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14 **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,)

18 Plaintiffs,)

19 vs.)

20 BURGER KING CORPORATION,)

21 Defendant.)

Case No. C 08-4262 WHA (JL)

**PLAINTIFFS’ REPLY BRIEF IN
SUPPORT OF MOTION TO COMPEL**

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

Chief Magistrate Judge James Larson
Courtroom F, 15th Floor

22 **INTRODUCTION**

23 Plaintiffs are entitled to discover factual information -- the quantitative measurements of
24 the elements at issue in this case -- without any showing of substantial need or unavailability of
25 equivalent information. Both Plaintiffs’ and Defendant’s cases demonstrate that underlying
26 factual information is simply not privileged. Quantitative measurements such as the width of a
27 parking space or the height of a lavatory do not reflect attorneys’ or consultants’ mental
28 impressions or analyses and must be produced.

1 Plaintiffs have also demonstrated that they are entitled to production of the surveys
 2 themselves -- that is, the documents and photographs, not just the information -- because the
 3 information would serve to establish liability for damages under state law and -- now that the
 4 restaurants have been altered -- is not otherwise available.

5 **1. Plaintiffs Are Entitled to Discover Factual Information With No Further Showing.**

6 Factual information -- here, the quantitative measurements of the elements at issue -- is
 7 not privileged. Plaintiffs demonstrated this in their two previous briefs,¹ and Defendant BKC's
 8 cases support this proposition as well. Most importantly, the Supreme Court, in the *Upjohn* case
 9 on which BKC relies,² specifically stated that the attorney-client privilege "only protects
 10 disclosure of communications; it does not protect disclosure of the underlying facts by those who
 11 communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). The
 12 Court explained:

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

17 *Id.* at 396 (emphasis added; quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp.
 18 830, 831 (E.D. Pa. 1962).) *AMCO Insurance Co. v. Madera Quality Nut LLC*, No. 1:04-cv-
 19 06456-SMS, 2006 WL 931437 (E.D. Cal. Apr. 11, 2006) -- which also featured prominently in
 20 BKC's briefing³ -- makes clear that "[t]he privilege protects communications; it does not protect
 21 facts related to a communication, . . . it does not prevent disclosure of underlying facts which
 22 may be referred to within a qualifying communication." *Id.* at *10.

23 ¹ See Pls.' Mot. to Compel (Docket No. 121) at 10-13; Pls.' Br. in Resp. to Def.
 24 Burger King Corp.'s Opening Supplemental Br. in Opp'n to Pls.' Mot. to Compel Survey and
 25 Remediation Information, and in Supp. of BKC's Mot. to Compel Return of Inadvertently
 26 Produc. Privileged Documents and for Protective Ord. ("Pls.' Resp. Br.," Docket No. 135) at 6-7.

27 ² See Def. Burger King Corp.'s Supplemental Br. in Opp'n to Pls.' Mot. to Compel
 28 Survey and Remediation Information, and in Supp. of its Mot. to Compel the Return of
 Inadvertently Produc. Privileged Documents and for Protective Ord. ("BKC's Opp'n Br.,"
 Docket No. 142) at 5.

³ See BKC Opp'n Br. at 5-8.

1 BKC's work product cases also support the production of the underlying factual
 2 information at issue. For example, the court in *Maertín v. Armstrong World Industries, Inc.*, 172
 3 F.R.D. 143 (D.N.J. 1997), *cited in* BKC Opp'n Br. at 8, held that the documents at issue were
 4 privileged, but that "although the work product doctrine protects the physical documents, it 'does
 5 not protect disclosure of the underlying facts in the documents.' Thus, the plaintiffs still have an
 6 opportunity to unearth the underlying facts in the documents by other means of fact discovery."
 7 *Id.* at 150 (quoting *Upjohn*, 449 U.S. at 395); *see also* *Secs. and Exch. Comm'n v. Schroeder*,
 8 No. C07-03798 JW (HRL), 2009 WL 1125579, at *7 (N.D. Cal. Apr. 27, 2009) (holding that
 9 although attorneys' interview notes were privileged, the defendant could interview the witnesses
 10 and ask them "what they told the . . . attorneys during the interviews"), *cited in* BKC Opp'n Br.
 11 at 7, 10.

