GLYNN & FINLEY, LLP
CLEMENT L. GLYNN, Bar No. 57117
ADAM FRIEDENBERG, Bar No. 205778
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596
Telephone: (925) 210-2800
Facsimile: (925) 945-1975
E-mail: cglynn@glynnfinley.com
afriedenberg@glynnfinley.com

GENOVESE JOBLOVE & BATTISTA, P.A.
MICHAEL D. JOBLOVE (admitted *pro hac vice)*
JONATHAN E. PERLMAN (admitted *pro hac vice)*
Bank of America Tower
100 Southeast Second Street, 44th Floor
Telephone: (305) 349-2300
Facsimile: (305) 349-2310
Email: mjoblove@gjb-law.com
jperlman@gjb-law.com

Attorneys for Defendant Burger King Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL CASTANEDA on behalf of himself and others similarly situated Plaintiff, vs. BURGER KING CORPORATION and BURGER KING HOLDINGS, INC., Defendants.	**Case No. CV 08-4262 WHA** **DEFENDANT BURGER KING CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS** **Date:** February 12, 2009 **Time:** 8:00 a.m. **Before:** Hon. William H. Alsup **Courtroom:** 9, 19th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiff Miguel Castaneda's Complaint purports to assert a state-wide class action under Title III of the Americans with Disabilities Act (the "ADA") and two California statutes as against every Burger King® branded restaurant in California in which Burger King Corporation has any leasehold interest (the "BKLs"). As Defendant Burger King Corporation explained in its motion to dismiss, because claims under the ADA are site-specific in nature and class allegations add nothing to the standing question, Plaintiff's standing under both Article III of the U.S. Constitution and the ADA is limited to the two named restaurants.

In response, Plaintiff claims that his lack of individual standing is irrelevant because it is "the standing of the class as a whole" that controls. (DE 42 at 9). Tellingly, Plaintiff never mentions the binding Supreme Court (and Ninth Circuit) decisions to the contrary that Burger King Corporation cites. Plaintiff's refusal to acknowledge that other courts have granted the identical relief sought by Defendant in virtually identical circumstances speaks volumes. *E.g.*, *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334 (D.N.J. 2003) (dismissing for lack of standing all claims as to restaurants that the named plaintiff had not visited, despite the presence of class allegations). Moreover, the only published decision Plaintiff cites on this issue actually supports Defendant's argument that Plaintiff's claims against the additional restaurants must be dismissed for lack of standing.[1]

Unable to distinguish Defendant's authorities or cite any that endorse his theory, Plaintiff invokes judicial efficiency as a reason to ignore his lack of standing. Judicial efficiency, however, does not cure a lack of jurisdiction and does not allow Plaintiff to act as a pseudo-attorney general by conducting a time consuming, expensive investigation into the conditions of all California BKLs, the cost of which will be borne by the small independent business owners who operate the restaurants.

[1] Plaintiff's opposition is replete with legal and factual omissions and misstatements and innuendo undeserving of response. For example, Plaintiff claims that because, in privately settling an ADA case in the District of Columbia more than 10 years ago, Defendant agreed to notify franchisees of their obligation to comply with the ADA, any current access violations are somehow within Defendant's knowledge, and worse, intentional. (DE 42 at 4). This illogical contention is diversionary, and the settlement agreement irrelevant. Moreover, Defendant's leases expressly advise its franchisee to comply with the ADA. (*See, e.g.*, DE 30, Exs. C, F, § 5.7).

Plaintiff argues alternatively that he *must* have standing to sue the additional restaurants, because only that can explain the district court decisions that have, on occasion, certified some Title III ADA class actions involving multiple locations. Those decisions are irrelevant because none involved a challenge to standing on a motion to dismiss, as is the case here.[2]

Most importantly, in each of those cases the named plaintiffs identified and alleged that the defendant had implemented a company-wide policy or specific design flaw that caused a common accessibility violation at all locations. This distinction is critical, because *only* where a defendant's centralized corporate policy or practice causes a common violation can individual standing exist for multiple unvisited locations. In such cases, the injury shared by the class members is caused by a single unlawful policy rather than by separate accessibility violations committed by different store operators at different locations.

Unlike those in the cases on which he relies, Plaintiff's Complaint fails to identify any Burger King Corporation policy that causes accessibility violations at its franchisees' restaurants. For example, in the two *Taco Bell* cases on which Plaintiff relies, Taco Bell Corporation allegedly designed and constructed its corporate stores to include a queue line narrower than permitted by the ADA. The instant case, to the contrary, is brought on account of restaurants that Burger King Corporation does not operate, and Plaintiff has no factual basis to claim that Defendant has done anything to make franchisees violate the ADA. Thus, Plaintiff's standing is clearly limited to the named restaurants, and all claims as to other BKLs must be dismissed under Rule 12(b)(1).

Plaintiff's opposition similarly fails to confront the fact that his lack of standing as to additional restaurants also requires that his class allegations as to additional restaurants be dismissed pursuant to Rule 23. Again, Defendant has cited binding precedent that Plaintiff has been unable to refute except by mischaracterizing the contents of his Complaint.

With respect to his state law claims, Plaintiff submits no decisions that refute either Burger King Corporation's argument that the Complaint fails to state a claim or its argument that supplemental jurisdiction should be declined pending State Supreme Court resolution of the

[2] Notably, the Supreme Court has reversed decisions for lack of standing without disturbing the class that was certified. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

unsettled questions as to intent. Moreover, Plaintiff's objection to the applicability of the local controversy exception to CAFA diversity jurisdiction should be overruled because the prior complaint on which Plaintiff relies is insufficiently similar to this case.

II. DISCUSSION

A. PLAINTIFF'S CLAIMS AS TO RESTAURANTS HE HAS NOT VISITED MUST BE DISMISSED UNDER RULE 12(b)(1) FOR LACK OF STANDING

1. Because Defendant's Challenge to Plaintiff's Standing Is Limited to the Face of the Complaint, Plaintiff's May Not Reference Extrinsic Matters

A Rule 12(b)(1) motion to dismiss for lack of standing is either "facial," in which the inquiry is limited to the complaint's allegations, or "factual," in which the court may look at extrinsic evidence as well. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A facial challenge is appropriate when the primary standing issues are legal. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *see Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 892 (3rd Cir. 1977) (factual attack "cannot occur until the plaintiff's allegations have been controverted" in an answer).

