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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. 4:02-cv-05849 PJH (NC)

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO ALTER AND AMEND THE CLASS CERTIFICATION ORDER

Hearing Date: To Be Determined
Time: To Be Determined

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

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In the wake of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Plaintiffs have proposed a modified class that, while consistent with the class previously pled in this action, narrows its scope while complying with the Supreme Court's revised Rule 23 jurisprudence. By narrowing the focus of the class to injunctive relief and five Key Barriers, the proposed class zeros in on the claims with overwhelming common issues where liability has already been resolved or will likely be resolved by summary adjudication. In addition, and fully consistent with *Wal-Mart*'s Rule 23(b) analysis, Plaintiffs advance class damages claims pursuant to Rule 23(b)(3).

Defendant's approach in its briefs is not limited to the *Wal-Mart* issues; rather, it seeks to relitigate issues repeatedly resolved in the original class certification order, the rejected motion to reconsider that order, summary adjudication orders, and the exemplar trial Findings of Fact and Conclusions of Law. Nothing in the *Wal-Mart* decision, for example, suggests that the 2004 Order Granting Plaintiffs' Motion for Class Certification ("2004 Certification Order"), ECF 84, was incorrect when it held that this class met the numerosity, typicality, or adequate representation requirements of Rule 23(a), or that class non-monetary claims met the requirements of Rule 23(b)(2).

As to the two issues actually implicated by the *Wal-Mart* decision, Plaintiffs demonstrated in their Opening Brief, ECF 646-1, and further establish in Parts I and II below, that: (1) the class in this case meets the commonality requirement as articulated in *Wal-Mart* because injunctive relief and the five Key Barrier issues are capable of classwide resolution, and there is a substantial amount of evidence "bridging the gap" to show that the harm suffered by the Named Plaintiffs was also suffered by members of the class; and (2) class damages claims meet the requirements of Rule 23(b)(3).

Defendant devotes many pages in its briefs to class certification issues that have nothing to do with the *Wal-Mart* decision. These arguments are addressed in Part III below.

Finally, Defendant makes a number of substantive arguments, most of which have already been decided by this Court, and all of which support class certification. These arguments are addressed in Part IV below.

ARGUMENT

I. The Class Meets The Commonality Requirement.

A. Defendant Has Not Attempted To Rebut Numerous Common Questions Identified By Plaintiffs.

Although commonality only requires that there be one common question capable of classwide resolution, *Wal-Mart*, 131 S. Ct. at 2556, Plaintiffs on pages 9-11 of their Opening Brief identified 20 such questions, the vast majority of which Defendant ignores.

1. Common Questions Relating To Class Injunctive Relief.

The current posture of this case makes injunctive relief unquestionably common to the class. Following surveys that established widespread violations, ECF 216-40, Defendant attempted to moot the case by remedying the violations. *See* Trial exs. 62, ¶ 28; 63, ¶ 28; 64, ¶ 49). Plaintiffs' later surveys found new and ongoing violations, ECF 483 at 18-20, which Defendant then continued to attempt to remedy. Based on the status in mid-2010, Plaintiffs proposed an injunction that would apply uniformly to all restaurants requiring Defendant to take measures to monitor and maintain the accessibility of its restaurants. *See* ECF 526-1. Plaintiffs' proposed injunction did not contain any restaurant-specific relief.

Following the exemplar trial, this Court rejected Defendant's voluntary cessation defense and held that,

> based on the court's prior findings in the August 8, 2007 order, and based on the evidence presented at trial, including the testimony of TBC's Director of ADA Compliance, the court finds 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.

Findings of Fact and Conclusions of Law ("FFCL") ECF 642 at 43, 53. Thus the injunction relevant to the Rule 23(a) analysis is one that will apply uniformly to all restaurants and will not require restaurant-by-restaurant analysis.

All class members share the common question of whether a classwide injunction should be entered, a question the Court has already answered in the affirmative. This common question turned on several classwide common factual and legal questions, including "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 (quoting *Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001).)

Defendant argues that *Armstrong* is irrelevant to this case because it purportedly addressed discriminatory policies. Reply Br., ECF 674, at 3. Even if this characterization of *Armstrong* were true, it misses the point. *Armstrong* reaffirmed the well-established principle that an injunction should be entered upon evidence that violations are likely to recur, and that such evidence can include symptomatic evidence of a defendant's past violations. Courts have applied this principle in a variety of settings having nothing to do with allegedly discriminatory policies. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132-33 (1969) (affirming injunction that was based on past violations of the Sherman Act); *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 857 (9th Cir. 1995) (in case involving violation of medical device reporting regulations, affirming injunction in part because "past illegal conduct gives rise to an inference that future violations may occur.").

Defendant also argues that because Plaintiffs have not asserted a "modification of policy" claim, its policies are irrelevant. Reply Br. at 7-8. To the contrary, Defendant's policies are relevant to several issues, including class certification, injunctive relief, and Defendant's voluntary cessation defense. *See* 42 U.S.C. § 12188(a)(2) (in architectural barrier case, injunctive relief includes "modification of a policy" where appropriate); FFCL at 40-42 (discussing Defendant's policies as relevant to voluntary cessation defense).

The only specific issue common to injunctive relief that Defendant addresses is the voluntary cessation defense (which it refers to as "mootness"). Reply Br. at 6. The Court, however, has already rejected this defense, and it is a common question capable of a common answer.

2. Common Questions Relating To The Issues Of The Compliance Status Of The Key Barriers And Class Damages.

On pages 9-11 of their Opening Brief, Plaintiffs identified a number of classwide common questions relevant to the issues of the compliance status of the Key Barriers, and class damages arising from those Barriers, including common questions relating to Defendant's

statute of limitations, equivalent facilitation, and building department defenses, and the application of state and federal regulations to architectural elements at its restaurants.

Defendant completely ignores these common questions. Instead, most of Defendant's commonality argument is devoted to a number of purportedly individualized issues, such as issues arising from the readily achievable standard, and the "unique" alteration history of each restaurant. *See* Reply Br. at 10-16. Commonality is established even if these additional issues are individualized, since commonality requires only that there be one common issue, and it is undisputed that this requirement is met here.

