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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

FRANCIE MOELLER, et al.,

Plaintiffs,

vs.

TACO BELL CORP.,

Defendant.

CASE NO. C 02-5849 PJH NC

TACO BELL CORP.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER AND AMEND CLASS CERTIFICATION ORDER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: TBA
TIME: TBA
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JUDGE: Hon. Phyllis J. Hamilton

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' Motion to Alter and Amend the Class Certification Order ("Motion") arises from their acknowledgment that the Supreme Court's ruling in *Dukes v. Wal-Mart Stores, Inc.*, __ U.S. __, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), prevents the certification of any damages class in this case. In an attempt to end-run this obvious conclusion and salvage their case, Plaintiffs seek to create an improper "hybrid" class action by certifying the supposedly separate "issues" of liability and damages for Plaintiffs' state law claims under different subsections of Rule 23. Ultimately, Plaintiffs' efforts fail to meet the requirements of either Rule 23(b)(2) or 23(b)(3).

Plaintiffs' Motion fails for at least five reasons. First, Plaintiffs' attempt to save the admittedly deficient current Rule 23(b)(2) class by arguing that liability for their state law claims can somehow be divorced from damages. What Plaintiffs fail to acknowledge, or even reference, in their Motion is that, under California law, liability and damages for disability claims are inextricably intertwined, requiring not only that a particular feature or "Key Barrier" was non-compliant, but also that the individual plaintiff encountered the feature and was denied equal access by it. Since liability cannot be separated from damages, a Rule 23(b)(2) liability "issue" class cannot be certified.

Second, the Court could not even impose such an "issue" because it is bound by the class definition in the operative complaint, which fails to address Plaintiffs' new theory. Third, reliance on an "issue" under Rule 23(c)(4) does not excuse Plaintiffs from establishing the underlying Rule 23(a) and (b)(2) requirements, which they fail to do.

Fourth, Plaintiffs cite no authority that even allows the Court to consider modification of a Rule 23(b)(2) class such that the damages portion of the class suddenly becomes certified as a Rule 23(b)(3) damages class in this situation. The Eleventh Circuit has already rejected the use of such "hybrid" classes which attempt to subvert the requirements of Rule 23(b)(3). None of the cases cited by Plaintiff allow the Court modify the existing class to create such a hybrid class absent the agreement of the parties.

Finally, Plaintiffs fail to meet either the predominance or superiority requirements imposed under Rule 23(b)(3). Since each class member will be required to prove their own interactions with the

alleged "Key Barriers" to establish liability, all class members will be required to testify, defeating predominance. Class treatment cannot be held superior because the glut of individual disability actions--including those filed by class representatives and unnamed class members--demonstrates the viability of individual suits as an alternative to class actions. Plaintiffs fail to explain how the individual liability questions at issue could even be determined on a classwide basis. Thus, the Court should deny Plaintiffs' Motion and decertify the existing Rule 23(b)(2) class.

II. ARGUMENT

A. The Proposed "Issue" of Classwide Liability for Damages Cannot Be Certified Under Rule 23(b)(2) Through The Application Of A Supposed Rule 23(c)(4) "Issue" Class.

1. Plaintiffs' Proposal to Certify an "Issue" of Classwide Liability Contradicts the Holding in *Dukes* Because Damages For California Disability Claims Are Inextricably Intertwined With Individualized Liability Questions.

Plaintiffs seek to litigate the issue as to Taco Bell's "liability" to each and every class member relating to their state law money damages claims under Rule 23(b)(2) instead of Rule 23(b)(3). However, the U.S. Supreme Court held in *Dukes* that "claims for individualized relief . . . do not satisfy the Rule [23(b)(2)]." *Dukes*, 131 S. Ct. at 2557 (Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."); *id.* at 2558 ("we think it clear that individualized monetary claims belong in Rule 23(b)(3)."). As explained below, Plaintiffs' state law claims under the Unruh Act or the California Disabled Persons Act ("CDPA") seek individualized relief or an individualized award of monetary damages. As a result, certification under Rule 23(b)(2) is improper.

(a) Liability for the State Law Damages Claims at Issue Cannot Be Determined on a Classwide Basis Because It Is Impossible To Make An Across-The-Board Conclusion As To The Recovery Of Damages By Any Class Member.

Plaintiffs seek to avoid *Dukes* by implying that classwide liability for the state law damages claims can somehow be determined on a global rather than an individualized basis. As an initial matter, Plaintiffs ignore the required elements for maintaining an Unruh Act or CDPA claim for statutory minimum damages. Specifically, "[T]o maintain an action for damages pursuant to section 54 et seq. an individual must take the additional step of establishing that he or she was denied equal access on a

particular occasion." *Donald v. Cafe Royale, Inc.*, 218 Cal. App. 3d 168, 183, 266 Cal. Rptr. 804 (Cal. Ct. App. 1990) (Merrill, J.)[1] *see also Boemio v. Love's Rest.*, 954 F. Supp. 204, 207 (S.D. Cal. 1997)

"This is not merely a question of damages, it is a question of liability." *Pryor v. Aerotek Scientific, LLC*, No. CV 10-06575 MMM (AJWx), 2011 WL 6376703, at *15 (C.D. Cal. Nov. 15, 2011) (Morrow, J.) (emphasis added). Such fact specific individual liability and damages questions cannot be determined on a classwide basis. *Rodriguez v. Gates*, No. CV 99-13190 GAF (AJWx), 2002 WL 1162675, at *11, 2002 U.S. Dist. LEXIS 10654, at *40-*41 (C.D. Cal. May 30, 2002) ("[T]here is no way to adjudicate the class members' claims on a classwide basis-not because damages are individual to each case, but because liability and causation are.") Courts have considered and rejected an aggregate approach to liability under California law where "each class member would need to establish entitlement to damages as well as the amount of damages." *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1427, 47 Cal. Rptr. 3d 83 (2006); *see also, Thayer-Ogden v. Pottery Barn Kids, Inc.*, No. RG05-199128, 2006 WL 3378686, at *4 (Cal. Super. Ct. Nov. 9, 2006) (Sabraw, J.).

