

1 Bill Lann Lee – CA State Bar No. 108452
2 Andrew Lah – CA State Bar No. 234580
3 Julia Campins – CA State Bar No. 238023
4 Joshua Davidson – CA State Bar No. 275168
5 LEWIS, FEINBERG, LEE, RENAKER &
6 JACKSON, P.C.
7 476 9th Street
8 Oakland, CA 94607
9 Telephone: (510) 839-6824
10 Facsimile: (510) 839-7839
11 Email: blee@lewisfeinberg.com

Timothy P. Fox – CA State Bar No. 157750
Amy Robertson (*pro hac vice*)
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
Telephone: (303) 595-9700
TTY: (877) 595-9706
Facsimile: (303) 595-9705
Email: tfox@foxrob.com

[Additional attorneys listed within]

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Mohan Vallabhapurapu; *et al.*, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

Burger King Corporation,

Defendant/Third Party Plaintiff,

vs.

Antelope Valley Restaurants, Inc., *et al.*,

Third Party Defendants.

Case No. C-11-00667-WHA (JSC)

**JOINT NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
STIPULATION AND SETTLEMENT
AGREEMENT**

Date: July 5, 2012
Time: 8:00 am
Courtroom: 8
Judge: Hon. William Alsup

NOTICE IS HEREBY GIVEN that on July 5, 2012, at 8:00 a.m., or as soon thereafter as
the matter may be heard in the above-entitled Court, Plaintiffs and Defendant Burger King
Corporation (“BKC”) will and hereby do move the Court as follows:

1. To preliminarily approve the Settlement Agreement (“Settlement” or “Settlement
Agreement”) (attached to the Proposed Preliminary Approval Order (“Proposed Order”) as
Exhibit A) between Plaintiffs, on behalf of themselves and the 86 Proposed Classes (which
Plaintiffs seek to certify by the contemporaneously filed Motion for Settlement Class
Certification), and Defendant BKC, by and through their respective counsel.

2. To set dates for the submission of any objections to the Settlement Agreement, as

1 well as any opt-outs to the monetary provisions of the Settlement Agreement.

2 3. To set a Final Approval hearing.

3 4. To authorize the dissemination plan described below.

4 5. To approve the short- and long- form Notices attached to the Proposed Order as
5 Exhibits B through D.

6 This motion is based on the Settlement Agreement, the Memorandum of Points and
7 Authorities filed herewith and in support of this Motion, the Declaration of Timothy Fox in
8 Support of the Joint Motion for Preliminary Approval of Settlement Agreement, and all other
9 papers filed in this action.

10 Dated: June 14, 2012

LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.

12 By: _____/s/

13 Bill Lann Lee
14 Andrew Lah
15 Julia Campins
16 Joshua Davidson
17 LEWIS, FEINBERG, LEE,
18 RENAKER & JACKSON, P.C.
19 476 -- 9th Street
20 Oakland, CA 94607
21 Telephone: (510) 839-6824
22 Facsimile: (510) 839-7839

23 Timothy P. Fox
24 Amy F. Robertson
25 FOX & ROBERTSON, P.C.
26 104 Broadway, Suite 400
27 Denver, CO 80203
28 Telephone: (303) 595-9700
Facsimile: (303) 595-9705

Mari Mayeda
P O Box 5138
Berkeley, CA 94705
Telephone: (510) 848-3331
Facsimile: (510) 841-8115

Attorneys for the Plaintiff Classes

By: _____/s/

Michael D. Joblove (pro hac vice)
Jonathan E. Perlman (pro hac vice)
GENOVESE JOBLOVE &
BATTISTA, P.A.

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100 SE Second Street, 44th Floor
Miami, FL 33131

Clement L. Glynn
Adam Friedenber
GLYNN & FINLEY, LLP
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596

*Attorneys for Defendant Burger King
Corporation*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION**
2 **FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT**

3 The Plaintiffs, on behalf of themselves and the 86 Proposed Classes of restaurant patrons
4 for which Plaintiffs are simultaneously seeking certification, have reached a settlement agreement
5 with Defendant Burger King Corporation (“BKC”) that provides for (a) injunctive relief,
6 including the elimination of alleged accessibility barriers, the use of mandatory checklists with
7 specific accessibility items for remodeling, alterations, repairs and maintenance, and the
8 monitoring of compliance over four years; and (b) a cash payment of \$19,000,000 for the
9 settlement fund for damages to the Named Plaintiffs and the classes as well as attorneys’ fees and
10 costs. This settlement encompasses the restaurants remaining after the settlement of *Castaneda v.*
11 *Burger King*, 08-4262 WHA, previously approved by the Court.

