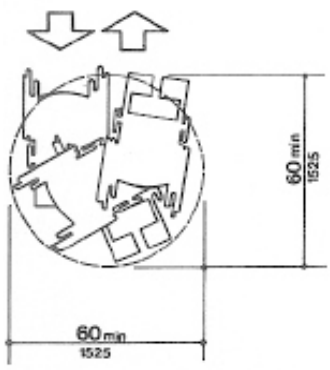


(b)
Turns around an Obstruction

In the alternative, each lane may be the minimum 36 inches permitted for accessible routes, provided that there is a 60-inch space at the turn for the wheelchair-using patron to make a 180-degree turn in place. See DOJ Stds. § 4.2.1 (requiring a 36-inch width for an

[18] Figure 7(a) addresses turns around wider obstructions -- those at least 48 inches wide -- and thus does not apply to a Taco Bell queue line, where the post around which patrons turn is far narrower than 48 inches.

accessible route) & 4.2.3 ("The space required for a wheelchair to make a 180-degree turn is a clear space of 60 inches diameter (see Fig. 3(a)) . . ."). Figure 3(a) illustrates the latter turning space.



(a)
60-In (1525-mm)-Diameter Space

Thus, under the DOJ Standards, if the queue line's lanes are less than 42 inches wide, a 60-inch diameter turning space is required. If the lanes are at least 42 inches wide, then a turning space of at least 48 inches is required. As this makes clear, the turn can never be less than 48 inches.

Exhibit 2 sets forth restaurants constructed after January 26, 1993[19] that have queue lines that violate the DOJ Standards because they have: (1) at least one turn that is 44 inches or less in width; or (2) lanes that are 32 inches or less and turns that are 56 inches or less.[20] Because these queue lines violate the ADA, they also violate the CDPA and Unruh. See Cal. Civ. Code §§ 51(f), 54(c) & 54.1(d).

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[19] For stipulated construction dates, see generally Agreements Reached.

[20] These dimensions are based on the four-inch tolerance endorsed by Taco Bell's Rule 30(b)(6) designee.

C. Taco Bell's Auxiliary Access for Persons Who Use Wheelchairs or Scooters Violates the ADA and California Law.

1. Background.

Taco Bell uses queue lines because they make the ordering process much easier for its customers. As Mr. Azalde explained, queue lines provide

> a stress-free ordering system for the customer. . . . If you don't have queue lines, the customers spend an inordinate amount of time jumping from line to line. And typically by the time they get to the front of the line, they don't even know what they want. So in the queue, they don't have to worry about what line they are in, they can concentrate on what they want to order.

(Azalde Colo. Dep. at 40.) Queue lines provide "faster and fairer service" to customers. (CCDC v. Taco Bell, Taco Bell's Answers to Pls.' First Set of Interrogs at 3 (Ex. 11 to Fox Decl.) ("Taco Bell Colo. Answers to Iterrogs..").)

Taco Bell claims that its system is designed so that people who use wheelchairs will use the separate auxiliary entrance to simply "go in the front of the line." (Azalde Colo. Dep. at 41-42.) As a result, disabled customers who are forced to use the separate entrance are put in the uncomfortable position of appearing to "cut" in front of the non-disabled customers already waiting in the queue line, or must try to keep track of the order in which other customers arrived to determine when they should approach the counter. (See, e.g., Moeller Dep. at 24; Yates Dep. at 31.)

In his Rule 30(b)(6) deposition in CCDC v. Taco Bell, Mr. Azalde conceded that:

- He did not know what other customers -- who had been waiting a longer time -- would think about wheelchair users going to the front of the line. (Azalde Colo. Dep. at 40.)
- There was no sign stating that customers in wheelchairs were to proceed to the front of the line. (Id. at 44.)
- He did not know how a customer in a wheelchair would keep track of his or her place in line. (Id.)

- When asked how mixed groups of customers in wheelchairs and able-bodied customers should handle the hospitality lines, he responded that he "had never thought through that particular situation." (Id.)
- It "would be easier if people in wheelchairs could go through the queue with everybody else." (Id. at 45-46.)

As such, far from being a stress-free system in which customers can concentrate on their orders rather than the line they are in, Taco Bell's system is stressful and confusing for people who use wheelchairs, requiring them to focus on whether the line is accessible, where to go if not, whether it is appropriate to cut in front of others who have been there longer and, if not, how to tell where they are in line. Finally, of course, it is uncontested that the system segregates people in wheelchairs from other patrons and imposes this confusion only on the former.

2. Taco Bell Discriminates Against Patrons Who Use Wheelchairs by Denying Them the Opportunity to Benefit from its Queue Lines.

