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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Mohan Vallabhapurapu; *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Burger King Corporation,

Defendant/Third Party Plaintiff,

vs.

Antelope Valley Restaurants, Inc., *et al.*,

Third Party Defendants.

Case No. C-11-00667-WHA (JSC)

JOINT NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF STIPULATION AND SETTLEMENT AGREEMENT

Date: October 25, 2012
Time: 3:00 pm
Courtroom: 8
Judge: Hon. William Alsup

NOTICE IS HEREBY GIVEN that on October 25, 2012, at 3:00 p.m., or as soon thereafter as the matter may be heard in the above-entitled Court, Plaintiffs and Defendant Burger King Corporation ("BKC") will and hereby do move the Court as follows:

To finally approve the Settlement Agreement ("Settlement" or "Settlement Agreement") previously filed with the Court on July 14, 2012 (ECF 216-1) between Plaintiffs, on behalf of themselves and the 86 Settlement Classes certified by the Court, and Defendant BKC, by and through their respective counsel.

This motion is based on the Memorandum of Points and Authorities filed herewith and in support of this Motion, the Declarations of Andrew Lah, Michael Joblove, and Jennifer M.

Keough in Support of the Joint Motion for Final Approval of Settlement Agreement, and all other papers filed in this action.

Dated: October 12, 2012

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT

The Plaintiffs, on behalf of themselves and the 86 restaurant-specific Settlement Classes certified by the Court, jointly request that this Court finally approve the proposed Settlement Agreement ("Settlement Agreement" or "Settlement"). The Court ordered that notice of the settlement be given to Class Members and scheduled a fairness hearing (the "Fairness Hearing") for October 25, 2012. (ECF 228 at 1.) Following the Court's approval of the notices and notice plan, the Class Administrator provided notice of the Settlement to Class Members. (*See* Declaration of Jennifer M. Keough ("Keough Decl.") ¶¶ 4-8).

The parties believe that the Settlement is fair, reasonable, and adequate, see Fed. R. Civ. P. 23(e), for the following reasons. The Settlement will benefit the Classes with extensive injunctive relief, including the elimination of alleged accessibility barriers, the use of mandatory checklists with specific accessibility items for remodeling, alterations, repairs and maintenance, and the monitoring of compliance over four years. The proposal is also likely to provide a substantial average per-capita monetary award on the order of $20,000 to the Class Members and Named Plaintiffs who have opted-in.

Experienced Class Counsel, who recommend approval of the Settlement, conducted sufficient investigation and discovery to be able to evaluate and test the claims and defenses in the action. Defense counsel, also experienced and knowledgeable, also recommend approval. The Settlement falls within the range of reasonableness given the risk, expenses, and complexity of further litigation. The period for objections and opt-outs ended September 17, 2012. To date, no Class Members have objected to the Settlement and only one Class Member opted-out in response to the notice describing the Settlement.

This Settlement ensures that 77 Burger King® restaurants ("Remaining BKLs" or "Restaurants") are accessible to Class Members.[1] In addition, the Settlement compares quite favorably with settlements in similar cases and average expected recovery.

[1] Of the 86 Remaining BKLs that have existed during the tolled class period, 9 are not subject to remediation under the Settlement Agreement because they have closed or are no longer leased

For these and other reasons discussed below, Class Counsel believes that this Settlement—negotiated at arm's length over more than four months with the assistance of a federal Magistrate Judge selected by the Court after several years of investigation and litigation—to be a fair, adequate, and reasonable resolution of the claims against Defendant. Accordingly, pursuant to Federal Rule of Civil Procedure 23(e), the parties jointly request that the Court finally approve the Settlement.

