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8 Attorneys for Defendant
9 TACO BELL OF AMERICA, INC.

10 THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 ERNESTINA SALDANA-NEILY

13 Plaintiff,

14 v.

15 TACO BELL OF AMERICA, INC.;
16 DOROTHY M. HIURA TRUST; and DOES
17 1-25; HEDIA PETROLEUM, INC., dba
18 CAMPBELL UNION 76; BOZORGHADAD
19 TRUST; and DOES 26-50, INCLUSIVE,

20 Defendants.

) Case No. 04-CV-04571 JF

) **DEFENDANT TACO BELL OF**
) **AMERICA, INC.'S FIRST AMENDED**
) **ANSWER TO PLAINTIFF'S**
) **COMPLAINT**

) Hon. Jeremy Fogel
) Action Filed: October 28, 2004
) Trial Date: Not Yet Set

21 Defendant Taco Bell of America, Inc. ("Taco Bell" or "Defendant"), on behalf of
22 itself, by and through its attorneys, answers the allegations set forth in Plaintiff Ernestina Saldana-
23 Neily's ("Plaintiff") Complaint (the "Complaint") and admits, denies, and alleges as follows:

24 1. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
25 the allegations contained in Paragraph 1, Page 1:28-2:9 of the Complaint, and on that basis denies
26 the allegations. Defendant responds that the allegations contained in Paragraph 1, Page 2:9-2:13 of
27 the Complaint set forth legal conclusions and therefore no response is required. Finally, Defendant
28 responds that Paragraph 1, Page 2:13-2:22 of the Complaint constitutes a prayer for relief and
therefore no response is required.

2. Defendant responds that the allegations contained in Paragraph 2 of the Complaint set
forth legal conclusions and therefore no response is required.

1 3. Defendant responds that the allegations contained in Paragraph 3 of the Complaint set
2 forth legal conclusions and therefore no response is required.

3 4. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
4 the allegations contained in Paragraph 4 of the Complaint, and on that basis denies the allegations.
5 Defendant further responds that the allegations contained in Paragraph 4 of the Complaint set forth
6 legal conclusions and therefore no response is required.

7 5. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
8 the allegations contained in Paragraph 5, Page 3:10-12 and certain portions of Page 3:14-25 of the
9 Complaint, and on that basis denies the allegations. Defendant further responds that the allegations
10 contained in Paragraph 5 of the Complaint set forth legal conclusions and therefore no response is
11 required. Defendant admits that it leases and operates the Taco Bell restaurant located at 3145 S.
12 Bascom Ave., Campbell, California (the "Restaurant"). Defendant further admits that the
13 Restaurant is a public accommodation.

14 6. Defendant responds that the allegations contained in Paragraph 6 of the Complaint set
15 forth legal conclusions and therefore no response is required.

16 7. Defendant responds that the allegations contained in Paragraph 7 of the Complaint set
17 forth legal conclusions and therefore no response is required, except that Defendant admits that it
18 leases and operates the Restaurant. Defendant lacks sufficient knowledge or information to form a
19 belief as to the truth of the allegations contained in Paragraph 7 relating to Defendants Dorothy M.
20 Hiura Trust, Hedia Petroleum, Inc., and Bozorghadad Trust (hereinafter "Union 76") and on that
21 basis denies the allegations. To the extent a further response is required, Defendant denies the
22 allegations contained in Paragraph 7 of the Complaint.

23 8. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
24 the allegations contained in Paragraph 8 of the Complaint, and on that basis denies the allegations.

25 9. Defendant responds that the allegations contained in Paragraph 9 of the Complaint set
26 forth legal conclusions and therefore no response is required. Defendant lacks sufficient
27 knowledge or information to form a belief as to the truth of the allegations contained in Paragraph

1 9 relating to Union 76 and on that basis denies the allegation. To the extent a further response is
2 required, Defendant denies the allegations contained in Paragraph 9 of the Complaint.

3 10. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
4 the allegations contained in Paragraph 10 of the Complaint, and on that basis denies the allegations.
5 To the extent a further response is required, Defendant denies the allegations contained in
6 Paragraph 10 of the Complaint.

