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11

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

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

16 Plaintiffs,

17 vs.

18 BURGER KING CORPORATION,

19 Defendant.
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) Case No. C 08-4262 WHA (JL)

) **PLAINTIFFS’ MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT AS TO**
) **VIOLATIONS OF APPLICABLE**
) **DISABILITY ACCESS STANDARDS IN**
) **RESTAURANT NUMBER 2055**

) Hearing Date: March 18, 2010
) Time: 8:00 a.m.

TABLE OF CONTENTS

1

2 Introduction 1

3 Background 1

4 A. Construction and Alteration History of Restaurant 2055 2

5 B. Defendant’s Accessibility Surveys of Restaurant 2055 3

6 Argument 4

7 I. Applicable Standards 4

8 A. Motion for Partial Summary Judgment 4

9 B. The Americans With Disabilities Act 5

10 C. The Unruh Civil Rights Act and the California Disabled Persons Act 6

11 II. The Undisputed Facts Demonstrate that Plaintiffs Are Entitled to

12 Partial Summary Judgment Concerning Certain Elements In Restaurant 2055 7

13 A. Accessibility Requirements Applicable to Restaurant 2055

14 on Which this Motion is Based 7

15 B. The Ramp to the Front Entrance Does Not Comply With

16 ANSI-61 or CBC-1994 Because it Does Not Have a Handrail 8

17 C. The Slope of Accessible Parking Spaces and Access Aisles Was Out of

18 Compliance with Applicable Standards As Recently As August 2008. 8

19 D. The Maneuvering Clearance at the Men’s Restroom Was Out of

20 Compliance with Applicable Standards As Recently As January 2009 9

21 E. The Force Required to Open the Women’s Restroom Door Was Out of

22 Compliance with Applicable Standards As Recently As January 2009 10

23 F. The Toilet Stalls in the Men’s and Women’s Restrooms

24 Were Out of Compliance with Applicable Standards As

25 Recently As August 2008. 11

26 G. The Lack of Accessible Seating Was Out of Compliance with Applicable

27 Standards As Recently As January 2009 12

28 Conclusion 12

TABLE OF AUTHORITIES

Cases

Bragdon v. Abbott,
524 U.S. 624 (1998) 6

Donald v. Café Royale, Inc.,
266 Cal. Rptr. 804 (Cal. Ct. App. 1990) 1

Fortyune v. American Multi-Cinema, Inc.,
364 F.3d 1075 (9th Cir. 2004) 6

Long v. Coast Resorts, Inc.,
267 F.3d 918, 921-24 (9th Cir. 2001) 4-5

Moeller v. Taco Bell Corp.,
2007 WL 2301778 (N.D. Cal. Aug. 8, 2007) 5, 6, 7

People ex rel. Deukmejian v. CHE, Inc.,
197 Cal. Rptr. 484 (Cal. Ct. App. 1983) 6

Sapp v. MHI Partnership, Ltd.,
199 F. Supp. 2d 578 (N.D. Tex. 2002) 5

United States v. AMC Entertainment, Inc.,
245 F. Supp. 2d 1094 (C.D. Cal. 2003) 5

