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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MIGUEL CASTANEDA on behalf of himself and others similarly situated, Plaintiff, vs. BURGER KING CORPORATION and BURGER KING HOLDINGS, INC., Defendants.	Case No. C 08-04262 WHA **MEMORANDUM OF POINTS AUTHORITIES IN SUPPORT OF DEFENDANT BURGER KING CORPORATION'S MOTION TO DISMISS** **Date:** **January 29, 2009** **Time:** **8:00 a.m.** **Before:** **Hon. William H. Alsup** **Courtroom:** **9, 19th Floor**

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I. INTRODUCTION

Plaintiff Miguel Castaneda allegedly encountered unspecified access barriers at two franchised Burger King® restaurants in Contra Costa County (the Pittsburg and Pleasant Hill Restaurants). Defendant Burger King Corporation subleases these properties to franchisees that operate and maintain the two restaurants.

Based only on his visits to those two restaurants, Plaintiff purports to bring a class action under Title III of the ADA for injunctive relief (and for damages under the Unruh Civil Rights Act ("Unruh") and the California Disabled Persons Act ("CDPA")) against *every* franchised Burger King® restaurant in California that Burger King Corporation leases or subleases. As a matter of law, however, Plaintiff's standing is limited to these two named restaurants. His attempt to cast his claims as class allegations does not expand his ability to seek redress from additional restaurants at which he has suffered no injury. Accordingly, Plaintiff's Complaint must be dismissed for want of standing as to all restaurants except for Pleasant Hill and Pittsburg.

Plaintiff's lack of standing also compels a finding that the commonality, typicality, and adequacy of representation necessary to maintain a class action under Fed. R. Civ. P. 23 as to the additional restaurants is absent. Accordingly, these class allegations should be stricken.

Other deficiencies in Plaintiff's Complaint require dismissal of various other aspects of Plaintiff's Complaint. For example, Plaintiff's Unruh and CDPA claims fail to state a claim because those statutes, unlike the ADA, do not impose liability based merely upon one's status as a lessor/sublessor. Likewise, Plaintiff has failed to allege facts that support his conclusory allegation that sublessor Burger King Corporation *intentionally* denied Plaintiff access to the Pittsburg and Pleasant Hill (or other) restaurants, as is necessary to state a claim for damages under Unruh's punitive damages provision. Moreover, because of the unsettled nature of the state law issues, which the California Supreme Court has accepted for review, this Court should decline to exercise supplemental jurisdiction over the state law claims.

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II. FACTUAL BACKGROUND

A. Burger King Corporation

Burger King Corporation is the franchisor of Burger King® hamburger quick service restaurants. Burger King Corporation has never operated any restaurants in California. (Declaration of Thomas G. Archer in Support of Defendant's Motion to Dismiss ("Archer Dec.") ¶¶ 2, 3).[1] All California Burger King® restaurants are operated and maintained by independent franchisees pursuant to franchise agreements and, in some cases, leases. (Archer Dec. ¶ 3). Most are also owned by franchisees. (*Id.*) Burger King Corporation leases or subleases the premises for approximately 90 franchised California restaurants (the "BKLs"). (DE 1 ¶¶ 11, 12; DE 15 at 2; Archer Dec. ¶ 3).

B. Plaintiff Castaneda's Individual Allegations Are Limited to Experiences at the Pleasant Hill and Pittsburg Restaurants

Plaintiff alleges that he "has patronized several Burger King restaurants" in California, "including" two located in Contra Costa County: 677 Contra Costa Boulevard in Pleasant Hill ("Pleasant Hill" or "BK #1864") and 2162 Railroad Avenue in Pittsburg ("Pittsburg" or "BK #2505"). (DE 1 ¶ 41). The Complaint does not allege when Mr. Castaneda patronized the Pleasant Hill and Pittsburg restaurants, or whether he encountered barriers to access at both restaurants, or, if so, what particular barriers he encountered at which restaurant. (*See id.* ¶ 42).

The Pleasant Hill and Pittsburg restaurants both were constructed for first occupancy in the late 1970's, long before the ADA's 1993 effective date. (Archer Dec. ¶¶ 7, 10, Ex. B). Burger King Corporation has never owned or operated either property. Rather, its interest is merely that of a sublessor. (Archer Dec. ¶ 6). California residents Mr. and Mrs. William

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[1] Where, as here, a party moves to dismiss for lack of standing under Rule 12(b)(1), "the moving party may submit affidavits or any other evidence properly before the court." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Where dismissal is sought under Rule 12(b)(6), the court may properly consider matters of public record and matters of which it may take judicial notice, as well as any documents referenced in the complaint or on which the complaint relies, such as Burger King Corporation's subleases with its franchisees. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (documents specifically referred to in complaint or whose contents are alleged in complaint may be considered in ruling on a Rule 12(b)(6) motion).

Scarbrough, through their California limited partnership Devil Mountain Foods – Pleasant Hills, LP, sublease and operate the Pleasant Hill restaurant (Archer Dec. ¶ 8, Ex. C). California resident Antony Sacca and his family sublease and operate the Pittsburg restaurant through the Sacca Family Corp., a California corporation (Archer Dec. ¶ 11, Ex. F; *see* DE 1 ¶ 41).

Pursuant to Burger King Corporation's subleases with these two franchisees, the franchisees are required to operate the restaurants, maintain the restaurants in good order at their own cost and expense, and to obtain all necessary licenses and permits and otherwise promptly observe and fully comply with all applicable laws and regulations, including specifically the ADA. (Archer Dec. Ex. C (Extension Sublease for Pleasant Hill), §§ 5.1, 5.2, 5.7; Ex. F (Successor Sublease for Pittsburg), §§ 5.1, 5.2, 5.7).

C. Plaintiff Castaneda's Conclusory Class Allegations

Based apparently on his alleged encounter(s) with barrier(s) at either the Pleasant Hill and Pittsburgh restaurants, or both, Mr. Castaneda alleges a state-wide putative class action against Burger King Corporation as to *all* California BKLs on behalf of "all individuals with manual and/or mobility disabilities who use wheelchairs or electric scooters." (DE 1 ¶ 13). Plaintiff seeks injunctive relief under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et. seq ("ADA"), and statutory minimum damages pursuant to the Unruh Civil Rights Act ("Unruh"), Cal. Civ. Code § 51 and the California Disabled Persons Act ("CDPA"), Cal. Civil Code § 54 (DE l ¶¶ 5, 13, 42).

