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15 IN THE UNITED STATES DISTRICT COURT
 16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 MIGUEL CASTANEDA, KATHERINE)
 CORBETT, and JOSEPH WELLNER on)
 19 behalf of themselves and others similarly)
 situated,)

Plaintiffs,)

vs.)

22 BURGER KING CORPORATION,)
 23)

Defendant.)

Case No. CV-08-4262 WHA (JL)

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION FOR CLASS
 CERTIFICATION; MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION FOR CLASS
 CERTIFICATION**

Date: September 17, 2009
 Time: 8:30 a.m.
 Judge: William H. Alsup

1 **NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION**

2 PLEASE TAKE NOTICE that on September 17, 2009, at 8:30 a.m., in Courtroom 9 of
3 the United States District Court for the Northern District of California, San Francisco Division,
4 located at 450 Golden Gate Avenue, San Francisco, California, 94102, the Honorable William
5 H. Alsup presiding, Plaintiffs will, and hereby do move the Court, pursuant to Federal Rule of
6 Civil Procedure 23, for certification of the following Class.

7 All individuals with disabilities who use wheelchairs or electric scooters for
8 mobility who, at any time on or after April 16, 2006, were denied, or are
9 currently being denied, on the basis of disability, full and equal enjoyment of
the goods, services, facilities, privileges, advantages, or accommodations of
California Burger King-leased restaurants.¹

10 This motion is made on grounds that the proposed Class is sufficiently numerous that
11 joinder is impracticable; there are questions of law and fact common to the Class; the named
12 Plaintiffs' claims are typical of the Class claims; and the named Plaintiffs will adequately
13 represent the Class. Fed. R. Civ. P. 23(a). Certification under Federal Rule of Civil Procedure
14 23(b)(2) is appropriate because Defendants have acted and/or refused to act on grounds that are
15 applicable to the class as a whole, thus making appropriate class-wide injunctive and
16 corresponding declaratory relief.

17 This motion is based on the accompanying memorandum of points and authorities;
18 deposition testimony by the proposed Class representatives; declarations of 48 putative class
19 members; declarations of counsel submitted concurrently with this motion; documents
20 produced pursuant to the parties' discovery; such oral argument as may be heard by the Court;
21 and all other papers on file in this action.

22 Plaintiffs further request that the Court appoint the named Plaintiffs Miguel Castaneda,
23 Katherine Corbett, and Joseph Wellner as class representatives, and the law firms of Fox &
24 Robertson, P.C.; Lewis, Feinberg, Lee, Renaker & Jackson, P.C.; Disability Rights Education
25 and Defense Fund; Law Offices of Antonio Lawson; and Mari Mayeda as class counsel
26 pursuant to Rule 23(g).

27 _____
28 ¹ The restaurants subject to this lawsuit are identified in Ex. 2 to the Declaration of
Ashley Boothby, filed concurrently with this motion.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

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1 **I. INTRODUCTION**

2 Plaintiffs challenge common barriers to customers who use wheelchairs and scooters at
3 Burger King leased (“BKL”) fast food hamburger restaurants throughout California. Plaintiffs
4 allege that these barriers violate Title III of the Americans with Disabilities Act, 42 U.S.C.
5 § 12181 *et seq.* (“ADA”), the Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq.* (“Unruh” or
6 “the Unruh Act”), and the California Disabled Persons Act, Cal. Civ. Code § 54 *et seq.* (the
7 “CDPA”). Plaintiffs seek certification of a class and, ultimately, injunctive relief to bring the
8 BKL restaurants into compliance with these statutes and minimum statutory damages under
9 Unruh and the CDPA.

10 This case epitomizes the type of case for which class action treatment—and
11 certification under Rule 23(b)(2) in particular—is appropriate, as the architectural barriers at
12 the subject restaurants, and policies of Defendant Burger King Corporation (“Burger King”)
13 that result in such barriers, affect the named Plaintiffs and class members in the same manner
14 and are appropriate subjects for final, company-wide, injunctive relief. *See Moeller v. Taco*
15 *Bell Corp.*, 220 F.R.D. 604, 608-13 (N.D. Cal. 2004); *Arnold v. United Artists Theatre Circuit,*
16 *Inc.*, 158 F.R.D. 439, 449-51 (N.D. Cal. 1994). In addition, there are no individualized damage
17 issues, because each class member seeks the minimum statutory damages per offense under
18 Unruh and the CDPA, to which they are entitled without proof of actual damages. *Moeller*,
19 220 F.R.D. at 613; *Arnold*, 143 F.R.D. at 453.

20 This case is markedly similar to *Moeller v. Taco Bell*, in which the court certified a
21 class of mobility-impaired persons challenging common architectural barriers at approximately
22 220 fast food chain restaurants throughout California. There, as here, the class suffered a
23 common experience of discrimination from the presence of the same categories of architectural
24 barriers to access in the restaurants, including entrances to restaurants, barriers to equal access
25 in parking lots, queue lines, condiment and drink dispensers, dining rooms, and restrooms.
26 *Moeller*, at 609-10 (noting that plaintiffs were challenging “the ‘same categories’ of
27 architectural barriers at Defendant’s restaurants”). Like Taco Bell’s restaurants, Burger King’s
28 BKL restaurants contain common categories of barriers that discriminate against people who

1 use wheelchairs and scooters.

2 **II. STATEMENT OF THE ISSUES TO BE DECIDED**

3 Whether Plaintiffs' proposed class should be certified pursuant to Federal Rule of Civil
4 Procedure 23(a) and (b)(2)?

5 **III. LEGAL CONTEXT**

6 Although at this stage, the Court should not consider whether the party seeking class
7 certification is likely to prevail on the merits under the ADA, Unruh Act, or CDPA, Plaintiffs
8 provide a brief background of the statutes so as to inform the context of this matter. *See*
9 *Bautista-Perez v. Holder*, 2009 WL 2031759, at *4 (N.D. Cal. July 9, 2009).

10 **A. The Americans with Disabilities Act.**

11 Title III of the ADA prohibits disability discrimination by those who own, operate,
12 lease, or lease to places of public accommodation such as the BKL restaurants. 42 U.S.C.
13 §§ 12181(7)(B) (restaurants are places of public accommodation), 12182(a) (anti-
14 discrimination provision); *see also Moeller*, 220 F.R.D. at 606. Here, Burger King leases or
15 leases to all of the BKLs, so they are covered by this provision.

16 Pursuant to statutory mandate, the Department of Justice has promulgated Standards for
17 Accessible Design at 28 C.F.R. pt. 36, app. A ("DOJ Standards" or "DOJ Stds."). *See* 42
18 U.S.C. § 12186(b) (statutory mandate). The DOJ Standards contain detailed design
19 specifications for public accommodations covering a variety of architectural elements,
20 including, for example, parking lots, accessible routes, and restrooms. *See generally* DOJ Stds.
21 These regulations are "entitled to deference." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).
22 The accessibility requirements of Title III and the DOJ Standards vary depending on the dates
23 that facilities were constructed or altered.² In addition, Burger King must "maintain in

24
25 ² Facilities built after January 26, 1993, are required to be "readily accessible to and
26 usable by" individuals who use wheelchairs, and these facilities must comply with the DOJ
27 Stds. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.406(a). When facilities that were built before
28 that time are altered in certain ways after January 26, 1992, the altered portion and—to a
certain extent—the path of travel to the altered portion must comply with the DOJ Standards.
28 C.F.R. §§ 36.402(b)(2); 36.406(a). In facilities built prior to January 26, 1993 and not
altered since January 26, 1992, Burger King is required to remove architectural barriers where

1 operable working condition those features of facilities and equipment that are required to be
2 readily accessible to and usable by persons with disabilities.” 28 C.F.R. § 36.211. The ADA
3 authorizes injunctive relief for violations of Title III. 42 U.S.C. § 12188(a)(2).

