

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 LEWIS, FEINBERG, LEE,  
5 RENAKER & JACKSON, P.C.  
6 1330 Broadway, Suite 1800  
7 Telephone: (510) 839-6824  
8 Facsimile: (510) 839-7839  
9 Email: blee@lewisfeinberg.com

Mari Mayeda - CA State Bar No. 110947  
P O Box 5138  
Berkeley, CA 94705  
Telephone: (510) 848-3331  
Facsimile: (510) 841-8115  
Email: marimayeda@earthlink.net

6 Timothy P. Fox - CA State Bar No. 157750  
7 Amy F. Robertson (*pro hac vice*)  
8 FOX & ROBERTSON, P.C.  
9 104 Broadway, Suite 400  
10 Denver, CO 80203  
11 Telephone: (303) 595-9700  
12 Facsimile: (303) 595-9705  
13 Email: tfox@foxrob.com

11 *Attorneys for Plaintiffs*

12  
13 IN THE UNITED STATES DISTRICT COURT  
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

18 Plaintiffs,

19 vs.

20 BURGER KING CORPORATION,

21 Defendant.

Case No. C 08-4262 WHA

**PLAINTIFFS' NOTICE OF MOTION AND  
MOTION FOR AN AWARD OF  
ATTORNEYS' FEES AND COSTS**

22 NOTICE IS HEREBY GIVEN that on July 8, 2010, at 8:00 a.m., or as soon thereafter as  
23 the matter may be heard in the above-entitled Court, Plaintiffs will and hereby do move the Court  
24 to approve an award of attorneys' fees and reimbursement of litigation costs to Class Counsel.

25 This motion is based on the Memorandum of Points and Authorities filed herewith and in  
26 support of this Motion, the Declarations of Bill Lann Lee, Amy Robertson, Mari Mayeda,  
27 Richard Pearl, Claudia Center, and Laurence Paradis in Support of the Motion for an Award of  
28 Attorneys' Fees and Costs, and all other papers filed in this action.

1 Dated: May 17, 2010

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

2  
3 By: /s/ Bill Lann Lee

Bill Lann Lee

4 Andrew Lah

Julia Campins

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

6 1330 Broadway, Suite 1800

7 Oakland, CA 95612-2519

Telephone: (510) 839-6824

8 Facsimile: (510) 839-7839

9 Timothy P. Fox

Amy F. Robertson

10 FOX & ROBERTSON, P.C.

104 Broadway, Suite 400

11 Denver, CO 80203

Telephone: (303) 595-9700

12 Facsimile: (303) 595-9705

13 Mari Mayeda

P O Box 5138

14 Berkeley, CA 94705

Telephone: (510) 848-3331

15 Facsimile: (510) 841-8115

16 *Attorneys for the Plaintiff Classes*

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1 **I. INTRODUCTION**

2 The parties have resolved this disability access class action; Class Counsel now move for  
 3 an award of attorneys' fees. Class Counsel--- Lewis, Feinberg, Lee, Renaker & Jackson, P.C.;  
 4 Fox & Robertson; and Mari Mayeda--- obtained for the class extensive injunctive relief and  
 5 court-supervised monitoring that will prevent the future occurrence of barriers at entrances,  
 6 service counters, dining rooms, restrooms and parking lots at ten Burger King leased ("BKL")  
 7 restaurants for customers who use wheelchairs and scooters for years to come. In addition to the  
 8 injunctive relief, the proposed Settlement provides \$5 million in monetary relief<sup>1</sup> to a potential  
 9 group of approximately 380 class members who opted in pursuant to the Court's class  
 10 certification and class notice orders. (*See* Dkt. #226 at 27; 252 at 2).<sup>2</sup> This is the largest  
 11 monetary recovery per class member ever in this type of case. (*See* Declaration of Laurence  
 12 Paradis ("Paradis Decl.") ¶¶ 5-6; Dkt. #340-1 (Decl. of Timothy P. Fox in Supp. of Joint Mot. for  
 13 Prelim. Approval of Stipulation); Settlement Agreement ¶¶ 9-10)). This relief promotes the  
 14 purposes of the federal Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, and the  
 15 California Unruh Civil Rights, Cal. Civ. Code § 51 *et seq.*, and Disabled Persons Acts, Cal. Civ.  
 16 Code § 54 *et seq.*, the statutes Class Counsel seek to enforce. To obtain this relief, the attorneys  
 17 and staff working on this case have collectively devoted over 8,000 hours and \$225,000 dollars in  
 18 out-of-pocket costs and expenses to this litigation on behalf of the the Class.

19 Pursuant to the Settlement and the Court's Order of March 19, 2010 (Dkt. #342 at 5),  
 20 Class Counsel seek a combined \$2.5 million in attorney's fees and litigation costs and expenses  
 21 pursuant to the state statutes. In particular, they seek reimbursement of \$225,138.87 in litigation  
 22 costs and expenses, and \$2,274,187.86 in attorneys' fees. (Lee Decl. ¶ 33).

