REDACTED PURSUANT TO PROTECTIVE ORDER

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL CASTANEDA, KATHERINE CORBETT, and JOSEPH WELLNER on behalf of themselves and others similarly situated, Plaintiffs, vs. BURGER KING CORPORATION, Defendant.	Case No. C 08-04262 WHA **DEFENDANT BURGER KING CORPORATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** **Date:** **September 17, 2009** **Time:** **8:30 a.m.** **Before:** **Hon. William H. Alsup** **Courtroom:** **9**

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I. SUMMARY OF ARGUMENT

Three mobility-impaired Representative Plaintiffs, after visiting only a few Burger King® restaurants, seek certification of class claims against Burger King Corporation ("BKC"), alleging that *every* franchised Burger King® restaurant in California that BKC leases to franchisees [the "BKLs"] contains common violations of federal and state accessibility laws. Class certification should be denied, for three independent reasons. First, Plaintiffs lack standing to represent a state-wide class because (i) they have not been subjected to discrimination at all of the BKLs, and (ii) they cannot identify a single central BKC policy that actually caused access barriers to exist during the putative class period at the independently-operated franchised restaurants in California. Second, Plaintiffs' individual claims for injunctive relief are moot, given that the restaurants they claim to have visited are compliant with both the ADA and California law. Third, Plaintiffs' claims otherwise fail to satisfy the "rigorous" standard of Fed. R. Civ. P. 23.

It is well-settled that Title III ADA claims are site-specific. Accordingly, as this Court noted in its ruling on BKC's motion to dismiss, absent a corporate policy that causes system-wide common violations, an ADA plaintiff's standing is limited to claims against the locations where he/she allegedly suffered discrimination. Thus, in denying BKC's motion to dismiss, this Court stated that even though Plaintiffs' allegations did not "pinpoint the exact common policy or design features allegedly giving rise to the violations at the 90 stores with particularity," discovery would be permitted to proceed in order to give Plaintiffs a fair chance to show at certification that a BKC "discriminatory policy or design or decision" caused similar accessibility barriers at all BKLs. (Docket No. 69 at 8, 9-12). This Court explained, "[t]his is not to say that plaintiff will be able to satisfy Rule 23 at the class certification stage. It is only to say that there is enough pled to allow discovery on the class issues so that plaintiff will have a fair chance to develop his Rule 23 motion." (*Id.* at 8).

Now, despite the benefit of extensive discovery, Plaintiffs fail to show that BKC has any "common offending policies" that are causing common accessibility barriers to exist at the BKLs today. Indeed, the sole "policy" Plaintiffs could muster was a sketch of a 30-inch

minimum width for queue lines in an Equipment Location Plan (not a building plan) that pre-dated the ADA and was discarded many years ago. To bolster this solitary "policy" argument, Plaintiffs filed declarations attesting to "narrow" queue lines at a number of specific BKLs. Incredibly, as many as 50% of those BKLs have never had a queue line.[1] Notwithstanding the faulty memory (to be kind) of Plaintiffs' witnesses, including the named Plaintiffs, it is undisputed that this so-called "evidence" of a policy requiring a 30-inch minimum width queue line was replaced more than 15 years ago, and Plaintiffs have offered no evidence that any of them actually encountered a queue line implementing that so-called policy. Nor could they.

Plaintiffs' inability to identify any "discriminatory policy or design or decision" also demonstrates both that Plaintiffs lack standing to assert claims as against the 86 restaurants they have not visited (as such standing requires a common policy) and that Plaintiffs cannot satisfy the commonality, typicality, and adequacy prerequisites for class certification.

Plaintiffs nonetheless argue that this case should be certified because it purportedly is identical to *Moeller, Corbett et al. v. Taco Bell*.[2] It is not. In that case, Taco Bell Corp. conceded the existence and use of a policy that admittedly resulted in current accessibility violations throughout California. Additionally, Plaintiffs sued Taco Bell Corp. only with respect to its corporate-run stores. Obviously, Taco Bell Corp. controls all aspects of its own corporate restaurants, including accessibility, a factor on which this Court relied in granting class certification in that case. Here, by contrast, Plaintiffs have sued BKC only with respect to leased franchised restaurants, as to which BKC has only limited veto rights granted by contract, not the control of an owner/operator such as Taco Bell Corp. In other words, Taco Bell Corp. itself caused there to be access barriers in all its corporate stores. BKC has not done so.

In addition, Plaintiffs' claims for injunctive relief under federal and state law are moot,

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[1] It is impossible to be precise, because many of the declarants fail to specify where they allegedly encountered specific access barriers. In any event, BKC has filed herewith a motion to strike the declarations as a sanction for Plaintiffs' failure to provide the requisite Rule 26 disclosure information with respect to these witnesses. (*See* Docket No. 169). Magistrate Judge Larson held that the information was withheld by Plaintiffs "for no legitimate reason." (Docket No. 150 at 5, 7).

[2] Ms. Corbett is a named Plaintiff both here and in the Taco Bell case. Moreover, the Fox & Robertson law firm that represents the Plaintiffs here is lead counsel in that case as well.

because all ten of the BKLs where they allegedly encountered access barriers indisputably are compliant with California and federal disability access laws.[3] Since Plaintiffs have no "live" claims for injunctive relief to assert, certification of claims for injunctive relief must be denied and Plaintiffs' ADA claims must be dismissed.

Plaintiffs' remaining claims are exclusively for damages under Unruh and the CDPA – significant damages. Plaintiff Castaneda's individual claim alone appears to exceed $700,000. Moreover, there is a wide disparity between the amounts of the damages claims – one declarant appears to claim entitlement to $2.5 million (Docket No. 140-6 at 48-51), while another to "only" $416,000 (Docket No. 140-2 at 12-13). Thus, the damages at issue are substantial, are non-common, and clearly are a motivating factor in bringing this action in California. As a result, Plaintiffs' damages claims are not merely "incidental" to their claims for injunctive relief, and their request for certification of an injunction class under Rule 23(b)(2) necessarily fails.

Nor can Plaintiffs show that they possess Unruh and CDPA damages claims against BKC. Unruh and the CDPA authorize suits only against a person/corporation who "denies, aids or incites a denial [of rights], or makes any discrimination" against a disabled person. These state laws, which require active conduct, differ from the ADA, under which landlords can be liable for injunctive relief based solely on a tenant's discriminatory conduct. Because the uncontroverted record evidence is that BKC's policies foster – rather than deny – full access to disabled patrons, the Court should deny certification of Plaintiffs' state law damages claims.

II. FACTUAL BACKGROUND

A. The Burger King® Franchise System

BKC is a franchisor of quick-service hamburger restaurants (s*ee* Docket No. 30, ¶ 2),[4] not "a highly-centralized company that sells hamburger and related fast-food products," as Plaintiffs falsely allege. (Docket No. 138 at 8). Contrary to Plaintiffs' erroneous assertion that BKC "operates or controls" more than 90 of the California restaurants, in whole or in part (s*ee* Docket No. 72, ¶ 25), BKC has never operated *any* restaurants in California. (Docket No. 30, ¶ 2). All

[3] *See* the Declaration of Kim Blackseth ("Blackseth Decl."), filed herewith, Ex.1.

