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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**OAKLAND DIVISION**

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02 5849 PJH (NC)

**PLAINTIFFS' MEMORANDUM (1) IN SUPPORT OF MOTION TO ALTER AND AMEND THE CLASS CERTIFICATION ORDER AND (2) IN RESPONSE TO DEFENDANT'S MOTION FOR DECERTIFICATION.**

**Hearing Date: To Be Determined**
**Time: To Be Determined**

**The Honorable Phyllis J. Hamilton**
**Courtroom 3, 3rd Floor**

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Plaintiffs hereby move to alter and amend the class certification order in this case, and respond to Defendant's Motion for Decertification ("Decert. Motion").

The class certified in this case in 2004 continues to meet the requirements for commonality as recently clarified in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and certification of the injunctive issues and classwide liability determinations for five Key Barriers identified below, remains proper under Rules 23(b)(2) and (c)(4). In light of *Wal-Mart*'s holding that certification of damages under Rule 23(b)(2) is generally inappropriate, Plaintiffs request that the Court alter the certification order to certify under Rule 23(b)(3) the issue of the amount of damages each class member is entitled to arising from the five Key Barriers.

As to these Key Barriers, the compliance status of the vast majority of these barriers has been, or can be, resolved on summary judgment, as detailed below. Further, Key Barriers constitute the types of barriers that most class members who eat at a Taco Bell restaurant will encounter: parking; getting into the restaurant; purchasing food; dining; and using the restroom. A class member is entitled to one recovery of minimum statutory damages for each visit during which he or she experienced "difficulty, discomfort, or embarrassment" as a result of a noncompliant element. *See* Cal. Civ. Code § 55.56(c). The nature of the Key Barriers is such that -- when they are encountered by class members -- this standard for damages is generally met. As a result, resolving Key Barrier damages claims has the potential to address the vast majority of class member damages claims. The occasional class member who experienced discrimination at a Taco Bell restaurant only because of some other barrier has the ability to opt out of the damages portion of the class and pursue his or her own claim.

To summarize Plaintiffs' position:

- Liability for an injunction has already been resolved on a classwide basis, and the scope of the injunction is appropriate for class wide determination as well, making the 2004 Order's Rule 23(b)(2) certification of injunctive issues appropriate.
- Liability for damages for the five Key Barriers -- explained below -- either has been resolved or is appropriate for resolution on a classwide basis under Rule 23(b)(2).

- The amount of damages to which each class member is entitled as a result of discrimination based on Key Barriers is appropriate for certification under Rule 23(b)(3).

Plaintiffs propose that the remainder of the case be bifurcated, with Rule 23(b)(2) injunctive and liability issues being resolved first, followed by the Rule 23(b)(3) damages issue.

Finally, although the *Wal-Mart* decision addressed only commonality and damages claims under Rule 23(b)(2), Defendant's Decertification Motion is much broader, rehashing a number of long-settled questions concerning typicality, adequacy of representation, and Rule 23(b)(2) certification of injunctive issues. None of these arguments has merit.

## BACKGROUND

### I. Initial Class Certification.

The complaint in this case was filed in December 2002, and was amended in August 2003. Both the Complaint and Amended Complaint asserted a putative class action under Rules 23(b)(2) and 23(b)(3) on behalf of persons who use wheelchairs or scooters for mobility. *See* ECF 1-1 at ¶ 20; ECF 36 at ¶ 20. On behalf of the class, the four Named Plaintiffs sought injunctive relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*, and injunctive relief and minimum statutory damages under the Unruh Civil Rights Act ("Unruh") (Cal. Civ. Code § 51) and Disabled Persons Act ("CDPA") (Cal. Civ. Code § 54).

On February 23, 2004, the Court certified the class, which included class claims for injunctive relief and minimum statutory damages. *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004) ("2004 Certification Order"). The Court subsequently denied TBC's motion to modify the class to remove damages claims. *See Moeller v. Taco Bell Corp.*, 2004 WL 5669683 (N.D. Cal. Dec. 7, 2004).

### II. Prior Substantive Rulings

On October 5, 2004, the Court appointed a Special Master, who surveyed the approximately 220 restaurants at issue. ECF No. 101. The results of his surveys are on file. ECF Nos. 216 through 240.

In February 2007, Plaintiffs moved for partial summary judgment based on the Special Master's measurements as to specified architectural elements. On August 8, 2007, the Court

granted Plaintiffs' motion in part, holding that almost 400 conditions in more than 160 restaurants were in violation of state law and/or the ADA. *Moeller v. Taco Bell Corp.,* 2007 WL 2301778, at *12-15, 20-22 (Aug. 8, 2007) ("SJ Order") (referencing Exs. 3 through 8 to Plaintiffs' Motion for Partial Summ. J. ("MPSJ"), ECF Nos. 256-3 through -8).

In June 2011, the Court conducted an exemplar trial concerning Restaurant 4518 in San Pablo, California. On October 5, 2011, the Court issued its Findings of Fact and Conclusions of Law ("FFCL"), holding "that plaintiffs have established that classwide injunctive relief is warranted, with regard to maintaining compliance, both as to Taco Bell 4518, and as to all corporate Taco Bell restaurants in California."[1] ECF No. 462 at 53.

As discussed below, the Court's holdings in the SJ Order and the FFCL were based on issues of fact and law that are common among class members, and as to which the Named Plaintiffs' claims are typical of those of class members.

**III. Key Barriers.**

The original class definition certified by the Court included minimum statutory damages arising from any noncompliant barrier at any covered Taco Bell restaurant. Plaintiffs seek to narrow the damages class by limiting those claims to five "Key Barriers" that, where they existed, often impacted class members' access. The SJ Order and the FFCL have already established liability for many of these barriers and the vast majority of the remainder of the Key Barrier liability case can be resolved through summary judgment.

The five Key Barriers are: (1) noncompliant access aisles at van-accessible parking spaces; (2) noncompliant exterior and interior door force; (3) noncompliant queue lines; (4) Interior seating areas with noncompliant accessible seating numbers and dimensions; and (5) noncompliant restroom amenities.[2].