23 The settlement provides that Defendant Burger King will not object to an application for  
 24 attorneys' fees and costs up to \$2.5 million but---as required by Rule 23---leaves the amount of  
 25 fees and costs to the discretion of the Court. (Settlement Agreement ¶ 12.1 (Dkt. #331)). Under

26 <sup>1</sup> Such monetary relief in the form of minimum statutory damages is authorized by the state  
 27 statutes. Cal. Civ. Code §§ 52(a)-(b), 54.3(a).

28 <sup>2</sup> The deadline of class members to object is June 7, 2010. (Dkt. #342 at 6).

1 California's lodestar adjustment approach to attorneys' fees, applicable here, a court initially  
2 determines a lodestar based on the product of reasonable hours at reasonable market rates for  
3 legal services. The court then adjusts the lodestar based on factors such as the (a) contingent risk  
4 factor; (b) results obtained; (c) preclusion of other employment; (d) quality of representation  
5 factors such as novelty and complexity of issues, difficulty of case, and skill of counsel, and (e) a  
6 public service element. The attorneys and staff working on this case spent approximately 8,100  
7 lodestar hours, incurring approximately \$3.1 million in fees. Notably, although Class Counsel  
8 will monitor compliance with the Agreement for several years during the term of the agreement,  
9 the Settlement Agreement does not provide for separate payment for the time spent on such  
10 monitoring (*see id.*); thus this lodestar includes compensation for an unknown amount of time for  
11 future monitoring.

12 Class Counsel have reduced their raw lodestar in two principal ways: Class Counsel  
13 eliminated approximately 587 hours (representing approximately \$226,000) in the exercise of  
14 billing judgment. (Lee Decl. ¶ 35). In addition, Class Counsel have applied an across-the-board  
15 reduction of 60% in recognition of the fact that some of the work performed in this case was  
16 attributable to the 80 restaurants originally encompassed by the complaint but not covered by the  
17 settlement. (Lee Decl. ¶ 40).

18 Class Counsel believe that the resulting lodestar time is reasonable. The rates requested  
19 for Class Counsel are also reasonable.

20 Applying billing judgment and the across-the-board reduction of 60% results in total  
21 lodestar hours of 3248 and an amount of \$1,188,519.10. For the reasons set forth below, Class  
22 Counsel seek a multiplier of just under 2 on this amount in light of the excellent results for the ten  
23 restaurants and other enhancement factors, as well as costs in the amount of \$225,138.87,  
24 bringing the total amount in fees and costs requested by Class Counsel to \$2.5 million.

25 Class Counsel have complied with the Court's order regarding the form of application for  
26 attorney's fees. (*See* Dkt. #343). Exhibit 1 to the Declaration of Bill Lann Lee sets forth the  
27 time, rates and fees for which Class Counsel request compensation, organized by project. Exhibit  
28 2 summarizes the information by timekeeper. Mr. Lee's declaration and those of Amy Robertson

1 and Mari Mayeda describe the various timekeepers' qualifications, background and roles; their  
2 normal rates ordinarily charged with a comparison to prevailing rates for like-skilled  
3 professionals in the Northern District of California; and proof that Class Counsel exercised billing  
4 judgment in computing the below-requested fees.

## 5 **II. STATEMENT OF FACTS**

### 6 **A. Work Performed by Class Counsel**

7 Class Counsel conducted an extensive investigation of the merits of the case and legal  
8 issues presented prior to filing their complaint on September 10, 2008. (Lee Decl. ¶ 16). This  
9 included extensive research concerning BKC's stores, finances and relationship with franchisees,  
10 as well as legal research in support of the claims set forth in the complaint. Finally, Class  
11 Counsel spent a good deal of time in amicable but ultimately unsuccessful pre-litigation  
12 discussions with counsel for BKC, including unsuccessful efforts to persuade BKC to identify  
13 which of its restaurants were leased "BKL" restaurants. (*Id.* ¶ 17).

14 Class Counsel kept the initial named plaintiff Miguel Castaneda and additional named  
15 plaintiffs Katherine Corbett and Joseph Wellner fully informed of the proceedings. (*Id.* ¶ 16).  
16 They also devoted extensive efforts to identifying and interviewing class member witnesses for  
17 trial and motions, including creating and maintaining a database accessible to all attorneys, law  
18 clerks and paralegals. (Lee Decl. ¶ 16). Class Counsel ended up interviewing over 400 Class  
19 members as potential witnesses. (*See* Decl. of Amy Robertson in Supp. of Pls.' Ex Parte Mem.  
20 Concerning Appointment of Class Counsel ¶ 25 (Dkt. #315)).

21 Once filed, the case was hotly contested. Burger King vigorously defended the action.  
22 Ultimately, 12 different attorneys from Burger King's General Counsel's office and its two  
23 outside law firms participated in the defense of the case compared to the eight Class Counsel  
24 attorneys for which fees are sought. (Lee Decl. ¶ 29). Even after the case was filed, BKC refused  
25 to identify the BKL restaurants at issue, causing Class Counsel to have to file a motion to compel  
26 this information. (Dkt. #8). Once this Court compelled BKC to disclose that information, BKC  
27 marked it confidential, requiring Class Counsel to file a motion (ultimately successful) to remove  
28 this designation. (Dkt. #50). BKC then moved to dismiss the litigation and to stay the discovery



1 pending resolution of its motion to dismiss, which motions Class Counsel opposed. (Dkt. ##28,  
2 37, 42, 45). Following this Court's denial of these motions, Plaintiffs amended the complaint to  
3 add two additional representative plaintiffs. (Dkt. #72, 254).

