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TACO BELL CORP.

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8 **UNITED STATES DISTRICT COURT**  
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10 **NORTHERN DISTRICT OF CALIFORNIA**  
11 **OAKLAND DIVISION**

12  
13 FRANCIE MOELLER, et al.,

14 Plaintiffs,

15 vs.

16 TACO BELL CORP.,

17 Defendant.

CASE NO. C 02-5849 PJH JL

**DEFENDANT TACO BELL CORP.'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS  
RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION TO STRIKE**

DATE: December 16, 2009  
TIME: 9:00 a.m.  
CTRM: 3  
JUDGE: Hon. Phyllis J. Hamilton

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 ARGUMENT

4 **A. Expert Testimony Is Not Required to Take Measurements of Accessible Elements.**

5 Plaintiffs contend that the declarations of Steve Elmer, Taco Bell Corp.'s Director of ADA  
6 Compliance, and Robert G. Reeves, the General Manager of Taco Bell's general contractor, Maintco  
7 Corp. ("Maintco"), which has handled the vast majority of ADA modifications performed during the  
8 summer and fall of 2009, should be stricken because they were not disclosed as retained experts by the  
9 expert disclosure deadline in this case. Plaintiffs' assumption that both need to have been formally  
10 retained and disclosed as experts is wrong.

11 Plaintiffs' position conflicts with published case authority that is directly on point. *Wilson v.*  
12 *Pier 1 Imports (US), Inc.*, 439 F. Supp. 2d 1054, 1074 (E.D. Cal. 2006) (Karlton, J.). In *Pier 1 Imports*,  
13 the defendants sued in a Title III ADA action moved to strike Joe Card as an expert because they  
14 claimed he was not qualified. The district court rejected the defendants' position upon noting,  
15 "Essentially, to report on the matters addressed in the report all that appears to be required is the ability  
16 to read a tape measure and use a level." *Id.* at 1074. Based upon Card's background as a licensed  
17 contractor and training, including a "brief" discussion of the ADA in one class, the district court held,  
18 "This appears to be sufficient for the task of determining whether physical measurements match those in  
19 the ADAAG." *Id.*

20 In *Panzica v. Mas-Maz, Inc.*, No. CV 05-2595 (ARL), 2007 WL 1732123 (E.D.N.Y. June 11,  
21 2007) (Lindsay, Mag. J.), the ADA defendants, owners or operators of a restaurant, sought to preclude  
22 as part of cross-motions for summary judgment a report submitted, on behalf of the ADA plaintiff, by an  
23 individual who had performed an accessibility review of the restaurant at issue. *Id.* at \*5. The  
24 defendants argued, *inter alia*, that the report was improper because it was not prepared by a qualified  
25 expert and did not provide any expert information or analysis. *Id.* at \*6. For purposes of the motion for  
26 summary judgment, the district court declined to preclude the report. Significantly, the district court  
27 noted, "While the report does largely include measurements of locations within the [restaurant] *that*  
28 *could have be[en] taken by a layperson*, such fact does not warrant an order of preclusion." *Id.* at \*6

1 (emphasis added). The district court also noted that “given that the defendants deposed [the author of  
2 the report at issue], there can be no genuine dispute that they had the opportunity to discover the scope  
3 of the plaintiff’s claims.” *Id.* at \*6.

4 In *Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 05CV1660 J (WMc), slip op. (S.D. Cal. June  
5 14, 2007) (Jones, J.), (*See* Collins Decl. ¶ 2 Ex. 1), the district court made a finding on summary  
6 judgment that “the Court finds that a layperson could determine from visual observation whether the  
7 ramp extended into the parking space and access aisle.” *Id.* at 2 n.1.

8 Similarly, Steve Elmer’s background and experience as Director of ADA Compliance for Taco  
9 Bell have provided him with the personal knowledge to either take measurements using an ordinary tape  
10 measure or a digital level or rely upon photographs depicting such measurements taken by others.

11 Robert Reeves is the General Manager of a licensed general contractor. (Reeves decl. of  
12 10/20/09 ¶ 1; docket #458-2.)

13 Separate and apart from their personal knowledge, Elmer and Reeves can both provide opinion  
14 testimony as lay witnesses under Fed. R. Evid. 701 based upon their opinion and inferences that are  
15 “rationally based on the perception of the witness”. Specialized knowledge is not required to read a tape  
16 measure or use a level. As noted by Judge Karlton, “all that appears to be required is the ability to read  
17 a tape measure and use a level.” *Pier 1 Imports (US), Inc.*, 439 F. Supp. 2d at 1074. Both witnesses  
18 have already had their depositions taken by plaintiffs and are available for future depositions as well.  
19 Indeed, Elmer has had his deposition taken on multiple occasions throughout this action.