Further, an individual class member's claim for damages cannot be adjudicated simply by demonstrating the mere presence of an alleged non-compliant feature. Each class member must show how he or she was personally affected. For example, in *Urhausen v. Longs Drug Stores Cal., Inc.*, 155 Cal. App. 4th 254, 266, 65 Cal. Rptr. 3d 838 (Cal. Ct. App. 2007), the plaintiff, who used crutches for mobility, argued that she should be deemed to have been denied equal access because neither the accessible parking space nor the cross-hatched access aisle adjoining it met the applicable slope regulations, leaving her with no accessible route in compliance with the CDPA. *Id.* at 265. The Court of Appeal rejected the plaintiff's position as follows:

> In contrast to section 55, section 54.3 imposes the standing requirement that the plaintiff have suffered an *actual denial of equal access* before any suit for damages can be brought. In other words, while virtually any disabled person can bring an action to

[1] Incredibly, plaintiffs do not even attempt to distinguish, let alone cite in their initial moving papers, the *Donald* decision, which is the leading interpretation of California's Disabled Persons Act. Plaintiffs' omission is telling. "[I]n resolving questions of California law, this court is bound by the pronouncement of the California Supreme Court . . . and the opinions of the California Courts of Appeal are merely data for determining how the highest California court would rule . . . [but] the opinion of the Court of Appeals on questions of California law cannot simply be ignored." *Campbell*, 253 F.R.D. at 603 n.17 (quoting *Brewster v. County of Shasta*, 112 F. Supp. 2d 1185, 1188 n.5 (E.D. Cal. 2000)).

> compel compliance with the DPA under section 55, a plaintiff cannot recover damages under section 54.3 unless the violation *actually denied* him or her equal access to some public facility.
>
> Plaintiff's attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities. Plaintiff's argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3, in contravention of the long-standing rule of *Donald*.

Urhausen, 155 Cal. App. 4th at 266 (emphasis added).

Similarly, in *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 99 Cal. Rptr. 3d 746 (Cal. Ct. App. 2009), the Court of Appeal explained "standing under section 54.3 of the DPA is not the same as standing to pursue a claim for injunctive relief under the ADA or the DPA and requires something more than mere awareness of or a reasonable belief about the existence of a discriminatory condition." *Id*. at 1221. A plaintiff must show more to demonstrate a right to recover statutory damages than to obtain an injunction:

> [S]tanding under section 54.3 of the DPA is established where a disabled plaintiff can show he or she actually presented himself or herself to a business or public place with the intent of purchasing its products or utilizing its services in the manner in which those products and/or services are typically offered to the public and was actually denied equal access on a particular occasion.
>
> *****
>
> If all of the relevant facts only established an awareness of or a reasonable belief about unequal access, plaintiff's remedy would be to seek injunctive relief under section 55 rather than an award of monetary damages under section 54.3 of the DPA. Otherwise…there would be no difference between a cause of action for equitable or injunctive relief under section 55 or the ADA and one for monetary damages under section 54.3."

Id. at 1224-1225.[2]

Although Plaintiffs seek to distinguish the state law damages individualized inquiry by characterizing it as pertaining only to the "amount of damages," (Docket 646-1 at 21:19), *Urhausen* and

[2] Standing under the Unruh Act's damages provision should be construed in a manner analogous to section 54.3 of the DPA given the significant areas of overlap between the two statutes. *Reycraft*, 177 Cal. App. 4th at 1227 n.6.

Reycraft make clear that the individualized questions required to prove Plaintiffs' state law claims pertain to Taco Bell's liability, not just the "amount of damages."

(b) The Trier of Fact's Finding as to the Existence of Architectural Barriers Does Not Ensure That Statutory Minimum Damages Are Warranted.

Brunnen v. Mission Ranch, No. 97-CV-20668JW, 2000 WL 33915634 (N.D. Cal. Dec. 19, 2000) (Ware, J.) demonstrates the sharp distinction between the mere existence of architectural barriers and whether such architectural barriers caused a particular plaintiff to suffer an actual denial of equal access on a particular occasion. In *Brunnen*, a jury trial was conducted wherein the jury found several deficiencies in the facilities at issue. Nevertheless, the jury found that the plaintiff had not been denied access as a result of the claimed inadequate features. *Id.* at *1. Based on the jury's findings, the district court held that the plaintiff had failed to establish any right to minimum statutory damages. *Id.* at *3 ("Because the jury did not accept Plaintiff's argument that she was denied full and equal access by Defendants, the Court cannot confer minimum statutory damages."). Thus, even if the trier of fact finds that architectural barriers existed at the facility at issue, that does not necessarily mean that the requirements for imposing minimum statutory damages have been met.

Taco Bell has asserted its right to a jury trial. (Docket #155.) As in *Brunnen*, the jury must decide whether any particular plaintiff was denied access on a case-by-case basis. Thus, Plaintiffs' assumption that this Court can adjudicate Taco Bell's liability as to all class claims for statutory minimum damages without engaging in any individualized fact finding relating to a particular class member is simply wrong. Plaintiffs cannot do so without an inquiry into the facts and circumstances of each class member's experience.

(c) Plaintiffs Have Abandoned Any Deterrence Theory of Liability.

Plaintiffs in the instant action have expressly waived their entitlement to deterrence-based damages claims under section 52 and 54.3 of the Civil Code. (*See* Tr. of 5/12/11 H'rg at 42:21-43:2; Final Pretrial Order of 5/16/11 at 3:1-2 [docket #580] (non-opposition to TBC's motion in limine #8). Since Plaintiffs' damages claims are not being sought via a deterrence-based theory, each class member must prove that he or she was actually denied equal access on a particular occasion at a particular store in order to have standing to recover damages.

2. Bifurcation Of "Liability-Phase Questions" Does Not Avoid The Required Individualized Inquiry.

Plaintiffs' reliance upon *United States v. City of New York*, 276 F.R.D. 22 (E.D.N.Y. 2011), for the proposition that issue certification of bifurcated liability-phase questions is appropriate, is misplaced. (Docket 646-1 at 22 n.12); (Docket 607-1 at 4:5-11) Plaintiffs ignore that in that case, the Plaintiffs brought an employment discrimination class action under Title VII based on a pattern-or-practice disparate treatment theory and a disparate impact theory. Under either theory of liability, the district court appropriately applied Second Circuit precedent to find that the interests of the class members were essentially identical during the liability phase. *Id.* at 35.

Here, in contrast, Plaintiffs abandoned their pattern or practice legal theory by failing to raise such theory in connection with the exemplar store trial, and do not make any disparate impact argument. Further, as established above, liability for statutory damages is individualized, unlike the broad based employment theories of *City of New York*. Thus, *City of New York* provides absolutely no support for the proposition that issue certification of any liability-phase questions is appropriate in the instant action under Rule 23(b)(2) and 23(c)(4).

3. Plaintiffs Have Failed to Identify Any "Issue" Within the Meaning of Rule 23(c)(4).

Plaintiffs have failed to identify any specific "issue" within the meaning of Rule 23(c)(4). *See Charron v. Pinnacle Group N.Y. LLC*, 269 F.R.D. 221, 239 (S.D.N.Y. 2010) (certifying five specific liability issues common to all members of a (b)(3) class). Instead, Plaintiffs seek to maintain certification of the "issue" of "classwide liability" for minimum statutory damages under California law for five so-called "Key Barriers" under Rule 23(c)(4). (Docket 646 at 2:7-10.) The unspecified "issue" of liability to the class members under state law is no different than referring to the individualized monetary claims themselves. Plaintiffs' effort to cast individualized claims as a separate "issue" is a meaningless attempt to avoid the application of *Dukes* which bars class treatment of such claims.