4 Discovery was comprehensive and time-consuming. (Lee Decl. ¶ 18). In order to  
5 establish a substantial record for class certification, dispositive motions, and trial, Class Counsel  
6 were required to litigate numerous motions before the Court and Magistrate Judge Larson. For  
7 example, BKC withheld---based on claims of privilege---surveys it had conducted of the  
8 restaurants at issue. Plaintiffs moved to compel, which motion Magistrate Judge Larson granted.  
9 (Dkt. ##121, 162). BKC filed objections, and ultimately attempted to appeal the matter to the  
10 Ninth Circuit. (Dkt. ##200, 265; 9<sup>th</sup> Cir. Case No. 09-17210). The Ninth Circuit dismissed the  
11 appeal. (*See* Dkt. #335).

12 Class certification was extensively briefed by both parties. (Dkt. ##138-140, 169-188,  
13 199). In conjunction with its opposition to class certification, BKC filed a motion to strike a  
14 number of Plaintiffs' declarations. In addition, a Burger King franchisee---not a party to the  
15 litigation---filed a motion to vacate the class certification hearing. (Dkt. #165). Not long before  
16 it filed its opposition to class certification, BKC moved the Court to order the joinder of the  
17 franchisees of the BKL restaurants at issue. (Dkt. #145). The Court ultimately granted this  
18 motion (Dkt. #226 at 26), requiring Class Counsel to research and draft a third amended  
19 complaint incorporating the franchisees as defendants. (*Id.*). In response to Plaintiffs' motion to  
20 file this new complaint, however, the Court required assurance that the newly joined franchisee  
21 defendants would abide by the existing schedule. (Dkt. #226 at 2). When BKC could not secure  
22 such assurances, the parties agreed not to amend the complaint to add the tenant/franchisees.  
23 (Dkt. #262).

24 Both parties filed summary judgment motions. (Dkt. ##299-302). Once the Court  
25 determined the scope of the case in its class certification order of September 25, 2009, (Dkt.  
26 #226), Class Counsel engaged in an intensive effort over six months to prepare the ten class  
27 actions for separate trials. (Lee Decl. ¶ 19). This required further document discovery, and  
28 preparing for and taking five Rule 30(b)(6) corporate representative depositions of top Burger

1 King manager potential trial witnesses. (*Id.*). Class Counsel also engaged in extensive third-  
2 party discovery. Class Counsel obtained documents from the tenant franchisees for use as  
3 potential exhibits and took eight corporate representative depositions of potential trial witnesses.  
4 (*Id.* ¶ 20). Class Counsel also obtained documents from planning departments, architects, and  
5 other potential trial witnesses, and took the deposition of one of the architects. (*Id.* ¶ 20).

6 Class Counsel devoted time to working with three trial experts. This included attending  
7 surveys of each of the ten restaurants at issue, reviewing their reports and the hundreds of  
8 photographs on which one of those reports relied, and preparing for and defending the depositions  
9 of two of those experts. (Lee Decl. ¶ 21). Class Counsel also took the deposition of Burger  
10 King's expert trial witness, which required review of three separate reports for each of the ten  
11 stores. (*Id.*).

12 Ultimately, Class counsel obtained and reviewed over 100,000 pages of documents from  
13 BKC and over 15,000 pages of documents from third parties. (Dkt. #340-1, ¶ 4). These  
14 documents were reviewed and coded by paralegals, and culled for use at deposition and at trial as  
15 potential exhibits. Class Counsel also devoted substantial time and resources to identifying and  
16 preparing class member witnesses to testify about injunctive and monetary claims. (Lee Decl. ¶  
17 22). Class Counsel ended up defending the depositions of the three named plaintiffs and ten class  
18 member witnesses. (*Id.*). When the case was settled, Class Counsel were not only preparing trial  
19 witnesses, exhibits and jury instructions, but also preparing for yet more depositions of class  
20 members and to complete briefing of cross-summary adjudication motions. (Lee Decl. ¶ 24).

21 Class Counsel undertook the litigation on a contingent basis because neither the Named  
22 Plaintiffs nor the Class were able to pay fees or costs. (Lee Decl. ¶ 49; Castaneda Decl. ¶ 3;  
23 Corbett Decl. ¶ 3; Wellner Decl. ¶ 3). Class Counsel expended money for costs and expenses  
24 required for prosecution of the action. (Lee Decl. ¶ 51).

25 The parties' settlement discussions were shoe-horned amid trial preparation. The parties  
26 held two in-person meetings---the first devoted to injunctive issues and the second to monetary  
27 relief with a mediator---and numerous telephone conferences. (Lee Decl. ¶ 24). Class Counsel  
28 resolved the parameters of injunctive relief before negotiating monetary relief. (*Id.*). They

1 negotiated fees and costs only after Class monetary relief was resolved. (*Id.*). The monetary  
2 relief agreed to by the parties was that proposed by the mediator, former California Supreme  
3 Court Justice Edward A. Panelli. (*Id.*). Class Counsel performed the bulk of the work drafting  
4 motions for the preliminary and final approval of the settlement. (*Id.*).