12 In sum, Plaintiffs are entitled to discover the underlying facts -- measurements of relevant
 13 elements -- without any demonstration of substantial need or diligence. The proper vehicle to
 14 provide this information is Plaintiffs' Interrogatory No. 24.⁴ Plaintiffs have previously
 15 demonstrated that this Court should approve this Interrogatory pursuant to Rule 33(a)(1);⁵ BKC's
 16 Opposition Brief offers no new arguments on this point.

17 **2. Plaintiffs Are Entitled to Production of the Surveys Because they Have Substantial**
 18 **Need and Cannot Obtain Equivalent Information.**

19 Plaintiffs have previously demonstrated that they have substantial need for the
 20 measurements they seek because they serve to establish liability for the alleged violations.⁶
 21 Plaintiffs have also demonstrated that they did not know the identity of the restaurants at issue
 22 until December 17, 2008 by which time BKC or its franchisees had begun altering the very

23 ⁴ Decl. of Amy F. Robertson in Supp. of Pls.' Mot. to Compel ("Robertson Decl.,"
 24 Docket No. 121-1) Ex. 19.

25 ⁵ *See* Pls.' Mot. to Compel at 16-17; Pls.' Resp. Br. at 9-10.

26 ⁶ *See* Pls.' Mot. to Compel at 1-3; Pls.' Resp. Br. at 1-2. BKC's assertion that the
 27 measurements are not relevant to injunctive relief, *see* BKC Opp'n Br. at 3 n.2, overlooks the
 28 fact that they are relevant to the damages remedies under the Unruh Civil Rights Act, Cal. Civ.
 Code § 52, and the California Disabled Persons Act, *id.* § 54.3.

1 features at issue in the litigation. They thus had -- and have -- no way to obtain measurements of
2 the relevant features during the first two and a half years of the class period. Because Plaintiffs
3 were aware that some BKL restaurants were being altered, *see* Joblove Decl. (Docket No. 143)
4 ¶ 5, but did not know -- and indeed still do not know -- which ones, they could not know which
5 restaurants to survey to gain information of pre-suit conditions. Any surveys of *altered*
6 restaurants would not yield an accurate picture of the conditions of the BKL restaurants for the
7 majority of the class period -- from April 2006 until whenever in 2008 or 2009 the BKL
8 restaurant was altered.

9 As demonstrated in Plaintiffs' previous briefs, this satisfies the standards in Rules
10 26(b)(3)(A)(ii) and 26(b)(4)(B) for production of the surveys and related photographs.⁷ BKC's
11 attempts to distinguish Plaintiffs' cases fail.

12 For example, BKC attempts to distinguish *Huggins v. Federal Express Corp.*, 250 F.R.D.
13 404, 406-07 (E.D. Mo. 2008), and *Zoller v. Conoco, Inc.*, 137 F.R.D. 9, 10 (W.D. La. 1991), on
14 precisely the grounds that make them most applicable here: that the facilities at issue have
15 changed. *See* BKC Opp'n Br. at 14. As in *Huggins*, Plaintiffs cannot "re-create the scene" at the
16 restaurants at issue, *id.* at 406; as in *Zoller*, the "location[s] [have] changed dramatically" after
17 the events at issue, *id.* at 9. These cases support production of the surveys and photographs.

18 BKC attempts to explain away *National Congress for Puerto Rican Rights v. City of New*
19 *York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000) on the grounds that the documents ordered to be
20 produced were "purely 'statistical analyses.'" BKC Opp'n Br. at 15. Yet statistical analyses --
21 requiring, as they do, analysis -- by definition require far more by way of opinion and mental
22 impressions than do the unanalyzed physical measurements and photographs Plaintiffs seek here.
23 BKC stresses that the court in *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental*
24 *Concrete Products, Inc.*, 140 F.R.D. 373, 377 (E.D. Wis. 1991), ordered the plaintiff to produce
25 only those portions of documents that did not disclose mental impressions or opinions, *see* BKC
26 Opp'n Br. at 15-16, a segregation task that will be far easier for BKC to accomplish with

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28 ⁷ *See* Pls.' Mot. to Compel at 13-16; Pls.' Resp. Br. at 3-6.

1 quantitative measurements and photographs than with the consumer survey interviews at issue in
2 *Milwaukee Concrete*.⁸

3 **3. Measurements and Photographs Do Not Contain or Reflect Protected Opinions.**

4 Plaintiffs seek measurements and photographs that document the physical condition of
5 the restaurants at issue, for example, the width of parking spaces or the height of lavatories.

