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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 FRANCIE E. MOELLER et al,

17 Plaintiffs,

18 v.

19 TACO BELL CORP.,

20 Defendant.
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Case No. C 02 5849 MJJ ADR

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF THEIR MOTION FOR
PARTIAL SUMMARY JUDGMENT.**

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

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1 **I. INTRODUCTION.**

2 The most crucial grounds for Plaintiffs' Motion for Summary Judgment ("Opening
3 Brief" or "Opening Br.") are undisputed, including:

- 4 • The Special Master's measurements of the architectural elements for which
5 Plaintiffs seek summary judgment (with the exception of the measurement of
6 the knee clearance at accessible seating positions, discussed below);
- 7 • The construction tolerances applied by Plaintiffs; and
- 8 • The construction dates of the restaurants at issue.

9 Much of Taco Bell's Memorandum of Points and Authorities in Support of Response in
10 Opposition to Motion For Partial Summary Judgment ("Opposition Brief" or "Opp. Br.")
11 addresses arguments that are irrelevant here. For instance, eleven pages of the Opposition
12 Brief are devoted to showing that Plaintiffs have not met their burden of establishing that Taco
13 Bell violated the alterations or readily achievable provisions of the ADA. (See Opp. Br. at 8-
14 19.) Plaintiffs, however, do not rely on either of these provisions in seeking summary
15 judgment.

16 As set forth below, Taco Bell's remaining arguments are incorrect and Plaintiffs are
17 entitled to summary judgment.

18 **II. THE RELIEF SOUGHT BY PLAINTIFFS.**

19 Through their Motion, Plaintiffs seek an order finding that the elements at issue are in
20 violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), the
21 California Disabled Persons Act, Cal. Civ. Code § 54 et seq. (the "CDPA"), and/or California's
22 Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq. ("Unruh").

23 This holding would establish the liability predicate for injunctive and monetary relief,
24 although as discussed below, during Stage 2, proof that class members were denied equal
25 access may be necessary for monetary relief. (See infra at 16-18.) Should the Court grant the
26 present motion, Plaintiffs respectfully request that the Court instruct the parties to attempt to
27 agree on a proposed remedial order, and to submit their proposals to the Court. See Madrid v.

1 Gomez, 889 F. Supp. 1146, 1283 (N.D. Cal. 1995) (ordering parties to submit proposed
2 remedial plan).

3 **III. TACO BELL MAKES SEVERAL IRRELEVANT ARGUMENTS**
4 **CONCERNING PLAINTIFFS' ADA CLAIMS.**

5 Plaintiffs seek summary judgment under the ADA only on restaurants that were built
6 after January 26, 1993, and are thus subject to the ADA's new construction standards.¹
7 Plaintiffs base these claims on violations of the Department of Justice Standards for Accessible
8 Design ("DOJ Standards"). 28 C.F.R. pt. 36, app A. As a result, several of Taco Bell's
9 arguments are irrelevant.²

10 **A. Plaintiffs Do Not Rely On The ADA's Readily Achievable or Alterations**
11 **Requirements.**

12 Taco Bell devotes much of its brief to arguing that Plaintiffs have not established
13 violations of the ADA's provisions governing alterations and readily achievable barrier
14 removal. (Opp. Br. at 8-19.) Those provisions, however, are irrelevant to Plaintiffs' Motion.

15 The ADA has different requirements based on the date that a building was constructed.
16 In buildings constructed before January 26, 1993, architectural barriers must be removed where
17 it is readily achievable to do so. 42 U.S.C. § 12182(b)(2)(A)(iv). In addition, areas of
18 buildings (and, in some cases, the path of travel to those areas) that have undergone alterations
19 since January 26, 1992, must be accessible. Id. § 12183(a)(2).

20 Plaintiffs' Motion does not rely on the ADA's readily achievable or alterations
21 requirements. Rather, Plaintiffs rely on 42 U.S.C. § 12183(a)(1) and 28 C.F.R. § 36.406(a),
22 which require that all buildings constructed after January 26, 1993, comply with the DOJ
23 Standards. Thus Plaintiffs seek summary judgment under the ADA only with respect to
24 restaurants that the parties have stipulated were built after January 26, 1993. (See Exs. 2, 3, 6

25 ¹ Opening Br. at 2. Although Plaintiffs move on a number of pre-1993
26 restaurants, that portion of their motion is based entirely on state law, not the ADA. Opening
27 Br. at 11-12, 21-23.

28 ² Because Plaintiffs' arguments here do not track the order of the arguments in
Taco Bell's Opposition Brief, Plaintiffs have prepared the table attached as Tab 10 to their
appendix showing where each of Taco Bell's arguments is addressed herein.

1 & 7 to the Declaration of Timothy P. Fox (“Fox Decl.”)³ (setting forth the stipulated
2 construction dates of the restaurants for which Plaintiffs seek summary judgment under the
3 ADA.) Taco Bell’s discussion of the ADA’s readily achievable and alterations requirements
4 is therefore irrelevant.⁴

5 **B. Plaintiffs Do Not Base Any ADA Claim On Violations Of Non-ADA**
6 **Standards.**

7 Defendant asserts that “there is no architectural barrier that violates the ADA that can
8 be premised upon a proffered non-ADA standard.” (Opp. Br. at 20.) Whether this is an
9 accurate statement of law is irrelevant here because Plaintiffs do not base any ADA claim on a
10 non-ADA standard.

11 In the cases cited by Taco Bell, the courts held that ADA claims must be based on
12 violations of the DOJ Standards, and rejected the plaintiffs’ attempts to base ADA claims on
13 violations of Title 24.⁵ Here, Plaintiffs’ ADA claims are based only on violations of the DOJ
14 Standards.

18 ³ This declaration was filed on February 23, 2007, and is docket number 256.

19 ⁴ Plaintiffs dispute much of Taco Bell’s analysis of the ADA’s readily achievable
20 and alterations requirements, but those disputes need not be resolved here.

21 ⁵ See Wilson v. Pier 1 Imports (US), Inc., 439 F. Supp. 2d 1054, 1066 (E.D. Cal.
22 2006) (Rejecting plaintiff’s reliance on violations of the California Building Code to establish
23 violations of the ADA.); Eiden v. Home Depot USA, Inc., No. CIVS04-977 LKK/CMK, 2006
24 WL 1490418, at *8 (E.D. Cal. May 26, 2006) (same); Chapman v. Pier 1 Imports, No. CIV. S-
25 04-1339 LKK CMK, 2006 WL 1686511, at *6-7 (E.D. Cal. June 19, 2006) (same); Sanford v.
26 Roseville Cycle, Inc., No. Civ. 04-1114 DFL CMK, 2007 WL 512426, at *1 (E.D. Cal.
27 February 12, 2007) (same); Sanford v. Del Taco, Inc., No. 2:04-cv-2154-GEB-EFB, 2006 WL
28 2669351, at *2 (E.D. Cal. Sept. 18, 2006) (Holding that the DOJ Standards provide the standard
for determining a violation of the ADA.); Sanford v. Del Taco, Inc., No. CIV-S-04-1337 DFL
CMK, 2006 WL 1310318, at *2 (E.D. Cal. May 12, 2006) (Holding that the fact that an
architectural element violates Title 24 may be “evidence of what constitutes a barrier to access”
under the ADA); Wilson v. Norbreck LLC, No. Civ.S-04-690 DFL JFM. 2006 WL 2651139, at
*4 (E.D. Cal. Sept. 15, 2006) (Not applying Title 24 to ADA claim.); Harris v. Costco
Wholesale Corp., 389 F. Supp.2d 1244, 1051 (S.D. Cal. 2005) (same); Martinez v. Home
Depot USA, Inc., No. Civ. S-04-2272 DFL DAD, 2007 WL 926808, at *3 (E.D. Cal. Mar. 27,
2007) (Holding that “violations of state law cannot create federal violations under the ADA.”).

1 Taco Bell’s violations of the ADA are set forth in sections II.B, III.A and IV.A of
2 Plaintiffs’ Opening Brief, and Exhibits 2, 3, 6 and 7 to the Fox Declaration. In these sections,
3 Plaintiffs rely exclusively on the DOJ Standards to establish violations of the ADA.⁶

4 Taco Bell apparently misunderstands Plaintiffs’ argument and believes that Plaintiffs
5 are relying on Title 24 to establish ADA violations. This is not the case. Plaintiffs rely on
6 Title 24 only to establish violations of state law. As set forth on pages 6 and 7 of Plaintiffs’
7 Opening Brief, a plaintiff can base a state claim on a violation of Title 24, and Taco Bell does
8 not dispute this assertion. Indeed, several of the cases cited by Taco Bell make this point. See,
9 e.g., Wilson v. Pier 1 Imports (US), Inc., 439 F. Supp. 2d at 1065 (Holding that “as a general
10 matter, a plaintiff may rely on both the [DOJ Standards] and [California Building Code] when
11 pursuing an Unruh claim . . .”); Chapman, 2006 WL 1686511 at *6 (same).

12 **IV. IT IS ENTIRELY APPROPRIATE FOR THIS COURT TO APPLY**
13 **CALIFORNIA LAW.**

14 When Plaintiffs filed their complaint in this case over four years ago, they alleged that
15 the Court had supplemental jurisdiction over Plaintiffs’ state law claims. Taco Bell has never
16 by motion challenged the Court’s jurisdiction over these claims.