I. BACKGROUND.

A. Applicable Statutes.

The relief provided in the Settlement Agreement is authorized by the following statutes. Title III of the ADA prohibits disability discrimination in places of public accommodation. 42 U.S.C. § 12181 *et seq*. The specific design criteria required by Title III are set forth in the Department of Justice Standards for Accessible Design ("DOJ Standards"). 28 C.F.R. pt. 36, app. A. Title III is enforceable through a private right of action for injunctive relief; there is no federal damages remedy for private plaintiffs. 42 U.S.C. § 12188(a)(1) & (2). Prevailing plaintiffs are entitled to attorneys' fees and costs. *Id.* § 12205.

Under California's Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq*. ("Unruh" or "the Unruh Act"), and Disabled Persons Act, Cal. Civ. Code § 54 *et seq*. (the "CDPA"), plaintiffs may also sue for injunctive relief to require compliance with California's access standards, set forth in Title 24 of the California Code of Regulations ("CBC"). *See, e.g.*, Cal. Civ. Code §§ 51(b), 52(c)(3), 54(a), 55 (prohibiting disability discrimination in public accommodations and providing injunctive remedy); *People ex. rel. Deukmejian v. CHE, Inc.*, 150 Cal. App. 3d 123, 133-34 (1983) (holding that Cal. Civ. Code § 54 required compliance with standards promulgated pursuant to Cal. Gov't Code § 4450, that is, Title 24 of the Code of Regulations). In addition to injunctive relief, Unruh and CDPA also provide for minimum statutory damages of $4,000 under Unruh, and $1,000 under the CDPA. Cal. Civ. Code § 52(a), 54.3(a). An award of attorneys' fees and costs is also authorized by state law to the prevailing party. *Id.*

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restaurants. Eighty-two of the Remaining BKLs remain open as of this date. *See* Decl. of Michael Joblove ("Joblove Decl.) ¶ 2.

B. History of this Litigation.

Prior to the filing of *Castaneda v. Burger King*, 08-4262 WHA in 2008, Class Counsel spent more than a year investigating possible access violations at Burger King® restaurants throughout California. (ECF 215-1 (Decl. of Timothy P. Fox ("Fox Decl.") ¶ 2).) In *Castaneda v. Burger King*, 3:08-cv-04262-WHA, three plaintiffs filed a class action lawsuit challenging violations of the ADA and state law at all California BKL restaurants. This Court ultimately certified, pursuant to Rule 23(b)(3), ten classes, one for each of the restaurants that the three plaintiffs had patronized ("*Castaneda* BKLs"). *Castaneda v. Burger King Corp.*, 264 F.R.D. 557, 572 (N.D. Cal. 2009). The claims of individuals concerning the 86 Remaining BKL restaurants were tolled by agreement of the parties, with the tolling period commencing on October 16, 2006. (Fox Decl. ¶ 7.)

The *Castaneda* case settled and the Court approved the settlement in 2010. (C-ECF 361.) Pursuant to the terms of the *Castaneda* Settlement, BKC committed to maintain access at the *Castaneda* BKLs in three primary ways: (1) by requiring the franchisees to perform a checklist of access-related tasks prior to opening each day, (*id.*, C-ECF 359 ("*Castaneda* Settlement Agreement"), ¶ 7.1.1); (2) by surveying each of the ten restaurants at least once every three years using an agreed-upon form and requiring the franchisees to take any required corrective action, (*id.* ¶ 7.1.2); and (3) by requiring the franchisees to hire registered architects to survey each restaurant every time the lease agreement is renewed and resurveying to ensure that the remodeled restaurant complies. (*Id.* ¶ 7.1.3.)

In February 2011, 27 plaintiffs in the instant case filed suit against BKC, alleging violations of the ADA and state law at the 86 BKL restaurants that were not covered by the *Castaneda* Settlement ("Remaining BKLs"). In addition to the discovery concerning the Remaining BKLs in *Castaneda*, the parties conducted further substantial discovery, including depositions of 26 potential named plaintiffs and of one Burger King corporate representative, and surveys of the Remaining BKLs. On December 21, 2011, the Court permitted two individuals to withdraw as named Plaintiffs. On December 8, 2011, Plaintiffs filed a Motion for Class Certification covering 62 restaurants, which Defendant opposed on January 18, 2012.