[4] Docket No. 30 is the Declaration of Thomas G. Archer submitted in Support of Defendant's Motion to Dismiss.

of the 690 California Burger King® restaurants are operated and maintained by independent franchisees, pursuant to franchise agreements and, in some cases, leases. (*Id.*, ¶ 3).

The construction dates of the BKLs vary from 1974 to 2008. (*See* Declaration of Thomas G. Archer in Opposition to Plaintiffs' Motion for Class Certification ("Archer Decl."), filed herewith, Ex. 1). Eighty-eight were constructed before the ADA became effective as to newly-constructed buildings in January 1993. (McGrory Decl., ¶ 9). Eight predate the 1982 effective date of the applicable state standards. (*Id.)* Each also has a unique alteration history, resulting in significant individual variations in terms of structure, design, facilities and accommodations. (McGrory Dec., ¶ 8; Blackseth Decl., Ex. 1). Significantly, and unlike other ADA cases such as *Taco Bell,* construction alterations to the BKLs were not based upon centralized construction plans developed by BKC. (McGory Decl., ¶ 10). Moreover, BKC's Operations ("OPS") Manual is devoted to operational issues like how to prepare menu items (such as "WHOPPER® Sandwiches" and "French Fries"), which it describes in detail. (*See* Declaration of Frank Massabki ("Massabki Decl."), filed herewith, Ex. B [2006 OPS Manual, Table of Contents] (BKC 15598-99)). It references accessibility issues only generally, for example, [redacted]. (*See id.*, Ex. A at Tab 3 (BKC 15205)). BKC's other system documents, such as conceptual drawings, are for informational purposes only. (McGrory Decl., ¶ 4). Franchisees are required to hire their own construction managers, contractors and architects to create actual blueprints and plans for the restaurants and to assure that they comply with applicable building codes and accessibility laws. (McGrory Decl., ¶ 2; Blackseth Decl., Ex. 1; Docket No. 148, Exs. A-E).[5]

BKC enters into two separate agreements with the franchisees who lease the BKLs: a franchise agreement and a lease agreement. (*See* Docket No. 30, ¶ 3; Docket No. 148, ¶¶ 4, 13). Both documents are standardized, such that their terms are substantially the same with respect to

[5] Docket No. 148 is the Declaration of Thomas G. Archer submitted in Support of BKC's Motion to Add Franchisees/Lessees as Additional Defendants Under Rules 19(a) and 21. Exhibits A-E to that Declaration contain the operative sections from the leases for each of the five BKLs identified in the Amended Complaint.

each franchisee, except for financial terms such as rent. (Docket No. 148, ¶¶ 4, 13).

The leases place all responsibility for the condition of the premises, including the cost of any repairs or alterations, squarely on the franchisee. (*See* Docket No. 148, ¶¶ 4, 5, 12, Exs. A-E, § 5.2). Franchisees further agree to make reasonable alterations necessary to reflect BKC's then-current image, also at their own cost and expense, and BKC has the right to approve such alterations. (*Id.*, Exs. A-E, § 5.3). Moreover, before making significant alterations, the franchisees must: (i) have plans and specifications drawn up by qualified architects or engineers; and (ii) obtain the approval of "all governmental authorities having jurisdiction." (*Id.*, Exs. A-E, § 5.3). BKC does not provide sample design plans for remodels. (McGrory Decl., ¶¶ 2, 4, 5). The leases require the franchisees to obtain all necessary licenses and to comply with all applicable laws and regulations governing their restaurants, expressly including access laws:

> § 5.7 LICENSE AND LAWS. Lessee shall, at its own cost and expense, promptly observe and comply with all present and future laws, ordinances, requirements, orders, directions, rules and regulations (referred to generally as "regulations") of governmental authorities . . .[including] compliance with governmental regulations [including] alterations and/or additions to the Premises if required under the Americans With Disabilities Act of 1990…

(Docket No. 148, Exs. A-E, § 5.7) (emphasis added).

B. Plaintiffs' Class Claims

The Amended Complaint identifies only five BKLs that have been visited by the three named Plaintiffs, all of which are located in the San Francisco Bay area. Mr. Castaneda alleges visits to BKLs in Pleasant Hill and Pittsburg. (Docket No. 72, ¶ 43). Ms. Corbett alleges visits to BKLs in El Cerrito and Oakland. (Docket No. 72, ¶ 46). Mr. Wellner alleges only a visit to a BKL in Fairfield. (Docket No. 72, ¶ 49). Mr. Castaneda's deposition and a previously-filed declaration identified 7 additional BKLs he claims to have visited, including 2 (Fairfield and Oakland) also visited by the other named Plaintiffs, bringing the total number visited by the Representative Plaintiffs to 10. (*See* Docket No. 43, ¶ 3). Each BKL allegedly visited by the named Plaintiffs predates the ADA and its design and construction requirements. (*See* Archer Decl., Ex. 1). Eight of these ten BKLs also pre-date the 1982 publication of extensive state accessibility standards. (*Id.;* Blackseth Decl., Ex. 1).

Plaintiffs claim that the named Plaintiffs' visits to these few BKLs are sufficient to support class certification, because BKC purportedly has a policy requiring franchisees to construct and maintain BKLs with queue lines that are narrower than applicable accessibility standards. (*See* Docket No. 138 at 10, 11-12). The only evidence Plaintiffs offer of the existence of any such policy is (i) [redacted] (Pltf. Ex. 124) and [redacted] (Pltf. Ex. 123). BKC dutifully changed [redacted] and any similar drawings more than fifteen years ago, after the ADA was enacted. (McGrory Decl., ¶ 12; *see also* Massabki Decl., Ex. D).[6]

Plaintiffs then attempt to bolster this anemic evidence of a "policy" by relying on allegations and declarations asserting, without measurements, the existence of "narrow" queue lines at numerous restaurants. (*See* Am. Compl. ¶¶49, 50). However, at least half of the cited restaurants have never had a queue line at all. (*See* Blackseth Decl., Ex. 1).[7]

Moreover, Plaintiffs' own pre-suit investigatory surveys of BKLs thoroughly refutes any claim that any non-compliant queue lines resulted from this purported pre-ADA "policy," either at any time during the class period or today, as Plaintiffs' own surveys show that the BKLs have queue lines that are at least 36 inches wide. (*See* Massabki Decl., Exs. E, F, G). Additionally, the franchisee-operators of those BKLs where Plaintiffs or their declarants supposedly have encountered queue line violations have submitted declarations attesting that their restaurants either have never had queue lines of 30 inches or less, or have never had queue lines at all. (*See, e.g.*, Docket Nos. 174 through 179). Finally, BKC's expert, Kim Blackseth, recently visited the ten BKLs where Representative Plaintiffs claim to have experienced "difficulties," and he too

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[6] To the extent that Plaintiffs object to the use of this drawing in a nationally circulated instruction manual, on the grounds that it allegedly did not comply with standards applicable only in California (*see* Docket No. 138 at 10), that objection is obviated by the express reference on the page to the fact that it reflected the "minimum" space required, coupled with the franchisees' obligation to hire their own professionals knowledgeable of locally-applicable requirements to prepare actual building plans. (*See* Pltf. Ex. 123; Docket No. 148, Exs. A_E).

[7] Moreover, as previously mentioned, BKC has filed a motion to strike these declarations. (*See* Docket No. 169).

found none to have a width of less than 36 inches. (Blackseth Decl., Ex. 1).

