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

SCOTT MAGEE, individually and on behalf of all others similarly situated,	)	CIVIL ACTION NO: 16-5652
Plaintiff,	)	JUDGE JOAN B. GOTTSCHALL
v.	)	MAG. JUDGE SIDNEY I. SCHENKIER
McDonald's Corporation and McDonalds's USA, LLC	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S SUMMARY JUDGMENT MOTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and other Citations

I. Case Background

This is a class action by Plaintiff Scott Magee ("Magee") challenging the policies of McDonald's USA, LLC ("McDonald's") in its operation of late-night restaurants in the United States. Magee alleges that many of McDonald's restaurants serve food exclusively through the drive-thru and so the blind cannot independently access these services because they cannot legally operate motor vehicles.[1]

Magee makes claims under both state and federal law. He alleges that McDonald's violates the Americans with Disabilities Act ("ADA") because it "operates"[2] and "leases"[3] McDonald's-branded restaurants within the meaning of that law, and because McDonald's system of operating its restaurants could be easily modified to accommodate the blind.[4] Magee also alleges that McDonald's violates the ADA by failing to provide him with auxiliary aids and services that would allow him to access their restaurants.[5] Magee additionally alleges that McDonalds' violates the

[1] Plaintiff's Statement of Additional Facts ("PSAF") ¶ 27 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pgs. 8-9 at ¶¶ 32-39].
[2] PSAF ¶ 28 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pg. 4 at ¶¶ 12-16].
[3] PSAF ¶ 29 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pg. 4 at ¶¶ 12-16].
[4] PSAF ¶ 30 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pgs. 13-15 at ¶¶ 64, 70].
[5] PSAF ¶ 31 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pgs. 13-15 at ¶¶ 64, 70].

ADA by failing to provide him *any* independent opportunity to access its services[6] or any opportunity that is *equal* to those provided to nondisabled customers.[7] Finally, Magee alleges that McDonald's violations of the ADA trigger liability under California's Unruh Act, entitling those blind persons who have experienced inaccessible McDonald's restaurants in California to money damages.[8] The case now comes before the Court on McDonald's summary judgment challenge to Magee's individual claim.

II. Facts

Scott Magee suffers from macular degeneration.[9] The disease first manifested itself when he was 16 years old.[10] His vision has deteriorated to the point that he is legally blind.[11] Despite his condition, Magee is still able to detect light and ascertain his surroundings by using his limited peripheral vision.[12] Yet while Magee is capable of navigating his home and public spaces without the assistance of a cane or a seeing-eye dog,[13] Magee's medical condition prevents him from legally operating a motor vehicle.[14]

---

[6] PSAF ¶ 32 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pgs. 13-14 at ¶¶ 64, 68].
[7] PSAF ¶ 33 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pgs. 13-14 at ¶¶ 64, 69].
[8] PSAF ¶ 34 [Tab "25" (Plaintiff's 56.1(b)(1) statement) - Second Amended Complaint, pg. 16 at ¶¶ 75-80].
[9] PSAF ¶ 1 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 1 at ¶ 2].
[10] *Id*.
[11] PSAF ¶ 2 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 1 at ¶ 6].
[12] PSAF ¶ 3 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 1 at ¶ 3].
[13] PSAF ¶ 4 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 1 at ¶ 4].
[14] PSAF ¶ 2 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 1 at ¶ 6].

Magee resides near a McDonald's restaurant.[15] It is approximately two blocks from his home in Metairie, Louisiana.[16] Magee regularly visits the restaurant to eat.[17] It has been a fixture in his neighborhood for many years, and Magee has fond childhood memories of visiting the restaurant.[18] When the restaurant closes its lobby during the nighttime, it remains open "24/7" through the drive-thru.[19] Magee has approached the restaurant several times when it is open only through the drive thru.[20] Generally, Magee is unable to access the interior of the restaurant because the doors are locked and the lobby is closed.[21] On one occasion, Magee was able to gain access to the interior of the restaurant, only to be told that the lobby was not open and that he had to exit immediately.[22]

When the lobby is closed but the drive-thru is open, Magee has tried to place an order by interacting with McDonald's personnel through the drive-thru communications system.[23] Magee has also tried to interact with McDonald's personnel through the drive-thru window.[24] In at least one instance, McDonald's personnel threatened to call the police if Magee did not stop trying to

---

[15] PSAF ¶ 6 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pgs. 1-2 at ¶ 8].
[16] *Id*.
[17] PSAF ¶ 7 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pgs. 1-2 at ¶ 8].
[18] PSAF ¶ 8 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pgs. 1-2 at ¶ 8].
[19] PSAF ¶ 9 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶ 9].
[20] PSAF ¶ 10 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶ 9].
[21] PSAF ¶ 11 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶ 11].
[22] PSAF ¶ 12 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶ 12; Tab "16" (Plaintiff's 56.1(b)(1) statement) - Deposition of Scott Magee, at 26:2-28:5].
[23] PSAF ¶ 13 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶ 13].
[24] PSAF ¶ 14 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶ 13].

order food.[25] In addition to actually approaching and attempting to gain access to the restaurant, Magee has also considered *trying* to access the restaurant on numerous occasions.[26] In these instances, Magee ultimately decided it would be futile to try and access the restaurant due to McDonald's policy of offering exclusively drive-thru service.[27]

In June of 2016, Magee visited the San Francisco metropolitan area.[28] The specific purpose of Magee's visit was to test McDonald's policy of discriminating against the blind in the state of California.[29] Based on conversations with his attorneys, Magee believed he could create greater pressure on McDonald's to change their corporate policies if they were subject to a claim under the Unruh Act.[30] Over the course of a weekend in the Bay Area, Magee visited two inaccessible McDonald's.[31] At the time he visited each, the lobby was closed but the drive-thrus remained open.[32] Neither of these McDonald's let Magee inside the restaurant to order food,[33] nor did they permit him to order food through the drive-thru speaker or drive-thru window.[34]

---

[25] PSAF ¶ 15 [Tab "16" (Plaintiff's 56.1(b)(1) statement) - Deposition of Scott Magee, at 26:2-28:5].
[26] PSAF ¶ 16 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶¶ 14-15].
[27] PSAF ¶ 17 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 2 at ¶ 15].
[28] PSAF ¶ 19 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 17].
[29] *Id*.
[30] PSAF ¶ 20 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 19].
[31] PSAF ¶ 21 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 18].
[32] PSAF ¶ 23 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 21].
[33] PSAF ¶ 24 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 21].
[34] PSAF ¶ 25 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 21].

