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United States District Court
For the Northern District of California

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

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

No. C 08-04262 WHA

Plaintiffs,

v.

BURGER KING CORPORATION,

Defendant.

**ORDER GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT**

INTRODUCTION

This is an ADA action alleging barriers to access on behalf of mobility-impaired customers of restaurants leased by defendants. Ten classes have been certified — one for each of the restaurants at which a named plaintiff allegedly encountered an access barrier — with separate trials scheduled for each class. Plaintiffs and defendant now move for preliminary approval of a stipulated settlement agreement that would resolve this action as to all ten certified classes. The parties have reached a settlement that is sufficiently fair and reasonable for damages claimants and absent class members that it should receive at least preliminary approval. Accordingly, the joint motion for preliminary approval of the proposed settlement is **GRANTED.**

STATEMENT

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3 Named plaintiffs, Miguel Castaneda, Katherine Corbett, and Joseph Wellner, use
4 wheelchairs or scooters for mobility. They brought this action to remedy alleged architectural
5 barriers to access at restaurants that defendant Burger King Corporation leases to franchisees in
6 California. The putative class sued for an injunction ordering defendant to adopt policies that
7 would ensure access for customers who used wheelchairs and scooters and to bring the leased
8 restaurants into compliance with the Americans with Disabilities Act, 42 U.S.C. 12101, Section
9 51 of the California Civil Code (the Unruh Civil Rights Act), and Section 54 of the California
10 Civil Code (the California Disables Persons Act). They also sought the statutory minimum
11 damages for each offense, which includes \$4,000 for each violation. Plaintiffs alleged that a
12 violation occurred each time a patron visited a store and encountered an access barrier there.

13 Plaintiffs sought to certify a single class including patrons of all Burger King restaurants
14 in California leased by Burger King to franchisees. There were approximately 92 such stores.
15 A September 2009 order held that whether or not any particular store was ever out of ADA
16 compliance would have to be determined store by store and feature by feature, and therefore
17 certified a separate class for each of the ten individual restaurants where a named plaintiff
18 encountered alleged access barriers (Dkt. No. 226). Class members were required to opt-in to
19 be eligible to claim individualized statutory damages pursuant to the Unruh Act and the CDPA.
20 The deadline for persons to opt in as class members was March 1, 2010. Three hundred eighty-
21 two people opted in by the deadline. An additional 27 individuals contacted class counsel and
22 may or may not be damages claimants. The parties have agreed that these individuals shall be
23 sent damages notices and claims forms and shall be allowed to make valid claims for monetary
24 damages if they so choose.

25 The first trial — for the class of patrons of the Burger King restaurant located at 6021
26 Central Avenue, in El Cerrito — is scheduled to begin on April 19, 2010. Summary judgment
27 motions relating to that class were pending when the parties filed their joint motion for
28 preliminary approval of class settlement. The motion for preliminary approval was heard on

1 March 18, 2010, on shortened time in lieu of the hearing on the parties' cross-motions for
2 summary judgment which had been scheduled for the same day.

3 ANALYSIS

4 1. BENEFIT TO CLASS MEMBERS.

5 The proposed settlement agreement provides for injunctive relief, including the
6 elimination of alleged accessibility barriers, the use of mandatory checklists with specific
7 accessibility items for remodeling, alterations, repairs and maintenance, and the monitoring of
8 compliance at the ten restaurants. The agreement requires three types of periodic access
9 surveys including (1) daily surveys conducted by tenant franchisee managers to ensure
10 frequently-changing elements remain in compliance such as that movable condiment dispensers
11 are kept within reach of persons in wheelchairs and that the path of travel to restrooms is not
12 obstructed, (2) mid-level surveys conducted every three years including items such as parking
13 lot restriping and restroom fixture, and (3) successor remodel surveys conducted whenever a
14 restaurant is remodeled, which occurs approximately once every 20 years. The proposed
15 settlement agreement provides for the Court to retain jurisdiction to enforce the terms of
16 settlement for six years after the settlement agreement has been finalized.

17 The settlement also provides for a cash payment of \$5,000,000 to the named plaintiffs
18 and the 382 class members who opted in stating that they wished to pursue damages claims
19 before the deadline on March 1, 2010. Monetary awards to each claimant will be distributed
20 *pro rata* based on the total number of visits by each damages claimant to one of the ten
21 restaurants where he or she encountered a barrier, with a maximum number of six visits for
22 which each damages claimant can obtain recovery. Each of these damage claimants must
23 complete a claim form documenting his or her eligible visits. Payment for the costs of notifying
24 the class up to \$15,000 and administering the settlement up to \$50,000 shall be paid by class
25 counsel, while costs above those amounts shall come from the settlement fund. Nevertheless,
26 the parties estimate that even after such funds are deducted, each of the 385 claimants will
27 receive over \$4000 per eligible visit up to six visits. The average recovery is approximately
28 \$13,000 for each claimant (Fox Decl. ¶ 2).