The ADA and California law make it illegal to provide persons with disabilities with services or facilities that are not equal to those provided others. 42 U.S.C. § 12182(b)(1)(A)(ii); Cal. Civ. Code §§ 51(b), 54.1(a)(1). Through its queue lines, Taco Bell provides non-disabled customers with a "stress-free ordering system" which allows such customers not to have to "worry about what line they are in," resulting in "faster and fairer service" based on "customer preference." (Azalde Colo. Dep. at 40; Taco Bell Colo. Answers to Interrogs. at 3.)

Yet Taco Bell denies the benefits of this facility and service to customers in wheelchairs who are unable to access the narrow queue lines. For such customers, the entire purpose is defeated as they are required to go through a side entrance. Once there, rather than enjoying the stress-free experience of non-disabled patrons, wheelchair-using patrons must do precisely what the queue lines are supposed to prevent: worry about where they are in line. As an alternative, Taco Bell suggests such patrons should proceed to the front of the line. Yet the reason why the queue line is "fairer" is because those who arrive first are served first. So a

wheelchair-using patron who attempts to cut in line will, by Taco Bell's own logic, be acting unfairly and thereby subjecting himself to the opprobrium of his fellow customers. A person who cuts ahead of a line full of hungry people will not have a "stress-free" ordering experience. As Named Plaintiff Craig Yates testified at his deposition, inaccessible queue lines

> [i]mpacts the idea that already I feel not that confident, being to the fact I'm in a wheelchair, and I don't like the idea of people feeling sorry for me. And, yet, I feel embarrassed at the end of the cue line and impacting myself on their placement in line by trying to cut in on them, by coming to the end of the line, not taking my place appropriately in line, as everyone else does.

(Yates Dep. at 36-37.)

"[N]othing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability." H. Rep. 101-485, Pt. 3, 101st Cong., 2nd Sess. 71, reprinted in 1990 U.S.C.C.A.N. 445, 494. Thus even if Taco Bell believes it is providing a "service" by permitting people who use wheelchairs to go to the head of the line, the overall treatment is unequal and denies such persons the benefits of its hospitality lines. It is therefore prohibited by the ADA.

Likewise, under California law, the "focus [is] on the equality of access." Boemio, 954 F. Supp. at 208 (S.D. Cal. 1997). "The standard cannot be 'is access achievable in some manner.'" Id. Here, Taco Bell's alternative entrance for customers who use wheelchairs or scooters denies such customers the benefits and advantages of queue lines and thus does not constitute equal access.

3. Taco Bell Discriminates Against Patrons Who Use Wheelchairs by Segregating Them from Nondisabled Patrons.

In enacting the ADA, the legislature recognized that "historically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). As the legislative history of the Act makes clear, "[p]roviding services in the most integrated setting is a fundamental principle of the ADA." H. Rep. 101-485, Pt. 2, 101st Cong., 2nd Sess. 102, reprinted in 1990 U.S.C.C.A.N. 303, 385.

As a result, public accommodations may not segregate persons with disabilities from other persons. For example, "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(b)(1)(B) (emphasis added); see also § 12182(b)(1)(A)(iii) (Making it illegal to provide a person with a disability "a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals." (Emphasis added)). Likewise, under California law, persons with disabilities must be afforded "full and equal" access to business establishments and places of public accommodation. Cal. Civ. Code §§ 51(b), 54.1(a)(1).

This principle is reflected in Title 24 and the DOJ Standards, both of which require that accessible routes, to the maximum extent feasible, coincide with the route for the general public. DOJ Standards § 4.3.2(1); Title 24-1994 § 3103A(i)2. Several courts have found that accessible routes that do not coincide with routes for the general public violate the ADA and/or California law. See, e.g., Wyatt v. Ralphs Grocery Co., No. SACV001260DOCEEX, 2002 WL 32985831 at *3 (C.D. Cal. Feb. 21, 2002), aff'd 2003 WL 1193809 (9th Cir. Mar. 14, 2003) (Holding that access that did not coincide with the route for the general public violated ADA); Neighborhood Ass'n Of The Back Bay, Inc. v. Fed. Transit Admin., 463 F.3d 50, 65-66 (1st Cir. 2006) (Holding that segregated handicap entrance violated ADA); People ex rel. Deukmejian, 197 Cal. Rptr. at 493 (Holding that the CDPA "is intended to promote accommodation of the physically handicapped by insuring them access to public restaurants without facing the unnecessary, adverse psychological impact of being separated from regular customer traffic and shunted through secondary entrances.").

Taco Bell's system segregates people who use wheelchairs from others in violation of the ADA and California law.

III. The Doors Listed in Exhibits 3, 4 and 5 Are In Violation of Applicable New Construction Standards.

The DOJ Standards regulate the force necessary to open interior doors. Title 24 regulates -- and has regulated since at least December 31, 1981 -- the force necessary to open both interior and exterior doors.

