

United States District Court,
N.D. California.
MOELLER et al, Plaintiff,
v.
TACO BELL CORP., Defendant.
No. C02-05849 MJJ.

Aug. 8, 2007.

Timothy P. Fox, Amy F. Robertson, Fox & Robertson, P.C., Ari Reuben Krichiver, Denver, CO, Antonio Michael Lawson, Lawson Law Offices, Oakland, CA, Brad Seligman, Jocelyn Dion Larkin, The Impact Fund, Mari Mayeda, Berkeley, CA, for Plaintiff.

Gregory A. Eurich, Jimmy Goh, Holland & Hart LLP, Denver, CO, Gregory F. Hurley, Richard Hidehito Hikida, Esq., Greenberg Traurig, LLP, Costa Mesa, CA, Jamerson C. Allen, Jackson Lewis LLP, San Francisco, CA, Thomas P. Howard, Louisville, CO, Titania Jean Mooney, Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, CA, for Defendant.

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

MARTIN J. JENKINS, United States District Judge.

INTRODUCTION

*1 Before the Court is Plaintiffs Francie Moeller, Edward Muegge, Katherine Corbett, and Craig Thomas Yates' (collectively, "Plaintiffs") Motion for Partial Summary Judgment.^{FN1} Defendant Taco Bell Corp. ("Defendant" or "Taco Bell") opposes the motion. For the following reasons, the Court **DENIES**, in part, and **GRANTS**, in part, Plaintiffs' Motion for Partial Summary Judgment.

FN1. Docket No. 255.

FACTUAL BACKGROUND

This class action arises from Defendant's alleged violations of federal and state disability civil rights laws. Plaintiffs claim that Defendant's California restaurants maintain architectural elements that discriminate against customers who use wheelchairs or scooters by preventing equal enjoyment and access to Defendant's services. At issue are three architectural elements in Defendant's California restaurants: (1) the dimensions of the queue lines which are the barriers that are put in place to cause customers to form a single line as they approach the counter, order, and pick up their food; (2) the force necessary to open interior and exterior doors; and (3) the number of, and knee clearance at, accessible seating positions at indoor dining areas.

Plaintiffs are a group of physically disabled California residents who use either electric scooters or wheelchairs as their primary means of mobility. Defendant is a corporation incorporated under the laws of California, with its principal place of business in California. (First Amended Complaint ("FAC") ¶ 19; Ans. ¶ 19.) Defendant owns, operates, leases, and/or leases restaurants in California to Taco Bell. (*Id.*) Such restaurants include combination restaurants in which Taco Bell products and products of other restaurants are sold. (*Id.*)

In their operative Complaint, Plaintiffs seek an injunction ordering Defendant to adopt policies to ensure access for customers who use wheelchairs and scooters, and to bring all of its restaurants into compliance with the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the "ADA"), the Unruh Civil Rights Act, California Civil Code § 51 *et seq.* ("the Unruh Act"), and the California Disabled Persons Act, California Civil Code § 54 *et seq.* (the "CDPA"). (FAC ¶¶ 50-73.) Plaintiffs also seek the minimum statutory damages per offense under the Unruh Act and the CDPA.

On October 5, 2004, this Court granted the parties' stipulation to appoint a Special Master.^{FN2} The parties agreement called for the Special Master to conduct site visits of Defendant-owned Taco Bell restaurants in California. The purpose of the site visits, among others, was for the Special Master to use his expertise under the Department of Justice Standards for Accessible Design ("DOJ Standards"), and Title 24 of the 2002 California Building Code ("Title 24"), to determine the dimensions, values, and measurements of the customer accessible elements at the restaurants under the DOJ Standards and/or Title 24 at the time of the site visit and to make recommendations as he sees fit for bringing into compliance those elements whose dimensions, values, or

measurements do not comply with DOJ Standards and/or Title 24.

FN2. Docket No. 101.

*2 This Court's Order Appointing Special Master provided that except as to dimensions, values, and measurements that were not challenged or that were resolved during the monthly meet and confer process above, any party may file objections or move to adopt or modify the Special Master's Report, or any portion thereof, not later than twenty days after the Report is filed with the Court. By Order dated September 19, 2006, this Court set the deadline for objections at January 12, 2007.

On January 12, 2007, Plaintiffs filed a Motion to Make Findings of Fact, and to Adopt the Special Master's Reports with Limited Objections.^{FN3}

FN3. Docket No. 243.

Also on January 12, 2007, Defendant filed its Objections to the Special Master's Report.^{FN4} Defendant did not object to or otherwise challenge the Special Master's queue line measurements or the number of seating positions in any restaurant. (Def.'s Objections to Special Master's Interim Survey Report.) Defendant objected to the Special Master's measurement of knee clearance at a single restaurant. (*Id.* at 103.) Plaintiffs do not currently move for summary judgment as to that measurement. Defendant made several objections concerning door force. (*Id.* at 77-80, 89, 117-19, 289-92.) The majority of Defendant's objections raised legal issues, however Defendant made factual objections to the door force on the women's restrooms at three restaurants. Plaintiffs do not currently move for summary judgment as to the door force on the women's restrooms for those three restaurants.

FN4. Docket No. 247.

Plaintiffs currently seek partial summary judgment as to three specific architectural barriers in Defendant's California restaurants. Plaintiffs seek summary judgment as to the queue lines in 77 restaurants, the door force in 171 restaurants, and the indoor accessible seating in 54 restaurants. Plaintiffs seek an order finding that the architectural elements at issue are in violation of the ADA, the CDPA, and Unruh, thereby establishing liability for

injunctive and monetary relief.

LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of demonstrating the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file that establish the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party meets this initial burden, the burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Anderson*, 477 U.S. at 247-48. An issue of fact is material if, under the substantive law of the case, resolution of the factual dispute might affect the case's outcome. *Id.* at 248. Factual disputes are genuine if they "properly can be resolved in favor of either party." *Id.* at 250. Thus, a genuine issue for trial exists if the non-movant presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in its favor. *Id.* However, "[i]f the [non-movant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted).

*3 The standards and procedures for partial summary judgment are the same as for summary judgment. Hon. William W. Schwarzer, *Federal Civil Procedure Before Trial*, § 14:33 (citations omitted). Partial summary judgment is appropriate upon a showing that there is no genuine issue of material fact as to particular claims or defenses, where the court may grant summary judgment in the party's favor "upon all or any part thereof." Fed. R. Civ. Proc. 56(a), (b); *See also* Hon. William W. Schwarzer, *supra* at § 14:33 (citing *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68 (1st Cir.1999); *Wang Laboratories, Inc. v. Mitsubishi Electronics, America, Inc.*, 860 F.Supp. 1448, 1450 (C.D.Cal.1993)); *See also, Long v. Coast Resorts, Inc.*, 267 F.3d 918, 921-24, 926

(9th Cir.2001) (affirming in part district court's decision granting partial summary judgment to plaintiffs based on an application of ADA accessibility standards to stipulated facts); *United States v. AMC Entm't, Inc.*, 245 F.Supp.2d 1094, 1101 (C.D.Cal.2003) (granting partial summary judgment to plaintiffs based on an application of ADA accessibility standards to undisputed dimensional information in plaintiffs' expert's report); *Sapp v. MHI P'ship, Ltd.*, 199 F.Supp.2d 578, 583 (N.D.Tex.2002) (granting partial summary judgment to plaintiffs based on an application of ADA accessibility standards to undisputed facts).

ANALYSIS

I. Summary of the Parties' Arguments

A short summary of the parties' arguments is helpful in framing the issues before the Court.

A. Plaintiffs' Arguments

Plaintiffs purport that their motion for partial summary judgment as to the three architectural barriers at issue is grounded upon undisputed facts. In support, Plaintiffs rely on: (1) the Special Master's measurements^{FN5} of the architectural elements at issue (with the exception of the excluded measurements, as noted above); (2) the construction tolerances^{FN6} applied by Plaintiffs as stipulated by the parties; and (3) the construction dates^{FN7} of the restaurants at issue.

FN5. Exhibits 1-8 of the Declaration of Timothy P. Fox ("Fox Decl.") contain the Special Master's measurements and statistics regarding the architectural elements for each of Defendant's restaurants at issue in the pending motion.

FN6. Plaintiffs explain that the DOJ Standards and-beginning in 1999-Title 24 provide that "[a]ll dimensions are subject to conventional building industry tolerances for field conditions." DOJ Stds. § 3.2; Title 24-1999 § 1101B.4. Although Defendant has stipulated that the question of what constitutes a tolerance under this provision is an affirmative defense on which Defendant bears the burden of proof, for purposes of this Motion, Plaintiffs are seeking

relief only with respect to architectural elements that are either (1) outside of tolerances to which the parties have stipulated, or (2) so far out of compliance as to be beyond any reasonable tolerance based on field conditions. (Pl.'s Mot. at 9:1-9) (citing Joint Status Conference Statement (Docket No. 157) ¶ 18; *see also Index. Living Res. v. Oregon Arena Corp.*, 982 F.Supp. 698, 782 (D.Or.1997) (Holding that the question of what constitutes "conventional building industry tolerances" is "an affirmative defense upon which the defendant bears the burden of proof."); *AMC Entm't, Inc.*, 245 F.Supp.2d at 1100 (Granting summary judgment to the plaintiff and rejecting the defendant's argument that small deviations should be excused as tolerances on the grounds that the defendant had "provided no evidence regarding any applicable conventional building industry tolerances ..."))).