12 BKC does not admit liability and continues to maintain that BKC has not violated any
13 accessibility laws, but has entered into this Settlement Agreement in the interest of bringing this
14 litigation to conclusion on reasonable terms.

15 This Settlement ensures that 77 Burger King® restaurants (“Remaining BKLs”) are
16 accessible to Class Members.¹ In addition, the Settlement compares favorably to settlements in
17 similar cases in terms of total recovery, expected average recovery per class member, and ratio of
18 settlement recovery to expected recovery if the class successfully litigated the case. For these and
19 other reasons discussed below, Class Counsel believes that this Settlement—negotiated at arm’s
20 length over more than four months with the assistance of a federal Magistrate Judge selected by
21 the Court after several years of investigation and litigation—to be a fair, adequate, and reasonable
22 resolution of the claims against Defendant. Accordingly, pursuant to Federal Rule of Civil
23 Procedure 23(e), the parties jointly request that the Court

- 24 (i) preliminarily approve the Settlement of this litigation;
25 (ii) approve three notices of the proposed Settlement, consisting of a long-form notice
26 directed to existing damages claimants who have already contacted Class Counsel

27 ¹ Of the 86 Remaining BKLs that have existed during the tolled class period, 9 are not subject to
28 remediation under the Settlement Agreement because they have closed or are no longer leased
restaurants.

1 concerning the injunctive and monetary relief provided by the proposed Settlement
 2 (Exhibit B), a long-form notice directed to class members who have not previously
 3 contacted Class Counsel concerning the injunctive and monetary relief (Exhibit
 4 C), and a short-form notice suitable for posting directed to class members who
 5 have not previously contacted Class Counsel (Exhibit D);

6 (iii) authorize dissemination of these notices in the manner described below;

7 (iv) set deadlines for Class Members to object to the Settlement Agreement, and for
 8 Damages Claimants to opt out of the monetary provisions of the Settlement
 9 Agreement; and

10 (v) set a fairness hearing to provide Class Members an opportunity to object and,
 11 should the Court see fit, for entry of final approval of the proposed Settlement Agreement and the
 12 petition of Class Counsel for an award of attorneys' fees and costs.

13 **I. HISTORY AND STATUS OF THE CASE.**

14 **A. Applicable Statutes**

15 The relief provided in the Settlement Agreement is authorized by the following statutes.
 16 Title III of the ADA prohibits disability discrimination in places of public accommodation. 42
 17 U.S.C. § 12181 *et seq.* The specific design criteria required by Title III are set forth in the
 18 Department of Justice Standards for Accessible Design ("DOJ Standards"). 28 C.F.R. pt. 36,
 19 App. A. Title III is enforceable through a private right of action for injunctive relief; there is no
 20 federal damages remedy for private plaintiffs. 42 U.S.C. § 12188(a)(1) & (2). Prevailing
 21 plaintiffs are entitled to attorneys' fees and costs. *Id.* § 12205. Under California's Unruh Civil
 22 Rights Act, Cal. Civ. Code § 51 *et seq.* ("Unruh" or "the Unruh Act"), and Disabled Persons Act,
 23 Cal. Civ. Code § 54 *et seq.* (the "CDPA"), plaintiffs may also sue for injunctive relief to require
 24 compliance with California's access standards, set forth in Title 24 of the California Code of
 25 Regulations. *See, e.g.*, Cal. Civ. Code §§ 51(b), 52(c)(3), 54(a), 55 (prohibiting disability
 26 discrimination in public accommodations and providing injunctive remedy); *People ex. rel.*
 27 *Deukmejian v. CHE, Inc.*, 150 Cal. App. 3d 123, 133-34 (1983) (holding that Cal. Civ. Code § 54
 28 required compliance with standards promulgated pursuant to Cal. Gov't Code § 4450, that is,

1 Title 24 of the Code of Regulations). In addition to injunctive relief, Unruh and CDPA also
2 provide a private right for actual damages for disability discrimination, and for minimum
3 statutory damages of \$4,000 under Unruh, and \$1,000 under the CDPA. Cal. Civ. Code § 52(a),
4 54.3(a). An award of attorneys' fees and costs is also authorized by state law to the prevailing
5 party. *Id.*

6 **B. History of this Litigation**

7 Prior to the filing of *Castaneda v. Burger King*, 08-4262 WHA, class counsel spent more
8 than a year investigating possible access violations at Burger King® restaurants throughout
9 California. (Decl. of Timothy P. Fox ("Fox Decl.") ¶ 2). In *Castaneda*, three plaintiffs filed a
10 class action lawsuit challenging violations of the ADA and state law at all California BKL
11 restaurants. This Court ultimately certified, pursuant to Rule 23(b)(3), ten classes, one for each of
12 the restaurants that the three plaintiffs had patronized ("*Castaneda* BKLs"). *Castaneda v. Burger*
13 *King Corp.*, 264 F.R.D. 557, 572 (N.D. Cal. 2009). The claims of individuals concerning the 86
14 Remaining BKL restaurants were tolled by agreement of the parties, with the tolling period
15 commencing on October 16, 2006. (Fox Decl. ¶ 7).