Mr. Castaneda does not allege that all, or even most, BKLs contain unlawful access barriers. He also does not allege that he knows of any specific common access barrier at the restaurants. Plaintiff does not allege that all BKLs contain a particular design flaw in violation of the ADA or that Burger King Corporation maintains any specific statewide policy or practice that violates the ADA.

Rather, Plaintiff merely sets forth "information and belief" allegations that Burger King Corporation assists "some" of its franchisees by providing training, operating specifications or "design prototypes." (*See* DE 1 ¶¶ 25-35, 44, 49). However, Plaintiff does not make a factual

allegation showing how any of those "information or belief" activities to "some" caused or created an accessibility violation. (*Id.*).

III. ARGUMENT

A. Plaintiff Castaneda's Claims Against the Restaurants He Has Not Visited Should Be Dismissed for Lack of Standing

Article III standing is "perhaps the most important" of the case-or-controversy doctrines placing limits on federal judicial power. *Allen v. Wright*, 468 U.S. 737, 750 (1984). To invoke this Court's jurisdiction, a plaintiff first must meet well established constitutional and prudential requirements on standing. *Warth v. Seldin*, 442 U.S. 490, 498 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Standing is determined as of the date the original complaint is filed. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 175 (2000); *Lujan*, 504 U.S. at 571 n.4.

The plaintiff bears the burden of establishing standing. *Lujan* 504 U.S. at 561; *Bates v. United Parcel Servs, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). A plaintiff must allege and establish three elements: (1) "injury in fact," which is a concrete and particularized invasion of a legally protected interest that is "actual or imminent, not 'conjectural' or 'hypothetical;'" (2) a causal connection between the injury and the defendant's conduct; and (3) redressability, which means that it is likely, and not merely speculative, that the plaintiff's injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61; *Bates*, 511 F.3d at 985; *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008).

In addition to the elements of standing discussed above, in order to have Article III standing to seek injunctive relief,[2] Plaintiff must allege a real and immediate threat of future injury. *Lujan*, 504 U.S. at 560; *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983); *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1019 (9th Cir. 2002). To establish this requisite real and immediate threat of future injury in a Title III ADA action, the plaintiff must show, "at the very least," a concrete "likelihood" that he will "return to patronize the accommodation in question." *Harris v. Stonecrest Care Auto Ctr., LLC.*, 472 F. Supp. 2d 1208, 1215-16 (S.D.

[2] Plaintiff's two Title III ADA claims are only for injunctive relief.

Cal. 2007).

Class allegations do not diminish the named plaintiff's burden to establish standing. Rather, standing remains the threshold inquiry in a putative class action, and at least one named plaintiff must have suffered the injury that gives rise to *each* claim asserted. *Warth*, 422 U.S. at 504; *O'Shea v. Littleton*, 414 U.S. 488, 494-95 (1973); *Casey v. Lewis*, 4 F.3d 1516, 1519, 1524 (9th Cir. 1993).

1. Plaintiff Admittedly Lacks Individual Standing Against Restaurants He Did Not Visit

Although Plaintiff's Complaint specifies only two restaurants he claims to have visited, Castaneda also seeks injunctive relief, and damages under Unruh and the CDPA, as against approximately 88 additional franchised Burger King® restaurants throughout California that he has never visited, which he does not know to have any violations, and at which he thus has not suffered legal injury. Courts repeatedly have held, however, that a disabled person's standing to sue under Title III of the ADA is limited to those stores or restaurants that a plaintiff has actually visited or at least been deterred from visiting due to known violations at that specific location. *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334 (D.N.J. 2003)*; Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D.N.J. 2003)*; Moyer v. Walt Disney World Co.*, 146 F. Supp. 2d 1249 (M.D. Fla. 2000). S*ee Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1043-44 (9th Cir. 2008) (holding that the list of barriers affecting plaintiff's disability at the facility he/she visited constitute the "single legal injury" plaintiff suffered); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 n.3 (9th Cir. 2007) ("[i]f Skaff's complaint had just asserted general categories of violations without attesting to Skaff's personal knowledge of or experience with these violations, then no injury in fact would have been pled"); *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 136 (9th Cir. 2002) ("under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing *that* accommodation, the plaintiff has suffered an injury") (emphasis added).

In *Moreno*, for example, a disabled plaintiff had encountered access barriers at one of defendant's California gasoline station-convenience stores. 88 F. Supp. 2d at 1117. Plaintiff sought to amend his complaint to obtain injunctive relief pursuant to Title III of the ADA against 82 additional stations the defendant owned throughout California, even though the plaintiff had never visited the other stations. *Id.* at 1117. The court held that the plaintiff lacked standing as to the stations he had not visited, stating: "The Court holds the Americans with Disabilities Act's anti-barrier provisions are 'site specific' under both jurisdiction principles and the terms of the statute." *Id.*

The court explained that such a result was required by Supreme Court precedent and the language of Title III of the ADA:

> The Supreme Court has held that, "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Plaintiff lacks standing to sue for any generalized injury caused by the existence of inappropriate barriers at the 82 additional locations.
>
> The terms of the statute corroborate this conclusion. Section 12188 requires that a plaintiff actually be "subjected to discrimination" or be "about to be subjected" to it. There is no showing this Plaintiff was subjected to or about to be subjected to discrimination at the 82 additional gas stations. The statute does not support any claim as to these stations.
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> The Court concludes that, under the federal ADA, Plaintiff here cannot assert either an interest of his own or the interests of third parties as to the 82 additional sites.

Id. at 1117-1118. *See 7-Eleven*, 524 F.3d at 1044-45 (quoting *Warth* in support of holding that prudential limits on standing also preclude courts from considering ADA violations at a facility plaintiff visited, but which do not relate to his/her disabilities). Accordingly, the court denied as futile plaintiff's motion to amend the additional claims on behalf of himself and others similarly situated. *G & M Oil Co.*, 88 F. Supp. 2d at 1118.

Clark v. Burger King Corp., 255 F. Supp. 2d 334 (D.N.J. 2003), is also on point.