For example, Plaintiffs explain they have applied a seven pound tolerance for interior door forces, a tolerance to which the parties have stipulated. (*See* "Chart of Acceptable Measurements for the DOJ Standards for New Construction and Alterations" ("Stipulated Tolerances") at 1, attached to Stipulation Concerning Acceptable Measurements (Fox Decl. ¶ 14, Ex. 9).) Plaintiffs have applied a tolerance of 3.9 inches to queue line dimensions, based on the testimony of Carlos Azalde, Defendant's Rule 30(b)(6) designee on queue line issues in both the Colorado litigation and the case at bar, who stated that a four inch deviation from the design of queue lines would be beyond construction tolerances. (*Colorado Cross Disability Coalition v. Taco Bell Corp.*, Civil Action No. 97-B-2135 (D.Colo.) ("*CCDC v. Taco Bell*"), Dep. of Carlos Azalde at 33-34 (Ex. 10 to Fox Decl.) ("Azalde Colo. Dep.")).

FN7. The parties have stipulated to the date on which each restaurant at issue was constructed. (Pls.' Submission of Agreements Reached by the Parties.) (Docket No. 241.)

Plaintiffs explain that their motion is limited to architectural elements that violate applicable new construction standards, which include restaurants that were built: (1) *after* January 26, 1993, and were thus subject to the "new construction" regulations under the ADA; and/or

(2) *after* December 31, 1981, and were thus subject to California access regulations in affect at the time of construction.

B. Defendant's Opposition

Defendant responds by emphasizing that new construction standards under the ADA apply only to those commercial facilities constructed after January 26, 1993. 42 U.S.C. § 12183(a)(1). Relying on the ADA's enactment, Defendant accords significance to Congress's exception for existing commercial facilities (those constructed before January 26, 1993)-requiring those existing facilities to be subject to new construction standards only if such work was "readily achievable." Defendant accuses Plaintiffs of improperly attempting to apply non-ADA legal standards (*e.g.* California state law standards) to Defendant's existing restaurants (those constructed before January 26, 1993). Defendant requests the Court to exclusively apply the ADA's legal standards to all of the restaurants at issue. Defendant alternatively argues that if the Court elects to apply non-ADA standards and regulations to the restaurants at issue, then Defendant still prevails as to Plaintiffs' ADA claims relating to those restaurants constructed prior to January 26, 1993 because Plaintiffs have failed to demonstrate that barrier removal or alteration, in those restaurants, is "readily achievable."

*4 As to those restaurants constructed *after* January 26, 1993, Defendant argues that such issues have been rendered moot due to Defendant's recent remediation efforts and implementation of appropriate policies designed to provide "full and equal" access to its restaurants.

Lastly, Defendant argues that even if the Court applies non-ADA accessibility standards, the discretionary issuance of certificates of occupancy by the local building official charged with enforcing the accessibility requirements of the California Building Code constitutes prima facie evidence that Defendant's restaurants were in compliance at the time such restaurants were first open for business, thereby creating a genuine issue of material fact precluding summary judgment.

C. Plaintiffs' Reply

In their reply, Plaintiffs clarify that they seek summary judgment under the ADA only with respect to those

restaurants that were built after January 26, 1993. Therefore, Plaintiffs submit that Defendant's analysis of the ADA's "readily achievable" standard for existing facilities is thus irrelevant and need not be resolved in this motion. Plaintiffs' reply explains that they seek summary judgment on their ADA claims based only on violations of the DOJ Standards, and not on non-ADA standards as Defendant contends. Plaintiffs also explain that they rely on non-ADA standards-such as Title 24-only to establish violations of state law under the CDPA and Unruh in the current motion.

II. ADA, CDPA, and Unruh

The parties disagree as to what legal standards apply to the architectural elements at issue. Thus, the Court must first address the relevant statutes-the ADA, the CDPA, and Unruh-and the elements of proof necessary to establish violations thereof.

A. ADA

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001) (holding that the ADA provides a "broad mandate" to eliminate discrimination against people with disabilities). The statute recognizes that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8).

Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation^{FNS}, both with respect to the accessibility of their physical facilities and with respect to their policies and practices. 42 U.S.C. § 12182(a); *Moeller v. Taco Bell*, 220 F.R.D. 604, 606 (N.D.Cal.2004); *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1020 (9th Cir.2002). Liability is imposed upon "any person who ... operates a place of public accommodation" that discriminates against an individual on the basis of disability. *Id.* Aside from attorney's fees, the only remedy available to a private litigant under Title III of the ADA is injunctive relief. 42 U.S.C. § 12188(a)(1); *see also Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir.2002).

FN8. The parties do not dispute that Taco Bell restaurants are “public accommodations” within the meaning of the ADA and the relevant California disability laws. *Moeller*, 220 F.R.D. at 606.

*5 In enacting the ADA, Congress adopted two systems for regulating building accessibility: (1) one to apply to newly constructed or altered facilities; and (2) a second to apply to facilities designed and constructed for occupancy before January 26, 1993. *See* 42 U.S.C. § 12183(a)(1) and § 12182(b)(2)(A)(iv). Congress also directed the Department of Justice (“DOJ”) to issue regulations implementing Title III. 42 U.S.C. § 12186(b). The DOJ regulations are at Part 36 of 28 C.F.R.

Newly-constructed facilities—those constructed after January 26, 2003—and altered facilities, must comply with the ADA Accessibility Guidelines (“ADAAG”), which were incorporated into the DOJ regulations as Appendix A of 28 C.F.R. Part 36. *See* 28 C.F.R. § 35.151(c). A failure to comply with the DOJ Standards in buildings constructed after January 23, 1996 is a violation of the ADA. 28 C.F.R. § 36.406(a). When a facility is deemed “altered,” the altered portion of the facility must be made accessible “to the maximum extent feasible.” The infeasibility exception “applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards” 28 C.F.R. § 36.402(c).

Existing facilities—those constructed before January 26, 1993, that are not deemed altered—are subject to a less stringent standard. Existing facilities must remove architectural barriers to access only where such removal is “readily achievable.” *See* 42 U.S.C. § 12182(b)(2)(A)(iv). The term “readily achievable” means “easily accomplished and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9); *see also* 28 C.F.R. § 36.304(a) (preexisting facilities must remove barriers to accessibility only “where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense”).^{FN9} The applicable regulations mandate that a public accommodation shall remove architectural barriers where such removal is readily achievable. *See* 28 C.F.R. §§ 36.304(a), (b). The regulations provide examples of steps to remove barriers, such as repositioning shelves, rearranging tables, chairs, vending machines, display racks, and other furniture, and widening doors. *See id.*

FN9. In determining whether an action is readily achievable, the ADA provides a number of factors to be considered. 42 U.S.C. § 12181(9)(A)-(D). Where an entity can demonstrate that the removal of a barrier is not readily achievable, discrimination also includes the failure to make such facilities available through alternative methods if such methods are readily achievable. 42 U.S.C. § 12182(b)(2)(A)(v).

Although existing facilities are not required to comply with the ADAAG (unless they have been altered), the ADAAG nevertheless provides guidance for determining whether an existing facility contains architectural barriers. *Mannick v. Kaiser Foundation Health Plan, Inc.*, 2006 WL 1626909 at *5 (N.D.Cal.2006) (citing *Parr v. L & L Drive-Inn Restaurant*, 96 F.Supp.2d 1065, 1086 (D.Haw.2000)). However, deviations from the ADAAG are not necessarily determinative in establishing barriers to access. *Id.* (citing 28 C.F.R. Part 36, App. A, ADAAG 2.2).

The ADA does not foreclose reliance on state law remedies that provide greater protection. 42 U.S.C. § 12201(b). In describing the ADA's relationship with other laws, the ADA provides,

*6 Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter....

Id.

B. The Unruh Act and CDPA

Both the CDPA and the Unruh Act prohibit discrimination on the basis of disability in the full and equal access to the services, facilities and advantages of public accommodations. Cal. Civ.Code §§ 51(b) (Unruh Act), 54.1(a)(1) (CDPA). *Moeller*, 220 F.R.D. at 606. A prevailing plaintiff is entitled to, among other relief, statutory minimum damages regardless of whether the plaintiff has suffered any actual damages. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir.2000) (holding that “proof of actual damages is not a prerequisite

to recovery of statutory minimum damages” under the Unruh Act and the CDPA).

All buildings constructed ^{FN10} or altered ^{FN11} after July 1, 1970, must comply with standards governing the physical accessibility of public accommodations. *D'Lil v. Stardust Vacation Club*, 2001 WL 1825832, 2001 U.S. Dist. LEXIS 23309 at *21-22 (E.D.Cal.2001). From December 31, 1981 until the present, the standards have been set forth in Title 24 of the California regulatory code (the “California Standards”). *People ex rel. Deukmejian v. CHE, Inc.*, 150 Cal.App.3d 123, 134, 197 Cal.Rptr. 484 (1983). In addition to setting forth design and construction standards, the California Standards require public accommodations to maintain in operable working condition those features of facilities and equipment that are required to be accessible to and usable by persons with disabilities. Title 24-1999 § 1101B.3.

FN10. Cal. Health & Safety Code § 19956.

FN11. Cal. Health & Safety Code § 19959.

A violation of a California Standard constitutes a violation of both the CDPA and the Unruh Act. *See, e.g., Arnold v. United Artists Theatre Circuit, Inc.*, 866 F.Supp. 433, 439 (N.D.Cal.1994). Similarly, a violation of the ADA also constitutes a violation of both statutes. Cal. Civ.Code §§ 51(f) & 54(c).^{FN12}

FN12. The Unruh Act, as amended, § 51 provides that “[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 ... shall also constitute a violation of this section.” Cal. Civ.Code § 51(f). Additionally, as of 1997, the CDPA incorporates by reference an individual's rights under the ADA. Cal. Civ.Code §§ 54(c), 54.1. Thus, a violation of the ADA also constitutes a violation of the CDPA. *Mannick*, 2006 WL 1626909 at *6 (citing *Pickern v. Best Western Timber Cove Lodge Marina Resort*, 194 F.Supp.2d 1128, 1130 (E.D.Cal.2002)).

