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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.

Case No. C 02 5849 MJJ ADR

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Date: **October 21, 2003**
Time: **9:30 a.m.**

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Plaintiffs' Motion for Class Certification ("Opening Brief" or "Opening Br.") demonstrated that the accessibility barriers at issue in this litigation are widespread throughout Defendant's corporate restaurants. In its Response Brief in Opposition to Plaintiffs' Motion for Class Certification ("Defendant's Response" or "Def.'s Resp."), Defendant does not dispute this. Rather, Defendant seeks to apply class certification requirements that are not supported by Rule 23 or precedent and that are contrary to the numerous cases in the Ninth Circuit and elsewhere that have certified classes identical in all relevant respects to the proposed class in this case. Because Named Plaintiffs have demonstrated that the proposed class meets the requirements of Rules 23(a) and 23(b)(2), the class should be certified.

ISSUES TO BE DECIDED

Whether the proposed class in this case should be certified pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

FACTS

I. Defendant Has Highly Centralized Policies.

Named Plaintiffs demonstrated in their Opening Brief that Defendant's accessibility policies, and its design and construction policies, are centralized.

Defendant does not dispute that its accessibility policies are centralized, but it contends that its design and construction policies are not centralized because "ultimate decisions affecting the design, layout and architectural features of a given store are made on an individualized basis by local managers and consultants . . ." (Def.'s Resp. at 6.) This contention is highly misleading because it relies on testimony discussing only one type of construction project: small remodeling projects at individual restaurants.[1]

Defendant's policies governing other types of construction at Taco Bell -- including construction of new restaurants and multi-restaurant retrofit projects -- are highly centralized.

All newly-constructed Taco Bell restaurants are built in accordance with prototypes designed by the A&E department (located at Taco Bell's corporate headquarters), and all large-scale retrofit projects are based on designs in "project books" prepared by the A&E department. (Deposition of Carlos Daniel Azalde ("Azalde Dep.") at 18:14-20; 20:11-14; 30:11-18 (ex. 1).)[2] Taco Bell then convenes meetings with its construction managers and facilities managers -- all of whom are employed by Taco Bell or its parent company, Yum!, Inc. -- to familiarize them with the prototypes or project designs, who then oversee the construction projects to make sure that they are done in compliance with the designs. (Azalde Dep. at 26:13-27:2;

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[1] For example, the indented quote from Mr. Azalde's testimony on page seven of Defendant's Brief is from a line of questions that began as follows:

> Q: Moving on now to individual restaurants remodeling retrofits, were there any policies in place at Taco Bell Corporation to ensure that the applicable statutes or regulations concerning accessibility were met during that remodel of these individual restaurants?

Azalde Dep. at 32:12-17 (ex. 1).

[2] All references to exhibit numbers throughout the brief refer to Exhibits to the Second Declaration of Timothy P. Fox, filed concurrently with this brief.

27:24-28:16; 31:19-24 (ex. 1).) Contrary to Defendant's implication, local contractors do not have the discretion to make any material modifications to these designs:

> Q. You send out a prototype that calls for level entrances into the Taco Bell restaurant. The contractor, at the local level, decides to change the plans to insert steps with no ramps at all entrances. Is there something in place that would stop that from happening?
>
> A. Yeah. The construction manager is there to ensure, again, that what's built is for what was permitted. So the contractor can't take it upon himself to revise designs. The contractors generally will cut corners in which a construction manager should be able to catch deletions or omissions.

(Azalde Dep. at 27:11-23 (ex. 1)(emphasis added).)

In light of the relief sought in this case, it is Defendant's policies concerning new construction and large-scale retrofit projects that are relevant. Named Plaintiffs seek an injunction requiring Taco Bell to build new restaurants in compliance with the Department of Justice Standards for Accessible Design ("DOJ Standards")[3] and Title 24 of the California regulatory code (the "California Standards"), and to retrofit its existing restaurants so that they comply with these Standards. The fact that Taco Bell already has a centralized system in place governing new construction and large retrofit projects makes it particularly appropriate that the architectural barriers at its restaurants be addressed on a systemic, class-wide basis.

