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

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

Plaintiffs,

vs.

20 BURGER KING CORPORATION,

Defendant.

Case No. C 08-4262 WHA (JL)

**JOINT NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
STIPULATION AND SETTLEMENT
AGREEMENT**

Date: March 18, 2010
Time: 8:00 am
Courtroom: 9
Judge: Hon. William Alsup

24 NOTICE IS HEREBY GIVEN that on March 18, 2010, at 8:00 a.m., or as soon thereafter
25 as the matter may be heard in the above-entitled Court, Plaintiff Class Representatives Miguel
26 Castaneda, Katherine Corbett, and Joseph Wellner (“Plaintiffs”) and Defendant Burger King
27 Corporation (“BKC”) will and hereby do move the Court as follows:

- 28 1. To preliminarily approve the Settlement Agreement (“Settlement” or “Settlement

1 Agreement”) (attached to the Proposed Preliminary Approval Order (“Proposed Order”) as
2 Exhibit A) between Plaintiffs, on behalf of themselves and the ten Classes certified by the Court
3 in its Order of September 25, 2009, and Defendant BKC, by and through their respective counsel.

4 2. To set dates for the submission of any objections to the Settlement Agreement, as
5 well as any opt-outs to the monetary provisions of the Settlement Agreement.

6 3. To set a final approval hearing.

7 4. To authorize the dissemination plan concerning injunctive relief described below,
8 and to approve the short- and long- form Notices of Injunctive Relief attached to the Proposed
9 Order as Exhibits B and C, respectively.

10 5. To authorize the dissemination plan concerning monetary relief described below,
11 and to approve the proposed notice concerning monetary relief (attached to the Proposed Order as
12 Exhibit D).

13 This motion is based on the Settlement Agreement, the Memorandum of Points and
14 Authorities filed herewith and in support of this Motion, the Declarations of Bill Lann Lee and
15 Timothy Fox in Support of the Joint Motion for Preliminary Approval of Settlement Agreement,
16 and all other papers filed in this action.

17 Dated: March 9, 2010

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION**
2 **FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT**

3 The Plaintiffs, on behalf of themselves and the ten Classes of restaurant patrons certified
4 by the Court, have reached a settlement agreement with Defendant Burger King Corporation
5 (“BKC”) that provides for (a) injunctive relief, including the elimination of alleged accessibility
6 barriers, the use of mandatory checklists with specific accessibility items for remodeling,
7 alterations, repairs and maintenance, and the monitoring of compliance over six years; (b) a cash
8 payment of \$5,000,000 to the Named Plaintiffs and the 382 members of the Classes who
9 contacted Class counsel on or before March 1, 2010, stating that they want to pursue damages in
10 this case (“Damages Claimants”) (with individual payments averaging approximately \$13,000);
11 (c) an agreement by BKC not to oppose a motion by Class counsel for an amount for attorneys’
12 fees and costs not to exceed \$2,500,000; and (d) dismissal of the pending interlocutory appeal of
13 the Court’s certification order and an agreement by Defendant to toll the statute of limitations for
14 possible further litigation of claims of individuals who visited Burger King® leased (“BKL”)
15 restaurants not certified for class treatment.

16 BKC does not admit liability and continues to maintain that BKC has not violated any
17 accessibility laws, but has entered in to this Settlement Agreement in the interest of bringing this
18 litigation to conclusion on reasonable terms.

19 This Settlement ensures that the ten Burger King® restaurants (“Restaurants”) it covers
20 are accessible to Class Members. In addition, on a per-class-member and per-facility basis, it is
21 the highest monetary Settlement ever in a disability access case involving public
22 accommodations. For these and other reasons discussed below, Class counsel believes that this
23 Settlement -- negotiated at arm’s length with the assistance of a third party neutral after several
24 years of investigation and one-and-a-half years of hard-fought litigation -- to be a fair, adequate,
25 and reasonable resolution of the claims against Defendant. Accordingly, pursuant to Federal Rule
26 of Civil Procedure 23(e), the parties jointly request that the Court (i) preliminarily approve the
27 Settlement of this litigation; (ii) approve three notices of the proposed Settlement, consisting of a
28 short-form notice suitable for posting concerning the injunctive relief provided by the proposed

1 Settlement (Exhibit B), a longer form further explaining injunctive relief (Exhibit C), and a notice
2 addressing the monetary relief provided by the proposed Settlement (Exhibit D); (iii) authorize
3 dissemination of these notices in the manner described below; (iv) set deadlines for Class
4 Members to object to the Settlement Agreement, and for Damages Claimants to opt out of the
5 monetary provisions of the Settlement Agreement; and (v) set a fairness hearing to provide Class
6 Members an opportunity to object and, should the Court see fit, for entry of final approval of the
7 proposed Settlement Agreement and the petition of Class counsel for an award of attorneys' fees
8 and costs.