16 The *Castaneda* case settled and the Court approved the settlement in 2010. C-ECF 361.
17 Pursuant to the terms of the *Castaneda* Settlement, BKC committed to maintain access at the
18 *Castaneda* BKLs in three primary ways: (1) by requiring the franchisees to perform a checklist
19 of access-related tasks prior to opening each day (*id.*, C-ECF 359 ("*Castaneda* Settlement
20 Agreement") ¶ 7.1.1); (2) by surveying each of the ten restaurants at least once every three years
21 using an agreed-upon form and requiring the franchisees to take any required corrective action
22 (*id.* ¶ 7.1.2); and (3) by requiring the franchisees to hire registered architects to survey each
23 restaurant every time the lease agreement is renewed and resurveying to ensure that the
24 remodeled restaurant complies (*id.* ¶ 7.1.3).

25 In February 2011, 27 plaintiffs in the instant case filed suit against BKC, alleging
26 violations of the ADA and state law at the 86 BKL restaurants that were not covered by the
27 *Castaneda* Settlement ("*Remaining* BKLs"). In addition to the discovery concerning the
28 Remaining BKLs in *Castaneda*, the parties conducted further substantial discovery, including

1 depositions of 26 potential named plaintiffs and of one Burger King corporate representative, and
2 surveys of almost half of the Remaining BKLs. On December 21, 2011, the Court permitted two
3 individuals to withdraw as named Plaintiffs. On December 8, 2011, Plaintiffs filed a Motion for
4 Class Certification covering 62 restaurants, which Defendant opposed on January 18, 2012. ECF
5 #169, 191. Contemporaneously with this Motion, Plaintiffs are filing an unopposed Motion to
6 Amend the Complaint for Settlement Purposes—seeking to add fifteen named Plaintiffs, who
7 have been to the remaining 24 BKLs, so that there is a named Plaintiff who has been to all of the
8 Remaining BKLs—and a Motion for Settlement Class Certification.

9 On December 2, 2011, the Court directed that the parties engage in settlement negotiations
10 in this case and the related case, *Newport v. Burger King*, 10-04511. ECF #160.

11 On January 4, 2012, pursuant to Court order, the parties met for their first Settlement
12 Conference with Magistrate Judge Spero. In part because of the *Newport* case, the settlement
13 conference also involved representatives of the franchisees and insurance carriers for Burger King
14 and the franchisees. Prior to that settlement conference, all parties understood that injunctive
15 relief would largely adhere to the principles of the *Castaneda* settlement. Settlement negotiations
16 continued after the January 4th mediation. In January and February, Plaintiffs completed their
17 surveys of the Remaining BKLs that had not been surveyed prior to class certification.

18 The parties eventually reached agreement on the basic outlines of the injunctive relief and
19 damages and fees. Throughout February, March, April, and into May, the parties met in person
20 on multiple occasions, and engaged in a number of conference calls, to negotiate the remaining
21 terms of the settlement, including the details of further barrier removal at Remaining BKLs. All
22 parties have been represented throughout these negotiations by counsel with substantial
23 experience in both disability rights and class action litigation.

24 **II. TERMS OF THE PROPOSED SETTLEMENT.**

25 The terms of the Proposed Settlement Agreement are set forth in the Settlement
26 Agreement, a copy of which is attached as Exhibit A to the Proposed Preliminary Approval
27 Order. The following summarizes the principal terms of the Settlement:
28

1 **A. Injunctive Relief**

2 In approximately September 2008, BKC experts began surveying the BKLs (including the
3 Remaining BKLs) and BKC instructed its tenant franchisees to remediate the accessibility issues
4 identified. Plaintiffs' experts have since conducted extensive surveys of each of the Remaining
5 BKLs. These surveys established that the remediation work done in response to this lawsuit had
6 greatly enhanced the accessibility of the Remaining BKLs.

7 The injunctive relief provided by the proposed Settlement Agreement mirrors the
8 injunctive relief approved by this Court in *Castaneda*.

9 First, the proposed Agreement specifically identifies the remaining architectural elements
10 that will be remediated. (*See* Settlement Agreement ¶ 6 & Exs. A & B).

