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

MIGUEL CASTANEDA, KATHERINE CORBETT, and JOSEPH WELLNER on behalf of themselves and others similarly situated, Plaintiffs, vs. BURGER KING CORPORATION, Defendant.	Case No. C 08-4262 WHA (JL) **PLAINTIFFS' OPPOSITION TO DEFENDANT BURGER KING CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT** Hearing Date: March 18, 2010 Time: 8:00 a.m.

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INTRODUCTION

Plaintiffs, by and through their counsel, hereby submit their Opposition to Defendant Burger King Corporation's Motion for Partial Summary Judgment. Ignoring clear-cut authority from the California Supreme Court as well as this Court, Defendant argues that Plaintiffs' state law claims under the California Disabled Persons Act ("CDPA") and Unruh Civil Rights Act ("Unruh") should be dismissed because there are no facts establishing that Defendant aided, participated in, or caused the access violations in the ten Burger King leased ("BKL") restaurants at issue here. Defendant's Motion should be denied because:

- The California Supreme Court in *Munson v. Del Taco, Inc.*, 208 P.3d 623, 634 (2009), and this Court in its class certification order in reliance on *Munson*, have both definitively held that because the CDPA and Unruh have adopted the full expanse of the ADA, all ADA violations -- whether or not involving intentional discrimination and whether or not aided or caused by Defendant -- are also violations of the CDPA and Unruh as a matter of law.
- Even CDPA and Unruh claims that are not premised on ADA violations do not require proof of a defendant's active participation in discriminatory acts.
- Even assuming *arguendo* that Plaintiffs needed to demonstrate that Defendant aided or caused a denial of rights secured by the CDPA and Unruh, this showing can be made with evidence that Defendant failed to adequately respond to complaints of civil rights violations.[1] Here, the facts demonstrate that for many years, Defendant has received complaints about access violations at franchised restaurants, but its response to these complaints has been woefully inadequate.[2]

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[1] *See, e.g., Nicole M. v. Martinez Unified Sch. Dist.,* 964 F. Supp. 1369, 1388-89 (N.D. Cal. 1997); *Michelle M. v. Dunsmuir Joint Union Sch. Dist.,* 2006 WL 2927485, *7-8 (E.D. Cal. Oct. 12, 2006); *Annamaria M. v. Napa Valley Unified Sch. Dist.,* 2006 WL 1525733, *13 (N.D. Cal. May 30, 2006).

[2] Defendant also argues that because the ten restaurants covered by the class certification order in this case were all constructed prior to January 26, 1993, they are not covered by the new construction provisions of the ADA. Plaintiffs do not dispute this argument.

FACTS

I. Complaints About Access Violations in Burger King Restaurants.

Long before this case was filed, Defendant was sued numerous times based on alleged violations of access requirements. For example:

- In 1995, a lawsuit was brought against Defendant and certain of its franchisees in the District of Columbia alleging various violations of the ADA, including for example inaccessible queue lines, noncompliant ramps, narrow doors, and inaccessible restrooms (*Day v. Republic Foods, Inc.,* no. 95-cv-1317 (D.D.C. 1995) (*See generally* Decl. of Timothy P. Fox ("Fox Decl.,") Ex. 1).
- In 1999, a lawsuit was brought against Defendant and its franchisee in the Southern District of California alleging various violations of the ADA, including for example barriers involving parking, noncompliant ramps, entrances, a narrow queue line, restrooms and accessible seating (*Org. for the Advancement of Minorities with Disabilities v. Burger King*, no. 99-cv-2302 (IEG) (S.D. Cal. Oct. 27, 1999) (*See generally* Decl. of Ashley K. Boothby ("Boothby Decl.") Ex. 1).
- In 2000, a lawsuit was brought against Defendant's franchisee in the Southern District of California, alleging various violations of the ADA, including for example barriers involving the entrances, restrooms, and parking lot (*Spikes v. Burger King*, no. 00-cv-00566 (AJB) (S.D. Cal., March 17, 2000) (*See generally* Boothby Decl. Ex. 2).
- In 2001, a lawsuit was brought against Defendant's franchisee in the Northern District of California, alleging various violations of the ADA, including for example barriers involving the parking lot, restroom doors and fixtures, service counters, and lack of accessible outdoor seating (*Wong v. Sacca, Corp.*, no. 01-cv-4289 (BZ) (N.D. Cal., Nov. 16, 2001) (*See generally* Boothby Decl. Ex. 3).
- In 2002, a lawsuit was brought against Defendant and certain of its franchisees in the District of New Jersey, alleging various violations of the ADA, including for

