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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, on behalf of itself, and ANN CUPOLO-FREEMAN and JULIE REISKIN, on behalf of themselves and a proposed class of similarly situated persons defined below,

Plaintiffs,

v.

ASHFORD HOSPITALITY TRUST, INC.,

Defendant.

Case No. 4:15-cv-00216-DMR

UNOPPOSED NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

The Honorable Donna M. Ryu
Courtroom 4, 3rd Floor
Hearing Date: December 10, 2015
Hearing Time: 11:00 a.m.

NOTICE IS GIVEN that on December 10, at 11:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled Court, Plaintiffs will and hereby do move the Court as follows:

1. To certify the proposed class for settlement purposes only.

2. To preliminarily approve the Settlement Agreement ("Settlement" or "Settlement Agreement") (attached to the Proposed Preliminary Approval Order ("Proposed Order") as Exhibit A) between Plaintiffs, on behalf of themselves and Proposed Class, and Defendant Ashford, by and through their respective counsel.

3. To set dates for the submission of any objections to the Settlement Agreement.

4. To set a Final Approval hearing.

5. To approve the form of Notice attached to the Proposed Order as Exhibit B.

6. To authorize the Notice dissemination plan described below.

7. To set a deadline for Class Counsel's Motion for Attorneys' Fees and Costs.

This unopposed motion is based on the Settlement Agreement, the Memorandum of Points and Authorities in support of this Motion, the Declarations of Timothy Fox, Julia Campins, Julie Wilensky, Kevin Williams, and Marissa McGarry in Support of the Unopposed Motion, and all other papers filed in this action.

DATED: November 5, 2015

CAMPINS BENHAM-BAKER, LLP

/s/Julia Campins
Julia Campins
Attorneys for Plaintiffs and the Proposed Class

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT AND CERTIFICATION OF SETTLEMENT CLASS

The parties in this injunctive-relief class action, which involves alleged violations of the Americans with Disabilities Act and California state law concerning provision of wheelchair-accessible transportation by hotels, have reached a settlement agreement that provides substantial benefits to the class.

Specifically, this Settlement ensures that the current approximately 73 Ashford hotels that provide transportation to hotel guests ("Ashford Hotels" or "Hotels"), and those Hotels that provide transportation in the future, will also provide equivalent accessible transportation to Class Members. The Plaintiffs did not bring claims for damages, and do not waive damages claims for the Proposed Class with this settlement; instead they are achieving full compliance with the law as requested in the Complaint. For these and other reasons discussed below, Plaintiffs' Counsel, who are experienced disability rights and class action practitioners, believe this Settlement—negotiated at arm's length over more than three months with the assistance of a mediator who is a retired federal Magistrate Judge—to be a fair, adequate, and reasonable resolution of the claims against Defendant. Accordingly, pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs request that the Court:

(i) certify the proposed settlement class;

(ii) preliminarily approve the Settlement of this litigation;

(iii) approve the proposed form of class notice;

(iv) authorize dissemination of the notice in the manner described below;

(v) set deadlines for Class Members to object to the Settlement Agreement;

(vi) set a deadline for Class Counsel's motion for Attorneys' Fees and Costs; and

(v) set a fairness hearing to provide Class Members an opportunity to be heard and, should the Court see fit, for entry of final approval of the proposed Settlement Agreement and the petition of Class Counsel for an award of attorneys' fees and costs.

BACKGROUND

I. Legal Background

Transportation services provided by hotels are covered by the ADA regulations applicable to "private entities not primarily engaged in the business of transporting people," which include "[s]huttle systems and other transportation services operated by privately-owned hotels." *See* 49 C.F.R. § 37.37(b).

The regulations generally require a hotel that offers transportation services to purchase accessible vehicles or to provide equivalent transportation services to persons with disabilities. *See* 49 C.F.R. §§ 37.101 & 37.171. Whether the hotel must purchase accessible vehicles, or instead provide equivalent transportation services, depends upon the capacity of the vehicle and whether the hotel operates a fixed route transportation system (i.e., providing transportation between fixed locations such as an airport shuttle service) or a demand responsive system (i.e., providing transportation to any place a guest would like to go within a certain radius of the hotel). The appendix to the regulations provides this helpful chart:

PRIVATE ENTITIES "NOT PRIMARILY ENGAGED"

System type	Vehicle capacity	Requirement
Fixed Route	Over 16	Acquire accessible vehicle.
Fixed Route	16 or less	Acquire accessible vehicle, or equivalency.
Demand Responsive	Over 16	Acquire accessible vehicle, or equivalency.
Demand Responsive	16 or less	Equivalency--see § 37.171.

