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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANCIE MOELLER, et al.,

Plaintiffs,

No. C 02-5849 PJH

v.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

TACO BELL CORP.,

Defendant.

The case was filed as a proposed class action case under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (“ADA”), the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq. (“Unruh Act”), and the California Disabled Persons Act, Cal. Civ. Code § 54 et seq. (“CDPA”).

Plaintiffs are physically disabled California residents who use electric scooters or wheelchairs as their primary means of mobility. Plaintiffs filed this action on December 17, 2002, against defendant Taco Bell Corp. (“TBC”), alleging that its corporate-owned restaurants in California contained architectural barriers that prevented plaintiffs’ access to and enjoyment of the restaurants, in violation of the ADA, the Unruh Act, and the CDPA.

On February 23, 2004, the court certified the following class:

All individuals with disabilities who use wheelchairs or electric scooters for mobility who, at any time on or after December 17, 2001, were denied, or are currently being denied, on the basis of disability, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of California Taco Bell corporate restaurants.

Moeller v. Taco Bell Corp., 220 F.R.D. 604, 613-14 (N.D. Cal. 2004).

On October 5, 2004, the court granted the parties’ stipulated request to appoint Bob Evans as Special Master to conduct site visits of all TBC-owned Taco Bell restaurants in

1 California; to determine the dimensions, values, and measurements of the customer-
2 accessible elements at those Taco Bell restaurants, under both federal and state
3 standards; and to make recommendations for bringing into compliance any elements
4 whose dimensions, values, or measurements did not comply with those standards. The
5 Special Master issued his report in mid-2005.

6 On February 23, 2007, plaintiffs moved for partial summary judgment as to three
7 types of barriers – the configuration of the queue lines in 77 restaurants, the door force in
8 171 restaurants, and the indoor accessible seating in 54 restaurants. In an order issued
9 August 8, 2007, the court denied the motion as to queue lines, finding triable issues that
10 precluded summary judgment; granted the motion as to interior door force and as to
11 exterior door force for those restaurants constructed after April 1, 1994, and denied it as to
12 exterior door force for those restaurants constructed prior to April 1, 1994; and granted the
13 motion as to the number of accessible seating positions. See Moeller v. Taco Bell Corp.,
14 2007 WL 2301778 (N.D. Cal. Aug. 8, 2007) (“Moeller Summ. J.”)

15 In October 2009, TBC filed a motion for partial summary judgment, addressing
16 numerous ADA violations. At the December 16, 2009 hearing, the court denied TBC’s
17 motion, and advised that it would conduct a trial as to one exemplar restaurant to be
18 chosen by plaintiffs, following a period of discovery. In the follow-up December 23, 2009
19 order, the court set a deadline for plaintiffs to provide TBC with a list of all ADA and Title 24
20 violations; a deadline for the parties to meet and confer, and prepare a list of all the
21 violations, for each restaurant, that had been remediated; a deadline for discovery; and a
22 deadline for plaintiffs to select the exemplar restaurant. Plaintiffs chose Taco Bell 4518.

23 On April 5, 2010, the court issued an order bifurcating discovery and the trial of the
24 exemplar restaurant, advising that the first stage of the trial would be on the issues of
25 whether there had been violations of federal and/or state law, and appropriate injunctive
26 relief, with the remaining issues, including trial of the damages phase of the exemplar
27 restaurant, to be scheduled thereafter.

28 From June 6 to June 16, 2011, the court convened an exemplar trial as to Taco Bell

1 4518, addressing liability and injunctive relief.¹ Plaintiffs limited their claims at the exemplar
 2 trial to the following twelve elements, as having been in violation of the ADA, the Unruh Act,
 3 and/or the CDPA during the class period: (1) the width of access aisle next to van
 4 accessible parking space; (2) signage at van accessible parking space; (3) force required
 5 to open north entry door; (4) time for north entry door to close; (5) queue line; (6) reach
 6 ranges for self-service drink lid dispenser; (7) knee and toe clearance under accessible
 7 dining tables; (8) push side maneuvering clearance at women's restroom door; (9) height
 8 and position of water closet in the women's restroom (height of seat and distance between
 9 centerline of water closet and nearest side wall); (10) obstructions in clear floor space at
 10 the water closets in the men's and women's restrooms (position or placement of movable
 11 trash cans); (11) height of soap dispenser and toilet seat cover dispenser in the men's and
 12 women's restrooms; and (12) lavatory insulation.

13 Plaintiffs' claims for both liability and injunctive relief are based on alleged violations
 14 relating to these twelve elements. Plaintiffs seek injunctive relief compelling TBC to ensure
 15 that its restaurants are, and remain, in compliance with applicable standards. They also
 16 seek minimum statutory damages under the Unruh Act and/or the CDPA, and attorneys'
 17 fees.

18 BACKGROUND

19 A. Customer Witnesses

20 1. Katherine Corbett

21 Named plaintiff Katherine Corbett testified at trial. She has used a power wheelchair
 22 for fifteen years. Her 18-year-old daughter also uses a wheelchair for mobility. Ms.
 23 Corbett eats at Taco Bell restaurants frequently because she likes the food. She has
 24 patronized the Taco Bell restaurant 4518 in San Pablo.

25 The first time Ms. Corbett went inside Taco Bell 4518 was in 2002. Although Ms.
 26

27 ¹ On June 23, 2010, plaintiffs submitted a proposed permanent injunction, setting forth
 28 the injunctive relief requested as to all Taco Bell restaurants that are the subject of this action.

1 Corbett often uses the drive-through, she has also been inside the restaurant on a number
2 of occasions. She estimated that she has patronized that restaurant approximately 80
3 times between 2002 and 2010; of these visits, she estimated she went inside two to ten
4 times. She tends to eat inside the restaurant when she is with her daughter, and prefers to
5 do that if she has the time. She intends to go inside Taco Bell 4518 in the future.

6 Ms. Corbett uses a van for transportation. When she visited Taco Bell 4518 in 2002,
7 the width of the then-existing access aisle next to the van-accessible parking space was
8 insufficient for her to deploy the lift on her van, roll off the lift, and retract the lift back into
9 the van. If she had parked in the designated space and a car later parked in the adjacent
10 space, there would not have been enough space for her to deploy her ramp and enter her
11 van.

12 However, on this occasion in 2002, Ms. Corbett was able to park and go inside
13 because the designated accessible parking space was unoccupied, as were the space to
14 the left of it and the space to the right of the access aisle. Because of that, she parked her
15 van half in the designated accessible space and half in the adjacent empty space, although
16 it made her uncomfortable to occupy two spaces. After that experience, when she went to
17 Taco Bell 4518 between 2002 and 2010, she parked at another store in the same mall that
18 had wider access aisles.

19 On her 2002 visit, although Ms. Corbett was able to open the north entry door to
20 Taco Bell 4518, it was heavy. In addition, during that visit, she encountered a "queue line"
21 that TBC had put in place to guide customers lining up to place their orders at the counter.
22 The queue line was too narrow for Ms. Corbett to navigate in her wheelchair, and there was
23 a chain extending from the end of the queue line closest to the entrance and the counter.
24 Ms. Corbett could not enter from the far side of the queue line because there was already a
25 customer there. There were no signs indicating what she should do given that she could
26 not fit through the queue line, and she was not offered any direction by TBC employees.
27 With some difficulty, she removed the chain and approached the counter.

28 During a later visit, Ms. Corbett encountered the same queue line, although the

1 chain was not in place. Nevertheless, there was no signage, and no TBC employee offered
2 assistance. Since there were people in the queue line, Ms. Corbett attempted to keep her
3 place in line by getting the attention of the last person then in line, and saying, "I just want
4 you to know I am going to be over there, but I am in line behind you." As later customers
5 arrived, she continued to let them know where she was in line, despite the fact that she had
6 to wait off to the side rather than in the queue with others.

7 When it eventually came her turn, however, people were staring at her and one said
8 to her, "Hey, . . . no cutting. . . . You are not in line." The second cash register was
9 available when it came her turn. However, the presence of other customers lined up at the
10 counter also made it difficult for Ms. Corbett to get to the second cash register in the space
11 available between the queue line and the counter.

12 During the 2002 visit, Ms. Corbett was also unable to reach the drink lids from the
13 self-serve dispenser. No employee offered to assist her, so she asked another customer to
14 hand her a drink lid.

15 During the visit in 2002, when Ms. Corbett looked for a table, she noticed that most
16 had fixed seats that would have prevented her from pulling her wheelchair up to the table.
17 There was no signage indicating the location of accessible seating, but she did find a table
18 with a removable chair. She was not, however, able to pull completely up to that table
19 either, because the supporting post was centered under the table, blocking her feet.

20 In 2002, Ms. Corbett had trouble using both the water closet and the sink in the
21 restroom. The seat of the water closet was too low, making it difficult to transfer on and off.
22 The drain pipe under the sink was not insulated, making it a risk for scalding if Ms.
23 Corbett's legs came in contact with it. As a result, she washed her hands in cold water.

24 On a subsequent visit, there was a loose trash can under the sink, which meant that
25 she could not get her legs under the sink to wash her hands.

26 Ms. Corbett testified that it was upsetting and unpleasant to encounter so many
27 inaccessible features at the restaurant. The queue lines made her feel like she was cutting
28 in line and being rude, or being privileged or special. She would have used the queue line

1 if it had been wider; indeed, she prefers “to use what everybody else uses” if possible, and
2 “to be treated like [a] regular customer[].”

3 2. Jacques Bronson

4 Jacques Bronson testified at trial concerning his mother’s experiences at Taco
5 Bell 4518. Mr. Bronson’s mother, former class member Elizabeth Googens Bronson,
6 passed away in 2009. Ms. Bronson used a wheelchair and a scooter, and Mr. Bronson
7 lived with her in order to provide assistance.

8 In the years prior to Ms. Bronson’s death, the Bronsons patronized Taco Bell 4518,
9 Ms. Bronson in a motorized scooter. They patronized that particular Taco Bell because it
10 was close to a grocery store where Ms. Bronson liked to shop. She would shop there once
11 a month, and went to Taco Bell almost every time.

12 Each time the Bronsons patronized Taco Bell 4518, Ms. Bronson was unable to
13 use the queue line because she could not fit her scooter through it. The chain at the queue
14 line was in place some of the times they were there; other times it was not. Although Ms.
15 Bronson was able to order, pay for, and carry her own food at other businesses, her son
16 had to order for her and bring the food to her table at Taco Bell 4518, because of the queue
17 line.

18 There were no signs that told Ms. Bronson what to do, nor did any TBC employee
19 ever offer assistance to either of the Bronsons. In fact, on one occasion, when Ms.
20 Bronson pulled up to the chain to wait for Mr. Bronson to go through the queue line, a TBC
21 employee told her that she couldn’t stay there. Mr. Bronson asked to speak to the
22 manager, and asked if his mother could go around the far end of the queue line to go to the
23 front of the line. The manager said, “No,” because people in line might object. Mr.
24 Bronson observed that his mother appeared frustrated by this interaction, and resigned by
25 the need to rely on her son. After this interaction, when the Bronsons went to Taco Bell
26 4518, Ms. Bronson would go straight to a table while her son ordered for her.

27 3. Uverda Harry

28 Class member Uverda Harry testified at trial. She uses a wheelchair. Ms. Harry first

1 patronized Taco Bell 4518 in 1994. She eats there because it is economical, and because
2 it is close to her medical appointments, including physical therapy. On average, she goes
3 to Taco Bell 4518 three times per month, and expects that she will continue to patronize
4 Taco Bell 4518 on future days when she has physical therapy appointments.

5 Ms. Harry testified that the north double doors close too quickly, and have closed on
6 the leg extenders of her wheelchair and on her ankle as she was attempting to move
7 through the doors. She has also had trouble opening the north entry door, finding it too
8 heavy. When she had trouble opening the door, no TBC employee did anything to assist
9 her.

10 Ms. Harry has encountered the queue line at Taco Bell 4518, both with and without
11 the chain. On one occasion, Ms. Harry attempted to go through the queue line in her
12 wheelchair, but became stuck. Because of the queue line, Ms. Harry found it necessary to
13 ask others – her children, acquaintances, and strangers – to place her order for her. On
14 one occasion, she had to rely on a colleague, even though she was embarrassed to have
15 to ask.

16 Ms. Harry never attempted to proceed directly to the counter to place her order, as
17 she thought that would be cutting in line, nor to go around the far end of the queue line,
18 because she observed that that was where customers picked up items. She never
19 observed any signs telling her what to do if she couldn't use the queue line, nor did any
20 TBC employee ever offer her assistance placing her order or instructions on what to do in
21 light of the queue line.

22 Ms. Harry testified that she wants to be an independent person, and that not being
23 able to do things for herself makes her feel like a failure. Her experience with the doors
24 made her feel futile, and having to rely on her children or a colleague to place her order
25 made her feel a little distraught and even brought her to tears on several occasions. Ms.
26 Harry would have preferred an accessible queue line because it would not have made her
27 feel like she was different than other customers.

28 Ms. Harry never used the restroom at Taco Bell 4518 because she observed that

1 it would have been difficult for her to navigate up to the door and use the handle to open it.

2 Several years ago, Ms. Harry complained to TBC by using their toll-free number.
3 She voiced concerns about the doors, the queue line, and the counter, and provided her
4 name and phone number, but never heard back from TBC.

