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

15 MIGUEL CASTANEDA, KATHERINE)
16 CORBETT, and JOSEPH WELLNER on)
behalf of themselves and others similarly)
17 situated,)

Plaintiffs,

vs.

19 BURGER KING CORPORATION,)
20)

Defendant.)
21)
22)
23)
24)
25)
26)
27)
28)

Case No. C 08-4262 WHA (JL)

PLAINTIFFS' MOTION TO COMPEL

Hearing Date: August 19, 2009
Hearing Time: 9:30 a.m.

Chief Magistrate Judge James Larson
Courtroom F, 15th Floor

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1 **INTRODUCTION**

2 Plaintiffs move to compel documents and/or factual information concerning surveys
3 conducted by Defendant Burger King Corp. (“BKC”) of the restaurants at issue and concerning
4 steps taken to alter the restaurants since receiving Plaintiffs’ demand letter. Because of these
5 recent alterations, it is now impossible to take measurements that will establish the conditions in
6 the restaurants during the putative class period which started on April 16, 2006.

7 Through this motion, Plaintiffs respectfully seek:

- 8 1. Production of documents relating to the survey and alteration of the restaurants at
9 issue, redacted to delete opinion work product but to leave factual information
10 including measurements of the conditions in the restaurants;
- 11 2. In the alternative, production of the information contained in these documents in
12 response to pending interrogatories;
- 13 3. Should this Court elect to order production of information rather than documents,
14 this Court’s approval of Plaintiffs’ Interrogatory No. 24 pursuant to Rule 33(a)(1);
- 15 4. An order compelling BKC to provide a compliant privilege log, because the
16 inadequacy of BKC’s privilege log makes it impossible to discern what
17 documents exist, when they were created, and with whom they have been shared.

18 **FACTS**

19 There are over 600 Burger King restaurants in California. This putative class action
20 addresses barriers to people who use wheelchairs or scooters at the approximately 90 Burger
21 King restaurants -- so-called “BKL” restaurants -- that are leased by Defendant Burger King
22 Corporation (“BKC”) to its franchisees.¹

23 The Documents and Information At Issue In This Motion

24 Plaintiffs allege that the architectural barriers in the approximately 90 BKL restaurants
25 violate Title III of the Americans with Disabilities Act (“ADA”) which prohibits discrimination
26

27 ¹ The remainder of the Burger King restaurants in California are apparently owned
28 by and franchised to third parties, with no leasehold interest by BKC.

1 on the basis of disability by “any person who owns, *leases (or leases to)*, or operates a place of
2 public accommodation.” 42 U.S.C. § 12182(a) (emphasis added). Plaintiffs also bring claims
3 under California’s Unruh Civil Rights Act (the “Unruh Act”), Cal. Civ. Code § 51 *et seq.*, and
4 the California Disabled Persons Act (“CDPA”), *id.* § 54 *et seq.* In this motion, Plaintiffs seek
5 production of access surveys conducted by BKC of architectural elements in the restaurants at
6 issue and information related to alterations made since Plaintiffs sent their demand letter in
7 January, 2008. This information is central to the present case because the statutes at issue require
8 architectural elements to comply with detailed and often quantitative design specifications, and
9 because barrier removal in older buildings depends in part on the nature and cost of required
10 measures, making the nature and cost of measures actually taken highly relevant.

11 Because Burger King has refused to produce these surveys based on assertions of
12 privilege, Plaintiffs cannot be certain the precise information they contain. Based on Plaintiffs’
13 counsel’s extensive experience with access surveys, however, Plaintiffs are confident that the
14 surveys at issue record at least some quantitative measurements of some or all of the elements in
15 the BKL restaurants at issue. Decl. of Amy F. Robertson in Support of Pls.’ Mot. to Compel
16 (“Robertson Decl.”) ¶ 41. Examples of the surveys and related documents -- which were
17 allegedly inadvertently produced by BKC and one of its franchisees -- are being filed under seal
18 pursuant to Fed. R. Civ. P. 26(b)(5)(B) for the Court’s reference.

19 The ADA, the Unruh Act, and the CDPA all look to sets of building-code-like standards
20 to define illegal barriers.² These standards describe compliance in quantitative rather than
21 qualitative terms: inches of clearance; percent of slope; pounds of force. For example, both Title
22 24 and the DOJ Standards require a clear floor space of 30 by 48 inches at dispensers such as
23

24
25 ² Title III requires buildings constructed after January 26, 1993 or portions altered
26 after January 26, 1992 to comply with the Department of Justice Standards for Accessible
27 Design, 28 C.F.R. pt. 36, app. A (“DOJ Standards”). *See, e.g., Moeller v. Taco Bell Corp.*, 220
28 F.R.D. 604, 606 (N.D. Cal. 2004). Under state law, a violation of Title 24 of the California Code
of Regulations (“Title 24”) -- a portion of the California Building Code -- constitutes a violation
of the Unruh Act and the CDPA. *Id.* at 607.

1 drink machines and condiments,³ a parking space to slope no more than two percent,⁴ and a
2 restroom door to require no more than five pounds of force to open.⁵

3 This type of quantitative information is only available through access surveys such as
4 those being withheld by BKC. While the allegations in Plaintiffs' complaint were based on the
5 personal experience of named Plaintiffs and potential class members, fast food patrons do not
6 generally carry a tape measure, digital level, or door pressure gauge when they stop in for a
7 hamburger and fries. These individuals can describe how the barriers prevented them from full
8 and equal enjoyment of a given BKL restaurant; however, they cannot provide the precise
9 measurements of the barriers they encountered.