1 Plaintiffs estimated damages as high as \$20,000,000 with respect to the ten certification
2 restaurants (Fox Decl. ¶ 8). Nevertheless, this assumed that plaintiffs could recover \$4,000 per
3 visit to each restaurant by a class member, which would have been disputed at trial. The parties
4 say that on a per-class-member and per-facility basis, this settlement is the highest monetary
5 settlement ever in a disability access case involving public accommodation (Br. at 1). It is at
6 the least an adequate recovery in light of the risks of litigation.

7 The breadth of the release to be imposed on the absent class members is sufficiently
8 narrow. With respect to injunctive relief, the proposed settlement binds not only the damages
9 claimants but also absent class members including:

10 “all individuals with mobility-impairment disabilities who use
11 wheelchairs or electric scooters for mobility who, at any time on
12 or after April 16, 2006, were denied, or are currently being
13 denied, on the basis of their mobility-impairment disability, full
14 and equal enjoyment of the goods, services, facilities, privileges,
15 advantages, or accommodations of one or more of [the ten
16 restaurants].”

17 Absent class members who have not pursued damages claims release only non-monetary
18 claims relating to the accessibility of the ten restaurants based on conduct preceding final
19 approval of the settlement agreement. Given the scope of injunctive relief provided for on their
20 behalf by the proposed settlement, and the fact that they do not release any claims for monetary
21 damages, this is not an unreasonably broad release.

22 Damages claimants, by contrast, are required to release all damages relating to
23 accessibility at the restaurants including monetary damages if they do not submit a form opting
24 out of receiving a monetary award. The parties have agreed that if more than 30 damages
25 claimants opt out of the class, or if the aggregate claims of damages claimants who opt out
26 exceeds \$500,000, defendant Burger King Corporation may declare the agreement null and
27 void.
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2. ATTORNEY’S FEES AND INCENTIVE FEES.

The parties say that attorney’s fees will not come from the \$5,000,000 in the damages fund, but shall be paid separately by defendant. The parties have agreed that defendant Burger King Corporation will not oppose a request of attorney’s fees and costs up to \$2,500,000. In addition, lead plaintiffs intend to apply for incentive payments to compensate them for time and expenses. Generally, additional benefits to named plaintiffs beyond those received by the rest of the class are disfavored. If a settlement is not good enough for named plaintiffs, it is usually not good enough for the class. Nevertheless, that issue need not be resolved at this stage of preliminary approval.

Class members must have an opportunity if they so choose to object to structuring the attorney’s fees in this manner. The parties must file a motion for final approval of settlement and a motion for attorney’s fees and any incentive payments for named plaintiffs no later than **MAY 17, 2010**. This motion must be posted to the website established by class counsel. The notices shall also be amended to inform class members that they have the right to object to the structure and amount of attorney’s fees and incentive payments. This will give the class members an opportunity to object to the amount of attorney’s fees and incentive payments if they desire to do so.

3. NOTICE TO CLASS MEMBERS.

The parties have submitted proposed forms of notices of injunctive relief as well as notices to damages claimants. They propose to post short-form notices at the ten restaurants for 30 calendar days, use a case-specific website and toll-free phone number, and to send long-form notices to advocacy groups. They also propose mailing notice to damages claimants to the last known address of each damages claimant and potential damages claimant. The forms of the proposed notices include an adequate summary of the proposed settlement to inform class members of the terms of settlement.

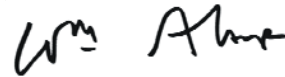
1 As noted above, the notices must be edited to inform class members that they have the
2 right to object to the structure and amount of attorney's fees. On the first page of all notices,
3 the following must be added:

4 "Class counsel shall file with the Court an application for
5 attorney's fees, costs, and incentive fees for the named plaintiffs
6 no later than May 17, 2010. You may view this application
7 online at www.burgerkingclassaction.net after May 17, 2010. If
8 you disagree with the amount or structure of these fees, you may
9 file a written objection or present oral objections at the Fairness
10 Hearing."

11 The deadline for notice to issue shall be **APRIL 1, 2010**. The parties must file a motion
12 for final approval of settlement and a motion for attorney's fees and any incentive payments for
13 named plaintiffs no later than **MAY 17, 2010**. Damages claimants shall have until **JUNE 7, 2010**,
14 within which to opt out of the monetary provisions of the settlement. Class members shall have
15 until **JUNE 7, 2010**, to submit objections to the settlement. If more than 30 damages claimants
16 opt out of the class, or if the aggregate claims of damages claimants who opt out exceeds
17 \$500,000, defendant Burger King Corporation may declare the settlement null and void no later
18 than **NOON ON JUNE 17, 2010**. If it does so, it must immediately so inform the Court. A final
19 approval hearing shall be held on **JULY 8, 2010, AT 8:00 A.M.** The deadline for damages
20 claimants to submit claims forms shall be no later than **AUGUST 13, 2010**.

21 **IT IS SO ORDERED.**

22 Dated: March 18, 2010.



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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE