Case No. 12-17144

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIE MOELLER, KATHERINE CORBETT, EDWARD MUEGGE, AND CRAIG YATES, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

TACO BELL CORP.,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of California, Oakland Division
Civil Action No. C 02-5849 PJH

APPELLANTS' OPENING BRIEF

TIMOTHY P. FOX
AMY F. ROBERTSON
Fox & Robertson, P.C.
104 Broadway, Ste. 400
Denver, CO 80203
303-595-9700

ANTONIO LAWSON
Lawson Law Offices
7700 Edgewater Dr. Ste 255
Oakland, CA 94621
510-878-7818

MARI MAYEDA
P.O. Box 5138
Berkeley, CA 94705
510-917-1622

BRAD SELIGMAN
JOCELYN LARKIN
The Impact Fund
125 University Ave
Berkeley, CA 94710
510-845-3473

BILL LANN LEE
Lewis, Feinberg, Lee,
Renaker & Jackson, P.C.
476 – 9th Street
Oakland, CA 94607
510-839-6824

Attorneys for Plaintiffs - Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Regulations

INTRODUCTION

During the ten-year span of this disability-rights class action, the district court made extensive findings supporting the entry of an injunction, the only relief remaining for the class or recoverable under Title III of the Americans with Disabilities Act. These included determinations on summary judgment and following a bench trial that, in over 160 restaurants, Appellee Taco Bell Corp. ("Taco Bell") has violated Title III and California access requirements hundreds of times, that these violations stem from inadequate and ineffective centralized accessibility policies, and that the violations likely will recur.

The district court held, in its October 2011 Findings of Fact and Conclusions of Law ("FFCL"), that this evidence warranted entry of a classwide injunction. It also held that Taco Bell's purported cessation of its illegal conduct did not moot class injunctive claims because architectural elements at Taco Bell restaurants change frequently, and the company's ineffective policies will not ensure that these elements will remain in compliance with accessibility requirements.

Recently, the district court changed its mind, issuing two orders on September 17, 2012 (the "September 17 Orders") that are the subject of this appeal. In these orders, the court refused to enter an injunction, and deferred even considering injunctive relief until after a series of damages trials are completed, a process that the court estimated "could span yet another decade." This Court has

held that entry of injunctive relief is mandatory for violations of Title III. The district court committed reversible error by refusing to do so here.

This error prejudices the class. By the time the district court, years from now, turns back to injunctive relief, it is almost certain that Taco Bell will argue that such relief is moot. Even if not, witnesses's memories will have faded, evidence will be stale, and many class members will have died. For these reasons, Appellants respectfully request that the district court's orders be reversed and remanded with instructions to enter an injunction.

STATEMENT OF JURISDICTION

The district court's subject-matter jurisdiction arose under 28 U.S.C. §§ 1331 and 1343, because Appellants (the "Class") allege discrimination on the basis of disability by Taco Bell in violation of Title III of the Americans with Disabilities Act ("Title III"). 42 U.S.C. § 12181, *et seq.* The district court had supplemental jurisdiction over the Class's claims under California's Unruh Civil Rights Act ("Unruh"), Cal. Civ. Code § 51, *et seq.,* and the California Disabled Persons Act ("CDPA"), Cal. Civ. Code § 54, *et seq*. *See* 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), permitting interlocutory review of orders refusing to enter an injunction. As explained in greater detail below, the district court properly held, in its October 2011 FFCL, that the Class was entitled to an injunction. ER 111. In its

September 17 Orders, however, the district court refused to enter an injunction and deferred further consideration of injunctive relief for up to ten years. ER 1, 3. These orders constituted a refusal to enter an injunction, thus providing interlocutory jurisdiction to this Court. *See, e.g., Computer Care v. Serv. Sys. Enters., Inc.*, 982 F.2d 1063, 1075 (7th Cir. 1992) ("Although the district court did not explicitly deny Computer Care's request that it enjoin the false advertising, the court's failure to grant such relief when it was sought by Computer Care has the substantive effect of a denial, and therefore is reviewable by this court.").

Even if these orders did not constitute an explicit refusal to enter an injunction, they are nonetheless properly reviewable under section 1292(a)(1) if: (1) the orders have the practical effect of entering or refusing to enter an injunction; (2) the orders have serious, perhaps irreparable consequences; and (3) immediate appeal is the only way to challenge the orders. *In re Lorillard Tobacco Co.*, 370 F.3d 982, 987-88 (9th Cir. 2004). Here this standard is easily met.

Numerous courts have held that an order indefinitely delaying the entry of an injunction has the practical effect of refusing to enter the injunction. *See, e.g., Rolo v. Gen. Dev. Corp.*, 949 F.2d 695, 702-03 (3rd Cir. 1991) (holding that order staying application for preliminary injunction had practical effect of denying injunction); *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1161-62 (4th

Cir. 1977) ("the indefinite continuance amounted to the refusing of an injunction and is appealable").

Additionally, the September 17 Orders deferring consideration of injunctive relief for up to a decade have irreparable consequences, and an immediate appeal is the only way to challenge those orders. First, when the district court finally addresses class injunctive claims years from now, Taco Bell will argue that such claims are moot. Taco Bell is currently engaged in a vigorous effort to sell all of the restaurants covered by this action, asserting to the district court that it will have sold more than 80% of these restaurants by the beginning of 2013. ER 56. Once it has sold all such restaurants, it intends to argue that injunctive relief is moot. *See id.* If it succeeds in that argument, the Class will not be able to appeal the September 17 Orders, and the Class will suffer irreparable harm -- the injunctive relief to which it is now entitled will no longer be available simply because of the delay caused by the September 17 Orders.

In addition, many class members will die over the next decade, memories of witnesses will fade, and evidence will become stale. *See, e.g., Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002) ("Unnecessary delay inherently increases the risk that witnesses' memories will fade and evidence will become stale.").[1]

[1] *See also U.S. Fid. & Guar. Co. v. Helm*, 84 F.2d 546, 547 (9th Cir. 1936) (Fact that delay can cause witnesses to disperse, evidence to be lost and (continued...)