All three of the restaurants Magee visited are managed by franchisees,[35] who also lease the restaurant buildings themselves from McDonald's.[36] Pursuant to their franchise agreements, the franchisees agree "to comply with all practices, policies, and procedures imposed by McDonald's."[37] This specific control over its franchisees gives McDonald's the ability to compel changes in restaurant operation that would accommodate Magee and provide him, or provide some other meaningful opportunity for the visually-impaired to access to McDonald's food during operating times when the restaurants are only open through the drive-thru. Specifically, Magee's proposes that the take his order over the telephone and deliver him his food through the front door of the restaurant when he arrives.[38] Alternatively, McDonald's can reimburse Magee for the cost of having McDonald's food delivered to his home.[39]

III. Statutory Framework of the Americans with Disabilities Act and Unruh Act

Under Title III of the ADA, Magee must prove three things in order to prevail in his claim: (1) that he is "disabled"; (2) that McDonald's "owns, operates, or leases" its franchised restaurants;

---

[35] PSAF ¶ 49 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000377 at 13; Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000870 at 13; Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000901 at 13].

[36] PSAF ¶ 40 [Tab "4" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Operator's Lease, Bates Number McD000354 at § 2.04; Tab "5" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Operator's Lease, Bates Number McD000913 at § 2.04; Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 70:21-72:22.].

[37] PSAF ¶ 42 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000375-376 at 12-12(a); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000869 at 12-12(a); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000900 at 12-12(a).].

[38] PSAF ¶ 70 [Tab "19" (Plaintiff's 56.1(b)(1) statement) - Plaintiff's Supplemental Response to Defendant's Interrogatory No. 16, at pg. 2 (first bullet point)].

[39] PSAF ¶ 82 [Tab "19" (Plaintiff's 56.1(b)(1) statement) - Plaintiff's Supplemental Response to Defendant's Interrogatory No. 16, at pg. 1 (first bullet point)].

and (3) that McDonald's "discriminates" against Magee at those restaurants by failing to provide him access. *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc*., 603 F.3d 666, 670 (9th Cir. 2010). Magee alleges four types of discrimination by McDonald's:

- Failure to reasonably modify its policies to accommodate his disability, 42 U.S.C. §12182(b)(2)(A)(ii).
- Failure to provide him auxiliary aids or services, 42 U.S.C. §12182(b)(2)(A)(iii).
- Failure to provide him any opportunity to independently access McDonald's services, 42 U.S.C. §12182(b)(1)(A)(i).
- Failure to provide him an opportunity to access McDonald's services equal to non-disabled people, U.S.C. §12182(b)(1)(A)(ii).

The elements of Magee's ADA claim completely overlap with his Unruh Act claim. Section 51(f) of the Unruh Act provides that "[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 shall also constitute a violation of this section." *See, e.g. Bass v. County of Butte*, 458 F. 3d 978, 981 (9th Cir. 2006).

IV. McDonald's Motion for Summary Judgment Arguments

McDonald's moves for summary judgment on five grounds. It argues that (1) it does not "operate" its franchised locations within the meaning of the ADA;[40] (2) that as lessor of its franchised locations it is not liable for ADA violations;[41] (3) that Magee's proposed modification to McDonald's policies is not reasonable;[42] (4) that McDonald's does not discriminate against

[40] Defendant's memorandum in support of its motion for summary judgment ("Def.'s Brief."), R. Doc. 211, pgs. 5-15.
[41] Def.'s Brief, pg. 5.
[42] Def.'s Brief, pgs. 21-26.

Magee "on the basis of" his disability[43] and Magee already has "meaningful access" to McDonald's restaurants;[44] and (5) Magee does not have standing to bring his claims.[45]

For the reasons stated below, these arguments fail.

1. McDonald's is an "operator" of its franchised restaurants under the ADA because its agreements with franchisees allow it to "control the modification to improve accessibility to the disabled."

Much of McDonald's brief is dedicated to arguing that it is not an "operator" of its franchised locations. It supports this argument by downplaying the essence of its franchise agreements and misconstruing the standard which governs operator liability under the ADA. When the correct standard is applied to the full factual record, it is clear that there is a material dispute on the operator question.

"Though the Seventh Circuit has not addressed" the exact issue of when a franchisor is an operator under the ADA, "several courts of appeal have concluded that" the "critical factor in determining the liability of a franchisor under Title III of the ADA…is whether the franchisor specifically controls the modification of the franchises to improve their accessibility to the disabled." *A.C. v. Taurus Flavors, Inc.*, 2017 WL 497765, at *2 (N.D. Ill. Feb. 7, 2017) (citations and quotations omitted). "[T]he relevant standard is whether [an entity has] the power to facilitate any necessary accommodation…the operator requirement *retains accountability for those in a position to ensure nondiscrimination*." *Lentini v. California Center for the Arts*, 370 F.3d 837, 849 (9th Cir. 2004) (emphasis in original) (citations and quotations omitted).

Here, McDonald's unquestionably exerts the necessary control over its franchised restaurants to improve their accessibility to the blind. This is evident from a review of the two

[43] Def.'s Brief, pgs. 19-21.
[44] Def.'s Brief, pgs. 15-18.
[45] Def.'s Brief, pgs. 26-27.

documents[46] that govern the operation of McDonald's franchised locations: the Franchise Agreement[47] and the Operations and Training Manual.[48] Both documents give McDonald's the power to "facilitate the necessary accommodation" in this case by compelling franchisees to take Magee's order over the telephone and hand him his food when he arrives at the restaurant.

a. McDonald's Franchise Agreement

McDonald's Franchise Agreement provides McDonald's with a variety of specific controls over the franchised restaurants, any of which can be exercised by McDonald's to improve accessibility to Magee. Those controls include:

- The ability to compel compliance with "all business policies, practices, and procedures imposed by McDonald's."[49]

[46] For the purposes herein Franchise Agreement and "Operator's Lease" are referred to as one document; however, Plaintiff attaches them as separate tabs. The Franchise Agreement incorporates an "Operator's Lease" as an attachment which governs the lease of the premises. PSAF ¶ 39 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000371 at 1(b) (second sentence); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000865 at 1(b) (second sentence); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000896 at 1(b) (second sentence)]. [redacted] [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 68:23-69:4].

[47] As is evident from the agreements themselves, the terms and provisions of the Franchise Agreement and Operator's Lease are uniform across the Metairie, Oakland, and San Francisco restaurants Magee visited. PSAF ¶ 36 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 25:23-26:8 and 71:22-72:22].

