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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, Defendant.	Case No. C 08-4262 WHA **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT BURGER KING CORPORATION'S MOTION TO DISMISS** **Hearing Date: February 12, 2009** **Time: 8:00 a.m.** Location: 19th Floor, Courtroom 9

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2. Whether Plaintiff's Complaint satisfies the requirements of Rule 8 of the Federal Rules of Civil Procedure.

3. Whether this Court has jurisdiction over Plaintiff's state law claims under the Class Action Fairness Act ("CAFA").

4. Whether it is appropriate for this Court to exercise supplemental jurisdiction over Plaintiff's state law claims.

5. Whether Plaintiff has properly alleged claims under California's Unruh Civil Rights Act and Disabled Persons Act.

INTRODUCTION

Plaintiff Miguel Castaneda -- a Burger King customer who uses a wheelchair -- brings this putative class action to challenge barriers to wheelchair access at 92 Burger King restaurants in California that are leased by Defendant Burger King Corporation ("BKC"). Plaintiff's Complaint describes the barriers he has encountered at two of these restaurants and alleges -- with great specificity -- that through its contracts with franchisees and other means, Defendant exercises considerable control over the design and operation of these and other BKC-leased ("BKL") restaurants. Plaintiff brings this case as a class action under Title III of the Americans with Disabilities Act ("Title III" or "ADA") and California state civil rights law, with the goal of remedying the common barriers in all 92 BKL restaurants.

The class Plaintiff will seek to certify will be very similar to a number of certified classes challenging wheelchair access barriers in chains of related public accommodations under Title III and California law. Such classes provide enormous efficiencies both in litigation and remediation, permitting the barriers to be solved at the headquarters level with policy changes that help ensure they will not recur.

Before class discovery has gotten underway and in the absence of a motion for class certification, Defendant has filed a kitchen-sink motion to dismiss, arguing that Plaintiff lacks standing to address the restaurants he has not visited, that his class action allegations should be stricken, that he should be ordered to file a more detailed complaint, that the Court lacks jurisdiction over Plaintiff's state law claims, and that Plaintiff has failed to state a claim under two state statutes.

Defendant provides no grounds, however, to distinguish this case from the many others in which a handful of plaintiffs have represented a class of wheelchair-users addressing common barriers at related facilities, including some that the named plaintiffs have not patronized. Defendant cannot point to a single case that does what it is asking the Court to do here: dismiss those facilities the named plaintiff has not visited before he has the chance to demonstrate that the class -- defined to include customers of those facilities -- meets the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Defendant's fundamental error is its contention that the scope of this case is determined by the standing of the named plaintiff, rather than the standing of the class as a whole. To the contrary, it is settled class action law that once a class is certified, the scope of the case is based on the standing of the class as a whole. Whether the class in this case will be certified depends on whether it meets the requirements of Rule 23, a question that is not yet properly before this Court.

Defendant's other arguments also fail. Defendant relies on an exception to the Class Action Fairness Act ("CAFA") to argue that the Court lacks jurisdiction over Plaintiff's state law claims. This exception does not apply, however, where a similar class action has been filed against a defendant within the previous three years. Defendant incorrectly stated that no such case had been filed. In fact, less than three years ago, BKC was named as a defendant in a class action asserting claims virtually identical to those at issue here, thereby vitiating its reliance on the CAFA exception. In any event, supplemental jurisdiction of Plaintiff's state law claims is appropriate both to avoid mammoth duplication of effort and because the question of state law on

which Defendant relies to contest such jurisdiction will soon be resolved by the California Supreme Court.

Finally, Plaintiff has properly alleged state law claims both because Defendant concedes that lessors are liable under Title III, which is a predicate for liability under state law, and because Plaintiff has independently alleged violations of state law. And although Defendant argues that Plaintiff has not pleaded his claims in sufficient detail, it failed to cite to the governing Ninth Circuit case on the pleading standard for wheelchair-access claims, a standard that Plaintiff's Complaint easily meets.

FACTS

A. Facts Alleged in the Complaint

Plaintiff Miguel Castaneda is a Burger King customer who uses a wheelchair. Complaint ¶ 10. He has encountered common barriers at a number of Burger King restaurants in California, including ones in Pittsburg and Pleasant Hill. *Id.* ¶¶ 41-42. These barriers include entry and restroom doors that were very difficult to open, parking lots with insufficient or inadequate accessible parking spots, inaccessible restrooms, narrow or steep sidewalks and ramps, queue lines that were too narrow for his wheelchair to navigate, and soda machines and condiments that were difficult for him to reach. *Id.* ¶ 42.

Plaintiff seeks to represent a class of Burger King customers who use wheelchairs or scooters and who have encountered similar barriers in any of the 92 Burger King stores in California that are leased by BKC. *Id.* ¶¶ 13-22. Plaintiff asserts claims challenging these common barriers under Title III of the ADA, 42 U.S.C. § 12181 *et seq.*, the Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq*. ("Unruh"), and the California Disabled Persons Act, Cal. Civ. Code, § 54, *et seq*. ("CDPA"). Complaint ¶¶ 2-3. Broadly speaking, these laws prohibit disability discrimination in places of public accommodation such as the Burger King restaurants at issue here.

There are over 600 Burger King restaurants in California. With respect to approximately 92 of these (so-called "BKLs"), BKC leases the building from the landlord and then sub-leases it to a Burger King franchisee. Complaint ¶ 23. As BKC agrees, this makes it liable for any

violations of Title III at those restaurants. *See* 42 U.S.C. § 12182(a) (prohibiting discrimination by those who lease or lease to places of public accommodation); Mem. of P. & A. in Supp. of Def. Burger King Corp.'s Mot. to Dismiss (Docket No. 29, "Def.'s Mem.") at 21-22 (agreeing that the ADA "creates strict liability for injunctive relief against . . . lessors, and lessees").

The Complaint contains extensive allegations supporting class certification. For example, it identifies a number of legal questions common to the class, Complaint ¶ 15, and describes the basis for Plaintiff's contention that his claims are typical and that he and his counsel will adequately represent the class, *id.* ¶¶ 16-17. The Complaint also provides detailed allegations concerning the standardizing role that BKC plays in the design and operation of its restaurants. Through its lease and franchise agreements and associated manuals and guidelines, BKC controls the development, design, alteration, remodel, maintenance, and operation of such restaurants. *Id.* ¶ 26. BKC requires BKLs to be constructed, remodeled, repaired, and maintained in conformity with BKC designs and standards, and has provided plans and specifications for such construction and remodeling. BKLs are required to comply with BKC's "Manual of Operating Data," ("MOD") which contains mandatory restaurant operating standards, specifications, and procedures. *Id.* ¶¶ 27-35.

Plaintiff alleges that BKC's violations are intentional, both because many of the barriers are so intuitively obvious that they could not but be so, *id.* ¶ 42, and because in 1997, BKC settled *Day v. Republic Foods, Inc.*, No. 95-1317CV (D.D.C.), a case in which the plaintiff alleged violations of the ADA similar to some of those alleged in Plaintiff's Complaint here. The settlement required BKC to survey and remedy ADA violations in its corporate-owned restaurants throughout the country, to notify franchisees of their obligation to comply with the ADA, to provide franchisees with a survey instrument to survey their restaurants, and to give franchisees training materials and technical assistance in bringing their restaurants into compliance with the ADA. BKC therefore knew or should have known of the requirements of the ADA and of its failure to comply with those requirements. *Id.* ¶ 39. (Exhibit 1 to the Declaration of Amy F. Robertson in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss ("Robertson Decl.").)

B. Public Documents and the Limited Discovery To Date Support The Allegations In the Complaint.

BKC complains in its motion that many of Plaintiff's assertions concerning BKC's designs and policies are "on information and belief." Def.'s Mem. at 3. This is for the simple reason that, prior to filing the Complaint, Plaintiff did not have access to many of these highly confidential documents. *See* Robertson Decl. ¶ 6. Rather, Plaintiff based his assertions on publicly-available documents, including annual reports and court pleadings in which BKC has touted the high degree of control that it exercises over its franchisees.