Finally, class damages claims were recently decertified in this case, ER 190, *Moeller v. Taco Bell Corp.*, 2012 WL 3070863, at *6 (N.D. Cal. July 26, 2012), and thus class members will need to bring their own actions for damages. Without interlocutory review of the district court's orders, those damages actions will proceed without the benefit of indisputable collateral estoppel as to the numerous issues decided during this lengthy litigation. As a result, the parties to the damages actions, and the courts adjudicating those actions, may be forced to brief and address issues that have already been resolved in this case. This Court has recognized that an interlocutory appeal is appropriate where doing so prevents delay in other related cases. *See Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1097 (9th Cir. 2008) ("And, of course, the order can only be challenged by immediate appeal because if Allianz awaits the final determination of this case, the damage to prompt proceedings in other cases will have already been done.").

In addition to jurisdiction under section 1292(a), this Court has jurisdiction because the district court's order indefinitely delaying consideration of class injunctive claims for a decade or more places those claims "effectively out of court." *See, e.g., Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 723-24 (9th Cir. 2007). Here, this factor strongly favors

[1](...continued)
memories to fade "are among the principle reasons for the axiom, 'Justice delayed is justice denied.'").

interlocutory review because there is a possibility that by the time years from now that the district court finally turns to injunctive claims, those claims will be moot. *See, e.g., Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1102-03 (9th Cir. 2005) (Granting interlocutory review of a stay where there was a possibility that claims would become moot during the term of the stay).

The Class filed its Notice of Appeal on September 25, 2012, well within 30 days of the September 17 Orders. ER 438-39. This appeal is therefore timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUE

Whether the district court erred by refusing to enter an injunction despite its findings that Taco Bell has violated Title III and California accessibility regulations hundreds of times, that these violations are likely to recur, and that Taco Bell has critically deficient accessibility policies that will not prevent such recurrence.

STATEMENT OF THE CASE

The four named plaintiffs filed this case on December 17, 2002 on behalf of a class of persons who use wheelchairs or scooters challenging architectural barriers at California corporate Taco Bell restaurants. ER 447. Plaintiffs sought injunctive relief under Title III, Unruh, and the CDPA, and minimum statutory damages under Unruh and the CDPA. *See* ER 344.

On February 23, 2004, the district court certified the following class for both monetary and injunctive relief under Federal Rule of Civil Procedure 23(b)(2):

> 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.

ER 414, *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004). At the time, this certification covered more than 220 restaurants. ER 403.

On October 5, 2004, the district court granted the parties' joint request to appoint a special master to conduct detailed access surveys of all of the restaurants covered by the action. ER 385-99. It also granted the parties' joint request to bifurcate the case, with Stage I determining equitable relief for the class, and Stage II addressing damages. ER 382.

The special master surveyed the stores in 2004 and 2005. *See* District Court Docket Nos. ("Dkt. Nos.") 216 - 240. Based on the surveys, the Class moved for partial summary judgment. The district court granted that motion in part on August 8, 2007. ER 343, *Moeller v. Taco Bell Corp.*, 2007 WL 2301778 (N.D. Cal. Aug. 8, 2007) ("2007 Summary Judgment Order"). The court held that accessible seating areas, as well as the force necessary to open exterior and interior doors, at specified covered restaurants were in violation of Title III and/or California law. All told, this order established almost 400 violations among more than 160 covered restaurants.

ER 378; *see also* ER 110, *Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831, 868 (N.D. Cal. 2011) (summarizing the violations established in the 2007 Summary Judgment Order).

Although Taco Bell argued that the Class's injunctive claims were moot, the district court rejected that argument. ER 352-54. The court explained that Taco Bell had not yet fully complied with the Title III's requirements and that, even if Taco Bell had brought certain architectural elements into compliance, in light of the fact that architectural elements in Taco Bell change frequently, "evidence of the current compliant status of certain elements is not dispositive of whether the elements will continue to be compliant in the future." ER 354. Thus it would be proper to issue "an injunction requiring Defendant to . . . maintain those elements in a compliant state [and] ensure that those elements comply in any new or acquired restaurants." *Id.*

On September 21, 2007, Taco Bell moved for reconsideration of the court's decision granting in part partial summary judgment to the Class, asserting again that Class injunctive claims were moot. Dkt. No. 319. On March 24, 2008, the district court denied Taco Bell's motion. ER 336.

Although the district court had scheduled a bellwether trial of twenty restaurants for November 2008, that trial was vacated when the case was reassigned in April 2008. ER 335. The new judge set a schedule in which Taco Bell would

have an additional year to attempt to bring all of its restaurants into compliance, after which it could again file a summary judgment motion arguing mootness based on the changes it had made to its restaurants. ER 331-32. In May 2009, Taco Bell requested, and received, an additional 90 days to file a summary judgment motion because it had not yet finished its remediation efforts. ER 329-30.

During 2008 and 2009, an expert retained by the Class conducted a second survey of the restaurants after they had purportedly been remedied. Dkt. Nos. 484, 484-1.

On October 20, 2009, Taco Bell moved for summary judgment arguing, again, that the changes it had made to its restaurants and to its accessibility policies mooted Class injunctive claims. Dkt No. 458. The Class opposed this motion, relying in part on its expert's surveys -- conducted after Taco Bell had purportedly finished its remediation efforts -- detailing more than 2,400 violations of access requirements. Dkt. Nos. 483, 484, 484-1.

On December 23, 2009, the district court denied Taco Bell's summary judgment motion, held that an exemplar trial as to one store would be scheduled, and ordered the Class to identify the proposed exemplar restaurant. ER 327-28. In February 2010, the Class selected restaurant 4518 located in San Pablo, California, and notified Taco Bell of this selection. *See* ER 267.

The December 23, 2009, order also required the Class to submit a proposed injunction. ER 328. The Class filed its proposed injunction on June 23, 2010. ER 303-326. Significantly, the Class informed the court and Taco Bell that in light of Taco Bell's efforts to remove existing barriers in covered restaurants, the Class was not seeking remediation of any existing barriers. *Id.* at 303-04. Rather, based on Taco Bell's admission that the elements in its restaurants "change frequently," *see* ER 354, the Class sought an injunction designed to ensure that when architectural elements are changed, replaced, or installed in the future, compliance with accessibility requirements would be maintained. ER 303-04.

The exemplar trial -- to the court -- was held in June 2011. In its trial brief and proposed findings of fact and conclusions of law, as well as during the exemplar trial, the Class reiterated its request for entry of a classwide injunction ensuring that access would be maintained at all covered restaurants. ER 116-17, 130, 136, 166-69 (trial transcript); 249 (proposed findings of fact and conclusions of law); 293 (trial brief).