[48] These documents represent the sum total of all agreements between McDonald's and the franchisees and there are "[no] other agreements" that "govern [the] relationship." PSAF ¶ 35 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 90:23-91:8].

[49] PSAF ¶ 42 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000375-376 at 12-12(a); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000869 at 12-12(a); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000900 at 12-12(a)].

- The ability to dictate what hours the restaurant will be open or closed.[50]

- The ability to compel franchises to "operate" their restaurants in the "manner designated by McDonald's."[51]

- The ability to compel franchisees to "operate" their restaurants "in conformity [and] strict adherence to McDonald's standards and policies as they exist now and as they may be from time to time by modified."[52]

- The ability to unilaterally terminate[53] the franchise and recoup all litigation costs in the event that a franchise refuses to comply with any of McDonald's requests.[54]

Not surprisingly, McDonald's downplays the severe language in the Franchise Agreement. It fails to address most of the provisions referenced above, generally claiming that the Franchise Agreement is only designed to ensure "brand uniformity" and that it does not give McDonald's the right to terminate a franchise for failure to serve Magee. Yet the plain language of the

---

[50] PSAF ¶ 43 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000376 at (g); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000870 at (g); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000901 at (g)].

[51] PSAF ¶ 41 [Tab "4" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Operator's Lease, Bates Number McD000354 at § 2.04; Tab "5" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Operator's Lease, Bates Number McD000913 at § 2.04; Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 70:21-72:22].

[52] PSAF ¶ 44 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000372 at (d); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000866 at (d); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000897 at (d)].

[53] PSAF ¶ 47 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000379 at 18; Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000873 at 18; Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000904 at 18].

[54] PSAF ¶ 46 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000379 at 18-18(a); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000873 at 18-18(a); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000904 at 18-18(a)].

agreement says otherwise. McDonald's has the authority to require *any policy* it chooses and can terminate a franchise if a franchisee does not agree to follow that policy. This would include a policy of requiring franchisees to take Magee's order over the phone and hand him his food when he arrives at the restaurant. Simply put, the Franchise Agreement puts McDonald's in *specific control* of the discriminatory barriers at issue in this case because it has the unfettered power to implement policies that would remove those barriers.

b. McDonald's Operations and Training Manual

In addition to the Franchise Agreement, McDonald's also retains the power to compel compliance with the Operations and Training Manual (the "OT Manual"). This authority is derived from the Franchise Agreement, which requires franchisees to "strict[ly] adhere[]…to McDonald's prescribed standards of Quality, Service, and Cleanliness in the Restaurant operation."[55] According to McDonald's, these "standards" come "exclusively" from the OT Manual.[56] The Franchise Agreement also requires franchisees to "promptly adopt and use exclusively…the policies contained in the [OT Manual][57], now and as they may be modified from time to time."[58]

[55] PSAF ¶ 55 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000371 at 1(c); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000865 at 1(c); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000896 at 1(c)].

[56] PSAF ¶ 56 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 57:6-24].

[57] Though Section 4 of the Franchise Agreement refers generally to "manuals," Section 4 is referring to the Operations and Training Manual. PSAF ¶ 54 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 52:16-53:7].

[58] PSAF ¶ 52 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000373 at 4; Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000867 at 4; Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000898 at 4].

The OT Manual is 1,200 pages long[59] and contains procedures for operating McDonald's restaurants.[60] [redacted]

The OT Manual is authored exclusively by McDonald's, and McDonald's revises it "as needed."[65] McDonald's is the "owner" of the OT Manual and "writer[] of any revisions to the OT Manual."[66] McDonald's testified that it prefers to revise the OT Manual than "change 12,000 franchise agreements."[67] McDonald's argues that some of the policies in the OT Manual are compulsory while others are only "recommendations." [redacted]

[59] PSAF ¶ 57 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 17:12-18].
[60] PSAF ¶ 58 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 55:1-8].
[61] PSAF ¶ 60 [Tab "18" (Plaintiff's 56.1(b)(1) statement) - Operations and Training Manual - Service Chapter Excerpts, Bates Number McD000332].
[62] PSAF ¶ 61 [Tab "18" (Plaintiff's 56.1(b)(1) statement) - Operations and Training Manual - Service Chapter Excerpts, Bates Number McD000332 and McD000454-460].
[63] PSAF ¶ 64 [Tab "17" (Plaintiff's 56.1(b)(1) statement) - Operations and Training Manual - Safety and Security Chapter Excerpts, Bates Number McD000848 at second to last bullet point].
[64] PSAF ¶ 63 [Tab "17" (Plaintiff's 56.1(b)(1) statement) - Operations and Training Manual - Safety and Security Chapter Excerpts, Bates Number McD000824].
[65] PSAF ¶ 68 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 17:12-18].
[66] PSAF ¶ 67 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 17:16-18:3].
[67] PSAF ¶ 45 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 56:20-57:4].

[redacted][68][redacted]

[redacted]

Like the Franchise Agreement, the OT Manual provides McDonald's with the control necessary to compel franchisees to take Magee's order over the phone and hand him his food when he arrives at the restaurant.

c. McDonald's Additional Arguments

McDonald's disputes that the franchise documents make it an operator under the ADA because it "did not exercise control over the franchisees' decision to lock their doors during overnight hours[,]" and because "McDonald's does not control franchisees' policies in this regard" McDonald's does not operate the restaurants.[69] But this argument misconstrues the standard which courts have used to evaluate franchisor liability under the ADA. The question is not whether a franchisee can make a decision independent of the franchisor—the question is whether the franchisor "specifically controls the modification of the franchises to improve their accessibility to the disabled," *Taurus Flavors* at *2, and are otherwise "in a position to ensure nondiscrimination." *Lentini* at 849. The sweeping control which McDonald's retains over all facets of the franchisees' restaurants ensure that it can, if it wants, compel them to serve Magee. This makes them an operator.

McDonald's cites to *Neff v. Am. Dairy Queen Corp*., 58 F.3d 1063 (5th Cir. 1995), but that case involved a different dispute over a significantly different franchise agreement. In *Neff*, the

[68] PSAF ¶ 65 [Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 81:5-16].