Burger King Corporation's motion to dismiss for lack of standing presents a "facial" challenge based solely upon Plaintiff's Complaint and the documents therein referenced. (*See* DE 29 at 4-11).[3] Plaintiff agrees that the question of his standing "is legal rather than factual." (DE 42 at 8). Accordingly, Plaintiff's opposition must be limited to the Complaint and documents incorporated by reference. *See Savage*, 343 F.3d at 1039 n.2 (non-moving party may submit evidence outside the complaint only after "the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence"); *Gould Elecs, Inc. v. U.S.*, 220 F.3d 169, 176 (3d Cir. 2000) (same); *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (documents referenced in the complaint are considered part of the complaint for purposes of motion to dismiss).

Ignoring that governing standard, Plaintiff submitted two declarations consisting of

[3] The few factual statements in the declaration Burger King Corporation submitted with its motion either support its argument as to CAFA diversity jurisdiction (*see* DE 29 at 17-19), or refer to public records or documents Plaintiff referenced in the Complaint, and therefore do not convert this to a factual challenge. *Doe v. Mann*, 285 F. Supp. 2d 1229, 1232 (N.D. Cal. 2003) (court hearing Rule 12(b)(1) motion "looks to the complaint and attached documents, as well as to facts that are judicially noticeable or undisputed").

numerous hearsay statements and allegations that are nowhere to be found in the Complaint.[4] It would appear from these filings that Plaintiff acknowledges his pleading deficiencies and wishes to amend the Complaint. The proper course of action is, of course, to seek leave to file an amended complaint, not to submit affidavits describing additional allegations that are not in the operative pleading.[5]

As the above decisions make plain, references to extraneous information must be ignored or stricken. Accordingly, the Court should ignore or strike Plaintiff's Declaration (DE 43) and Ms. Robertson's Declaration (DE 44), including the double hearsay within, as well as all references to documents or other evidence not referenced in the Complaint. (DE 42 at 5-7).

2. Plaintiff Must Have Individual Standing With Respect to Each Restaurant About Which He Wishes to Complain, Irrespective of Class Allegations

As Burger King Corporation explained in its motion, dismissal for lack of standing of Plaintiff's claims against BKLs other than the Pleasant Hill and Pittsburg restaurants is mandated by long-settled legal principles: (1) Plaintiff bears the burden of establishing standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); (2) the site-specific nature of Title III ADA claims

[4] Two items are most objectionable. First, counsel claims that the allegations in the Complaint are based on "information and belief" because counsel did not have access to Defendant's leases, franchise agreements, or designs prior to suit. (DE 42 at 5; DE 44 ¶¶ 1-7). If that were true, then counsel would be admitting that the allegations were made with ***no*** basis in fact, in violation of Fed. R. Civ. P. 11. In fact, Defendant met with Plaintiff's counsel many times pre-suit and even provided copies of its store designs. (DE 16, ¶ 3). Notably, the Complaint does not identify any purported design flaws. Moreover, a simple Google search reveals that Defendant's form franchise agreements and leases, and store locations are available for purchase on the internet from many services. (Van Horn Declaration, ¶¶ 2-5, Exs. A-C). Second, counsel's suggestion that pre-suit, she could not discern which of stores were BKLs is not accurate. Burger King Corporation agreed pre-suit to provide counsel with this information for any restaurant counsel identified as having an accessibility issue, and did, in fact, provide that information. (DE 16, ¶6). Significantly, this belies Plaintiff's current claim that he did not know before filing his Complaint which of the restaurants that he had patronized were BKLs. (*See* DE 42 at 7). Moreover, despite having been able to learn which restaurants were BKLs pre-suit merely by asking, now that Burger King Corporation has produced a list of the BKLs, Plaintiff suddenly claims to have visited seven additional locations pre-suit. This goes well beyond the allegations of the Complaint, as does counsel's affidavit that asserts that someone at her office or elsewhere ("we") "estimate" that a number of individuals have encountered "similar" identical barriers at an "approximately" number of unidentified BKLs. (DE 44, ¶ 7).

[5] The additional allegations, even if true, would not alter the dispositive standing question -- whether Plaintiff's standing is limited to the specific restaurants at which he claims to have encountered access barriers before he filed the Complaint.

limits a disabled person's standing to those sites where he actually encountered access barriers, or at least was deterred from visiting due to known barriers at that location, *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 343-44 (D.N.J. 2003)*;* (3) class allegations do not diminish the named plaintiff's burden to establish standing as to each claim asserted, *Blum v. Yaretsky*, 457 U.S. 991, 999-1002 (1982); and (4) because individual standing is a threshold inquiry, claims which no named plaintiff has standing to assert must be dismissed prior to class certification in order to ensure that the court does not exceed its jurisdiction. *Id.*; *see also Lee v. State of Or.*, 107 F.3d 1382, 1390 (9th Cir. 1997) ("Standing is a jurisdictional element that must be satisfied prior to class certification").

Rather than attempt to distinguish the binding authorities, Plaintiff ignores them. Instead, Plaintiff blithely – and wrongly – proclaims that individual standing is not a threshold issue in class actions, and that the Court should proceed directly to a Rule 23 class certification analysis.

Not surprisingly, the few authorities Plaintiff cites in support of that proposition do not support it at all. For example, Plaintiff claims that *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2000), held that it is only "the standing of the entire class [and not the named plaintiff] that matter[s]." (DE 42 at 10). In fact, the court stated an entirely different proposition – that, *after* a putative class action has been *properly* certified, class standing as a whole is relevant to the scope of injunctive relief. *Id.* at 871. *Armstrong* also made clear that *prior* to class certification, as here, the plaintiffs must have individual standing as to each claim asserted.[6] *See Bates v. United Parcel Servs., Inc.*, 511 F.3d 974, 987 (9th Cir. 2007) (standing of the class as a whole becomes relevant only after class certification). Thus, *Armstrong* actually refutes Plaintiff's contention that his class allegations dispense with the

