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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 FRANCIE E. MOELLER et al,

17 Plaintiffs,

18 v.

19 TACO BELL CORP.,

20 Defendant.
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Case No. C 02 5849 MJJ ADR

**PLAINTIFFS' BRIEF IN
OPPOSITION TO DEFENDANT'S
MOTION FOR MODIFICATION OF
CLASS DEFINITION**

Date: December 7, 2004

Time: 9:30 a.m.

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SAN FRANCISCO DIVISION

14 FRANCIE E. MOELLER et al,

Case No. C 02 5849 MJJ ADR

15 Plaintiffs,

**PLAINTIFFS' BRIEF IN OPPOSITION
TO DEFENDANT'S MOTION FOR
MODIFICATION OF CLASS
DEFINITION**

16 v.

17 TACO BELL CORP.,

Date: December 7, 2004

18 Defendant.

Time: 9:30 a.m.

19 _____
20
21 **NOTICE**

22 On December 7, 2004 at 9:30 a.m., Defendant's Motion for Modification of Class
23 Definition, and Plaintiffs' opposition to that motion, will be heard before the Honorable Martin
24 J. Jenkins.

25
26
27 Case No. C 02 5849 MJJ ADR
Plaintiffs' Brief in Opposition to Defendant's Motion for Modification of Class Definition

28

1 **POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION**

2 **ISSUE TO BE DECIDED**

3 Whether there exists any reason to modify the definition of the class that has been
4 certified in this case.

5 **INTRODUCTION**

6 Plaintiffs bring suit to challenge architectural barriers at corporate Taco Bell restaurants
7 in California under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.
8 (“ADA”), the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq. (“Unruh” or “the Unruh
9 Act”), and/or the California Disabled Persons Act, Cal. Civ. Code § 54 et seq. (the “CDPA”).

10 Less than a year ago, this Court certified the following class under Rule 23(b)(2) of the Federal
11 Rules of Civil Procedure:

12 All individuals with disabilities who use wheelchairs or electric scooters for
13 mobility who, at any time on or after December 17, 2001, were denied, or are
14 currently being denied, on the basis of disability, full and equal enjoyment of the
goods, services, facilities, privileges, advantages, or accommodations of
California Taco Bell corporate restaurants.

15 Moeller v. Taco Bell Corp., 220 F.R.D. 604, 613-14 (N.D. Cal. 2004).

16 In certifying this class, the Court joined the overwhelming majority of courts that have
17 held that classes of persons with disabilities challenging alleged architectural barriers satisfy
18 the requirements of Rule 23. The Court granted class certification after carefully considering,
19 and rejecting, Defendant’s argument that certification should be denied because of alleged
20 differences among its restaurants and among class members. Defendant did not file a timely
21 appeal or motion for reconsideration of this Court’s ruling on class certification. Instead,
22 months after the deadline for appeal, Defendant filed the instant Motion for Modification of
23 Class Definition (“Def.’s Mot.” or “Defendant’s Motion”). Defendant’s Motion is little more
24 than a motion for reconsideration. Defendant offers no evidence or arguments -- old or new --
25 that justify revisiting or amending this Court’s decision certifying the class.

1 Lacking any new evidence or valid legal arguments, Defendant resorts to speculation
2 and exaggeration, in an attempt to show that the damages phase of this case will be
3 unmanageable. To the contrary, adjudicating damages in this case will be straightforward and
4 eminently manageable. During Stage I, the Special Master will provide the measurements from
5 which this Court will be able to determine both which elements in Defendant's restaurants are
6 in violation of applicable statutes and whether Defendant has engaged in a pattern and practice
7 of disability discrimination. If Plaintiffs establish a pattern and practice of discrimination, then
8 class members during Stage II will be entitled to a presumption that they were discriminated
9 against on the basis of disability. Stage II will commence with notice and a simple claims form
10 for class members to submit. Only those class members who submit a claims form will be
11 entitled to recover damages, and only those architectural elements encountered by those class
12 members will be at issue. Thus, Defendant's speculative estimates concerning class size and
13 manageability are vastly exaggerated and, at a minimum, premature. Once the claims forms are
14 received, there a number of management options available to the Court to adjudicate damages.
15 For the reasons set forth herein, Defendant's Motion should be denied.

16 **FACTS**

17 This case was filed in December 2002, and the first year of this case was devoted to the
18 issue of whether the class in this case should be certified. The parties briefed this issue during
19 the fall of 2003, and on February 23, 2004, this Court certified the class. See Moeller v. Taco
20 Bell Corp., 220 F.R.D. 604 (N.D. Cal. 2004). Defendant now moves to decertify the class
21 damage claims because of allegedly new evidence.

22 In its decision certifying the class, this Court found that the class met the commonality
23 requirement of Rule 23(a)(2) because: (1) the state of architectural elements at Defendant's
24 restaurants, and the legal adequacy of such elements, were issues of fact and law common to all
25

1 class members; and (2) Defendant’s centralized decision-making weighed “heavily towards a
2 finding of commonality, if it [did] not establish commonality outright.” Id. at 609-10.

3 Nothing in Defendant’s Motion undermines either of those two bases; indeed, this
4 Court’s finding that Defendant has a centralized decision-making structure is reinforced by
5 Defendant’s Motion, which demonstrates that even such routine, day-to-day operations as
6 repair, maintenance and minor remodeling at Defendant’s restaurants are centralized. (See
7 Decl. of Jaime de Beers in Support of Def.’s Mot. for Modification of Class Definition (“De
8 Beers Decl.”) at ¶¶ 2-3 (attached to Def.’s Mot.).)

9 Despite Defendant’s claim that its Motion is based on points that “were not apparent
10 during the original certification process,”¹ virtually every issue it now raises was previously
11 asserted in its original Defendant’s Response Brief in Opposition to Plaintiffs’ Motion for
12 Class Certification (the “2003 Opposition Brief” or “2003 Opp. Br.”), and rejected by this
13 Court in the order certifying the class. For example, among the facts that Defendant now
14 contends were not apparent during the original certification process are that class members are
15 different, its restaurants are different, and its restaurants change over time. Defendant asserted
16 every one of these points in its 2003 Opposition Brief. (See id. at 11 (arguing that “the
17 damages sought by plaintiffs . . . require particularized findings for each class member”); 7
18 (contending that Defendant’s restaurants have “an infinite number of seating layouts and
19 different types of condiment stations”); & 8 (asserting that “[t]he force required to open
20 exterior entrances vary [sic] from store to store and from day to day,” and “[t]he presence of
21 parking or restroom signage is highly changeable, subject to weathering, vandalism or removal
22 by members of the public.”).)

23
24
25 ¹ Def.’s Mot. at 2.