Even if Plaintiffs identified a cognizable "issue", the court is bound by the class definition provided in the complaint, which fails to define the class sought as for the "issue" of "classwide liability" for minimum statutory damages under Rule 23(c)(4).[3] *Berlowitz v. Nob Hill Masonic Mngt,*

[3] Significantly, Plaintiffs have not moved for leave to file a second amended complaint. Even if Plaintiffs were to seek leave to amend now, the unreasonable delay in doing so, after extensive discovery, motion practice and trial, would preclude leave to amend.

Inc., No. C-96-01241 MHP, 1996 WL 724776, at *2 (N.D. Cal. Dec. 6, 1996) (Patel, J.) (rejecting plaintiff's attempt to seek certification of a class different from that alleged in the complaint; stating that the court was "bound by the class definition provided in the complaint" and that it would "not consider certification of the class beyond the definition provided in the complaint unless Plaintiffs choose to amend it").

4. Plaintiffs Cannot Avoid Satisfying the Requirements of Rule 23(a) and (b) by Relying on Rule 23(c)(4).

Plaintiffs falsely believe that, by relying on Rule 23(c)(4), they can avoid their burden of satisfying the requirements of both Rule 23(a) and (b). *See Charron v. Pinnacle Group N.Y. LLC*, 269 F.R.D. 221, 239 (S.D.N.Y. 2010) ("For particular issues to be certified pursuant to Rule 23(c)(4), the requirements of Rules 23(a) and (b) must be satisfied only with respect to those issues."); *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 250 (C.D. Cal. May 5, 2006) (Fischer, J.) ("Rule 23(c)(4)(A) does not permit a court to bypass the requirements of Rule 23(b)(3) entirely simply by defining the issues for certification narrowly enough."). Even if Plaintiffs had identified one or more actual "issues" to be certified under (c)(4), the holding in *Dukes*, which focuses on the relief sought affecting "the entire class at once," precludes certification under Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2558.

The instant action is analogous to *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229 (C.D. Cal. May 5, 2006) (Fischer, J.). In *Sepulveda*, the district court denied class certification under both Rule 23(b)(2) and (b)(3) as well as a request to certify certain issues under Rule 23(c)(4). On appeal, following the ruling in *Dukes*, *supra*, the Ninth Circuit affirmed the denial of class certification under Rule 23(b)(2). *Sepulveda v. Wal-Mart Stores, Inc.*, No. 06-56090, 2011 WL 6882918, at *1 (9th Cir. Dec. 30, 2011) (mem.) ("In *Dukes*[,] the Court explicitly adopted the 'not incidental' test for certification under Rule 23(b)(2)."). In addition, in light of the denial of class certification under Rule 23(b)(2), the Ninth Circuit also applied the Rule 23(b)(2) standards to affirm the denial of class certification for limited purposes under Rule 23(c)(4). *Id.* at *1.[4] Plainitffs' proposed "issue" class fails to meet the applicable Rule 23(a) and 23(b) standards.

[4] Although the Ninth Circuit initially instructed the district court to reconsider, in the alternative, using Rule 23(c)(4) to certify specific issues under the Rule 23(b)(2) standard, the Ninth Circuit ultimately held that "it is no longer necessary or possible for the district court to consider severing particular issues

(a) The Proposed Rule 23(b)(2) "Issue" of Classwide Liability for Damages Does Not Meet the Commonality Requirement.

The merits of a claim should not be litigated via the class certification motion unless it overlaps with the requirements for satisfying the class certification requirements. *Dukes*, 131 S.Ct. at 2251-2252.

Here, Plaintiffs cannot demonstrate commonality as to their proposed "liability" class because, as explained above, damages liability on Plaintiffs' state law claims are inextricably intertwined with each individual's interaction with a particular alleged barrier. As a result, commonality cannot be established.

(b) The Proposed Rule 23(b)(2) "Issue" of Classwide Liability for Damages Does Not Meet the Typicality Requirement Because a Fact-Specific Inquiry Is Necessary.

Plaintiffs have failed to meet the typicality requirement because a fact-specific inquiry shall be required to address the so-called "issue" of classwide liability for state law damages. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342–44 (4th Cir. 1998) (holding that individualized damages will preclude typicality where a fact-specific inquiry is necessary).

(c) The Proposed Rule 23(b)(2) "Issue" of Classwide Liability for Damages Does Not Meet the Adequacy of Representation Requirement.

As addressed in the concurrently-filed reply brief, the named Plaintiffs are refusing to prosecute the action vigorously with respect to the entire class by seeking to abandon the adjudication of numerous barriers, which the absent class members will be unable to relitigate under the doctrine of res judicata. (*See* Reply Br. at p.18)

(d) The Proposed Rule 23(b)(2) "Issue" of Classwide Liability for Damages Does Not Meet the Ascertainability Requirement.

As addressed in the concurrently-filed Reply Brief, the proposed Rule 23(b)(2) "issue" does not meet the ascertainability requirement. (Reply Br. at 3)

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for class treatment" "[b]ecause we now affirm denial of class certification under Rule 23(b)(2)." *Id.* at *1.

(e) The Proposed Rule 23(b)(2) "Issue" of Classwide Liability for Damages Does Not Meet the Numerosity Requirement.

As addressed in the concurrently-filed Reply Brief, the proposed Rule 23(b)(2) "issue" does not meet the numerosity requirement. (Reply Br. at 3)

B. Plaintiffs Failed to Meet Their Burden of Satisfying the Requirements for Certifying the "Issue" of the Damages Recoverable by Each Class Member Under Rule 23(b)(3).

Plaintiffs' proposed division of this class action into a "hybrid" class action wherein classwide injunctive relief is sought under Rule 23(b)(2) and damages are sought under Rule 23(b)(3) is improper. While such a "hybrid" class can exist, the Eleventh Circuit has already warned against attempting what Plaintiffs propose:

> "[It is] possible to create hybrids in given cases. Since in theory there should be no hard requirement that (b)(2) be mutually exclusive, and since subpart (c)(4)(A) allows an action to be maintained 'with respect to particular issues,' the fact that damages are sought as well as an injunction or declaratory relief should not be fatal to a request for a (b)(2) suit, *as long as the resulting hybrid case can be fairly and effectively managed*. On the other hand, the *policies underlying the requirements of (b)(3) should not be subverted by recasting and bifurcating every class suit for damage as one for final declaratory relief of liability under (b)(2) followed by a class suit for damages under (b)(3)*."