[6] In *Armstrong*, seventeen disabled prisoners brought a class action against the State of California seeking a reformation of the State's written policy and practice that prevented disabled prisoners and parolees from attending, communicating at, or comprehending parole revocation hearings. *Id.* at 855, 867. After class certification and trial, the district court entered a permanent injunction supported by seventy-four pages of detailed factual findings as to why the State's written parole revocation notification and hearing process violated the ADA. On appeal, the State accepted the court's comprehensive factual findings, "including those that support the district court's standing determination." *Id.* at 860. The State then argued that the relief should have been limited to the named plaintiffs, because they lacked standing to pursue claims on behalf of other prisoners with different injuries. *Id.* at 867. The Ninth Circuit disagreed, holding that the discriminatory policy amounted to a single wrong that the named plaintiffs and class members shared. *Id.* at 866-67.

requirement that he have individual standing for each of the site-specific claims he wishes to assert.[7]

Importantly, *Armstrong* itself was quoting from, and applying, *Lewis v. Casey*, 518 U.S. 343 (1996), which, in turn, addressed -- and rejected -- the argument Plaintiff makes here. There, inmates brought a class action against Arizona officials alleging unlawful deprivation of access to legal research materials. Following class certification and trial, the district court granted statewide injunctive relief that aided illiterate prisoners, non-English speakers, prisoners in lockdown, and the inmate population at large, even though only one named plaintiff, who was illiterate, had established actual injury. *Lewis*, 518 U.S. at 358. The Supreme Court accepted review to consider whether the named plaintiffs' injuries justified the scope of injunctive relief ordered. *Id.*

The Court began by observing that the "actual-injury requirement would hardly serve [its] purpose….if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* at 357. The Court then reaffirmed that this settled rule applies in class actions:

> This is no less true with respect to class actions than with respect to other suits. *That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."*

Id. (citations omitted) (emphasis added). In dissent, Justice Stevens posited that any individual standing by the named plaintiff should be sufficient to confer standing on the plaintiff to pursue similar claims on behalf of all class members. The Court expressly rejected this contention:

> Justice STEVENS concludes, in gross, that Bartholic's and Harris's injuries are sufficient to satisfy any constitutional standing concerns. *But standing is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of **all** administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.* As we have said, 'nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another

[7] Likewise, the section of *Newberg on Class Actions* that Plaintiff quotes sets forth the unremarkable proposition that once the named plaintiff has satisfied the threshold individual standing requirement for all claims he asserts, then the issue of whether he may represent a class depends on satisfying Rule 23. Conte and Newberg, *Newberg on Class Actions* § 2:7 (4th ed. 2008).

kind, although similar, to which he has not been subject."

Id. at 358 n.6 (quoting *Blum*, 457 U.S. at 999) (emphasis in original) (italics added). Accordingly, the Court held that the scope of the injunction could not extend beyond those changes designed to remedy the named plaintiffs' injuries. *Id.* at 358-59.

Finally, the Court rejected the argument Plaintiff Castaneda makes here that the standing determination is replaced by the certification determination in class actions:

> [O]ur holding that respondents lacked standing to complain of injuries to non-English speakers and lockdown prisoners does not amount to a conclusion that the class was improper. The standing determination is quite separate from certification of the class. Again, *Blum* proves the point."

Id. at 358 n.6; *see also Dallas Gay Alliance v. Dallas County Hosp. Dist.*, 719 F. Supp. 1380, 1384 (N.D. Tex. 1989) (the limitations of Article III apply to class actions).

Here, Plaintiff repeats the losing argument from *Lewis* that standing should be dispensed in gross, such that his visit to two restaurants automatically confers standing to bring all California BKLs before the court for review. As *Lewis* and *Blum* (discussed in Defendant's initial brief) make plain, "that is of course not the law." Thus, Plaintiff's lack of standing to bring claims against the additional BKLs requires that those claims be dismissed, notwithstanding his class allegations.

3. Plaintiff's Assertion that Defendant Has Not Cited Decisions that Dismissed for Lack of Standing Title III ADA Claims Against Restaurants the Named Plaintiff Failed to Visit Is Patently False

Plaintiff also attempts to justify his standing to assert claims against additional restaurants by arguing – falsely – that Defendant has not cited a single putative class action that dismissed for lack of standing Title III ADA claims as to restaurants or stores the named plaintiff had not visited. In fact, Burger King Corporation cited cases that did *precisely* that. In both *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 343-44 (D.N.J. 2003) (*cited in* DE 29 at 5, 7, 8, 11, 13), and *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 230 (D.N.J. 2003) (*cited in* DE 29 at 5, 6, 7, 15), the court dismissed Title III ADA claims as to the restaurants in the respective restaurant chains that Mr. Clark had never patronized, precisely because his inclusion of class allegations was legally insufficient to extend his standing, or the court's jurisdiction, to restaurants he had not visited (and which, accordingly, had not caused him injury). Similarly, in *Small v. Gen. Nutrition Cos.*, 388 F. Supp. 2d 83 (E.D.N.Y. 2005), the court dismissed for lack of standing the named plaintiff's Title III

ADA claims as to vitamin stores he had not visited pre-suit, despite the presence of class allegations. And in *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116, 1117-18 (C.D. Cal. 2000) (*cited in* DE 29 at 5, 6), the court denied the plaintiff's request to file an amended complaint seeking to assert claims on behalf of himself and others similarly situated as to 82 additional service stations owned by the defendant.

Plaintiff suggests that the *BKC* and *McDonald's* cases are not on point, because, after dismissing claims as to restaurants Mr. Clark had not patronized, "the court held that it was premature to resolve the question of the scope of an eventual plaintiff class action." (DE 42 at 11). To the contrary, the court made it clear that any eventual class would be limited to the restaurants the plaintiff had visited pre-suit. *McDonald's*, 213 F.R.D. at 226; *BKC*, 255 F. Supp. 2d at 342. The court reserved ruling on the scope of the class only to await the filing of amended complaints specifically identifying all restaurants the plaintiff had visited. *McDonald's*, 213 F.R.D. at 233-34; *BKC*, 255 F. Supp. 2d at 345. Thus, these cases make plain that plaintiff's lack of individual standing requires dismissal of all claims against the additional BKLs.