On December 2, 2011, the Court directed that the parties engage in settlement negotiations in this case and the related case, *Newport v. Burger King*, 10-04511. (ECF 160.)

On January 4, 2012, pursuant to Court order, the parties met for their first Settlement Conference with Magistrate Judge Spero. Because of the *Newport* case, the settlement conference also involved representatives of the franchisees and insurance carriers for Burger King and the franchisees. Prior to that settlement conference, all parties understood that injunctive relief would adhere to the principles of the *Castaneda* settlement. (ECF 230-1 (Decl. of Bill Lann Lee ("Lee Decl.) ¶ 24.) Settlement negotiations continued after the January 4th mediation. In January and February, Plaintiffs completed their surveys of the Remaining BKLs that had not been surveyed prior to class certification. (*Id*. ¶ 20.)

The parties eventually reached agreement on the basic outlines of the injunctive relief and damages and fees. The parties met in person under Judge Spero's supervision on several occasions into May, and engaged in a number of conference calls, to negotiate the remaining terms of the settlement. (*Id.* ¶ 23.) All parties were represented in these negotiations by counsel with substantial experience in both disability rights and class action litigation.

C. Certification of Settlement Classes.

Upon reaching agreement on the Settlement, Plaintiffs filed an unopposed Motion to Amend the Complaint for Settlement Purposes—seeking to add fifteen named Plaintiffs, who had been to the remaining 24 BKLs, so that the complaint included a named Plaintiff who had been to all of the Remaining BKLs—and a Motion for Settlement Class Certification. The Court allowed Plaintiffs to file the amended complaint on July 2, 2012. (ECF 225.) By separate order dated July 2, 2012, the Court granted Plaintiffs' Unopposed Motion for Certification of Settlement Classes pursuant to Rule 23(b)(2) for injunctive relief and Rule 23(b)(3) for damages claims. (ECF 227.)

D. Order Directing Notice.

With respect to class notice, the parties proposed a notice procedure based on the process previously approved by the Court in *Castaneda* for giving notice for opting-in for monetary relief. (*See* C-ECF 340 at 15-17). Adding several amendments, the Court approved the parties' notice

proposal that included posting for 30 days of short form notices at the Restaurants with information on how to obtain long form notices for opting-in, personal service by mail of the long form injunctive relief notice to those with known addresses and those who request the notice, and personal service by mail of the Damage Claimant long form notice and claim form to Damages Claimants. (*See* ECF 228). Class Counsel incorporated each of the Court's amendments in its Order Regarding Notice. (Decl. of Andrew Lah ("Lah Decl.") ¶ 3.) The amended notices and claim forms were timely distributed by the Class Administrator, The Garden City Group, Inc. ("Garden City") by July 16, 2012, the notice deadline set by the Court. (Keough Decl. ¶ 9). At Class Counsel's request, the Class Administrator also emailed a copy of the Opt-Out Notice and the Claim Form to existing Damages Claimants with email addresses known to Class Counsel. (Keough Decl. ¶ 10, 11.) Those emails, which were not required by the Court, were sent on July 16, 2012, and August 17, 2012. (*Id.*)

BKC instructed franchisees to post short form notices at 82 Restaurants, the number of Restaurants that remain open today. (Joblove Decl. ¶ 2; *see also* supra at fn. 1.) Plaintiffs discovered that several stores had not posted the short form notices and advised BKC. (Lah Decl. ¶ 4.) BKC investigated and found that several stores had initially failed to post the notices by the date specified by the Court, but that all of the 82 stores had the notice posted as of August 15, 2012. BKC also ensured that those stores that had not timely posted the notices would nevertheless keep the notices posted for the full 30 day period ordered by the Court. (Joblove Decl. ¶ 8.) No objections were rejected on timeliness grounds. (Keough Decl. ¶ 14.) The Class Administrator reports that 620 individuals have submitted claim forms to recover damages, to date. (*See* Keough Decl. ¶ 16.)