10 The alterations information withheld by BKC is also important. The ADA requires that
11 barriers in buildings built before January 26, 1993 be removed where it is "readily achievable" to
12 do so, 42 U.S.C. § 12182(b)(2)(A)(iv), a standard that looks to, among other factors, the "nature
13 and cost of the action needed" to remove barriers. *Id.* § 12181(9)(A). The nature and cost of
14 actual barrier removal is good evidence for this factor. *See, e.g., Mannick v. Kaiser Found.*
15 *Health Plan*, No. C-03-5905-PJH, 2006 WL 2168877, at *17 (N.D. Cal. July 31, 2006). A
16 description of measures taken by BKC and its franchisees to remove barriers will be directly
17 relevant to the "readily achievable" analysis.

18 Pre-Suit Discussions

19 Based on reports of barriers from dozens of wheelchair-using Burger King customers and
20 on surveys of 31 of the 600 California Burger Kings showing common barriers, Plaintiffs sent a
21 demand letter to BKC on January 16, 2008. Decl. of Timothy P. Fox in Support of Pls.' Mot. to
22 Compel ("Fox Decl.") ¶ 2. In the eight months between that date and the filing of this lawsuit on
23 September 10, 2008, the parties engaged in pre-suit negotiations -- including a proposal by
24 Plaintiffs to jointly survey the restaurants at issue -- in an attempt to address Plaintiffs' claims.

25
26 ³ DOJ Standards § 4.2.4.1; Title 24 (2006), § 1118B.4.1.

27 ⁴ DOJ Standards, § 4.6.3; Title 24 (2006), § 1129B.3.4.

28 ⁵ DOJ Standards § 4.13.11(2)(b); Title 24 (2006), § 1133B.2.5.

1 *Id.* ¶ 3. Plaintiffs provided BKC with copies of all of the 31 surveys they had conducted as well
 2 as photographs they had taken at those restaurants. *Id.* ¶ 3. Nevertheless, with the exception of
 3 five of the 31 restaurants surveyed by Plaintiffs, BKC repeatedly refused to identify which of the
 4 600 Burger King restaurants in California were BKL restaurants, that is, in which BKC had a
 5 leasehold interest. *Id.* ¶ 4. The negotiations did not result in a resolution.

6 Immediately prior to filing suit, Plaintiffs sent an email to BKC notifying it of their
 7 decision to file suit, and requesting:

8 that Burger King take before and after measurements and photos of any
 9 accessibility barriers or violations that it remediates in its California stores. Doing
 10 so will benefit both parties. If Burger King is unwilling to do this, we request that
 11 it provide, in the spirit of General Order 56, notice to us of any upcoming barrier
 12 removal or other changes so that we may survey the stores before any changes are
 13 made.

14 *Id.* ¶ 5.

15 Post-filing Attempts to Obtain a List of BKL Restaurants and Other Discovery

16 Plaintiff Miguel Castaneda⁶ filed the instant lawsuit on September 10, 2008, alleging
 17 violations of Title III of the ADA, the Unruh Act, and the CDPA at two of the five BKL
 18 restaurants that BKC had been willing to identify. Based on interviews of then hundreds of
 19 potential class members as well as publicly-available BKC documents demonstrating common
 20 construction and control, he also alleged a class action to address common barriers at all 90-
 21 some-odd BKL restaurants.

22 Because it included claims under Title III of the ADA, the case was covered by General
 23 Order No. 56 of the Northern District of California. Gen. Ord. No. 56 (“GO 56”). That Order
 24 mandates that discovery in Title III cases be stayed and that the parties complete joint inspections
 25 of the “subject premises” within 100 days of filing. *Id.* ¶¶ 2-3. The day after Plaintiffs filed,
 26 they wrote to counsel for BKC to request the identity and location of the BKL restaurants so that
 27 the parties could conduct the required joint inspections. Robertson Decl. Ex. 1. BKC again

28 ⁶ Plaintiffs Corbett and Wellner were added to the suit on March 13, 2009. First
 Am. Compl. (Docket No. 72).

1 refused, asserting that because Mr. Castaneda had only alleged violations at two BKL restaurants,
2 those were the only “subject premises” under GO 56. *Id.* ¶ 3 & Ex. 2.

3 On October 23, 2008, Plaintiff Castaneda filed his Motion to Compel Compliance with
4 General Order 56 (Docket No. 8). In that motion, Plaintiff explained that he needed the
5 addresses of the BKL restaurants so that he could jointly inspect the restaurants as required by
6 GO 56. *Id.* at 2. BKC opposed this motion -- and thus, again, refused to provide the locations of
7 the remaining BKL restaurants -- on the grounds that only two BKL restaurants mentioned in the
8 complaint were at issue. Defendants’ Mem. of P. & A. in Opp’n to Pls.’ Mot. to Compel
9 Compliance with General Rule 56 (Docket No. 15) at 3.

10 On November 12, 2008, the Court ordered that GO 56 was suspended and that discovery
11 was permitted to commence concerning all 90-some-odd BKL restaurants. Order Re: Disc.
12 (Docket No. 18) at 1. Plaintiff served his first set of discovery the next day, including requests to
13 identify the BKL restaurants (Interrogatory No. 1), to identify any changes that had occurred in
14 those restaurants (Interrogatory No. 11), and to identify any surveys that had been conducted in
15 those restaurants (Interrogatory No. 23). Robertson Decl. Ex. 3. Pursuant to agreement by the
16 parties, Plaintiff received the list of BKL restaurants on December 16, 2008, but did not receive
17 responses to his discovery requests until January 14, 2009. *Id.* ¶ 6.

