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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIGUEL CASTANEDA, KATHERINE CORBETT, and JOSEPH WELLNER on behalf of themselves and others similarly situated Plaintiff, vs. BURGER KING CORPORATION, Defendants.	Case No. C 08-4262 WHA (JL) **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Date: September 17, 2009 Time: 8:00 a.m. Judge: William H. Alsup

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I. Introduction

Plaintiffs established, in their Memorandum in Support of Motion for Class Certification (Dkt. #138) ("Class Cert. Memo") that: (1) the proposed class has common experiences of discrimination at Burger King leased ("BKL") restaurants, creating common issues of law and fact; (2) Burger King leases all of the BKL restaurants, obligating it to ensure that BKLs comply with the ADA and thus state law, and making it liable for violations of those statutes; and (3) despite exercising control over virtually every aspect of the BKLs, Burger King has abdicated virtually all responsibility for compliance with the ADA and state accessibility requirements to franchisees, leading to a uniform failure to ensure accessibility by franchisees. These factors demonstrate that class certification is appropriate.

Burger King's Opposition (Dkt. #184) ("BK Opp.") does not dispute the vast majority of facts set forth in Plaintiffs' opening brief. Instead, it focuses on three threshold defenses. First, Burger King trumpets the fact that it makes very little effort to ensure that BKLs comply with state and federal accessibility requirements in the mistaken belief that only a policy that affirmatively requires violations of accessibility requirements makes it liable. Second, it argues that Plaintiffs lack standing to challenge practices at restaurants they have not personally patronized because the ADA is site specific. Third, it contends that its program of post-suit attempted remediation has mooted the need for injunctive relief.

The ADA, however, imposes an affirmative obligation to prevent and remove barriers. Because it leases BKLs, Burger King has a non-delegable duty to ensure that BKLs comply with access requirements, and, as courts including this one have held, failing to have in place adequate policies to ensure such compliance is itself a violation and presents a common question for the class. With respect to standing, the Court has previously determined that the ADA is *not* site specific. Nor is this case moot. But for these threshold defenses, Burger King largely does not contest Rule 23(a) and (b)(2), making class certification appropriate.

II. Argument

A. Burger King's Policy Failure Supports Class Certification.

It is undisputed that Burger King leases the BKLs. BK Opp. at 1. As a result, it is liable

for any violations that exist in BKLs, whether those barriers are affirmatively required by its policies or result from its failure to have in place appropriate policies. Burger King's assertion that it abdicates compliance duties to its franchisees is a concession of a common failure to implement a legally required policy that supports class certification.

1. Burger King as a Lessor Is Liable for Access Violations at BKLs and *Neff v. American Dairy Queen Corp.* Is Irrelevant.

The ADA imposes liability on any entity that "owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Burger King leases the BKLs and is accordingly liable under the ADA.[1] Burger King relies heavily on *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995), but *Neff* is a red herring. The defendant in *Neff* was not a lessor. To establish that the defendant was covered by the ADA, Neff tried to show that the defendant franchisor "operate[d]" the facility. *Id.* at 1065. The Fifth Circuit examined the franchise agreement and held that the defendant was not an operator. *Id.* at 1066-69. Here, in contrast, Burger King indisputably leases these restaurants and is therefore liable for any violations of the ADA.

2. Burger King May Not Delegate Its Duty to Ensure that BKLs Comply with Access Requirements.

Burger King argues that its franchise agreement makes its lessee franchisees contractually liable for accessibility compliance. BK Opp. at 5. But, it may not delegate to lessees its duty to ensure that BKLs comply with the ADA. The U.S. Department of Justice, in its ADA Technical Assistance Manual ("TAM"), states, "[A]ny allocation made in a lease or other contract is only effective as between the parties, and both landlord and tenant remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation." TAM at § III-1.2000 (emphases added), available at http://www.ada.gov/taman3.html.[2] "[A] landlord has

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[1] As will be discussed below, because a violation of the ADA is automatically a violation of both of the California statutes, any discussion of ADA violations applies equally to Plaintiffs' state law claims. *See infra* Section II.E.