Statutes

Title III of the Americans with Disabilities Act

42 U.S.C. § 12181 1

42 U.S.C. § 12182(a) 5

42 U.S.C. § 12183(a)(2) 5, 6

42 U.S.C. § 12182(b)(2)(A)(iv) 5

42 U.S.C. § 12188 2

Unruh Civil Rights Act

Cal. Civ. Code § 51 1

Cal. Civ. Code § 51(b) 6

Cal. Civ. Code § 51(f) 7

Cal. Civ. Code § 52(a) 2

1 California Disabled Persons Act

2 Cal. Civ. Code § 54 1

3 Cal. Civ. Code § 54(c) 7

4 Cal. Civ. Code § 54.1(a)(1) 6

5 Cal. Civ. Code § 54.3(a) 2

6 Cal. Health & Safety Code

7 § 114276(c) 9-10

8 § 19956 6

9 § 19959 6

10 **Regulations**

11 Nondiscrimination on the Basis of Disability by Public Accommodations and

12 in Commercial Facilities, 28 C.F.R. pt. 36

13 § 36.403(f)(1) 5

14 § 36.406(a) 6

15 Department of Justice Standards for Accessible Design, 28 C.F.R. pt. 36, app. A. 5-6

16 § 3.2 8

17 § 3.5 8

18 § 4.1.2(5)(a) 8

19 § 4.1.3(18) 12

20 § 4.1.6(1)(j) 11

21 § 4.6.3 8

22 § 4.13.6 9, 10

23 § 4.13.11(2)(b) 10

24 § 4.17.3 11

25 Fig. 25 9

26 Fig. 30(a) 11

27 Fig. 30(b) 11

28

1 California Building Code, Cal. Code Regs., tit. 24, pt. 2 6

2 § 404(p.1) 8

3 § 419(j) 8

4 § 3103A(b)(4C) 12

5 § 3105A(b)(3)(A)(ii) 11

6 § 3105A(l) 12

7 § 3107A(a)(1) 8

8 § 3107A(b)(1) 8

9 § 3107A(b)(4) 8

10 § 3304(i.1)(2)(B) 9, 10

11 § 3304(i.2)(1) 10

12 § 3307(a.1) 8

13 § 3307 (e.1) 8

14 § 3112A(a) 7

15 Fig. 31-1A 11

16 Fig. 33-2 9

17

18 ANSI A117.1-1961: American National Standard Specifications for Making Buildings and
Facilities Accessible to and Usable by, The Physically Handicapped 6, 7

19 § 5.1.2 8

20 § 5.3.2 9

21 **Rules**

22 Federal Rules of Civil Procedure

23 Rule 56(a) 1, 4

24 Rule 56(c) 4

25 Rule 56(d) 1, 4

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Exhibits to the Declaration of Amy F. Robertson

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- Exhibit 1 Declaration of Eric McSwain and photos MBK000142 and MBK000271
- Exhibit 2 Current California BKL Restaurants
- Exhibit 3 Expert Report of Kim R. Blackseth for Defendant Burger King Corp. and Exhibit 1
- Exhibit 4 Burger King Corporation Facility Inspection Report
- Exhibit 5 CM Pacific, Inc., Bid
- Exhibit 6 JBI Bid
- Exhibit 7 UDC Survey dated August 27, 2008
- Exhibit 8 UDC Survey dated January 5, 2009
- Exhibit 9 Excerpts from the deposition of Kim Blackseth and Exhibits 272 and 278
- Exhibit 10 Excerpts from the 1994 version of the California Building Code
- Exhibit 11 Excerpts from the Department of Justice Standards for Accessible Design
- Exhibit 12 Defendant Burger King Corp.'s Supplemental Response to Plaintiffs' Third Set of Discovery Requests and "Burger King Corporation's Tolerances Chart"

INTRODUCTION

Undisputed facts establish that the following elements of Burger King Restaurant 2055 were in violation of applicable federal and state accessibility standards during the relevant period in this litigation:

- The ramp to the front entrance;
- The slope of the required accessible parking spaces;
- The force required to open the women’s restroom door;
- The maneuvering clearance at the men’s restroom door;
- The men’s and women’s toilet stalls; and
- The lack of accessible seating.

Plaintiffs hereby move for partial summary judgment establishing that those elements are or were out of compliance with applicable disability access standards. While there remain fact issues that must be resolved before an individual class member may make a claim for damages -- for example, whether the class member “was denied equal access on a particular occasion,” *Donald v. Café Royale, Inc.*, 266 Cal. Rptr. 804, 813 (Cal. Ct. App. 1990) -- Plaintiffs move pursuant to Rules 56(a) and 56(d) of the Federal Rules of Civil Procedure for partial summary judgment with respect to the undisputed questions of fact and law listed above. Rule 56(a) permits a party to move for summary judgment “on all or any part” of his claim; Rule 56(d)(1) permits the Court to determine what material facts “are not genuinely at issue.”

A ruling on Plaintiffs’ present motion will have the effect of narrowing the issues in the trial relating to Restaurant 2055, currently set to begin on April 19, 2010.

BACKGROUND

This class action lawsuit -- at this juncture -- challenges barriers to individuals who use wheelchairs and scooters at ten Burger King leased (“BKL”) restaurants in California. Plaintiffs allege that these barriers violate title III of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12181 *et seq.*, and California’s Unruh Civil Rights Act (“the Unruh Act”), Cal. Civ. Code § 51 *et seq.*, and Disabled Persons Act (“CDPA”), *id.* § 54 *et seq.* Plaintiffs seek injunctive

1 relief pursuant to the ADA, 42 U.S.C. § 12188, and injunctive relief and minimum statutory
2 damages under state law. *See* Cal. Civ. Code §§ 52(a) (Unruh) & 54.3(a) (CDPA).

