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

FRANCIE E. MOELLER et al, Plaintiffs, v. TACO BELL CORP., Defendant.	No. C 02 5849 MJJ ADR **DEFENDANT'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** **Date: October 21, 2003** **Time: 9:30 a.m.**

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ISSUE

Whether plaintiffs have satisfied the requirements of Rule 23(a) and (b) for certification of a class action.

INTRODUCTION

Plaintiffs seek to certify a class of mobility-impaired individuals who have allegedly been denied "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations" in any of the 220 company-owned Taco Bell restaurants scattered throughout the entire state of California. Using a broadbrush, one-size-fits-all approach, plaintiffs attempt to sweep in all so-called "accessibility barriers" in each and every one of the 220 restaurants. Included in plaintiffs' definition of such "accessibility barriers" is a laundry list encompassing every conceivable alleged violation of the Americans With Disabilities Act ("ADA"), the Unruh Act, and/or the California Disabled Persons Act ("CDPA")—ranging from parking spaces to front entrances to accessible seating to queue lines to dining rooms to condiment and drink dispensers to restrooms. Through the class action mechanism, plaintiffs attempt to cast a single dragnet over 220 distinct facilities with varying construction designs or styles, interior layouts, and dates of construction or renovation—some having been built after the ADA, some predating the ADA, and others having been remodeled since the ADA, thereby triggering different legal standards. Plaintiffs' Motion for Class Certification to redress alleged injuries isolated to a cluster of restaurants in northern California by a small, finite, and identifiable group of individuals should be denied.

RELEVANT FACTS

Taco Bell owns and operates approximately 220 restaurants within the state of California. Azalde Decl. ¶2 (Ex. A to Goh Decl.)[1]. Most of these restaurants were designed according to dozens of different prototypes, each with different layouts and architectural features. *Id.* Typically, Taco Bell rolled out a new prototype once a year. Azalde depo. at 28:11-12 (Ex. B to Goh Decl). Each prototype incorporates general

[1] Unless otherwise specified, all references to exhibits are to Exhibits to the Declaration of Jim Goh ("Goh Decl."), filed concurrently with this Response.

accessibility standards, but is further adapted by local consultants, architects and construction managers prior to the completion of the building. Azalde Decl. ¶3. Thus, even within each particular prototype, there can be significant architectural variations from store to store. *Id.* Due to these site-specific adaptations, no two Taco Bell restaurants are identical in all major respects. *Id.*

Some restaurants, however, were not even designed according to any prototype. These include "in line" restaurants that are not standalone buildings but are built within an existing structure such as a high-rise building or a shopping center, as well as "conversion" restaurants that were converted from a preexisting structure such as a bank or another fast food restaurant. *Id.* at ¶4. In California, Taco Bell operates numerous "conversion" restaurants, principally due to its purchase of the Pup N' Taco chain of fast food restaurants. These restaurants do not conform to any Taco Bell prototype and vary dramatically from one store to the next. *Id.* at ¶5.

Aside from the variations in architectural features, Taco Bell's restaurants in California have vastly different dates of construction and occupancy—ranging from the 1960's to the present. Some of these restaurants were built and occupied prior to January 26, 1993—the date of the enactment of the ADA; others were built and occupied after the ADA enactment date. Additionally, some of the pre-ADA restaurants have undergone various degrees of renovations after January 26, 1992. Ex. 3 to Fox Decl.

The four named plaintiffs in this case have identified a host of restaurants located within, or in proximity to, the San Francisco bay area. Plaintiffs allege that they have encountered multiple "accessibility barriers" in each of those restaurants, and have identified a long laundry list of such alleged barriers, including inaccessible queue lines, heavy doors, insufficient accessible seating, non-conforming toilets, inadequate or non-existent signage, inaccessible condiment and drink dispensers and non-compliant

parking stalls.[2] While plaintiffs contend that they have experienced difficulties with access, none of them has any evidence that the alleged accessibility barriers violated the ADA or the California statutes.

Taco Bell denies that the alleged accessibility barriers constitute a violation of the ADA or the California statutes. Notwithstanding the lack of merit in plaintiffs' claims, the almost-infinite variations in design, layout and architectural features that distinguish one restaurant from another, and the vastly different dates of construction and renovation present individualized, store-specific factual and legal issues so as to preclude a finding of commonality or typicality. Plaintiffs have also failed to establish that the putative class is so numerous that joinder is impracticable, or that they are adequate class representatives. Finally, plaintiffs have failed to show that they meet the requirements of Rule 23(b). For all these reasons, plaintiffs' motion to certify a class should be denied.

ARGUMENT

I. PLAINTIFFS CANNOT PROVE THAT CERTIFICATION IS PROPER UNDER RULE 23(a).

Fed. R. Civ. P. 23 sets forth a two-part test for the maintenance of a class action. First plaintiffs must satisfy the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation.[3] Second, one of the three subsections of Rule 23(b) must also be satisfied.[4] *Amchem Prods., Inc. v. Windsor*, 521

[2] Plaintiffs warn that this laundry list might get even longer once they embark on substantive discovery. Plaintiffs' Motion for Class Certification, at 7.