For example, in its Annual Report for the fiscal year ending June 30, 2008, BKC's parent company, Burger King Holdings, asserted that all of its restaurants "must adhere to strict standardized operating procedures and requirements" and are "required to follow the Manual of Operating Data, an extensive operations manual containing . . . standard design, equipment system, color scheme and signage, operating procedures, hours of operation and standards of quality for products and services." *Id.* at 6 (Robertson Decl. Ex. 2). In its brief to the Supreme Court in *Burger King Corp. v. Rudzewicz*, No. 83-2097, 1984 WL 565536 (Nov. 15, 1984) (Robertson Decl. Ex. 3), attempting to ensure that a Michigan franchisee was subject to Florida long-arm jurisdiction, BKC explained that it made available "[s]tandard plans and specifications for a freestanding building," and required approval of all building plans and alterations by BKC. *Id.* at *5 & n.3. "Burger King's active support extended into day-to-day operations. It offered a confidential MOD Manual containing the standards, specifications, procedures and methods for operating a Burger King Restaurant." *Id.* at *6.

The limited discovery that has occurred so far in this case provides additional support for Plaintiff's allegations. For example, the lease for the Pleasant Hill restaurant requires the lessee to operate a Burger King restaurant on the premises in accordance with the franchise agreement. Robertson Decl. Ex. 4 at 13. It also requires the lessee to alter the building to conform to BKC's "current image," and empowers BKC to enter the premises to make repairs or fulfill other obligations under the franchise agreement. *Id.* at 14.

The franchise agreement for that restaurant requires the franchisee to adopt "standardized design . . . uniform standards . . . and procedures of operation." Robertson Decl. Ex. 5 at 3. It requires the restaurant to be "constructed and improved" as authorized by BKC and requires repair and maintenance in accordance with "BKC's then current repair and maintenance standards." *Id.* The franchisee is required to "improve, alter and remodel the Franchised Restaurant to bring it into conformance with the national and local plans, specifications and/or other standards for new or remodeled Burger King Restaurants." *Id.* Failure to comply with these requirements is a material default of the franchise agreement. *Id.* at 19.

BKC enforces these requirements, often in federal court, and BKC's pleadings in those cases confirm both the level of detail on which BKC controls its franchisees and the lengths to which it will go to enforce that control. For example, through the Amended Complaint for Specific Performance and Damages in *Burger King Corp. v. Shams*, No. 06-20870 (S.D. Fla. Apr. 25, 2006) (Robertson Decl. Ex. 6), BKC requests specific performance of a franchise agreement, based on the franchisee's "failure to operate his BURGER KING(R) Restaurants in accordance with the standards and specifications required by BKC." *Id.* ¶ 1. The complaint details the shortcomings BKC is asking the court to compel the franchisee to remedy. *Id.* ¶ 35. While many of the items relate to food preparation and sanitary standards, they also include items relevant to ensuring wheelchair access, for example, "[h]andicap parking not easily identifiable" and "[r]estrooms not clean and maintained." *Id.*; *see also, e.g.*, Complaint for Injunctive Relief and Damages, *Burger King Corp. v. Bru Corp.*, No. 07-21316, ¶ 59 (S.D. Fla. May 22, 2007) (alleging that the franchisee's "failure to operate the Restaurant in accordance with BKC's standards relating to service, cleanliness, health, sanitation, repair and maintenance, as well as operational requirements, is a breach of the Franchise Agreement.") (Robertson Decl. Ex. 7). It is thus clear that Burger King imposes strict uniform standards on its franchisees and enforces them -- in federal court where necessary.

PROCEDURAL STATUS

Plaintiff filed this case on September 10, 2008. Although no case management conference has yet occurred, in response to Plaintiff's Motion to Compel Compliance with

General Order 56 (Docket No. 8), this Court ordered discovery to commence. *See* Order Re Disc. (Docket No. 18, dated Nov. 11, 2008). Shortly after receiving the Court's Order Re Discovery, Plaintiff served his first set of interrogatories and document requests on Defendant, responses to which would have been due on December 16, 2008. Defendant requested an extension of this deadline to January 12, 2008; Plaintiff agreed to that extension but requested production of a handful of basic documents, which BKC limited to the list of BKLs, BKC-selected excerpts from the MOD, and lease and franchise documents only for the two restaurants specifically identified in the Complaint. Robertson Decl. ¶¶ 2-4. Thus, class discovery has essentially not yet begun.[1]

Undersigned counsel has heard from over one thousand individuals complaining of similar barriers at Burger King restaurants around California and has conducted interviews with approximately 200 of those individuals. Robertson Decl. ¶ 7. BKC initially refused to identify for Plaintiff which of the over 600 Burger King restaurants in this state were BKLs, so it was impossible for Plaintiff to ascertain whether he or other potential class members had been to other such leased restaurants. Plaintiff received the list of BKLs on December 16, 2008. Robertson Decl. ¶ 5. Based on a review of this list, Plaintiff's counsel was able to identify an additional seven BKLs at which Mr. Castaneda has encountered similar barriers over the past two years. Decl. of Miguel Castaneda In Supp. of Pl.'s Opp'n to Def.'s Mot. to Dismiss ¶ 3; Robertson Decl. ¶ 8. In addition, of the approximately 200 individuals Plaintiff's counsel have interviewed, approximately 83 individuals have encountered barriers similar to those encountered by Mr. Castaneda at one or more BKLs, and those individuals have encountered similar barriers at a total of over 40 of the 92 BKLs. Robertson Decl. ¶ 7.

[1] Defendant has moved to stay discovery pending resolution of its Motion to Dismiss. *See* Def. Burger King Corp.'s Notice of Mot. and Mot. for Stay of Certain Disc. Pending Ruling on Mot. to Dismiss Compl. (Docket No. 37). A hearing on that motion is scheduled for next Monday, January 12, 2009.

ARGUMENT

I. Standard of Review.

Plaintiff brings his claims under the ADA and state civil rights laws to remedy barriers to access for individuals who use wheelchairs. Because this is a civil rights case, the Complaint is to be liberally construed. *Holley v. Crank*, 400 F.3d 667, 674 (9th Cir. 2005) ("We liberally construe civil rights complaints." (citation omitted.)).

BKC moves pursuant to Rules 12(b)(1), 12(b)(6), 12(e) and 12(f) of the Federal Rules of Civil Procedure. *See* Def. Burger King Corp.'s Notice of Mot. and Mot. to Dismiss ("Def.'s Mot.," Docket No. 28) at 2.

Defendant relies on Rule 12(b)(1) for its arguments relating to standing, CAFA, and supplemental jurisdiction, and therefore references material outside the pleadings. *See* Def.'s Mot at 2; Def.'s Mem. at 2 & n.1. While this is technically correct, *see, e.g., Corrie v. Caterpillar Inc.*, 503 F.3d 974, 980 (9th Cir. 2007), with respect to standing, the question is legal rather than factual: Given that Defendant concedes that Plaintiff has standing as to the two restaurants named in the Complaint, *see* Def.'s Mem. at 1, is it appropriate, prior to class discovery, to hold -- as a matter of law -- that the proposed class cannot include BKLs visited by other class members but not by Plaintiff, without giving Plaintiff the opportunity to demonstrate the numerous common questions of law and fact he shares with these putative class members?

Defendant moves to strike Plaintiff's class allegations pursuant to Rule 12(f) on the grounds that they do not meet the commonality, typicality and adequacy requirements of Rule 23(a)(2), (3) and (4). *See* Def.'s Mot. at 2; Def.'s Mem. at 11-14. "[M]otions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." *Greenburg v. Life Ins. Co. of N. Am.*, No. 08-03240-JW, 2008 WL 5396387, at *1 (N.D. Cal. Dec. 18, 2008) (internal citations omitted). "Accordingly, such motions should be denied unless the matter has no logical connection to the controversy at issue and may prejudice one or more of the parties to the suit. . . . When considering a motion to strike, the court 'must view the pleading in a light most favorable to the pleading party.'" *Id.* (internal citations omitted).

Finally, Defendant moves to dismiss Plaintiff's state law claims pursuant to Rule 12(b)(6). In considering such a motion, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Williams v. Gerber Prods. Co.*, --- F.3d ---, 2008 WL 5273731, at *2 (9th Cir. Dec. 22, 2008). To survive a motion to dismiss, Plaintiff's complaint must plead "enough facts to state a claim to relief that is plausible on its face" and that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 1974 (2007), *quoted in Williams*, 2008 WL 5273731, at *3.

II. It Would Be Improper to Dismiss Claims Relating to Restaurants Mr. Castaneda Has Not Visited.

A. Rule 23 -- Not Article III -- Will Dictate the Scope of Class Claims.

Plaintiff Miguel Castaneda brings this putative class action challenging common barriers to individuals who use wheelchairs or scooters at approximately 92 BKLs in California. Mr. Castaneda has encountered these common barriers in a total of nine BKLs and intends to continue to patronize those and other Burger King restaurants. There is thus no question -- and Defendant does not contest -- that Mr. Castaneda has Article III standing to bring this case.