One aspect of the notice program varied from the Court's order. The Court's order provided that disability rights organizations be sent the long form notice for Damages Claimants. (ECF 228 at 4.) Instead, Plaintiffs' counsel instructed the Class Administrator to send these organizations the short form notice, which was the notice that was intended for the general public and posted at Burger King restaurants. (Lah Decl. ¶ 5.)

Class counsel only recently recognized this discrepancy. (*Id.*) Otherwise, they would have sought permission from the Court to send disability rights organizations the short form notice, rather than the long form notice for Damages Claimants, for three reasons.

First, Plaintiffs believe that the Court ordered sending notices to these organizations in order to enhance giving notice to the general public, particularly potential Damages Claimants who had not already contacted Plaintiffs' Counsel. (*Id.*) The short form notice is much easier to understand and thus more suitable for posting at these organizations' offices or to be forwarded to the membership of these organizations. The notice generally describes the case, the injunctive relief provided, the availability of damages for those eligible to apply, and how to obtain copies of the long form notice in order to opt in or apply for damages. Second, the long form notice is not designed for members of the general public. It is designed for Damages Claimants to apply for damages and was intended for people who had previously contacted Class Counsel. It also contains an opt out notice, meaning that the notice informed recipients that they were releasing their claims to proceed separately unless they opted out of the settlement. The vast majority of members of disability rights organizations had not previously contacted Class Counsel, and had not already opted into the class. Third, the short form notice informs Damage Claimants how they may request a long form notice, thus nobody was deprived of an opportunity to obtain a copy of the long form.

E. Objections and Opt-Outs.

The Class Administrator has not received any objections in response to the notice of Settlement. (Keough Decl. ¶ 15.) One Class Member opted out of the settlement. (*Id.* ¶ 14.) Class Counsel attempted to contact the Class Member by telephone on October 4, 2012, without success. (Lah Decl. ¶ 6.) Class Counsel subsequently sent a letter to the opt-out Class Member that requested that the Class Member contact Class Counsel. On October 9, 2012, Ms. Mazzara left a voice message with a legal assistant at Lewis Feinberg confirming that she did not want to take part in the settlement. Further attempts to reach the Class Member were unsuccessful.

II. THE PROPOSED SETTLEMENT.

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

A. Injunctive Relief.

In approximately September 2008, BKC experts began surveying the BKLs (including the Remaining BKLs) and BKC instructed its tenant franchisees to remediate the accessibility issues identified. Plaintiffs' experts have since conducted extensive surveys of each of the Remaining BKLs. These surveys established that the remediation work done in response to this lawsuit had greatly enhanced the accessibility of the Remaining BKLs.

The injunctive relief provided by the proposed Settlement Agreement mirrors the injunctive relief approved by this Court in *Castaneda*. In addition, the proposal provides for additional relief to maintain the appropriate door force for entry and restroom doors. *See infra.*

First, the proposed Agreement specifically identifies the remaining architectural elements that will be remediated. (*See* Settlement Agreement ¶ 6 & ex. A.)

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

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

Third, BKC will produce to Class Counsel on a periodic basis the mid-level and remodel survey forms for monitoring. (*See id.* ¶ 8.)

Fourth, BKC will include in its manual that franchisees should check the force required to open all public exterior and restroom doors twice per month to ensure that they do not exceed 5 pounds of pressure to open. (*See id.* ¶ 7.1.2.)