[2] The TAM "must . . . be given substantial deference and will be disregarded only if 'plainly erroneous or inconsistent with the regulation.'" *Bay Area Addiction Research &*

(continued...)

an independent obligation to comply with the ADA that may not be eliminated by contract." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 833 (9th Cir. 2000). Indeed, Burger King itself has previously admitted that "[t]he ADA . . . creates strict liability for injunctive relief against . . . lessors, and lessees and leaves it to those parties to decide among themselves who caused the violation." Mem. of P&A in Supp. of Def. BKC's Mot. to Dismiss (Dkt #29) at 21-22.

3. Burger King's Admitted Failure To Satisfy this Non-Delegable Duty Provides Ground for Class Certification.

Burger King's failure to implement and enforce policies to ensure compliance where it has a duty to comply provides a solid basis for class certification. As this Court held, in *American Council of the Blind v. Astrue*, "'it is sufficient for plaintiffs to allege that defendant has failed to take action—i.e., failed to implement a practice or policy—that satisfies his obligations' to satisfy the commonality requirement." 2008 WL 4279674, at *4 (N.D. Cal. Sept. 11, 2008) (quoting *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560-61 (N.D. Cal. 2007)); *see also Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 344-49 (N.D. Cal. 2008) (certifying class where plaintiffs pled lack of adequate policy regarding individuals with disability, even though defendant argued that it had no centralized policy of discrimination, but rather made individualized decisions).

Here it is undisputed that Burger King fails in many respects to meet its non-delegable duty to comply with the ADA. For example, Burger King acknowledges that it has the "right to approve whatever final plans the franchisee intends to use," but admits that it "does not review or approve plans for compliance with . . . accessibility laws." McGrory Decl. (Dkt. #182) ¶¶ 4-5. While franchisees "must adhere to strict standardized operating procedures and requirements" set forth in the MOD, Campins Decl. Ex. 98 at 6, Burger King concedes that the MOD "references accessibility issues only generally," BK Opp. at 4. Finally, Burger King acknowledges that it does not provide design specifications for many of the barriers reported by putative class

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[2](...continued)
Treatment v. City of Antioch, 179 F.3d 725, 732 n.11 (9th Cir. 1999) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

members. McGrory Decl. ¶ 13.

B. Plaintiffs Have Standing to Address the Classwide Claims.

Defendant premises the majority of its opposition on the argument—resuscitated from its Motion to Dismiss—that the Named Plaintiffs do not have standing to assert claims against Burger King for those BKLs they have not visited. *E.g.* BK Opp. at 7-10. This legal issue has already been decided in Plaintiffs' favor by this Court in denying the Motion to Dismiss. *See* Dkt. #69 at 4-11. Burger King simply ignores this law of the case and reasserts the already-rejected argument that "Title III ADA claims are site-specific." BK Opp. at 1; *see also id.* at 7.

This Court has specifically held that "ADA standing is not necessarily site specific." Dkt. #69 at 8; *see also id.* at 6 ("Article III standing for ADA claims is not inherently site specific."). This Court ruled that "most district courts to have considered the issue [of common injuries in the ADA] find that a plaintiff may challenge discrimination on behalf of a class where the discrimination arises from a common policy or practice, or a common architectural design, at multiple commonly owned or affiliated locations." *Id.* at 7. It cited with approval language from *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 429 (N.D. Cal. 1994), certifying a class where the challenged "design features" are alleged to exist at "many if not all of defendant's theaters," and "the legality of those features are legal issues common" to the class." Dkt. #69 at 7 (quoting *Arnold*, 158 F.R.D. at 449). The conclusion that Title III claims are not site-specific "simply recognizes that the specific injury under the ADA is not a specific barrier at a specific site but instead the discriminatory policy or design or decision." *Id.* at 8.

The injuries suffered by putative class members—like those in *Arnold* and the other cases on which this Court relied, *id.* at 7 n.5—were caused by design features alleged to exist at many if not all BKLs, the legality of which turns on common legal issues and various corporation-wide factors. These factors include not only availability of resources, as in *Arnold*, but failure to ensure required access, and extensive control over designs and alterations.[3] Plaintiffs have thus

[3] Burger King also misrepresents *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982), by adding the word "only" before the Supreme Court's language, "[s]ignificant proof that (continued...)

provided ample evidence of discriminatory policies, designs, and decisions that cause the common barriers experienced by putative class members.