17 Taco Bell now asserts that “Plaintiffs seek to evade the limitations imposed by
18 Congress upon businesses to retrofit older facilities by relying upon [California state law] and,
19 at the same time, use the vehicle of federal subject matter jurisdiction to accomplish this.
20 Principles of fairness and equity dictate that the Court not permit Plaintiffs to achieve this
21 result . . .” (Opp. Br. at 3.) This argument rests on two incorrect premises: (1) that state laws
22 with stronger access laws than the ADA somehow are contrary to the spirit and purpose of the
23 ADA; and (2) that there is something improper about raising state claims in federal court.

26 ⁶ Taco Bell’s only specific example of Plaintiffs’ alleged reliance on a non-ADA
27 standard to establish an ADA violation concerns the force necessary to open exterior doors.
28 (Opp. Br. at 20.) This is incorrect: Plaintiffs argue that Taco Bell’s exterior doors violate
California state law, not the ADA, and Plaintiffs rely only on Title 24 requirements for this
argument. (See Opening Br. at 21-22.)

1 **B. Enforcing State Laws is Consistent With the Purpose of Supplemental**
2 **Jurisdiction.**

3 Taco Bell argues that federal courts addressing ADA claims should not enforce state
4 access statutes, which apparently would have to be heard in state court. This position would
5 result in significant inefficiencies that contradict the purposes of supplemental jurisdiction.

6 According to a leading treatise:

7 Ancillary jurisdiction exists because without it the federal court neither could dispose of
8 the principal case effectively nor do complete justice in the dispute that is before the
9 tribunal. Viewed from this perspective then, the concept is a commonsense solution to
the problems of piecemeal litigation that otherwise would arise by virtue of the limited
jurisdiction of the federal courts prescribed in Article III and the complexity of many
modern lawsuits.

10 13 Charles Alan Wright et al., Federal Practice and Procedure § 3523 (2d ed. 1986 with
11 updates through 2007). (“In 1990, Congress codified the long-standing judicial doctrines of
12 pendent and ancillary jurisdiction, giving them the collective name of ‘supplemental
13 jurisdiction.’” Id.)

14 Here, Plaintiffs’ state claims share many factual and legal issues with their ADA
15 claims. Indeed, a violation of the ADA constitutes a violation of both state claims. Cal. Civ.
16 Code §§ 51(f) & 54(c). Both the federal and state claims require factual investigation into the
17 construction and alteration dates of the restaurants, as well as the measurements of the
18 architectural elements at issue. Trying this case in one forum, as contrasted with the piecemeal
19 litigation proposed by Taco Bell, serves the purposes of supplemental jurisdiction.⁸

20 _____
21 ⁷(...continued)
22 requiring only new construction to be in full compliance with the DOJ Standards “because it
23 costs far less to incorporate accessible design into the planning and construction of new
24 buildings . . .” (Opp. Br. at 11.) Plaintiffs’ Motion is in complete harmony with this balance:
it demonstrates that the pre-1993 buildings on which Plaintiffs move were all out of
compliance with Title 24 regulations in effect at the time the building in question was built,
that is, when Taco Bell concedes it would have cost far less to comply.

25 ⁸ In its April 11th “Notice of Supplemental Authority in Support of Defendant
26 Taco Bell Corp.’s Memorandum of Points and Authorities in Opposition to Motion for Partial
27 Summary Judgment,” Taco Bell cites Cross v. Pacific Coast Plaza Investments, L.P., No. 06-
28 cv-02543-JM-RBB, 2007 WL 951772 (S.D. Cal. Mar. 6, 2007), in which the court declined to
exercise supplemental jurisdiction based on the differences between Lentini v. California
Center for the Arts, 370 F.3d 837 (9th Cir. 2004) and Gunther v. Lin, 144 Cal. App. 4th 223
(continued...)

1 **V. TACO BELL’S ARGUMENT THAT SUMMARY JUDGMENT SHOULD BE**
2 **DENIED BASED ON CERTIFICATES OF OCCUPANCY IS INCORRECT.**

3 Taco Bell does not dispute that the elements in Exhibits 1, 4, 5, and 8 are out of
4 compliance with Title 24. Violation of Title 24 constitutes violation of Unruh and CDPA.
5 Moeller v. Taco Bell Corp., 220 F.R.D. 604, 607 (N.D. Cal. 2004) (citing Arnold v. United
6 Artists Theatre Circuit, Inc., 866 F. Supp. 433, 439 (N.D. Cal.1994)). Defendant argues that
7 summary judgment should be denied simply because building inspectors issued certificates of
8 occupancy for the restaurants in question. This argument should be rejected because:

- 9 • Building inspectors do not have unfettered discretion to bless noncompliant
10 facilities. Their discretion is bounded by the law and they may only permit
11 variations from Title 24 where a specific statutory or regulatory exception
12 applies.
- 13 • There are only two exceptions to the standards set forth in Title 24. The one on
14 which Defendant relies -- “unreasonable hardship” -- is a stringent exception
15 (1) that rarely applies; (2) on which Defendant bears the burden of proof, and
16 (3) on which Defendant offers no proof.
- 17 • Where, as here, written findings are required to invoke an exception, the Court
18 may not presume -- in the absence of such findings -- that the exception applies.

19 ⁸(...continued)
20 (Cal. Ct. App. 2006). These cases differ on the question whether it is necessary to show intent
21 to proceed under Unruh. Cross is inapposite here for two reasons.

22 First, in Wilson v. Haria and Gogri Corp., -- F. Supp.2d --, 2007 WL 851744 (E.D. Cal.
23 Mar. 22, 2007), a case decided after Plaintiffs submitted their Opening Brief, Judge Karlton
24 exhaustively analyzed Lentini and Gunther. The court ultimately followed Lentini and held
25 that Unruh claims that are based on ADA violations do not require a showing of intent.
26 Wilson, 2007 WL 851744, at *11.

27 Second, whether supplemental jurisdiction “should be exercised in a given
28 circumstance depend[s] on the district court assessing whether doing so ‘would most sensibly
accommodate’ the values of ‘economy, convenience, fairness, and comity.’” Executive
Software North America, Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1554 (9th Cir. 1994). In
Cross, the motion to dismiss the state claims was filed approximately one month after the filing
of the plaintiff’s complaint, before any discovery or motions practice had occurred. (See Decl.
of Amy F. Robertson in Support of Pls.’ Reply Br. in Support of Pls.’ Mot. for Partial Summ.
J. (“Robertson Decl.”) Ex. 7.) By contrast, the present case has been actively litigated for over
four years, involving discovery of hundreds of thousands of pages of documents, surveys of
every restaurant at issue, multiple depositions, and extensive motions practice, including two
fully briefed and decided motions concerning class certification, and three summary judgment
motions. In these circumstances, the values of economy, convenience and fairness set forth in
Executive Software weigh heavily in favor of retaining supplemental jurisdiction.

1 **A. Building Inspectors May Not Allow Variations from Title 24 Unless The**
2 **Prerequisites of a Statutory or Regulatory Exception are Met.**

3 Defendant suggests that building inspectors have the discretion to allow any deviation
4 from the requirements of Title 24, even deviations that do not meet the prerequisites for a
5 statutory or regulatory exception. (Opp. Br. at 27-28 (Asserting that a certificate of compliance
6 indicates that a building inspector “either determined that the stores in question complied with
7 the California Building Code or determined that some type of exemption warranted some
8 deviation from the California Building Code.” (Emphasis added.)) In this section, Plaintiffs
9 demonstrate that building officials do not have unfettered discretion to approve facilities that
10 violate Title 24 in the absence of an express exception. In section V(B) below, Plaintiffs
11 demonstrate that no exception applies; in section V(C), Plaintiffs demonstrate that the Court
12 may not presume that an exception applied.

13 The fact that building inspectors have the discretion to issue building and occupancy
14 permits does not allow them to issue permits for projects that violate statutory or regulatory
15 requirements. Building departments and other administrative agencies are “not . . . lawmaking
16 bod[ies] and ha[ve] no power to disregard or amend the ordinances which define [their]
17 authority.” City & County of San Francisco v. Bd. of Permit Appeals, 207 Cal. App. 3d 1099,
18 1109-10 (Cal. Ct. App. 1989). ““An administrative agency, therefore, must act within the
19 powers conferred upon it by law and may not validly act in excess of such powers.”” City &
20 County of San Francisco v. Padilla, 23 Cal. App. 3d 388, 400 (Cal. Ct. App. 1972) (citations
21 omitted); see also Dep’t of Parks & Recreation v. State Pers. Bd., 233 Cal. App. 3d 813, 824
22 (Cal. Ct. App. 1991); Bd. of Permit Appeals, 207 Cal. App. 3d at 1105. “Accordingly, it is
23 well settled that ‘when an administrative agency acts in excess of, or in violation, of the powers
24 conferred upon it, its action thus taken is void.’” Padilla, 23 Cal. App. 3d at 400 (citations
25 omitted); Dep’t of Parks & Recreation, 233 Cal. App. 3d at 824; Bd. of Permit Appeals, 207
26 Cal. App. 3d at 1105.

27 Several courts have reversed building agency actions that exceeded their statutory
28 authority. For example, in Horwitz v. City of Los Angeles, 124 Cal. App. 4th 1344, 1347 (Cal.

1 Ct. App. 2004), a homeowner was issued a building permit to construct an addition to his
2 house. A neighbor challenged the issuance of the permit, arguing that the permit was contrary
3 to the municipal code. Id. On appeal, the court found that the proposed addition would violate
4 the municipal code. The city argued that the court could not order it to revoke the permits
5 because that would be contrary to the “discretion legally vested” in the city. Id. at 1355. The
6 court rejected this argument, holding that “the City has no discretion to issue a permit in the
7 absence of compliance [with the municipal code].” Id. at 1356.