There, the court dismissed for lack of standing the very same class action claims, against the very same California Burger King® restaurants (among others) that are at issue here. Despite having only visited a handful of restaurants, plaintiff Clark filed a putative class action against defendant Burger King Corporation seeking injunctive relief under the ADA and damages under state laws (including Unruh) for accessibility violations at all Burger King® restaurants in the United States. The court, citing *G & M Oil* with approval, held that Clark's standing to assert ADA and state law accessibility violations against Burger King® restaurants was limited to those he visited prior to filing the underlying action, and that he lacked standing with regard to any restaurants he had not visited. *Clark*, 255 F. Supp. 2d at 343-44. Accordingly, the court dismissed all "claims related to Burger King restaurants not visited by Clark." *Id.*

Similarly, in *Clark v. McDonald's Corp.*, a New Jersey resident plaintiff asserted a nationwide class action against McDonald's Corp. as to its corporate owned and operated McDonald's® restaurants. With respect to claims against 38 restaurants in Wisconsin which the complaint identified as having been visited by professional ADA inspectors, the court held that plaintiff "lacks standing to assert claims as to those restaurants because he has not alleged (and is not excused from alleging) that he would visit the Wisconsin restaurants but for the violations of which he has actual notice." *Id.*, 213 F.R.D. 198, 230 (D.N.J. 2003). Accordingly, the court dismissed these ADA and state law claims.

Likewise, in *Tyler v. Kansas Lottery*, 14 F. Supp. 2d 1220 (D. Kan. 1998), plaintiff, a Kansas resident who later moved to Wisconsin, sought an injunction compelling the Kansas lottery to bring all lottery retailers in the state into compliance with Title II of the ADA. The court held that plaintiff never had standing to ask for statewide injunctive relief, and that plaintiff's intention to visit his family in Kansas and play the lottery at such times failed to make out a claim of imminent future harm sufficient to establish standing for any purpose. *Id.* at 1225.

As these decisions make plain, Plaintiff lacks standing to sue the unidentified BKLs. Indeed, Plaintiff's counsel previously admitted to the Court that Mr. Castaneda does not have "individual . . . standing to challenge each of the 90 stores." (DE 17 ¶ 7).

2. Plaintiff Cannot Create Standing to Assert Claims Against Additional Restaurants Merely By Making Class Allegations

Notwithstanding Plaintiff's admitted lack of individual standing to assert claims against restaurants other than Pleasant Hill and Pittsburg, Castaneda claims that his characterization of the Complaint as a putative "class action" creates standing to assert claims allegedly possessed by class members against other BKLs. *Id.* To the contrary, it is settled that class allegations *cannot* create standing, and that a named plaintiff's class representational standing is limited to representing the class of people who suffered the same legal injury.[3] *Warth*, 422 U.S. at 504; *see Blum v. Yaretsky*, 457 U.S. 991, 999-1002 (1982) (dismissing for lack of Article III standing all class claims except for those that the disabled named plaintiffs had individual standing to assert); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 n.15 (1982) ("[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons . . . is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer"); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir. 2000) (one named plaintiff must have individual standing for *each* proffered class claim for standing to exist to assert all such ADA claims); *Clark v. Burger King Corp.*, 255 F. Supp. 2d at 343-44 (granting motion to dismiss for lack of standing all Title III ADA and state law claims related to Burger King® restaurants that the named class plaintiff did not visit); *Clark v. McDonald's Corp.*, 213 F.R.D. at 229-230, 235 (granting motion to dismiss all claims concerning McDonald's® restaurants for which nominal class plaintiffs either lacked actual knowledge of ADA violation or did not intend to visit).

In other words, even as a class representative, Plaintiff may assert claims only on behalf of the mobility-disabled persons subjected to discrimination *at the Pittsburg and/or Pleasant Hill restaurants.*

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[3] The Supreme Court has noted that a nominal plaintiff's lack of standing, when addressed under Fed. R. Civ. P. 23's rubric of adequacy of representation, typicality, and commonality, yields the same result. *See Gratz v. Bollinger*, 539 U.S. 244, 263 n.15 (2003); *see also Bates*, 511 F.3d at 986-87. Accordingly, as discussed, *infra*, Plaintiff's lack of standing also requires that the class allegations as to additional restaurants be stricken pursuant to Rule 23.

The Supreme Court's *Blum v. Yaretsky* decision is instructive. In *Blum*, the nominal plaintiffs were two nursing home residents who had been transferred to a lower level of care as a result of a state-mandated utilization review committee ("URC") decision. They sued the New York Department of Social Services on behalf of all Medicaid-eligible residents of New York nursing homes claiming that the required URC decisional process was unlawful. Although they had only been transferred to a lower level of care, the two named plaintiffs purported to represent a class that also included URC-induced transfers to a higher, i.e., more intensive, level of medical care. The Supreme Court held that the plaintiffs' failure to suffer that particular injury was fatal to their standing to assert such class claims:

> Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of URC's decisions. Respondents, however, "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Unless these individuals "can thus demonstrate the requisite case or controversy between themselves personally and petitioners, 'none may seek relief on behalf of himself or any other member of the class'"

Id. at 1001 n. 13 (quotations omitted).

Accordingly, the Supreme Court concluded that, "although respondents have standing to challenge facility-initiated discharges and transfers to lower levels of care, the District Court exceeded its authority in adjudicating the procedures governing transfers to higher levels of care." *Id.* at 1002.

Here, as in *Blum*, the claims Plaintiff seeks to assert as class representative against additional restaurants allege a different legal injury than the injury he allegedly suffered at Pleasant Hill and Pittsburg.[4] *Doran v. 7-Eleven*, 524 F.3d at 1043-44, n.7. Unable to

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[4]Plaintiff has not even suffered the same type of injury as he alleges against other restaurants. Plaintiff vaguely alleges a design and construction case pursuant to 42 U.S.C. §12183(a)(1), premised upon the theory that the BKLs were constructed pursuant to prototypical plans that Burger King Corporation created. (DE 1 ¶¶ 1, 2, 25, 44, 49). Putting aside that Plaintiff's conclusory "some or all," on "information and belief" allegations should be ignored, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), Plaintiff does not individually possess *any* design/construction claim because the Pleasant Hill and Pittsburg restaurants were

demonstrate the requisite case or controversy between himself personally and the other restaurants, Plaintiff cannot "seek relief on behalf of himself or any other member of the class" with respect to the additional restaurants. *Blum*, 457 U.S. at 1001, n.13.