[3] Subsection (a) of Rule 23 contains four prerequisites: (1) the class is so numerous that joinder 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 and defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

[4] In this action, plaintiffs seek to certify their class under either Rule 23(b)(2), which provides: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

U.S. 591, 614 (1997). The United States Supreme Court has required district courts to conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). A trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

Plaintiffs bear the burden of proving that all the requirements for class certification are met. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988) ("A party seeking to certify a class is required to show 'under a strict burden of proof, that all the requirements of 23(a) are clearly met.'"). As one court aptly stated: "It is neither practical nor prudential to engage the powerful machinery of a class action on the basis of a hypothetical." *Reed*, 849 F.2d at 1311. After *Falcon*, courts will not presume that the elements of Rule 23 are satisfied. *Sheehan v. Purolator, Inc.*, 103 F.R.D. 641, 648 (E.D.N.Y. 1984), *aff'd*, 839 F.2d 99 (2d Cir.1988), *cert. denied*, 488 U.S. 891 (1988). Although an inquiry into the merits of the claims of the representative or the class is inappropriate when making the decision whether the action should be certified under Rule 23, the court is "'at liberty' to consider evidence that relates to the merits if such evidence also goes to the requirements of Rule 23." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

A. Plaintiffs Cannot Satisfy The "Commonality" Requirement of Rule 23(a)(2).

To satisfy Rule 23(a)(2), there must be issues of law or fact common to the class. *E.g. Kohn v. American Hous. Found., Inc.*, 178 F.R.D. 536, 540 (D. Colo. 1998). "After *Falcon*, a general question of class-based discrimination . . . is not enough for commonality . . .. Plaintiffs cannot 'simply leap from the premise that they were the victims of discrimination to the position that others must also have been.'" *Stambaugh*

v. Kan. Dep't of Corr., 151 F.R.D. 664, 674 (D. Kan. 1993) (citing *Morrison v. Booth*, 763 F.2d 1366, 1371 (11th Cir. 1985)). The requirement of commonality is not satisfied by asserting, as plaintiffs do, the broad issue of whether or not Taco Bell's policies and practices, or lack thereof, have violated the accessibility laws. Plaintiffs' Motion at 19-20. *See, e.g.*, *Falcon*, 457 U.S. at 158; *Wheeler v. City of Columbus*, 703 F.2d 853, 855 (5th Cir. 1983) ("Discrimination in its broadest sense is the only question alleged common to [plaintiff] and to the Class sought to create and represent. Under *Falcon*, this is not enough.").

Rather, plaintiffs must make a "specific presentation identifying the questions of law or fact that [are] common to the claims of the plaintiff and of the members of the class." *Falcon*, 457 U.S. at 158. In other words, plaintiffs must demonstrate that the proof offered in support of their individual claims will also prove the claims asserted on behalf of the alleged class members who have visited the hundreds of other Taco Bell stores. *See, e.g.*, *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103-104 (2nd Cir. 1988) (denying certification because the class claims "were not susceptible to class-wide proof"); *Ross v. Nikko Sec. Co. Int'l, Inc.*, 133 F.R.D. 96, 96 (S.D.N.Y. 1990); *Grimes v. Pitney Bowes, Inc.*, 100 F.R.D. 265, 270 (N.D. Ga. 1983) (commonality requires plaintiffs to demonstrate "that the issues are subject to generalized proof and that such generalized proof will be applicable to the class as a whole").

Plaintiffs' factually-diverse and store-specific claims do not lend themselves to generalized proof. To begin with, contrary to plaintiffs' contention, the alleged accessibility barriers were not designed or constructed pursuant to a centralized corporate policy. While Taco Bell has a generalized policy of designing building prototypes that comply with the ADA and all applicable laws, Azalde depo. at 14:9-16, ultimate decisions affecting the design, layout and architectural features of a given store are made on an individualized basis by local managers and consultants overseeing the construction or remodeling of that store. Carlos Azalde, former Manager of Restaurant

Design, testified that Taco Bell prototypes "are adapted locally by an architect to make sure that they comply with local regulations. . . . [T]he construction manager's job is to ensure that what was permitted [by local authorities] was what was built." Azalde depo. at 26:19 – 27:2; 85:8-11 (architectural features such as seating layout and dispensers are left up to local vendors); 66:21-24 ("The official way to do local adaptations or renovations is for the restaurant manager to work with the facility manager to execute a renovation."); 67:15-17 ("we leave it up now to local consultants to design into the renovations all ADA requirements"). As Azalde further testified:

> Q. Who at an individual restaurant would be responsible for ensuring that a remodel complied with any applicable accessibility statutes?
>
> A. In an individual case like that, we would be relying on the consultant that was doing the plans or the supplier of the furniture that would be retrofitted into the store.