On October 5, 2011, the district court issued its Findings of Fact and Conclusions of Law, discussed in detail below. Most significantly, the district court held that -- based on the evidence admitted at the exemplar trial as well as the 2007 Summary Judgment Order -- "plaintiffs have established that classwide injunctive relief is warranted, with regard to maintaining compliance, both as to [the exemplar

restaurant], and as to all corporate Taco Bell restaurants in California." ER 111. The district court deferred entering an injunction, however, until after it had resolved Taco Bell's then pending motion to decertify the class based on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). ER 111-12.

By order dated July 26, 2012, the district court decertified class damages claims, but held that the class would remain certified pursuant to Fed. R. Civ. P. 23(b)(2) with respect to its injunctive claims. ER 190. The district court ordered the parties to submit proposed injunctions with respect to the Rule 23(b)(2) class. *Id.*

On the appointed date, the Class filed a proposed injunction. Dkt. No. 684. Taco Bell did not, instead filing a motion to reconsider, arguing that it was improper for the district court to hold that a systemic injunction was warranted based only on evidence concerning the exemplar restaurant. ER 53-56. The district court denied that motion, pointing out that the basis for the systemic injunction went well beyond the circumstances of the exemplar restaurant and included the 2007 Summary Judgment Order establishing almost 400 violations in more than 160 restaurants, as well as the evidence presented at the exemplar trial concerning Taco Bell's centralized accessibility policies. ER 45-46.

Less than two weeks later, however, at a case management conference on September 13, 2012, the district court verbally stated that it had changed its mind, and that it wold not enter an injunction. ER 35-38.

On September 17, 2012, the district court issued two written orders. In the first, it stated that its determination in the 2011 FFCL that a systemic injunction would be entered was premature, and modified the FFCL to replace the final two paragraphs of that decision with the following: "The court will determine the form of injunctive relief, if any, to be issued, following the conclusion of the other trials to be held in this case." ER 1. The district court made no other modifications to the FFCL.

In the second order, the district court vacated the June 2013 setting for the first named plaintiff's damages trial, held that a separate damages trial would be needed for each of the four named plaintiffs, and stated that "it is clear that this litigation could span yet another decade." ER 3.

This appeal followed.

STATEMENT OF FACTS

The Class does not challenge any of the district court's factual findings or conclusions of law in the FFCL and Taco Bell did not cross appeal the FFCL; thus the recitation below relies extensively on that order.

1. The District Court Found Numerous Title III and State Law Violations at Covered Restaurants.

The district court recited, in its findings following the exemplar trial, that it had "previously held that almost 400 conditions in more than 160 Taco Bell restaurants violated the applicable standards, and therefore violated the ADA and/or the state access laws." ER 110 (citing *Moeller*, 2007 WL 2301778 at *12-15, 20-22, *found at* ER 343).[2] The violations established by the 2007 Summary Judgment Order were thus part of the district court's grounds for entry of an injunction pursuant to 42 U.S.C. § 12188(a)(2).

During the exemplar trial itself, the Class did not dispute that Restaurant 4518 was in compliance with accessibility requirements at the time of the trial, instead demonstrating that 12 specific architectural elements at the exemplar restaurant had previously been in violation of accessibility requirements. *See* ER 61. The district court agreed, holding that all 12 elements had been in violation of Title III and/or California state law, either when they were surveyed by the Special Master in April 2005 or at some subsequent point in time. ER 110-11.

---

[2] In addition, the 2007 Summary Judgment Order held that the queue lines -- fixed barriers causing customers to form a single line -- in 77 restaurants violated the Title III or state law, but concluded that a material fact issue existed regarding whether Taco Bell could establish the "equivalent facilitation" defense, 28 C.F.R. pt. 36, app. D, § 2.2. *See* ER 362; Dkt. No. 256-1 & 256-2. In the FFCL, however, the court rejected Taco Bell's "equivalent facilitation" defense in the context of queue lines as a matter of law, ER 102-10, effectively establishing an additional 77 violations.

2. The District Court Found That Many Architectural Elements in Taco Bell Restaurants Change Frequently.

The district court found that "a number of architectural elements in Taco Bell restaurants are subject to frequent change," including parking striping and signs, entrance door force and closing time, position of chain blocking access in queue line, obstruction of route from door to queue line, self-service dispensers, dining room tables and chairs, restroom soap dispensers, and insulation on restroom lavatory pipes.[3] ER 100-01.

3. The District Court Found That Taco Bell's Centralized Access Policies Are Inadequate to Ensure That Violations Do Not Recur.

In light of the numerous violations and frequent changes that occur in Taco Bell restaurants, effective accessibility policies must be in place to ensure that the restaurants stay in compliance with accessibility regulations as changes occur over time. The district court found that Taco Bell's access policies are centralized, that is, that policies in place at Taco Bell 4518 are also in place at all other California corporate Taco Bell restaurants. ER 73. It also found that Taco Bell's centralized policies are wholly inadequate for the task of ensuring that accessibility is

---

[3] The district court also noted that in Taco Bell's response to an interrogatory asking for an identification of alterations and modifications that had occurred in its restaurants, Taco Bell objected on the grounds that the request was "unduly burdensome to answer due to the number and frequent changes that could and do occur in every store that may affect or may have affected accessibility during the class period." ER 101.

maintained. Specifically, the court found "that Taco Bell is not currently following its policies, and has a history of not doing so; that Taco Bell's policies are vague and contradictory; and that Taco Bell could change or rescind its policies at any time." ER 98. Each of these findings is discussed in detail below.

a. Taco Bell Is Not Currently Following its Policies, and Has a History of Not Doing So.

In its FFCL, the district court found that Taco Bell had a history of not implementing or following its centralized access policies. Prior to 2005, "Taco Bell had no policies in place to monitor whether certain elements that change frequently remained in compliance with accessibility requirements, including entrance and restroom door force, door closing time, and restriping of parking lots." ER 73.

