Case No. 09-17210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL CASTANEDA, KATHERINE CORBETT, AND JOSEPH WELLNER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs - Appellees,

v.

BURGER KING CORPORATION,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of California, San Francisco Division
Civil Action No. C 08-4262 WHA

APPELLEES' REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AND RESPONSE TO APPELLANT'S MOTION TO TREAT APPEAL AS PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Defendant-Appellant Burger King Corp.'s ("BKC's") opposition to the motion to dismiss and its request for mandamus are based on two false premises:

1. That Plaintiffs-Appellees seek privileged material from BKC's access surveys. To the contrary, at issue are only "underlying facts," which are not privileged. *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981).

2. That disclosure will have a chilling effect on the removal of barriers. To the contrary, BKC has been required by law to remove barriers since January 26, 1993, and to build in conformity with California's access standards since July 1, 1970.

The district court held that measurements and photographs of the restaurants at issue in this Americans with Disabilities Act ("ADA") case were not privileged. This ruling is not eligible for collateral appeal. *Mohawk Indus., Inc. v. Carpenter*, --- U.S. ---, 2009 WL 4573276, at *7 (Dec. 8, 2009).

BKC argues in the alternative for a writ of mandamus. To be entitled to mandamus, BKC must show "extraordinary circumstances," that is, that the "disclosure order works a manifest injustice." *Mohawk*, 2009 WL 4573276, at *7. In evaluating a request for mandamus, "the absence of . . . clear error is dispositive." *Perry v. Schwarzenegger*, --- F.3d ---, No. 09-17241, slip op. at 16 (9th Cir. Jan 4, 2010) (internal quotation omitted) (Decl. of Amy F. Robertson, Ex. 3). Because this is a routine discovery order in which the district court correctly held that information *per se* is not privileged, mandamus is not appropriate.

The Supreme Court held in *Mohawk* that the proponent of an attorney-client privilege may be compelled to turn over allegedly privileged material and rely on postjudgment appeals -- and the remedy of retrial without access to the materials at issue if successful -- to address any harm. 2009 WL 4573276, at *6. Nothing in this case makes that remedy any less appropriate than *Mohawk* held it to be for the entire class of cases involving assertions of attorney-client privilege.

FACTS

The district court's order requires BKC to produce measurements and photographs of the ten stores now at issue, which Plaintiffs allege have barriers to people who use wheelchairs or scooters in violation of Title III of the ADA, 42 U.S.C. § 12181 *et seq*., and state civil rights law. BKC conducted surveys and took photographs of these restaurants and then made alterations to them while acting to prevent Plaintiffs from conducting their own surveys. BKC then refused to provide information or photographs from the surveys in response to discovery.[1] On Plaintiffs' motion to compel, the district court ultimately held that measurements and photos were "the least protectable information possible," Docket No. 253 at 2 (Robertson Decl. Ex. 1), and ordered that they be produced.

[1] Plaintiffs have recently received copies of three of the surveys in response to subpoenas to architects working for franchisees of the restaurants. BKC received the same productions and Plaintiffs informed BKC, as a courtesy, that these surveys had been produced. Nevertheless, BKC has not objected. Decl. of Amy F. Robertson ("Robertson Decl.") ¶ 10.

1. The Information Ordered to Be Produced.

Plaintiffs seek -- and the district court ordered production of -- photographs of the restaurants as well as the measurements in the surveys. The district court explicitly excluded from its order any opinions or advice that may be contained in the surveys, Robertson Decl. Ex. 1 at 2, and Plaintiffs have expressly stated that any such information should be redacted out, Docket No. 121 at 1. Indeed, Plaintiffs offered BKC the alternative of withholding its surveys but providing the information in response to interrogatories; that is, by stating the dimensions of various features in the restaurants. *Id.*; *see also* Robertson Decl. ¶ 11.