8 Likewise, in Board of Permit Appeals, 207 Cal. App. 3d at 1104, a board of permit
9 appeals overruled a zoning administrator and granted a building permit that effectively
10 authorized maintenance of a third dwelling unit on property zoned for single-dwelling use. The
11 zoning administrator then sought judicial review. Id. The court recognized that generally, the
12 board of permit appeals enjoyed “broad discretion.” Id. That discretion, however, “must be
13 exercised within the bounds of all applicable city charter, ordinance and code sections . . .” Id.
14 at 1105. There were only three exceptions to the San Francisco City Planning Code that would
15 have allowed the zoning variance granted by the board. Id. at 1106. The court held that the
16 board did not have discretion to permit the zoning variance unless one of the exceptions
17 applied. Id. at 1110.

18 Finally, in Morris v. County of Marin, 18 Cal. 3d 901, 905 (Cal. 1977), an injured
19 construction worker sued a county for issuing a building permit to his employer without
20 requiring a certificate of workers’ compensation insurance. Labor Code section 3800 required
21 that counties “shall require that each applicant” for a building permit submit an insurance
22 certificate. Id. at 906. In light of this language, the Court held that the county was required to
23 obtain a certificate of insurance before issuing a building permit. Id.

24 These cases demonstrate that building inspectors do not have discretion to issue
25 building permits or certificates of occupancy for projects that do not comply with applicable
26 statutes. As set forth in the next section, California statutes permit deviations from the
27 accessibility requirements of Title 24 only if the prerequisites of one of two narrow exceptions
28

1 are met. Building inspectors “have no power to disregard”⁹ these statutes, and thus to the
2 extent that a building inspector permitted a non-compliant architectural element which did not
3 fall within one of these two exceptions, that determination is void.

4 Defendant’s cases are not to the contrary. These cases all involve plaintiffs seeking
5 damages from building inspectors, and all address a very narrow issue: whether damages are
6 precluded by California’s Governmental Immunity Act (“CGIA”) because the decision to issue
7 a building permit, certificate of occupancy or other permit involves discretion.¹⁰ At most, these
8 decisions demonstrate that when a building inspector makes a decision that violates applicable
9 laws, he or she is not liable for damages as a result. These cases do not stand for the
10 proposition that a court cannot correct the erroneous decision. As set forth above, numerous
11 courts have done just that. See also Rezai v. City of Tustin, 26 Cal. App. 4th 443, 448 (Cal. Ct.
12 App. 1994) (Holding that a a building permit decision can be challenged through a mandamus
13 action); City of Walnut Creek v. Leadership Hous. Sys., Inc., 73 Cal. App. 3d 611, 621 (Cal.
14 Ct. App. 1977) (“A petition for a writ of mandate . . . is the appropriate remedy for abuse of
15 discretion in refusing a permit.”).

16 In sum, any discretion the building inspectors have in issuing permits is bounded by
17 California statutes and Title 24. To avoid summary judgment on the elements in Exhibits 1, 4,
18 5 and 8, Defendant must show either that the element in question complied with Title 24 --
19 something it does not attempt to do in its Opposition Brief -- or that the building inspector
20 applied a statutory or regulatory exception to the requirements of Title 24.

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25 ⁹ Bd. of Permit Appeals, 207 Cal. App. 3d at 1109.

26 ¹⁰ See Thompson v. City of Lake Elsinore, 18 Cal. App. 4th 49, 53-54 (Cal. Ct.
27 App. 1993); Haggis v. City of Los Angeles, 22 Cal. 4th 490, 498-99 (Cal. 2000); Inland
28 Empire Health Plan v. Superior Court, 108 Cal. App. 4th 588, 592-93 (Cal. Ct. App. 2003);
Fox v. County of Fresno, 170 Cal. App. 3d 1238, 1241-42 (Cal. Ct. App. 1985); Sutherland v.
City of Fort Bragg, 86 Cal. App. 4th 13, 18-19 (Cal. Ct. App. 2000); Creason v. Dep’t of
Health Servs., 18 Cal. 4th 623, 629-30 (Cal. 1998).

1 California’s Office of the State Architect, which promulgated the Title 24 access regulations,¹⁴
2 the undue hardship exception applies only where compliance would be “difficult or impossible
3 because the cost of providing access is too high in relationship to the total cost of the job.”
4 Office of the State Architect, California State Accessibility Standards Interpretive Manual
5 § 110A(b)11A at 11 (3d ed. 1989) (“1989 Interpretive Manual”) (interpreting “unreasonable
6 hardship”).

7 Taco Bell -- which has the burden of proving that the unreasonable hardship exception
8 applies¹⁵ – has not submitted any evidence whatsoever either (1) that any of the occupancy
9 permits for any of the buildings at issue in Plaintiffs’ Motion were based on an unreasonable
10 hardship exception, or (2) that such an exception was in fact merited. It has not submitted any
11 written documentation by the building inspector beyond the occupancy permits, nor has it
12 submitted any evidence concerning the cost of constructing accessible elements, the overall
13 costs of constructing the restaurants, or that constructing these basic features in a manner
14 compliant with Title 24 would have made the construction of the restaurant unfeasible.

15 Instead of providing evidence, Taco Bell asks the Court simply to presume that building
16 inspectors made unreasonable hardship determinations, citing Bringle v. Board of Supervisors,
17 54 Cal. 2d 86, 89 (Cal. 1960), which held that “[w]here an authorized board grants a variance it
18 will be presumed that official duty was performed and that the existence of the necessary facts
19 was found . . .” The Bringle presumption is inapplicable here.

20 “The presumption that an agency’s rulings rest upon the necessary findings and that
21 such findings are supported by substantial evidence . . . does not apply to agencies which must

22 ¹⁴ See Cal. Gov’t Code § 4450(b). The State Architect’s interpretation of its
23 regulations is “controlling” unless it is “plainly erroneous or inconsistent with the
24 regulation,” which is clearly not the case here. See Basiri v. Xerox Corp., 463 F.3d 927, 930
(9th Cir. 2006) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997))

25 ¹⁵ The parties have stipulated that Taco Bell has the burden of proof of
26 establishing that the unreasonable hardship exception applies. Joint Status Conference
27 Statement ¶ 27 (Docket No. 157, filed Feb. 2, 2005). This is consistent with established rules
28 of statutory construction. See N.L.R.B. v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711
(2001) (Discussing “the general rule of statutory construction that the burden of proving
justification or exemption under a special exception to the prohibitions of a statute generally
rests on one who claims its benefits.” (Citation omitted)).

1 expressly state their findings and must set forth the relevant supportive facts.” Broadway,
2 Laguna, Vallejo Ass’n v. Bd. of Permit Appeals, 66 Cal. 2d 767, 773 (Cal. 1967); see also Bd.
3 of Permit Appeals, 207 Cal. App. 3d at 1107 (quoting Broadway).

4 Since their inception, the Title 24 access regulations have required that the “details of
5 any finding of unreasonable hardship shall be recorded and entered in the files of the enforcing
6 agency.”¹⁶ Since there is no evidence of written hardship findings or determinations for any of
7 the elements at issue here, no such determinations may be presumed.

8 Ultimately, there is a good reason why Taco Bell does not and cannot provide evidence
9 that any building inspector found that it would have posed an unreasonable hardship to
10 construct the architectural elements at issue here in compliance with Title 24: because such a
11 finding would be absurd on its face. Plaintiffs move only on new construction standards, that
12 is, the standards applicable when each door, queue, and seating area was being put in place as
13 part of the construction of an entire new Taco Bell restaurant. It is inconceivable that ensuring
14 that door closers are adjusted to require the proper force, that the rails of a queue line are
15 spaced far enough apart (or simply never put in place at all) or that a handful of tables have the
16 proper knee clearance would render the project -- the building of a Taco Bell restaurant --
17 “unfeasible” in light of, among other things, “[t]he cost of all construction contemplated.”¹⁷

18 Without the presumption of unreasonable hardship, the only evidence before the Court
19 is that the elements at issue are substantially out of compliance with Title 24. Taco Bell has
20 not met its burden of establishing that an exception applies, and thus Plaintiffs are entitled to
21 summary judgment.

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24 ¹⁶ See Title 24-1981 § 2-422(c); Title 24-1984 § 2-422(c); Title 24-1987 § 2-422
25 at 29; Title 24-1989 § 422(c); Title 24-1994 § 422(c); Title 24-1999 § 222-U at 28; Title 24-
2001 § 222-U at 22-23.

26 ¹⁷ Taco Bell requests permission to seek a retroactive unreasonable hardship
27 determination. (Opp. Br. at 26.) In light of its utter failure to present any evidence that
28 building the architectural elements at issue in compliance with Title 24 would have posed an
unreasonable hardship, that request should be denied. See Fed. R. Civ. P. 56(e) (Taco Bell
cannot “rest upon the mere allegations or denials of [Plaintiffs’] pleading” but “must set forth
specific facts showing that there is a genuine issue for trial.”)

1 **VI. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT WITH RESPECT**
2 **TO QUEUE LINES.**

3 In their Opening Brief, Plaintiffs demonstrated that the Taco Bell queue lines in
4 Exhibits 1 and 2 violated Title 24 and the DOJ Standards, respectively, and that Taco Bell’s
5 auxiliary access for persons who use wheelchairs violated the ADA and state law because it
6 denies them the benefit of the queue lines and segregates them from nondisabled patrons.
(Opening Br. at 10-18.)

7 Taco Bell does not dispute the legal or factual assertions in Plaintiffs’ Opening Brief,
8 including the dimensions in Exhibits 1 and 2. Instead it argues that its queue lines do not
9 violate the ADA or state law because the auxiliary access provides persons who use
10 wheelchairs with equivalent facilitation. (Opp. Br. at 38-39.)