6 Despite making this clear to BKC, throughout its briefing, BKC asserts that Plaintiffs are
7 seeking opinion work product and mental impressions. *See, e.g.* BKC Opp'n Br. at 7, 9, 15-16.
8 The only record support for BKC's assertions is a single paragraph in its attorney's declaration
9 reciting its consultants' duties and the fact that they analyzed accessibility issues beyond those in
10 Plaintiffs' complaint. *See* Perlman Decl. (Docket No. 124) ¶ 7. Plaintiffs seek neither analyses
11 nor issues outside their complaint; they seek only data. BKC does not explain how the recitation
12 of the dimensions recorded from tape measures and digital levels and photographs of physical
13 conditions can reflect analyses or mental impressions.

14 **4. BKC Misrepresented Judge Alsup's Order On Motion for Continuance.**

15 On July 16, 2009, Plaintiffs filed a motion to continue the briefing on class certification
16 to permit this Court to resolve the pending motion to compel. (Docket No. 125.) Judge Alsup
17 denied the motion, opining that Plaintiffs had had ample time for class discovery, and had not
18 brought the present motion in time to be heard before class certification briefing. Order Denying
19 Motion to Continue (Docket No. 133) at 1. Judge Alsup did not address the question whether
20 Plaintiffs should have conducted, or had enough time or information to conduct, their own
21 surveys, so BKC's assertion that the Judge noted that Plaintiffs' "failure to conduct their own
22 investigations appears to be the result of their own lack of diligence," BKC Opp'n Br. at 11, is a
23

24 ⁸ BKC argues that Plaintiffs "falsely claim[ed]," BKC Opp'n Br. at 15, that *In re*
25 *Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844 (8th Cir. 1988),
26 supported Plaintiffs' substantial need argument. BKC is wrong. While the Eighth Circuit
27 ultimately resolved the case on waiver grounds, it explicitly stated that the computer tape
28 containing data gathered by Chrysler's attorneys was "not opinion work product," and that "the
government made the requisite showing of substantial need and inability to secure substantial
equivalent without undue hardship." *Id.* at 846.

1 gross distortion. Nor -- contrary to BKC's claims -- did the Judge hold that "Plaintiffs [had]
2 fail[ed] to make a threshold showing of relevancy." *Id.* at 12. Rather, the Judge stated that he
3 did not see how the information at issue in the present motion "would make a difference on *class*
4 *certification*," but noted that this was "without prejudice to the possibility that any nuggets found
5 in the sought-for materials can be submitted in the reply brief." Order at 1 (emphasis added).
6 The Judge did not, contrary to BKC's statement, comment on the relevance of this information to
7 the merits.

8 Perhaps acknowledging that Judge Alsup's views on relevance were limited to class
9 certification, BKC argues that production of the requested information would be premature until
10 a class is certified. BKC Opp'n Br. at 12. This is not appropriate in the absence of a motion to
11 stay. In any event, Judge Alsup has ordered that discovery in this case should address both class
12 and merits issues. *See* Tr. of Proceedings (Hr'g on Pl.'s Mot. to Compel, Nov. 10, 2008) at
13 19:25 - 20:5 (ordering discovery to commence and stating "I'm not going to limit it to class
14 discovery, either. Right now you're entitled to ask for broad discovery on every issue in the case
15 including class issues.").

16 **5. The Information Plaintiffs Seek Is Not Available from Other Sources**

17 Plaintiffs have previously established that the requested measurements are not available
18 in other BKC documents, documents received from building departments, or the few documents
19 that BKC has permitted its franchisees to produce. Decl. of Julia Campins in Supp. of Pls.' Mot.
20 to Compel (Docket No. 122) ¶ 3, Robertson Decl. ¶ 38. BKC now argues that Plaintiffs could
21 have compiled the list of Burger King leased ("BKL") restaurants from the public record and thus
22 presumably surveyed them before receiving the official list from BKC in December, 2008. *See*
23 BKC Opp'n Br. at 13. As Plaintiffs have previously explained, while they obtained some leases
24 from some county recorder's offices, obtaining all of the leases would have required them to
25 contact the county recorder's office for each county in which any one of the more than 600
26 California Burger King restaurants was located and procure from that office a copy of any
27 recorded leases. This, in turn, could have required in-person visits to county offices around the
28

1 state. *See* Decl. of Julia Campins in Supp. of Pl.’s Mot. to Compel Removal of Confidentiality
 2 Designation (Docket No. 54) ¶¶ 2-5 (detailing process for obtaining leases from county offices).
 3 All this when the alternative is the simple step that Plaintiffs began requesting months before
 4 they filed suit and that Judge Alsup ordered almost immediately after hearing Plaintiffs’ motion:
 5 getting the definitive BKL list from BKC itself.