As to these purported individualized issues, Defendant fails to explain how these issues will arise in the context of the Key Barrier compliance determinations and damages actually sought by Plaintiffs. As explained in detail on pages 4-6 of Plaintiffs' Opening Brief, these barriers were chosen because their compliance status largely has already been determined, and those few determinations that remain share issues common to the class, the vast majority of which can be resolved via summary judgment.

Ultimately, *Armstrong* made clear that classes of persons with disabilities challenging systemic discrimination easily satisfy the commonality requirement: "We have previously held, in a civil-rights suit, that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. In such circumstance, individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." 275 F.3d at 868 (citations omitted).

Defendant's argument rests heavily on *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009). That decision, however, did not mention *Armstrong*, perhaps the Ninth Circuit's preeminent discussion of class certification in disability rights cases. The *Castaneda* court also lacked crucial elements that this case now has: extensive Special Master evidence of widespread violations; partial summary judgment establishing violations at more than 160 restaurants; an exemplar trial; and an order holding that classwide injunctive relief is appropriate.

In addition, the plaintiffs in *Castaneda* were challenging all of the architectural elements in the defendant's franchised restaurants, whereas here, Plaintiffs are challenging the compliance status of the five Key Barriers, an issue that has already been determined for most such Barriers. Further, the *Castaneda* decision on its face distinguished its analysis from the analysis in the 2004 Certification Order in this case based on the very different facts of the two cases. 264 F.R.D. at 567-68. Finally, the *Castaneda* decision is by far the minority view concerning certification of classes of persons with disabilities in actions under the ADA and California state law. At least seven decisions have held that such classes meet the requirements of Rule 23. *See* Pls.' Opening Br. at 7 n.5; Pls.' Mot. for Class Certification, ECF 40, at 14-16 & n.18 (together citing decisions in *Jorgensen, Berlowitz, Arnold, Leiken, Park*, *Nat'l Fed'n of the Blind,* and *Lucas*). Indeed, the Ninth Circuit granted a Rule 23(f) petition concerning the *Castaneda* decision, but the case settled before the merits of the appeal were decided.

B. Named Plaintiffs And The Class Experienced The Same Type Of Injury.

Under *Wal-Mart*, there must be evidence showing that the Named Plaintiffs and members of the class suffered the same type of injury. 131 S. Ct. at 2551. That evidence can consist of a neutral policy, such as a test or evaluation method (or for that matter an architectural design) that may be "charged with bias," or of significant proof that an employer operated under a general policy of discrimination.[1] Both types of evidence exist here.

1. Defendant Has Facially Discriminatory Policies.

Defendant contends that commonality does not exist because Plaintiffs have not identified any written policy, architectural plan, or blueprint that – on its face – is in violation of accessibility laws. Reply Br. at 6-7. While *Wal-Mart* does not require such an extreme

[1] 131 S. Ct. at 2553. There is a significant difference in the types of discrimination at issue here and in a Title VII intentional discrimination claim such as that addressed by *Wal-Mart*. In *Wal-Mart*, the plaintiffs and the class were required to prove that each adverse employment action was motivated by a discriminatory animus. Here, Defendant's motivation is irrelevant, and numerous courts interpreting *Wal-Mart* have distinguished it on those grounds. *See, e.g., Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909 (7th Cir. 2012); *DL v. District of Columbia*, 277 F.R.D. 38, 46 (D.D.C. 2011); *Creely v. HCR ManorCare, Inc.*, 2011 WL 3794142 (N.D. Ohio July 1, 2011) (distinguishing *Wal-Mart* on the grounds that the claims at issue did "not require an examination of the subjective intent behind millions of individual employment decisions…").

showing in order to establish commonality, Defendant here does have facially discriminatory policies. For example, during the exemplar trial, Defendant acknowledged that its queue lines were "never intended for wheelchair use." Trial tr. at 28:1-5 (6/6/11). Instead, Defendant intended that such persons use the "alternative route," which is segregated from the route of the general public, and which this Court has held violates state and federal law. FFCL at 46-51. In addition, one of Defendant's current access policies sets exterior door force at 8.5 pounds, and Defendant's DMA Ops Leader testified at trial that it was his understanding that it is Defendant's policy that door opening force should be 8.5 pounds regardless of when the store was built despite the fact that starting in 2002, state law limited exterior door force to a maximum of five pounds. *See* FFCL at 16; Cal. Code Regs., tit. § 1133B.2.5 (2002).

2. There Is Significant Proof That Defendant Operated Under A Policy Of Discrimination.

As set forth in Plaintiffs' Opening Brief, the August, 2007, Order Denying in Part and Granting in Part Plaintiffs' Motion for Partial Summary Judgment ("2007 SJ Order"), ECF 307, and the Special Master reports, ECF 216-40, established numerous and widespread violations of accessibility requirements, easily meeting the commonality standard discussed in *Wal-Mart*.

Additional evidence admitted at trial concerning Defendant's practice and policies provides further support that the access violations were widespread, resulting in the same type of injury to the Named Plaintiffs and the class. This evidence included, for example: (1) Defendant's pre-2005 policy and practice of relying primarily on facilities leaders for compliance with access requirements, but providing them with no training, with the result that they had "no clue" about accessibility requirements; (2) Defendant's practice of issuing access policies that contradict provisions in earlier policies, and omitting architectural elements that had been covered by earlier policies; and (3) Defendant's practice of not following, and in some cases repeatedly violating, its own access policies. FFCL at 15-18.

These deficient practices and policies result in widespread violations because they are centralized. Defendant, citing two lines from the trial transcript, claims that its policies are not

centralized. Reply Br. at 15. Here is the testimony on which it relies: "[Managers in charge] make those checks before the store opens and then periodically throughout the day, anywhere from 30 minutes." Trial tr. at 586:13-14 (6/10/11).

Defendant, however, omits the facts that the managers in charge (and construction managers and maintenance technicians) conduct their purported surveys based on centralized access policies developed at the direction of Steve Elmer, Defendant's Director of ADA Compliance, and in place at all corporate restaurants. Trial tr. at 561:10-562:4 (6/9/11), 790:21-791:12 (6/13/11). Mr. Elmer -- who is shown on the organizational chart submitted by Defendant as above Defendant's Development, Operations and Facilities departments[2] -- also testified that the checklists used during access checks were centrally developed, training of people conducting the surveys is centralized, and Defendant purportedly has incentives in place to ensure that its contractors and employees follow its centralized policies.[3] Further, Mr. Elmer testified that Defendant centralized the design of its restaurants using "standard design template[s]." Trial tr. at 562:12-15 (6/9/10).