18 BKC’s discovery responses asserted the attorney-client privilege and work-product
19 protection with respect to requests for both alterations to and surveys of BKL restaurants,
20 Robertson Decl. Ex. 4 at 10-11, 17, but BKC did not provide a privilege log until April 24, 2009,
21 over four months after it served the discovery responses to which the log pertains.⁷ *Id.* ¶ 16.
22 This log included reference -- for the first time -- to “surveys of restaurants made as a result of
23 Plaintiffs’ initial demand and subsequent litigation . . .” *Id.* Ex. 12 at BKCPP000463. It also
24 included a single line item, dated December 2008 through February 2009, for “scope of work
25 documents and verification punchlists,” demonstrating for the first time that BKC had not only

26
27 ⁷ BKC only provided a privilege log in response to Plaintiffs’ repeated requests (*see*
28 Robertson Decl. Exs. 5, 7-10), Plaintiffs’ April 14 letter to Judge Alsup (Docket No. 74), and the
Court’s April 15 order setting a hearing on the matter (Docket No. 76).

1 been surveying, but altering the restaurants at issue. *Id.* Ex. 12 at BKCPP000459. Plaintiffs also
2 received the privilege log of one of BKC's consultants, Universal Designers and Consultants
3 ("UDC"), on April 8, 2009; it contained reference to a March 23, 2008 memorandum relating to
4 this matter, and an August 8, 2008 retainer agreement. *Id.* Ex. 11.

5 Thus despite Plaintiffs' repeated requests -- both before and after the filing of this action
6 -- for the addresses of the BKL restaurants explicitly for the purpose of surveying those
7 restaurants, Defendant refused to provide these addresses for almost a year until ordered to do so
8 by the Court. Further, Defendant did not disclose until April 2009 that it has been surveying and
9 altering the restaurants at issue. And despite Plaintiffs' explicit request, BKC never notified
10 Plaintiffs of any impending alterations so that Plaintiffs would have the chance to conduct a pre-
11 alteration survey.

12 Burger King's Privilege Log

13 The portions of BKC's privilege log listing documents relating to its survey and alteration
14 efforts contain very little of the required detail. *See, e.g.*, Robertson Decl. Ex. 12 at
15 BKCPP000458-59 and 463, line items 1707-10, 1713-17, and 1737-38. Most of the entries are
16 group entries. For example, the entry that apparently refers to the surveys themselves provides
17 the following information: Date: "Various;" Author: "ADA Consultants;" Recipient: "Counsel,
18 Consultants;" Subject Matter: "All surveys of restaurants made as a result of Plaintiff's initial
19 demand and subsequent litigation in preparation of BKC's litigation strategy." Robertson Decl.
20 Ex. 12 at BKCPP000463, item 1737. Similarly, the only entry to refer to scope of work and
21 punchlist documents lists the date as "12/2008 through 2/2009," the recipients include four
22 named individuals and "[o]ther JLL people," and the documents are described as
23 "[a]pproximately 50 Emails with attachments transmitting and discussing surveys, scope of work
24 documents and verification punchlists, and consultant's recommendation re: same." *Id.* at
25 BKCPP000459, item 1717.⁸

26
27 ⁸ The treatment of survey and alteration information is in stark contrast to the
28 remainder of the privilege log. For much of the rest of the log -- which totals 183 pages -- BKC
(continued...)

1 The privilege log makes clear that BKC shared the survey and alteration information with
2 its franchisees. Although BKC asserts the existence of joint defense privileges, it has not
3 produced or included in its privilege log any of the alleged joint defense agreements. Robertson
4 Decl. ¶ 17.

5 Responses to Plaintiffs' Subpoenas to Burger King Franchisees

6 Plaintiffs served 57 third party subpoenas on Burger King franchisees on or around April
7 10, 2009. Decl. of Julia Campins in Support of Pls.' Mot. to Compel ("Campins Decl.") ¶ 4. To
8 date, they have received documents from 22 franchisees. *Id.*

9 On or about April 30, 2009, franchisee Centennial Restaurants, Inc. ("Centennial")
10 produced documents that included a completed UDC survey form and other documents relating
11 to BKC's survey and alteration efforts, including correspondence between Jones, Lang, LaSalle
12 and the franchisee. Robertson Decl. ¶ 18. As required, Plaintiffs produced these documents to
13 BKC. *Id.* ¶ 19. On June 5, 2009, counsel for BKC wrote the undersigned asserting that the
14 Centennial documents were privileged and had been inadvertently produced and requesting that
15 Plaintiffs return the documents to BKC. *Id.* Ex. 13. Although the documents had been produced
16 by Centennial and not BKC, and included a cover letter from Centennial's Joseph Rubin,
17 Plaintiffs did not hear from Mr. Rubin himself, nor did they receive any other request from
18 Centennial to return the documents at that time. *Id.* ¶ 25.

19 Since the documents as to which BKC asserted a privilege had been produced by a third
20 party, Plaintiffs responded by requesting evidence of the existence of a joint defense privilege.
21 *Id.* Exs. 14 and 15. BKC responded that the joint defense agreement itself was privileged, *id.*,
22 although it has not, to date, appeared in BKC's privilege log. Robertson Decl. ¶ 17. It was not
23 until June 16 that BKC provided the barest of information concerning its claimed joint defense
24

25 _____
26 ⁸(...continued)
27 provides document-by-document accounts of up to 40-year-old documents concerning largely
28 irrelevant topics such as title reports and mechanics' liens. *See, e.g.*, Robertson Decl. ¶ 16 & Ex.
12 at BKCPP000281. It is only in the final few pages, addressing documents that go to the core
issues in this case, that the entries become vague.