4 **B. The California Unruh Act and CDPA.**

5 Two state statutes prohibit discrimination on the basis of disability in the full and equal
6 access to the services, facilities and advantages of public accommodations. Cal. Civ. Code
7 §§ 51(b) (Unruh), 54.1(a)(1) (CDPA); *see Moeller*, 220 F.R.D. at 606. A violation of the ADA
8 also violates both statutes. *See* Cal. Civ. Code §§ 51(f), 54(c); *Munson v. Del Taco, Inc.*, 46
9 Cal. 4th 661, 670-73 (2009).

10 All buildings constructed or altered after July 1, 1970 must comply with state standards
11 governing the physical accessibility of public accommodations. *Moeller*, 220 F.R.D. at 607
12 (citing Cal. Health & Safety Code §§ 19956, 19959). From December 31, 1981 until the
13 present, the standards have been set forth in Title 24 of the California regulatory code. *Id.*
14 (citing *People ex rel. Deukmejian v. CHE, Inc.*, 150 Cal. App. 3d 123, 134 (1983)). In addition
15 to setting forth design and construction standards, the California Standards, like the DOJ
16 Standards, require public accommodations to maintain in operable working condition those
17 features of facilities and equipment that are required to be accessible to and usable by persons
18 with disabilities. Cal. Code Regs. tit. 24, § 1101B.3 (2007) (the “California Standards” or
19 “Cal. Stds.”). A violation of a California Standard violates both the CDPA and the Unruh Act.
20 *See Moeller*, 220 F.R.D. at 607.

21 A prevailing plaintiff is entitled to statutory minimum damages of \$4,000 for each
22 violation of the Unruh Act, or statutory minimum damages of \$1,000 for each violation of the
23 CDPA. Cal. Civ. Code §§ 52(a) (Unruh), 54.3(a) (CDPA). “[P]roof of actual damages is not a
24 prerequisite to recovery of statutory minimum damages” under the CDPA and Unruh Act.
25 *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000). The putative class seeks
26 only the statutory minimum damages for each offense.

27 _____
28 it is “readily achievable” to do so. 42 U.S.C. § 12182(b)(2)(A)(iv).

1 **IV. FACTS**

2 Plaintiffs and the proposed class share a common experience of discrimination that
3 results from the consistent placement of architectural barriers at BKL restaurants. *See* Section
4 IV.A. Additionally, Defendant Burger King Corporation (“Burger King” or “BKC”), as the
5 lessor/sublessor and franchisor of those restaurants, exerts central control of the architectural
6 features of BKL restaurants. That central control—though unnecessary to establish Burger
7 King’s liability under the ADA and state law—supports class certification because it results in
8 the common experience of discrimination as well as giving Burger King the capacity and
9 control to remedy it. *See* Section IV.B.

10 **A. Plaintiffs and the Proposed Class Share a Common Experience of**
11 **Discrimination.**

12 Named Plaintiffs Miguel Castaneda, Katherine Corbett, and Joseph Wellner (“Named
13 Plaintiffs”) are among the more than 150,000 Californians who use wheelchairs or scooters for
14 mobility. *See Moeller*, 220 F.R.D. at 608 (citing census data). Plaintiffs have also submitted
15 the declarations of 48 putative class members (“Declarants”), who also use wheelchairs or
16 scooters for mobility. The Named Plaintiffs and Declarants allege a common experience of
17 discrimination demonstrating a consistent pattern of accessibility problems at Defendant’s
18 California BKLs.

19 **1. Entrances.**

20 Named Plaintiffs and Declarants have encountered common barriers at entrances to
21 BKL restaurants, including doors that were difficult or impossible for them to open. *See*
22 Castaneda Depo 30:15-33:2, 66:19-22, 73:24-74:8, 77:22-78:14, 83:19-84:2, 84:10-22, 90:4-7,
23 96:10-13, 96:22-23, 97:20-98:18, 103:14-16, 105:7-20, 110:20-111:9 (Ex. 1);³ Corbett Depo
24 142:16-144:6, 144:12-25 (Ex. 2); Wellner Depo 39:23, 44:7-14 (Ex. 3); Ex. 4, Column 1; *see*

25
26
27 ³ Unless otherwise noted, all references to exhibit numbers throughout the brief refer to
28 Exhibits to the Declaration of Julia Campins, filed concurrently with this motion. For
convenience, all deposition testimony in this brief is abbreviated as “[Witness’s Last Name]
Depo.” All declarations are abbreviated as “[Witness’s Last Name] Decl.”

1 also First Amended Complaint, Dkt. #72, (“FAC”), ¶¶ 44, 47, 50, 58(f).⁴ This violation
2 prevents many class members from even entering restaurants independently, and it has also
3 caused them injury, both physical and emotional. *See, e.g.*, Stiles Decl. ¶ 5 (Ex. 47) (“The
4 door has shut on my hand a couple of times, however, because I could not pull my wheelchair
5 through the doorway quickly enough. My hand gets bruised as a result of the door closing on
6 me.”); Sarfaty Decl. ¶ 5 (Ex. 45) (“On a number of occasions, the door has closed on me and I
7 have gotten stuck in the doorway. When this occurs, employees and other customers stare at
8 me, and I feel embarrassed.”); Castaneda Depo 32:21-33:1 (Ex. 1).

9 2. Queue Lines.

10 Named Plaintiffs and Declarants have encountered common barriers at BKL queue
11 lines (the lines that customers wait in to order), including lines that were too narrow for them
12 to traverse. Castaneda Depo 34:25-37:13, 66:24-25, 67:4-10, 96:25, 99:4-14, 103:14-17,
13 105:23-106:1 (Ex. 1); Corbett Depo 145:7-147:5 (Ex. 2); Wellner Depo 39:23-25, 46:12-47:25,
14 48:17-50:8 (Ex. 3); Ex. 4, Column 2; *see also* FAC ¶¶ 44, 47, 50, 58(f).⁵ Narrow queue lines
15 restrict disabled patrons’ access to the counter and thus their ability to order and receive their
16 food independently. *See, e.g.*, Conklin Decl. ¶ 6 (Ex. 12) (“I got stuck in the line because it
17 was too narrow and I had to back out.”); Mayers Decl. ¶ 6 (Ex. 6) (“I waited to the side while
18 my cousin’s son ordered for me. This was a humiliating situation to be in. Waiting alone to
19 the side while everyone in the line filed past me made me feel like an observed zoo animal.”);
20 Corbett Depo 146:15-21 (Ex. 2).

21 3. Condiment and Drink Dispensers.

22 Named Plaintiffs and Declarants have encountered drink and condiment dispensers that
23 were difficult or impossible for them to reach. Castaneda Depo 37:14-38:3, 41:8-15, 66:23,
24 67:1-3, 73:24-74:10, 79:7-10, 90:10-11, 96:24-97:1, 98:25-99:3, 103:25-104:1 (Ex. 1); Corbett

26 ⁴ Applicable design standards govern, among other things, the weight of and
27 maneuvering clearance at entry doors. Cal. Stds. §§ 1133B.2.4, 1133B.2.5.

28 ⁵ Applicable design standards govern the width of accessible routes. DOJ Stds. §§
4.2.3, 5.5; Cal. Stds. §§ 1104B.5(5), 1118B.3.