This action was brought by Plaintiffs-Appellees under the ADA and state accessibility statutes to obtain injunctive and monetary relief. The evidence at stake in this appeal is crucial to Plaintiffs' case. The state statutes under which Plaintiffs have sued provide for minimum damages for each time an illegal barrier prevents a class member from equal access to one of the subject restaurants. Cal. Civ. Code §§ 52(a); 54.3(a); *Donald v. Café Royale, Inc.*, 218 Cal. App. 3d 168, 183 (Cal. App. 1990) (holding that a plaintiff is entitled to damages upon a showing that he was "denied equal access on a particular occasion"). Plaintiffs can show a violation of either of these state statutes by showing a violation of architectural standards of Title 24 of the California Code of Regulations or of the ADA. *See, e.g., Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 607 (N.D. Cal.

2004). Because the class period goes back to April 16, 2006, Robertson Decl. ¶ 12, it is essential that Plaintiffs know the conditions in the restaurants from that time to the present, not just following the most recent alterations.

2. Obstacles to Plaintiffs' Ability To Survey The Restaurants.

There are over 600 Burger King restaurants in California but only approximately 90 of these are leased by BKC (so-called "BKL" restaurants). The remainder are operated by franchisees with no leasehold interest by BKC. BKC is strictly liable for violations of the ADA at restaurants it leases. 42 U.S.C. § 12182(a) (prohibiting disability discrimination by, among others, any person who "leases (or leases to) . . . a place of public accommodation"). Since early in pre-suit discussions, Plaintiffs have made clear that BKL restaurants were the ones at issue. Robertson Decl. ¶¶ 3-4.

During their investigation of this case, Plaintiffs heard from hundreds of California Burger King customers who use wheelchairs or scooters that Burger King restaurants throughout the state contained barriers that discriminated against them. Plaintiffs did not, however, know which of these restaurants were BKL restaurants. Starting in early 2008, while the parties were attempting to resolve this matter informally, Plaintiffs requested that BKC identify the BKL restaurants so that the parties could discuss resolution of the ADA and state law claims relating to those restaurants. BKC refused to do this. Robertson Decl. ¶¶ 2-3.

Before filing suit, Plaintiffs requested that BKC notify Plaintiffs of any upcoming alterations to the restaurants so Plaintiffs could survey the unaltered restaurants; in the alternative, Plaintiffs requested that BKC take measurements and photographs before and after the alterations. Robertson Decl. ¶ 5.

After the instant suit was filed on September 10, 2008, BKC continued to refuse to provide a list of BKL restaurants, requiring Plaintiffs to move the district court to compel production. Docket No. 8. The district court's order of November 12, 2008 permitted discovery to go forward as to all approximately 90 BKL restaurants, Docket No. 18;[2] Plaintiffs served their first discovery requesting a list of BKL restaurants the following day. BKC still took the full 30 days permitted under Rule 34 to provide the list. Plaintiffs thus did not know which restaurants were at issue until they received the list on December 16, 2009. Although they suspected that surveys were being conducted and work performed, they did not have confirmation of this until April, 2009, when BKC belatedly provided a privilege log listing surveys and work orders among the many documents it withheld. Robertson Decl. ¶¶ 7-9.

By the time Plaintiffs knew the identity of the restaurants at issue -- and certainly by April, 2009, when they became aware that BKC had not only

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[2] Discovery had been stayed pursuant to General Order 56 of the United States District Court for the Northern District of California.

surveyed but altered the restaurants -- BKC's alterations made it impossible for Plaintiffs to ascertain the conditions in the restaurants during a significant portion of the class period.

PROCEDURAL POSTURE

Plaintiffs moved to compel production of the factual information in BKC's surveys as well as any photographs of the stores. The magistrate judge granted the motion both on the grounds that Plaintiffs had substantial need for the information and could not obtain it by other means, *see* Fed. R. Civ. P. 26(b)(3)(A)(ii), and that the factual information in the documents was not privileged. Docket No. 162 at 10 (Robertson Decl. Ex. 2).

The district court overruled BKC's objection to the magistrate's order in its October 16, 2009 order, which held that the information was not privileged but that BKC did not have to produce it until 70 days before each of the ten trials -- one for each of the ten stores as to which the district court has certified a subclass. Robertson Decl. Ex. 1 at 2.