1 agreement with Centennial: the date of the agreement.⁹ *Id.* Ex. 16. And it was not until after the
2 June 24 filing of the Joint Statement of Issues Regarding Plaintiffs’ Motion to Compel Survey
3 and Remediation Information (“Joint Statement,” Docket No. 103), that BKC provided Plaintiffs
4 declarations from Joseph Rubin, owner of Centennial, and Stanley Rubin, his attorney, stating
5 that they requested the return of the documents. *Id.* ¶ 26. These declarations were dated June 23
6 and June 24, respectively. (Docket Nos. 111 and 112.)

7 Receipt of documents from many of the remainder of the franchisees is apparently being
8 held up by BKC’s interference with the process. On April 23, Plaintiffs were contacted by the
9 law firm of Hanson Bridgett, LLP (“HB”), which represents 46 of the 60 franchisees,
10 representing a total of 64 of the BKL restaurants at issue. Campins Decl. ¶ 5. HB signaled that
11 its clients were willing and able to comply with the subpoena, and that the firm would do its best
12 to meet the subpoena return date of May 13, 2009. *Id.* Ex. 1. On June 4, Plaintiffs received an
13 email from an HB associate, stating that the firm “hope[d] to send out responses early next
14 week.” *Id.* Ex. 2. However, on June 15, in response to Plaintiffs’ request for an update, the
15 associate wrote that “[p]ursuant to our joint defense agreement with BKC, we are in the process
16 of notifying BKC about the documents we plan to produce in response to the subpoenas.” *Id.* Ex.
17 3. HB did not produce any documents until July 9, when it sent a CD with documents from 18 of
18 the 46 franchisees it represents, covering 21 of 64 restaurants. *Id.* ¶ 9 In a phone call on the next
19 day, the HB associate stated that no further documents would be forthcoming as some
20 franchisees had no responsive documents and BKC had instructed the franchisees to withhold the
21 remainder on the basis of a joint defense privilege. *Id.* ¶ 10 and Ex. 4. HB has not provided a
22 privilege log for any of the documents withheld. *Id.* ¶ 11.

23
24
25 ⁹ Despite the fact that the mere assertion of a joint defense agreement and recitation
26 of its date did not, in Plaintiffs’ view, support the existence of a privilege, on June 16 Plaintiffs
27 immediately sequestered the documents in question pursuant to Rule 26(b)(5)(B). On June 24,
28 2009, BKC informed Plaintiffs of a second inadvertent production of a survey, which Plaintiffs
also sequestered. Robertson Decl. ¶¶ 35-36 and Ex. 25. As noted above, these documents are
being filed under seal pursuant to Rule 26(b)(5)(B).

1 Attempts to Obtain Survey and Alteration Information

2 Plaintiffs began their efforts to obtain survey and alteration information by letter dated
3 February 25, 2009, asking BKC to respond to (among others) Interrogatory Nos. 11 and 23.
4 Robertson Decl. Ex. 5 at 2. In response, BKC asserted that any surveys requested in
5 Interrogatory No. 23 were work product and that the alteration information requested in
6 Interrogatory No. 11 “other than work product, should be in the [store specific] files” that
7 Plaintiffs were planning to review at BKC’s headquarters in Miami. *Id.* Ex. 6. Plaintiffs
8 immediately wrote to counsel for BKC and asked him to confirm whether BKC was asserting
9 privilege as to the actual alterations that had been made to BKL stores in the past two years. *Id.*
10 Ex. 7. Counsel for BKC informed the undersigned by telephone that any accounts of actual
11 changes -- as opposed to communications among Burger King and its counsel -- would not be
12 withheld as privileged, and could be found in the store-specific files. *Id.* ¶ 12 and Ex. 9.

13 Three of Plaintiffs’ counsel spent two days in early April, 2009, reviewing the store-
14 specific files and other documents at BKC’s headquarters in Miami and ultimately requested that
15 over 149,000 pages of documents be scanned and sent to them, at a total cost to Plaintiffs of over
16 \$16,000. Campins Decl. ¶ 2. Since then, Plaintiffs’ counsel and their paralegals have reviewed
17 all of these documents. *Id.* ¶ 3. Plaintiffs’ review has revealed no documents containing
18 measurements of the type contained in access surveys. Similarly, Plaintiffs have seen no
19 documents containing substantive information regarding recent accessibility alterations to the
20 BKL restaurants at issue. *Id.* BKC has not provided any other substantive response to
21 Interrogatory No. 11 or No. 23. *Id.*

22 On May 27, 2009, Plaintiffs served their Interrogatory No. 24, which requested that BKC
23 provide the measurements of a list of features in each BKL restaurant. Robertson Decl. ¶ 29 and
24 Ex. 19. BKC objected to this interrogatory on the grounds of attorney client privilege and the
25 work-product doctrine, and refused to provide any of the requested information.¹⁰ *Id.* Ex. 26.

26
27 ¹⁰ BKC also objected on the grounds that it exceeded the number of permissible
28 interrogatories. Robertson Decl. Ex. 26 at 3-4. Plaintiffs had requested that BKC stipulate,
(continued...)

1 On June 3, 2009, Plaintiffs served a notice of deposition pursuant to Rule 30(b)(6) requesting to
 2 depose the person most knowledgeable about, among other topics, the survey and alteration
 3 information they now seek. *Id.* Ex. 23. BKC objected to this topic on work product grounds. *Id.*
 4 Ex. 24.