7 11. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
8 the allegations contained in Paragraph 11 of the Complaint, and on that basis denies the allegations.
9 To the extent a further response is required, Defendant denies the allegations contained in
10 Paragraph 11 of the Complaint.

11 12. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
12 the allegations contained in Paragraph 12 of the Complaint, and on that basis denies the allegations.
13 To the extent a further response is required, Defendant denies the allegations contained in
14 Paragraph 12 of the Complaint.

15 13. Defendant responds that the allegations contained in Paragraph 13 of the Complaint set
16 forth legal conclusions and therefore no response is required. Defendant further responds that the
17 allegations contained in Paragraph 13, Page 8:15-19 of the Complaint constitute a prayer for relief
18 and therefore no response is required.

19 14. Defendant responds that the allegations contained in Paragraph 14 of the Complaint set
20 forth legal conclusions and therefore no response is required. Defendant further responds that the
21 allegations contained in Paragraph 14, Page 8:23-27 of the Complaint constitute a prayer for relief
22 and therefore no response is required.

23 15. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
24 the allegations contained in Paragraph 15 of the Complaint, and on that basis denies the allegations.
25 To the extent a further response is required, Defendant denies the allegations contained in
26 Paragraph 15 of the Complaint. Defendant further responds that the allegations contained in
27 Paragraph 15 of the Complaint constitute a prayer for relief and legal conclusion and therefore no

1 response is required. Defendant lacks sufficient knowledge or information to form a belief as to
2 the truth of the allegations contained in Paragraph 15 relating to Union 76 and on that basis denies
3 the allegations.

4 16. Defendant responds that the allegations contained in Paragraph 16 of the Complaint
5 constitute a prayer for relief and legal conclusions and therefore no response is required; to the
6 extent a response is required, Defendant denies that Plaintiff is entitled to seek attorneys' fees under
7 California Health & Safety Code Section 19953, California Civil Code Sections 54.3 and 55,
8 California Code of Civil Procedure Section 1021.5, or any other laws.

9 17. Defendant responds that the allegations contained in Paragraph 17 of the Complaint
10 constitute a prayer for relief and legal conclusions and therefore no response is required.

11 18. Defendant responds that the allegations contained in Paragraph 18 of the Complaint set
12 forth legal conclusions and therefore no response is required. Defendant further responds that the
13 allegations contained in Paragraph 18 of the Complaint constitute a prayer for relief and therefore
14 no response is required; to the extent a response is required, Defendant denies that Plaintiff is
15 entitled to seek attorneys' fees under California Civil Code Sections 54.3 and 55 or California Code
16 of Civil Procedure Section 1021.5.

17 19. Defendant repeats, realleges, and incorporates herein by this reference, each of its
18 respective statements, admissions and/or denials, as the case may be, to Paragraphs 1 through 18,
19 inclusive, of the Complaint.

20 20. Defendant responds that the allegations contained in Paragraph 20 of the Complaint set
21 forth legal conclusions and therefore no response is required.

22 21. Defendant responds that the allegations contained in Paragraph 21 of the Complaint set
23 forth legal conclusions and therefore no response is required. Defendant further responds that the
24 allegations contained in Paragraph 21 of the Complaint constitute a prayer for relief and therefore
25 no response is required; to the extent a response is required, Defendant denies that Plaintiff is
26 entitled to seek attorneys' fees under California Civil Code Section 52(a).

1 22. Defendant repeats, realleges, and incorporates herein by this reference, each of its
2 respective statements, admissions and/or denials, as the case may be, to Paragraphs 19 through 21,
3 inclusive, of the Complaint.

4 23. Defendant responds that the allegations contained in Paragraph 23 of the Complaint set
5 forth legal conclusions and therefore no response is required.

6 24. Defendant responds that the allegations contained in Paragraph 24 of the Complaint set
7 forth legal conclusions and therefore no response is required.

8 25. Defendant responds that the allegations contained in Paragraph 25 of the Complaint set
9 forth legal conclusions and therefore no response is required.

10 26. Defendant responds that the allegations contained in Paragraph 26 of the Complaint set
11 forth legal conclusions and therefore no response is required.

12 27. Defendant responds that the allegations contained in Paragraph 27 of the Complaint set
13 forth legal conclusions and therefore no response is required.