The restrictive language of Title III of the ADA requiring a private plaintiff to have been or be about to be subjected to discrimination, 42 U.S.C. § 12188(a)(1),[5] is also significant to this Court's standing analysis. This language, when contrasted with the broad powers the Act grants to the Attorney General to investigate, enforce and even issue monetary punishment, 42 U.S.C. § 12188(b)(2)(C), confirms that Congress intended to limit individuals' standing to assert class claims for the facility[ies] where he/she personally has been subjected to discrimination. *See Falcon*, 457 U.S. at 156 (because Title VII of the Civil Rights Act grants the EEOC broad enforcement authority and contains no special authorization for class suits by private parties, the court must "limit the class claims to those fairly encompassed by the named plaintiff's claims"); *Blake v. Southcoast Health Sys.*, 145 F. Supp. 2d 126, 132, 134 n.12 (D.Mass. 2001) (statutory scheme providing for different forms of relief depending on whether the Attorney General or a private litigant brings suit reinforces requirement that private litigant must demonstrate personal standing as to each form of relief sought); *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 501 (D.C. Cir. 1994) ("Vindicating the public interest . . . is the function of Congress and the Chief Executive," especially where, as in Title III of the ADA, the Attorney General is the only party vested with the statutory authority to "vindicate the public interest"); *see also Nishi v. Ethicon, Inc.*, 2003 WL 917978 (N.D. Cal. Feb. 26, 2003) (dismissing case for lack of standing in part because "they do not have standing to request an injunction on behalf of the general public").

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constructed in the 1970s, *before the ADA was enacted.* (Archer Dec. ¶¶ 7, 10, Ex. B). Because Mr. Castaneda does not personally possess this type of claim, he lacks standing to bring such claims on behalf of others.

[5] Unruh likewise confers standing only upon persons who have actually been subjected to discrimination. *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. App. 3d 1377, 1385 (Cal. Ct. App. 1990) (standing to sue under Unruh is limited to actual victims of discrimination); *Surrey v. Truebeginnings*, 2008 WL 4916102, at *4 (Cal. Ct. App. 2008).

As *Blum*, *Clark v. Burger King Corp.* and the other cases cited above make plain, Plaintiff's use of the class device does not enlarge his standing to assert claims with respect to restaurants at which he has not suffered injury. Consequently, the Complaint should be dismissed as to all BKLs other than Pleasant Hill and Pittsburg, which even Plaintiff concedes are the only restaurants for which he has individual standing.

B. Plaintiff's Class Allegations Should Be Dismissed or Stricken

Plaintiff's also fails to satisfy the commonality, typicality, and adequacy of representation prerequisites to a class action imposed by Rule 23. *See Gratz v. Bollinger*, 539 U.S. 244, 263 n.15 (2003) (conclusion that named plaintiff lacks individual standing to assert class claims also demonstrates lack of commonality, typicality, and adequacy of representation under Fed. R. Civ. P. 23); *Bates*, 511 F.3d at 986-87 (same). Dismissal of the class claims is therefore required. *See* Fed. R. Civ. P. 23(d)(1)(D) (granting court authority to order "that the pleadings be amended to eliminate [class] allegations"); *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975) (upholding dismissal of class allegations under Rule 23(c) and (d) where allegations of complaint and matters of public record made clear that class action was inappropriate); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (approving dismissal of Rule 23 allegations where issues "are plain enough from the pleadings").

1. Plaintiff's Allegations Fail to Demonstrate Commonality

Plaintiff alleges a class complaint regarding 90 different restaurants, built at different times, of markedly different configuration, maintained and operated by different franchisees. Plaintiff has pled no facts showing common barriers at the locations, no facts showing the existence of a discriminatory company policy or practice, and no facts showing a common design flaw. Instead, the Complaint makes a series of factually-void, conclusory allegations that say nothing more than that Plaintiff hopes to find through discovery that "some or all" of the Restaurants contain accessibility barriers. Plaintiff's description of the "common" barriers is nothing more than a laundry list of every type of barrier that could conceivably exist. (DE 1 ¶¶ 2, 3, 41, 42, 49).

Conclusory allegations such as Plaintiff's are insufficient to establish commonality

under Rule 23. *See Davis v. Astrue*, 250 F.R.D. 476, 484 (N.D. Cal. 2008).

Access Now Inc. v. Walt Disney World Co., 211 F.R.D. 452, 454-55 (M.D. Fla. 2001), is a case in point. There, the plaintiff claimed to have been subjected to access barriers at one of the defendant's facilities and, sought to assert a class action against the defendants' 15 associated hotels, two theme parks and monorail system on the basis of an allegation that the defendants had a corporate policy of violating the ADA. The court found that "Plaintiffs' conclusory allegations [of corporate policy] are insufficient to establish the element of commonality." *Id.* at 454-455. The court also found that because "the facilities each were constructed at different times, some predating the ADA, some built after the ADA and some having been remodeled since the ADA," and plaintiff had alleged no facts showing a common discriminatory practice, plaintiff could not establish commonality.[6] *Id.* at 455. Accordingly, the court denied class certification. *Id.*; *see Falcon*, 457 U.S. at 157 (the representative plaintiff has a heavy burden to allege facts, as opposed to mere conclusory allegations, of a company-wide policy-practice of discrimination, in order to bridge the wide gulf between an individual claim and class claims and show commonality and typicality).[7]

For the same reasons, here too, any similarities at the BKLs in California are vastly

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[6] In so holding, the court distinguished *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354 (D. Colo. 1999), where the court certified a class complaint that specifically was based upon a single, common flaw in the defendant's queue line design in corporate-owned restaurants throughout the state. *Taco Bell* thus demonstrates the converse of this patently uncertifiable class complaint against multiple restaurants.

[7] *See also Access Now, Inc. v. Macy's East, Inc.*, No. 99-9088-CIV-Jordan (S.D. Fla. Feb. 15, 2001) (denying class certification for lack of commonality at Macy's department stores) (attached as Exhibit A);.*Access Now, Inc. v. The May Dept. Stores Co.*, No. 00-0148-CIV-Moreno (S.D. Fla. Oct. 6, 2000) (denying class certification for lack of commonality in ADA case where plaintiff's bare allegation of a corporate policy was unsubstantiated, the complaint alleged only specific violations rather than a uniform policy and stores were constructed at different times) (attached as Exhibit B); *Ass'n for Disabled Ams., Inc. v. Motiva Enters., LLC*, No. 99-0580-CIV-Ungaro Benages (S.D. Fla. Oct. 18, 1999) (denying class certification and granting motion to dismiss class action in ADA case where plaintiff's only "evidence" of a corporate policy was an unsubstantiated allegation that the defendant's conduct constituted a policy, and the only way to show the defendant's alleged non-compliance with the ADA was to examine each gas station) (copy attached as Exhibit C).

outweighed by the myriad of differences among them.[8] *See Clark v. Burger King Corp.*, 255 F. Supp. 2d at 343 ("not[ing] that many Burger King restaurants were built at various times and markedly differ from one-another in their construction and configuration."). Because individualized issues will predominate in the series of mini-trials that will be necessary to adjudicate the individualized inquiries into potential ADA violations in the various and varied stores, Rule 23(a) cannot be satisfied.