example barriers involving noncompliant ramps, lack of accessible parking spaces, and restroom doors and fixtures (*Clark v. Burger King Corp.*, Case no. 02-cv-246 (JEI) (D.N.J., January 22, 2002) (*See generally* Boothby Decl. Ex. 4).

- In 2002, a lawsuit was brought against Defendant and its franchisee in the Southern District of California, alleging various violations of the ADA, including for example barriers involving the lack of van accessible parking, noncompliant ramps, heavy doors, lack of accessible seating, and high service counters (*Degroote v. Burger King 9156*, no. 02-cv-0800 (JFS) (S.D. Cal. April 26, 2002) (*See generally* Boothby Decl. Ex. 5).

Class members, too, have complained to Defendant about the accessibility of franchised restaurants. For example, class member Karen Conklin testified that at some time prior to 2005, she called a Burger King regional office to complain about the accessibility of a queue line at a Burger King restaurant in Concord, California, but Defendant took no action on the queue line. Dep. of Karen Conklin 99:7-25, 100:1-3 (Jan. 20, 2010) (Fox Decl. Ex. 2).

II. Defendant's Response To Complaints Of Access Violations In Burger King Restaurants.

Defendant has the power to ensure that its franchised restaurants comply with access requirements but has chosen not to do so. Indeed, Defendant exercises substantial control over the design, modification and operation of its BKL restaurants. For example:

- A BKL franchisee that intends to construct a new restaurant must comply with Defendant's standard plans and specifications, and any deviations must be approved by Defendant. *See* Docket no. 139-1, Tbl. 1.
- Through its standard franchise agreement, Burger King controls remodels of franchised restaurants, including BKLs. The standard term of a Burger King franchise agreement is 20 years, and the agreement obligates the franchisee to remodel the restaurant at the end of the term in order to renew. Fox Decl. Ex. 3 at 23. The remodel must reflect Burger King's standard plans and specifications.

See Docket no. 139-1, Tbl. 2 at Column 1. Failing to remodel is grounds for default. *See id*. at Column 2.

- Defendant prohibits BKL franchisees from making any alteration, change, addition, or improvement without the prior written consent of Defendant, and the files maintained at Burger King's headquarters are replete with requests for and approvals and denials of legal clearance for remodels at BKL restaurants. *See* Docket no. 139-1, Tbl. 2 at Column 3; *see also, e.g.,* Fox Decl. Exs. 4-5.
- Defendant requires that BKL franchised restaurants "adhere to strict standardized operating procedures and requirements which we believe are critical to the image and success of the Burger King brand." Fox Decl. Ex. 3 at 6. Each BKL and franchised restaurant "is required to follow the Manual of Operating Data ["MOD"], an extensive operations manual containing mandatory restaurant operating standards, specifications and procedures prescribed from time to time to assure uniformity of operations and consistent high quality of products at Burger King restaurants." *Id*.; *see also* Dep. of Samuel Wong 38:18-25, 39:1-4 (Jan. 26, 2010) (Fox Decl. Ex. 6).
- To ensure compliance with these requirements, Defendant "conduct[s] scheduled and unscheduled inspections of company and franchise restaurants throughout the Burger King system." Fox Decl. Ex. 3 at 14; *see also Id.* Ex. 7 ("Record of Visitation - Training Visit").
- Before and after a restaurant is remodeled, Defendant inspects the BKL restaurant to make sure that the remodel conformed to Defendant's requirements. Dep. Of James Carberry ("Carberry Dep.") 9:25 - 10:1-10 (Dec. 9, 2009) (Fox Decl. Ex. 8).