> Section 37.105 sets forth the equivalent service standard and provides as follows: [A] fixed route system or demand responsive system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including individuals who use wheelchairs, is provided in the most integrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals with respect to the following service characteristics:

(a) (1) Schedules/headways (if the system is fixed route);
(2) Response time (if the system is demand responsive);
(b) Fares;
(c) Geographic area of service;
(d) Hours and days of service;
(e) Availability of information;
(f) Reservations capability (if the system is demand responsive);
(g) Any constraints on capacity or service availability;
(h) Restrictions priorities based on trip purpose (if the system is demand responsive).

49 C.F.R. § 37.105.

There are two important conclusions from these regulations. First, a hotel that offers transportation services—whether fixed route[1] or demand responsive—must, at a minimum, provide equivalent transportation services in lift-equipped vehicles to people who use wheelchairs or scooters. Second, equivalent really means equivalent. If a nondisabled person can decide on the spur of the moment to take a hotel shuttle to a nearby attraction, and that shuttle is available every 30 minutes, then a wheelchair-accessible shuttle must be available on equivalent notice to people who use wheelchairs or scooters. Similarly, if a nondisabled person can board a hotel airport shuttle, free of charge, without having to make any advance arrangements for that shuttle, an accessible shuttle must be available without charge to persons with disabilities, and they must not be required to arrange for the transportation themselves or to call in advance to schedule it.

II. Factual Background

A. Ashford

Ashford Hospitality Trust, Inc. (Ashford) is a publicly traded real estate investment trust (REIT) that owns approximately 125 hotels, approximately 73 of which offer transportation services to their guests and are thus subject to the ADA transportation requirements. Declaration of Julia Campins in Support of Preliminary Approval of Class Action Settlement and Certification of Settlement Class (Campins Decl.) Ex. 1 (Am. Resp. to Interrog. No. 1).[2] These 73 Hotels are spread among 20 states. *Id.*

[1] The fixed route requirements kick in if the transportation system uses vehicles purchased or leased after August 25, 1990, which is almost universally the case.
[2] Although the Interrogatory Responses list 75 hotels, two of them are duplicates.

Ashford tracks occupancy numbers for its hotels, calculated based on the number of rooms per hotel and availability.[3] The occupancy rates since January 1, 2013 at Ashford Hotels are as follows:

- 2013: 6,628,187 room nights sold.
- 2014: 6,893,236 room nights sold.
- 2015: 5,292,435 room nights sold as mid-September.[4]

Id. (Am. Resp. to Interrog. No. 8).

As a real estate investment trust, Ashford is subject to various tax provisions, and one of its primary defenses in this case concerns 26 U.S.C. § 856 and 26 C.F.R. § 1.856-4 (together the "REIT tax provisions"), which condition favorable tax treatment of real estate investment trusts on limitations on their ability to operate or manage hotels that they own. As a result, Ashford contracts with third parties to manage its Hotels, and it has asserted that those management companies are responsible for providing transportation services. Ashford thus asserts that it "does not provide its management companies with any uniform policy or plan regarding the operation of shuttle or transportation services at the hotels." Supplemental Joint Case Management Statement at 3, Dkt. No. 49.

B. Plaintiffs' Investigation

Prior to filing this lawsuit, Plaintiff Civil Rights Education and Enforcement Center ("CREEC"), and several of its members who have mobility disabilities and use wheelchairs, called a number of Ashford Hotels to investigate whether there were ADA violations and to confirm that the alleged violations of the ADA were widespread.[5] Declaration of Marissa McGarry (McGarry Decl.) ¶ 4. Plaintiff CREEC's efforts to resolve the ADA violations before

[3] These numbers do not precisely correlate with the number of guests that stayed at Ashford hotels because, for example, some guests stay more than one night. They do, however, provide a rough approximation of the number of guests who have stayed at Ashford hotels over the last few years.

[4] This number assumes occupancy for the full year to date, although some of these hotels were acquired during the course of the year, and thus the occupancy numbers for the time that these hotels were owned by Ashford would be less. But for purposes of numerosity, the key point here is that millions of people stay at hotels owned by Ashford each year.

[5] Plaintiff CREEC does not seek to represent a class or be designated as a class representative.

filing suit were unsuccessful. First Am. Compl. ¶ 24, Dkt. No. 54. The complaint specifically identified 15 Ashford Hotels allegedly in violation of the transportation requirements. Compl. ¶¶ 14-21, Dkt. No. 1. On behalf of a class, Plaintiffs sought injunctive relief; Plaintiffs did not seek damages on behalf of the class or the named plaintiffs.