Holmes v. Continental Can Co., 706 F.2d 1144, 1158 (11th Cir. 1983) (emphasis added). This is exactly what Plaintiffs attempt here.

Under Rule 23(b)(3), a class can be certified only if "the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3). As discussed, Plaintiffs fail to meet these standards. As a result, the proposed Rule 23(b)(3) class cannot be certified.

1. The Court Does Not Have The Power To Alter The 2004 Class Certification Order To Avoid The Changes In Class Certification Standards Imposed By *Dukes*.

Plaintiffs' argument that the Court can create a hybrid class by altering the basis for only part of the class from Rule 23(b)(2) to 23(b)(3) is unsupported by anything in the Rules themselves. None of the cases cited by Plaintiff allow for the creation of a "hybrid" class as part of a modification motion.

Further, Plaintiffs' cited pre-*Dukes* case law is readily distinguishable and inapplicable in a post-*Dukes* context. For example, in *Langley v. Coughlin* 715 F.Supp. 522 (S.D.N.Y. 1989) the request to

change the Rule 23(b) grounds for the class arose from a settlement of the injunctive relief claims which left only compensatory and punitive damages claims which could not be certified under the then-prevailing Rule 23(b)(2) "predominance" test. *Id*. at 551. Essentially, the Court allowed for a shift in the basis for the class based on a changed set of circumstances created by the parties. In that circumstance, modifying the statutory basis for the class did not require the plaintiffs to "carry precisely the same burden as when they originally sought certification" because "[s]ince the Rule 23(a) standards are preconditions for any form of class certification, this Court's 1985 certification order necessarily reflects the appropriate findings." *Id*. at 552-553.

Here, Plaintiffs' Motion to Amend admits that this Court's original 2004 certification order does not "necessarily reflect[] the appropriate findings" because the Supreme Court's intervening decision in *Dukes* significantly altered the relevant considerations on class certification. Notably, under *Dukes*, *Coughlin*'s Rule 23(b)(2) damages class could not have been certified in the first place. *Dukes*, 131 S.Ct. at 2557-2559. Plaintiffs' reliance on a footnote in *Pichler v. UNITE*, 446 F.Supp. 2d 353 (E.D. Pa. 2006) is similarly misplaced because, in that case, the Court had previously analyzed and approved a class under the stringent standards of Rule 23(b)(3), and shifted the basis to the less exacting Rule 23(b)(1)(A) standards by agreement of the parties. *Id*. at 365 n.37.[5]

Finally, in *Rowell v. Voortman Cookies, Ltd*., 2005 WL 2266607 (N.D. Ill. 2005), the defendant sought, not to decertify the class, but to amend it on the ground that the court previously erred in certifying the matter under Rule 23(b)(1)(A). *Id*. at *3. The plaintiffs in that matter essentially conceded the issue, filing only a four page opposition solely on the ground that the motion to amend was an improper motion to reconsider the court's certification order. [02-cv-00681; Document 77, attached hereto as Exhibit 1] In sum, Plaintiffs have submitted no authority permitting a plaintiff to alter the Rule 23 grounds for the class absent a settlement or other agreement of the parties.

[5] Plaintiffs fail to acknowledge that the statute at issue in *Pichler* allowed for recovery of minimum damages without the showing of any actual damage. *Pichler v. UNITE*, 228 F.R.D. 230, 257-258 (E.D. Pa. 2005). As addressed above, Plaintiffs' state law claims require each class member to demonstrate they actually encountered a barrier and were denied equal access.

2. Plaintiffs Have Not Met Their Burden of Showing a Predominance of Common Issues Over Individual Issues Under Rule 23(b)(3).

(a) Legal Standard for Predominance.

The predominance requirement in Rule 23(b)(3) is "far more demanding" than the Rule 23(a) commonality requirement. *Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231 (1997); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "[T]he presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)." *Hanlon*, 150 F.3d at 1022; *Gales v. Winco Foods*, No. C 09-05813 CRB, 2011 WL 3794887, at *2, *6 (N.D. Cal. Aug. 26, 2011) (Breyer, J.) (concluding that whether the employer had correctly classified the job duties of a group of employees as exempt was a common question, but that predominance was not satisfied because determining whether each class member spent the majority of his or her time performing exempt duties required an individualized inquiry).

"[W]hile Rule 23(a)(2) 'is about invoking common questions, . . . Rule 23(b)(3) requires a district court to formulate *some prediction as to how specific issues will play out* in order to determine whether common or individual issues predominate in a given case.'" *Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 638 (N.D. Cal. 2010) (Hamilton, J.) (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 593 (9th Cir. 2010), *rev'd on other grounds by Dukes*, 131 S. Ct. 2541) (emphasis added).

"The predominance inquiry of Rule 23(b)(3) asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *In re Wells Fargo Home Mort. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009); *Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231 (1997). "The overarching focus" of the predominance inquiry is "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) (Callahan, J.). "Among the issues central to the predominance inquiry is whether the case, if tried, would present intractable management problems." *Cruz v. Dollar Tree Stores*, Nos. 07-2050 SC & 07-07-4012 SC, 2011 WL 2682967, at *3 (N.D. Cal. July 8, 2011) (Conti, J.) (citing Rule 23(b)(3)(D)); *Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231 (1997) ("intractable management problems" must be considered if a class is being certified for trial rather than settlement).

"To satisfy this requirement, it is not enough simply that common questions of law or fact exist; predominance is a comparative concept that calls for *measuring the relative balance* of common issues to individual ones." *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476, 483 (C.D. Cal. 2008) (emphasis added). "[W]hen individualized issues or determinations become *central to a case*, the class action no longer advances the efficiency and economy for which it was intended." *Id.* at 484 (emphasis added). "One way this can happen is when a plaintiff brings a claim on a class-wide basis that raises individualized issues, but fails to provide common proof that would have allowed a jury to determine those issues on a class-wide basis." *Id.* at 485. If individual testimony from absent class members is required to address individualized inquiries, then the trial may become an unmanageable set of mini-trials. *Id.* at 486.

"To determine whether the predominance requirement is satisfied, 'courts must identify the issues involved in the case and determine which are subject to 'generalized proof, and which must be the subject of individualized proof.'" *Sullivan v. Kelly Servs., Inc.*, 268 F.R.D. 356, 364 (N.D. Cal. Apr. 27, 2010) (Wilken, J.) (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *6 (N.D. Cal. June 5, 2006) (Hamilton, J.)); *see also*, *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 251 (C.D. Cal. 2006) (Selna, J.). "Because no precise test can determine whether common issues predominate, the Court must *pragmatically assess* the entire action and the issues involved." *Weigele v. Fedex Ground Package System, Inc.*, 267 F.R.D. 614, 620 (S.D. Cal. 2010) (Sammartino, J.) (emphasis added).