3 On September 25, 2009, this Court certified ten subclasses, one for each of the ten BKL
4 restaurants now at issue, and scheduled trials for these subclasses throughout 2010 and early
5 2011. Order Granting Class Certification as to Ten Burger King Stores and Otherwise Denying
6 Class Certification (Docket No. 226) at 27-28. The class period in this case extends back to
7 April 16, 2006. *Id.* at 9. The first trial -- of Restaurant 2055 -- is scheduled to begin on April 19,
8 2010. *Id.* at 27. This motion addresses only this first restaurant.

9 As set forth below, both the ADA and California state law require that when a restaurant
10 or other public accommodation is constructed or altered, the construction or alterations must
11 comply with accessibility requirements applicable at that time. The undisputed facts on which
12 this Motion relies are: (1) the construction date and alterations history of Restaurant 2055; and
13 (2) accessibility surveys *conducted by Defendant's experts*¹ showing that specified architectural
14 elements at Restaurant 2055 did not comply with state and/or ADA requirements in effect when
15 that restaurant was constructed or altered.

16 **A. Construction and Alteration History of Restaurant 2055.**

17 Restaurant 2055 was built in 1977. Decl. of Amy F. Robertson ("Robertson Decl.") Ex. 2
18 at 2. Defendant Burger King Corp.'s ("BKC's") expert, Kim Blackseth, determined that
19 alterations costing \$230,000 occurred at Restaurant 2055 in 1997. Expert Report of Kim R.
20 Blackseth for Defendant Burger King Corp. ("Blackseth Report"), Ex. 1 at 3 (Robertson Decl.
21 Ex. 3). The 1997 alterations included alterations to the restrooms and parking lots as well as
22 dining room tables. BKC's Facility Inspection Report for Restaurant 2055 required certain work
23 to be done on the restaurant, including that the entire parking lot be replaced, that the entire
24

25 ¹ Plaintiffs' expert Eric McSwain surveyed all ten stores documenting ongoing
26 violations and evidence of previous violations. He submitted a declaration (Robertson Decl. Ex.
27 1), a 64-page exhibit detailing violations in the ten stores, and over 5,800 photographs taken
28 during his ten surveys. In order to ensure that the facts on which Plaintiffs rely for summary
judgment are undisputed, however, Plaintiffs rely only on evidence from Defendant's surveys.

1 dining room decor package -- including table tops and chairs -- be replaced, and that the
2 restrooms be replaced. *Id.* at BKCPP000781, 783, 790, 793 (Robertson Decl. Ex. 4). The bid
3 documents in BKC's files for the work show bids for "Rest Room Remodel" and significant
4 work in the parking lot, *see* Robertson Decl. Ex. 5 at BKCPP000850, 851, and bid documents
5 received from the franchisee show replacement of tables and seating. *See* Robertson Decl. Ex. 6
6 at COOK-MER-2055_2288-00096.

7 **B. Defendant's Accessibility Surveys of Restaurant 2055.**

8 At various points in 2008 and 2009, BKC commissioned its nontestifying experts,
9 including Universal Designers and Consultants ("UDC"), to survey the ten restaurants to
10 investigate accessibility issues. *See* Docket No. 123 at 4. After BKC received these surveys, it
11 directed that the franchisees of the restaurants attempt to correct the violations identified in the
12 surveys. *See* Docket No. 200 at 4. The UDC surveys thus document the conditions in the
13 restaurants prior to the time these corrective alterations took place. The conditions in the
14 restaurants between April 16, 2006 and the time any violations were remedied are relevant to
15 determining whether class members who encountered barriers during that time are entitled to
16 recover damages pursuant to state law.

17 The parties disputed whether the UDC surveys were privileged. Following briefing to the
18 magistrate and objections,² this Court held that the surveys were not privileged but that BKC
19 could withhold production of the surveys until 70 days before each trial. Order Denying Def.'s
20 Mot. for Stay Pending Appeal of Disc. Order (Docket No. 253) at 2. Based on this Order, on
21 February 8, 2010, Plaintiffs received three surveys relating to restaurant number 2055 in El
22 Cerrito, California, trial of which is scheduled to begin on April 19, 2010. The two UDC surveys
23 Plaintiffs reference herein are dated August 27, 2008 (the "August 2008 Survey," Robertson
24 Decl. Ex. 7) and January 5, 2009 (the "January 2009 Survey," Robertson Decl. Ex. 8).³ These
25 surveys show that there were specific -- and undisputed -- violations of accessibility standards

26
27 ² *See* Docket Nos. 103, 121, 123, 135, 142, 151, 154, 200, 239, 241-1.