III. Mootness

Because the issue of mootness goes to this Court's subject matter jurisdiction, the Court will consider it first, and

then turn to the architectural barriers at issue in this action: (1) queue lines and auxiliary access lanes; (2) door force; and (3) seating accessibility.

As to queue lines, Defendant insists that Plaintiffs' claims are moot because Defendant has removed queue lines at forty six restaurants and modified them at ten additional restaurants. (Ford Decl. at ¶¶ 6-70; Kane Decl. ¶¶ 6-39.) Defendant also states that it intends to modify or remove non-compliant queue lines by January 1, 2008. (De Bella Decl. at ¶¶ 6-7.) As to door force, Defendant contends that Plaintiffs' claims are moot because Defendant has replaced the door closers at ninety five of its restaurants (*id.*), and has expressed its intent to replace additional door closers at the remaining stores in the near future. (De Bella Decl. at ¶¶ 4-5.) As to the accessible seating, Defendant maintains that Plaintiffs' claims are moot because Defendant has added additional indoor accessible seating at thirty one restaurants and modified the existing accessible seating at forty additional restaurants. (Ford Decl. at ¶¶ 6-70; Kane Dec. at ¶¶ 6-39.) As to Defendant's proposed modifications, Defendant argues that unless Plaintiff can come forward with admissible evidence creating a reasonable expectation that Defendant's expressed intent is disingenuous, then Plaintiffs' ADA claims are moot.

*7 Plaintiffs dispute that their ADA claims are moot. Plaintiffs challenge Defendant's expressed intent to comply with the ADA insisting that injunctive relief remains necessary to ensure future compliance. Plaintiffs also argue that Defendant cannot satisfy the heavy burden to establish that the challenged conduct cannot reasonably be expected to recur. Lastly, Plaintiffs explain that even if Defendant was able to meet its heavy burden of showing that the architectural elements have been remedied, and that the challenged conduct will not recur, the legal questions presented by the current motion are not moot because Plaintiffs are seeking monetary relief for class members under California state law predicated on Defendant's violations of the DOJ Standards and Title 24. Thus, the question of whether the architectural elements at issue were in violation of the ADA and/or state law before they allegedly were remedied must be addressed to determine Defendant's liability for damages.

Mootness is a jurisdictional defect that can be raised at any time by the parties or the court *sua sponte*. *Grove v. De La Cruz*, 407 F.Supp.2d 1126, 1130 (C.D.Cal.2005) (citing *Barilla v. Ervin*, 886 F.2d 1514, 1519 (9th Cir.1989)). “[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable

interest in the outcome.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). “[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.” *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir.2000). “Mere voluntary cessation of allegedly illegal conduct does not moot a case; it if did, the courts would be compelled to leave [t]he defendant ... free to return to his old ways.” *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)); see also, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000). Voluntary cessation of illegal conduct does not render a challenge to that conduct moot unless “(1) there is no reasonable expectation that the wrong will be repeated, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir.1992); see also *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 854 (9th Cir.1985) (quoting *Davis*, 440 U.S. at 631). “The burden of demonstrating mootness ‘is a heavy one.’ “ *Davis*, 440 U.S. at 631 (quoting *W.T. Grant*, 345 U.S. at 632-33). A number of ADA cases have held that promised improvements and policy changes do not moot a claim for injunctive relief under that statute. See, e.g., *Cupolo v. Bay Area Rapid Transit*, 5 F.Supp.2d 1078, 1080 (N.D.Cal.1997); *Clavo v. Zarrabian*, 2004 WL 3709049 at *4 (C.D.Cal. May 17, 2004); *Watanabe v. Home Depot USA, Inc.*, 2003 WL 24272650, at *4 n. 2 (C.D.Cal. July 14, 2003).

*8 Here, a review of the undisputed factual record demonstrates that a number of Defendant's restaurants continue to have architectural elements that remain non-ADA compliant. Although Defendant claims that it intends to modify or remove non-compliant queue lines by January 1, 2008, and to replace additional door closers at the remaining stores in the near future, (De Bella Decl. at ¶¶ 4-7), such representations do not render Plaintiffs' ADA claims moot. See, e.g., *Cupolo*, 5 F.Supp.2d at 1080. As Defendant has admitted, many of the elements in its restaurants change frequently due to “regular maintenance, remodels, repairs, and normal wear and tear.” (Def.'s Mot. for Modification of Class Definition at 3:13-18.) Defendant has explained that, because of this frequent change, the fact that an element is in compliance at one time “is not dispositive of whether the same element is in compliance” at another time. (*Id.*) Thus, evidence of the current compliant status of certain elements is not

dispositive of whether the elements will continue to be compliant in the future.

For these reasons, the Court finds that Defendant cannot satisfy its heavy burden to show that the past and existing ADA violations will not recur.^{FN13} Even if certain doors and seating were in compliance in the summer of 2006, as Defendant contends, this Court may order effective relief as to those elements in the form of an injunction requiring Defendant to (1) remedy the remainder of these elements that are out of compliance; (2) maintain those elements in a compliant state; and (3) ensure that those elements comply in any new or acquired restaurants.

FN13. Defendant cites a number of cases involving physical changes in which courts have held ADA claims to be moot. All are distinguishable because in none of the cases was there evidence that the elements in question remained subject to “frequent change.” Furthermore, in three of the cases, the plaintiffs had conceded that the claims were moot. *Brother v. CPL Invts., Inc.*, 317 F.Supp.2d 1358, 1372 (S.D.Fla.2004); *Pickern v. Best Western Timber Cover Lodge Marina Resort*, 194 F.Supp.2d 1128, 1130 (E.D.Cal.2002); *Parr v. L & L Drive-Inn Rest.*, 96 F.Supp.2d 1065, 1087 (D.Haw.2000). Next, the *Troiano* case involved a government defendant, which the Eleventh Circuit found to be dispositive. *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir.2004) (“when the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will not recur.”). Finally, in the *Hickman* case—which also involved a government defendant—the primary reason the case was held to be moot was that all of the prisoner plaintiffs has been paroled. *Hickman v. Missouri*, 144 F.3d 1141, 1142 (8th Cir.1998).

Having resolved the issue of mootness, the Court now turns to the three types of architectural barriers at issue in this action: (1) queue lines and auxiliary access lanes; (2) door force; and (3) seating accessibility.

IV. Queue Lines and Auxiliary Access Lanes

The first architectural barriers at issue are Defendant's queue lines and auxiliary access lanes. Plaintiffs insist that

the queue lines in Defendant's restaurants listed in Exhibits 1 ^{FN14} and 2 ^{FN15} violate applicable new construction standards. As to the queue lines listed in Exhibit 1, Plaintiffs claim that the queue lines are in violation of the applicable Title 24 regulations governing the width of cafeteria lines and circulation aisles. As a result of those Title 24 violations, Plaintiffs claim that the queue lines in Exhibit 1 violate the CDPA as well. As to the queue lines listed in Exhibit 2, Plaintiffs claim that the queue lines are in violation of the ADA, the CDPA, and Unruh. Plaintiffs more specifically contend that Defendant's segregated auxiliary access lanes for persons who use wheelchairs or scooters, do not excuse Defendant's queue line violations, and that the auxiliary access is also in violation of both California law and the ADA. Defendant responds that its queue lines do not violate the ADA or state law because the available auxiliary access lanes provide persons who use wheelchairs or scooters with equivalent facilitation. The Court now turns to Defendant's queue lines and auxiliary access lanes in order to determine if they violate either the ADA or state law.

FN14. The queue line measurements in Exhibit 1 are taken from buildings built between December 31, 1981 and January 26, 1993. (Fox Decl. ¶ 2, Ex 1.)

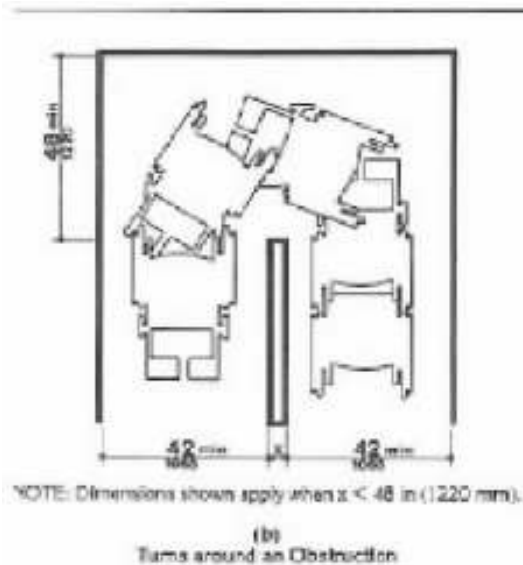
FN15. The queue line measurement in Exhibit 2 are taken from buildings built after January 26, 1993. (Fox Decl. ¶ 3, Ex 2.)

*9 The queue lines and auxiliary access in Defendant's restaurants are generally arranged as depicted below:

The queue lines in Exhibit 2 are measurements taken from stores built after January 26, 1993. (Fox Decl. ¶ 3, Ex 2.) For stores built in that time frame, Plaintiffs rely on violations of the DOJ Standards for newly-constructed facilities as basis for liability under the ADA, and also as a predicate for liability under Unruh and the CDPA. *See* Part 36 of 28 C.F.R.; *see also* ADAAG (incorporated into the DOJ regulations as Appendix A of 28 C.F.R. Part 36); 28 C.F.R. § 35.151(c).

