IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-00865-MSK-BNB

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation,
LAURA HERSHEY,
CARRIE ANN LUCAS,
HEATHER REBEKAH RENEE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS
ADRIANNE EMILY MONIQUE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS,
ASIZA CAROLYN KOLENE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS, and
DANIEL WILSON,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO,

Defendant and Third Party Plaintiff,

v.

SEMPLE BROWN DESIGN, P.C.,

Third Party Defendant.

PLAINTIFFS' UNOPPOSED MOTION FOR CLASS CERTIFICATION

Plaintiffs Laura Hershey, Carrie Ann Lucas, and Daniel Wilson ("Named Plaintiffs"), by and through their attorneys, hereby move for class certification.

INTRODUCTION

Plaintiffs -- individuals who use wheelchairs and scooters, a family member, and the Colorado Cross Disability Coalition ("CCDC") -- filed suit against Defendant/Third Party

Plaintiff the City and County of Denver (the "City"), the owner and operator of the Ellie Caulkins Opera House ("Opera House") alleging violations of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (the "ADA"), and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the "Rehabilitation Act"), and the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-601 *et seq.* ("CADA") at the City-owned and operated Opera House. Plaintiffs allege that the Opera House contains certain barriers that prevent full use and enjoyment by individuals who use wheelchairs or scooters.

The parties have negotiated in good faith and reached a settlement which they have memorialized in a Class Action Settlement Agreement, preliminary approval of which is sought in a motion filed simultaneously with this one. As part of the settlement, the parties agreed that it would be appropriate to seek certification of a class action. As such, Plaintiffs respectfully request this Court to certify the following class

> all persons with disabilities who are currently or have been in the past four years residents of the State of Colorado who use wheelchairs or scooters for mobility who, within four years prior to the filing of the complaint in this Lawsuit, were denied or are being denied, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the Ellie Caulkins Opera House.

ARGUMENT

Class Certification is Appropriate in this Case

A class should be certified if it meets the numerosity, commonality, typicality and adequate representation requirements of Rule 23(a) of the Federal Rules of Civil Procedure and also falls within one of the three subdivisions of Rule 23(b). The proposed class meets Rule 23(a) and certification is appropriate pursuant to Rule 23(b)(2).

As an overview, numerous courts have certified classes of individuals with disabilities challenging inaccessible architectural elements, equipment, or facilities.[1]

A. The Proposed Class Meets the Requirements of Rule 23(a).

Rule 23(a) requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. The proposed class in the case at bar meets these requirements.

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[1] *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001) (affirming certification of class of individuals with varying disabilities challenging barriers and policies at prison facilities in California); *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997) (affirming certification of a class of blind and mobility-impaired individuals challenging accessibility of polling places); *Lucas v. Kmart Corp.*, Civil Action No. 99-cv-1923-JLK, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (certifying nationwide class of people who use wheelchairs challenging barriers and policies at 1,500 retail stores) & 2006 WL 722163 (D. Colo. Mar. 22, 2006) (certifying damages subclasses in seven states); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004) (certifying statewide class of people who use wheelchairs challenging barriers and policies at approximately 220 restaurants); *Nat'l Org. on Disability v. Tartaglione*, No. Civ. A. 01-1923, 2001 WL 1258089, at *5 (E.D.Pa. Oct. 22, 2001) (certifying class of blind and mobility-impaired individuals and organizations representing same challenging accessibility of voting machines and polling places); *Access Now, Inc. v. AHM CGH, Inc.*, Case Number: 98-3004 CIV, 2000 WL 1809979, at *6 (S.D. Fla. Jul. 12, 2000) (certifying a class of individuals with all disabilities challenging barriers at a chain of health care facilities); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group*, Ltd., 197 F.R.D. 522, 530 (S.D. Fla. 2000) (same); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 363 (D. Colo. 1999) (certifying class of people who use wheelchairs challenging barriers at approximately 42 restaurants); *Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (certifying class of deaf individuals challenging accessibility of municipal 911 and street alarm box system); *Bacal v. Southeastern Pa. Transp. Auth.*, Civil Action No. 94-6497, 1995 WL 299029, at * 6 (E.D. Pa. May 16, 1995) (certifying class of individuals who use paratransit services challenging discrimination in the provision of such services); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 458 (N.D. Cal. 1994) (certifying statewide class of people who use wheelchairs challenging barriers at a chain of movie theaters).