[69] McDonald's relatedly suggests that the franchisees are also "operators" under the ADA. *See* Defendants' Statement of Material Fact, R. Doc. 212, pgs. 2-3 at ¶¶ 6, 8, and 10. But this does not change the fact that McDonald's itself is an operator of the franchised restaurants—and the ADA protects against discrimination by "*any* person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. §12182(a) (emphasis added).

plaintiff sought to have a franchised restaurant modified to include wheelchair access. *Id.* at 1064. The Fifth Circuit determined that there was only a single paragraph in the franchise agreement which related "to modifications of the structure of the [restaurant]" and that this paragraph only provided the franchisor with the right to "disapprove any proposed modifications to the [restaurant] building and equipment." *Id.* at 1068. The Fifth Circuit further found that this amounted to a "limited form of control over structural modifications," but not enough to make the defendant an "operator" under the ADA. *Id.*

As shown above, McDonald's franchise documents are considerably more comprehensive and controlling than the one involved in *Neff*. In *Neff*, the Fifth Circuit found that there was only one provision in the franchise agreement that would have governed the franchisor's ability to compel plaintiff's requested alteration to the restaurant, and that this provision provided the franchisor with limited enforcement rights. By contrast, Magee seeks a policy change to the way McDonald's franchises *operate*—and the policies of operation at McDonald's franchises is the absolute dominion of McDonald's. It can impose any "business policy, practice, or procedure" on its franchisees and require "conformity [and] strict adherence" to the OT Manual—a document which McDonald's has the exclusive right to author, revise, and impose. Further, [redacted] In addition to modifying an existing policy or practice, McDonald's control is so complete that it could also simply author a new one.[70]

[70] McDonald's other case authority is also inapposite. In *Lemmons v. Ace Hardware Corp.*, 2014 WL 3107842, at *2 (N.D. Cal. July 3, 2014), a wheelchair bound patron sought access to a local, franchised hardware store. The court found that the franchisor was not an operator because they

In fact, McDonald's is in the *best* position to effect these changes.[71] Because McDonald's uses the Franchise Agreement and OT Manual to dictate the policies, practices, and procedures that franchisees will be compelled to follow, and because McDonald's is the sole creator and arbiter of these documents, McDonald's has the specific control necessary to "improve their accessibility to the disabled[.]" *Taurus Flavors* at *2.

2. McDonald's is also liable as a "lessor" of the franchised restaurants under the ADA.

McDonald's is also separately liable under the ADA as a *lessor* of its franchised restaurants. It is undisputed that McDonald's owns and leases the restaurants at issue in this case,[72] and so prohibited from discriminating under the ADA. 42 U.S.C. § 12182(a).

McDonald's argues that even though it is a lessor, it still should not be held liable because the "policy" of not serving Magee is a franchisee policy—not McDonald's. McDonald's cites to *Haynes v. Wilder Corp. of Del.*, 721 F. Supp. 2d 1218 (M.D. Fla. 2010), a district court case from

---

did not "retain authority" under the franchise agreement to "dictate the physical layout of the store" or otherwise "[have] control over the store such that it could ensure nondiscrimination against the disabled." *Id.* at *7. Similarly, in *Pona v. Cecil Whittaker's, Inc.*, 155 F.3d 1034, 1036 (8th Cir. 1998) the 8th Circuit based its holding, in part, on the fact that the franchisor specifically did not "reserve the right" to control the franchisee on the accessibility issue in that case. *Lemmons* and *Pona* are inapposite because, as argued above, McDonald's has the specific and boundless authority to dictate that its franchisees accommodate Magee and thus "ensure nondiscrimination." Finally, *In re Jimmy John's Overtime Litigation*, 2018 WL 3231273 (N.D. Ill. June 14, 2018) was a wage and hour case, not an ADA dispute. It involved a different franchise agreement and a far different liability standard.

[71] Imagine the inefficiencies if Magee had to sue every franchisee individually. He would need to file dozens of lawsuits in his hometown alone (and again each time a franchise changed hands or a new McDonald's was built). He would also have to preemptively sue franchisees in other geographic areas before visiting family, or anywhere else he planned to travel. That is a lot of lawsuits for the right to order a hamburger.

[72] PSAF ¶ 94 [Tab "4" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Operator's Lease, Bates Number McD00353 at first paragraph; Tab "5" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Operator's Lease, Bates Number McD00912 at first paragraph; Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, 70:21-72:22].

Florida holding that a "landlord incurs liability only if the landlord implements a discriminatory policy, practice, or procedure." *Id*. at 1228.

With due respect to the *Haynes* court, the ADA nowhere states that a landlord must implement a discriminatory policy to be liable under the law. 28 CFR § 36.201 specifically says the opposite: that landlords and tenants are co-extensively subject to the ADA. *Cf. Connors v. Orlando Regional Healthcare System, Inc*., 2009 WL 2524568, at *3 (M.D. Fla. June 12, 2009) (finding that landlord liability under Title III is not limited to architectural barriers; "[f]or the purposes of landlord responsibility, the Department of Justice ADA regulations make no distinction between building access and provision of auxiliary services within a building."). The holding in *Haynes* relied exclusively on a "Response to Comments" issued by the Department of Justice, explaining how § 36.201 was drafted—and specifically how landlords and tenants might draw up their lease agreements. The DOJ's response to comments is not legal precedent; and the rationale of the *Haynes* court is found nowhere within the ADA itself.

By contrast, other courts have found strong public policy reasons to make the landlord and tenant co-liable for ADA violations, regardless of the type of violation. For instance, the 9th Circuit in *Botosan v. Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000), found that the landlord is a "necessary party" in actions to enforce Title III of the ADA. "Not only does this construction of the regulation hamper efforts of a landlord and a tenant to evade ADA requirements, but it also aids in the enforcement of the Act. A landlord who is aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." *Id*. The *Botosan* court reviewed the history of the ADA, including proposed rules that would have distinguished between landlords and tenants with regard to providing auxiliary services. *Id*. at 834. It found that such rules were eventually discarded, because "[a] landlord would be able to allocate

all responsibility for ADA compliance to the tenant in the lease, and if the compliance measures were not 'readily achievable' for the tenant, the plaintiff would have recourse against no one." *Id*. at 834.

The shell game envisioned by *Botosan* is precisely what McDonald's argues for here. It is easy to imagine franchisees' contractual defenses if Magee sought relief against them. The franchisees could argue that their lease with McDonald's requires them operate the restaurant "in the manner…[that] maximize[s] Gross Sales."[73] Since serving Magee is less than maximally profitable (as McDonald's is quick to point out in its motion) a franchisee could argue that it is unable to accommodate Magee under the terms of its lease. No doubt there are other nooks and crannies of the Franchise Agreement that the franchisee could cite to explain how it is powerless to accommodate Magee without the say so of McDonald's. This creates a chicken-and-egg scenario that is anathema to the ADA. The proper result is to hold both landlord and tenant responsible—and the parties can seek indemnification under the terms of their agreements. *Botosan* at 834.

