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12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
OAKLAND DIVISION

14 FRANCIE E. MOELLER et al,
15 Plaintiffs,
16 v.
17 TACO BELL CORP.,
18 Defendant.

Case No. 02-CV-05849 PJH JL
PLAINTIFFS' MOTION TO STRIKE
Hearing Date: December 16, 2009
Hearing Time: 9:00 a.m.
The Honorable Phyllis J. Hamilton
Courtroom 3, 3rd Floor

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1 **NOTICE**

2 On December 16, 2009, at 9:00 a.m., or as soon thereafter as this motion may be heard,
3 before the Honorable Phyllis J. Hamilton, Plaintiffs will, and hereby do, move for an order
4 striking portions of: the Declaration of Steve Elmer in Support of Taco Bell Corp.'s Motion for
5 Partial Summary Judgment (Docket No. 458-1, hereinafter the "Elmer Declaration"); exhibit
6 18 to the Elmer Declaration ("Elmer Exhibit 18"); the Declaration of Robert G. Reeves in
7 Support of Taco Bell Corp.'s Motion for Partial Summary Judgment (Docket No. 458-2,
8 hereinafter the "Reeves Declaration"), and the Memorandum of Points and Authorities in
9 Support of Taco Bell Corp.'s Motion for Partial Summary Judgment (Docket No. 458,
10 hereinafter "MPSJ"). This motion is based on this Notice of Motion, the supporting
11 memorandum of points and authorities, and all accompanying attachments hereto.

12 **RELIEF SOUGHT**

13 Plaintiffs seek an order striking portions of the Elmer Declaration, Elmer Exhibit 18,
14 the Reeves Declaration, and the MPSJ.

15 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

16 **ISSUES TO BE DECIDED**

17 Whether the Court should strike portions of the Elmer Declaration, Elmer Exhibit 18,
18 the Reeves Declaration and the MPSJ for failure to comply with the Federal Rules of Evidence
19 ("FRE"), the Federal Rules of Civil Procedure ("FRCP") and the Local Rules for the Northern
20 District of California ("Local Rules").

21 **SUMMARY OF ARGUMENT**

22 Defendant's summary judgment papers violate several basic but important procedural
23 and evidentiary rules. Specifically:

- 24 • The MPSJ and Elmer Exhibit 18 include several bald factual contentions
25 without any evidentiary support, violating Local Rule 7-5 which requires that
26 "[f]actual contentions made in support of or in opposition to any motion must be
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1 supported by an affidavit or declaration and by appropriate references to the
2 record.”

- 3 • The MPSJ and Elmer Exhibit 18 rely extensively on positions taken by
4 Plaintiffs in their Meet and Confer charts. Both parties agreed long ago that
5 these charts would be protected by FRE 408, and these charts reflect
6 compromise positions taken by Plaintiffs. Thus the assertions in the MPSJ and
7 Elmer Exhibit 18 that rely on Plaintiffs’ Meet and Confer charts should be
8 struck.
- 9 • In Elmer Exhibit 18, Defendant relies on various documents and photographs
10 that it did not submit to the Court, violating the requirement that whatever
11 establishes an undisputed fact “must *both* be in the district court file *and* set
12 forth in the response.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d
13 1026, 1029 (9th Cir. 2001) (emphasis in original).
- 14 • In their declarations, Mr. Elmer and Mr. Reeves assert that many architectural
15 elements have been fixed, and purport to provide measurements of the fixed
16 elements, but in most cases, there are no facts in their declarations showing that
17 they have personal knowledge of these assertions, as required by FRCP 56 and
18 FRE 602.
- 19 • The Elmer and Reeves Declarations, and Elmer Exhibit 18, include testimony
20 concerning measurements and dimensions of architectural elements that
21 Defendant allegedly has remedied, critiques of Plaintiffs’ expert and opinions as
22 to whether such elements now comply with the ADA. This Court, and
23 Magistrate Judge Larson, have previously held that this evidence constitutes
24 expert testimony. This testimony should be struck pursuant to FRCP 26(a)(2)
25 and 37(c), and FRE 702, because it was not disclosed by the expert designation
26 deadline set by the Court, or at any time since, and because the Elmer and
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1 Reeves Declarations do not provided foundational facts establishing that they
2 qualify as experts.