Thus, the Court held that "TBC's access policies are centralized - policies in place at Taco Bell 4518 are also in place at all other California corporate Taco Bell restaurants." FFCL at 15. The fact that Defendant's policies are centralized distinguishes this case from *Wal-Mart* and further supports class certification. *See, e.g.*, *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 610 (N.D. Cal. 2004) ("[C]entralized decision-making is an additional factor weighing heavily towards a finding of commonality, if it does not establish commonality outright.").

3. The Barriers Themselves Satisfy *Wal-Mart*.

The *Wal-Mart* case arose under Title VII, 42 U.S.C. § 2000e *et seq.*, and thus the pattern and practice claims there required a showing of discriminatory intent. Under this theory, a set of adverse employment decisions -- failures to hire; differences in pay -- do not

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[2] *See* trial ex. A88.

[3] **Centralized training:** June 9 trial tr. at 567:6 - 568:11, June 10 trial tr. at 618:2-18, 628:19-629:22. **Centrally developed checklists:** June 10 trial tr. at 583:8-19, 604:20-605:22, 613:1-11, 623:10-24, 632:10-17. **Incentives:** June 10 trial tr. at 580:2-20, 582:4-24, 631:7-22.

violate the law in the absence of evidence that they were made with discriminatory intent. In contrast, to establish noncompliance with applicable accessibility codes and hence entitlement to injunctive relief, *see Donald v. Café Royale*, 218 Cal. App. 3d 168, 183 (Cal. Ct. App. 1990*)*, Plaintiffs here only need show basic empirical data: measurements; dates of construction; admitted alterations. Plaintiffs do not need to show a policy or practice where, for example, Special Master surveys show over 100 stores with noncompliant queue lines, or more than 140 with non-compliant restroom doors. These common barriers support commonality without reference to policy.

II. Class Damages Claims Satisfy Rule 23(b)(3).

A. The Court Has the Power to Narrow The Class Pled In The Complaint, And To Change the Rule 23(b) Basis for Class Damages Claims At Any Time Prior To Final Judgment.

Plaintiffs alleged both a Rule 23(b)(2) and 23(b)(3) class in their complaint, ECF 36 at 4, 6-7, and Plaintiffs do not seek any change to the class definition with respect to class injunctive relief. Thus Plaintiffs seek only to narrow the class – on the issues of compliance status and damages – from all barriers to the five Key Barriers, and in light of *Wal-Mart,* to change the basis for class damages claims to Rule 23(b)(3). Defendant incorrectly argues that the Court lacks the power to make any changes to the class definition after a decision on the merits, certify a class narrower than that pled in the complaint, or to create a "hybrid" class whereby the non-monetary issues are certified under Rule 23(b)(2) and monetary claims are certified under Rule 23(b)(3). Opp. Br., ECF 673, at 6-7, 9, 21-22; Reply Br. at 21-22.

1. Rule 23(c)(1)(C) Permits The Court To Alter Or Amend The Class Certification Order Before Final Judgment.

Prior to 2003, Rule 23(c)(1)(C) provided that a court could alter or amend a class certification order before a "decision on the merits." In 2003, the Rule was amended to its current text, which provides that a court can alter or amend a class definition at any time "before final judgment." Defendant mistakenly cites to an Eleventh Circuit decision issued before that amendment to argue that this Court does not have the power to alter or amend the class after a decision on the merits. *See* Reply Br. at 21-22 (citing *Prado-Steiman v. Bush*, 221

F.3d 1266, 1273 (11th Cir. 2000)). Because final judgment has not entered in this case, this Court continues to have the power under Rule 23(c)(1)(C), as amended, to alter or amend the class certification order.

2. The Court May Certify a Class That Is Narrower than Alleged in the Complaint.

While an amendment to the complaint may be necessary when a plaintiff seeks to expand a class, it is not necessary where, as here, a plaintiff seeks to narrow the class.[4]

The only case cited by Defendant to support its claim that a court is bound by the definition in the complaint (Reply Br. at 6-7) is Judge Patel's decision in *Berlowitz v. Nob Hill Masonic Management, Inc.*, 1996 WL 724776, at *2 (N.D. Cal. Dec. 6, 1996). In that case, the complaint limited the class to persons with certain disabilities, but in their motion for class certification, the plaintiffs sought to expand the class to include companions of persons with disabilities. The court held that it was bound by the definition of the class in the complaint, and refused to consider the expanded class in the motion for class certification.

In a subsequent case, after having determined that the proposed class was overbroad, Judge Patel held that "an over-inclusive class definition need not defeat certification entirely. Where the court determines that the class definition is overbroad, the court has the discretion to narrow the class to bring it within the requirements of Rule 23." *Nat'l Fed'n of the Blind v. Target Corp.*, 2007 WL 1223755, at *3 (N.D. Cal. Apr. 25, 2007) (emphasis added) (citing *Gibson v. Local 40*, 543 F.2d 1259, 1264 (9th Cir. 1976)).

Numerous other courts have recognized that while a court may not expand a class beyond that pled in the operative complaint, it can narrow the class.[5] Here, Plaintiffs have

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[4] Should the Court determine that the complaint needs to be amended before the class definition can be narrowed on the issues of compliance status and class damages claims, Plaintiffs respectfully request leave to do so. Because the effect of the amendment would be to narrow class damages claims, and because the amendment was necessitated by the recent *Wal-Mart* decision, Defendant will suffer no prejudice by the amendment.

[5] *Compare Plascencia v. Lending 1st Mortgage*, 2012 WL 253319, at *4 (N.D. Cal. Jan. 26, 2012) (refusing to modify class definition in manner that would expand class) *with Greenwood v. Compucredit Corp.*, 2010 WL 291842, at *3 (N.D. Cal. Jan. 19, 2010)

(continued...)

narrowed the (b)(3) claims pled in the original complaint to the five Key Barriers. This contrasts with the class asserted, and rejected, in this Court's recent decision in *Berndt v. California Department of Corrections*, 2012 WL 950625, at *7-8 (N.D. Cal. Mar. 20, 2012), where plaintiffs sought to certify a (b)(3) class and subclass despite the fact that the original complaint relied solely on Rule 23(b)(1) and (2).