Although Defendant has the power to ensure that franchised restaurants comply with access requirements, and notwithstanding the numerous and repeated complaints that it has received about access violations in these restaurants, Defendant has refused to exercise its power

to eliminate and prevent these violations. For example, Defendant acknowledges that it has the "right to approve whatever final plans the franchisee intends to use," but admits that it "does not review or approve plans for compliance with . . . accessibility laws." Decl. of Jim McGrory (Docket no. 182) ¶¶ 4-5. While BKL franchisees "must adhere to strict standardized operating procedures and requirements" set forth in the MOD, Fox Decl. Ex. 3 at 6, Burger King concedes that the MOD "references accessibility issues only generally," Docket no. 184 at 4. The inspections it conducts before and after a BKL franchisee remodel do not cover access issues. Carberry Dep. 23:7-9, 24:3-18, 31:19-25, 32:1-2 (Fox Decl. Ex. 8). And while Defendant requires an architect to sign off on compliance with accessibility requirements with a "Certificate of ADA Compliance" for remodels of both BKLs and corporate-owned stores, strikingly, Defendant only actually verifies compliance when it comes to its corporate restaurants, but does not verify these certificates for compliance at BKL remodels. Dep. of Ronald Hailend ("Hailend Dep."), 81-83 (Fox Decl. Ex. 9). Finally, Burger King acknowledges that it does not provide design specifications for many of the barriers reported by putative class members. McGrory Decl. ¶ 13.

Not surprisingly in light of Defendant's completely inadequate response to the access complaints it has received over many years, the types of violations that have been the subject of these complaints -- including barriers involving noncompliant ramps, doors, queue lines, service counters, seating, and restrooms -- were also found at the ten restaurants covered by this case. *See* Fox Decl. Ex. 10 at, e.g., 1, 3-4, 6, 9, 10-12, 17, 24 (report prepared by Plaintiffs' expert after surveying the ten restaurants at issue for accessibility violations).

After the lawsuit was filed, Defendant required BKL franchisees to make accessibility improvements, further demonstrating that it has the power to ensure that franchised restaurants comply with access regulations. *See* Dep. of Willie Cook 38:1-6, 41:8-15, 78:11-15, 114:9-12, 115:2-4 (Dec. 14, 2009) (Fox Decl. Ex. 11); Dep. of Patricia Corcoran 27:3-8, 31:21-24, 49:1-5, 122:6-11 (Dec. 10, 2009) (Fox Decl. Ex. 12); Dep. of Sunil Gulati 57:5-14, 70:17-25, 71:1-12;

82:20-25 (Dec. 16, 2009) (Fox Decl. Ex. 13); Dep. of Anthony Sacca 31:3-25, 33:7-18 (Jan. 28, 2010) (Fox Decl. Ex. 14).

ARGUMENT

As this Court previously ruled, a violation of the ADA constitutes a violation of the CDPA and Unruh entitling a plaintiff to relief under those statutes, and as a matter of law, a plaintiff need not also establish that a defendant acted intentionally or aided or caused the violation. Further, even CDPA and Unruh claims that are not premised on ADA violations do not require proof of a defendant's active participation in discriminatory acts. Finally, even assuming *arguendo* that a showing that a defendant aided or caused a violation was required under the CDPA and Unruh, there are material issues of disputed fact precluding summary judgment on this issue. For these reasons, Defendant's motion should be denied.