5 Finally, Plaintiffs requested documents from the relevant permitting agencies in each
 6 jurisdiction that contained a BKL restaurant. This involved writing letters to the relevant
 7 agencies, a campaign of follow-up calls and letters, and eventually the receipt of 5,595 pages of
 8 documents from 65 agencies. Robertson Decl. ¶ 38. These documents have all been produced to
 9 Defendants. *Id.* 39. Plaintiffs have reviewed these documents and found only one -- a 1999 plan
 10 review citing a handful of measurements -- that contained the type of measurements that a survey
 11 would provide. None of those documents provide measurements of BKL restaurants during the
 12 class period. *Id.* 40.

13 ARGUMENT

14 I. The Requested Information Is Not Protected.

15 Plaintiffs seek documents and/or information concerning the measurements of relevant
 16 features of the BKL restaurants during the class period and an account of alterations to the BKL
 17 restaurants, including alterations relating to claims in the present litigation. Defendant has
 18 refused to describe recent changes to the restaurants or to provide requested measurements on the
 19 ground that this information is protected by attorney-client privilege and the work-product
 20 doctrine. Defendant is incorrect. Neither privilege applies; and even if the work product
 21 doctrine should, *arguendo*, apply, Plaintiffs are entitled to production of the documents and/or
 22 information because they have substantial need for them and cannot obtain their substantial
 23 equivalent by other means.

24
 25
 26 ¹⁰(...continued)
 27 pursuant to Rule 33(a)(1), to an increase in the number of interrogatories. *Id.* Exs. 18 and 22.
 28 BKC refused to respond to this request. *Id.* Ex. 21. Plaintiffs thus move, below, for such an
 increase pursuant to Rule 33(a)(1). *See infra* Section III.

1 In addition, BKC's delay in providing a privilege log and the shortcomings of the log it
2 eventually provided serve to waive the privilege. *See infra* Section IV.

3 **A. The Requested Information Does Not Constitute a Communication and Is**
4 **Thus Not Protected by the Attorney-client Privilege.**

5 In their document requests and interrogatories, Plaintiffs seek only factual information --
6 the measurements of architectural elements at the time the measurements were taken by BKC or
7 its consultants and the alterations that have occurred in the restaurants over the past two years.
8 Because Plaintiffs seek only facts, and not communications, BKC's refusal to produce these facts
9 based on the attorney-client privilege is erroneous.

10 The attorney-client privilege "only protects disclosure of communications; it does not
11 protect disclosure of the underlying facts by those who communicated with the attorney."

12 *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). As a leading treatise explains:

13 The most important point to be conveyed by the definition of "communication" is that the
14 privilege only applies to communications, not to their informational content. The client
15 may be asked "what do you know about X?" but may not be asked "what did you say to
16 your attorney about X?" The policy of the privilege is to encourage clients to talk to their
17 attorneys, not to suppress information merely because it was relayed to the attorney via a
18 client communication. . . . Information in the possession of corporate employees does not
19 become privileged simply because it was embodied in a communication to corporate
20 counsel. Any employee who has the relevant information may be required to divulge it
21 during trial or deposition, and the corporation may be required to reveal the knowledge in
22 response to an interrogatory so long as what is asked for is the information and not the
23 revelation of a communication to counsel.

24 Charles Alan Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5484
25 (footnotes omitted); *see also Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1005 (9th Cir.
26 2009) ("As the Supreme Court has explained with respect to the attorney-client privilege, for
27 example, invocation of that privilege does not create a 'zone of silence' around the contents of
28 privileged communications."); *Informatica Corp. v. Bus. Objects Data Integration, Inc.*, 454 F.
29 Supp. 2d 957, 963 (N.D. Cal. 2006) (holding that the attorney-client privilege does not apply to
30 information that does not constitute "communications between a client and his attorney.").

31 In this case, the measurements set forth in the surveys and the alterations to the stores are
32 simply facts and thus are not protected by the attorney-client privilege. To the extent that the
33 surveys contain other information that is privileged, that information can be redacted. Likewise,
34

1 Plaintiffs' interrogatories request measurements and an account of recent changes to the
2 restaurants, which are facts and not communications, and thus are not privileged.

3 **B. Regardless of the Status of the Documents, Survey and Alteration**
4 **Information Is Not Protected by the Work Product Doctrine.**

5 The work product privilege covers only "documents and tangible things," Fed. R. Civ. P.
6 26(b)(3)(A); it does not cover information contained in privileged documents. As stated in the
7 Advisory Committee Notes, "one party may discover relevant facts known or available to the
8 other party, even though such facts are contained in a document which is not itself discoverable."
9 48 F.R.D. 487, 501 (1970); *see also Natural Res. Def. Council v. Gutierrez*, NO. C 01-0421 JL,
10 2008 WL 2468494, at *3 (N.D. Cal. June 17, 2008) (holding that work product protection applies
11 only where, among other factors, "the material in question [is] . . . a document or tangible
12 thing"); *Informatica*, 454 F. Supp. 2d at 963 ("Unlike the attorney-client privilege, which
13 protects all communication whether written or oral, work-product immunity protects documents
14 and tangible things . . ."); *AT&T Corp. v. Microsoft Corp.*, NO. 02-0164 MHP (JL), 2003 WL
15 21212614, at *5 (N.D. Cal. Apr. 18, 2003) (holding that work-product privilege applies only to a
16 document or tangible thing); *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003)
17 (holding that the work-product doctrine "does not protect . . . facts contained within the work
18 product" (internal citation omitted)). Thus even assuming *arguendo* that the work-product
19 privilege applies to documents relating to surveys or alteration, it does not apply to the
20 measurements or alterations themselves.