The law on the books is already clear: McDonald's is independently responsible for any ADA violations that occur at its leased restaurants. The Court should decline McDonald's invitation to follow on *Haynes*.

3. Magee's proposed modification to McDonald's policies is not unreasonable.

Whether a requested accommodation is reasonable is a highly fact-specific inquiry and requires balancing the needs of the parties. *Dadian v. Village of Wilmette*, 269 F. 3d 831, 838 (7th

[73] PSAF ¶ 93 [Tab "4" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Operator's Lease, Bates Number McD000354 at § 2.04; Tab "5" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Operator's Lease, Bates Number McD000913 at § 2.04; Tab "8" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's corporate representative Bruce Steinhilper, at 70:21-72:22].

Cir. 2001). An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it. *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F. 3d 538, 543 (7th. Cir. 1995). An accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program. *Erdman v. City of Fort Atkinson*, 84 F.3d 960, 962 (7th Cir.1996).

Here, Magee has made two proposed modifications to McDonald's policies that would accommodate his disability. First, McDonald's can simply take Magee's order over the telephone and then hand Magee his food through the front door when he presents to the restaurant.[74] This modification can be easily be achieved by providing Magee with a private phone number to call, or alternatively, by providing Magee with a pin number he can enter when calling an "auto attendant" phone answering service that is connected to the McDonald's restaurant.[75] After placing his order over the phone, Magee can physically present at the McDonald's, call again, and then McDonald's personnel can deliver him his order through the front door.[76] This is a simple, cheap,[77] and reasonable way for Magee to access the McDonald's restaurant.[78]

[74] PSAF ¶ 70 [Tab "19" (Plaintiff's 56.1(b)(1) statement) - Plaintiff's Supplemental Response to Defendant's Interrogatory No. 16, pg. 2 at first bullet point].
[75] PSAF ¶ 71 [Tab "20" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's telecommunications expert Lori Bocklund, pg. 3 at ¶¶ 17-18]. Magee's disability does not prevent him from using a cellular phone. PSAF ¶ 5 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 1 at ¶ 7].
[76] PSAF ¶ 72 [Tab "20" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's telecommunications expert Lori Bocklund, pg. 2 at ¶ 12; Tab "22" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's security expert Richard Sem, pgs. 3-4 at ¶ 4(e)].
[77] PSAF ¶ 78 [Tab "20" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's telecommunications expert Lori Bocklund, pgs. 4-5 at ¶ 25].
[78] PSAF ¶ 92 [Tab "22" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's security expert Richard Sem, pg. 2 at ¶ 4(a); Tab "15" (Plaintiff's 56.1(b)(1) statement) - Deposition of Magee's security expert Richard Sem, at 106:3-107:2].

Magee's second, less preferred[79] proposal is that McDonald's reimburse him for the cost associated with using the food delivery service UberEats. The charge for UberEats is five dollars to the consumer.[80] Magee estimates he would use the service twice a month,[81] which would total a $120 annual expense to McDonald's.[82]

McDonald's takes issue with Magee's proposals for a variety of reasons, indicated below.

a. **Magee's proposal is not missing "essential elements."**

McDonald's first argues that Magee's idea to call the restaurant and then pick up his food is missing "essential elements." It argues that there is no process to confirm Magee has not given away his pin number to someone; there is no process to ensure that the person who arrives at the restaurant claiming to Magee is in fact Magee;[83] there is no explanation of "how payments will be processed"; that it is unclear whether McDonald's might need to install more video cameras; and there is no projection of how much time away from serving other customers it will require to serve Magee.[84]

These over-technical, hypothetical concerns with Magee's proposal do not demonstrate the absence of material fact on the reasonableness question. McDonald's cites no authority for the proposition that Magee's modification must have the "essential elements" that they describe. In

[79] PSAF ¶ 99 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 23].
[80] PSAF ¶ 83 [Tab "10" (Plaintiff's 56.1(b)(1) statement) - Deposition of Metairie Restaurant Franchisee, at 118:5-120:9].
[81] PSAF ¶ 84 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 23].
[82] Considering that single-plaintiff ADA cases involving the installation of wheelchair accommodations routinely involve tens of thousands of dollars of renovations, *see, e.g., Kreisler v. Second Ave. Diner Corp*., 731 F. 3d 184, 187 (2d. 2013), Magee's proposal that McDonald's expend approximately $120 a year in UberEats deliveries is comparatively modest.
[83] McDonald's took the videotaped deposition of Magee and knows what he looks like. PSAF ¶ 100 [Tab "16" (Plaintiff's 56.1(b)(1) statement) - Deposition of Scott Magee, pg. 5.].
[84] Def.'s Brief, pgs. 22-23.

order to prove his case, Magee is tasked with proposing a modification to McDonald's "policies, practices, or procedures." And he has done just that: he proposes that McDonald's field his phone call orders and then hand him the food out the front door.

While the simplicity of the idea speaks for itself, Magee commissioned experts to further refine it. Lori Bocklund, a telecommunications expert, explained how McDonald's could inexpensively set up an automated phone attendant that would prompt all callers to enter a pin code.[85] Once entered, the phone would ring inside the restaurant.[86] This system prevents telemarketers or spam phone calls and ensures only Magee (or other disabled people who are provided the pass code) can connect with the restaurant.[87]

To defeat a defendant's motion for summary judgment on the reasonable modification issue, a plaintiff "need only show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases." *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 401–02 (2002). This means that the modification is "plausible" or that it is feasible "at least on the face of things." *Id*. The standard does not require, as McDonald's suggests, that the plaintiff map out every iota of detail with regard to the accommodation. If it did, ADA defendants could endlessly object to trivial deficiencies and hypothetical concerns with every proposal.

b. **Magee's proposed modification does not pose a "direct threat" to McDonald's.**

[85] PSAF ¶ 71 [Tab "20" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's telecommunications expert Lori Bocklund, pg. 3 at ¶¶ 17-18].
[86] *Id*.
[87] Contrary to McDonald's arguments, Ms. Bocklund did not lack "specific details" as to which type of automated phone attendant could be used. Def.'s Brief, pg. 22. Instead, she stated that all of her proposals were low cost, and that precisely which one would be *lowest* cost would depend on the existing systems at the restaurant. PSAF ¶ 80 [Tab "11" (Plaintiff's 56.1(b)(1) statement) - Deposition of Magee's telecommunications expert Lori Bocklund, at 77:11-79:8].