BKC appealed pursuant to 28 U.S.C. § 1291. On December 8, 2009, the Supreme Court decided the *Mohawk* case, holding that collateral appeal from a decision adverse to the attorney-client privilege was not available. 2009 WL 4573276, at *3. Based on that decision, on December 11, 2009, Plaintiffs-Appellees moved to dismiss this appeal. BKC opposes that motion and has moved

in the alternative for a writ of mandamus reversing the district court's order. *See generally* Appellant's Resp. to Mot. to Dismiss Appeal and Alternative Mot. to Treat Appeal as Pet. for Writ of Mandamus ("BKC Response").

ARGUMENT

I. *Mohawk* Forecloses Collateral Appeal in this Case.

A. *Mohawk* Explicitly Forecloses BKC's Collateral Appeal of its Attorney-Client Claims.

The *Mohawk* decision forecloses collateral appeal for all orders adverse to the attorney-client privilege. As this Court explained in *Perry*, the Supreme Court held that collateral appeal was not available for "*the class of rulings* addressing invocation of the attorney-client privilege during discovery." *Perry*, slip op. at 12-13 (emphasis added). In *Mohawk*, the Court was very clear that its ruling was not limited to the facts before it, but applied to "'the entire category to which a claim belongs.'" *Mohawk*, 2009 WL 4573276, at *5 (internal quotations omitted). Thus, BKC's attempt to distinguish the facts in *Mohawk* from those in the present case is unavailing. *See* BKC Response at 8-13. To the extent BKC's appeal addresses claims of attorney-client privilege, it is foreclosed by *Mohawk*.

B. *Mohawk* Effectively Forecloses BKC's Appeal of its Work Product Claims.

Given the similarity of concerns underlying attorney-client and work product claims, *Mohawk* effectively forecloses BKC's entire appeal.

The Supreme Court's opinion in *Mohawk* supports this conclusion. One of the cases cited with approval by the Court, *see id.* 2009 WL 4573276, at *4 n.1, treated the work product and attorney-client privileges together in reaching the same conclusion as the Court did, that is, that postjudgment appeal is sufficient, with the option of retrial without the challenged document if the appeal is successful. *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993), *compare Mohawk*, 2009 WL 4573276, at *6 (same). Another of the cases endorsed by the Court held that no discovery orders were directly appealable. *Reise v. Bd. of Regents of Univ. of Wis.*, 957 F.2d 293, 295 (7th Cir. 1992), *cited in Mohawk*, 2009 WL 4573276, at *4 n.1. Finally, one of the cases abrogated by Mohawk also treated the attorney-client and the work product privileges together in permitting appeals. *See In re Ford Motor Co.,* 110 F.3d 954, 957-64 (3d Cir. 1997), *abrogated by Mohawk*, 2009 WL 4573276 at *4 n.1.

Furthermore, the Supreme Court made clear in *Mohawk* that the analysis of whether certain claims were eligible for collateral appeal was to be made on a categorical basis. *Mohawk*, 2009 WL 4573276, at *5 ("In making this determination, we do not engage in 'individualized jurisdictional inquiry.' Rather our focus is on 'the entire category to which a claim belongs.'" (Internal citations omitted)). Here, BKC would have to demonstrate that there is no effective postjudgment review for the entire category of work product claims. It has not

even attempted to do this.

In *Perry*, this Court recently addressed the question whether claims of First Amendment privilege were ineligible for collateral appeal under *Mohawk*. Although this Court ultimately reserved the question, *Perry*, slip op. at 10, it pointed out a number of important differences between the First Amendment privilege and the attorney-client privilege; these differences demonstrate that work product claims, like attorney-client claims, are ineligible for collateral appeal.

First, like the attorney-client privilege, but unlike the First Amendment privilege, the work product doctrine has no "constitutional dimensions." *Id.* at 13.

Second, the level of public interest in work product claims is similar to that of attorney-client claims; neither is of the same "magnitude" as First Amendment claims. Orders adverse to the attorney-client or work product privileges would not have a "profound chilling effect on the exercise of political rights." *See id.* at 14. Any chilling effect of an order to disclose work product would be similar to an order to disclose attorney-client privileged materials; this factor was considered and rejected by the Supreme Court in *Mohawk*. 2009 WL 4573276, at * 8.

Third, both the attorney-client and the work product privilege are often invoked,[3] implicating the "significant 'institutional costs'" that contributed to the

[3] As an extremely rough measure of the relative frequency with which these three privileges are invoked, a search for "attorney client privilege" in (continued...)