Taco Bell also failed to implement those access policies that it purportedly did have. For example, prior to 2005, Facility Leaders were responsible for ensuring that all repairs and minor construction complied with accessibility requirements, and for providing informal training to restaurant employees about accessibility. *Id.* These Facility Leaders were not, however, provided with any accessibility training even though Taco Bell knew that accessibility regulations were complicated and were beyond the expertise of a Facility Leader. *Id.* As a result, the Facility Leader for Northern California from 1997 to 2005 "testified that she had 'no

clue' about various accessibility requirements. She thought access regulations simply required being 'able to get to the counter and be served. That, to me, was access and have a parking spot. And, now, it's so confusing with the inches and the height.'" *Id.*

At the exemplar trial, Taco Bell claimed to have established four new policies designed to ensure that access in its restaurants will be maintained over time. ER 74-76. The district court found that these policies are being implemented poorly or not at all at the exemplar restaurant. The district court's findings include, for example:

- Although maintenance technicians are supposed to check each of the 34 items on the ADA Maintenance Technician Checklist each time they visit a restaurant, the maintenance technician for restaurant 4518 had never seen the ADA Maintenance Technician Checklist, did not understand what some of the items on the Checklist meant, and checked only five of the 34 items on the Checklist. ER 75.
- Although Maintco, a third-party contractor that Taco Bell has retained on a year-to-year basis, is supposed to survey each restaurant twice a year for access issues, Maintco conducted no surveys of restaurant 4518 for more than a year in 2009 and 2010, and Maintco had only

surveyed that restaurant a total of two times, whereas according to Taco Bell's policy, it should have been surveyed four or five times. ER 75-76.

- Although restaurant managers are supposed to conduct "success walks" through their restaurant every 30 minutes checking for accessibility problems, the Restaurant General Manager ("RGM") at Taco Bell 4518 testified that these walks do not address disability or accessibility issues. ER 76.
- Finally, although restaurant managers are supposed to conduct an "Access for the Disabled Walk" before the restaurant opens to check accessibility items on a checklist, the RGM for restaurant 4518 had never heard of a disabled walk, had never been given a checklist with specific disability issues, and testified that the pre-opening walk did not include any accessibility issues. ER 76.

Finally, the district court found that "photographs admitted at trial demonstrated that in the past five years, Taco Bell had on multiple occasions not followed its policy that accessible parking spaces have required signage, that trash cans in restrooms not block dispensers, and that pipes under lavatories in restrooms be insulated." ER 99-100.

b. Taco Bell's Policies Are Vague and Contradictory.

The district court also found that Taco Bell's access policies are vague and contradictory. ER 100.

As explained above, two of Taco Bell's most important current access policies purport to require maintenance technicians and Maintco to inspect for access problems when they visit restaurants, but the checklists used during these inspections both contain the following loophole:

> If a deviation from an applicable guideline is detected following an inspection, these item(s) shall be reviewed by our ADA Compliance team to determine whether certain limited exceptions to the guidelines apply, which will be evaluated on an item-by-item basis.

ER 75-76.

The district court found that these provisions gave "Taco Bell the discretion to ignore violations of the checklist based on unknown and unspecified criteria. Thus it is impossible to determine the circumstances under which elements that do not comply with a particular checklist will actually be fixed." ER 100.

The district court also cited numerous changes that Taco Bell had made in its corporate access policies over time, and found "provisions in later policies contradicted provisions in earlier policies, and omitted architectural elements that had been covered by earlier policies." ER 73-74.

c. Taco Bell Could Change or Rescind its Policies at Any Time.

Finally, the district court found that Taco Bell could change or rescind these policies at any time by, for example, not renewing its year-to-year contract with Maintco, or not providing access training to new maintenance technicians. ER 100.

4. The District Court's Conclusions Of Law.

The district court held that because Taco Bell had repeatedly engaged in violations in the past, it was likely that violations would recur, and thus Plaintiffs had standing to seek injunctive relief. ER 83. Based on the widespread violations that the district court found in both the 2007 Summary Judgment Order and the FFCL, and its findings of material deficiencies in Taco Bell's past and present corporate accessibility policies, the district court held that entry of an injunction covering all of the restaurants at issue was warranted. ER 111.

The district court also rejected Taco Bell's argument that, by removing barriers from its restaurants and issuing new accessibility policies, it had mooted Class injunctive claims. ER 97-101. The district court held that based on the inadequacies described above in Taco Bell's past and current accessibility policies, Taco Bell had not met its formidable burden -- under the voluntary cessation exception to the mootness defense -- of demonstrating that it is 'absolutely clear the alleged wrongful behavior could not reasonably be expected to recur.'" ER 98

(*quoting Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (other citations omitted)).

SUMMARY OF ARGUMENT

When a district court finds an architectural violation of Title III, the statute makes injunctive relief mandatory. 42 U.S.C. § 12188(a)(2).

Here, the district court found that Taco Bell had committed almost 400 violations of accessibility requirements in more than 160 stores across California, that these violations are likely to recur, and that Taco Bell's new access policies, like its old, are critically deficient, are not sufficient to prevent violations from recurring, and thus do not moot the case or make injunctive relief inappropriate.

The district court found all of this, and its findings and conclusions were fully supported by the record. But the district court has now refused to enter an injunction, deferring even considering injunctive relief until some indefinite point years in the future, a delay during which injunctive relief may become moot, and which will cause irreparable harm to the Class. The district court's refusal to enter an injunction was an abuse of discretion[4] and thus constituted reversible error. *See United States v. Ressam*, 679 F.3d 1069, 1086 (9th Cir. 2012) (en banc) ("[W]e

[4] Refusal to enter an injunction is reviewed for abuse of discretion. *Molski v. Foley Estates Vineyard and Winery, LLC*, 531 F.3d 1043, 1046 (9th Cir. 2008).

have held that 'a district court abuses its discretion when it makes an error of law . . .'")(citation omitted).

The overwhelming evidence before the district court supporting entry of a classwide injunction was compiled over a decade of intense litigation that included dozens of depositions, multiple summary judgment motions, exchanges of hundreds of thousands of pages of documents, a two-week bench trial, multiple surveys of the restaurants and multiple extensions of time for Taco Bell to try to fix its restaurants. The district court's refusal to enter an injunction under these circumstances imposes an impossibly high standard for injunctive relief -- the only relief obtainable under Title III and the only remaining relief for the Class -- and will create a strong deterrent to private enforcement of Title III, which this Court has held is vital to ensuring compliance with that statute.[5]

[5] *See, e.g., Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (Recognizing that "private enforcement suits 'are the primary method of obtaining compliance with the Act.'" (*quoting Doran v. 7–Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008))).