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

B. Damages.

As in *Castaneda*, Damages Claimants will include all Class Members who contacted Class Counsel prior to the date of settlement. (*Compare Castaneda* Settlement Agreement ¶ 3.4 *with* Settlement Agreement ¶ 3.6.) While Damages Claimants are required to release all damages relating to accessibility at the Restaurants (Settlement Agreement ¶ 16.2.2 (including release of "statutory, actual, compensatory, consequential, special, emotional harm or punitive damages")), they have the right to opt out of the monetary provisions of the Settlement if they wish to pursue claims on an independent basis in lieu of what the Settlement provides. (*Id.* ¶ 10.) Additionally, Class Members who did *not* contact Class Counsel prior to the Settlement Agreement but who wish to receive damages may opt into the class as Damages Claimants. In addition, Paragraph 10.4 of the Agreement (the "Blow Up Provision") provided BKC the right to declare the Agreement null and void if the number of Damages Claimants who opt out of the Class exceeds 100, or consists of Damages Claimants whose claims, in the aggregate, exceed $1,500,000. (*Id.*) Since only one person opted out, the Blow-Up provision did not come into effect.

In addition to payments to Damages Claimants, discussed below, the money from the $19 million fund may be used for two other purposes: (a) Payment for the costs of notifying the class of the Settlement, and administering the Settlement, to the extent that those costs exceed $100,000, as costs *up to* these amounts will be paid by Class Counsel; and (b) reasonable costs and attorneys' fees to Class Counsel, in an amount to be determined by the Court. (Settlement Agreement ¶¶ 9.2.2, 9.2.1.2.) If there are any funds remaining after disbursements to Damages Claimants and towards these other obligations, *e.g.*, returned checks, they will be donated to

Disability Rights California, a non-profit organization located in Oakland, California, devoted to ensuring accessibility for the disabled. (*Id.* ¶ 9.6.)

As in *Castaneda*, monetary awards will be distributed *pro rata* based on the total number of eligible claims for all Damages Claimants, with a maximum of six (6) visits for which an individual Damages Claimant can obtain recovery. (*Id.* ¶ 9.5.1.[2]) For example, if (a) the amount of the fund remaining after disbursements for costs and fees (the "Net Settlement Fund") is $14 million; (b) there are 1,500 Eligible Claimants, and (c) the sum of all Qualifying Visits for all Eligible Claimants (with Class Member averaging three visits) is 4,500, then the amount that an Eligible Claimant would recover for a Qualifying Visit would be ($14 million / 4,500), or $3111.11 per Qualifying Visit. Under this scenario, an Eligible Claimant seeking recovery for one Qualifying Visit would receive $3111.11, and an Eligible Claimant seeking recovery for six or more Qualifying Visits would receive $18,666.67. (*Id.* ¶ 9.5.2.) The average recovery per Class Member based on the claims received to date is set forth below.

C. Attorneys' Fees and Costs.

The parties have agreed that Class Counsel may seek an award of attorneys' fees and costs in an amount not to exceed 25% of the Total Settlement Fund remaining after litigation and administrative costs have been deducted, and that BKC will not oppose such request. Plaintiffs filed their application for attorneys' fees and costs on August 27, 2012. (ECF 230.) The application was posted on Plaintiffs' website on August 27, 2012, in order to give Class Members an opportunity to review and comment on the application in advance of the September 17, 2012 deadline to object to or opt-out of the Settlement. (Lah Decl. ¶ 7.)

Class Counsel have included the totals for the amount deleted per timekeeper as billing judgment, per this Court's Order Re Fairness Hearing. (*See* Lah Decl. ¶ 8 & Ex. A.) All timekeepers are accounted for in Exhibit A. (*Id.*) In total, Class Counsel cut the time of twelve attorneys, five summer associates, and eleven paralegal interviewers. (*Id.*)

[2] Named Plaintiffs shall be eligible for monetary payments under the same criteria and procedures as other eligible claimants. (Settlement Agreement ¶ 9.3.9.)

In addition, Class Counsel will pay the costs of the Class Administrator and notice up to $100,000, with costs in excess of these amounts to be paid from the damages fund. (Settlement Agreement ¶ 9.2.) As of October 11, 2012, the settlement administration costs are approximately $52,000. (Keough Decl. ¶ 17.)

III. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL.