Id. at 32:24 – 33:5. As the undisputed facts establish, decisions pertaining to the challenged architectural features are not made on an institutional basis pursuant to a centralized corporate policy. Thus, unlike the typical discrimination class action, this case does not pose a challenge to a systemwide policy or practice of discrimination.

Equally important, there can be no dispute that Taco Bell's restaurants have unique architectural styles and designs. In California, the 220 company-owned restaurants encompass a multitude of architectural designs, based on approximately 30 different prototypes with different interior layouts and features.[5] Ex. 3 to Fox. Decl. Within each prototype, there are great variances in architectural features or elements. Azalde depo. at 85:11-13 ("each particular prototype ha[s] an infinite number of seating layouts and different types of condiment stations" and other architectural features). For example:

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[5] By contrast, the Colorado case involved "only seven basic prototypes for Colorado restaurants" with inaccessible queue lines. *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 360 (D. Colo. 1999).

- Some restaurants have queue lines less than 36 inches, others have queue lines measuring 36 inches or more; some of the queue lines have right angle turns, each with different turn widths; some have gradual "C" curves; and some restaurants have no queue lines at all.
- The force required to open exterior entrances vary from store to store and from day to day, depending on regularity of maintenance and weather conditions.
- The number of accessible tables, and the dimensions of those tables and floor spaces, vary from store to store.
- The placement of condiment and drink dispensers as well as their reach and height specifications differ from store to store.
- The size and layout of the restrooms, including floor clearances, and the presence of lavatory fixtures and vanities vary from one store to another.
- The presence of parking or restroom signage is highly changeable, subject to weathering, vandalism or removal by members of the public.
- The overall number of parking stalls, and the number and dimensions of designated handicap parking spaces, vary from store to store.
- Some parking lots are located in common areas and are shared by other business establishments, raising issues of control specific to those stores, and would require joinder of landlords or other third-parties in the adjudication of liability.

Azalde Decl. ¶¶6-10. The list goes on.

These wide-ranging variances amply demonstrate the lack of the commonality of issues. Determining whether Taco Bell has acted or failed to act in a manner that violates the ADA and the California statutes requires a highly individualized assessment of each of those architectural features and elements in each of the 220 architecturally-diverse stores. It is impossible for the Court to issue an order that would effectively address, across the board, the multitude of alleged "accessibility

barriers." Certifying a class based on a plethora of alleged accessibility violations scattered across 220 locations would require an interminable parade of mini-trials, each focused on the individualized proof of accessibility violations in each of those 220 stores. *See Hall v. Burger King Corp.*, 1992 WL 372354, at *4 (S.D. Fla Oct. 26, 1992) (class certification denied where court would have to conduct "hundreds of mini-trials" to resolve numerous "discrete factual issues").[6]

Aside from the architectural disparities, the applicable legal standards are different, warranting case-by-case determinations. Of the 220 California stores, many were built and occupied after January 26, 1993 (the enactment of the ADA), placing those stores under the more stringent "readily accessible" standard. Many other stores, however, were built prior to the enactment of the ADA, and are governed under the less stringent, more fact-intensive "readily achievable" standard. Under that standard, barriers to access must be removed if it is readily achievable, meaning that such barrier removal "is easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). What is "readily achievable" in one restaurant will not necessarily be "readily achievable" in another. *See Access Now v. S. Fla. Stadium*, 161 F. Supp. 2d 1357, 1371 (S.D. Fla. 2001) ("'readily achievable' is a fact-intensive inquiry"). In addition, some of the pre-ADA stores have been remodeled since the enactment of the ADA, and may be held to the "readily accessible" standard depending on the nature and extent of the renovations—implicating yet again store-by-store fact determinations. In light of these material differences, plaintiffs cannot establish that

[6] Proof of the existence of the "access situation" alone is problematic. Each class member would have to establish that the alleged barriers existed at the time of his visit. *See Arnold v. United Artists Theatre Circuit*, 158 F.R.D. 439, 453 (N.D. Cal. 1994). Given that the barriers alleged by plaintiffs are not only multitudinous but also encompass conditions that are non-static and transitory (such as door force and presence of signage), the highly individualized assessment of each class member's encounter with each alleged barrier during each visit to each restaurant would be interminable.

their claims have common issues of law or fact to those sought to be asserted by the class.

The California statutes pose the same hurdles. Under Title 24, certain accessibility barriers (such as non-conforming parking spaces) are allowable when complying with the regulations or providing equivalent facilitation would create an unreasonable hardship. CAL. CODE REGS. tit. 24, § 101.17.11(4) (2003). These are inherently fact-intensive, store-specific defenses. Likewise, the CDPA does not consider a non-compliant architectural feature a violation of the Act if it is necessary to comply with other existing laws. CAL. CIV. CODE § 54 (West 2003). The Court, therefore, has to examine the interplay of various state and local laws as applied to certain architectural features in certain localities.

This case is virtually identical to *Access Now, Inc. v. Walt Disney World Co.*, 211 F.R.D. 452 (M.D. Fla. 2001), where the plaintiff sought to certify a Rule 23(b)(2) class of disabled individuals who had been denied "full and equal access to all of Defendant's goods, services, and programs located at all of Defendant's facilities." *Id.* at 453. Denying class certification, the court found in part that plaintiff failed to meet the commonality element of Rule 23(a)(2) because it challenged a host of different architectural features in multiple facilities. The court reasoned that "[t]he lack of commonality of the architectural features of Defendant's facilities . . . weighs against class certification." The court further reasoned that the facilities at issue were "each constructed at different times, some predating the ADA, some built after the ADA, and some having been remodeled after the ADA." Because the Defendant's facilities possess different architectural styles and features, and were built or remodeled at different times, the court held that the "individualized nature of the facilities" precluded a finding of commonality. Notably, the court distinguished *Colorado Cross Disability v. Taco Bell Corp.*, 184 F.R.D. 354 (D. Colo. 1999) ("the Colorado case") on the basis that it involved solely "a uniform design flaw common to all of defendant's

restaurants." *Id.* at 455. *See also Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 164 (S.D.N.Y. 2003) (in action alleging negligent design of conventional needle devises, the inclusion of "many different types of needle devises in [plaintiffs'] proposed class" precludes finding of commonality); *In re Bridgestone/Firestone, Inc.*, 289 F.3d 1102, 1120 (7th Cir. 2002) (holding that the different tires alleged to be defective – each with different diameters, widths, and tread designs – negates commonality).

The authorities cited by plaintiffs holding that commonality is satisfied by broadbrush allegations of discrimination are unpersuasive for two reasons. One, they fail to satisfy the heightened standard for certification set forth by the Supreme Court in *Falcon*, 457 U.S. 147 (1982). Two, they do not involve multiple locations with different floor plans (and therefore, different alleged architectural barriers) occupied both before and after January 26, 1993 (and therefore, subject to different legal remedies). *Cf. Berlowitz v. Nobb Hill Masonic Mgmt.*, 1996 WL 724776 (N.D. Cal. Dec 6, 1996) (single location); *Leiken v. Squaw Valley Ski Corp.*, 1994 WL 494209 (E.D. Cal. 1994) (single location); *Civic Ass'n of the Deaf v. Giuliani*, 915 F. Supp. 622 (S.D.N.Y. 1996) (uniform removal of alarm boxes); *Bates v. United Parcel Serv.*, 204 F.R.D. 440 (N.D. Cal. 2001) (challenging systemwide policy adversely affecting deaf individuals). Those fact-specific cases are, therefore, inapposite.

Finally, the damages sought by plaintiffs—based on the number of *violations* per class member—require particularized findings for each class member. *Cf. Duprey v. Conn. Dep't of Motor Vehicles,* 191 F.R.D. 329, 331 (certifying class of disabled persons seeking injunctive relief and award of set fee per class member, not per violation). Additionally, although plaintiffs are seeking the minimum statutory damages per offense, the damage claims of putative class members would potentially include deterrence damages. Under the Unruh Act, an aggrieved individual is entitled to the statutory remedies not only for damages flowing from actual visits but also based

on incidents of deterrence. *Arnold v. United Artists Theatre Circuit*, 866 F. Supp. 433, 439 (N.D. Cal. 1994). Such deterrence claims raise individual-specific issues, implicating determinations of individualized intent and state of mind. For this additional reason, plaintiffs cannot satisfy the commonality element, and class certification should be denied. *See Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal. 1999) (where complex damages questions are inextricably intertwined with issues of law, class certification is not appropriate).

B. Plaintiffs Cannot Satisfy The "Numerosity" Requirement of Rule 23(a)(1).

To satisfy the numerosity requirement, plaintiffs "must first adequately define the class and then establish that it is so numerous that joinder of all members is impracticable." *Schwartz*, 178 F.R.D. at 549. Plaintiffs have failed to fulfill either of these prerequisites.

Plaintiffs rely on nothing more than overbroad census data to discharge their burden of showing that the putative class is so numerous that joinder is impracticable. Citing census figures indicating that there are over 150,000 non-institutionalized wheelchair users in the entire state of California, and making a logical leap to the proposition that these individuals frequent Taco Bell restaurants, plaintiffs invite this Court to use "common sense" in assuming that joinder would be impracticable. Plaintiff's Motion at 16. Such raw population data is insufficient to establish numerosity. *See, e.g., Green v. Borg-Warner Protective Servs. Corp.*, 1998 WL 17719, at *1-4 (S.D.N.Y. Jan. 16, 1998) (rejecting census data on overall population of shelter residents because plaintiffs failed to link the population data to an actual violation of rights).[7]

[7] *See also Mazus v. Dep't of Transp.*, 489 F.Supp. 376, 378 n.3, 387-88 (M.D. Pa. 1979) *aff'd in relevant part, Mazus v. Dep't of Transp.*, 629 F.2d 870, 875-876 (3rd Cir. 1980) (denying class certification for lack of numerosity where plaintiff relies on overly broad census data); *Jeffries v. Pension Trust Fund*, 172 F.Supp.2d 389, 394 (S.D.N.Y. 2001) (overall number of laid off employees does not establish numerosity absent evidence ...(cont'd)

Such an assumption is also inconsistent with the uncontroverted facts in this case. Although the plaintiffs profess to be active advocates in the mobility-impaired community in California, they are personally unaware of other similarly-situated individuals who have encountered accessibility problems at Taco Bell restaurants. *E.g.* Muegge depo. at 120:7-14 (has not had any conversations with other mobility-impaired individuals, except plaintiff Moeller, about accessibility issues at Taco Bell restaurants) (Ex. C to Goh Decl.); Yates depo. at 74:18-21 (does not know if any other wheelchair users have encountered access issues at Taco Bell restaurants) (Ex. D to Goh Decl.). As plaintiff Corbett admits:

> Q. But have you heard about or learned about experiences of others who use wheelchairs where they've had - believe that they've had access problems at Taco Bell?
>
> A. I don't remember.
>
> Q. You can't think of any as you sit here today?
>
> A. Right.

Corbett depo. at 27:12-18 (Ex. E to Goh Decl).

Plaintiff Yates joined this lawsuit because he saw a notice in a newsletter of an organization that advocates for disabled persons, inviting mobility-impaired individuals who have experienced accessibility problems at Taco Bell restaurants to contact Mr. Tim Fox. Yates depo. at 13:4-8. There is no evidence, however, that any other

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(cont'd)
that those employees suffered the alleged injury; although the court may make common sense assumptions to support a finding of numerosity, it cannot do so "on the basis of pure speculation without any factual support"); *Legrand v. New York City Transit Auth.*, 1999 WL 342286, at *3-5 (E.D.N.Y. May 26, 1999) (numerosity not satisfied because the statistical data on number of pregnant women in company had no relation to the number of such women who suffered pregnancy discrimination); *Ross*, 133 F.R.D. at 97 (holding that statistical data must show a statistically significant number of similarly situated aggrieved employees in relation to the overall number of employees in the company).

mobility-impaired individual has contacted Mr. Fox as a result of the publication of the notice. In addition, plaintiffs have been able to identify only 10 putative class members (excluding the named plaintiffs) despite a notice posted on a web-site inviting participation in this lawsuit. Responses to Defendant's First Set of Interrogatories And Requests For Production of Documents to Plaintiffs at 4-6 (Ex. F to Goh Decl).

Because the plaintiffs themselves can identify only a small handful of individuals who have allegedly encountered access issues at the 220 Taco Bell locations in California, despite the use of website and newsletter notices, there is no basis for assuming that the class is so large that joinder is impracticable. Plaintiffs have, therefore, failed to establish the requisite numerosity. *Stambaugh*, 151 F.R.D.at 675 (certification denied due to plaintiff's failure to provide evidence from statistically significant number of aggrieved persons in putative class).

C. Plaintiffs' Have Failed To Satisfy The "Typicality" Requirement Of Rule 23(a)(3).

The typicality requirement of Rule 23(a) "does not focus as much on the relative strengths of the cases of the named and unnamed plaintiffs as it does on the similarity of the legal and remedial theories behind their claims." *Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 193 (W.D. Tex. 1998); *Berlowitz*, 1996 WL 724776, at *3. *See also Lightbourn v. County of El Paso*, 118 F.3d 421, 425 (5th Cir. 1997). As demonstrated in the discussion regarding the lack of commonality among plaintiffs' claims and those of the putative class, plaintiffs cannot establish that their claims are based on similar legal and remedial theories as those sought to be asserted by the class. Because each of the stores has a unique set of characteristics related to architectural features, prototype, occupancy date, and the like, the claim and remedy sought by each plaintiff will vary according to each store. As a result, plaintiffs cannot establish that their claims are typical of those of the class.

D. Plaintiffs Have Failed To Satisfy The "Adequate Representation" Requirement of Rule 23(a)(4).

Adequate representation, within the meaning of Rule 23(a)(4), requires named plaintiffs who are "knowledgeable as to the status and underlying legal basis of the action, . . . willing and able to pay notification and other costs [and to] diligently pursue their claims, and [whose] interests are not antagonistic to the interests of the class." *In re Storage Tech. Corp. Sec. Litig.*, 113 F.R.D. 113, 118 (D. Colo. 1986). Courts have uniformly held:

> The class is entitled . . . to more than competent counsel. It must also be assured that it will have an adequate representative, one who will check the otherwise unfettered discretion of counsel in prosecuting the suit and who will provide his personal knowledge of the facts underlying the complaint. . . . The class is entitled to a representative who is more than 'a key to the courthouse door dispensable once entry has been effected.'

Weisman v. Darneille, 78 F.R.D. 669, 671 (S.D.N.Y. 1978) (*quoting Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972)); *In re Goldchip Funding Co.*, 61 F.R.D. 592 (M.D. Pa. 1974) ("The class is entitled to more than blind reliance upon even competent counsel . . .. An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved.").