II. The Differences in Defendant's Restaurants are Largely Irrelevant.

Defendant contends that alleged differences in the physical layout of its restaurants means that "[c]ertifying a class based on a plethora of alleged accessibility violations scattered across 220 locations would require an interminable parade of mini-trials . . ." (Def.'s Resp. at 9.) This is wrong. Defendant does not explain how the alleged differences in restaurant layouts are relevant to the issues in this case, or why the alleged differences would require a "parade of mini-trials." To the contrary, the issues here will largely be able to be resolved through a few key legal decisions that can then be applied in Defendant's restaurants with a tape measure.

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[3] See 28 C.F.R. pt. 36, app. A.

Take, for example, queue lines. Defendant claims that the alleged differences between queue lines in its restaurants is one reason why numerous mini-trials will be needed. (Def.'s Resp. at 8-9.) But, as Named Plaintiffs demonstrated in their Opening Brief, all of Defendant's queue lines installed before the early 1990s were narrower than 36 inches. (Opening Br. at 12.) This violated the California Standard in effect then and now that required cafeteria lines to be at least 36 inches wide, and this Standard has no exceptions based on the configuration of the queue line or the layout of the restaurant. (Id.) Thus a single decision by this Court on this point will apply to all restaurants with queue lines narrower than 36 inches without the need for separate mini-trials. Similarly, from the early 1990s until approximately 1998, the width at the turn in queue lines was only 42 inches, instead of 60 inches as required by the Standards. (Id.) Thus a decision by this Court on this issue will apply to a large number of restaurants.

This is also true with respect to, for example, the accessibility of Defendant's parking lots, which can be determined by a single ruling. Both sets of Standards require that alterations strictly comply with applicable accessibility requirements. (See Opening Br. at 5-6.) In December 1997, Taco Bell conducted a project to restripe and repair the parking lots at all of its corporate restaurants, and this project was supposed to include a review and correction of accessible parking. (Id. at 13.) Pursuant to the alterations provisions of both the California and DOJ Standards, as a result of this project, Defendant's parking lots must strictly comply with the applicable provisions of these Standards, and a single order to this affect will apply to all of Defendant's restaurants.

ARGUMENT

I. This Case Should Be Tried as a Class Action.

"'[T]he class-action device save[s] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.'" Gratz v. Bollinger, 123 S. Ct. 2411, 2426 n.17 (2003) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)). As demonstrated above and in Named Plaintiffs' Opening Brief, Taco Bell is a centrally-run company, with centralized design and construction

policies, that operates 220 very similar restaurants. Only through the class action device can the ADA violations at these restaurants be tried and remedied efficiently. Although Plaintiffs do not believe that this case will require 220 "mini-trials," the alternative is at least 220 separate cases, in multiple fora, involving largely overlapping discovery of centralized policies and design documents, repeated briefing of similar issues, and potentially varying or even contradictory standards for each restaurant in California. This would be phenomenally wasteful of both judicial and party resources, and the difficulty of implementing different or conflicting standards would likely result in the perpetuation of violations.

The alternative that a class action offers is a single case, with unified discovery and a single set of motions and legal rulings to be applied to all 220 restaurants. The uniform standards such a ruling would produce would be straightforward to implement and monitor, achieving both procedural efficiency and substantive results.

II. Defendant's Commonality Argument Must Be Rejected.

Named Plaintiffs in their Opening Brief identified numerous questions of law and fact common to the class. (Opening Br. at 17-21.) Defendant does not dispute that these questions exist, or that they are common to the class. Instead, Defendant -- relying on General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982) -- asserts that the alleged physical differences in its restaurants defeat commonality. (Def.'s Resp. at 6-11.) As demonstrated above, this argument rests on incorrect factual premises. Taco Bell has centralized policies governing the design and construction of its physically very similar restaurants. Defendant's argument also fails because it is (1) contrary to the proper analysis of the commonality issue, (2) based on an erroneous interpretation of Falcon, and (3) based on an erroneous interpretation of applicable standards.[4]

[4] Defendant's argument that Named Plaintiffs' have not met the typicality requirement is based on its argument that Named Plaintiffs have not met the commonality requirement. Def.'s Resp. at 14. Because, as demonstrated herein, Named Plaintiffs have established commonality, Defendant's typicality argument must be rejected.