I. Summary Judgment Standard.

Summary judgment is proper only if there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The party seeking summary judgment always bears the initial responsibility of identifying the evidence which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Rather, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255; *see also Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 456 (1992). Issues of credibility and intent should not be resolved on summary judgment. *Harris v. Itzhaki,* 183 F.3d 1043, 1051 (9th Cir. 1999).

II. Violations of the ADA Constitute Violations of Unruh and the CDPA Without Any Additional Showing That The Defendant Aided or Caused The Violation.

As relevant here, the rights secured by the CDPA and Unruh are set forth in sections 54 and 51 of the California Civil Code, respectively. After the enactment of the ADA, the California Legislature amended those sections to provide that a violation of the ADA constitutes

a violation of those statutes as well. *See* Cal. Civ. Code §§ 51(f) & 54(c). A violation of the ADA does not require any showing that a defendant aided or caused the violation.[3] As a simple matter of logic, then, violations of the CDPA and Unruh that are premised on ADA violations necessarily do not require a showing that a defendant aided or caused the ADA violation.

Defendant, however, argues that this is not the case. Defendant points out that the California Legislature only incorporated the ADA into sections 54 and 51 of the CDPA and Unruh, but did not also incorporate the ADA into the enforcement provisions of the CDPA and Unruh, sections 54.3 and 52 respectively. As a result, Defendant asserts that the amendment had no impact on these enforcement provisions, which generally provide a remedy against entities that interfere with or deny rights under these statutes, or that aid or incite a denial. Def.'s Mot. at 7-8. Thus under Defendant's interpretation, a plaintiff could demonstrate a violation of the CDPA or Unruh by establishing an ADA violation, which would not require evidence that the Defendant aided or caused the violation. However, if she did not also demonstrate that the defendant aided or caused the violation, then she would have no remedy under state law.

Defendant's argument hinges on the dubious proposition that the provisions of the CDPA and Unruh describing the rights secured by those statutes are entirely independent from the enforcement provisions of these statutes, and thus the amendment to sections 54 and 51 of the CDPA and Unruh incorporating the ADA had no impact on the enforcement sections of those statutes. Remarkably, the primary case on which Defendant relies for this proposition -- *Munson v. Del Taco, Inc.*, 208 P.3d 623 (2009) -- actually rejected this very argument and reached the exact opposite conclusion.

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[3] Defendant does not dispute this point. *See* Def. Burger King Corp.'s Not. of Mot., Mot. for Partial Summ. J. and Mem. Of P. & A. ("Def.'s Mot.") (Docket no. 301) at 5 ("BKC does not contest Plaintiffs' right to name it as a defendant on their ADA claims, based on its status as a lessor, even though any accessibility violations that might exist would have been caused by the franchisees/lessees that operate the restaurants, and not by BKC.").

Although Unruh claims usually require proof of intentional discrimination,[4] ADA violations do not, and the issue in *Munson* was rather whether an Unruh claim that was premised on an ADA violation required proof of intentional discrimination. The California Supreme Court considered and rejected the exact statutory interpretation argument raised by Defendant here: that because the amendment expressly incorporated the ADA only into section 51 but not section 52, the enforcement provision of Unruh, then the amendment had no impact on section 52 and even Unruh claims based on ADA violations still required proof of intentional discrimination.

The *Munson* court rejected the argument that sections 51 and 52 operated independently of each other:

> [S]ections 51 and 52 have, throughout their history, functioned as an integral legal scheme; section 51 has defined the civil rights of Californians to equal treatment in public accommodations, and section 52 has established the liabilities of those who violate such civil rights. Section 52 has always referred expressly to violations of section 51 and provided remedies for those violations. As we said in *Harris,* section 52 "provide[s] an enforcement mechanism for section 51."

Id., 208 P.3d at 629.

The court also rejected the interpretation advanced by Defendant here because it would result in violations of Unruh without a remedy: "The most natural reading of the statutory language -- that section 52 provides remedies for *all* categories of discrimination prohibited under section 51 -- is also the reading that best accords with the law's history." *Id*. at 629-30 (emphasis added).

