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

MIGUEL CASTANEDA on behalf of himself and others similarly situated, Plaintiff, vs. BURGER KING CORPORATION and BURGER KING HOLDINGS, INC., Defendants.	Case No. C 08-4262 WHA **PLAINTIFF'S MOTION FOR LEAVE TO SUBMIT REPLY BRIEF AND REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH GENERAL ORDER 56** Hearing Date: November 10, 2008 Time: 3:00 p.m.

Plaintiffs' Motion for Leave to Submit Reply Brief

Plaintiff respectfully requests leave to submit the reply brief below to provide notice of authorities he intends to rely on during the meet and confer and hearing ordered for Monday, November 10, 2008. Defendants consent to the filing of this reply.

Plaintiffs' Reply Brief in Support of Motion to Compel Compliance with General Order 56

1. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Compel Compliance with General Order 56 ("Defs.' Opp'n," Docket No. 15) raises the question whether General Order 56 can ever be a useful tool in early information exchange concerning, and resolution of, class actions under Title III of the Americans with Disabilities Act. Plaintiff believes that it can and should play such a role. Under Defendants' theory, however, productive settlement negotiations would be postponed until after full class discovery and briefing and resolution of a motion for class certification.

2. There are over 600 Burger King restaurants in California. (Joblove Decl. ¶ 3.) Plaintiff's counsel have heard from over one thousand potential class members who have federal

and state claims concerning common barriers to individuals who use wheelchairs or scooters at many of those restaurants. (Robertson Decl. ¶ 9.) The identity and addresses of these restaurants are not a secret: they are available in the Yellow Pages. This litigation, however, concerns only the 90 restaurants in which Burger King Corporation admits that it has a leasehold interest (*see* Joblove Decl. ¶ 3), for which Burger King is thus liable under Title III. *See* 42 U.S.C. § 12182(a) (prohibiting discrimination by those who "lease[ ] (or lease[ ] to)" public accommodations).

3. For eight months before this suit was filed, Plaintiff's counsel attempted to negotiate with Burger King to reach a settlement addressing claims for barriers in those 90 restaurants. These negotiations foundered on Burger King's refusal to identify this subset of restaurants.

4. Almost immediately after this case was filed, the undersigned contacted counsel for Defendants to begin the General Order 56 process. Defendants continued to refuse to identify the subset of noncompliant restaurants that are at issue here. Because this made it impossible to survey and attempt to resolve the claims concerning the 90 restaurants -- as required by General Order 56 -- Plaintiff filed the present motion.

5. Defendants' refusal to provide the identity of this subset of its restaurants is based on a promised motion to dismiss that will, in the end, be an empty gesture. Defendants are apparently planning to move to dismiss for lack of standing as to restaurants that Plaintiffs Michael Castaneda has not pleaded an intent to visit in the future. (*See* Defs.' Opp'n. at 2.)

6. Crucially, Defendants do not contest that Mr. Castaneda has standing as to the two restaurants he has visited and intends to patronize in the future. There is thus no question that this case is properly before this Court.

7. On the other hand, Mr. Castaneda does not allege that he -- *in an individual action* -- has standing to challenge each of the 90 stores. Rather, he alleges that he is an appropriate representative of a class of individuals with common claims against Burger King involving similar barriers at the 90 restaurants in which it has a leasehold interest.

8. Mr. Castaneda will be entitled to test those allegations against the requirements of Rule 23 of the Federal Rules of Civil Procedure in a motion for class certification. As part of

pre-certification discovery, he will be entitled to obtain disclosure of the requested information and to conduct discovery of his class claims. Plaintiff is confident that his motion will be successful, and that this case will join the many previous cases in which individual plaintiffs who have patronized a single or handful of facilities have served as representatives of a class with common claims against a much larger set of facilities, both under the ADA[1] and other statutes.[2]

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[1] *See, e.g., Californians for Disability Rights, Inc. v. Ca. Dep't of Transp.*, 249 F.R.D. 334, 342-49 (N.D. Cal. 2008) (certifying class of individuals with disabilities challenging conditions at Caltrans facilities around the state); *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (certifying nationwide class of people who use wheelchairs challenging common barriers and policies at 1,500 retail stores) & 2006 WL 722163, at *6 (D. Colo. Mar. 22, 2006) (certifying damages subclasses challenging common barriers at Kmart stores in seven states); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004) (certifying statewide class of people who use wheelchairs challenging common barriers and policies at approximately 220 restaurants); *Access Now, Inc. v. Claire's Stores, Inc.*, No. 00-14017-CIV., 2002 WL 1162422, at *3 (S.D. Fla. May 7, 2002) (certifying settlement class addressing common barriers at 2,200 retail stores nationwide); *Access Now, Inc. v. AHM CGH*, Inc., No. 98-3004 CIV, 2000 WL 1809979, at *6 (S.D. Fla. Jul. 12, 2000) (certifying a class of individuals with all disabilities challenging common barriers at a chain of health care facilities); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 530 (S.D. Fla. 2000) (same); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 363 (D. Colo. 1999) (certifying class of people who use wheelchairs challenging common barriers at approximately 42 restaurants); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 458 (N.D. Cal. 1994) (certifying statewide class of people who use wheelchairs challenging common barriers at a chain of movie theaters).