Plaintiffs alternatively allege that they share a "common experience of discrimination" that "results from the consistent placement of architectural barriers at BKL restaurants." (Docket No. 138 at 4). Plaintiffs then posit a laundry list of ADAAG standards, as the alleged "common" barriers. (Docket No. 138 at 4-8). Although ADAAG and Title 24 define barriers as specific dimensions of elements (*see* Blackseth Decl., Ex. 1), Plaintiffs submit no measurements to prove that any violations exist. Moreover, Plaintiffs' allegations of "difficulties" with doorways, parking spaces, and dining room seating -- based on the same dubious testimony as that relating to queue lines -- is not tied to *any* BKC policy and therefore renders this case indistinguishable from those finding a lack of standing to maintain class claims. Indeed, it is *undisputed* that there is no BKC central policy with respect to any item complained of by Plaintiffs, as BKC indisputably does not provide specifications on the weight of doors, the height of condiment and drink dispensers, the dimensions of dining room tables, or the number or width of parking spaces. (McGrory Decl., ¶ 13). BKC directs this Court to the accompanying Declaration of Jim McGrory, which details BKC's role in the construction and alteration process at the BKLs.

III. ARGUMENT

A. Plaintiffs Lack Standing to Assert Class Claims as Against Restaurants They Have Not Visited

Before a class action may be certified, representative plaintiffs must first demonstrate that they have standing to assert the proposed class claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Title III ADA claims generally are site-specific for standing purposes. *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116, 1117-18 (C.D. Cal. 2000); *Moyer v. Walt Disney World Co.*, 146 F. Supp. 2d 1249 (M.D. Fla. 2000); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 343-44 (D.N.J. 2003); *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 229-30, 235 (D.N.J. 2003).[8]

This Court held in its order denying BKC's motion to dismiss that, although the Ninth Circuit has not ruled on the issue, public accommodation disability claims are not site specific **if** the discrimination allegedly suffered is the result of a discriminatory corporate policy or decision

[8] BKC reincorporates its argument from its motion to dismiss papers. (*See* Docket Nos. 29, 58).

or design of the defendant. (Docket No. 69 at 8-9, *quoting Clark v. Burger King Corp.*, 255 F. Supp. 2d at 343 n.11 ("if . . . [BKC had] implement[ed] a corporate policy violative of the ADA, Clark may have standing as to restaurants he has yet to visit") and *Clark v. McDonald's Corp.*, 213 F.R.D. at 221, 230 ("rejecting class claims but explaining that '[h]ad plaintiffs alleged, for example, that McDonald's and its franchisees adhered to a company-wide policy [contrary to the ADA] . . . then one could imagine why injunctive relief - against the defendants as a class - might be appropriate to redress such violations.'") (ellipses original)).[9] As this Court explained, where a centralized discriminatory policy or design is the cause of the barriers at all locations, then the named plaintiffs and class members who visited other locations were harmed by a single legal injury, *i.e.*, the unlawful policy. (*See* Docket No. 69 at 8, 10).

This Court ruled that, because Plaintiffs had alleged "a policy of barriers at Burger King restaurants discriminatory to individuals in wheelchairs," the complaint should not be dismissed at the pleading stage, even though "[i]t is true that the pleadings do not pinpoint the exact common policy or design features allegedly giving rise to the violations at the 90 stores with particularity." (*Id.* at 8). Instead, the Court ordered Plaintiffs to proceed with discovery, stating that, at class certification, it would hold Plaintiffs to the higher burden of pinpointing a specific BKC "discriminatory policy or design or decision" that actually caused similar accessibility barriers at all BKLs. (*Id.* at 8-12). As the Court explained, "[t]his is not to say that plaintiff will be able to satisfy Rule 23 at the class certification stage. It is only to say that there is enough pled to allow discovery on the class issues so that plaintiff will have a fair chance to develop his Rule 23 motion." (*Id.* at 8).

Now, despite having received the benefit of *extensive* discovery, which Plaintiffs tout in seeking to justify the adequacy of proposed class counsel, Plaintiffs still cannot show that BKC

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[9] In *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157-58 (1982), the Court held that proof that the named plaintiff was discriminated against on the basis of race was *not* sufficient to justify the inference that such discriminatory treatment was *typical*, that one incident evidenced a *policy* of ethnic discrimination, or that any such policy was typical of the defendant's *other* employment practices, as is required to bridge the "wide gap" between an individual's claim of discrimination and a class impacted by his otherwise unsupported allegation that the company has a policy of discrimination. *Id.* The Court held that **only "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a [broader] class. . . ."** *Id.* at 159 n.15 (emphasis added). (*See, infra,* at Rule 23 discussion).

has any "common offending policies or design characteristics" that would cause common accessibility barriers to exist at all BKLs today. This is because, in contrast, BKC's actual policy has consistently been to require compliance with federal and state accessibility standards at all restaurants. As noted, the only "policy" alleged by Plaintiffs is their misplaced reliance on [redacted] abandoned more than 15 years ago.[10] Plaintiffs also allege problems with entranceway doors, parking spaces, and the height of soft drink dispensers, but tie none of these alleged barriers to any BKC policy. In fact, Plaintiffs cannot do so, as BKC does not impose specifications with respect to any of these items of complaint. (McGrory Decl., ¶ 13).

BKC's actual policy of requiring compliance with accessibility standards is pervasive. It is reflected in its leases with the franchisees for the BKLs, which state that the franchisee must ensure that its restaurant complies with accessibility laws (*see* Docket No. 148, Exs. A-E); in BKC's Operations Manuals, which state that [redacted]," (*see* Massabki Decl., Ex. A), and in other system documents. BKC even requires franchisees to provide an architect's certification of ADA compliance whenever they complete certain major remodels of a restaurant. (McGrory Decl., ¶ 11; Exs. 1, 2).

BKC's anti-discrimination policy is also reflected in conceptual drawings. Over the years BKC has created many versions of design sketches to demonstrate the myriad ways that a property of any size or shape could achieve the critical "look and feel" elements of the then-current Burger King® image, *i.e.*, its approved color schemes, signage, parapet, and similar elements. (McGrory Dec., ¶ 2; Massabki Decl., Ex. C). Even though they are merely informational, BKC ensures that all concept sketches fully comply with ADA standards. (McGrory Decl., ¶¶ 2, 6). Indeed, for approximately 12 years, BKC has retained a nationally recognized accessibility consulting firm to review its conceptual drawings to ensure ADA

[10] Plaintiffs' statement [redacted] is simply false. [redacted]. (*See* Plfs. Ex. 123).

compliance. (McGrory Decl., ¶ 6). BKC's concept drawings, like BKC's leases and Operations Manual, typically remind the franchisees yet again that they must ensure that final construction plans comply with all accessibility standards. (McGrory Decl., ¶ 6).[11]

Plaintiffs have made no showing that a BKC policy or design causes common barriers to exist -- either today, as is necessary for injunctive relief under the ADA or state law -- or during the proposed class period for Plaintiffs' state law damages claim. Absent that showing, Plaintiffs lack standing to assert claims as to the 86 BKLs they have not visited.[12]

B. Class Certification Must Be Denied Because the Representative Plaintiffs' Title III ADA Claims and State Law Claims for Injunctive Relief Are Moot

It is black letter law that Article III requires a "live" controversy between the parties at all times, including "at the time [a] class action is certified." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Mootness can be raised at any time by the parties or by the court *sua sponte*. *Barilla v. Ervin*, 886 F.2d 1514, 1519 (9th Cir. 1989). Moreover, mootness is an absolute defense to class certification. *Valentine v. Sec'y of HHS*, 542 F. Supp. 76, 78 (N.D. Cal. 1982); *Tucker v. Phyfer*, 819 F.2d 1030, 1034 (8th Cir. 1987) (dismissing claims for mootness *sua sponte* in response to class certification motion).