Finally, Defendant asserted that commonality was not met because Named Plaintiffs seek deterrence damages on behalf of the class.[5] This is not the case: Named Plaintiffs do not seek deterrence damages on behalf of the class. See Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 453 (N.D. Cal.), modified, 158 F.R.D. 439, 443, 460 (1994) (holding that deterrence claims are not appropriate for class certification).

A. Commonality is not Defeated by Alleged Differences in Defendant's Restaurants.

The commonality requirement is "construed permissively." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). "Class suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Charles Alan Wright et al., Federal Practice and Procedure § 1763 (2d ed. 1986). Significantly, "[a]ll questions of fact and law need not be common to satisfy the rule." Hanlon, 150 F.3d at 1019. Thus even if Defendant's restaurants are different (which, as demonstrated above, is largely not the case), because it is undisputed that the class shares numerous common legal and factual questions, the proposed class satisfies the commonality requirement.

Fundamentally, Defendant's focus on differences in its restaurants misses the point of the commonality analysis. The proper question is what legal and factual issues are common to the members of the putative class, not what legal and factual issues are common to the restaurants that are the subject of the lawsuit. Defendant's focus would only make sense if California had only 220 people who used wheelchairs or scooters and each patronized one and only one Taco Bell restaurant not patronized by any other. This is, of course, not the case. Instead, each restaurant is open for business to the entire class, and the access barriers in each

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[5] (Def.'s Resp. at 11-12.) Defendant also incorrectly contends that commonality is defeated because the class seeks any damages. Named Plaintiffs seek only the minimum statutory damages per violation, and because such damages are recoverable without proof of actual damages, the only damages issue not common to the class "is the simple question of the number of instances that individual class members were aggrieved" by Defendant's violations. Arnold, 158 F.R.D. at 449; see also Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1306 (9th Cir. 1990) (holding that because statutory damages under Farm Labor Contractor Registration Act are not dependent on proof of actual injury, "the district court was not obligated to require individual proof of injury from each class member.")

restaurant will affect the entire class in the same way. The fact that there are multiple barriers in multiple restaurants does not change this analysis. It may make the case more complex than a single-restaurant class action -- though, as explained above, far less complex and more efficient than 220 separate cases -- but it is not relevant to the question of commonality.

The only case cited by Defendant -- Access Now, Inc. v. Walt Disney World Co., 211 F.R.D. 452 (M.D. Fla. 2001) -- in which a court refused to certify a class challenging architectural barriers at multiple sites is thus wrong, but also easily distinguishable. The plaintiffs in Access Now provided only "conclusory allegations" that the defendant's policies violated the ADA. Id. at 454-55. In this case, Named Plaintiffs have specifically identified the deficiencies in Defendant's policies. (Opening Br. at 11-13, 19-20.) In addition, the facilities at issue in Access Now included fifteen hotels, two theme parks and a monorail system, and each facility possessed a unique architectural style. Access Now, 211 F.R.D. at 453 n.2 & 455. In contrast, this case involves restaurants that share very similar architectural elements built in accordance with prototypes and centralized design and construction policies.

B. The Requirements of Falcon are Easily Met in this Case.

In Falcon, the plaintiff, a Mexican-American, alleged that he had not been promoted for discriminatory reasons. Falcon, 457 U.S. at 149. The class he sought to represent, however, was far broader than Mexican-American employees who were denied promotions. Rather, the proposed class, certified by the district court, consisted of "'all hourly Mexican American employees who have been employed, are employed, or may in the future be employed and all those Mexican-Americans who have applied or would have applied for employment had the Defendant not practiced racial discrimination in its employment practices.'" Id. at 151.