6 Most tellingly, BKC never addresses the fact that Plaintiffs requested to be informed
 7 before any changes were made to the BKL restaurants so that Plaintiffs could conduct their own
 8 surveys before any changes. Decl. of Timothy P. Fox in Supp. of Pls.’ Mot. to Compel (Docket
 9 No. 121-2) ¶ 5. If BKC had done this simple thing, this motion would be unnecessary.

10 **6. BKC Provides No Justification For Its Noncompliant Privilege Log**

11 Plaintiffs previously demonstrated that BKC’s privilege log includes a number of entries⁹
 12 that violate Rule 26(b)(5)(A)(ii) and Paragraph 16 of the Supplemental Order to Order Setting
 13 Initial Case Management Conference in Civil Cases Before Judge William Alsup (“Supplemental
 14 Order,” Docket No. 3). In particular, these entries failed to provide authors, recipients, subjects,
 15 and dates for each individual document, in direct violation of Judge Alsup’s Supplemental Order
 16 that this information be provided “[w]ith respect to *each communication for which a claim of*
 17 *privilege or work product is made.*” *Id.* ¶ 16 (emphasis added).

18 BKC provides no authority for the proposition that the group entries identified above
 19 satisfy Judge Alsup’s Supplemental Order. That Order provides further that “[f]ailure to furnish
 20 this information at the time of the assertion will be deemed a waiver of the privilege or
 21 protection.” *Id.* ¶ 16.

22 For this reason and the reasons set forth in Plaintiffs’ previous briefs, BKC has waived
 23 the privilege with respect to the documents covered by items 1707-10, 1713-17, and 1737-38. In
 24 the alternative, at the very least, BKC should be ordered to provide a compliant log for those
 25 documents.

27 ⁹ Plaintiffs move with respect to the documents covered by items 1707-10, 1713-
 28 17, and 1737-38, *see* Robertson Decl. Ex. 12.

1 **CONCLUSION**

2 For the reasons set forth above and in Plaintiffs’ prior briefs in support of their Motion to
3 Compel, Plaintiffs respectfully request that this Court order:

- 4 1. That BKC produce documents and photographs relating to the survey and
5 alteration of the restaurants at issue, redacted to delete opinion work product but
6 to leave factual information including measurements of the conditions in the
7 restaurants; or
- 8 2. In the alternative, that BKC produce the information contained in these documents
9 in response to pending interrogatories;
- 10 3. That Plaintiffs’ Interrogatory No. 24 be approved pursuant to Rule 33(a)(1); and
- 11 4. That Defendant has waived its privileges and must produce all documents covered
12 by items 1707-10, 1713-17, and 1737-38 of its privilege log; or
- 13 5. In the alternative, that BKC must provide a compliant privilege log including
- 14 a. Document-by-document descriptions of items 1707-10, 1713-17, and
15 1737-38 including all of the information required by Judge Alsup’s
16 Supplemental Order; and
- 17 b. All documents relevant to the assertion of the privileges themselves
18 including, for example, any and all joint defense agreements.
- 19 6. *In camera* review of the following documents:
- 20 a. The surveys BKC is withholding from production;
- 21 b. The “Scope of Work Summary”¹⁰ and other documents that were
22 inadvertently produced and filed under seal by Plaintiffs; and
- 23 c. BKC’s joint defense agreement(s) with franchisees.
- 24
- 25

26 _____
27 ¹⁰ BKC has stated that the “Scope of Work Summaries” provided to the franchisees
28 were different from the full surveys. *See* Perlman Decl. ¶¶ 7-11. To Plaintiffs’ knowledge, the
Court does not currently have before it an example of a full survey.

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Respectfully submitted,
FOX & ROBERTSON, P.C.

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

Dated: August 5, 2009

Counsel for Plaintiffs