Claims by private plaintiffs under Title III of the ADA are limited to injunctive relief. 42 U.S.C. § 12188(a)(1); *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002). Accordingly, "the fact that the alleged barrier has been remedied renders the issue moot" and requires dismissal of the ADA claim. *Hubbard v. 7-Eleven, Inc.*, 433 F. Supp. 2d 1134,

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[11] Plaintiffs submit, as their sole evidence of actual barriers, enigmatic statements such as [redacted]" (*See* Docket No. 170-171, Exs. A, F, L). However, the applicable access standards are defined in terms of specific measurements dependent on the dates of the plaintiffs' visits. (Blackseth Decl., Ex. 1). And many disabled persons will have difficulty negotiating facilities that fully comply with accessibility standards. *See Harris v. Costco Wholesale Corp.*, 389 F. Supp. 2d 1244, 1249 (S.D. Cal. 2005) (testimony of plaintiff that he "believes the store did not have sufficient accessible parking spaces" and that he had "difficulty" reaching the ATM card reader in the checkout lane, was rejected as legally insufficient); *Hubbard v. Twin Oaks Health and Rehab. Ctr.*, 408 F. Supp. 923, 930 (E.D. Cal. 2004) (declaration inadmissible due to failure to include measurements of alleged barriers).

[12] Plaintiffs' lack of standing also results in a lack of the commonality, typicality, and adequacy required for class certification. (*See infra* at Rule 23 discussion).

1145 (S.D. Cal. 2006).[13] Similarly, remediation requires dismissal of state law claims for injunctive relief, to the extent injunctive relief sought is for removal of the same barriers. *Hubbard,* 433 F. Supp. 2d at 1145.

BKC recently retained Kim Blackseth Interests, one of the foremost consultants on California and ADA building accessibility standards, to review the Representative Plaintiffs' claims and survey each of the ten restaurants they claim to have visited, to determine whether they currently comply with federal and state access laws. The Declaration of Kim Blackseth submitted herewith demonstrates that all ten of these BKLs are fully compliant with federal and state accessibility standards. (*See* Blackseth Decl., Ex. 1).

Moreover, because the claims relate to permanent structural items, *e.g.*, queue rails, dispensers, grab bars, tables, door closers, sidewalks and parking lots, they are unlikely to recur. Accordingly, the "likelihood of repetition" exception to the mootness doctrine is not applicable. *See Hickman v. Mo.,* 144 F.3d 1141, 1144 (8th Cir. 1998) (upholding dismissal on mootness grounds where the "defendants' compliance with the ADA, including structural changes such as installation of ramps, pull and grab bars, and chair lifts, is far more than a mere voluntary cessation of alleged illegal conduct" where the defendants would be "free to return to [their] old ways") (citations omitted)*; Independent Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 771 (D. Or. 1997) (holding, in Title III ADA access case, that when "the challenged conditions have been remedied, then these particular claims are moot absent any basis for concluding that [the] plaintiffs will again be subject to the same wrongful conduct by [the] defendant").

Additionally, as Plaintiffs admit (*see* Docket No. 138 at 9, n.10), three of the restaurants that were BKLs during the proposed class period either closed or converted to a different form of ownership before Plaintiffs' initial complaint was filed: #910 in Lemon Grove, #2132 in Glendale, and #5150 in Los Alamitos, California. (*See* Docket No. 138 at 9 n.10; Pltfs' Exs. 53, 122). Another (#2215 in Tifton) closed shortly after the complaint was filed. (*Id.*) Five

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[13] *See also Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1087 (D. Haw. 2000); *Pickern v. Best Western Timber Cove Lodge Marina Resort,* 194 F. Supp. 2d 1128, 1130 (E.D. Cal. 2002); *Feezor v. De-Jesus,* 439 F. Supp. 2d 1109, 1111 (S.D. Cal. 2006); *Grove v. De La Cruz,* 407 F. Supp. 2d 1126, 1131 (C.D. Cal. 2005).

additional former BKLs have closed during 2009: BKLs #1572 and 6028 in San Jose, #2202 in Yuba City, #3316 in Big Bear Lake, and #5869 in Hayward. (*See* Archer Decl., ¶ 3). Accordingly, injunctive relief is no longer available as to those restaurants, and they must be excluded from any ADA class. *Hubbard,* 433 F. Supp. 2d at 1145.

C. Plaintiffs' Have Failed to Satisfy Fed. R. Civ. P. 23

Plaintiffs' lack of standing is fatal to the proposed class claims. The Supreme Court has specifically noted that a named plaintiff's lack of standing, when addressed under Rule 23's rubric of adequacy of representation, typicality, and commonality, results in a failure to satisfy Rule 23. *Gratz v. Bollinger*, 539 U.S. 244, 263 n.15 (2003); *see also Bates v. United Parcel Svc., Inc.*, 511 F.3d 974, 986-87 (9th Cir. 2007) (noting relationship between standing and adequacy). Moreover, Plaintiffs otherwise fail to meet the rigorous standard of Rule 23.

1. Class Certification Standards

Plaintiffs bear a "strict" burden of establishing *each* requirement of Rule 23(a) *and* one requirement of Rule 23(b). *Hanlon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *Garza v. Gruma Corp.*, No. C 07-02092 JW, 2009 WL 2136930, at *2 (N.D. Cal. July 16, 2009). Courts considering a class certification motion must conduct "a rigorous analysis" into whether these prerequisites have been met. *Falcon*, 457 U.S. at 161; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). In conducting that analysis, "judges are at liberty to, and indeed must, consider evidence relating to the merits if such evidence also goes to the requirements of Rule 23." *In re LDK Solar Secs. Litig.*, 255 F.R.D. 519, 525 (N.D. Cal. 2009).

a. Plaintiffs Have Failed to Demonstrate Numerosity

Rule 23(a)(1) requires that a class be so numerous that joinder of all members would be impracticable. Plaintiffs' only evidence of numerosity is (1) a citation to census data admitted in the *Moeller v. Taco Bell* case that there are approximately 151,580 non-institutionalized California residents aged 16 or older who use wheelchairs (*see* Docket No. 138 at 18), and (2) 48 declarations from putative class members, which are of dubious veracity and are subject to a pending motion to strike (*see* Docket No. 169).