- 3 • The Reeves Declaration and Elmer Exhibit 18 contain conclusory assertions that
4 should be struck.

5 **FACTS**

6 This class action alleges that Defendant's California restaurants contain architectural
7 barriers that deny class members -- persons who use wheelchairs or scooters for mobility -- full
8 and equal enjoyment of the goods and services of the restaurants. Plaintiffs contend that by
9 failing to prevent and remove these barriers, by failing to maintain the accessibility of its
10 restaurants, and by having in place discriminatory practices and policies, Defendant has
11 violated the ADA and California state law. The class seeks injunctive relief under the ADA
12 and state law, and minimum statutory damages under state law.

13 In 2004, at the parties request, the Court appointed a Special Master to conduct access
14 surveys of the restaurants at issue. *See* October 5, 2004 Order Appointing Special Master
15 (Docket No. 101). The Order Appointing Special Master required the parties to meet and
16 confer to see if they could reach agreement as to a number of items in, or relevant to, the
17 Special Master's survey reports. *Id.* at ¶ 7(d). Pursuant to this Order, the parties discussed how
18 to go about the meet and confer process, and during those discussions, both parties
19 contemplated that the meet and confer process would be protected by FRE 408. *See* Decl. of
20 Amy F. Robertson in Supp. of Pls.' Mem. In Opp'n to Def.'s Mot. for Partial Summ. J. at ¶ 4-5
21 (filed Nov. 10, 2009) ("Robertson Decl.").

22 For example, by letter dated July 19, 2005, Defendant's counsel proposed that the
23 parties add several columns to the Special Master survey reports, including one column for
24 Plaintiffs' comments, and one for Defendant's comments. Defendant stated that the statements
25 in these columns "will be subject to Federal Rule of Evidence 408 and these columns will be
26 redacted if the reports were ever submitted to the Court." *See* Ex. 8 to Robertson Decl.

1 Plaintiffs made a counter-proposal, agreed to by Defendant, involving an exchange of
2 charts with various columns of information. The parties agreed that these charts, as well as the
3 meet and confer process, would be subject to FRE 408.

4 Plaintiffs documented this agreement in their cover letter transmitting Plaintiffs' first
5 set of meet and confer charts. That cover letter stated: "As the parties have agreed, the contents
6 of this letter, the charts, and the meet and confer process are protected by Rule 408 of the
7 Federal Rules of Evidence." *See* Ex. 10 to Robertson Decl.

8 The meet and confer process, including the positions of the parties reflected in the meet
9 and confer charts, reflected compromise positions. There were many instances in which the
10 position Plaintiffs set forth in these charts would not be their litigation position but rather
11 reflected efforts at compromise. Robertson Decl. at ¶ 6.

12 Almost three years ago, Defendant announced its intention to try to fix its restaurants,
13 not because it had seen the error of its ways or had had a change of heart, but rather because of
14 an explicit attempt to seek dismissal of Plaintiffs' ADA claims based on mootness. Decl. of
15 Richard L. Deleissegues (Docket No. 363-1) ¶ 3; *see also* Taco Bell Corp.'s Mem. of P. & A.
16 in Support of its Opp'n to Pls.' Mot. to Compel (Docket No. 363) at 2 (same). Over the years,
17 Defendant has repeatedly claimed to have fixed its restaurants, yet when Plaintiffs have
18 inspected these restaurants, they have found that Defendant has not fixed old violations, and
19 has ignored new violations that have occurred. *See* Pls.' Mem. in Opp'n to Def. Taco Bell
20 Corp.'s Mot. for Partial Summ. J. at 2-5 (filed Nov. 10, 2009).