McDonald's next argues that Magee's proposal is too dangerous. If a proposed modification poses a "direct threat' and "significant risk" to the health or safety of others, it need not be employed. 42 U.S.C. § 12182(b)(3); 28 C.F.R. § 36.208. Yet an ADA plaintiff is "not required to prove that he or she poses no risk." *Lovejoy–Wilson v. NOCO Motor Fuel, Inc*., 263 F.3d 208, 220 (2d Cir. 2001). "Because few, if any, activities in life are risk free, [the ADA does not] ask whether a risk exists, but whether it is significant." *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). "The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient." *Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 432 (6th Cir. 1999).[88] A party arguing the direct threat exception bears a "heavy burden," *Lockett v. Catalina Channel Exp., Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007), and the defense should be subject to a "rigorous objective inquiry." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 305 (3d Cir. 2007). "The existence, or nonexistence, of a significant risk must be [based on]…objective evidence." *Bragdon* at 649. The objective evidence must demonstrate the nature, duration, and severity of the risk and the ***probability*** that the potential injury will ***actually occur***. 28 C.F.R. § 36.208(c); *Emerson v. N. States Power Co*., 256 F.3d 506, 514 (7th Cir. 2001) (emphasis added).

The direct threat exception is an affirmative defense. To prevail on summary judgment McDonald's must "show that the evidence on the question of direct threat is so one-sided no reasonable jury could find for [plaintiff]." *Branham v. Snow*, 392 F.3d 896, 907 (7th Cir. 2004). It is not enough that McDonald's merely point to parts of the record it maintains are not in dispute;

[88] Like many ADA issues, much of the case law applying the direct threat defense occurs in the Title I context—however the elements of the defense apply equally across Titles II and III, *Dadian* at 841, and so Magee's brief cites cases dealing with all three Titles.

instead "it must lay out the elements of the [affirmative defense], cite the facts which it believes satisfies these elements, and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant on the claim." *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 601 (7th Cir. 2015).

McDonald's does not meet this burden. Its motion does not even stake out the elements of the direct threat exception, let alone establish them. The sole piece of evidence cited by McDonald's in support of its argument are the opinions of its safety expert, Michael D'Angelo, who merely opines that any time the door to the restaurant is unlocked it "elevates the risk [of] criminal activity."[89] This is precisely the type of conclusory and speculative risk the case law has rejected. McDonald's offers no objective evidence establishing the *actual* probability of a specific, imminent, and substantial harm that will follow from opening the door to serve Magee his food.[90]

---

[89] Def.'s Brief, pg. 23.

[90] Mr. D'Angelo cites to a single "study" in his report. The alleged study, entitled "2016 Restaurant Industry Crime & Security Measure Usage Trends" is the result of a poll conducted by a trade organization of various restaurant owners in the United States. PSAF ¶ 86 [Tab "12" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's security expert Michael D'Angelo, at 7:11-17].

The poll disclaims the results as not "definitive assessments" that are only based on a "limited study sample," and for which the authors cannot guarantee "the accuracy of the answers provided [to the poll]." PSAF ¶ 87 [Tab "13" (Plaintiff's 56.1(b)(1) statement) - Exhibit 2 to Deposition of McDonald's security expert Michael D'Angelo, pg. 3 at last paragraph]. Mr. D'Angelo was unaware of how the two organizations generated the information—he testified that he "believed it was more than a survey" but was unsure what other information might have been included. PSAF ¶ 91 [Tab "12" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's security expert Michael D'Angelo, at 10:13-11:21].

This poll is not "objective evidence." *Cf. Bragdon* at 652 (rejecting as objective evidence data that was not clearly a "scientific assessment of the risk to which the ADA refers" and because it did not explicitly "assess the level of risk" that was alleged by the defendant). Even if the poll was objective evidence, it does not establish the "statistical likelihood" that a McDonald's employee will be attacked when Magee goes to collect his food. At best, the poll establishes that 2.3 percent of restaurants are robbed per year and 45 percent of those robberies occur between midnight and six in the morning. The general phenomena of robbery is not objective evidence establishing the *specific nature* of a risk that is *imminent*. As Magee's expert observed, McDonalds' employees face significantly more risk opening their doors to the public

In fact, Magee's proposed accommodation incorporates security measures *already endorsed* by McDonald's. He proposes that McDonald's personnel use a "buddy system" whereby one person watches for threats via video camera, or by looking through the windows, while a second person delivers Magee his food and accepts payment.[91] [redacted]

The ADA would lose much of its potency if any defendant or other self-interested party could stop a claim in its tracks by merely offering conclusory opinions about the alleged dangers of a particular accommodation. McDonald's fails to establish the specific nature, duration, severity, or probability of the risk it claims exists when opening the door to serve Magee his food. For that reason, McDonald's does not meet their burden of establishing the direct threat defense.

c. **The costs of Magee's proposals are not out of proportion to their benefits.**

McDonald's next argues that the costs of Magee's proposals "significantly exceed [their] benefits" because they do not result in a net profit to McDonald's. Yet again, McDonald's stakes its argument to the wrong standard. The Seventh Circuit has held that an ADA-plaintiff must only

each day than they do serving Magee at nighttime. PSAF ¶ 92 [Tab "22" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's security expert Richard Sem, pg. 2 at ¶ 4(a); Tab "15" (Plaintiff's 56.1(b)(1) statement) - Deposition of Magee's security expert Richard Sem, at 106:3-107:2].

[91] PSAF ¶ 79 [Tab "22" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's security expert Richard Sem, pgs. 3-4 at ¶ 4(e)].

[92] Page 104 of the Safety and Security Chapter in the OT Manual reads: "If any manager or employee needs to go outside the restaurant after dark…the manager or employee should use the front lobby doors, wear a headset and be monitored by a second employee from inside the restaurant." PSAF ¶ 64 [Tab "17" (Plaintiff's 56.1(b)(1) statement) - Operations and Training Manual - Safety and Security Chapter Excerpts, Bates Number McD000848 at second to last bullet point].

[93] PSAF ¶ 81 [Tab "22" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's security expert Richard Sem, pgs. 3-4 at ¶ 4(e)].

show their proposed modification is *reasonably proportionate* to its cost; and, having made that showing, the defendant has the burden of proving that "the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health." *Vande Zande* at 542-3. Nowhere does this two-pronged analysis require that an accommodation be profitable to the business. None of the cases cited by McDonald's hold that, either.