It is well-established that census data cannot, by itself, establish class numerosity; it must

be tied to actual discrimination. For example, in *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007), the court rejected the plaintiffs' reliance on census data and statistics as "too ambiguous and speculative to establish numerosity" where the plaintiffs asked the court to infer that many mobility impaired individuals who did not currently play golf would like to do so, and would like to do so at Marriott courses, but "provide[d] no insight into how many disabled people who would like to play golf, at Marriott courses, are deterred from doing so because of the absence of single-rider carts." *Id.* [14]

Similarly, here, Plaintiffs ask the Court to infer, merely from the raw number of mobility impaired California residents, that a large number of wheelchair-bound patrons enter each of the 90-some BKLs, and have encountered barriers at those restaurants. No evidence supports this assumption, and it is counter-intuitive, especially given the fact that 61% of Burger King® customers use the drive-thru. (Archer Decl., ¶ 9).

BKC has filed herewith a motion to strike Plaintiffs' declarations because Plaintiffs withheld the contact information for the declarants for, in Magistrate Larson's words "no legitimate reason," until well after the class discovery deadline expired. (Docket No. 150 at 5).[15] Accordingly, these declarations cannot be used to establish numerosity. Moreover, even if allowed, they show on average visits by less than two disabled persons for each of the BKLs referenced. (*See* Docket No. 170, Exs. A, F, L). This is far less than what is necessary to establish a class for each restaurant whose joinder is so numerous as to be impracticable.

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[14] *See also Mazus v. Dep't of Transp.*, 489 F. Supp. 376, 378 n.3, 387-88 (M.D. Pa. 1979), *aff'd in relevant part*, 629 F.2d 870, 875-876 (3d Cir. 1980) (denying class certification for lack of numerosity because plaintiffs relied on overly broad census data); *LeGrand v. N.Y. City Transit Auth.*, No. 95-CV-0333 JG, 1999 WL 342286, at *3-5 (E.D.N.Y. May 26, 1999) (numerosity not satisfied because the statistical data on number of pregnant women in company had no relation to the number of such women who suffered pregnancy discrimination); *Green v. Borg-Warner Protective Servs. Corp.*, No. 96 CIV. 8740 (RPP), 1998 WL 17719, at *1-4 (S.D.N.Y. Jan. 16, 1998) (census data unconnected to actual violation of rights cannot determine class).

[15] The importance of BKC's right to contact, or examine, these witnesses, is amply demonstrated by the statements contained in the declarations. As discussed in BKC's motion to strike, the witnesses allege queue lines that are "too narrow" in ten restaurants that never had queue lines, or from which queue lines had been absent for more than 5 years. (*See* Docket No. 160). Whatever the cause of the affirmative misstatements in these declarations, they should be stricken for failure to comply with Rule 26 and cannot be considered in determining numerosity.

b. Plaintiffs Have Failed to Demonstrate Commonality

The Supreme Court in *Falcon* cautioned that there is:

> a wide gap between (a) an individual's claim that he has been denied a promotion on discrimination grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact.

457 U.S. at 157. The Court explained that to satisfy Rule 23's commonality and typicality requirements, much more than individual allegations of discrimination are necessary to sustain an "across-the-board" attack, adding that "significant proof" that the defendant "operated under a general policy of discrimination conceivably could justify" such a class *Id.* at 159 n. 15.

In *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006), the D.C. Circuit addressed the showing that a class action plaintiff must make to "bridge the gap" in a gender discrimination case. To show commonality, the plaintiffs were required to "'make a significant showing'" that "'the members of the class suffered from a common policy of discrimination that pervaded'" the decision-making process. *Id*. at 728 (quoting *Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994)). The court affirmed the denial of class certification, because plaintiffs' declarations "did not require the District Court to infer the existence of a 'common policy of discrimination' that affected the non-declarants as well." *Id*. at 729.[16]

Plaintiffs have failed to show that BKC has a discriminatory policy that caused more than 90 restaurants throughout the state of California, operated by separate franchisees, to have access barriers in violation of the ADA and California law. Nor can they.

Plaintiffs' complaint and class certification motion are patterned on *Moeller v. Taco Bell Corp*., 220 F.R.D. 604 (N.D. Cal. 2004). This case, however, lacks all of the critical ingredients that supported class certification in that case. First, in *Moeller*, all of the restaurants subject to

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[16] *See also Jimenez v. Lakeside Pic-N-Pac, LLC*, No. CIV.A. 1:06-CV-456, 2007 WL 4454295, at *10 (W.D. Mich. Dec. 14, 2007)(class action plaintiffs failed to show existence of standardized conduct or general policy); *Gaston v. Exelon Corp.*, 247 F.R.D. 75, 83 (E.D. Pa. 2007) (court rejected plaintiffs' assertion of commonality where they "failed to identify a policy, practice, or procedure that is *the root of the alleged harm for all class members*") (emphasis added). "Conclusory allegations and general assertions of discrimination are not sufficient to establish commonality." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565 (6th Cir. 2004).

the class certification motion were *owned and operated* by Taco Bell Corp. Indeed, Plaintiffs' counsel in *Moeller* were careful to "seek class certification . . . *only with respect to patrons of the corporate restaurants*." *Id*. at 607 (emphasis added). In this case, by contrast, all of the BKLs are operated by independent franchisees who are responsible for their own construction or remodeling decisions. Second, in *Taco Bell*, the plaintiffs submitted direct evidence of a company-wide design flaw: deposition testimony from Taco Bell's corporate representative admitting that all Taco Bell restaurants constructed over a 14-year period were constructed pursuant to prototypes that violated standards for queue lines and dispensers, copies of defective prototypes, and evidence that the resulting violations of access laws had never been corrected. *See Moeller v. Taco Bell*, No. C 02-5849 MJJ, 2003 WL 25743635, at p. 14 (N.D. Cal. Feb 23, 2004). By contrast, the only alleged "design flaw" Plaintiffs here can submit is [redacted]. (Plfs. Exs. 123, 126). Not only do these fail to show a violation of access laws *per se*, but Plaintiffs offer no evidence that either was ever used in a BKL.

Finally, in *Taco Bell*, Taco Bell Corp. constructed all restaurants using the defective prototypes it had designed, from which no modifications were permitted. 220 F.R.D. at 610. The Court held that this evidence of centralized decision-making weighed heavily towards a finding of commonality. *Id.* Here, however, no such control exists. BKC makes design sketches available to franchisees, but, contrary to Plaintiffs' allegations (*see* Docket No. 138 at 9) does not require franchisees to use them, and expressly advises franchises they must ensure their final plans comply with all laws, including the ADA. (McGrory Dec., ¶ 2, 4). Moreover, unlike Taco Bell, BKC has no designs for use in connection with remodels or "retrofits." (McGrory Dec., ¶¶ 10, 11). *Compare* 220 F.R.D. at 610.[17] The lack of a centralized corporate policy likewise distinguishes this case from *Arnold v. United Artists Theatre, Inc.*, 158 F.R.D.

[17] The other cases on which Plaintiffs rely are similarly inapposite to the commonality requirement of Rule 23(a) because each involved either corporate-owned stores, an across-the-board policy or lack of one, or the existence of the same barrier at multiple locations traceable to a policy or action of a single defendant. (*See* Docket No. 138 at 16-17).

439 (N.D. Calif. 1994) and *Colo. Cross-Disability Coalition v. Taco Bell*, 184 F.R.D. 354 (D. Colo. 1999), and all other cases on which Plaintiffs rely.

