

1 FOX & ROBERTSON, P.C.
Timothy P. Fox, Cal. Bar No. 157750
2 Amy F. Robertson, Pro Hac Vice
104 Broadway, Suite 400
3 Denver, Colorado 80203
Tel: (303) 595-9700
4 Fax: (303) 595-9705
Email: tfox@foxrob.com

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

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

THE IMPACT FUND
Brad Seligman, Cal. Bar No. 83838
Jocelyn Larkin, Cal. Bar No. 110817
125 University Ave.
Berkeley, CA 94710
Tel: (510) 845-3473
Fax: (510) 845-3654
Email: bseligman@impactfund.org

9 Attorneys for Plaintiffs

10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
OAKLAND DIVISION

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

Case No. 02-CV-05849 PJH JL
**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF THEIR MOTION TO
STRIKE**

Hearing Date: December 16, 2009
Hearing Time: 9:00 a.m.

The Honorable Phyllis J. Hamilton
Courtroom 3, 3rd Floor

18
19 Plaintiffs hereby submit their Reply Brief in Support of their Motion to Strike. In their
20 Motion to Strike ("Pls.' Mot.," Docket No. 481), Plaintiffs set forth six arguments why various
21 assertions in Defendant's summary judgment papers should be struck. In its Motion to Strike
22 Response,¹ Defendant ignores several of these arguments and fails to adequately respond to the
23 remainder. Crucially, a large number of assertions are still not supported by personal
24 knowledge, as required by Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and Rule
25 602 of the Federal Rules of Evidence ("FRE"), and many others constitute expert testimony for
26 which there is neither foundation nor a timely expert report.

27
28 ¹ Def. Taco Bell Corp.'s Mem. of P. & A. in Supp. of its Resp. in Opp'n to Pls.'
Mot. to Strike (Docket no. 495, filed Nov. 25, 2009).

1 **I. The Elmer and Reeves Declarations Include Many Assertions for Which No**
2 **Foundational Facts Are Provided Establishing Personal Knowledge in Violation of**
3 **FRCP 56 and FRE 602.**

4 In their declarations in support of Taco Bell Corp's. Motion for Partial Summary
5 Judgment ("MPSJ"), both Mr. Reeves and Mr. Elmer asserted that Defendant or its contractor,
6 Maintco, had fixed various architectural elements, and in many cases purported to provide very
7 specific measurements of the fixed elements. With very few exceptions, however, they
8 provided no basis for having personal knowledge of the factual assertions they made, and thus
9 did not comply with FRCP 56 and FRE 602, requiring that there must be a showing that
10 declarants have personal knowledge of their factual assertions. *See* Pls.' Mot. at 9-10.
11 Defendant attempts to remedy this shortcoming in two steps: first, they cut and paste Mr.
12 Reeves's testimony into the Supplemental Declaration of Steve Elmer (Docket No. 496-6),
13 *compare id.* ¶¶ 214-375 with Reeves Decl. ¶¶ 3-164, and then they attempt to provide
14 foundational facts for Mr. Elmer. Elmer Supp. Decl. ¶¶ 5-13. This attempt fails utterly.

15 Despite the fact that he now makes (1) all of the assertions that he originally made,
16 (2) the assertions originally made by Mr. Reeves, and (3) a number of brand new assertions,
17 Mr. Elmer's declaration makes clear that he never saw many of the architectural elements after
18 they were purportedly fixed. In fact, Mr. Elmer unambiguously states that he personally
19 visited the stores modified by Maintco "before such modifications were made," and has never
20 even been to some restaurants in Northern California. Elmer Supp. Decl. at ¶ 8.