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[1] The Court decided to wait to decide on the form of the injunction until after the class certification issues are resolved. FFCL at 53-54.

[2] For each Key Barrier, at least one Named Plaintiff testified during their deposition that their access at a covered restaurant has been impeded. *See, e.g.,* Corbett Dep. 32, 40, 52-53, 75-77, 87-88; Moeller Dep. 18-20, 23-24, 36-37, 65-67; Muegge Dep. 54-58, 60-62, 70, Yates Dep. 58-60, 66-67, 70 (Exs. 4-7 to the Robertson Decl.); *see also* Plaintiffs' (continued...)

**A. Van-Accessible Parking Spaces.**

As this Court has held, the ADA requires each Taco Bell restaurant to have at least one van accessible parking space with an access aisle of at least 96 inches; the parties have agreed to a tolerance of 94 inches. FFCL at 28. This requirement would apply to any restaurant built after January 26, 1993. 42 U.S.C. § 12183(a)(1). This Court has held that restriping a parking lot constitutes an alteration that would require compliance with alterations provisions, FFCL at 28, so any parking lot that was restriped after January 26, 1992, was required to have a van accessible parking space. TBC has admitted that it restripes its parking lots annually.[3] A summary judgment motion can establish that approximately 88 restaurants that the Special Master determined did not have a van accessible parking space with an access aisle at least 94 inches in width were in violation of the ADA, either because they were built after January 1, 1993 or because they were restriped in the meantime. *See* Robertson Decl. ¶¶ 4-8.

**B. Door Force.**

Starting on December 31, 1981, Title 24 required that exterior door force be no more than 8.5 pounds. SJ Order at *14. Until April 1, 1994 that limit applied only to "primary entrances;" after that date, it applied to all entrances. *Id.* at *14-15. The SJ Order granted partial summary judgment with respect to restaurants built after April 1, 1994 that had an exterior door force of more than 9.5 pounds, the tolerance applied by the Court. *Id*. There were approximately 49 such restaurants. Robertson Decl. ¶ 9.

TBC has stated in interrogatory responses that the primary entrance is the entrance closest to the accessible parking space(s). Robertson Decl. Ex. 2. Using that definition and the Special Master's measurements, summary judgment will be appropriate as to an additional approximately 46 restaurants with exterior door force violations because they are either

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[2](...continued)
Response to Taco Bell Corp.'s Supplemental Case Authority (ECF No. 615) at 2-3 & nn. 1-10, which is incorporated herein by reference.

[3] *See, e.g.,* Elmer 9/28/05 tr. at 80:15-16 (Rule 30(b)(6) deponent testified that "I know for a fact that every year we have the parking lots restriped . . .") (Robertson Decl. Ex. 1).

(1) violations at primary entrances at stores built between 1981 and 1994; or (2) violations at stores built before 1981 at which TBC's responses to requests for admission ("RFAs") establish that either the door closer or the door itself was replaced after 1981. Robertson Decl. ¶¶ 13-14. The FFCL established that newly installed door closers must comply with the standards at the time of installation. *Id.* at 31.

Starting on December 31, 1981, Title 24 required that interior door force be no more than five pounds; the ADAAG contains the same standard. *See* SJ Order at *13. The SJ Order granted partial summary judgment with respect to 141 restaurants built after December 31, 1981 that had restroom door forces of more than seven pounds, the tolerance agreed to by the parties. *Id.* at *13-14, MPSJ Exs. 3-4. Using the Special Master's measurements, summary judgment will be appropriate on an additional approximately seven interior door force violations at pre-1981 stores because either (1) TBC has admitted through RFAs that either the door or the door closer was replaced after 1981; or (2) Plaintiffs will demonstrate -- based on unrebutted expert evidence of precisely the type that the Court relied on in the FFCL, *see id.* at 31 -- that it was "readily achievable," *see* 42 U.S.C. § 12182(b)(2)(A)(iv), to replace the door closer. Robertson Decl. ¶¶ 28-29.

**C. Queue Lines.**

Starting on December 31, 1981, state law required cafeteria lines and circulation paths to be at least 36 inches wide. SJ Order at *9. Starting on January 26, 1993, the ADA required either (1) that the lanes of the queue line be at least 42 inches wide with 48 inches at the point of the turn, or (2) that the lanes be at least 36 inches wide with 60 inches at the point of the turn. *Id.* at *9-10. The SJ Order held that queue lines at 77 restaurants violated one of those standards, but that TBC had raised a disputed question of fact as to whether its auxiliary access constituted equivalent facilitation. *Id*. at *9-12, MPSJ Exs. 1 & 2.

Following the exemplar trial, this Court held that the auxiliary access does not provide equivalent facilitation. FFCL at 45-51. Thus, liability can be established for the 77 queue lines held noncompliant in the SJ Order. Summary judgment will also be appropriate with respect to an additional approximately nine queue lines that, based on the Special Master's

measurements, did not comply with the 1982 standard because TBC has admitted, in response to Plaintiffs' RFA, that all queue lines were installed in Taco Bell restaurants no earlier than 1983. Robertson Decl. ¶ 18 & Ex. 3.

**D. Interior Seating.**

Since December 31, 1981, state law has required at least one wheelchair seating space for each twenty seats. SJ Order at *22. The ADA requires that five percent but not less than one. *Id.* at *20. The ADA also governs the dimensions of knee clearance at accessible seating spaces. *Id.* The SJ Order granted partial summary judgment with respect to 54 restaurants that violated those standards. *Id.* at *21, *22; MPSJ Exs. 6-8.

Summary judgment will be appropriate concerning an additional approximately 59 violations of table number and dimension requirements because: (1) TBC has admitted through RFAs that either tables were replaced after the applicable date; or (2) Plaintiffs will demonstrate -- based on unrebutted expert evidence of precisely the type that the Court relied on in the FFCL, *see id.* at 33-34 -- that it was readily achievable to replace the table top. Robertson Decl. ¶¶ 24-25.