5 4. Yvonne Westbrook-White

6 Yvonne Westbrook-White testified at trial. She uses a scooter for mobility. Ms.
7 Westbrook-White patronized Taco Bell 4518 approximately twice per month between 2001
8 and 2005. She stopped going in 2005 because she was trying to eat a healthier diet.
9 However, she plans to go back because she likes the tacos.

10 On her first visit in 2001, Ms. Westbrook-White encountered the queue line; the
11 chain was in place at that time. She saw that the queue line was narrow and the turn area
12 appeared too small for her to get in. She did not, however, see any signs indicating what
13 she was supposed to do as a person using a scooter, nor did any TBC employee provide
14 instructions. Assuming it was the way to place her order, Ms. Westbrook-White attempted
15 to use the queue line but got stuck at the turn. By that time there were customers lined up
16 behind her in the queue, whom she had to interrupt in order to back all the way out of the
17 queue line. She observed that the customers behind her appeared disgusted and
18 impatient.

19 When TBC employees saw her backing out, they told her to go to the far end of
20 the line. She testified that the experience made her feel less than a person, because
21 “everyone else could get through the queue line, order their food, and go about their
22 business” while she had to “interrupt the people who that were trying to do just that, and
23 move them out of the way so [she] could get preferred treatment.” She did not like getting
24 preferred treatment, as she wants to be treated like everybody else. Thus, she would have
25 preferred an accessible queue line. She did not try to use the queue line after that first
26 visit, but instead went off to the side.

27 After she got her order, Ms. Westbrook-White was unable to reach the drink lids,
28 and ended up having to ask an employee for help, though she would have preferred to do

1 this herself. When she tried to sit down at one of the accessible dining tables, she found
2 that the table leg made it impossible for her to get under the table. This caused her to have
3 to sit sideways to the table to eat. This is not her preferred way of eating because she
4 would like “to face [her] food like everybody else.”

5 Ms. Westbrook-White spoke with employees of Taco Bell 4518 about the issues
6 described above but got, as she described it, a “typical kid reaction – ‘Okay, ma’am,’ and
7 on about their business.”

8 5. Curtis Cone

9 Class member Curtis Cone testified by deposition. Ms. Cone uses a wheelchair.
10 She has patronized Taco Bell 4518 because it is close to an area where she shops.

11 Ms. Cone’s major difficulty at Taco Bell 4518 was the queue line, which was too
12 narrow for her wheelchair. She didn’t try to use the queue line at Taco Bell 4518 because
13 she had become stuck in a Taco Bell queue line in the past. Instead, she asked the person
14 she was with to order for her, though she does not like to do that. However, she feels that
15 if she goes to the front of the line herself, it looks like she’s cutting in front of people, which
16 she finds embarrassing and upsetting.

17 Although Ms. Cone is living temporarily in North Carolina, she testified that she will
18 probably patronize Taco Bell 4518 after she returns to the Bay Area.

19 B. Special Master

20 In 2004, the parties agreed to have Bob Evans, a Certified Access Specialist, survey
21 twenty Taco Bell restaurants as part of a “Pilot Program,” which he did in June and July
22 2004. In September 2004, the parties jointly proposed to the court that it appoint Mr. Evans
23 as a Special Master. On October 5, 2004, the court issued an order appointing Mr. Evans
24 Special Master to survey the remaining Taco Bell restaurants at issue in this action.

25 Mr. Evans is the principal of Equal Access, which specializes in all matters related to
26 accessibility. He is a licensed architect, and, as a Certified Access Specialist in California,
27 was required to pass an exam administered by the state designed to ensure that those who
28 hold themselves out as access consultants in fact know the applicable codes and

1 standards. See Cal. Gov't Code §§ 4459.5-4459.8; Cal. Code Regs. tit. 21, § 111, et seq.

2 Mr. Evans surveyed approximately 223 Taco Bell restaurants. The purpose of the
3 site visits was for Mr. Evans to use his expertise under the Department of Justice
4 Standards for Accessible Design ("DOJ Standards" or "ADAAG"), 28 C.F.R. pt. 36, app. A,
5 and Title 24 of the 2002 California Building Code ("Title 24 (2002)") to determine the
6 dimensions, values and measurements of the customer accessible elements at the
7 California Outlets under the ADAAG and/or Title 24 (2002) at the time of the site visit and to
8 make recommendations as he saw fit for bringing into compliance those elements whose
9 dimensions, values or measurements do not comply with ADAAG and/or Title 24.

10 Mr. Evans worked with an assistant, Larry Recht, to conduct the surveys in this
11 case. Mr. Evans trained Mr. Recht in conducting the Special Master survey, instructed him
12 to take photos of certain conditions in the restaurants he surveyed, and reviewed Mr.
13 Recht's field notes and photos before incorporating them into the typewritten Special
14 Master survey forms.

15 Mr. Recht surveyed Taco Bell 4518 on April 26, 2005, and the Special Master's
16 report concerning that restaurant was sent to the parties in or about June 2005. Among
17 other things, the Special Master found as follows with respect to Taco Bell 4518:

18 (1) the access aisle adjacent to the single designated accessible parking
19 space was 60 inches wide;

20 (2) the force required to open the north entry door (the primary entrance) was
21 ten pounds on the left side and seven and a half pounds on the right;

22 (3) the closing time of the north entry door was three seconds on the left and
23 two seconds on the right;

24 (4) the width of the queue line was 21 3/4 inches at the entrance, 22 1/4 to 22
25 3/8 inches along the first lane, 22 inches at the turn, and 22 to 22 1/4 inches along the
26 second lane;

27 (5) the reach range to the drink lids – which was over an obstruction – was
28 52 inches high and 28 1/4 inches laterally;

1 (6) the depth of the knee clearance at the two designated accessible tables
2 was 10 1/2 to 11 inches, and the required depth of 19 inches was obstructed by the center
3 support pole under the table;

4 (7) the maneuvering clearance at the push side of the women's restroom door
5 was four inches beyond the strike jamb; the door had a closer and a latch;

6 (8) the centerline of the water closet in the women's restroom was 20 inches
7 to the near wall;

8 (9) the height of the water closet seat in the women's restroom was 15 1/2
9 inches;

10 (10) the height of the soap dispenser in the women's restroom was 45
11 inches;

12 (11) the height of the toilet seat cover dispenser in the women's restroom was
13 52 inches;

14 (12) the height of the soap dispenser in the men's restroom was 46 inches;

15 (13) the height of the toilet seat cover dispenser in the men's restroom was
16 52 1/2 inches;

17 (14) the distance from the water closet to the far wall in the men's restroom
18 was 38 inches; a trash can obstructed that area;

19 (15) the distance from the front of the water closet to the wall in front of it in
20 the women's restroom was 46 5/8 inches; a trash can obstructed that area.

21 C. Later Conditions at Taco Bell 4518

22 In the summer of 2006, TBC retained Alianza Development International, LLC
23 ("Alianza") to serve as project manager over the modification of approximately 140
24 California corporate-owned Taco Bell restaurants that are at issue in this litigation, to
25 enhance their accessibility for individuals with mobility impairments. Alianza surveyed Taco
26 Bell 4518 in February 2007, and subsequently oversaw accessibility modifications at Taco
27 Bell 4518 between February and June 2007.

28 In 2007, Alianza stated that it had restriped the access aisle adjacent to the

1 accessible parking space to be eight feet wide; added new door closers to the double north
2 entrance doors; completely wrapped the drain pipes and hot water supply line in the men's
3 restroom; and removed the floor trash can from the women's restroom.

4 When Alianza restriped the parking space in the spring of 2007 to provide a
5 compliant van accessible space, it did not install a van accessible sign at the new space.
6 When the restaurant was surveyed by plaintiffs' experts in March 2008, there was still no
7 van accessible sign. Photographs produced by TBC show that there was no sign in the
8 summer of 2009.

9 TBC argued that these photos were taken just before a new sign was installed.
10 However, Steve Allen Elmer, TBC's Director of ADA Compliance, testified at trial that TBC's
11 maintenance vendor, Maintco, was supposed to take photos both before and after
12 performing modifications, and while there is an "after" photo of the van accessible sign from
13 the summer of 2009, TBC did not provide a photo showing that sign in 2007 or 2008.

14 Mr. Elmer's testimony demonstrates that there was no sign in place when Maintco
15 inspected Taco Bell 4518 in the summer of 2009 – that is, before it added the sign – and
16 other photos show that there had been no sign on two prior occasions approximately a year
17 apart.

18 Plaintiffs conducted site inspections attended by one or more of their retained
19 accessibility experts at approximately 180 corporate-owned Taco Bell restaurants
20 throughout the fall of 2008 and spring of 2009. Plaintiffs' accessibility expert Eric McSwain
21 – who has extensive experience surveying facilities for compliance with the ADAAG and
22 Title 24 – surveyed approximately 190 Taco Bell restaurants. Among those restaurants
23 was Taco Bell 4518, which Mr. McSwain surveyed on March 17, 2008.

24 However, in his May 1, 2009 expert report, Mr. McSwain did not address all twelve
25 of the above-listed barriers at Taco Bell 4518. Mr. McSwain's report addressed only the
26 lack of a van accessible parking sign, the door closing speed of the entrance door, whether
27 the lavatory drain pipe and hot water supply line were insulated or covered in the men's
28 restroom, and whether the loose trash can in the women's restroom posed an obstruction

1 to the clear floor space at either the water closet or toilet seat cover dispenser.²

2 When Mr. McSwain surveyed Taco Bell 4518 in March, 2008, despite the fact that
3 the north entry door closer had been replaced in 2007, the door closing time of its two
4 leaves was 2.5 seconds and 2.75 seconds, respectively.

5 When Mr. McSwain surveyed Taco Bell 4518 in March, 2008, the insulation on
6 the men's restroom lavatory pipes was gone, despite the fact that it had been replaced by
7 Alianza in 2007. Photographs produced by TBC show that there was no insulation on the
8 men's restroom lavatory pipes on several subsequent occasions in 2009.

9 Although Alianza stated that the floor trash can had been removed in the spring
10 of 2007, when Mr. McSwain surveyed Taco Bell 4518 in March 2008, it had returned to the
11 location in which the Special Master observed it to be an obstruction, and it was in that
12 same location in photographs taken in the summer and fall of 2009.

13 The van accessible parking sign, the men's restroom lavatory insulation, and the
14 trash can in the women's restroom were out of compliance in summer and fall of 2009
15 despite the fact that Mr. McSwain's report was issued on May 1, 2009, informing TBC of
16 these violations.

17 Mr. Evans surveyed Taco Bell 4518 on June 3, 2011 and did not find any of these
18 violations.

19 D. Construction and Relevant Alterations at Taco Bell 4518

20 Taco Bell Restaurant 4518 was constructed on November 18, 1991. Although the
21 building was issued a certificate of occupancy, TBC did not produce any evidence at trial
22 that it had applied for, or been granted, an unnecessary hardship or any other exemption
23 from the local building department in connection with the construction or any later
24 alterations of Taco Bell 4518 that would have excused any deviations from Title 24.

25 In addition, while TBC submitted building plans stamped by the City of San Pablo
26 Building Department, and while Mr. Elmer testified concerning the general practices of

27 _____
28 ² Prior to the trial, the court granted Taco Bell's motion in limine to exclude testimony
by Mr. McSwain of alleged barriers not enumerated in his May 1, 2009 expert report.

1 building departments concerning plan review and inspections, TBC did not offer testimony
2 from any individual with first-hand knowledge of the San Pablo Building Department's plan
3 review or inspection process with respect to Taco Bell 4518.

4 TBC admitted in its responses to plaintiffs' requests for admissions that the parking
5 lot at Taco Bell 4518 was re-striped in about 2003, and again in about 2004; and that the
6 restroom doors and the toilet in the women's restroom were removed and replaced in about
7 2003.

8 E. Readily Achievable Barrier Removal

9 Plaintiffs rely on the ADA's readily achievable barrier removal requirement for
10 two of the violations at issue in Taco Bell 4518: the door closing time of the north entry
11 doors, and the knee clearance under the two accessible dining tables surveyed in 2005.

12 Plaintiffs' expert James Terry estimated the cost (in 2001 dollars) of replacing
13 the door closer and replacing the bases of two accessible tables to achieve compliant knee
14 clearance at \$1,386.04. He testified further that because this type of modification could be
15 done while the restaurant was closed, there would be little impact on operations.

16 Plaintiffs' expert D. Paul Regan, a Certified Public Accountant, testified that it
17 would have been easily accomplishable without much difficulty or expense for TBC to have
18 incurred the cost of \$1,386.04 to replace the door closers and table bases in 2001. Mr.
19 Regan based this conclusion on an analysis of the profits from Taco Bell 4518 in 2001,
20 from all California corporate-owned restaurants, from Taco Bell Corp., and from Yum!,
21 TBC's parent corporation.

22 TBC did not offer any evidence relating to the cost, financial analysis, or impact
23 of barrier removal at Taco Bell 4518.

24 F. TBC's Access Policies

25 1. Policies in place prior to 2005

26 Mr. Elmer became Director of ADA Compliance for TBC in 2005, and he currently
27 holds that position at Yum! Brands, TBC's parent company. In September 2005, plaintiffs
28 took Mr. Elmer's Rule 30(b)(6) deposition as TBC's "person most knowledgeable" about the

1 company's practices and policies concerning accessibility of architectural features at
2 corporate restaurants in California.