Queue lines in restaurants built after January 26, 1993 are required to comply with the “accessible route” requirements of the DOJ Standards. An “accessible route” is “[a] continuous unobstructed path connecting all accessible elements and spaces of a building or facility.” 28 C.F.R. pt. 36, app. A, § 3.5. Doors and counters are “elements” under the DOJ Standards. *See id.* (defining elements), §§ 4.3.9 (doors), 5.2 & 7.2 (counters). Notwithstanding the existence of the auxiliary access lanes, Plaintiffs argue that as part of the route that customers are expected to follow from the entrance to the counter, the queue line must comply with the requirements governing such routes.

***10** The DOJ Standards governing accessible routes prescribe specific measurements where a route makes a 180-degree turn around an obstruction, as the queue line does where patrons make a 180-degree turn around the post in the middle. 28 C.F.R. pt 36, app. A, § 4.3.3 (“If a person in a wheelchair must make a turn around an obstruction, the minimum clear width of the accessible route shall be as shown in Fig. 7(a) and 7(b).”) Figure 7(b) dictates that each lane must be a minimum of 42 inches wide and the turn must be at least 48 inches wide, as shown below.



Id. at Fig. 7(b). The DOJ Standards alternatively provide that each lane may be the minimum 36 inches permitted for accessible routes, provided that there is a 60-inch space at the turn for the wheelchair-using patron to make a 180-degree turn in place. *Id.* at § 4.2.1 (requiring a 36-inch width for an accessible route) & § 4.2.3 (“The space required for a wheelchair to make a 180-degree turn is a clear space of 60 inches diameter (see Fig. 3(a) ...”). Figure 3(a) illustrates the latter turning space, as shown below.



Id. at Fig. 3(a). Accordingly, under DOJ Standards: (1) if the queue line's lanes are less than 42 inches wide, a 60-inch diameter turning space is required; and (2) if the

queue line's lanes are at least 42 inches wide, then a turning space of at least 48 inches is required. In any event, the turn can never be less than 48 inches.

The restaurants identified in Exhibit 2 have queue lines that have: (1) at least one turn that is 44 inches or less than width; or (2) lanes that are 32 inches or less and turns that are 56 inches or less. (Fox Decl. ¶ 3, Ex. 2.) The width measurements of 44 inches, 32 inches, and 56 inches, represent the applicable DOJ Standards minus the 4-inch queue line construction tolerance set forth by Defendant's Rule 30(b)(6) designee. (*Id.* at ¶ 20, Ex. 15, Azalde Depo. at 33-34.) Because the queue lines in Exhibit 2 violate the DOJ Standards, they would violate the ADA, and in turn, the queue lines would also violate the CDPA and the Unruh, *see, e.g., Arnold*, 866 F.Supp. at 439, unless, as discussed more fully below, Defendant's auxiliary access lanes raise a triable issue of fact as to whether the auxiliary access lanes provide a means of equivalent facilitation.

B. Auxiliary Access Lanes

Plaintiffs assert that Defendant's use of the auxiliary access lanes discriminate against patrons who use wheelchairs by: (1) denying them the equal opportunity to benefit from its queue lines; and (2) segregating them from non-disabled patrons. Plaintiffs emphasize that Defendant uses queue lines because they make the ordering process much easier for its customers. Plaintiffs specifically point to the deposition testimony of Defendant's Rule 30(b)(6) witness in a similar action, where the deponent stated that the queue lines provide

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

*11 (Fox Decl. at ¶ 20, Ex. 15, Azalde Depo. at 40.) Plaintiffs also highlight Defendant's discovery responses, where Defendant stated that queue lines provide "faster and fairer" service to customers. (*Id.* at ¶ 16, Ex. 11.) According to Plaintiffs, the auxiliary access lanes segregate them, and deprive them of the benefits associated with the queue lines. Plaintiffs also state that disabled customers who are forced to use the auxiliary access lanes are put in the uncomfortable position of appearing to "cut" in front of the non-disabled customers waiting in the queue line, or must try to keep track of the order in which the other customers arrived to determine when they should approach the counter.

At the hearing in this matter, Plaintiffs' counsel directed the Court to two undisputed facts upon which the Court should grant summary judgment in their favor. Plaintiffs' counsel first pointed to the undisputed fact that the DOJ's amicus brief in another action indicating that its view was that the segregated auxiliary access lanes violated DOJ Standards. (Fox Decl. at ¶ 19, Ex. 14.)^{FN18} Next, Plaintiffs' counsel argued that the factual record supports a finding that disabled persons are denied the benefit of the purpose of the queue lines, which is to provide a stress-free ordering system.^{FN19}

FN18. Although not dispositive on the issue, the Court gives deference to the DOJ's interpretation of the applicable standards. In that other action, the DOJ submitted an amicus brief setting forth its view that Defendant's queue lines, and auxiliary access lanes for wheelchair-users, violate the DOJ Standards. (*CCDC v. Taco Bell*, Memo. of United States as Amicus Curiae in Opp. to Taco Bell's Summ. J. Mot. at 15-20 (Jan. 27, 1999) (Fox Decl. at ¶ 19, Ex. 14).) An agency's interpretation of its own regulations is "controlling" unless it is "plainly erroneous or inconsistent with the regulation." *Basiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir.2006) (quoting *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)). The fact that the agency interpretation is set forth in an amicus brief does not lessen the deference owed to that interpretation. *See Basiri*, 463 F.3d at 930 (agency interpretation owed deference "even if through an informal process"); *Zurich American Ins. Co. v. Whittier Props. Inc.*, 356 F.3d 1132, 1137 n. 27 (9th Cir.2004) (citing *Auer* for proposition that "agency's position set forth in a legal brief, in a case in which the agency is not a party, is entitled to deference.").

FN19. In further support of their argument, Plaintiffs also cite to legal authority and argue that courts have found discrimination and segregation in public accommodations in violation of the ADA and California law on similar records. However, the Court notes that the authority upon which Plaintiffs rely are not procedurally postured as motions for summary judgment and are therefore distinguishable from the current case. None of Plaintiffs' legal authority supports the proposition that this Court may grant summary judgment, on this record, and accordingly find that Defendant's auxiliary access lanes do not provide equivalent

facilitation in comparison to its queue lines. *See Boemio v. Love's Restaurant*, 954 F.Supp. 204 (S.D.Cal.1997) (finding violations of ADA and California law after bench trial); *Wyatt v. Ralph Grocery Co.*, 2002 WL 32985831 (C.D.Cal. Feb.21, 2002) (finding violations of ADA and California law after bench trial); *Neighborhood Ass'n Of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50 (1st Cir.2006) (denying plaintiffs' request for preliminary injunction).

Although not substantively relied on by Plaintiffs, the Court notes that partial summary judgment was granted in *United States v. AMC Entertainment, Inc.*, 245 F.Supp.2d 1094 (C.D.Cal.2003). There the Court found that the defendant had failed to adduce evidence that the documented ADA violations were the result of designs and technologies that were implemented in order to provide substantially equivalent or greater access to and usability of the facility under section 2.2. *Id.* at 1101. The court noted that there was no evidence that any of the documented violations have resulted in substantially equivalent or greater access to the theaters. *Id.* To the contrary, in the current case, there is a disputed factual question as to whether the auxiliary access lanes provide equivalent or greater access.

Defendant insists that, Plaintiffs' factual contentions notwithstanding, the auxiliary access lanes provide equivalent facilitation for customer service when compared to the queue lines. Defendant emphasizes that it has a customer assistance policy that provides mobility-impaired patrons with the effective opportunity to order using the auxiliary access lanes instead of the queue lines. (Blackseth Decl. at ¶ 9; Harkins Decl. at ¶¶ 4-7.) Defendant also identifies facts indicating that disabled persons have benefitted from the auxiliary access lanes and the customer assistance policy. (Blackseth Decl. at ¶ 9.) In such instances, the disabled person stated they did not experience any discomfort, embarrassment, or hostility from other able-bodied customers nor the sense that they were being singled out by restaurant employees by being invited to place their order at the auxiliary access lane next to the ordering counter. (*Id.*) Defendant also argues that it intends to soon install indoor signage communicating such policy to its customers. (Harkins Decl. at ¶ 7.)

The ADA and California law make it illegal to provide

persons with disabilities with services or facilities that are not equal to those provided others. 42 U.S.C. § 12182(b)(1)(A)(ii); Cal. Civ.Code §§ 51(b), 54.1(a)(1). The ADA also prohibits public accommodations from segregating disabled persons from others. *See* 42 U.S.C. § 12182(b)(1)(B) (“[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”); *See also* 42 U.S.C. § 12182(b)(1)(A)(iii) (making it illegal to provide a person with a disability “a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals.” (Emphasis added)). California law similarly requires persons with disabilities to be afforded “full and equal” access to business establishments and places of public accommodation. Cal. Civ.Code §§ 51(b), 54.1(a)(1). Newly constructed facilities are able to depart from strict adherence of the design specifications of the DOJ Standards if they provide a substantially equivalent or greater level of access for people with disabilities. 28 C.F.R. pt 36, app. A, § 2.2 (defining “equivalent facilitation” providing that “[d]epartures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.”); *see also* § 4.3.2(1) (providing that accessible routes and the route for the general public coincide “to the maximum extent feasible.”). California law similarly provides for an equivalent facilitation exception in certain circumstances. Cal. Gov't Code § 4451(f) (“[a]dministrative authorities ... may grant exceptions from the literal requirements of the building standards published in the California Building Standards Code relating to access for persons with disabilities ... only when it is clearly evident that equivalent facilitation and protection that meets or exceeds the requirements under federal law are thereby secured.”); *see also* Cal. Health & Safety Code § 19957; *CHE, Inc.*, 150 Cal.App. at 139 (reversing trial court's grant of summary judgment and finding triable issues of fact existed as to whether the facility at issue provided equivalent facilitation.)