A. The Notice Provided by the Parties Satisfies Due Process and F.R.C.P. 23.

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

The notice standard is satisfied here. The Class Administrator timely and properly provided the notice prescribed in the Court's Order Regarding Notice of Class Action and Proposed Settlement. (Keough Decl. ¶¶ 4-9.) The Class Administrator mailed 945 notices and claim forms to Class Members. (*Id*. ¶ 9.) As noted above, all 82 Remaining BKLs still open posted the short form notice for at least 30 days. (Joblove Decl. ¶ 2.) The Class Administrator also sent the short-form notice to sixty-nine disability rights organizations across California. (Keough Decl. ¶¶ 4-8.)

Accordingly, the notice procedure previously approved by the Court and now implemented by the Class Administrator was the best notice practicable under the circumstances and satisfied the requirements of due process and F.R.C.P. 23(e).

B. The Proposed Settlement Agreement is Fair, Reasonable, and Adequate.

In drafting the ADA, Congress provided that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations . . . is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212 (2009). Similarly, "there is a strong judicial policy that favors settlement, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig*., 516 F.3d 1095, 1101 (9th Cir. 2008) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992)).

Final approval of a proposed class action settlement should be granted where the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). In determining whether to grant final approval, the Court can consider a number of factors, including the benefit to the individual Class Members; the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the extent of discovery completed, and the stage of the proceedings; and the experience and views of counsel. *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026–27 (9th Cir.1998); *see also Stern v. Gambello,* 2012 WL 1744453 (9th Cir. May 17, 2012).

These factors, however, are not exclusive, and a court must consider whether the settlement "taken as a whole" is fair to absent Class Members. *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1376 (9th Cir.1993) (citing *Officers for Justice*, 688 F.2d 615, 625 (9th Cir. 1982). Furthermore, "under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval." *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 525-26 (C.D. Cal. Jan. 5, 2004) (citing *Torrisi*, 8 F.3d at 1376).

Here, the proposed Settlement satisfies the approval requirements. Class Counsel believe that the proposed Settlement is an excellent result for the Class Members, reached after hard-fought litigation and negotiation, after years of litigation and case development, and with assistance of a federal Magistrate Judge experienced in mediation. (Fox Decl. ¶¶ 9-13). As explained below, these factors support a finding that the Settlement is fair, adequate, and reasonable.

1. The Settlement Will Benefit the Class.

The Settlement provides substantial injunctive and monetary benefits to the members of

the Class.

a. Injunctive Relief.

The Settlement will provide substantial injunctive relief to the Class. As this Court is aware, as a result of this litigation, BKC has already enhanced accessibility at the Remaining BKL restaurants. Additionally, under the Settlement, BKC has committed to ensuring additional accessibility enhancements, and the parties have negotiated injunctive relief that ensures that Restaurants remain in compliance with applicable accessibility requirements. *See* supra pp. 6-8.

One disability access expert believed that similar injunctive relief provided in the *Castaneda* settlement was "exemplary" and would become the model for future agreements in cases involving chain restaurants. (Declaration of Claudia Center ("Center Decl."), C-ECF 354 ¶ 10).) The expert noted that the detailed checklists and survey requirements are impressive and commendable. (*Id* ¶ 11.) The agreed upon expansion of the daily opening checklist, for example, will ensure that current and future restaurant employees will take the steps necessary at the beginning of each day to ensure an accessible path of travel to all restaurant areas. (*Id*.)

b. Monetary Relief.

Assuming the Court grants Plaintiffs' request for fees and costs, there will be approximately $14 million to be distributed to the class. As demonstrated below, this monetary recovery compares very favorably to court-approved settlements in similar class actions in terms of total recovery obtained. Moreover, as in *Castaneda*, the monetary relief for the class here consists entirely of cash, rather than coupons.