**E. Restroom Amenities.**

Starting on July 1, 1970[4] and continuing to the present, state law has required restroom amenities such as paper towel dispensers, hand dryers, soap dispensers, and toilet seat cover dispensers to be mounted at no more than 40 inches above the finished floor. *See, e.g.*, FFCL at 37. The parties agreed to a tolerance of 42 inches. *Id.* In approximately 170 restaurants built since July 1, 1970, at least one and often multiple restroom amenities are mounted with their operable parts higher than 42 inches. Robertson Decl. ¶ 32.

In sum, a total of approximately 216 restaurants have at least one Key Barrier that has either been adjudged noncompliant or would be amenable to summary adjudication. *Id.* ¶ 33.

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[4] ANSI A-117.1-1961 § 5.6.6. Between July 1, 1970 and the first effective date of Title 24 on December 31, 1981, compliance was governed by "ANSI A117.1-1961: American National Standard Specifications for Making Buildings and Facilities Accessible to and Usable by, The Physically Handicapped." *People ex rel. Deukmejian v. CHE, Inc.*, 197 Cal. Rptr. 484, 491 (Cal. Ct. App. 1983).

## ARGUMENT

The 2004 Certification Order is one of dozens of decisions holding that the requirements of Rule 23 -- including the commonality requirement -- are met by classes of persons with disabilities asserting claims under disability rights statutes.[5] As demonstrated below, this class easily meets the commonality requirement as delineated in *Wal-Mart*. Finally, while the class claims as to liability and injunctive relief remain properly certified under Rule 23(b)(2), the 2004 Certification Order should be altered and amended to certify under Rule 23(b)(3) the issue of the amount of statutory damages each class member is entitled to arising from Key Barriers.

### I. The Class Satisfies The Numerosity Requirement.

TBC does not challenge numerosity. As set forth in the 2004 Certification Order, the class is geographically dispersed and covers more than 220 popular fast food restaurants. As a matter of common sense, the class is numerous and joinder is impracticable. *See Moeller*, 220 F.R.D. at 608 ("A court may make common sense assumptions to support a finding that joinder would be impracticable.").

### II. The Class Satisfies The Commonality Requirement.

This Court held in the 2004 Certification Order that the commonality requirement was met because "this case involves a homogeneous class of plaintiffs (individual wheelchair or scooter users) who are bringing multiple but common factual claims that will be determined

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[5] *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 869-70, 879 (9th Cir. 2001) (affirming the certification of a class of prisoners and parolees with sight, hearing, learning, developmental, and mobility disabilities); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 120-23 (C.D. Cal. 2008) (certifying class of persons with mobility disabilities suing for alleged violations of architectural accessibility requirements at a grocery store chain); *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 344-49 (N.D. Cal. 2008) (certifying class of persons with mobility and/or vision disabilities suing due to barriers along outdoor designated pedestrian walkways throughout the state of California which are owned and/or maintained by the California Department of Transportation); *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1199-1203 (N.D. Cal. 2007) (certifying class of persons with visual impairments suing for alleged violations of accessibility requirements at online store); *Lucas v. Kmart Corp.,* 2005 WL 1648182 (D. Colo. July 13, 2005) (nationwide class) & 2006 WL 722163 (D. Colo. Mar. 22, 2006) (damages settlement sub-class). *See also* Pls.' Mot. for Class Certification (ECF No. 40) at 14-16 & n.18 (citing cases).

pursuant to a common legal backdrop." *Id.* at 609. This decision is entirely in accord with the Supreme Court's discussion of commonality in *Wal-Mart*.

**A. The *Wal-Mart* Decision.**

The class in *Wal-Mart* had about one and a half million members, current and former female employees of Wal-Mart at 3,400 stores across the country. 131 S. Ct. at 2546. The plaintiffs alleged that local supervisors had exercised their discretion over pay and promotion matters in a manner that violated Title VII by discriminating against women. *Id.* The Court held that the class did not meet the commonality requirement for two reasons.

First, the Court held that commonality requires not only one or more common questions, but also that those questions "must be of such a nature that [they are] capable of classwide resolution." *Id.* at 2551.

Second, commonality requires that plaintiffs bridge the gap between the named plaintiffs' discriminatory experiences, and the existence of a class of persons who have suffered the same injury, such that the individuals' claims and the claims of the class will share common questions, and that the individuals' claims will be typical of those of the class. *Id.* at 2553 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 (1982)).

Many of the claims and defenses in this case -- including decisions on the merits that have already resolved a number of those claims and defenses -- are common issues capable of classwide resolution, and constitute substantial proof that Plaintiffs and members of the class have suffered discrimination manifested in the same general fashion. *See id.*

**B. The Class Shares A Number Of Common Questions That Can Be (And In Many Cases Have Been) Answered In A Classwide Proceeding.**

Although a single common question capable of classwide resolution suffices to satisfy Rule 23(a)(2), *Wal-Mart*, 131 S. Ct. at 2556, here common issues permeate virtually every aspect of the case.

**Injunctive relief:** In its FFCL, this Court found that injunctive relief is warranted as to all corporate Taco Bell restaurants in California. FFCL at 53. That decision was based on a number of common questions that were answered on a classwide basis, including:

| Common Questions | Common Answers |
|---|---|
| Are TBC's violations of access requirements sufficiently widespread to justify an injunction covering all of the restaurants at issue? | Yes. FFCL at 53. |
| Does Taco Bell's remediation of its restaurants deprive plaintiffs and class members of standing to seek injunctive relief? | No. FFCL at 22-25. |
| Do architectural elements at TBC's restaurants change frequently, undermining a voluntary cessation defense? | Yes. FFCL at 42-43. |
| Does TBC have a history of not following its access policies, undermining a voluntary cessation defense? | Yes. FFCL at 40-41. |
| Are TBC's access policies contradictory, undermining a voluntary cessation defense? | Yes. FFCL at 42. |
| Is TBC not following its current access policies, undermining a voluntary cessation defense? | Yes. FFCL at 41-42. |
| Could TBC change or rescind its access policies in the future, undermining a voluntary cessation defense? | Yes. FFCL at 42. |

**Liability:** In *Wal-Mart*, the liability determination required an individualized analysis of the reason that a specific raise or promotion was denied. 131 S. Ct. at1552. In contrast, in this case liability is established by comparing the measurements of an architectural element with the requirements in place at the time that the restaurant was constructed or altered. Because the same types of elements -- parking, doors, queue lines, seating, and restroom amenities -- are found in many if not most of the restaurants at issue, and are subject to a common legal framework, the common question whether these elements are out of compliance can be answered in this proceeding.