5 The Court preliminarily approved the settlement on March 19, 2010, on the brink of trial,  
6 a month before the first of the ten trials was set to begin.

### 7 **B. Terms of the Settlement Agreement**

8 The parties described the terms of the Agreement in their Joint Notice of Motion and  
9 Motion for Preliminary Approval of Stipulation and Settlement Agreement. (Dkt. #340). This  
10 section provides a summary.

11 After this lawsuit was filed, Burger King surveyed the ten restaurants and instructed the  
12 tenant/franchisees to remediate barriers that were found during the surveys. (*See* Dkt. #340-1 ¶  
13 6). After this remediation work was completed, Plaintiffs' architectural expert conducted  
14 additional extensive surveys of each of the restaurants, establishing that the remediation work  
15 done in response to this lawsuit had greatly enhanced the accessibility of the BKLs outlined and  
16 further work that was required. (Lee Decl. ¶ 25). The Settlement Agreement requires BKC to  
17 arrange for remediation of these remaining items. (*See* Settlement Agreement ¶ 6 and Ex. A  
18 (Dkt. #331)).

19 To ensure that access is maintained, the Settlement Agreement requires three types of  
20 daily checklists or periodic access surveys geared to the frequency and type of access barriers that  
21 typically arise in restaurants (*Id.* ¶ 7):

- 22 (1) Daily surveys conducted by tenant franchisee managers that focus on ensuring that  
23 frequently-changing elements remain in compliance. For example, managers must  
24 make sure that movable condiment dispensers are kept within reach, and the path of  
25 travel to restrooms is not obstructed by high chairs or other items. (*See id.* ¶ 7.1.1).
- 26 (2) Mid-level surveys conducted every three years target elements that change less  
27 frequently than those found in daily surveys, such as parking lot re-striping and  
28 restroom fixtures. (*See id.* ¶ 7.1.2 and Ex. C).

1 (3) Comprehensive successor remodel surveys, conducted when a restaurant is remodeled,  
2 approximately once every 20 years. (*See id.* ¶ 7.1.3 and Ex. D).

3 BKC will produce to class counsel on a periodic basis the mid-level and remodel survey forms for  
4 monitoring. (*See id.* ¶ 8.2). The parties have also agreed to a dispute resolution process in which  
5 disputes that the parties cannot resolve can be brought to the Court for resolution during the term  
6 of the Settlement Agreement. (*See id.* ¶ 11). One disability access expert considers the injunctive  
7 relief provided “exemplary” and anticipates that it will become the “model” for future settlement  
8 agreements against restaurant chains in disability access cases. (Declaration of Claudia Center  
9 (“Center Decl.”) ¶¶ 10-11).

10 Pursuant to this Court’s orders, the Named Plaintiffs and approximately 380 Class  
11 members who opted in to pursue damage claims by March 1, 2010 are eligible as Damages  
12 Claimants for a share of the \$5 million Damages Fund. (*See* Dkt. #252 at 1-2; Settlement  
13 Agreement ¶¶ 3.4, 9.3). Monetary awards will be distributed by the Claims Administrator *pro*  
14 *rata* based on the total number of eligible claims for all Damages Claimants, with a maximum of  
15 six visits for which an individual Damages Claimant can obtain recovery. (Settlement Agreement  
16 ¶ 9.5.1).<sup>3</sup> This is the largest monetary recovery per class member ever in a class action alleging  
17 disability discrimination by a public accommodation. (Paradis Decl. ¶¶ 5-6; Dkt. #340-1 ¶¶ 9-  
18 10).

19 In addition to payments to Damages Claimants, the money from the Damages Fund may  
20 be used for two other purposes: (a) payment for the costs of notifying the class of the Settlement,  
21 and administering the Settlement, to the extent that those costs exceed \$15,000 and \$50,000  
22 respectively;<sup>4</sup> and (b) payments to the Named Plaintiffs who in an amount to be determined by  
23 the Court, based upon declaration evidence and such other proof as the Court may require.  
24 (Settlement Agreement ¶ 9.2.2). If there are any funds remaining after disbursements to Damages

25 \_\_\_\_\_  
26 <sup>3</sup> Named Plaintiffs are eligible for monetary payments as Damages Claimants under the same  
27 criteria and procedures as other eligible claimants. (Settlement Agreement ¶ 9.3.9).

28 <sup>4</sup> Costs up to these amounts will be paid by Class Counsel based on estimates they have obtained  
from claims administrators, and the cost of issuing notice to the class after the certification order,  
Class Counsel do not expect these costs to exceed these amounts, but if they do, the remainder  
will be paid from the Damages Fund.