Both the ADA and Title 24 require that public accommodations maintain accessible features in operable working condition. 28 C.F.R. § 36.211(a); Title 24-2001 § 1101B.3.1. While this "does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs," 28 C.F.R. § 36.211(b); Title 24-2001 § 1101B.3.2, it does not permit inaccessibility to "persist beyond a reasonable period of time" or "repeated mechanical failures due to improper or inadequate maintenance." "Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. pt. 36, app. B at 696 (2005). Under section 36.211, a "defendant must periodically monitor and maintain all such equipment to ensure that it continues to comply with the Title III Standards." Indep. Living Res. v. Oregon Arena Corp., 1 F. Supp.2d 1124, 1136 (D. Or. 1998) (citing 28 C.F.R. § 36.211).

Despite the fact that Taco Bell is aware that door pressure changes frequently, it has no policy or practice of monitoring door pressure to ensure it maintains compliance. The Facility Leader for Taco Bell's Northern California Territory -- responsible for the "management and supervision of 136 facilities" including "managing repair, maintenance and minor remodeling projects for existing Taco Bell restaurants" -- testified that the door pressure for exterior and restroom doors were two items in Taco Bell restaurants that "are subject to frequent change." (Decl. of Jaime de Beers in Support of Def.'s Mot. for Modification of Class Definition ("de Beers Decl.") ¶¶ 2, 3, 6(a)(xvi) & (b)(iv).)[21] In her deposition, Ms. de Beers clarified that by "frequent" she meant "from year to year" because that was how often she saw the doors, but it "could happen more frequently than just annually." (Dep. of Jaime de Beers (de Beers Dep.")

[21] Ex. 16 to Fox Decl.

at 33, 35, 37 (Ex. 17 to Fox Decl.); see also Dep. of Steve Elmer at 66-67 (door pressure hard to maintain) (Ex. 18 to Fox Decl.).)

Despite Taco Bell's awareness that door pressure changes frequently, the company takes no steps to monitor or maintain the compliance of this element. Steve Elmer, Taco Bell's Rule 30(b)(6) designee on the topic of Taco Bell's practices and procedures concerning accessibility, testified that no one at Taco Bell monitored door opening force. (Elmer dep. at 76 - 77.) Indeed, even as of Mr. Elmer's deposition in September, 2005 -- almost three years after this suit was filed -- no one was monitoring this essential accessibility feature. (Id.) Similarly, Ms. de Beers testified that she did not "have any training . . . in pressure doors" (de Beers Dep. at 34-35), and that the first time she used a device to measure door pressure was around 2004, seven years into her tenure as Facility Leader. (Id. at 14; 128-29.) Although she "make[s] regular inspections at Taco Bell restaurants," (de Beers Decl. at ¶ 3), and visits each of the restaurants for which she is responsible at least annually (de Beers Dep. at 16), she can only recall three times when a Taco Bell door was measured for the pressure necessary to open it. (Id. at 133.)

As a result, the Special Master found widespread violations of the door force requirements. The parties have stipulated that 196 restaurants were built after December 31, 1981. Of these, 171 have interior and/or exterior doors that violate door force requirements. (See Fox Decl. at ¶ 8; exs. 3-5.)

A. The Interior Doors in Exhibit 3 Are In Buildings Built After January 26, 1993 And Are In Violation of the ADA, the CDPA and Unruh.

The DOJ Standards limit the force necessary to open an interior door to five pounds. Id. § 4.13.11(2)(b). The parties have agreed to a tolerance of seven pounds. (Stipulated Tolerances at 1.) The restroom doors listed in Exhibit 3 are all in restaurants built after January 26, 1993[22] and all require in excess of seven pounds of pressure to open. They are all in

[22] For stipulated construction dates, see generally Agreement Reached.

violation of the ADA, and thus the CDPA and Unruh. See Cal. Civ. Code §§ 51(f), 54(c) & 54.1(d).

B. The Interior Doors in Exhibit 4 Are In Buildings Built Between December 31, 1981 and January 26, 1993 And Are In Violation of Title 24 and thus the CDPA.

Title 24 has limited the force necessary to open interior doors to five pounds since December 31, 1981.[23] While Title 24 did not, until 1999, contain a provision subjecting the dimensions it regulated to tolerances,[24] because the Title 24 requirement is the same as that under the DOJ Standards, Plaintiffs have applied the seven-pound tolerance that the parties agreed applied to interior doors under the latter standard.[25]

The restroom doors listed in Exhibit 4 are all in restaurants built between December 31, 1981 and January 26, 1993[26] and all require in excess of seven pounds of pressure to open. They are all in violation of Title 24 and thus the CDPA. See, e.g., Arnold, 158 F.R.D. at 447.

C. The Exterior Doors in Exhibit 5 Are In Buildings Built After December 31, 1981 And Are In Violation of Title 24 and thus the CDPA.