"The party seeking certification bears the burden of demonstrating that he has met the requirements of Rule 23(b)." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 n.9 (9th Cir. 2009) (Callahan, J.).

(b) Predominance Cannot Be Established Because Each Class Member Will Be Required to Testify at Trial to Meet the Requirements of State Law Liability.

Although Plaintiffs imply that Taco Bell's defenses relate solely to the issue of calculating the amount of damages for each absent class member, courts in similar contexts have rejected attempts to ignore the preliminary issue of liability, i.e., whether a violation occurred. *Prise v. Alderwoods Group, Inc.*, No. 06-1641, 2011 WL 4101145, at *22 (W.D. Pa. Sept. 9, 2011) (Conti, J.) ("Only after liability is

found can the court determine the *amount owed* to each opt-in plaintiff in a damages phase of a trial.").

Individualized questions as to whether there is *liability* owed to class members results in the absence of predominance. *Pryor v. Aerotek Scientific, LLC*, No. CV 10-06575 MMM (AJWx), 2011 WL 6376703, at *15 (C.D. Cal. Nov. 15, 2011) (Morrow, J.) ("This is not merely a question of damages, it is a question of liability.") (emphasis added); *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 253 (C.D. Cal. 2006) (Selna, J.) ("In sum, this is not the typical case where a class can be certified because the class members' duties are, or can be determined to be, roughly identical, despite the need for individual damage determinations based on the number of hours worked. *Here the variability goes to whether an individual class member has any claim at all* for misclassification.") (emphasis added). "[C]ourts are . . . decidedly less willing to certify classes where individualized inquiries are necessary to determine liability." *Kurihara v. Best Buy Co.*, No. C 06-01884 MHP, 2007 WL 2501698, at *9 (N.D. Cal. Aug. 30, 2007) (Patel, J.), *quoted in Gales v. Winco Foods*, No. C 09-05813 CRB, 2011 WL 3794887, at *7 (N.D. Cal. Aug. 26, 2011) (Breyer, J.), and *Stuart v. Radioshack Corp.*, No. C-07-4499 EMC, 2009 WL 281941, at *18 (N.D. Cal. Feb. 5, 2009) (Chen, Mag. J.).

The right to cross-examine a class member to determine whether there is liability as to that specific person cuts against predominance and superiority. *Jimenez*, 238 F.R.D. at 253 ("[Employer] has a right to cross-examine each general manager to determine whether there is liability as to that specific person.").

As part of the predominance inquiry, this court has previously held that the issues to be adjudicated in the case must be identified during the class certification motion and that the issues that are subject to "generalized proof" and "individualized proof" must be determined. *In re Dynamic Random Access Memory*, 2006 WL 1530166, at *6. Plaintiffs have failed to identify or acknowledge the following issues that are subject to individualized proof, thereby precluding the adjudication of the absent class members' state law damages claims by representation.

(i) Class Member Testimony of Deprivation on a Particular Occasion in Compliance with *Donald v. Café Royale, Inc.*

In order for an absent class member to prevail on either of the state law claims for damages, he or she must testify at trial in order to establish that he or she encountered a barrier that hindered or

deprived his or her full and equal access on a particular occasion. *Donald v. Cafe Royale, Inc.*, 218 Cal. App. 3d 168, 183, 266 Cal. Rptr. 804 (Cal. Ct. App. 1990) (Merrill, J.) As recognized in *Reycraft*, the standing requirement set forth in *Donald* for any CDPA claim constitutes an issue of ***liability***, in and of itself, and not merely of the amount of ***damages***. *Reycraft*, 177 Cal. App. 4th at 1218.

Plaintiffs have taken the position that Unruh or CDPA statutory damages should be "recovered only by class members who were harmed by this conduct [directed toward the class]." (Pls.' Br. in Opp'n to Def.'s Mot. For Mod. Of Class Def. of 11/9/04 at 15:3-4; docket #122-1.) To prove that harm under *Donald* and *Reycraft*, each class member must testify and be cross-examined not only on the number of visits, but also on whether they experienced unequal access on each visit to each store. Any attempt to extrapolate damages based on the experiences of a subset of class members would be speculative. *See Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476, 486 (C.D. Cal. 2008).

In their depositions, class members have testified about a varying number of store visits and different experiences on different visits to different stores. For example, Warren Duckstein, a class member identified by Plaintiffs, apparently never experienced unequal access at Taco Bell. He does not even like Taco Bell, he only visited because his late wife liked it. [Exhibit 2, Duckstein Depo at 35:5-14] While he saw queue lines, he never tried to navigate them because he never ordered food. [Exhibit 2, Duckstein Depo at 33:11-34:12; 45:9-11] He would sit at a table while his wife ordered her own food. [Exhibit 2; Duckstein Depo at 35:15-36:1; 45:12-14] He did not have trouble finding accessible seating [Exhibit 2; Duckstein Depo at 34:19-35:3; 47:9-11]. And he cannot recall ever having problems using the restroom or restroom amenities at a Taco Bell. [Exhibit 2; Duckstein Depo at 36:22-37:10; 46:13-21] His only potential claim for any of the "Five Key Barriers" is for door force, but he personally never tried to open the door because "my wife waited on me hand and foot." [Exhibit 2; Duckstein Depo at 32:14-24; 36:19; 44:10-12]

The fact that Plaintiffs identified and produced for deposition a class member who never suffered from unequal access based on any of the "Five Key Barriers" demonstrates that Plaintiff have no viable way of addressing the disparity among class members' experiences without an individualized inquiry.

Taco Bell was only permitted to take the depositions of thirty-five (35) out of the 3,000 class

members who have already contacted Plaintiffs' counsel.[6] [Docket 659 at 1:28-2:1; Docket 646-1 at p.23 fn13] It can reasonably be assumed that more Mr. Ducksteins exist in that large pool of plaintiffs.

The disparity among class members alleged barrier claims is further exemplified by the deposition matrix analyzing the testimony of twenty-nine (29) unnamed class member depositions class member depositions taken to date.[7] [Exhibit 3] The testimony illustrates that something that might be perceived as an architectural barrier for one person is not necessarily a barrier to another. Thus, liability cannot be imposed without examining the specific claims of each and every class member.

(ii) Class Member Testimony Regarding Purpose in Visit to Store (Tester vs. Bona Fide Patron).

Besides the requirements of *Donald*, Plaintiffs must demonstrate that class members were not visiting Taco Bell stores as "testers." I]f a plaintiff's sole purpose in visiting an establishment were to check for ADA violations, he would be simply a 'tester' rather than a bona fide patron, and would therefore lack standing." *Harris v. Stonecrest Care Auto Center, LLC*, No. 472 F. Supp. 2d 1208, 1218 (S.D. Cal. 2007) (Burns, J.) . "Testers who do not suffer personal injury lack standing to bring a discrimination claim." *Cross v. Pacific Coast Plaza Investments, L.P.*, No. 06 CV 2543 JM (RBB), 2007 WL 951772, at *2 (S.D. Cal. Mar. 6, 2007) (Miller, J.)