Total recovery in similar cases: Plaintiffs are aware of the total settlement recoveries in the following disability access class actions:

Case	Total Recovery Amount	Maximum or Average Recovery Per Class Member
Castaneda	$5 million	$13,000
Lucas v. Kmart	Just under $13 million	$8,000
National Federation of the Blind v. Target Corp., No. C 06-01802 MHP (N.D. Cal.)	$6 million	$8,000
Lieber v. Macy's West,	$2.8 million	$2,000

Inc., Case Nos. C96-02955 MHP (N.D. Cal.)		

Expected average recovery per Class Member: The court-approved settlements in the *Target*, *Kmart*, and *Macy's* cases capped the number of claims for which an individual Class Member could recover at two, meaning that the most that Class Members obtained was $8,000 in the *NFB* and *Kmart* cases, and $2,000 in the *Macy's* case, and that assumes that those amounts were not reduced based on a pro rata reduction because total claims exceeded the settlement funds. In the *Kmart* case, the maximum recovery obtained by an individual Class Member was $6,000 (of which $2,300 was in the form of a gift card) after a pro rata reduction.

As of October 10, 2012, the Class Administrator reports that it had received and processed 620 damages claim forms. (Keough Decl. ¶ 16.) Of those, claimants have indicated a raw total of 11,367 store visits to Burger King Restaurants. (*Id*.) If each claimant is limited to the store visits they claimed, but no more than six store visits per individual claim, the adjusted total store visit count for all claims processed to date is 2,868. (*Id*.) Assuming the number of Damage Claimants the Class Administrator finds eligible is 620 and the Net Settlement Fund remains at $14,250,000.00, the average award value is $22,983.87 per processed claim, $1,253.62 per store visit based on a raw store visit count, and $4,968.61 per store visit based on an adjusted store visit count. (*Id.*)

If the numbers reported by the Class Administrator do not change significantly, the average recovery in the instant case will be two times the maximum recoveries in the *Target* and *Kmart* cases. The average recovery here will be 50% above the average recovery in *Castaneda*.

C. The Distribution Plan Is Fair to the Class.

As in *Castaneda*, the Class Members will be compensated for each visit to a covered restaurant during the class period. Imposing a maximum on the number of visits for each claimant represents a fair balance between a distribution that closely approaches reality and one that protects Class Members from possibly illegitimate claims. The Court approved the same

maximum in *Castaneda* (C-ECF 361) and a similar—though lower—maximum was approved in the *Lucas v. Kmart* settlement. (Fox Decl. ¶ 12 (capping the number of eligible visits at two).)

Second, Class Counsel believe that if the average recovery is $20,000, that average will be the largest per person monetary recovered in a disability rights class action involving a public accommodation.

1. The Settlement Was Reached Through Arm's-Length Negotiation Following Sufficient Discovery.

"A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Browning v. Yahoo, Inc.*, No. C04-01463 HRL, 2006 WL 3826714, at *8 (N.D. Cal., Dec. 27, 2006) (quoting *Nat'l Rural Telecomm.*, 221 F.R.D. at 528).

Here, Plaintiffs settled the case only after approximately six years of pre-suit investigation and litigation. (Fox Decl. ¶ 10.) *Castaneda* was settled after full discovery had been completed and was at the brink of trial, and Class Counsel therefore settled both *Castaneda* and this case with the benefit of an extensive factual record aware of the strengths and weaknesses of their claims as well as the strengths and weaknesses of their defenses. (*Id.*). The same is true here. Class Counsel conducted discovery of the Remaining BKLs, defended the depositions of 26 named plaintiffs, engaged in document discovery, surveyed the Remaining BKLs, and deposed a Burger King's corporate representative.

In addition, this Settlement Agreement is the result of genuine arm's length negotiations. On January 4, 2012, pursuant to Court order, the parties met for their first Settlement Conference with Magistrate Judge Spero. Because of the *Newport v. Burger King* case, the settlement conference also involved representatives of the franchisees and insurance carriers for Burger King and the franchisees. (ECF 160.) Prior to that settlement conference, all parties understood that injunctive relief would adhere to the principles of the *Castaneda* settlement. Settlement negotiations continued after the January 4th mediation. In January and February, Plaintiffs completed their surveys of the Remaining BKLs that had not been surveyed prior to class certification.