3 At his 2005 deposition, Mr. Elmer testified that TBC had no policies in place to
4 monitor whether certain elements that change frequently remained in compliance with
5 accessibility requirements, including entrance and restroom door force, door closing time,
6 and restriping of parking lots.

7 Mr. Elmer also testified that Facility Leaders were responsible for a number of
8 accessibility tasks. Facility Leaders, for example, were responsible for ensuring that all
9 repairs, and all minor construction that did not rise to the level of a restaurant remodel,
10 complied with accessibility requirements. Facility Leaders were also responsible for
11 providing "informal" training to restaurant employees about accessibility.

12 Mr. Elmer testified that accessibility regulations are "highly technical, ha[ve] a
13 number of different aspects, [are] in many cases beyond the expertise level of a facilities
14 leader . . ." Nevertheless, TBC did not provide Facility Leaders with accessibility training
15 until 2005.

16 For example, Jamie de Beers, the Facility Leader for Northern California from 1997
17 to 2005, testified in her deposition that she had not received any formal accessibility
18 training until she attended an accessibility meeting in 2005. As a result, Ms. de Beers
19 testified that, prior to the 2005 meeting, she had "no clue" about various accessibility
20 requirements. She thought access regulations simply required being "able to get to the
21 counter and be served. That, to me, was access and have a parking spot. And, now, it's so
22 confusing with the inches and the height."

23 2. Policies from 2005 to present

24 Beginning in 2005, and ending in late 2010, TBC issued a series of documents
25 setting forth its accessibility policies. TBC's access policies are centralized – policies in
26 place at Taco Bell 4518 are also in place at all other California corporate Taco Bell
27 restaurants. Over time, provisions in later policies contradicted provisions in earlier
28 policies, and omitted architectural elements that had been covered by earlier policies.

1 For example, TBC's policy concerning door force changed from 8 pounds in 2005,
2 to 5 pounds in 2006, to 5 pounds or 8.5 pounds in April 2009, depending upon the
3 permitting date of a restaurant. By 2010, there were three policies in effect, each of which
4 set forth a different standard for exterior door force. TBC's "DMA Ops Leader" Erich
5 Moxley testified at trial that it was his understanding that it is TBC's policy that door opening
6 force should be 8.5 pounds regardless of when the store was built, and a form dated
7 October 2010 asks only whether the exterior doors open with 8.5 pounds of pressure or
8 less.

9 Similarly, although TBC's 2005 policy covered closing time on restroom and
10 entrance doors, Mr. Elmer testified that that issue had been omitted from TBC's 2006 and
11 2009 policies.

12 In addition, the evidence submitted at trial demonstrated that TBC had repeatedly
13 violated its own policies. For example, Mr. Elmer testified that it has been TBC's policy
14 since 2005 to have accessible signs designating accessible parking spaces. Nevertheless,
15 photographs admitted at trial demonstrated that there was no such signage at Restaurant
16 4518 in June 2007, March 2008, and the summer of 2009.

17 Mr. Elmer also testified that it has been TBC's policy since December 2006 not to
18 locate trash cans in front of restroom accessories. However, photographs admitted at trial
19 demonstrated that there was a trash can in front of the toilet seat cover dispenser in the
20 women's restroom of Restaurant 4518 in March 2008, in the summer of 2009 and at some
21 point between August and October 2009.

22 Mr. Elmer testified further that it has been TBC's policy since at least at least 2007 to
23 insulate water supply and drain pipes under restroom lavatories, yet photographs admitted
24 at trial demonstrated that the pipes under the lavatory in the men's restroom at Restaurant
25 4518 were not insulated in March 2008, in the summer of 2009, and at some point between
26 August and October 2009.

27 3. Current policies concerning maintaining access.

28 During the trial, Mr. Elmer identified four TBC policies that are intended to ensure

1 that accessibility is maintained at its restaurants: (a) the Maintenance Technician
2 Checklist; (b) Maintco surveys and the “3rd Party ADA Maintenance Vendor Checklist,”
3 which is meant to be used during the surveys; (c) “Success Walks”; and (d) Pre-Opening
4 “Access for the Disabled Walks” and the checklist of items that are supposed to be checked
5 during those walks. According to Mr. Elmer, these four policies are in place at Taco Bell
6 4518, as well as all other California corporate Taco Bell restaurants.

7 a. Maintenance Technician Checklist.

8 According to testimony from Mr. Elmer, each time a Maintenance Technician visits a
9 restaurant, he or she is supposed to check each of the 34 items listed on the ADA
10 Maintenance Technician Checklist. The Maintenance Technician for Taco Bell 4518 is
11 Doug Henry. TBC did not call Mr. Henry as a witness at trial.

12 Nevertheless, during his deposition, Mr. Henry testified that he had never seen the
13 ADA Maintenance Technician Checklist, that he did not understand what some of the items
14 on the Checklist meant, and that his standard practice was to check only five of the 34
15 items on the Checklist.

16 The ADA Maintenance Technician Checklist includes the following language in bold:
17 “If a deviation from an applicable guideline is detected following an inspection, these
18 item(s) shall be reviewed by our ADA Compliance team to determine whether certain
19 limited exceptions to the guidelines apply, which will be evaluated on an item-by-item
20 basis.”

21 b. Maintco twice-yearly surveys

22 According to Mr. Elmer, TBC has entered into a year-to-year contract with Maintco
23 to perform twice yearly surveys of its restaurants. Those surveys began in mid-2009.
24 Each time it surveys a Taco Bell restaurant, Maintco sends an invoice to TBC, and also
25 sends a completed Maintco Checklist.

26 At trial, TBC submitted invoices from Maintco for surveys of Taco Bell 4518. Based
27 on those invoices, there was no Maintco survey at Taco Bell 4518 between June 12, 2009
28 and August 3, 2010. Based on Mr. Elmer’s testimony that Maintco began its surveys of

1 Taco Bell 4518 by at least June 2009, there should be at least four, and possibly five,
2 Maintco Checklists for that restaurant. At trial, TBC submitted only two such checklists for
3 Taco Bell 4518.

4 The Maintco Checklist includes the following language in bold: “If a deviation
5 from an applicable guideline is detected following an inspection, these item(s) shall be
6 reviewed by our ADA Compliance team to determine whether certain limited exceptions to
7 the guidelines apply, which will be evaluated on an item-by-item basis.”

8 c. Success walks

9 According to Mr. Elmer, every 30 minutes, the manager in charge of a Taco Bell
10 restaurant conducts a “success walk” through the restaurant, during which “they check for
11 access for the items that the plaintiffs have raised here.” TBC did not submit the checklist
12 used for the Success Walks at trial.

13 Jeffrie Kuan-Bone, who for the last two years has been the Restaurant General
14 Manager (“RGM”) at Taco Bell 4518, testified during his deposition that success walks do
15 not address disability or ADA issues. TBC did not call Mr. Kuan-Bone as a witness at trial.

16 d. Pre-opening “Access for the Disabled Walks”

17 According to Mr. Elmer, each morning before a Taco Bell restaurant opens, the
18 manager in charge is supposed to check each of the accessibility items on Ex. A-50, the
19 “Access for the Disabled Walk.” Taco Bell RGMs were responsible for making sure that
20 these walks occurred.

21 Taco Bell did not call any employees at Taco Bell 4518 who were involved in
22 the process of opening the restaurant, or whose responsibilities included conducting the
23 preopening Access for the Disabled Walk.

24 The only Taco Bell 4518 employee to testify in person, Ms. Contreras, testified that
25 her shift started after the restaurant opened. Mr. Kuan-Bone testified during his deposition
26 that he had never heard of a disabled walk, that he had never been given a checklist with
27 specific disability issues, and that the pre-opening walk did not include any accessibility
28 issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the evidence introduced at trial and the arguments made by counsel, the court now makes the following findings of fact and conclusions of law.

A. Legal Standards

The plaintiff class brings claims under the ADA, the Unruh Act, and the CDPA, alleging violations of applicable accessibility standards throughout the class period.

1. Title III of the ADA

Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182(a).

To state a claim under Title III of the ADA, a plaintiff must show that he or she is disabled within the meaning of the ADA; that the defendant is a private entity that owns, leases, or operates a place of public accommodation; and that the plaintiff was denied public accommodation by the defendant because of his or her disability. Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc., 603 F.3d 666, 670 (9th Cir. 2010).

The class is limited to individuals who use wheelchairs or scooters, and thus plaintiffs satisfy the first element. It is undisputed that the Taco Bell restaurants are places of public accommodation, which satisfies the second element. See 42 U.S.C. § 12181(7)(B).

The third element – whether plaintiffs were denied public accommodations on the basis of disability – is met if there was a violation of applicable accessibility standards. See, e.g., Chapman v. Pier 1 Imports (U.S.), Inc., 631 F.3d 939, 945 (9th Cir. 2011); Donald v. Cafe Royale, 218 Cal. App. 3d 168, 183 (1990).

There are three categories of accessibility requirements under Title III of the ADA – the “new construction” provisions, which apply to public accommodations constructed after January 26, 1993; the “alteration” provisions, which apply to post-January 26, 1992 alterations to buildings that existed as of that date; and the “readily achievable” provisions,

1 which apply to unaltered portions of buildings constructed before January 26, 1993.

2 All facilities built for first occupancy after January 26, 1993 are required to be “readily
3 accessible to and usable by persons with disabilities, except where an entity can
4 demonstrate that it is structurally impracticable to meet the requirements of the ADAAG, 28
5 C.F.R. pt. 36, app. A. See 42 U.S.C. § 12183(a)(1). All facilities built for first occupancy
6 after January 26, 1993 must comply with the ADAAG. 28 C.F.R. § 36.406.

7 Because Taco Bell 4518 was constructed in 1991, it is not governed by the “new
8 construction” provisions of Title III. However, both the “alteration” and the “readily
9 achievable” provisions do apply. Under the “alteration” provisions, the altered portion of
10 any existing building altered after January 26, 1992 is required, to the maximum extent
11 feasible, to be “readily accessible to and useable by” individuals with disabilities. 42 U.S.C.
12 § 12183(a)(2). To meet this standard, alterations must comply with the ADAAG. 28 C.F.R.
13 § 36.406(a).

14 In existing but unaltered facilities, barriers must be removed where it is “readily
15 achievable” to do so. The removal of barriers is “readily achievable” when it is “easily
16 accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C.
17 §§ 12181(9), 12182(b)(2)(A)(iv). The Ninth Circuit has not decided whether the plaintiff or
18 the defendant bears the burden of proof in showing that removal of an architectural barrier
19 in a non-historic building is readily achievable, but various district courts throughout the
20 Circuit have applied the burden-shifting framework set forth in Colorado Cross Disability
21 Coalition v. Hermanson Family Ltd. Partnership I, 264 F.3d 999 (10th Cir. 2001). See, e.g.,
22 Johnson v. Beahm, 2011 WL 3665114 at *2 (E.D. Cal. Aug. 19, 2011); Vesecky v. Garick,
23 Inc., 2008 WL 4446714, at *2 (D.Ariz. Sept. 30, 2008).

24 In Colorado Cross, the Tenth Circuit held that the “[p]laintiff bears the initial burden
25 of production to present evidence that a suggested method of barrier removal is readily
26 achievable” and that if plaintiff meets that burden, the burden shifts to the defendant, who
27 “bears the ultimate burden of persuasion regarding its affirmative defense that a suggested
28 method of barrier removal is not readily achievable.” Id., 264 F.3d at 1006.

1 Under either the “alterations” or “readily achievable” provision, whether an
2 architectural element denies full and equal access to persons with disabilities is determined
3 based on the ADAAG. Chapman, 631 F.3d at 945.

4 2. The Unruh Act and the CDPA

5 The Unruh Act and the CDPA prohibit discrimination on the basis of disability in the
6 full and equal access to the services, facilities, and advantages of public accommodation.
7 Public accommodations constructed subsequent to July 1, 1970 are subject to the
8 requirements of Division 13, Part 5.5 of the California Health & Safety Code, relating to
9 access to public accommodations by physically handicapped persons; and to the
10 provisions of Chapter 7 (commencing with § 4450) of Division 5 of Title 1 of the California
11 Government Code (access to public buildings by physically handicapped persons).

12 Since December 31, 1981, the standards governing the physical accessibility of
13 public accommodations in California include those set forth in Title 24 of the California
14 regulatory code (“California standards” or “Title 24”). The California Standards apply to all
15 alterations to facilities, requiring that the altered portion – including a primary entrance to a
16 building, the primary path of travel to the altered portion of the facility, and restrooms
17 serving the altered area – be brought into compliance with the then-applicable standards.
18 See Cal. Code Regs., tit. 24 (1981) § 2-105(b)(11)(B)(4); id. (1984) § 2-105(b)(11)(B)(4); id.
19 (1987) § 2-110(b)(11)(B)(4); id. (1989) § 110A(b)(11)(B)(4); id. (1994) § 110(11)(B)(4); id.
20 (1989) § 1134B.2.1.

21 Because Taco Bell 4518 was constructed in 1991, all elements must comply with
22 Title 24, and the applicable standards are those promulgated in 1989. Cal. Code Regs., tit.
23 24 (1989). Title 24 also applies to alterations, requiring that the altered portion be brought
24 into compliance with the then-applicable standards. See id. (1989) § 110A(b)(11)(B)(4); id.
25 (2002) § 1134B.2.