1 Defendant also dramatically asserts that “Plaintiffs have revealed” that an accessibility
2 survey will examine “over 600 accessibility elements” at each restaurant. (Def.’s Mot. at 3.)
3 This is referring to the line items in the Special Master’s survey form jointly drafted by the
4 parties, line items that simply track the requirements of the applicable accessibility standards.
5 (See [Proposed] Order Appointing Special Master, Ex. B.) Far from being a revelation by
6 Plaintiffs, the line items reflect California standards that have been in place since 1970, and
7 federal standards that have been in place since 1993, all of which are noted in the form. Id. In
8 any event, Defendant argued in its 2003 Opposition Brief -- using the phrase “laundry list” no
9 fewer than three times -- that there were many different elements at stake in the litigation.
10 (2003 Opp. Br. at 2-4.) And the Court, of course, was fully aware of the scope of the
11 Department of Justice and California standards when it certified the class. See, e.g., Moeller,
12 220 F.R.D. at 606 (“The DOJ Standards contain detailed design specifications for public
13 accommodations covering a variety of architectural elements, including, for example, parking
14 lots, food service lines, accessible routes, and restrooms.”).

15 Finally, Defendant asserts that the Pilot Program surveys “established no pattern of non-
16 compliance” among the 20 stores. (Def.’s Mot. at 3.) This is simply a recycling of
17 Defendant’s argument that the stores are different (2003 Opp. Br. at 6-8), an argument
18 considered and rejected by this Court. Moeller, 220 F.R.D. at 609 (“The ‘unique architecture’
19 argument has been rejected by a number of courts in disability cases.”).

20 In any event, the Pilot Program survey demonstrated significant patterns of non-
21 compliance. For example, as demonstrated in Plaintiffs’ Motion for Partial Summary
22 Judgment, at least 16 of the 20 restaurants surveyed had non-compliant doors, 11 restaurants
23 had non-compliant queue lines, and 19 restaurants had non-compliant restrooms. (Pls.’ Mot.
24 for Partial Summ. J. at 15, 17 & 20.) This pattern of non-compliance was observed despite the
25 fact that the Pilot Program stores were selected to be as different as possible. The

1 Memorandum of Understanding between the parties assigned to Taco Bell the task of selecting
2 the 20 Pilot Program stores and mandated that its “selection criteria shall be designed to
3 achieve a variety of architectural and design conditions.”²

4 **ARGUMENT**

5 In its decision certifying the class in this case, the Court held that the class satisfied the
6 requirements of Rule 23(a) and Rule 23(b)(2). Moeller, 220 F.R.D. at 608-13. Defendant now
7 contends that the class does not satisfy the commonality and typicality requirements of Rule
8 23(a), and does not satisfy the requirement under Rule 23(b)(2) that injunctive relief
9 predominate over monetary relief. As set forth below, Defendant is incorrect.

10 **I. The Class Satisfies The Commonality and Typicality Requirements.**

11 The Court previously held that the class met the commonality and typicality
12 requirements. While it is true that Rule 23(c)(1) permits this Court to revisit class certification
13 at any time during the litigation, Defendant has not provided this Court with any reason to do
14 so. Defendant’s single new legal theory -- relating to due process -- is wrong; properly
15 understood, any question of due process reinforces rather than undermines commonality.

16 **A. The Class as Certified Satisfies the Commonality Requirement.**

17 **1. Rule 23 Does Not Require That Every Issue Be Common to the Class.**

18 The Court certified the class because, among other reasons, “the state of [architectural]
19 elements at Defendant’s restaurants, and the legal adequacy of such elements, are issues of fact
20 and law common to all class members.” Moeller, 220 F.R.D. at 609. Defendant does not
21

22 ² The Memorandum of Understanding strictly prohibited the parties from
23 submitting any aspect of the pilot program other than the dimensions of measured elements.
24 Because of this, Plaintiffs were careful, in their motion for summary judgment, simply to state
25 that the measurements were stipulations, without further discussion of how they came to be so.
(See, e.g., Pls.’ Mot. for Partial Summ. J. at 2.) Because Defendant appears to be comfortable
26 discussing the origins of and procedures for the Pilot Program (see Def.’s Mot. at 6-7),
27 Plaintiffs assume they will not object to the discussion in text.

1 challenge this finding, and does not dispute that there are common legal and factual issues
2 shared by the class. Instead, Defendant argues that commonality is defeated because there are
3 individual questions relating to damages.

4 Defendant’s analysis is contrary to the most basic principles of Rule 23(a)(2):
5 commonality does not require that every factual and legal question be common to the class; it
6 simply requires that there be some common questions. The Ninth Circuit has made this
7 abundantly clear: “Rule 23(a)(2) has been construed permissively. All questions of fact and
8 law need not be common to satisfy the rule.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019
9 (9th Cir. 1998) (emphasis added). Indeed, the Ninth Circuit has specifically rejected the
10 argument that differences in class members’ damages claims defeat commonality. Id. (holding
11 that the commonality requirement is met where the class has “shared legal issues with
12 divergent factual predicates, . . . [or] a common core of salient facts coupled with disparate
13 legal remedies within the class.”) (emphasis added); see also Blackie v. Barrack, 524 F.2d 891,
14 905 (9th Cir. 1975) (“The amount of damages is invariably an individual question and does not
15 defeat class action treatment.”).

16 In this case, there is no dispute that the class shares common legal and factual issues,
17 and this is sufficient to satisfy Rule 23(a)(2), despite any differences in class member’s
18 damages claims.

19 Indeed, as set forth below, there are many questions relevant to damages that are
20 common to the class, including, for example: What were the conditions at a given restaurant
21 for a given period of time? Does a class member who knows that an architectural element is
22 inaccessible have to engage in the futile gesture of attempting to access the element in order to
23
24
25
26

1 recover damages? Is a class member who manages, with difficulty, to access a non-compliant
2 element entitled to damages?³

3 **2. Commonality Exists Because Defendant Has Centralized Decision**
4 **Making.**

5 This Court also held, in certifying the class, that “centralized decision-making is an
6 additional factor weighing heavily towards a finding of commonality, if it does not establish
7 commonality outright.” Moeller, 220 F.R.D. at 610. This conclusion is bolstered by Ms. de
8 Beers’s declaration, attached to Defendant’s Motion, demonstrating that one person is
9 responsible for overseeing the repair, maintenance and minor remodeling projects at 136 Taco
10 Bell restaurants in Northern California. (De Beers Decl. at ¶¶ 2-3.)