9 **I. HISTORY AND STATUS OF THE CASE.**

10 **A. Applicable Statutes**

11 The relief provided in the Settlement Agreement is authorized by the following statutes.
12 Title III of the ADA prohibits disability discrimination in places of public accommodation. 42
13 U.S.C. § 12181 *et seq.* The specific design criteria required by Title III are set forth in the
14 Department of Justice Standards for Accessible Design ("DOJ Standards"). 28 C.F.R. pt. 36, app.
15 A. Title III is enforceable through a private right of action for injunctive relief; there is no federal
16 damages remedy for private plaintiffs. 42 U.S.C. § 12188(a)(1) & (2). Prevailing plaintiffs are
17 entitled to attorneys' fees and costs. *Id.* § 12205. Under California's Unruh Civil Rights Act,
18 Cal. Civ. Code § 51 *et seq.* ("Unruh" or "the Unruh Act"), and Disabled Persons Act, Cal. Civ.
19 Code § 54 *et seq.* (the "CDPA"), plaintiffs may also sue for injunctive relief to require
20 compliance with California's access standards, set forth in Title 24 of the California Code of
21 Regulations ("CBCR"). *See, e.g.,* Cal. Civ. Code §§ 51(b), 52(c)(3), 54(a), 55 (prohibiting
22 disability discrimination in public accommodations and providing injunctive remedy); *People ex.*
23 *rel. Deukmejian v. CHE, Inc.*, 150 Cal. App. 3d 123, 133-34 (1983) (holding that Cal. Civ. Code
24 § 54 required compliance with standards promulgated pursuant to Cal. Gov't Code § 4450, that is,
25 Title 24 of the Code of Regulations). In addition to injunctive relief, Unruh and CDPA also
26 provide a private right for actual damages for disability discrimination. Cal. Civ. Code § 52(a),
27 54.3(a). An award of attorneys' fees and costs is also authorized by state law to the prevailing
28 party. *Id.*

1 **B. History of this Litigation**

2 Prior to the filing of this case, Class counsel spent more than a year investigating possible
3 access violations at California Burger King® restaurants. (Decl. of Timothy P. Fox (“Fox Decl.”)
4 ¶ 2). On September 10, 2008, Plaintiff Miguel Castaneda filed this action on behalf of himself
5 and similarly situated wheelchair and scooter users against BKC for both injunctive relief and
6 damages. He alleged that BKC was liable under Title III, Unruh and the CDPA, for unlawful
7 barriers to access at approximately 92 BKL restaurants throughout California. The Complaint
8 alleged that BKC is directly liable as a lessor/sublessor of these restaurants, and that BKC, in any
9 event, exercised control over the construction, alteration, repair and maintenance, and operation
10 of these restaurants. (See generally Dkt. #1). BKC’s Answer denied all allegations and asserted
11 numerous affirmative defenses. (See generally Dkt. #73)

12 On November 26, 2008, BKC filed a Motion to Dismiss Plaintiff’s Complaint. (Dkt.
13 #28). After a hearing on February 12, 2009, the Court denied BKC’s Motion. (Dkt. #69).

14 On March 6, 2009, pursuant to stipulation, Plaintiff amended his complaint to add two
15 new named Plaintiffs, Katherine Corbett and Joseph Wellner. (Dkt. #70). On March 9, 2009, the
16 Court granted the order allowing Plaintiff’s amendment. (Dkt. #71).

17 On September 25, 2009, the Court granted class certification as to the ten restaurants
18 where the Named Plaintiffs personally reported access barriers, but otherwise denied class
19 certification. (Dkt. #226). On October 16, 2009, the Court ordered that notice of the class action
20 be issued to the Classes, and approved notices that informed Class Members that if they did not
21 opt out of the case, they would be bound by any determinations concerning injunctive relief.
22 (Dkt. #252 at 1). The notices also informed Class Members that if they wanted to participate in
23 any monetary recovery obtained in this case, they would be required to opt in and must do so no
24 later than March 1, 2010. *Id.* at 2. In response to the notices, 382 Class Members (inclusive of
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1 the Named Plaintiffs) opted in by informing Class counsel that they wanted to pursue monetary
2 relief through this class action (“Damages Claimants”), and 13 people opted out. Fox Decl. ¶ 5.