11 Second, to ensure that access is maintained, the Settlement Agreement requires three types
12 of periodic access surveys geared to the frequency and type of access barriers that typically arise
13 in restaurants (*Id.* ¶ 7):

- 14 (1) Daily surveys conducted by tenant franchisee managers that focus on ensuring
15 that frequently-changing elements remain in compliance. For example, during
16 these surveys, managers make sure that movable condiment dispensers are kept
17 within reach, and the path of travel to restrooms is not obstructed by high
18 chairs or other items. (*See id.* ¶ 7.1.1).
- 19 (2) Mid-level surveys conducted every three years. These surveys target elements
20 that change less frequently than those found in daily surveys, including, for
21 example, parking lot re-striping and restroom fixtures. (*See id.* ¶ 7.1.3 and Ex.
22 C).
- 23 (3) Successor remodel surveys, which are comprehensive surveys conducted when
24 a restaurant is remodeled, approximately once every 20 years. (*See id.* ¶ 7.1.4
25 and Ex. D).

26 Third, BKC will produce to Class Counsel on a periodic basis the mid-level and remodel
27 survey forms for monitoring. (*See id.* ¶ 8).

28 Fourth, BKC will also recommend to its franchisees that they check the force required to
open all public exterior and restroom doors twice per month to ensure that they do not exceed 5
pounds of pressure to open. (*See id.* ¶ 7.1.2).

1 Finally, the parties have also agreed to a dispute resolution process in which disputes that
2 the parties cannot resolve can be brought to the Court for resolution during the term of the
3 Settlement Agreement. (*See id.* ¶ 11).

4 **B. Damages**

5 As in *Castaneda*, Damages Claimants will include all class members who contacted Class
6 Counsel prior to the date of settlement. *Compare Castaneda* Settlement Agreement ¶ 3.4 with
7 Settlement Agreement ¶ 3.6. While Damages Claimants are required to release all damages
8 relating to accessibility at the Restaurants (Settlement Agreement ¶ 16.2.2 (including release of
9 “statutory, actual, compensatory, consequential, special, emotional harm or punitive damages”)),
10 they have the right to opt out of the monetary provisions of the Settlement if they wish to pursue
11 claims on an independent basis in lieu of what the Settlement provides. (*Id.* ¶ 10). Additionally,
12 Class Members who did *not* contact Class Counsel prior to the Settlement Agreement but who
13 wish to receive damages may opt into the class as Damages Claimants. In addition, Paragraph
14 10.4 of the Agreement (the “Blow Up Provision”) gives BKC the right to declare the Agreement
15 null and void if the number of Damages Claimants who opt out of the Class exceeds 100, or
16 consists of Damages Claimants whose claims, in the aggregate, exceed \$1,500,000. (*Id.*)

17 In addition to payments to Damages Claimants, discussed below, the money from the \$19
18 million fund may be used for two other purposes: (a) Payment for the costs of notifying the class
19 of the Settlement, and administering the Settlement, to the extent that those costs exceed
20 \$100,000, as costs *up to* these amounts will be paid by Class Counsel; and (b) reasonable costs
21 and attorneys’ fees to Class Counsel, in an amount to be determined by the Court. (Settlement
22 Agreement ¶¶ 9.2.2, 9.2.1.2). If there are any funds remaining after disbursements to Damages
23 Claimants and towards these other obligations, they will be donated to Disability Rights
24 California, a non-profit organization located in Oakland, California, devoted to ensuring
25 accessibility for the disabled. (*Id.* ¶ 9.6.)

26 As in *Castaneda*, monetary awards will be distributed *pro rata* based on the total number
27 of eligible claims for all Damages Claimants, with a maximum of six (6) visits for which an
28

1 individual Damages Claimant can obtain recovery. (*Id.* ¶ 9.5.1).² For example, if (a) the amount
 2 of the fund remaining after disbursements for costs and fees (the “Net Settlement Fund”) is \$14
 3 million; (b) there are 1,500 Eligible Claimants, and (c) the sum of all Qualifying Visits for all
 4 Eligible Claimants (with no single Class Member eligible for more than six visits) is 4,500, then
 5 the amount that an Eligible Claimant would recover for a Qualifying Visit would be (\$14 million
 6 / 4,500), or \$3111.11 per Qualifying Visit. Under this scenario, an Eligible Claimant seeking
 7 recovery for one Qualifying Visit would receive \$3111.11, and an Eligible Claimant seeking
 8 recovery for six or more Qualifying Visits would receive \$18,666.67. (*Id.* ¶ 9.5.2).