21 This distinction makes sense. "The work-product immunity promotes a fair and efficient
22 adversarial system by protecting 'the attorney's thought processes and legal recommendations'
23 from the prying eyes of his or her opponent." *Informatica*, 454 F. Supp. 2d at 963 (quoting *In re*
24 *EchoStar Communications Corp.* 448 F.3d 1294, 1301 (Fed. Cir. 2006)). Plaintiffs are not
25 seeking BKC's views on whether the architectural elements it measured did or did not comply
26 with access regulations, whether or not the alterations were required by law, or any other
27 information that would reflect its attorneys' or consultants' thought processes or legal
28 recommendations. Rather, Plaintiffs seek information concerning the condition of the public

1 areas of Defendant's restaurants prior to their modification and a description of the modifications
2 made. This factual information is not privileged.

3 **II. Even if the Survey and Alteration Information is Covered by the Work-Product**
4 **Doctrine, Plaintiffs Have Substantial Need for It and Cannot Obtain the Equivalent**
5 **by Other Means.**

6 Documents covered by the work product privilege must be produced if Plaintiffs show
7 "that [they have] substantial need for the materials to prepare [their] case and cannot, without
8 undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P.
9 26(b)(3)(A)(ii). Ultimately, if BKC intends to argue that the BKL stores either were or are in
10 compliance with applicable standards, Plaintiffs have substantial need for the survey and
11 alteration information to rebut those arguments.

12 **A. Plaintiffs Have Substantial Need for the Survey and Alteration Information.**

13 Plaintiffs have substantial need for the survey information because liability under both
14 state and federal law can be established by evidence showing quantitative measurements of the
15 challenged barriers, *see supra* at 4-5, and because Burger King patrons do not bring survey tools
16 -- tape measures; digital levels -- with them when they stop by for a hamburger. While putative
17 class members can testify to the ways they were denied equal access by the barriers at issue, they
18 will largely not be able to testify to the precise measurements of those barriers. These
19 measurements -- likely recorded in the surveys at issue -- can demonstrate violations of the DOJ
20 Standards and Title 24 of the California Building Code.

21 Plaintiffs also have substantial need for the alteration information to show the cost and
22 nature of barrier removal measures, items relevant to the ADA's "readily achievable" standard
23 for pre-1993 buildings. *See* 42 U.S.C. §§ 12181(9)(A); 12182(b)(2)(A)(iv); *Mannick*, 2006 WL
24 2168877, at *17 (holding that evidence of actual barrier removal is good evidence of what is
25 readily achievable). While Plaintiffs could survey the current conditions, in the absence of the
26 requested discovery, they have no way of knowing what measures were taken to put each
27 restaurant in that condition.
28

1 **B. Plaintiffs Cannot Obtain the Substantial Equivalent of the Survey and**
2 **Alteration Information by Other Means.**

3 It is now impossible for Plaintiffs to obtain the substantial equivalent of the survey
4 information. Many of the elements at issue have apparently been altered,¹¹ making it impossible
5 to establish their measurements during the class period. BKC's efforts to conceal the list of BKL
6 stores -- and its failure, despite Plaintiffs' explicit request, to provide notice prior to any changes,
7 *see* Fox Decl. ¶¶ 5-6 -- ensured that Plaintiffs did not have the opportunity to conduct their own
8 surveys before such alterations took place.

9 Where, as here, the underlying physical conditions have changed, courts routinely order
10 production of factual work-product. For example, in *Huggins v. Federal Express Corp.*, 250
11 F.R.D. 404 (E.D. Mo. 2008), the court ordered the defendant to produce photographs of a vehicle
12 involved in an accident and the accident scene itself in light of the plaintiff's "inability to re-
13 create the scene or otherwise access the subject photographs." *Id.* at 406-07. In light of the fact
14 that BKC or its franchisees have apparently altered the BKL restaurants, Plaintiffs are unable to
15 re-create the conditions experienced by named Plaintiffs and putative class members in order to
16 measure them now. The court in *Zoller v. Conoco, Inc.*, 137 F.R.D. 9, 10 (E.D. La. 1991) made
17 clear that the ability of a plaintiff to describe a scene is not a substitute for photographs, and
18 ordered disclosure of photographs of an accident scene taken at direction of counsel. Similarly
19 here, Plaintiffs have substantial need for the quantitative information despite the ability of
20 Plaintiffs and witnesses to describe the barriers they encountered. *See also McDonald v. Clubb*,
21 143 F.R.D. 103, 104 (W.D. N.C. 1992) (ordering production of work product photographs of
22 accident scene).

23 Courts have also required parties to produce the results of investigations and studies
24 pursuant to Rule 26(b)(3)(A)(ii). In *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental*
25 *Concrete Products, Inc.*, 140 F.R.D. 373 (E.D. Wis. 1991), for example, the court ordered

26 ¹¹ Plaintiffs would have a clearer picture of what had been altered if BKC had
27 itemized the "scope of work documents and verification punchlists" in item 1717 of its privilege
28 log. *See* Robertson Decl. Ex. 12 at BKCPP000459. In any event BKC has not attempted to
argue that any of the information is still available.

1 production of a customer survey conducted at the direction of counsel on grounds that it was
2 “predominantly factual in nature [with] little, if any, risk of revealing [the plaintiff’s] trial
3 strategy” and that, because the market for the products at issue was seasonal, the equivalent
4 information was no longer available. *Id.* at 377; *see also In re Chrysler Motors Corp. Overnight*
5 *Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1989) (holding that computer tape
6 containing data gathered by Chrysler’s attorneys was discoverable because “replication of the
7 computer tape would involve duplication of effort and considerable delay and expense”); *Weber*
8 *v. Paduano*, 02-Civ.-3392(GEL), 2003 WL 161340, at *14 (S.D.N.Y. Jan. 22, 2003) (holding
9 that the plaintiff was entitled to the defendants’ fire investigation reports because the damage had
10 been repaired); *Nat’l Cong. for Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110
11 (S.D.N.Y. 2000) (ordering disclosure of arrest statistics because it would be “burdensome and
12 costly” for he plaintiffs to compile the same information).