3 In addition, prior to class certification, 6 people contacted Class counsel stating that they
4 had encountered access barriers at one or more of the 10 Restaurants covered by the certification
5 Order, but failed to contact Class counsel after that Order to confirm that they want to pursue
6 monetary relief through this case. Following notice and class certification, another 21 people left
7 a voice message for Class counsel stating that they had encountered access problems at Burger
8 King® restaurants but did not identify which Burger King® restaurants they had visited.
9 Together these 27 people will be referred to as “Potential Damages Claimants.” Class counsel
10 has been unsuccessful in its attempts to contact the Potential Damages Claimants to determine
11 whether they encountered access barriers at a covered restaurant during the relevant period, and
12 whether they want to opt in for the purposes of pursuing monetary relief through this action. (Fox
13 Decl. ¶ 5).

14
15
16 The Court set trial dates for each of these ten Classes, starting April 19, 2010 and
17 occurring every two to four weeks thereafter through January 3, 2011. (Dkt. #226 at 27-28). The
18 Court also designated several of Plaintiffs’ counsel as Class counsel. (*Id.* at 28-29; *see also* Dkt.
19 #252). Plaintiffs filed an interlocutory appeal from the class certification order, which the Court
20 of Appeals eventually granted on February 10, 2010.

21
22 Between the filing of the case and January 31, 2010, the parties conducted extensive
23 discovery. Plaintiffs obtained and reviewed over one hundred thousand pages of documents from
24 BKC and over fifteen thousand pages of documents from third parties. (Fox Decl. ¶ 4). Plaintiffs
25 also took multiple depositions. In addition to the depositions of Named Plaintiffs taken earlier,
26 Defendant BKC took the deposition of ten Damage Claimants. The discovery is outlined below,
27
28

1 at footnote 2.¹ In addition to the discovery conducted prior to the close of discovery, the Court
 2 has permitted Defendant BKC to take further depositions of remaining Damage Claimants prior
 3 to trial. (Dkt. # 310).

4 Plaintiffs retained experts who prepared reports for use at trial on the following subjects:
 5 surveys of the restaurants for compliance with the Department of Justice Standards and the
 6 California Building Code; specific topics relevant to such compliance; the cost of remediation of
 7 certain elements; and an analysis of BKC's financial status.² One of Plaintiffs' experts conducted
 8 detailed accessibility surveys of each of the ten BKLs, with each survey averaging three to five
 9 hours. (Fox Decl. ¶ 6). Defendant BKC retained an expert who also prepared a series of expert
 10 reports.³

11
 12
 13 ¹ Plaintiffs obtained information about the following subjects (among others) through
 14 documentary and interrogatory discovery: the construction and alterations history of the
 15 restaurants; any involvement by BKC in the construction and alteration of the restaurants; surveys
 of the restaurants; and BKC's operations, construction and maintenance policies. (Decl. of Bill
 Lann Lee ("Lee Decl.") ¶ 2)

16 Plaintiffs obtained information about BKC's relationship to tenants with respect to
 17 construction, alterations, repair and maintenance, and operations by taking the depositions of the
 following BKC employees: James Carberry (Senior Construction Manager, Dec. 9, 2009); Ronald
 Hailand (Senior Director of Construction, Dec. 18, 2009), Robert Andrews (Franchise Business
 Leader ("FBL"), Dec. 1, 2009), Stephen Thomas (FBL, Dec. 2, 2009), and Samuel Wong (FBL,
 18 Jan. 26, 2010). (*Id.* ¶ 3)

19 Plaintiffs took the depositions concerning barriers and remediation of the following tenant
 operators of the ten BKL restaurants for which the Court granted class certification: Willie Cook
 (Huntington Restaurants, Inc., Dec. 14, 2009), Patricia Corcoran (Scarborough Restaurants, Inc.,
 20 Dec. 10, 2009), Sunil Gulati (Gluba Holdings, LLC; Dec. 16, 2009), Anthony Sacca (Sacca
 Corp., Jan. 28, 2010), Ravi Batra (Ravind Enterprises, Jan. 20, 2010), Myrna Schultz (Strategic
 Restaurants Acquisition Co., Dec. 21, 2009), David Hairston (Sarah Wade Corp., Jan. 21, 2010),
 21 and Rakesh Patel (Hart Foods, Inc., Jan. 22, 2010). Plaintiffs also prepared the declarations of 48
 22 individuals in support of the motion for class certification. (*Id.* ¶¶ 4, 7; Dkt. #138).

23 Defendant took the following depositions of Named Plaintiffs and Damage Claimants:
 Miguel Castaneda (Jan. 28, 2009), Katherine Corbett (June 9, 2009), Joseph Wellner (June 23,
 2009), Florence Ashford (Jan. 15, 2010), Beverly Bryant (Jan. 27, 2010), George Butler (Jan. 27,
 24 2010), Karen Conklin (Jan. 20, 2010), Lisa Kilgore (Jan. 22, 2010), William Showen, Julie
 Siddall (Jan. 28, 2010), Cheryl Smith (Jan. 19, 2010), Ruby Taylor (Jan. 25, 2010), and A. Tony
 25 Walsh (Jan. 22, 2010). (*Id.* ¶ 5).