The Court found that the purpose of the Rule 23(a) requirements was to "'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" Id. at 156. The plaintiff in Falcon had brought an "across-the-board" class action, in that he sought to represent class members who had suffered types of discrimination that he did not suffer. In other words, there was a gap between his claim for discrimination in promotion, and the claims of the class

members for discrimination in all employment practices. Id. at 157. The Court held that in across-the-board class actions, in order for the representative's claims to fairly encompass the claims of class members, there must be evidence to bridge this gap, by, for example, showing that both claims resulted from a "general policy of discrimination." Id. at 158, 159 n.15.

The case at bar is not an across-the-board class action. The Named Plaintiffs seek to represent only persons who, like them, use wheelchairs or scooters for mobility -- they do not seek to represent persons with other types of disabilities.[6] The Named Plaintiffs seek to represent persons who, like them, suffered discrimination as a result of architectural barriers at Defendant's restaurants -- they do not seek to represent persons with disabilities who suffered employment discrimination. Thus the Named Plaintiffs' claims fairly encompass the claims of class members as required by Falcon.

C. The Class Shares Common Legal Issues.

Although such an analysis would not defeat class certification, Defendant is wrong that this case will require a store-by-store analysis. Defendant's contention is based on three legal issues (see Def.'s Resp. at 9-10); in each case, Defendant has misconstrued the relevant statute.

First, Defendant contends that the "readily achievable" standard under the ADA, see 42 U.S.C. § 12181(b)(2)(A)(iv), will require store-specific evaluations. (Id.) As discussed in the Opening Brief, restaurants built after January 1993, and alterations that took place after January 1992, must comply with the DOJ Standards,[7] and the readily achievable standard does not apply to these restaurants.

Further, many architectural barriers violated California Standards, which have been in place since 1970. The readily achievable standard is irrelevant to these barriers. For example, as set forth above, Defendant's pre-ADA queue lines violated the California Standards, and thus must be made accessible regardless of whether it is readily achievable to do so.

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[6] Indeed, the Ninth Circuit has affirmed certification of a class consisting of persons with differing disabilities. See Armstrong v. Davis, 275 F.3d 849, 869-70, 879 (9th Cir. 2001), cert. denied, 537 U.S. 812 (2002).

[7] 42 U.S.C. § 12183(a); 28 C.F.R. § 36.406.

Finally, even where a readily achievable analysis is necessary, this analysis involves questions that are common to the class. For example, the readily achievable issue "hinges, in part, on various corporation-wide factors such as the availability of resources" and thus presents a question common to the class. Arnold, 158 F.R.D. at 449. In addition, because Defendant's restaurants are very similar, the costs and methods of removing particular types of barriers will be similar among its restaurants. For example, if in pre-1993 restaurants, lowering drink dispensers is evaluated under the readily achievable standard, the cost of doing so will be virtually identical among the restaurants, thereby creating another issue common to the class.

Second, Defendant contends that store-specific determinations will be necessary because the California Disabled Persons Act ("CDPA") allegedly permits deviations from that Act if they are necessary to comply with other existing laws. (Def.'s Resp. at 10.) This is an apparent reference to Cal. Civ. Code § 54.1(a)(1), which states that "[i]ndividuals with disabilities shall be entitled to full and equal access . . . to accommodations, advantages, facilities [of] places of public accommodation . . . subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons." This section has never been interpreted to allow a public accommodation to deviate from the California Standards, and Defendant fails to cite a single statute or regulation that it contends would prevent it from complying with the Standards. Even if such a statute or regulation existed, its interpretation and application to Taco Bell restaurants are issues common to the class.

Finally, Defendant asserts that store-by-store evaluations will be necessary because deviations from the California Standards are permissible when compliance would create an unreasonable hardship. (Def.'s Resp. at 10.) This is simply wrong. A public accommodation must apply to the relevant enforcing agency for the unreasonable hardship exception at the time of construction, and the "[t]he details of any finding of unreasonable hardship [by the enforcing agency] shall be recorded in the files of the enforcing agency." Cal. Standards § 222-U (see ex. 2). Defendant has presented no evidence that it has ever applied for an undue hardship

exception, nor has it produced such evidence in discovery. Having never applied for this exception, Defendant cannot seek to rely on it after the fact.