11 The purpose of both the ADA and California law is to provide persons with disabilities
12 with “full and equal” access to places of public accommodation. See 42 U.S.C. § 12182(a);
13 Cal. Civ. Code §§ 51(b) & 54.1(a)(1). While both the ADA and California law provide an
14 exception from the requirements of the DOJ Standards and Title 24 for alternative methods of
15 access, this exception applies only where the alternative method provides “equivalent
16 facilitation” to persons with disabilities. (See DOJ Stds. § 2.2¹⁸ (Permitting alternative designs
17 only where they “provide substantially equivalent or greater access to and usability of the
18 facility.”); Cal. Gov’t Code § 4451(f) (Permitting other methods of access “only when it is
19 clearly evident that equivalent facilitation and protection are thereby secured.”).)¹⁹

20 Here, Taco Bell does not dispute that the DOJ Standards and Title 24 require that its
21 queue lines be wide enough to permit passage by persons who use wheelchairs, or that its
22 queue lines are a service for customers to provide a convenient and stress-free experience.
23

24 _____
25 ¹⁸ Most of the DOJ Standards and Title 24 provisions cited herein were included in
26 the Appendix to Plaintiffs’ Opening Brief. Any that were not so included are in the Appendix
hereto.

27 ¹⁹ This is the text of section 4451(f) prior to 1993. See Cal. Stats.1993, c. 1220
28 (A.B.1138), § 2. In 1993, the section was amended to provide that other methods of access are
permitted only “when it is clearly evident that equivalent facilitation and protection that meets
or exceeds the requirements under federal law are thereby secured.”

1 Thus Taco Bell’s auxiliary access constitutes “equivalent facilitation” only if it provides access
2 and service that are equivalent to that provided by accessible queue lines. The auxiliary access
3 does not come close to meeting this standard.

4 First, the auxiliary access is segregated. Integration of persons with disabilities is a
5 primary purpose of both the ADA and California law. (See Opening Br. at 17-18.) The CDPA
6 “is intended to promote accommodation of the physically handicapped by insuring them access
7 to public restaurants without facing the unnecessary, adverse psychological impact of being
8 separated from regular customer traffic and shunted through secondary entrances.” People ex
9 rel. Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 136 (Cal. Ct. App. 1983). Likewise,
10 according to the Department of Justice, “[i]f the concept of ‘equivalent facilitation’ allowed
11 businesses such as Taco Bell to provide segregated customer service queues where it would
12 have been easy to construct fully accessible integrated service lines, one of the main purposes
13 of the ADA would be significantly undermined . . .” (Ex. 14 to Fox Decl., at 20.)

14 Further, the auxiliary access is not equivalent because it denies persons who use
15 wheelchairs the benefits of the queue lines. The purpose of queue lines is to permit customers
16 not to have to worry about where they are in line so they can concentrate on what they want to
17 order. (Opening Br. at 15.) The auxiliary access denies this benefit to persons who use
18 wheelchairs. Taco Bell admits that persons using the auxiliary access must keep track of where
19 they would have been in the queue line because they are “expected to wait and place their order
20 after the person ahead of them in the queue line has been served first . . .” (Opp. Br. at 38.)
21 This is not full and equal access to Taco Bell’s facilities and services.

22 Because Taco Bell’s auxiliary access is segregated and denies persons who use
23 wheelchairs the benefits of the queue lines, it does not provide equivalent facilitation and thus
24 Plaintiffs are entitled to summary judgment as to queue lines.

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1 **VII. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT FOR DOORS IN VIOLATION OF DOOR FORCE REQUIREMENTS.**

2 In their Opening Brief, Plaintiffs demonstrated that 171 restaurants have exterior and/or
3 interior doors that are in violation of the door force requirements under the DOJ Standards
4 and/or Title 24. (See Opening Br. at 19-22, Exs. 3-5 to Fox Decl.)

5 Again, Defendant does not challenge the accuracy of the measurements in Exhibit 3, 4
6 and 5 or the legal standards relied on by Plaintiffs to demonstrate that those doors are out of
7 compliance. Defendant argues that summary judgment should be denied because: (1) To
8 prevail on their ADA claims, Plaintiffs must show that the door force violations “deprive[d]
9 each of the class members of effective access;”²⁰ and (2) To prevail on their Title 24 claims for
10 restaurants built prior to April 1, 1994, Plaintiffs must establish that the doors in violation were
11 “primary entrances.”²¹ Defendant is incorrect.

12 **A. Plaintiffs Are Entitled to Summary Judgment as to Liability by**
13 **Establishing that the Architectural Elements Violate Title 24 and/or the**
14 **DOJ Standards.**

15 Class liability will be premised on Taco Bell’s violations of the ADA and/or state law.
16 Once this is shown, the class will be entitled to injunctive relief, and class-wide liability for
17 monetary relief will be established, although additional proceedings may be required to
18 determine individual class member entitlement to monetary relief. Cf. Nat’l Bhd. of Teamsters
19 v. United States, 431 U.S. 324, 361 (1977); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137,
20 174 (N.D. Cal. 2004) (citing Teamsters), aff’d 474 F.3d 1214 (9th Cir. 2007).

21 Defendant argues that Plaintiffs must show that the challenged interior and exterior
22 doors “deprive each of the class members of effective access.” (Opp. Br. at 7.) Defendant is
23 wrong. Under both California law and the ADA’s new construction provisions, Plaintiffs are
24 entitled to injunctive relief by showing that the architectural elements were built in violation of

25
26 _____
27 ²⁰ Opp. Br. at 7.

28 ²¹ Id. at 33-34. Defendant also contends that the door force claims are moot, and Plaintiffs address this contention below.

1 Title 24 or the DOJ Standards respectively. Even to obtain damages, under state law, class
2 members must only demonstrate a denial of “equal access,” not “effective access.”

3 **1. Plaintiffs Need Not Show That Class Members Were Denied**
4 **“Effective” Access for Violations of Title 24.**

5 Taco Bell’s “effective access” argument addresses only the ADA, and does not cite any
6 cases involving California statutes or Title 24. (See Opp. Br. at 7-8.) Nevertheless Plaintiffs
7 demonstrate here that to obtain injunctive relief, they need only show a violation of Title 24
8 and that, even to recover damages, each class member will only have to show he or she was
9 denied equal access.

10 The California legislature recognized that the specifications in Title 24 are the
11 “minimum requirements to insure that buildings, structures and related facilities . . . are
12 accessible to” persons with disabilities. Cal. Govt. Code § 4452. The legislature provided a
13 private right of action to enforce these minimum standards. (See Cal. Civ. Code § 55; Cal.
14 Health & Safety Code § 19953.)

15 The leading case on this issue is Donald v. Café Royale, Inc., 218 Cal. App. 3d 168
16 (Cal. Ct. App. 1990). In Donald, the court distinguished between what a plaintiff must show to
17 obtain injunctive versus monetary relief:

18 Sections 19955 et seq., 4450 et seq. and 54 et seq., taken together, provide for a
19 two-fold procedure. A designated public agency or an individual may initiate an action
20 to enforce compliance with the handicapped access standards provided for by section
21 19955 et seq. and section 4450 et seq. On the other hand, to maintain an action for
22 damages pursuant to section 54 et seq. an individual must take the additional step of
23 establishing that he or she was denied equal access on a particular occasion. Thus,
24 Donald was entitled to an award of damages in the instant case on his second cause of
25 action but not based on the first cause of action. For example, let us take a restaurant
26 that is required to have 100 percent of its dining area accessible to the handicapped, but
27 in fact only 90 percent of the dining area meets this standard. If a handicapped
28 individual is readily seated and served in the 90 percent primary dining area which
meets all handicap access requirements, then he or she would not have a cause of action
for damages for denial or interference with admittance pursuant to Civil Code section
54.3, but an individual or a designated public agency could pursue an action under one
of the enforcement provisions to bring about full compliance by the restaurant.

Id. at 183 (emphasis added); see also Boemio v. Love’s Rest., 954 F. Supp. 204, 207 (S.D. Cal.
1997) (“The standard cannot be ‘is access achievable in some manner’. We must focus on the

1 equality of access. If a finding that ultimate access could have been achieved provided a
2 defense, the spirit of the law would be defeated.”)

3 In this case, Plaintiffs have established that the doors in Exhibits 4 and 5 violate Title
4 24, and thus they are entitled to a holding of liability and injunctive relief. In order to recover
5 monetary relief, there will only need to be a showing that the noncompliant doors denied class
6 members equal access.

7 **2. Plaintiffs Need Not Show That Class Members Were Denied**
8 **“Effective” Access for Violations of the New Construction**
9 **Requirements of the ADA.**

10 Plaintiffs have established that the restroom doors in Exhibit 3 are in material violation
11 of the DOJ Standards. Defendant contends that this is not sufficient, and that for Plaintiffs to
12 obtain injunctive relief, they must also show that each member of the class was denied
13 “effective access.” (Opp. Br. at 7.) Defendant is incorrect. Plaintiffs’ Motion relies on the
14 ADA’s new construction provisions while the cases cited by Taco Bell construe the ADA’s
15 readily achievable provisions.²² This is crucial because while in a readily achievable case, a
16 plaintiff seeking an injunction must demonstrate that an architectural element actually poses a
17 barrier,²³ a plaintiff in a new construction case is entitled to an injunction simply by showing
18 that the architectural element violates the DOJ Standards.