Burger King's analysis is based on plucking out and restrictively interpreting the word "policy" as used by this Court, but ignoring the words "or design or decision" that follow it. Dkt. #69 at 8. For example, it states that "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." BK Opp. at 7. Although there is evidence that Burger King in fact provides such specifications,[4] the policy in question need not be one explicitly *compelling* non-compliance. Rather, common injuries for standing purposes can be those that arise from policies—such as those demonstrated by Plaintiffs here—that encourage or permit violations, or fail to ensure compliance with the accessibility laws. Class Cert. Memo at 9-15; *see also supra* at 3 (citing *Astrue*; *Californians for Disability Rights*). Again, because of Burger King's non-delegable duty to comply with the accessibility laws, its failure to implement adequate policies establishes common injury.

Moreover, "[w]hether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 2:7 (4th Ed., updated 2008); *see also Lucas v. Kmart Corp.*, 2005 WL 1648182, at *3 (D. Colo. July

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[3](...continued)
an employer operated under a general policy of discrimination conceivably could justify a [broader] class." BK Opp at 8 n.9 (second quote of *Falcon*); *see Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003) (clarifying *Falcon* as permitting cases challenging policies *or* practices).

[4] Indeed, by way of example Burger King insists that BKL franchisees only use equipment from specific vendors, leases equipment to at least some of the BKL franchisees, and insists that any changes to "products, equipment, uniforms, restaurant facilities, service format, and Advertising" be approved by Burger King, which takes ownership over those ideas. *See, e.g.*, Campins Decl. Exs. 110 at 13452, 112 at BKC 63495; Boothby Supp. Decl. Exs. 2-4 at 67919, 85787, 113322. This last provision is part of a section of the Successor Franchise Agreement titled "Standards and Uniformity of Operations." *Id.* Ex. 3 at 85787.

13, 2005) ("Defendants' objection regarding representative Plaintiffs' standing to assert claims on behalf of individuals who patronized other Kmart stores is subsumed by my determination that the Rule 23(a) prer[e]quisites have been met."). Because Plaintiffs have established that they satisfy Rule 23, they have standing to represent the class.

C. Plaintiffs' Claims Are Not Moot.

Burger King argues that the ten BKLs the Named Plaintiffs visited are currently in compliance with the ADA and the California Building Code ("CBC"). This argument goes to the merits and is improper for consideration at this juncture. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 178 (1974); *Bautista-Perez v. Holder*, 2009 WL 2031759, *4 (N.D. Cal. July 9, 2009).[5]

Burger King's "'voluntary cessation of a challenged practice,'" moreover, cannot moot Plaintiffs' claims unless "'subsequent events [make] it *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted, emphasis added). Burger King has the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (citations omitted; alteration in original). Burger King cannot meet that heavy burden.

First, Burger King's mootness argument is based entirely on the reports of their expert, Kim Blackseth, who states that he surveyed 10 of the 93 current BKLs last month, that is, after the conclusion of Burger King's alterations program. *See* Dkt. #162 at 2. These reports are thus irrelevant to the common discriminatory experiences of class members during the vast majority of the class period, from April 2006 to mid-2009.[6]

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[5] Similarly—and contrary to Burger King's argument—Plaintiffs have no obligation to prove their claims by submitting any measurements of the barriers at this juncture. The question to be determined at this stage is not whether Plaintiffs will ultimately prevail on their claims, but whether those claims are properly addressed on a classwide basis. *See, e.g.*, *Bautista-Perez*, 2009 WL 2031759, at *7.

[6] Irrespective of the relevance and merits of Mr. Blackseth's reports, Plaintiffs urge the Court to disregard these reports, as neither Mr. Blackseth nor his reports were disclosed to Plaintiffs before the filing of Burger King's brief, let alone by the July 1, 2009, close of class

(continued...)