14 28. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
15 the allegations contained in Paragraph 28 of the Complaint, and on that basis denies the allegations.
16 To the extent a further response is required, Defendant denies the allegations contained in
17 Paragraph 28 of the Complaint. Defendant further responds that the allegations contained in
18 Paragraph 28 of the Complaint set forth legal conclusions and therefore no response is required.

19 29. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
20 the allegations contained in Paragraph 29 of the Complaint, and on that basis denies the allegations.
21 To the extent a further response is required, Defendant denies the allegations contained in
22 Paragraph 29 of the Complaint. Defendant further responds that the allegations contained in
23 Paragraph 29 of the Complaint constitute a prayer for relief and therefore no response is required.

24 30. Defendant lacks sufficient knowledge or information to form a belief as to the truth of
25 the allegations contained in Paragraph 30 of the Complaint, and on that basis denies the allegations.
26 To the extent a further response is required, Defendant denies the allegations contained in
27 Paragraph 30 of the Complaint. Defendant further responds that the allegations contained in

1 Paragraph 30 of the Complaint constitute a prayer for relief and legal conclusions and therefore no
2 response is required.

3 31. Defendant lacks sufficient knowledge or information to form a belief as to the truth
4 of the allegations contained in Paragraph 31 of the Complaint, and on that basis denies the
5 allegations. To the extent a further response is required, Defendant denies the allegations
6 contained in Paragraph 31 of the Complaint. Defendant further responds that the allegations
7 contained in Paragraph 31 of the Complaint constitute a prayer for relief and legal conclusions and
8 therefore no response is required.

9 **ANSWER TO PRAYERS FOR RELIEF**

10 1. In response to pages 16-17 of the Complaint, paragraphs 1-5, these paragraphs
11 constitute prayers for relief and therefore no response is required. Nonetheless, Defendant denies
12 Plaintiff is entitled to any injunctive relief, preventative relief, or any other relief pursuant to 42
13 U.S.C. Section 12205, California Civil Code Section 52, California Civil Code Section 55, or
14 California Health and Safety Code Section 19953, or any other statute; Defendant denies Plaintiff
15 is entitled to any damages, statutory damages, general damages, or treble damages; Defendant
16 denies Plaintiff is entitled to any attorney's fees, litigation expenses and/or costs of this suit; and
17 Defendant denies that Plaintiff is entitled to any other relief under his Complaint.

18 **AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT**

19 Defendant alleges the following affirmative defenses with respect to the claims alleged in
20 the Complaint, without assuming the burden of proof where the burden of proof rests on Plaintiff:

21 **FIRST AFFIRMATIVE DEFENSE**

22 1. This court lacks subject matter jurisdiction over this matter because there is no
23 actionable wrong arising under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et
24 seq.

25 **SECOND AFFIRMATIVE DEFENSE**

26 2. This court lacks pendant jurisdiction over all claims arising under California state law,
27 including, but not limited to, claims under California Health and Safety Code § 19955 et seq.,

1 California Civil Code §§ 51, 51.5, 54 et seq., and California Business and Professions Code §
2 17200 et seq., because there is no actionable wrong arising under the Americans with Disabilities
3 Act of 1990, 42 U.S.C. §12101 et seq.

4 THIRD AFFIRMATIVE DEFENSE

5 3. This court lacks subject matter jurisdiction over this matter because there is no
6 actionable wrong arising under California Health and Safety Code §19955 et seq.

7 FOURTH AFFIRMATIVE DEFENSE

8 4. This court lacks subject matter jurisdiction over this matter because there is no
9 actionable wrong arising under California Civil Code §§ 54, 54.1, 54.3 et seq.

10 FIFTH AFFIRMATIVE DEFENSE

11 5. This court lacks subject matter jurisdiction over this matter because there is no
12 actionable wrong arising under the Unruh Civil Rights Act, Cal. Civ. Code §§ 51. 51.5 et seq.

13 SIXTH AFFIRMATIVE DEFENSE

14 6. Defendant is performing all readily achievable architectural barrier removal, within its
15 control, required by law, and therefore Plaintiff's Complaint against Defendant is barred.

16 SEVENTH AFFIRMATIVE DEFENSE

17 7. Defendant is performing all repairs to any architectural barrier with alternative methods
18 of access as required by law, and therefore Plaintiff's Complaint against Defendant is barred.