28 ³ Plaintiffs have highlighted the measurements in the surveys on which they rely.

1 during the liability period as late as August 2008 or January 2009 at Restaurant 2055 prior to
2 corrective alterations.

3 In addition to the UDC surveys, BKC's expert, Kim Blackseth, analyzed the alterations
4 history of the stores and then surveyed them on a number of occasions starting in mid-2009
5 through the end of that year. *See, e.g.*, Blackseth Report, Ex. 1 at 1-4 (documenting visits to
6 Restaurant 2055 and alterations history of same). Although these surveys took place after the
7 attempted corrective alterations, Mr. Blackseth nevertheless found at least one ongoing violation
8 as late as August 2009 at Restaurant 2055.

9 The UDC surveys of Restaurant 2055 and Mr. Blackseth's report relating to that
10 restaurant provide a number of undisputed facts demonstrating the existence of violations of the
11 ADA and/or state law in Restaurant 2055 that are appropriate for resolution on motion for partial
12 summary judgment.

13 ARGUMENT

14 **I. Applicable Standards**

15 **A. Motion for Partial Summary Judgment**

16 Summary judgment is appropriate where "the pleadings, the discovery and disclosure
17 materials on file, and any affidavits show that there is no genuine issue as to any material fact and
18 that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). A plaintiff
19 may move for summary judgment in his favor "on all or any part" of his claim. *Id.* Rule 56(a).
20 "An interlocutory summary judgment may be rendered on liability alone, even if there is a
21 genuine issue on the amount of damages." *Id.* Rule 56(d)(2); *see also id.* Rule 56(d)(1)
22 (permitting the Court, when not rendering judgment upon the whole case, to issue an order
23 "specifying what facts. . . are not genuinely at issue.").

24 A number of courts have held that partial summary judgment is appropriate where a
25 plaintiff has demonstrated -- through undisputed facts -- violations of applicable accessibility
26 standards. *See, e.g., Long v. Coast Resorts, Inc.*, 267 F.3d 918, 921-24, 926 (9th Cir. 2001)
27 (affirming in part district court's decision granting partial summary judgment to plaintiffs based
28

1 on an application of ADA accessibility standards to stipulated facts); *Moeller v. Taco Bell Corp.*,
2 2007 WL 2301778, at *2-3, *22 (N.D. Cal. Aug. 8, 2007) (granting partial summary judgment to
3 plaintiffs under ADA and California accessibility standards); *United States v. AMC Entm't, Inc.*,
4 245 F. Supp. 2d 1094, 1101 (C.D. Cal. 2003) (granting partial summary judgment to plaintiffs
5 based on an application of ADA accessibility standards to undisputed dimensional information in
6 plaintiffs' expert's report); *Sapp v. MHI P'ship, Ltd.*, 199 F. Supp. 2d 578, 583 (N.D. Tex. 2002)
7 (granting partial summary judgment to plaintiffs based on an application of ADA accessibility
8 standards to undisputed facts).

9 **B. The Americans With Disabilities Act**

10 Title III of the ADA prohibits disability discrimination by those who own, operate, lease
11 or lease to places of public accommodation -- such as Burger King restaurants -- "in the full and
12 equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of
13 that public accommodation. 42 U.S.C. § 12182(a). Title III requires differing levels of
14 architectural compliance depending on whether the restaurant was (1) built after January 26,
15 1993; (2) built before that time but altered after January 26, 1992; or (3) built before that time but
16 not altered. *See generally Moeller*, 2007 WL 2301778, at *5. The only standard at issue in this
17 motion is the second of these, the alterations standard. Restaurant 2055 was built in 1977, so the
18 new construction standard does not apply, and Plaintiffs are not moving pursuant to the third
19 standard, requiring barrier removal where "readily achievable" in unaltered facilities. 42 U.S.C.
20 § 12182(b)(2)(A)(iv).