21 In late 2008 and 2009, Plaintiffs' experts surveyed many of Defendant's restaurants,
22 once again finding thousands of violations. On May 1, 2009, the deadline for expert
23 designations in effect at that time, Plaintiffs served lengthy and detailed expert reports, which
24 included exhibits identifying each violation that they had observed in their surveys. *See*
25 Declaration of Eric D. McSwain in Opp'n to Def. Taco Bell Corp.'s Mot. for Partial Summ. J.
26 ¶ 5 & ex. 3 (filed Nov. 10, 2009). Defendant served one expert report, from an expert who had
27 not been to a single restaurant at issue, had not looked at any photographs, and had not
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1 reviewed any of the Special Master surveys. *See* Ex. 1 at 30 and Ex. 2 to Decl. of Timothy P.
2 Fox in Supp. Of Pls.’ Mot. to Strike (“Fox Decl.”) (filed Nov. 10, 2009). There were no
3 measurements in that report, and it had nothing to do with Defendant’s attempts to fix its
4 restaurants. *See generally* Ex. 2 to Fox Decl. Defendant has not supplemented this report, nor
5 served any subsequent expert report or designation.

6 Defendant sought, and received, an extension of the dispositive motion deadline on the
7 ground that it needed additional time to fix its restaurants. June 18, 2009 Order at 2 (Docket
8 No. 435). In addition, the expert designation deadline was extended to July 2, 2009, and the
9 expert discovery cut-off was extended to August 14, 2009. *Id.*

10 On July 31, 2009, Plaintiffs served an FRCP 34 notice for the purpose of surveying
11 Defendant’s purported fixes to its restaurants,¹ which were still not complete at that time and
12 indeed, have not been completed as of the date of this filing. *See* MPSJ at 7. Defendant
13 objected to this notice, and the parties submitted the dispute to Magistrate Judge Larson. In the
14 joint submission, Defendant argued that the measurements and other tasks involved in an
15 access survey require an expert, and thus should have been completed by the August 14, 2009
16 expert discovery cutoff. Docket No. 452 at 4 (filed Sept. 15, 2009). Magistrate Judge Larson
17 agreed, sustaining Defendant’s objection to Plaintiffs’ FRCP 34 notice. September 22, 2009
18 Order at 3 (Docket no. 453). This Court subsequently gave leave to Plaintiffs to conduct access
19 surveys, but also confirmed that the measurements and analysis that occur during these surveys
20 require expert testimony. October 22, 2009 Order (Docket no. 461).

21 On October 20, 2009, Defendant filed its Motion for Partial Summary Judgment,
22 arguing that its past fixes, and promises of future fixes, mooted Plaintiffs’ injunctive relief
23 claims under the ADA. Defendant also made 84 other miscellaneous arguments. The evidence
24 submitted by Defendant in support of its Motion consisted of three declarations and
25 corresponding exhibits.

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28 ¹ Ex. 3 to Fox Decl.

1 The Reeves Declaration was submitted by Robert Reeves, the General Manager of
2 Maintco Corp. Defendant retained Maintco for two purposes: to conduct semi-annual access
3 surveys of a limited set of architectural elements in Defendant's California restaurants; and to
4 attempt to fix violations found during Plaintiffs' expert surveys of the restaurants. Reeves
5 Decl. ¶¶ 1-2.

6 In his declaration, Mr. Reeves purports to identify various fixes that either Taco Bell or
7 Maintco performed at the restaurants at issue, often including specific measurements of the
8 post-fix elements. Nowhere in his declaration does Mr. Reeves explain how he has personal
9 knowledge that these fixes occurred, or of the resulting measurements set forth with great
10 specificity in his declaration.

11 The Elmer Declaration was submitted by Steve Elmer, the Director of ADA
12 Compliance for Taco Bell Corp. Like Mr. Reeves, Mr. Elmer purports to identify various fixes
13 that either Taco Bell or Maintco performed at the restaurants at issue, often including specific
14 measurements of the post-fix elements. Once again, the Elmer Declaration does not provide
15 any facts demonstrating that he has personal knowledge of the fixes and measurements set forth
16 in his declaration.