Magee establishes facts that suggest his proposed modification is proportional to its costs. By even McDonald's inflated estimates,[94] he is still proposing a modification that is well below the costs that are common in ADA remediation cases. *See, e.g., Kreisler v. Second Ave. Diner Corp*., 731 F. 3d 184, 187 (2d. 2013) (between $10,000 and $20,000 to install a ramp and renovate a bathroom); *Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth*., 635 F.3d 87, 90 (3d Cir. 2011) (more than $800,000 to install an elevator); *Rodriguez v. Barrita, Inc*., 10 F. Supp. 3d 1062, 1072 (N.D. Cal. 2014) (roughly $46,000 to make a restaurant accessible to a wheelchair-bound patron).[95]

---

[94] McDonald's claims that the cost of taking Magee's order over the telephone will be $1,340 a year, "$800 for the necessary Internet service" and "$540 for the automated call solution." But the restaurants already all have internet connections. PSAF ¶ 74 [Tab "10" (Plaintiff's 56.1(b)(1) statement) - Deposition of Metairie Restaurant Franchisee, at 23:7-9; Tab "7" (Plaintiff's 56.1(b)(1) statement) - Deposition of Oakland Restaurant Franchisee, at 30:24-31:5. Tab "14" (Plaintiff's 56.1(b)(1) statement) - Deposition of San Francisco Restaurant Franchisee, at 46:14-17.].

So McDonald's is essentially pretending—just to make their argument, not based on the facts as they know them to exist at their restaurants—that no internet exists, and hence the extra $800 dollars. With regard to the $540 for the automated call solution, Ms. Bocklund explained that at least one of the services, offered through Amazon, has no upfront charge and is "pay as you go." PSAF ¶ 77 [Tab "20" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's telecommunications expert Lori Bocklund, pgs. 4-5 at ¶ 25]. Not only that, it costs literally *pennies* per minute of talk time. PSAF ¶ 78 [Tab "20" (Plaintiff's 56.1(b)(1) statement) - Expert Report of Magee's telecommunications expert Lori Bocklund, pgs. 4-5 at ¶ 25].

[95] It is worth noting that McDonald's repeatedly suggests Magee asks the *franchisees* to reimburse him for the costs of food delivery. This is inaccurate. Magee proposes that McDonald's itself do so.

Even if we accept McDonald's inflated $1,340 a year cost-of-service estimate, McDonald's does not demonstrate why it is "excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health." *Vande Zande* at 542-3. [redacted][96] [redacted][97] [redacted] And if we were to use the actual costs of Magee's proposal—not McDonalds's inflated costs—the percentage would be even more infinitesimal.[98] *Cf. Berthiaume v. Doremus*, 998 F. Supp. 2d 465, 476 (W.D. Va. 2014) (finding that modifications that cost one percent of defendant's revenue were not unreasonable).

d. **Magee's proposal is not a "fundamental alteration" of McDonald's business.**

A public accommodation need not modify its policies to serve a disabled individual if it can demonstrate that such modification "would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodation[.]" 42 U.S.C.§ 12182(b)(2)(A)(ii). Whether a proposed modification is a "fundamental alteration" is an affirmative defense, *Lentini*

[96] PSAF ¶ 85 [Tab "1" (Plaintiff's 56.1(b)(1) statement) - Metairie Restaurant Franchise Agreement, Bates Number McD000374 at 8(a); Tab "2" (Plaintiff's 56.1(b)(1) statement) - Oakland Restaurant Franchise Agreement, Bates Number McD000868 at 8(a); Tab "3" (Plaintiff's 56.1(b)(1) statement) - San Francisco Restaurant Franchise Agreement, Bates Number McD000899 at 8(a); Tab "24" (Plaintiff's 56.1(b)(1) statement) - Exhibit Record of McDonald's income from the Metairie, San Francisco, and Oakland Restaurants, Bates Number McD000810].

[97] *Id*.

[98] It is also a fraction of the cost of McDonald's economist expert—ironically the person who they relied on to formulate their argument. As of the day of the deposition, McDonald's had paid Dr. Stephen Bronars "between $50,000 and $60,000 dollars." PSAF ¶ 101 [Tab "23" (Plaintiff's 56.1(b)(1) statement) - Deposition of McDonald's economist Stephen Bronars, at 45:8-24]. Assuming it was $55,000, that is enough to pay for 11,000 UberEats deliveries, or 41 years of the $1,340 annual fees McDonald's claims that Magee's phone proposal costs.

at 845, that the Supreme Court has observed is "an intensively fact-based inquiry." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 673 (2001). As noted above, a defendant urging summary dismissal based on an affirmative defense has the burden of "demonstrat[ing] why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant on the claim." *Hotel 71* at 601.

McDonald's does not meet this burden. It does not explain specifically how a "new process to identify Magee" would cause drive-thru employees to "abandon" drive-thru related duties. It does not explain how serving Magee—like any other customer—would meaningfully impact the drive-thru operation in any way. Unlocking the door for Magee is not an alteration of the essential service that McDonald's provides: fast food at a low price.

In *Martin*, the Supreme Court was tasked with deciding whether the use of a golf cart in a golf tournament (rather than walking the course) constituted a fundamental alteration of the tournament under Title III. *Martin* at 663. The Supreme Court first considered what it thought would be "fundamental alterations"—changes that might give an advantage to the disabled person and thus "an advantage over others and therefore fundamentally alter the character of the competition." *Id*. The court then found that "[t]he use of carts is not inconsistent with the fundamental character of golf, the essence of which has always been shotmaking. The walking rule contained in petitioner's hard cards is neither an essential attribute of the game itself nor an indispensable feature of tournament golf." *Id*.

Here, the essential element of McDonald's food service has nothing to do with the drive-thrus or serving customers in cars. The essence of what McDonald's does is prepare a limited number of food items in quick fashion for a low price. Service to customers in cars is neither an "essential attribute" or "indispensable feature" of McDonald's fast food service. McDonald's fails

to offer concrete, specific evidence that serving Magee through the front door would work to be a fundamental alteration and so their motion should be denied.[99]

4. **Seventh Circuit Caselaw Does Not Require Dismissal of Magee's Case.**

McDonald's next argues that because Magee can use a food delivery service or ask his family for a car ride, he (1) already has "meaningful access" to the McDonald's restaurants and (2) McDonald's is not discriminating against him "on the basis of" his disability. These arguments conflate two related, but distinct legal principles; and wrongly give the impression that Magee must meet two different standards when in reality he must meet only one. Applying the single, correct standard undermines McDonald's arguments and reinforces this Court's prior decision in denying McDonald's motion to dismiss.

a. Meaningful Access

The phrase "meaningful access" was coined by the Supreme Court in the context of the Rehabilitation Act in *Alexander v. Choate* 469 U.S. 287 (1985). The Court found that meaningful access was denied when eligibility for a service relied on "criteria that [had] a particular exclusionary effect on the handicapped…[and] distinguish[ed]…on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having." *Id*. at 302. The 7th Circuit has since observed that it "follow[s] the corollary principle implicit in the *Choate* decision that the Rehabilitation Act helps disabled individuals obtain access to benefits only when they would have difficulty obtaining those benefits "by reason of" their disabilities, and not because of some quality that they share generally with the public." *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee,* 465 F.3d 737, 748 (7th Cir. 2006).