21 In facilities built before January 26, 1993 but altered after January 26, 1992, the altered
22 portion⁴ must comply with the Department of Justice Standards for Accessible Design ("DOJ
23

24 ⁴ In addition, the path of travel to the altered portion, and the restrooms that serve
25 the altered area must be brought into compliance, up to a cost of 20% of the overall cost of the
26 alteration. 42 U.S.C. § 12183(a)(2) (requiring path of travel and restrooms to comply if not
27 "disproportionate"); 28 C.F.R. § 36.403(f)(1) (deeming path of travel and restroom alterations
28 disproportionate if they exceed 20% of the cost of the original alteration); *see also* Blackseth
Report, Ex. 1 at 4. In this Motion, Plaintiffs do not rely on the ADA's path of travel
requirements.

Standards” or “DOJ Stds.”),⁵ 28 C.F.R. pt. 36, app. A. *See* 42 U.S.C. § 12183(a)(2); 28 C.F.R. § 36.406(a).⁶ The DOJ Standards contain detailed design specifications for public accommodations covering a variety of architectural elements, including, for example, parking lots, food service lines, accessible routes, and restrooms. *See generally id.*

C. The Unruh Civil Rights Act and the California Disabled Persons Act.

Both the CDPA and the Unruh Act prohibit discrimination on the basis of disability in the full and equal access to the services, facilities and advantages of public accommodations. Cal. Civ. Code §§ 51(b) (Unruh) & 54.1(a)(1) (CDPA). All buildings constructed or altered after July 1, 1970, must comply with standards governing the physical accessibility of public accommodations. *Moeller*, 2007 WL 2301778, at *6 (citing Cal. Health & Safety Code §§ 19956 & 19959). From December 31, 1981 until the present, the standards have been set forth in the California Building Code (“CBC”), Cal. Code Regs., tit. 24, pt. 2. *See Moeller*, 2007 WL 2301778, at *6. Buildings constructed between July 1, 1970 and December 31, 1981 must comply with the 1961 version of the American National Standards Institute, Inc.’s “ANSI A117.1-1961: American National Standard Specifications for Making Buildings and Facilities Accessible to and Usable by, The Physically Handicapped” (“ANSI-61”). *People ex rel. Deukmejian v. CHE, Inc.*, 197 Cal. Rptr. 484, 491 (Cal. Ct. App. 1983); *see also* Dep. of Kim Blackseth (“Blackseth Dep.”) 52-53 and Ex. 272 (Robertson Decl. Ex. 9).

As Defendant’s expert acknowledges, if facilities are altered, they “have to comply with the edition of the CBC in effect on the date of their last alteration.” Blackseth Report, Ex. 1 at 1. The CBC requires that -- in addition to the altered area itself -- the path of travel to, and restrooms that serve, the altered area be brought into compliance with the applicable version of

⁵ The Americans with Disabilities Act Architectural Guidelines (“ADAAG”) were adopted by the DOJ as its Standards for Accessible Design. *See Fortuone v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir. 2004). As a result, the DOJ Standards are often referred to as the “ADAAG.”

⁶ The DOJ’s Title III regulations are “entitled to deference.” *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

1 the code. CBC § 3112A(a) (1994).⁷ However, the compliance requirement is limited to the area
 2 of alteration only -- and does not extend to the path of travel or restrooms -- where the total cost
 3 of the alterations falls below the valuation threshold⁸ and “the enforcing agency finds that
 4 compliance with [the] code creates an unreasonable hardship.” *Id.*, Exception 1. A project is not
 5 eligible for this exception unless it applies to the enforcing agency and that agency makes the
 6 required findings to grant the exception. *See* Blackseth Dep. 55-56.

7 A violation of the CBC constitutes a violation of both the CDPA and the Unruh Act. *See*
 8 *Moeller*, 2007 WL 2301778, at *6. A violation of the ADA -- including a violation of the DOJ
 9 Standards where applicable -- also constitutes a violation of both statutes. *See* Cal. Civ. Code
 10 §§ 51(f) & 54(c).