21 To the contrary, Mr. Elmer's testimony makes clear that -- far from "personal
22 knowledge" -- his awareness of the alleged fixes was entirely second-hand. He claims to know
23 that the fixes were made for three reasons: he was told that elements were fixed by Maintco
24 and Newport personnel; he reviewed their invoices for doing this work (which Defendant has
25 not submitted to the Court); and he reviewed photographs purporting to depict the fixes. Elmer
26 Supp. Decl. at ¶¶ 9-12. To have the "personal knowledge" required by FRE 602, however, a
27 declarant must have "actually perceived or observed that which he testifies to." *Latman v.*
28 *Burdette*, 366 F.3d 774, 787 (9th Cir. 2004) (citation omitted). It is not sufficient that a

1 declarant was told that a condition exists, or obtains information from some other indirect
2 source. *See id.* (holding that FRE 602 was violated where the only basis for a declarant’s
3 assertion that accounting records were authentic was that he had been told so by another
4 employee). Because Mr. Elmer never personally observed many of the architectural elements
5 after they purportedly were fixed, but rather only learned of these fixes indirectly from others,
6 he does not have the personal knowledge required by FRE 602.

7 Nor can Mr. Elmer provide the authentication necessary for the photographs attached to
8 his declaration to be considered. In order for a declarant to authenticate a photograph, the
9 declarant must have “personal knowledge of the scene depicted [and] can testify that the photo
10 fairly and accurately depicts it.” *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 561
11 (D. Md. 2007); *see also Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571
12 F.3d 206, 214 (2d Cir. 2009) (“The standard for admissibility of photographs requires the
13 witness to recognize and identify the object depicted and testify that the photograph is a fair
14 representation of what it purports to portray.”). Here, Mr. Elmer never personally saw the
15 architectural elements after they were allegedly fixed, and thus cannot state whether the
16 photographs accurately depict those elements.

17 Defendant also offers the declarations of Sabrina Wright² and Dawn Bennyhoff³ in an
18 attempt to authenticate the hundreds of photographs attached to those declarations. As an
19 initial matter, very few of those photographs are cited in Defendant’s summary judgment
20 papers, so it is unclear what purpose they serve. In any event, because Defendant is submitting
21 this evidence for the first time with its Reply Brief, it should be ignored. *See, e.g., Roe v. Doe*,
22 2009 WL 1883752, at *5 (N.D. Cal. June 30, 2009) (citation omitted) (Holding that “[i]t is
23 well accepted that . . . submission of new facts in [a] reply brief is improper” and declining to
24 consider new facts submitted with the defendants’ reply brief); *Langston v. N. Am. Asset Dev.*

26
27 ² Docket No. 496-5.

28 ³ Docket No. 496-1.

1 *Corp.*, 2009 WL 941763, at *5 n.7 (N.D. Cal. Apr. 6, 2009) (refusing to consider new evidence
2 submitted in a reply brief).

3 **II. Expert Testimony In The Elmer And Reeves Declarations And Elmer Exhibit 18**
4 **Should Be Struck Because It Was Not Disclosed By The Expert Designation**
5 **Deadlines and Because The Declarations Lack Foundation.**

6 As set forth in Plaintiffs' Motion to Strike, certain assertions in the Elmer and Reeves
7 Declarations, and Elmer Exhibit 18, should be struck because they were not disclosed in
8 connection with the expert discovery in this case. As Plaintiffs pointed out, this result is
9 consistent with Defendant's assertions in this case that access surveys require expertise, and
10 with the Court's holding that the measurements and analysis that occur during these surveys
11 require expert testimony. *Id.* at 10-13. Plaintiffs also argued that Defendant had not
12 demonstrated that Mr. Elmer and Mr. Reeves had the qualifications necessary to make the
13 assertions in their declarations. *Id.* at 13.

14 As an initial matter, it is now clear that Mr. Elmer -- who, as set forth above, has not
15 even seen most or all of the architectural elements after they were fixed -- did not take the
16 measurements set forth in his declaration. Nor has Defendant submitted any evidence showing
17 that Mr. Reeves took any of the measurements set forth in his declaration. This raises several
18 crucial questions: Who took these measurements? And what qualifications, if any, did they
19 have? It was Defendant's responsibility to provide this basic foundational evidence, and its
20 failure to do so means that the assertions in the Elmer and Reeves declarations as to the
21 measurements and compliance status of the allegedly fixed elements should be struck.