Defendant argues that Mr. Castaneda does not have standing to bring claims concerning restaurants that he has not visited. This argument misses the point. The claims in this case concerning restaurants that the named Plaintiff has not visited are not based on his individual standing, but rather on the standing of the class as a whole. Whether this is proper is judged by the requirements of Rule 23, not Article III of the United States Constitution.

"Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." 1 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 2:7 (4th Ed., updated 2008). Here, the question is not whether Mr. Castaneda has individual standing as to the restaurants he has not visited, but rather whether his claims are sufficiently similar to those of

individuals who encountered discrimination at those restaurants to support class certification and, ultimately, an injunction requiring BKC to bring those restaurants into compliance.

The Ninth Circuit addressed this question in *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001). In that case, a handful of prisoners with various disabilities represented a class challenging accommodations and physical barriers at facilities around the state where parole-related proceedings took place. *Id.* at 854, 858-59. The district court had entered a system-wide injunction; on appeal, the defendants argued that any relief should have been limited to the named plaintiffs, as those plaintiffs "failed to demonstrate standing for 'each type of relief sought.'" *Id.* at 860, 867. The Ninth Circuit held that when considering the scope of relief, it was the standing of the entire class that mattered.

> [W]hen 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. Accordingly, although in a class-action lawsuit, as in any other suit, "the remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established," the "plaintiff" has been broadened to include the class as a whole, and no longer simply those named in the complaint.

Id. at 871 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996).) In this case, if a class is properly certified, this Court will be empowered to order relief as to any noncompliant restaurants encompassed within the class definition.

The precise issue raised by Defendant here was addressed in *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK, 2005 WL 1648182 (D. Colo. July 13, 2005). In that case, the plaintiffs sought to certify a class under Title III of the ADA challenging barriers to wheelchair-users at approximately 2,100 Kmart department stores nationwide. Kmart argued that the named plaintiffs did not have standing to challenge barriers in stores they had not visited. The court rejected that argument and held, in certifying the nationwide class, 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.* at *3. Similarly, Defendant's standing argument here will be subsumed in this Court's Rule 23 analysis of the proposed class.

B. None of Defendant's Cases Support Its Effort to Restrict the Standing of Any Eventual Class.

Defendant does not provide a single case that does what it is asking the Court to do here: Dismiss from a putative class action facilities that Plaintiff has not patronized but as to which he asserts he has claims sharing common issues of law and fact. Instead, Defendant cites a long line of *individual* cases, that do not address the class action issues now before the Court. *See Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000) ("This is not a class action."); *Tyler v. Kansas Lottery*, 14 F. Supp. 2d 1220 (D. Kan. 1998) ("Plaintiff is not bringing this case as a class action."); *see also Doran v. 7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008) (individual case), *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832 (9th Cir. 2007) (same), *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133 (9th Cir. 2002) (same), *Moyer v. Walt Disney World Co.*, 146 F. Supp. 2d 1249 (M.D. Fla. 2000) (same).

Defendant also relies on two decisions from the District of New Jersey. Both of these decisions held that there is no *individual* standing as to restaurants that an individual plaintiff has not patronized. *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 226, 230 (D.N.J. 2003); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 343-44 (D.N.J. 2003). In both cases, however, the court held that it was premature to resolve the question of the scope of an eventual plaintiff class action. *See McDonald's*, 213 F.R.D. at 226; *Burger King*, 255 F. Supp. at 345.

Ultimately, Defendant offers no cases supporting its argument that the class Plaintiff seeks to certify will not have standing to challenge restaurants Plaintiff has not visited.

III. Plaintiff's Class Allegations Should Not Be Stricken.

Because Defendant concedes that Mr. Castaneda has Article III standing, the next step will be to consider whether class certification is appropriate, that is, whether Mr. Castaneda's claims are common to and typical of the class he seeks to represent. Given that almost no class discovery has taken place, this analysis is premature at this juncture; Plaintiff intends to file a motion to certify the class as quickly as possible once he has had the chance to take reasonable class discovery. However, based on the fact that this case is almost identical to a number of

cases certifying classes under Title III and related California state law, it is clear that Mr. Castaneda has *alleged* sufficient commonality and typicality to defeat a motion to strike.

A. It Is Premature to Assess Class Certification.

Plaintiff filed this case on September 10, 2008 and, by Order of this Court, discovery started on November 11, 2008. (Docket No. 18.) Although Plaintiff served his first set of written discovery three days later, he has, to date, received very limited information. Robertson Decl. ¶¶ 2-5. In the absence of class discovery and a motion by Plaintiff for class certification, Defendant's motion to strike is premature. *See, e.g.*, *Baas v. Dollar Tree Stores, Inc.*, No. C 07-03108 JSW, 2007 WL 2462150, at * 3 (N.D. Cal. Aug. 29, 2007) (holding that a motion to strike or dismiss class allegations was premature when brought before class discovery had commenced and before the plaintiffs had moved for class certification); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-0715 S C, 2006 WL 3422198, at *3 (N.D. Cal. Nov. 28, 2006) (holding that the defendant's motion pursuant to Rule 23(d)(4) was "an improper attempt to argue against class certification before the motion for class certification has been made and while discovery regarding class certification is not yet complete.").

B. Plaintiff's Class Allegations.

Plaintiff alleges that BKL restaurants contain similar barriers to individuals who use wheelchairs or scooters. Complaint ¶¶ 2, 25. He makes a series of detailed allegations concerning BKC's extensive control over the physical conditions and operations of these restaurants. For example, he alleges that many of these restaurants were built according to BKC's designs, *id.* ¶¶ 25, 28-31, that BKC "exercises substantial control over . . . the development, design, alteration, remodel, maintenance and operation" of the restaurants, *id.* ¶ 26, and that the restaurants are required to be operated in conformance with Burger King's "Manual of Operating Data," containing detailed requirements for the design and operation of the BKLs, *id.* ¶ 32. The facts alleged by Plaintiff are very similar to those that supported class certification in a number of Title III class actions in this district and elsewhere. They are thus more than sufficient -- at the pleading stage -- to support class certification here. Defendant's motion to strike the class allegations should be denied so that class discovery can proceed.

C. The Class that Plaintiff Alleges Is Very Similar to Many Certified Classes.

"A number of courts have held that where people who use wheelchairs encounter the same types of barriers at a number of commonly-owned or affiliated public accommodations, commonality is established and class certification is appropriate." *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 609 (N.D. Cal. 2004) (citing *Colo. Cross Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 359-60 (D. Colo. 1999); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 526 (S.D. Fla. 2000); and *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 449 (N.D. Cal 1994)).

The class certified in *Moeller* was virtually identical to the class Plaintiff seeks to certify here: Four plaintiffs who had visited a handful of Taco Bell restaurants in California represented a statewide class of customers who used wheelchairs and scooters challenging barriers in approximately 220 Taco Bell corporate restaurants under the ADA, Unruh, and the CDPA. *Moeller*, 220 F.R.D. at 605, 607. Like Defendant here, Taco Bell argued that, because each of its stores was different and because their differing ages invoked different legal standards, there was no commonality. *Id.* at 609-10, *compare* Def.'s Mem. at 11. The court rejected both of those arguments, noting that "[t]he 'unique architecture' argument has been rejected by a number of courts in disability cases" and that the different legal standard for older restaurants was "a question common to the class." *Moeller*, 220 F.R.D. at 609-10.

Moeller relied to a great degree on an earlier case in this district certifying a very similar class involving a chain of theaters. In *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D.Cal 1994), four people with disabilities sought to certify a statewide class challenging barriers at over seventy theaters. That court held that the class satisfied the commonality requirement because, "[f]rom the fact that the same categories of design features are being challenged in each theater, it follows that the legality of those features are legal issues common to the claims of the members of all of the subclasses." *Id.* at 449. Similarly, the putative class in this case challenges the "same categories of design features" in each BKL restaurant.

The *Arnold* court held that the claims of the named plaintiffs were typical of those of the class: "[I]n a public accommodations suit such as this one where disabled persons challenge the

legal permissibility of architectural design features, the interests, injuries, and claims of the class members are, in truth, identical such that any class member could satisfy the typicality requirement for class representation." *Id.* at 450. The court specifically wrestled with a question similar to that raised by BKC's Motion: "It is true that members of the class will each likely have attended only certain of defendant's theaters. This means that, in a sense, the proposed class is divided into more than seventy subclasses," one for each theater. *Id.* at 449. The court concluded that step was not necessary, "since, even *among* the subclasses, there exist sufficient common issues" to satisfy Rule 23(a)(2). *Id.* (emphasis in original).