3. The Court May Certify A Hybrid Class.

Plaintiffs request that non-monetary issues remain certified under Rule 23(b)(2), while class damages claims be certified under Rule 23(b)(3), resulting in a hybrid class. As support for this request, Plaintiffs cited Rule 23(c)(1)(C), and Rule 23(c)(4), which permits class certification "with respect to particular issues."

Defendant asserts that Plaintiffs' request for a hybrid class is "unsupported by anything in the Rules themselves," but in doing so, it does not even mention, let alone attempt to distinguish, the broad language of Rules 23(c)(1)(C) or (c)(4). *See* Opp. Br. at 9. Further, it does not cite a single case or other authority for its assertion that this Court lacks the power to change the basis for the certification of class damages claims. Indeed, the only case it cites addressing hybrid class actions found that "it is possible to create hybrids in given cases." Opp. Br. at 9 (citing *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1158 n.10 (11th Cir. 1983)).

Courts after *Wal-Mart* have repeatedly approved hybrid classes. *See. e.g., United States v. City of New York*, 276 F.R.D. 22, 53-54 (E.D.N.Y. 2011) (certifying liability and injunctive relief claims under Rule 23(b)(2) and back pay and other relief under Rule 23(b)(3)); *Bowers v. Windstream Ky. E., LLC*, 2012 WL 216616, at *2 (W.D. Ky. 2012) (in response to *Wal-Mart*, changing basis of certification of some claims from Rule 23(b)(1) to (b)(3)); *DL*, 277 F.R.D. at 47 (in response to *Wal-Mart*, keeping class injunctive and declaratory relief claims certified

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[5](...continued)
(certifying revised class definition first set forth in reply brief that resulted in narrower class) *and Santillan v. Ashcroft*, 2004 WL 2297990, at *4 (N.D. Cal. Oct. 12, 2004) ("district courts may shape the contours of a nationwide class to exclude pending cases addressing similar issues"); *see also* 1 McLaughlin on Class Actions § 4:2 (8th ed.) ("Courts are not bound by the class definition proposed in the complaint and have considerable flexibility to modify a proposed class definition that defines the class too narrowly, broadly, or imprecisely.").

under Rule 23(b)(2), and changing basis of certification of class monetary claims to (b)(3)); *Easterling v. Conn. Dep't of Corr.*, 278 F.R.D. 41, 51 (D. Conn. 2011) (same); *In re Motor Fuel Temperature Sales Practices Litig.*, 2012 WL 205904, at *3-4 (D. Kan. Jan. 19, 2012) (same). Indeed, the Ninth Circuit recently reversed and remanded a class certification decision, instructing the district court to consider a hybrid certification -- with some issues certified under Rule 23(b)(2) and some under (b)(3). *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 988 (9th Cir. 2011); *see also Beck v. Boeing Co.,* 60 Fed. Appx. 38, 39 (9th Cir. 2003) (Stating that "there is no rule against 'hybrid certification' under both Rule 23(b)(2) and 23(b)(3) . . .").

B. Class Damages Claims Meet the Requirements of Rule 23(b)(3).

1. Common Issues Predominate Regardless of Whether the Simple Determination of the Number of Times a Class Member Was Aggrieved by a Noncompliant Key Barrier Is Characterized As "Damages" or "Liability".

On pages 10-11 and 21 of their Opening Brief, Plaintiffs demonstrated that the predominance requirement is satisfied because there are numerous and important questions common to their proposed Rule 23(b)(3) damages class, while the only individualized issue is the "simple question of the number of instances that individual class members were aggrieved by" noncompliant Key Barriers. *Moeller*, 220 F.R.D. at 610 (citing *Arnold v. United Artists Theatre Circuit, Inc.,* 158 F.R.D. 439, 449 (N.D. Cal. 1994)). The number of times that a class member has been aggrieved is a damages issue, and under clear Ninth Circuit precedent, individualized issues relating to damages do not defeat a predominance finding. *See, e.g.*, *Blackie v. Barrack,* 524 F.2d 891, 905 (9th Cir. 1975); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1027, 1094 (9th Cir. 2010).

Seeking to avoid the holdings in *Blackie* and *Yokoyama*, Defendant argues that the determination of whether a class member has been aggrieved by a noncompliant Key Barrier is actually a liability issue, not a damages issue. Opp. Br. at 12-15. This is pure semantics. Whether characterized as "damages" or "liability," the only individualized question is identical and simple: how many times has a class member been aggrieved by a noncompliant Key Barrier? This number is then multiplied by the statutory minimum damages amount. If a class

member has not been aggrieved, then she is not entitled to any damages, whether that result is characterized as "damages" or "liability."

This is just the sort of individualized determination that the Ninth Circuit in *Blackie* held not to obstruct class certification, and is far less complex than many individualized damages determinations in certified classes. For example, in *Yokoyama*, a class action was brought on behalf of purchasers of the defendant's annuities based on alleged violations of Hawaii's Deceptive Practices Act. 594 F.3d at 1089. The plaintiffs sought treble actual damages for class members. *See Yokoyama v. Midland Nat'l Life Ins. Co.*, 243 F.R.D. 400, 401 (D. Haw. 2007). The district court denied certification, in part based on its finding that the predominance requirement was not satisfied because individualized determinations were necessary for damages. The Ninth Circuit reversed, holding that "[o]ur court long ago observed that '[t]he amount of damages is invariably an individual question and does not defeat class action treatment.'" *Yokoyama,* 594 F.3d at 1089 (quoting *Blackie,* 524 F.2d at 905).

In reaching this conclusion, the Ninth Circuit expressly recognized that "[d]amage calculations will doubtless have to be made under Hawaii's consumer protection laws," *id.* at 1094, which in turn required an analysis of whether the violation of the Deceptive Practices Act voided the underlying annuity agreement, and, if so, a determination of the amount of actual damages suffered by the class member. *See Flores v. Rawlings Co., LLC*, 177 P.3d 341, 355 (2008). This two-step damages analysis did not defeat class certification. *See also Delagarza v. Tesoro Ref. and Mktg. Co.*, 2011 WL 4017967, at *11-12, 17 (N.D. Cal. Sept. 8, 2011) (Holding that predominance requirement met despite need for individualized damages determinations addressing, for example, different rates of pay for different shifts, and fact that some shifts were excluded from class); *Yamada v. Nobel Biocare Holding AG*, 275 F.R.D. 573, 579-80 (C.D. Cal. 2011) (predominance requirement met in action alleging defective dental implants despite individualized damages determinations concerning costs, projected repairs and medical monitoring expenses). The damages determinations in *Yokoyama*, *Delagarza* and *Yamada* were much more complicated and individualized than in this case and demonstrate that such determinations do not defeat class certification here.