19 “In enacting the ADA, Congress adopted two systems for regulating building
20 accessibility - one to apply to facilities designed and constructed for occupancy before January
21 26, 1993, and one to apply to newly constructed or altered facilities.” Mannick v. Kaiser
22 Found. Health Plan, Inc., No. C 03-5905 PJH, 2006 WL 1626909, at *5 (N.D. Cal. June 09,
23 2006). The ADA has different requirements for new construction versus buildings constructed
24 before January 26, 1993.

25 ²² See infra n.25.

26 ²³ In a class action, a plaintiff that establishes that a defendant has engaged in a
27 pattern or practice of violating the ADA’s readily achievable requirements would be entitled to
28 injunctive relief without any further evidence. See Teamsters, 431 U.S. at 361.

1 The ADA provides that buildings constructed after January 26, 1993, must be “readily
2 accessible to and usable by individuals with disabilities . . . in accordance with standards set
3 forth or incorporated by reference in regulations issued under this subchapter.” 42 U.S.C.
4 § 12183(a)(1) (emphasis added). The Department of Justice implemented the standards
5 referenced in section 12183(a)(1) in the form of the DOJ Standards. Thus a failure to comply
6 with the DOJ Standards in buildings constructed after January 26, 1993, is, by definition, a
7 violation of the ADA. 28 C.F.R. § 36.406(a).²⁴ Further, when a defendant violates the new
8 construction requirements, an injunction “shall include an order to alter facilities to make such
9 facilities readily accessible to and usable by individuals with disabilities to the extent required
10 by this subchapter.” 42 U.S.C. § 12188(a)(2) (emphasis added); see also 28 C.F.R.
11 § 36.501(b) (same). According to the Department of Justice, ““an order to make a facility
12 readily accessible to and usable by individuals with disabilities is mandatory’ . . .” Preamble to
13 Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in
14 Commercial Facilities, (“Preamble”) 28 C.F.R. pt. 36, app. B at 715-16 (2002) (citation
15 omitted).

16 The ADA’s readily achievable requirements -- not at issue here -- are applicable to
17 buildings constructed before January 26, 1993 and work differently. Unlike the new
18 construction provisions – which require all architectural elements to comply with the DOJ
19 Standards – the readily achievable provisions only require removal of “architectural barriers.”
20 42 U.S.C. § 12182(b)(2)(A)(iv).

21 The difference in the ADA’s new construction and readily achievable provisions results
22 in differences in the type of proof that a plaintiff must present in order to establish a statutory
23 violation. In cases such as this one involving buildings constructed after January 26, 1993,
24 because the ADA requires such buildings to comply with the DOJ Standards, a plaintiff simply
25 must show that the buildings do not comply with the DOJ Standards.

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28 ²⁴ See infra at 20.

1 By contrast, because the readily achievable requirement applies only to “architectural
2 barriers,” an individual plaintiff in a readily achievable case must demonstrate that a particular
3 architectural element constitutes a barrier or, in a class case, that there is a pattern and practice
4 of barriers.

5 Courts have recognized this distinction. Several courts have held that in new
6 construction cases, a defendant’s violation of the DOJ Standards entitles a plaintiff to
7 injunctive relief – a plaintiff is not required to make an additional showing that the element
8 denied the plaintiff “effective” access. See, e.g., Long v. Coast Resorts, Inc., 267 F.3d 918,
9 923 (9th Cir. 2001) (Holding that the only defense to the ADA’s new construction requirements
10 is structural impracticability and the lower court had committed reversible error by refusing to
11 award injunctive relief because of “the near absence of hardship and . . . minimal
12 inconvenience to wheelchair users.”); Ability Ctr. v. City of Sandusky, 133 F. Supp. 2d 589,
13 592 (N.D. Ohio 2001) (Holding that “[t]here are no exceptions allowed to [the] requirements”
14 of the DOJ Standards and that a one and one-half inch lip on a Curb ramp - flared sides - not
15 required so need not comply. cut made it noncompliant despite the defendant’s assertion that it
16 caused “slight inconvenience to the user.”).

17 This precise issue was addressed in Torres v. Rite Aid Corp., 412 F. Supp. 2d 1025
18 (N.D. Cal. 2006), involving the alterations provisions of the ADA, which, like the new
19 construction provisions, require compliance with the DOJ Standards. See 28 C.F.R.
20 § 36.406(a). The plaintiff argued that the defendant’s store violated section 4.4.1 of the DOJ
21 Standards, and the defendant moved for summary judgment on the ground that the plaintiff was
22 not denied access. The court rejected this argument:

23 Defendant misses the point here. Plaintiff does not seek to prove ultimately that he was
24 denied access. To prevail, he must instead demonstrate that Rite Aid discriminated
25 against him. See 42 U.S.C. 12182(a). Discrimination in the provision of public
26 accommodations, such as the Rite Aid store, is defined as failing to alter a facility “in
27 such a manner that, to the maximum extent feasible, the altered portions of the facility
28 are readily accessible to and usable by individuals with disabilities....” 42 U.S.C.
12183(a)(2). The Attorney General, in turn, has implemented that statute by adopting
Section 4.4.1 and other standards. Thus, whether or not plaintiff was able to get to all
the merchandise and parts of the store is not dispositive. In fact, he did not need to
enter the store at all to make out a case. See 42 U.S.C. 12188(a)(1) (“Nothing in this

1 section shall require a person with a disability to engage in a futile gesture if such
 2 person has actual notice [of a violation].”). Plaintiff may make out a valid claim of
 3 discrimination based solely on Rite Aid’s purported failure to conform the store’s
 alterations to Section 4.4.1. For this reason, defendant’s argument for summary
 judgment on grounds that plaintiff was not denied access is rejected.

4 Id. at 1034-35 (emphasis added); see also Johanson v. Huizenga Holdings, Inc., 963 F. Supp.
 5 1175, 1176-77 (S.D. Fla. 1997) (holding that plaintiffs had standing to sue challenging
 6 noncompliance with the DOJ Standards in a stadium that had not yet been built).

7 With one exception, all of the passages from the cases cited by Taco Bell involved the
 8 readily achievable provisions of the ADA.²⁵ Because these provisions apply only to
 9 architectural “barriers,” it is not surprising that several of these cases -- in determining whether
 10 the architectural elements at issue were barriers -- discussed whether the elements actually
 11 denied the plaintiff equal access.

12 Nevertheless, several of these cases distinguished the barrier analysis applicable to the
 13 readily achievable provisions from the analysis appropriate to the new construction provisions.
 14 For example, the passage in Access Now, Inc. v. South Florida Stadium Corp. cited by Taco
 15 Bell is in the section entitled “readily achievable.” 161 F. Supp. 2d 1357, 1369 (S.D. Fla.
 16 2001), cited in Opp. Br. at 13. In contrast, earlier in the opinion, the court states that “[f]ailure
 17 to abide by the Guidelines in new construction evidences intentional discrimination against

19 ²⁵ See Mannick, 2006 WL 1626909, at *1, *7 (Addressing facility built in 1956
 20 and 1970 and applying readily achievable standard); Gathright-Dietrich v. Atlanta Landmarks,
 21 Inc., 452 F.3d 1269, 1273-74 (11th Cir. 2006); Chapman, 2006 WL 1686511 at *7 (discussing
 22 requirements for claim that “removal of the barrier is readily achievable”); Eckert v. Donahue
 23 Schriber Co., No. Civ. S-02-1684WBSKJM, 2003 WL 24273566 at *2 (E.D. Cal. Oct. 14,
 2003); Access Now, 161 F. Supp. 2d at 1362-63; Brother v. CPL Invs., Inc., 317 F. Supp. 2d
 24 1358, 1370 (S.D. Fla. 2004); Ass’n for Disabled Americans, Inc. v. Concorde Gaming Corp.,
 158 F. Supp. 2d 1353, 1361 n.4 (S.D. Fla. 2001).

25 In Hooper v. Calny Inc., No. CIV-S-03-0167 DFL/GGH, slip op. at 14 (E.D. Cal. Nov.
 26 10, 2004) (Tab 9 in the Appendix), the court addressed the issue of what a plaintiff must show
 27 to obtain monetary, not injunctive, relief.

28 Finally, although the court in Independent Living Resources v. Oregon Arena Corp.,
 1 F. Supp. 2d 1124, 1153 (D. Or. 1998) did not order the defendant to remedy certain
 violations because they were “de minimis and do not materially impair usage of the parking
 spaces,” it do so before the Ninth Circuit’s decision in Long. In Long, the Ninth Circuit
 reversed the lower court, which, like the court in Independent Living Resources, had refused to
 enter injunctive relief for violations that it considered “technical” violations that constituted “a
 minimal inconvenience to wheelchair users.” 267 F.3d at 923.

1 disabled persons.” Id. at 1362. In Mannick, another case relied on by Taco Bell, the court
2 held:

3 In enacting the ADA, Congress adopted two systems for regulating building
4 accessibility—one to apply to facilities designed and constructed for occupancy before
5 January 26, 1993, and one to apply to newly constructed or altered facilities. . . Only
6 newly-constructed or altered facilities must comply with the [DOJ Standards] . . .
7 Although existing facilities are not required to comply with the [DOJ Standards] (unless
8 they have been altered), the [DOJ Standards] nevertheless provide[] guidance for
9 determining whether an existing facility contains architectural barriers. However,
10 deviations from the [DOJ Standards] are not necessarily determinative in establishing
11 barriers to access.

12 2006 WL 1626909, at *5-6 (emphasis added & citations omitted).

13 Similarly, in Pascuiti v. New York Yankees, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999),
14 the Court held that while “new construction . . . must comply with the Standards,” architectural
15 elements subject to the readily-achievable standard must be removed only if they pose “barriers
16 to access.” See also Brother, 317 F. Supp. 2d at 1370 (Holding that while new construction
17 must comply with the Standards, a plaintiff must show that a barrier exists under readily
18 achievable standard).