17 Elmer Exhibit 18 is a table that purports to set forth Taco Bell's position with respect to
18 violations found by Plaintiffs' experts during their surveys. *See* Elmer Decl. ¶ 58. As detailed
19 below, Elmer Exhibit 18 includes factual assertions with no supporting declaration or record
20 cite, cites to documents and photographs not provided to the Court, expert opinions lacking
21 foundation and not disclosed under Rule 26(a)(2), and legal argument.

22 Exhibit 4 to the Declaration of Timothy P. Fox in Support of Plaintiffs' Motion to
23 Strike ("Fox Exhibit 4 ") is a table identifying the statements from the MPSJ that Plaintiffs
24 contend should be struck, with the basis for that contention; Fox Exhibit 5 identifies the
25 statements from the Elmer Declaration that Plaintiffs contend should be struck; Fox Exhibit 6
26 identifies the statements from the Reeves Declaration that Plaintiffs contend should be struck;
27 and the column entitled "Plaintiffs' Procedural Response" in Exhibit 1 to the Robertson
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1 Declaration (“Robertson Exhibit 1”) identifies the statements from Elmer Exhibit 18 that
2 Plaintiffs contend should be struck.

3 **ARGUMENT**

4 **I. The MPSJ and Elmer Exhibit 18 Include Several Factual Contentions That Are**
5 **Not Supported by an Affidavit, Declaration or Appropriate Reference to the**
6 **Record In Violation Of Local Rule 7-5.**

7 The MPSJ and Elmer Exhibit 18 include many unsupported factual contentions. For
8 example, on page 33 of the MPSJ, the following contention has no evidentiary support:
9 “[m]any of McSwain’s site inspections occurred before stores were open for business to the
10 general public and had restocked various condiment bins and other items.”

11 Similarly, on page 1 of Elmer Exhibit 18, Defendant asserts with respect to element 5
12 that it has “eliminated the disputed cross-slope by replacing the portions of the walkway at
13 issue. The current cross-slope is 2% or less.” No citation is provided to support this claim, and
14 nothing in any of the declarations submitted by Defendant purports to establish this factual
15 contention.

16 The unsupported factual assertions in the MPSJ and Elmer Exhibit 18 should be struck
17 because they violate Local Rule 7-5, which requires that “[f]actual contentions made in support
18 of or in opposition to any motion must be supported by an affidavit or declaration and by
19 appropriate references to the record.” In Fox Exhibit 4, and Robertson Exhibit 1, these
20 unsupported assertions are identified in with the following language: “This statement is not
21 supported by an affidavit, declaration, or appropriate reference to the record. See Motion to
22 Strike at Section I. Loc. Rule 7-5.”

23 **II. The MPSJ and Elmer Exhibit 18 Include Citation to Statements Made in**
24 **Compromise Negotiations in Violation of FRE 408.**

25 As set forth above, beginning in 2005, Plaintiffs provided Defendant with Meet and
26 Confer charts, attached as Exhibit 2 to the Hikida Declaration, identifying the violations that
27 Plaintiff alleged existed at the restaurants, and setting forth Plaintiffs’ position as to what fixes
28 should be made. In many cases, the positions set forth in these charts were not Plaintiffs’

1 litigation position, but rather reflected their efforts at compromise. The parties agreed that
2 these charts would be protected by FRE 408. Robertson Decl. ¶ 6.

3 In the MPSJ and Elmer Exhibit 18, Defendant uses Plaintiffs' Meet and Confer charts
4 to attempt to establish liability, and to show purported contradictions between positions taken
5 by Plaintiffs in those charts and Plaintiffs' current position.