Taco Bell is entitled to insist that each class member meet his or her "constitutionally imposed burden of demonstrating an injury-in-fact" by proving that he or she was acting as a bona fide patron during their particular store visit instead of as a "tester." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 953 (9th Cir. 2011) (*en banc*) (Wardlaw, J.)

For example, class member Robert Mansfield appeared at his deposition not because he is a Taco Bell class member seeking relief but because, "I'm here to help, you know, these attorneys, you know, fight for disability rights and access." [Exhibit 4; Mansfield Depo at 11:3-12:4] Further, even though

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[6] The thirty-five (35) depositions included the four named class representatives, leaving only thirty-one (31) potential unnamed class member depositions.

[7] Despite Plaintiffs' counsel's representations that Patsy Pattorroyo was in contact with Plaintiffs' counsel and would appear for her deposition on two (2) separate occasions, Ms. Pattorroyo failed to appear at either scheduled deposition. Neal Davidson was properly served with a subpoena, but failed to appear.

Mansfield recognized changes at his local Taco Bell, including remodeled queue lines, he never attempted to use the new queue lines because "I avoid queue lines wherever possible…I really have a lot of disdain for queue lines." [Exhibit 4; Mansfied Depo at 19:11-20:15] This sort of testimony raises questions as to whether Mr. Mansfield is a bona fide patron, or simply a "tester" who helps attorneys prosecute actions out of malice for queue lines without determining whether they actually affected his access.

Determining whether class members such as Mr. Manfield were bona fide patrons would inherently require an inquiry into the credibility of class members which causes questions and issues of proof to be individualized, barring a determination of predominance. *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 252 (C.D. Cal. 2006) (Selna, J.).

(c) The Prior ADA Class Action Decisions Cited by Plaintiffs Do Not Address the Various Claims that Require the Individualized Scrutiny of Class Member Claims.

Although Plaintiffs claim in conclusory fashion that there are "dozens" of multiple certified class actions regarding disability rights, (Pls.' Mot. at 7:2), Plaintiffs have failed to cite to a single case wherein a court analyzed *Donald*, *Urhausen*, *Harris*, and *Reycraft* to determine whether the individual testimony of class members would need to be heard in order to establish a defendant's state law liability for money damages under the Unruh Act or CDPA (*e.g.*, Did each class member seeking damages have a personal encounter with a facility that deprived such class member of full and equal access on a particular occasion?). Thus, the cases cited by Plaintiffs are all distinguishable. Those cases are also distinguishable because the courts did not have the benefit of the U.S. Supreme Court's guidance in *Dukes* regarding the commonality requirement and the "rigorous analysis" of Rule 23(a) factors.

Not surprisingly, Plaintiffs have failed to cite a single instance wherein a federal district court has certified *both* a Rule 23(b)(2) injunctive relief class and a *separate* Rule 23(b)(2) "issue" as to classwide liability for state law damages simultaneously in the Title III ADA context. The reason for such omission is that such case authority does not exist, especially in a post-*Dukes* context.

Based on Plaintiffs' theory of liability under the CDPA, there is no class recovery of any aggregate award of damages to the class as a whole. Plaintiffs have cited no case authority wherein an aggregate award of damages has been awarded to an entire class after litigation (i.e., adjudication on the

merits as opposed to a class settlement). Thus, Plaintiffs appear to concede that awarding damages to the absent class members in this case requires an individualized analysis.

(d) Plaintiffs Improperly Conflate Commonality with Predominance.

In arguing in favor of predominance, Plaintiffs rely upon the allegedly common question relating to whether Taco Bell's actual practices were consistent with its current access policies. (Pls.' Mot. at 9:10-11, 21:3-5.) In so doing, Plaintiffs conflate the standard for commonality with predominance. *Perry v. U.S. Bank*, No. C-00-1799-PJH, 2001 WL 34920473, at *7 (N.D. Cal. Oct. 17, 2001) (finding that Rule 23(a)(2) was satisfied but Rule 23(b)(3) was not), *cited in Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 242 (C.D. Cal. May 5, 2006) (Fischer, J.).

This case is analogous to *Washington v. Joe's Crab Shack*, 271 F.R.D. 629 (N.D. Cal. 2010) (Hamilton, J.), wherein the named plaintiff cited alleged common policies regarding wage and hour issues in a putative class action:

> Plaintiff's position is that common questions predominate because the main issue is whether--notwthstanding [employer's] written policies--Joe's Crab Shack restaurants in California followed a common unwritten policy of denying meal and rest breaks, failing to pay for overtime, requiring employees to purchase their own uniforms, and so forth. However, this argument confuses the question of the existence of common issues of law and fact, with the question of whether common questions predominate over individual questions.

Id. at 640 (emphasis added).

Because the alleged policies were unwritten, the court held that the individualized assessments as to why class members behaved the way that they did precluded a predominance finding. *Id.* at 641-642.

The district court's holding in *Helm v. Alderwoods Group, Inc.*, No. C 08-01184 SI, 2009 WL 5206207 (N.D. Cal. Dec. 29, 2009) (Illston, J.), is directly on point. In that case, the district court refused to certify any of the eight (8) subclasses in a nationwide wage and hour class action premised upon eight (8) company-wide policies of a business providing funerary services. Significantly, the district court held a lack of predominance for any of the subclasses largely based on the need to inquire on an individual basis whether each of the employer's funeral home locations implemented the purported unlawful policy. *Id.* at *9-*11.

Here, Plaintiffs have failed to reference or submit any evidence with their motion papers regarding any unlawful access-related policy implemented at each and every corporate-owned Taco Bell

store in the State of California. Although this Court has relied upon the existence of an alleged "policy", no specific policy document has been cited by the Court. Even if Plaintiffs had demonstrated such a policy, more is required: "a district court abuses its discretion in relying on an internal [ ] policy to the near exclusion of other factors relevant to the predominance inquiry." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009); *see, In re Wells Fargo Home Mort. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009); *Soderstedt v. CBIZ Southern Cal., LLC*, 197 Cal. App. 4th 133, 153, 127 Cal. Rptr. 3d 394 (Cal. Ct. App. 2011) (citing *Vinole*); *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1427, 47 Cal. Rptr. 3d 83 (2006).