19 Plaintiffs’ Motion relies only on the ADA’s new construction provisions. Plaintiffs
20 have demonstrated that the doors in Exhibit 3²⁶ are in material violation of the DOJ Standards
21 -- a proposition Defendant does not contest -- and thus Plaintiffs are entitled to summary
22 judgment.

23 **B. All Customer Entrances Are Primary Entrances.**

24 Taco Bell argues that with respect to restaurants built before April 1, 1994, Plaintiffs
25 must show that the non-compliant exterior doors are “primary entrances” in order to prevail
26 under Title 24. (Opp. Br. at 33-34.) As set forth below, this standard is met because all
27 customer entrances constitute “primary entrances” under Title 24.

28 ²⁶ Defendant’s “effective access” argument was limited to doors. (Opp. Br. at 7-8.) Naturally, Plaintiffs response would apply with equal force to other elements as well.

1 Taco Bell asserts that only “the” primary entrance need comply with the door force
2 requirements, suggesting that there is only one primary entrance at each restaurant. (Opp. Br.
3 at 33.) This is not the case.

4 A “primary entrance” is “any entrance to a facility which has a substantial flow of
5 pedestrian traffic to any specific major function of the facility.” Title 24-1981 § 2-417(k); Title
6 24-1984 § 2-417(k); Title 24-1987 § 2-417 at 26; Title 24-1989 § 417(s). Many of the
7 restaurants at issue here have more than one customer entrance, and each such entrance is a
8 primary entrance.

9 This issue has been explicitly addressed by California’s Office of the State Architect,
10 which set forth the following question and answer:

11 What is a primary entrance?

12 Section 417 states primary entrance shall mean any entrance to a facility which has a
substantial flow of pedestrian traffic to any specific major function of the facility.

13 As an example in a large shopping mall with several entrances to the mall area which
14 would be considered the primary entrance? All of them would!

15 (See 1989 Interpretive Manual, § 3301(f)(1), at 95 .) Thus in this case, all of the customer
16 entrances to Taco Bell restaurants are primary entrances and must comply with the door force
17 requirements of Title 24.

18 **VIII. PLAINTIFFS’ ARE ENTITLED TO SUMMARY JUDGMENT FOR TACO**
BELL’S VIOLATIONS OF THE ACCESSIBLE SEATING REQUIREMENTS.

19 In their Opening Brief, Plaintiffs established that the indoor seating areas in 36
20 restaurants violate the requirements of Title 24 or the DOJ Standards concerning the number of
21 seating locations, and that accessible seating positions in 21 post-1993 stores did not provide
22 the knee clearance required by section 4.32.3 of the DOJ Standards (subject to agreed
23 tolerances). (Opening Br. at 22-23; Exs. 6-8 to Fox Decl.)

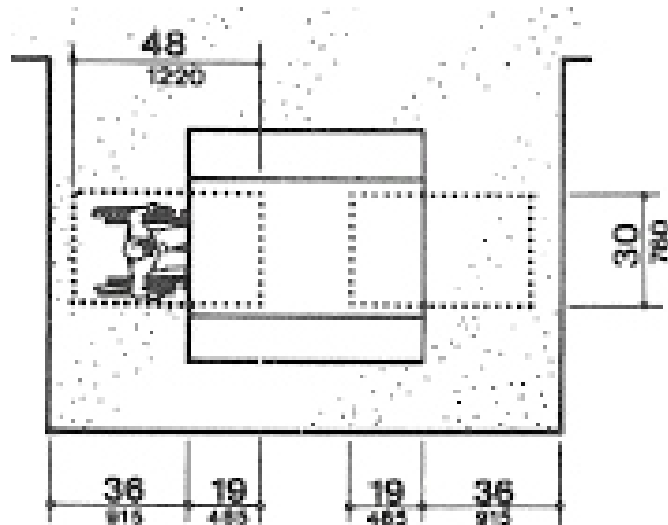
24 Taco Bell does not dispute that the indoor dining areas listed in Exhibits 6 and 8 violate
25 the requirements of the DOJ Standards and Title 24, respectively, concerning the number of
26 accessible seating locations, other to contend that these claims are moot, addressed below.

27 With respect to the stores in Exhibit 7 -- which Plaintiffs argue violate the knee clearance
28

1 requirements for accessible seating positions -- Taco Bell asserts that knee clearance is not
 2 required to be centered under the table and that, because it is unknown whether the Special
 3 Master imposed such a requirement when measuring, summary judgment is not appropriate.
 4 Defendant is incorrect: (1) knee clearance is required to be centered on the table top; and given
 5 that fact, (2) we do not need to know whether the Special Master required centering or not.

6 **A. Knee Clearance Under Tables is Required to be Centered.**

7 Section 4.32.3 of the DOJ Standards requires knee clearance 27 inches high, 19 inches
 8 deep and 30 inches wide under fixed tables. The question raised by Defendant's argument is
 9 whether the 30-inch dimension -- the side-to-side width of the knee clearance under the table --
 10 must be centered under the table or whether it can be off to one side. The DOJ Standards make
 11 it clear that centering is required. Section 4.32.3 cross references Figure 45, which provides
 12 the following illustration where of a single wheelchair seating area on one side of a table:



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 23 In this Figure, the dotted line outlines the required clear floor space adjacent to and underneath
 24 a fixed table. The 30-inch dimension corresponds to the 30-inch-wide knee clearance required
 25 by section 4.32.3. This illustration clearly shows that the 30-inch dimension is centered on the
 26 table in question. Common sense supports this interpretation. If the knee clearance area were
 27 not required to be centered, a wheelchair-using patron could end up sitting considerably off to
 28

1 one side, unable to make use of much of the table. This presents an especially challenging
2 situation in restaurants such as Defendant's, where many of the dishes on the menu are
3 prepared with sauces and intended to be consumed by hand.

4 **B. Since Knee Clearance Is Required to Be Centered, Where the Special**
5 **Master Found less than the Required Knee Clearance, it Is Irrelevant**
6 **Whether He Measured it Centered or Not.**

7 It is true that the parties do not know whether the Special Master required knee
8 clearance area to be centered on the table. This, however, has no effect on the list of
9 noncompliant tables in Exhibit 7.

10 If the Special Master correctly required the knee clearance to be centered, then all of the
11 tables in that exhibit are out of compliance. If the Special Master incorrectly permitted the
12 knee clearance area to be off-center -- that is, that the 30-inch side-to-side width of the knee
13 clearance could be anywhere along one side of the table -- that would permit a much larger
14 area to be considered as part of the required width. If the Special Master used this standard and
15 still found less than the required knee clearance, then the tables in Exhibit 7 would all the more
16 so be out of compliance. The only result of such a mistake would be that many of the tables at
17 which the Special Master found compliant knee clearance -- none of which feature in Plaintiffs'
18 motion -- would in fact be out of compliance.

19 In light of this, for the purposes of this motion, it is not necessary to find out whether
20 the Special Master required knee clearance to be centered on each table in order to hold that the
21 tables in Exhibit 7 are out of compliance with section 4.32.3 of the DOJ Standards.

22 **IX. PLAINTIFFS' ADA CLAIMS ARE NOT MOOT.**

23 Defendant argues that Plaintiffs' claims for injunctive relief under the ADA relating to
24 door force, queue lines and accessible seating are moot -- Taco Bell makes no such argument
25 with respect to Plaintiffs' state law claim. Because Taco Bell cannot satisfy the heavy burden
26 it bears to make it absolutely clear that the challenged conduct cannot reasonably be expected
27

1 to recur -- that is, the those elements will never be inaccessible in the future -- an injunction is
2 necessary to ensure compliance. Plaintiffs' claims are, as a result, not moot.

3 The following sections demonstrate that Plaintiffs' claims for injunctive relief are not
4 moot. Ultimately, however, even if Taco Bell was able to meet its heavy burden of showing
5 that the architectural elements have been remedied, and that the challenged conduct will not
6 recur, the legal questions presented by this Motion are not moot. Plaintiffs are seeking
7 monetary relief for class members based on Defendant's violations of the DOJ Standards²⁷ and
8 Title 24. Thus the question of whether the architectural elements at issue were in violation of
9 the ADA or state law before they allegedly were remedied by Defendant must be addressed to
10 determine Defendant's liability for damages.

11 **A. Factual Background Relevant to Mootness.**

12 Taco Bell has previously informed this Court that, “[d]ue to regular maintenance,
13 remodels, repairs, and normal wear and tear, virtually every accessibility element [in a Taco
14 Bell store] is subject to change over time so that evidence that an element is or is not in
15 compliance today (for purposes of determining injunctive relief) is not dispositive of whether
16 the same element was in compliance” at the time of any class member visit. (Def.'s Motion
17 for Modification of Class Definition, Docket No. 110, at 3, see also id. at 9-10.) Taco Bell
18 made clear that among the elements subject to “frequent change” were two of those at issue
19 here -- door force and seating -- and that, more broadly, “many stores undergo remodeling or
20 upgrading.” (Decl. of Jaime de Beers in Support of Def.'s Motion. for Modification of Class
21 Definition (“de Beers Decl.”) ¶¶ 6(a)(xvi), (b)(iv), (c)(vi), 8.)

22 While Taco Bell restaurants may change frequently due to maintenance, remodeling,
23 repairs, and wear and tear, Taco Bell has ignored years of opportunities -- nine years, in the
24 case of queue lines and four years in the case of the other elements at issue here -- to make

25
26 ²⁷ Although damages are not recoverable under Title III of the ADA, a violation of
27 the ADA constitutes a violation of the CDPA and Unruh entitling plaintiff to damages. Cal.
Civ. Code §§ 51(f) & 54(c).