ARGUMENT

The District Court Erred by Refusing to Enter an Injunction Despite Dispositive Findings of Widespread Violations of Accessibility Requirements and Critically Deficient Accessibility Policies.

The 2007 Summary Judgment Order and the FFCL established widespread violations of accessibility requirements and materially deficient and centralized accessibility policies, thus requiring entry of an injunction and rejection of Taco Bell's mootness defense. The district court erred by refusing to enter an injunction.

A. The District Court Correctly Held That The Evidence Warranted an Injunction Covering All Restaurants.

The district court correctly concluded in its Findings of Fact and Conclusions of Law that the large number of violations and Taco Bell's inadequate policies justified the entry of a classwide injunction.

1. Taco Bell's Numerous and Widespread Violations Establish a Likelihood that they will Recur and Constitute Symptomatic Evidence Justifying a Classwide Injunction.

The district court correctly held that Taco Bell's numerous past violations established a likelihood that violations will recur in the future. *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001) (holding that a likelihood that violations will recur in the future is established where a defendant has "repeatedly engaged in the injurious acts in the past"); *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852,

855 (9th Cir. 1995) (holding that a single previous violation can establish a cognizable danger of recurrent violations).

The district court also correctly concluded that the scope of the injunction should include all restaurants covered by the class. "The scope of injunctive relief is dictated by the extent of the violation established. The key question . . . is whether the inadequacy complained of is in fact widespread enough to justify system wide relief." *Armstrong v. Davis*, 275 F.3d at 870, *quoted in* ER 97. Further, "while the scope of relief must correspond to the injury suffered, in a certified class action, the injury, and the corresponding relief, extends to the class as a whole." ER 97, *citing Armstrong*, 275 F.3d at 871.

> In determining the extent of the violations,
>
> > [a] court need not address every violation in order to conclude that violations are sufficiently widespread to necessitate a system wide injunction. Rather, *a court can enter such an injunction based on evidence that is 'symptomatic' of the defendant's violations*, including 'individual items of evidence [that are] representative of larger conditions or problems.'

ER 97 (emphasis added), *quoting Armstrong*, 275 F.3d at 871.

The almost 400 violations spread among more than 160 restaurants established in the 2007 Summary Judgment Order and the FFCL constituted

symptomatic evidence representative of larger problems and thus by themselves were sufficient to justify an injunction covering all of the restaurants.

2. Taco Bell's Centralized but Deficient Policies Constitute Further Support for a Classwide Injunction.

The district court's determination that Taco Bell's past and present centralized accessibility policies have been, and are, critically deficient because they often are not followed, they are inconsistent, vague and contradictory, they change frequently -- often for the worse -- and some key current policies give Taco Bell complete discretion to ignore violations, further supports an injunction covering all restaurants.

Significantly, as the district court found, Taco Bell's accessibility policies are centralized (ER 73), and thus the deficiencies identified by the district court in Taco Bell's past and present accessibility policies apply to all of the restaurants at issue in this action. Because the scope of the injunction should correspond to the scope of the violation established, the district court properly held that an injunction covering all restaurants should be entered. *See Armstrong*, 275 F.3d at 870 ("System-wide relief is required if the injury is the result of violations of a statute . . . that are attributable to policies or practices pervading the whole system . . .").

This Court has on several occasions held that where the evidence demonstrates that deficient policies are in place at a number of facilities, the scope of the injunction properly includes all such facilities.

For example, in *Clement v. California Department of Corrections*, 364 F.3d 1148 (9th Cir. 2004), this Court affirmed the district court's holding that a regulation prohibiting inmates from receiving mail containing material downloaded from the internet violated the inmate's First Amendment rights. This Court further affirmed the district court's entry of a statewide injunction:

> The district court properly addressed the injunction to all prisons under CDC control. "The scope of injunctive relief is dictated by the extent of the violation established." *Armstrong*, 275 F.3d at 870 (*quoting Lewis*, 518 U.S. at 359, 116 S. Ct. 2174). Clement has provided uncontroverted evidence that at least eight California prisons have adopted a policy banning all internet-generated mail, and that more are considering it. There is no indication in the record that the policies that other California prisons have enacted differ in any material way from Pelican Bay's blanket prohibition. Because a substantial number of California prisons are considering or have enacted virtually identical policies, the unconstitutional policy has become sufficiently pervasive to warrant system-wide relief.

Id. at 1153.

Similarly, in *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996), this Court affirmed the district court's determination that a policy of the California Highway Patrol violated the Fourth Amendment, and also affirmed the

district court's entry of a statewide injunction, in part because the policy at issue was "formulated on a statewide level." *Id*. at 1502.

* * *

Based on this governing Circuit law, the district court properly held in the FFCL that the 2007 Summary Judgment Order establishing almost 400 violations of Title III and California state law spread amongst more than 160 restaurants, as well as the evidence admitted during the exemplar trial demonstrating the material deficiencies in Taco Bell's past and present centralized accessibility policies, warranted entry of an injunction covering all of the restaurants at issue.

B. The District Court Correctly Held That Taco Bell Had Failed to Meet its Burden Under The Voluntary Cessation Doctrine Of Establishing That Class Injunctive Claims were Moot.

Taco Bell argued that by removing barriers from its restaurants and implementing new accessibility policies, it had mooted Class injunctive claims.

The district court properly rejected this argument on the grounds that Taco Bell had not satisfied its "'formidable burden' of demonstrating that it is 'absolutely clear the alleged wrongful behavior could not reasonably be expected to recur.'" ER 98 (*quoting Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (other citations omitted)). To render a claim for injunctive relief moot, "'the reform of the defendant must be irrefutably

demonstrated and total.'" *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135 (9th Cir. 1986) (citation omitted)). Ultimately, "[i]t is no small matter to deprive a litigant of the rewards of its efforts . . .. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000).

The district court's conclusion that Taco Bell had not met this burden is well-supported by relevant precedent and was based on a detailed analysis of the facts, including that architectural elements in the restaurants are subject to frequent change, that Taco Bell was not currently following its own access policies, and has a history of not doing so, and that Taco Bell could change or rescind its policies at any time. ER 98-101. This latter concern was exacerbated by the fact that Taco Bell has in the past frequently changed its access policies, often for the worse. ER 73-74.

The district court's conclusion also rested on the fact that Taco Bell's accessibility policies are vague and contradictory. The court cited as examples policies that had appeared and disappeared and set contradictory standards over time. ER 100. More significantly, two of Taco Bell's most important current access policies give Taco Bell the discretion to ignore violations based on unknown

and unspecified criteria, causing the district court rightly to conclude that "it is impossible to determine the circumstances under which elements that do not comply with a particular checklist will actually be fixed." *Id.* These "outs" in Taco Bell's access policies essentially leave the fox in charge of the hen house. Taco Bell is a proven serial violator of the ADA and California accessibility requirements, and yet its new access policies leave it with sole discretion whether to remedy violations that occur in the future. In light of this, Taco Bell failed to meet its "formidable burden" of demonstrating that it is absolutely clear its wrongful behavior could not reasonably be expected to recur.

Whether based on architectural fixes or policy changes, this Court has consistently rejected mootness in cases similar to this. For example, in *Pereira v. Ralph's Grocery Co.*, 329 Fed. Appx. 134 (9th Cir. 2009), the Ninth Circuit summarily reversed a district court that found mootness in circumstances where the evidence supporting mootness was much stronger than exists in this case. In *Pereira*, a class action was brought on behalf of persons who used wheelchairs or scooters against a chain of grocery stores alleging architectural barriers in violation of Title III. The defendant remediated the barriers, and the district court granted summary judgment on the ground that the class injunctive claims were moot. 2007 WL 7543254, at *5 (C.D. Cal. Oct. 25, 2007). This Court reversed, holding that

"[t]he defendant's 'voluntary cessation of allegedly illegal conduct' did not moot this case." 329 Fed. Appx. at 134.

TBC's new policies, similarly, cannot satisfy its formidable burden under the voluntary cessation doctrine. As the Supreme Court has explained, the mere "possibility that [the defendant] may change its mind in the future is sufficient to preclude a finding of mootness." *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (Holding that if voluntary cessation could render an action moot, "[t]he defendant is free to return to his old ways"). Taco Bell's history of violations is probative of the likelihood of future violations, and undercuts its claims of mootness. *See Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1175 (9th Cir. 2009); *see also Porter v. Bowen*, 496 F.3d 1009 (9th Cir. 2007) (relying on voluntary cessation exception to reverse district court's dismissal of injunctive claims on mootness grounds in response to letter from secretary of state).

Several other circuits have applied this principle under Title III. In *Feldman v. Pro Football, Inc.*, 419 Fed. Appx. 381, 387–88 (4th Cir. 2011), deaf plaintiffs sued under Title III challenging the lack of captioning at a professional football stadium. The defendant began providing captioning and asserted that the plaintiffs'

claims were moot. The Fourth Circuit affirmed the conclusion that claims were not moot, holding that "[g]iven the ease with which defendants could stop providing captioning, we simply cannot say that they have made an affirmative showing that the continuation of their alleged ADA violations is 'nearly impossible.'" *See also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1189 (11th Cir. 2007) (holding that a medical office that changed its service animal policy in response to a lawsuit did not moot the plaintiff's claims).

Here, there is far more than a mere possibility that Taco Bell will change its policies in the future. To the contrary, Taco Bell has a history of frequently changing its accessibility policies, often for the worse, and its current policies explicitly permit it to ignore access violations found by personnel tasked with monitoring such violations. In analogous circumstances, both the Supreme Court and this Court have rejected defendants' arguments that claims against them have been mooted by their adoption of new policies that comply with the law. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 3009 n. 3 (2010) (refusing to hold that a defendant's new policy moots injunctive relief, because the defendant has a "practice of changing its announced policies"); *Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (rejecting the defendant's argument that its new policy mooted the plaintiffs'

injunctive claims because the new policy was vague, and the defendant had a history of failing to comply with accessibility requirements).

C. The District Court Erred By Refusing to Enter An Injunction.

As set forth above, the district court determined that Taco Bell had engaged in hundreds of violations of Title III and state law, and found critical deficiencies in its past and present centralized accessibility policies. As such, entry of an injunction covering all current and future restaurants subject to those policies was mandatory, and the district court's September 17 Orders refusing to enter an injunction was an abuse of discretion.

1. Standard of Review.

In its September 17 Orders that are the basis for this appeal, the district court refused to enter an injunction and deferred consideration of injunctive relief for potentially another decade, by which time injunctive relief may be moot. ER 1, 3. This Court reviews a district court's decision whether to grant equitable relief under Title III for an abuse of discretion. *Molski v. Foley Estates Vineyard and Winery, LLC*, 531 F.3d 1043, 1046 (9th Cir. 2008). By failing to impose a legally mandated remedy, the district court abused its discretion. *United States v. Ressam*, 679 F.3d 1069, 1086 (9th Cir. 2012) (en banc) ("[W]e have held that 'a district court abuses its discretion when it makes an error of law . . .'")(citation omitted).

2. The District Court Abused Its Discretion by Refusing To Enter An Injunction Because Entry of An Injunction Is Mandatory for Violations of Title III.

Title III's remedial provision requires, in relevant part, that in the case of violations of the architectural provisions[6] of that title, "injunctive relief *shall* include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter [and w]here appropriate, injunctive relief *shall* also include . . . modification of a policy . . ." 42 U.S.C. § 12188(a)(2) (emphasis added). Section 12188 goes on to provide that in actions brought by the Attorney General, a court "may" grant any equitable relief that such court considers to be appropriate. *Id.* § 12188(b)(2).

"'The word "may," when used in a statute, usually implies some degree of discretion,' especially 'when the same [provision] uses both "may" and "shall,"' in which case, 'the normal inference is that each is used in its usual sense -- the one act being permissive, the other mandatory.'" *Sauer v. U.S. Dept. of Educ.*, 668 F.3d

---

[6] Title III requires that new construction and alterations to existing facilities be "readily accessible to and usable by" individuals with disabilities, 42 U.S.C. § 12183(a)(1) & (2), and that barriers be removed from unaltered portions of existing facilities where it is "readily achievable" to do so, 42 U.S.C. § 12182(b)(2)(A)(iv). Section 12188(a)(2) mandates an injunction where violations of any of these provisions is established.

644, 651 (9th Cir. 2012) (*quoting United States v. Rodgers*, 461 U.S. 677, 706 (1983) & *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)).