9 C. Attorneys’ Fees and Costs and Costs of Administration of the Settlement

10 The parties have agreed that Class Counsel may seek an award of attorneys’ fees and costs
 11 in an amount not to exceed 25% of the Total Settlement Fund remaining after litigation and
 12 administrative costs have been deducted,³ and that BKC will not oppose such request. Should the
 13 Court preliminarily approve the proposed Settlement Agreement, Plaintiffs intend to apply for
 14 such an award with their application for final approval of the Settlement. In addition, as set forth
 15 above, Class Counsel will pay the costs for a claims administrator and notice up to \$100,000, with
 16 costs in excess of these amounts to be paid from the damages fund. (*Id.* ¶ 9.2).

17 III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL.

18 Preliminary approval is an initial assessment of the fairness of the proposed settlement
 19 made by a court on the basis of written submissions and presentations from the settling parties.

20 *Newberg on Class Actions* summarizes the preliminary approval criteria as follows:

21 If the preliminary evaluation of the proposed settlement does not disclose grounds
 22 to doubt its fairness or other obvious deficiencies, such as unduly preferential
 23 treatment of class representatives or of segments of the class, or excessive
 24 compensation for attorneys, and appears to fall within the range of possible
 25 approval, the court should direct that notice under Rule 23(e) be given to the class
 26 members of a formal fairness hearing, at which arguments and evidence may be
 27 presented in support of and in opposition to the settlement.

27 ² Named Plaintiffs shall be eligible for monetary payments under the same criteria and
 28 procedures as other eligible claimants. (Settlement Agreement ¶ 9.3.9).

³ *Anthony v. Yahoo!, Inc.*, 2010 WL 1552819, at *1 (9th Cir. 2010).

1 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:25 (4th ed. 2002)
2 (“Preliminary Court Approval”) (quoting *Manual for Complex Litigation* (Third) § 30.41 at 237
3 (1995)).

4 The purpose of the preliminary approval process is to determine whether the proposed
5 settlement is within the range of reasonableness and thus whether notice to the Class of the terms
6 and conditions and the scheduling of a formal fairness hearing is worthwhile. 4 *Newberg on*
7 *Class Actions* § 11:25 (4th ed. 2002) (“Preliminary Court Approval”); *see also Young v. Polo*
8 *Retail, LLC*, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) (same).

9 Here, the proposed Settlement satisfies the preliminary approval requirements. Class
10 Counsel believe that the proposed Settlement is an excellent result, reached after hard-fought
11 litigation and negotiation, after years of litigation and case development, and with assistance of a
12 federal Magistrate Judge experienced in mediation. (Fox Decl. ¶¶ 9-13).

13 **A. Injunctive Relief**

14 The Settlement will provide substantial injunctive relief to the Class. As this Court is
15 aware, as a result of this litigation, BKC has already enhanced accessibility at the Remaining
16 BKL restaurants. (Fox Decl. ¶ 4). Additionally, under the Settlement, BKC has committed to
17 ensuring additional accessibility enhancements, and the parties have negotiated injunctive relief
18 that ensures that Restaurants remain in compliance with applicable accessibility requirements.
19 *See supra* pp. 5-7.

20 **B. Monetary Relief**

21 Assuming the Court grants Plaintiffs’ request for fees and costs, there will be
22 approximately \$14 million to be distributed to the class. As demonstrated below, this monetary
23 recovery compares favorably to court-approved settlements in similar class actions in terms of
24 total recovery obtained, the expected average recovery per class member, and the ratio of the
25 settlement amount to the estimated recovery if this case was litigated and the class prevailed.
26 Moreover, as in *Castaneda*, the monetary relief for the class here consists entirely of money,
27 rather than coupons.
28

1 *Total recovery in similar cases:* Plaintiffs are aware of the total settlement recoveries in
2 the following disability access class actions:

3 *Castaneda:* Total monetary recovery for class was \$5 million.

4 *Lucas v. Kmart:* Class action challenging access barriers in Kmart stores. Total
5 monetary recovery for class for stores in California was just under \$13 million.

6 *National Federation of the Blind v. Target Corp.*, No. C 06-01802 MHP (N.D.
7 Cal.): Class action challenging accessibility to blind users of a website operated by
8 a retailer. Total monetary recovery for class was \$6 million.

9 *Lieber v. Macy's West, Inc.*, Case Nos. C96-02955 MHP (N.D. Cal.): Class action
10 challenging access barriers in Macy's stores. Total monetary recovery for class
11 was \$2.8 million.⁴

12 (Fox. Decl. ¶¶ 11-14.)

13 *Expected average recovery per class member:* The court-approved settlements in the
14 *National Federation of the Blind*, *Kmart*, and *Macy's* cases capped the number of claims for
15 which an individual class member could recover at two, meaning that the most that class
16 members obtained was \$8,000 in the *NFB* and *Kmart* cases, and \$2,000 in the *Macy's* case, and
17 that assumes that those amounts were not reduced based on a pro rata reduction because total
18 claims exceeded the settlement funds. (*Id.*) In the *Kmart* case, the maximum recovery obtained
19 by an individual class member was \$6,000 (of which \$2,300 was in the form of a gift card) after a
20 pro rata reduction. (*Id.* ¶ 12).