6 For example, on page 12 of its MPSJ, Defendant states:

7 Even if the Court does not find that Taco Bell's modifications have rendered certain
8 issues moot, plaintiffs failed to challenge as noncompliant walkways that exceeded
9 3.0% cross-slope at store numbers 3027 (3.3%) and 3471 (3.8%) in their 2006 Meet
10 and Confer Charts. The apparent reason why plaintiffs failed to challenge such
11 cross-slope is that plaintiffs determined that the cross-slope did not deprive plaintiffs of
12 "full and equal enjoyment" of the services provided at the Taco Bell stores. These
13 omissions constitute evidence that such cross-slope in accessible walkways did not
14 deprive plaintiffs of "full and equal enjoyment" of the services provided at the Taco
15 Bell stores.

12 (Emphasis in original.)

13 This is a clear violation of FRE 408, which unequivocally prohibits statements made in
14 compromise negotiations to be used to prove "invalidity of . . . a claim . . . or to impeach
15 through a prior inconsistent statement or contradiction." FRE 408(a). That is precisely what
16 Defendant is doing -- it is using statements made in Plaintiffs' Meet and Confer charts to try to
17 show that Plaintiffs' claims are invalid. For this reason, each assertion in the MPSJ and Elmer
18 Exhibit 18 that relies on, or cites to, Plaintiffs' Meet and Confer charts should be struck.

19 Statements that should be struck for violation of FRE 408 are set forth in Fox Exhibit 4
20 and Robertson Exhibit 1 with the following language: "Reliance on meet and confer charts is
21 inappropriate under Rule 408 and agreement of the parties."

22 **III. The MPSJ and Elmer Exhibit 18 Cite Documents and Photographs That**
23 **Defendant Did Not Submit to the Court.**

24 The MPSJ and Elmer Exhibit 18 cite documents and photographs that Defendant did
25 not submit to the Court. For example, on page 309 of Elmer Exhibit 18, Defendant states:
26 "Taco Bell has relocated the drink lid dispenser by mounting it to the front of the drink table
27 immediately below the drink table itself. The vertical tri-level drink lid dispenser is usable via
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1 a side reach of at least 9 inches AFF. (See TBGT233942.)” Defendant, however, did not
2 submit a document Bates numbered TBGT233942 to the Court.

3 The Ninth Circuit has held that whatever establishes an undisputed fact “must *both* be
4 in the district court file *and* set forth in the response.” *Carmen v. San Francisco Unified*
5 *School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (emphasis in original). Factual contentions
6 in the MPSJ and Elmer Exhibit 18 that cite to documents or photographs that Defendant did
7 not submit are not in the record, and thus these contentions should be struck. In Fox Exhibit 4
8 and Robertson Exhibit 1, these contentions are identified with the following language:
9 “Document(s) or photograph(s) cited by Taco Bell not provided to the Court.”

10 **IV. The Elmer and Reeves Declarations Include Many Assertions for Which No**
11 **Foundational Facts Are Provided Establishing Personal Knowledge in Violation of**
12 **FRCP 56 and FRE 602.**

12 In their declarations, Both Mr. Reeves and Mr. Elmer assert that Defendant or Maintco
13 have fixed various architectural elements, and in many cases purport to provide the very
14 specific measurements of the fixed elements. With very few exceptions, however, they provide
15 no basis for having personal knowledge of the factual assertions they make.

16 Compare, for example, paragraphs 45 and 52 of the Elmer Declaration. In paragraph
17 45, Mr. Elmer states that “[o]ver the past few months, I have personally measured the
18 horizontal projection or ‘run’ of the element at store #757 depicted in EMP008393, which I
19 construe to be a curb ramp, as 11' 2-1/2" in length.” Here Mr. Elmer provided foundational
20 facts demonstrating that he has personal knowledge of the measurement set forth in this
21 paragraph -- he took the measurement himself.

22 By contrast, in paragraph 52, Mr. Elmer asserts that “Taco Bell also relocated the toilet
23 seat cover dispensers in both restrooms [in store 3390] to make them usable without having to
24 reach over a toilet tank.” He provides no facts as to how he has knowledge that the change he
25 describes actually occurred.