2. Plaintiff's Allegations Fail to Show Typicality or Adequacy of Representation

"A class representative must be a part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (internal quotations omitted). As discussed previously, plaintiff has suffered a different legal injury than putative class members who allegedly encountered access barriers at the 88 BKLs Plaintiff has not visited. Thus Plaintiff has not alleged, and cannot allege, typicality and adequacy of representation under Rule 23.

Notably, the Pleasant Hill and Pittsburg restaurants were constructed and first opened for business in the 1970s. (Archer Dec., ¶¶ 7, 10, Ex. B).[9] Because these restaurants were constructed before the January 26, 1993 effective date of the ADA's new construction standards, (*see* 42 U.S.C. § 12183(a)(1)), the ADA's design and construction requirements are inapplicable. *See Voytek v. Univ. of Cal.*, 1994 WL 478805 (N.D. Cal. Aug. 25, 1994) (ADA claim barred because it predated effective date of ADA), *aff'd on other grounds*, 77 F.3d 491

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[8] With regard to accessibility issues under the ADA for existing facilities, barrier removal is only required to the extent that removal is "readily achievable." 42 U.S.C. § 12181(9); 28 C.F.R. § 36.104. By necessity, the determination of what is readily achievable will need to be revisited for each restaurant that pre-dates the ADA. The standards applicable to new construction are similarly varied. *See* 42 U.S.C. § 12183(a); 28 C.F.R. 36.401(a)(1). Spaces altered after January 26, 1992 will be governed by another set of regulations. *See* 42 U.S.C. § 12183(a)(2); 28 C.F.R. § 36.402(a)(1). Thus, issues of individualized proof predominate over issues of generalized proof.

[9] The Court may consider facts that are matters of public record on a motion to dismiss class allegations. *Kamm v. Cal. City Dev. Corp.*, 509 F.2d 205, 210 (9th Cir. 1975).

(9th Cir. 1996); *see also Colon v. League of United Latin Am. Citizens*, 91 F.3d 140 (5th Cir. 1996) (courts lack jurisdiction when events predate ADA's effective date).

For this reason too, Plaintiff's claims -- that he encountered miscellaneous barriers that two franchisees did not satisfactorily remediate under the existing facilities' barrier removal standard -- are atypical of the putative class claims for violation of new construction standards. *See Am. Council of the Blind v. Astrue*, 2008 WL 4279674 (N.D. Cal. Sept. 11, 2008) (Alsup, J.) (named plaintiffs could not represent a class including Social Security programs in which no representative plaintiff participated, due to lack of typicality); *Kakani v. Oracle Corp.*, 2007 WL 1793774 (N.D. Cal. June 19, 2007) (Alsup, J.) (representative plaintiffs who alleged claims under California law were not adequate representatives of absent class members with claims under other states' laws).

In sum, Plaintiff has failed to allege three of the four Rule 23 prerequisites: commonality, typicality, and adequacy of representation. The Court should dismiss or strike Plaintiff's class allegations.

C. Plaintiff's Complaint Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6), or, Alternatively, Plaintiff Should Provide a More Definite Statement under Rule 12(e))

Fed. R. Cir. P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* This rule, in tandem with Rule 12(b)(6), imposes on Plaintiff an obligation to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*, 127 S. Ct. at 1974. If "the plaintiffs [ ] have not [with sufficient facts] nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 1974.[10]

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of

[10] In so holding, the Court stated that the "no set of facts" language in *Conley v. Gibson*, 355 U.S. 41 (1957), that many courts had interpreted as imposing a lesser burden has "earned its retirement" and is "best forgotten." *Id.* at 1968.

action will not do." *Id.* at 1964-1965 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (on motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965 (citations omitted). A complaint should state the "specific time, place and person" involved in the claim, as well as the specific activities in which the person allegedly was involved. *Id.* at 1971 n.10; *see also In Re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 313-14 (N.D. Cal 2007).

Thus, Plaintiff was required to allege: the restaurants at which he had been subjected to unlawful discrimination (or was deterred from visiting due to known barriers), the unlawful architectural barriers he encountered at each restaurant prior to filing suit, an intent to return to that restaurant, and the injury that occurred. *Cf. Wilson v. PFS LLC*, 2006 WL 3841517 (S.D. Cal. Nov. 2, 2006) (denying motion to dismiss or for more definite statement where complaint listed 37 areas of non-compliance, attached photographs and an "Accessibility Survey," and alleged details of plaintiff's visit to restaurant). Although Plaintiff alleges he visited Pleasant Hill and Pittsburg, he fails to state when he visited each restaurant. Without this information, Defendant cannot even discern whether Plaintiff's claims as to these two restaurants are barred by statutes of limitation, a matter which Defendant must plead in its answer and affirmative defenses to avoid waiver. *See Pickern v. Holiday Quality Foods*, 293 F. 3d at 1137 ("a plaintiff has no cause of action under the ADA for an injury that occurred outside of the limitations period.").

Likewise, although Plaintiff vaguely identifies alleged barriers, he does not identify which barriers he confronted at which restaurant. (*See* DE 1 ¶ 42). These are essential elements of Plaintiff's claim, which *Bell Atlantic* required Plaintiff to plead.

Plaintiff obviously cannot make the required factual allegations with respect to restaurants that he has never visited. And "information or belief" allegations that "some or all" of these BKLs may contain accessibility barriers cannot breathe life into his facially invalid claims.

In *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D.N.J. 2003), the court dismissed a

similar complaint against unidentified McDonald's® restaurants. There the plaintiff also "[did] not discriminate between the restaurants known to be in violation of the ADA from those which are not, and which, among the restaurants known to be in violation, [did] not discriminate between architectural barriers known to exist from those which [did] not," thereby leaving the defendant to guess which of its restaurants were alleged to violate the and how. *Id.* at 234-35. The court explained that the upshot of this "pleading style" is that:

> McDonald's is simply left to guess as to which of its remaining. . . . restaurants are alleged to violate the ADA and how so. Without information as to which of its restaurants are at issue, McDonald's can neither admit, nor in good faith deny, the allegations of ADA violations.
> *Id.* at 234.