[99] Magee's case is also distinguishable from *Roberts By & Through Rodenberg-Roberts v. KinderCare Learning Centers, Inc*., 86 F.3d 844 (8th Cir. 1996), where a very small Minnesota child daycare would have had to hire an additional employee solely to watch the plaintiff's disabled child, at a net loss to the defendant of $100 dollars a week.

Neither *Choate*, nor *City of Milwaukee*, nor any case cited by McDonald's relies on the concept of "meaningful access" to decide a Title III case. All of the authority cited by McDonald's are Rehabilitation Act or Title II cases—both of which deal with access to government services and neither of which has a standalone reasonable accommodation requirement. *See A.H. by Holzmueller v. Illinois High Sch. Ass'n*, 881 F.3d 587, 592 (7th Cir. 2018) (explaining that unlike Title III, the Rehabilitation Act and Title II of the ADA do not have a statutory reasonable accommodation requirement).

While "meaningful access" is a valid concept in the realm of disability rights law, it is not a separate and distinct burden for Title III claimants to establish—as McDonald's suggests that it is. Rather, it is only analogous to the *actual* burden Magee must carry: that McDonald's discriminates against him "on the basis of" his disability.

b. *A.H.* and "on the basis of disability"

McDonald's defense that Magee's can access their restaurants by paying for delivery or hitching a ride from a family member are properly analyzed in the context of *A.H. by Holzmueller*. In *A.H.*, the 7th Circuit acknowledged that an ADA claimant must establish a public accommodation discriminates "on the basis of" the claimant's disability. *Id*. at 592. This is referred to as the "but for causation test." *Id*. at 593.

McDonald's argument that *A.H.* forecloses Magee's claim was recently and persuasively rejected by another court in this District. In *Morey v. McDonald's* No. 18-1137, slip op. at 2 (N.D. Ill. Nov. 26, 2018), the plaintiff alleged the same facts Magee does here: that she is visually impaired and unable to operate motor vehicle—and thus unable to access McDonald's drive-thru only restaurants. McDonald's argued that the plaintiff could pay a taxi or ask a friend to help provide her access to the drive-thru. *Morey* slip op. at 9. The *Morey* court was not convinced.

"McDonald's argument equating visually impaired people to children or those without cars or proposing that Morey can get food by asking a friend or car service to drive her runs counter to the goals of the ADA." *Id*. The *Morey* court further found that "McDonald's misconstrues the appropriate causation test: but for her disability, would Morey be able to access the drive-thru like any other sighted person—in other words, someone who can drive," *Morey* at 8; and further that "Morey would likely be able to access McDonald's late-night menu via automobile but-for her visual impairment." *Morey* slip op. at n. 5.

While *Morey* was decided at the briefing stage, the same result should apply here. McDonald's has introduced no evidence that Magee would not be able to drive a car but-for his disability. To the contrary, Magee has offered evidence that he actually leases and insures a car that his girlfriend drives. [100] In *A.H.*, the plaintiff had to establish he would have been one of the fastest runners in the state if he were not disabled. That is a far different question than establishing Magee could drive a car were he not blind. Thus, *A.H.* does not foreclose Magee's claim as a matter of law or fact.

5. **Magee Does Not Lack Standing to Bring His Claims**.

That Magee decided to go to California and confront a number of inaccessible restaurants as the general public surely gawked does not make his injury "self-inflicted" and his case worthy of summary dismissal. It makes him a courageous person and an apt champion for the rights of those who have suffered the same wrong. To dismiss a civil rights claim because the plaintiff sought to confront discrimination in order to test its legality in our court systems is an unpersuasive

[100] PSAF ¶ 18 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 22].

and dangerous argument, unsurprisingly without support among any of the cases cited by McDonald's.

An Unruh Act plaintiff can establish standing by showing they personally encountered an ADA violation on a "particular occasion" which caused them "difficulty, discomfort, or embarrassment." *Hernandez v. Polanco Enterprises, Inc*., 624 F. App'x 964, 965 (9th Cir. 2015). An intent to return to the site of discrimination is not necessary to make a damages claim under the Unruh Act. *Id*. "As long as Magee is seeking only damages on the basis of his actual past encounters with these restaurants, the court does not see any standing bar." *Magee v. McDonald's Corp*., No. 16-5652, slip op. at 5 (N.D. Ill. Feb. 15, 2017).

Before he approached each California restaurant and was turned away, Magee could not have known, absolutely, that they would not serve him.[101] And while he was aware that California might afford him laws to obtain better redress for himself and class members,[102] this is not a basis to find Magee has no standing—because it does not change the fact that Magee encountered a barrier to access that made him uncomfortable. There is no dispute that Magee visited the McDonald's restaurants in California and was unable to access them due to the lack of any accessible ordering policy.[103] There is also no dispute that, in light of his inability to access the restaurants, he felt "frustrated" and "angry."[104] Taken together, these facts establish that Magee has standing to bring his claims.

---

[101] One California restaurant, not involved in this litigation, in fact served Magee—albeit through the drive-thru. PSAF ¶ 102 [Tab "16" (Plaintiff's 56.1(b)(1) statement) - Deposition of Scott Magee, at 92:16-20].
[102] PSAF ¶ 21 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 18].
[103] PSAF ¶¶ 23-25 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 21].
[104] PSAF ¶ 26 [Tab "6" (Plaintiff's 56.1(b)(1) statement) - Declaration of Scott Magee, pg. 3 at ¶ 21].

Respectfully submitted,

/s/ Roberto Luis Costales
Roberto Luis Costales (#33696)
William H. Beaumont (#33005)
BEAUMONT COSTALES LLC
3151 W. 26th Street, Second Floor
Chicago, Illinois 60623
Tel: (773) 831-8000
rlc@beaumontcostales.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2019, I served a copy of the foregoing on counsel for Defendants via the Court's CM/ECF system.

/s/ Roberto Luis Costales