11 **3. Alleged Differences Among Defendant’s Restaurants, and Among**
12 **Class Members, Do Not Defeat Commonality.**

13 Defendant’s argument that differences in its restaurants defeat commonality was
14 expressly considered and rejected by this Court in its decision granting certification. Moeller,
15 220 F.R.D. at 609 (rejecting Defendant’s argument that commonality does not exist because its
16 restaurants have “an infinite number of seating layouts and different types of condiment
17 stations.”). There is no dispute that the class challenges “the same categories of design
18 features” -- including, for example, parking lots, entrances, queue lines, counters, dispensers,
19 seating areas and restrooms -- and that this satisfies the commonality requirement. Id. (quoting
20 Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 449 (N.D. Cal.1994)).

21 Defendant also contends that differences in the class members’ disabilities and mobility
22 devices precludes a finding of commonality. A similar argument was raised by the defendant
23 in Armstrong v. Davis, 275 F.3d 849, 854 (9th Cir. 2001), cert. denied, 537 U.S. 812 (2002),
24 which involved a class of persons with a wide range of disabilities, including persons with
25 hearing impairments, vision impairments, developmental disabilities, learning impairments,

26 ³ See infra pp. 27-28.

1 and mobility impairments. The Ninth Circuit held that “commonality is satisfied where the
 2 lawsuit challenges a system-wide practice or policy that affects all of the putative class
 3 members.” Id. at 868. Because the class members “suffer[ed] similar harm from the
 4 [defendant’s] failure to accommodate their disabilities,” the commonality requirement was met.
 5 Id.; see also Arnold, 158 F.R.D. at 444, 449 (finding commonality among members of a class
 6 that included both people who use wheelchairs and those who are semi-ambulatory -- that is,
 7 people who walk “using crutches, braces, or walkers.”).

8 The class in this case -- consisting only of persons who use wheelchairs or scooters for
 9 mobility -- is much more homogenous than either of the classes in Armstrong or Arnold. For
 10 example, there is a much more significant difference between the harm suffered by someone
 11 with a vision impairment and that suffered by someone with a mobility impairment -- both
 12 members of the Armstrong class -- than among the members of the class in this case, which is
 13 limited to persons who use wheelchairs or scooters. Armstrong and Arnold thus demonstrate
 14 that the class in this case satisfies the commonality requirement.

15 4. Defendant’s Due Process Argument Supports Commonality.⁴

16 Plaintiffs seek the statutory minimum damages of \$4,000 under Unruh, and \$1,000
 17 under the CDPA, for each instance that a class member was aggrieved by Defendant’s
 18 violations of these statutes during the limitations period. Defendant, relying on an analysis
 19 used by the Supreme Court to determine whether punitive damages awards by juries violate
 20

21
 22 ⁴ Defendant incorrectly contends that establishing that a statutory damages award
 23 complies with due process is an element of a class member’s claim. (Def.’s Mot. at 15.)
 24 Defendant, of course, bears the burden of demonstrating that the Unruh and CDPA statutory
 25 penalty provisions violate due process. Cf. Kyle Rys., Inc. v. Pac. Admin. Servs., Inc., 990
 26 F.2d 513, 518-19 (9th Cir. 1993) (holding that ““the burden is on one complaining of a due
 process violation to establish that the legislature has acted in an arbitrary and irrational way.””
 (Citation omitted.)).

1 due process (“punitive damages analysis”),⁵ argues that commonality is defeated because this
2 Court must engage in a “case-by-case” punitive damages analysis of each class member’s claim
3 to determine whether an award of statutory minimum damages violates due process. (Def.’s
4 Mot. at 24-25.) Defendant is wrong: (a) Defendant applies the wrong analytical framework --
5 it is well established that a punitive damages analysis is irrelevant to determining whether
6 statutory damages provisions violate due process; (b) the proper analysis involves a comparison
7 of the Unruh and CDPA statutory damages provisions with the public (not individual) wrong
8 they are intended to address, an analysis common to the class; and (c) even applying the
9 punitive damages analysis, the analysis involves common questions.

10 **a. A Punitive Damages Analysis Is Inapposite Here.**

11 Because the statutory damages in this case were set by the California legislature, a
12 punitive damages analysis -- which limits a jury’s determination of punitive damages -- is
13 inapposite.

14 The reason why a punitive damages analysis does not apply to statutory damages
15 provisions determined by a legislature is that a court owes deference to the legislature that it
16 does not owe to a jury. This point was made clear in BMW of North America, Inc. v. Gore,
17 517 U.S. 559, 562-63 (1996), in which the Court considered due process limits on a jury award
18 of punitive damages. The Court held that courts must “accord “substantial deference” to
19 legislative judgments concerning appropriate sanctions for the conduct at issue.” Id. at 583
20 (citations omitted). As a result, the Court expressly adopted -- as one of the factors that courts
21 should use in a punitive damages analysis -- a comparison of the punitive damages award with
22 comparable legislatively-determined civil penalty: the closer the amount of punitive damages

24 ⁵ See Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994) (considering jury
25 award of punitive damages); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562-63 (1996); State
26 Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003) (same).

1 to the amount of a statutory penalty that could have been assessed for the conduct, the less
2 likely it is that the punitive damages award violates due process. See id. at 583.

3 Gore illustrates the error of Defendant's contention that a punitive damages analysis
4 should apply to statutory damages provisions. First, Defendant's argument fails to recognize
5 the "substantial deference" that a court owes to legislative judgments concerning appropriate
6 sanctions for conduct. Second, Defendant's argument would require this Court, consistent with
7 Gore, to engage in the absurd exercise of comparing the Unruh and CDPA statutory damages
8 with themselves. As a result, many courts have explicitly declined to apply a punitive damages
9 analysis in determining whether statutory damages provisions violate due process.⁶

10 **b. The Unruh and CDPA Statutory Damages Provisions Should**
11 **be Analyzed in Relation to the Public Wrong They Address.**

12 Using the appropriate analysis, the question whether the Unruh and CDPA statutory
13 damages provisions violate due process is not determined by whether the amount of damages
14 sought by a class member is proportional to the harm he suffered,⁷ but rather by the relation
15 between the statutory damages provisions and the public wrong that they are meant to address.

16 ⁶ See, e.g., Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1165 (S.D. Ind.
17 1997) ("We decline to extend the holding of Honda Motor to require judicial review of
18 statutorily prescribed damage awards that may exceed the amount of actual loss proven at
19 trial."); Native Am. Arts, Inc. v. Bundy-Howard, Inc., 168 F. Supp. 2d 905, 914 n.6 (N.D. Ill.
20 2001) (refusing to apply Gore factors to statutory penalties on the grounds that punitive
21 damages are different than statutory penalties and that courts owe substantial deference to
legislate determinations); Accounting Outsourcing, LLC v. Verizon Wireless Pers.
Communications, L.P., 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004) (refusing to apply
punitive damages factors in analyzing whether statutory penalties violate due process); Lowry's
Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) (same).