1 Depo 147:24-148:9, 150:15-19 (Ex. 2); Wellner Depo 39:25-40:2, 58:24-60:7 (Ex. 3); Ex. 4,
2 Column 3; *see also* FAC ¶¶ 44, 47, 50, 58(e).⁶ The inaccessibility of the drink and condiment
3 dispensers leads to an unequal dining experience for disabled patrons. *See, e.g.*, Mayers Decl.
4 ¶ 7 (Ex. 36) (“We are trained from childhood to get things for ourselves at fast food places, but
5 at Burger King I am denied this option. The whole idea of fast food is that it is quick and
6 simple to get, but this falls by the wayside when I can’t even grab my own condiments.”);
7 Suttles Decl. ¶ 7 (Ex. 48) (“I don’t like to ask strangers to get things for me since I’m used to
8 doing things for myself, but I have no choice when I’m at Burger King alone.”). Mr.
9 Castaneda, for example, no longer buys drinks at BKLs unless he has a friend to help him,
10 because he spilled a drink all over himself after struggling with the inaccessible self-serve
11 drink dispenser at one BKL. Castaneda Depo 37:14-38:3 (Ex. 1); *see also* Jackson Decl. ¶ 6
12 (Ex. 28) (“Due to the position of the drink dispenser, I end up spilling soda on myself because
13 I can’t see when my cup is full.”).

14 4. Dining Rooms.

15 Named Plaintiffs and Declarants have experienced common barriers in BKL dining
16 rooms, including an insufficient number of designated accessible tables, and designated tables
17 that were inaccessible. Castaneda Depo 38:4-21, 41:4-7, 90:16-18, 96:24, 97:3, 98:19-23,
18 103:14-17, 106:2-8 (Ex. 1); Corbett Depo 148:10-149:13, 157:17-20 (Ex. 2); Wellner Depo
19 40:2-3, 50:24-56:15 (Ex. 3); Ex. 4, Column 4; FAC ¶¶ 44, 50.⁷ For example, it is often
20 difficult for people who use wheelchairs to find a place at a table in a BKL restaurant. *See,*
21 *e.g.*, Rediske Decl. ¶ 8 (Ex. 42) (“The last time I ordered inside the restaurant, I could not
22 access a table in the dining area. As a result, I took my food outside and ate on the sidewalk. I
23 felt humiliated by the experience of having to sit alone on the sidewalk in order to eat my
24 meal.”); Belt Decl. ¶ 8 (Ex. 10) (“If I want to eat at the table with my family or friends, I have

26 ⁶ Applicable design standards govern the reach ranges for self-service items. DOJ
27 Stds. §§ 4.2, 5.6; Cal. Stds. §§ 1104B.5(6), 1122B.4.

28 ⁷ Applicable design standards govern the number of accessible tables required and the
dimensions of those tables. DOJ Stds. §§ 4.32, 5.1; Cal. Stds. §§ 1104B.5, 1122B.

1 to be lifted up out of my wheelchair and placed into a seat.”); Wellner Depo 51:12-18 (Ex. 3).
 2 When they do find a table that can partially accommodate them, they cannot fully utilize it and
 3 are forced to be in the aisles. *See, e.g.*, Allred Decl. ¶ 8 (Ex. 5) (“The other customers bump
 4 into the back of my wheelchair when they try to get past me, and they don’t seem to
 5 understand that I can’t scoot in closer to the table.”).

6 **5. Restrooms.**

7 Named Plaintiffs and Declarants have experienced common barriers at BKL restrooms,
 8 including difficulty entering or exiting the BKL restrooms because the doors were difficult or
 9 impossible to open. Castaneda Depo 41:16-21, 67:15-17, 84:3-9, 90:12-15 (Ex. 1); Corbett
 10 Depo 149:19-150:2 (Ex. 2); Wellner Depo 40:3-5, 61:19-62:1 (Ex. 3); Ex. 4, Column 5; *see*
 11 *also* FAC ¶¶ 44, 47, 50, 58(e).⁸ Named Plaintiffs and Declarants have also experienced
 12 common barriers in the restrooms, including inadequate restroom stalls. Wellner Depo 62:16-
 13 24, 63:21-64:1 (Ex. 1); Ex. 4, Column 5; *see also, e.g.*, Thompson Decl. ¶ 9 (Ex. 49) (“When I
 14 was in the stall with my wheelchair, I could not close the door. Because I did not have enough
 15 privacy, I gave up and exited the restroom.”).

16 **6. Parking Lots.**

17 The Named Plaintiffs and Declarants have encountered barriers in the parking lots of
 18 BKLs, including parking spaces and access aisles that are too narrow to permit persons who
 19 use wheelchairs or scooters to unload from their vans, too few accessible spaces, parking lots
 20 that have no, or inadequate, signage, and inaccessible routes to entrances. Castaneda Depo
 21 30:4-32:16, 78:21-79:1, 90:4-9, 92:21-93:3, 96:10-19, 97:14-19, 110:3-15 (Ex. 1); Corbett
 22 Depo 139:12-142:15, 144:12-23 (Ex. 2); Wellner Depo 39:21-23, 40:11-17 (Ex. 3); Ex. 4,
 23 Columns 6 & 7; *see also* FAC ¶¶ 44, 47, 50, 58(f).⁹ The lack of accessible spaces is not merely
 24 inconvenient, it is dangerous and inhibits access to the BKLs. *See, e.g.*, Susan Douglas Decl. ¶

25
 26 ⁸ Applicable design standards govern most aspects of customer-use restrooms,
 including the weight of doors, size of stalls, and position of amenities. DOJ Stds. §§ 4.16-.19,
 4.22, 4.24, 4.26; Cal. Stds. § 1115B.

27
 28 ⁹ Applicable design standards govern the number and dimensions of accessible parking
 spaces and access aisles. DOJ Stds. §§ 4.1.2, 4.6; Cal. Stds. §§ 1129B.

1 4 (Ex. 17) (“I have had to park where I can take up two regular spaces. On occasion, a car will
 2 park too close to my vehicle, making it impossible for me to extend my wheelchair ramp and
 3 get into my vehicle. I have had to waive down a passerby and ask that passerby, a stranger, to
 4 back my car out for me so that I could lower the ramp.”); Kilgore Decl. ¶ 4 (Ex. 32) (“When I
 5 do get to use a handicapped space, the space is too narrow for me to get out of my vehicle if
 6 there are cars parked in the adjacent spaces. My wife has had to pull out of the space and let
 7 me out in the middle of the parking lot when there is a car parked next to us.”).

8
 9 In encountering these barriers, the Named Plaintiffs and Declarants have all
 10 experienced a loss of dignity. For example James Pinnix, a Vietnam War veteran whose
 11 injuries in the war require him to use a wheelchair, states, “It is frustrating, despite my service
 12 and sacrifices, to have to confront these barriers that make me feel like a second-class citizen.”
 13 Pinnix Decl., ¶ 9 (Ex. 40). Others find that their experiences at BKLs counteract their efforts
 14 to live independently and teach their children about the importance of living independently as a
 15 person with disabilities. *See, e.g.*, Marcell Decl. ¶ 6 (Ex. 35) (“I have tried to instill a sense of
 16 independence in my daughter, . . . to teach her that she is a normal person like anyone else.
 17 But when I have to do basic tasks for her like placing her order at a restaurant, I feel those
 18 lessons I have tried to impart are undermined.”); Belt Decl. ¶ 8 (Ex. 10) (“I am over 80 years
 19 old, and I have been independent most of my life. I do not want to rely on or burden others to
 20 find suitable parking, open the door, place my order, get my drink, and help me to sit at a
 21 table.”); Corbett Depo 184:32-185:10, 192:12-193:8, 213:19-24 (Ex. 2).

22 **B. Defendant Burger King Corporation’s Centralized Control Creates a**
 23 **Common Experience of Discrimination.**

24 **1. Background of Defendant Burger King Corporation.**

25 Burger King is a highly-centralized company that sells hamburger and related fast food
 26 products. Throughout the class period, Burger King has leased and/or leased to approximately

27 ///

28 ///

1 96 restaurants in California (“BKLs”), with 93 current BKLs.¹⁰ All BKLs are franchised.
2 Although there are other California Burger King restaurants operated by Defendant’s
3 franchisees, in which Burger King has no leasehold interest, Plaintiffs seek class certification
4 only with respect to patrons of the BKLs. Because BKLs are franchised restaurants with
5 structures subject to Burger King’s leasehold interest, their operations and structure are
6 controlled by two main contracts: the Lease/Sublease and the Franchise Agreement.