1. The Proposed Class Is So Numerous That Joinder Is Impracticable.

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. There are a number of factors that are relevant to whether joinder is impracticable, including the class size, the geographic diversity of class members, the relative ease or difficulty in identifying members of the class for joinder, the financial resources of class members and the ability of class members to institute individual lawsuits. *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 357 (D. Colo. 1999) (hereinafter "*CCDC v. Taco Bell*"); *see also Anderson v. Dep't of Pub. Welfare*, 1 F. Supp. 2d 456, 461-62 (E.D. Pa. 1998); 1 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* ("*Newberg*") § 3:6 (4th ed. 2008) (and cases cited therein). Each of these factors show that joinder is impracticable in the case at hand.

The class is large. In determining class size, the exact number of potential members need not be shown. *See, e.g., Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986). Rather the court may make "common sense assumptions" to support a finding that joinder would be impracticable. *Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 632 (S.D.N.Y. 1996); *see also* 1 Newberg § 3:3 (and cases cited therein). "Census data are frequently relied on by courts in determining the size of proposed classes." *CCDC v. Taco Bell*, 184 F.R.D. at 358.

Here, both parties agree that the class is large. Census figures demonstrate that there are approximately 15,369 noninstitutionalized persons age 16 or older in Colorado who use wheelchairs. *See* Table 3, "Selected Population Characteristics for States and Counties Including Model-Based Estimates of the Prevalence of Specific Disabilities Among Persons 16 and Over,"

Household Survey Data on Employment and Disability, June 26, 1996, United States Department of Commerce, Bureau of the Census at 3.[2] This number does not include institutionalized persons who use wheelchairs, persons under the age of 16 who use wheelchairs, or persons who use scooters for mobility, all of whom are also members of the proposed class.

The proposed class is also geographically diverse. "The fact that a class is dispersed over several counties weighs in favor of a finding of numerosity." *CCDC v. Taco Bell*, 184 F.R.D. at 358 (citation omitted). In the case at hand, the proposed class -- like the class in *CCDC v. Taco Bell* -- covers the entire state of Colorado and thus joinder would be difficult or impossible.

The class members are difficult to identify. Of particular import where, as here, the class consists of persons with disabilities impacted by architectural barriers, joinder is impracticable where it is very difficult to identify individual class members. *See, e.g., id.* at 358-59; 1 *Newberg* § 3:5 (and cases cited therein). In *Arnold v. United Artists Theatre Circuit, Inc.*, for example, the court held that "by the very nature" of the class of persons with disabilities affected by the defendant's architectural barriers, its members were "unknown" and could not be "readily identified" and thus joinder of class members was impracticable. 158 F.R.D. 439 (N.D. Cal.), *modified*, 158 F.R.D. 439, 448 (1994).

For these reasons, the class is so numerous that joinder is impracticable and thus satisfies Rule 23(a)(1).

2. The Class Members Share Common Questions of Law and Fact.

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[2] *Available at* http://www.census.gov/hhes/www/disability/census/tables/tab3us.html (last visited Oct. 1, 2008).

Rule 23(a)(2) requires that there be questions of law or fact common to the class. This does not mean that every issue must be common to the class so long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory. *Joseph*, 109 F.R.D. at 639-40. "Where a class of persons sharing a common disability complain of the identical architectural barrier based on the same alleged violations of law, commonality is unquestionably established." *CCDC v. Taco Bell*, 184 F.R.D. at 359. As the court in *Arnold* stated:

> Inadequate wheelchair accommodations at particular theaters are very likely to affect all wheelchair-users in the same way . . . Thus the state of such accommodations at defendant's various theaters, and the legal adequacy of those accommodations, are issues of fact and law common to all those disabled persons affected by them.

Id., 158 F.R.D. at 449. Similarly, *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D. Cal. 2004), challenged the accessibility of a number of architectural elements in a chain of restaurants. The court held, in certifying the class, that "the state of such elements at Defendant's restaurants, and the legal adequacy of such elements, are issues of fact and law common to all class members." *Id.* at 609; *see also Lucas v. Kmart Corp.*, Civil Action No. 99-cv-1923-JLK, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) & 2006 WL 722163, at *2 (D. Colo. Mar. 22, 2006) (holding that individuals who use wheelchairs challenging accessibility of Kmart stores nationwide shared common issues of law and fact).