III. Named Plaintiffs Have Met the Numerosity Requirement.

As set forth in Named Plaintiffs' Opening Brief, joinder in this case is impracticable because: (1) census figures, in combination with Taco Bell's annual transaction counts, demonstrate as a matter of common sense that the class is large; (2) the class is geographically dispersed; and (3) the class members are difficult to identify. (Opening Br. at 16-17.)

Defendant does not dispute that the class is geographically dispersed or that class members are difficult to identify. Rather, Defendant challenges Named Plaintiffs' use of census information, and contends that Named Plaintiffs have not identified a sufficient number of class members to establish numerosity. (Def.'s Resp. at 12-14.)

Numerous cases involving violations of DOJ or California Standards have relied on population statistics to show numerosity. See, e.g., Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 358 (D. Colo. 1999); Arnold, 158 F.R.D. at 448; Berlowitz v. Nob Hill Masonic Mgmt., Inc., No. C-96-0141 MHP, 1996 WL 724776, at *3 (N.D. Cal. Dec. 6, 1996). The nature of such cases make population statistics particularly appropriate to establish numerosity. The evidence presented by Named Plaintiffs indicates (1) that a large number of persons who use wheelchairs or scooters have visited Defendant's restaurants, and (2) that many or all of Defendant's restaurants have architectural barriers (a fact not disputed in Defendant's Response.) From this evidence, and as a matter of common sense, a large number of persons who use wheelchairs or scooters have encountered architectural barriers.

The cases cited by Defendant are different. In these cases, unlike architectural barrier cases, there is no evidence that the population group actually suffered discrimination or was otherwise harmed. For example, in Green v. Borg-Warner Protective Services Corp., Nos. 95 Civ. 10419(RPP), 96 Civ. 0038(RPP), 95 Civ. 5558(RPP), 96 Civ. 8740(RPP), 1998 WL 17719, at *1 (S.D.N.Y. Jan. 16, 1998), homeless persons who lived at shelters sought class certification based on excessive force by security personnel at the shelters. The court held that

the fact that 4,000 people resided in shelters each day was not sufficient to establish numerosity because there was no evidence that their rights were being violated. Id. at *3.

Because Named Plaintiffs have demonstrated that many or all of Defendant's restaurants have architectural barriers, the only way that this class is not numerous is if virtually none of Defendant's 50 million transactions involved persons who use wheelchairs or scooters. This conclusion defies common sense. There are approximately 151,580 non-institutionalized Californians 16 years of age or older who use wheelchairs. This represents .68% of the population of California, and this number does not include institutionalized people who use wheelchairs, people under the age of 16 years who use wheelchairs, or people who use scooters for mobility, all of whom are potential members of the class. Applying this percentage to the total number of transactions at Taco Bell corporate restaurants in 2002 results in an estimate of 340,000 transactions involving customers who use wheelchairs. (See Resps. to Def.'s First Set of Interrogs. & Reqs. for Produc. of Docs. to Pls., Interrog. Resp. No. 2 ("Interrog. Resp. No. 2")(ex. 3).) This is a very conservative estimate because it does not include the categories described above, nor does it include transactions within the statute of limitations for years other than 2002.

Although one customer may account for several transactions during a year, even based on the far-fetched assumption that each class member ate at Taco Bell 100 times in 2002, the number of class members would exceed 3,000. (See Interrog. Resp. No. 2 at 3. (ex. 3).)