This was illustrated by the SJ Order. Based on the Special Master's surveys and stipulated construction dates, the Court held that almost 400 architectural elements among more than 160 restaurants violated state and/or federal requirements. In that Order, and in the Court's FFCL, the Court resolved a number of common liability questions, including:

| Common Questions | Common Answers |
|---|---|
| What is the standard for van accessible access aisles? | Minimum 96 inches in width, with a tolerance of 94 inches. FFCL at 28. |
| Does restriping parking constitute an alteration under state and federal law? | Yes. FFCL at 28-29. |
| What is the standard for exterior door force after December 31, 1981? | Maximum 8.5 pounds, with a tolerance up to 9.5 pounds. FFCL at 29-30. |
| What entrances did this apply to? | Primary entrances before April 1, 1994; all entrances after. SJ Order at *14-15. |
| What is the standard for interior door force after December 31, 1981? | Maximum 5 pounds, with a tolerance up to 7 pounds. SJ Order at *13. |
| What is the standard applicable to queue lines in restaurants built after December 31, 1981? | Minimum 36 inches in width. SJ Order at *9. |
| What is the standard applicable to queue lines in restaurants built after January 26, 1993? | Minimum 42-inch-wide lanes with at least 48 inches at the turn or minimum 36-inch-wide lanes with at least 60 inches at the turn. SJ Order at *9-10. |
| How many seats are required to be accessible? | One out of every 20, SJ Order at *22, or five percent, SJ Order at *20. |

Going forward, the compliance status of only a small subset of architectural elements will need to be determined. The Court has already found that there is sufficient evidence for an injunction covering all restaurants at issue, and thus further compliance determinations are not necessary for injunctive relief. Additionally, Plaintiffs have agreed to limit class damages claims to the five Key Barriers. The SJ Order already determined that many of these barriers were in violation of state and/or federal law and, as discussed above, the compliance status of the vast majority of remaining Key Barriers can be determined by summary judgment.

**Defenses**: There are a number of common questions relating to TBC's defenses that can be (and have been) answered on a classwide basis, including:

| Common Questions | Common Answers |
|---|---|
| Has TBC met its burden under the voluntary cessation defense? | No. FFCL at 39. |
| Should the fact that a building department issued a certificate of occupancy for a restaurant create a presumption that the building department granted an exception covering any access violations in that restaurant in the absence of written evidence of such an exception? | No. FFCL at 43-44. |
| Does the auxiliary access lane at TBC's queue line constitute equivalent facilitation? | No. FFCL at 50-51. |
| Does the difficulty of maintaining compliant door force excuse such compliance? | No. FFCL at 30. |
| Does the fact that the ADAAG does not contain a standard for exterior door force constitute equivalent facilitation? | No. FFCL at 51-52. |

**C. Named Plaintiffs and Class Members Suffered The Same Injury.**

Commonality requires that named plaintiffs and class members share common issues, so there must be evidence showing that the discrimination complained of was not isolated to the named plaintiffs but was also encountered by class members. *Id.* at 2553. The plaintiffs in *Wal-Mart* did not meet this requirement because they alleged that the discriminatory employment decisions at issue were made by store managers, but had no statistical or anecdotal evidence showing common violations by store managers. *Id.* at 2554-56.

Here, the Court's SJ Order established that there were noncompliant entrance doors, seating areas and/or restroom doors at over 160 restaurants at issue in this case. SJ Order at *12-15, 20-22 (referencing Exs. 3 through 8 to MPSJ). In other words, more than 70% of the restaurants at issue have one or more architectural elements that have been determined to violate state and/or federal law. This evidence easily "bridges the gap" to show that the discrimination experienced by the Named Plaintiffs was also experienced by class members when they patronized covered restaurants, and that they suffered the same injury.

TBC argues that the Named Plaintiffs and class members did not suffer the same injury because, it asserts, a class member who cannot use an inaccessible queue line suffers a

different injury from a class member who cannot use some other element, such as an inaccessible table. Decert. Motion at 9-12. The Ninth Circuit has twice rejected this approach to the injury caused by architectural barriers. In *Doran v. 7–Eleven, Inc.*, 524 F.3d 1034, 1042-43 (9th Cir. 2008) and again in *Chapman v. Pier 1 Imports (U.S.) Inc.,* 631 F.3d 939, 944 (9th Cir. 2011) (en banc), the Ninth Circuit held that:

> "it is ultimately misleading to conceptualize each separate architectural barrier inhibiting a disabled person's access to a public accommodation as a separate injury that must satisfy the requirements of Article III." Rather, the injury suffered by disabled plaintiffs is the "discrimination" under the ADA that results from an accommodation's "failure to remove architectural barriers."

*Chapman,* 631 F.3d at 951-52 (quoting *Doran*).

Further, commonality does not require the claims of class members to be identical. *See, e.g., Rodriguez v. Hayes,* 591 F.3d 1105, 1122 (9th Cir. 2010) (Holding that class members need "not share every fact in common or completely identical legal issues."); *see also Walter v. Hughes Commc'ns, Inc.,* 2011 WL 2650711, at *8 (N.D. Cal. July 6, 2011). Indeed, in *Wal-Mart*, the Court, quoting *Falcon*, stated that commonality exists when discrimination is manifested "in the same general fashion" among class members. *Wal-Mart*, 131 S. Ct. at 2253.

**D. TBC's Arguments Based On Alleged Differences In The Configuration Of Its Restaurants Should Be Rejected.**

TBC argues against commonality on the grounds that the restaurants are configured differently and were constructed or altered at different times. Decert. Motion at 10-11, 24. These minor differences are largely irrelevant and are insufficient to overcome the significant common questions unifying the class. As this Court previously held, "[t]he 'unique architecture' argument has been rejected by a number of courts in disability cases." *Moeller*, 220 F.R.D. at 609; *see also Park*, 254 F.R.D. at 121 ("Despite differences from store to store, the alleged accessibility barriers affect all wheelchair users in the same way."); *Colo. Cross-Disability Coal. v. Taco Bell Corp.,* 184 F.R.D. 354, 359-60 (D. Colo. 1999).

First, each type of architectural element in TBC's restaurants -- including the Key Barriers -- is subject to a common legal framework, a common set of measurements taken by the Special Master, and a common set of stipulated or admitted construction and alteration

dates. Together, these common legal and factual issues permit the compliance status of large numbers of Key Barriers to be determined in a single ruling on a classwide basis. The fact that not every architectural element exists at every covered restaurant does not defeat commonality because "'[a]ll questions of fact and law need not be common to satisfy the rule.'" *Ellis v. Costco Wholesale Corp.*, --- F.3d ----, 2011 WL 4336668, at *7 (9th Cir. Sept. 16, 2011).

Second, aside from the elements in covered restaurants, there are a number of important common issues that can be (and have been) answered in this proceeding, including whether TBC's violations were sufficiently widespread to justify systemwide relief, whether Taco Bell's remediation of its restaurants deprived plaintiffs and class members of standing for injunctive relief, whether the facts supported TBC's voluntary cessation defense, and the validity of TBC's building department, equivalent facilitation, and other defenses.

Finally, TBC's contention that alleged differences in the configuration of its restaurants precludes an injunction is belied by the fact that the Court, in its FFCL, determined that there was sufficient evidence to warrant an injunction covering all restaurants. FFCL at 53; *see also id.* at 39 ("A court need not address every violation in order to conclude that violations are sufficiently widespread to necessitate a system wide injunction.").

For the above reasons, the class in this case satisfies the commonality requirement.

## III. The Class Satisfies the Typicality Requirement.

The *Wal-Mart* Court did not address the typicality requirement of in Rule 23(a)(3). TBC is simply rehashing an argument that the Court has already twice rejected:[6] that typicality does not exist because of alleged differences in the configuration of its restaurants and in the disabilities of class members. TBC's position contradicts Ninth Circuit precedent.

For example, in *Armstrong v. Davis*, 275 F.3d 849 (2001), the Ninth Circuit held that where the challenged conduct is a practice that affects all class members,

[6] *See* 2004 Certification Order, 220 F.R.D. at 611 n.15; ECF No. 148 at 5-6.

> We do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct.

*Id.* at 869. "'Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). Here, the Named Plaintiffs' and class members' injuries result from the same course of conduct -- TBC's failure to comply with access requirements -- and the nature of their claims is the same. Thus the typicality requirement is met, as numerous other courts in similar cases have found. *See, e.g., Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 450 (N.D. Cal. 1994); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 121 (C.D. Cal. 2008); *Access Now, Inc. v. AHM CGH, Inc.,* 2000 WL 1809979, at *3 (S.D. Fla. July 12, 2000); *see also supra* note 5 (citing cases).

The sole case that TBC relies on -- *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009) -- does not change this result. The *Castaneda* decision -- for which the Ninth Circuit granted the plaintiffs' Rule 23(f) interlocutory appeal[7] -- involved facts that the *Castaneda* court explicitly distinguished from those at issue here. *See id.* at 567-68.

The *Castaneda* litigation involved franchised restaurants, in contrast to the corporate restaurants at issue here. As such, that court found, there were no "common offending policies or design characteristics." *Id.* at 568. In contrast, this Court has examined TBC's access policies and held that they are "centralized -- policies in place at Taco Bell 4518 are also in place at all other California corporate Taco Bell restaurants." FFCL at 15. Similarly, while the *Castaneda* court held that there were no centralized features, *id.* at 563, this Court -- in its SJ Order -- has ruled on three barriers, each of which is common to many restaurants, and Plaintiffs have explained above how all five Key Barriers are similarly common. *See supra* at 3-6. TBC directly operates the restaurants at issue, its policies are centralized, and the Special Master's surveys demonstrate a number of common facts concerning barriers that, for example,

[7] *See* Robertson Decl. Ex. 8. The case settled before the appeal was decided. *Id.* ¶ 38.

permitted a liability determination on approximately 400 barriers in 160 restaurants, as well as a determination that an injunction covering all of the restaurants at issue was warranted.

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

Again, this was not a question addressed in the *Wal-Mart* case, but represents TBC's attempt to rehash long-settled questions. The adequacy requirement is easily met here.

### A. Named Plaintiffs Satisfy the Ninth Circuit Standard for Adequacy

Named Plaintiffs satisfy the adequacy requirement of Rule 23(a)(4) because they do not have any conflicts of interest with other class members and because they will prosecute -- indeed have prosecuted -- the action vigorously on behalf of the class. *See Ellis*, 2011 WL 4336668, at *12 (citation omitted).

There is no question that Named Plaintiffs will prosecute the action vigorously. They have done so for nine years, and TBC does not and could not argue to the contrary. In addition, there are no conflicts between Named Plaintiffs and the class, nor does TBC argue that there are.[8] Named Plaintiffs share with the class -- with respect to an injunction -- an interest in ensuring that California corporate Taco Bell restaurants become and -- importantly, at this stage -- remain maximally accessible. As for damages, at least one Named Plaintiff has experienced discrimination based on encounters with each of the Key Barriers, *see supra* note 2, so they will be motivated to work for -- and indeed have achieved -- advantageous rulings relating to those barriers, and will continue to be motivated to work for advantageous recovery for the class resulting from these barriers.

TBC relies on *Castaneda* to argue that Named Plaintiffs are not adequate representatives with respect to restaurants they have not patronized. Decert. Motion at 15-16. The citation on which it relies, however, relates to a discussion of commonality, not adequacy,

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[8] TBC argues that Named Plaintiff Ed Muegge is an inadequate class representative with respect to injunctive relief because he now lives out of state. Decert. Motion at 2, 16, 18. Mr. Muegge has testified that he returns regularly to California. Muegge dep. 123:1-7, 124:8-13 (Robertson Decl. Ex. 6). For this reason, he shares with the class the interest in ensuring continued accessibility at Taco Bell's California restaurants. Should this Court disagree, it would not affect the ultimate outcome, as TBC does not challenge the adequacy of the remaining Named Plaintiffs on this ground.

*see id.* (citing *Castaneda*, 264 F.R.D. at 571-72). As was established above in Section III, *Castaneda* is distinguishable and, indeed, distinguished the present case in the very ruling on which TBC relies. *See Castaneda*, 264 F.3d at 567-68.

**B. Modification of the Class Certification Order as Requested by Plaintiffs Will Not Violate Absent Class Members' Due Process Rights.**

TBC argues, without citation, that the facts that the Exemplar Trial was limited to 12 barriers and that the proposed damages class is limited to five Key Barriers would violate absent class members' due process rights by binding them to a limited class definition. Decert. Motion at 16-17. This is incorrect.

The injunctive phase of the trial -- which is binding on the class without opt-out rights -- has already established "that classwide injunctive relief is warranted, with regard to maintaining compliance . . . as to all corporate Taco Bell restaurants in California." FFCL at 53. Thus the issues litigated in that trial, combined with the Court's findings in its SJ Order, were broad enough to secure significant injunctive relief for the class.

With respect to damages, class members' due process rights will be protected by Rule 23(b)(3)'s opt out right -- if a class member is unhappy with the limitation of the class to five Key Barriers, he or she may opt out and pursue his or her rights in individual litigation. *See* Fed. R. Civ. P. 23(c)(2)(B)(v).

**C. Named Plaintiffs Have Standing and Their Claims Are Not Moot**

TBC argues that Plaintiffs are not adequate representatives because they do not have standing and because their claims are moot. Decert. Motion at 17-19. Since TBC filed its motion, this Court has rejected both arguments. FFCL at 22-26 (standing); 39-43 (mootness).

Specifically, the Court held that "plaintiffs have sufficiently established a likelihood that the injury will recur by showing that TBC "'repeatedly engaged in injurious acts in the past.'" FFCL at 25 (quoting *Armstrong*, 275 F.3d at 861). "Standing exists if at least one named plaintiff meets the requirements." *Ellis*, 2011 WL 4336668, at *5 (citation omitted).

The Court also held that Plaintiffs' claims were not moot because "TBC has failed to carry the 'heavy burden' of showing that violations of the ADA and Title 24 will not occur in

the future at Taco Bell 4518." FFCL at 43. Several of the grounds for this holding are applicable to all of the restaurants covered by the class: TBC's policies -- which the Court found to be "centralized," *id.* at 15 -- are "vague and contradictory, *id.* at 42; crucial maintenance policies "include a provision giving TBC the discretion to ignore violations . . . based on unknown and unspecified criteria," *id.*; and "TBC could change or rescind its policies at any time," *id.* Finally, the Court relied on the fact that Jaime de Beers, a former TBC facility leader for Northern California, testified that "certain elements at TBC restaurants are 'subject to frequent change.'" *Id.* at 42-43. Ms. de Beers's declaration was not limited to any specific stores. *See* Trial Ex. 85 ¶ 6.

## V. Class Injunctive And Liability Claims Are Properly Certified Under Rule 23(b)(2).

TBC argues that class injunctive claims do not meet the requirements of Rule 23(b)(2), but nothing in the *Wal-Mart* decision supports this argument. To the contrary, the Court recognized that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." 131 S. Ct. at 2557 (citation omitted). Similarly, it is common to certify liability issues (here, liability as to the Key Barriers) Bunder Rule 23(b)(2).[9]

TBC's argument to the contrary rests on two assertions squarely rejected in this Court's FFCL. First, it contends that because it has (temporarily) fixed its restaurants, there is no likelihood of future injury. Decert. Motion at 20-21. This argument goes to whether an injunction should be entered, not whether the requirements of Rule 23(b)(2) are met. *See Ellis*, 2011 WL 4336668, at *10 n.8. Further, as a substantive matter, this Court has already rejected this argument. *See* FFCL at 39-43, 53.

[9] *See, e.g., Ryan v. Carl Corp.*, 1999 WL 16320, at *11 (N.D. Cal. Jan. 13, 1999) ("[T]he interests of justice are best served in this action by certifying the proposed main class under Rule 23(b)(2) for a determination of liability and injunctive relief . . .); *Barefield v. Chevron, U.S.A., Inc.,* 1988 WL 188433, at *4 (N.D. Cal. Dec. 6, 1988) ("Accordingly, the case shall remain certified under (b)(2) through the determination of liability for the claims for injunctive, declaratory, back pay, and punitive damages.").

TBC also argues that before an injunction can enter, the circumstances of each barrier, and each class member, must be separately analyzed. The Court has already effectively rejected this argument as well, by holding that "the court finds that plaintiffs have established that classwide injunctive relief is warranted." FFCL at 53. The court can enter an injunction based on "evidence that is 'symptomatic' of the defendant's violations, including 'individual items of evidence [that are] representative of larger conditions or problems.'" FFCL at 39 (citing *Armstrong*, 275 F.3d at 871).

## VI. The Class Certification Order Should Be Altered And Amended So That Key Barrier Damages Claims Are Certified Under Rule 23(b)(3).