13 BKC, in its portion of the Joint Statement, does not appear seriously to contend that the
14 information in their surveys is still available. *See id.* at 4-6. Rather, Defendant argues that
15 Plaintiffs could have obtained the information earlier by surveying the BKL restaurants
16 themselves. As demonstrated above, *see supra* at 5-7, this was simply impossible. Defendants
17 worked hard and -- until December 17, 2008 -- successfully to ensure that Plaintiffs did not know
18 the identity and location of the 90 BKL restaurants at issue in this litigation (out of the over 600
19 Burger King restaurants in California). By the time Plaintiffs got the list of BKL restaurants in
20 December, 2008, they were in the midst of responding to BKC’s Motion to Dismiss (Docket No.
21 28) and BKC and its franchisees were -- if the dates in the privilege log are any guide -- in the
22 midst of altering the restaurants.

23 The cases on which BKC relied in its portion of the Joint Statement are not to the
24 contrary. In *Martin v. Monfort, Inc.*, 150 F.R.D. 172 (D. Colo. 1993) -- in stark contrast to the
25 situation here -- the plaintiff had put on no evidence demonstrating why it could not have
26 obtained the information at issue either previously or at the time of the motion. *Id.* at 173. In
27 *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252 (3d Cir. 1993), the evidence in
28

1 question consisted of a single identifiable dishwasher. Again, in contrast to the situation here,
2 the defendant had not precluded the plaintiff from conducting its own test on the dishwasher. *Id.*
3 at 1262, 1255. *Equal Rights Center v. Post Properties, Inc.*, 247 F.R.D. 208 (D.D.C. 2008) is
4 also distinguishable. The court in that case refused to apply Rule 26(b)(3)(A)(ii) to the plaintiff's
5 request for access surveys because the plaintiff had not reviewed relevant files or taken
6 defendants' depositions. *Id.* at 212. In contrast, Plaintiffs here have reviewed tens of thousands
7 of pages of BKC documents and found nothing that provides the types of measurements that the
8 withheld surveys could provide, Campins Decl. ¶ 3, and BKC has objected to any questions to its
9 Rule 30(b)(6) designee(s) on the topic. Robertson Decl. Ex. 24.

10 Because Plaintiffs have substantial need for the factual information contained in the
11 surveys and a factual accounting of the work performed, and because they are not able to obtain
12 the substantial equivalent -- either at all or in the absence of highly burdensome costs -- Plaintiffs
13 respectfully request that this Court order Defendant to either (1) produce its surveys and
14 documents relating to alterations, including measurements of elements in its restaurants (redacted
15 to remove any opinion work-product); or (2) respond in full to Interrogatory Nos. 11 and 24. *See*
16 *infra* Section III.

17 **III. Plaintiffs Should Be Permitted To Serve Interrogatory No. 24.**

18 If this Court should decline to order BKC to produce the surveys themselves but agree
19 with Plaintiffs that the information they contain is not privileged, Plaintiffs respectfully request
20 the Court's approval of their Interrogatory No. 24. Plaintiffs make this request pursuant to Rule
21 33(a)(1), that is, that the interrogatory is permissible despite the 25-interrogatory limit. Rule
22 33(a)(1) provides that "[I]leave to serve additional interrogatories may be granted to the extent
23 consistent with Rule 26(b)(2)," which in turn requires the Court to consider whether:

24 (i) the discovery sought is unreasonably cumulative or duplicative, or can be
25 obtained from some other source that is more convenient, less burdensome, or less
26 expensive; (ii) the party seeking discovery has had ample opportunity to obtain the
27 information by discovery in the action; or (iii) the burden or expense of the
28 proposed discovery outweighs its likely benefit, considering the needs of the case,
the amount in controversy, the parties' resources, the importance of the issues at
stake in the action, and the importance of the discovery in resolving the issues.

1 The information sought in Interrogatory No. 24 has not previously been sought (that is, it
 2 is not cumulative or duplicative) and -- as demonstrated above -- it cannot be obtained from any
 3 other source save the surveys themselves, which Plaintiffs would happily accept in lieu of a
 4 response to Interrogatory No. 24. There has been no other opportunity to obtain this information,
 5 again save production of the surveys themselves. And Plaintiffs do not seek to compel
 6 Defendant to *take* the measurements that are requested in Interrogatory No. 24, but merely to
 7 report on any measurements they or their consultants have already taken. Hence the burden is
 8 very low and the discovery -- which goes directly to the question of liability for barriers to access
 9 -- very important to the resolution of issues. The considerations in Rule 26(b)(2) suggest that it
 10 would be proper to for this Court to approve of Interrogatory No. 24 despite the fact that it may
 11 exceed the limit of 25.

12 **IV. BKC's Privilege Log Is Not Adequate.**

13 With respect to eleven line items -- 1707-10, 1713-17, and 1737-38 -- of BKC's privilege
 14 log, BKC has not provided sufficient information to satisfy the Federal Rules of Civil Procedure
 15 or Judge Alsup's standing order.¹² It has thus waived any privileges as to those documents or, in
 16 the alternative, must provide the required information.

17 Federal Rule of Civil Procedure 26(b)(5)(A)(ii) requires a party withholding documents
 18 or information as privileged to "describe the nature of the documents, communications, or
 19 tangible things not produced . . . in a manner that, without revealing information itself privileged
 20 or protected, will enable other parties to assess the claim." Judge Alsup's Supplemental Order to
 21 Order Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup
 22 ("Supplemental Order," Docket No. 3) requires that:

23 With respect to *each communication for which a claim of privilege or work product is*
 24 *made*, the asserting party must, at the time of the assertion, identify:

25 (a) all persons making or receiving the privileged or protected communication;

27 ¹² There are other entries for which BKC has provided insufficient information;
 28 Plaintiffs move only with respect to these eleven line items.