Further, the Colorado Taco Bell Class Action involved 40 restaurants, or less than 20% of the number of restaurants at issue in this case, and challenged only two architectural barriers. The percentage of persons who use wheelchairs in Colorado is smaller than in California. (Ex. 4 at P26.) Approximately 115 class members responded to the settlement notice. Because the damages that each class member received in Colorado ($50) is much smaller than the amount that each California class member may be entitled to (either $1,000 or $4,000 per instance of discrimination), it is virtually certain that the response rate will be higher in California. (See

Pls.' First Supplement to their Resps. to Def.'s First Set of Interrogs. & Reqs. for Produc. of Docs. to Pls. at 2 (ex. 5).)

Finally, the class action in Lieber v. Macy's West, Case No. C-96 02955 MHP (BZ) (N.D. Cal.), like the case at bar, was brought on behalf of a class of Californians with mobility disabilities based on alleged architectural barriers at a department store chain. The action settled, and approximately 1,350 class members with compensable claims responded to the settlement notice. Because there were only 72 department stores at issue in Macy's, or less than 1/3 of the number of restaurants at issue in this case, the number of class members in this case likely significantly exceeds the number of class members in Macy's. (See Interrog. Resp. No. 2 at 3 (ex. 3).)

Defendant also contends that Named Plaintiffs have not identified a sufficient number of class members to establish numerosity. (Def.'s Resp. at 12-14.) This ignores the fact that the difficulty of identifying class members supports class certification. See, e.g., Arnold, 158 F.R.D. at 448 (holding that numerosity requirement was met, in part because "[b]y the very nature of this class, its members are unknown and cannot be readily identified."). As one court put it in responding to the identical argument made here: "No authority supports limiting the putative class to those who have come forward with actual or potential claims. The difficulties of identifying additional class members at this stage in the litigation support certification, rather than undercutting it." Leiken v. Squaw Valley Ski Corp., Nos. CIV. S-93-505 LKK and CIV. S-93-1622 LKK, 1994 U.S. Dist. LEXIS 21281, at *13 n.8 (E.D. Cal. June 28, 1994).

IV. Named Plaintiffs Will Adequately Represent the Class.

Defendant does not dispute that (1) Named Plaintiffs do not have conflicts of interest with the proposed class, and (2) Named Plaintiffs are represented by qualified counsel. This satisfies the adequate representation requirement. Bates v. United Parcel Serv., 204 F.R.D. 440, 447 (N.D. Cal. 2001).

Defendant claims that Named Plaintiffs are inadequate representatives because there is no evidence that they have the financial resources to litigate this action. (Def.'s Resp. at 18.)

Numerous courts have held that a named plaintiff's financial status is irrelevant to class certification. See, e.g., In re West Coast Dep't Stores Antitrust Litig., Civil No. C-79-2724 SW, 1979 WL 1721, at *1 (N.D. Cal. Nov. 16, 1979) (holding that "inquiry into the financial affairs of the named plaintiff [was] irrelevant and not within the proper scope of discovery"); Sanderson v. Winner, 507 F.2d 477, 479 (10th Cir. 1974) ("We generally eschew the question whether litigants are rich or poor."). This is particularly true where, as here, Named Plaintiffs' counsel is advancing litigation costs. See, e.g., Kaplan v. Pomerantz, 131 F.R.D. 118, 125 (N.D. Ill. 1990).

Defendant also contends that Named Plaintiffs are inadequate representatives because they purportedly are unfamiliar with the design and construction specifications set forth in the Standards. (Def.'s Resp. at 15-18.) In other words, although all of the Named Plaintiffs testified in detail about the architectural barriers they encountered, their inability to state the precise width of queue lines, or the maximum door force, required by the Standards, renders them inadequate. This is an absurd standard not required by Rule 23.

It is astonishing to hear Taco Bell -- a multi-billion dollar corporation with internal legal and architecture departments under a legal obligation to comply with the Standards that has consistently demonstrated an ignorance of those Standards -- complain that the Named Plaintiffs are inadequate representatives because they cannot recite the design specifications.