4. Plaintiff's Failure to Allege Specific Facts Showing that a Burger King Corporation Policy/Practice Caused Common Accessibility Violations Is Fatal to Plaintiff's Standing as Against the Additional BKLs

Plaintiff has failed to cite any apposite decision that supports his contention that Defendant's motion to dismiss for lack of standing should be denied. Instead, relying solely on cases considering motions for class certification, Plaintiff argues that he *must* have standing to sue the additional restaurants, because what else explains why classes have been certified in some Title III ADA cases involving chain businesses that the named plaintiffs had never patronized.[8]

But there are important differences. In those cases, the defendant designed and/or operated *all* of the restaurants/stores at issue, and the Plaintiff alleged either a specific design flaw or a similar company-wide directive that caused a specific common accessibility violation at all of the business locations. This is the critical distinction, because in the case of a company-wide ADA violation, the

[8] The fact that Plaintiff needs to rely upon decisions that neither involve a motion to dismiss for lack of standing nor even discuss in dicta the proposition for which they are asserted demonstrates the lack of merit of Plaintiff's contention. Those "less than dicta" district court opinions are, of course, of no precedential effect. *Lewis*, 518 U.S. at 352 n.2.

named plaintiff and the entire class have suffered a shared injury from the same single wrong, even though it manifests itself at numerous locations. *See Blum*, 457 U.S. at 1001 (named plaintiff's standing limited to representing class members at other facilities who were victims of same unlawful policy with same type of claim); *Clark v. Burger King Corp.*, 255 F. Supp. 2d at 343 (noting that named plaintiff may have had standing as against restaurants he had not visited had he alleged implementation of a specific corporate policy that violated the ADA).

For example, in both *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D. Cal. 2004) and *Colo. Cross Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 356 (D. Colo. 1999) (DE 42 at 14), the complaints not only alleged that the multiple restaurants the named plaintiffs visited contained an identical ADA barrier in their queue lines, but also that Taco Bell Corporation itself had designed and constructed that flaw into *every company-owned and operated* Taco Bell® restaurant. *See Moeller*, 2003 WL 25743634, ¶¶ 7-18, 29-44, 46 (N.D. Cal. 2003). Taco Bell Corp. logically chose not to challenge plaintiffs' standing. *See* 220 F.R.D. at 615 ("in this case the class members, rather than challenging individual actions taken by the defendant against each of them separately, all challenge the same actions [that] affect all class members in almost precisely the same way [making this] a paradigm of the type of action for with the [Rule 23](b)(2) form was created").

In *Lucas v. Kmart Corp.*, also brought by Plaintiff's counsel, the plaintiffs alleged centralized policies and practices, including a "display policy" and a "stocking policy" that created barriers at all corporate owned and operated stores nationwide. *See* 2005 WL 1648182, at *1 (D. Colo. July 13, 2005); 2006 WL 722163, at *2 (D. Colo. Mar. 22, 2006).[9] In *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 445-46 (N.D. Cal. 1994) (DE 42 at 13-14), the court certified a class including theaters that no named plaintiff had attended, where the complaint alleged a company policy pursuant to which *every* theater constructed post-ADA violated a specific requirement by

[9] Significantly, in *Kmart*, the only one of Plaintiff's certification cases where standing was apparently raised, plaintiff, represented by the Fox & Robertson firm, argued that standing existed with respect to unvisited stores precisely because they were challenging *Kmart's* "policies and practices that cause[d] barriers to individuals with mobility impairments," and not the "specific physical barriers" themselves. (*See* Van Horn Dec., ¶ 6, Ex. D.)

placing all wheelchair spaces in the back row.[10] Thus, these cases included *both* an expressly-identified access barrier present throughout the defendant's stores *and* a company-wide practice or policy that caused that access barrier.[11]

Finally, Plaintiff cites two Ninth Circuit employment discrimination cases to show that "courts have certified classes of individuals with legal claims involving varying facilities without requiring a named plaintiff with individual standing as to each facility." (*See* DE 42 at 15, *citing Parra v. Bashas', Inc.*, 536 F.3d 975 (9th Cir. 2008) and *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2008)). These cases are inappropriate. First, both assert Title VII claims, which the Supreme Court has previously characterized as involving "class" wrongs by their very nature. *See E. Tex. Motor Freight Sys. v. Rodriguez,* 431 U.S. 395, 405 (1977) ("suits alleging racial or ethnic discrimination are by their very nature class suits, involving classwide wrongs"). Moreover, both do, in fact, assert company-wide discriminatory policies affecting a broad class of employees. In a more analogous Title VII situation involving multiple locations where no company-wide policy existed, the Ninth Circuit has denied class certification. *See Donninger v. Pacific Nw. Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977) (denying class certification as to all six of defendant's locations where each office had a separate affirmative action program with "decentralized enforcement" and the named plaintiffs represented only three of the six locations.[12]

---

[10] *See also Access Now, Inc. v. Ambulatory Surgery Ctr. Group,* 197 F.R.D. 522, 526 (S.D. Fla. 2000) (complaint alleged that all of the defendants were parties to a unique services agreement that included a common program of construction, design, and building code/ADA compliance review designed by the same group of advisors, which resulted in identical structural and operational barriers at every location). Notably, *Ambulatory Surgery* is contrary Ninth Circuit law in that it certified a class that included every type of disability despite the fact that the named plaintiffs did not represent all types of disabilities. *See Doran v. 7-Eleven,* 524 F.3d 1034, 1044 n.7 (9th Cir. 2008).

[11] The final group of ADA cases on which Plaintiff relies certified classes for settlement purposes only, making them even less authoritative. Again, they appear to have involved corporate owned stores and/or company-wide policies or practices. *See, e.g., Access Now, Inc. v. Claire's Stores, Inc.*, 2002 WL 1162422, at **1-3 (S.D. Fla. May 7, 2002) (class certification and settlement limited to stores with nationwide design and construction flaws resulting in exclusionary practices and structural barriers); *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 463 (S.D. Fla. 2002); *Access Now, Inc. v. AHM CGH, Inc.*, 2000 WL 1809979, at *3 (S.D. Fla. July 12, 2000).

[12] Moreover, reliance on such cases must be tempered by the fact that the grant of standing under Title III of the ADA is significantly narrower than that granted by either Title VII or Titles I, II and VI of the ADA. *Compare* 42 U.S.C. § 2000e-5(f)(1) and 42 U.S.C. §§ 12117, 12133 *with* 42 U.S.C. § 12188(a).

In recognition of the need for a common policy/practice to avoid dismissal, Plaintiff stretches to reach the additional BKLs by conclusorily asserting, solely on "information and belief," that Burger King Corporation provided prototypes, plans and other assistance to its franchisees in connection with the construction of their restaurants. (*See* DE 1 ¶¶ 27-29). The crucial allegation, however, is missing – that there is something in those practices, policies, prototypes or plans that caused a violation of disability access laws.[13] The absence of such crucial factual allegations is the precise reason why this case is different from the other cases in which classes were certified despite the fact that the named plaintiffs had not visited all of the defendant's locations.

Plaintiff likewise argues that his allegations that Defendant provides its franchisees with a "standardized" operations manual that teaches how to properly prepare a hamburger and keep the restrooms clean, demonstrate that Burger King Corporation maintains a high level of control over the independent franchisees. (DE 42 at 5). This is nothing more than a back-door attempt to mislead the Court into believing that the franchised restaurants are actually company operated, like the stores in the *Taco Bell* and *Kmart* cases, and to unwittingly impose franchisor liability under the ADA, something that courts repeatedly have rejected. *See Neff v. Am. Dairy Queen*, 58 F.3d 1063 (5th Cir. 1995) (franchisor not liable under ADA as "operator" because it does not have authority over the discriminatory action); *U.S. v. Days Inns of Am.*, 1998 WL 461203 (E.D. Cal. Jan. 12, 1998) (same); *Alonzo v. Mr. Gatti's Pizza, Inc.*, 933 S.W.2d 294 (Tex. Ct. App. 1996) (franchisor cannot be held liable for ADA violations where it neither owns nor operates the facility).[14]

---

[13] Plaintiff's representation that he needed to make the allegations in paragraphs 23-36 of his Complaint on "information and belief" because he did not have access to relevant documents (DE 42 at 5) is wrong. First, as counsel informed the Court during the hearing on Plaintiff's so-called Motion to Compel Compliance with General Order No. 56 (DE 8), Burger King Corporation voluntarily provided certain documents, including prototypical store designs, to Plaintiff's counsel pre-suit. (DE 41 at p. 8, ll. 16-19). Defendant's franchise agreements and leases, moreover, are publicly available. (Van Horn Dec., ¶¶ 4,5).

[14] Plaintiff also contends he has adequately alleged "common barriers." (DE 42 at 11-15). This contention grossly overstates the Complaint, which does not include a single allegation that supports the claim that common barriers exist at all BKLs. In fact, nowhere in his Complaint does Plaintiff identify a single "common" barrier among Burger King® restaurants, nor could he since he has failed to visit them. (S*ee* DE 1 ¶¶ 41, 42). Moreover, Plaintiff fails to trace their cause to an unlawful policy or practice. This is especially important given the fact that the restaurants Plaintiff seeks to sue are independently operated, "were built at various times and markedly differ from one-another in their construction and configuration." *Clark*, 255 F. Supp. 2d at 343 n.11.

In short, while it is possible to conceive of a case where a named plaintiff has alleged injury from a discrimination policy sufficient to allow him to withstand a motion to dismiss premised upon his failure to have suffered injury at all stores or restaurants identified in a Title III ADA action, this is not such a case. As the governing case law Defendant has cited makes plain, Plaintiff's class allegations have "added *nothing* to the question of standing," and his claims against the additional BKLs must be dismissed.

5. Plaintiff Lacks Standing to Assert Any Design and Construction Claim

Burger King Corporation explained in its initial brief that Plaintiff does not possess a claim under the ADA relating to the design or construction because both named restaurants were designed and constructed prior to the enactment of the ADA's design and construction requirement. (DE 29 at 9 n.4, 13-14). Plaintiff responds by stating that even though constructed pre-ADA, these two restaurants are still subject to the barrier removal if "readily achievable." (DE 42 at 17-18).

Plaintiff misses the point. Title III of the ADA permits private plaintiffs to assert three different types of claims: (i) claims based on the failure to comply with ADA standards in connection with the original design and construction of the building (*see* 42 U.S.C. § 12183(a)(1)); (ii) claims based on the failure to comply with ADA standards in connection with subsequent alterations of the building (*see* 42 U.S.C. § 12183(a)(2)); and (iii) claims based on the failure to remove architectural barriers in existing facilities, where doing so is "readily achievable" (42 U.S.C. § 12182(b)(2)(A)(iv)). Plaintiff's Complaint purports to assert all three types of claims. (*See* DE 1 at 11). However, Plaintiff does not personally possess a Section 12183(a)(1) design and construction claim -- even at Pleasant Hill and Pittsburg. Having failed to suffer any injury from a § 12183(a)(1) violation, Plaintiff lacks standing as to such claims and they should be dismissed.

B. PLAINTIFF'S CLASS ALLEGATIONS AS TO THE ADDITIONAL RESTAURANTS SHOULD ALSO BE DISMISSED UNDER RULE 23(d)

The fact that Plaintiff lacks standing to assert claims as against additional BKLs requires dismissal of the class allegations against those BKLs as well under Rule 23(d). *Gratz v. Bollinger*, 539 U.S. 244, 263 n.15 (2003); *Bates v. United Parcel Servs, Inc.*, 511 F.3d 974, 986-87 (9th Cir. 2007). Plaintiff ignores this, and essentially argues that class allegations should never be dismissed

at the pleadings stage. To the contrary, it is settled dismissal on the pleadings prior to discovery or a Rule 23 motion is appropriate where the flaws in the class claims are apparent. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (approving dismissal of class allegations where issues were "plain enough from the pleadings"); *Clark v. McDonald's Corp.*, 213 F.R.D. at 205 n.3 (collecting cases dismissing class allegations under Rule 23 at the pleadings stage).[15]

Put simply, just as Plaintiff lacks standing, his claimed injury differs from those of putative class members who visited the restaurants that Plaintiff did not patronize. As a result, Plaintiff cannot satisfy the commonality, typicality and adequacy of representation requirements under Rule 23 as to the additional BKLs. (*See* DE 29 at 11-14). Therefore, class claims relating to those additional restaurants must be dismissed.

C. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULES 8, 12(b)(6) AND 12(e)

Plaintiff misapprehends Defendant's arguments regarding the sufficiency of his allegations. Burger King Corporation has not argued that Plaintiff's vague description of the access barriers that he claims to have encountered was not sufficient. (*See* DE 42 at 19). What Defendant protests is Plaintiff's failure to "identify which barriers he confronted at which restaurant." (DE 29 at 15). In that respect, the Complaint is so broadly worded that it is impossible to discern which of the listed barriers Plaintiff encountered at which restaurants. (*See* DE 1 ¶ 42). Accordingly, *Skaff v. Meridian N. Am. Beverly Hills, LLC*, 506 F.3d 832 (9th Cir. 2007), actually supports dismissal in this instance.

Clark v. McDonald's Corp., which, as here, involved multiple restaurants, is also instructive. There, the court dismissed the complaint in part because the complaint failed to distinguish those restaurants that were alleged to have violated the ADA from those that were not, and failed to state which violations existed at each of the restaurants alleged to violate the ADA, leaving the defendant "to guess which of its … restaurants are alleged to violate the ADA and how so." 213 F.R.D. at

[15] Although Plaintiff's opposition characterizes Defendant's motion to dismiss class allegations relating to those restaurants he has not visited as a Rule 12(f) motion to strike (which motions Plaintiff says are disfavored) (*see* DE 42 at 8), Defendant's motion actually is brought under Rule 23 (*see* DE 29 at 11, citing Rule 23(d)(1)(D).) Indeed, all of the cases cited herein that dismiss class allegations do so under either Rule 23(c) or Rule 23(d)(1)(D).

234-35. Accordingly, the Complaint should be dismissed under Rule 12(b)(6).[16]

D. PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED

1. Neither Unruh Nor the CDPA Impose Liability on Burger King Corporation Merely Due to Its Status as a Franchisor or Sublessor

Unlike the ADA, which makes the landlord an additional party responsible for curing accessibility violations caused by a facility's operator, liability under California's statutory disability scheme is based on the actions of the party. To be liable under Unruh, a party itself must engage in intentional discrimination. Similarly, to be liable under the CDPA, a party itself must have denied or interfered with access (although there is no intentional discrimination requirement). Nonetheless, Plaintiff insists that any leasehold interest Burger King Corporation may have in a restaurant renders it liable under Unruh and CDPA for any accessibility violation created by the third party operators.

Plaintiff asks this Court to do what the California Supreme Court has prohibited California courts from doing in construing California statutes: imply terms employed in one place that are excluded in another. *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 725 (Cal. 1989). Plaintiff attaches significance to the fact that the California Supreme Court's opinion in *Brown* did not deal specifically with the interplay between Unruh and the CDPA with the ADA. The California Supreme Court, however, did not so limit its directive to courts interpreting *any* statute:

> If the Legislature had intended subdivision 3 [of Section 47 of the Civil Code dealing with a privileged publication or broadcast] to apply to the new media as such or to communications on matters of public interest, the Legislature could have used the same clear language as subdivisions 4 and 5 [of Section 47 relating to privileges afforded public journals and to fair and true reports].

Brown, 48 Cal.3d at 725 (citations omitted). The Supreme Court observed: "The omission from subdivision 3 of any reference to public journals, coupled with such a reference in subdivision 4, suggests the Legislature did *not* intend subdivision 3 to provide a special privilege to communications by the news media based on their status." *Id*. at 724 (emphasis added). Similarly,

[16] Plaintiff improperly attempts to add by affidavit seven more restaurants that he purportedly just now remembered having visited prior to filing the Complaint. (*See* DE 43). If, following dismissal Plaintiff is permitted to amend, it should be issued instructions to include with any proposed amended complaint a list of all BKLs that Plaintiff claims to have visited prior to filing his original Complaint, the dates on which such visits occurred, and the access violations that Plaintiff claims to have encountered at each listed restaurant. *Clark v. McDonald's*, 213 F.R.D. at 234.

the California Legislature's omission from Unruh and the CDPA of the ADA's status based liability categories demonstrates that the Legislature did not intend to impose liability on franchisors or sublessors based on their status as opposed to their actions.[17] Plaintiff's opposition brief is unable find any support that would allow the Court to amend the clear language of either Unruh or the CDPA to impose status based liability on a franchisor such as Burger King Corporation.

Plaintiff erroneously argues that the "precise issue" raised by Burger King Corporation's motion to dismiss was decided in its favor in *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006). First, in *National Fed'n of the Blind*, the plaintiff brought an action against Target based on *Target's* actions – plaintiff did not seek to impose liability on a party based on that party's status as a franchisor or sublessor. Moreover, *Nat'l Fed'n of the Blind* was decided *before* *Gunther v. Lin*, 144 Cal. App. 4th 223 (Cal. Ct. App. 2006), and, accordingly, the Court did not have the benefit of the California court's interpretation of its own laws. Nor was the issue of status-based liability raised in any of the other decisions cited. *See Hubbard v. Rite Aid Corp.*, 433 F. Supp. 2d 1150 (S.D. Cal. 2006) (pre-*Gunther* case that failed to address whether a party could be liable merely as a result of its status as sublessor); *Haworth v. Haddock*, 2007 WL 3239564 (E.D. Cal. Nov. 2, 2007) (post-*Gunther* case in which plaintiff obtained a default and the defendant was not a franchisor or sublessor but the owner/operator of the restaurant); *Molski v. M.J. Cable, Inc.*, 481 F.3d 724 (9th Cir. 2007) (defendant was owner/operator rather than a franchisor/sublessor and court did not address *Gunther* or status based liability); W*ilson v. Haria & Gogri Corp.*, 479 F. Supp. 2d 1127 (E.D. Cal. 2007) (suit against franchisee of a Jack-in-the-Box and *not* the franchisor awarding summary judgment to the plaintiff in which the court was sharply critical of *Gunther* and chose to ignore the California court's pronouncement regarding intent). Two subsequent cases specifically declined to follow that opinion. *See Wilson v. PFS, LLC.*, 493 F. Supp. 2d 1122, 1126 (S.D. Cal.

[17] Rather than substantively address the California Supreme Court's rules of statutory construction as set forth in *Brown*, Plaintiff quotes from the Court's 1985 opinion in *Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 214 (Cal. 1985), where it held that the Unruh should be interpreted "in the broadest sense reasonably possible." Of course, nowhere in *Isbister* does the Court hold that courts may re-write a statute. Moreover, just six years later, the same court held that an Unruh plaintiff must plead and prove intentional discrimination. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1175 (Cal. 1991).