*12 Here, after a review of the factual record the Court finds Plaintiffs' motion for partial summary judgment raises a triable issue of material fact as to whether Defendant's auxiliary access lanes provide equivalent facilitation in comparison to the queue lines. The Court cannot find, as a matter of law on this record, that the auxiliary access lanes are not equivalent facilitation compared to the queue lines. The current record indicates that the auxiliary access lanes, while separate, are in close proximity to the queue lines. Additionally, there is

evidence in the record that the auxiliary access lanes, in conjunction with Defendant's customer assistance policy, do not necessarily deprive Defendant's disabled customers of the benefits associated with its restaurants or queue lines. There is also evidence that disabled customers who use the auxiliary access lanes do not necessarily experience the discomfort, embarrassment, or hostility alleged by Plaintiffs. For these reasons, the Court cannot find as a matter of law, on this record, that the auxiliary access lanes are not an equivalent facilitation to the queue lines.

Because triable issues of material fact exist as to whether the auxiliary access lanes deny equal opportunity to benefit from the queue lines and whether the auxiliary access lanes segregate disabled patrons, the Court cannot grant partial summary judgment. For the foregoing reasons the Court **DENIES** Plaintiffs' motion for partial summary judgment as to the queue lines and auxiliary access lanes set forth in Exhibits 1 and 2.

V. Force Necessary to Open Interior and Exterior Doors

The second architectural barrier at issue is the force necessary to open the interior and exterior doors of Defendant's restaurants.

Plaintiffs claim that the force necessary to open the interior and exterior doors in Defendant's restaurants listed in Exhibits 3, 4, and 5, violates applicable new construction standards, and therefore violates the ADA, the CDPA, and/or Unruh. More specifically, Plaintiffs claim that: (1) the *interior* doors in Exhibit 3-consisting of door measurements taken from buildings built after January 26, 1993-violate the ADA, and therefore violate the CDPA and Unruh; (2) the *interior* doors in Exhibit 4-consisting of door measurements taken from buildings built between December 31, 1981 and January 26, 1993-violate Title 24 and therefore violate the CDPA; and (3) the *exterior* doors in Exhibit 5-consisting of door measurements taken from buildings built after December 31, 1981-violate Title 24 and therefore violate the CDPA.

In opposition, as to *all* of the restaurants at issue, Defendant contends that summary judgment is inappropriate because Plaintiffs cannot satisfy their initial burden under the ADA of demonstrating that the exterior and interior doors deprived Plaintiffs of effective access. Defendant claims there is no evidence in the record

establishing that Plaintiffs cannot open the doors without assistance, and therefore Plaintiffs have failed to show that the doors at issue are a barrier to their effective access. Next, as to the restaurants constructed *before* January 26, 1993, Defendant argues that Plaintiffs cannot satisfy their burden under the ADA of demonstrating that removal of the architectural barriers is "readily achievable." Defendant also argues that in order for Plaintiffs to prevail on their Title 24 claims for restaurants built prior to April 1, 1994, Plaintiffs must establish that the doors in violation were "primary entrances."

*13 The Court now turns to the door force in each of the restaurants as set forth in Exhibits 3, 4, and 5.

A. Interior Doors-Exhibit 3

Plaintiffs argue that the *interior* door force for those restaurants listed in Exhibit 3-consisting of door measurements taken from buildings built after January 26, 1993-violates the ADA, and therefore violates the CDPA and Unruh. Because Plaintiffs rely upon an underlying ADA violation as a predicate for liability under CDPA and Unruh, the Court must examine the applicable DOJ Standards for interior door force to resolve the issue.

The applicable DOJ Standards for interior door force limit the force necessary to open them to five pounds. 28 C.F.R. pt 36, app. A, § 4.13.11(2)(b).^{FN20} The parties in this action have stipulated to a door force tolerance of seven pounds. (Fox Decl. at ¶ 14, Ex. 9, Stipulated Tolerances.) In order to avoid factual disputes as to Exhibit 3, and in accordance with the parties' stipulated tolerances, Plaintiffs have included only the doors that require in excess of seven pounds of pressure to open.

FN20. The Court notes that the DOJ Standards do not provide a standard opening force for *exterior* doors. *See Independent Living Resources v. Oregon Arena Corp.*, 1 F.Supp.2d 1124, 1155 (D.Or.1998) (noting that the Access Board and DOJ have never promulgated any force standard for exterior doors). However, because Plaintiffs do not rely on DOJ Standards as means to establish any exterior door force violations, the Court need not address the proper standard, if any, for exterior doors under the ADA.

(Fox Decl. ¶ 5, Ex. 3.) Here, because the doors listed in Exhibit 3 are subject to the DOJ Standard of five-pounds as provided above, and because those doors each require in excess of seven pounds of force to open, each of them is in violation of the ADA, and therefore also in violation of the CDPA and Unruh. See Cal. Civ. Code § § 51(f), 54(c) & 54.1(d).

For these reasons, the Court finds that Plaintiffs have satisfied their initial burden of demonstrating an absence of a triable issue of material fact as to those interior doors listed in Exhibit 3. See *Celotex Corp.*, 477 U.S. at 323. Accordingly, the burden shifts to Defendant to show that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87. As discussed in more detail below, the Court finds each of Defendant's door force arguments to the contrary to be unconvincing. However, because Defendant's door force arguments have application to each of the categories of doors listed in Exhibit 3, Exhibit 4, and Exhibit 5, the Court will completely address the remaining doors in Exhibit 4 and Exhibit 5 before turning to Defendant's arguments.

B. Interior Doors-Exhibit 4

Plaintiffs argue that the *interior* door force for those restaurants listed in Exhibit 4-consisting of door measurements taken from buildings built between December 31, 1981 and January 26, 1993-violates Title 24, and therefore violates the CDPA.

The applicable Title 24 standard for interior door force to open doors in facilities constructed after December 31, 1981 is five pounds. See Title 24-1981 § 2-3303(1)(2); Title 24-1984 § 2-3303(1)(2); Title 24-1987 § 2-3304(1)(2); Title 24-1989 § 3304(i.2)(1); Title 24-1994 § 3304(i.2)(1); Title 24-1999 § 1133B.2.5; Title 24-2001 § 1133B.2.5. Again, in order to avoid factual disputes, and in accordance with the parties' stipulated tolerances, the doors in Exhibit 4 each require in excess of seven pounds of pressure to open. (Fox Decl. ¶ 5, Ex. 3.) Here, because the doors listed in Exhibit 4 are subject to the five-pound Title 24 standard as provided above, and because those doors each require in excess of seven pounds of force to open, each of them is in violation of the Title 24, and therefore also in violation of the CDPA. See *Arnold*, 158 F.R.D. at 447.

*14 For these reasons, the Court finds that Plaintiffs have

satisfied their initial burden of demonstrating an absence of a triable issue of material fact as to those interior doors listed in Exhibit 4. See *Celotex Corp.*, 477 U.S. at 323. Accordingly, the burden shifts to Defendant to show that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87.

C. Exterior Doors-Exhibit 5

Plaintiffs argue that the *exterior* door force for those restaurants listed in Exhibit 5-consisting of door measurements taken from buildings built after December 31, 1981-violates Title 24, and therefore violates the CDPA.

The applicable Title 24 standard for exterior door force in facilities constructed between December 31, 1981 and November 1, 2002 was limited to eight and one-half pounds. See Title 24-1981 § 2-3303(1)(2); Title 24-1984 § 2-3303(1)(2); Title 24-1987 § 2-3304(1)(2); Title 24-1989 § 3304(i.2)(1); Title 24-1994 § 3304(i.2)(1); Title 24-1999 § 1133B.2.5. For facilities constructed after November 1, 2002, the force necessary to open an exterior door was reduced to five pounds. See Title 24-2001 § 1133B.2.5.^{FN21}

FN21. Plaintiffs explain that only one of the stores at issue in this motion was built after November 1, 2002, and that they Plaintiffs have applied only the pre-2002 standard. (Pl.'s Mot. at 21:27 n. 27.)

Unlike the previous door force measurements, the parties have not reached a stipulation on the applicable tolerances for maximum exterior door force under Title 24. (Fox Decl. at ¶ 24, Ex. 19, Letter from R. Hikida to T. Fox dated May 24, 2006 (indicating “the Orange Empire chapter of the ICBO has indicated that a 9 lb. maximum pull tolerance for exterior doors is appropriate.”).) In light of the parties' correspondence setting forth a proposed tolerance of nine pounds, Plaintiffs have included within Exhibit 5 only those doors that require at least nine and one-half pounds to open. (Pl.'s Mot. at 21:15-22:4.) Taking into account the statutory door force maximums, the Court finds that as to those facilities referenced in Exhibit 5-that were constructed between December 31, 1981 and November 1, 2002-the measurements exceed the statutory maximum door force requirement by no less than one pound; and as to those facilities contained in Exhibit

5-that were constructed after November 1, 2002-the measurements exceed the statutory maximum door force requirement by no less than four and one-half pounds. Accordingly, Exhibit 5 contains a list of non-compliant exterior doors.