The 2004 Certification Order certified the class claims seeking minimum statutory damages under Rule 23(b)(2). Based on *Wal-Mart*, Plaintiffs respectfully request that this Court exercise its power pursuant to Fed. R. Civ. P. 23(c)(1)(C) and (c)(4) to alter and amend the 2004 Certification Order such that the issue of classwide liability for minimum statutory damages as to Key Barriers be certified under Rule 23(b)(2), and the issue of the damages recoverable by each class member resulting from Key Barriers, be certified under Rule 23(b)(3), for the following class:

> All individuals with disabilities who use wheelchairs or electric scooters for mobility who, at any time on or after December 17, 2001, were denied, or are currently being denied, on the basis of disability, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of California Taco Bell corporate restaurants based on any one of the following non-compliant barriers: access aisles at van accessible parking; entry or restroom door force; number or dimensions of accessible seating positions; queue line; height of restroom amenities.

### A. The Court Has The Power To Alter And Amend The 2004 Order.

Rule 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment," and TBC agrees that the Court can alter or amend the 2004 Order. *See* Decert. Motion at 5-6. Indeed, amending the certification order as to damages after a liability determination is a common use of the power vested courts under Rule 23(c)(1)(C). According to the Advisory Committee notes to the 2003 amendments to this subsection, "[f]ollowing a determination of liability . . . proceedings to define the remedy may

demonstrate the need to amend the class definition or subdivide the class." Numerous courts have held that courts can alter or amend a certification order to address damages issues. *See, e.g., Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.). Finally, altering and amending the 2004 Certification Order is particularly necessary because that Order was based on then-existing Ninth Circuit precedent that was rejected in *Wal-Mart*. *See Ellis*, 2011 WL 4336668, at *1 ("In light of *Wal–Mart*'s rejection of the 'predominance' test, the district court must consider whether the claims for various forms of monetary relief will require individual determinations and are therefore only appropriate for a Rule 23(b)(3) class.").

The power to alter or amend a class includes the power to change the subsection of Rule 23(b) pursuant to which the class is certified. *See, e.g., Langley v. Coughlin*, 715 F. Supp. 522, 552 (S.D.N.Y. 1989) (Holding that "a modification of the class certification to invoke Rule 23(b)(3) in place of Rules 23(b)(1)(A) and (b)(2) is appropriate."); *Pichler v. Unite*, 446 F. Supp. 2d 353, 365 n.37 (E.D. Pa. 2006) (recertifying a Rule 23(b)(3) class under Rule 23(b)(1)(A)); *Rowell v. Voortman Cookies, Ltd.*, 2005 WL 2266607, at *4 (N.D. Ill. Sept. 14, 2005) (Changing basis of certification from Rule 23(b)(1)(A) to 23(b)(3)).

In addition, Rule 23(c)(4) permits class certification "with respect to particular issues."[10] This subsection "is designed to give the court additional flexibility in handling class actions," including to address manageability issues. 7AA Charles Alan Wright *et al.*, Federal Practice and Procedure § 1790 (3d ed.). As demonstrated below, limiting class damages claims to Key Barriers will assist manageability.

[10] District courts should "take full advantage of this provision to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2001); *See also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.").

**B. The Amended Damages Class Satisfies Rule 23(b)(3).**

Rule 23(b)(3) has two requirements: (1) questions of law or fact common to class members must predominate over any questions affecting only individual members; and (2) and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Those requirements are met here.

**1. Questions of Law or Fact Common to Class Members Predominate over Any Questions Affecting Only Individual Members.**

"[T]he main concern in the predominance inquiry . . . [is] the balance between individual and common issues." *Kelley v. Microsoft Corp.*, 395 F. App'x 431, 432 (9th Cir. 2010) (citation omitted). When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis. *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (citation omitted). Courts conducting this balance should consider all factual or legal issues, including those conceded by the party opposing class certification or resolved earlier in the litigation. *See In re Nassau County Strip Search Cases,* 461 F.3d 219, 227-29 (2d Cir. 2006); *Seijas v. Republic of Arg.*, 606 F.3d 53, 57 (2d Cir. 2010).

The court in *Lucas v. Kmart Corp.*, 2006 WL 722163 (D. Colo. March 22, 2006), addressed the precise issue before this Court. That court certified, for settlement purposes,[11] a Rule 23(b)(3) class with claims for statutory damages under Unruh and the CDPA. *Id.* at *1. In so doing, it held: "[W]hen a class . . . of individuals with disabilities seeks statutory minimum damages for alleged discrimination based on architectural or other barriers, the factual and legal issues common to the class predominate over any individual issues. . . [W]hile there [are] various questions concerning the defendant's possible liability that were common to

[11] As the *Kmart* court noted, "[t]he class must satisfy the requirements of F.R.C.P. 23 even in the settlement context." 2006 WL 722163, at *2 n.3 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997)).

the class, the only issue individual to each class member [is] 'the number of instances of discrimination encountered by each class member.'" *Id.* at *5 (citation omitted).

There are multiple, significant common questions relating to the Key Barrier damages claims. Indeed, all of the common questions concerning liability and defenses set forth in the tables above (*see supra* at 10-11) are relevant to Key Barrier damages claims. These common legal and factual questions have permitted, in one proceeding, classwide determinations concerning the compliance status of hundreds of architectural elements, as well as the resolution of a number of significant legal issues, resulting in substantial efficiencies for the Court, the parties and class members. *See Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1189 (9th Cir. 2001) ("Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." (Citation omitted.)).

TBC argues that the predominance requirement is not met because "[d]amages claims are highly individualized and unique." Decert. Motion at 23. The only individualized damages issue, however, is "the simple question of the number of instances that individual class members were aggrieved by [noncompliant Key Barriers] at Defendant's restaurants during the period covered by the lawsuit." *Moeller*, 220 F.R.D. at 610 (citing *Arnold*, 158 F.R.D. at 449.)

Further, the Ninth Circuit has repeatedly held that "'[t]he amount of damages is invariably an individual question and does not defeat class action treatment.'" *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).