2007) (also rejecting the path taken by *Wilson v. Haria & Gogri Corp*., and instead, granting motion to dismiss because "Plaintiff's state law claims are more appropriately resolved by state courts in light of *Gunther* and because novel and complex matters of state law are 'better left to the California courts"). *See also Cross v. Pacific Coast Plaza Invs. L.P.*, 2007 WL 951772, at *5 (S.D. Cal. Mar. 6, 2007)); *Morgan v. Am. Stores Co.*, 2007 WL 1971945, at *3 (S.D. Cal. June 29, 2007) (quoting *Cross*, 2007 WL 95172, at *5). Clearly, in light of *Gunther* and *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142 (Cal. 1991), the best course is to dismiss Plaintiff's Unruh Act claim.

2. Plaintiff Cannot Adequately Allege Discriminatory Intent as Required to State an Unruh Act Claim

As fully set forth in Burger King Corporation's initial memorandum, Plaintiff is required to plead and prove that Burger King Corporation intended to discriminate against Plaintiff to state a cause of action pursuant to Section 52, which imposes liability on those that "den[y], aid[ ] or incite[ ] a denial, or make any discrimination . . . ." Cal. Civ. Code §§51(f), 52(a). The California Supreme Court has held that Section 52 requires a plaintiff to plead and prove discriminatory intent. *Harris*, 52 Cal.3d at 1175; *Gunther*, 144 Cal. App. 4th 223, 227.[18]

As previously discussed, Plaintiff fails to identify any specific policies, practices, procedures, or barriers created by *Burger King Corporation* or how such policies, practices, procedures, or barriers of *Burger King Corporation* intentionally discriminated against Plaintiff or anyone else. Further, Plaintiff fails to allege which, if any, barriers existed and which applicable access standards were violated.

The Supreme Court has rejected the type of conclusory and formulaic allegations found in Plaintiff's Complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007);

[18] The California Legislature recently acknowledged the "intent" element when it enacted the "Construction-Related Accessibility Standards Compliance Act (the "Compliance Act"), Cal. Civil Code at § 55.51 *et seq*., which provides that the failure to hire a certified access specialist "shall not be admissible to prove that person's *lack of intent* to comply with the law." Cal. Civ. Code §55.53(f)(emphasis added). Section 55.51 states that the Compliance Act "shall apply to *any* construction-related accessibility claim." Cal. Civ. Code §55.1 (emphasis added). The reason why the California Legislature found it necessary to specifically reference "lack of intent" in a statute that took effect on January 1, 2009 is obvious: the Legislature was acknowledging the already existing intent requirement necessary to state an Unruh claim. Any other reading of Section 55.53 renders the pertinent language superfluous and meaningless.

Brewer v. Indymac Bank, 2008 WL 3863432, at * 1 (E.D. Cal. Aug. 14, 2008). Where "plaintiffs do not explain what allegedly wrongful conduct of defendants caused [plaintiffs' injury]", the complaint should be dismissed. *Id*. at *2-3. This is especially true here where the documents referenced in the Complaint directly *contradict* the allegations of the Complaint. Indeed, Plaintiff's opposition brief does not address, much less explain, how Burger King Corporation could have intentionally (or unintentionally) discriminated against Plaintiff (or anyone else for that matter) or denied or interfered with his or anyone else's access to any BKL restaurant given that it affirmatively requires its franchisees to "promptly observe and comply with all present and future laws" and requires that all "[a]lterations and/or additions to the Premises if required [must comply with] the American Disabilities Act of 1990." (DE 30 Exs. C, F). Plaintiff's formulaic and conclusory allegations are not sufficient to withstand Burger King Corporation's motion to dismiss. As the Ninth Circuit has held, courts "are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998); *see also ASIS Internet Servs. v. Optin Global, Inc.*, 2006 WL 2792436, at * 6 (N.D. Cal. Sept. 27, 2006)(same).

Clearly, Plaintiff's Unruh Act claim must be dismissed given that he is unable to "*plead and prove* intentional discrimination in public accommodations in violations of the terms of the Act." *Harris*, 52 Cal. 3d at 1175; *cf McColm v. San Francisco Hous. Auth.*, 2007 WL 1575883, at *19 (N.D. Cal. May 29, 2007) (in granting motion for summary judgment, Judge Hamilton held that Unruh claimant "provide[s] absolutely no detail or description regarding the basis for the allegation"). "Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud" that is Plaintiff's Complaint. *Brewer*, 2008 WL 3863432, at *1.

3. Plaintiff's CDPA Action also Must Be Dismissed

Plaintiff also fails to state a claim under the CDPA. Although the CDPA does not require intentional discrimination, whether a party is liable under the CDPA is determined by its actions and not on its status as a franchisor or sublessor: "Any person or persons, firm or corporation who *denies* or *interferes* . . . ." Cal. Civ. Code §54.3(a)(emphasis added). Given that Burger King

Corporation did not operate any BKL in California and that it affirmatively requires franchisees to comply with all disability access laws, Burger King Corporation has not *denied* or *interfered* with Plaintiff's access or the access of anyone else. Further, to state a claim for damages under the CDPA, "an individual must take the additional step of establishing that he or she was *denied* equal access on a *particular occasion*." *Urhausen v. Longs Drug Stores Cal., Inc.*, 155 Cal. App. 4th 254, 262 (Cal. Ct. App. 2007)(emphasis added). Because the Complaint itself only references two BKLs that Plaintiff allegedly visited, Plaintiff admittedly has not been denied equal access at any other BKL restaurant under any set of circumstances. Accordingly, at a minimum, the Court should dismiss Plaintiff's CDPA claim as to these restaurants where he could not possibly have been denied access. The Court also should dismiss Plaintiff's CDPA claim for damages as to the two restaurants that the Complaint conclusorily alleges he visited, because Plaintiff fails to allege how he was denied access at these two restaurants and on what "particular occasion" he allegedly was denied access. *Id.*

Finally, "to state a cause of action for violation of sections 54 or 54.1 based on a structural or architectural barrier, the existence of the barrier must be in violation of a separate provision of law relating to structural access standards." *Coronado v. Cobblestone Vill. Cmty. Rentals*, 163 Cal. App. 4th 831, 845 (Cal. Ct. App. 2008). In addition to failing to identify which barriers denied him access at any of the BKL restaurants, Plaintiff completely fails to identify any "separate provision of law relating to structural access standards" that these unnamed barriers violated. Accordingly, Plaintiff's CDPA claim should be dismissed. As with his Unruh Act claim, Plaintiff has wholly failed to satisfy his pleading requirements and has asked this Court and Burger King Corporation to "fish a gold coin from a bucket of mud." *Brewer*, 2008 WL 3863432, at *1.