22 Defendant now argues that "[s]pecialized knowledge is not required to read a tape
23 measure or use a level,"⁴ and thus it was not necessary for Defendant to include the assertions
24 at issue in an expert report. This is a significant change of tune for Defendant, and also ignores
25 the complexity and nature of many of the assertions in the Elmer and Reeves Declarations, and
26 Elmer Exhibit 18.

27
28 ⁴ Mot. to Strike Resp. at 2.

1 Defendant has long maintained that access measurements are complicated and must be
2 done in a specific and precise manner to be accurate. Indeed, Defendant challenged a large
3 number of measurements taken by the Special Master -- who both parties acknowledged was
4 an expert in access surveys, *see* October 5, 2004 Order Appointing Special Master (Docket No.
5 101) at 2 -- on the ground that he did not use the proper methodology in taking measurements.
6 *See generally* Ex. 1 to the Supp. Decl. of Timothy P. Fox (filed concurrently). For example,
7 although Defendant now claims that a lay person can take slope measurements, it has in the
8 past challenged the type of instrument the Special Master used to take slope measurements, the
9 number of slope measurements taken by the Special Master in a particular location, and
10 whether the Special Master properly calibrated his slope meter. Joint Status Conference
11 Statement at 18-19 (Docket no. 249, filed Jan. 19, 2007).

12 Defendant also objected to Plaintiffs' access surveys of Defendant's restaurants on the
13 ground that the surveys constituted expert work that had to be completed by the expert
14 discovery cutoff. *See* Pls.' Mot. at 5, 12. Defendant now tries to reconcile its position by
15 arguing that Plaintiffs would have used an expert to take measurements while Defendant used
16 lay persons. Mot. to Strike Resp. at 2-3. This argument makes no sense. The measurements
17 sought to be taken by Plaintiffs during their surveys, and those actually taken by Defendant's
18 representatives, are identical. Either these measurements constitute expert work, or they do
19 not. Indeed, Defendant's position leads to the absurd result that the persons most qualified to
20 take measurements -- experts -- cannot, while those least qualified -- lay persons -- can.

21 Defendant also minimizes the nature of the assertions in Elmer and Reeves
22 Declarations, and Elmer Exhibit 18. These are not simply tape measure readings. They
23 include expert critiques of Plaintiffs' expert's methodology and conclusions⁵ as well as expert
24 interpretation of accessibility regulations.⁶

25
26
27 ⁵ *See, e.g.*, examples (2) and (6) on page 11 of Plaintiffs' Motion.

28 ⁶ *See, e.g.*, examples (3), (5) and (6) on page 11 of Plaintiffs' Motion.

1 The cases cited by Defendant are distinguishable on two grounds. First, in none of
2 these cases did a party that had consistently argued that access surveys required expertise then
3 switch its position and argue that such surveys could be conducted by lay persons. Second,
4 unlike the present case, none of these cases involved substantive expert testimony, such as
5 critiques of the opposing expert's opinion and complicated analysis of applicable regulations.

6 **III. The MPSJ and Elmer Exhibit 18 Include Citations to Statements Made in
7 Compromise Negotiations in Violation of FRE 408.**

8 As set forth in the Motion to Strike, Defendant's MPSJ repeatedly used statements in
9 Plaintiffs' Meet and Confer charts to attempt to prove the invalidity of Plaintiffs' claims in
10 clear violation of FRE 408. Pls.' Mot. at 7-8. Defendant's only argument justifying this
11 violation is that Plaintiffs somehow "waived" the protection of FRE 408 by citing to Meet and
12 Confer charts in discovery requests. Mot. to Strike Reply at 3-4. This argument -- which
13 Defendant does not support with even one case citation or other authority -- is wrong.