However, unlike the *interior* doors referenced in Exhibits 3 and 4, the doors in Exhibit 5 raise an additional issue by virtue of being *exterior* doors. As to the exterior doors in Exhibit 5, Defendant distinguishes between the doors that are “entrances,” and the doors that are “primary entrances” noting that Title 24 eliminated the reference to “primary” entrances after April 1, 1994. Therefore, Defendant argues that in order for Plaintiffs to prevail on their Title 24 claims for restaurants built prior to April 1, 1994, Plaintiffs must also establish that the non-compliant exterior doors were “primary entrances” rather than just “entrances,” citing Title 24-1994 § 2-3301. *See* Title 24-1989 § 417, *compare*, Title 24-1994 §§ 406, 417.

*15 At the hearing in this matter, Plaintiffs' counsel responded to Defendant's “primary entrance” distinction stating that under Title 24 all customer entrances, by definition, were “primary entrances.” Plaintiffs pointed to the commentary found in the California State Accessibility Standards Interpretive Manual for the Office of the State Architect. In that manual the Office of the State Architect responded to the question of what constitutes a “primary entrance” stating:

What is a primary entrance?

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.

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

Office of the State Architect, California State Accessibility Standards Interpretive Manual § 3301(f)(1), at 95 (3d ed.1989). Plaintiffs also pointed to the decision in *People ex rel. Deukmejian v. CHE, Inc.*, 150 Cal.App.3d 123, 197 Cal.Rptr. 484 (1983) arguing that “primary entrance” should be given a broad definition by this Court. Lastly, Plaintiffs' counsel alternatively argued that “[i]f the Court decides that the primary entrance issue creates a factual

issue, that [factual issue] only applies to the exterior doors in restaurants built before April of 1994.” (Mot.Hr'g. Tr. 41:5-8.)

In *CHE, Inc.*, the court addressed the issue of what constitutes a “primary entrance.” *CHE, Inc.*, 150 Cal.App.3d at 134-35, 197 Cal.Rptr. 484. There, the court stated that a “primary entrance” is “any entrance to a facility which has a substantial flow of pedestrian traffic to any specific major function of the facility.” *Id.* at 134, 197 Cal.Rptr. 484 (citing Title 24-1981 § 2-417(k)); *see also*, Title 24-1984 § 2-417(k); Title 24-1987 § 2-417 at 26; Title 24-1989 § 417(s). There, the court rejected the defendant's argument that the then applicable statutory and regulatory scheme authorized separate primary entrances for handicapped and non-handicapped patrons. *Id.* at 135, 197 Cal.Rptr. 484. In doing so, the court stated, “[b]ecause we find the required primary entrance must necessarily be burdened by a substantial flow of pedestrian traffic, a public restaurant entrance used by no patrons other than the physically handicapped cannot realistically be a ‘primary entrance.’” *Id.* Thus, the court recognized a distinction between “primary entrances” and “entrances.”

The Court finds the distinction between “primary entrances” and “entrances” to be significant on this record. After considering the “primary entrance” analysis from *CHE, Inc.* in conjunction with the April 1994 amendment to Title 24, which eliminated the reference to “primary” entrances, the Court finds that triable issues of fact exist as to some of the exterior doors in Exhibit 5. In particular, turning to the exterior doors for those restaurants built *before* April 1994, the undisputed factual record does not allow this Court to find, as a matter of law, that those exterior doors were burdened by a sufficiently substantial flow of pedestrian traffic to constitute “primary entrances” as Title 24 then required. Because the Court cannot determine, as a matter of law, that the pre-April 1994 non-compliant exterior doors were “primary entrances” it cannot grant partial summary judgment as to those doors. However, as to the exterior doors for those restaurants built *after* April 1994, the undisputed factual record is sufficient for the Court to find, as a matter of law, that the non-compliant exterior doors were “entrances.” Accordingly, the Court finds that Plaintiffs have satisfied their initial burden of demonstrating an absence of a triable issue of material fact as to the exterior doors for those restaurants built *after* April 1994. Accordingly, the burden shifts to Defendant to show that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87.^{FN22}

FN22. Defendant makes weight of the fact that there is no DOJ Standard for exterior door opening force. However, because Plaintiffs do not rely on any DOJ Standards to establish any exterior door force ADA violations, the Court finds this argument to be irrelevant to the factual record now before this Court.

D. Defendant's Door Force Arguments

*16 Because Plaintiffs have satisfied their initial burden of demonstrating an absence of a triable issue of material fact as to those interior doors listed in Exhibits 3 and 4, and because Plaintiffs have satisfied their initial burden of demonstrating an absence of a triable issue of material fact as to some of the exterior doors listed in Exhibit 5, the Court now turns to Defendant's arguments as to why summary judgment on the issue of door force is inappropriate. *See Celotex Corp.*, 477 U.S. at 323.

1. Denial of "Effective Access"

Defendant argues that in order for Plaintiffs to prevail they must initially show that Defendant's exterior and interior doors actually deprived Plaintiffs of "effective access." Defendant posits that Plaintiffs have failed to satisfy the initial burden of demonstrating a denial of "effective access." In support of its position, Defendant argues that the factual record is devoid of evidence establishing that Plaintiffs cannot open the doors at issue without assistance and therefore they have failed to show that the doors are a barrier to their "effective access."

It is true that to be entitled *monetary damages* the class members must demonstrate a denial of "equal access." *See Donald v. Café Royale, Inc.*, 218 Cal.App.3d 168, 266 Cal.Rptr. 804 (Cal.Ct.App.1990).^{FN23} However, to be entitled to *injunctive relief*, under both California law and the ADA's new construction provisions, Plaintiffs must only demonstrate that the architectural elements at issue were built in violation of Title 24 or the DOJ Standards, respectively. Because the current motion seeks summary judgment as to liability and injunctive relief, and not monetary relief, the Court finds Defendant's monetary relief argument here to be unconvincing.

FN23. Plaintiffs concede that in order to obtain monetary damages, Plaintiffs must show that the non-compliant doors denied class members

"equal access." *Donald*, 218 Cal.App.3d at 183, 266 Cal.Rptr. 804.

In *Donald*, the court explained the difference between the necessary showings for injunctive versus monetary relief under Title 24. *Id.* at 183, 266 Cal.Rptr. 804. In doing so, the court first noted that the California legislature recognized that the specifications in Title 24 are the "minimum requirements to insure that buildings, structures and related facilities ... are accessible to" persons with disabilities, Cal. Govt.Code § 4452, and that the legislature provided a private right of action to enforce these minimum standards. *See* Cal. Civ.Code § 55; Cal. Health & Safety Code § 19953. In applying these standards, the court stated,

Sections 19955 *et seq.*, 4450 *et seq.* and 54 *et seq.*, taken together, provide for atwo-fold procedure. A designated public agency or an individual may initiate anaction to enforce compliance with the handicapped access standards provided for bysection 19955 *et seq.* and section 4450 *et seq.* On the other hand, *to maintain an action for damages pursuant to section 54 et seq. an individual must take the additional step of establishing that he or she was denied equal access on a particularoccasion....* For example, let us take a restaurant that is required to have 100 percentof its dining area accessible to the handicapped, but in fact only 90 percent of thedining area meets this standard. If a handicapped individual is readily seated and served in the 90 percent primary dining area which meets all handicap accessrequirements, 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 individualor a designated public agency *could pursue an action under one of the enforcementprovisions to bring about full compliance* by the restaurant.

*17 *Id.* at 183, 266 Cal.Rptr. 804 (emphasis added).

Here, as to the doors in Exhibit 3, Plaintiffs have established that those doors violate the DOJ Standards, and thus Plaintiffs are entitled to a finding of liability and injunctive relief under the ADA. As to the doors in Exhibits 4 and the doors in Exhibit 5 constructed after April 1, 1994, Plaintiffs have established violations of Title 24, and thus Plaintiffs are entitled to a finding of liability and injunctive relief under state law. *Id.* Defendant's argument to the contrary relies on the ADA standard for preexisting facilities, which is not applicable

to the doors at issue. For these reasons, the Court finds Defendant's arguments do not preclude a grant of summary judgment for Plaintiffs.

2. "Readily Achievable" Standard

As to the restaurants constructed *before* January 26, 1993, Defendant maintains that Plaintiffs cannot satisfy their prima facie burden under the ADA of demonstrating that removal of the architectural barriers is "readily achievable." However, Defendant again applies an improper standard. As explained above, Plaintiffs do not rely on the ADA's "readily achievable" standard applicable to preexisting facilities. To the contrary, Plaintiffs rely on the new construction standard for buildings constructed after January 26, 1993, which are by definition not preexisting facilities. *See Mannick*, 2006 WL 1626909 at *4-*6 (explaining the different standards for new construction versus preexisting facilities).^{FN24} Accordingly, Defendant's argument does not preclude a grant of summary judgment for Plaintiffs.

FN24. Defendant makes a related argument that Plaintiffs have also failed to satisfy their initial burden of demonstrating that "alterations" of the restaurants constructed before January 26, 1993. This argument fails for the same reasons. As set out above, Plaintiffs do not rely on DOJ Standards-for "alterations," or otherwise-as a means to establish any ADA violation for those restaurants.

3. Administrative Agency Discretion and Certificates of Occupancy

Defendant asserts that California Health and Safety Code and Title 24 provide local building departments with discretion to grant exceptions to the California Building Code where doing so would create practical difficulty or unnecessary hardship. According to Defendant, the certificates of occupancy for each restaurant indicate that a building inspector "either determined that the stores in question complied with the California Building code or determined that some type of exemption warranted some deviation from the California Building Code." (Def.'s Opp. at 27:25-28:3; 32:25-33:3.) Defendant avers that Plaintiffs' motion for partial summary judgment improperly assumes that Defendant has not received a hardship exemption for the restaurants at issue, and that even if Defendant has not received any hardship

exemptions to date, it may nevertheless retroactively apply for them. Plaintiffs reply that building officials do not have unfettered discretion to approve facilities that violate Title 24, that no such exception applies here and that it would be improper for the Court to presume that any exception applied. As discussed below, the Court finds Defendant's argument here problematic.