A number of other courts have certified similar class actions, that is, cases in which a handful of representative plaintiffs with disabilities challenge barriers in a large group of related public accommodations -- either statewide or nationwide -- under Title III of the ADA. *See, e.g., Colo. Cross Disability Coal.*, 184 F.R.D. at 363 (certifying statewide class of wheelchair-users under Title III and Colorado state law challenging common barriers in approximately 40 Taco Bell restaurants around that state); *Lucas v. Kmart Corp.*, 2005 WL 1648182, at *3 (certifying nationwide class of wheelchair-users under Title III challenging common barriers in approximately 2,100 Kmart stores); *id.* 2006 WL 722163, at *6 (D. Colo. March 22, 2006) (certifying for settlement purposes[2] damages subclasses for seven states including California); *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 460 (S.D. Fla. 2002) (certifying nationwide settlement class of individuals with all disabilities challenging common barriers in 2,800 Amoco service stations under Title III); *Ambulatory Surgery*, 197 F.R.D. at 526 (certifying nationwide Title III class of individuals with all disabilities challenging common barriers at 350-400 medical facilities of various types located throughout the country); *Access Now, Inc. v. AHM CGH, Inc.*, No. 983004-CIV-GOLD-SIMONTO, 2000 WL 1809979, at *1, *6 (S.D. Fla. 2000) (same); *Access Now, Inc. v. Claire's Stores, Inc.*, No. 00-14017-CIV, 2002 WL 1162422, at *3

[2] The Supreme Court has held that, in the context of a request to certify a settlement class, the court must conduct a thorough analysis to reassure itself that the proposed class satisfies Rule 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997).

(S.D. Fla. May 7, 2002) (certifying settlement class under Title III challenging common barriers at 2,200 retail stores nationwide).

It is true that the stores at issue in *Moeller* and *Lucas*, for example, were all corporate-operated stores while the BKL restaurants at issue here are all leased. This fact at most simply introduces additional -- *common* -- questions of law and fact shared by the class. In reality, BKC, by its own admission, plays a standardizing role that underscores both the commonality of the barriers encountered by the class and the superior effectiveness of a class action in remedying and preventing barriers to wheelchair-users in Burger King restaurants. *See, e.g., supra* at 5-6 (describing BKC leases, franchise agreements, an annual report and pleadings in other cases asserting the uniformity of Burger King's design and operation); *see also Ambulatory Surgery*, 197 F.R.D. at 526 (certifying class involving hundreds of facilities owned and operated by different entities that participated in a common design and construction program).

In a number of other arenas, courts have certified classes of individuals with legal claims involving varying facilities without requiring a named plaintiff with individual standing as to each facility. In *Parra v. Bashas', Inc.*, 536 F.3d 975 (9th Cir. 2008), for example, the Ninth Circuit reversed the district court's refusal to certify a class challenging pay disparities in a chain of 150 grocery stores operating under three trade names. *Id.* at 976-77, 979. In *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), the Ninth Circuit upheld the certification of a class of female Wal-Mart employees brought by eight representative plaintiffs addressing gender discrimination at 3,400 Wal-Mart stores nationwide. *Id.* at 1175. In none of these cases -- whether under Title III or another statute -- did the court require a named plaintiff with *individual* standing at each of the hundreds or thousands facilities at issue, for example, 2,100 named plaintiffs in *Lucas*, 2,800 named plaintiffs in *Amoco*, or 3,400 named plaintiffs in *Dukes*.

D. Defendant's Cases Do Not Support Its Request to Strike Class Allegations.

1. Defendant Ignores All Recent Precedent Certifying Classes of Individuals with Disabilities Challenging Common Barriers.

In requesting that this Court strike Plaintiff's class allegations, Defendant relies primarily on a handful of older -- and largely unpublished -- cases in which four courts in the Middle and

Southern Districts of Florida refused to certify classes of individuals with disabilities bringing claims under Title III of the ADA. Significantly, each of these cases was decided on the plaintiff's motion for class certification. *See Access Now, Inc. v. Macy's East, Inc.*, No. 99-9088-CIV-JORDAN (S.D. Fla. Feb 15, 2001), slip op. at 1 (Def.'s Mem. Ex. A); *Access Now, Inc. v. Walt Disney World Co.*, 211 F.R.D. 452, 453 (M.D. Fla. 2001); *Access Now, Inc. v. May Dep't Stores Co.*, No. 00-148-CIV-MORENO (S.D. Fla. Oct. 6, 2000), slip op. at 1 (Def.'s Mem. Ex. B); *Ass'n for Disabled Ams. v. Motiva Ent., LLC.*, No. 99-0580-CV-UNGARO BENAGES (S.D. Fla. Oct. 18, 1999), slip op. at 5 (Def.'s Mem. Ex. C), *cited in* Def.'s Mem. at 12.[3] These cases do not support Defendant's request to strike Plaintiff's class allegations before class discovery.

Furthermore, Defendant does not cite any case more recent than 2001 and ignores a long line of cases certifying Title III classes alleging similar barriers at a series of related facilities. *See supra* at 13-15. In addition, starting around the time Defendant's cases were decided, judges in the Southern District of Florida granted motions to certify a series of classes far broader than the class for which Plaintiff will seek certification. *See Claire's Stores*, 2002 WL 1162422, at *3 (2,200 stores nationwide); *Amoco*, 211 F.R.D. at 460 (2,800 stores nationwide), *Ambulatory Surgery*, 197 F.R.D. at 526 (350-400 medical facilities nationwide), *AHM CGH*, 2000 WL 1809979, at *1 (S.D.Fla. 2000) (same).[4]

2. Defendant Construes the Concept of "Same Legal Injury" Too Narrowly.

Defendant's assertion -- in connection with its standing argument -- that "named plaintiff's class representational standing is limited to representing the class of people who suffered the same legal injury," Def's. Mem. at 8, simply underscores the fact that the question

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[3] Defendant also relies on *Clark v. Burger King*, 255 F. Supp. 2d at 343. *See* Def.'s Mem. at 13. However, as explained above, the court in that case did not deny class certification, but rather -- as Plaintiff requests here -- postponed that decision until such time as it received the plaintiffs' motion for class certification. *Burger King*, 255 F. Supp. 2d at 345.

[4] Plaintiff cited most of these cases -- as well as *Moeller*, 220 F.R.D. at 613-14 , *Arnold*, 158 F.R.D. at 458, and *Lucas*, 2005 WL 1648182, at *3 & 2006 WL 722163, at *6 -- in his Reply Brief in Support of Motion to Compel Compliance with General Order 56 (Docket No. 17), *see id.* at 3-4 & n.1. Despite this, Defendant did not address any of them in its Motion.

should be addressed through Rule 23 rather than Article III: The question of what constitutes the "same legal injury" will be answered by the commonality and typicality inquiry under Rule 23(a)(2) and (3). In any event, Defendant's attempt to limit "same legal injury" to injuries suffered due to barriers only at the precise stores Plaintiff visited goes against the Ninth Circuit's instruction in *Armstrong* that "[w]hen determining what constitutes the same type of relief or the same kind of injury, we must be careful not to employ too narrow or technical an approach." *Id.*, 275 F.3d at 867.

Several courts have addressed this question in the context of Title III classes. For example, in *Arnold*, the court addressed it under the rubric of typicality, *see* Fed. R. Civ. P. 23(a)(3), holding that four named plaintiffs who had patronized a handful of movie theaters had claims typical of a class of theater patrons with disabilities challenging barriers at seventy theaters: "these named plaintiffs possess the same interests, *have suffered the same alleged injuries*, and rely on the same legal theories as the other members of the proposed class." *Id.*, 158 F.R.D. at 450 (emphasis added). Similarly, the court in *Ambulatory Surgery*, in certifying a nationwide class of individuals with all types of disabilities challenging barriers in hundreds of medical facilities, held that, "the representative Plaintiffs have the same interests and *suffer the same injuries* as the class members in that they are allegedly denied access to the same facilities as the class members and discriminated against as the result of the continued existence of physical barriers to access." *Id.*, 197 F.R.D. at 528 (emphasis added). Mr. Castaneda has suffered the same legal injury as the class he hopes to represent: Denial of access to BKL restaurants caused by physical barriers to customers who use wheelchairs.