Supreme Court's decision to prohibit collateral review of the former type of claim. *Perry*, slip op. at 14 (quoting *Mohawk*, 2009 WL 4573276, at *8).

Because work product claims implicate the same considerations as attorney-client claims, *Mohawk* bars BKC's collateral appeal of its work product claims.

II. BKC Is Not Entitled to a Writ of Mandamus

The Supreme Court in *Mohawk* left open the possibility of a writ of mandamus "in extraordinary circumstances -- i.e., when a disclosure order . . . works a manifest injustice . . .." *Mohawk*, 2009 WL 4573276, at *7 (internal quotations omitted). Mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 369 (2004) (internal quotation omitted). This Court stressed in *Perry* that mandamus is appropriate for "extraordinarily important questions of first impression concerning the scope of a privilege," and that the class of such extraordinary cases was "small." *Id.*, slip op. at 10.

BKC has the burden "to establish 'that its right to issuance of the writ is

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[3](...continued)
Westlaw's "allfeds" database yields over 10,000 results; a search for "work product privilege" yields 5,094, and for "first amendment privilege," 432. Robertson Decl. ¶ 13. This likely undercounts the invocation of the work product privilege, as it is not, strictly speaking, a privilege, so many courts refer to it using phrases such as "work product doctrine." *See, e.g., Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1080 (9th Cir. 2007). A search for "work product privilege" or "work product doctrine" yields 7,452 results. Robertson Decl. ¶ 13.

clear and indisputable.'" *U.S. v. Godinez-Ortiz*, 563 F.3d 1022, 1032 (9th Cir. 2009) (internal quotation omitted).

This Court has established five guidelines to determine whether mandamus is appropriate:

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression.

Perry, slip op. at 15-16 (citing *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Plaintiffs agree that the first factor is met: as explained above, no direct appeal is available for BKC's privilege claims. BKC does not argue that the fourth factor applies, though this is not fatal.

The other three factors counsel against the issuance of a writ of mandamus. First, *Mohawk* demonstrates that BKC will not be harmed by postjudgment review of the order at issue, and BKC shows no "extraordinary circumstances" differentiating its situation from run-of-the-mill privilege rulings.

Second, because the information at issue is not privileged and, in any event, Plaintiffs showed substantial need for it, there is no clear error.

Finally, there is nothing new or important about the district court's ruling.

The key legal principle at issue was resolved by *Upjohn* in 1981.

A. BKC Will Not Be Damaged or Prejudiced in Any Way That Is Not Correctable on Postjudgment Appeal.

The second *Bauman* factor -- whether the petitioner will be prejudiced in a way not correctable on appeal -- is similar to the question addressed in *Mohawk*, that is, whether an order is effectively unreviewable on appeal. *Id.*, 2009 WL 4573276, at *6. The Court rejected this as grounds for collateral appeal of privilege orders, holding that "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege," but that mandamus was available to address any "extraordinary circumstances" involving "manifest injustice." *Id.* at *6, *7 (internal quotation omitted). Unless mandamus is to become a loophole that swallows *Mohawk* -- rather than a remedy in "extraordinary circumstances" -- BKC must show some sort of damage or prejudice from being made to wait for postjudgment appeal that differentiates its circumstances from run-of-the-mill privilege rulings.

Indeed, the Supreme Court earlier noted that mandamus was appropriate only when some factor served to "remove [a] case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise." *Cheney*, 542 U.S. at 381. In *Cheney*, for example, it was the fact that the discovery order applied to the Vice President and involved issues

of executive privilege. *Id.* Neither of the factors invoked by BKC serve to remove this case from the category of ordinary discovery orders: there is nothing unusual about the fact that this case is a class action; and the actions BKC asserts will be chilled are required by law.

1. No Mental Impressions or Legal Opinions Will be Disclosed.

Before addressing the factors BKC believes distinguish this case, it is important to debunk a false premise on which BKC's brief relies. BKC asserts that it is being forced to disclose "mental impressions and legal opinions of BKC's counsel and litigation consultants." BKC Response at 10-11. This is incorrect. As the district court made clear, "[t]he information at question is explicitly merely factual and does not include opinions, impressions, attorney advice, or attorney musings. All that was ordered to be turned over are measurements and photographs." Robertson Decl. Ex. 1 at 2. Indeed, as explained above, BKC had the option to withhold the surveys and simply state the relevant measurements in response to interrogatories.