26 ² Defendant took the depositions of Plaintiff experts Eric McSwain (Jan. 29, 2010) and
 James L.E. Terry (Feb. 2, 2010). (Lee Decl. ¶ 6).

27 ³ Plaintiffs took the deposition of Defendant expert Kim Blackseth (Feb. 1, 2010). In
 addition, Plaintiffs took the deposition of third party architect Robert DeGrasse (Jan. 12, 2010).
 28 (Lee Decl. ¶ 6).

1 The parties began discussing settlement of the claims of the ten certified Classes after
2 certification, devoting substantial time to such discussions after the parties completed discovery.
3 (Lee Decl. ¶ 9). The parties carefully structured the settlement negotiations. The parties initially
4 agreed to a preliminary, unmediated negotiation on January 7, 2010 to discuss injunctive relief,
5 and reached agreement on the structure and essential elements of injunctive relief, with the parties
6 to work out details later. (*Id.* ¶ 10). The parties then agreed to a mediated negotiation on January
7 27, 2010 to discuss monetary relief. (*Id.* ¶ 11). Retired California Supreme Court Justice Edward
8 Panelli served as the mediator. (*Id.*). The parties and BKC's insurer met for most of the day on
9 January 27th. (*Id.*) Settlement negotiations continued after the January 27th mediation. (*Id.*)

11 Throughout settlement negotiations, injunctive relief and damages were kept completely
12 separate. (*Id.*) Further, the parties did not discuss attorneys' fees and costs until after the issues
13 of injunctive relief and damages were resolved. (*Id.*)

15 Ultimately, the parties eventually reached agreement on damages and fees in an amount
16 that had first been proposed by the mediator. (*Id.* ¶ 12). Both parties have been represented
17 throughout these negotiations by counsel with substantial experience in both disability rights and
18 class action litigation. (*See* Dkt. #138-2 ¶¶ 5-7; 138-3 ¶¶ 11-25).

19 **II. TERMS OF THE PROPOSED SETTLEMENT.**

21 The terms of the Proposed Settlement Agreement are set forth in the Settlement
22 Agreement, a copy of which is attached as Exhibit A to the Proposed Preliminary Approval
23 Order. The following summarizes the principal terms of the Settlement:

24 **A. Injunctive Relief**

25 After this lawsuit was filed, BKC surveyed the ten BKLs and instructed its tenant
26 franchisees to remediate barriers that were found during the surveys. (Fox Decl. ¶ 6). After this
27 remediation work was completed, Plaintiffs' expert again conducted extensive surveys of each of
28

1 the BKLs. (*Id.*). These surveys established that the remediation work done in response to this
2 lawsuit had greatly enhanced the accessibility of the BKLs. (*Id.*). The proposed Settlement
3 Agreement requires BKC to arrange for remediation of remaining items. (*See* Settlement
4 Agreement ¶ 6 and Ex. A).

5
6 To ensure that access is maintained, the Settlement Agreement requires three types of
7 periodic access surveys geared to the frequency and type of access barriers that typically arise in
8 restaurants (*Id.* ¶ 7):

- 9 (1) Daily surveys conducted by tenant franchisee managers that focus on ensuring that
10 frequently-changing elements remain in compliance. For example, during these
11 surveys, managers make sure that movable condiment dispensers are kept within
12 reach, and the path of travel to restrooms is not obstructed by high chairs or other
13 items. (*See id.* ¶ 7.1.1).
- 14
15 (2) Mid-level surveys conducted every three years. These surveys target elements that
16 change less frequently than those found in daily surveys, including, for example,
17 parking lot re-striping and restroom fixtures. (*See id.* ¶ 7.1.2 and Ex. C).
- 18
19 (3) Successor remodel surveys, which are comprehensive surveys conducted when a
20 restaurant is remodeled, approximately once every 20 years. (*See id.* ¶ 7.1.3 and Ex.
21 D).

22 BKC will produce to class counsel on a periodic basis the mid-level and remodel survey forms for
23 monitoring. (*See id.* ¶ 8).

24 The parties have also agreed to a dispute resolution process in which disputes that the
25 parties cannot resolve can be brought to the Court for resolution during the term of the Settlement
26 Agreement. (*See Id.* ¶ 11).