19 EIGHTH AFFIRMATIVE DEFENSE

20 8. Plaintiff's claims are barred, in whole or in part, by the doctrines of estoppel, waiver,
21 laches, and unclean hands.

22 NINTH AFFIRMATIVE DEFENSE

23 9. Some or all of Plaintiff's claims for relief are moot, and are therefore barred.

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TENTH AFFIRMATIVE DEFENSE

10. Plaintiff has failed to state a claim upon which relief may be granted with respect to all counts alleged in the Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff has not suffered any loss or harm as a result of any act or omission of Defendant and, therefore, Plaintiff's Complaint against Defendant is barred.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff has failed to mitigate his damages, if any, and therefore Plaintiff's Complaint against Defendant is barred.

THIRTEENTH AFFIRMATIVE DEFENSE

13. At all relevant times, Defendant has met all federal and state statutory and regulatory obligations owed to Plaintiff and all other individuals with disabilities, including individuals in wheelchairs, if any, and therefore Plaintiff's Complaint against Defendant is barred.

FOURTEENTH AFFIRMATIVE DEFENSE

14. At all relevant times, Defendant has complied with all of the Americans with Disabilities Act final rules and Accessibility Guidelines, 28 C.F.R. Ch.1, Part 36, and therefore Plaintiff's Complaint against Defendant is barred.

FIFTEENTH AFFIRMATIVE DEFENSE

15. Plaintiff lacks standing to sue for alleged violations that were not directly experienced by Plaintiff.

SIXTEENTH AFFIRMATIVE DEFENSE

16. As a separate and additional affirmative defense, Defendant alleges and avers that the imposition of any punitive or exemplary damages in this matter would violate Defendant right to due process of law in violation of the California Constitution and the United States Constitution.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. Plaintiff's claims for injunctive and monetary relief under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., California Civil Code §§ 54, 54.1, 54.3 et seq., and the

1 Unruh Civil Rights Act, Cal. Civ. Code §§ 51, 51.5 et seq. (collectively, the "ADA Claims"), are
2 duplicative of the claims asserted in the first-filed action entitled Moeller v. Taco Bell Corp., Case
3 No. C02 5849 MJJ (N.D. Cal. Dec. 17, 2002) (the "Moeller Action"), a certified mandatory class
4 action of which Plaintiff is a class member, and therefore Plaintiffs' ADA Claims against
5 Defendant are barred.

6 EIGHTEENTH AFFIRMATIVE DEFENSE

7 18. This court lacks federal question jurisdiction over all claims arising under California
8 state law, including, but not limited to, claims under California Health and Safety Code § 19955 et
9 seq., California Civil Code §§ 51, 51.5, 54 et seq., California Civil Code §§ 54, 54.1, 54.3 et seq.,
10 because Plaintiff's claims under the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et
11 seq., are barred by the first-filed Moeller Action.

12 NINETEENTH AFFIRMATIVE DEFENSE

13 19. Plaintiff is a member of the certified mandatory class in the Moeller Action and his
14 ADA Claims against Defendant are duplicative and substantially identical to the claims asserted
15 against Defendant in the Moeller Action, and therefore Plaintiffs' ADA Claims against Defendant
16 should be dismissed or stayed in favor of the Moeller Action.

17 RESERVED

18 20. Defendant presently has insufficient knowledge or information upon which to form a
19 belief as to whether it may have additional, as yet unstated, affirmative defenses available.
20 Defendant hereby gives notice that it intends to rely upon any other defenses that may become
21 available or apparent during the discovery proceedings in this matter and hereby reserve its right to
22 amend the Answer and to assert any such affirmative defense(s).

23 WHEREFORE, Defendant prays for judgment as follows:

- 24 1. That the Court dismiss Plaintiff's Complaint with prejudice, orders that Plaintiff take
25 nothing by this action, and enters judgment in Defendant' favor;
- 26 2. That the Defendant be awarded all of its litigation costs and attorneys' fees in this
27 action; and

1 3. That the Court award such other and further relief as it deems just and equitable.
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3 DATED: December 8, 2004

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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5 By: _____



Jeffrey H. Dasteel
Attorneys for Defendant
Taco Bell of America, Inc.

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