In any event, Taco Bell's argument has been rejected by numerous courts. "[C]ourts have held that a representative plaintiff must be conscientious, [but] there is no requirement that the representative plaintiff be knowledgeable of either the allegations or the legal theories on which the lawsuit rests." Paper Sys. Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 609 (E.D. Wis. 2000); see also In re Catfish Anitrust Litig., 826 F. Supp. 1019, 1037 (N.D. Miss. 1993) ("An antitrust litigant is not expected to appreciate the finer points of the Sherman Act, Clayton Act, or the Federal Rules of Civil Procedure governing class action certification."); Kaplan, 131 F.R.D. at 122 ("As long as the plaintiff has some basic knowledge of the lawsuit and is capable of making intelligent decisions based upon his lawyers' advice, there is no reason that

he may not delegate further factual and legal investigation to his attorneys."). Thus in Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 366, 373-74 (1966), the Supreme Court held that the named plaintiff satisfied the adequate representation requirement even though her deposition showed that she did not understand the complaint at all, was unable to explain the statements made in the complaint, had a very small degree of knowledge as to what the lawsuit was about, and was ignorant of the defendants' names and the nature of their alleged misconduct.

Even though Named Plaintiffs have not committed the Standards to memory, they are clearly committed to the rights of persons with disabilities, and to the class in this case, and Defendant has presented no facts to the contrary. They are adequate representatives.

V. The Proposed Class Satisfies Rule 23(b)(2).

As set forth in Named Plaintiffs Opening Brief, the Ninth Circuit in Molski v. Gleich, 318 F.3d 937, 949-50 (9th Cir. 2003), decided the precise question before this Court, holding that a class of persons with disabilities seeking injunctive relief under the ADA, and statutory damages under the Unruh Civil Rights Act and the CDPA, met the requirement of Rule 23(b)(2). (Opening Br. at 22-23.) The court in Molski also held that notice should be sent to the class, and Named Plaintiffs have no objection if the Court believes that notice is appropriate in this case.

Defendant does not contend that the proposed class fails to meet Rule 23(b)(2). Rather, Defendant claims that in notes 15 and 16 of the Molski opinion, the Ninth Circuit adopted a "functional equivalent" of a Rule 23(b)(3) analysis, and Defendant then argues that the class in this case does not meet the Rule 23(b)(3)'s requirement that "questions of law and fact predominate over any questions affecting only individual members." (Def.'s Resp. at 21-22.) Note 15 discusses the method of determining whether Rule 23(b)(2)'s requirement that injunctive relief predominate over monetary relief is satisfied. Molski, 318 F.3d at 950 n.15. Note 16 discusses due process concerns raised when a class settlement waives class members' claims to treble damages. Id. at 951 n.16. Nothing in notes 15 or 16 (or anywhere else in the

decision) even suggests that the Ninth Circuit was adopting a Rule 23(b)(3) analysis to evaluate a Rule 23(b)(2) class.

The Ninth Circuit in Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998), specifically rejected the argument that the Rule 23(b)(3) requirements apply to a Rule 23(b)(2) class:

> We note that with respect to 23(b)(2) in particular, the government's dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule. Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate. See 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1775 (2d ed. 1986) ("All the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)."); see also Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir.1988) (emphasizing that although "the claims of individual class members may differ factually," certification under Rule 23(b)(2) is a proper vehicle for challenging "a common policy").
>
> Moreover, the claims raised by the plaintiffs in this action are precisely the sorts of claims that Rule 23(b)(2) was designed to facilitate. As the Advisory Committee Notes explain, 23(b)(2) was adopted in order to permit the prosecution of civil rights actions.

Id. at 1047.

Named Plaintiffs seek certification under Rule 23(b)(2), and thus the requirements of Rule 23(b)(2), and not those of Rule 23(b)(3), apply. As demonstrated by Molski (and the numerous other cases cited in the Opening Brief), the proposed class satisfies Rule 23(b)(2).

CONCLUSION

For the reasons set forth above and in their Opening Brief, Named Plaintiffs request that this Court, pursuant to Rules 23(a) and 23(b)(2), certify a class in this case.

FOX & ROBERTSON

BY: /s/ Timothy P. Fox
Timothy P. Fox

Dated: October 8, 2003