1 **B. Damages**

2 Pursuant to this Court's orders, the only people eligible for monetary awards under the
3 Settlement are the three Named Plaintiffs and those members of the ten certified classes who
4 opted in to pursue damage claims by March 1, 2010. (See Dkt. #252 at 1; Settlement Agreement
5 ¶¶ 3.4, 9.3). Likewise, these are the only Class Members releasing their damage claims.
6 (Settlement Agreement ¶ 17.2). Individuals who did not opt in to seek a monetary award in this
7 case are not releasing any damage claims in this Settlement. While Damages Claimants are
8 required to release all damages relating to accessibility at the Restaurants (*id.* (including release
9 of "statutory, actual, compensatory, consequential, special, emotional harm or punitive
10 damages")),⁴ they have the right to opt out of the monetary provisions of the Settlement if they
11 wish to pursue claims on an independent basis in lieu of what the Settlement provides. (*Id.* ¶ 10).
12 In addition, Paragraph 10.4 of the Agreement (the "Blow Up Provision") gives BKC the right to
13 declare the Agreement null and void if the number of Damages Claimants who opt out of the
14 Class exceeds 30, or consists of Damages Claimants whose claims, in the aggregate, exceed
15 \$500,000. (*Id.*)

18 In addition to payments to Damages Claimants, discussed below, the money from the \$5
19 million fund may be used for two other purposes: (a) Payment for the costs of notifying the class
20 of the Settlement, and administering the Settlement, to the extent that those costs exceed \$15,000
21 and \$50,000 respectively.⁵ Costs up to these amounts will be paid by Class Counsel. (b)
22 Payments, if any, to the Named Plaintiffs who brought and pursued this case, in an amount to be
23 determined by the Court, based upon declaration evidence and such other proof as the Court may

24
25 ⁴ The damages available under § 52(a) of the Unruh Act are commensurately broad. They are
26 "actual damages and any amount to be determined by a jury but in no case less than four thousand
dollars."

27 ⁵ Based on estimates they have obtained from claims administrators, and the cost of issuing
28 notice to the class after the certification order, Class counsel do not expect these costs to exceed
these amounts, *see* Fox Decl. ¶ 12, but if they do, the remainder will be paid from the damages
fund.

1 require. (Settlement Agreement ¶ 9.2.2). If there are any funds remaining after disbursements to
2 Damages Claimants and towards these other obligations, they will be donated to Disability Rights
3 Advocates, a non-profit organization located in Berkeley, California, devoted to ensuring
4 accessibility for the disabled. (*Id.* ¶ 9.6)

5
6 Monetary awards will be distributed *pro rata* based on the total number of eligible claims
7 for all Damages Claimants, with a maximum of six (6) visits for which an individual Damages
8 Claimant can obtain recovery. (*Id.* ¶ 9.5.1).⁶ For example, if (a) the amount of the fund
9 remaining after disbursements for costs and to Named Plaintiffs is \$4.9 million; (b) there are 350
10 Eligible Claimants, and (c) the sum of all Qualifying Visits for all Eligible Claimants (with no
11 single Class Member eligible for more than six visits) is 1,200, then the amount that an Eligible
12 Claimant would recover for a Qualifying Visit would be (\$4.9 million / 1,200), or \$4,083.33 per
13 Qualifying Visit. Under this scenario, an Eligible Claimant seeking recovery for one Qualifying
14 Visit would receive \$4,083.33, and an Eligible Claimant seeking recovery for six or more
15 Qualifying Visits would receive \$24,499.98. (*Id.* ¶ 9.5.2).

17 **C. Attorneys Fees and Costs and Costs of Administration Of the Settlement**

18 The parties have agreed that Class counsel may seek an award of attorneys' fees and costs
19 in an amount not to exceed \$2,500,000, and that BKC will not oppose such request. The
20 attorneys fees and costs awarded will not come from the \$5 million Damages Fund. (*Id.* ¶ 12.1).
21 Under 42 U.S.C. § 12205 and California Civil Code § 52(a), Class counsel are entitled to request
22 statutory fees and costs. Should the Court preliminarily approve the proposed Settlement
23 Agreement, Plaintiffs intend to apply for such an award with their application for final approval
24 of the Settlement. In addition, as set forth above, Class counsel will pay the costs for a claims
25
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27 _____
28 ⁶ Named Plaintiffs shall be eligible for monetary payments under the same criteria and
procedures as other eligible claimants. (Settlement Agreement ¶ 9.3.9).

1 administrator up to \$50,000, and for providing notice to the class up to \$15,000, with costs in
 2 excess of these amounts to be paid from the damages fund. (*Id.* ¶¶ 9.2.1, 14.4).

3 **III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL**

4 Preliminary approval is an initial assessment of the fairness of the proposed settlement
 5 made by a court on the basis of written submissions and presentations from the settling parties.
 6 *Newberg on Class Actions* summarizes the preliminary approval criteria as follows:
 7

8 If the preliminary evaluation of the proposed settlement does not disclose grounds
 9 to doubt its fairness or other obvious deficiencies, such as unduly preferential
 10 treatment of class representatives or of segments of the class, or excessive
 11 compensation for attorneys, and appears to fall within the range of possible
 approval, the court should direct that notice under Rule 23(e) be given to the class
 members of a formal fairness hearing, at which arguments and evidence may be
 presented in support of and in opposition to the settlement.