The court ultimately concluded that "[t]he Legislature's intent in [amending Unruh] was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." *Id*. at 625.

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[4] *See Harris v. Capital Growth Investors XIV*, 805 P.2d 873, 891 (1991).

Thus under the authoritative *Munson* opinion, a plaintiff that demonstrates an ADA violation is entitled to the remedies set forth in the CDPA and Unruh, and need not prove that the defendant acted intentionally, or aided or caused the violation, in order to obtain those remedies.

This Court has already rejected Defendant's argument. In its class certification papers, Defendant argued that Plaintiffs' state law claims under Unruh and the CDPA should be stricken because these statutes, by their terms, limit liability to those who actively make or incite discrimination, in contrast to the ADA, which imposes strict liability upon lessors of public accommodations. *See Castaneda v. Burger King Corp.*, --- F.R.D. ---, 2009 WL 3151168, *18 (N.D. Cal. Sept. 25, 2009). Citing *Munson*, this Court rejected Defendant's argument, holding that "[b]ecause the Unruh Act adopted the full expanse of the ADA, the California Supreme Court held that *all* ADA violations -- whether or not involving intentional discrimination -- were violations of the Unruh Act as well." *Id.* (emphasis in original).

III. As a Matter of Law, Even for CDPA and Unruh Claims That Are Not Premised On ADA Violations, Plaintiffs Need Not Establish Defendant's Active Participation In Discriminatory Acts.

As set forth above, the enforcement provisions of the CDPA and Unruh provide a remedy against entities that interfere with or deny rights under these statutes, or that aid or incite a denial. Defendant asserts that the access violations at issue were caused by BKL franchisees, that it was merely a passive actor, and therefore it is not liable under these state statutes because it did not interfere with or deny rights under these statutes, or aid or incite a denial. Def.'s Mot. at 5-7. As set forth above, CDPA and Unruh claims premised on ADA violations do not require a showing that a defendant aided or caused the violation. Further, even CDPA and Unruh claims that are not based on ADA violations do not require a showing that the defendant was an active participant in the violation.

Numerous courts have held that an entity that owns or leases a public accommodation, but played no role in creating access violations at the public accommodation, nevertheless is liable under the CDPA and/or Unruh for those violations.

For example, in *Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000), a disabled plaintiff who attempted to visit a realty office that had no designated accessible parking brought suit under the ADA and Unruh against the trustees of the trust that owned the property on which the realty office was located, and the lessees of the office. The lease on the property assigned responsibility for compliance with all laws to the tenant, and the trustees argued that as a result, they were entitled to summary judgment on the plaintiff's claims. *Id*. at 830. Despite the fact that there was no evidence that the trustees played an active role in creating the access violation, the district court denied summary judgment and awarded the plaintiff statutory damages under Unruh, and the Ninth Circuit affirmed. *Id.* at 835; *see also Botosan v. Fitzhugh,* 13 F. Supp. 2d 1047, 1051-54 (S.D. Cal. 1998) (holding that plaintiff stated claims under the CDPA and Unruh against a landlord despite the fact that lease allocated all responsibility for complying with the law to the tenant).

Similarly, in *Hodges v. El Torito Restaurants, Inc.*, 1998 WL 95398 (N.D. Cal. Feb. 23, 1998), the court considered whether "the current owner of a building can be held liable [under the CDPA] for the previous owner's failure to make the restaurant accessible." *Id*. at *3. The court held that in order to effectuate the purpose of California's accessibility requirements, a current owner must be liable for a previous owner's access violations. Otherwise "businesses would be able to circumvent California's accessibility requirements through sham sales and transfers." *Id.* This would seriously undermine access laws. In *Hodges*, for example, if the plaintiff could only sue the previous owner, "it is unlikely that plaintiffs could obtain money damages. Furthermore, because [the previous owner] no longer has control over the building, plaintiffs could not achieve the ultimate goal of the various state laws at issue-an accessible restaurant. It is therefore clear that the best way to effectuate the goals of California's accessibility laws is to hold the current owners of buildings liable for existing violations." *Id* at *4.