Here, in a case where they must prove violations of the ADA and the California statutes, plaintiffs have demonstrated that they have no knowledge that any of the alleged accessibility barriers constitutes a violation of those laws. To begin with, plaintiff Corbett does not even know what the Unruh Act is, or "the difference between a class action and a lawsuit." Corbett depo. at 10:17-18; 11:1-2. Although she challenges the legality of alleged accessibility barriers at various Taco Bell restaurants, she has no knowledge of whether those alleged barriers violate the applicable laws. For example, although she complains that the door at the Richmond restaurant felt "heavy," she conceded that she "wouldn't know" if the force of the door exceeded the legal limit.

Id. at 40:11-14. Likewise, despite alleging that the condiment and drink dispensers were inaccessible, she testified:

> Q. Do you know whether the reach distances for each of those tasks were in compliance with the regulations or not?
>
> A. I wouldn't know.

Id. at 45:7-10. The same holds true on her allegation that the toilet in the store at San Pablo Dam Road was too low:

> Q. Do you know whether [the toilet] was in compliance with the applicable regulations?
>
> A. I wouldn't know that.

Id. at 48:21-23. Again, with respect to Corbett's allegation that there was insufficient floor space to maneuver her wheelchair in the dining room:

> Q. Do you have an opinion as to whether the space in which you were trying to maneuver presented some violation of applicable regulations?
>
> A. I don't know.

Id. at 50:20-23. *See also id.* at 35:7-11 (does not even have an estimate of the dimensions of the parking stall that she complains about); 48:11-16 ("wouldn't know" if entrance at San Pablo Dam store violated laws); 72:20-23 ("wouldn't know" if entrance at Rohnert Park restaurant was in compliance or not); 86:14-18 (complains about inaccessible seating but "do[es]n't know" if the number of accessible tables in dining room satisfies regulations); 87:4-7 ("do[es]n't know" if force of restroom door complies with regulations); 88:8-12 (has "no idea" of reach distance in restroom and whether it violates regulations); 88:25 – 89:3 (no knowledge of whether outdoor seating violates regulations).

Plaintiff Yates similarly alleges that he has encountered accessibility barriers at Taco Bell restaurants but has no idea if those alleged barriers violate any laws. Although he complains about inaccessible seating at the Novato store, he admits that he

has never counted the number of accessible tables and chairs in that store, Yates depo. at 45:20-22. He complains that accessible seating is located in traffic areas, but has never surveyed the dining room to determine if accessible seating exists in other areas. *Id.* at 46:2-8. Indeed, Yates concedes that he has never even used, or attempted to use, the accessible tables in the Novato store. *Id.* at 46:15:19. *See also id.* at 63:12-20 (claims that the drink dispenser is "too high" but has no knowledge of its height); 42:13-15 (doesn't know if signage on restroom door was in compliance with laws); 26:11-13 (doesn't know the amount of pressure needed to open front door).

Plaintiff Muegge presently lives in Hawaii, and plans to visit California only "once every six months." Muegge depo. at 35:21-25. He too lacks personal knowledge of whether his encounters with alleged barrier constitute violations of the applicable laws. *See* Muegge depo. at 55:4-6 ("would not" know if door complies with regulations); 59:25 – 60:5 (same for drink dispensers); 110:20-22 (does not know if seating complies with regulations); *see also id.* at 79:15-18; 83:1-3; 88:23 – 89:1; 90:18-20; 92:14-16; 110:10-12; 111:18-20; 115:2-9; 116:7-10.

Plaintiff Moeller's deposition testimony is similarly replete with disavowals of any knowledge that the alleged barriers constitute violations. Moeller depo. at 40:16-20; 42:18-22; 56:17-19; 63:2-3; 68:7-9; 74:23 – 75:3; 81:11-13; 82:10-14 (Ex. G to Goh Decl).

As their own testimony reveals, the plaintiffs present nothing more than their own vague generalized notions that they encountered barriers to access at Taco Bell restaurants. They have no personal knowledge that the alleged barriers constitute violations of the ADA or the California statutes—and therefore cannot satisfy the most fundamental element of their claims. Absent any such knowledge, plaintiffs are inadequate class representatives. Indeed, their inadequacy as class representatives is nowhere more evident than in class counsel's attempt to offer evidence based on his *personal* observations of alleged barriers at Taco Bell stores. *See* Fox Decl. ¶¶ 5-10.

Taco Bell does not dispute Mr. Fox's adequacy as class counsel, but he cannot become a class representative to fill in the evidentiary void created by the plaintiffs. *See Kassover v. Computer Depot, Inc.*, 691 F. Supp. 1205, 1213-14 (D. Minn. 1987) (plaintiff who was "unfamiliar with several critical aspects of this litigation" and who "possesse[d] no facts to support essential allegations in his complaint" deemed inadequate class representative). *See also Greenspan v. Brassler*, 78 F.R.D. 130, 133-34 (S.D.N.Y. 1978) (plaintiffs' "limited personal knowledge" of the underlying facts and certain elements of the complaint renders them inadequate representatives); *Rolex Employees Ret. Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 665-66 (D. Ore. 1991) (denies class certification in part because plaintiff has failed to show that he has sufficient familiarity with the "basic elements of the case"); *In re Storage Technology*, 113 F.R.D. at 118 (finding plaintiffs who were "unaware of even the most material aspect of [the] action" to be inadequate representatives).