Like the classes certified in *CCDC v. Taco Bell*, *Arnold*, *Moeller*, and *Lucas*, the proposed class in this case shares many issues of fact and law: (1) the class complains of the same architectural barriers and practices; (2) Plaintiffs allege that by these architectural barriers and practices, Defendant discriminated against all members of the class; and (3) the

determination of whether these barriers and practices violate the ADA, the Rehabilitation Act and the CADA is the same whether there is one plaintiff or a class of plaintiffs. Nor are there individual questions of law or fact. Thus the class meets the requirements of Rule 23(a)(2).

3. The Claims of Named Plaintiffs Are Typical of the Claims of the Class.

Rule 23(a)(3) requires that the claims asserted by the representative plaintiff be typical of the claims of the class. According to the Tenth Circuit, "the typicality requirement is ordinarily not argued. . . . It is to be recognized that there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the other class members are based on the same legal or remedial theory." *Penn v. San Juan Hosp., Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975).

> In this case, the Named Plaintiffs and the members of the class have
>
> disabilities which, although not identical, require the use of a wheelchair or scooter for mobility. Thus, the effect of the disability is shared by all class members. Further, the representative plaintiffs contest the legality of architectural barriers under the same statutes as the class. [T]herefore . . . the claims of the representative plaintiffs are typical of the class.

CCDC v. Taco Bell, 184 F.R.D. at 360; *see also Lucas*, 2005 WL 1648182, at * 3 (holding that where the focus of an ADA lawsuit is final injunctive relief against the defendant benefitting the class as a whole, "the prerequisites of commonality and typicality are met"); *Arnold*, 158 F.R.D. at 450 ("Indeed, in a public accommodations suit such as this one where disabled persons challenge the legal permissibility of architectural design features, the interests, injuries, and claims of the class members are, in truth, identical such that *any* class member could satisfy the typicality requirement for class representation."); *Civic Ass'n of the Deaf*, 915 F. Supp. at 633

(Finding typicality where the representative plaintiffs, "like every other member of the proposed Class, are or represent deaf or hearing-impaired individuals. As a result of removal of the street alarm boxes, the members of the Class have had or will have impaired their ability to report fires from City streets.").

The Named Plaintiffs in the case at bar, like the members of the proposed class, use a wheelchair or scooter for mobility (*see* Decl. of Carrie Ann Lucas ¶ 2; Decl. of Laura Hershey ¶ 2; Decl. of Daniel Wilson ¶ 2), allege the same form of discrimination as all class members, and bring claims identical to those of the class. Therefore the proposed class meets the typicality requirement of Rule 23(a)(3).

4. Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

The final requirement of Rule 23(a), adequate representation, requires that the representative plaintiffs have common interests with the class members and that the representative plaintiffs vigorously prosecute the interests of the class through qualified counsel. *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 386 (D. Colo. 1993). Adequate representation is usually presumed in the absence of contrary evidence. *Id.* (quoting 2 Newberg § 7.24 at 7-80 to -81).

Named Plaintiffs, like the members of the proposed class, seek redress for the architectural barriers and practices that discriminate against them and the class members. Thus the interests of Named Plaintiffs do not conflict with those of the class. In addition, Named Plaintiffs and their counsel have prosecuted the interests of the class vigorously. Named Plaintiffs have sought broad relief since the inception of the lawsuit and the City has been

forthcoming in providing extensive discovery concerning the conditions at the Opera House. In many ways, this case has been litigated as a class action throughout.

Plaintiffs' counsel are qualified to represent the class. Kevin Williams, who is the Legal Program Director of the Colorado Cross Disability Coalition, graduated third in his class from the University of Denver College of Law in 1996, has been published on the topic of the ADA, and was the Co-Chair of the Colorado Bar Association Disability Law Forum Committee. Mr. Williams has extensive experience litigating under the ADA and other civil rights legislation. (Decl. of Kevin W. Williams ("Williams Decl.") ¶¶ 3-4.) Mr. Williams is thoroughly familiar with issues concerning people with disabilities because he is a tetraplegic and has used an electric wheelchair for over 20 years. (Williams Decl. ¶ 5.)

Amy Robertson, of the undersigned law firm of Fox & Robertson, graduated from Yale Law School in 1988. (Declaration of Amy F. Robertson ("Robertson Decl.") ¶¶ 2-3.) After clerking for the Hon. Richard L. Williams of the United States District Court for the Eastern District of Virginia, Ms. Robertson worked in the litigation departments at the law firms of Dorsey & Whitney in Minneapolis, Wilmer, Cutler & Pickering in Washington, D.C., and Rothgerber, Appel, Powers & Johnson LLP in Denver. (*Id*. ¶¶ 3.) Ms. Robertson co-founded Fox & Robertson in 1996 and has litigated extensively under the ADA and other civil rights legislation since that time. (*Id.* ¶¶ 4-5.)