26 A violation of the standards in Title 24 constitutes a violation of both the Unruh Act
27 and the CDPA. See, e.g., Arnold v. United Artists Theater Circuit, Inc., 866 F.Supp. 433,
28 439 (N.D. Cal. 1994). In addition, the Unruh Act, since 1992, and the CDPA, since 1996,

1 have also provided that “[a] violation of the right of any individual under the [ADA] . . .
2 constitute[s] a violation of this section.” Cal. Civ. Code §§ 51(f), 54(c).

3 3. Maintenance of accessible features

4 Both the ADA and state law require TBC to “maintain in operable working condition
5 those features of facilities and equipment that are required to be accessible to and usable
6 by persons with disabilities. 28 C.F.R. § 36.211; Cal. Code Regs., tit. 24 (2002) § 1101B.3.

7 B. Standing

8 TBC argues that because it has remediated the numerous barriers found by the
9 Special Master and plaintiff’s expert, and because it has implemented new policies since
10 the filing of this lawsuit, plaintiffs have no standing to seek injunctive relief, which is the only
11 remedy available to private parties for violations of the ADA.

12 Standing is a threshold matter central to the court’s subject matter jurisdiction.

13 Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007); see also Summers v.
14 Earth Island Inst., 555 U.S. 488, 129 S.Ct. 1142, 1148 (2009) (Article III limits judicial power
15 to “cases” and “controversies”). Constitutional standing has three elements. To establish
16 standing, a plaintiff must show that he or she has suffered or is threatened with an injury
17 that is both “concrete and particularized,” and “actual or imminent, not conjectural or
18 hypothetical;” that there is a causal link between the injury and the conduct of which the
19 plaintiff complains – that is, that the injury is “fairly traceable” to the challenged conduct;
20 and that the injury is “likely” to be “redressed by a favorable decision.” Bates, 511 F.3d at
21 985 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quotations
22 omitted)); see also Skaff v. Meridien North America Beverly Hills, LLC, 506 F.3d 832, 837
23 (9th Cir. 2007).

24 The evidence relevant to the standing inquiry consists of “the facts as they existed at
25 the time the plaintiff filed the complaint.” D’Lil v. Best Western Encina Lodge & Suites, 538
26 F.3d 1031, 1036 (9th Cir. 2008) (quoting Skaff, 506 F.3d at 838); see also Lujan, 504 U.S.
27 at 569 n.4. A plaintiff must demonstrate standing for each form of relief sought. Friends of
28 the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc., 528 U.S. 167, 185 (2000);

1 Bates, 511 F.3d at 985. In a class action, standing is satisfied if at least one named plaintiff
2 meets the requirements. Armstrong v. Davis, 275 F.3d 849, 860 (9th Cir. 2001), abrogated
3 in part on other grounds by Johnson v. California, 543 U.S. 499, 504-05 (2005).

4 Under the ADA, when a disabled person encounters an accessibility barrier violating its
5 provisions, it is not necessary for standing purposes that the barrier completely preclude
6 the plaintiff from entering or from using a facility in any way. See Doran v. 7-Eleven, Inc.,
7 524 F.3d 1034, 1041 n. 4 (9th Cir. 2008) (the ADA “does not limit its antidiscrimination
8 mandate to barriers that completely prohibit access”). Rather, the barrier need only
9 interfere with the plaintiff’s “full and equal enjoyment” of the facility. 42 U.S.C. § 12182(a).

10 Once a disabled individual has encountered or become aware of ADA violations that
11 interfere with his access to a place of public accommodation, “he has already suffered an
12 injury in fact traceable to the defendant’s conduct and capable of being redressed by the
13 courts, and so he possesses standing under Article III.” Doran, 524 F.3d at 1042 n.5.

14 In addition, an ADA plaintiff who has Article III standing as a result of at least one
15 barrier at a place of public accommodation may, in one suit, challenge all barriers in that
16 public accommodation that are related to his or her specific disability. Chapman, 631 F.3d
17 at 950-51 (citing Doran, 524 F.3d at 1047). Thus, a plaintiff need not have encountered all
18 the barriers that impede his or her access in order to have standing to seek an injunction to
19 remove those barriers. Id. at 951-53. In addition, in evaluating whether a civil rights litigant
20 has satisfied the requirements set forth in Lujan, the court should take a broad view of
21 standing, “especially where, as under the ADA, private enforcement suits are the primary
22 method of obtaining compliance with the Act.” Doran, 524 F.3d at 1039-40 (citation and
23 quotation omitted).

24 Here, TBC does not argue that plaintiffs lacked standing at the time the original
25 complaint was filed in 2002. Indeed, testimony at trial established that in 2002, named
26 plaintiff Katherine Corbett personally encountered barriers at Taco Bell 4518, which
27 impaired her full and equal enjoyment of the facility due to her particular disability – as did
28 other members of the class. Thus, Corbett and the class members had standing to sue as

1 to those barriers in addition to other barriers related to their disability. See Chapman, 631
2 F.3d at 944.

3 However, because “a disabled individual claiming discrimination must satisfy the
4 case or controversy requirement of Article III by demonstrating his standing to sue at each
5 stage of the litigation,” Chapman, 631 F.3d at 946, TBC argues that plaintiffs do not
6 currently have standing to seek injunctive relief. In the alternative, TBC asserts that
7 because Taco Bell 4518 is currently compliant, plaintiffs’ claims have become moot.

8 The argument that plaintiffs do not currently have standing to seek injunctive relief
9 appears to be a challenge to the second prong of the “injury in fact” requirement – the
10 requirement that the injury be “actual or imminent” – or, possibly, to the “redressability”
11 requirement – the requirement that the injury is likely to be redressed by a favorable
12 decision. See Lujan, 504 U.S. at 560-61.

13 When a plaintiff is seeking injunctive relief, the requirement that the injury be “actual
14 and imminent” can be satisfied only where the plaintiff demonstrates “a sufficient likelihood
15 that he will again be wronged in a similar way;” that is, he “must establish a real and
16 immediate threat of repeated injury.” D’Lil, 538 F.3d at 1036-37; Bates, 511 F.3d at 985;
17 see also Chapman, 631 F.3d at 946, 948. Here, TBC argues, because plaintiffs have
18 conceded that Taco Bell 4518 is currently a compliant facility, they lack standing to seek
19 injunctive relief because they cannot show that the injury is likely to recur.

20 In Armstrong, the Ninth Circuit described two ways in which a plaintiff can show that
21 an injury is likely to recur. First, a plaintiff may show that the defendant had, at the time of
22 the injury, a written policy, and that the injury “stems from” that policy. Id., 275 F.3d at 861.
23 “[W]here the harm alleged is directly traceable to a written policy, there is an implicit
24 likelihood of its repetition in the immediate future.” Id. (citation and quotation omitted).
25 Second, the plaintiff may demonstrate that the harm is part of a “pattern of officially
26 sanctioned . . . behavior, violative of the plaintiffs’ [federal] rights.” Id. (quoting LaDuke v.
27 Nelson, 762 F.2d 1318, 1323 (9th Cir. 1985)). “[W]here the defendants have repeatedly
28 engaged in the injurious acts in the past, there is a sufficient possibility that they will

1 engage in them in the near future to satisfy the ‘realistic repetition’ requirement.” Id.

2 Later, in Chapman, the Ninth Circuit identified additional ways in which a plaintiff can
3 show a likelihood of future injury. First, he can demonstrate an intent to return to a
4 noncompliant accommodation. Id., 631 F.3d at 948-49. Evidence of past injury is
5 particularly relevant to making this showing. Id. Second, he can demonstrate that he was
6 deterred from visiting a noncompliant accommodation because he has encountered
7 barriers related to his disability there. Id. at 949-50.

8 TBC contends that because Taco Bell 4518 is currently compliant, plaintiffs cannot
9 establish standing to pursue injunctive relief by demonstrating an intent to return to a
10 noncompliant facility. TBC asserts further that the trial record is devoid of any evidence
11 indicating that named plaintiff Katherine Corbett had the specific intention to return to Taco
12 Bell 4518 to re-encounter the noncompliant barriers that she encountered during her pre-
13 lawsuit visit to Taco Bell 4518.

14 The court finds, however, that plaintiffs have standing to seek injunctive relief in this
15 case. First, named plaintiff Ms. Corbett, and class members Ms. Harry, and Ms.
16 Westbrook-White, all testified at trial that they plan to patronize Taco Bell 4518 in the
17 future. In her deposition, class member Ms. Cone also testified that she plans to patronize
18 Taco Bell 4518 once she has returned to California from her temporary stay in North
19 Carolina. Whether plaintiffs will encounter barriers on those return trips cannot be known
20 with certainty. However, the court finds that plaintiffs have sufficiently established a
21 likelihood that the injury will recur by showing that TBC “repeatedly engaged in injurious
22 acts in the past.” See Armstrong, 275 F.3d at 861.

23 Finally, to the extent that TBC argues that the court lacks jurisdiction over plaintiffs’
24 claims because the violations have been remediated, and the claims are therefore moot,
25 the court notes that while the doctrine of mootness requires that an actual, ongoing
26 controversy exist at all stages of the federal court proceeding, the mootness doctrine is
27 “applied . . . flexibly, particularly where the issues remain alive.” Pitts v. Terrible Herbst,
28 Inc., ___ F.3d ___, 2011 WL 3449473 at *3 (9th Cir., Aug. 9, 2011). This issue is addressed,

1 below, in the discussion of TBC's voluntary cessation defense.

2 C. Findings regarding twelve elements at Taco Bell 4518

3 Both the ADAAG and Title 24 provide that "all dimensions are subject to
4 conventional building industry tolerances for field conditions." ADAAG § 3.2; see also, e.g.,
5 Cal. Code Regs., tit. 24 (2002) § 1101B.4. In this case, the parties stipulated in their
6 February 1, 2005 Joint Status Conference Statement that once plaintiffs had established a
7 prima facie case of a violation, TBC would bear the burden of proof to put on expert
8 testimony regarding applicable conventional building industry tolerances. The parties
9 subsequently stipulated to a number of specific tolerances, and TBC provided others in
10 responses to interrogatories. The only elements not covered by either stipulations or
11 interrogatory responses are door force, door closing time, and knee clearance.

12 Following the exemplar trial, and the parties' submission of their proposed findings,
13 TBC submitted additional argument to the court, in which it asserts that based on the Ninth
14 Circuit's recent decision in Oliver v. Ralph's Grocery Company, ___ F.3d ___, 2011 WL
15 3607014 (9th Cir., Aug. 17, 2011), any findings by the court in this action with respect to
16 barriers that violate the ADA must be limited to specific barriers alleged in the first amended
17 complaint ("FAC"), which is the operative complaint. TBC contends that because the FAC
18 identified only two barriers at Taco Bell 4518 – the narrow queue line and inaccessible
19 parking – plaintiffs failed to give TBC "fair notice" of the claims asserted against it, as
20 required under Federal Rule of Civil Procedure 8(a).

21 The court does not agree that Oliver controls this case. As an initial matter, Oliver is
22 distinguishable because it was not a class action. To apply the reasoning in Oliver to a
23 class action would arguably vitiate Federal Rule of Civil Procedure 23. While the named
24 plaintiffs know which barriers they encountered, they do not necessarily know which of the
25 barriers that existed at the time the suit was filed posed a problem for the unnamed class
26 members. At most, Oliver would require the named plaintiffs to list the barriers they
27 themselves encountered, which they have done.

28 Nor does the court agree that plaintiffs failed to give TBC notice of the specific

1 claims asserted against it. This case, which was filed in December 2002, has been
2 pending for nearly nine years. TBC took the depositions of the named plaintiffs in 2003, at
3 which time the plaintiffs described encountering the following barriers: inaccessible
4 parking, inadequate parking signage, path of travel to entry doors, heavy and otherwise
5 inaccessible entry and restroom doors, narrow queue lines, inaccessible self-service items,
6 insufficient accessible seating, low toilet seats, uninsulated lavatory pipes, and inaccessible
7 restroom amenities. TBC acknowledged many of these claimed barriers in its opposition to
8 plaintiffs' motion for class certification.

9 TBC was also put on notice of the claimed barriers when it received the report of
10 Bob Evans, the Special Master, in mid-2005. Mr. Evans is an accessibility expert who was
11 jointly retained by plaintiffs and TBC to conduct a survey of all the Taco Bell restaurants
12 (starting with a pilot program of 20 stores). He was instructed jointly by the parties as to
13 which elements he should survey in each restaurant. It is undisputed that Mr. Evans
14 provided a complete survey of all the barriers existing in TBC's corporate restaurants in
15 2004-2005. Many of the barriers were also documented by plaintiffs' own expert Eric
16 McSwain in his May 2009 report, to which TBC provided a line-by-line response, and by
17 TBC's contractors in 2007 and 2009. For TBC to argue, based on the facts in Oliver, that it
18 was not placed on notice of the claimed violations because not all the barriers were listed in
19 the FAC, is to elevate form over substance.

20 Moreover, when it denied TBC's 2009 motion for summary judgment, the court
21 ordered an exemplar trial as to a single store, and ordered plaintiffs to submit a list showing
22 remediated, unremediated, and recurring violations, which plaintiffs did on June 23, 2010.
23 Further, in preparation for the trial of the exemplar store, the parties filed a Joint Pretrial
24 Statement on April 7, 2011, in which plaintiffs listed the barriers at Taco Bell 4518, relying
25 on their June 23, 2010 filing. At the pretrial conference, TBC objected and attempted to
26 limit the barriers, but the objection was overruled, on the basis that TBC had been on notice
27 for a year (since June 23, 2010) of all the barriers, including those at Taco Bell 4518.