In addition, plaintiffs have presented no evidence that they have the financial resources to litigate this action. To the contrary, Yates, for example, does not even know if he is able to pay any of the costs associated with this case. Yates depo. at 77:3-5. To satisfy Rule 23(a)(4), the named representatives must be in a position to "'check the otherwise unfettered discretion of counsel in prosecuting the suit,' not only with respect to the facts but also with respect to the economic consequences of the suit." *Rolex Employees Ret. Trust*, 136 F.R.D. at 666. A class representative who is not financially invested leads to the attorney having "free rein" of the prosecution of the action. *Id.* As one court aptly declared: "This is tantamount to the unacceptable situation of the attorney being a member of the class of litigants while serving as class counsel." *In re Mid-Atlantic Toyota Antitrust Litig.*, 93 F.R.D. 485, 490 (D. Md. 1982). Plaintiffs' failure to establish that they have the financial resources and investment in this case to allow them to check the actions of counsel mandates a finding that they are not adequate representatives for the class under Rule 23(a)(4).

II. PLAINTIFFS ALSO CANNOT SATISFY THE REQUIREMENTS OF RULES 23(b).

Plaintiffs assert that the class they seek to represent should be certified under Rule 23(b)(2). The requirements of Rule 23(b) are designed to test whether there are *compelling circumstances* to make the class action appropriate. *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 596 (M.D. Pa. 1997).

As discussed above, plaintiffs have failed to satisfy the threshold requirements for certification of Rule 23(a), thereby defeating certification. Although their failure is dispositive on the issue of certification, Taco Bell also will analyze the requirements of Rules 23(b), and demonstrate that plaintiffs have failed to satisfy the additional, but necessary, requirements to certification.

A. Plaintiffs' Claims Preclude Certification Under Rule 23(b)(2).

To certify this action under Rule 23(b)(2), this Court must find that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." "A class of cases found to fall squarely within the category authorized by subpart (b)(2) are civil rights cases which seek 'broad declaratory or injunctive relief for a large and amorphous class'" based on systemwide discriminatory policies or practices. *Neff*, 179 F.R.D. at 195.

Certification under Rule 23(b)(2) is not appropriate in this action for at least two reasons. First, the class is not "large and amorphous." As discussed above with regard to plaintiffs' failure to satisfy the numerosity requirement, the various notices and invitations to participate in this lawsuit have produced only 14 individuals, all of whom have been readily identified and four of whom are already parties to this action. Joinder of the remaining individuals is clearly not impracticable.

Second, this action does implicate a systemwide corporate policy, as discussed previously. In *Lang v. Kansas City Power & Light Co.*, 199 F.R.D. 640, 648 (W.D. Mo. 2001), the court held that Rule 23(b)(2) certification is "properly invoked when a policy or practice is challenged, and injunctive or declaratory relief is necessary to prohibit or change the policy or practice." Finding that the claims "do not arise from official company policy directed toward [plaintiffs], but rather from separate, discrete events" scattered across various locations, the court denied class certification. *Id.* Likewise, plaintiffs' claims here arise from separate and distinct alleged discriminatory conditions at separate and distinct locations, not from any official corporate policy aimed at the plaintiffs. For these reasons, class certification under Rule 23(b)(2) is improper.

B. Plaintiffs' Claims For Substantial Money Damages Require Analysis Under Rule 23(b)(3), Which Further Defeats Class Certification

Aside from plaintiffs' failure to meet the requirements of Rule 23(a) and (b)(2), plaintiffs' motion suffers from an additional infirmity. The Ninth Circuit, in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), recently held that an accessibility action based on Title III of the ADA, the Unruh Act and the CDPA which seeks statutory damages cannot be certified under Rule 23(b)(2) *unless* the class members are afforded adequate notice and opt-out rights. In so holding, the Ninth Circuit, along with certain other federal courts, have imposed a *de facto* Rule 23(b)(3) requirement for class actions such as this, which seeks both injunctive relief and substantial money damages.[8]

The Ninth Circuit in *Molski* aligned itself with the approach taken by the Second Circuit in *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)

[8] As early as 1982, the Ninth Circuit has recognized that some class actions certified under Rule 23(b)(2) are effectively *de facto* Rule 23(b)(3) class actions. *See Officers for Justice v. Civil Serv. Comm'n of San Francisco,* 688 F.2d 615, 634 (9th Cir. 1982) (breadth and nature of plaintiff's claims and the procedures adopted by district court in certifying class under Rule 23(b)(2) essentially converted case to Rule 23(b)(3) class action).