Because there are numerous issues common to class damages claims, and only one individualized issue, the predominance requirement is met.

**2. A Class Action Is Superior to Other Available Methods for Fairly and Efficiently Adjudicating the Controversy.**

Rule 23(b)(3) also requires that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." "This determination necessarily

involves a comparative evaluation of alternative mechanisms of dispute resolution." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). "The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009).

This class action has already resulted in extraordinary efficiencies as compared to hundreds of individual lawsuits. As set forth above, the compliance status of hundreds of architectural elements covering the majority of restaurants has been determined, numerous substantial disputes of law have been resolved, and the Court has found that an injunction covering all restaurants at issue is warranted. These accomplishments have resulted from nine years of hard work by the Court and the parties and significant expense by the parties.

Going forward, bifurcating the case will result in a number of efficiencies.[12] First, even if damages claims are not certified, the classwide liability determinations made in the first stage will apply to subsequent individual actions by class members. *See Newsome v. Up-To-Date Laundry, Inc.,* 219 F.R.D. 356, 365 (D. Md. 2004).

Second, if damages claims remain certified, the liability determinations will make it easier to subsequently address those claims. This results from the legal principle that once a defendant has been found to have violated anti-discrimination laws, all uncertainties in damages should be resolved against the defendant, and an "unrealistic burden" should not be placed on class members to establish damages. *See, e.g., Domingo v. New England Fish Co.*, 727 F.2d 1429, 1445 (9th Cir. 1984) (holding that, during damages stage of employment discrimination class action, a "court should not put an unrealistic burden on claimants"); *United States v. City of Miami*, 195 F.3d 1292, 1299 (11th Cir. 1999) (holding that, in determining remedial relief in employment class action, uncertainties in the relief process

[12] *See United States v. City of New York*, --- F.R.D. ----, 2011 WL 2680474, at *10 (E.D.N.Y. July 8, 2011) ("Issue certification of bifurcated liability-phase questions is fully consistent with *Wal–Mart*'s careful attention to the distinct procedural protections attending (b)(2) and (b)(3) classes.").

should be resolved against the discriminating employer.); *Salinas v. Roadway Express, Inc.*, 735 F.2d 1574, 1578 (5th Cir. 1984).

During the damages stage, there are a variety of tools commonly employed in class actions to address management issues. For example:

- The parties can consent to having damages claims heard by a special master or Magistrate Judge. *See* Rules 53(a)(1)(A) & 73(a).
- Alternatively, the damages process can begin with the submission of claims forms by class members. *See Gutierrez v. Wells Fargo & Co.*, 2009 WL 1247040, at *6 (N.D. Cal. May 5, 2009); 3 Newberg on Class Actions ("Newberg") § 9:64 (4th ed.). Any disputed claims can be addressed by *Teamsters* hearings, which the Supreme Court expressly identified in *Wal-Mart* as a method "'to determine the scope of individual relief.'" 131 S. Ct. at 2561 (quoting *Teamsters v. United States,* 431 U.S. 324, 361 (1977)). *Teamsters* hearings "have become routine." *Kraszewski v. State Farm Gen. Ins. Co.*, 912 F.2d 1182, 1183 n.1 (9th Cir. 1990).
- Or the Court can hold an initial damages exemplar trial, based on a single restaurant or single type of barrier, which would allow the parties to better evaluate their settlement positions. *See* 3 Newberg § 9:54.

The Court has "broad discretion" to manage damages proceedings. For example, it can limit the time the parties have to put on their case, or it can organize individual trials by restaurant, by barrier or by geographic region. *See generally Navellier v. Sletten,* 262 F.3d 923, 941 (9th Cir. 2001).

TBC argues that a Rule 23(b)(3) class "would be impossible to manage,"[13] but it does not attempt to undertake the analysis required by that Rule -- comparing the efficiency of

[13] TBC contends, without any substantiation, that there are "potentially over 100,000 class members" who will seek damages in this case. This is a wild exaggeration. During the nine years that this case has been litigated, class counsel have been contacted by approximately 3,000 people and have interviewed approximately 1,100 individuals who claim to have encountered barriers at covered restaurants.

litigating class member damages claims in this action as compared to hundreds of individual actions in courts across the state. *See* Decert. Motion at 23-24. In addressing superiority, "the proper comparison is not between class litigation and no litigation at all, but between class litigation and actions conducted separately by individual class members."[14]

The comparison required by Rule 23(b)(3) demonstrates that litigating damages claims in this action is far superior to individual class members litigating their claims in courts across the state. For example:

- Litigating damages claims in this action will permit one court to decide remaining legal issues, while requiring each class member to file an individual action will result in courts across the state addressing the same legal issues, almost assuredly resulting in inconsistent holdings.
- Over the last nine years, the parties in this case have expended an enormous amount of time and resources establishing the factual predicates to liability, including conducting multiple surveys to determine measurements.
- Litigating damages in this proceeding, after liability has been resolved, allows class members and the Court to take advantage of the efficiencies resulting from the principle that uncertainties in damages should be resolved against a defendant who has been found to violate anti-discrimination laws.
- Litigating damages claims in one proceeding will all the Court and parties to take advantage of case management tools unavailable if individual class members must bring their own claims, including organizing damages claims by restaurant, barrier or geographic region.

Ultimately, manageability concerns "must be weighed against the alternatives and 'will rarely, if ever, be in itself sufficient to prevent certification of a class.'" *Zeisel v. Diamond Foods, Inc.*, 2011 WL 2221113, at *11 (N.D. June 7, Cal. 2011) (citations omitted).

For these reasons, the class damages claims satisfy Rule 23(b)(3).

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[14] *City of New York*, 2011 WL 2680474, at *26; *see also* 2 Newberg § 4:32 ("It is only when [management] difficulties make a class action less fair and efficient than some other method . . . that a class action is improper.").

## CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Decertification Motion be denied, and Plaintiffs' Motion to Alter and Amend the Class Certification Order be granted.

Respectfully submitted,

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