22 ⁷ Plaintiffs do not mean to suggest that a class member's damages resulting from
23 being aggrieved by architectural barriers is less than the minimum damages under Unruh
24 (\$4,000) or the CDPA (\$1,000). Indeed, fact-finders in similar, individual cases involving
25 architectural barriers have awarded far greater damages. See, e.g., Hankins v. El Torito Rests.,
Inc., 74 Cal. Rptr. 2d 684, 687 (Cal. App. 1998) (plaintiff awarded \$80,000 in case involving
26 inaccessible restroom). But the point here is that the appropriate due process analysis
27 compares the statutory damages with the public harm that they address, an issue common to the
28 class.

1 Such provisions are constitutional as long as they are not so severe and oppressive as to be
2 wholly disproportionate to that wrong. Unruh and the CDPA easily meet this standard. In any
3 event, the legal question whether the statutory damages provisions of those statutes meet due
4 process requirements is a class-wide question.

5 The seminal case on the constitutionality of statutory damages provisions is St. Louis,
6 I.M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919). In Williams, a railroad company collected
7 66 cents more than the fare prescribed by Arkansas law from two passengers. Id. at 64. The
8 passengers subsequently brought suit and each recovered \$75 pursuant to an Arkansas statute
9 that set forth a penalty of “not less than fifty dollars nor more than three hundred dollars” for
10 each violation of the fare restrictions. Id. The railroad company challenged the statutory
11 penalty provision on the ground that it violated due process.

12 The Court found that the statutory penalty was constitutional as long as it was not “so
13 severe and oppressive as to be wholly disproportioned to the offense and obviously
14 unreasonable.” Id. at 66-67 (citations omitted); see also United States v. Citrin, 972 F.2d 1044,
15 1051 (9th Cir. 1992) (quoting this passage from Williams). The Court held that this analysis
16 required a comparison between the statutory penalty and the public harm addressed by the
17 statute, not the harm suffered by any single passenger. Williams, 251 U.S. at 66. Significantly,
18 the Court held that the penalty need not “be confined or proportioned to [an individual
19 passenger’s] loss or damages; for, as it is imposed as a punishment for the violation of a public
20 law, the Legislature may adjust its amount to the public wrong rather than the private
21 injury . . .” Id. Indeed, the Court noted that

22 [w]hen the penalty is contrasted with the overcharge possible in any instance it
23 of course seems large, but . . . its validity is not to be tested in that way. When it
24 is considered with due regard for the interests of the public, the numberless
25 opportunities for committing the offense, and the need for securing uniform
26

1 adherence to established passenger rates, we think it properly cannot be said to
2 be so severe and oppressive as to be wholly disproportioned to the offense or
obviously unreasonable.

3 Id. at 67.

4 Numerous courts have held that statutory damages that far exceed an individual
5 plaintiff's actual damages nevertheless satisfy due process when the statutory damages are
6 intended to deter public wrongs. See, e.g., Chair King, Inc. v. GTE Mobilnet of Houston, Inc.,
7 135 S.W.3d 365, 385-86 (Tex. App. 2004) (holding that \$500 statutory damages for sending an
8 unsolicited facsimile advertisement satisfied due process even though actual damages were two
9 to forty cents because the statute "was not designed solely to compensate each private injury
10 caused by unsolicited fax advertisements. It also was intended to address and deter the overall
11 public harm caused by such conduct."); Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296, 326
12 (Cal. App. 2003) (holding that \$500 statutory damages for sending an unsolicited facsimile
13 advertisement satisfied due process); DirecTV, Inc. v. Hoverson, 319 F. Supp. 2d 735, 740
14 (N.D. Tex. 2004) (due process not violated where statute provided for damages even though
15 the plaintiff suffered no actual damages).

16 The rationale of Williams and its progeny is fully applicable here. As Taco Bell
17 acknowledges, the statutory damages provisions of Unruh and the CDPA are designed to deter
18 conduct that harms the public. (Def.'s Mot. at 22.) Indeed, one rationale for the statutory
19 damages provisions of Unruh and the CDPA -- that they are necessary to deter defendants who
20 "have hundreds or thousands of transactions that violated the acts and which unjustly enriched"
21 them⁸ -- is one of the primary reasons cited in Williams supporting statutory damages that
22 exceed actual damages. Williams, 251 U.S. at 67 (holding that a statutory penalty satisfies due
23 process when it is intended to deter "the numberless opportunities for committing the

24 ⁸ Def.'s Mot. at 22 (quoting Daniel Pone, Assembly Third Reading of AB 587,
25 2001-02 Reg. Session, Judiciary Committee Report, pp. 1-2 (Mar. 26, 2001)).

1 offense”). This justification is particularly appropriate here, where the Defendant has engaged
2 in countless transactions over several decades in restaurants that violate accessibility
3 regulations, and continues to do so despite the fact that it has been sued repeatedly for these
4 violations, and despite the fact that Defendant’s restaurants apparently undergo regular
5 maintenance and modifications without coming into compliance with accessibility
6 requirements. (See De Beers Decl. at ¶¶ 6-9; Pls.’ Mot. for Partial Summ. J., exs. 1-19.)

7 **c. Even Applying a Punitive Damages Analysis, the Analysis of**
8 **the Unruh and CDPA Statutory Damages Provisions Involves**
9 **Common Questions.**

10 Even using a punitive damages analysis, the question whether the Unruh and CDPA
11 statutory damages provisions violate due process is a common question shared by the class.
12 Significantly, Defendant’s argument that due process is an individual issue includes no
13 supporting cases. To the contrary, one case cited by Defendant in another section of its brief,
14 Parker v. Time Warner Entertainment Co., 331 F.3d 13 (2d Cir. 2003), reversed an order
15 denying class certification and analyzed the due process question on a classwide basis. The
16 Second Circuit reached no ultimate conclusion concerning whether potential class damages
17 satisfied due process -- the court was reversing for additional discovery, id. at 21, -- but did
18 note: “it may be that in a sufficiently serious case the due process clause might be invoked, not
19 to prevent certification, but to nullify that effect and reduce the aggregate damage award.” Id.
20 at 22 (emphasis added).

21 Ultimately, State Farm was an individual case in which the Court was concerned that
22 the jury had considered conduct by the defendant in other states that had not directly affected
23 the plaintiffs. State Farm, 538 U.S. at 422-23. As this Court has noted, the class action
24 mechanism has sufficient safeguards to address that concern, for example, “ensur[ing] that any
25 award of punitive damages to the class is based solely on evidence of conduct that was directed
26 toward the class” and limiting awards of punitive damages to class members who were harmed

1 by the defendant's conduct. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 172 (N.D. Cal.
2 2004). Although Plaintiffs do not concede that Unruh or CDPA statutory damages are
3 punitive, it is clear that any such damages will be based on conduct directed toward the class,
4 and recovered only by class members who were harmed by this conduct.

5 Indeed, a class action is an excellent way to address the problem raised by State Farm.
6 As the Eighth Circuit has held -- in reversing an individual punitive award --

7 In [State Farm], the Supreme Court emphasized that courts cannot award
8 punitive damages to plaintiffs for wrongful behavior that they did not
9 themselves suffer. Tying punitive damages to the harm actually suffered by the
10 plaintiff prevents punishing defendants repeatedly for the same conduct: If a
11 jury fails to confine its deliberations with respect to punitive damages to the
12 specific harm suffered by the plaintiff and instead focuses on the conduct of the
13 defendant in general, it may award exemplary damages for conduct that could be
14 the subject of an independent lawsuit, resulting in a duplicative punitive
15 damages award. Where there has been a pattern of illegal conduct resulting in
16 harm to a large group of people, our system has mechanisms such as class action
17 suits for punishing defendants. Punishing systematic abuses by a punitive
18 damages award in a case brought by an individual plaintiff, however, deprives
19 the defendant of the safeguards against duplicative punishment that inhere in the
20 class action procedure.

21 Williams v. ConAgra Poultry Co., 378 F.3d 790, 797 (8th Cir. 2004) (emphasis added). The
22 class action mechanism is thus ideally suited to ensuring the goals of State Farm are met: the
23 defendant is punished for behavior affecting an entire class of people, but only for behavior
24 toward that class, and class members -- bound by res judicata -- are not able to engage in
25 duplicative litigation.

26 **B. The Class as Certified Satisfies the Typicality Requirement.**

27 With respect to Rule 23(a)(3) typicality, “[t]he Ninth Circuit does ‘not insist that the
28 named plaintiffs’ injuries be identical with those of the other class members, only that the
unnamed class members have injuries similar to those of the named plaintiffs and that the
injuries result from the same injurious course of conduct.’” Moeller, 220 F.R.D. at 611
(quoting Armstrong, 275 F.3d at 869); see also In re Paxil Litig., 218 F.R.D. 242, 246 (C.D.
Cal. 2003) (holding that typicality does not require that “[t]he physical, emotional, or monetary

1 damages sustained by Plaintiffs . . . be identical or even similar, so long as those differences do
2 not negatively affect the viability of the legal theories under which they proceed.”).

3 Defendant contends that typicality does not exist in this case because “each plaintiff’s
4 entitlement to damages will depend on his or her particular disability, the particular
5 accessibility violation alleged, and whether the technical violation actually constituted a barrier
6 to the particular plaintiff.” (Def.’s Mot. at 25.) Again, Defendant made, and this Court
7 rejected, virtually the identical argument in its 2003 Opposition Brief.⁹

8 In any event, Defendant’s argument is based on its contention that the typicality
9 requirement is not met unless “a named plaintiff who proves his or her claim will necessarily
10 have proved” another class member’s claim. Def.’s Mot. at 25. This simply is not what Rule
11 23(a)(3) requires. This rule does not require “that the claims of the class representative[s] . . .
12 be identical or substantially identical to those of the absent class members.” Staton v. Boeing
13 Co., 327 F.3d 938, 957 (9th Cir. 2003) (citation omitted). The typicality requirement is met if
14 the named plaintiffs’ claims “arise from the same remedial and legal theories’ as the class
15 claims.” Wal-Mart, 222 F.R.D. at 166 (quoting Arnold, 158 F.R.D. at 449).

16 That standard is easily met here. The named plaintiffs’ claims, like those of the class,
17 arise frm the same legal and remedial theory: that they are entitled to minimum statutory
18 damages un California law for each instance that they were denied equal access as a result of
19 barriers in Defendant’s restaurants.

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24 ⁹ 2003 Opp. Br. at 14 (Arguing that typicality does not exist “[b]ecause each of
25 the stores has a unique set of characteristics related to architectural features, prototype,
26 occupancy date, and the like, the claim and remedy sought by each plaintiff will vary according
to each store.”); Moeller, 220 F.R.D. at 611 (holding that typicality requirement was met).

1 **II. The Class As Certified Satisfies Rule 23(b)(2).**¹⁰

2 A class seeking both damages and injunctive relief may be certified under Rule 23(b)(2)
3 as long as the damages claims do not predominate over the claims for injunctive relief.

4 Moeller, 220 F.R.D. at 612. Defendant incorrectly argues that the predominance test is not met
5 here because (i) class damages may be large,¹¹ and (ii) adjudicating damages allegedly will be
6 difficult to manage.

7 As this Court has recognized, the fact that class damages may be significant does not
8 mean that they predominate over injunctive relief. See Wal-Mart, 222 F.R.D. at 171. Rather,
9 the predominance test turns on the primary goal of the litigation, not the potential size of the
10 damage award. Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003).

11 Injunctive relief is the primary goal where “(1) even in the absence of a possible
12 monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or
13 declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both
14 reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” Robinson
15 v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2nd Cir. 2001). Both tests are
16 satisfied here.

17 First, reasonable plaintiffs would have brought this suit even in the absence of damages
18 -- indeed, class actions challenging architectural barriers seeking only injunctive relief are

19 ¹⁰ Defendant also argues that the class does not satisfy Rule 23(b)(3), but this
20 argument is irrelevant since the class satisfies Rule 23(b)(2). In any event, a class of persons
21 with disabilities seeking damages under disability rights laws satisfies Rule 23(b)(3). See, e.g.,
22 Rahim v. Sheahan, No. 99 C 0395, 2001 WL 1263493, at *16-17 (N.D. Ill. Oct. 19, 2001);
23 Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 362-63 (D. Colo.
1999). When a class meets the requirements of both Rules 23(b)(2) and (b)(3), certification
under Rule 23(b)(2) is preferred. ² Robert Newberg, Newberg on Class Actions, § 4:20 at 145
(4th ed. 2002).

24 ¹¹ The fact that aggregate damages in this case may be large simply reflects the
25 fact that there are many class members and many non-compliant restaurants. Each individual
26 class member simply seeks minimum statutory damages for each instance of discrimination
that has occurred since December 2001.

1 routinely brought under the ADA. See generally Access Now, Inc. v. Ambulatory Surgery Ctr.
 2 Group, Ltd., 197 F.R.D. 522, 525 (S.D. Fla. 2000); Ass'n for Disabled Ams. v. Amoco Oil Co.,
 3 211 F.R.D. 457, 465 (S.D. Fla. 2002); Lightbourn v. County of El Paso, 118 F.3d 421, 424-25
 4 (5th Cir. 1997).

5 Second, the injunctive relief sought in this case would be both reasonably necessary and
 6 appropriate were the plaintiffs to succeed on the merits. Plaintiffs allege that Defendant's
 7 restaurants contain architectural barriers that deny class members full and equal access to those
 8 restaurants. Should Plaintiffs prevail, an injunction requiring Defendant to bring its restaurants
 9 into compliance with state and federal access regulations would be both necessary and
 10 appropriate. See, e.g., 42 U.S.C. § 12188(a) (providing injunctive relief for violations of Title
 11 III of the ADA); Cal. Civ. Code § 55 (providing injunctive relief for violations of § 54.)

12 Further, measuring the value of injunctive relief in this case is “almost impossible . . .
 13 as the importance of eradicating discriminatory practices . . . through injunctive relief is
 14 virtually immeasurable.” Arnold, 158 F.R.D. at 451 (citations omitted). As demonstrated in
 15 Plaintiffs' Motion for Partial Summary Judgment, for more than three decades, Defendant has
 16 been constructing and altering its restaurants in violation of state and federal access regulations.
 17 An injunction will put an end to this.¹² Equally, or perhaps more, important, an injunction will
 18 ensure that in the future, Defendant's construction and alteration of its restaurants will comply
 19 with access regulations. This will benefit not only class members eligible for damages, but all
 20 persons who use wheelchairs or scooters, even those who do not need such devices now but
 21 will in the future. See Wal-Mart, 222 F.R.D. at 171 (Plaintiffs' claims for injunctive relief

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 23 ¹² This is why the two cases cited by Defendant are irrelevant here -- in both cases,
 24 the plaintiffs sought virtually no injunctive relief. See Carson v. Giant Food, Inc., 187 F. Supp.
 25 2d 462, 472 (D. Md. 2002) (“In this case, Plaintiffs have asked almost exclusively for money
 26 damages.”); In re Cordis Corp. Pacemaker Prod. Liab. Litig., No. MDL 850, C-3-86-543, 1992
 WL 754061, at *9 (S.D. Ohio Dec. 23, 1992) (stating that the injunctive relief requested by
 plaintiffs in part had already occurred and in part was simply a monetary claim recast as an
 injunctive claim).

1 would change defendant's policies in ways "that would benefit not only current class members,
2 but all future female employees as well"); Young v. Pierce, 544 F. Supp. 1010, 1028 (E.D.
3 Tex.1982) ("[W]hen the relief sought is injunctive relief, the benefits . . . would inure not only
4 to known class, but also to a future class of indefinite size."). These future Taco Bell customers
5 who use wheelchairs will be able to patronize Defendant's California restaurants without the
6 fear or humiliation inherent in discrimination.

7 These principles were illustrated in Molski, which, like the case at bar, involved a class
8 action on behalf of persons with disabilities based on alleged violations of Unruh and the
9 CDPA. Molski, 318 F.3d at 942. The action settled, and the proposed consent decree required
10 the appellants to undertake certain accessibility enhancements, and released class members'
11 claims for statutory damages -- which the Ninth Circuit estimated could total \$500 million¹³ --
12 as well as treble damages and actual damages, but did not release claims for personal injuries.
13 Id. at 945. The appellants argued that the district court improperly certified the class under
14 Rule 23(b)(2) because damages predominated over injunctive relief. Id. at 949. The Ninth
15 Circuit rejected this argument, holding that because the appellant "alleged that [the appellees]
16 acted in a manner generally applicable to the class by denying access to [their] facilities[,]
17 [p]articularly in light of the fact that claims of physical injury were preserved," the
18 predominance test was satisfied. Id. at 950.

19 In this case, injunctive relief is even more predominant than in Molski. The damages in
20 Molski included statutory, treble and actual damages, whereas the plaintiffs here seek only
21 minimum statutory damages (and do not seek damages for personal injuries suffered by class
22 members).

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25 ¹³ 318 F.3d at 954 n.23.

1 Defendant also argues that the predominance test is not satisfied because of alleged
2 difficulties in managing damage adjudication. As set forth below, there are a number of
3 management options available to adjudicate damages in this case.

4 **III. Managing the Trial.**

5 This case, like many class actions, has been bifurcated into two stages: Stage I will
6 address liability and injunctive relief and, if Plaintiffs establish liability in Stage I, then Stage II
7 will address damages.

8 **A. Stage I: Liability and Injunctive Relief.**

9 During Stage I, “plaintiffs are required to prove that the defendant engaged in a pattern
10 and practice of discrimination against the class.” Wal-Mart, 222 F.R.D. at 173 (citing
11 Robinson, 267 F.3d at 158.).

12 Stage I in this case will be much simpler than in employment discrimination class
13 actions, in which plaintiffs often establish a pattern and practice of discrimination through
14 statistical evidence or evidence of system-wide policies and practices. See id. at 174. In this
15 case, the evidence will be much more comprehensive. The Special Master appointed in this
16 case will have surveyed every one of Defendant’s corporate restaurants in California, and the
17 legality of many of the surveyed elements will have been determined prior to trial through
18 summary judgment motions. Based on the results of the Pilot Program,¹⁴ Plaintiffs anticipate
19 that the results of the Special Master survey will show numerous and wide-spread violations of
20 state and federal access regulations, thereby demonstrating that Defendant has engaged in a
21 pattern and practice of discrimination against the class.

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25 ¹⁴ See Pls.’ Mot. for Partial Summ. J., Robertson Decl. Exs. 1-19.

1 **B. Stage II: Damages.**

2 **1. Evidentiary Burdens During Stage II.**

3 If Plaintiffs prove during Stage I that Defendant has engaged in a pattern and practice of
4 discrimination, “[t]he force of that proof does not dissipate at the remedial stage of the trial.”
5 Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977). During the Stage II
6 damages proceedings, once there has been a showing that class members “were either actually
7 harmed by the discriminatory policy or were at least . . . ‘potential victim[s] of the proved
8 discrimination,’”¹⁵ the class is entitled to “a presumption that the individual class members had
9 been discriminated against on account of” disability. Cooper v. Fed. Reserve Bank of
10 Richmond, 467 U.S. 867, 875 (1984). The burden then shifts to the defendant to rebut the
11 presumption. See Wal-Mart, 222 F.R.D. at 176 (citing Teamsters, 431 U.S. at 362; Robinson,
12 267 F.3d at 159-60).