The court accordingly ordered the plaintiffs to file an amended complaint identifying each restaurant of which plaintiffs had actual notice of ADA violations, and the dates on which the plaintiff visited each specific restaurant, so that McDonald's could discern the availability of applicable statute of limitations defenses.

Plaintiff here has failed to make the same basic factual allegations. For the same reasons, Plaintiff's Complaint should be dismissed for failure to state a claim under Rule 12(b)(6). Alternatively, Plaintiff should be ordered to provide a more definite statement.

D. The Court Should Decline to Hear, or, at Minimum, Stay Consideration of Plaintiff's Unruh and CDPA Claims

Plaintiff claims two bases for federal jurisdiction over his state law claims. First, he asks the Court to exercise supplemental jurisdiction over his state law claims based upon the federal question jurisdiction created by his Title III ADA claims. Second, he asserts diversity jurisdiction.

As set forth below, diversity jurisdiction does not exist under the CAFA's "local controversy exception." Consequently, the Court can exercise jurisdiction over Plaintiff's state law claims only through supplemental jurisdiction under 28 U.S.C. § 1367. A compelling basis exists, however, for the Court to decline supplemental jurisdiction, because the state law rule of decision is so unsettled that the Ninth Circuit has certified the question to the California

Supreme Court. Even if the Court accepts supplemental jurisdiction over Plaintiff's state law claims, it should stay consideration of those claims pending a decision from the California Supreme Court.

1. CAFA Diversity Jurisdiction Does Not Exist

Plaintiff alleges diversity jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). CAFA generally creates diversity jurisdiction over multi-state class actions involving state law claims, subject to a number of exceptions.

Section 1332(d)(4) of CAFA, commonly known as the "local controversy exception," applies to this case. This Section provides that a district court *shall* decline to exercise jurisdiction over any class action in which: (1) more than two-thirds of the members of the proposed plaintiff class are citizens of the State in which the action was filed; (2) the principal injuries were incurred in the State in which the action was filed; (3) at least one defendant is a defendant (i) from whom significant relief is sought, (ii) whose conduct forms a significant basis for the claims asserted by the plaintiff class, and (iii) who is a citizen of the State in which the action was filed; and (4) no other class action has been filed against the defendants in the preceding three years asserting the same or similar claims. 28 U.S.C. § 1332(d)(4)(A); *Serrano v. 180 Connect, Inc.*, 478 F.R.D. 1018 (9th Cir. 2007); *see* Davis *v. HSBC Bank of Nevada, N.A.*, 2008 WL 4829880 (C.D. Cal. 2008) (declining jurisdiction based on local controversy exception).

The Court should conclude, that most, if not all, of the class plaintiffs are California residents based on Plaintiff's allegation that the class consists of several thousand members who are dispersed across the State of California. (DE 1 ¶ 14). *See Mattera v. Clear Channel Comm., Inc.*, 239 F.R.D. 70, 80 (S.D.N.Y. 2006) (concluding that most, if not all, of the members of a class of employees of businesses located in New York City were New York residents).

The second and fourth prerequisites under the exception are also satisfied. The injuries of the putative class, which by definition occurred at California restaurants (DE 1 ¶ 13), necessarily were "incurred" in California. And no disqualifying class actions have been filed

against Burger King Corporation in the past three years. (Archer Dec. ¶ 12).

Thus, the only remaining question is whether any of the defendants are "significant" defendants under the local controversy exception.[11] In making this determination, the court must include any absent party that is a necessary or indispensable party under Fed. R. Civ. P. 19. *See Mattera v. Clear Channel Comm., Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006) (dismissing putative class action against out-of-state corporation under local controversy exception to CAFA where plaintiff failed to join New York corporation that operated affiliated radio stations that would necessarily provide relief if plaintiffs were successful). If such a party is a "significant" defendant and a resident of the state in which the action was filed, the local controversy exception to CAFA applies and diversity jurisdiction is destroyed. *Mattera*, 239 F.R.D. at 81.[12]

An absent party is necessary or indispensable under Rule 19 if the court cannot accord complete relief without that party, if the party's rights will be prejudiced unless joined, or if the existing parties risk exposure to multiple or inconsistent obligations. Fed. R. Civ. P. 19(a); *United States v. Bowen*, 172 F.2d 682, 688 (9th Cir. 1999). If any of those factors applies, the absent party must be joined. *Id.* If the absent party cannot be joined without destroying diversity, the court must then determine whether the absent party is an indispensible party without whom the action cannot proceed. Fed. R. Civ. P. 19(b).

In the context of Title III of the ADA, the crucial question with respect to whether an absent party is indispensable is which party exercises sufficient control over the premises to accord meaningful relief to the plaintiff. Here, the franchisees that operate the individual restaurants are the parties with the right (and obligation) to remove the access barriers of which

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[11] The omitted defendant operators of the Pittsburgh and Pleasant Hill Restaurants are California residents as required by the local controversy exception. *Mattera*, 239 F.R.D. at 80.

[12] The usual result of a failure to join an indispensable party whose presence destroys diversity jurisdiction is dismissal of the case. Because Plaintiff also asserts federal question jurisdiction, the Court need only strike Plaintiff's diversity allegation.

Plaintiff complains.[13] Likewise, because they are ultimately responsible for making all modifications and for paying all damages and fees that Plaintiff seeks, their rights clearly will be prejudiced. *See, e.g., Frotton v. Barkan*, 219 F.R.D. 31, 32 (D. Mass. 2003) (requiring tenant businesses to be joined as parties in ADA suit against shopping center landlord because they "surely have an interest in the question of whether the barriers violate the ADA, and if so, whether remedial measures are readily achievable"); *Roberts v. Royal Atlantic Corp.*, 542 F.3d 363, 378-79 (2d Cir. 2008) (remanding case to district court to determine if tenants were indispensable parties based on Department of Justice *Americans with Disabilities Act Handbook, § 6.02 Questions and Answers* statement that, as between landlords and tenants, the duty to remove barriers depends on who has legal authority to make alterations, "which is generally determined by the contractual agreement"); *Thompson v. Jiffy Lube Internat'l, Inc.*, 505 F. Supp. 2d 907, 918-22 (D. Kan. 2007) (granting in part motion to dismiss CAFA class action against nationwide franchisor where franchisee not subject to long-arm jurisdiction was indispensable party under Rule 19); *Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000) (concluding that landlord was necessary party to lawsuit against tenant where landlord had authority over common areas). Thus, the tenant operators of the restaurants are "significant defendants." Consequently, this case falls under the "local controversy exception." CAFA diversity jurisdiction therefore does not exist.[14]