11 **II. The Undisputed Facts Demonstrate that Plaintiffs Are Entitled to Partial Summary**
 12 **Judgment Concerning Certain Elements In Restaurant 2055.**

13 **A. Accessibility Requirements Applicable to Restaurant 2055 on Which this**
 14 **Motion is Based.**

15 Restaurant 2055 was constructed in 1977 and thus must comply with ANSI-61. In
 16 addition, as determined by Mr. Blackseth, the restaurant was altered in 1997 at a cost of
 17 \$230,000. Blackseth Report, Ex. 1 at 3. As a result, as acknowledged by Mr. Blackseth, these
 18 1997 alterations “triggered the 1997 CBC and ADAAG Alteration standards in the area of
 19 alteration, paths of travel, parking and restrooms.” *Id.*, Ex. 1 at 4. These alterations were over
 20 the valuation threshold, Blackseth Dep. 63-64, so the restrooms and path of travel were required
 21 to comply without limitation.

22 In addition, the altered areas of the restaurant -- which, as demonstrated above, included
 23 dining room tables, the parking lot, and the restrooms, *see infra* at 2-3 -- must comply with the
 24 state and federal accessibility requirements in place in 1997. The version of the CBC applicable

25 ⁷ Excerpts from 1994 CBC are attached as Exhibit 10 to the Robertson Declaration.

26 ⁸ The valuation threshold is the amount of \$50,000 in 1981, adjusted to the current
 27 year based on the “ENR US20 Cities” average. CBC § 3112A(a), Exception 1 (1994). This
 28 would be \$122,000 in 2009. Blackseth Report Ex. 1 at 4.

1 in 1997 was the 1991 Uniform Building Code as amended effective April 1, 1994. Robertson
2 Decl. Ex. 10. These standards are referred to herein as “CBC-1994.”

3 **B. The Ramp to the Front Entrance Does Not Comply With ANSI-61 or CBC-**
4 **1994 Because it Does Not Have a Handrail.**

5 A path of travel is considered to be a ramp if its slope is greater than one foot of rise in 20
6 feet of horizontal run, or five percent. CBC-1994 § 3307(a.1). Handrails are required at ramps
7 where the slope exceeds five percent. *Id.* § 3307(e.1).

8 The ramp at the front entrance to Restaurant 2055 slopes eight percent. Blackseth Dep.
9 77 & Ex. 278. Under the CBC, it is required to have handrails. CBC-1994 § 3307(e.1);
10 Blackseth Dep. 77 (“Under the CBC it would have been required to have handrails either way,
11 yes.”). The standards applicable when the restaurant was built also required a handrail on at least
12 one side. ANSI-61 § 5.1.2 (“A ramp shall have handrails on at least one side and preferably two
13 sides. . . .”) (copy provided as Ex. 272 to the Blackseth Deposition, Robertson Decl. Ex. 9).

14 This ramp did not -- when surveyed by Mr. Blackseth in August, 2009 -- have handrails.
15 Blackseth Dep. Ex. 278. Mr. Blackseth agreed that, “without handrails this is . . . a noncompliant
16 condition with the CBC.” *Id.* at 77-78.

17 **C. The Slope of Accessible Parking Spaces and Access Aisles Was Out of**
18 **Compliance with Applicable Standards As Recently As August 2008.**

19 Both the DOJ Standards and the 1994 CBC required that parking lots provide accessible
20 parking spaces and access aisles. DOJ Stds. § 4.1.2(5)(a);⁹ CBC-1994 § 3107A(a)(1) & A(b)(1).
21 The DOJ Standards limits slope and cross slope of accessible parking spaces to two percent in
22 any direction. DOJ Stds. § 4.6.3.¹⁰ The 1994 CBC limits the slope of accessible parking spaces
23 to 2.083%. CBC-1994 § 3107A(b)(4). The dimensional requirements of the DOJ Standards are
24 “subject to conventional building industry tolerances for field conditions.” *Id.* § 3.2. In its

25 ⁹ Excerpts from DOJ Standards are attached as Exhibit 11 to the Robertson
26 Declaration.

27 ¹⁰ There are two kinds of slope: “running slope,” which is slope parallel to the
28 direction of travel; and “cross slope,” which is perpendicular to the direction of travel. *See* DOJ
Stds. § 3.5 (definitions); CBC-1994 §§ 404(p.1) & 419(j) (same).

1 discovery responses, BKC has stated that -- subject to such a tolerance -- slopes and cross slopes
 2 of parking spaces and access aisles cannot exceed three percent. Def. Burger King Corp.'s
 3 Supplemental Resp. to Pls.' Third Set of Disc. Reqs. at 6-7 and attached "Burger King
 4 Corporation's Tolerances Chart" at 1 ("BKC's Tolerance Chart," Robertson Decl. Ex. 12).
 5 Defendant's August 2008 survey identified several violations of this requirement.