Defendant cites several cases which found that the preponderance requirement was not met because individualized determinations were necessary to establish liability, but these cases are very different than the case at bar. Here, whether a particular Key Barrier violates the law is a common question dependent on factors that are common to the class, for example, measurements and construction dates, rather than factors specific to the circumstances of each class member. Indeed, whether the vast majority of Key Barriers are in violation of state and/or federal law has already been determined through the 2007 SJ Order.

In the cases cited by Defendant, however, the predicate question of whether the defendant had violated the law was specific to each class member, and required an individualized analysis of each class member's circumstances. For example, Defendant cites several class actions brought under California wage and hour laws. In two of these cases -- *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 253 (C.D. Cal. 2006) and *Gales v. Winco Foods*, 2011 WL 3794887 (N.D. Cal. Aug. 26, 2011) -- "the work actually performed by [each] employee[]," *id.* at *8, had to be analyzed to determine whether he or she was exempt from overtime requirements. If the employee was exempt, then the defendant had not violated the law with respect to that class member. In the third -- *Pryor v. Aerotek Scientific, LLC*, --- F.R.D. ---, 2011 WL 6376703, at *15 (C.D. Cal. Nov. 15, 2011) -- an analysis of "the arrival and departure time of each employee on each day" was required to determine whether the defendant had violated California compensation laws. And in *Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010), to determine whether a class member's failure to take a rest or meal break violated California law required an analysis of the reason why that class member did not take that break. *See also Helm v. Alderwoods Group, Inc.*, 2009 WL 5206207, at *10 (N.D. Cal. Dec. 29, 2009) ("highly individualized" inquiry needed to determine whether defendant had violated wage and hour laws).

An example of an issue that does not defeat predominance despite being relevant to liability is found in another case cited by Defendant, *Kurihara v. Best Buy Co., Inc.*, 2007 WL 2501698 (N.D. Cal. Aug. 30, 2007). In that case, the plaintiff brought a class-action alleging that the defendant violated labor laws by subjecting its employees to inspections in order to

prevent inventory loss without compensating these employees for the time spent during these inspections. *Id.* at *1. The defendant argued that the predominance requirement was not met because individualized inquiries would be necessary to determine whether the time spent by each employee undergoing inspections was de minimis and thus not compensable. *Id.* at *9. The defendant, like Defendant here, characterized this as a liability issue, but the court rejected this argument, holding that these individualized inquiries were "directed principally toward damages rather than liability." *Id.* at *11. The court concluded that "the simple question of how many hours were worked" by an employee did not defeat predominance. *Id.*

Together, these cases stand for the proposition that it is not the label given to a particular individualized issue that determines whether it defeats predominance, but rather the nature of the inquiry required by that issue. In *Jimenez*, *Gale*s, *Pryor, Washington* and *Helm*, predominance did not exist because the predicate question of whether the defendant's actions violated the law differed among class members, and required a detailed, individualized analysis for each class member. On the other hand, in *Blackie*, *Yokoyama* and (to a large extent) *Kurihara,* the issue of whether the defendant had violated the law was common to the class and could be determined on a classwide basis, and predominance existed because the only remaining individualized issues were straightforward. This is true in this case, and because the only individualized issue -- the number of times a class member was aggrieved -- is much simpler than the inquiries necessary in a number of cases certified under Rule 23(b)(3), the predominance requirement is met.

2. The Rule 23(b)(3) Class Satisfies The Superiority Requirement.

The "overarching focus" of the superiority requirement is a comparison of the efficiencies of litigating the claims as a class in one forum versus other alternatives. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009).

Defendant asserts that given the potential size of damages recoveries, class members will bring damages claims in state court if those claims cannot be asserted in this action. Opp. Br. at 19-21. This, however, simply highlights the importance of the analysis required by *Vinole* -- is it more efficient to resolve class damages claims in multiple proceedings in various

state courts, or to resolve those claims in this case? A proper examination of this balance clearly favors litigating class damages claims in this forum.

First, the efficiencies of trying class damages in this forum, instead of starting from scratch in numerous state court actions, cannot be overstated. This case has been litigated for almost a decade, during which hundreds of thousands of pages of documents have been produced, dozens of depositions have been taken, multiple legal issues have been resolved on a classwide basis, and Plaintiffs have interviewed more than 1,000 class members. The parties and their attorneys are very familiar with the facts and legal issues relevant to this case.

By contrast, litigating class damages claims in multiple state court proceedings will involve multiple different attorneys for the plaintiffs and multiple courts, all of whom will need to get up to speed on the facts and law relevant to this case. This argues strongly in favor of litigating damages in this forum. *See, e.g.*, *DL*, 277 F.R.D. at 47-48 ("[T]his case has grown quite long in the tooth . . the extent of the litigation already begun on behalf of the class further supports this Court's conclusion that the superiority requirement is satisfied.").

Second, litigating class damages claims in multiple state court proceedings will involve a significant amount of repetition. The same types of discovery requests and disputes will be repeated among the various state court actions. Numerous experts will analyze the same issues across the actions, the same people will likely be deposed repeatedly on the same issues, and the parties and the courts will brief the same legal and factual issues over and over.

Third, because the same issues will be analyzed by multiple courts, there is a high risk of inconsistent holdings.

Finally, Defendant assumes every class member will have numerous claims against it, but many likely will not. Even assuming each class members' claim is large enough to pursue individually, "that does not defeat certification, especially in light of the substantial judicial resources conserved by determining common issues in a single adjudication." *Dalton v. Lee Publn's, Inc.*, 270 F.R.D. 555, 565 (S.D. Cal. 2010); *see also Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003) ("[T]he size of class members' recovery is hardly determinative of superiority.").