7 **2. Burger King’s Centralized Policies.**

8 Through its centralized policies, Burger King has the power to control virtually every
9 aspect of a BKL, including the construction, alteration, and operation of these restaurants.
10 *See* FAC ¶¶ 27-38. This culture of centralized control and micro-management stands in stark
11 contrast to its delegation to BKLs of compliance with accessibility laws. Burger King
12 otherwise strictly enforces standards, but merely suggests compliance with accessibility laws
13 and regulations.

14 While centralized control is not a required element for either class certification (which
15 is largely established through the common discriminatory experiences described above) or
16 liability (which is established by Burger King’s leasehold interest in the BKLs), it
17 demonstrates that the class action device is the best way to address the barriers and other
18 violations encountered by putative class members throughout the BKL restaurants.

19 **a. Burger King’s Centralized Control over the Initial** 20 **Construction of BKLs.**

21 Burger King has substantial control over the initial construction of BKLs. For
22 example, a BKL franchisee that intends to construct a new restaurant must comply with Burger
23 King’s standard plans and specifications, and any deviations must be approved by Burger
24 King. *See* Boothby Decl., Ex. 1, Tbl. 1. For initial construction, Burger King instructs its
25

26 ¹⁰ On September 10, 2006, there were 93 BKLs in operation. Since that date, 3
27 additional BKLs were opened or acquired by Burger King. Between September 2006 and
28 January 14, 2009, 2 BKLs closed, and 2 were converted from BKL to franchisee ownership.
To the best of Plaintiffs’ knowledge, there are thus 92 BKLs currently in operation. There are
therefore approximately 96 BKLs currently subject to this lawsuit. Ex. 53; Ex. 122.

1 BKL franchisees that

2 construction of . . . new Burger King restaurant[s] shall be in a manner
 3 authorized and approved by BKC. All signs, equipment, playground
 4 equipment and design, landscaping, and furnishings to be used in the
 5 restaurant shall meet BKC's specifications, criteria, and performance
 6 standards. BKC shall review the building type, site layout, signage, and
 overall adherence to current building standards and identity, and may require
 any reasonable modifications to any or all of those items at any time before
 the restaurant opens for business.

7 *See* Ex. 87 at BKC003945; *see also, e.g.*, Ex. 88 at BKC059409; Ex. 89 at BKC061781.

8 This control in many cases led directly to the construction of common barriers
 9 experienced by putative class members. For example, at a time when the California Standards
 10 required food service lines to be 36 inches wide, [REDACTED]

11 [REDACTED]
 12 [REDACTED]¹¹

13 **b. Burger King's Centralized Control over Alterations to BKLs.**

14 Burger King also exercises centralized control over alterations to BKLs. This control is
 15 derived both from the Lease/Sublease agreement and the Franchise Agreement.

16 Burger King's lease agreements with BKL franchisees ensure that it also has control
 17 over any post-construction alterations to BKLs. These agreements provide that the lessee shall
 18 not at any time make any alteration, change, addition, or improvement without the prior written
 19 consent of Burger King,¹² and the franchise files maintained at Burger King's headquarters are
 20 replete with requests for and approvals and denials of legal clearance for remodels. *See, e.g.*,
 21 Ex. 90 (issuing legal clearance 3362); Ex. 91 (request for approval 1985); Ex. 92 (request for
 22 approval 1999); Ex. 93 (issuing legal clearance 2002); Ex. 94 (holding legal clearance 1995).
 23 Indeed, BKL franchisees are punished for not complying with the legal clearance requirements.
 24 *See, e.g.*, Ex. 96. "[O]ne of the reasons the [Burger King] Law Department processes remodels
 25 for legal clearance is to be sure that all work done on the properties is done in full compliance

26 _____
 27 ¹¹ *See* Cal. Admin. Code, tit. 24, § 2-611(c)(4) (1982) (Ex. 95).

28 ¹² *See, e.g.*, Boothby Decl., Ex. 1, Tbl. 2 at Column 3; Ex. 86 at BKC 004297 (§ 5.3).

1 with the Leases and/or any existing property restrictions and to avoid the Franchisees
 2 performing remodels without BKC's knowledge." Ex. 97.

3 Through its standard franchise agreement, Burger King controls remodels of franchised
 4 restaurants including BKLs. The standard term of a Burger King franchise agreement is 20
 5 years, and the agreement obligates the franchisee to remodel the restaurant at the end of the
 6 term in order to renew. Ex. 98 at 23. The remodel must reflect Burger King's standard plans
 7 and specifications. See Boothby Decl., Ex. 1, Tbl. 2 at Column 1. Failing to remodel is
 8 grounds for default. See *id.* at Column 2.

9 **c. Burger King's Centralized Control Over the Operation of**
 10 **BKLs.**

11 Uniformity of restaurant operations is vital to Burger King's success. According to its
 12 most recent Form 10-K, "[a]ll of our restaurants must adhere to strict standardized operating
 13 procedures and requirements which we believe are critical to the image and success of the
 14 Burger King brand." Ex. 98 at 6. Burger King takes a number of steps to ensure the
 15 uniformity of BKL restaurant operations. This uniformity emphasizes Burger King's
 16 centralized control over both the structure and the operations of the BKLs.

17 First, "[e]ach restaurant is required to follow the Manual of Operating Data, an
 18 extensive operations manual containing mandatory restaurant operating standards,
 19 specifications and procedures prescribed from time to time to assure uniformity of operations
 20 and consistent high quality of products at Burger King restaurants." *Id.* Among other
 21 requirements, the Manual of Operating Data ("MOD") addresses "standard design, equipment
 22 systems, color scheme and signage, operating procedures, hours of operation and standards of
 23 quality for products and services." *Id.* Thus, the MOD prescribes not only policies that are
 24 strictly operational, but also policies that are architectural and structural and that interact with
 25 the structure of the restaurants.¹³ Again, by way of example, inaccessible queue lines at many

26 _____
 27 ¹³ [REDACTED]

28 (continued...)

1 BKL restaurants result from a centralized policy concerning restaurant design promulgated by
2 Burger King in the mid-1980's and [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 In addition, BKL franchisees must maintain restaurants in accordance with Burger
9 King's repair and maintenance standards, and must implement a training program for
10 restaurant employees in accordance with training standards and procedures prescribed by
11 BKC. Ex. 98 at 14; Boothby Decl., Ex. 1, Tbl. 4. The Lease contains a provision requiring the
12 lessee/sublessee to maintain the building and other improvements in good condition and repair.
13 *See, e.g.*, Ex. 82 at BKC005420 (§ 5.2). Burger King has invoked this provision to institute
14 inspection programs. *See, e.g.*, Boothby Decl., Ex. 1, Tbl. 3 at Column 2; Ex. 99 (instituting
15 "inspection program" for Burger King to monitor BKL franchisee's compliance with lease
16 provision).

17 **d. Burger King Monitors Compliance with and Enforces Its**
18 **Centralized Policies.**

19 Burger King takes steps to ensure that the above policies are followed. For example, it
20 "conduct[s] scheduled and unscheduled inspections of company and franchise restaurants
21 throughout the Burger King system." Ex. 98 at 14; *see also* Ex. 100 ("Record of Visitation -
22 Training Visit"); Ex. 101 (email containing restaurant's "mystery shop history," "record of
23 visitation - general visit"). Burger King also has a set of "Minimum Acceptable Repair,
24 Maintenance, and Image Standards for Expansion Approvals, Conversions and FtoFs" and
25 mandates compliance with those standards. Franchisees are placed on warning for not
26

1 complying with these minimum standards. *See, e.g.*, Ex. 102 at BKC009361; Ex. 103; Ex.
2 104. Failure “to maintain the Restaurant in accordance with the Franchise Agreement and
3 BKC’s specifications and requirements” results in further discipline. *See* Ex. 103. Burger
4 King states unequivocally that it will take “whatever action it deems necessary to protect its
5 interests and the Burger King Burger King® [sic] brand.” Ex. 105.