12 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:25 (4th ed. 2002)
 13 (“Preliminary Court Approval”) (quoting *Manual for Complex Litigation* (Third) § 30.41 at 237
 14 (1995)).

15 The purpose of the preliminary approval process is to determine whether the proposed
 16 settlement is within the range of reasonableness and thus whether notice to the Class of the terms
 17 and conditions and the scheduling of a formal fairness hearing is worthwhile. 4 *Newberg on*
 18 *Class Actions* § 11:25 (4th ed. 2002) (“Preliminary Court Approval”); *see also Young v. Polo*
 19 *Retail, LLC*, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) (same).

21 Here, the proposed Settlement satisfies the preliminary approval requirements. Class
 22 counsel believe that the proposed Settlement is an excellent result, reached after hard-fought
 23 litigation and negotiation, shortly before trial, and with assistance of a skilled and experienced
 24 mediator. (Lee Decl. ¶¶ 9-13).

25
 26 *First*, the Settlement will provide substantial injunctive relief to the Class. As this Court
 27 is aware, as a result of this litigation, BKC has already enhanced accessibility at the Restaurants.
 28 (Fox Decl. ¶ 6). Additionally, under the Settlement, BKC has committed to ensuring additional

1 accessibility enhancements, and the parties have negotiated injunctive relief that ensures that
2 Restaurants remain in compliance with applicable accessibility requirements. *See supra* pp. 11-
3 12.

4 *Second*, Plaintiffs' counsel believe the monetary Settlement obtained in this disability
5 access case is the largest ever on a per-class member and per-facility basis, and will provide Class
6 members who opted in to submit damages claims that will provide substantial recovery. As of the
7 date of the close of the opt-in period, 382 Class Members have opted in. The average recovery is
8 approximately \$13,000 for each Damages Claimant. (Fox Decl. ¶ 5, 9). By comparison, the
9 largest monetary recovery obtained in a disability access class action was in *Lucas v. Kmart*, No.
10 99-cv-01923-JLK (D. Colo. 2006). (*Id.* ¶ 10). In *Kmart*, the average monetary recovery for
11 members of the California sub-class was \$6,058.88, of which approximately \$2,300 was in the
12 form of a gift card. (*Id.*). Further, in *Kmart* the average recovery per covered facility was
13 \$95,404.09; here, that average is \$500,000 per covered restaurant. (*Id.*).

14 *Third*, Plaintiffs' counsel believes that the Settlement represents a reasonable discount
15 from any estimate of the damages that the class could recover at trial. Although Plaintiffs believe
16 that they have strong claims against BKC, they recognize that there is always substantial litigation
17 risk. Additionally, Plaintiffs recognize that there are particular risks that might lower the amount,
18 if any, ultimately awarded to Class Members after trials and appeals. Such risks include: (1)
19 possible unwillingness or inability of Class Members to testify at trial in San Francisco; (2) the
20 jury's possible failure to credit evidence of the existence of barriers; (3) the jury's possible failure
21 to credit the number of visits to which a Class Member testifies; (4) uncertainties regarding
22 recovering for "deterred" visits;⁷ (5) the possibility that novel legal issues may be reversed on
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27 ⁷ From pleadings filed by BKC in discovery and related matters, Plaintiffs understand that BKC
28 intended to challenge drive-thru visits as not qualifying as visits for the purposes of recovery.
Additionally, BKC expressed its disagreement with Plaintiffs' claim that each visit in which a

1 appeal; and (6) the years-long delay in receipt by Class Members of monetary relief during the
2 pendency of appeals, even if the appeals were ultimately denied.

3 Plaintiffs understand that this Court would like to analyze the relationship of the
4 Settlement amount to a damages calculation, and therefore provide a brief description of their
5 current understanding of the damages the Class would be entitled to. Plaintiffs note that this
6 calculation is particular to this litigation alone and is tied to the particular facts and circumstances
7 of this litigation and these ten Restaurants.
8

9 **Number of Class Members**—Pursuant to this Court’s Orders (Dkt. #226, 252), the
10 parties disseminated notice to potential Class Members, alerting them to the certification
11 regarding the ten certified Restaurants and the procedures for opting into the damages case and
12 out of the injunctive relief case. (Lee Decl. ¶ 8). The deadline for Class Members to opt in was
13 March 1, 2010, and 382 Class Members opted in to the damages Class. (Fox Decl. ¶ 5).
14

15 **Determination of Number of Class Visits**—To determine the average number of visits
16 per month, Plaintiffs conducted extensive interviews with 60 Damages Claimants. (*Id.* ¶ 7).
17 Based on these interviews, Plaintiffs estimate that Class Members visited a certification restaurant
18 slightly less than once every two months on average. (*Id.*).