2. Even if the Court Does Not Dismiss Plaintiff's Federal Claim, It Should Decline Supplemental Jurisdiction Over State Law Claims

Absent diversity jurisdiction, this Court's only potential authority over Plaintiff's state law claims is discretionary supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The Court

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[13] *See* Archer Dec. ¶¶ 7, 11, Ex. C, F, stating that franchisees are responsible, at their own cost, to maintain and operate the property and to comply with all applicable laws, including specifically the ADA. Moreover, Burger King Corporation is a mere sublessor who does not even own the property on which the Pleasant Hill and Pittsburg restaurants stand. (Archer Dec. ¶ 6).

[14] Plaintiff's failure to join the franchisees also constitutes a violation of Rule 19's requirement that a plaintiff identify any person who is a necessary party but has not been joined. Fed. R. Civ. P. 19(c).

may decline to exercise jurisdiction over such claims if it dismisses the federal claims for non-jurisdictional reasons,[15] if the state law claims raise "a novel or complex issue of State law," or if "there are other compelling reasons to decline jurisdiction." 28 U.S.C. § 1367(c)(1), (3), (4); *Executive Software N. Am., Inc. v. United States District Court*, 24 F.3d 1545, 1556 (9th Cir. 1994).

This Court should decline to exercise supplemental jurisdiction over Plaintiff's Unruh and CDPA claims because they raise complex, unsettled questions of state law currently being considered by the California Supreme Court, which, as a matter of comity, should be permitted to decide those questions in the first instance.

In *Munson v. Del Taco, Inc.*, 522 F.3d 997 (9th Cir. 2008), the Ninth Circuit Court of Appeals certified to the California Supreme Court a clear, long-standing, and heatedly contested, split among the courts as to whether intentional discrimination is necessary to state a claim for damages under Unruh, especially (but not solely) where the claim is based on an ADA violation.[16] The California Supreme Court has accepted the certified question for resolution. (Exhibit D).

A federal court should dismiss state law claims when a split in authority exists in the state courts. *Oliver v. GMRI, Inc.*, 2007 WL 4144995, at *3 (S.D. Cal. 2007); *Edmundson & Gallagher v. Album Towers Tenants Ass'n*, 48 F.3d 1260 (D.D.C. 1995). The federal courts in this circuit repeatedly have declined to exercise supplemental jurisdiction over such claims. *See Wilson v. PFS, LLC*, 493 F.Supp.2d 1122 (S.D. Cal. 2007); *Oliver v. Long Drug Stores Cal., Inc.*, 2008 WL 544399 (S.D. Cal. 2008); *Cross v. Pacific Coast Plaza Investments, L.P.*, 2007 WL 951772 (S.D. Cal. 2007); *Pinnock v. Java Depot, Inc.*, 2007 WL 2462106 (S.D. Cal. 2007); *Org. for the Advancement of minorities with Disabilities v. Brick Oven Restaurants*, 406 F.Supp.2d 1132 (S.D. Cal. 2005). The only reported decision to have considered the issue

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[15] If the Court dismisses the federal claims for lack of standing, an issue of subject matter jurisdiction, it must dismiss corresponding supplemental claims. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001).

[16] For details, *compare Lentini v. Cal. Ctr. For the Arts*, 370 F.3d 837, 846-47 (9th Cir. 2004) *with Gunther v. Lin*, 144 Cal. App. 4th 223, 252-57, 50 Cal. Rptr. 3d 317 (Ca. App. 2006).

following the California Supreme Court's acceptance of the certified question in *Munson* concluded that dismissal of the state claims was the only proper course of action. *Oliver v. KFC Corp.*, 2008 WL 2756605 (S.D. Cal. 2008). This Court too should decline supplemental jurisdiction, as a matter of comity between state and federal courts.

3. Even if the Court Accepts Supplemental Jurisdiction, it Nonetheless Should Stay Consideration of Plaintiff's State Law Claims

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Even if the Court elects to exercise supplemental jurisdiction over Plaintiff's state law claims, the Court should stay further proceedings on those claims pending the California Supreme Court's ruling in *Munson*, just as the Ninth Circuit did in Munson after certifying the state law questions to the state Supreme Court. 522 F.3d at 1003. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-80 (1997) (federal courts should stay or certify consideration of novel, unsettled questions of state law).

E. Plaintiff's State Law Claims Should Be Dismissed for Failure to State a Cause of Action Against Defendants

1. Plaintiff Cannot State a Cause of Action Against Burger King Corporation Pursuant to Unruh and CDPA Merely as a Result of its Status as a Sublessor or Franchisor

Plaintiff improperly attempts to impose liability on Burger King Corporation merely as a result of its status as a franchisor, lessor or sublessor. Unlike the ADA, which imposes strict liability in certain circumstances, the California Legislature did not create status based liability categories when it enacted Unruh and the CDPA. The interplay of the ADA and Unruh and the CDPA demonstrates that the California Legislature never intended to impose strict liability. Instead, California's statutory disability scheme looks solely at the defendant's actions.

The ADA provides that "[n]o individual shall be discriminated against on the basis of disability . . . by any person who *owns, leases (or leases to), or operates* a place of public accommodation." 42 U.S.C. § 12182(a)(emphasis added). The ADA thus creates strict liability for injunctive relief against owners, operators, lessors, and lessees and leaves it to

those parties to decide among themselves who caused the violation. Unruh and the CDPA, on the other hand, specifically limit liability based on the actions of a party. For example, Unruh limits liability to "[w]hoever denies, aids or incites a denial, or makes any discrimination . . . ." Further, "to establish a case under the Unruh Act, [a plaintiff] must *plead and prove* intentional discrimination in public accommodations in violations of the terms of the Act." *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1175 (Cal. 1991)(emphasis added). Cal. Civ. Code § 52(a). The CDPA also limits liability based on a party's actions: "Any person or persons, firm or corporation who denies or interferes . . . ." Cal. Civ. Code § 54.3(a).