6 The August 2008 Survey recorded multiple slope measurements at the two accessible
 7 parking spaces and one access aisle. *Id.* at BKCPP007716. In one accessible space, two of the
 8 three running slope measurements exceeded three percent (3.3% and 4.1%); in the other, all three
 9 running slope measurements exceeded three percent (5.4%, 3.3%, and 4.1%). All three running
 10 slope measurements in the access aisle exceeded three percent (4.2%, 3.6%, and 4.2%). *Id.*

11 Because, as Defendant's expert has admitted, the parking at Restaurant 2055 was required
 12 to be in compliance with the DOJ Standards and CBC standards applicable in 1997, and because
 13 the evidence shows that the parking lot itself was redone in 1997, the accessible parking spaces
 14 and access aisle were out of compliance when surveyed by UDC in August 2008.

15 **D. The Maneuvering Clearance at the Men's Restroom Door Was Out of**
 16 **Compliance with Applicable Standards As Recently As January 2009.**

17 Doors were required by the 1994 CBC to have at least 60 inches of clear floor space
 18 perpendicular to the door on the pull side. CBC-1994 § 3304(i.1)(2)(B) & Fig. 33-2. The ANSI-
 19 61 standard required that "[t]he floor on the inside and outside of each doorway shall be level for
 20 a distance of 5 feet from the door in the direction the door swings. . ." ANSI-61 § 5.3.2. The
 21 DOJ Standards require at least 60 inches where the door is approached from the front, and at
 22 least 54 inches if the door is approached from the side and has a closer. DOJ Stds. § 4.13.6 &
 23 Fig. 25. The men's restroom door in Restaurant 2055 pulls open into the restaurant. *See*
 24 Blackseth Report, Ex. 1 at 13, Fig. 3.3. It has a closer. *See* Robertson Decl. Ex. 1 (photographs
 25 taken by Mr. McSwain in November, 2009).¹¹ As such, Restaurant 2055 was required to have 54

26
 27 ¹¹ Indeed, it is required by state law to have a closer. *See* Cal. Health & Safety Code
 28 § 114276(c)(1) ("Toilet rooms shall be separated by well-fitted, self-closing doors that prevent
 (continued...)

1 or 60 inches of clear floor space perpendicular to the men's restroom door under the DOJ
2 Standards and 60 inches under the CBC and ANSI-61.

3 Prior to recent alterations in Restaurant 2055, there was a wall approximately 49 inches
4 from the face of the men's restroom door. August 2008 Survey at BKCPP007720,
5 BKCPP007731 (Photos 2055-0031.jpg and 2055-0032.jpg); January 2009 Survey at
6 BKCPP007743, BKCPP007750 (Photo 2055-10.jpg). This condition violated section
7 3304(i.1)(2)(B) of the 1994 CBC and section 4.13.6 of the DOJ Standards. Although the wall
8 had been removed by the time Mr. Blackseth surveyed the restaurant, he agreed that if there were
9 a wall approximately 50 inches from the face of the restroom door, it would be a noncompliant
10 condition. Blackseth Dep. 66-68, 81.

11 Because, as Mr. Blackseth opined, the restrooms at Restaurant 2055 were required to be
12 in compliance with the DOJ Standards and the CBC standards applicable in 1997, and because
13 the evidence shows that the restrooms themselves were remodeled in 1997, the maneuvering
14 clearance at the men's restroom door was out of compliance when surveyed by UDC in August,
15 2008, and January, 2009. It was also out of compliance with the ANSI-61 standard, applicable to
16 the store when built.

17 **E. The Force Required to Open the Women's Restroom Door Was Out of**
18 **Compliance with Applicable Standards As Recently As January 2009.**

19 Both the DOJ Standards and the CBC limit the force required to open an interior door to
20 five pounds. DOJ Stds. § 4.13.11(2)(b); CBC-1994 § 3304(i.2)(1). In its discovery responses,
21 BKC has stated that -- subject to an applicable tolerance -- interior door force cannot exceed six
22 pounds. BKC's Tolerance Chart at 2.

23 The August 2008 Survey recorded that the force required to open the women's restroom
24 door was seven pounds. *Id.* at BKCPP007722. The January 2009 Survey recorded that the
25 required force was ten pounds. *Id.* at BKCPP07746.

26
27 ¹¹(...continued)
28 the passage of flies, dust, or odors”).