21 As explained below, based on the claims experience in the *Castaneda* case, Plaintiffs
22 estimate that there will be approximately 1,250 class members with valid claims in this case. (*Id.*
23 ¶ 16). But even assuming that number ends up being much higher – say, for example, 1,700 class
24 members – the *average* recovery per class member in this case will be over \$8,200, which
25 exceeds the *maximum* recovery per class member in the *NFB*, *Kmart* and *Macy's* cases.⁵ (*Id.* ¶¶
26 12-14, 17).

27 Plaintiffs anticipate that the average recovery per class member in this case will be
28 slightly lower than in *Castaneda*. As explained below, however, that difference is justified by a

⁴ At the time the *Macy's* case was filed and settled, minimum statutory damages under Unruh
were \$1,000 per discriminatory incident. That amount has increased to \$4,000 per discriminatory
incident.

⁵ Based on the claims data in *Castaneda*, under this scenario, the maximum amount a class
member would receive would be almost \$11,000, well in excess of the maximum recovery in the
NFB, *Kmart* and *Macy's* cases. (*Id.* ¶¶ 12-14).

1 number of factors, including that the effective damages period is shorter in this case than in
2 *Castaneda*.

3 *Ratio of the settlement amount to the estimated recovery if case successfully litigated:* In
4 estimating damages, Plaintiffs use the same approach as they did in *Castaneda*; that is:
5
$$\text{Aggregate class damages} = (\text{No. of class members}) \times (\text{Avg. no. of visits per}$$

6
$$\text{month}) \times (\text{Tot. no. of months during which damages accrued}) \times (\text{Statutory}$$

7
$$\text{damages}).$$

8 Number of Class Members: Approximately 850 class members with facially valid
9 claims have contacted Class Counsel to date. (*Id.* ¶ 15). That number will increase after class
10 notice of the settlement is issued, and to try to estimate the magnitude of that increase, Class
11 Counsel examined the claims process in *Castaneda*. (*Id.* ¶ 16).

12 In *Castaneda*, the claims administrator determined that 379 class members had submitted
13 valid claims. Class Counsel have been able to determine that 257 of those class members had
14 contacted Class Counsel prior to the issuance of class notice in connection with class certification.
15 In other words, the total number of class members with valid claims who contacted Class Counsel
16 increased by 47.47% after class notice was issued. Applying that percentage increase here yields
17 an estimate of approximately 1,250 class members with valid claims. (*Id.*)

18 Determination of Number of Class Visits: As explained in *Castaneda*, to
19 determine the average number of visits per month, Plaintiffs conducted extensive interviews with
20 60 Damages Claimants. (Decl. of Timothy Fox in Supp. of Joint Motion for Preliminary
21 Approval of Stipulation and Settlement Agreement (*Castaneda*) (C-ECF 340-1 ¶ 7)). Based on
22 these interviews, Plaintiffs estimate that Class Members visited a Remaining BKL restaurant
23 slightly less than once every two months on average. (*Id.*)

24 Damages Period: The length of the damages period in this case is significantly
25 shorter than in *Castaneda*. The statute of limitations period in *Castaneda* began in April 2006,
26 and for purposes of estimating damages, Plaintiffs assumed that there were few damages after
27 September 2008, when Burger King began the process of remediating its restaurants. Thus
28 Plaintiffs in *Castaneda* used a 30-month period for purposes of estimating class damages.

1 Here, the statute of limitations period began on October 16, 2006, and Plaintiffs are once
2 again using the end date of September 2008 (when Burger King began remediating the BKLs) for
3 purposes of estimating class damages, resulting in a damages period of 23.5 months.

4 Damages Estimate: Based on these assumptions, estimated aggregate class damages total
5 approximately \$52 million. (Fox Decl. ¶ 18). This figure compares well to the settlement
6 reached in *Castaneda*. In *Castaneda*, Plaintiffs estimated aggregate class damages of
7 approximately \$20 million, and the settlement approved by this Court was for \$5 million, 25% of
8 estimated exposure. Here, the approximate amount of the settlement fund to be distributed to the
9 class is \$14 million, or approximately 27% of estimated exposure.