Section 12188 uses both "may" and "shall" and thus, under the statutory construction principle delineated in *Sauer*, entry of an injunction in private Title III actions -- where the word "shall" is used -- is mandatory.[7]

This Court reached the same conclusion in *Moreno v. La Curacao*, 463 Fed. Appx. 669 (9th Cir. 2011), in which a person who used a wheelchair had sought a default judgment in an action against a furniture store for violations of Title III and Unruh. *See Moreno v. La Curacao*, 2010 WL 3749598, at *1-2 (C.D. Cal. Sept. 22, 2010). The relief sought by the plaintiff included a mandatory injunction requiring the defendant to remove specified barriers. *Id.* at *2. Although the district court deemed as admitted the plaintiff's allegations that removing these barriers would be readily achievable, it refused to enter an injunction. *Id.* at *4.

This Court, reviewing the district court's order for an abuse of discretion, reversed, holding that because the district court determined that removal of some

---

[7] *See also CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 450 F.3d 505, 527 (11th Cir. 2006) (holding that statute that provided that upon a finding of a patten or practice, a court "shall order a permanent injunction" whereas it "may order statutory damages" demonstrated that "Congress unequivocally stated a purpose to restrict the courts' traditional equitable authority upon a finding of a 'pattern or practice.'").

barriers would be readily achievable -- the standard under 42 U.S.C. § 12182(b)(2)(A)(iv) -- the plaintiff "was entitled to injunctive relief, which 'shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities.' 42 U.S.C. § 12188(a)(2). Accordingly, the district court erred in denying the plaintiff's request for a mandatory injunction." *Moreno*, 463 Fed. Appx. at 670.

This Court reached a similar result in *Antoninetti v. Chipotle Mexican Grill, Inc.*, in which it reversed a district court's determination that certain architectural features in a restaurant did not violate Title III. 643 F.3d 1165, 1172-74 (9th Cir. 2010). This Court further held that "[c]onsidering all the circumstances, including particularly the statutory violations we have found and the fact that an injunction is the only relief available to a private party under the Act, *it would be an abuse of discretion for the district court now to deny injunctive relief*." *Id.* at 1175 (emphasis added).

The district court in the case at bar found that Taco Bell has engaged in widespread violations of Title III, and that those violations resulted from critically deficient centralized policies. The district court thus abused its discretion by refusing to enter an injunction.

D. The District Court's Refusal To Enter An Injunction Is Extremely Prejudicial To The Class.

The district court's decision not to enter an injunction despite its findings that Taco Bell has engaged in widespread violations of accessibility requirements is extremely prejudicial to the class. Although the September 17 Orders purport only to defer consideration of injunctive relief until after the damages trials, the practical effect very well may be to deny the Class any injunctive relief.

The district court held that each of the four named plaintiff's damages claims will need to be separately tried before it will even consider injunctive relief. Given the district court's docket, this will be a very lengthy process, one that the district court itself estimated could take up to ten years. ER 3.

In the meantime, three things will happen. First, Taco Bell will continue its ongoing efforts to sell all of the covered restaurants, a process that it claims will be 80% complete by the beginning of 2013. ER 56. Once it has done that, it intends to argue that class injunctive claims are moot. *See id.* If it prevails on that argument, the effect will be to deny all relief to the Class, notwithstanding the fact that, as set forth above, Taco Bell has violated accessibility requirements hundreds of times, and those violations are likely to recur, thus entitling the Class to immediate entry of an injunction.

Second, witnesses's memories will fade and evidence will become stale. As a result, even if Taco Bell does not finally succeed in its efforts to moot class injunctive claims, those claims will be much more difficult to prove.

Third, class members will die, which is to be expected with a class consisting of people who use wheelchairs or scooters, many of whom are elderly or medically fragile.

Thus despite the fact that the district court has found that Taco Bell has engaged in hundreds of violations of accessibility requirements, classwide injunctive relief -- which is the only relief provided by Title III, and the only relief remaining for the class -- may very well be denied if the September 17 Orders are not reversed.

E. The Orders Under Appeal Will Chill Essential Private Enforcement of Title III of the ADA.

The district court's September 17 Orders essentially hold that, to obtain a mandatory injunction under section 12188(a)(2), it is not enough for plaintiffs with disabilities -- faced with systemic barriers at a chain of public accommodations -- to litigate for ten years, share the cost of a 220-store survey by a court-appointed special master, completely underwrite the cost of a second full survey, retain financial and architectural experts, take and defend dozens of depositions, exchange

and analyze hundreds of thousands of documents, obtain summary judgment on hundreds of violations, defeat three defense attempts over the course of four years to argue that the case is moot, and prevail completely in an exemplar trial that established, among other things, the inadequacy of years of the defendant's corporate policies.

By holding that plaintiffs who have labored this hard and achieved these excellent results must wait another decade for an injunction -- assuming that there are live injunctive claims at that point -- the district court's orders will discourage individuals with disabilities and their counsel from bringing precisely the sort of Title III suits that should be encouraged: well-founded, multi-plaintiff or class cases that challenge systemic barriers in a chain of public accommodations. The district court's action directly contravenes this Court's and the Supreme Court's holdings that private lawsuits are an essential component of the enforcement of Title III and related civil rights statutes, and thus should not be unduly burdened.

Title III borrows its enforcement provision from Title II of the Civil Rights Act of 1964 ("CRA"), which bars discrimination on the basis of race, color, religion, or national origin at places of public accommodation. 42 U.S.C. § 12188(a)(1), *incorporating by reference* 42 U.S.C. § 2000a-3(a). This provision does not contain a damages remedy; the only available relief is injunctive. *Id.* Early

in the enforcement of Title II of the CRA, the Supreme Court explained the importance of private enforcement:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.

Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-02 (1968).

Because private lawsuits are essential to enforcement of the statute they are to be encouraged, not burdened. As the *Newman* Court held, it is for this reason that Title II of the CRA contains a fee-shifting provision intended to ensure that individuals who face discrimination are able to retain counsel to challenge it. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Id*. at 402; *see also, e.g., Harris v. Maricopa County Superior Court*, 631 F.3d 963, 971 (9th Cir. 2011) (noting the importance of fee-shifting provisions because "Congress and the courts have long recognized that creating broad compliance with our civil rights laws, a policy of the

'highest priority,' requires that private individuals bring their civil rights grievances to court;" citing *Newman*).