At most, Plaintiffs' current theory of liability seeks to demonstrate that some access-related policies at issue "were implemented in an ad hoc, decentralized manner depending upon the individualized circumstances at each…location and the management practices at that location." *Prise v. Alderwoods Group, Inc.*, No. 06-1641, 2011 WL 4101145, at *19 (W.D. Pa. Sept. 9, 2011) (Conti, J.) (emphasis added). Thus, an individualized inquiry would need to be conducted as to the actual access-related management practices taking place at over 200 company-owned stores throughout the State of California.[8]

Since the propriety of class certification must be analyzed claim-by-claim, the existence of common issues relating to the ADA claim for injunctive relief has no bearing as to the certification of the state law damages claim at issue. *See, e.g.*, *Norris-Wilson v. Delta-T Group, Inc.*, 270 F.R.D. 596, 612 (S.D. Cal. 2010) (Burns, J.) ("The overtime, wage statement, and waiting time claims are suitable for class-wide treatment, but the meal and rest break and reimbursement claims aren't."). "Once these common questions have been answered, many highly individualized questions remain." *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 247 (C.D. Cal. May 5, 2006) (Fischer, J.) Thus, in light of the extensive individualized issues present in the state law analysis, any common issues related to injunctive relief "are a relatively minor portion of this litigation." *Weigele v. Fedex Ground Package System, Inc.*, No. 06-CV-1330-JLS (POR), 267 F.R.D. 614, 622 (S.D. Cal. 2010) (Sammartino, J.).

[8] Some Taco Bell policies Plaintiffs challenge, such as regularly scheduled independent inspections, exceed any requirements imposed by law.

Further, "Defendant's common processes and training are not overwhelmingly supportive of a finding that common issues predominate." *Id*. at 622. Thus, any reliance upon Taco Bell's "policies" does absolutely nothing to facilitate common proof on the otherwise individualized issue as to whether a particular class member seeking to recovery statutory minimum damages was actually denied full and equal access on a particular occasion.

3. Plaintiffs Failed to Meet Their Burden of Showing Superiority.

"In addition to the predominance requirement, a class action must be superior to other methods of adjudicating the controversy." *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476, 487 (C.D. Cal. 2008) (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996)). "A class action is the superior method for managing litigation if no realistic alternative exists." *Valentino*, 97 F.3d at 1234-35. "In determining superiority, courts must consider the four factors of Rule 23(b)(3)." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001). Those factors are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action."

(Fed. R. Civ. P. 23(b)(3)).

Plaintiffs have completely ignored all four factors.

(a) A "Realistic Alternative" to a Class Action Exists Via Individual Actions as Demonstrated by the "Current ADA Lawsuit Binge" And Individual Suits Filed By Current Class Representatives And Absent Class Members.

One of the primary goals of the class action procedure is to vindicate the rights of absent class members in cases in which there is otherwise little or no incentive to bring any solo action:

> "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 <u>*any individual to bring a solo action prosecuting his or her rights*</u>. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchen Products, Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231 (1997) (emphasis added); *see also Sav-on*, 34 Cal. 4th at 340 (a class action "provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual

litigation"). Conversely, where clear incentives exist for individual actions, class certification is inappropriate.

Here, class treatment is inappropriate because both the ADA and California state law disability statutes provide an incentive for individual litigation so strong that courts have lamented the "explosion of private ADA-related litigation" and "[t]he current ADA lawsuit binge." *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) and *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1280-82 (M.D. Fla. 2004) Obviously, such an "explosion" of disability related cases could not exist if the economics of pursuing ADA litigation presented a significant burden upon individual litigants. Since a "realistic alternative exists" to the class action procedure, the class action procedure is not superior to other methods of adjudication. *Valentino*, 97 F.3d at 1234-1235.

Although Plaintiffs rely heavily upon *Lucas v. Kmart Corp.*, 2006 WL 722163 (D. Colo. Mar. 22, 2006), as an example of a Rule 23(b)(3) class certification of statutory minimum damages claims, its superiority analysis is distinguishable for two (2) reasons. First, certification in *Lucas* was decided as part of a proposed settlement, not a contested Motion. *Id*. at *1. Plaintiffs ignore that, in the settlement context, the superiority analysis is given little weight: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231 (1997)

Second, the Colorado statutes at issue in *Lucas* provided little monetary relief to individual plaintiffs. The court noted that the amounts at stake for individuals were as little as fifty dollars and "only rarely over eight thousand dollars," rendering "most individual suits impracticable." *Lucas v. Kmart Corp.*, 2006 WL 722163 at *5. In contrast, California courts have recognized that individual Unruh and DPA claims frequently exceed $1 million. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1060 (9th Cir. 2007) (per curiam); *Mandarin Touch Rest*., 347 F.Supp.2d 860, 863 (C.D. Cal. 2004) ("[A] lawsuit is filed, requesting damages that would put many of the targeted establishments out of business.") Thus, *Lucas* offers no support for Plaintiffs' position especially as to the superiority requirement in the ADA class action context.

Emphasizing the feasibility of individual actions as an alternative, some of the named class representatives have filed numerous claims to vindicate their disability rights. *See, e.g.*, *Moeller v. Cruiseshipcenters*, No. C-00-3260 PJH, 2001 WL 34057009 (N.D. Cal. Oct. 9, 2000) (Hamilton, J.); *Yates v. Perko's Café*, No. C 11-00873 SI, C 11-1571, 2011 WL 2580640 (N.D. Cal. June 29, 2011) (Illston, J.); *Yates v. Union Square*, No. C 07-04087 JSW, 2008 WL 346418 (N.D. Cal. Feb. 7, 2008); *Yates v. New Tin's Market*, No. 07-01403 MJJ, 2007 WL 3232243 (N.D. Cal. Oct. 31, 2007); *Yates v. Belli Deli*, No. C 07-01405 WHA, 2007 WL 2318923 (N.D. Cal. Aug. 13, 2007). In fact, in *Yates v. Belli Deli*, No. C 07-01405 WHA, 2007 WL 2318923 (N.D. Cal. Aug. 13, 2007) (Alsup, J.), the district court observed that as of August 13, 2007, class representative Yates had been a plaintiff in 18 actions in the Northern District of California alone. *Id.* at *4. Equally telling, absent class members have filed individual actions against Taco Bell. *See*, e.g., *Molski v. Taco Bell Corporation*, No. 02cv01192 (S.D. Cal. June 18, 2002); *Molski v. Taco Bell #1106*, No. 04cv02020 (C.D. Cal. March 24, 2004).

Separate actions by class members are not impracticable. If anything, separate actions by class members will be far easier (and faster) to litigate because of the likelihood that many of such cases will be filed in the California Superior Court, and be subject to the summary procedures of limited civil cases (as long as the amount demanded is $25,000 or less), *see* Cal. Civ. Proc. Code § 86(a)(1), with limited opportunities for discovery. *See* Cal. Civ. Proc. Code § 94.