1 Because, as Mr. Blackseth opined, the restrooms and path of travel at Restaurant 2055
 2 were required to be in compliance with the DOJ Standards and CBC standards applicable in
 3 1997, and because the evidence shows that the restrooms themselves were remodeled in 1997,
 4 the force required to open the women's restroom door was out of compliance when surveyed by
 5 UDC in August, 2008, and January, 2009.

6 **F. The Toilet Stalls in the Men's and Women's Restrooms Were Out of**
 7 **Compliance with Applicable Standards As Recently As August 2008**

8 The DOJ Standards require that toilet stalls be at least 60 inches wide and 56-59 inches
 9 deep. *Id.* § 4.17.3 & Fig. 30(a).¹² The 1994 version of the CBC required that there be 32 inches
 10 of clear space between the side of the water closet and the far wall, and that the centerline of the
 11 water closet be 18 inches from the near wall. *Id.* § 3105A(b)(3)(A)(ii) & Fig. 31-1A. Adding
 12 these two requirements together, the stall was required to be at least 32 plus 18 or a total of 50
 13 inches wide. The CBC also required 48 inches between the front of the water closet and the front
 14 of the stall. *Id.*

15 The August 2008 Survey recorded that the men's restroom had a clear floor space at the
 16 water closet that was only 42¼ inches wide. *Id.* at BKCPP007721. That survey recorded that the
 17 women's restroom had a clear floor space at the water closet that was 51¾ inches deep and had
 18 only 24 inches of clear floor space in front of the water closet. *Id.* at BKCPP007723. As such,
 19 both toilet stalls were in violation of both the DOJ Standards and the 1994 CBC.

20 ¹² In alterations such as those at issue in Restaurant 2055, where it is technically
 21 infeasible or prevented by application of the plumbing code, the alternate stalls depicted in
 22 Figure 30(b) may be used. *See* DOJ Stds. § 4.17.3, Exception. An alteration is "technically
 23 infeasible" where

24 it has little likelihood of being accomplished because existing structural conditions would
 25 require removing or altering a load-bearing member which is an essential part of the
 26 structural frame; or because other existing physical or site constraints prohibit
 27 modification or addition of elements, spaces, or features which are in full and strict
 28 compliance with the minimum requirements for new construction and which are
 necessary to provide accessibility.

DOJ Stds. § 4.1.6(1)(j). Because the stalls in both restrooms now comply, Blackseth Report Ex.
 1 at 14, this exception does not apply here.

1 Because, as Mr. Blackseth opined, the restrooms at Restaurant 2055 were required to be
2 in compliance with the DOJ Standards and CBC standards applicable in 1997, and because the
3 evidence shows that the restrooms themselves were remodeled in 1997, the toilet stalls in the
4 men's and women's restrooms were out of compliance when surveyed by UDC in August, 2008.

5 **G. The Lack of Accessible Seating Was Out of Compliance with Applicable**
6 **Standards As Recently As January 2009.**

7 The DOJ Standards require that at least five percent of all fixed or built-in seating or
8 tables be accessible. *Id.* § 4.1.3(18). The 1994 CBC required that dining areas have one
9 wheelchair seating space for every 20 seats. *Id.* § 3103A(b)(4C); *see also id.* § 3105A(1)
10 (requiring five percent of fixed seats to be accessible).

11 The August 2008 Survey recorded that none of the 88 seats were accessible. *Id.* at
12 BKCPP007719; *see also* January 2009 Survey at BKCPP007742 (zero out of 124 seats
13 accessible).

14 Because the evidence shows that all of the seating was replaced in 1997, it was required
15 to comply with the DOJ Standards and CBC standards applicable in 1997. The fact that there
16 was no accessible seating when the restaurant was surveyed in August, 2008, and January, 2009,
17 demonstrates a violation of applicable standards.

18 **CONCLUSION**

19 For the reasons set forth above, Plaintiffs respectfully request that this Court enter partial
20 summary judgment holding that the following elements were out of compliance with applicable
21 standards during the class period:

- 22 ● The ramp to the front entrance;
 - 23 ● The slope of the required accessible parking spaces;
 - 24 ● The force required to open the women's restroom door;
 - 25 ● The maneuvering clearance at the men's restroom door;
 - 26 ● The men's and women's toilet stalls; and
 - 27 ● The lack of accessible seating.
- 28

1 Respectfully submitted,

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