[2] *See, e.g., Anderson v. Cornejo*, 199 F.R.D. 228, 267 (N.D. Ill. 2000) (certifying a nationwide case of women who had been subject to certain common types of searches by Customs at any United States international airport); *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 213 (D. Md. 1997) (certifying a class of African-American customers of approximately 550 Premier hair salons nationwide); *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1996 WL 421436 at *1 (N.D. Cal. Jan 25, 1996) (certifying a class of all female applicants and employees within the West Coast division of Home Depot); *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 407850 at *1, *10 (M.D. Fla. Mar.12, 1996) (certifying class of female employees at 500 retail grocery stores in Florida, Georgia and South Carolina); *Grijalva v. Shalala*, Civ. No. 93-711 TUC ACM, 1995 WL 523609 at *1-2, *7 (D. Ariz. July 18, 1995) (certifying nationwide class involving one hundred HMOs around the country providing care to over one million Medicare beneficiaries), *aff'd on other grounds* 152 F.3d 1115 (9th Cir. 1998), *vacated and remanded on other grounds* 526 U.S. 1096 (1999); *Roman v. Korson*, 152 F.R.D. 101, 112 (W. D. Mich. 1993) (certifying class of migrant farmworkers challenging rent charged in certain federally-subsidized housing nationwide); *Haynes v. Shoney's, Inc.*, No. 89-30093-RV, 1992 WL 752127 at *1, 2-6, 20 (N.D. Fla. June 22,

(continued...)

9. In *Lucas v. Kmart Corp.*, for example, three named plaintiffs who had patronized a handful of stores in Denver and one in Tennessee moved to certify a class of wheelchair-using customers challenging common barriers at 2,100 Kmart stores nationwide. Kmart argued that the plaintiffs did not have standing to do this because they did not have representative plaintiffs who had claims at each of these 2,100 stores. The district court rejected this argument, holding that "Defendants' objection regarding representative Plaintiffs' standing to assert claims on behalf of individuals who patronized other Kmart stores is subsumed by my determination that the Rule 23(a) prerequisites have been met." *Id.*, 2005 WL 1648182 at *3.

10. This approach "rest[s] on the long-standing rule that, once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." *Payton v. County of Kane*, 308 F.3d 673, 680 (7th Cir. 2002); *see also Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001) ("when a class is properly certified, the injury asserted by the named plaintiffs at the standing stage of our inquiry is asserted on behalf of all members of the class." Thus the plaintiff, for purposes of assessing standing for systemic injunctive relief, "has been broadened to include the class as a whole, and no longer simply those named in the complaint.")

11. Similarly, in a case cited by Burger King, the court dismissed for lack of *individual* standing the restaurants that the plaintiff had not visited. *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 344-45 (D.N.J. 2003), *cited in* Defs.' Opp'n at 4-5. However, the court made clear that this did not circumscribe any eventual class action, stating that, "as to Plaintiffs' anticipated request for class certification, it is still too early to predict whether Plaintiffs will eventually be able to certify plaintiff and defendant classes similar to those defined in the amended complaint. Therefore, we must await Plaintiffs' motion to certify." *Id.* at 345.

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[2](...continued)
1992) (certifying a class of store-level employees at two different commonly-owned restaurant chains); *Kernan v. Holiday Universal, Inc.*, No. JH90-971, 1990 WL 289505 at *9 (D. Md. Aug. 14, 1990) (provisionally certifying class of Black customers of spa facilities in five metropolitan areas).

12. The remainder of the cases on which Defendants rely are similarly inapposite. Most of them are not class action cases. For example, Defendants characterize *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000), as a "class action[ ]." (Defs.' Opp'n at 6.) The court in *Moreno*, however, stated clearly, "[t]his is not a class action." *Id.*, 88 F. Supp. 2d at 1117. Similarly, *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008), *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133 (9th Cir. 2002), and *Moyer v. Walt Disney World Co.*, 146 F. Supp. 2d 1149 (M.D. Fla. 2000), *cited in* Defs.' Opp'n at 4-5, are not class action cases.

13. In Defendants' other three cases, the named plaintiffs attempted to bring claims on behalf of the class that either they themselves did not have, *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir. 2000) (Defendants argued that named plaintiffs did not have standing as to seven of the ten legal claims alleged on behalf of the class), *In re Terazosin Hydrochloride Antitrust Litigation*, 160 F. Supp. 2d 1365, 1372 (S.D. Fla. 2001) (dismissing claims under state laws under which named plaintiffs did not have claims), or against defendants who were not responsible for the plaintiffs' injuries. *LaMar v. H&B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973) (the typicality requirement of Rule 23 "is not met when the 'representative' plaintiff never had a claim of any type against any defendant."). Here, in contrast, Plaintiff has claims under the same statutes as the claims he asserts on behalf of the class -- those for barriers to wheelchair access under the federal ADA, and California's Unruh Civil Rights Act, Cal. Civ. Code § 51, *et seq.*, and Disabled Persons Act, Cal. Civ. Code § 54, *et seq.* -- and brings claims only against defendants who were responsible for his injuries and those of the putative class.

14. Ultimately, Plaintiff has properly alleged and will properly support the certification of a class addressing common barriers at the subset of noncompliant Burger Kings in which BKC has a leasehold interest.

15. The question before the Court is when Burger King will identify that subset so that the parties can inspect them and meet and confer concerning settlement of this putative class action, as required by Paragraph 4 of General Order 56. To this question, Plaintiff believes there is a ready answer that General Order 56 provides in the interest of early and efficient resolution.

Conclusion

For the reasons set forth above and in Plaintiffs' Motion to Compel Compliance with General Order 56, Plaintiffs respectfully request that the Court order Defendants immediately to produce the addresses of all Burger King restaurants in California that are leased by or to Burger King Corporation as well as the construction and alteration history of those restaurants so that the joint inspections may be completed pursuant to General Order 56.

Dated: November 7, 2008

Respectfully submitted,

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

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