Finally, Plaintiffs acknowledge that there is nothing precluding class members from filing individual actions by proposing to limit the damages class to class members who encountered only five so-called Key Barriers instead of the full list of alleged barriers surveyed. (Docket 646-1 at 16:14-17) In essence, the named Plaintiffs are arguing that absent class members would not, in any way, be prejudiced from starting anew and filing suit individually for barriers beyond those deemed "Key." If anything, the Court should construe the named Plaintiffs' position as conceding that the class device is not superior to other procedures including individual actions.

(b) Plaintiffs Fail To Explain How The Individualized Inquiries Required Can Be Effectively Managed On A Classwide Basis.

As an additional proof of superiority, "An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests

whether they are susceptible of class-wide proof." *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 233 n.4 (C.D. Cal. May 5, 2006) (Fischer, J.) (quoting Fed. R. Civ. P. 23(c)(1)(A), Advisory Comm. Notes, 2003 Amendments); *Thayer-Ogden v. Pottery Barn Kids, Inc.*, No. RG05-199128, 2006 WL 3378686, at *2 (Cal. Super. Ct. Nov. 9, 2006) (Sabraw, J.) ("Because 'partial commonality' cases present greater trial management concerns, a plaintiff seeking to pursue such a case should present a manageable trial plan at the class certification stage.").

(i) Plaintiffs' Proposal for Bifurcation or "Innovative Procedural Tools" Cannot Overcome the Fact that Determination of Plaintiffs' Damages Claims Will Require a Fact-Intensive, Individual Analysis of Each Absent Class Member.

Plaintiffs have offered no tenable alternative mechanism to a full-fledged trial for each absent class member. Plaintiffs have failed to explain how any innovative procedural tools would be used to effectively manage the damages issues in dispute. "It is not sufficient…simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question, and plaintiff has failed to do so here." *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1432, 47 Cal. Rptr. 3d 83 (2006)

Plaintiffs' Motion proposes to bifurcate the case "with rule 23(b)(2) injunctive and liability issues being resolved first, followed by the Rule 23(b)(3) damages issue." (Docket 646-1 at 2:3-4, 22:11.) Plaintiffs ignore that this Court has previously bifurcated the case without any progress made in resolving, on the merits, Plaintiffs' state law damages claims. Bifurcation has not and will not assist in resolving the state law damages claims because, as explained above, state law liability, in and of itself, requires an individualized inquiry. Plaintiffs' reliance upon *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), is misplaced. The "amount of damages" for each class member is not the sole issue remaining to be resolved. The classwide liability issue remains pending as well. Put differently, Plaintiffs wrongly assume that the Court can impose classwide liability as to the state law statutory minimum damages claims, and prevent Taco Bell from submitting relevant evidence in its defense against monetary damages claims of potentially thousands of absent class members.

Further, each of Plaintiffs' three suggestions for handling the thousands of individualized issues to be determined in the "damages" phase are fatally flawed. First, notwithstanding Taco Bell's request

for a jury trial on Plaintiffs' damages claims, Plaintiffs propose to have individualized damages claims heard by a special master or Magistrate Judge. (Doceket 646-1 at 23:5-6) In *Dukes*, the Supreme Court held, "Contrary to the Ninth Circuit's view, [the defendant] is entitled to *individualized determinations* of each employee's eligibility for backpay." 131 S. Ct. at 2560 (emphasis added). The Court explained:

> We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings…to determine the scope of individual relief." *Teamsters*, 431 U.S., at 361, 97 S.Ct. 1843. At this phase, the burden of proof will shift to the company, but it will have the right to raise any *individual affirmative defenses* it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."

Id. at 2561 (emphasis added).

Thus, even if classwide liability could be determined in one stroke, the party opposing class certification is still entitled to raise *any affirmative defenses* it may have to challenge individual liability to a particular class member.

The recent decision in *Duran v. U.S. Bank N.A.*, __ Cal. App. 4th __, __ Cal. Rptr. 3d __, 2012 WL 366590 (Cal. Ct. App. Feb. 6, 2012), is directly on point. In that case, the California Court of Appeal not only reversed a judgment in favor of a certified class of 260 allegedly misclassified employees, it also decertified the class based on the unmanageability of the class finding, in pertinent part that the trial management plan denied the defendant employer's due process rights by "foreclosing [the defendant employer's] opportunity to raise individualized challenges to the absent class members' claims." *Id.* at *30-31.

Second, the Ninth Circuit has considered and rejected the use of "innovative procedural tools" such as questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, expert testimony, etc. in light of claims that "require a fact-intensive, individual analysis" of each claimant. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 (9th Cir. 2009) (Callahan, J.).

Finally, Plaintiffs' proposal for an "initial damages exemplar trial" to help the parties evaluate their settlement positions, (Pls.' Mot. at 23:16-18), lends no support for their superiority analysis.

Instead of assuming that the instant action will be resolved via a settlement, Plaintiffs should be analyzing the superiority requirement to determine whether the class device would be "superior to other methods of *adjudicating* the controversy." *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476, 487 (C.D. Cal. 2008) (emphasis added). This is not a case in which the superiority requirement can be given short shrift. *See Amchen Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

(ii) The Compliance Status of Alleged Barriers Does Not Avoid The Unmanageability Of Individual Liability Determinations.

Plaintiffs' assertion that the "compliance status" of most of the Key Barriers can be resolved via summary judgment, (Docket 646-1 at 1:11-12; 3:18-19), is irrelevant to a determination of whether those barriers actually interfered with an individual class member's equal access on any occasion. Even if the complex task of determining the compliance status of over 200 stores at different points in time as measured against differing federal and state law standards, Plaintiffs ignore the individualized state law liability determinations that need to occur pursuant to *Donald*, *Urhausen*, *Reycraft*, and *Brunnen*.

In addition, Plaintiffs' reference to the so-called "compliance status" of an alleged barrier is misleading insofar as it ignores Taco Bell's right to assert affirmative defenses such as alternative access and the "readily achievable" removal standards that apply differently to each barrier at each store. The reality is that this Court will need to decide Taco Bell's liability for the state law damages claims and affirmative defenses at trial on an individual basis.

Given the volume and significance of the individualized issues to be adjudicated, this Court should hold that it "does not believe that certifying a class is superior since the individual issues to be adjudicated will dominate, result in an unmanageable series of minitrials, and consume an extraordinary amount of time." *Pryor v. Aerotek Scientific, LLC*2011 WL 6376703, at *20.

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III. CONCLUSION

For the foregoing reasons, Taco Bell requests that the Court deny Plaintiffs' Motion and decertify the class.

DATED: March 16, 2012

GREENBERG TRAURIG, LLP

By /s/ Gregory F. Hurley
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