cert denied, 535 U.S. 951, 122 S.Ct. 1349 (2002), which permits certification under rule 23(b)(2) only if the district court, "in its informed sound discretion finds that: (1) the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed; *and* (2) class treatment would be manageable, thereby achieving an appreciable measure of judicial economy." *Robinson,* 267 F.3d at 164 (internal citations and quotations omitted).[9] This analysis adopted by *Molski* is the functional equivalent of Rule 23(b)(3)'s requirements. *See Molski*, 318 F.3d at 950-51 n.15 & n.16 (determining predominance by balancing the value of injunctive relief against the value of money damages, and implicitly assessing manageability of class action in its conclusion that the class could also have been certified under 23(b)(3)). Here, although plaintiffs seek to certify a Rule 23(b)(2) class, which by definition does not require notice or opt-out rights to class members, *Molski*'s holding that notice and opt-out rights are *mandatory* in a case like this effectively imposes Rule 23(b)(3) requirements upon plaintiffs—which they cannot satisfy.

The first prong of Rule 23(b)(3), the "predominance" test, requires Plaintiffs to establish that "questions of law or fact predominate over any questions affecting only individual members." For the reasons that plaintiffs have failed to establish commonality under Rule 23(a)(2), they would all the more fail to meet Rule 23(b)(3)'s more demanding standard that common issues predominate over individual issues. *See Amchem Products,* 521 U.S. at 624.

[9] These requirements for certification of Rule 23(b)(2) class actions seeking money damages serve the same functions as the procedural safeguards and manageability or efficiency standards of Rule 23(b)(3). *See Zinser,* 253 F.3d at 1190 ("Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 448 (6th Cir. 2002) (applying advisory committee's discussion of Rule 23(b)(3) to certification under Rule 23(b)(2) when money damages are sought).

The second prong of Rule 23(b)(3), commonly referred to as "superiority," is that "a class action is superior to all other forms of fair and efficient adjudication." A superiority analysis may encompass review of several factors including whether: (a) the value of individual claims is so low that individuals are discouraged from filing their own claims ("negative value suit"); (b) the case is unmanageable as a class action thereby defeating the interests of judicial economy. *Zinser*, 253 F.3d at 1190-91. The most compelling factor in a superiority determination is whether aggregation of the claims of putative class members overcomes the problems of "negative value suits." *Amchem Products*, 521 U.S. at 617; *see also Zinser*, 253 F.3d at 1191. In fact, the United States Supreme Court has noted:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Products, 521 U.S. at 617, (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997). Claims under CDPA and the Unruh Act, however, have substantial value to persons allegedly aggrieved by barriers to access, each providing for treble actual damages or minimal statutory damages per violation, and attorneys' fees. CAL. CIV. CODE §§ 52(a), 54.3(a); *see Castano v. American Tobacco Co., Inc.*, 84 F.3d 734, 748 (5th Cir. 1996). Therefore, class treatment is unnecessary to provide Plaintiffs and putative class members recovery for their claims. *O'Conner v. Boeing N. America, Inc.*, 197 F.R.D. 404, 415 (C.D. Cal. 2000).

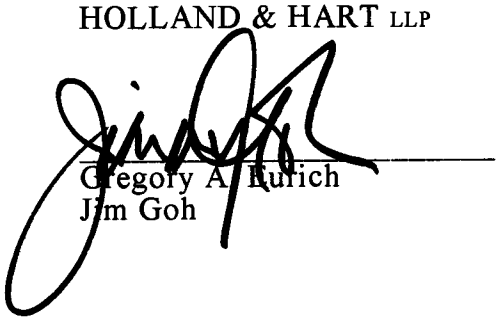
Manageability is also a critical factor in the superiority analysis. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 164 (1974). Individualized issues pertaining to every class member complicate a case to such a degree that class treatment is inefficient and unmanageable. Courts have routinely held that where "the complexities of class treatment outweigh the benefits of considering common issues at trial, class action

treatment is not the 'superior' method of adjudication." *See e.g. Zinser,* 253 F.3d at 1192. Here, aside from the individualized issues that abound in this case, requiring mobility-impaired individuals to travel from all parts of California to adjudicate claims in San Francisco further renders class treatment inappropriate.

CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion for Class Certification should be denied.

HOLLAND & HART LLP



Gregory A. Rufich
Jim Goh

Date: October 1, 2003.

PROOF OF SERVICE VIA E-MAIL

STATE OF COLORADO

CITY AND COUNTY OF DENVER

I am employed in the City and County of Denver, State of Colorado, am over the age of 18, and not a party to the within action; my business address is 555 – 17th Street, Suite 3200, Denver, CO 80202. On the date below indicated, I served on the interested parties in this action the within document(s) described as:

Defendant's Response Brief in Opposition to Plaintiffs' Motion for Class Certification

__X__ (BY E-MAIL) to:

Timothy P. Fox, Esq.
tfox@foxrob.com

I declare that I am employed in the office of a member of the Bar of this Court at whose direction service was made.

I declare under penalty of perjury under the laws of the State of Colorado that the above is true and correct, and that this declaration was executed on October 1, 2003.

Pam Knapp

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