Second, Plaintiffs seek injunctive relief protecting the class from future discrimination, including a change in policies and future monitoring. *See, e.g.*, First Amended Complaint ("FAC"), Relief ¶ 5 (Dkt. #72). Burger King has provided no evidence that the barriers experienced by Plaintiffs and their declarants will not recur in the future. Even "promised improvements and policy changes do not moot a claim for injunctive relief." *Moeller v. Taco Bell*, 2007 WL 2301778, at *7 & n.13 (N.D. Cal. 2007) (citing cases).[7] Frequent alterations and remodels, among other factors, preclude mootness. *Id.* at *8. Here, Burger King generally requires that a BKL undergo a significant remodel every 20 years. With over 90 restaurants at issue, it is reasonable to infer that 4-5 BKLs are remodeled each year. Class Cert. Memo at 11. Whatever the current state is of any BKL, an injunction is needed covering future remodels, future acquisitions, maintenance, and monitoring. *See Moeller*, 2007 WL 2301778, at *8.

Third, Burger King's failure to comply with the access laws until it was in litigation negates any mootness, *see Armster v. U.S. Dist. Court*, 806 F.2d 1347, 1357 (9th Cir. 1986), as does its persistent denial of responsibility, *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 430 F. Supp. 2d 996, 1006 (N.D. Cal. 2006), and its failure to comply with the ADA despite an earlier settlement addressing ADA violations, *see* FAC ¶ 41 (*Day* litigation).

Finally, Mr. Blackseth's submissions to this court do not satisfy Burger King's "heavy burden" of proving current compliance. To take one very telling example, seven of the ten restaurants about which he opines were built in the 1970s,[8] and were thus governed by the American National Standards Institute, Inc.'s ANSI A117.1-1961. *People ex rel. Deukmejian v.*

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[6](...continued)
discovery (*see* Dkt. #69 at 17). *See Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 969 n.5 (9th Cir. 2006) (exclusion of expert witness disclosed after scheduling deadline not abuse of discretion).

[7] *See also Clavo v. Zarrabian*, 2004 WL 3709049, at *4 (C.D. Cal. May 17, 2004) (holding that implementing new policies did not moot ADA barrier claim); *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1084 (N.D. Cal.1997) (holding that voluntary remediation of alleged ADA violations did not moot claims).

[8] *See* Boothby Supp. Decl, Ex. 1 at 1-2 (build dates for stores 997, 1864, 1943, 2032, 2055, 2288, and 2505 were between 1977 and 1979).

CHE, Inc., 150 Cal. App. 3d 123, 133-34 (1983). While admitting that "there were limited access standards in place since 1970," *see, e.g.,* Dkt #183-2 at 1, Mr. Blackseth does not apply them to the seven restaurants built during that decade.[9]

Ultimately, the question of compliance presents common questions of law and fact that underscore the need for class certification.

D. Plaintiffs Have Satisfied All of the Prerequisites for a Class Action.

When Burger King's legally and factually unsound challenges to liability, standing, and mootness are eliminated, as they should be, what remains is a paradigmatic class action.

1. This Case Is a Prototypical Class Action.

As explained in depth in Plaintiffs' Class Cert. Memo, this case is precisely the type of case that courts routinely certify as a class action. *See* Class Cert. Memo at 16-17 & n.15.

Indeed, Burger King's attempt to distinguish Plaintiffs' cases by saying that *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D. Cal. 2004), and the other cases Plaintiffs cite involved "corporate-owned stores, 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," BK Opp. at 15 n.17, succeeds only in describing this case to a "T" and underscoring the appropriateness of class certification. Not only do the leased BKLs have the same status as corporate-owned stores, but Plaintiffs have demonstrated an across-the-board policy of general instructions to comply with the law, coupled with an across-the-board policy of failing to enforce those policies to ensure compliance with the ADA. Class Cert. Memo at 9-15.