Defendant also argues that Mr. Castaneda's claims cannot be typical of those of the class because the two stores listed in the complaint were built in the 1970s, when the new construction provision of Title III, 42 U.S.C. § 12183(a)(1), was not yet in effect. Def.'s Mem. at 9 n.4. This is incorrect.

As a substantive matter, both the ADA and California accessibility standards apply to restaurants built in the 1970s. Under the ADA, in facilities built prior to January 26, 1993, architectural barriers are required to be removed where it is "readily achievable" to do so.

Moeller, 220 F.R.D. at 606 (citing 42 U.S.C. § 12182(b)(2)(A)(iv)). Under California law, "[a]ll buildings constructed or altered after July 1, 1970, must comply with standards governing the physical accessibility of public accommodations." *Id.* at 607 (citations omitted). In any event, for purposes of whether the putative class in this case should be certified, the application of accessibility requirements to Defendant's restaurants supports certification because it involves questions of law and fact common to the class. *See id.* at 610.

Defendant's argument on this point completely ignores these applicable standards and instead cites to an ADA *employment* case for the proposition that an ADA claim may be "barred because it predated the effective date of the ADA." *See* Def.'s Mem. at 13 (citing *Voytek v. Univ. of Cal.*, No. 92-3465, 1994 WL 478805 (N.D. Cal. Aug. 25, 1994)). Under no interpretation of the ADA are Mr. Castaneda's claims "barred" because the restaurants in question were built in the 1970s. Barriers must be removed from "existing facilities" where it is "readily achievable" to do so, regardless of when they were built. 42 U.S.C. § 12182(b)(2)(A)(iv). And unlike the situation in either *Voytek* or *Colon v. League of United Latin American Citizens*, 91 F.3d 140 (5th Cir. 1996), *cited in* Def.'s Mem. at 14, the events giving rise to Plaintiff's claim all occurred within the last year, long after the effective date of the Americans with Disabilities Act. *See* Complaint ¶ 41.

Defendant also relies on this Court's decisions in *Kakani v. Oracle Corp.*, No. 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007), and *American Council of the Blind v. Astrue*, No. 05-04696 WHA, 2008 WL 4279674 (N.D. Cal. Sept. 11, 2008). In the former case, this Court held that it would be inappropriate for plaintiffs with only California claims to represent class members with claims under other states' laws, and denied preliminary approval to a class action settlement purporting to release other states' claims. *Kakani*, 2007 WL 1793774, at *2. In the present case, Mr. Castaneda has claims under the ADA and two California statutes, and seeks to represent only a class with those very claims; no other states' laws are at issue here. Once the *Kakani* settlement was redrafted so as to release only California claims, this Court approved it. *Kakani v. Oracle Corp.*, Order Granting Preliminary Approval of Settlement at 2-3 (N.D. Cal. Aug. 2, 2007) (Robertson Decl. Ex. 8). With respect to *Astrue*, Defendant does not

explain how a case addressing recipients of government benefits is more relevant than the on-point Title III class action cases it fails to cite. Plaintiff here has alleged that common barriers to wheelchair access occur in a chain of public accommodations; he respectfully suggests that the decisions in *Arnold*, *Moeller*, *Lucas* and other cases cited above are more relevant. All hold that typicality and adequacy exist under the circumstances alleged here.

IV. Plaintiff's Complaint Satisfies Rule 8; No More Definite Statement Is Required.

Defendant's request for a more definite statement relies on a mistake of fact and a glaring omission of law.

Defendant asserts that Plaintiff failed to state when he visited the Pleasant Hill and Pittsburg restaurants and that as a result, it cannot determine whether he suffered injuries within the statute of limitations. Def.'s Mem. at 15. This is incorrect. Plaintiff alleges that he visited both restaurants within the last twelve months. Complaint ¶ 41. Furthermore, the Ninth Circuit has held that "when a plaintiff who is disabled . . . has actual knowledge of illegal barriers at a public accommodation to which he or she desires access [and] seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief . . . by the statute of limitations . . .." *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002). Plaintiff has alleged that he has encountered barriers at the Pleasant Hill and Pittsburg stores and that he intends to patronize Burger King restaurants in California in the future. Complaint ¶¶ 10, 42-43. His claims are not barred by the statute of limitations.

Defendant argues further that the allegations in the complaint do not provide sufficient detail, and relies on the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See* Def.'s Mem. at 14-15. However, Defendant failed to cite the controlling Ninth Circuit case applying the *Bell Atlantic* standard to a complaint under Title III of the ADA. In *Skaff v. Meridien North American Beverly Hills, LLC*, 506 F.3d 832 (9th Cir. 2007), the Ninth Circuit concluded that allegations very similar to Plaintiff's satisfy the *Bell Atlantic* standard. In that case, the plaintiff had alleged that he "'encountered numerous other barriers to disabled access, including "path of travel," guestroom, bathroom, telephone, elevator, and signage barriers to access . . .'" *Id.* at 836 (quoting the complaint). The Ninth Circuit held that this satisfied

Rule 8's pleading requirement, and rejected what it viewed as the defendant's attempt to "impose [a] heightened pleading standard upon ADA plaintiffs," that is, one that would require them "to plead the existence of accessibility barriers in specific detail and to support such pleadings with evidence that the plaintiff encountered those barriers." *Id.* at 841.

Plaintiff here provided a level of detail similar to that in *Skaff*, alleging that he had encountered barriers that included "entry and restroom doors that were very difficult to open, parking lots with insufficient or inadequate accessible parking spots, inaccessible restrooms, narrow or steep sidewalks/ramps, queue lines that were too narrow for his wheelchair to navigate, and soda machines and condiments that were difficult to reach." Complaint ¶ 42. These allegations are sufficient to satisfy Rule 8 of the Federal Rules of Civil Procedure; no more definite statement is required.

V. Jurisdiction Is Appropriate over Plaintiff's State Law Claims.

This Court has federal question jurisdiction of Plaintiff's claims under the ADA. 28 U.S.C. § 1331. Plaintiff has asserted two independent grounds for federal jurisdiction of his state law claims: Diversity jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d); and supplemental jurisdiction under 28 U.S.C. § 1367. *See* Complaint ¶ 6. Either of these grounds is sufficient; thus, should this Court hold that CAFA jurisdiction is appropriate -- for example, because it is undisputed that another class action was filed within the past three years asserting similar allegations -- it does not need to reach the question of supplemental jurisdiction. On the other hand, should this Court conclude that supplemental jurisdiction is appropriate to avoid both parties -- and two courts -- having to litigate two parallel class action cases addressing the same barriers in the same restaurants under virtually identical accessibility standards, it does not have to address the question of CAFA jurisdiction.

A. This Court Has Jurisdiction Under CAFA over Plaintiff's State Law Claims.

Defendant apparently concedes that the prerequisites for jurisdiction under CAFA exist, *see* 28 U.S.C. § 1332(d)(2), but argues that the required joinder of necessary and indispensable parties would trigger the so-called "local controversy" exception to CAFA jurisdiction, thereby requiring dismissal of the state law claims. Def.'s Mem. at 17-19.

The local controversy exception requires the Court to decline to exercise jurisdiction under CAFA when *all* of four conditions apply, including:

> at least 1 defendant is a defendant (aa) from whom significant relief is sought by members of the plaintiff class; (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and (cc) who is a citizen of the State in which the action was originally filed;

28 U.S.C. § 1332(d)(4)(A)(i)(II), and

> during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

Id. § 1332(d)(4)(A)(ii). Defendant has the burden to prove that this exception applies, *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007), which here requires it to show that both of the subsections above are satisfied. Defendant cannot meet that burden.

1. Another Class Action Has Been Filed within the Past Three Years.

First, there is no question that Defendant cannot satisfy the requirement that, within the past three years, "no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." 28 U.S.C. § 1332(d)(4)(A)(ii). This case was filed September 10, 2008. On March 22, 2006 -- two and a half years before this case was filed -- the "Complaint - Class Action" in *Disability Advocates and Counseling Group, Inc. v. Burger King Corp.*, 06-20716, was filed in district court for the Southern District of Florida. Robertson Decl. Ex. 9. The plaintiffs there, as here, asserted a putative class claim for violations of Title III on the basis of denial of equal access to Burger King restaurants. *Id.* ¶¶ 26-27. The plaintiffs in *Disability Advocates* asserted claims against BKC for all Burger King restaurants nationwide. *Id.* ¶ 21. Thus, that class action was filed within the past three years, asserting the same factual allegations against the same defendant as this case on behalf of many of the same persons.[5]

[5] The Declaration of Thomas G. Archer in Support of Defendant's Motion to Dismiss (Docket No. 30) asserts that "[t]here were no class actions filed against Burger King Corporation asserting claims under the ADA or any similar statute, or including factual allegations similar to those made in this case, in the three year period preceding the filing of this action." *Id.* ¶ 12; *see also* Def.'s Mem. at 17-18 (same). This is incorrect.

The fact that the *Disability Advocates* case was never certified as a class action is irrelevant. It is the filing of a class action complaint raising similar allegations that is the key event under CAFA. The plain language of the statute requires, for the exception to apply, that "no other class action has been *filed*." 28 U.S.C. § 1332(d)(4)(A)(ii) (emphasis added). In the cases addressing this provision, courts have cited simply to the filing of the complaint in other class actions as being fatal to the local controversy exception. *See, e.g., Summerhill v. Terminix, Inc.*, No. 08-CV-00659 GTE, 2008 WL 4809448, *2 (E.D. Ark., Oct. 30, 2008); *Brook v. UnitedHealth Group Inc.*, No. 06-CV-12954 (GBD), 2007 WL 2827808, *4 (S.D.N.Y. Sept. 27, 2007); *Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364, 370-71 (E.D. La. 2007). As a matter of clear statutory interpretation, Defendant cannot satisfy the local controversy exception.

2. No Significant Defendant is a Citizen of California.

Because it is clear beyond dispute that another class action was filed within the past three years -- and that BKC can thus not satisfy *all* of the requirements of the local controversy exception -- this Court does not need to consider the question whether there is a defendant from whom "significant relief is sought" who is a citizen of California. Should this Court consider the question, however, it is clear that the only party from whom "significant relief" is sought is BKC, and BKC does not challenge Plaintiff's allegation that it is not a citizen of California. *See* Complaint ¶ 11.

BKC argues that the franchisees are significant defendants and -- though not named -- are necessary and indispensable parties under Rule 19. A party is necessary if either (1) the present parties will be denied complete relief in the absence of the party to be joined, or (2) the absent party will suffer some loss or be put at risk of suffering such a loss if not joined. *See* Fed. R. Civ. P. 19(a). Here, the franchisees are not necessary parties.

There is no question, here, that "the court can[] accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A), in the absence of the franchisees. "In conducting the Rule 19(a)(1) analysis, the court asks whether the absence of the party would preclude the district court from fashioning meaningful relief as between the parties." *Disability Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004). In that case, the Ninth Circuit held

that meaningful relief under Title III could be granted against the lessees/operators of a public venue -- in the absence of the owner -- by addressing the factors over which the lessees had control. *Id.* at 879-80. Similarly, a Florida court has held that meaningful relief could be afforded under Title III against a condominium association and hotel developer of a timeshare hotel -- in the absence of either the unit owners or the operator of the rental program -- because the latter "is subject to [the defendant's] control and direction regarding [the relevant] policies." *Access 4 All, Inc. v. Atlantic Hotel Condominium Ass'n, Inc.*, No. 04-61740, 2005 WL 5643878, at *14 (S.D. Fla. Nov. 23, 2005). The court held that the defendant "cannot simply contract out of ADA obligations" by asserting that another entity controlled the program at issue. *Id.*; *see also Celano v. Marriott Int'l Inc.*, No. 05-4004-PJH, 2008 WL 239306, at *8-9 (N.D. Cal. Jan. 28, 2008) (holding that the owners of a series of golf resorts were not necessary parties in a Title III case challenging inaccessible golf carts because the defendant management company controlled the selection of golf carts).

In this case, BKC is independently liable under both the ADA, *see* 42 U.S.C. § 12182(a), and state law, *see infra* at 28-33. It cannot contract out of this liability. And it will be possible to fashion meaningful relief here in the absence of the franchisees. BKC retains enormous control over the design and operation of the Burger King restaurants it leases and franchises. Meaningful relief in this case could take the form of an order requiring Burger King to reform its standardized designs and policies to ensure compliance with the ADA and state law, and requiring BKC to exercise the control it reserves to itself -- and often exercises -- over franchisees to cause them to remedy noncompliant features of their restaurants. (*See, e.g., supra* at 5-6.) And BKC is certainly in a position to afford meaningful compensatory relief under state law. In light of BKC's extensive control and resources, it would be speculative to conclude that the franchisees are necessary before liability is assessed. "If during the remedy stage of this litigation it appears [the franchisees] may be impacted, the[y] may be given notice and permitted to intervene." *E.E.O.C. v. Lilja Indus. Const. Corp.*, No. C-92-1492 MHP, 1992 WL 532168, at *2 (N.D. Cal. Dec. 16, 1992).

It is also apparent that joinder is not required under Rule 19(a)(1)(B) as the franchisees have not asserted their right to be joined. In the absence of such an assertion, it is improper for Defendant to argue that they are necessary and indispensable. *See In re County of Orange*, 262 F.3d 1014, 1023 (9th Cir. 2001) (citing *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) ("[I]t is inappropriate for one defendant to attempt to champion the absent party's interests."); *see also Procurador de Personas con Impedimentos v. Municipality of San Juan*, 541 F. Supp. 2d 468, 474-75 (D. Puerto Rico 2008) (holding that property owners and business operators were not necessary parties in a wheelchair access lawsuit; cursory assertion of interests in the defendant's brief did not demonstrate that they have "sufficient interest to render them necessary parties").

Although BKC asserts that the franchisees will ultimately be responsible for any repairs or damages, this is a matter between BKC and the franchisees and can be resolved in separate litigation. It should not hinder Plaintiff's rights to proceed in the venue of his choice if that venue is appropriate. *See In re County of Orange*, 262 F.3d at 1022 (absent parties not necessary under Rule 19 because defendant could seek reimbursement in separate action); *Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1054 (3d Cir. 1988) ("A defendant's right to contribution or indemnity from an absent non-diverse party does not render that absentee indispensable pursuant to Rule 19.").

B. This Court Should Exercise Supplemental Jurisdiction over Plaintiff's State Law Claims.

Plaintiff has asked this Court to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, of his state law claims under Unruh and the CDPA. Defendant does not contest that Plaintiff's state law claims meet the basic prerequisite for supplemental jurisdiction, that is, that they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* Indeed, Plaintiff's ADA claims are, by definition, claims under Unruh and CDPA. Cal. Civ. Code §§ 51(f); 54.1(d); *see also Skaff*, 506 F.3d at 845 n.13 ("Congress has provided us with supplemental jurisdiction over state law claims that are part of the same case as ADA claims.")

Defendant asks this Court to decline supplemental jurisdiction based on subsection 1367(c)(1), which provides that the court "*may* decline to exercise supplemental jurisdiction" where the case "raises a novel or complex issue of State law."[6] *Id.* (emphasis added).

As noted above, should this Court hold that it has diversity jurisdiction pursuant to CAFA, it does not need to reach the question of supplemental jurisdiction.

Should the Court reach the question, Plaintiff urges the Court to accept supplemental jurisdiction and reject Defendant's argument for two primary reasons: (1) because of the significant duplication and waste of judicial resources that would ensue were Plaintiff forced to litigate two parallel wheelchair access class actions in state and federal court, addressing the same restaurants under largely identical design standards; and (2) because the question of state law on which Defendant's argument relies will be resolved by the California Supreme Court long before it becomes relevant to the present case, leaving no reason for delay or for the decline of supplemental jurisdiction.

1. Declining Supplemental Jurisdiction Would Lead to Substantial Duplication of Judicial Effort and Waste of Resources.

Supplemental jurisdiction -- which evolved out of the doctrine of pendant jurisdiction -- "'is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity.'" *Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091 (9th Cir. 2008) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988)). The factors in subsection 1367(c) permit, but do not require, a court to decline supplemental jurisdiction. Even where one of those factors exists, this Court retains discretion to accept supplemental jurisdiction: "[h]aving identified that a claim falls into a [section 1367(c)] category, the exercise of discretion 'is informed by whether remanding the

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[6] Defendant also refers to subsections 1367(c)(3) and (4), but does not argue them. *See* Def.'s Mem. at 20. Subsection 1367(c)(3) permits a court to decline supplemental jurisdiction where it has "dismissed all claims over which it has original jurisdiction." Since Defendant concedes that this Court has jurisdiction over Mr. Castaneda's ADA claims relating to the Pittsburg and Pleasant Hill restaurants, this section does not apply. Subsection 1367(c)(4) is a catch-all, permitting a court to decline jurisdiction where there are "other compelling reasons" to do so. Defendant does not identify any such reasons.

pendent state claims comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity.'" *LiveOps, Inc. v. Teleo, Inc.*, No. 05-03773 MJJ, 2006 WL 83058, at *4 (N.D. Cal. Jan. 9, 2006) (quoting *Executive Software N. Am., Inc. v. U.S. Dist. Court*, 24 F.3d 1545, 1557 (9th Cir. 1994) (internal citations omitted)).