1 (b) the steps taken to ensure the confidentiality of the communication, including
2 affirmation that no unauthorized persons have received the communication;

3 (c) the date of the communication; and

4 (d) the subject matter of the communication.

5 Failure to furnish this information at the time of the assertion will be deemed a waiver of
6 the privilege or protection.

7 *Id.* ¶ 16 (emphasis added).

8 As an initial matter, BKC provided no information “at the time of the assertion,” as
9 required by the Supplemental Order, but rather waited four months and only provided a privilege
10 log after repeated requests, Plaintiffs’ letter to the Judge, and an order setting a hearing on that
11 letter. *See supra* note 7. That fact alone, according to the Supplemental Order, is sufficient to
12 constitute waiver. The Ninth Circuit, while rejecting a *per se* waiver rule for privilege logs
13 produced after Rule 34’s 30-day limit, upheld a district court holding of waiver as to documents
14 addressed in a privilege log served five months late:

15 Here, the district court found a waiver where the log not only was not filed during
16 the Rule 34 time limit, but was filed *five months* later. In the absence of
17 mitigating considerations, this fact alone would immunize the district court’s
18 ruling from reversal . . .

19 *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont.*, 408 F.3d 1142, 1149
20 (9th Cir. 2005) (emphasis in original). The delay of four months here -- alone and especially in
21 combination with the inadequacies discussed below -- is sufficient to constitute waiver.

22 Even after BKC finally provided a privilege log, the information provided for items 1707-
23 10, 1713-17, and 1737-38 is insufficient to comply with Rule 26(b)(5)(A)(ii) or the paragraph 16
24 of the Supplemental Order. In addition to Judge Alsup’s requirements, the Ninth Circuit requires
25 that a compliant privilege log contain:

26 (a) the attorney and client involved, (b) the nature of the document, (c) all persons
27 or entities shown on the document to have received or sent the document, (d) all
28 persons or entities known to have been furnished the document or informed of its
substance, and (e) the date the document was generated, prepared, or dated.

Natural Res. Def. Council, 2008 WL 2468494, at *3 (quoting *In re Grand Jury Investigation*,
974 F.2d 1068, 1071 (9th Cir. 1992)). BKC’s privilege log does not provide this information for

1 the challenged line items. For example, in lieu of an account of all persons shown or known to
2 have received the document or informed of its substance, BKC states that recipients included, for
3 example, “File” (item 1707), “Consultants; Employees of Consultants” (item 1708), “Other JLL
4 people” (item 1717) and “Counsel; Consultants” (item 1737). Although Judge Alsup’s
5 Supplemental Order requires the date of the communication, all but two of the challenged line
6 items contain multiple dates, and two are simply dated “Various.”

7 In addition, most of these items are group items, that is, one line item addresses multiple
8 documents -- up to 40 or 50 emails or all of the surveys, for example -- rather than providing
9 information for individual documents. This does not comply with the plain language of
10 paragraph 16 of the Supplemental Order. *See also Baxter Healthcare Corp. v. Fresenius Med.*
11 *Care Holding, Inc.*, NO. C 07-1359 PJH (JL), 2008 WL 4547190, at *1 (N.D. Cal. Oct. 10,
12 2008) (“Each email is a separate communication, for which a privilege may or may not be
13 applicable. Defendants cannot justify aggregating authors and recipients for all emails in a string
14 and then claiming privilege for the aggregated emails.”) Plaintiffs requested that Defendant
15 provide a compliant privilege log with respect to the challenged items. Robertson Decl. Ex. 17.
16 Defendant refused. *Id.* Ex. 20.

17 The lack of information has made it impossible for Plaintiffs to know precisely what is
18 being withheld. While this motion asks specifically for production of the surveys, documents
19 relating to alterations, and/or the information contained therein, it is possible that -- with the
20 information contained in a proper privilege log -- Plaintiffs may be entitled to production of
21 additional documents and/or information. Plaintiffs thus respectfully request that this Court
22 either hold that the privileges asserted as to the documents covered by items 1707-10, 1713-17,
23 and 1737-38 have been waived and compel BKC to produce the documents, or compel BKC to
24 provide the detailed information required by the Ninth Circuit and Judge Alsup for these items.

1 **CONCLUSION**

2 For the reasons set forth above, Plaintiffs respectfully request that this Court order:

3 1. That BKC produce documents relating to the survey and alteration of the
4 restaurants at issue, redacted to delete opinion work product but to leave factual information
5 including measurements of the conditions in the restaurants; or

6 2. In the alternative, that BKC produce the information contained in these documents
7 in response to pending interrogatories;

8 3. That Plaintiffs' Interrogatory No. 24 is approved pursuant to Rule 33(a)(1); and

9 4. That Defendant has waived its privileges and must produce all documents covered
10 by items 1707-10, 1713-17, and 1737-38; or

11 5. In the alternative, that BKC must provide a compliant privilege log including

12 a. Document-by-document descriptions of items 1707-10, 1713-17, and
13 1737-38 including all of the information required by Judge Alsup's
14 Supplemental Order; and

15 b. All documents relevant to the assertion of the privileges themselves
16 including, for example, any and all joint defense agreements.

17 Respectfully submitted,

18
19 FOX & ROBERTSON, P.C.

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

22 Dated: July 15, 2009

Counsel for Plaintiffs