Plaintiffs on page 23 of their Opening Brief identified a number of tools to help manage the resolution of class damages claims. After the Court resolves the issue of the compliance status of those Key Barriers not addressed by the 2007 SJ Order, class members can be sent claim forms to complete, followed, where necessary, by *Teamsters* hearings, or the Court can schedule an exemplar damages trial. Defendant contends that the Ninth Circuit rejected the use of any such techniques in *Vinole,* 571 F.3d at 947. To the contrary, the Ninth Circuit in *Vinole* expressly held that the use of such tools are "within the discretion of the district court."

C. The Court May Certify Class Liability and Injunctive Relief Issues Under Rule 23(c)(4).

If the Court remains concerned that individual damages determinations may not be feasible, it should nevertheless certify the stage one liability[6] and injunctive relief claims under Rule 23(c)(4), which allows certification of issues. *See 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."). As Judge Posner recently explained, ordering just such a certification, the liability issue can "most efficiently be determined on a class-wide basis" even though this proceeding "could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected . . . and by how much." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, --- F.3d ----, 2012 WL 592745, at *8 (7th Cir. Feb. 24, 2012). The court ordered certification pursuant to Rule 23(c)(4) despite the fact that individual claims were undoubtedly large enough to make individual suits feasible. "But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful." *Id.*

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[6] In their Opening Brief, Plaintiffs alternately used the term "liability" and "compliance status" in describing the non-injunctive issues included in their Rule 23(b)(2) class. Defendant challenges the use of the term "liability" on the ground that a full liability determination requires testimony from class members that their access was impeded by a noncompliant barrier. To be clear, as a (b)(2) issue, Plaintiffs seek a determination of whether the dimensions of the Key Barriers comply with state and/or federal accessibility regulations, determinations that have already been made for the vast majority of Key Barriers, and none of which require individual class member testimony.

III. Defendant's Other Class Certification Arguments Unrelated to the *Wal-Mart* Decision Should Be Rejected.

A. The Class Is Ascertainable.

Defendant asserts that the class is not ascertainable. Reply Br. at 3-4. In addressing ascertainability, "insistence on detailed class delineation is contrary to the intent of revised Rule 23 and is unnecessary." 8 Newberg on Class Actions § 24:68 (4th ed.). In a Rule 23(b)(2) class, "it is immaterial that not all class members are susceptible of ascertainment." 2 Newberg on Class Actions § 6:15 (4th ed.); *see also Berndt*, 2012 WL 950625, at *9. A damages class is ascertainable if it describes "a common transactional fact or status predicated on the cause of action," "the time span appropriate to the cause of action," and "[a]ny appropriate geographical scope." 2 Newberg on Class Actions § 6:17 (4th ed.).

The damages class in this case easily satisfies this standard. The class is limited to: (1) individuals with disabilities who use wheelchairs or electric scooters mobility who were denied the full and equal enjoyment of Defendant's goods and services as a result of a Key Barrier; (2) on or after December 17, 2001; at (3) a Taco Bell corporate restaurant in California. Opening brief at 18. The level of specificity of this definition far exceeds class definitions in similar cases in which courts have found the ascertainability requirement to be met. For example, the court in *National Federation of the Blind v. Target Corp.* held that the following class definition met the ascertainability requirement: "All legally blind individuals in the United States who have attempted to access Target.com and as a result have been denied access to the enjoyment of goods and services offered in Target stores." 2007 WL 1223755, *4 (N.D. Cal. Apr. 25, 2007).

Defendant argues that the class in this case is not ascertainable because, Defendant speculates, it may include "testers." Such speculation does not make the class unascertainable, and is, in any event, based on several incorrect premises. Defendant asserts that testers lack standing to sue. See Reply Br. at 3-4; Opp. Br. at 15-16. As an initial matter, according to Judge Gould's concurring opinion, this is no longer the law in this circuit. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1069 (9th Cir. 2009) ("[W]e accord standing to individuals

who sue defendants that fail to provide access to the disabled in public accommodation as required by the Americans with Disabilities Act ("ADA"), even if we suspect that such plaintiffs are hunting for violations just to file lawsuits." (Citing *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1061-62 (9th Cir. 2007) (per curiam)).

Defendant cites two cases addressing testers. The court in the first of these cases, *Cross v. Pacific Coast Plaza Investments, L.P.*, 2007 WL 951772, at *2 (S.D. Cal. Mar. 6, 2007), defined a "tester" to be someone who "falsely pos[es] as a disabled individual." Such individuals are not included in Plaintiffs' class, which is limited to individuals with disabilities who use wheelchairs or electric scooters.

The second case defined "tester" as a person whose "sole purpose in visiting a local business is to litigate." *Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F. Supp. 2d 1208, 1219 (S.D. Cal. 2007). *Harris* held only that testers lack standing to seek injunctive relief under the ADA because they have no reason to return to the establishment. It did not address whether testers may seek injunctive relief or damages under state law, a point made explicit in a later decision in that case. *Harris v. Stonecrest Care Auto Ctr., LLC*, 559 F. Supp. 2d 1088, 1091 (S.D. Cal. 2008) ("The Court dismissed Plaintiff's supplemental state claims because his federal claim was dismissed, and not because the Court found Plaintiff lacked standing to bring those claims."). Indeed, the second decision suggested that testers have standing to seek injunctive relief under state law, which extends such relief to those "potentially aggrieved." *Id.* at 1091.

Testers do have standing to obtain damages under state law. *Brunnen v. Mission Ranch*, 2000 WL 33915634, at *3 (N.D. Cal. Dec. 19, 2000). A tester, like any class member, is entitled to damages upon a showing that "'he or she was denied equal access on a particular occasion.'" *Id.* (quoting *Donald*). Thus Defendant's contention that the Court will have to examine the subjective motivation for each class member's visit to a restaurant to weed out testers is simply wrong. Testers -- to the extent they even exist, a matter of pure speculation -- are entitled to damages based on the same standard applicable to all class members.

B. The Classes Satisfy The Numerosity Requirement.

The 2004 Certification Order found that the numerosity requirement was met based on a number of facts, including that the class is geographically dispersed, and that there were fifty million transactions at the covered restaurants in 2002 alone. Thus as a matter of common sense, the class is large. *Moeller*, 220 F.R.D. at 608. This conclusion is even more apt now. While the Court in its 2004 Certification Order assumed that violations were widespread throughout the covered restaurants, it has now been established through the 2007 SJ Order that there are indeed violations in more than 160 restaurants. Further, at the time of the 2004 Certification Order, the limitations period was just over two years, while it is now more than a decade, meaning that many more class members have been to covered restaurants in the interim.