The existence of "the 'same categories' of architectural barriers" at multiple locations is traceable to the above policies and actions. *Moeller*, 220 F.R.D. at 609-10 (citing *Arnold*, 148 F.R.D. at 449). Indeed, the link between Burger King and the BKLs is far closer than that in many of the cases cited in Plaintiffs' Class Cert. Memo. For example, in two of the cases disabled residents were permitted to proceed as a class against the entity in charge of voting for

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[9] Dkt. #185-2 at 4 (store 977; "applicable building code" does not refer to ANSI-1961); 185-3 at 4 (store 1864, same); 185-4 at 4 (store 1943, same); 185-5 at 4 (store 2032, same); 185-6 at 4 (store 2055, same); 185-7 at 4 (store 2288, same); 185-8 at 4 (store 2505, same).

the inaccessibility of various polling places. *See Lightbourn v. County of El Paso, Tx*, 118 F.3d 421, 423-26 (5th Cir. 1997); *Nat'l Org. of Disability v. Tartaglione*, 2001 WL 1258089, at *1-5 (E.D. Pa. Oct 22, 2001).[10] In none of these cases was there a single entity with total control and a policy allowing discrimination. Yet, all were certified.

In the face of Plaintiffs' extensive list of certified classes of individuals with disabilities challenging access barriers, *see* Class Cert. Memo. at 16-17 & n.15, Burger King can only cite four inapposite opinions from Florida district courts from 2001 or earlier, BK Opp. at 16 & n.18. In *Access Now, Inc. v. Walt Disney World Co.*, 211 F.R.D. 452 (M.D. Fla. 2001), the court noted that "[t]he parties do *not* dispute that the Defendants' facilities each possess a unique architectural style." *Id.* at 455 (emphasis added). Here, Plaintiffs do. Moreover, Plaintiffs have alleged and documented common policies, designs, practices, and decisions, allegations not sufficiently articulated in the Florida cases.[11]

2. The Proposed Class Is So Numerous that Joinder Is Impracticable.

Plaintiffs have presented (1) census figures demonstrating that there is a huge number of people in California who use wheelchairs and scooters; (2) declarations of 48 putative class members who all allege discrimination at California BKLs; and (3) evidence that Burger King is a popular fast food restaurant, leading to the common sense conclusion that it has many patrons.[12] Burger King does not dispute any of this information, except to challenge the declarations generally. Even if the declarants misstated some of the facts of their experiences, which

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[10] Similarly, in *Access Now, Inc. v. AHM CGH, Inc.*, 2000 WL 1809979 (S.D. Fla. July 12, 2000), the court certified a class of individuals with disabilities against "affiliated acute care hospitals, ambulatory surgical centers, specialty clinics, and medical office buildings."

[11] The other cases contain no analysis of the evidence offered of common policies, designs, and decisions, so it is impossible to compare them to this case. Moreover, at least one contains an erroneous understanding of the commonality requirement. *See Ass'n for Disabled Ams., Inc. v. Motiva Enters., LLC*, No. 99-0580 at *4 (S.D. Fla. Oct. 18, 1999) (BK Opp. Ex. C) (stating that plaintiffs failed to show that common issues predominate).

[12] A court may make common sense assumptions to support a finding that joinder would be impracticable. *Moeller*, 220 F.R.D. at 608. *Moeller* held numerosity satisfied without a single declaration from absent class members.

Plaintiffs deny, their mere existence demonstrates that there are a substantial number of mobility-impaired patrons of BKLs who allege discrimination. At this stage, Plaintiffs need not *prove* that such discrimination exists, but rather that the class of people alleging such discrimination is so numerous that joinder is impracticable. *See, e.g.*, *Bautista-Perez*, 2009 WL 2031759, at *7.

Burger King argues that the use of census figures is improper in the face of *Moeller v. Taco Bell*, which relied expressly and heavily on census figures. 220 F.R.D. at 608 (citing census data). Burger King cites *Celano v. Marriott International, Inc.*, 242 F.R.D. 544 (N.D. Cal. 2007), in which the court held that census data were insufficient to demonstrate numerosity with respect to a class of individuals alleging barriers at Marriott hotel golf courses. Common sense suggests that the number of hotel golfers is smaller than the number of fast food patrons.

Finally, Burger King argues that Plaintiffs must demonstrate that *each* BKL was visited by a large number of individuals. BK Opp. at 13. This case does not seek individual subclasses for each BKL, but rather seeks a class of all individuals who have patronized or been deterred from patronizing BKLs throughout California.