This case is much more akin to *Access Now, Inc. v. Walt Disney World Co.*, 211 F. R. D. 452 (M. D. Fla. 2001), in which the plaintiff, who had not been to all of defendant's facilities, nonetheless sought certification of a disability access class action as to defendant's 15 hotels and two theme parks. The court denied class certification for lack of commonality because plaintiffs provided only "conclusory allegations" that the defendant's policies violated the ADA, and because "the facilities were each constructed at different times, some predating the ADA, some built after the ADA, and some having been remodeled since the ADA." *Id.* at 455.[18]

Moreover, cases discussing the question have repeatedly held that system controls such as those implemented by BKC as franchisor, do not render it liable under the ADA; thus, Plaintiffs' arguments regarding BKC's extensive system standards intended to protect the value of its brand are of no moment. The leading case addressing the liability of franchisors under the ADA is the Fifth Circuit's opinion in *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995), in which the plaintiffs pointed to "numerous non-structural aspects" of various stores' operations that they contended American Dairy Queen ("ADQ") controlled, which the Fifth Circuit held were irrelevant to the discriminatory conditions at the stores. *Id.* at 1067. Similar to Plaintiffs' assertions here, the *Neff* plaintiffs also relied on various provisions of the franchise agreement that required ADQ's "prior written approval." The Fifth Circuit held that "this right,

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[18] *See also Access Now, Inc. v. Macy's East, Inc.*, No. 99-9088-CIV-Jordan (S.D. Fla. Feb. 15, 2001)(denying class certification for lack of commonality at Macy's department stores) (attached as Exhibit A); *Access Now, Inc. v. The May Dept. Stores Co.*, No. 00-0148-CIV-Moreno (S.D. Fla. Oct. 5, 2000)(denying class certification for lack of commonality in ADA case where plaintiff's bare allegation of a corporate policy was unsubstantiated, the complaint alleged only specific violations rather than a uniform policy and stores were constructed at different times) (attached as Exhibit B); *Ass'n for Disabled Ams., Inc. v. Motiva Enters., LLC*, No. 99-0580-CIV-Ungaro Benages (S.D. Fla. Oct. 18, 1999)(denying class certification and granting motion to dismiss class action in ADA case where plaintiff's only "evidence" of a corporate policy was an unsubstantiated allegation that the defendant's conduct constituted a policy, and the only way to show the defendant's alleged non-compliance with the ADA was to examine each gas station) (copy attached as Exhibit C).

which is essentially negative in character, cannot support a holding that ADQ 'operates' the . . . store with respect to its removal of architectural barriers to the disabled." *Id.* at 1068.[19]

Similarly, here, as in *Neff*, Plaintiffs rely on BKC Operations Manuals that do "not relate to the modifications of the physical structure or accessibility." *Id*. at 1068. As here, the Fifth Circuit observed that the plaintiffs made no showing that the store operations manual "prevented" the franchisee from complying with the ADA. *Id*. Further, notwithstanding that ADQ and BKC had the right to terminate franchisees for breach of the franchise agreement, such a right "does not grant [the franchisor] additional control over . . . modification[s] of the . . . store[s] to increase [their] accessibility to the disabled beyond [the franchisors'] underlying contractual rights with respect to such modifications." *Id*. at 1068 n.11.

Most importantly, Plaintiffs here, as in *Neff*, have "not alleged or offered any . . . evidence to show that [BKC] has withheld its consent to proposed modifications to" any of the BKLs "designed to bring [them] into compliance with the ADA" or that BKC did anything that "prevented" the franchisees "from complying with the ADA." *Id*. at 1068-69; *see Alonzo*, 933 S.W.2d at 297 (no evidence that franchisor withheld written approval from franchisee to make structural changes necessary to comply with ADA). Thus, Plaintiffs have failed to show that BKC had a discriminatory policy that satisfies Plaintiffs' burden of showing commonality.

This Court has invoked similar reasoning in holding that a franchisor is not an employer of franchisee's employees in an action brought under the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, and the California Labor Code §204, 510, and 1194. *Singh v. 7-Eleven, Inc.*, No. C-05-04534 RMW, 2007 WL 715488 (N.D. Cal. Mar. 8, 2007). Notwithstanding the franchisor's ability to set store hours, its control over the delivery of services, its control over food services, and its ability terminate the franchise agreement, this Court held that "[s]uch

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[19] *See also U.S. v. Days Inn of Am., Inc.*, 151 F.3d 822, 826-27 (8th Cir. 1998)(franchisor's review of building plans not sufficient to impose ADA liability); *U.S. v. Days Inn of Am., Inc.*, No. Civ. S-96-260 WBS/GGH, 1998 WL 461203 (E.D. Cal. Jan. 12, 1998)("negative veto" inadequate to establish ADA liability); *Alonzo v. Mr. Gatti's Pizza, Inc.*, 933 S.W.2d 294, 296-97 (Tex. App. 1996)(retaining the right to set building standards and to veto proposed structural changes is insufficient to show that franchisor "operated" store).

policies are merely reflective of an inherent interrelation of operations between the two entities and 7-Eleven's goal of attaining conformity to certain operational standards and details." *Id.* [20]

At most, the record demonstrates that numerous and diverse franchisees made individualized decisions relating to more than 90 restaurants dispersed throughout the State of California over the course of many years. *See Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006) (affirming denial of class certification because of large number of geographically dispersed decision-makers in discrimination case brought by Hispanic farmers). Given that discriminatory decisions of various decision-makers within a single entity do not support the commonality requirement of Rule 23(a), the alleged discriminatory construction and remodeling decisions of nearly 60 different franchisees here clearly do not satisfy Plaintiffs' burden of showing that the commonality requirement of Rule 23(a) has been met.

Additionally, the applicable legal standards for each restaurant are different, warranting case-by-case determinations. Some of the BKLs were built and occupied after January 26, 1993 (the enactment of the ADA), placing those stores under the more stringent "readily accessible" standard. (*See* Archer Decl., Ex. 1). However, most of the stores were built prior to the enactment of the ADA, and are governed under the less stringent, more fact-intensive "readily achievable" standard. (*Id.*) Under that standard, barriers to access must be removed if doing so is "readily achievable," meaning removal "is easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). What is "readily achievable" in one store may not be in another. *See Access Now. v. S. Fla. Stadium*, 161 F. Supp. 2d 1357, 1371 (S.D. Fla. 2001) ("readily achievable is a fact-intensive inquiry").

In addition, some of the pre-ADA stores have been remodeled since the enactment of the ADA (*see* Archer Decl., Ex. 1), and may have certain elements that are subject to the more stringent standard, depending on the nature and extent of the renovations -- implicating yet again store-by-store fact determinations. In light of these material differences, Plaintiffs cannot

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[20] The court also distinguished *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354 (D. Colo. 1999), as being based upon a single, common flaw in the defendant's queue line design in corporate-owned restaurants throughout the state. *Taco Bell* thus demonstrates the converse of this patently uncertifiable class complaint against multiple restaurants.

establish that their claims have common issues of law or fact to the proposed class claims.

The California statutes pose the same hurdles. The Title 24 in use today began in 1982. The Title 24 accessibility standards were largely revised in 1984, 1986, 1987, 1989, 1994, 1996, 1998 and 2001. The 2007 California Building Code ("CBC") became effective on January 1, 2008 for all alterations and new construction.