After the ADA was passed by Congress, the California Legislature amended Section 51 of the California Civil Code to make a violation of the ADA a violation of Section 51. Cal. Civ. Code § 51(f). The California Legislature's incorporation of the ADA into California's statutory disability scheme is important in two respects as it relates to this matter. Notably, the Legislature *did not* amend the language of either Sections 52(a) or 54(a) to include the "status" based liability categories of owners, lessors, lessees, or operators found in the ADA. Instead, the Legislature retained the language of Unruh and the CDPA that limit liability based on the actions of a party -- namely that the defendant intentionally commit discrimination in the case of Unruh and that it at least "den[y]" or "interfere[ ]" with access in the case of CDPA.

"'It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.'" *Brown v. Kelly Broadcasting Co.*, 49 Cal. 3d 711, 725 (Cal. 1989) (*quoting Ford Motor Co. v. County of Tulare*, 145 Cal. App. 688, 691 (Cal. Ct. App. 1983)); *see also Gunther v. Lin*, 144 Cal. App. 4th 223, 239 (Cal. Ct. App. 2006) (court should consider how a statute fits within a general statutory scheme to divine its meaning); *Jurcoane v. Superior Ct.*, 93 Cal. App. 4th 886, 894 (Cal. Ct. App. 2001) (courts must "presume the Legislature intended everything in a statutory scheme, and . . . should not read statutes to omit expressed language or include omitted language."). As the California Supreme Court has held: "we are aware of no authority that supports the notion of legislation by accident." *In re Christian S.*, 7 Cal. 4th 768, 776 (Cal. 1994).

"If the California Legislature had intended [owners, lessors, lessees, and operators to be liable under Unruh or the CDPA based on their status], the Legislature could have used the same clear language as" the ADA. *Brown*, 49 Cal. 3d at 725. It did not. Clearly, the California Legislature did not intend to make Defendant Burger King Corporation liable under either Unruh or the CDPA merely because of its status as a franchisor,[17] or as a lessor/sublessor where the lessee/sublessee operates the facility and has contractually accepted full responsibility for the facility's condition, including the obligation to comply with accessibility laws. Accordingly, the Unruh and claims should be dismissed.

2. Plaintiff Cannot Adequately Allege Discriminatory Intent as Required to State an Unruh Cause of Action against Burger King Corporation

The California Legislature's incorporation of the ADA into its statutory disability scheme also is important as it relates to this matter for a second reason. In amending Section 51, the California Legislature did not change the language of Section 52, which the California Supreme Court has interpreted to require discriminatory intent. *Harris*, 52 Cal. 3d at 1175; *Gunther*, 144 Cal. App. 4th at 227. Also, more recently, Governor Schwartzenegger signed Senate Bill 1608, which creates the "Construction-Related Accessibility Standards Compliance Act (the "Compliance Act") and which will be found in the California Civil Code at § 55.51 *et seq*. The Compliance Act is effective January 1, 2009 and includes numerous provisions applicable to disability access claims under Unruh and the CDPA. Significantly, Section 55.53(f) of the Compliance Act unambiguously presumes that a party still must "plead and prove" discriminatory intent to state an Unruh cause of action: "A property owner's or tenant's election not to hire a [certified access specialist] shall not be admissible to prove that person's

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[17] Significantly, courts have repeatedly held that a franchisor (who does not own or lease the subject accommodation) does not "operate" such facility and therefore is not even liable under the broader "strict liability" language of the ADA. *See Neff v. Am. Dairy Queen Corp.* 58 F.3d 1063, 1067 (5th Cir. 1995); *U.S. v. Days Inns of Am., Inc.*, 1998 WL 461203 (E.D. Cal. Jan. 12, 1998); *U.S. v. Days Inns of Am., Inc.*, 22 F. Supp. 2d 612 (E.D. Ky. 1998). This, too militates in favor of a finding that Plaintiff has not stated a valid claim against Burger King Corporation under Unruh or the CDPA.

lack of *intent* to comply with the law." Cal. Civ. Code § 55.53(f)(emphasis added).

The Complaint, however, fails to adequately allege that Burger King Corporation intended to discriminate against Plaintiff. The reason is simple. Plaintiff is unable to do so. Paragraph 44 of the complaint conclusorily alleges: "*On information and belief*, Burger King has engaged in intentional discrimination, including but is [sic] not limited to: designing, constructing, implementing and maintaining policies, practices, procedures and barriers that discriminate . . . ." (DE 1 ¶ 44) (emphasis added). By contrast, the documents incorporated into Plaintiff's Complaint by reference demonstrate that Burger King Corporation *requires* its franchisees to "promptly observe and comply with all present and future laws" and requires that all "[a]lterations and/or additions to the Premises if required [must comply with] the American Disabilities Act of 1990." (Archer Dec. Ex. C, F). This Court should not accept as true the conclusory, factually unwarranted allegations of Plaintiff's Complaint. *Bell Atlantic*, 127 S. Ct. at 1964; *Jackson v. Mills Corp.*, 2007 WL 2705215, at *1 (N.D. Cal. Sept. 14, 2007).

"[A] cause of action in which a plaintiff seeks damages for disability discrimination under Section 51 based on a structural or architectural barrier requires a showing that the barrier existed due to an intentional violation of an applicable law relating to disability access standards." *Coronado v. Cobblestowne Vill. Cmty. Rentals*, 163 Cal. App. 4th 831, 841 (Cal. Ct. App. 2008). Plaintiff, however, fails to allege any facts that Burger King Corporation even had knowledge of the unidentified barriers at the unidentified restaurants, much less that it intentionally caused the unspecified barriers.

Clearly, Plaintiff's Unruh claim must be dismissed given that he is unable to "*plead* and prove intentional discrimination in public accommodations in violations of the terms of the Act." *Harris*, 52 Cal. 3d at 1175.

IV. CONCLUSION

For all of the foregoing reasons, this Court should: (i) dismiss the Complaint for lack of standing as to all unidentified restaurants; (ii) dismiss or strike Plaintiff's class allegations under Rule 23; (iii) dismiss Plaintiff's claims for failure to state a claim or order a more

definite statement, including identification of each restaurant Plaintiff visited, when he visited such restaurant(s), and the barriers encountered and/or known to exist at such restaurant(s); (iv) decline to accept supplemental jurisdiction over Plaintiff's state law claims, or stay such valid claims; and/or (v) dismiss Plaintiff's state law claims under for failure to state a claim.

Dated: November 26, 2008

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