The parties eventually reached agreement on the basic outlines of the injunctive relief and

damages and fees. From February into May, the parties met in person several times under the supervision of Judge Spero, and engaged in a number of conference calls, to negotiate the remaining terms of the settlement, including the details of further barrier removal at Remaining BKLs. All parties have been represented throughout these negotiations by counsel with substantial experience in both disability rights and class action litigation. As a result of settlement following more than a year of investigation and four years of litigation in *Castaneda* and this action and the arm's-length nature of the settlement negotiations, the Court has substantial guaranty of the fairness of the Settlement.

2. The Recommendations of Experienced Counsel Favor Approval of the Settlement.

In appraising the fairness of a proposed settlement, the judgment of experienced counsel favoring the settlement is entitled to substantial weight and also should be accorded a "presumption of reasonableness." *In re Omnivision Technologies Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. Jan. 9, 2008) (citing *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979); *Nat'l Rural Telecomm.*, 221 F.R.D. at 528 (internal quotations and citations omitted) (noting counsel are "most closely acquainted with the facts of the underlying litigation.") Here, the parties' counsel jointly submit that the Settlement is fair, adequate, and reasonable.

The Court appointed the undersigned Plaintiffs' counsel as Class Counsel after considering their qualifications and experience. (ECF 227). Class Counsel have extensive experience in prosecuting civil rights class actions generally, and disability access class actions specifically. (*See* Lee Decl. ¶ 3-8, Fox Decl. ¶ 21-34, ECF 230-3, Declaration of Mari Mayeda ¶ 3-4.) It is their considered opinion that the Settlement is excellent and achieves the best result possible for Class Members under the circumstances. (Fox Decl. ¶ 10.) BKC's counsel, also experienced and knowledgeable in complex litigation, also recommend approval.

3. Litigating This Action Would Be Risky, Expensive, and Time Consuming, and Delay Any Recovery.

A settlement is evaluated in light of the risks and costs of litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). "The Court shall consider the vagaries of

litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *Nat'l Rural Telecomm.*, 221 F.R.D. at 526. "'[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *Id.* (quoting 4 A. Conte 7 H. Newberg, *Newberg on Class Actions* § 11:50 at 155 (4th ed. 2002)).

Although Plaintiffs believe that they have strong claims against BKC, they recognize that there is always substantial litigation risk. For example, this Court suggested in *Castaneda* that Class Members would have to appear in person at the trial to obtain damages. (C-ECF #218) (Transcript of Oral Argument at 26 (Sept. 17, 2009)). If the Court reached the same conclusion here, it is likely that some Class Members with valid claims would not have the ability to appear at trial, thus possibly reducing aggregate class damages. Additional risks include: (1) the fact finder's possible failure to credit evidence of the existence of barriers; (2) the fact finder's possible failure to credit the number of visits to which a Class Member testifies; (3) uncertainties regarding recovering for "deterred" visits; (4) the possibility that novel legal issues may be reversed on appeal; and (5) the years-long delay in receipt by Class Members of monetary relief during the pendency of appeals, even if the appeals were ultimately denied.

BKC believes the results obtained in the Settlement are more than could be achieved had the claims been fully litigated because: (a) it is not liable under state law for damages because the Restaurants are independently operated and because BKC neither engaged in, fostered nor aided any of the alleged discrimination; (b) a large number of opt-in Claimants did not personally encounter barriers, as required by the Unruh Act and CDPA; (c) the opt-in Claimants did not encounter barriers in the quantity of visits contended; and (d) a number of Claimants' contentions are not credible.

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III. CONCLUSION.

For the reasons set forth above, the parties respectfully request that the Court grant final approval to the Settlement Agreement and enter the parties' concurrently-filed Proposed Order of Final Approval of Settlement.

Dated: October 12, 2012

LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.

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