The applicable State standard for each restaurant depends largely on its construction date and alteration history. If an alteration is made, the facility must comply with the edition of the CBC in effect on the date of their last alteration, but only with respect to the functional areas renovated, the path of travel to them and the sanitary facilities that support them, not the entire facility. (Blackseth Decl., Ex. 1). These are inherently fact-intensive, store-specific issues.[21]

It is impossible for the Court to issue an order that would effectively address, across the board, the multitude of alleged "accessibility barriers." Certifying a class based on a plethora of alleged varying accessibility violations scattered across more than 90 locations would require an interminable parade of mini-trials, each focused on the individualized proof of accessibility violations in each of these 96 stores. *See Hall v. Burger King Corp.*, No. CIV. A. 890260CIVKEHOE, 1992 WL 372354, at *4 (S.D. Fla. Oct. 26, 1992) (class certification denied where court would have to conduct "hundreds of mini-trials" to resolve numerous "discrete factual issues"). Accordingly, Plaintiffs have failed to demonstrate commonality and the Court should deny class certification.

c. Plaintiffs Have Failed to Show Typicality

"A class representative must be a part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (internal quotations omitted). Proof of typicality requires more than general conclusory allegations. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

As discussed previously, Plaintiffs have suffered a different legal injury than the putative

[21] Likewise, the CDPA does not consider a non-compliant architectural feature a violation of the Act if it is necessary to comply with other existing laws. Cal. Civ. Code § 54 (West 2003). The Court, therefore, has to examine the interplay of various state and local laws as applied to certain architectural features in certain localities.

class members who allegedly encountered access barriers at the BKLs that the named Plaintiffs have not visited.[22] Thus Plaintiffs have not, and cannot, demonstrate either typicality or adequacy of representation under Rule 23.[23]

Plaintiffs' typicality cases are not helpful to their cause. Plaintiffs' cases involved uniform, company-wide, barriers resulting from centralized company policies (*e.g.*, narrow doorways in *Jorgensen v. Jack in the Box Rest.*, No. C95-0406 SAW, slip. op. at 5-6 (N.D. Cal. Feb. 28, 1997)). Plaintiffs complain of no such uniform barrier here, but rather give a laundry list of alleged barriers, each of which could impact a particular person differently, or not at all.

Plaintiffs do not dispute that every restaurant identified in the Amended Complaint (as well as the five additional restaurants Mr. Castaneda claims he has visited) was constructed in the 1970s or 1980s, well before the ADA was in effect.[24] (Archer Dec., Ex. 1). Because these restaurants were constructed before the January 26, 1993 effective date of the ADA's new construction standards, (*see* 42 U.S.C. § 12183(a)(1)), the ADA's design and construction requirements are inapplicable. *See Voytek v. Univ. of Cal.*, No. C-92-3465 EFL, 1994 WL 478805 (N.D. Cal. Aug. 25, 1994) (ADA claim barred because it predated effective date of ADA), *aff'd on other grounds*, 77 F.3d 491 (9th Cir. 1996); *Colon v. League of United Latin Am. Citizens*, 91 F.3d 140 (5th Cir. 1996) (courts lack jurisdiction when events predate ADA's effective date). Thus, Plaintiffs do not possess a new-construction claim in their own right. Accordingly, they lack typicality as to a class that asserts such claims, and certification of such claims must be denied. *See Am. Council of the Blind v. Astrue*, No. C-05-04696 WHL, 2008 WL 4279674 (N.D. Cal. Sept. 11, 2008) (Alsup, J.)(named plaintiffs could not represent a class including Social Security programs in which no representative plaintiff participated, due to lack of typicality); *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal.

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[22] The typicality requirement and the commonality requirement are related; therefore, the above arguments against commonality are applicable here as well. *Falcon*, 457 U.S. at 158.
[23] As stated above, where Plaintiffs lack standing, their claims by definition are not typical.
[24] In its order denying BKC's motion to dismiss, the Court acknowledged that this presented a basis to deny class certification: "[i]f the facts ultimately reveal, for example, that plaintiff visited no store subject to ADA's new construction provisions, the effect thereof for class certification will be considered at the appropriate time." (Docket No. 69 at 12).

June 19, 2007) (Alsup, J.) (representative plaintiffs who alleged claims under California law were not adequate representatives of absent class members with claims under other states' laws). Plaintiffs' claims also lack typicality because the 10 BKLs visited by the named Plaintiffs represent only 3 of the 12 or more basic architectural types of buildings included among the 96 BKLs. (*See generally* McGrory Decl., ¶ 8). Finally, Plaintiffs lack typicality as to the state-wide class that they propose because their claims relate solely to restaurants in the San Francisco Bay area. Accordingly, Plaintiffs' class certification motion should be denied for lack of typicality.

d. Plaintiffs Have Not Demonstrated Adequacy

Rule 23 also requires a showing that both the named plaintiffs and plaintiffs' counsel "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The named Plaintiffs here are not adequate representatives for the class they propose, for the same reasons that they lack commonality and typicality: (i) they lack standing to assert claims against the majority of the BKLs in the proposed class; (ii) their claims for injunctive relief are moot; and (iii) they are unable to assert design and construction claims, or claims as to the entire range of architectural types of BKLs, because the BKLs they visited predated the ADA and represent only 3 of the more than 12 architectural types at issue. Thus, their claims are not typical of the claims of the class they seek to represent, and they, consequently, are not adequate class representatives. *See E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405-06 (1977) (the "mere fact" that a plaintiff has alleged a discrimination claim does not ensure "that the party who has brought the lawsuit will be an adequate representative" of other victims of discrimination).

With respect to proposed class counsel, under Rule 23(g), the court must analyze "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(iv). Where, as here, numerous attorneys seek a joint appointment as class counsel, the Advisory Committee Notes caution that "the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure." Advisory Committee Note to Rule 23(g)(2) (2003 amendments).

Here, five separate law firms seek joint appointment as lead counsel. They have provided

no information about how they propose to staff the case, how they will divide responsibilities for various tasks, or about any fee-sharing arrangements among them. *See* Fed. R. Civ. P. 23(g)(1)(C) (court may require counsel to propose terms for attorneys' fees and nontaxable costs). This is exactly the type of "ungainly counsel structure" that the Advisory Committee warned against, and raises substantial risks of duplication of efforts and a compounding of fees and expenses that would waste class resources, as well as the potential for conflicts between counsel and the class members with respect to the utilization of class resources.

2. Plaintiffs Cannot Satisfy Rule 23(b)(2) Because Damages Predominate

Certification under Rule 23(b)(2) is appropriate only where a "claim for monetary damages is secondary to the primary claim for injunctive or declaratory relief." *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003) (citations omitted). Where damages, rather than injunctive relief, are the "essential goal" of the litigation, certification is improper. *Id.* at 950; *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1240 (9th Cir. 1998); *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) ("In Rule 23(b)(2) cases, monetary damage requests are generally allowable only if they are merely incidental to the litigation").