Defendant does not challenge any of these findings in the 2004 Certification Order, and does not argue that the Rule 23(b)(2) and (b)(3) classes identified by Plaintiffs do not meet the numerosity requirement. Rather, it asserts that hypothetical single-restaurant subclasses would not meet the numerosity requirement. Reply Br. at 5. Whether or not that is true is irrelevant because Plaintiffs do not seek single-restaurant subclasses.

C. The Classes Satisfy The Typicality Requirement.

Plaintiffs in their Opening Brief identified numerous cases, virtually identical to the one at bar, in which the typicality requirement was found to have been met.[7] Most important, the Ninth Circuit in *Armstrong,* 275 F.3d at 868-869, held that a class of persons with disabilities challenging, among other things, architectural barriers met the typicality requirement.

Defendant, without even citing *Armstrong*, let alone attempting to distinguish it, argues that the typicality requirement is not met here because the Named Plaintiffs have not been to every restaurant covered by the class. Reply Br. At 16. Typicality, however, simply requires that the Named Plaintiffs have injuries that are "similar to those of" class members, and that the injuries result from the same injurious course of conduct. *Armstrong*, 275 F.3d at 869. The

[7] *See* cases cited on p.5 *supra*.

Ninth Circuit held that this standard was met where "mobility impaired individuals [seek] to overcome . . . physical barriers . . ." *Id.* This is precisely the situation in the case at bar.

Defendant's entire argument rests on *Castaneda*. That decision, however: (1) came at a much earlier point in the case, without the significant evidence of commonality and typicality that exists here; (2) did not cite or mention *Armstrong*; (3) explicitly distinguished the 2004 Certification Order in this case based on the very different facts of the two cases, including that Defendant's policies in this case are centralized; and (4) involved challenges to all architectural elements in the defendant's restaurants, whereas Plaintiffs in this case are only challenging five Key Barriers.

D. Plaintiffs' Request To Narrow The Damages Class To Common Questions That Can Easily Be Resolved Does Not Make Them Inadequate.

In their opening brief, Plaintiffs demonstrated that they easily meet the adequacy requirements as set forth by the Ninth Circuit.

One of the grounds on which Defendant contests adequacy is the assertion that Plaintiffs have fought against providing notice to the class, with an opt-out right. Reply Br. at 20. This is demonstrably wrong. In 2004, Plaintiffs informed the Court and Defendant that they believed that "notice, with an opportunity to opt out, should be provided to the class," but Defendant argued that it was "premature to address Class Notice." ECF 93 at 6. In 2010, Plaintiffs moved for leave to issue notice to the class, with an opt-out right, and Defendant opposed this motion. *See* ECF 513-15.

Defendant asserts that Plaintiffs are not adequate based on certain strategic decisions they have made, including their request to narrow class damages claims to five Key Barriers. According to Defendant, class damages resulting from any other barriers would be barred by the doctrine of res judicata. Defendant is wrong for three reasons.

First, Plaintiffs have made the strategic decision, based on more than a thousand interviews with class members, and their analysis of the law, that: the Key Barriers have had by far the biggest and most common impact on the class; given the nature of the Key Barriers, class members would have likely been impeded by at least one of them during a visit, and thus

any encounters with other types of barriers during a visit would not entitle them to additional statutory damages; and damages claims relating to these barriers are the most likely to be certified. Numerous courts have held that named plaintiffs have the power -- and obligation -- to limit class claims in order to increase the likelihood that the class will be certified. *See, e.g., Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("Refusing to certify a class because the plaintiff decides not to make the sort of person-specific arguments that render class treatment infeasible would throw away the benefits of consolidated treatment"); *In re Conseco Life Ins. Co. LifeTrend Ins. Sales and Mktg. Litig.*, 270 F.R.D. 521, 532 (N.D. Cal. 2010) ("Plaintiffs are permitted to press a theory . . . that affords them the best chance of certification and of success on behalf of the class."); *Chakejian v. Equifax Info. Servs. LLC*, 256 F.R.D. 492, 499-500 (E.D. Pa. 2009) (quoting *Murray*, 434 F.3d at 953).

Second, class members who wish to pursue damages claims arising from barriers other than the Key Barriers will have the right to opt out,[8] and obviously res judicata will have no bearing on their claims. 18A Fed. Prac. & Proc. Juris. § 4455 (2d ed.) (Stating that "class members who properly avail themselves of an opportunity to 'opt out' of the class action" are not bound by it); *see also Gunnells,* 348 F.3d at 432 (rejecting argument that plaintiff's decision to narrow claims to those common to class prejudiced class members with individual claims because those class members could opt out); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 415 (D. Me. 2010) (rejecting argument that plaintiffs, who had not included personal injury claims in the proposed class, were not adequate because class members with such claims could opt out).

Finally, Defendant gets the law of res judicata wrong. Under Plaintiffs' proposal, class damages claims concerning barriers other than the five Key Barriers would be excluded from the class, and would not be litigated in this action. Defendant argues that these claims would nonetheless be barred by res judicata because they are claims that "could have been raised" in this litigation. While this may generally be true in cases involving individual plaintiffs (and the

[8] *See* Rule 23(c)(2)(B)(v).

case cited by Defendant for this proposition involved individual plaintiffs), res judicata principles are applied very differently in class actions, as explained by a leading treatise:

> Other cases provide equally clear illustrations of the need to adjust claim-preclusion rules to distinguish between the rules that apply to individual actions and the rules that apply to class actions. So an individual who has suffered particular injury as a result of practices enjoined in a class action should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief.

18A Fed. Prac. & Proc. Juris. § 4455 (2d ed.); *see also Hiser v. Franklin*, 94 F.3d 1287, 1293 (9th Cir. 1996) (Recognizing that "res judicata must be applied carefully in the class action context.").

In a class action, claims that are not actually litigated,[9] or that are excluded from the class,[10] are not barred by res judicata from being brought in subsequent actions by class members. This is true even if the claims in the subsequent actions "overlap with the common claims" in the class action. 5 Newberg on Class Actions § 16:29 (4th ed.).