6 Indeed, Burger King has sued franchisees to enforce its standards. For example, in
7 *Burger King Corp. v. Shams*, No. 06-20870 (S.D. Fla. Apr. 25, 2006) (Ex. 106), BKC sought
8 specific performance of a franchise agreement, based on the franchisee’s “failure to operate his
9 BURGER KING® Restaurants in accordance with the standards and specifications required by
10 BKC.” *Id.* ¶ 1. Among other alleged violations, the complaint alleged that the “[r]estrooms
11 [were] not clean and maintained.” *Id.*; *see also, e.g.*, Complaint for Injunctive Relief and
12 Damages, *Burger King Corp. v. Bru Corp.*, No. 07-21316, ¶ 59 (S.D. Fla. May 22, 2007) (Ex.
13 107) (alleging that the franchisee’s “failure to operate the Restaurant in accordance with
14 BKC’s standards relating to service, cleanliness, health, sanitation, repair and maintenance, as
15 well as operational requirements, is a breach of the Franchise Agreement.”). Eventually,
16 Burger King completes a walk-through to satisfy itself that the BKL is “back on track.” *See*
17 Ex. 108.

18 Burger King also conducts Facility Inspection Reports (FIRs) as part of contract
19 renewal, and requires BKL franchisees to conduct regular and periodic “Repair and
20 Maintenance reviews.” *See, e.g.*, Ex. 109 at BKC012652; *see also* Dkt. #123 at 6; Ex. 110 at
21 BKC012440; Ex. 111 at BKC001029; Ex. 112 at BKC063485. These FIRs contain a
22 staggering amount of detail, from requirements regarding the “mansard roof” to requirements
23 that the tables and chairs be “free of rust.” *See, e.g.*, Ex. 110; Ex. 113 at BKC008989.

24 The FIRs, however, omit virtually all accessibility requirements set forth in applicable
25 law and standards, including, for example, door force standards, queue line navigation, and
26 seating accessibility, just to name a few of the omissions. *Id.* Instead Burger King requires
27 BKL franchisees to hire engineers to submit ADA Compliance surveys in a prescribed form as
28 part of the FIR. *See, e.g.*, Ex. 114 at BKC129862 (“Certificate of Inspection - Americans with

1 Disabilities Act (page 27) must be completed for all BKL restaurants.”); Ex. 110 at
2 BKC012440(same); Ex. 111 at BKC001029 (same); Ex. 112 at BKC063485 (same). The
3 access laws state specific, objective standards. *See supra* nn. 4-9. In contrast, these surveys
4 contain no standards, do not mention the California statutes or standards, and require only the
5 conclusory assessment of whether the BKL is “[i]n substantial compliance with Title III of the
6 ADA and the ADAG.” *See, e.g.*, Ex. 115 at BKC021075; Ex. 116; Ex. 117.

7 Significantly—and in stark contrast to Burger King’s reaction to violations of its other
8 procedures and design specifications, which, as set forth above, result in threats of default and
9 lawsuits—when Burger King receives a compliance survey indicating access violations, it
10 merely sends the franchisee a standardized letter encouraging the franchisee to rectify the
11 violations. *See, e.g.*, Ex. 118; Ex. 119.

12 **e. Burger King’s Access Surveys.**

13 Burger King demonstrated its centralized control and ultimate control over the
14 accessibility of the BKL restaurants in its response to Plaintiffs’ pre-suit demand letter. After
15 the parties to this case began pre-suit negotiations, Burger King hired consultants and
16 commissioned accessibility surveys of the BKL restaurants. Dkt. #123 at 4.¹⁴ Indeed, Burger
17 King and its counsel worked with the consultants to develop and perform surveys and to
18 prepare the resulting “scope of work summar[ies]” outlining the feasibility of possible
19 remediation. *Id.* Only after all of this work was completed did Burger King send the scope of
20 work summary to the BKL franchisees nor did Burger King seek the consent or input of the
21 BKL franchisees; the BKL franchisees were not even given copies of the consultants’ survey
22 results of their own restaurants. *Id.* at 5. Thus, Burger King exercised its control to centrally
23 organize and compel uniform, California-wide surveys of all of its BKLs and alteration of the
24 restaurants in accordance with the results of those surveys. These surveys and subsequent
25 extensive communications regarding remediation also strongly suggest that many, if not all,

26 _____
27 ¹⁴ Defendant’s privilege log, although woefully inadequate, also suggests a high level
28 of control evident in Burger King’s surveys of these restaurants and subsequent remediation.
See Ex. 120.

1 BKLs failed to comply with the access laws with respect to barriers giving rise to putative
2 class members' common experience of discrimination.

3
4 Burger King exercises substantial centralized control over both the structure and the
5 operations of the BKLs. Although Burger King does have certain centralized accessibility
6 policies, enforcement of these policies sharply contrasts with the micro-management of the
7 BKLs outside of the context of disability access. Indeed, the policies are remarkable in their
8 lack of specificity. Such delegation has resulted in a common experience of discrimination for
9 individuals who use wheelchairs and scooters.

10 **V. ARGUMENT**

11 **A. Introduction**

12 The Court must determine whether the proposed class satisfies the four prerequisites of
13 Rule 23(a), as well as one of the three subsections of Rule 23(b). *Hanlon v. Chrysler Corp.*,
14 150 F.3d 1011, 1019, 1022 (9th Cir. 1998). Plaintiffs seek certification pursuant to Rule
15 23(b)(2) because Defendant has “acted or refused to act on grounds that apply generally to the
16 class so that final injunctive relief or corresponding declaratory relief is appropriate respecting
17 the class as a whole.” Fed. R. Civ. P. 23(b)(2).

18 In analyzing whether the class meets the prerequisites noted above, a court is to take
19 the substantive allegations of the complaint as true, and may also consider extrinsic evidence
20 submitted by the parties. *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975); *see also*
21 *Am. Council of the Blind v. Astrue*, 2008 WL 4279674, at *2 (N.D. Cal. Sept. 11, 2008) (citing
22 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974)). Although the Court is “at
23 liberty” to consider evidence that relates to the merits if such evidence also goes to the
24 requirements of Rule 23, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992), the
25 Court, as noted above, may not consider whether the party seeking class certification has stated
26 a cause of action or is likely to prevail on the merits, *Eisen*, 417 U.S. at 178; *Bautista-Perez*,
27 2009 WL 2031759, at *4.

28 Plaintiffs will analyze each of the requirements of Rule 23(a) and Rule 23(b)(2)

1 separately below. As an overview, however, numerous courts in the Ninth Circuit have
 2 certified classes of individuals with disabilities challenging architectural barriers and/or
 3 deficient policies. *See* Dkt. #69 at 7-8. These include, for example:

- 4 • *Armstrong v. Davis*, 275 F.3d 849, 869-70, 879 (9th Cir. 2001) (affirming the
 5 certification of a class of prisoners and parolees with sight, hearing, learning,
 6 developmental, and mobility disabilities);
- 7 • *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 120-23 (C.D. Cal. 2008)
 8 (certifying class of persons with mobility disabilities suing for alleged
 9 violations of architectural accessibility requirements at a grocery store chain);
- 10 • *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D.
 11 334, 344-49 (N.D. Cal. 2008) (certifying class of persons with mobility and/or
 12 vision disabilities suing due to barriers along outdoor designated pedestrian
 13 walkways throughout the state of California which are owned and/or maintained
 14 by the California Department of Transportation);
- 15 • *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1199-1203
 16 (N.D. Cal. 2007) (certifying class of persons with visual impairments suing for
 17 alleged violations of accessibility requirements at online store);
- 18 • *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 607-08, 613 (N.D. Cal. 2004)
 19 (certifying class of persons with mobility disabilities suing for alleged
 20 violations of architectural accessibility requirements at a fast food chain);
- 21 • *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 448 (N.D. Cal. 2001) (certifying
 22 nationwide class of hearing impaired employees of the defendant);
- 23 • *Siddiqi v. Regents of the Univ. of Calif.*, 2000 WL 33190435, at *11 (N.D. Cal.
 24 Sept. 6, 2000) (certifying classes of deaf and hard of hearing students suing for
 25 alleged violations of federal law);
- 26 • *Jorgensen v. Jack in the Box Rests.*, No. C95-0406 SAW, at 3 n.4, 7 (N.D. Cal.
 27 Feb. 28, 1997) (Ex. 121) (certifying class of persons with mobility disabilities
 28 suing for alleged violations of architectural accessibility requirements);
- *Berlowitz v. Nob Hill Masonic Mgmt., Inc.*, 1996 WL 724776 at *1, 5 (N.D.
 Cal. Dec. 6, 1996) (certifying class consisting of all persons in California with
 physical disabilities suing for alleged violations of architectural accessibility
 requirements at a concert arena);
- *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 460 (N.D. Cal.
 1994), *modified*, 158 F.R.D. 439, 443, 460 (1994) (certifying a class of disabled
 persons who used wheelchairs or who walked using aids suing for alleged
 violations of architectural accessibility requirements of the ADA and the
 CDPA); and
- *Leiken v. Squaw Valley Ski Corp.*, Nos. CIV. S-93-505 LKK, 1994 U.S. Dist.
 LEXIS 21281, at *18-19 (E.D. Cal. June 28, 1994) (certifying a class of
 physically disabled persons suing for alleged architectural barriers).

These cases are in accord with numerous decisions across the country certifying classes of

1 individuals with disabilities challenging architectural barriers, transportation barriers, other
2 barriers, and/or discriminatory policies.¹⁵

3 **B. The Proposed Class Meets the Requirements of Rule 23(a).**

4 **1. The Proposed Class Is so Numerous that Joinder Is Impracticable.**

5 Rule 23(a)(1) requires that a class be so numerous that joinder of all members is
6 impracticable. Plaintiffs have submitted declarations from 48 putative class members who use
7 wheelchairs for mobility, have patronized California BKLs since 2006, and have encountered
8 similar accessibility barriers. These declarations alone demonstrate that the numerosity
9 requirement is met. 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 3:5
10 (4th ed. 2002) (hereinafter “*Newberg*”) (“[T]he difficulty inherent in joining as few as 40 class
11 members should raise a presumption that joinder is impracticable, and the plaintiff whose class
12 is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.”)

13 Further, “Plaintiffs do not need to state the exact number of potential class members,
14 nor is a specific number of class members required for numerosity.” *Moeller*, 220 F.R.D. at
15 608; *Bates*, 204 F.R.D. at 444 (citing *Arnold*, 158 F.R.D. at 448). A court may make common
16 sense assumptions to support a finding that joinder would be impracticable. *Moeller*, 220
17 F.R.D. at 608; *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 358 (D. Colo.

18
19 ¹⁵ See, e.g., *Lightbourn v. County of El Paso*, 118 F.3d 421, 423, 426 (5th Cir. 1997);
20 *Lucas v. Kmart Corp.*, 2005 WL 1648182 (D. Colo. July 13, 2005) (nationwide class) & 2006
21 WL 722163 (D. Colo. Mar. 22, 2006) (damages settlement sub-class); *Alexander A. ex rel.*
22 *Barr v. Novello*, 210 F.R.D. 27, 38 (E.D.N.Y. 2002); *Access Now, Inc. v. Claire’s Stores, Inc.*,
23 2002 WL 1162422, at *3 (S.D. Fla. May 7, 2002); *Ass’n for Disabled Ams., Inc. v. Amoco Oil*
24 *Co.*, 211 F.R.D. 457, 459, 466 (S.D. Fla. 2002); *Marcus v. Kan., Dep’t of Revenue*, 206 F.R.D.
25 509, 511, 513 (D. Kan. 2002); *Neiberger v. Hawkins*, 208 F.R.D. 301, 318-20 (D. Colo. 2002);
26 *Nat’l Org. on Disability v. Tartaglione*, 2001 WL 1258089, at *5 (E.D. Pa. Oct. 22, 2001);
27 *Access Now, Inc. v. AHM CGH, Inc.*, 2000 WL 1809979, at *5 (S.D. Fla. Jul. 12, 2000);
28 *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 530 (S.D. Fla.
2000); *Bacal v. Se. Pa. Transp. Auth.*, 1995 WL 299029, at *8-9 (E.D. Pa. May 16, 1995);
Boulet v. Cellucci, 107 F. Supp. 2d 61, 63, 81 (D. Mass. 2000); *Duprey v. Conn. Dep’t of*
Motor Vehicles, 191 F.R.D. 329, 339-42 (D. Conn. 2000); *Neff v. VIA Metro. Transit Auth.*,
179 F.R.D. 185, 196 (W.D. Tex. 1998); *Anderson v. Dep’t of Pub. Welfare*, 1 F. Supp. 2d 456,
462 (E.D. Pa. 1998); *Kathleen S. v. Dep’t of Pub. Welfare*, 1998 WL 83973, at *2-3 (E.D. Pa.
Feb. 25, 1998); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 326-27 (D. Mass. 1997);
Thrope v. Ohio, 173 F.R.D. 483, 486, 491 (S.D. Ohio 1997); *Civic Ass’n of the Deaf of New*
York City, Inc. v. Giuliani, 915 F. Supp. 622, 634 (S.D.N.Y. 1996); *Henrietta D. v. Giuliani*,
1996 WL 633382, at *16 (E.D.N.Y. Oct. 25, 1996); *McKay v. County Election Comm’rs for*
Pulaski County, Ark., 158 F.R.D. 620, 626 (E.D. Ark. 1994).

1 1999); 1 *Newberg* § 3:3 (“Where the exact size of the class is unknown but general knowledge
2 and common sense indicate that it is large, the numerosity requirement is satisfied.”).

3 The fact that a class is geographically dispersed, and that class members are difficult to
4 identify, supports class certification. *Moeller*, 220 F.R.D. at 608 (joinder impracticable where
5 class members are difficult to identify); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 648 (C.D.
6 Cal. 1996); 1 *Newberg* § 3:6. BKL restaurants are geographically dispersed from Eureka to
7 San Diego. Boothby Decl. Ex. 2; Ex. 4., Column 8. The proposed class therefore stretches
8 throughout the state of California. Class members, however, are difficult to identify. Both of
9 these factors support a finding that joinder in this case is impracticable.

10 Census figures demonstrate that there are approximately 151,580 non-institutionalized
11 people 16 years of age or older in California who use wheelchairs. *See Moeller*, 220 F.R.D. at
12 608 (citing census data). Burger King is one of the top three fast food hamburger chains in the
13 world. *See Ex. 98* at 4. As a matter of common sense, then, the class in this case is large,
14 substantially exceeding the Named Plaintiffs and Declarants.

15 2. There Are Questions of Law and Fact Common to the Proposed 16 Class.

17 Rule 23(a)(2) requires that there be questions of law or fact that are common to the
18 class. The commonality standard under Rule 23(a)(2) “has been construed permissively” and
19 is “flexible.” *Parra v. Bashas’, Inc.*, 536 F.3d 975, 978 (9th Cir. 2008). The requirements for
20 finding commonality are “minimal.” *Hanlon*, 150 F.3d at 1020; *Bates*, 204 F.R.D. at 445.
21 “Where the circumstances of each particular class member vary but retain a common core of
22 factual or legal issues with the rest of the class, commonality exists.” *Parra*, 536 F.3d at 978-
23 79; *accord Moeller*, 220 F.R.D. at 608-09; *Bates*, 204 F.R.D. at 445.