19 **Damages Period**—Plaintiffs used a 30-month damages period, from April 2006 (the
20 beginning of the limitations period) through September 2008 (when Defendant began remediating
21 its restaurants). Plaintiffs assumed for the purposes of calculating a reasonable, conservative
22 settlement, that a jury may only compensate the Class Members for visits prior to September
23 2008.
24

25 **Conservative Damages Estimate**—Based on these assumptions, estimated damages with
26 respect to the ten certification Restaurants total approximately \$20 million. (Fox Decl. ¶ 8).

27 _____
28 Damage Claimant encounters unequal access entitles that Class Member to \$4000 in statutory
damages under the Unruh Act. (*See* Dkt. #284 at 1, 13).

1 Thus, the Classes are recovering approximately one-quarter of the amount to which Plaintiffs
2 estimate they may be entitled if every Damages Claimant was awarded full damages for every
3 claimed visit to a covered Restaurant. (*Id.* ¶ 8-9). Plaintiffs believe that the monetary recovery
4 obtained through this Settlement is a reasonable discount for time, litigation risk, and the other
5 risks outlined above. (Lee Decl. ¶ 13).
6

7 BKC believes the results obtained in the Settlement are more than could be achieved had
8 the claims been fully litigated: (a) BKC believes it is not liable under state law for damages
9 because the Restaurants are independently operated and because BKC neither engaged in,
10 fostered nor aided any of the alleged discrimination; (b) a large number of opt-in Claimants did
11 not personally encounter barriers, as required by the Unruh Act and CDPA; (c) the opt-in
12 Claimants did not encounter barriers in the quantity of visits contended; (d) a number of
13 Claimants' contentions are not credible and (e) certification of damage classes was inappropriate
14 given the individualized nature of the proof required.
15

16 *Fourth*, the distribution plan is fair to the class. (Fox Decl. ¶ 11). As in *Kmart*, the Class
17 Members will be compensated for each visit to a covered restaurant during the class period.
18 Imposing a maximum on the number of visits for each claimant represents a fair balance between
19 a distribution that closely approaches reality and one that protects Class Members from possibly
20 illegitimate claims. (*Id.*). A similar – though lower -- maximum was approved in the *Lucas v.*
21 *Kmart* settlement. (*Id.*). (*Kmart* settlement capped the number of eligible visits at two).
22

23 *Fifth*, Plaintiffs assert that compensating the named plaintiffs for the hours they spent
24 representing the Class is fair and reasonable. Named Plaintiffs will participate in the damages
25 distribution in the same way as any other Class Member; they are not seeking incentive payments
26 as class representatives, a practice that the Court disfavors. *See, e.g., Adderley v. Nat'l Football*
27 *League Players Ass'n*, 2009 WL 4250792 (N.D. Cal. Nov. 23, 2009). Rather than incentive
28

1 payments, the proposed distribution plan provides that the Court -- in its discretion -- may order
2 compensation for the Named Plaintiffs based on their level of active participation in the case, and
3 set the amount. *Id.* at *8 (approving compensation).

4 *Finally*, Plaintiffs believe that the provision for attorneys' fees and costs is fair in that
5 Class counsel have agreed to a ceiling on their petition for an award of fees and costs that the
6 Court will ultimately determine. (Lee Decl. ¶ 14). As discussed above, the ceiling was
7 negotiated by the parties only after the essential elements of injunctive relief and the amount of
8 damages were negotiated. (*Id.* ¶ 12). *See, e.g., Manual for Complex Litigation* (Fourth) § 21.7 at
9 335 (2004) ("Separate negotiation of the class settlement before an agreement on fees is generally
10 preferable."). In litigating this matter, Class counsel have taken very substantial risk and have
11 aggressively investigated and litigated the matter for over three years, spending thousands of
12 hours investigating and prosecuting the case.⁸ (Lee Decl. ¶ 14). Counsel, moreover, intend to
13 exclude time devoted to the restaurants that the Court did not certify for class treatment in its
14 September 2009 order. (*Id.*). As noted above, the fees application will also include a request for
15 most, if not all, the expenses of Settlement Administration.
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1 **IV. THE PARTIES' PROPOSAL CONCERNING POTENTIAL DAMAGES**

2 **CLAIMANTS**

3 As discussed above, there are 27 Potential Damages Claimants, individuals who had
4 contacted Class Counsel who may or may not be Damages Claimants. *See supra* p. 8. The
5 Parties propose to send Damages Notices and Claims Forms to all of these individuals at their last
6 known addresses with instructions to the Claims Administrator to attempt to locate individuals
7 whose notices are returned. Any of these individuals who make a valid claim will be bound by
8 the monetary provisions of the Agreement; any individuals who do not respond will not be bound.
9