26 FRCP 56(e)(1) provides that “[a] supporting or opposing affidavit must be made on
27 personal knowledge, set out facts that would be admissible in evidence, and show that the
28 affiant is competent to testify on the matters stated.” FRE 602 requires that “[a] witness may

1 not testify to a matter unless evidence is introduced sufficient to support a finding that the
2 witness has personal knowledge of the matter.” Many of the factual assertions in the Elmer and
3 Reeves Declarations violate FRCP 56(e)(1) and FRE 602 because the Declarations do not set
4 forth a foundation establishing that these declarants have personal knowledge of their
5 assertions.

6 A virtually identical issue was considered by the court in *Johnson v. Kriplani*, No. Civ.
7 2:06-CV-02054 JAM GGH, 2008 WL 2620378 (E.D. Cal. July 2, 2008), a disability access
8 case in which the plaintiff brought suit under the ADA and California state law based on
9 alleged access violations at a fast food restaurant. The defendant moved for summary
10 judgment, and in support of his opposition, the plaintiff submitted his declaration with
11 measurements relating to running slope, cross-slope and the restaurant’s restroom. The
12 defendant moved to strike portions of the declaration on the ground that the plaintiff failed to
13 lay a proper foundation for his personal knowledge with respect to these measurements. The
14 court granted the motion to strike, holding: “Because [plaintiff’s] declaration does not state that
15 he made these measurements himself or specify how he acquired this knowledge, it is unclear
16 whether [the plaintiff] has personal knowledge of these facts or has merely been advised of
17 them by others. . . Thus, because [the plaintiff] did not state that he was personally involved in
18 any of the measurements to which he testifies, and because personal knowledge cannot be
19 inferred, the statements in [the plaintiff’s] declaration referencing such measurements are
20 stricken.” *Id.* at *3 (citations omitted).

21 As in *Johnson*, factual assertions in the Elmer and Reeves Declarations for which no
22 foundation is provided establishing personal knowledge should be struck. In Fox Exhibits 5
23 and 6, these assertions are identified with the following language: “No evidence that this
24 statement is based on personal knowledge.”

25 **V. Expert Testimony In The Elmer And Reeves Declarations And Elmer Exhibit 18**
26 **Should Be Struck Because It Was Not Disclosed By The Expert Designation**
Deadlines and Because The Declarations Lack Foundation.

27 As described above, in connection with Plaintiffs’ request under Rule 34 to survey
28 Defendant’s restaurants, both Magistrate Judge Larson and this Court held that the

1 measurements and other tasks performed during such surveys require expert testimony. Sept.
2 22, 2009 Order at 3 (Docket no. 453); October 22, 2009 Order (Docket no. 461). The Elmer
3 and Reeves Declarations and Elmer Exhibit 18 all contain this type of evidence. For example,
4 these documents contain the following assertions:

- 5 (1) "At store #22871, Taco Bell has relocated the urinal shield closer to the urinal
6 so that the clear width at the urinal is 36-5/8 inches instead of the former 38-7/8
7 inches measurement. Based on the reduction of the clear width at the urinal of
8 2-1/4 inches, the clear floor space at the lavatory has increased by exactly that
9 same number, which means that the prior clear floor space width at the lavatory
10 has increased by 2-1/4 inches from 34-3/8 inches to 36-5/8 inches, which
11 exceeds the 36 inches standard for maneuvering clearance in an alcove based on
12 a forward approach. (ADAAG 4(e).)" Reeves Decl. ¶ 144.
- 13 (2) "In reviewing [Plaintiffs' expert's] methodology for measuring the dimensions
14 of a *diagonal* or *angled* van accessible parking space or standard accessible
15 parking space and adjoining access aisle, [Plaintiffs' expert's] methodology
16 would require a significant amount of additional space, depicted in red, based on
17 his apparent methodology. Attached hereto as Exhibit "12" is a chart depicting
18 [Plaintiffs' expert's] measurement methodology for measuring the dimensions
19 of a diagonal 45 degree van accessible parking space and access aisle. Attached
20 hereto as Exhibit '13' is a chart depicting [Plaintiffs' expert's] measurement
21 methodology for measuring the dimensions of a diagonal 'saw-tooth' style of
22 accessible parking space and access aisle." Elmer Decl. ¶ 19 (emphasis in
23 original).
- 24 (3) "The ADAAG provides that an accessible route can be 32 inches wide for 24
25 inches of depth. (ADAAG 4.3.3, 4.13.5, Fig. 24(e).) At store #3904, the base of
26 the advertising stand at issue created a change in level of 1/4 inch or less, which
27 is compliant under the ADAAG. (ADAAG Fig. 7(c).) Thus, the change in level
28 due to the base of the advertising stand did not deprive any disabled customer of
the full and equal enjoyment of Taco Bell's services." Elmer Decl. ¶ 25.
- (4) "Over the past few months, I have personally measured the horizontal projection
or 'run' of the element at store #757 depicted in EMP008393, which I construe
to be a curb ramp, as 11' 2-1/2" in length." Elmer Decl. ¶ 45.
- (5) "Taco Bell has relocated the toilet paper dispenser so that its centerline is 36
inches from the rear wall. This modification satisfies the unspecified 'within
reach' current ADAAG standard and/or the proposed ADAAG standard
depicted in Fig. 604.7." Elmer Exhibit 18 at 4.
- (6) "The hand dryer does not obstruct the clear floor space at the water closet. (See
ADAAG Fig. 28.) To the extent that [Plaintiffs' expert] contends that the
ADAAG requires a 60 inch width surround a water closet as measured from the
side wall closest to a water closet, that view is wrong. As depicted in Fig. 28 of
the ADAAG, fixtures such as lavatories are depicted as compliant even if their
side edge is 18 inches minimum to the centerline of the water closet. Thus, the
actual distance between the side edge of a lavatory and the side edge of the
water closet is far less than 18 inches, and still compliant. The same reasoning
applies to the hand dryer at issue." Elmer Exhibit 18 at 20.

1 Through their Rule 34 request, Plaintiffs sought simply to take measurements of
2 elements in Defendant's restaurants, a request which was held to require expert testimony. The
3 Elmer and Reeves Declarations and Elmer Exhibit 18 are replete with precisely these types of
4 measurements, as shown by examples (1), (3), (4) and (5) above.

5 These Declarations and Elmer Exhibit 18 offer much more substantive expert analysis
6 as well. They offer expert critiques of Plaintiffs' expert's methodology and conclusions
7 (examples (2) and (6)) as well as expert interpretation of accessibility regulations (examples
8 (3), (5) and (6)). None of the expert assertions set forth in the Elmer and Reeves Declarations
9 and Elmer Exhibit 18 was disclosed in connection with the expert disclosure or discovery
10 deadlines in this case.

11 Further, neither the Elmer Declaration nor the Reeves Declaration set forth facts
12 establishing that these declarants qualify as expert on the subjects of their testimony.

13 FRCP 26(a)(2)(C) requires a party to disclose expert testimony at the time ordered by
14 the Court. FRCP 37(c)(1) provides that if a party fails to provide information or identify a
15 witness as required by Rule 26(a), the party is not allowed to use that information or witness to
16 supply evidence on a motion unless the failure was substantially justified or is harmless.
17 Defendant bears the burden of showing that its failure to designate experts was justified or
18 harmless. *See Yeti By Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir.
19 2001); *Green v. Baca*, 226 F.R.D. 624, 655 (C.D. Cal. 2005).

20 Defendant cannot meet its burden of showing that its utter failure to serve expert
21 designations addressing the expert topics covered in the Elmer and Reeves Declarations and
22 Elmer Exhibit 18 was justified. Nothing prevented Defendant from timely serving an expert
23 designation setting forth its interpretation of accessibility regulations, or from serving an expert
24 rebuttal designation critiquing Plaintiffs' experts' reports.