10 Although Plaintiffs believe that they have strong claims against BKC, they recognize that
11 there is always substantial litigation risk. For example, this Court suggested in *Castaneda* that
12 class members would have to appear in person at the trial to obtain damages. C-ECF #218 at 26
13 (Transcript of Oral Argument (Sept. 17, 2009)). If the Court reached the same conclusion here, it
14 is likely that some class members with valid claims would not have the ability to appear at trial,
15 thus reducing aggregate class damages. Additional risks include: (1) the fact finder's possible
16 failure to credit evidence of the existence of barriers; (2) the fact finder's possible failure to credit
17 the number of visits to which a Class Member testifies; (3) uncertainties regarding recovering for
18 "deterred" visits; (4) the possibility that novel legal issues may be reversed on appeal; and (5) the
19 years-long delay in receipt by Class Members of monetary relief during the pendency of appeals,
20 even if the appeals were ultimately denied.

21 BKC believes the results obtained in the Settlement are more than could be achieved had
22 the claims been fully litigated because: (a) it is not liable under state law for damages because the
23 Restaurants are independently operated and because BKC neither engaged in, fostered nor aided
24 any of the alleged discrimination; (b) a large number of opt-in Claimants did not personally
25 encounter barriers, as required by the Unruh Act and CDPA; (c) the opt-in Claimants did not
26 encounter barriers in the quantity of visits contended; (d) a number of Claimants' contentions are
27 not credible; and (e) certification of damage classes was inappropriate given the individualized
28 nature of the proof required and for other reasons.

1 **C. The Distribution Plan Is Fair to the Class.**

2 As in *Castaneda*, the Class Members will be compensated for each visit to a covered
3 restaurant during the class period. Imposing a maximum on the number of visits for each
4 claimant represents a fair balance between a distribution that closely approaches reality and one
5 that protects Class Members from possibly illegitimate claims. The Court approved the same
6 maximum in *Castaneda* (C-ECF #361) and a similar—though lower—maximum was approved in
7 the *Lucas v. Kmart* settlement. (Fox Decl. ¶ 12 (capping the number of eligible visits at two)).

8 **D. The Provision for Attorneys’ Fees and Costs Is Fair.**

9 Class Counsel have agreed to a ceiling on their petition for an award of fees and costs that
10 the Court will ultimately determine. (Fox Decl. ¶ 19; Settlement Agreement ¶ 9.2.1.2). In
11 litigating this matter, Class Counsel have taken very substantial risk and have aggressively
12 investigated and litigated the matter for almost six years, spending thousands of hours
13 investigating and prosecuting the case. (Fox Decl. ¶ 20).

14 **IV. THE PROPOSED NOTICE SATISFIES DUE PROCESS AND SHOULD BE
15 APPROVED.**

16 Under Federal Rule of Civil Procedure 23(e)(1), the court “must direct notice in a
17 reasonable manner to all class members who would be bound by a propos[ed settlement].” Class
18 members are entitled to receive “the best notice practicable” under the circumstances. *Burns v.*
19 *Elrod*, 757 F.2d 151, 154 (7th Cir. 1985) (citing Fed. R. Civ. P. 23(c)(2)). Notice is satisfactory
20 “if it generally describes the terms of the settlement in sufficient detail to alert those with adverse
21 viewpoints to investigate and to come forward and be heard.” *Churchill Vill., L.L.C. v. Gen.*
22 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal citation omitted). Moreover, notice that is
23 mailed to each member of a settlement class “who can be identified through reasonable effort”
24 constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

25 The notice standard is satisfied here. The parties propose that the Court approve three
26 separate notices to be sent by an independent Claims Administrator. These notices incorporate
27 the changes required by this Court in *Castaneda*.

1 **Notice to Existing Damages Claimants.** Because “Damages Claimants” is identified in
2 the Settlement Agreement—as it was in the *Castaneda* Settlement Agreement—as including “all
3 members of the Class who contacted Class Counsel prior to the date of this Settlement Agreement
4 indicating a desire to seek monetary recovery in this case,” the identity of existing Damages
5 Claimants is known. (See Settlement Agreement ¶ 3.6). The parties propose that the Claims
6 Administrator send the Existing Damages Claimants Notice by first-class U.S. mail to the last
7 known address of each known Damages Claimant. The Existing Damages Claimants Notice (the
8 proposed form of which is attached to the Proposed Preliminary Approval Order as Exhibit B)
9 describes the terms of the Settlement addressing injunctive relief and damages; sets forth the
10 procedure for comments, objections and exclusions; provides specifics on the date, time, and
11 place of the final Settlement approval hearing;⁶ enables Class Members to exercise their rights
12 and make informed decisions regarding their views of the fairness, adequacy and reasonableness
13 of the proposed Settlement; and provides information as to how to obtain additional information
14 regarding this litigation and the Settlement Agreement. The Existing Damages Claimants Notice
15 will explain that Class Members who do not opt-out are bound by the monetary terms of the
16 Settlement Agreement, and will also explain that Class Members do not have a right to opt-out of
17 the injunctive terms of the Settlement Agreement.