1 Claimants and towards these other obligations, they will be donated to a *cy pres* recipient. (*Id.* ¶  
2 9.6).

3 Damages Claimants may opt out of the monetary provisions by June 7, 2010. (*Id.* ¶ 10;  
4 Dkt. #342 at 6). Burger King may declare the Agreement null and void by June 17, 2010 if the  
5 number of Damages Claimants who opt out of the Class exceeds 30, or consists of Damages  
6 Claimants whose claims, in the aggregate, exceed \$500,000. (Settlement Agreement ¶ 10.4; Dkt.  
7 342 at 6).

8 In addition to the Damages Fund, the parties have agreed that Class Counsel may seek an  
9 award of attorneys' fees and costs in an amount not to exceed \$2,500,000, and that Burger King  
10 will not oppose such request. Fees and costs awarded will not come from the \$5 million  
11 Damages Fund. (*Id.* ¶¶ 9.2;12.1). Although Class Counsel will spend time monitoring  
12 compliance with the Settlement Agreement for the next four years, that time will not be  
13 separately reimbursed. (*Id.* ¶ 12.1).

14 The term of the proposed Settlement Agreement was originally six years, (Settlement  
15 Agreement ¶ 5) but the parties have since agreed to reduce the term to four years in light of the  
16 Court's recommendation at the preliminary approval hearing. *See Revised Settlement Agreement*  
17 *attached to the Proposed Order of Final Approval.*

### 18 **C. Notice, Objections and Opt-outs.**

19 As described in the Motion for Final Approval, court-approved notice has been given to  
20 the Class by the Claims Administrator. (Blair Decl. ¶¶ 3-4). Three weeks remain for Class  
21 members to submit objections and opt-outs. *See Dkt. #342 at 6.* To date, the Claims  
22 Administrator reports that no objections or opt-outs have been submitted. (Blair Decl. ¶¶ 8-9).

### 23 **III. ARGUMENT**

24 Class Counsel are entitled to an award of fees and costs because they obtained substantial  
25 relief. Since they prevailed on both federal and state statutory grounds that separately provide  
26 attorneys' fees and costs remedies, the Court should award fees and costs based on state law.  
27 *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995). Application of state  
28 law attorneys' fees standards is particularly appropriate in this case where the \$5 million

1 monetary relief obtained is authorized only under California law and is unavailable under the  
 2 federal ADA. Here statutory fees are sought under §§ 52(a)-(b) of the Unruh Act and § 54.3(a) of  
 3 the CDPA. *Engel v Worthington*, 70 Cal. Rptr. 2d 526, 528-30 (Cal. Ct. App. 4 1997).

4 Under California’s adjusted lodestar approach to attorneys’ fees, a lodestar figure is  
 5 obtained by multiplying the reasonable hours worked by a reasonable hourly rate. *See Ketchum v.*  
 6 *Moses*, 17 P.3d 735, 741-42 (2001); *Serrano v. Priest*, 569 P.2d 1303, 1315 (1977). After  
 7 deriving the lodestar figure, the court then determines if an adjustment is appropriate based on  
 8 specific factors. *Ketchum*, 17 P.3d at 741.

9 Litigation costs and expenses are authorized by both federal and state statutes.

10 **A. Class Counsel is Entitled to Attorneys’ Fees and Costs.**

11 A party is deemed to have prevailed in a case for purposes of qualifying for an award of  
 12 attorneys’ fees and cost if the party “realized its litigation objectives whether by judgment,  
 13 settlement or otherwise.” *Graham v. Daimler-Chrysler Corp.*, 101 P.3d 140, 152 (2004) (internal  
 14 quotation omitted); *Folsom v. Butte County Ass’n of Gov’ts*, 652 P.2d 437, 450 (1982)  
 15 (settlement); *Barrios v. Cal. Interscholastic Found.*, 277 F.3d 1128, 1134 (9th Cir. 2002)  
 16 (plaintiff prevails when he or she “enters into a legally enforceable settlement agreement against  
 17 the defendant”). A party is deemed to have prevailed even if, as here, all the relief originally  
 18 sought was not obtained. *See Sokolow v. County of San Mateo*, 261 Cal. Rptr. 520, 529-30 (Cal.  
 19 Ct. App. 1989); *Texas State Teachers Ass’n v. Garland Sch. Dist.*, 489 U.S. 782, 791-92 (1989).

20 **B. The Relief Obtained Supports the Reasonableness of the Requested Fees.**

21 Class Counsel have obtained significant injunctive relief, including: the removal of  
 22 architectural barriers undertaken by Burger King *pendite lite* as a result of the litigation (*see Decl.*  
 23 *of Tim Fox in Supp. Of Joint Mot. For Prelim. Approval of Stipulation and Settlement Agreement*  
 24 *¶ 6 (Dkt. #340-1)*); further removal of barriers (*see ¶ 6 of the Settlement Agreement*); changing  
 25 business practices for daily, middle term and long-term checklists and surveys (*see id.* at *¶ 7.1*  
 26 *and Exhibits C-D*); monitoring by Class Counsel, (*id.* *¶ 8.2*); and the availability of judicial  
 27 intervention, (*id.* *¶ 11*), are substantial measures that ensure accessibility by customers who use  
 28 wheelchairs and scooters. According to one expert in disability access litigation, the injunctive