25 Nor was it justified in failing to submit an expert designation with the measurements of
26 the fixes it purportedly had made. Although it had not completed all of its remediation efforts
27 by the July 2, 2009 expert designation deadline, by its own admission, it had by that date
28 "incurred over \$8 million in ADA remediation costs . . ." *See Notice of Mot. and Mot.*

1 For Continuance of Case Management and Scheduling Order Deadlines at 25 (Docket no. 421,
2 filed May 29, 2009). Instead of doing nothing, it should have “issued a preliminary report to be
3 supplemented after” it completed its remediation efforts, or “asked for an extension of the
4 discovery deadline.” *Yeti By Molly*, 259 F.3d at 1106.

5 Defendant also cannot demonstrate that its failure to serve expert designations was
6 harmless. By failing to do so, Defendant deprived Plaintiffs of the opportunity to designate
7 rebuttal experts on these topics, as well as to depose Defendant’s experts on the topics that
8 should have been disclosed in the designations. *See, e.g., Dos Amigos Distribs., Inc. v.*
9 *Cadbury Bebidas, S.A. de C.V.*, Civil No. 05cv0151-L(POR), 2008 WL 3844062, *4 (S.D. Cal.
10 Aug. 14, 2008) (holding that failure to serve a supplemental expert report harmed the opposing
11 party by depriving it of the opportunity to conduct relevant discovery and designate a rebuttal
12 expert).

13 Finally, the Elmer and Reeves Declarations are deficient because they fail to set forth
14 facts establishing that these declarants qualify as experts as required by FRE 702. *See Talada*
15 *v. City of Martinez*, --- F. Supp. 2d ----, 2009 WL 2941514, *7 n.4 (N.D. Cal. Sept. 10, 2009)
16 (striking purported expert declaration in part because it failed to set forth expert’s qualifications
17 as required by FRE 702). Indeed, Mr. Reeves admitted in his deposition that he had never
18 received *any* training relating to the Americans with Disabilities Act, and his training for the
19 entire Taco Bell barrier removal project was limited to accompanying Steve Elmer to a few
20 Taco Bell restaurants and reviewing a checklist. Robertson Decl. Ex. 15 at 12:8-12; 27-30.

21 The assertions set forth in the Elmer and Reeves Declarations and Elmer Exhibit 18 that
22 Plaintiffs contend should be struck as undisclosed expert testimony lacking foundation are
23 identified in Fox Exhibits 4, 5 and 6, and in Robertson Exhibit 1, as “Testimony constituting
24 expert opinion that was not the subject of disclosures pursuant to Rule 26(a)(2).”

25 **VI. Conclusory Assertions in the Reeves Declaration and Elmer Exhibit 18 Should be**
26 **Struck.**

27 An assertion is conclusory if it is “unsupported by factual data.” *Hansen v. United*
28 *States*, 7 F.3d 137, 138 (9th Cir. 1993). A summary judgment motion cannot be based on

1 conclusory assertions. *See Walker v. Sumner*, 917 F.2d 382, 387 (9th Cir. 1990) (“Such
2 conclusory assertions are wholly insufficient to sustain either the defendants’ burden or the
3 district court’s grant of summary judgment.”).

4 The Reeves Declaration and Elmer Exhibit 18 include a number of conclusory
5 assertions. For example, paragraph 29 of the Reeves Declaration asserts that “[a]t store #2961,
6 Maintco has relocated the garbage can away from both access aisles and taken steps to ensure
7 that it does not return.” The Declaration, however, fails to provide any facts as to what those
8 “steps” were, and thus this assertion is conclusory.

9 The assertions set forth in the Reeves Declaration and Elmer Exhibit 18 that Plaintiffs
10 contend should be struck as conclusory are identified in Fox Exhibit 6 and Robertson Exhibit 1
11 as “Conclusory assertion.”

12
13 **CONCLUSION**

14 For the reasons set forth above, Plaintiffs respectfully request that their Motion to Strike
15 be granted.

16
17
18 Respectfully submitted,

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20
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25 November 10, 2009

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