3. There Are Common Questions of Law and Fact.

"All questions of fact and law need not be common to satisfy the rule [23(a)(2)]. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Nor does Burger King refute any of the numerous common questions in Plaintiffs' Class Cert. Memo. *See* Class Cert. Memo at 20-21.

As demonstrated above, Burger King's failure to develop, let alone enforce, a policy ensuring required access is sufficient to establish commonality. *See supra* at 3 (citing, e.g., *Astrue*, 2008 WL 4279674, at *4). This is a complete answer to Burger King's objection that Plaintiffs have not shown a policy that caused the barriers alleged by Named Plaintiffs and Plaintiffs' declarants. *See* BK Opp. at 14. As in *Californians for Disability Rights*, certification is appropriate where Plaintiffs have demonstrated that "the common question addressed by this lawsuit is whether and to what extent [Defendant] has violated the ADA on a 'systematic basis for many years through the use of improper design guidelines and the failure to ensure

compliance with even those deficient guidelines.'" 249 F.R.D. at 346; *see also Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd*, 197 F.R.D. 522, 526 (S.D. Fla. 2000) (commonality satisfied where loosely affiliated defendants "availed themselves of a common program of construction, design, and building code/ADA review"). Furthermore, Burger King never disputes that construction and alterations must be approved by Burger King, that Burger King requires the restaurants to be consistent with its current image, and that Burger King has and enforces repair and maintenance standards and monitors the restaurants' compliance with all of its standards. Class Cert. Memo at 9-15.

Burger King argues that the existence of the "readily achievable" standard obviates any commonality. BK Opp. at 18. This argument was squarely rejected by *Moeller*, which held that "the readily achievable issue 'hinges, in part, on various corporation-wide factors such as the availability of resources' and thus presents a question common to the class." 220 F.R.D. at 610 (quoting *Arnold*, 158 F.R.D. at 449). Burger King also suggests that certification is inappropriate because the BKLs have a "unique alteration history, resulting in significant individual variations in terms of structure, design, facilities and accommodations," and because some restaurants lack queue lines.[13] BK Opp. at 6-7. Variation among facilities is insufficient to defeat commonality. *See, e.g.*, *Moeller*, 220 F.R.D. at 609 ("The 'unique architecture' argument has been rejected by a number of courts in disability cases.").[14]

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[13] Burger King appears to believe its queue line discussion impeaches Plaintiffs' declarants' credibility. It does not. Burger King states, without citation, that "as many as 50% of those BKLs [mentioned by declarants] have never had a queue line." BK Opp. at 2. In support of this argument, Burger King cites to only 3 out of 48 declarations of putative class members, and these 3 declarants visited a total of 4 out of 96 —or 4%—of the BKLs. Boothby Supp. Decl. ¶ 2. In support of its statement that "at least half of the cited restaurants [in the Complaint] have never had a queue line at all," BK Opp. at 6, Burger King relies on the declaration of an individual who surveyed the restaurants after Burger King's alteration program. *See, e.g.*, Blackseth Decl. Ex. 1 at 1 (Dkt. #180-9). In any event, the presence and absence of queue lines is a merits issue and far more than queue lines are at issue in this litigation. *See, e.g.*, Class Cert. Memo at 4-8.

[14] Moreover, Burger King has withheld from Plaintiffs a series of surveys demonstrating the conditions in the BKL restaurants prior to its recent alteration program. Judge Larson granted (continued...)