1 relief is likely to be an example for how to resolve other chain restaurant disability access cases.  
 2 (Center Decl. ¶¶ 10-11). Thus, Class Counsel would be entitled to fees and costs even if they had  
 3 only obtained injunctive relief. *See Folsom*, 652 P.2d at 449-50; *Richard S. v. Dep't. of Dev.*  
 4 *Servs.*, 317 F.3d 1080, 1087 (9th Cir. 2003) (cases awarding attorneys' fees based on the  
 5 injunctive relief obtained in a settlement without monetary relief); *see also City of Riverside v.*  
 6 *Rivera*, 477 U.S. 569, 575 (1986) ("the amount of fees awarded under [civil rights fee-shifting  
 7 statutes should]...*not be reduced because the rights involved may be nonpecuniary in nature.*")  
 8 (internal citation omitted) (emphasis in original). The Unruh Act prohibits the dignitary harm of  
 9 denial of "full and equal accommodations...in all business establishments." *See* Unruh Act § 51.  
 10 California courts recognize that Unruh Act-prohibited "discrimination by businesses is, *per se*,  
 11 injurious" even when the actual damages are "insignificant." *Engel* at 70 Cal. Rptr. 2d at 53  
 12 (omitting internal citations).

13 " [I]n determining a reasonable fee award [the court] should consider not only the  
 14 monetary results but also the significant nonmonetary results [the plaintiff] achieved for himself  
 15 and other members of society." *Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996).  
 16 In this case, in addition to "exemplary" injunctive relief, Class Counsel obtained an average of  
 17 approximately \$13,000 per opt-in class member, the largest monetary recovery ever in this type  
 18 of case. (Paradis Decl. ¶¶ 5-6; Dkt. #340-1 ¶¶ 9-10). As the Court noted at the preliminary  
 19 approval hearing, all of the monetary recovery is in the form of cash.

### 20 **C. The Lodestar Attorneys' Fees Figure Is Reasonable.**

21 The starting point for computing the lodestar amount is to multiply the reasonable number  
 22 of hours expended by attorneys, law clerks, and paralegals by reasonable hourly rates to obtain a  
 23 lodestar figure. *See Ketchum*, 17 P.3d at 741; *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Caudle*  
 24 *v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000).

#### 25 **1. The Hours Expended by Class Counsel Are Reasonable.**

26 As described above, *see supra* Part II.A., in order to obtain the substantial settlement in  
 27 this case, Class Counsel expended over eight thousand hours to prepare the case for ten separate  
 28 trials. The Court ordered preliminary approval of the settlement only a month before the first of

1 the trials was scheduled to begin.

2 The work performed by Class Counsel in prosecuting the case is documented in  
3 contemporaneously-maintained records of attorneys, law clerks, and paralegals. (*See* Lee Decl. ¶  
4 30). The aggregate time records have been provided by project headings under the successive  
5 stages of the litigation; the qualifications, backgrounds and roles of timekeepers; and individual  
6 summaries of each timekeeper have also been provided, as directed by the Court. (*See* Lee Decl.  
7 ¶¶ 8-14, 30; Robertson Decl. ¶¶ 3-14; and Mayeda Decl. ¶¶ 2-9). Although Class Counsel were  
8 drawn from several firms, they coordinated their prosecution of the case, with each firm assuming  
9 complementary tasks and cooperating with the other firms. (*See* Lee Decl. ¶¶ 26-27). The work  
10 detailed above ultimately required approximately 8,100 hours of attorney and staff time for a total  
11 of approximately \$2.9 million in fees. (Lee Decl. ¶ 33). Class Counsel have reduced that amount  
12 by approximately 4800 hours and \$1.7 million in two principal ways.

13 First, Class Counsel exercised billing judgment to delete approximately 587 hours totaling  
14 approximately \$226,000. (Lee Decl. ¶ 35). For example, the attorneys and staff of the Disability  
15 Rights Education and Defense Fund and Antonio Lawson devoted approximately 174 hours  
16 totaling approximately \$80,000 in fees. (*Id.* ¶ 35). While there is no question that this work  
17 contributed to the ultimate success of the case, since this Court declined to appoint DREDF or  
18 Mr. Lawson to represent the class, Class Counsel excluded their time from the lodestar. (*Id.* ¶  
19 35). Class Counsel also excluded entirely the time devoted to the Rule 23(f) appeal of this  
20 Court's class certification decision because the work done did not relate to the ten restaurants  
21 certified by the Court. (*Id.* ¶ 36).

22 Class Counsel heeded the Court's instructions concerning staffing at depositions and  
23 hearings, including the fact that "the award will take into account the staffing used by the  
24 opposing party." (Dkt. #343 at 3). As such, Class Counsel eliminated from their lodestar time  
25 spent by attorneys at hearings and depositions over and above the number of attorneys present  
26 representing BKC and (in the case of depositions) third-party deponents. This resulted in  
27 eliminating the time of ten attorneys at hearings and seven personnel at depositions. (*See* Lee  
28 Decl. ¶ 38). Finally, beyond these extensive reductions, Class Counsel reviewed all of the time



1 entries and eliminated various entries, including, for example, time devoted by new attorneys  
2 coming up to speed, time of other firm attorneys and staff who were consulted, time spent by  
3 attorneys on projects that could have been done by paralegals but were not due to time  
4 constraints, and possible duplication of effort. (Lee Decl. ¶ 39 and Exh. 2).