20 Finally, contrary to plaintiffs’ position, Taco Bell did not argue in its portion of the Joint  
21 Statement submitted to the Magistrate Judge on September 15, 2009 that any measurements must be  
22 taken by a retained expert, but rather that *plaintiffs* had consistently taken the position throughout the  
23 course of this case that they intended to rely upon measurements taken by a formally retained expert,  
24 which is why the Court, in turn, relying upon plaintiffs’ position, ordered plaintiffs to conduct their site  
25 inspections of Taco Bell’s stores, assuming that they would do so via an expert. (Order of 6/27/08 at  
26 2:13; docket #386) (referring to inspections by plaintiffs’ expert). During the Court’s telephonic Case  
27 Management Conference conducted on October 22, 2009, which resulted in the Court’s refusal to allow  
28 plaintiffs to conduct secret site inspections at Taco Bell’s stores, the Court allowed plaintiffs to conduct

1 supervised and announced site inspections on 48 hours notice. (Order of 10/22/09 at 2:2-4; docket  
2 #461.) In so doing, the Court clearly informed the parties' respective counsel during the conference call  
3 that the Court intended to make no ruling as to whether a formally retained expert would be the only  
4 individual who could conduct a site inspection of a Taco Bell store, notwithstanding plaintiffs' counsel  
5 Amy Robertson's express oral request for such ruling. Thus, plaintiffs' characterization of the Court's  
6 October 22, 2009 Order should be rejected.

7 **B. Steve Elmer Has Laid the Foundational Facts Via His Concurrently-Filed Supplemental**  
8 **Declaration.**

9 Although plaintiffs challenge the foundation for Steve Elmer's declaration filed on October 20,  
10 2009, Elmer has concurrently filed a supplemental declaration, which lays the foundation for both his  
11 original declaration and his supplemental declaration. (Elmer Supp. Decl. of 11/25/09 ¶¶ 4-12.) Taco  
12 Bell has also attached to Elmer's supplemental declaration photographs taken by himself or Maintco  
13 technicians or ADA project managers at Newport CM, which documents the ADA modifications  
14 referenced in Taco Bell's moving papers.

15 **C. Plaintiffs Waived Their Reliance Upon Fed. R. Evid. 408 By Relying Upon Their Meet and**  
16 **Confer Charts in Formal Discovery Requests Propounded Against Taco Bell.**

17 Although plaintiffs contend that their Meet and Confer charts are subject to Federal Rule of  
18 Evidence 408,<sup>1</sup> (Opp'n at 28:15-16), plaintiffs conveniently ignore that they have affirmatively relied  
19 upon their Meet and Confer Charts in formal discovery requests propounded against Taco Bell in the  
20 instant action. In particular, on July 7, 2008, plaintiffs propounded numerous Interrogatories against  
21 Taco Bell that expressly relied upon and incorporate by reference "Meet and Confer Charts" "provided  
22 in electronic form by Plaintiffs to Defendant in or about April through June, 2006". (Hikida Supp. Decl.  
23 of 11/25/09 ¶ 2 Ex. 1.) Such Interrogatories are Interrogatories Nos. 11, 12, 13, 14, 15, and 16 to  
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25 \_\_\_\_\_  
26 <sup>1</sup> Plaintiffs' reliance upon former defense counsel's letter dated July 19, 2005, (A. Robertson decl.  
27 Ex. 8), is misplaced. That letter expressly contemplated adding four columns to the Special Master  
28 Interim Survey Reports to create a "Final Special Master Form" including two columns that would be  
labeled as "SASMF Comments" and "F&R Comments". That proposed Form was never used by the  
parties. (Hikida Supp. Decl. ¶ 2.) As one can see from plaintiffs' M&C charts, no such columns exist.  
(Hikida decl. of 10/20/09 ¶ 3 Ex. 2.)

1 Plaintiffs’ July 7, 2008 Interrogatories. *Id.* at 6:7-7:10. Plaintiffs selectively rely upon their “Meet and  
2 Confer Charts”.

3           Indeed, if a discovery dispute erupts in the future as to plaintiffs’ Interrogatories Nos. 11, 12, 13,  
4 14, 15, and 16, the Court will necessarily have to consider plaintiffs Meet and Confer Charts given that  
5 plaintiffs’ Interrogatories are expressly premised upon such Charts. Indeed, such discovery requests  
6 become meaningless if the Meet and Confer Charts upon which they are premised are ignored.

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8 DATED: November 25, 2009

GREENBERG TRAUIG, LLP

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By /s/ \_\_\_\_\_  
Gregory F. Hurley  
Attorneys for Defendant TACO BELL CORP.

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