The fact that building inspectors have discretionary governmental immunity as to the issuance of building and occupancy permits does not otherwise empower them to actually issue permits for facilities that violate statutory or regulatory requirements. Building departments and other administrative agencies are "not ... lawmaking bod[ies] and ha[ve] no power to disregard or amend the ordinances which define [their] authority." *City & County of San Francisco v. Bd. of Permit Appeals*, 207 Cal.App.3d 1099, 1109-10, 255 Cal.Rptr. 307 (Cal.Ct.App.1989). "An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers." *City & County of San Francisco v. Padilla*, 23 Cal.App.3d 388, 400, 100 Cal.Rptr. 223 (Cal.Ct.App.1972) (citing *Ferdig v. State Personnel Bd.*, 71 Cal.2d 96, 103, 77 Cal.Rptr. 224, 453 P.2d 728 (1969)); *see also Bd. of Permit Appeals*, 207 Cal.App.3d at 1105, 255 Cal.Rptr. 307. "Accordingly, it is well settled that 'when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void.'" *Padilla*, 23 Cal.App.3d at 400, 100 Cal.Rptr. 223 (citing *Ferdig*, 71 Cal.2d 96 at 104, 77 Cal.Rptr. 224, 453 P.2d 728); *Bd. of Permit Appeals*, 207 Cal.App.3d at 1105, 255 Cal.Rptr. 307. In fact, courts have reversed building agency actions that exceeded the agency's statutory authority. *See e.g., Horowitz v. City of Los Angeles*, 124 Cal.App.4th 1344, 1347, 1355-56, 22 Cal.Rptr.3d 295 (Cal.Ct.App.2004) (rejecting city's argument that the court could not order it to revoke the permits because it would be contrary to the city's discretion, and stating, "the City has no discretion to issue a permit in the absence of compliance [with the municipal code]."); *Bd. of Permit Appeals*, 207 Cal.App.3d at 1110, 255 Cal.Rptr. 307. Thus, while an agency may have discretion, it must exercise that discretion within the bounds set forth by the applicable law.

*18 Defendant relies upon a series of cases that discuss the discretion afforded to administrative officials, such as building officials. However, unlike the current case, each of Defendant's cases involve suits against governmental entities alleging failure to discharge their duties, thereby raising the issue of discretionary governmental immunity. *See Thompson v. City of Lake Elsinore*, 18 Cal.App.4th

49, 53-54, 22 Cal.Rptr.2d 344 (Cal.Ct.App.1993) (discussing California Government Code Section 815.6 in suit against city); *Haggis v. City of Los Angeles*, 22 Cal.4th 490, 498-99, 93 Cal.Rptr.2d 327, 993 P.2d 983 (Cal.2000) (discussing section 815.6 in suit brought by property owner against city for city's failure to follow its own municipal code); *Inland Empire Health Plan v. Super. Ct.*, 108 Cal.App.4th 588, 592-93, 133 Cal.Rptr.2d 735 (Cal.Ct.App.2003) (discussing public HMO's immunity under section 818.4 based on its discretionary decision to credential a certain physician); *Fox v. County of Fresno*, 170 Cal.App.3d 1238, 1241-42, 216 Cal.Rptr. 879 (Cal.Ct.App.1985) (finding duties imposed on public entities by Health & Saf.Code, § 17980, to abate or take other appropriate action with regard to nuisances, are discretionary, not mandatory, therefore section § 815.6, which renders a public entity liable for injury caused by its failure to discharge a mandatory duty, was inapplicable, and the county was not liable for the fire damage); *Sutherland v. City of Fort Bragg*, 86 Cal.App.4th 13, 18-19, 102 Cal.Rptr.2d 736 (Cal.Ct.App.2000) (finding provisions at issue imposed a discretionary, rather than mandatory, duty, as required for liability under Gov.Code, § 815.6); *Creason v. Dep't of Health Servs.*, 18 Cal.4th 623, 629-30, 76 Cal.Rptr.2d 489, 957 P.2d 1323 (Cal.1998) (concluding the department did not have a mandatory duty, and its allegedly negligent exercise of discretion in selecting a particular standard would not support a cause of action under section 815.6.). These cases are inapposite on the question of whether permits were issued. Because the current case is factually and legally distinguishable from these cases, they are not helpful in resolving the issues now before the Court.

What is clear is that the legal authority presented by the parties demonstrates that building inspectors do not have discretion to issue building permits or certificates of occupancy for facilities that do not comply with Title 24. Because building inspector discretion is bounded by these provisions, to avoid summary judgment Defendant must show that the architectural elements at issue either: (1) complied with Title 24; or (2) that the building inspector applied a statutory or regulatory exception to the requirements of Title 24. Defendant concedes that the measurements are in violation of Title 24. Therefore, the Court turns to the issue of whether there is evidence that the building inspectors applied an exception to Title 24 for any of the restaurants at issue.

California law requires that public accommodations “shall conform” with the accessibility requirements of the Title 24 in effect at the time of construction “[e]xcept as otherwise provided by law.” Cal. Gov't Code § 4451(c).

Thus a public accommodation must comply with the architectural specifications of Title 24 unless a regulatory or statutory exception applies. California law provides for only two such exceptions: (1) where a covered entity can show that compliance with Title 24 would result in an unnecessary hardship, and (2) where the entity has shown that its access design will provide equivalent facilitation for people with disabilities. *See* Cal. Health & Safety Code § 19957; Cal. Gov't Code § 4451(f). Because the Court has already disposed of Defendant's equivalent facilitation argument above, the Court turns to Defendant's reliance upon the unnecessary hardship exception.

*19 The unnecessary hardship exception applies where compliance with the building standard at the time of construction would make a construction project “unfeasible” based on, among other factors, the cost of providing access, and the cost of all construction contemplated. *See* Title 24-1981 § 2-422(c); Title 24-1984 § 2-422(c); Title 24-1987 § 2-422 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. According to California's Office of the State Architect, which promulgated the Title 24 access regulations, the undue hardship exception applies only where compliance would be “difficult or impossible because the cost of providing access is too high in relationship to the total cost of the job.” Cal. Gov't Code § 4450(b); Office of the State Architect, California State Accessibility Standards Interpretive Manual § 110A(b)11A at 11 (3d ed.1989) (interpreting “unreasonable hardship”).^{FN25} Here, consistent with the rules of statutory construction, the burden of proving the unreasonable exception applies falls on Defendant. (Joint Status Conference Statement ¶ 27 (Docket No. 157) (stipulating that Defendant has the burden of proof of establishing that the unreasonable hardship exception applies); *see also N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711, 121 S.Ct. 1861, 149 L.Ed.2d 939 (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.)).

FN25. An agency's interpretation of its regulations is “controlling” unless it is “ ‘plainly erroneous or inconsistent with the regulation.’ ” *See Basiri*, 463 F.3d 927 at 930 (quoting *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)).

In the current case, Plaintiffs have produced evidence

indicating that certain architectural elements of Defendant's restaurants are in violation of Title 24. (Fox Decl., ¶¶ 6, 7, and 11, Exs. 4, 5, and 8.) Having satisfied their initial burden, Plaintiffs have shifted the burden to Defendant to present specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324. In response Defendant has failed to identify evidence from which the Court could find: (1) that any of the occupancy permits for any of the restaurants at issue were based on a hardship exception; or (2) that any such hardship exception was merited. Defendant's conjecture that the building inspectors may have applied the hardship exception is insufficient to create a material issue of fact to defeat Plaintiffs' motion for partial summary judgment. *Anderson*, 477 U.S. at 247-48.

Alternatively, Defendant asks the Court to presume that the building inspectors granted hardship exemptions, citing *E.R. Bringle v. Bd. of Supervisors*, 54 Cal.2d 86, 89, 4 Cal.Rptr. 493, 351 P.2d 765 (Cal.1960) (stating that where an authorized board grants a variance it will be presumed that an official duty was performed and that the existence of the necessary facts was found.) However, that presumption does not apply here because Title 24 regulations require "details of any finding of unreasonable hardship shall [to] be recorded and entered in the files of the enforcing agency." See Title 24-1981 § 2-422(c); Title 24-1984 § 2-422(c); Title 24-1987 § 2-422 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. Courts have determined that where an agency must make such findings, and set forth the relevant supportive facts, the presumption does not apply. *Broadway, Laguna, Vallejo Ass'n v. Bd. of Permit Appeals*, 66 Cal.2d 767, 773, 59 Cal.Rptr. 146, 427 P.2d 810 (Cal.1967) ("The presumption that an agency's rulings rest upon the necessary findings and that such findings are supported by substantial evidence ... does not apply to agencies which must expressly state their findings and must set forth the relevant supportive facts."); see also *Bd. of Permit Appeals*, 207 Cal.App.3d at 1107, 255 Cal.Rptr. 307. Because Defendant has failed to present any evidence of any hardship findings or determinations, the Court cannot presume any such findings or determinations were made. Absent any evidence supporting the application of any hardship exceptions, the Court is left with Plaintiffs' un rebutted evidence that Defendant's restaurants contained architectural elements that violated Title 24.

*20 Having considered each of Defendant's arguments above, the Court finds that Defendant's have failed to show there is a genuine issue of fact for trial with respect to the following aspects of Plaintiffs' motion. Fed.R.Civ.P.