10 **V. THE PROPOSED NOTICE SATISFIES DUE PROCESS AND SHOULD BE**

11 **APPROVED**

12 Under Federal Rule of Civil Procedure Rule 23(e)(1), the court “must direct notice in a
13 reasonable manner to all class members who would be bound by a propos[ed settlement].” Class
14 members are entitled to receive “the best notice practicable” under the circumstances. *Burns v.*
15 *Elrod*, 757 F.2d 151, 154 (7th Cir. 1985)(citing Fed. R. Civ. P. 23(c)(2)). Notice is satisfactory
16 “if it generally describes the terms of the settlement in sufficient detail to alert those with adverse
17 viewpoints to investigate and to come forward and be heard.” *Churchill Vill., L.L.C. v. Gen.*
18 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal citation omitted). Moreover, notice that is
19 mailed to each member of a settlement class “who can be identified through reasonable effort”
20 constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).
21
22

23 The notice standard is satisfied here. The parties propose that the Court approve two
24 separate notices to be sent by an independent Claims Administrator.

25 **Notices of Injunctive Relief.** The parties propose to use the means the Court has
26 previously determined is best calculated to reach each Class Member who is affected by the
27 injunctive relief of the proposed Settlement. After the Class was certified, this Court approved a
28

1 notice plan projected to reach the maximum number of Class Members through mailing long-
2 form notices to individuals known to Class counsel, posting of short-form Notices at the ten
3 restaurants for 30 calendar days, use of a case-specific website and toll-free number, and sending
4 long-form notices to advocacy groups. (See Dkt. #261). The parties believe this notice plan
5 remains appropriate for providing Injunctive Notice to the Class. The Injunctive Notices (the
6 proposed long- and short- forms of which are attached to the Proposed Preliminary Approval
7 Order as Exhibits B and C) describe the terms of the Settlement; set forth the procedure for
8 comments and objections; provide specifics on the date, time, and place of the final Settlement
9 approval hearing; enable Class Members to exercise their rights and make informed decisions
10 regarding their views of the fairness, adequacy and reasonableness of the proposed Settlement;
11 and provide information as to how to obtain additional information regarding this litigation and
12 the entire Settlement Agreement (including providing the website for the class action as well as
13 the address of the Clerk's Office).

14
15
16 **Notice to Damages Claimants.** Because the March 1, 2010 opt-in deadline for damages
17 has passed, the identity of Damages Claimants is known. The parties propose an additional notice
18 of the damages Settlement to Damages Claimants. The parties propose that the Claims
19 Administrator send the Damages Notice by first-class U.S. mail to the last known address of each
20 Damages Claimant and Potential Damages Claimant. The Damages Notice (the proposed form of
21 which is attached to the Proposed Preliminary Approval Order as Exhibit D) describes the terms
22 of the Settlement; sets forth the procedure for comments, objections and exclusions; provides
23 specifics on the date, time, and place of the final Settlement approval hearing; enables Class
24 Members to exercise their rights and make informed decisions regarding their views of the
25 fairness, adequacy and reasonableness of the proposed Settlement, and provides information as to
26 how to obtain additional information regarding this litigation and the Settlement Agreement.
27
28

1 The deadlines set forth in the Settlement Agreement are triggered by the Notice Deadline,
2 which is the deadline set by the Court for Notice to issue as described herein. The parties propose
3 the following schedule:

4 **Notice Deadline:** March 29, 2010 or 10 days after the entry of the Order granting
5 preliminary approval of the Settlement, whichever is later.

6
7 **Deadline to submit Objections to the Settlement, and for Damages Claimants to Opt**
8 **Out of the Monetary Provisions of the Settlement:** Sixty days after the Notice Deadline.

9 **Deadline for Defendant to Declare Settlement Null and Void Based on “Blow Up”**
10 **Provision:** Ten days after the deadline for Damages Claimants to opt out of the monetary
11 provisions of the Settlement.

12 **Final Approval hearing:** June 15, 2010,⁹ or eighty days after the Notice Deadline set by
13 the Court, whichever is later, or as soon thereafter as the Court may set the hearing.

14
15 **Deadline for Damages Claimants to submit Claims Forms:** Ten days after the Final
16 Approval hearing.

17 **VI. CONCLUSION**

18 For the reasons set forth above, the parties respectfully request that the Court grant the
19 Proposed Preliminary Approval Order filed herewith.

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⁹ The Final Approval hearing cannot be held prior to June 15, 2010, based on the notice
28 requirements of the Class Action Fairness Act. *See* 28 U.S.C.A. § 1715(d).

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Dated: March 9, 2010

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