UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02757-WYD-KMT

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation, *et al*., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ABERCROMBIE & FITCH CO., *et al.*,

Defendants.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs, by and through counsel, hereby move for Class Certification.

Plaintiffs move pursuant to Fed. R. Civ. P. 23(b)(2) for certification of a nationwide class of Hollister customers who use wheelchairs seeking injunctive relief in the form of an order requiring the removal of the elevated porch-like entrances that this Court has held violate Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq*. *See* Order, ECF No. 109.

FACTS

Defendant J.M. Hollister LLC owns and operates Hollister retail clothing stores in malls around the country. Defendants "have designed porch-like structures at some Hollister stores in order to give those stores the aesthetic appearance of a Southern California surf shack." Defs.' Resps. to Pls.' First Set of Interrogs., Requests for Production of Documents, and Requests for

Admission at 8 (Decl. of Amy F. Robertson ("Robertson Decl.") Ex. 2). These porch-like structures contain steps that render them inaccessible to customers who use wheelchairs. *See* Declaration of Anita Hansen ("Hansen Dec.") ¶¶ 3, 6-8, 21-24; Declaration of Julie Farrar ("Farrar Dec.") ¶¶ 3, 6-12. Defendants have identified approximately 249 Hollister stores around the country that contain these porch-like structures. Robertson Decl. Ex. 3. All of these stores were constructed after January 26, 1993. Defs.' Supplemental Resps. to Pls.' Interrogs and Requests for Production of Documents at 4 (Robertson Decl., Ex. 1).

Plaintiffs moved for partial summary judgment as to two stores in Colorado that had porch-like entrances. ECF No. 87. On August 31, 2011, this Court -- after analyzing the entrances, the parties' arguments, and the Statement of Interest of the Department of Justice -- granted Plaintiffs' motion for partial summary judgment, concluding that these entrances violate the provision of Title III of the Americans with Disabilities Act governing new construction, that is, facilities constructed after January 26, 1993, 42 U.S.C. § 12183(a)(1). ECF No. 109 at 12.

Following this Order, Plaintiffs filed their Fourth Amended and Class Action Complaint ("Fourth Complaint") which narrowed the case by eliminating all substantive claims except the Title III claim for injunctive relief relating to the porch-like entrances. ECF No. 117. This complaint removed the claims of two plaintiffs as well as any damages claims. *Id.* Just after filing that complaint, undersigned counsel learned that one of the two Plaintiffs would not be able to participate a class representative. As a result, Plaintiffs sought leave to file a Fifth Amended and Class Action Complaint ("Fifth Complaint"), seeking to substitute another individual who uses a wheelchair – Julie Farrar -- as a plaintiff and class representative. ECF

No. 123. This motion is still pending. Because Mr. Stapen can no longer serve as a representative plaintiff, this Motion respectfully requests that Ms. Hansen and Ms. Farrar be appointed to that role.

In both the Fourth and Fifth Complaints, Plaintiffs stated that they sought to maintain this action as a class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure with respect to the question of whether the porch-like entrances at Hollister Stores nationwide violate Title III of the ADA. Fourth Complaint ¶ 36; Fifth Complaint ¶ 35. Plaintiffs propose the following class definition:

> all people with disabilities who use wheelchairs for mobility who are being or, during the two years prior to the filing of the Complaint in this case, have been denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any Hollister Co. store in the United States on the basis of disability because of the existence of an elevated porch-like entrance.

("Proposed Class"). Plaintiffs now seek an Order certifying the Proposed Class pursuant to Rule 23(b)(2), and allowing this case to be maintained as a nationwide class action.

Pursuant to D.C.COLO.LCivR 7.1(A), the undersigned conferred with Defendants' counsel, Mark Knueve, and sought Defendants' consent to the relief sought herein. Mr. Knueve reported that Defendants would not consent to such relief, but would agree not to oppose the adequacy of Plaintiffs' counsel under Rule 23(g). Robertson Decl. ¶ 3.

ARGUMENT

"A district court may certify a class if the proposed class satisfies the requirements of Rule 23(a) and the requirements of one of the types of classes in Rule 23(b)." *DG ex rel.*

Stricklin v. Devaughn, 594 F.3d 1188, 1194 (10th Cir. 2010). Here, the Proposed Class meets all of the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(2).

Because the class covers approximately 249 Hollister stores nationwide, there is no question that the class is sufficiently numerous and geographically dispersed that joinder would be impracticable. Plaintiffs challenge a single common barrier – the porch-like entrance with steps -- that affects all wheelchair users in the same way, by rendering that entrance unusable. Named Plaintiffs' claims are thus both common with and typical of those of the Proposed Class. Finally, Named Plaintiffs have no conflict with the class, and Defendants have indicated that they have no opposition to the adequacy of class counsel, *see* Robertson Decl. ¶ 3.

Plaintiffs seek certification pursuant to Rule 23(b)(2) because Hollister has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Plaintiffs seek only injunctive and declaratory relief.

Plaintiffs will analyze each of the requirements of Rule 23(a) and Rule 23(b)(2) separately below. As an overview, numerous courts have certified classes of individuals with disabilities challenging inaccessible architectural elements, equipment, or facilities.[1]

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[1] *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001) (affirming certification of class of individuals with varying disabilities challenging barriers and policies at prison facilities in California); *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997) (affirming certification of a class of blind and mobility-impaired individuals challenging accessibility of polling places); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 120-23 (C.D. Cal. 2008) (certifying class of persons with mobility disabilities suing for alleged violations of architectural accessibility requirements at a grocery store chain); *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 344-49 (N.D. Cal. 2008) (certifying class of persons with mobility and/or vision disabilities suing due to barriers along

I. The Proposed Class Meets the Requirements of Rule 23(a).

A. The Proposed Class Is So Numerous That Joinder Is Impracticable.

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. There are a number of factors that are relevant to this requirement, including the class size, the geographic diversity of class members, and the relative ease or difficulty in identifying members of the class for joinder. *See Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 357 (D. Colo. 1999) (hereinafter "*CCDC v. Taco Bell*"); 1 William B.

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outdoor designated pedestrian walkways throughout the state of California which are owned and/or maintained by the California Department of Transportation); *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1199-1203 (N.D. Cal. 2007) (certifying class of persons with visual impairments suing for alleged violations of accessibility requirements at online store); *Lucas v. Kmart Corp.*, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (certifying nationwide class of people who use wheelchairs challenging barriers and policies at 1,500 retail stores) & 2006 WL 722163 (D. Colo. Mar. 22, 2006) (certifying damages subclasses in seven states); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004) (certifying statewide class of people who use wheelchairs challenging barriers and policies at approximately 220 restaurants); *Nat'l Org. on Disability v. Tartaglione*, 2001 WL 1258089, at *5 (E.D.Pa. Oct. 22, 2001) (certifying class of blind and mobility-impaired individuals and organizations representing same challenging accessibility of voting machines and polling places); *Access Now, Inc. v. AHM CGH, Inc.*, 2000 WL 1809979, at *6 (S.D. Fla. Jul. 12, 2000) (certifying a class of individuals with all disabilities challenging barriers at a chain of health care facilities); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group*, Ltd., 197 F.R.D. 522, 530 (S.D. Fla. 2000) (same); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 363 (D. Colo. 1999) (certifying class of people who use wheelchairs challenging barriers at approximately 42 restaurants); *Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (certifying class of deaf individuals challenging accessibility of municipal 911 and street alarm box system); *Bacal v. Southeastern Pa. Transp. Auth.*, 1995 WL 299029, at * 6 (E.D. Pa. May 16, 1995) (certifying class of individuals who use paratransit services challenging discrimination in the provision of such services); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 458 (N.D. Cal. 1994) (certifying statewide class of people who use wheelchairs challenging barriers at a chain of movie theaters).

Rubenstein, Alba Conte, and Herbert B. Newberg, *Newberg on Class Actions* ("*Newberg*") § 3:6 (4th ed. 2008) (and cases cited therein). These factors show that joinder is impracticable in the present case.

The Proposed Class is large and geographically diverse. In determining class size, the exact number of potential members need not be shown. *See, e.g.*, *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986). Rather the court may make "common sense assumptions" to support a finding that joinder would be impracticable. *Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 632 (S.D.N.Y. 1996) (citation omitted); *see also* 1 Newberg § 3:3 (citing cases). Because this case involves 249 stores nationwide, there is no question that -- as a common sense matter -- the class is numerous and geographically dispersed. Joinder is thus impracticable.

Particularly where, as here, the class consists of persons with disabilities impacted by architectural barriers, joinder is impracticable because it is very difficult to identify individual class members. *See, e.g.*, *CCDC v. Taco Bell*, 184 F.R.D. at 358-59; 1 *Newberg* § 3:5 (citing cases). In *Arnold v. United Artists Theatre Circuit*, *Inc.*, for example, the court held that "by the very nature" of the class of persons with disabilities affected by the defendant's architectural barriers, its members were "unknown" and could not be "readily identified" and thus joinder of class members was impracticable. 158 F.R.D. 439 (N.D. Cal.), *modified*, 158 F.R.D. 439, 448 (1994).

For these reasons, the class is so numerous that joinder is impracticable and satisfies Rule 23(a)(1).

B. **Class Members Share Common Issues of Law and Fact**

Rule 23(a)(2) requires that there be questions of law or fact common to the class. This does not mean that every issue must be common to the class so long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory. *Joseph*, 109 F.R.D. at 639-40. "Where a class of persons sharing a common disability complain of the identical architectural barrier based on the same alleged violations of law, commonality is unquestionably established." *CCDC v. Taco Bell*, 184 F.R.D. at 359.

As the Supreme Court recently clarified, what matters is "'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (2011) (emphasis in original) (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 132 (2009)); *see also J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999) (holding that commonality is satisfied where "the putative class . . . share[s] a discrete legal question of some kind"). Given that Plaintiffs challenge only a single barrier that is materially similar if not identical in each of the 249 stores included in the class definition and do so under a single legal theory, the common questions are all capable of being -- and indeed likely already have been -- answered on a classwide basis.

The primary common question is whether Hollister's porch-like entrances violate the new construction provisions of Title III of the ADA, 42 U.S.C. § 12183(a)(1). In its September 31 Order, this Court answered that question in the affirmative with respect to two stores in Colorado. ECF No. 109 at 12. There is no material difference between the porch-like entrances

at those two stores and those at the remaining stores listed in Exhibit 1, all of which Defendants admit have the porch-like entrances and all of which they admit were constructed after January 26, 1993.[1] They will thus all be subject to the same analysis as set forth in this Court's order granting Plaintiffs' motion for partial summary judgment.

While this Court has not yet addressed the appropriate remedy for this violation, Title III's remedial provision requires that where, as here, a violation of 42 U.S.C. § 12183(a) is found, *see* ECF No. 109 at 12, "injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter." 42 U.S.C. § 12188(a)(2). Thus this Court can rule on liability and remedy based on two questions common to the entire class.

C. **The Claims of Named Plaintiffs Are Typical of the Claims of the Class.**

As the Supreme Court recently reiterated, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Wal-Mart*, 131 S. Ct. at 2551 n.5 (citation omitted). Typicality exists where the harm or threat of harm to the Named Plaintiffs is similar to that of the class. *D.G. ex rel. Stricklin*, 594 F.3d at 1195. In this case, the Named Plaintiffs and the members of the class have

> disabilities which, although not identical, require the use of a wheelchair or scooter for mobility. Thus, the effect of the disability is shared by all class members. Further, the representative plaintiffs contest the legality of architectural barriers under the same statutes as the class. [T]herefore . . . the claims of the representative plaintiffs are typical of the class.

[1] Indeed, because the Court's September 31 Order was on a Motion for Partial Summary Judgment, there were no disputed facts resolved by the Court in reaching its legal conclusion regarding the stores' ADA violation.

CCDC v. Taco Bell, 184 F.R.D. at 360; *see also Lucas v. Kmart Corp.*, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (holding that where the focus of an ADA lawsuit is final injunctive relief against the defendant benefitting the class as a whole, "the prerequisites of commonality and typicality are met"); *Arnold*, 158 F.R.D. at 450 ("Indeed, in a public accommodations suit such as this one where disabled persons challenge the legal permissibility of architectural design features, the interests, injuries, and claims of the class members are, in truth, identical such that *any* class member could satisfy the typicality requirement for class representation.")

Here, the Named Plaintiffs are individuals with disabilities who use wheelchairs, who attempted to patronize Defendants' Hollister stores that featured porch-like structures and who, because of those porch-like structures, were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of those Hollister stores. *See* Hansen Dec. ¶¶ 3, 6-35; Farrar Dec. ¶¶ 3, 6-20. Plaintiff CCDC is a non-profit disability rights organization whose membership includes individuals with disabilities who use wheelchairs (including Named Plaintiffs), who were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of Hollister stores because of the porch-like structures. *See* Decl. of Julie Reiskin ("Reiskin Decl.") ¶¶ 3-4; Hansen Decl. ¶ 4; Farrar Decl. ¶ 4. Named Plaintiffs' claims relating to the porch-like structures at Defendants' Hollister stores are typical, if not identical, to the claims of the Proposed Class members.

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

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*,

521 U.S. 591, 625-26 (1997) (citation omitted). In short, the question is "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 626 n.20 (citation omitted). Adequate representation is usually presumed in the absence of contrary evidence. *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 386 (D. Colo. 1993) (quoting 2 Newberg § 7.24 at 7-80 to -81).

Here Plaintiffs, like the members of the Proposed Class, seek remedies for the steps that pose barriers to their full and equal enjoyment of the 249 Hollister stores at issue. There are neither unique facts nor unique defenses relevant to Plaintiffs' claims that would put them in conflict with the Proposed Class. In addition, Plaintiffs and their counsel have prosecuted the interests of the class vigorously, including opposing two motions to dismiss and successfully moving for partial summary judgment.

CCDC is also an adequate representative plaintiff. This Court has previously held that CCDC alleged sufficient facts to support associational standing. Order, ECF No. 94, at 8-11; *see also* Reiskin Decl. ¶ 5. Under these circumstances, several courts have held that organizations of individuals with disabilities can serve as representative plaintiffs. *See, e.g.*, *Civic Ass'n of the Deaf*, 915 F. Supp. at 633; *E. Paralyzed Veterans Ass'n, Inc. v. Veterans' Admin*., 762 F. Supp. 539, 547 (S.D.N.Y. 1991).

As indicated above, Defendants have courteously agreed that they do not oppose the adequacy of Plaintiffs' counsel. Robertson Decl. ¶ 3. For the Court's information, Plaintiffs' counsel have been held by the United States District Court for the District of Colorado to be able

adequately to represent a class of persons with mobility impairments bringing suit under Title III of the ADA. Robertson Decl. ¶ 4 (Among many other cases, Kevin W. Williams, Amy F. Robertson, and Bill Lann Lee were approved as class counsel in *Lucas v. Kmart Corp.*; Mr. Williams and Ms. Robertson in *CCDC v. Taco Bell*).

II. The Proposed Class Satisfies Rule 23(b)(2) Because Defendants Have Acted on Grounds Generally Applicable to the Class, Making Classwide Injunctive Relief Appropriate.

A class is proper under Rule 23(b)(2) if the party opposing the class "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole" and the representatives are seeking "final injunctive relief or corresponding declaratory relief." "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 131 S. Ct. at 2557. Named Plaintiffs here seek a single injunction ordering the removal of the stepped entrances at Hollister stores nationwide; that injunction would provide relief to all members of the class. Certification pursuant to Rule 23(b)(2) is thus appropriate.

Indeed, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 614 (quoting Adv. Comm. Notes, 28 U.S.C. App., at 697); *see also Wal-Mart*, 131 S. Ct. at 2558 (Rule 23(b)(2) "reflects a series of decisions involving challenges to racial segregation -- conduct that was remedied by a single classwide order"). Cases such as this one

"provide[ ] a paradigm for class certification under Rule 23(b)(2) . . . ." *Lucas*, 2005 WL 1648182, at * 2; *see also Arnold*, 158 F.R.D. at 452.

"A class action in which all members of the class complain of the identical architectural barrier necessarily involves acts that are generally applicable to the class." *CCDC v. Taco Bell*, 184 F.R.D. at 361 (citations omitted). The Advisory Committee Notes to the 1966 amendment to Rule 23 demonstrate that subdivision (b)(2) was intended to reach precisely the type of class proposed here: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." The single architectural barrier at issue in this case involves acts generally applicable to the class, and can be remedied with a single injunction. Certification pursuant to Rule 23(b)(2) is thus appropriate.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court certify the following class under Rule 23(b)(2):

> all people with disabilities who use wheelchairs for mobility who are being or, during the two years prior to the filing of the Complaint in this case, have been denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any Hollister Co. store in the United States on the basis of disability because of the existence of an elevated porch-like entrance.

Plaintiffs further request that CCDC, Ms. Hansen and Ms. Farrar be appointed representative plaintiffs and that the counsel listed below be appointed class counsel.

Dated: October 31, 2011

Respectfully submitted,

/s/ Amy F. Robertson

Amy F. Robertson
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, Colorado 80203
Voice: (303) 595-9700
Facsimile: (303) 595-9705
E-mail: arob@foxrob.com

Kevin W. Williams
Andrew C. Montoya
Colorado Cross-Disability Coalition
655 Broadway, Suite 775
Denver, Colorado 80203
Phone: (303) 839-1775
Facsimile: (303) 839-1782
E-mail: kwilliams@ccdconline.org
E-mail: amontoya@ccdconline.org

Bill Lann Lee
Julia Campins
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.
476 - 9th Street
Oakland, CA 94607
Voice: (510) 839-6824
Facsimile: (510) 839-7839
E-mail: blee@lewisfeinberg.com
E-mail: jcampins@lewisfeinberg.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2011, a copy of the foregoing document and the Declarations of Amy F. Robertson, Julie Reiskin, Anita Hansen, and Julie Farrar were filed with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

Gregory A. Eurich
geurich@hollandhart.com

Thomas B. Ridgley
tbridgley@vorys.com

Mark A. Knueve
maknueve@vors.com

/s/ Caitlin R. Anderson
Caitlin R. Anderson
Paralegal
Fox & Robertson, P.C.