24 a. Common Experience of Discrimination.

25 “A number of courts have held that where people who use wheelchairs encounter the
26 same types of barriers at a number of commonly-owned or affiliated public accommodations,
27 commonality is established and class certification is appropriate.” *Moeller*, 220 F.R.D. 604,
28 609 (N.D. Cal. 2004) (citing *Colo. Cross Disability Coal.*, 184 F.R.D. at 359-60; *Access Now*,

1 *Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 526 (S.D. Fla. 2000); *Arnold*,
2 158 F.R.D. at 449); *see also, e.g., Park*, 254 F.R.D. at 120-21; *Lucas v. Kmart Corp.*, 2005 WL
3 1648182 (D. Colo. July 13, 2005). The proposed class here, like the certified classes in similar
4 cases, have suffered common experiences of discrimination.

5 Because plaintiffs challenge “the ‘same categories’ of architectural barriers at
6 Defendant’s restaurants,” the class satisfies the commonality requirement. *Moeller*, 220
7 F.R.D. at 609-10. This results from the fact that “[i]nadequate wheelchair accommodations” at
8 a chain “are very likely to affect all wheelchair-users in the same way . . . [and thus] the state
9 of such accommodations . . . , and the legal adequacy of those accommodations, are issues of
10 fact and law common to all of those disabled persons affected by them.” *Arnold*, 158 F.R.D. at
11 449.

12 This case presents the same scenario as *Moeller* and *Arnold*. Like the plaintiffs in those
13 cases, Plaintiffs here allege that Burger King’s discriminatory policies and barriers have a
14 similar impact on putative class members. Also like *Moeller* and *Arnold*, Burger King is
15 directly liable under the ADA for the access barriers that have created this common experience
16 of discrimination at BKLs. 42 U.S.C. § 12182 (prohibiting discrimination by “any person who
17 . . . leases (or leases to) . . . a place of public accommodation”).

18 **b. Centralized Decision Making.**

19 Questions concerning allegedly discriminatory policies, the lack of required policies,
20 and/or failure to enforce required policies also present factual and legal questions that establish
21 commonality. “[C]entralized decision-making is an additional factor weighing heavily towards
22 a finding of commonality, if it does not establish commonality outright.” *Moeller*, 220 F.R.D.
23 at 610. Sins of omission as well as sins of commission establish commonality. Centralized
24 control combined with a “fail[ure] to implement a practice or policy [] that satisfies [its]
25 obligations” can satisfy the commonality requirement. *See, e.g., Am. Council of the Blind*,

1 2008 WL 4279674, at *4; *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560-61 (N.D. Cal. 2007).¹⁶

2 Here, Burger King exercises significant centralized control over the BKLs. For
 3 example: (1) Through its development, franchise, and lease agreements, BKLs must be built,
 4 remodeled, and altered in accordance with Burger King’s design specifications, and any
 5 deviations must be approved by Burger King; (2) Burger King monitors compliance with its
 6 centralized policies and procedures through scheduled and unscheduled inspections, and by
 7 conducting FIRs; (3) Burger King enforces compliance with its centralized policies and
 8 procedures by threatening default and by filing suit; (4) Burger King has the power to survey
 9 the BKLs for compliance with access regulations and attempt to address violations, as
 10 demonstrated by the surveys it commissioned after receiving Plaintiffs’ demand letter; and (5)
 11 Burger King has substantial control over the operations of BKLs by requiring that these
 12 restaurants be operated in compliance with the MOD, Burger King training standards, and
 13 Burger King repair and maintenance standards.

14 **c. Common Questions of Law and Fact.**

15 The similar experiences of the class members, together with Defendant’s centralized
 16 policies, give rise to a number of common factual and legal questions, including:¹⁷

- 17 • Do the common barriers experienced by putative class members violate the
 18 ADA, Unruh and the CDPA?
- 19 • Are the BKLs “places of public accommodation” under the ADA and/or
 20 CDPA? *See* 42 U.S.C. §§ 12181(7)(B); Cal. Civ. Code § 54.1(a)(1).
- 21 • Are the BKLs “business establishments” under Unruh? Cal. Civ. Code § 51(b).

22 ¹⁶ *See also, e.g., Lightbourn*, 118 F.3d at 426 (defendants did not have policies in place
 23 “direct[ing] local election officials to comply with [29 U.S.C. § 794] and the ADA” by making
 24 polling places accessible); *Tartaglione*, 2001 WL 1258089, at *3 (allegation that defendant
 25 failed to have policies ensuring that voters with mobility impairments had access to
 26 neighborhood polling places was an allegation that defendant “engaged in a common course of
 conduct on a classwide . . . basis”); *Ceaser v. Pataki*, 2000 WL 1154318, at *5-6 (S.D.N.Y.
 Aug. 14, 2000) (holding that commonality requirement was met where there was a common
 question as to whether the defendants’ failure to enforce and to assure compliance with various
 statutory mandates violated Title VI).

27 ¹⁷ Because class members seek only the minimum statutory damages per offense,
 28 damage issues for each class member are almost identical. *See Arnold*, 158 F.R.D. at 449; *see*
also Moeller, 220 F.R.D. at 610.

- 1 • Is Burger King liable for the violations of the ADA, Unruh and CDPA at the BKL restaurants?
- 2
- 3 • Do the 20-year remodels required by Burger King's standard franchise agreements constitute "alterations" under the ADA, Unruh Act and/or CDPA? *See* 28 C.F.R. §§ 36.402(b)(2); 36.406(a); Cal. Health & Safety Code § 19959.
- 4
- 5 • Have Defendant's past or present design specifications violated the ADA, Unruh Act and/or CDPA by setting forth specifications, such as too-narrow queue lines, that violate these statutes?
- 6
- 7 • Does the ADA, Unruh Act and/or CDPA require Defendant to have in place practices and policies to ensure that BKLs are accessible to putative class members?
- 8
- 9 • If so, has Defendant, now or in the past, violated this requirement that the BKLs be accessible to putative class members?

10 3. Named Plaintiffs' Claims Are Typical of the Claims of the Class.

11

12 Rule 23(a)(3) requires that the claims of the named Plaintiffs be typical of those of the

13 class. The Ninth Circuit does "not insist that the named plaintiffs' injuries be identical with

14 those of the other class members, only that the unnamed class members have injuries similar to

15 those of the named plaintiffs and that the injuries result from the same, injurious course of

16 conduct." *Armstrong*, 275 F.3d at 869; *see also Nat'l Federation of the Blind*, 582 F. Supp. 2d

17 at 1201. "[I]n a public accommodations suit . . . where disabled persons challenge the legal

18 permissibility of architectural design features, the interests, injuries, and claims of the class

19 members are, in truth, identical such that *any* class member could satisfy the typicality

20 requirement for class representation." *Arnold*, 158 F.R.D. at 450; *see also Moeller*, 220 F.R.D.

21 at 611 ("The effect of these alleged barriers and policies is the same for the named plaintiffs as

22 for the class."); *Jorgensen*, No. C95-0406 SAW, at 5-6 (Ex. 121) ("This and other physical

23 obstacles would, presumably, hinder the ability of persons with many types of mobility

24 disabilities from fully enjoying the goods and services offered by Defendants and would deter

25 mobility disabled persons from attempting to visit similarly unaccommodating Jack in the Box

26 restaurants.").

27 Plaintiffs submit with this motion 48 declarations of members of the proposed class.

28 These declarations confirm that the three named Plaintiffs have suffered the same experience

1 of discrimination as the members of the proposed class.

2 The named Plaintiffs, like members of the proposed class, all use wheelchairs or
3 scooters for mobility and have encountered discriminatory barriers and policies at Defendant's
4 BKLs. The effect of these barriers and policies is the same for the Named Plaintiffs as for the
5 class: It impairs their ability to patronize Defendant's restaurants. Named Plaintiffs challenge
6 these barriers under the same statutes and remedial theories as the class, thereby establishing
7 the typicality of the Named Plaintiffs' claims.