In this case, the values of economy, convenience, fairness, and comity favor retention of supplemental jurisdiction.

Central to the application of these values here is the fact that, should this Court dismiss Plaintiff's state law claims, Plaintiff will file those claims in state court and -- as here -- request certification of a statewide class. The Ninth Circuit "frequently has upheld decisions to retain pendent claims on the basis that returning them to state court would be a waste of judicial resources." *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992); *see also Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 787 (3rd Cir. 1995) (holding that it is appropriate to take into account the fact that dismissal under section 1367(c) would result in parallel proceedings in state and federal court).

The potential for waste and inefficiency if Unruh and CDPA claims are dismissed from an ADA case and pursued in state court has led at least four courts to retain supplemental jurisdiction. As one court explained, in considering the same claims as are at issue here:

> [T]he competing principles of judicial economy and convenience weigh strongly in favor of asserting supplemental jurisdiction. Plaintiff's state and federal law claim involve the identical nucleus of operative fact, and require a very similar, if not identical, showing in order to succeed. If this court forced plaintiff to pursue his state law claim in state court, the result would be two highly duplicative trials, constituting an unnecessary expenditure of plaintiff's, defendants', and the courts' resources.

Johnson v. Barlow, No. Civ S-06-01150 WBS GGH, 2007 WL 1723617, at *5 (E.D. Cal. June 11, 2007); *see also Hannah v. W. Gateway Reg'l Recreation Park & Dist.*, No. CIV S-06-571 LKK/DAD, 2007 WL 2795769, at *2 (E.D. Cal. Sept. 25, 2007) ("[I]t would hardly be economical or convenient to conduct a trial on all the elements of plaintiff's ADA claim in federal court but then require plaintiff to seek relief separately on the issue of damages in state court"); *Yates v. Belli Deli*, No. C07-01405 WHA, 2007 WL 2318923, at *7 (N.D. Cal. Aug. 13, 2007) ("It would be inefficient to try the claims separately, so the exercise of supplemental

jurisdiction is appropriate."); *Pinnock v. Solana Beach Do It Yourself Dog Wash, Inc.*, No. 06cv1816 BTM (JMA), 2007 WL 1989635, at *3 (S.D. Cal. July 3, 2007) ("To [decline supplemental jurisdiction] would create the danger of courts rushing to judgment, increased litigation costs, and wasted judicial resources.").

2. The Question of State Law on Which Defendant Relies Will Soon Be Resolved.

Defendant urges this Court to decline supplemental jurisdiction based on subsection 1367(c)(1), because the question whether intent is an element of an Unruh claim is currently before the California Supreme Court. *See Munson v. Del Taco, Inc.*, 522 F.3d 997 (9th Cir. 2008) (certifying the question to the California Supreme Court). As an updated California Supreme Court docket shows, however, the matter is fully briefed on the merits, and a number of amicus briefs were filed in late December, responses to which are due later this month. *See* Docket, *Munson v. Del Taco, Inc.*, No. S162828 (Robertson Decl. Ex. 12). It is thus likely that, long before this Court will have to address the question of intent under Unruh in this case, the California Supreme Court will have spoken definitively on the matter. Once *Munson* is decided, there will be no novel or complex question of state law; rather, merely the routine application of whatever standard the California Supreme Court establishes. *See Munson*, 522 F.3d at 999 ("We will accept the decision of the California Supreme Court.").

Ultimately, the question before the court in *Munson* will have very little effect on this case. Most importantly, it will in no way be dispositive here. This is because the question in *Munson* is limited to whether intent is required to obtain damages under the Unruh Act. *See Munson*, 522 F.3d at 999 (Certifying question "[m]ust a plaintiff *who seeks damages* under" the Unruh Act "prove 'intentional discrimination'?" (Emphasis added.)). Even if intent is held to be an element of an Unruh Act damages claim, Plaintiff can still (1) prove a violation of the ADA and obtain injunctive relief, (2) prove a violation of Unruh and obtain injunctive relief, and (3) prove a violation of the CDPA and obtain both injunctive relief and damages -- all without proving intent. Intent is not required to prove a violation of the ADA, which violation will entitle the class to injunctive relief. *Munson*, 522 F.3d at 1001; 42 U.S.C. § 12188(a). Nor is

intent required to obtain injunctive relief under Unruh or the CDPA. *Gunther v. Lin*, 50 Cal.Rptr.3d 317, 336 (Cal. App. 2006). Finally, intent is not required to obtain damages under the CDPA. *Donald v. Café Royale, Inc.*, 266 Cal.Rptr. 804, 809 (Cal. App. 1990). On the unlikely chance both that the California Supreme Court requires an intent element *and* Plaintiff is unable to prove intent, most of this case remains unaffected.

For these same reasons, there is no need for a stay pending a decision in *Munson*. Defendant bases its request for a stay on the fact that the Ninth Circuit stayed the *Munson* case itself. *See* Def.'s Mem. at 21. However, that case was ripe for decision but for the question currently before the California Supreme Court. *See Munson*, 522 F.3d at 1000 (district court had granted summary judgment to the plaintiff, parties had stipulated to damages in lieu of trial, and the defendant had appealed the question of intent). In contrast, there is much work to be done in this case before the question of intent is before the Court.

As an initial matter, as explained in greater detail below, Plaintiff has pleaded sufficient facts to satisfy the intent standard should the California Supreme Court adopt that standard. *See infra* at 32-33. The next step in this case will be class discovery and Plaintiff's motion for class certification. Because the question of intent is a merits question, it will not be before the Court in that motion. *See Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003) ("[I]t is improper to advance a decision on the merits to the class certification stage."). Finally, as explained above, if the class should be certified, the question of intent will still not be relevant until the remedies phase and even then, Plaintiff will be able to prove up his ADA, Unruh, and CDPA claims for injunctive relief with no need to address the question of intent.

VI. Plaintiff Has Properly Alleged Claims Under Unruh and the CDPA.

A. Plaintiff's State Law Allegations.

Plaintiff alleges that the Burger King restaurants at issue here have numerous common architectural barriers and discriminatory policies that deny putative class members full and equal enjoyment of the goods and services of these restaurants, and that these barriers violate the ADA. *See, e.g.,* Complaint ¶¶ 1, 2, 16, 42. Because "[a] violation of the right of any individual under the [ADA] shall also constitute a violation of" Unruh and the CDPA, Cal. Civ. Code § 51(f), *see*

also id. § 54.1(d) (same), Plaintiff alleges that Defendant has violated these state statutes by dint of its violations of the ADA. *Id.* ¶¶ 56, 58, 63, 65. Plaintiff further alleges that Defendant "denie[d], or aid[ed] or incite[d] the denial of" rights secured under Unruh, and that Defendant "den[ied] and/or interfer[ed]" with rights under the CDPA. *Id.* ¶¶ 57-58, 64-65.

Plaintiff's Complaint provides specific factual allegations showing Defendant's responsibility for discriminatory policies and barriers at the BKL restaurants, including that Defendant's contracts with its franchisees require that Burger King restaurants be built, designed, remodeled, repaired, and maintained in conformance with Defendant's construction and design plans, and specifications. Complaint ¶¶ 25-31, 34. These contracts also require that these restaurants be operated in accordance with Defendant's specifications and procedures, including the "highly detailed requirements" of the MOD. *Id.* ¶¶ 32-33, 35. Thus, Plaintiff has satisfactorily alleged independent legal bases for claims under the Unruh Act and CDPA.

Plaintiff further alleges that Defendant knew of the discriminatory policies and barriers, and the effect of those policies and barriers on persons with disabilities, through several means: (1) a 1997 settlement of an accessibility lawsuit brought against Defendant, which (among other things) required it to survey all corporate restaurants in the United States and to provide its franchisees with information concerning the ADA; (2) inspections of the restaurants at issue here; and (3) a highly publicized settlement reached by the Department of Justice with the Wendy's restaurant chain, which made clear that the DOJ believed that inaccessible queue lines -- such as those found in many of Burger King's California Restaurants -- violated the ADA. *Id.* ¶¶ 36, 39-40.