28 The court indicated that the barriers listed on pages 29 and 30 of the Pretrial

1 Statement would be the ones that would be tried during the exemplar trial. Pleadings are
2 superceded by a pretrial order, see DP Aviation v. Smiths Indus. Aerospace & Def. Sys.
3 Ltd., 268 F.3d 829, 842 (9th Cir. 2001), and parties are therefore held to be on notice that
4 issues set forth in a pretrial order are the issues to be tried.

5 1. Van accessible parking space

6 Wheelchair vans generally have lifts or ramps that fold out of the passenger side;
7 thus, they require a wider access aisle to permit the user to wheel down and then off the lift
8 or ramp, and then to retract the lift or ramp into the van. See United States Dep't of
9 Justice, ADA Technical Assistance, Design Details: Van Accessible Parking ("Design
10 Details"), <http://www.ada.gov/adata1.pdf> at 15.

11 Although the 1989 version of Title 24 did not require van accessible spaces,
12 both the ADAAG and Title 24 (2002) require that one out of every eight spaces be van
13 accessible, defined as an accessible space adjacent to a 96-inch-wide access aisle.
14 ADAAG § 4.1.2(5)(b); Cal. Code Regs., tit. 24 (2002) § 1129B.3.2. Because the parking lot
15 at Taco Bell 4518 was restriped in 2003 and 2004, the alterations provisions of both laws
16 required that TBC bring the parking lot into compliance with the ADAAG and Title 24.

17 The Special Master measured the access aisle at 60 inches in 2005. The parties
18 have stipulated that the ADAAG tolerance for the width of the access aisle is 94 inches,
19 and TBC stated in interrogatory responses that the same tolerance applies under Title 24.
20 The access aisle is thus out of compliance with the ADAAG and Title 24 (2002).

21 TBC argues that restriping is not an alteration sufficient to invoke the requirement
22 that it provide a van accessible space with required access aisle. However, the Special
23 Master testified that each time the parking lot was restriped constituted an alteration and
24 TBC was thus required to comply with the ADAAG and Title 24 (2002). In addition, the
25 Department of Justice has provided specific technical assistance stating that, "[i]f you
26 restripe the parking area, you must restripe so that you provide the correct number of
27 accessible parking spaces, including van accessible parking." Design Details,
28 <http://www.ada.gov/adata1.pdf> at 17. Because van accessible parking is defined as a

1 parking space with a 96-inch access aisle, ADAAG § 4.1.2(5)(b), TBC was required to
2 provide such an aisle.

3 TBC also relies on Title 24(2002) § 1134B.2.1, Exception 4, which excepts from the
4 alterations requirement “cosmetic work that does not affect items regulated by this code,
5 such as painting.” However, parking striping is an “item regulated by” Title 24, and thus
6 cannot be considered merely cosmetic.

7 Because the parking lot was restriped in 2003 and 2004, and because the Special
8 Master found that the access aisle at the single van accessible parking space was 60
9 inches wide in 2005, the van accessible parking access aisle was in violation of the ADA
10 and state access laws.

11 2. Van accessible parking signage

12 Both the ADAAG and Title 24 (2002) require signage identifying van accessible
13 parking spaces. ADAAG § 4.6.4; Cal. Code Regs, tit. 24 (2002) § 1129B.4. Although there
14 was a van accessible sign in place at Taco Bell 4518 when it was surveyed by the Special
15 Master in 2005, a sign was not installed when the original 60-inch aisle was restriped to
16 create a compliant van accessible space in 2007. It appears that no sign was installed until
17 the summer of 2009.

18 TBC was required to maintain access and failed to do so by removing the van
19 accessible sign. In addition, because TBC altered the van accessible signage by removing
20 it after 2002, it was required by the ADAAG and 2002 version of Title 24 to reinstall
21 compliant signage. The fact that it did not do so until 2009 was a violation of the ADA and
22 state access laws.

23 3. North entry door force

24 Title 24 places a limit on the amount of force required to open an exterior door. In
25 1989, the maximum door force was 8 1/2 pounds. Cal. Code Regs, tit. 24 (1989)
26 § 3304(i.2)(1). The Special Master found in 2005 that the force required to open the north
27 entry double door at Taco Bell 4518 was 10 pounds on the left, and 7 1/2 pounds on the
28 right.

1 In the August 2007 summary judgment order, the court applied a one-pound
2 tolerance and concluded that the door at Taco Bell 4518 was non-compliant. The court
3 also held, however, that with respect to restaurants built before 1994, only the “primary
4 entrance” was required to comply. TBC has since stipulated that the door in line 209 of the
5 Special Master’s survey for restaurant 4518 is the “primary entrance.” Based on the above,
6 the court finds that the north entry door was out of compliance with the new construction
7 standard in the 1989 version of Title 24.

8 TBC argues that it is difficult to adjust door force so that it is compliant. Although
9 the fact that the north entry door was out of compliance with the 1989 standard was
10 resolved by the court in its August 2007 summary judgment decision, it is also true that the
11 fact that it is difficult to comply with a law does not make it legal to violate it. TBC’s expert
12 testified at trial that, if the door pressure standard were difficult to meet, TBC had the option
13 of installing an automatic door opener, an option he has “suggested . . . many times,” and
14 the applicable 1989 version of Title 24 states that “[c]ompensating devices or automatic
15 door operators may be utilized to meet the above standards.” Cal. Code Regs, tit. 24
16 (1989) § 3304(i.2)(l).

17 TBC argues that equivalent facilitation is established by the fact that the right door of
18 the two-door entry complied with the 1989 Standard. The court finds, however, that
19 because the right door leaf did not comply with the applicable door timing standard, the
20 door as a whole was noncompliant. It would be unreasonable to require a wheelchair-
21 bound patron who encounters a door too heavy to open to try the adjacent door rather than
22 assume that it too would likely be noncompliant.

23 4. North entry door closing time.

24 The ADAAG and Title 24 (since 2002) require that doors take at least three seconds
25 to close. ADAAG § 4.13.10; Cal. Code Regs. tit. 24 (2002) §1133B.2.5.1. The door closing
26 time of the right-side door of the north entry was 2 seconds when measured by the Special
27 Master in 2005. TBC has stated in interrogatory responses that the tolerance on door
28 closing time should be 2.5 seconds.

1 The Special Master's measurement of 2 seconds in 2005 shows that the north entry
2 door was out of compliance with the ADAAG. Because the ADAAG's door closing standard
3 was not in effect when Taco Bell 4518 was built, plaintiffs rely on the ADA's readily
4 achievable provision to argue that TBC should have replaced the door closer by 2001 – the
5 beginning of the class period – to achieve a compliant door closing time.

6 Plaintiffs have made a sufficient showing that replacing the door closers was readily
7 achievable in 2001. TBC contends that plaintiffs put on evidence only as to cost, and did
8 not address the other factors in 42 U.S.C. § 12181(9). However, plaintiff also presented
9 expert evidence of the impact on operations, and an expert analysis of the cost in light of
10 TBC's profits at several different levels, from the individual store to the parent corporation.
11 This court finds this evidence sufficient, even under the more stringent Colorado Cross
12 standard, to shift the burden to TBC to demonstrate that it was not readily achievable to
13 replace the door closers.

14 TBC made no effort to satisfy its burden. Plaintiffs' evidence concerning costs,
15 finances, and impact on operations was un rebutted. The court holds that it was readily
16 achievable in 2001 to replace the north entry door closers. As a result, the right leaf of the
17 door was in violation of applicable standards in 2005.

18 TBC installed new door closers on the north entry doors in 2007. The door closing
19 time would subsequently have had to comply with the ADAAG and 2002 Title 24 standards
20 requiring a minimum of 3 seconds. However, when Taco Bell 4518 was surveyed by Mr.
21 McSwain in 2008, the door closing times for the leaves of the north entry door were 2.5
22 seconds and 2.75 seconds. This does not comply with Title 24 or the ADAAG.

23 Although Mr. McSwain's measurements are within the tolerance stated in TBC's
24 interrogatory, plaintiffs assert that these measurements are out of compliance. Despite
25 having the burden to do so, TBC did not put on expert testimony concerning the
26 appropriate tolerances for door closing time.

27 Mr. Terry testified that construction tolerances would not apply to door closing
28 speed, as it is adjustable and thus required to be maintained to be accessible. TBC did

1 not rebut this testimony.

2 Because allowable tolerances must be based on “conventional building industry
3 tolerances for field conditions,” ADAAG § 3.2; Cal. Code Regs., tit. 24 (2002) § 1101B.4,
4 TBC’s general references to the effect of wind and ventilation, or the difficulty of
5 compliance, are insufficient to meet its burden of proof. Moreover, as wind and ventilation
6 would affect any building’s exterior door, those factors cannot serve as an excuse for
7 noncompliance.

8 Based on the above, the court holds that the door closing times were in violation of
9 applicable standards.

10 5. Queue line

11 The court has already held that the queue line at Taco Bell 4518 violated the
12 new construction provisions of Title 24. In granting summary judgment on this issue, the
13 court held that TBC – relying on Mr. Blackseth’s declaration – had raised a triable issue of
14 fact as to whether the separate auxiliary access was discriminatory. This question is
15 addressed below, in the discussion of TBC’s defense of equivalent facilitation.

16 6. Reach range for drink lid dispenser

17 Both Title 24 and the ADAAG govern the location of objects that wheelchair users
18 must be able to reach from their wheelchairs. If the individual is able to pull up immediately
19 next to the object, he can reach higher than if he is required to reach laterally over an
20 obstruction.

21 In 2005, the Special Master established that the reach range to the drink lids at Taco
22 Bell 4518 was over an obstruction, but required a reach up of 52 inches and a lateral reach
23 of 28 1/4 inches. As noted below, the ADA applies only to equipment that is fixed or built
24 into the structure of the facility. However, because the 1989 version of Title 24 limits
25 reaches over obstructions to 46 inches in height and 24 inches laterally, Cal. Code Regs.
26 tit. 24 (1989) § 522(c) & Fig. 5-5D, the reach to the drink lids was out of compliance.

27 TBC has stated in interrogatory responses that, at a height of 52 inches, the
28 tolerance on the maximum lateral reach over an obstruction should be 15 inches, and on

1 the maximum lateral reach overall should be 25 inches. TBC argues that the 1989 version
2 of Title 24 did not govern the height of the object over which one is reaching. See Cal.
3 Code Regs., tit. 24 (1989) Fig. 5-5D. While true, this does not render the drink lid location
4 as compliant. That same figure set limits on the height and lateral reach, and the
5 placement of the lids did not comply with these standards.

6 7. Knee and toe clearance at accessible tables³

7 The ADAAG provides minimum dimensions for the clearance under an accessible
8 dining table so that the legs and toes of a person in a wheelchair can fit under the table.
9 Among other things, the knee space is required to be 19 inches deep from the front of
10 the table. ADAAG § 4.32.3.

11 The knee clearance at two designated accessible tables was 10 1/2 to 11 inches
12 when measured by the Special Master in 2005. Because the ADAAG's knee clearance
13 standard was not in effect when Taco Bell 4518 was built, plaintiffs rely on the ADA's
14 readily-achievable provision to argue that TBC should have replaced the two table bases by
15 2001 – the beginning of the class period – to achieve a compliant knee clearance.

16 The parties stipulated to a tolerance for the depth of the knee clearance under
17 dining tables – 18 inches – but this applies only to new construction and alterations under
18 the ADAAG, while plaintiffs here apply the ADAAG under the readily-achievable provision.
19 TBC did not provide evidence of an appropriate tolerance for the depth of knee clearance
20 under the readily achievable provision. Plaintiffs' expert Mr. Terry testified that no
21 construction tolerance applies to knee clearance depth. TBC did not rebut this testimony.

22 Plaintiffs made a sufficient showing that replacing two table bases was readily
23 achievable in 2001. Again, TBC argues that plaintiffs put on only evidence as to cost, and
24 did not address the other factors in § 12181(9). The court notes, however, that plaintiffs
25 also put on expert evidence of the impact on operations, and an expert analysis of the cost
26 in light of TBC's profits at several different levels, from the individual store to the parent

27
28 ³ The court has already ruled that Taco Bell 4518 did not have a sufficient number of
accessible dining tables for the number of seats in the restaurant.

1 corporation. This court finds that this evidence is sufficient, even under the more stringent
2 Colorado Cross standard, to shift the burden to TBC to demonstrate that it was not readily
3 achievable to replace the table bases.

4 TBC made no effort to satisfy its burden. Plaintiffs' evidence concerning costs,
5 finances and impact on operations was un rebutted. The court finds that it was readily
6 achievable in 2001 to replace the bases of two designated accessible tables.

7 8. Maneuvering clearance at women's restroom door

8 The ADAAG and the 2002 version of Title 24 require maneuvering clearances on
9 either side of a door. A push door that has a closer and a latch must have an additional
10 space of 12 inches to the side of the door with the latch hardware, providing space for the
11 wheelchair-user's feet as he or she reaches for the door handle. Cal. Code Regs. tit. 24
12 (2002) § 1133B.2.4.2 & Fig. 11B-26A(a); ADAAG § 4.13.6 & Fig. 25(a). TBC has stated in
13 interrogatory responses that the tolerance for this requirement should permit a minimum of
14 8 inches.