13 The initial showing -- that class members were either actually harmed by the
14 discriminatory policy or were at least potential victims of the proved discrimination -- is
15 minimal, less than what would be required to establish a prima facie case. Wal-Mart, 222
16 F.R.D. at 175-76 (citing Robinson, 267 F.3d at 159). Further, once it has been determined that
17 a defendant has violated anti-discrimination laws, all uncertainties in damages should be
18 resolved against the defendant, and an “unrealistic burden” should not be placed on class
19 members to establish damages. See, e.g., Domingo v. New England Fish Co., 727 F.2d 1429,
20 1445 (9th Cir. 1984) (holding that, during damages stage of employment discrimination class
21 action, a “court should not put an unrealistic burden on claimants”); United States v. City of
22 Miami, 195 F.3d 1292, 1299 (11th Cir. 1999) (holding that, in determining remedial relief in
23 employment class action, uncertainties in the relief process should be resolved against the
24 discriminating employer.); Salinas v. Roadway Exp., Inc., 735 F.2d 1574, 1578 (5th Cir. 1984)

25 ¹⁵ Wal-Mart, 222 F.R.D. at 175 (quoting Teamsters, 431 U.S. at 362).
26

1 (same); Pitre v. W. Elec. Co., Inc., 843 F.2d 1262, 1276 (10th Cir. 1988) (“In group remedy
2 cases, ‘[i]f effective relief for the victims of discrimination necessarily entails the risk that a
3 few nonvictims might also benefit from the relief, then the employer, as a proven discriminator,
4 must bear that risk.’” (Citation omitted.)).

5 Defendant’s description of what the class must show to obtain damages is flawed. The
6 case law is clear: in order to recover damages under Unruh or the CDPA, a person with a
7 disability needs to show “that he or she was denied equal access on a particular occasion.”
8 Donald v. Cafe Royale, Inc., 266 Cal. Rptr. 804, 835 (Cal. App. 1990); Botosan v. Paul
9 McNally Realty, 216 F.3d 827, 835 (9th Cir. 2000); Boemio v. Love’s Rest., 954 F. Supp. 204,
10 207 (S.D. Cal. 1997). Defendant adds to this -- without support -- the separate requirement that
11 class members must prove that they “attempted to access” the noncompliant feature. (Def.’s
12 Mot. at 15.) It is not immediately clear what level of attempt Defendant believes must be
13 shown. If Defendant is arguing that class members must demonstrate that they attempted to
14 patronize the restaurant but were denied equal access, that is accurate but redundant with the
15 denial of equal access. For example, a patron who, upon entering the restaurant, noted that the
16 queue line was too narrow for his wheelchair and -- wanting to avoid embarrassment, injury or
17 damage to the chair -- decided to use the “drive-thru,” or asked a friend to order for him, has
18 attempted to patronize the restaurant, but been denied equal access, and is entitled to recover
19 damages. Similarly, Defendant is incorrect that class members will not be able to recover
20 damages for visits to Taco Bell restaurants in which they used the “drive-thru” window, if they
21 did so because parking was inaccessible, or because they wanted to avoid known barriers in the
22 restaurant. See Botosan, 216 F.3d at 835 (holding that plaintiff was entitled to recover
23 minimum statutory damages where, had he parked in an inaccessible space, “he would have
24 risked having another car park next to him”).

1 It appears from a later passage, however, that Defendant has something more in mind:
 2 in its description of its various studies, it repeatedly suggests that if a class member can
 3 “manage” to access a non-compliant architectural element, then she cannot recover damages.
 4 (Def.’s Mot. at 20.) If Defendant is arguing that class members must physically attempt to
 5 access unusable elements -- for example, by driving their wheelchairs into inaccessible queue
 6 lines, suffering the embarrassment and hassle of getting stuck -- to recover damages, such a
 7 requirement has been expressly rejected. In Boemio, the plaintiff, who used a wheelchair,
 8 brought suit under Unruh and the CDPA challenging the defendant’s noncompliant restroom.
 9 The defendant argued that the plaintiff was not entitled to minimum statutory damages because,
 10 “with additional time, patience, and jockeying of the wheelchair, access could have been
 11 achieved . . .” 954 F. Supp. at 208. The court held that this argument

12 was not reasonable nor consistent with the public policy interest in providing physically
 13 handicapped persons with equal access to public facilities and warrants a finding for
 14 Plaintiff in this action. We must be guided by reason and the broad construction given
 15 to the Unruh Act. The standard cannot be “is access achievable in some manner.” We
 16 must focus on the equality of access. If a finding that ultimate access could have been
 achieved provided a defense, the spirit of the law would be defeated. It is clear, that
 the legislative purpose behind these disability access laws would not support such a
 finding.

17 Id. The court held that the plaintiff was entitled to statutory damages. Id. at 209.

18 2. Manageability Options for Stage II.

19 Much of Defendant’s argument that adjudicating damages in this case is unmanageable
 20 is based on its unsubstantiated speculation that the damages phase may involve more than
 21 150,000 class members¹⁶ requiring “132,000 historical determinations.” (Def.’s Mot. at 18.)

22 ¹⁶ Def.’s Mot. at 23. Defendant’s only support for this claim is its
 23 mischaracterization of Plaintiffs’ allegations in their Motion for Class Certification. (See
 24 Def.’s Mot. at 6.) In that Motion, Plaintiffs noted that there are approximately 150,000
 25 non-institutionalized people 16 years of age or older in California who use wheelchairs.
 Plaintiffs never contended that all such persons are class members, and it is, of course, very
 unlikely that this is the case. Indeed, the complaint in Lieber v. Macy’s West, Case No. C-96

(continued...)

1 Because this case has been bifurcated, the Court need not rely on speculation to determine how
 2 damages will be adjudicated, but can instead wait to see how many class members, restaurants
 3 and architectural elements will actually be involved in Stage II before making this
 4 determination.

5 “By bifurcating issues like general liability or general causation and damages, a court
 6 can await the outcome of a prior liability trial before deciding how to provide relief to the
 7 individual class members.” Simo v. Philip Morris Inc., 200 F.R.D. 21, 30 (E.D.N.Y.2001).
 8 Plaintiffs propose that if they establish during Stage I that Defendant has engaged in a pattern
 9 and practice of discriminating against the class, that notice be provided to the class. Class
 10 members who respond can then be sent a very simple claims form to be completed and
 11 returned. As a result of this process, the parties and the Court will have a much better
 12 understanding of the number of class members, restaurants and architectural elements that will
 13 be at issue during Stage II, and thus will be in a much better position to determine how
 14 damages will be adjudicated. See, e.g., Hartman v. Wick, 678 F. Supp. 312, 335 (D.D.C. 1988)
 15 (deferring determination of how damages would be managed until after claims form process).

16 At that point, there will be a number of options available to the Court to adjudicate
 17 damages, including:

18 Teamsters hearings. These are mini-hearings presided over by the court or a special
 19 master. See Teamsters, 431 U.S. at 361 (1977). According to the Ninth Circuit, Teamsters
 20 hearings are a routine method of addressing class damages. Kraszewski v. State Farm Gen. Ins.

21 _____
 22 ¹⁶(...continued)
 23 02955 MHP (BZ) (N.D. Cal.), like the case at bar, was brought on behalf of a class of persons
 24 with mobility disabilities based on alleged architectural barriers at a department store chain
 25 throughout California. That case involved approximately one-third of the number of facilities
 26 that are at issue here. Lieber eventually settled, and approximately 1,350 class members with
 compensable claims responded to the settlement notice. (See Plaintiffs’ Reply Brief in Support
 of Their Motion for Class Certification at 12 & ex. 3.) Lieber demonstrates that it is premature
 at best to speculate that this case will involve 150,000 -- or even 2,000 -- class members.

