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13  
14 **IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 MIGUEL CASTANEDA on behalf of himself )  
and others similarly situated )

16 Plaintiff, )

17 vs. )

18 BURGER KING CORPORATION and )  
19 BURGER KING HOLDINGS, INC., )

20 Defendants. )  
21 \_\_\_\_\_ )

Case No. C 08-4262 WHA

**PLAINTIFF’S MOTION TO COMPEL  
COMPLIANCE WITH GENERAL  
ORDER 56 AND REQUEST FOR  
EXPEDITED CONSIDERATION**

Hearing Date: December 4, 2008  
Time: 8:00 a.m.

22 **NOTICE**

23 On December 4, 2008, at 8:00 a.m., or as soon thereafter as this motion may be heard,  
24 before the Honorable William H. Alsup, Plaintiff will, and hereby does, move to compel  
25 compliance with General Order No. 56. This motion is based on this Notice of Motion, the  
26 Points and Authorities below, and the Declaration of Amy F. Robertson in Support of Plaintiff’s  
27 Motion to Compel Compliance with General Order 56 and Request for Expedited Consideration  
28 (“Robertson Decl.”).

1 **RELIEF SOUGHT**

2 Plaintiff seeks an order requiring Defendants to disclose the addresses and construction  
3 and alterations history of all of the over ninety stores at issue in this litigation.

4 **REQUEST FOR EXPEDITED CONSIDERATION**

5 This motion concerns information that is necessary to conduct joint inspections of over  
6 ninety Burger King restaurants under General Order 56. The Court has set a deadline of  
7 December 19, 2008 to complete these inspections. Under the schedule required by N.D. Cal.  
8 Civ. L.R. 7-2(a) and Paragraph 6 of this Court’s Supplemental Order to Order Setting Initial  
9 Case Management Conference in Civil Cases Before Judge William Alsup, the earliest date on  
10 which this motion could be heard was Thursday, December 4, 2008, just 15 days before the  
11 deadline to complete the inspections.

12 In light of this tight deadline, Plaintiff respectfully requests that this Court order  
13 expedited briefing of this matter, and consider the matter on an expedited basis.

14 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

15 Plaintiff Miguel Castaneda, a Burger King customer who uses a wheelchair, has filed a  
16 putative class action under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181-  
17 89, and state law alleging that restaurants leased to or from Burger King in California contain  
18 barriers to their customers who use wheelchairs or scooters. This case thus falls squarely under  
19 General Order No. 56, an order of this Court requiring the parties to a Title III case to meet early  
20 in the litigation at the sites of the alleged violations to attempt to reach a settlement. The Order  
21 requires the defendant to produce information concerning the construction and alteration history  
22 of the subject premises, General Order No. 56 ¶ 2, and the parties to jointly inspect the subject  
23 premises, *id.* ¶ 3, and then to attempt -- privately, *id.* ¶ 4, or with the assistance of a mediator, *id.*  
24 ¶ 6 -- to resolve the matter. In the present case, such a resolution requires Defendants to produce  
25 information and the parties to survey all of the stores covered by the class action complaint. The  
26 Order requires that the surveys be completed within 100 days after the filing of the complaint.  
27 *Id.* ¶ 3. In this case, the Court has ordered the surveys to be completed by December 19, 2008.

1 See Scheduling Order for Cases Asserting Denial of Right of Access Under Americans with  
2 Disabilities Act Title III (42 U.S.C. §§ 12181-89) (Docket No. 2) at 1.

3 During the course of discussions over the months before the complaint in this case was  
4 filed, Plaintiff requested that Defendants provide this information. (Robertson Decl. ¶ 2.) The  
5 day after the complaint was filed, Plaintiff renewed this request in a letter to counsel for  
6 Defendants, specifically requesting that Defendants produce information required by General  
7 Order No. 56 -- including store address, and construction and alteration history -- for all of the  
8 stores at issue so that the parties could schedule surveys and begin meeting and conferring on a  
9 resolution of this matter. (*Id.* ¶ 3.) Defendants asked for additional time to consider this request  
10 and to retain local counsel to advise them. Plaintiff believed this to be reasonable and agreed to  
11 delay this motion to give Defendants the chance to do so. (*Id.* ¶¶ 4-8.) Defendants, having  
12 considered Plaintiff's request with benefit of the advice of California counsel, continue to refuse  
13 to produce this information, and as of today -- over a month after the complaint was filed --  
14 Plaintiff has been unable to get Defendants to schedule any of the required surveys.

15 Plaintiff is entitled to this information under General Order No. 56 beginning, most  
16 importantly, with store addresses so that the parties may schedule the required joint inspections.  
17 There are over 600 Burger King restaurants in California and Plaintiff's counsel's interviews  
18 with putative class members reveal significant accessibility barriers at many of them. However,  
19 Defendants have indicated that only 90 or so of these restaurants are leased to or from Burger  
20 King Corporation and are thus at issue here. In order to survey the proper restaurants and have  
21 the information necessary to attempt to resolve the matter, Plaintiff needs to know the addresses.

22 This, at the very least, is clear: without the addresses of California Burger King  
23 restaurants leased to or from Defendants, there is no possibility that General Order No. 56's  
24 ultimate purpose will be served. The parties will not be able to resolve the case if they cannot  
25 determine which restaurants are at issue.

26 This is, in any event, information to which Plaintiff will soon be entitled during ordinary  
27 pre-certification discovery. That is, if Defendants continue to refuse to produce this information  
28 -- making further settlement discussions and joint surveys impossible -- the case will proceed to

1 discovery and the first information Plaintiff will request is the address and construction and  
2 alteration history for the stores at issue in the litigation. This is all information to which Plaintiff  
3 will be entitled as a matter of course during the class discovery period.