1 changes to bring those stores into compliance with wheelchair access standards. In October,
2 1997, the Colorado Cross-Disability Coalition sued Taco Bell alleging that the queue lines in
3 its Colorado restaurants violated the DOJ Standards. Colorado Cross-Disability Coalition v.
4 Taco Bell Corp., No. 97-cv-2135-LTB (D. Colo.) (“CCDC”) (Robertson Decl. ¶ 2.)²⁸ In
5 January, 1999, the Department of Justice filed an amicus brief in that case taking the position
6 that Taco Bell’s queue lines were out of compliance with section 4.3.3 and figure 7(b) of the
7 DOJ Standards. (Brief at 15-20, Fox Decl., Ex. 14.)²⁹

8 The parties to the CCDC case reached a settlement in early 2000 that required Taco
9 Bell to bring the queue lines in its Colorado corporate Taco Bell stores into compliance with
10 section 4.3.3 or 4.2 and 5.5 of the DOJ Standards by December 31, 2001. (Robertson Decl. ¶
11 3 & Ex. 1.) The CCDC plaintiffs’ investigation in mid-2002 revealed, however, that many of
12 the queue lines that Taco Bell had promised to remedy -- in a class action settlement approved
13 by a federal district judge, see Robertson Decl. ¶ 4 & Ex. 2 -- remained out of compliance. It
14 was only after the undersigned contacted counsel for Taco Bell and threatened to take the
15 matter to arbitration (as provided in the settlement) that Taco Bell finally complied.
16 (Robertson Decl. ¶¶ 5-8 & Exs. 3-6.)

17 Five years after the CCDC case was filed, four years after Taco Bell learned the DOJ’s
18 position on queue lines, two years after the CCDC case settled, and six months after Taco Bell
19 had to be threatened with arbitration to get it to carry out its judicially-approved promise to
20 remedy queue lines in Colorado, the investigation preliminary to the filing of the present case
21
22

23 ²⁸ Fox & Robertson, counsel for Plaintiffs here, was counsel for the plaintiffs in
24 the CCDC case. Taco Bell was represented in that case by Holland & Hart, a Denver firm that
25 was counsel for Taco Bell in this case for the first year and a half. Taco Bell’s in-house
26 counsel, Richard Deleissegues, is the in-house counsel responsible for both the CCDC case and
27 the present case. (Robertson Decl. ¶ 2.)

28 ²⁹ The DOJ’s position in this amicus brief is entitled to deference. (See Opening
Br. at 12 & n.17.)

1 revealed that many queue lines in California corporate Taco Bell stores continued to be out of
2 compliance with the DOJ Standards in precisely the way the Colorado queue lines had been.

3 This lawsuit was filed in December, 2002. Taco Bell took no action to remedy its
4 queue lines or any of the other violations alleged in the complaint. In the summer of 2004, the
5 parties received the results of the Special Master's pilot program: survey forms showing
6 extensive violations at 20 stores selected by Taco Bell and jointly surveyed by the Special
7 Master and the parties. Taco Bell took no action to remedy its queue lines or any of the other
8 violations identified by the Special Master as recurring throughout those 20 stores. In the
9 summer of 2005, the parties received survey results from the Special Master for over 220
10 corporate Taco Bell stores. Still, Taco Bell did not take action to remedy the myriad violations
11 identified by the Special Master. Only in the summer of 2006 -- almost nine years after it was
12 first sued in Colorado³⁰ -- did Taco Bell retain a construction management company to make
13 certain modifications to its stores. (See Decl. of Sabrina Ford in Support of Defendant. Taco
14 Bell Corp.'s Mem. of Points and Authorities in Opp'n to Plaintiffs.' Motion. for Partial Summ.
15 J. ("Ford Decl.") ¶ 2.)

16 In the various documents filed with its opposition brief, Taco Bell now claims to have
17 remedied 51% of the queue lines, 63 % of the seating, and 65% of the interior doors on which
18 Plaintiffs moved under the ADA. (See Robertson Decl. ¶¶ 11, 14, 17.) In addition, Taco Bell
19 claims that it will, in the future, modify or eliminate certain queue lines, replace certain door
20 closers, and inspect door pressure. (See Decl. of Joseph M. DeBella, P.E., in Support of
21 Defendant. Taco Bell Corp.'s Mem. of Points and Authorities in Opp'n to Plaintiffs.' Motion.
22 for Partial Summ. J. ("DeBella Decl.") ¶¶ 4-7, Decl. of Mike Harkins in Support of Defendant.

24 ³⁰ Not to mention twenty-five years after the California Building Code first
25 included requirements governing interior and exterior door force, queue lines and accessible
26 restaurant seating, see Title 24-1981 §§ 2-402(d), 2-611(c)(3) & (c)(4), 2-710(a)(7)(A), 2-
27 3303(l)(2), and fifteen years after the DOJ Standards were published with provisions governing
those elements (save exterior door force) as well. DOJ Stds. §§ 4.1.3(18), 4.3.3 & Fig. 7(b),
4.13.11(2)(b) & 4.32.3.

1 Taco Bell Corp.’s Mem. of Points and Authorities in Opp’n to Plaintiffs.’ Motion. for Partial
2 Summ. J. (“Harkins Decl.”) ¶ 2.) Despite the fact that it has not remedied all of the seating
3 violations covered by the ADA, Taco Bell makes no attempt to promise future seating
4 remedies, but rather relies on its general “intent to serve all of its customers regardless of
5 physical disability.” (Opp. Br. at 39.) Finally, nowhere in the materials submitted with Taco
6 Bell’s Opposition Brief does that company commit to ensuring that newly built or acquired
7 stores have compliant doors, queue lines and seating areas, nor does it commit to ensuring that,
8 throughout the “frequent changes” due to “regular maintenance, remodels, repairs, and normal
9 wear and tear,” queue lines and accessible seating positions will be maintained to comply with
10 applicable standards.

11 Taco Bell’s future promises relating to queue lines and doors clearly do not reflect a
12 change in corporate policy. Rather, they are carefully circumscribed to apply only to
13 “California company-owned stores,” or even -- in the case of door force inspection --
14 “California company-owned Taco Bell stores currently in existence that are at issue in the
15 present action.” (DeBella Decl. ¶¶ 4-7, Harkins Decl. ¶ 2.) The survey form relating to the
16 latter limits the requirement that Taco Bell employees inspect customer restroom doors -- an
17 element covered by the DOJ Standards, see id. § 4.13.11(2)(b), and thus having nationwide
18 application -- to “CA ONLY.” (Id. ¶ 3 and Ex. 2.) Taco Bell has not decided to implement a
19 company-wide policy of compliant queues, doors, and tables; it has simply done the least
20 possible work -- in fact, somewhat less than the least possible, with limited promises of future
21 work -- to attempt a mootness argument in this case.

22 Finally, it is important to note that Taco Bell vigorously defends the legality of the
23 status quo. It argues that it is not required to remedy any elements that are out of compliance
24 with Title 24 (Opp. Br. at 19-33) and that the current configuration of its queue lines is
25 acceptable even under the ADA (id. at 38-39), while promising -- only in response to the
26
27

1 present motion -- to remedy not all stores or even all queues, doors and seating company-wide,
2 but only those select elements at issue in this motion.

3 **B. Defendant Has Not Satisfied its Heavy Burden of Persuading the Court**
4 **that the Challenged Conduct Cannot Reasonably Be Expected to Start Up**
5 **Again.**

6 It is well established that Defendant's "voluntary cessation of a challenged practice"
7 cannot moot Plaintiffs' claim unless "subsequent events [make] it absolutely clear that the
8 allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth,
9 Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (citations omitted). Taco
10 Bell has the "heavy burden of persua[ding] the court that the challenged conduct cannot
11 reasonably be expected to start up again." Id. (citations omitted; alteration in original). "The
12 possibility that [the defendant] may change its mind in the future is sufficient to preclude a
13 finding of mootness." United States v. Generix Drug Corp., 460 U.S. 453, 456 n.6 (1983); see
14 also United States v. W.T. Grant, 345 U.S. 629, 632 (1953) (Holding that if voluntary cessation
renders the action moot, "[t]he defendant is free to return to his old ways").

15 **1. Taco Bell's Statements Concerning its Intent to Comply in the**
16 **Future Are Insufficient to Satisfy its Heavy Burden.**

17 Defendant's promises of future compliance, standing alone, "cannot suffice to satisfy
18 the heavy burden of persuasion which we have held rests upon" a party urging mootness.
19 United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968); see also
20 Halet v. Wend Inv. Co., 672 F.2d 1305, 1308 (9th Cir. 1982) ("A promise to refrain from
21 future violations is . . . not sufficient to establish mootness."); Env'tl. Prot. Info. Ctr. v. Pac.
22 Lumber Co., 430 F. Supp. 2d 996, 1006 (N.D. Cal. 2006) (the defendant's "self-serving
23 statement falls far short of satisfying its heavy burden to "assert[] or demonstrate[] that [it]
24 will never resume" the challenged conduct."). Defendant's statements that it intends to remedy
25 certain queue lines or door closers in the future or intends to implement a policy of inspecting
26 its doors will not suffice to render those claims moot.