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1 Co., 912 F.2d 1182, 1183 n.1 (9th Cir. 1990). Prior to Teamsters hearings, class members can
2 be required to submit claims forms that request information “in straightforward terms that do
3 not deter potential class members from submitting a form.” Hartman, 678 F. Supp. at 332.
4 This process reduces the number of hearings because the parties may be able to mediate and
5 settle some of the smaller or simpler claims. In the hearings themselves, a class member will
6 simply have to testify that her access was hindered by an architectural barrier on one or more
7 occasions during the limitations period. As set forth above, this will create a presumption that
8 she was discriminated against based on her disability, and Defendant will bear the burden of
9 rebutting this presumption.

10 Subclasses. Where necessary, a court can create damage subclasses consisting of class
11 members with common issues pursuant to Rule 23(c)(4). See, e.g., 3 Robert Newberg,
12 Newberg on Class Actions, § 9:48 at 422-24 (4th ed. 2002) (“Where class members share
13 common issues with respect to the general liability of a defendant but have divergent issues or
14 interests with respect to the impact and damages suffered . . . the establishment of subclasses
15 by the court under Rule 23(c)(4) will facilitate management of the litigation . . .”). In this case,
16 individual restaurants may present issues that merit the formation of subclasses. See Arnold,
17 158 F.R.D. at 449 (acknowledging the possibility of facility-specific subclasses in a multi-
18 facility architectural barrier class action).

19 Sample trials. In cases involving large numbers of class members, special masters can
20 preside over sample or bellwether hearings. The results of these hearings are used by the
21 special master to extrapolate aggregate class damages. This estimate is provided as a special
22 master recommendation to the jury, which may accept or reject it. See 3 Robert Newberg,
23 Newberg on Class Actions, § 10:3 at 480-81 (4th ed. 2002); Hilao v. Estate of Marcos, 103
24 F.3d 767, 784-87 (9th Cir. 1996); Bell v. Farmers Ins. Exchange, 9 Cal. Rptr.3d 544, 578-79
25 (Cal. App. 2004); Manual for Complex Litigation (Fourth) § 11.493 at 102-04 (2004)

1 (“Acceptable sampling techniques, in lieu of discovery and presentation of voluminous data
2 from the entire population, can save substantial time and expense, and in some cases provide
3 the only practicable means to collect and present relevant data.”).

4 Aggregate or formula damages. In some cases involving large numbers of class
5 members, courts may use formulas to calculate a defendant’s aggregate liability to the class.
6 See, e.g., Wal-Mart, 222 F.R.D. at 176. Defendant appears to acknowledge -- through the
7 detailed statistical data it provided concerning the percentages of persons with disabilities that
8 are hindered by various architectural barriers -- that a formula approach would be feasible in
9 this case. (See generally Decl. of Bruce Bradtmiller, Ph.D. (attached to Def.’s Mot.).)

10 **C. Adjudicating Class Members’ Damage Claims In One Case Is Significantly**
11 **Better Than Numerous Separate Cases.**

12 Defendant argues that trial of this matter is unmanageable based on its estimate of “tens
13 of thousands of class members,” and “132,000 historical determinations.” (Def.’s Mot. at 3,
14 18.) While neither of these dramatic phrases reflects reality, even if true, they would mitigate
15 for, rather than against, class treatment.

16 Defendant’s figure of 132,000 determinations apparently results from multiplying 220
17 restaurants by the 600 line items in the Special Master survey form. However, by agreement of
18 the parties and order of this Court, these forms will all have been completed by the Special
19 Master and evaluated by this Court by the end of Stage I and the entry of injunctive relief.
20 Defendant not only concedes that class certification is appropriate for these 132,000
21 determinations, it worked cooperatively with Plaintiffs in developing and proposing to the
22 Court the 600-line survey form through which they would be accomplished. (See generally
23 [Proposed] Order Appointing Special Master.)

1 Defendant appears to argue that the lack of manageability stems from the fact that each
2 of these line items would have to be re-examined for each class member for each visit.¹⁷ This
3 misconstrues the way Stage II will proceed in this case. First, only those architectural elements
4 encountered by class members who submit claims forms will be at issue during Stage II.
5 Second, if Plaintiffs demonstrate during Stage I a pattern and practice of discrimination, each
6 class member's claim will be evaluated under a presumption of liability which Defendant will
7 be required to rebut. The evidence required to rebut would relate to the restaurant itself, and
8 would thus be common to all class members who suffered discrimination at that restaurant.

9 Defendant's assertion that there will be "tens of thousands of class members" -- while
10 likely highly inflated¹⁸ -- argues persuasively for class treatment: the alternative is that each of
11 those tens of thousands of people with disabilities must retain counsel, investigate their
12 restaurants, and file suit -- in various courts around the state -- re-litigating a vast array of
13 common legal and factual questions: Does a class member who knows that an architectural
14 element is inaccessible have to engage in the futile gesture of attempting to access the element
15 in order to recover damages? Is a class member who manages, with difficulty, to access a non-
16 compliant element entitled to damages? What were the conditions at a given restaurant for a
17 given period of time? If damages are tried as a class, these questions can be answered once for
18 all class members. If class members are forced to bring individual suits in various courts
19 across California, then these common issues will have to be repeatedly proven, briefed and
20 decided, a very inefficient process.

21 ¹⁷ Because it is highly unlikely that all 132,000 elements are in violation of the
22 standards, or that class members encountered each and every dimension that did violate the
23 standards, the 132,000 figure is completely divorced from the reality of the Stage II
24 proceedings in this case. It is also absurd as a practical matter to suggest that every dimension
25 is different each time a class member visits a restaurant. Most of the dimensions relate to items
26 that will have changed rarely if at all over the class period -- queue lines, fixed tables, toilets,
27 sinks.

28 ¹⁸ See supra note 16.

1 This is so even for a restaurant that has changed repeatedly over time. As noted above,
2 the Court can create a subclass of those class members who have patronized that restaurant, and
3 the history of the changes at that restaurant can be determined in one proceeding by one fact
4 finder applying a consistent set of legal standards. Under Defendant's approach, on the other
5 hand, each class member would have to bring a separate suit. Different fact finders would have
6 to address the same factual issue -- the history of changes at the restaurant. Not only is this
7 grossly inefficient, it also creates a significant risk of inconsistent factual determinations
8 concerning the history of changes.

9 **CONCLUSION**

10 For the reasons set forth above, Plaintiffs respectfully request that Defendant's Motion
11 for Modification of Class Definition be denied.

12 Respectfully submitted,

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