5 Second, after the exercise of billing judgment, Class Counsel took a further across-the-  
6 board reduction of 60%. (*Id.* ¶ 40). This substantial reduction resulted from the fact that the  
7 complaint filed by Plaintiffs sought certification for approximately 90 restaurants, but the class  
8 certified by the Court, and the settlement reached by the parties, covered ten restaurants. Class  
9 Counsel do not seek fees for work related only to the approximately 80 restaurants for which  
10 certification was denied. In such circumstances, courts commonly apply an across-the-board  
11 percentage reduction to the lodestar. *See, e.g., Gates v. Deukmejian*, 987 F.2d 1392, 1399-1400  
12 (9th Cir. 1992) (where a voluminous fee application is filed “percentages indeed are acceptable,  
13 and perhaps necessary, tools for district courts fashioning reasonable fee awards.”). The  
14 reduction of 60% reflects Class Counsel’s best estimate of the work they spent attributable only  
15 to the remaining 80 restaurants. (Lee Decl. ¶ 41).

16 All told, Class Counsel reduced their raw lodestar number of \$2.9 million to \$1.2 million.  
17 Class Counsel’s request is also supported by the fact that for at least the next four years they “will  
18 have continuing obligations to the case for which no additional compensation will be awarded.”  
19 *See Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at \*26 (M.D. Tenn. Aug. 11, 1999).

## 20 **2. The Hourly Rates Used by Class Counsel Are Reasonable.**

21 The rates used to calculate the lodestar figure are reasonable. The lodestar should be  
22 calculated using prevailing market rates in the community in which the case was litigated. *MBNA*  
23 *Am. Bank v. Gorman*, 147 Cal. App. 4th Supp. 1, 13 (2006); *Camacho v. Bridgeport Fin. Inc.*,  
24 523 F.3d 973, 979 (9th Cir. 2008); *Briggs v. United States*, 2010 WL 1759457 at \*10 (N.D. Cal.  
25 April 30, 2010); *see also Blanchard v. Bergeron*, 489 U.S. 87, 94-95 (1989). The hourly rates  
26 used to calculate the lodestar in this case are the rates of counsel with similar experience,  
27 reputation, and ability. The declaration of attorneys’ fees expert Richard M. Pearl, author of the  
28 treatise *California Attorney Fee Awards, Second Edition*. (2006), confirms that the rates used by

1 Class Counsel are reasonable market rates. (Pearl Decl. ¶¶ 6, 8). Class Counsel have extensive  
 2 experience litigating complex civil rights class actions. (Lee Decl. ¶¶ 4-6; Robertson Decl. ¶¶  
 3 22-36; Mayeda Decl. ¶¶ 4, 11). Courts in this District have approved the reasonableness of the  
 4 hourly rates of Lewis Feinberg Class Counsel and their law clerks and paralegals in similar cases.  
 5 (Lee Decl. ¶ 48).

6 Based on these reasonable hours and reasonable rates, Class Counsel's lodestar figure is  
 7 \$1,188,519.10.

#### 8 **D. An Upward Enhancement of Almost 2% Is Appropriate.**

9 After deriving the lodestar figure, the court then determines if an adjustment is appropriate  
 10 based on specific factors. *See Ketchum*, 17 P.3d at 741 (2001); *Serrano*, 569 P.2d at 1312 (1977).  
 11 These factors include (1) contingent risk of non-payment; (2) results obtained; (3) preclusion of  
 12 other employment; (4) quality of representation factors such as novelty and complexity of issues,  
 13 difficulty of case, and skill of counsel, and (5) a public service element. *Ketchum*, 17 P.3d at 741;  
 14 *Serrano*, 569 P.2d at 1316-17. None of these factors is already taken into account in the lodestar  
 15 figure discussed above.<sup>5</sup> Moreover, where the lodestar already accounts for the fact that plaintiff  
 16 has not obtained all the relief originally sought, that circumstance is not further considered for  
 17 enhancement purposes. *Corder v. Gates*, 947 F.2d 374, 378 (9th Cir. 1991)

#### 18 **1. Contingent Risk**

19 Under the California lodestar enhancement method, "fee enhancements are intended to  
 20 compensate for the risk of loss generally in contingency cases as a class." *Ketchum*, 17 P.3d at  
 21 742. The lodestar figure alone does not account for contingent risk. *See id.* ("A lawyer who both  
 22 bears the risk of not being paid and provides legal services is not receiving the fair market value  
 23 of his work if he is paid only for the second of these functions. If he is paid no more, competent  
 24 counsel will be reluctant to accept fee award cases." (internal citations omitted)); (*see* Pearl Decl.  
 25 ¶ 15; Mayeda Decl. ¶ 13). Class Counsel undertook representation of the class on a contingent

26 <sup>5</sup> Because the California approach is "an independent state rule", *Serrano*, 652 P.2d at 997 n. 29,  
 27 a unanimous California Supreme Court rejected the contrary federal approach of the United States  
 28 Supreme Court in *Burlington v. Dague*, 505 U.S. 557 (1992). *Ketchum*, 17 P.3d at 745 ("Nor are  
 the considerations of the majority opinion in *Burlington* . . ., which involved issues of federal law  
 and practice, applicable herein.").