There is no prejudice to BKC for the simple reason that Plaintiffs will have access to *no* attorney or consultant opinions or mental impressions, but simply to measurements and photographs of the public areas of fast food restaurants.

2. Nothing about the Fact That this Is a Class Action Removes it from the Category of Ordinary Discovery Orders.

The first basis on which BKC attempts to distinguish this case is that this "this appeal . . . involves investigatory work product regarding ten restaurants in an opt-in class action." BKC Response at 10. To recognize this as the "extraordinary circumstances" necessary to justify mandamus would be to exclude all large-scale or class-action cases from *Mohawk's* reach. This would be an enormous loophole, and one that would defy the Supreme Court's institutional concerns by ensuring that appellate courts would be swamped with privilege appeals from large-scale and class-action cases. *See id.*, 2009 WL 4573276, at *8.

Furthermore, BKC's explanation for why this factor should distinguish the present case does not hold up to scrutiny. It complains that there would be no way to protect against the use of this information by other litigants. BKC Response at 11. But the only other litigants to whom this information would be relevant will be those who opt out of the certified class. The rationale of *Mohawk* applies equally to cases brought by such plaintiffs: postjudgment appeal is sufficient, with the remedy of retrying the case without the challenged material if the privilege is upheld on appeal. There is nothing special about multiple plaintiffs or multiple cases that blunts the effectiveness of the remedy endorsed by the Supreme Court.

BKC's assertion that class members would "falsely claim access barriers,"

BKC Response at 12 n.8, is groundless and offensive. Class members have -- without access to BKC's surveys -- described multiple barriers in all of the restaurants at issue. In addition to being offensive, the argument makes no sense in light of BKC's argument that Plaintiffs should have conducted their own surveys. *Id.* at 20. Had BKC not worked hard to prevent this, Plaintiffs would have conducted their own surveys, and the results would have been available to class members. Given that BKC argues for this result on page 20 of its Response, it cannot be heard to argue against it on page 12.

3. The Actions BKC Claims Would be Chilled Are Required by Law.

BKC argues that an order requiring the production of the measurements and photographs at issue will chill the remediation of access barriers in places of public accommodation. BKC Response at 13. BKC's logic does not hold up, as it and other public accommodations have another -- much more important -- incentive to remove barriers: the fact that barrier removal has been required by federal law since January 26, 1992[4] and by state law since July 1, 1970.[5] Courts

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[4] 42 U.S.C. § 12182(b)(2)(A)(iv) (requiring barrier removal in existing facilities where "readily achievable"); Pub. L. No. 101-336, § 310(a), 104 Stat. 327, 365 (1990) (effective date 18 months after enactment, that is, July 26, 1990).

[5] "All buildings constructed or altered after July 1, 1970, must comply with standards governing the physical accessibility of public accommodations." *Moeller*, 220 F.R.D. at 607 (citing Cal. Health & Safety Code §§ 19956, 19959).

should not be "concerned about chilling conduct that is compulsory and required by law." *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 243 (3d Cir. 2007); *see also Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379, 387 (N.D. Ga. 2001) ("With regard to documents such as those at issue here . . . any chilling effect would be *de minimis* since the documents are mandated by law.").

Indeed, the requirement that BKC produce the measurements and photos at issue would have the salutary effect of discouraging the sort of ball-hiding and game-playing that BKC engaged in from January to December, 2008, when it refused either to identify the restaurants at issue or to inform Plaintiffs when a restaurant was about to be altered so that Plaintiffs could survey the restaurant themselves. Had BKC done this, Plaintiffs would have their own set of pre-alteration measurements and would have no need for BKC's. A decision dismissing this appeal and denying mandamus would perhaps encourage future defendants in disability access cases to cooperate with the plaintiffs in surveying the facilities at issue, or at least not to obstruct such surveys by the plaintiffs.