Nor was this an unfair result. Prior to purchasing the restaurant, the current owner in *Hodges* could have demanded that the previous owner bring the building into compliance with access requirements. *Id.*

These cases demonstrate that Defendant's argument that it is not liable under the CDPA or Unruh because it allegedly did not actively participate in creating the access violations is simply wrong as a matter of law. The landlords in the *Botosan* cases did not actively participate in creating the access violations at issue and yet they were found to be proper defendants under the CDPA and/or Unruh. Even more telling, the current owner in *Hodges* could not possibly have participated in creating the access violations in the restaurant prior to its acquisition of the building, yet it too was found liable under the CDPA.

As discussed in *Hodges*, the position advocated by Defendant -- that entities are only liable under the CDPA and Unruh for access violations which they actively participated in creating -- would substantially weaken California access statutes. In this case, for example, while Defendant claims not to have been responsible for the access violations and points the finger at BKL franchisees, the franchisees can turn around and assert that the violations were actually the fault of the contractors who performed the work.

Further, again as forewarned in *Hodges*, there would be an incentive for companies to avoid liability under the CDPA and Unruh through sham transactions. For example, a restaurant chain could use an undercapitalized company to build a restaurant, purchase it from that company, and then claim that it was not responsible for access violations in the restaurant because it was not an active participant in creating the violations.

Finally, contrary to Defendant's claim that it would be "unfairly punitive" to hold it responsible for damages,[5] doing so would give it an incentive to do what it has always had the power to do, and what it should have done long ago: make sure its franchised restaurants comply with access requirements. For many years, it has had in place detailed and effective

[5] Def.'s Mot. at 9.

policies that ensure, for example, that hamburgers in franchised restaurants are cooked at the right temperature, and that the correct color schemes are used when a franchised restaurant is remodeled. Fox Decl. Ex. 3 at 6, 14. It is entirely in keeping with California access laws that Defendant apply the same diligence to ensuring that franchised restaurants are accessible to persons with disabilities.

IV. There Are Disputed Issues of Material Fact as to Whether Defendant Interfered with or Denied Rights Secured by the CDPA or Unruh, or Aided or Incited a Denial.

Even assuming *arguendo* that with respect to CDPA and Unruh claims not premised on ADA violations, Plaintiffs must show that Defendant interfered with or denied rights under these statutes, or aided or incited a denial, there are disputed issues of material fact precluding summary judgment on this issue.

Several courts have held that an inadequate response to complaints of civil rights violations constitutes an intentional interference or denial of rights under Unruh. *See, e.g.*, *Nicole M. v. Martinez Unified School Dist.*, 964 F. Supp. 1369, 1388-89 (N.D. Cal. 1997) (holding that "an inadequate response to complaints of sexual harassment as a denial of" rights secured by Unruh); *Annamaria M. v. Napa Valley Unified School Dist.*, 2006 WL 1525733, *13 (N.D. Cal. May 30, 2006) (same); *Michelle M. v. Dunsmuir Joint Union School Dist.*, 2006 WL 2927485, *7-8 (E.D. Cal. Oct. 12, 2006).

In *Michelle M.*, for example, the plaintiff's son was sexually harassed by another student at a high school. *Id.* at *1. Although by the time the plaintiff's family complained to the defendant school district the harassment had stopped, the school district had previously received similar complaints about the harassing student, but had responded inadequately to the complaints. *Id.* at *1-2, 8. The court denied the defendant's request for summary adjudication, holding that the inadequate response to the harassment complaints constituted an intentional denial of rights secured by Unruh. *Id.* at *7-8.

Here, Plaintiffs have presented substantial facts that Defendant received complaints about the accessibility of Burger King restaurants, and that it inadequately responded to these complaints.