15 According to the Special Master's survey, the women's restroom door had a closer
16 and latch, but had a space of only 4 inches to the side of the door. All that was required to
17 bring the door into compliance was to remove the latch. Plaintiffs were not requesting that
18 TBC reconfigure the door to add eight inches to the latch side, and the Special Master
19 testified that replacing the latch remedied plaintiffs' concerns with the women's restroom
20 door maneuvering clearance.

21 Because the restroom doors were replaced in 2003, the new doors were required to
22 comply with the 2002 version of Title 24, which would have required that the new door not
23 have a latch. The Special Master testified that if the restroom doors were replaced in 2003,
24 the 2002 version of Title 24 and the ADAAG would have applied during the Special Master
25 survey in 2005. Thus, when the Special Master survey recorded the door as having a latch
26 and closer with only 4 inches of maneuvering clearance in 2005, it was out of compliance.

27 9. Height and position of water closet in women's restroom

28 The version of Title 24 in effect when Taco Bell 4518 was built required that the

1 water closet seat be between 17 and 19 inches in height. Cal. Code Regs tit. 24 (1989)
2 § 1502. TBC has stated in interrogatory responses that the proper tolerance for this
3 requirement would permit a range of 16 to 20 inches. According to the Special Master's
4 survey, the water closet seat in the women's restroom was 15 1/2 inches high. As such,
5 the dimensions measured by the Special Master violated the new construction standards of
6 Title 24 applicable when Taco Bell 4518 was built.

7 The ADAAG and the 2002 version of Title 24 require that the centerline of the water
8 closet be 18 inches from the near wall. ADAAG § 4.16.2 & Fig. 28; Cal. Code Regs. tit. 24
9 (2002) § 1115B.7.2. According to the Special Master's survey, the centerline of the water
10 closet in the women's restroom was 20 inches from the near wall. The parties have
11 stipulated that the ADAAG tolerance for the position of centerline of the water closet is 16
12 to 19 inches.

13 Because the women's restroom water closet was replaced in 2003, the new water
14 closet was required to comply with the ADAAG and 2002 version of Title 24, which required
15 that the centerline be 18 inches from the near wall. The Special Master testified that if
16 water closet in women's restroom was replaced in 2003, the 2002 version of Title 24 and
17 the ADAAG would have applied during the Special Master survey in 2005. Thus, when the
18 Special Master survey recorded the centerline measurement as 20 inches in 2005, it was
19 out of compliance.

20 10. Clear floor space at water closet

21 The version of Title 24 in effect when Taco Bell 4518 was built required TBC to
22 provide a "clear space" of 32 inches to the side of the water closet, and 48 inches in front of
23 the water closet. Cal. Code Regs tit. 24 (1989) § 511.1(a)(8). In both the men's and
24 women's restroom, the clear space at the water closet complies with the applicable
25 standards as an architectural matter. When surveyed by the Special Master, however,
26 these required clear spaces were obstructed by moveable trash cans. Furthermore,
27 despite the fact that Alianza reported that it removed the movable trash can from the
28 women's restroom in 2007, the trash can had been returned to the precise place observed

1 by the Special Master when it was surveyed by plaintiffs' expert in March, 2008, and again
2 in photographs from TBC on two occasions in 2009.

3 TBC does not dispute that there were moveable trash cans in the required clear
4 space; rather, it argues that this does not constitute a violation because the ADAAG does
5 not apply to moveable objects and therefore permits a moveable trash can in the required
6 clear floor space. However, plaintiffs do not rely on the ADAAG to support their claim
7 regarding this element. TBC has not provided any evidence or citations to the effect that
8 Title 24 would permit obstructions in required "clear space." Indeed, TBC's expert
9 concedes that a removable trash can "could be a barrier" . . . "depend[ing] upon how big
10 the trash can is or where it's placed."

11 In addition, with regard to whether the ADAAG permits moveable trash cans to
12 obstruct required clear floor space, the court notes that DOJ regulations implementing Title
13 III require that a public accommodation "maintain in operable working condition those
14 features of facilities and equipment that are required to be readily accessible to and usable
15 by persons with disabilities." 28 C.F.R. § 36.211(a).

16 In the DOJ's interpretation – which is entitled to deference – this regulation
17 recognizes that it is not sufficient to provide features such as accessible routes, elevators,
18 or ramps, if those features are not maintained in a manner that enables individuals with
19 disabilities to use them. See Guidance on ADA Regulation on Nondiscrimination on the
20 Basis of Disability by Public Accommodations and in Commercial Facilities. originally
21 published on July 26, 1991, 28 C.F.R. Pt. 36, App. C (Mar. 15, 2011). While isolated or
22 temporary obstructions are not prohibited, allowing obstructions to persist or "[f]ailure . . . to
23 ensure that accessible routes are properly maintained and free of obstructions . . . would
24 also violate this part." Id. The 2002 version of Title 24 contained language similar to 28
25 C.F.R. § 36.211(a). See Cal. Code Regs. tit. 24 (2002) § 1101B.3.1.

26 And while it is true that the Access Board drafted the ADAAG to apply to fixed
27 elements, see Colorado Cross-Disability Coalition v. Too (Delaware), Inc., 344 F. Supp. 2d
28 707, 712 (D. Colo. 2004), the ADAAG also clearly governs – and requires – clear floor

1 space in restrooms. See, e.g., ADAAG § 4.22.3. “Clear floor space” is defined by the
2 ADAAG as “[t]he minimum unobstructed floor or ground space required to accommodate a
3 single, stationary wheelchair and occupant.” Id. § 3.5.

4 TBC’s expert Kim Blackseth conceded that a moveable trash can could be a barrier,
5 but testified that he believed that TBC’s trash cans were not barriers because they were
6 lightweight, and he could move them with his feet. However, TBC provided no evidence
7 that class members with other disabilities or types of wheelchairs attempted this task.

8 TBC later argued that because the plaintiffs use motorized scooters or wheelchairs,
9 they can reasonably be expected to use the force of their motorized vehicles to move
10 lighter-weight obstructions out of the way. However, TBC provided no evidence to support
11 this claim, nor any evidence, for example, that an amputee would be able to move the trash
12 can without feet, or even that a quadriplegic like Mr. Blackseth who had a foot injury would
13 be able or inclined to do so. This evidence is insufficient to require a finding that
14 obstructions are permitted in space that is required to be “clear.”

15 11. Height of soap dispensers and toilet seat cover dispensers

16 At the time that Taco Bell 4518 was constructed, Title 24 required that dispensers in
17 restrooms be mounted no higher than 40 inches above the floor. Cal. Code Regs tit. 24
18 (1989) § 511.1(b)(2). TBC has agreed that a 2-inch tolerance would be appropriate. The
19 Special Master’s survey showed that both the soap dispenser and the toilet seat cover
20 dispenser in both the men’s and women’s restrooms were higher than 42 inches.

21 TBC argues that the ADAAG’s height limitations, which are higher than those in Title
22 24, provide equivalent facilitation. This argument is addressed below in the context of the
23 discussion of the equivalent facilitation defense.

24 12. Lavatory insulation

25 Title 24 required, when Taco Bell 4518 was built, that the hot water and drain
26 pipes under the lavatory be insulated. Cal. Code Regs tit. 24 (1989) § 1504(b). Although
27 Alianza wrapped the drain pipes and hot water supply line in the men’s restroom in 2007,
28 the insulation was missing from the men’s restroom when the restaurant was surveyed by

1 plaintiffs' experts in March 2008. It was also missing when TBC took photographs in the
2 summer of 2009 and in the August-October 2009 period.

3 TBC claims that because the City of San Pablo inspected and approved the design
4 of the lavatory, it "had to have had insulation" at the time of construction. TBC asserts that
5 the above-described violations were isolated incidents, but the court finds it not credible
6 that plaintiffs' expert and TBC's representatives should have photographed the drain pipe
7 and hot water supply line on the only three days during the period from 2007 to 2009 when
8 there was no insulation. The court finds that the conditions observed by Mr. McSwain and
9 portrayed in TBC's photos constitute a violation of Title 24.

10 D. Entitlement to Injunctive Relief

11 To be entitled to an injunction, plaintiffs must show that TBC has violated the
12 ADAAG or Title 24. See 42 U.S.C. § 12188(a)(2) ("In the case of violations of [the
13 accessibility provisions] of this title, injunctive relief shall include an order to alter facilities to
14 make such facilities readily accessible to and usable by individuals with disabilities" and,
15 "[w]here appropriate, injunctive relief shall also include requiring a provision of an auxiliary
16 aid or service [or] modification of a policy . . . "); Cafe Royale, 218 Cal. App. 3d at 183
17 (plaintiffs may file suit for injunctive relief under the CDPA to enforce compliance with the
18 standards).

19 Plaintiffs are not required to show other prerequisites generally required for
20 injunctive relief, as "[t]he standard requirements for equitable relief need not be satisfied
21 when an injunction is sought to prevent the violation of a federal statute which specifically
22 provides for injunctive relief." Antoninetti v. Chipotle Mexican Grill, Inc., 643 F.3d 1165,
23 1175-76 (9th Cir. 2010), cert. denied, 131 S.Ct. 2113 (Apr. 18, 2011).

24 As set forth above, and in this court's August 2007 order re plaintiffs' motion for
25 partial summary judgment, plaintiffs have established that TBC has engaged in numerous
26 violations of state and federal accessibility requirements. At present, it is undisputed that
27 TBC has remediated all barriers at Taco Bell 4518. At trial, Special Master Bob Evans
28 testified that he found no federal or state access violations during his June 3, 2011 site

1 inspection of Taco Bell 4518. Based on this, TBC argues that plaintiffs' claims for injunctive
2 relief are moot.

3 However, as discussed below, because TBC has not met its burden under the
4 voluntary cessation doctrine, an injunction shall enter, and the only remaining question is
5 the scope of the injunctive relief. "The scope of injunctive relief is dictated by the extent of
6 the violation established. The key question . . . is whether the inadequacy complained of is
7 in fact widespread enough to justify system wide relief." Armstrong, 275 F.3d at 870
8 (quotation and citation omitted).

9 A court need not address every violation in order to conclude that violations are
10 sufficiently widespread to necessitate a system wide injunction. Rather, a court can enter
11 such an injunction based on evidence that is "symptomatic" of the defendant's violations,
12 including "individual items of evidence [that are] representative of larger conditions or
13 problems." Id. at 871. Finally, while the scope of relief must correspond to the injury
14 suffered, in a certified class action, the injury, and the corresponding relief, extends to the
15 class as a whole. Id.

16 E. TBC's Defenses

17 1. Voluntary cessation doctrine.

18 TBC argues that because it has removed or remediated all barriers in Taco Bell
19 4518, and because it has issued new accessibility policies (and plaintiffs have not
20 requested that any specific changes be made to those policies) plaintiffs' claim for
21 injunctive relief is moot.

22 "A case is moot when the issues presented are no longer 'live' or the parties lack a
23 legally cognizable interest in the outcome." City of Erie v. Pap's A.M., 529 U.S. 277, 287
24 (2000).

25 Mootness can be characterized as the doctrine of standing set in a time
26 frame: The requisite personal interest that must exist at the commencement
27 of the litigation (standing) must continue throughout its existence (mootness).
28 Mootness is a jurisdictional issue, and federal courts have no jurisdiction to
hear a case that is moot, that is, where no actual or live controversy exists. If
there is no longer a possibility that an appellant can obtain relief for his claim,
that claim is moot and must be dismissed for lack of jurisdiction.

1 Foster v. Carson, 347 F.3d 742, 745 (9th Cir. 2003) (citations and quotations omitted).

2 Thus, the central inquiry in any mootness challenge is whether changes in the
3 circumstances existing when the action was filed have forestalled any meaningful relief.

4 “[T]he question is not whether the precise relief sought at the time an application for
5 injunctive relief was filed is still available. The question is whether there can be any
6 effective relief.” West v. Secretary of Dep’t. of Transportation, 206 F.3d 920, 925 (9th Cir.
7 2000); see also San Francisco BayKeeper, Inc. v. Tosco Corp., 309 F.3d 1153, 1159 (9th
8 Cir. 2002). So long as the court can grant some effective relief, it does not matter that the
9 relief originally sought is unavailable due to changed circumstances. See Church of
10 Scientology of Calif. v. United States, 506 U.S. 9, 12-13 (1992).

11 Here, in effect, TBC asserts that by removing or remediating the barriers at Taco
12 Bell 4518, it has voluntarily ceased the challenged conduct. A request for prospective
13 injunctive relief will be mooted by a defendant’s voluntary compliance only if the defendant
14 meets the “formidable burden” of demonstrating that it is “absolutely clear the alleged
15 wrongful behavior could not reasonably be expected to recur.” Friends of the Earth, 528
16 U.S. at 190; see also Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 221 (2000);
17 Rosemere Neighborhood Ass’n v. U.S. Env’tl. Protection Agency, 581 F.3d 1169, 1173 (9th
18 Cir. 2009). That is, TBC has the “heavy burden of persua[ding]’ the court that the
19 challenged conduct cannot reasonably be expected to start up again.” Friends of the Earth,
20 528 U.S. at 189 (citation omitted); see also Adarand, 528 U.S. at 222. Plaintiffs assert that
21 in this case, TBC fails to meet this burden.

22 The court agrees, and finds that a number of factors demonstrate that TBC has not
23 met its burden under the voluntary cessation doctrine. The evidence presented at trial
24 demonstrates that TBC is not currently following its own access policies, and has a history
25 of not doing so; that TBC’s policies are vague and contradictory; and that TBC could
26 rescind the policies at any time.