56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87. Accordingly, the Court **GRANTS** Plaintiffs' motion for partial summary judgment as to the *interior* door force for those restaurants listed in Exhibit 3; the Court **GRANTS** Plaintiffs' motion for partial summary judgment as to the *interior* door force for those restaurants listed in Exhibit 4; the Court **GRANTS** Plaintiffs' motion for partial summary judgment as to the exterior door force for those restaurants listed in Exhibit 5 that were constructed after April 1, 1994; and the Court **DENIES** Plaintiffs' motion for partial summary judgment as to the exterior door force for those restaurants listed in Exhibit 5 that were constructed before April 1, 1994.

VI. Fixed Seating

The final architectural barrier at issue is the number of, and knee clearance at, accessible seating positions in the fixed indoor areas of Defendant's restaurants.

Plaintiffs assert that the restaurants listed in Exhibits 6, 7, and 8 are in violation of applicable new construction standards. As to the fixed accessible seating listed in Exhibits 6 and 7 ^{FN26}, Plaintiffs claim that the seating is in violation of the ADA, and therefore also in violation of the CDPA, and Unruh. As to the accessible seating listed in Exhibits 8 ^{FN27}, Plaintiffs claim that the seating is in violation of Title 24, and therefore in violation of the CDPA. Defendant responds that summary judgment is inappropriate because knee clearance is a measurement that is not required to be centered under the table, and it is unknown whether the Special Master's methodology imposed such a requirement.

FN26. The fixed accessible seating measurements in Exhibits 6 and 7 are taken from buildings built after January 26, 1993.

FN27. The fixed accessible seating measurements in Exhibit 8 are taken from buildings built after 1981.

A. Exhibits 6 and 7-ADA, Unruh, and CDPA

The fixed seating listed in Exhibits 6 and 7 are statistics and measurements, respectively, taken from restaurants built after January 26, 1993. For facilities built in that time frame, Plaintiffs rely on violations of the DOJ Standards

for newly-constructed facilities as basis for liability under the ADA, and also as a predicate for liability under Unruh and the CDPA. *See* Part 36 of 28 C.F.R.; *see also* ADAAG (incorporated into the DOJ regulations as Appendix A of 28 C.F.R. Part 36); 28 C.F.R. § 35.151(c)).

Fixed seating for restaurants built after January 26, 1993 are required to comply with DOJ Standards. DOJ Standards for fixed seating require that “at least five percent (5%), but not less than one, of the fixed or built-in seating areas or tables” must be accessible, that is, must comply with section 4.32 of the DOJ Standards. 28 C.F.R. pt. 36, app. A, § 4.1.3(18). Section 4.32.3 requires a knee space that is 27 inches high, 30 inches wide and 19 inches deep. *Id.* at § 4.32.3. The parties have stipulated to the following tolerances: 26 1/2 inches high; 29 inches wide; 18 inches deep. (Fox Decl. at ¶ 14, Ex. 9, Stipulated Tolerances.) The Court now turns to the Special Master's findings in Exhibits 6 and 7.

1. Exhibit 6

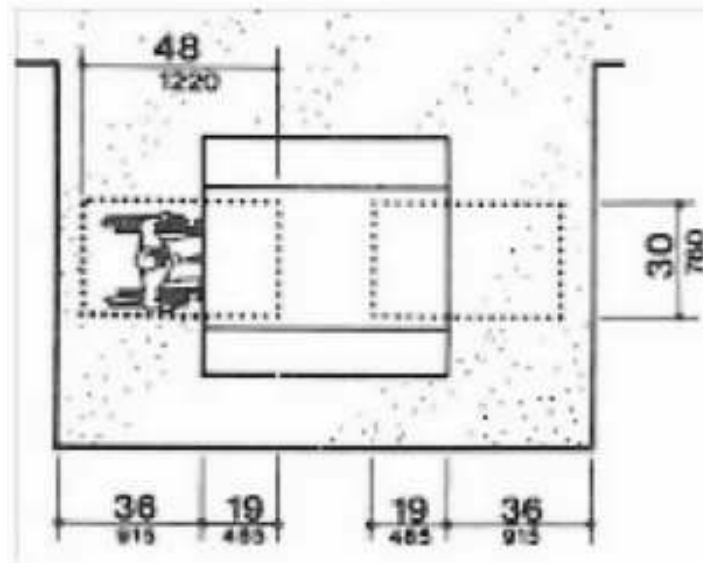
*21 The restaurants identified in Exhibit 6 have fixed seating that does not include at least five percent accessible seating positions as required by DOJ Standards. (Fox Decl. at ¶ 9, Ex. 6) Because the seating positions in Exhibit 6 violate the DOJ Standards, they violate the ADA, and in turn, also violate the CDPA and Unruh. *See, e.g., Arnold*, 866 F.Supp. at 439.

2. Exhibit 7

As reported by the Special Master, the restaurants identified in Exhibit 7 have knee clearances that do not comply with section 4.32.3, as subject to the parties' agreed tolerances. (Fox Decl. at ¶ 10, Ex. 7.) However, Defendant argues that summary judgment is not appropriate as to the measurements identified in Exhibit 7 because there is a legal question whether the 30-inch dimension—the side-to-side width of the knee clearance under the table—must be centered under the table or whether it can be off to one side. Defendant asserts that 30-inch-wide knee clearance mandated by section 4.32.3, is not required to be centered under the table. Accordingly, Defendant contends that summary judgment is inappropriate on the current record given that the Special Master's methodology in collecting the table measurements was incomplete.

Plaintiffs agree that it is not clear whether the Special Master measured knee clearances from the center of the tables, but contend that summary judgment is appropriate regardless of the Special Master's measuring methodology. (Pl.'s Rep. at 25:6-8.) As explained below, the Court finds Plaintiffs' reasoning persuasive.

Initially, the Court notes that the DOJ Standard for knee clearance support's Plaintiffs' position that the knee clearance measurement is to be made from the center of the table. Most compelling is that fact that section 4.32.3 cross references Figure 45. 28 C.F.R. pt. 36, app. A, § 4.32.3. As set forth below, Figure 45 indicates that the 30-inch dimension is centered on the table in question.



See id. at Fig. 45. In this figure, the dotted line outlines the required clear floor space adjacent to and underneath a fixed table. The 30-inch dimension corresponds to the 30-inch-wide knee clearance required by section 4.32.3. This illustration clearly depicts the 30-inch dimension as centered on the table in question. Common sense also supports this interpretation because if the knee clearance area were not required to be centered, a wheelchair-using patron could end up sitting considerably off to one side, therefore unable to make use of a portion of the table.

Next, in addressing the asserted factual question raised by Defendant concerning the Special Master's measuring methodology, the Court finds that regardless of the methodology, the tables are non-compliant under the ADA. Defendants' asserted factual question can result in only two scenarios, neither of which raise a triable issue of fact as to whether Defendants' tables are in compliance. First, if the Special Master correctly required the knee clearance to be centered on the table, then all of the tables in Exhibit 7 are out of compliance. Second, and alternatively, if the Special Master incorrectly permitted the knee clearance to be off-center—that is, that the 30-inch side-to-side width of the knee clearance could be anywhere along one side of the table—such methodology would permit a much larger area to be considered as part of the required width. Assuming, as Defendant contends, that the Special Master used this latter standard, and still found less than the 30-inch required knee clearance, then the tables in Exhibit 7 would still be out of compliance. As Plaintiffs point out, the only result of such a mistake would be that many of the tables at which the Special Master found compliant knee clearance—upon none of which Plaintiffs' rely in their motion—would in fact be out

of compliance. Therefore, because the seating positions in Exhibit 7 violate the DOJ Standards, they violate the ADA, and in turn, also violate the CDPA and Unruh. *See, e.g., Arnold*, 866 F.Supp. at 439.

B. Exhibit 8-CPDA

*22 The fixed seating listed in Exhibit 8 are statistics taken from restaurants built after 1981. For facilities built in that time frame, Plaintiffs rely on violations of Title 24 as a predicate for liability under the CDPA. Title 24 has required, since 1981, that “[e]ach dining, banquet and bar area shall have one wheelchair seating space for each twenty seats ... “ Title 24-1981 § 2-611(c)(3); *see also* Title 24-1984 § 2-611(d)(3); Title 24-1987 § 2-611(d)(3); Title 24-1989 § 611(d)(3); Title 24-1994 § 3103A(b)4C; Title 24-1999 § 1104B.5.4; Title 24-2001 § 1104B.5.4. The restaurants listed in Exhibit 8 do not have a minimum of one wheelchair seating space for each twenty seats—regardless of whether fixed or moveable—and are thus in violation of Title 24 and the CDPA. *See, e.g., Arnold*, 158 F.R.D. at 447.

Because there are no triable issues of material fact regarding the number of fixed seating positions, the Court **GRANTS** Plaintiffs' motion for partial summary judgment as to the number of seating positions for those restaurants listed in Exhibits 6, 7, and 8.

CONCLUSION

For the foregoing reasons the Court:

DENIES Plaintiffs' motion for partial summary judgment as to the queue lines and auxiliary access lanes set forth in Exhibits 1 and 2;

GRANTS Plaintiffs' motion for partial summary judgment as to the interior door force for those restaurants listed in Exhibit 3 and 4;

DENIES Plaintiffs' motion for partial summary judgment as to the exterior door force for those restaurants listed in Exhibit 5 that were constructed before April 1, 1994;

GRANTS Plaintiffs' motion for partial summary judgment as to the exterior door force for those restaurants listed in Exhibit 5 that were constructed after April 1, 1994.

GRANTS Plaintiffs' motion for partial summary judgment as to the number of seating positions for those restaurants listed in Exhibits 6, 7, and 8.

THE COURT FURTHER ORDERS that this case is scheduled for a Status Conference on **September 18, 2007 at 2:00 p.m.** A Joint Status Conference Statement is due 7 days prior to the conference.

IT IS SO ORDERED.