The facts submitted by Plaintiffs establish that since at least 1995, Defendant has been repeatedly sued for violations of access regulations in California and elsewhere, including violations identical to those found in the ten restaurants at issue here.

Further, Plaintiffs have submitted facts showing that Defendant's response to these complaints has been woefully inadequate.

For example, Plaintiffs have submitted facts establishing that Defendant had the power to ensure that franchised restaurants complied with access requirements. Defendant has in fact used its power to ensure compliance with non-accessibility requirements by, for example, conducting inspections of franchised restaurants on a regular basis. Indeed, after this lawsuit was filed, Defendant demonstrated its power to ensure compliance by requiring the franchisees of the restaurants at issue here to bring their restaurants into compliance with access regulations.[6]

Despite the fact that Defendant had the power to ensure that BKL restaurants complied with access requirements, it largely failed to do so, at least prior to the filing of this lawsuit. For example:

- Defendant has the "right to approve whatever final plans the franchisee intends to use," and yet it "does not review or approve plans for compliance with . . . accessibility laws." McGrory Decl. (Docket no. 182) ¶¶ 4-5.
- While BKL franchisees "must adhere to strict standardized operating procedures and requirements" set forth in the MOD, Fox Decl. Ex. 3 at 6, Defendant concedes that the MOD "references accessibility issues only generally," Docket no. 184 at 4.
- The inspections Defendant conducts before and after a remodel at BKL restaurants do not cover access issues. Carberry Dep. 23:7-9, 24:3-18, 31:19-25,

[6] *See* Dep. of Willie Cook 38:1-6, 41:8-15, 78:11-15, 114:9-12, 115:2-4 (Dec. 14, 2009) (Fox Decl. Ex. 11); Dep. of Patricia Corcoran 27:3-8, 31:21-24, 49:1-5, 122:6-11 (Dec. 10, 2009) (Fox Decl. Ex. 12); Dep. of Sunil Gulati 57:5-14, 70:17-25, 71:1-12; 82:20-25 (Dec. 16, 2009) (Fox Decl. Ex. 13); Dep. of Anthony Sacca 31:3-25, 33:7-18 (Jan. 28, 2010) (Fox Decl. Ex. 14).

32:1-2 (Fox Decl. Ex. 8). Additionally, while Defendant requires an architect to sign off on compliance with accessibility requirements with a "Certificate of ADA Compliance" for remodels of both BKLs and corporate-owned stores, it only actually verifies compliance when it comes to its corporate restaurants. Hailend Dep. 81-83 (Fox Decl. Ex. 9).

- Finally, Defendant acknowledges that it does not provide design specifications for many of the barriers reported by putative class members. McGrory Decl. ¶ 13.

From these facts, a fact finder could conclude that Defendant responded inadequately to complaints of access violations in franchised restaurants, thus precluding summary judgment.

V. Plaintiffs Do Not Dispute That The Ten BKL Restaurants Currently At Issue Are Not Subject To The ADA's New Construction Requirements.

Plaintiffs' Amended Complaint sought class certification as to more than 90 leased Burger King restaurants in California. Because some of these restaurants were constructed after January 26, 1993, the operative date for the ADA's new construction provisions, the Complaint alleged violations of these provisions.

The class actually certified by the Court covers ten BKL restaurants, none of which was constructed after January 26, 1993, and had Defendant conferred with Plaintiffs prior to filing its Motion, Plaintiffs would have stipulated that the ADA's new construction provisions are inapplicable to these ten restaurants. Nor is this fact material to the litigation, because Plaintiffs allege that Burger King has made alterations at the restaurants such that the alteration provisions of the ADA apply to these stores,[7] as Plaintiffs are prepared to prove at trial.

[7] *See* 42 U.S.C. § 12183(a)(2); 28 C.F.R. § 36.406(a).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendant's Motion be denied.

Respectfully submitted,

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