A damage claim is predominant, rather than secondary, where, *inter alia*: 1) the named plaintiffs lack standing to pursue injunctive claims; 2) the injunctive claims are moot; or 3) the damage claim would require individualized proof. Each circumstance exists here. Thus, the Court must deny certification under Rule 23(b)(2).

a. Damages predominate because Plaintiffs lack standing

Where plaintiffs lack standing to pursue their injunctive relief claims, damages claims predominate such that certification must be denied. *See Nelsen v. King*, 895 F.2d 1248, 1254-55 (9th Cir. 1990) ("where named plaintiffs lacked standing to assert their claims for injunctive relief, the district court did not abuse its discretion in denying their motion for class certification under 23(b)(2)"). Such is the case here. As shown above, the named Plaintiffs lack standing because: 1) they point to no common policy or practice by BKC; and 2) the particular restaurants they have visited are fully compliant with all applicable access standards. Consequently, only their damages claims remain. Rule 23(b)(2) certification is therefore inappropriate.

b. Damages predominate because Plaintiffs' injunctive claim is moot

As shown, the 10 BKLs at issue are fully compliant with the ADA and state access laws. Moreover, Plaintiffs cannot show a reasonable likelihood of recurrence. *Hickman*, 144 F.3d at 1144. Their injunctive claims are therefore moot; thus, their damages claims are necessarily predominant. *See Smith v. University of Washington Law School*, 233 F.3d 1188, 1194-95, 1196 (9th Cir. 2000) (damages under 23(b)(2) "would hardly be incidental when the prospective relief portion of the action had become moot"); *Hubbard*, 433 F. Supp. 2d at 1145; *In re Paxil Litig.*, 218 F.R.D. 242, 247-48 (C.D. Cal. 2003) (damage claims predominated, compelling denial of certification, where "most of the allegedly offending conduct" had ceased). For this further reason, certification is improper under Rule 23(b)(2), and must be denied.

c. Damages predominate because Plaintiffs' damages claims require highly individualized proof

Here, Plaintiffs' Unruh Act claim requires proof that a construction-related statutory violation denied full and equal access on a *particular occasion*. Cal. Civ. Code § 55.56(a). For each alleged violation, Plaintiffs must show that a particular individual was denied entry as a result of an unlawful barrier that the plaintiff *personally encountered* or of which plaintiff had actual knowledge. *Id.* § 55.56(b); *see also Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1040 (9th Cir. 2008); *Urhausen v. Longs Drug Stores Cal., Inc.*, 155 Cal.App.4th 254, 263 (1st Dist., 2007) ("to maintain an action for damages . . . an individual must take the additional step of establishing that he or she was denied equal access on a particular occasion"). Statutory damages are recoverable for each particular occasion on which access is denied, and *not* for each violation of construction-related accessibility standards at the site. Cal. Civ. Code § 55.56(e). Moreover, a violation requires proof of difficulty, discomfort or embarrassment. *Id.* § 55.56(c).[25]

[25] The applicable statute was effective January 1, 2009. Plaintiffs commenced this action before that date, alleging violations at 2 restaurants, but added additional restaurants subsequently, and seek to add many more by this motion. Because the applicable statutory amendments codified, rather than changed, existing law, the above-referenced standards also apply to all restaurants eventually included in this suit. *See* Senate Rules Committee, Bill Analysis, S.B. 1608, August 12, 2008 ("SB 1608 also codifies a standard for assessing statutory damages that reflects case law allowing a person to sue and collect damages when the person is denied full and equal access").

Here, such questions are so individual-specific that class relief would be ineffective and improper. As shown, damages are recoverable only upon proof that a particular individual actually encountered, and was denied or deterred access by, a particular barrier. Cal. Civ. Code § 55.56(e). If, for example, a class member visited a BKL with an allegedly non-compliant restroom facility, but that individual never attempted to use the restroom, no damages would be recoverable. *Id.* Thus, determining each violation for the purposes of statutory damages would require a mini-trial for each occasion alleged by each class member. These are precisely the sort of individualized determinations for which class relief is improper.

The class definition Plaintiffs propose, moreover, is not even limited to all disabled Burger King patrons. Rather, Plaintiffs ask the Court to certify a class encompassing all mobility impaired California residents. To ascertain which of these potential class members actually visited Burger King, much less encountered a barrier, necessarily requires substantial individualized proof. Such claims are not suitable for class relief. *Drimmer v. WD-40 Co.*, 2009 WL 2519188, 3 (9th Cir. 2009) (claims requiring proof of individual damages not suitable for class certification); *Mazus*, 257 F.R.D. at 572; *Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2007 WL 2015440, at 6-7 (N.D. Cal. July 11, 2007). Thus, for this further and independent reason, the Court should deny Plaintiffs' motion.

D. Plaintiffs' State Law Claims Should Be Stricken From the Class Definition

Plaintiffs seeks to include within their class definition claims against BKC under Unruh and CDPA (in addition to Title III ADA claims), even though they have failed to show any basis for liability under these statutes. Accordingly, the Unruh and CDPA claims should be stricken from Plaintiffs' class definition. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158 F. R. D. 439, 456-58 (N.D. Cal. 1994) (striking certain Unruh, CDPA claims from accessibility discrimination class definition at certification, because such claims did not state a valid claim).

Unlike the ADA, which imposes strict liability upon lessors of public accommodations, Unruh and the CDPA limit liability to those who actually make or incite discrimination. Thus, Unruh states that whoever actually "denies, aids or incites a denial, or makes any discrimination

. . .” may be sued. And the CDPA likewise limits liability to: “Any person or persons, firm or corporation who denies or interferes . . . .” with access on account of disability. Cal. Civ. Code § 54.3(a). *See Deukmejian v. CHE Inc.*, 150 Cal. App. 3d 123, 133 (Cal. Ct. App. 1983) (§ 54 “requir[es] operators of such facilities to ‘open its doors on an equal basis’” to the physically handicapped) (emphasis added).

Notably, when the California Legislature amended Section 51 to make ADAAG standards actionable under Unruh and CDPA, the Legislature *did not* amend Sections 52(a) or 54(a) to add the “status”-based liability categories, including lessors, found in the ADA. Cal. Civ. Code § 51(f). “‘It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.’” *Brown v. Kelly Broadcasting Co.*, 49 Cal. 3d 711, 725 (Cal. 1989) (quotation omitted).

Nonetheless, Plaintiffs’ class certification motion seeks to hold BKC liable under Unruh and CDPA merely because it is a lessor. As this Court did in *Arnold*, it should strike references to the state law claims against BKC from the class definition. *Arnold*, 158 F. R. D. at 458.

IV. CONCLUSION

For all of the foregoing reasons, this Court should (1) find that Plaintiffs Castaneda, Corbett and Wellner lack standing to assert claims as against restaurants other than the ten they have identified as allegedly containing barriers; (2) find that Plaintiffs’ claims for injunctive relief are moot; (3) find that Plaintiffs’ remaining claims for monetary relief predominate and that the case is unsuitable for class certification under Fed. R. Civ. P. 23(b)(2) as requested; (4) find that Plaintiffs have failed to satisfy the requirements of Fed. R. Civ. P. 23(a) and (b); and (5) deny class certification in its entirety. BKC alternatively requests that the Court strike (a) class allegations regarding damages; (b) class allegations regarding permanently closed or converted restaurants; (c) class allegations regarding restaurants other than the ten visited by the representative plaintiffs; (d) class allegations regarding restaurants of architectural types other than those visited by the named Plaintiffs; and (e) class allegations regarding restaurants outside of the San Francisco Bay area.

REDACTED PURSUANT TO PROTECTIVE ORDER

Dated: August 21, 2009

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