Under Title 24 in effect between December 31, 1981 and November 1, 2002, the force necessary to open an exterior door was limited to eight and one-half pounds.[27] Although the parties did not stipulate to tolerances on dimensions set forth in Title 24, Defendant proposed, in correspondence, a tolerance of nine pounds on exterior door force. (Letter from R. Hikida to

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[23] Title 24-1981 § 2-3303(l)(2); Title 24-1984 § 2-3303(l)(2); Title 24-1987 § 2-3304(1)(2); Title 24-1989 § 3304(i.2)(1); Title 24-1994 § 3304(i.2)(1); Title 24-1999 § 1133B.2.5; Title 24-2001 § 1133B.2.5.

[24] Title 24-1999 § 1101B.4.

[25] See Stipulated Tolerances at 1.

[26] For stipulated construction dates, see generally Agreement Reached.

[27] Title 24-1981 § 2-3303(l)(2); Title 24-1984 § 2-3303(l)(2); Title 24-1987 § 2-3304(1)(2); Title 24-1989 § 3304(i.2)(1); Title 24-1994 § 3304(i.2)(1); Title 24-1999 § 1133B.2.5. The DOJ Standards do not regulate exterior door force. See id. § 4.13.11(2)(a). In the 2001 version of Title 24, which took effect on November 1, 2002, the force necessary to open an exterior door was reduced to five pounds. Title 24-2001 § 1133B.2.5. Only one of the stores at issue in this motion was built after November 1, 2002. Plaintiffs have applied only the pre-2002 standard.

T. Fox and A. Robertson dated May 24, 2006 ("the Orange Empire chapter of the ICBO has indicated that a 9 lb. maximum pull tolerance for exterior doors is appropriate.") (Ex. 19 to Fox Decl.).) For purposes of this Motion, Plaintiffs have applied a nine and one-half pound tolerance, which is more generous to Taco Bell than the tolerance it proposed.

The exterior doors listed in Exhibit 5 are all in restaurants built after December 31, 1981[28] and all require in excess of nine and one-half pounds of pressure to open. They are all in violation of Title 24 and thus the CDPA. See, e.g., Arnold, 158 F.R.D. at 447.

IV. The Accessible Seating in the Indoor Dining Areas of the Restaurants Listed in Exhibits 6, 7 and 8 Are In Violation of Applicable New Construction Standards.

The DOJ Standards regulate the number of, and knee clearance at, accessible seating positions in fixed seating. Since December 31, 1981, Title 24 has regulated the number of wheelchair seating spaces in restaurants, regardless of whether they were fixed or moveable.

A. The Fixed Accessible Seating In Exhibits 6 and 7, in Buildings Built After January 26, 1993, Violates the ADA, the CDPA and Unruh.

The DOJ Standards require that "at least five percent (5%), but not less than one, of the fixed or built-in seating areas or tables" must be accessible, that is, must comply with section 4.32 of the DOJ Standards. Id. § 4.1.3(18). Section 4.32.3 requires a knee space that is 27 inches high, 30 inches wide and 19 inches deep. Id. The parties have stipulated to the following tolerances: 26½ inches high; 29 inches wide; 18 inches deep.[29]

The restaurants listed in Exhibit 6 all have fixed seating that does not include at least five percent accessible seating positions, and are thus in violation of the DOJ Standards.

The restaurants listed in Exhibit 7 all have accessible tables that do not comply with the knee clearance requirement of Section 4.32.3 -- subject to the agreed tolerances -- and are thus in violation of the DOJ Standards.

Because the elements listed in Exhibits 6 and 7 violate the ADA, they also violate the CDPA and Unruh. See Cal. Civ. Code §§ 51(f), 54(c) & 54.1(d).

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[28] For stipulated construction dates, see generally Agreement Reached.

[29] Stipulated Tolerances at 1.

B. The Accessible Seating In Exhibit 8 Is In Violation of Title 24 and thus the CDPA.

Title 24 has required, since 1981, that "[e]ach dining, banquet and bar area shall have one wheelchair seating space for each twenty seats . . .." Title 24-1981 § 2-611(c)(3).[30]

The restaurants listed in Exhibit 8 do not have a minimum of one wheelchair seating space for each twenty seats -- regardless of whether fixed or moveable -- and are thus in violation of Title 24 and the CDPA. See, e.g., Arnold, 158 F.R.D. at 447.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their Motion for Partial Summary Judgment be granted.

Respectfully submitted,

FOX & ROBERTSON, P.C.

By: /s/ Timothy P. Fox

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

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Attorneys for Plaintiffs

[30] See also Title 24-1984 § 2-611(d)(3); Title 24-1987 § 2-611(d)(3); Title 24-1989 § 611(d)(3); Title 24-1994 § 3103A(b)4C; Title 24-1999 § 1104B.5.4; Title 24-2001 § 1104B.5.4.