In order to ensure private enforcement, this Court has limited burdens that may be placed on Title III plaintiffs. For example, this Court has, on several occasions, noted that constitutional standing must be interpreted broadly "'where, as under the ADA, private enforcement suits "are the primary method of obtaining compliance with the Act."'" *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (*quoting Doran v. 7–Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) and *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)). And this Court has explained that the "futile gesture" provision -- that people with disabilities are not required to engage in a futile gesture to have a claim when they have actual notice of noncompliance, 42 U.S.C. § 12188(a)(1) -- "seek[s] to avoid unreasonable burdens on ADA plaintiffs." *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002); *see also Dudley v. Hannaford Bros., Co.*, 333 F.3d 299, 307 (1st Cir. 2003) (holding that the "futile gesture" provision demonstrates that "Congress clearly meant not to overburden Title III claimants;" citing *Newman*).

Requiring plaintiffs who have litigated for ten years and obtained excellent results to wait another ten years for an injunction will impose just the sort of burden

this Court and the Supreme Court have deemed improper. This burden will make it difficult for people with disabilities to bring -- and find counsel to undertake -- the private litigation so widely recognized as essential to enforcement of Title III.

Title III was enacted in 1990 and effective, at the latest, in 1993. 104 Stat. 327, § 310; *see also Moeller*, 220 F.R.D. at 606. California has had a well-developed accessibility code since 1982. *See id.* at 607 (citing Cal. Code Regs. tit. 24 (1982) & *People ex rel. Deukmejian v. CHE, Inc.*, 150 Cal. App. 3d 123, 134 (1983)). Here, the district court held -- in both the 2007 Summary Judgment Order and the FFCL -- that hundreds of violations still existed in 2002, at least ten and perhaps as long as twenty years after they became illegal. Taco Bell ignored these violations for one to two decades, litigated them for another decade, and now stands to avoid injunctive relief for yet another decade, if not entirely. Faced with litigation barriers like these, what disabled person will have the stamina to challenge systemic architectural barriers?

The law of this Circuit -- *Armstrong*'s holding that symptomatic evidence of violations is sufficient to enter a systemic injunction and *Moreno*'s and *Antoninetti*'s holdings that it is an abuse of discretion not to enter an injunction where violations have been established -- is clear that Title III plaintiffs should not have to wait

twenty years for effective relief, and that the district court's findings here mandate immediate entry of an injunction under section 12188(a)(2).

RELIEF SOUGHT

The Class seeks an order remanding this case to the district court for prompt entry of a classwide injunction ensuring that compliance with accessibility requirements under Title III and California law is maintained in California restaurants currently operated by Taco Bell, or that are constructed or acquired by Taco Bell during the term of the injunction.

REQUEST FOR ORAL ARGUMENT

Appellants' counsel believe that the issues raised in this appeal have significant public importance and respectfully request that oral argument be permitted.

CERTIFICATION

The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. of App. P. 32(a)(7)(B) because it contains approximately 9,600 words, excluding the parts of the brief exempted by Fed. R. of App. P. 32(a)(7)(B)(iii).

STATEMENT OF RELATED CASES

Appellants know of no related cases pending before this Court.

Respectfully submitted,

FOX & ROBERTSON, P.C.

By: /s/ Timothy P. Fox

Timothy P. Fox
Amy F. Robertson
Fox & Robertson, P.C.
104 Broadway, Ste. 400
Denver, CO 80203
Telephone: 303-595-9700

Brad Seligman
Jocelyn Larkin
The Impact Fund
125 University Ave
Berkeley, CA 94710
Telephone: 510-845-3473

Mari Mayeda
P.O. Box 5138
Berkeley, CA 94705
Telephone: 510-917-1622

Antonio Lawson
Lawson Law Offices
7700 Edgewater Dr. Ste 255
Oakland, CA 94621
Telephone: 510-878-7818

Bill Lann Lee
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.
476 – 9th Street
Oakland, CA 94607
510-839-6824

Date: October 29, 2012

Case No. 12-17144

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIE MOELLER, KATHERINE CORBETT, EDWARD MUEGGE, AND CRAIG YATES, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

TACO BELL CORP.,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of California, Oakland Division
Civil Action No. C 02-5849 PJH

APPELLANTS' ADDENDUM SETTING FORTH PERTINENT STATUTES

TIMOTHY P. FOX
AMY F. ROBERTSON
Fox & Robertson, P.C.
104 Broadway, Ste. 400
Denver, CO 80203
303-595-9700

ANTONIO LAWSON
Lawson Law Offices
7700 Edgewater Dr. Ste 255
Oakland, CA 94621
510-878-7818

MARI MAYEDA
P.O. Box 5138
Berkeley, CA 94705
510-917-1622

BRAD SELIGMAN
JOCELYN LARKIN
The Impact Fund
125 University Ave
Berkeley, CA 94710
510-845-3473

BILL LANN LEE
Lewis, Feinberg, Lee,
Renaker & Jackson, P.C.
476 – 9th Street
Oakland, CA 94607
510-839-6824

Attorneys for Plaintiffs - Appellants

TABLE OF CONTENTS

28 U.S.C. § 1292:

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the

litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin

Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

42 U.S.C. § 12188:

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief

In the case of violations of sections 12182(b)(2)(A)(iv) and section1 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general

The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) Attorney General certification

On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local

ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation

If the Attorney General has reasonable cause to believe that--

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court

In a civil action under paragraph (1)(B), the court--

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter--

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount--

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) Single violation

For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages

For purposes of subsection (b)(2)(B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration

In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems

relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

Respectfully submitted,

FOX & ROBERTSON, P.C.

By: /s/ Timothy P. Fox

Timothy P. Fox
Amy F. Robertson
Fox & Robertson, P.C.
104 Broadway, Ste. 400
Denver, CO 80203
Telephone: 303-595-9700

Brad Seligman
Jocelyn Larkin
The Impact Fund
125 University Ave
Berkeley, CA 94710
Telephone: 510-845-3473

Mari Mayeda
P.O. Box 5138
Berkeley, CA 94705
Telephone: 510-917-1622

Antonio Lawson
Lawson Law Offices
7700 Edgewater Dr. Ste 255
Oakland, CA 94621
Telephone: 510-878-7818

Bill Lann Lee
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.
476 – 9th Street
Oakland, CA 94607
510-839-6824

Date: October 30, 2012