14 FRE 408(a) prohibits a party from using statements made in compromise negotiations
15 "to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or
16 amount, or to impeach through a prior inconsistent statement or contradiction." Plaintiffs'
17 reference to the Meet and Confer charts was not for any of the purposes prohibited by FRE
18 408. Rather, these discovery requests simply sought to identify Defendant's position as to
19 violations alleged by Plaintiffs, such as whether Defendant asserted a defense to the violation
20 or challenged the measurement. *See* Supp. Hikida Decl. Ex. 1 at 12-13 (Docket no. 496-3,
21 filed Nov. 25, 2009).

22 For example, Plaintiffs asked: "With respect to the elements listed in the Meet and
23 Confer Charts for which there are ADA Citations, identify any such element as to which you
24 contend the technical infeasibility provision applies, see, e.g., 28 C.F.R. pt. 36, app. A,
25 § 4.1.6(1)(j), state the basis for such contention, identify all documents supporting such
26 contention, and identify all persons with knowledge relating to such contention." Supp. Hikida
27 Decl. Ex. 1 at 12.

1 Nothing about these discovery requests violated FRE 408. Plaintiffs did not use
2 statements in the Meet and Confer Charts for purposes prohibited by FRE 408, but rather
3 simply to identify the particular set of violations for which Defendant was required to state its
4 position.

5 In contrast, Defendant explicitly attempted to use purported omissions of specific
6 violations from the Meet and Confer Charts to argue that Plaintiffs' claims as to those
7 violations are invalid. *See, e.g.*, Pls.' Mot. at 8. This is a *per se* violation of FRE 408.

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

11 As demonstrated in Plaintiffs' Motion to Strike, the MPSJ and Elmer Exhibit 18
12 included several bald factual contentions without any evidentiary support, violating Local Rule
13 7-5. Pls.' Mot. at 7.

14 In support of its Reply Memorandum of Points and Authorities in Support of its Motion
15 for Partial Summary Judgment ("MPSJ Reply," Docket No. 496), Defendant has now
16 submitted Exhibit 1 to Steve Elmer's Supplemental Declaration. Several factual assertions in
17 this exhibit continue to violate Local Rule 7-5 because they fail to cite any evidentiary
18 support.⁷

19 In addition, Defendant has added citations to photographs and other evidence that
20 purportedly support its factual assertions. As explained above, Defendant has failed to provide
21 the required foundation for the photographs submitted through the Elmer Supplemental
22 Declaration.
23
24
25

26
27 ⁷ *See, e.g.*, Store 137, item 199 (Supp. Ex. 1 at 8); Store 955, item 533 (Supp. Ex.
28 1 at 64); Store 2423, item 63 (Supp. Ex. 1 at 119); Store 2918, item 401 (Supp. Ex. 1 at 164);
Store 2961, item 339 (Supp. Ex. 1 at 195).

1 **V. The MPSJ and Elmer Exhibit 18 Cite Documents and Photographs That**
2 **Defendant Did Not Submit to the Court.**

3 In connection with its MPSJ Reply, Defendant submitted some of the documents cited
4 in its MPSJ and Elmer Exhibit 18. As set forth above, because Defendant is submitting this
5 evidence for the first time with its Reply Brief, the evidence should be ignored.

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

8 The Reeves Declaration and Elmer Exhibit 18 included a number of conclusory
9 assertions that should be struck. *See* Pls.' Mot. at 13-14. Defendant ignored this issue in its
10 Motion to Strike Response, and the conclusory assertions identified by Plaintiffs in Elmer
11 Exhibit 18 carried over into Elmer Supplemental Exhibit 1. *See, e.g.,* Elmer Supp. Ex. 1 at 19
12 (element 515) & 19-20 (element 533) (claiming that Defendant has taken unidentified "steps"
13 to ensure continuing compliance).

14 **CONCLUSION**

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

17
18 Respectfully submitted,

19 FOX & ROBERTSON, P.C.

20
21 By: /s/ Timothy P. Fox
22 Timothy P. Fox, Cal. Bar No. 157750
23 Amy F. Robertson, *pro hac vice*
24 104 Broadway, Suite 400
25 Denver, Colorado 80203
26 Tel: (303) 595-9700
27 Fax: (303) 595-9705

28
December 2, 2009

Attorneys for Plaintiffs