8 **4. Named Plaintiffs Will Fairly and Adequately Protect the Interests of**
9 **the Class.**

10 The final requirement of Rule 23(a), adequate representation, requires that the proposed
11 representatives do not have conflicts of interest with the proposed class. Fed. R. Civ. P.
12 23(a)(4); *Bates*, 204 F.R.D. at 447. Adequate representation is usually presumed in the
13 absence of contrary evidence. 3 *Newberg* § 7:24.

14 The named Plaintiffs in this case do not have conflicts of interest with the proposed
15 class. All are members of the class that they seek to represent, all seek to remedy allegedly
16 discriminatory architectural barriers and policies, all have a history of advocating for the rights
17 of persons with disabilities, and all will vigorously prosecute this case on behalf of the class.

18 Outside of this litigation, the named Plaintiffs are all actively working toward enforcing
19 the rights of persons with disabilities. Mr. Castaneda is a rehabilitation coordinator for the
20 State of California, helping people with disabilities return to work. Castaneda Depo 5:6-18,
21 9:19-11:1 (Ex. 1). Ms. Corbett has, on several occasions, spoken at conferences on issues
22 relating to persons with disabilities. Corbett Depo 21:14-23:6 (Ex. 2). As the mother of a
23 child who uses a wheelchair, she desires that her daughter be able to eat in an accessible BKL
24 with her non-disabled friends. Corbett Depo 192:12-193:8, 213:19-24 (Ex. 2). Mr. Wellner is
25 active on the Solano County Public Authority Advisory Committee, which is an "advocacy go-
26 between between disabled seniors and in-home support services and social workers." Wellner
27 Depo 20:16-25 (Ex. 3). They have all testified that their primary interest is in rectifying the
28 inaccessibility of Burger King restaurants. Castaneda Depo 58:5-15 (Ex. 1); Corbett Depo

1 214:11-18 (Ex. 2); Wellner Depo 89:23-24 (Ex. 3).

2 **5. The Proposed Class Counsel Will Adequately Represent the Class.**

3 Rule 23(g) requires that class counsel adequately represent the interests of the class.
4 Plaintiffs' counsel is qualified to represent the class. The law firms and organizations that
5 comprise proposed Class Counsel together possess extensive class action and ADA experience.
6 They have extensive experience litigating not just ADA class actions, but civil rights class
7 actions, pattern or practice cases, and individual ADA cases. Lee Decl. ¶¶ 5, 8, 10; Robertson
8 Decl. ¶¶ 11-21, 23; Kilb Decl. ¶¶ 10-12; Mayeda Decl. ¶¶ 4, 8. Plaintiffs' counsel have been
9 certified as class counsel in many class actions under the ADA and other disability rights
10 statutes, including several prior class actions against fast food restaurants and chain stores.
11 Lee Decl. ¶ 5; Robertson Decl. ¶¶ 11-21; Kilb Decl. ¶¶ 10-12; Mayeda Decl. ¶¶ 4, 8. Indeed,
12 Fox & Robertson, Bill Lann Lee, Mari Mayeda, and Antonio Lawson were appointed litigation
13 class counsel, and subsequently settlement class counsel, in *Lucas v. Kmart*, 99-cv-01923-JLK
14 (D. Colo.), a nationwide class action challenging architectural barriers to access in over 1,400
15 Kmart stores across the country. After litigating the case for almost seven years, including
16 through Kmart's bankruptcy, the parties reached a class-wide settlement covering all Kmart
17 stores in the United States and Puerto Rico. The settlement covered damages under certain
18 state laws, and resulted in extensive and ongoing injunctive relief, as well as \$13 million in
19 monetary relief, the largest monetary recovery ever in this type of case. Robertson Decl. ¶¶
20 12-13.

21 Judge John L. Kane, who approved the settlement, remarked during the final
22 approval hearing, "I would say that anyone, whether a lawyer or a layman, who is interested in
23 class action litigation should examine the file in this case to see how a class action should be
24 handled. It is the best example I can think of." *Lucas*, Reporter's Transcript Final Approval of
25 Settlement Agreement (July 27, 2006), at 87, Robertson Decl, Ex. 1. He added, "The quality
26 of the briefs and the motions filed by both sides in this case has been exemplary. It has been of
27 the highest quality." *Id.* at 88.

28 Proposed Class Counsel are familiar with the challenges of ADA class actions and have

1 demonstrated their dedication to protecting the interests of class members. Additionally,
2 Plaintiffs' counsel have vigorously litigated this case so far. Plaintiffs, for example, conducted
3 extensive pre-litigation factual research, discovered over 149,000 pages of documents from
4 Defendant, conducted hundreds of interviews and obtained declarations from 48 class
5 members, obtained approximately 5600 pages of documents from building departments, served
6 subpoenas on all BKL franchisees and worked to obtain documents from them. Lee Decl. ¶ 3.

7 **C. The Proposed Class Is Proper Under Rule 23(b)(2).**

8 Once a class has satisfied all four of the prerequisites of Rule 23(a), it must satisfy one
9 of the subsections of Rule 23(b). The class proposed herein satisfies Rule 23(b)(2) if Burger
10 King “acted or refused to act on grounds that apply generally to the class, so that final
11 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a
12 whole.” Like the class in *Lucas*—addressing wheelchair access barriers in Kmart stores
13 nationwide—“[t]his case provides a paradigm for class certification under Rule 23(b)(2),
14 where the party opposing the class is alleged to have acted or refused to act on grounds
15 generally applicable to the class, and the relief sought seeks to compel compliance with civil
16 rights laws in a manner that will inure to the benefit of all members of the putative class.”
17 *Lucas*, 2005 WL 1648182, at *2. “Rule 23(b)(2) was designed specifically for civil rights
18 cases like this, where plaintiffs seek system-wide injunctive relief for a large class.”
19 *Californians for Disability Rights*, 249 F.R.D. at 345-46 (citing 2 *Newberg* § 4:11); see also
20 *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (“Civil rights cases against parties
21 charged with unlawful, class-based discrimination are prime examples of Rule 23(b)(2)
22 classes.” (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697)); 7A Charles Alan Wright et al.,
23 *Federal Practice & Procedure* §§ 1775-76 (2d ed. 1986).

24 A class that seeks monetary relief as well as injunctive relief should be certified under
25 Rule 23(b)(2) if injunctive relief is the predominant form of relief sought by the class. *Molski*
26 *v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003). *Molski* specifically addressed the question
27 before this Court: Whether the requirements of Rule 23(b)(2) are met when a class of persons
28 with disabilities challenges architectural barriers and seeks injunctive and monetary relief

1 under the ADA, Unruh and CDPA. The Ninth Circuit held that injunctive relief was the
2 predominant form of relief sought by the class, and thus the class met the requirements of Rule
3 23(b)(2). *Id.* at 950. Courts have certified under Rule 23(b)(2) classes of persons with
4 disabilities seeking similar injunctive relief and statutory damages for alleged violations of the
5 ADA, Unruh, and CDPA, because such injunctive relief is incalculable. *See, e.g., Park*, 254
6 F.R.D. at 115, 123; *Nat'l Fed'n of the Blind*, 582 F. Supp. 2d at 1189, 1203; *Moeller*, 220
7 F.R.D. at 612-13; *Arnold*, 158 F.R.D. at 461-62; *Leiken*, 1994 U.S. Dist. LEXIS 21281, at *15-
8 16; *Jorgensen*, at 3 n.4 (Ex. 121); *Berlowitz*, 1996 WL 724776, at *1, 5.

9
10 **VI. CONCLUSION**

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

13 Dated: July 29, 2009
14 Respectfully submitted,

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