B. Plaintiff Has Alleged Both Independent and ADA-Based Violations of Unruh and the CDPA.

In 1992, the California legislature amended Unruh and the CDPA to provide that "[a] violation of the right of any individual under the [ADA] shall also constitute a violation of this section." Cal. Civ. Code § 51(f), *see also id.* § 54.1(d).[7] Title III of the ADA prohibits disability

[7] The Unruh Act is to be interpreted "in the broadest sense reasonably possible" in (continued...)

discrimination by entities -- such as BKC -- that lease or lease to restaurants and other places of public accommodation. 42 U.S.C. §§ 12181(7)(B), 12182(a). Plaintiff alleges that BKC has violated the ADA, and that these violations also constitute violations of Unruh and the CDPA. Based on the plain language of Unruh and the CDPA -- providing that a violation of the ADA "shall also constitute a violation of" these state statutes, Cal. Civ. Code §§ 51(f), 54.1(d) -- those allegations state claims under Unruh and the CDPA. Defendant argues that, in addition to establishing that Defendant violated the ADA, Plaintiff must also establish that Defendant is independently covered by Unruh and the CDPA. Specifically, Defendant contends that Plaintiff must allege that Defendant "denie[d], aid[ed] or incite[d] a denial, or ma[de] any discrimination or distinction contrary to" Unruh, and that Defendant "denie[d] or interfere[d] with" rights secured by the CDPA. Def.'s Mem. at 21-23.

First, as demonstrated above, Plaintiff has alleged that Defendant denied, aided, incited, and interfered with rights secured under state law, and has provided detailed factual allegations supporting those claims. Complaint ¶¶ 25-35, 57-58, 64-65. This is sufficient to defeat Defendant's motion to dismiss pursuant to Rule 12(b)(6).

Even assuming *arguendo* that Plaintiff had not made these specific allegations of denying, aiding, inciting and interfering, and his Unruh and CDPA claims were based only on Defendant's ADA violations, this, too, would state a claim under these statutes.

The purpose of the 1992 amendment was to "provid[e] persons injured by a violation of the ADA with the remedies provided by the Unruh Act (*e.g.*, right of private action for damages, including punitive damages)." Cal. Assembly Cmte. on Judiciary report on AB 1077, at 2 (Jan. 22, 1992); Cal. Senate Cmte. on Judiciary report on AB 1077, at 5 (June 9, 1992) (Robertson Decl. Exs. 10, 11). Defendant's assertion that a plaintiff injured by an ADA violation may not be entitled to recover monetary relief under state law unless he shows that the defendant is

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[7](...continued)
order to "banish [discriminatory] practices from California's community life." *Isbister v. Boys' Club of Santa Cruz, Inc.,* 707 P.2d 212, 214 (Cal. 1985) (internal citations omitted).

independently covered by Unruh or the CDPA is entirely inconsistent with the purpose of the 1992 amendment. An interpretation that

> leaves a successful ADA plaintiff without a corresponding Unruh Act remedy undermines the California legislature's purpose in passing section 51(f) to provide that a violation of the ADA is also a violation of the Unruh Act. The court presumes that the California legislature did not intend section 51(f) to be a law that is all bark and no bite.

Morgan v. Am. Stores Co. LLC, NO. 06 CV 2437 JM (RBB), 2007 WL 1971945, at *2 (S.D. Cal. June 29, 2007).

This precise issue was before the court in *National Federation of the Blind v. Target Corp.,* 452 F. Supp. 2d 946 (N.D. Cal. 2006). In that case, the plaintiffs brought suit under the ADA, Unruh, and the CDPA based on the inaccessibility of the defendant's website to blind customers. The court held that the plaintiffs' allegation that the website was inaccessible stated a claim under the ADA. *Id.* at 956. The defendant argued that, notwithstanding the Court's determination that the plaintiffs had stated an ADA claim, they also had to establish that the website was a "business establishments" under Unruh, and a physical space under the CDPA. The court held that it need not reach these arguments because a violation of the ADA constituted a violation of Unruh and the CDPA, and thus the plaintiffs had stated a claim under these statutes even if the website was not a business establishment or a physical space. *Id.* at 957-58.

The holding in *National Federation of the Blind* demonstrates that the 1992 amendment means what it says -- a violation of the ADA, by itself, constitutes a violation of Unruh and the CDPA, and Plaintiff need not demonstrate that Defendant is otherwise covered by these state laws. Indeed, the Ninth Circuit has unambiguously held that "[a]ny violation of the ADA *necessarily constitutes a violation of the Unruh Act*." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir. 2007) (emphasis added). As a result, in several cases, courts have held defendants liable for damages under Unruh and/or the CDPA based solely on a showing of an ADA violation, without requiring any additional proof that the defendants denied, aided, or incited the violation. *See, e.g., Hubbard v. Rite Aid Corp.*, 433 F. Supp. 2d 1150, 1170 (S.D. Cal. 2006); *Wilson v. Haria and Gogri Corp.*, 479 F. Supp. 2d 1127, 1141 (E.D. Cal. 2007); *Haworth v. Haddock*, NO. 1:06-CV-1713-OWW-DLB, 2007 WL 3239564, at *2-3 (E.D. Cal. Nov. 2, 2007).

Defendant, on the other hand, does not cite a single case holding that a plaintiff who demonstrates that a defendant has violated the ADA has an additional burden of establishing that the defendant denied, aided, or incited a violation to recover under Unruh or the CDPA. The *Brown* case -- which Defendant edited to make it appear to have addressed the liability of lessors under Unruh and the CDPA, *see* Def.'s Mem. at 23 -- in fact addressed a California statute governing privileges afforded the news media and has nothing to do with the issues or statutes before this Court. *See Brown v. Kelly Broadcasting Co.*, 771 P.2d 406, 413 (Cal. 1989).

C. Plaintiff Has Properly Pleaded Discriminatory Intent.

Defendant incorrectly argues that Plaintiff's Unruh[8] claims should be dismissed for failing to adequately plead discriminatory intent. This argument should be rejected.

As an initial matter, it is not clear that intent is a required element of an Unruh claim. The question is currently before the California Supreme Court on referral from the Ninth Circuit. *See Munson*, 522 F.3d at 999.

Even if the California Supreme Court holds that proof of discriminatory intent is an element of an Unruh claim, Plaintiff's allegations meet this standard. Here Plaintiff alleges that Defendant knew of the impact on access of the various barriers at issue because, in the 1990s, it had been sued based on these types of barriers, and the settlement of that lawsuit required Defendant to survey its restaurants and provide ADA-related information and assistance to its franchisees. Complaint ¶ 39. Notwithstanding this knowledge, Defendant designed and/or failed to remove numerous and substantial barriers at the restaurants at issue here, and this constitutes intentional discrimination. In addition, the court in *Gunther* held that some of the applicable standards "are basically so intuitive and obvious . . . that it would be hard to believe that noncompliance with them could be other than intentional" and that some barriers are "so obvious as to implicate at least a prima facie case of discriminatory intent." 50 Cal. Rptr. 3d at 321 &

[8] It is undisputed that proof of discriminatory intent is not required for claims under the CDPA. *See Donald*, 266 Cal.Rptr. at 809.

n.6. Plaintiff has alleged a number of such barriers, including narrow queue lines, heavy doors, and inaccessible restrooms and has alleged that they meet this standard. Complaint ¶¶ 42, 44.[9]

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court deny Defendant's Motion to Dismiss.

[9] Defendant's argument relies almost exclusively on the recently-enacted "Construction-Related Accessibility Standards Compliance Act." (*See* Def.'s Mem. at 23-24.) This reliance is misplaced. First, that Act is irrelevant to this case because it "appl[ies] only to claims filed on or after January 1, 2009. Nothing in this part is intended to affect litigation filed before that date." Cal. Civ. Code § 55.54(o). Further, Defendant relies on new section 55.53(f), which states that a decision not to hire a state certified access inspector "shall not be admissible to prove . . . lack of intent to comply with the law." This section does not address the elements necessary to prove an Unruh violation or to obtain damages and nothing in the Act suggests that such evidence is a prerequisite to recovery of statutory minimum or actual damages under section 52(a).

Respectfully submitted,

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