Fox & Robertson has been certified as class counsel in at least seven previous cases, including five cases before the District of Colorado in which Mr. Williams was also certified as class counsel. *Commonwealth of Mass. v. E*TRADE Access, Inc.*, Civil Action No. 03-11206-MEL (D. Mass. Dec. 7, 2007) (settlement class addressing accessibility to blind people of

defendant's automatic teller machines nationwide); *Lucas v. Kmart*, 99-cv-01923-JLK, 2005 WL 1648182 (D. Colo. Jul. 13, 2005) (certifying nationwide injunctive class addressing ADA violations in over 1,400 Kmart stores) & 2006 WL 722163 (D. Colo. Mar. 22, 2006) (certifying damages subclasses in seven states); *Moeller,* 220 F.R.D. 613-14 (certifying class addressing ADA violations at over 220 Taco Bell restaurants in California); *Ehman v. Home Builders Ass'n of Denver*, Civil Action No. 01-cv-01522-EWN-BNB (D. Colo. 2003) (addressing ADA violations at the Parade of Homes); *CCDC v. Taco Bell*, 184 F.R.D. at 363 (addressing ADA violations at over 40 Taco Bell restaurants in Colorado); *Farrar-Kuhn v. Conoco, Inc.*, Civil Action No. 99-cv-2086-MSK (D. Colo.) (addressing ADA violations at approximately 120 service stations in approximately six states); *Colo. Cross-Disability Coalition v. Fey Concert Company*, Civil Action No. 97-cv-1586-ZLW (D. Colo.) (addressing ADA violations at a Denver concert venue). (Robertson Decl. ¶ 5; Williams Decl. ¶ 4.)

For the reasons set forth above, the proposed class satisfies the requirements of Rule 23(a).

B. The Proposed Class Is Proper Under Rule 23(b)(2).

A class is proper under Rule 23(b)(2) if the party opposing the class "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . ." and the representatives are seeking "final injunctive relief or corresponding declaratory relief." Indeed, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (quoting Adv. Comm. Notes, 28 U.S.C. App., at 697). Cases such as this one "provide[ ] a paradigm for class

certification under Rule 23(b)(2) . . .." *Lucas*, 2005 WL 1648182, at * 2; *see also Arnold*, 158 F.R.D. at 452 (holding that classes of individuals with disabilities challenging architectural barriers are "paradigm[s] of the type of action for which the (b)(2) form was created").

"A class action in which all members of the class complain of the identical architectural barrier necessarily involves acts that are generally applicable to the class." *CCDC v. Taco Bell*, 184 F.R.D. at 361 (citing *Arnold*, 158 F.R.D. at 452, and *Civic Ass'n of the Deaf*, 915 F. Supp. at 634). Indeed, the Advisory Committee Notes to the 1966 amendment to Rule 23 demonstrate that subdivision (b)(2) was intended to reach precisely the type of class proposed here: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."

In the case at bar, Plaintiffs allege that Defendant's architectural barriers and practices discriminate against all persons who use wheelchairs and scooters and thus that Defendant has acted in a manner applicable to the entire class. Further, the members of the class are incapable of specific enumeration. Finally, Plaintiffs seek injunctive and declaratory relief -- but not monetary relief -- on behalf of the class. Therefore the class should be certified under Rule 23(b)(2).

CERTIFICATE REQUIRED BY LOCAL RULE 7.1(A)

The undersigned certifies that she has conferred with counsel for the other parties to this matter and that they do not oppose this motion.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court:

1. Certify the following class:

> all persons with disabilities who are currently or have been in the past four years residents of the State of Colorado who use wheelchairs or scooters for mobility who, within four years prior to the filing of the complaint in this Lawsuit, were denied or are being denied, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the Ellie Caulkins Opera House.

2. Certify Laura Hershey, Carrie Ann Lucas, and Daniel Wilson as class representatives; and

3. Certify Amy F. Robertson and Kevin W. Williams as class counsel.

Respectfully submitted,

FOX & ROBERTSON, P.C.

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Dated: October 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2008, I electronically filed the foregoing document and associated declarations with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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