The Ninth Circuit has explained why res judicata does not apply to claims that "could have been raised" during the class action: "If all class members had to bring their own individual claims in addition to the common class claims, it would destroy the efficiency of having class actions and reduce the benefit of joining such a suit." *Akootchook v. United States*, 271 F.3d 1160, 1165 (9th Cir. 2001); *see also Hiser*, 94 F.3d at 1293 (Finding that if normal res judicata rules were applied to class actions, "it would essentially make class actions obsolete. . . No responsible attorney would file a class action challenging a prison condition, because by doing so, all future claims by prisoners challenging an unconstitutional condition could be barred -- even if the specific issue was never raised in the previous litigation.").

Examples of the limits of the application of res judicata in class actions can be found in a number of contexts. For example:

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[9] *See, e.g., Cameron v. Tomes*, 990 F.2d 14, 17 (1st Cir. 1993); *Marshall v. Kirkland*, 602 F.2d 1282, 1295–1298 (8th Cir. 1979); 5 Newberg on Class Actions § 16:29 (4th ed.).

[10] 18A Fed. Prac. & Proc. Juris. § 4455 (2d ed.) (After a class action, "individual actions remain available to pursue any other questions that were expressly excluded from the class action.").

- The Supreme Court and the Ninth Circuit have held that a final determination on the merits in class action suits alleging illegal patterns or practices do not preclude later suits involving the same parties for individual instances of such illegal actions. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984); *Leandry v. County of Los Angeles*, 352 Fed. Appx. 214, 215 (9th Cir. 2009).

- The Ninth Circuit has held that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damages claims by class members, "even if based on the same events." *Hiser*, 94 F.3d at 1291.

Here, because class damages claims arising from barriers other than the five Key Barriers will be excluded from the class, and will not actually be litigated, res judicata will not bar class members from bringing their own actions asserting these claims.

IV. Defendant's Non-Class Certification Arguments Should Be Rejected.

A. Defendant's Request To Revisit The 2007 SJ Order Should Be Rejected.

Defendant argues for the first time in its Reply Brief that the Court should revisit the 2007 SJ Order on the grounds that there are 14 restaurants which it did not design or construct and is thus not liable under the design and construct provisions of the ADA. This argument should be rejected for three reasons: (1) having waited almost five years to assert this argument, Defendant has waived it; (2) as a factual matter, Defendant did design and construct these restaurants, and its claim to the contrary contradicts its interrogatory responses; and (3) even assuming *arguendo* that Defendant was both factually and legally correct, it would have no impact on this Court's finding that Defendant "has engaged in numerous violations of state and federal accessibility requirements." FFCL at 38.

1. Defendant Has Waived Its Design And Construct Argument.

In this case, the Court and the parties spent a great deal of time on Plaintiffs' partial summary judgment motion. The parties extensively briefed the motion, including submission of a surreply brief, multiple submissions of supplemental authorities, and a fully briefed motion to reconsider. *See* ECF 255, 260, 269, 271, 280, 292, 298, 300, 301, 302-05, 319, 331, 335, 339, 342-44, 355 & 367. All told, the briefing cycle took more than a year, beginning with Plaintiffs' submission of their motion in February 2007, ECF 255, and ending with the order denying Defendant's motion to reconsider in March 2008, ECF 367. Nowhere in any of those

briefs did Defendant argue that it was not liable under the ADA's design and construct provisions because it had not designed and constructed some of the restaurants at issue.

In 2007, Defendant had both the law and the facts necessary to have made this argument. This is demonstrated by the fact that it made this argument as to these precise restaurants in its 2008 summary judgment motion, which depended on pre-2007 facts and law. ECF 404 at 3. In that motion, Defendant based its factual argument on documents from 1998 and 2001,[11] and its legal argument on the 2004 decision in *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1282 (M.D. Fla. 2004). ECF 404 at 14 n.8. Thus by failing to raise this argument in response to Plaintiffs' 2007 motion, Defendant has waived it. *See, e.g., Arik v. Astrue*, 2010 WL 2557493, at *3 (N.D. Cal. June 21, 2010) (Holding that the defendant waived an argument "by failing to raise it in his opposition to Plaintiff's motion for summary judgment.").

2. Defendant Is Factually Wrong.

Relying on a 2001 purchase and sale agreement that it submitted in support of its 2008 motion for summary judgment, Defendant lists 14 restaurants that it asserts it did not design or construct. Reply at 8-9 (citing Decl. of Steve Elmer, Exs. 22, 23, ECF 404-2). This is inaccurate. In response to Defendant's motion, Plaintiffs demonstrated that 13 of these 14 restaurants were designed and constructed by Defendant, sold to a third-party, and then repurchased by Taco Bell through the purchase and sale agreement on which it relied -- and once again relies. See ECF 409 ¶¶ 16(d)-(q) & Exs. 1, 46-59. Even if this legal argument were timely, properly raised, and legally meritorious, it is factually unsupported.

3. Even Assuming *Arguendo* That Defendant Is Correct, There Would Be No Impact on the Finding That Defendant "Has Engaged in Numerous Violations of State and Federal Accessibility Requirements."

The 2007 Order found almost 400 violations in just over 160 restaurants. Assuming *arguendo* that Defendant is correct and that the 2007 Order should not have included any element in the 14 restaurants it has identified, that Order still held that there were more than

[11] *See* ECF 404-2 at ¶ 5.

350 violations among 150 restaurants. *See* Declaration of Timothy P. Fox at ¶¶ 2-3 (filed concurrently herewith). This easily supports this Court's conclusion that Defendant has "engaged in numerous violations of state and federal accessibility requirements." FFCL at 38.

B. Standing.

Defendant argues that the Named Plaintiffs lack standing to seek injunctive relief as to restaurants they have not visited. Reply Br. at 17. This Court, however, has already held that "in a certified class action, the injury, and the corresponding relief, extends to the class as a whole." FFCL at 39 (citing *Armstrong*).

C. Statute of Limitations.

Defendant, citing *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008), argues that the "precise timing of when a particular store" was open for business must be determined because it affects the accrual of the statute of limitations. Reply Br. at 9-10. Once again, this Court has already rejected this argument. *See* ECF 416.

CONCLUSION

For the reasons set forth above, and in Plaintiffs' Opening Brief, 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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Timothy P. Fox

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