18 **Notices to Potential Additional Damages Claimants.** The parties propose to use the
19 means the Court determined was best calculated to reach each Class Member who was affected
20 by the injunctive relief of the *Castaneda* Settlement as the notice procedure for *potential*
21 additional Damages Claimants in this case—i.e. individuals who satisfy the class definition but
22 have not previously contacted Class Counsel. After the class was certified in *Castaneda*, this
23 Court approved a notice plan projected to reach the maximum number of Class Members through
24 mailing long-form notices to individuals known to Class Counsel, posting of short-form Notices
25 at the restaurants at issue for 30 calendar days, use of a case-specific website and toll-free
26 number, and sending long-form notices to advocacy groups and to individuals who request the

27 _____
28 ⁶ The proposed Notices do not currently contain the date, but the parties will insert it once the Court sets it.

1 long-form notice after reading the short-form notice. (*See* C-ECF #261). The parties believe this
 2 notice plan remains appropriate for providing Notice to the potential additional Damages
 3 Claimants.⁷ The Potential Additional Damages Claimants Notices (the proposed long- and short-
 4 forms of which are attached to the Proposed Preliminary Approval Order as Exhibits C and D)
 5 describe the terms of the Settlement concerning injunctive relief and damages; set forth the
 6 procedure for comments, objections, and opting in; provide specifics on the date, time, and place
 7 of the final Settlement approval hearing; enable Class Members to exercise their rights and make
 8 informed decisions regarding their views of the fairness, adequacy and reasonableness of the
 9 proposed Settlement; and provide information as to how to obtain additional information
 10 regarding this litigation and the entire Settlement Agreement (including providing the website for
 11 the class action as well as the address of the Clerk's Office).

12 The deadlines set forth in the Settlement Agreement are based on the deadlines the Court
 13 approved in *Castaneda*. *See Castaneda* Settlement Agreement. They are triggered by the Notice
 14 Deadline, which is the deadline set by the Court for Notice to issue as described herein. The
 15 parties propose the following schedule:

16 **Notice Deadline:** July 16, 2012 or 10 days after the entry of the Order granting
 17 preliminary approval of the Settlement, whichever is later.

18 **Deadline to submit Objections to the Settlement, and for Damages Claimants to Opt**
 19 **Out of the Monetary Provisions of the Settlement:** Sixty days after the Notice Deadline.

20 **Deadline for Defendant to Declare Settlement Null and Void Based on "Blow Up"**
 21 **Provision:** Ten days after the deadline for Damages Claimants to opt out of the monetary
 22 provisions of the Settlement.

23 **Final Approval hearing:** October 11, 2012,⁸ or eighty days after the Notice Deadline set
 24 by the Court, whichever is later, or as soon thereafter as the Court may set the hearing.

26 _____
 27 ⁷ Obviously, the first form of notice—mailing to individuals who have contacted Class Counsel,
 is irrelevant for this Notice, as those individuals are existing Damages Claimants.

28 ⁸ The Final Approval hearing cannot be held prior to October 3, 2012, based on the notice
 requirements of the Class Action Fairness Act. *See* 28 U.S.C. § 1715(d).

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Deadline for Damages Claimants to submit Claims Forms: Ten days after the Final Approval hearing.

V. CONCLUSION

For the reasons set forth above, the parties respectfully request that the Court grant the Proposed Preliminary Approval Order filed herewith.

Dated: June 14, 2012

LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.

By: _____/s/_____

Bill Lann Lee
Andrew Lah
Julia Campins
Joshua Davidson
LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.
476 – 9th Street
Oakland, CA 94607
Telephone: (510) 839-6824
Facsimile: (510) 839-7839

Timothy P. Fox
Amy F. Robertson
FOX & ROBERTSON, P.C.
104 Broadway, Suite 400
Denver, CO 80203
Telephone: (303) 595-9700
Facsimile: (303) 595-9705

Mari Mayeda
P O Box 5138
Berkeley, CA 94705
Telephone: (510) 848-3331
Facsimile: (510) 841-8115

Attorneys for the Plaintiff Classes

By: : _____/s/_____

Michael D. Joblove
Jonathan E. Perlman
GENOVESE JOBLOVE &
BATTISTA, P.A.
100 SE Second Street, 44th Floor
Miami, FL 33131
Telephone: (305) 349-2333
Facsimile: (305) 349-2310

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Clement L. Glynn
Adam Friedenber
GLYNN & FINLEY, LLP
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596
Telephone: (925) 210-2809
Facsimile: (925) 945-1975

*Attorneys for Defendant Burger King
Corporation*