1 basis because neither Named Plaintiffs nor the Class was able to pay any portion of their fees.  
2 (Lee Decl. ¶ 49).

### 3 2. Results Obtained

4 Lodestar enhancement is appropriate when “an exceptional effort produced an exceptional  
5 benefit” for the Class. *Graham*, 101 P.3d at 159 (internal quotation omitted). The exemplary  
6 results obtained, as noted above, have not been factored into the lodestar figure. In this case, the  
7 injunctive relief has not only eliminated barriers for users of wheelchairs and scooters, but the  
8 daily, mid-level, and successor remodel checklist and survey requirements with the monitoring  
9 and judicial oversight provisions promise to prevent occurrence of future barriers. (*See*  
10 Settlement Agreement ¶¶ 7, 8, 11). Moreover, the average per capita \$13,000 recovery is the  
11 highest per capita monetary relief for a disability access class. (Paradis Decl. ¶¶ 5-6; Dkt. #340-1  
12 (Decl. of Timothy P. Fox in Supp. of Joint Mot. for Prelim. Approval of Stipulation and  
13 Settlement Agreement, ¶¶ 9-10)).

### 14 3. Preclusion of Other Employment

15 “[T]he extent to which the nature of the litigation precluded other employment by the  
16 attorneys” is a factor in enhancement of lodestar. *Ketchum*, 17 P.3d at 741. Time limitations  
17 imposed by the circumstances are an enhancement factor when they are so substantial that the  
18 time limitations preclude maintaining other employment. *See Camacho v. Bridgeport Fin., Inc.*,  
19 523 F.3d 973, 982 n.1 (9<sup>th</sup> Cir. 2008); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9<sup>th</sup> Cir.  
20 2002). Class Counsel expended over eight thousand hours to bring the case to settlement 18  
21 months after filing. The last six of those months were particularly hectic and largely precluded  
22 maintaining Class Counsel’s other obligations: Class Counsel devoted approximately 5000 hours  
23 readying ten class separate actions for trial between late September 2009 and March 2010. (Lee  
24 Decl. ¶ 49). As Class Counsel testify in their declarations, this intense activity substantially  
25 precluded them from accepting other employment during that period. (*See* Lee Decl. ¶ 50,  
26 Robertson Decl. ¶ 20, Mayeda Decl. ¶ 13).

27 //

28 //



1 even higher”); *Steiner v. Am. Broad. Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007)  
 2 (approving multiplier of approximately 6.85 and finding it “within the range of multipliers that  
 3 courts have allowed”); *Vizcaino*, 290 F.3d at 1051 (approving multiplier of 3.65).

4 Based on an upward enhancement of almost 2%, the total enhanced lodestar figure is  
 5 \$2,274,187.86.

6 **E. The Litigation Costs and Expenses Are Reasonable.**

7 The costs and expenses incurred by Class Counsel are reasonable. Reimbursement of  
 8 costs and expenses is authorized by Cal. Civ. Proc. Code § 1032(b); *see Heather Farms*  
 9 *Homeowners Ass’n, Inc. v. Robinson*, 26 Cal. Rptr. 2d 758, 761 (Cal. App. 1 Dist. 1994), as well  
 10 as federal statute. 42 U.S.C. § 12205 (prevailing party entitled to costs). During the course of  
 11 this litigation, Class Counsel have had to incur substantial costs and expenses of \$225,138.87  
 12 associated with the prosecution of this case, including deposition costs, transcripts, service of  
 13 subpoenas, travel, filing fees, costs of notice, and expert fees. Fees for Plaintiffs’ testifying and  
 14 non-testifying experts alone totaled almost \$75,000. These items are detailed by Class Counsel.  
 15 (Lee Decl. ¶ 51 and Exh. 4, Robertson Decl. ¶ 19 and Exh. A, Mayeda Decl. ¶ 19 and Exh. A).  
 16 However, Class Counsel is not seeking reimbursement for overhead expenses normally incurred  
 17 in operating their law practice. (*See* Lee Decl. ¶ 51, Robertson Decl. ¶ 19, Mayeda Decl. ¶ 12).

18 Accordingly, Class Counsel is entitled to recover of \$ \$225,138.87 in reasonable costs and  
 19 expenses.

20 **IV. CONCLUSION**

21 For the above-stated reasons, the Court should award Class Counsel \$2,274,187.86 in  
 22 reasonable attorneys’ fees and \$225,138.87 in reasonable costs and expenses.

23 Dated: May 17, 2010

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

24  
 25 By:  /s/ Bill Lann Lee  
 Bill Lann Lee  
 Andrew Lah  
 Julia Campins  
 LEWIS, FEINBERG, LEE,  
 RENAKER & JACKSON, P.C.  
 1330 Broadway, Suite 1800

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Oakland, CA 95612-2519  
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 Class*