27 First, TBC is not currently following its own access policies, and has a history of not
28 doing so. A defendant’s “ongoing history of not following its own stated . . . procedures

1 ma[kes] necessary” an injunction. United States v. Laerdal Mfg. Corp., 73 F.3d 852, 857
2 (9th Cir. 1995). Here this factor is particularly important because TBC bases its claim that
3 violations will not recur in the future on a number of accessibility policies that it adopted or
4 revised in 2010. The evidence shows, however, that TBC is not following those policies.

5 For example, although TBC claims to have had a policy since September 2010
6 whereby each day before a restaurant opens, a manager is supposed to conduct an
7 “Access for the Disabled” walk to check various accessibility items, the RGM for Taco Bell
8 4518 testified in his deposition that he had never heard of an access walk, and the
9 pre-opening walk had nothing to do with disability or access issues. Despite the fact that
10 the RGM was responsible for ensuring that the Access for the Disabled Walk was
11 performed, TBC did not call him as a witness at trial, or any other employee at Taco Bell
12 4518 who was involved in the process of opening the restaurant, or whose responsibilities
13 included conducting the preopening Access for the Disabled Walk.

14 Similarly, although TBC claims that accessibility issues are checked every 30
15 minutes to two hours during “Success Walks”, the RGM testified during his deposition that
16 these walks do not involve accessibility issues. While TBC claims that Maintenance
17 Technicians use a written checklist of 34 different accessibility items each time they visit a
18 restaurant, the Maintenance Technician for Taco Bell 4518 testified during his deposition
19 he had never seen the checklist and checked only six accessibility items at most.

20 Moreover, although TBC asserts that Maintco conducts access surveys of each
21 restaurant twice a year, and provides TBC with an invoice and a completed checklist for
22 each such survey, at trial, TBC submitted only two checklists for Taco Bell 4518 when there
23 should have been at least four completed during the relevant period, and the invoices
24 submitted by TBC indicated that there was a 14-month gap between Maintco surveys at
25 that restaurant.

26 TBC also has a history of not following its own access policies. For example,
27 photographs admitted at trial demonstrated that in the past five years, TBC had on multiple
28 occasions not followed its policy that accessible parking spaces have required signage, that

1 trash cans in restrooms not block dispensers, and that pipes under lavatories in restrooms
2 be insulated.

3 Second, a voluntary cessation defense cannot be based on policies that are vague
4 or contradictory. See, e.g., Gluth v. Kangas, 951 F.2d 1504, 1507 (9th Cir. 1991). Here, at
5 least some of TBC's policies appear vague and contradictory. For example, TBC's 2005
6 policy covered door closing time, but that element was omitted from its subsequent policies
7 up until 2010. TBC's door force policy has changed numerous times over the years, and in
8 2010, there were three different door force standards set forth in TBC's access documents.
9 As a result, it is impossible for the court to determine what TBC's current door force policy
10 is, much less whether it complies with accessibility regulations.

11 In addition, although TBC's Maintenance Technician Checklist and the Maintco
12 Checklist each identify specific accessibility items that are supposed to be inspected, both
13 of these checklists include a provision giving TBC the discretion to ignore violations of the
14 checklist based on unknown and unspecified criteria. Thus it is impossible to determine the
15 circumstances under which elements that do not comply with a particular checklist will
16 actually be fixed.

17 Third, TBC could change or rescind its policies at any time. Even if the court
18 assumes for the sake of argument that TBC's accessibility policies are facially sufficient
19 and are being followed, the fact that TBC could change these policies – by, for example,
20 not renewing its year-to-year contract with Maintco, or not providing access training to new
21 maintenance technicians – means that TBC has not met its burden under the voluntary
22 cessation doctrine, particularly given the length of time required for TBC to remove or
23 remediate the barriers at Taco Bell 4518, and also given TBC's history of vague and
24 contradictory policies. See, e.g., Feldman v. Pro Football, Inc., 419 Fed. Appx. 381, 2011
25 WL 1097549, at *5 (4th Cir., Mar. 25, 2011).

26 Finally, the evidence showed that a number of architectural elements in Taco Bell
27 restaurants are subject to frequent change. Jaime de Beers, a former TBC employee who
28 was Facility Leader for Northern California, with responsibility for 87 restaurants (including

1 Taco Bell 4518), stated in an October 19, 2004 declaration subsequently admitted as an
2 exhibit at trial that certain elements at TBC restaurants are “subject to frequent change,”
3 including parking striping and signs, entrance door force and closing time, position of chain
4 blocking access in queue line, obstruction of route from door to queue line, self-service
5 dispensers, dining room tables and chairs, restroom soap dispensers, and insulation on
6 restroom lavatory pipes. And although Mr. Elmer testified at trial that certain elements at
7 Taco Bell 4518 are unlikely to change in the future, he also testified that Taco Bell 4518 is
8 slated to undergo a major interior and exterior remodeling in 2012.

9 Moreover, in its January 10, 2005 response to an interrogatory asking for an
10 identification of alterations and modifications that had occurred in its restaurants, TBC
11 objected on the grounds that the request was “unduly burdensome to answer due to the
12 number and frequent changes that could and do occur in every store that may affect or may
13 have affected accessibility during the class period.”

14 For all of these reasons, the court finds that TBC has failed to carry the “heavy
15 burden” of showing that violations of the ADA and Title 24 will not occur in the future at
16 Taco Bell 4518.

17 2. Building Department argument

18 The evidence at trial demonstrated that several elements at Taco Bell 4518 were in
19 violation of Title 24 regulations in effect when the restaurant was constructed. Based on
20 Bringle v. Board of Sup’rs of Orange County, 54 Cal. 2d 86, 89 (1960), TBC asks the court
21 to presume that an exception to Title 24’s requirements was granted by the City of San
22 Pablo Building Department, based on the fact that it approved the building plans for Taco
23 Bell 4518, and issued a certificate of occupancy.

24 This argument, and the Bringle case specifically, were discussed extensively in
25 this court’s August 8, 2007 order. See Moeller Summ. J., 2007 WL 2301778. As explained
26 in that order, building departments and other administrative agencies are “not
27 . . . lawmaking bod[ies] and ha[ve] no power to disregard or amend the ordinances which
28 define [their] authority.” Id., 2007 WL 2301778 at *17 (quoting City and County of San

1 Francisco v. Board of Permit Appeals, 207 Cal. App. 3d 1099, 1109-10 (1989)). As a
2 result, “while an agency may have discretion, it must exercise that discretion within the
3 bounds set forth by the applicable law.” Id. In addition, under California law, “building
4 inspectors do not have discretion to issue building permits or certificates of occupancy for
5 facilities that do not comply with Title 24.” Id. at *18.

6 Thus, TBC must show either that the architectural elements at issue complied with
7 Title 24, or that a building inspector applied an exception to Title 24 that is allowed by a
8 statute or regulation. Id. Here, TBC has done neither. Instead, it asks this court to
9 presume pursuant to Bringle that the building inspector granted an exception.

10 The Bringle presumption, however, does not apply where, as here, an agency is
11 required to make written findings in order to grant an exception. Id. at *19 (citing
12 Broadway, Laguna, Vallejo Ass’n v. Bd. of Permit Appeals, 66 Cal. 2d 767, 773 (1967)
13 (“The presumption that an agency’s rulings rest upon the necessary findings and that such
14 findings are supported by substantial evidence . . . does not apply to agencies which must
15 expressly state their findings and must set forth the relevant supportive facts.”)). Thus TBC
16 was required to present written evidence that the building inspector applied an exception to
17 Title 24, which TBC failed to do.

18 In any event, TBC’s counsel agreed that any presumption arising from the building
19 department’s approval of building plans, and issuance of a certificate of occupancy, can be
20 rebutted by “by evidence that whatever it approved was not in compliance.” Here even
21 assuming a presumption of compliance arose, that presumption was rebutted by evidence
22 admitted at trial showing that architectural elements were not in compliance with Title 24.

23 3. Equivalent facilitation

24 TBC asserts that its “auxiliary access” provides equivalent facilitation for its narrow
25 queue line, that customer service provides equivalent facilitation for drink lids that are out of
26 reach range, and, with respect to exterior door force and the height of restroom amenities,
27 that a more lax or nonexistent ADAAG standard provides equivalent facilitation for a Title
28 24 standard.

1 With respect to each of these elements, plaintiffs proceed under the new
2 construction standard of the 1989 version of Title 24. As such, TBC relies on the
3 equivalent facilitation provisions in that version of Title 24. In each case, equivalent
4 facilitation would be permitted only upon a written finding of unreasonable hardship by the
5 enforcing agency. No such finding is in evidence.

6 In support of its Title 24 equivalent facilitation argument, TBC points to § 406(g) of
7 the 1989 version. This is, however, only the definition of equivalent facilitation; it does not
8 state when a covered entity may use equivalent facilitation in lieu of compliance. In 1989,
9 there was no general equivalent facilitation provision. Rather, equivalent facilitation was
10 required if compliance was excused based on a written finding of unreasonable hardship, in
11 those specific provisions in which an unreasonable hardship exception was permitted. This
12 was the case with respect to queue lines, but the provisions governing door force, reach
13 range, and height of restroom amenities did not permit such deviation.

14 Throughout the trial, TBC reiterated that the placement of the seal of the City of San
15 Pablo on their building plans and the issuance of a certificate of occupancy meant that the
16 City must have approved the configuration of its queue line. The question of the authority
17 of the building department and the relevance of the certificate of occupancy in general are
18 addressed above.

19 The 1989 version of Title 24 contains specific provisions that would prevent any
20 inference that stamped building plans or a certificate of occupancy constituted an
21 endorsement of TBC's auxiliary queue line access as equivalent facilitation.

22 As the court previously found in the August 8, 2007 order, the Title 24 regulations
23 that apply to queue lines in pre-1993 stores such as Taco Bell 4518 are § 611(d)(4), which
24 requires that "cafeteria lines" be a minimum of 36 inches wide, and § 712(b)(7)(A), which
25 requires that "circulation aisles" – defined as "circulation path between objects such as
26 seats, tables, merchandise equipment, displays, shelves, desks, etc." – be 36 inches wide.
27 Sections 611(d) and 712(b) both also provide that "[i]n existing buildings, when the
28 enforcing agency determines that compliance with any regulation under this section would

1 create an unreasonable hardship, an exception shall be granted when equivalent facilitation
2 is provided.” Moeller Summ. J., 2007 WL 2301778 at *8.

3 According to these exceptions, at the time it was constructed, Taco Bell 4518
4 would have been excused from compliance with the 36-inch requirement for queue lines
5 only if it were an existing facility which, by definition, it was not. Thus, under the applicable
6 standards, TBC is not entitled to use equivalent facilitation in lieu of compliance with the
7 36-inch minimums in §§ 611(d)(4) and 712(b)(7)(A).

8 Even if the exception were extended to apply to buildings (like Taco Bell 4518)
9 constructed after the 1989 version of Title 24 was in effect, TBC would have been excused
10 from compliance only if the enforcing agency had determined in writing that compliance
11 would create an unreasonable hardship. According to the definition of “unreasonable
12 hardship,” such condition “exists where the enforcing agency finds that compliance with the
13 building standard would make the specific work of the project affected by the building
14 standard unfeasible” based on an evaluation of five factors. Crucially, “[t]he details of any
15 finding of unreasonable hardship shall be recorded and entered in the files of the enforcing
16 agency.” Cal. Code Regs. tit. 24 (1989) § 422(c).

17 TBC has submitted no evidence of such a finding, nor even any evidence that
18 compliance with the 36-inch requirement would have made the specific work of the project
19 affected by the building standard unfeasible. Indeed, it is hard to imagine how it would have
20 been unfeasible to construct the queue line to be compliant or simply to have eliminated it
21 altogether, as TBC eventually did.

22 Based on the provisions on which it relies – the equivalent facilitation provisions
23 of the 1989 Title 24 – TBC is not excused from compliance with the 36-inch minimums in
24 §§ 611(d)(4) and 712(b)(7)(A).

25 The separate auxiliary access would not in any event have constituted “equivalent
26 facilitation” under the definition relied on by TBC. TBC cites to the definition in section
27 406(g) of the 1989 version of Title 24. That provision requires that “[i]n determining
28 equivalent facilitation, consideration shall be given to means that provide for the maximum

1 independence of persons with physical disabilities.” Cal. Code Regs tit. 24 (1989) § 406(g)
2 (note 2).

3 The narrow queue line and auxiliary access did not provide persons who use
4 wheelchairs or scooters with “maximum independence.” To the contrary, such persons
5 were forced to depend on staff, family, friends and total strangers to line up, keep their
6 place in line, order their food, and/or retrieve it. Although reach ranges to drink lids are not
7 eligible for an unreasonable hardship/equivalent facilitation exception, it is also clear that
8 TBC’s proposed equivalent facilitation – that customers with disabilities rely on staff
9 assistance to retrieve out-of-reach items – would not comply with note 2 of § 406(g).

10 Nor did the narrow queue line and auxiliary access provide persons who use
11 wheelchairs or scooters with access that was “equivalent” to an accessible queue line. The
12 testimony of customer witnesses shows that such auxiliary access segregated persons with
13 wheelchairs or scooters, made them feel different than other customers, and made them
14 feel like they were cutting in line. Customer witnesses testified that they would have
15 preferred an accessible queue line.