E. THE COURT SHOULD DECLINE TO HEAR, OR, AT MINIMUM, STAY CONSIDERATION OF PLAINTIFF'S UNRUH AND CDPA CLAIMS

The parties are in agreement that Plaintiff's most substantial monetary claim -- for automatic punitive damages amounting to $4,000 per encounter with accessibility violation under Unruh -- is the subject of conflicting law, some of which issues are presently before the California Supreme Court. (*See* DE 42 at 19-20). Accordingly, this Court should decline to exercise supplemental

jurisdiction pursuant to 28 U.S.C. § 1367. *See Oliver v. GMRI, Inc.*, 2007 WL 4144995, at *3 (S.D. Cal. Nov. 19, 2007). Alternatively, principles of fairness and comity dictate that this Court stay or dismiss these claims. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

Plaintiff responds by arguing that the California Supreme Court proceeding to resolve the certified question "will be resolved soon" and that it "will have very little effect on this case" in any event. (DE 42 at 26-27). To the contrary, it is impossible to predict when the matter will be resolved, especially since responses to amicus briefs are not yet even due. (*See* DE 42 at 27*;* DE 44, Ex. 12). Moreover, a strong likelihood remains that the California Supreme Court ruling will not resolve the issues raised here, which are not identical.

Additionally, proceeding without a governing standard will clearly prejudice Burger King Corporation in its defense of such vague claims. Respectfully, this Court should follow the lead of the only case to address this issue since the Ninth Circuit certified the question, and dismiss the state claims. *Oliver v. KFC Corp.*, 2008 WL 2756605 (S.D. Cal. July 14, 2008).

F. CAFA DIVERSITY JURISDICTION IS ABSENT

The recently-enacted Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), requires a federal court to decline to exercise jurisdiction over any class action that qualifies for exemption from the law under the "local controversy exception." 28 U.S.C. § 1332(d)(4). Plaintiff's Response does not dispute that this case satisfies the first two prongs of the four-part test: (1) more than 2/3 of the putative class members are citizens of California, and (2) their principle injuries were incurred in California. (*See* DE 42 at 21). The applicability of the third prong, the presence of a significant defendant who is a California resident, *see* 28 U.S.C. § 1332(d)(4)(A)(i)(II), turns on the question of whether the franchisee operators of the BKLs at issue are indispensible parties who must be joined under Fed. R. Civ. P. 19, which is discussed in some detail in Burger King Corporation's opening papers. (*See* DE 29 at 17-19). Plaintiff argues that at least some relief can be provided in the absence of the franchisees, relying upon Burger King Corporation's "extensive" resources. (DE 42 at 23, emphasis added). Plaintiff ignores the important – and dispositive – question of whether the franchisees' rights will be prejudiced if this case proceeds without them. (*See* DE 29 at 18-19, collecting cases). Moreover, because absent parties such as the franchisees must be considered

when applying the CAFA "significant defendant" test, and because the franchisees clearly as "indispensible" parties under Rule 19, the third prong of the CAFA "local controversy exception" test is satisfied. *See Mattera v. Clear Channel Comm., Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006).

The final prong of the exception is that "no other class action has been filed against the defendants in the preceding three years asserting the same or similar claims." 28 U.S.C. § 1332(d)(4)(A). The parties dispute whether or not this prong has been met. Plaintiff argues that such an action has been filed, because on March 22, 2006, less than three years before this action was filed, a disability rights group in Florida filed a putative class complaint against Burger King Corporation under the ADA. (*See* DE 42 at 21, *citing Disability Advocates & Counseling Group, Inc. v. Burger King Corp.*, No. 06-20716, in the Southern District of Florida). Plaintiff conclusorily alleges that the Florida action asserts "the same factual allegations against the same defendant" (DE 42 at 21), but provides no analysis in support of that conclusion. Moreover, the only guidance provided by the cases that Plaintiff cites on the question of whether another complaint's allegations are sufficiently similar or "assert the same factual allegations" as the case at bar, is that three cases filed against their insurers by Louisiana homeowners whose properties were damaged by Hurricane Katrina, all of which purported to assert claims on behalf of a class of insured homeowners under Louisiana's Valued Policy Law, "undoubtedly assert similar factual allegations." *Caruso v. Allstate Ins. Co.*, 369 F. Supp. 2d 364, 370-31 (E.D. La. 2007).

The case at issue here ("DAC") differs from the case at bar in important respects. In DAC, the plaintiffs had only visited company-operated restaurants all located in Florida, while in this case the Plaintiff has only visited franchised restaurants located in California. DAC sought only injunctive relief under the ADA, while this case seeks significant damages under Unruh and CDPA as well. Finally, although the DAC was originally filed as a putative class action, plaintiffs' first action was to file an amended complaint that withdrew all class claims. (Van Horn Dec., Ex. E).

Burger King Corporation respectfully submits that DAC is not sufficiently similar to this case to prohibit the application of the local controversy exception. CAFA was enacted to protect interstate defendants from "certain abusive practices by plaintiffs' class counsel" who filed multiple class actions in multiple states to avoid federal jurisdiction. *See Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007) (*citing* CAFA §2, 119 Stat. at 5). Here, such concerns do not apply.

IV. CONCLUSION

For the foregoing reasons, Defendant requests that this Court dismiss Plaintiff's Complaint and provide such further relief as set forth in Defendant's motion and supporting memorandum.

Dated: January 29, 2009

GENOVESE JOBLOVE & BATTISTA, P.A.
Michael D. Joblove (*pro hac vice)*
Jonathan E. Perlman (*pro hac vice)*
Bank of America Tower, 44th Floor
100 S.E. Second Street
Miami, Florida 33131

GLYNN & FINLEY, LLP
Clement L. Glynn
Adam Friedenberg
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596

By s/Adam D. Friedenberg
Adam D. Friedenberg
Attorneys for Defendant Burger King Corporation

2000-491/574 v. 3