4. Named Plaintiffs' Claims Are Typical of Those of the Proposed Class.

Plaintiffs have suffered the same legal injury as the class: They have been harmed by common architectural barriers for which defendant Burger King has non-delegable liability. The fact that these barriers occur in restaurants built and altered at different times is not relevant for typicality purposes. Plaintiffs' claims, like those of all other class members, arise under 42 U.S.C. § 12182(a), which prohibits discrimination on the basis of disability in places of public accommodation. "Discrimination" under that provision is comprehensively defined by the provisions that follow it to include barriers in post-January 26, 1993 construction, *id.* § 12183(a)(1), in post-January 26, 1992 alterations, *id.* § 12183(a)(2), *and* in existing facilities where it is "readily achievable" to remove the barriers, *id.* § 12182(b)(2)(A)(iv); *see* Dkt. #69 at 5. Significantly, the question whether a barrier exists in any of these facilities is evaluated against the *same* standards: the DOJ Standards for Accessible Design, 28 C.F.R. pt. 36, app. A.[15] Even if the statutory basis were different, given the similarity of the discriminatory experiences, Plaintiffs' claims would be typical. *See Rodriguez v. Hayes*, — F.3d —, 2009 WL 2526622, at *11 (9th Cir. 2009) (claims under different statutes not atypical, because class alleged to be victims of same practice); *see also Bautista-Perez*, 2009 WL 2031759, at *7 ("[C]lass certification does not require each class member to prosecute an identical legal theory. Instead, it is sufficient to demonstrate a common set of operative facts.").

The only cases Burger King cites as support for the proposition that "the ADA's design and construction requirements are inapplicable" to the Named Plaintiffs' claims are cases in which the alleged discriminatory *events* pre-dated the ADA. *See Voytek v. Univ. of Cal.*, 1994 WL 478805 (N.D. Cal. 1994) (employment discrimination case); *Colon v. League of United*

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[14](...continued)
Plaintiffs' motion to compel the surveys, *see* Dkt. # 162, but Burger King has indicated that it will file objections to that ruling. Unless it produces the surveys, it cannot rely on the unaltered conditions in the restaurants. *Cf. United States v. Nobles*, 422 U.S. 225, 239-40 (1975) (holding that investigator could testify only if relevant portions of his report were produced).

[15] *See* 28 C.F.R. § 36.406(a) (new construction and alterations required to comply with the Standards); *see also Johnson v. Kriplani*, 2008 WL 2620378 (E.D. Cal. July 2, 2008) ("non-compliance with [the Standards] can demonstrate a prima facie barrier" in a pre-1993 facility).

Latin Am. Citizens, 91 F.3d 140 (5th Cir. 1996) (unpublished) (dicta that *if* the events had preceded the passage of the ADA, the court would lack jurisdiction). Here, the events at issue are the conditions of the BKLs throughout the proposed class period, not conditions pre-dating the ADA.

5. Proposed Class Counsel Will Protect the Interests of the Class.

Confusing Rule 23(a)(4) with Rule 23(g), Burger King challenges the proposed class counsel's adequacy solely because of possible overstaffing.[16] Burger King presents absolutely no evidence supporting its allegation, and cites no case law denying the appointment of class counsel simply because "five separate law firms" have worked on the case.[17] Indeed, to the extent there is any risk of such activity, such considerations are properly addressed at the stage at which counsel request fees. *See* Fed. R. Civ. P. 23(h) and 2003 advisory committee notes (discussing the award of "reasonable" attorneys fees). Proposed class counsel have demonstrated their prompt and capable handling of the extensive discovery, motion practice, and client management involved in this matter. Class Cert. Memo at 24. Proposed counsel have also demonstrated their adequacy as class counsel. Class Cert. Memo at 23-24.

6. The Proposed Class Satisfies Rule 23(b)(2).

Burger King's non-delegable duty, its denial of responsibility, and its failure to implement effective policies demonstrates compellingly the need for injunctive relief in this case. This makes the case appropriate for certification under Rule 23(b)(2), as Burger King has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

In opposition to Rule 23(b)(2) certification, Burger King argues standing and mootness,

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[16] Burger King's only argument regarding the purported inadequacy of the Named Plaintiffs relates to their alleged lack of standing. As explained above, *see supra* Section II.B, that argument is without merit. Named Plaintiffs have no conflicts with the proposed class and have demonstrated their desire to fight for its rights. Class Cert. Memo at 22-23.