B. The District Court's Decision was Not Clearly Erroneous.

As pointed out above, this factor is dispositive. *Perry*, slip op. at 16; *see also Burlington N.*, 408 F.3d at 1147 ("Because we hold that there was no clear error, we do not reach the remaining *Bauman* factors."). "'To issue the writ, the court must be firmly convinced that the district court has erred, and that the

petitioner's right to the writ is clear and indisputable.'" *United States v. Austin*, 416 F.3d 1016, 1024 (9th Cir. 2005) (internal quotations omitted).

1. Information is Not Privileged.

Plaintiffs seek -- and the district court limited its order to -- strictly factual information: measurements; photographs; accounts of physical changes in the restaurants. As the district court held, "[t]his is the least protectable information possible." Robertson Decl. Ex. 1 at 2. The Supreme Court has held that the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981). The Court explained:

> "The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

Id. at 396 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962).)

Underlying facts are not protected by the work product doctrine either. As the Advisory Committee notes provide, "one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable." 48 F.R.D. 487, 501 (1970). This Court has indicated that *Upjohn's* holding applies to evidentiary privileges in

general. *See Admiral Ins. Co. v. U. S. Dist. Ct. for the Dist. of Ariz.*, 881 F.2d 1486, 1490 n.5 (9th Cir. 1989) ("As the Supreme Court made clear in [*Upjohn*], the operation of an evidentiary privilege does not shield from discovery the underlying facts known to a party or a witness."). Other courts have applied this rationale in the work product context. *See, e.g., Maertin v. Armstrong World Indus., Inc.*, 172 F.R.D. 143, 150 (D.N.J. 1997) ("although the work product doctrine protects the physical documents, it 'does not protect disclosure of the underlying facts in the documents.'" (quoting *Upjohn*, 449 U.S. at 395)).

Because Plaintiffs seek only information the requested discovery is not covered by either the attorney-client privilege or the work product doctrine.

2. Plaintiffs Had Substantial Need for the Information

Although the district court did not reach this question, the magistrate judge held that Plaintiffs had substantial need for the information at issue and could not obtain it by any other means. *See* Fed. R. Civ. P. 26(b)(3)(A)(ii). Plaintiffs need the information because each subclass has damages claims under state law going back to April 16, 2006 -- long before BKC began its remedial efforts. And in light of the extensive alterations to the restaurants, there is no way Plaintiffs can get this information by other means.[6] BKC's argument that Plaintiffs could have obtained

[6] *See Huggins v. Fed. Express Corp.*, 250 F.R.D. 404, 406-07 (E.D. Mo. 2008) (ordering production of photographs based on inability to recreate the (continued...)

this information on their own, BKC Response at 20, ignores the lengths to which BKC went to ensure that this was impossible.

C. The Issues Raised by BKC's Petition Are Neither New Nor Important.

Given that no privileged material -- no mental impressions or analyses -- were ordered to be produced, the issue here is not particularly important. Nor is it new. The Supreme Court resolved in 1981 that "underlying facts" are not privileged, *see Upjohn*, 449 U.S. at 395, and the Advisory Committee notes made clear in 1970 that "one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable." 48 F.R.D. at 501. Defendant portrays the issue as novel because it is being considered in the context of "investigations by ADA consultants." BKC Response at 20. The application of a settled legal principle in a particularized

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[6](...continued)
scene); *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Prods., Inc.*, 140 F.R.D. 373, 377 (E.D. Wis. 1991) (production of customer survey because equivalent information no longer available); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1989) (holding that computer tape containing data gathered by attorneys was discoverable because "replication of the computer tape would involve duplication of effort and considerable delay and expense"); *Weber v. Paduano*, 2003 WL 161340, at *14 (S.D.N.Y. Jan. 22, 2003) (holding that the plaintiff was entitled to the defendants' fire investigation reports because the damage had been repaired); *Nat'l Cong. for Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000) (ordering disclosure of arrest statistics because it would be "burdensome and costly" for the plaintiffs to compile the same information).

context does not make the issue novel.

CONCLUSION

For the reasons set forth above and in Plaintiffs-Appellees' Motion to Dismiss Appeal, Plaintiffs-Appellees respectfully request that this Court dismiss the present appeal and deny Defendant-Appellant's request for mandamus.

Respectfully submitted,

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Date: January 6, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 6, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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