16 As noted above, there was no provision for unreasonable hardship or equivalent
17 facilitation in the sections governing door force, Cal. Code Regs. tit. 24 (1989) § 3304
18 (i.2)(1), reach range to drink lids, *id.* § 522(c) & Fig. 5-5D, or height of restroom amenities,
19 *id.* § 511.1(b)(2). TBC provides no evidence that it was not feasible to adjust the door
20 force, place the drink lids or install the soap or toilet seat cover dispensers so that the
21 positioning was compliant.

22 TBC also relies on the ADAAG’s equivalent facilitation provision. That provision, like
23 the provision in Title 24, would not permit TBC’s auxiliary access in lieu of a compliant
24 queue line. The ADAAG provide that “[d]epartures from particular technical and scoping
25 requirements . . . by the use of other designs and technologies are permitted where the
26 alternative designs and technologies used will provide substantially equivalent or greater
27 access to and usability of the facility.” ADAAG § 2.2; see also Cal. Code Regs tit. 24 (2010)
28 § 1101B.1.2 (same).

1 In enacting the ADA, Congress indicated that an “equivalent facilitation” provision
2 would be appropriate because “[a]llowing these departures will provide public
3 accommodations and commercial facilities with necessary flexibility to design for special
4 circumstances and will facilitate the application of new technologies.” H. Rep. 101-485, pt.
5 2, at 119, reprinted in 1990 U.S.C.C.A.N. 303, 402. Title 24 provides that “[i]n determining
6 equivalent facilitation, consideration shall be given to means that provide for the maximum
7 independence of persons with disabilities . . .” Cal. Code Regs tit. 24 (2010) § 1101B.1.3.

8 This court previously held that “there are only two requirements for an equivalent
9 facilitation: 1) it is an alternative design or technology; and 2) it provides equal or greater
10 access to subject facilities.” Moeller v. Taco Bell Corp., 2005 WL 1910925, at *3
11 (N.D. Cal. Aug. 10, 2005). Indeed, “the ‘Equivalent Facilitation’ provision does not allow
12 facilities to deny access under certain circumstances, but instead allows facilities to bypass
13 the technical requirements laid out in the [Accessibility] Standards when alternative designs
14 will provide ‘equivalent or greater access to and usability of the facility.’” Id., 2005 WL
15 1910925 at *3 n.1 (quotations and citation omitted).

16 The Ninth Circuit recently addressed the question of what constitutes equivalent
17 facilitation under ADAAG § 2.2 in the restaurant context. In Antoninetti, the defendant fast
18 food restaurant prepared customers’ meals behind a 45-inch-high wall topped with a
19 transparent plastic shield. Customers who did not use wheelchairs could observe the
20 preparation of their meals and were able to interact with staff concerning ingredients,
21 portion size, and the like. Id., 643 F.3d at 1169. Because the height of the counter was out
22 of compliance with the ADAAG, it obstructed the view of customers who used wheelchairs
23 who were, in turn, unable to observe and interact in the same way nondisabled customers
24 could. Id. at 1170.

25 The defendant argued that its customer service policy provided equivalent
26 facilitation, thereby excusing the noncompliance of the 45-inch-high wall. Id. at 1170-71.
27 The court rejected this argument, holding that the policies did not constitute “equivalent
28 facilitation” because they did not involve “use of other designs and technologies” or

1 “provide [him with] substantially equivalent or greater access to and usability of the facility.”
2 They merely provide a substitute experience that lacks the customer’s personal
3 participation in the selection and preparation of the food that the full “Chipotle experience”
4 furnishes. Id. at 1173-74. This language makes clear in the absence of “substantially
5 equivalent or greater access to or usability of the facility,” no policy or design can constitute
6 equivalent facilitation.

7 TBC’s separate auxiliary access fails this standard. TBC argues that it provides
8 equivalent facilitation for its narrow queue line because customers who use wheelchairs
9 can line up off to the side of the queue. However, the customer witnesses who testified at
10 trial experienced the auxiliary access as inconvenient, cumbersome, and embarrassing, as
11 it required them to rely on others to place their orders.

12 The only evidence TBC offered concerning its queue line practice was the testimony
13 of a single assistant manager that it was TBC’s policy to take down the chain for customers
14 in wheelchairs and that team members were trained to do this. On cross-examination,
15 however, this same witness testified that she had received no training instructing her to
16 take down the chain for customers in wheelchairs, or that this was TBC’s policy. In
17 addition, customer witnesses testified that TBC staff never offered to assist them or
18 explained how to use the auxiliary access, and Jacques Bronson testified that a TBC
19 employee told him that his mother could not line up at the chain nor could she go around to
20 the far side of the queue.

21 TBC never introduced evidence of a written policy addressing how customers
22 using wheelchairs were supposed to use the auxiliary access or how staff were supposed
23 to handle this situation. There was no evidence indicating that there was signage offering
24 assistance to customers with disabilities in place in Taco Bell 4518 before 2009. The 2005
25 photograph by the Special Master shows no sign; nor do the 2008 photographs by
26 plaintiffs’ experts show any sign (although a TBC photograph from the summer of 2009
27 does show a sign stating, “Please Ask If You Need Assistance”).

28 Thus, during the portion of the class period when the queue line was in place

1 in Taco Bell 4518 – from December 2001 to Spring 2007 – there was nothing to indicate to
2 customers in wheelchairs what they were supposed to do when confronted by a queue line
3 in which other customers were lined up, but that was clearly too narrow for them to
4 navigate, and no sign explaining that the area that was often blocked off by a chain was
5 supposed to serve as auxiliary access.

6 TBC introduced no lay witness testimony from customers who use wheelchairs
7 that they understood or endorsed the separate auxiliary access. It offered only the
8 personal experience of its retained expert Mr. Blackseth – who uses a wheelchair – that he
9 was directed by TBC staff to use the auxiliary access and that he personally did not feel
10 discriminated against. Mr. Blackseth also testified, however, that he “would have preferred”
11 that there be no queue lines, and that “if you are going to put them in, obviously I would
12 advise my client to put one in that was compliant.” Although auxiliary access worked for
13 him, he testified that it “wouldn’t have been the one that I would have chosen” and that “it
14 wouldn’t have been what I recommended.”

15 Furthermore, although Mr. Blackseth testified that he personally did not object to the
16 auxiliary access, both he and TBC’s director of ADA compliance, testified that they rely on
17 the DOJ’s interpretation of Title III. Mr. Blackseth agreed that “the [DOJ] provides the
18 interpretive direction for Title III,” and that he would give “great weight” to the DOJ’s
19 position on the requirements of Title III. Similarly, Mr. Elmer testified, in response to a
20 question about a meeting with the DOJ concerning queue lines, that “the views of the
21 Department of Justice were important to Taco Bell.”

22 Moreover, Mr. Blackseth’s testimony concerning his experience at Taco Bell 4518
23 was not entirely consistent. At trial, he testified that he had been to Taco Bell 4518 “10 to
24 30 times.” However, in his deposition, he testified that he had been to a Taco Bell with a
25 queue line only three to five times over the years, and that he was offered the option of
26 lining up at the side of the queue line “at least once, maybe twice.”

27 Based on the evidence above, the court finds that where TBC’s queue line is
28 narrower than required by applicable standards, auxiliary access whereby customers with

1 disabilities must line up to the side of the queue line does not provide substantially
2 equivalent or greater access to or usability of the Taco Bell restaurant and does not provide
3 for the maximum independence of persons with physical disabilities.

4 The auxiliary access also violates the ADA's integration mandate. Title III requires
5 public accommodations to provide "[g]oods, services, facilities, privileges, advantages, and
6 accommodations . . . in the most integrated setting appropriate. . . ," 42 U.S.C.

7 § 12182(b)(1)(B) (emphasis added), and prohibits places of public accommodation from
8 providing people with disabilities with services, facilities, privileges, advantages, or
9 accommodations that are not equal to, or are different or separate from those provided to
10 other individuals, *id.* § 12182(b)(1)(A)(ii) & (iii). "Providing services in the most integrated
11 setting is a fundamental principle of the ADA." H.R. Rep. 101-485, pt. 2, at 102 (1990),
12 reprinted in 1990 U.S.C.C.A.N. 303, 385.

13 Finally, TBC argues that the Special Master found the auxiliary access to be
14 compliant. There is no evidence that the Special Master did anything other than measure
15 the width of the opening. The court previously ruled that equivalent facilitation was beyond
16 the scope of the Special Master order, which specifically reserved to the parties and the
17 court the question whether any given configuration complies with the ADA or state law.

18 With respect to door force and the height of restroom amenities, TBC makes the
19 additional argument that a more lax or nonexistent ADAAG standard provides equivalent
20 facilitation for a Title 24 standard. It argues that the complete lack of an ADAAG standard
21 governing exterior door force is equivalent facilitation for compliance with Title 24's exterior
22 door force requirement, and that its 54-inch reach range limit is equivalent facilitation for
23 compliance with Title 24's 40-inch limit on restroom amenities.

24 This interpretation of the equivalent facilitation defense finds no support in the law.
25 "Where California access standards provide greater accessibility than the ADA, the
26 California standards control." Shimozono v. May Dep't Stores Co., 2002 WL 34373490, at
27 *16 (C.D. Cal. Nov. 20, 2002); Lieber v. Macy's West, Inc., 80 F. Supp. 2d 1065, 1074
28 (N.D. Cal. Oct. 28, 1999) (same). Indeed, the ADA specifically states that it is not to be

1 “construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any
2 State . . . that provides greater or equal protection for the rights of individuals with
3 disabilities than are afforded by this chapter.” 42 U.S.C. § 12201(b).

4 **CONCLUSION**

5 The court previously held that almost 400 conditions in more than 160 Taco Bell
6 restaurants violated the applicable standards, and therefore violated the ADA and/or the
7 state access laws. See Moeller Summ. J., 2007 WL 2301778 at *12-15, 20-22. In addition,
8 the court finds that the evidence presented at trial establishes that TBC violated the ADA
9 and/or Title 24 at Taco Bell 4518, with regard to the 12 elements at issue, as follows:

- 10 • TBC failed to provide an access aisle adjacent to the van-accessible parking
11 space that complied with the requirements of the ADAAG and Title 24 (2002);
- 12 • TBC failed to install and/or maintain van accessible parking signage, in
13 violation of the ADAAG and Title 24 (2002);
- 14 • TBC failed to maintain proper door entry force at the primary exterior door, in
15 violation of Title 24 (1989);
- 16 • TBC failed to maintain the proper closing time at the north entry door, in
17 violation of the ADAAG and Title 24 (2002);
- 18 • As previously determined by the court, the queue line at Taco Bell 4518
19 violated the new construction provisions of Title 24 (1989); in addition, TBC failed to
20 establish that its separate auxiliary access provided equivalent facilitation under either the
21 ADAAG or Title 24;
- 22 • TBC failed to locate the drink lids at Taco Bell 4518 in compliance with the
23 limits set on height and lateral reach by Title 24 (1989);
- 24 • The provision of adequate knee and toe clearance at the accessible tables,
25 while not subject to the ADAAG when Taco Bell 4518 was constructed, was nevertheless
26 readily achievable by TBC in 2001;
- 27 • TBC failed to provide sufficient maneuvering clearance at the women’s
28 restroom door, and failed to provide compliant doors when the women’s restroom doors

1 were replaced in 2003, in violation of the ADAAG and Title 24 (2002);

2 • At the time the water closet in the women’s restroom was replaced in 2003,
3 TBC failed to locate the water closet so that it was compliant with the ADAAG and Title 24
4 (2002);

5 • TBC failed to provide clear floor space at the water closet in both the men’s
6 and women’s restroom, in violation of the ADAAG;

7 • At the time Taco Bell 4518 was constructed, TBC failed to locate the soap
8 dispensers and toilet seat cover dispensers at a height compliant with Title 24 (1989); in
9 addition, TBC failed to establish that its auxiliary access provided equivalent facilitation
10 under either the ADAAG or Title 24;

11 • TBC failed to maintain insulation on the lavatory hot water and drain pipes in
12 the men’s restroom, in violation of Title 24 (1989).

13 The evidence shows that there were a significant number of violations at Taco Bell
14 4518 in 2005, and later, and that those barriers were in existence prior to the filing of the
15 lawsuit. Thus, plaintiffs have standing to proceed in this action. Defendants have not met
16 their burden of establishing any defense to the finding of liability.

17 The court finds further that plaintiffs have standing to seek injunctive relief,
18 notwithstanding that Taco Bell 4518 is currently a compliant accommodation, because they
19 have established an intent to return to Taco Bell 4518, and because they have sufficiently
20 demonstrated that the injury is likely to recur based on TBC’s pattern of past violations of
21 federal and state access laws.

22 Finally, based on the court’s prior findings in the August 8, 2007 order, and based on
23 the evidence presented at trial, including the testimony of TBC’s Director of ADA
24 Compliance, the court finds that plaintiffs have established that classwide injunctive relief is
25 warranted, with regard to maintaining compliance, both as to Taco Bell 4518, and as to all
26 corporate Taco Bell restaurants in California. However, given the pendency of TBC’s
27 motion to decertify both the liability and the damages classes, and because the court finds
28 the proposed injunction submitted by plaintiffs in June 2010 to be overly broad, the court is

1 disinclined to approve that form of injunction.

2 Following the ruling on the parties' motions regarding class certification, the court will
3 decide on the form of injunctive relief to be issued in this case.

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5 Dated: October 5, 2011



6 PHYLLIS J. HAMILTON
7 United States District Judge

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