[17] Moreover, only two law firms seek appointment as lead counsel: Fox & Robertson, P.C. and Lewis, Feinberg, Lee, Renaker & Jackson, P.C. Lee Decl. ¶ 2 (Dkt. #138-2); Robertson Decl. ¶ 2 (Dkt. #138-3).

neither of which has merit and both of which are addressed above. "[E]ven if the challenged design features had been fully remedied in all of the [buildings] built or remodeled since 1982, such 'mootness' would pose no obstacle to (b)(2) certification." *Arnold*, 158 F.R.D. at 455.[18]

Burger King also argues that the damages claims, which arise under California law, require highly individualized proof and present large damages amounts.[19] Burger King does not even attempt to address *Moeller* in this context, which certified an almost identical class for classwide injunctive relief and statutory damages. *Moeller*, 220 F.R.D. at 612-13. This case involves only statutory damages, which do not require an individualized analysis of the extent of harm, but can rather be awarded based on a simple claims process. *Arnold*, 158 F.R.D. at 453. Likewise, large amounts of damages do not render this case inappropriate for certification under Rule 23(b)(2). *Id.* at 452. Instead, civil rights cases like this one present the "paradigm of the type of action for which the (b)(2) form was created." *Id.*; *see Moeller*, 220 F.R.D. at 612-13.[20]

E. Plaintiffs' State Law Claims Are Valid and Should Be Certified.

Burger King argues that it is not liable under state law. This is a merits question that is common to the class. Burger King is also wrong. California Civil Code Section 52 establishes the liability of "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to" the mandates of the Unruh Act. Similarly, California Civil Code Section 54.3(a) establishes the liability of any person or entity "who denies or interferes with admittance to or enjoyment of the public facilities" covered by the CDPA, or who "otherwise interferes with

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[18] Bizarrely, Burger King argues that the proposed class definition is not limited to Burger King patrons. BK Opp. at 24. It is unclear where it gets this understanding, as the proposed class definition is for individuals who use wheelchairs and scooters who were or have been denied full and equal enjoyment of California BKLs. Class Cert. Memo at "Notice."

[19] Burger King's guesses as to damages amounts for select declarants are premature and speculative.

[20] Whether the class is ultimately entitled to statutory damages, and who among the class is so entitled, are both merits issues. Moreover, Burger King's citation of recent amendments to the California Civil Code are irrelevant, as those amendments explicitly do not apply to this case and cannot be used to interpret the prior statute's application here. Cal. Civ. Code § 55.57(a) ("[N]o inference shall be drawn from provisions contained in this part concerning the state of the law as it existed prior to January 1, 2009.").

the rights of an individual with a disability" guaranteed by that statute. Burger King asserts that, because "Unruh and the CDPA limit liability to those who actually make or incite discrimination," those claims should be stricken from the class definition. BK Opp. at 24. The expansive and sweeping statutory language is far broader than Burger King asserts. Regardless of its scope, however, Plaintiffs have demonstrated that Burger King, at the least, exerts control that "aids or incites" a denial of access. More importantly, whether Burger King has "aided," "incited" or "ma[d]e discrimination" by its actions and failures is question of law common to the entire class.

Burger King also argues that the legislature's failure to amend Civil Code sections 52(a) and 54(a) precludes the finding that liable parties under the ADA are liable parties under the Unruh and CDPA. BK Opp. at 25. Burger King does not bother even to cite, much less address, the recent California Supreme Court decision squarely rejecting arguments almost identical to this one. *See Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 670-73 (2009) (rejecting argument that non-amendment of Section 52 precluded strict liability for violation of ADA). The court held,

> Section 52 authorizes a damages action against any person who "makes any discrimination . . . contrary to Section 51." By adding subdivision (f) to section 51, making all ADA violations—whether or not involving intentional discrimination—violations of the Unruh Civil Rights Act as well, the Legislature included ADA violations in the category of "discrimination" contrary to section 51, thus making them remediable under section 52. As the *Lentini* court explained, quoting an earlier district court decision, "'Because the Unruh Act has adopted the full expanse of the ADA, it must follow, that the same *standards for liability* apply under both Acts.'"

Id. at 672 (emphasis added) (quoting *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 847 (9th Cir. 2004)). *Munson* therefore compels the conclusion that, in addition to liability under the terms of the Unruh Act itself, Burger King's leasehold interest is also sufficient to establish liability under the Unruh Act through the incorporation of the ADA.

III. CONCLUSION

For the reasons set forth above and in Plaintiffs' Class Cert. Memo, Named Plaintiffs request that this Court, pursuant to Rules 23(a) and 23(b)(2), certify a class in this case.

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