4 Prior to class certification, Plaintiff is (at a minimum) entitled to discovery relevant to  
5 whether the proposed class should be certified. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*,  
6 437 U.S. 340, 351 n.13 (1978) (finding that “discovery often has been used to illuminate issues  
7 upon which a district court must pass in deciding whether a suit should proceed as a class action  
8 under Rule 23, such as numerosity, common questions, and adequacy of representation”). The  
9 addresses of all covered restaurants are relevant to class certification in a number of ways.

10 First, the addresses are relevant to numerosity. If these restaurants are geographically  
11 dispersed, this fact supports a finding that the proposed class meets the numerosity requirement.  
12 *See, e.g., Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 608 (N.D. Cal. 2004) (certifying a Title III  
13 class action involving barriers at fast food restaurants and holding that “the fact that a class is  
14 geographically dispersed . . . supports class certification”).

15 Second, courts often rely on anecdotal evidence from putative class members in making  
16 class certification decisions. *See, e.g., Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1182 (9th Cir.  
17 2007); *Nat’l Fed’n of the Blind v. Target Corp.*, NO. C 06-1802 MHP, 2007 WL 2846462, at \*6-  
18 9, 13, 16 (N.D. Cal. Oct. 2, 2007); *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 442 (N.D. Cal.  
19 2001). Here, Plaintiff’s counsel has been contacted by almost a thousand potential class  
20 members complaining of barriers at Burger King restaurants in California to customers who use  
21 wheelchairs or scooters (Robertson Decl. ¶ 9); the complaint, however, addresses only  
22 restaurants leased by or to Burger King Corp. In order for Plaintiff to identify which potential  
23 class members may have anecdotal evidence relevant to class certification, he needs to know the  
24 addresses of restaurants in this category. Moreover, the Named Plaintiff himself may have been  
25 to and experienced discrimination at other subject restaurants, but until he can confirm which  
26 restaurants those are, he cannot properly investigate his claim.

27 Courts commonly order similar class-wide discovery, including the identity of all  
28 employees covered in a putative fair labor or employment discrimination class. *See, e.g., Ho v.*

1 *Ernst & Young, LLP*, No. 05-04867 JF (HRL), 2007 WL 1394007, at \*2 (N.D. Cal. May 9,  
2 2007); *Babbitt v. Albertson's, Inc.*, No. 92-1883 SBA (PJH), 1992 WL 605652, \*5-6 (N.D. Cal.  
3 Nov. 30, 1992).

4 The Northern District of California has, in its General Order 56, set forth required  
5 procedures for parties in Title III actions. This includes a prompt exchange of information, and  
6 joint surveys of the property at issue, so that both parties know -- early in the litigation -- the  
7 scope of the potential violations so that they can attempt to resolve the matter efficiently. This is  
8 precisely what Plaintiff seeks.

9 Plaintiff therefore respectfully requests that the Court order Defendants immediately to  
10 produce the addresses of all Burger King restaurants in California that are leased by or to Burger  
11 King Corporation as well as the construction and alteration history of those restaurants so that the  
12 joint inspections may be completed pursuant to General Order 56.

13 **Statement of the Parties' Attempts to Resolve this Matter**

14 The undersigned represents that the parties have discussed the subject matter of the  
15 present motion at great length through numerous telephone calls and emails, but have been  
16 unable to reach resolution. (*See* Robertson Decl. ¶¶ 2-8.)

17  
18 Dated: October 23, 2008

Respectfully submitted,

19  
20 By: /s/ Amy F. Robertson  
Amy Robertson (*pro hac vice*)

21 *Attorney for Plaintiff*  
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**PROOF OF SERVICE**

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The undersigned declares as follows:

I am over 18 years of age and not a party to the above matter. I am employed in the City and County of Denver, State of Colorado. My place of employment and business address is Fox & Robertson, P.C., 3801 E. Florida Ave., Suite 400, Denver, CO 80210.

On this date, I served a true and correct copy of the following document(s):

Plaintiff’s Motion to Compel Compliance with General Order 56 and Request for Expedited Consideration.

**[X] BY MAIL by placing the true copies thereof enclosed in sealed envelopes, postage prepaid, addressed as noted below:**

Michael D. Joblove  
Genovese, Joblove & Battista, P.A.  
Bank of America Tower  
100 Southeast 2<sup>nd</sup> Street, 44<sup>th</sup> Floor  
Miami, FL 33131

Clement L. Glynn  
Glynn & Finley, LLP  
One Walnut Creek Center  
100 Pringle Ave, Suite 500  
Walnut Creek, CA 94596

I caused such envelopes to be deposited in the mail at Denver, Colorado 80210. The envelope was mailed with postage thereon fully prepaid. I am “readily familiar” with our firm’s practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

**[X] BY ELECTRONIC MAIL on the recipients listed below.**

Michael D. Joblove  
[mjoblove@gjb-law.com](mailto:mjoblove@gjb-law.com)

Clement L. Glynn  
[cglynn@glynnfinley.com](mailto:cglynn@glynnfinley.com)

I am “readily familiar” with my employer’s electronic mail (“email”) services. In the ordinary course of business, the above documents were transmitted by email this same day.

I certify and declare under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct. Executed in Denver, Colorado.

Date: October 23, 2008 By: /s/ Ashley K Boothby  
Ashley K. Boothby  
Paralegal