1 A number of ADA cases have held that promised improvements and policy changes do
2 not moot a claim for injunctive relief under that statute. In Cupolo v. Bay Area Rapid Transit,
3 5 F. Supp. 2d 1078, 1080 (N.D. Cal.1997), for example, the plaintiffs sued alleging lack of
4 access to San Francisco's mass transit system and -- in the matter before the court -- moved for
5 a preliminary injunction concerning the maintenance and repair of the system's elevators. In
6 response, the defendant argued the plaintiffs' claims for injunctive relief were moot in light of
7 steps it had taken to rectify the problems including actual and planned upgrades in physical
8 facilities and a new preventive maintenance program. Id. at 1084. The court rejected this
9 argument -- and ultimately granted the plaintiffs' motion for a preliminary injunction -- on the
10 grounds that such voluntary cessation of the illegal conduct was insufficient to demonstrate
11 that the problems had been solved. Id.

12 Similarly, in Clavo v. Zarrabian, No. SACV03864CJCRCX, 2004 WL 3709049 (C.D.
13 Cal. May 17, 2004), the defendant claimed to have instituted new policies to remedy the fact
14 that its turnstile gate and accessible check-out aisle were often inaccessible to the plaintiff, a
15 customer who used a wheelchair. The court rejected this argument -- and granted the plaintiff's
16 motion for partial summary judgment -- based on the fact that the defendant's

17 implementation of a new policy does not eliminate the possibility of future
18 violations when it has always had a wheelchair accessible gate and check-out
19 aisle, it had an entrenched policy of blocking access to those fixtures in
violation of well established law and, despite Plaintiff's complaints, it failed to
change that policy until after this case was filed.

20 Id. at *4. See also, e.g., Buchanan v. Consol. Stores Corp., 217 F.R.D. 178, 189, n. 4 (D. Md.
21 2003) (holding that the plaintiffs' claims for race discrimination in public accommodations
22 were not mooted by the adoption of a new policy, noting that the "Defendants' commitment to
23 the new . . . policy is questionable, having instituted it just several months after the filing of
24 this lawsuit."); Watanabe v. Home Depot USA, Inc., No. CV025088RGKMCX, 2003 WL
25 24272650, at *4 n.2 (C.D. Cal. July 14, 2003) (Holding that a memorandum circulated to the
26 defendant's employees concerning preserving access to parking spaces was not sufficient to

1 render ADA claims moot: “Defendant has wholly failed to meet its heavy burden. As discussed
2 herein, Defendant provides no evidence or persuasive argument that its unlawful conduct will
3 not continue”); Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, 1382
4 (N.D. Ga. 2002) (“Improvements in service will not preclude injunctive relief where there has
5 been a clearly established pattern of failing to provide an acceptable level of service to the
6 disabled.”); cf. Desert Outdoor Advertising v. City of Oakland, No. C 03-1078-MJJ, 2005 WL
7 147582 at *2 (N.D. Cal. Jan. 20, 2005) (analyzing voluntary cessation doctrine and holding
8 that city’s enactment of amended ordinance did not moot the plaintiff’s case because it
9 provided “no evidence that it will not re-enact the prior legislation” when the temporary
10 ordinance expires).

11 **2. Taco Bell’s Physical Modification of its Restaurants is Insufficient to**
12 **Satisfy its Heavy Burden.**

13 The fact that some of the actions Taco Bell claims to have taken involve physical
14 changes to their stores does not moot the corresponding claims for injunctive relief. Because
15 this, too, represents voluntary cessation of challenged conduct, Taco Bell has the burden of
16 demonstrating that it is “absolutely clear that the allegedly wrongful behavior could not
17 reasonably be expected to recur.” Friends of the Earth, 528 U.S. at 170. Given the
18 unremarkable fact that many of the elements in Taco Bell restaurants change frequently due to
19 “regular maintenance, remodels, repairs, and normal wear and tear” (see Def.’s Motion for
20 Modification of Class Definition at 3), Taco Bell cannot satisfy this burden.

21 Taco Bell has explained that, because of this frequent change, the fact that an element is
22 in compliance at one time “is not dispositive of whether the same element is in compliance” at
23 another time. (Id.) Thus evidence of the current (allegedly) compliant status of certain
24 elements “is not dispositive” of whether they will continue to be compliant in the future, and
25 such evidence cannot satisfy Taco Bell’s heavy burden to show that its violations will not
26 recur. Although Taco Bell has not even attempted to do so, it would not be sufficient were it to
27 promise that doors, queue lines and seating would be maintained as accessible through future

1 maintenance, remodels, repairs and wear and tear: as demonstrated in the section immediately
2 above, such a promise of future compliance would not satisfy its heavy burden.

3 Taco Bell cites a number of cases involving physical changes in which courts have held
4 ADA claims to be moot. All are distinguishable: in none of the cases was there evidence that
5 the elements in question remained subject to “frequent change.” Furthermore, in three of the
6 cases, the plaintiffs had conceded that the claims were moot. Brother, 317 F. Supp. 2d at 1372;
7 Pickern v. Best Western Timber Cover Lodge Marina Resort, 194 F. Supp. 2d 1128, 1130
8 (E.D. Cal. 2002); Parr v. L&L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1087 (D. Haw. 2000).
9 The Troiano case involved a government defendant, which the Eleventh Circuit found to be
10 dispositive. Troiano v. Supervisor of Elections, 382 F.3d 1276, 1283 (11th Cir. 2004) (“when
11 the defendant is not a private citizen but a government actor, there is a rebuttable presumption
12 that the objectionable behavior will not recur.”). Finally, in the Hickman case -- which also
13 involved a government defendant -- the primary reason the case was held to be moot was that
14 all of the prisoner plaintiffs has been paroled. Hickman v. Missouri, 144 F.3d 1141, 1142 (8th
15 Cir. 1998). Even the paragraph from which Defendant quotes extensively concludes thus:
16 ““The defendants cannot resume their allegedly illegal conduct [as to plaintiffs] until [they]
17 voluntarily commit[] an act justifying [their] parole revocation.”” Id. at 1144.

18 **3. Not Only Is Effective Injunctive Relief Possible, it Is Essential to**
19 **Ensure That Taco Bell Complies with the Law.**

20 “To establish mootness, a defendant must show that the court cannot order any effective
21 relief.” San Francisco Baykeeper, Inc. v. Tosco Corp., 309 F.3d 1153, 1159 (9th Cir. 2002).
22 “[T]he question is not whether the precise relief sought at the time the application for an
23 injunction was filed is still available. The question is whether there can be any effective
24 relief.” Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001) (internal quotations
25 omitted). In this case, even if certain queue lines, doors and seating were in compliance in the
26 summer of 2006 (see generally Ford Decl.; Decl. of Aaron Kane in Support of Defendant. Taco
27 Bell Corp.’s Mem. of Points and Authorities in Opp’n to Plaintiffs.’ Motion. for Partial Summ.

1 J.), this Court can still order effective relief as to those elements in the form of an injunction
 2 requiring Taco Bell to (1) remedy the remainder of these elements that are out of compliance;
 3 (2) maintain those elements in a compliant state; and (3) ensure that those elements comply in
 4 any new or acquired stores.

5 In light of Taco Bell's past behavior, such an injunction is not only possible, it is
 6 essential. As explained in detail above, in a previous case, Taco Bell signed a settlement
 7 agreement and submitted it for approval by a federal judge promising to remedy queue lines in
 8 all of its Colorado stores. Six months after the deadline set forth in that settlement agreement,
 9 many of the promised queue lines remained unremedied. This demonstrates that an
 10 enforceable injunction is required to ensure Taco Bell's performance of its promised
 11 remediation and maintenance.³¹

12 Other factors also undermine the sincerity of Taco Bell's promises. Where a litigant
 13 attempts to remedy a problem during litigation while continuing to assert the legality of its
 14 original conduct, this suggests that the conduct is likely to resume. See, e.g., Env'tl. Prot. Info.
 15 Ctr., 430 F. Supp. 2d at 1006 (holding that the defendant's "persistent representations" that the
 16 challenged operations were legal "are an additional factor suggesting that there is a likelihood
 17 that [the defendant] will resume the challenged activity."); Blue Ocean Pres. Soc'y v. Watkins,
 18 767 F. Supp. 1518, 1525 (D. Haw. 1991) (holding that "the likelihood of recurrence of
 19 challenged activity is more substantial when the cessation is not based upon a recognition of
 20 the initial illegality of that conduct." (citing Walling v. Helmerich & Payne, Inc., 323 U.S. 37,
 21 43 (1944))). Here, Taco Bell argues -- in the same brief in which it argues for mootness -- that
 22 the challenged queue line configuration is legal and that it does not have to bring any of the
 23 challenged elements into compliance with Title 24.

24
 25 ³¹ Taco Bell concedes that if Plaintiffs can provide evidence that Defendant's
 26 "expressed intent is disingenuous" then the claims are not moot. (Opp Br. at 37, 39.) While
 27 this misstates the burden of proof -- the "heavy burden" remains on Defendant to demonstrate
 mootness -- Plaintiffs have in fact provided significant evidence calling into question the
 credibility of Defendant's promise of future compliance.

1 It is also suspect that Taco Bell waited nine years after first receiving notice that its
 2 queue lines were noncompliant and four years after the filing of this case before promising to
 3 remedy the challenged conduct, and then only within a universe carefully circumscribed to
 4 include only the types of elements at issue in the present motion. The Supreme Court has
 5 cautioned that “[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by
 6 protestations of repentance and reform, especially when abandonment seems timed to
 7 anticipate suit, and there is probability of resumption.” United States v. Oregon State Med.
 8 Soc’y, 343 U.S. 326, 333 (1952); see also Armster v. United States Dist. Court, 806 F.2d
 9 1347, 1357 (9th Cir. 1986) (holding that “[a] change of activity by a defendant under the threat
 10 of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or
 11 controversy [under the voluntary cessation exception to mootness].”).

12 **CONCLUSION**

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

15 Respectfully submitted,
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