The parties participated in early Court-mandated mediation at arms' length through a private mediator, retired Magistrate Judge James Larson of JAMS. An in-person mediation session was held on July 1, 2015, and the parties continued to negotiate by phone and email for several months afterwards. Campins Decl. ¶ 5.

Simultaneously, the parties have engaged in discovery, and Plaintiffs have conducted further investigation regarding the remainder of the hotels in the Ashford portfolio that provide transportation to guests. This investigation included review of a number of documents produced by Ashford, such as brand policies relevant to transportation services, management agreements and hotel accessibility policies. *Id.* ¶ 9. Plaintiffs called 68 Ashford hotels that provide transportation services to investigate whether those Hotels also provided equivalent accessible transportation services as required by the ADA.[6] McGarry Decl. ¶ 5. Ashford also provided the names of third party transportation providers on which some of its Hotels rely to provide accessible transportation services. Plaintiffs called these third parties, and determined that many of those third parties were not capable of providing equivalent accessible transportation services. *Id.* ¶ 6. These calls confirmed for Plaintiffs the necessity for strong injunctive relief.

C. Negotiations and Settlement

From July through September, the parties engaged in a number of telephone calls and email exchanges to negotiate the injunctive relief terms of the settlement. Campins Decl. ¶ 5. All parties have been represented throughout these negotiations by counsel with substantial experience in both disability rights and class action litigation. The parties reached full agreement on the injunctive relief before negotiating attorneys' fees and costs. *Id.* The parties reached full

[6] Plaintiffs called every hotel identified by Ashford in Ashford's initial responses to Plaintiffs' interrogatories. Ashford supplemented these responses to add additional hotels after Plaintiffs had completed their calls.

agreement on the injunctive relief before negotiating attorneys' fees and costs. On September 29, the parties executed a Memorandum of Understanding. The material terms of that Memorandum have been memorialized in the longer-form Settlement Agreement—along with additional terms necessary for formally submitting the Settlement for approval to the Court—and signed by all parties and counsel on October 23, 2015.

ARGUMENT

I. The Proposed Class Should Be Certified

To certify the proposed class in this case, this Court must determine whether the Named Plaintiffs have standing to assert injunctive claims, and whether the proposed class meets the requirements of Rule 23. *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 860, 868 (9th Cir. 2001). As set forth below, both of these prerequisites are easily met here.

A. The Named Plaintiffs Have Standing to Seek Injunctive Relief.

To have standing to seek injunctive relief, a plaintiff must demonstrate that she has suffered an injury in fact, and that she faces a "real and immediate threat of repeated injury" in the future. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011).

> [A] plaintiff can demonstrate sufficient injury to pursue injunctive relief when discriminatory architectural barriers deter him from returning to a noncompliant accommodation. Just as a disabled individual who intends to return to a noncompliant facility suffers an imminent injury from the facility's "existing or imminently threatened noncompliance with the ADA," a plaintiff who is deterred from patronizing a store suffers the ongoing "actual injury" of lack of access to the store.

Id. at 950.

The Named Plaintiffs, Ann Cupolo Freeman and Julie Reiskin, have standing to pursue injunctive relief: (1) they called Ashford Hotels and were told by the Hotels that although they do provide inaccessible transportation, they do not provide equivalent accessible transportation;[7] (2) as a result, the Named Plaintiffs are deterred from patronizing those Hotels; and (3) they will

[7] Once the named plaintiffs were told by the hotels that they do not provide accessible transportation, the plaintiffs were not required to make the futile gesture of actually staying at the hotel and experiencing the lack of accessible transportation. *See, e.g.*, *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002).

patronize the Hotels once the Hotels provide equivalent accessible transportation, and the Plaintiffs are accurately informed of this when they contact the Hotels to inquire about equivalent accessible transportation. First Am. Compl. ¶¶ 14-20. Under *Chapman*, the Named Plaintiffs have standing to seek injunctive relief against Ashford.

Plaintiffs here called the Ashford Hotels at least in part as "testers," i.e., people whose purpose in attempting to patronize a defendant's establishment is "to determine whether defendant engaged in unlawful practices." *Tandy v. City of Wichita*, 380 F.3d 1277, 1285 (10th Cir. 2004) (holding that testers have standing under title II of the ADA). As such, their purpose in calling Ashford Hotels was in part to determine whether those Hotels comply with ADA transportation requirements. Under well-established law, plaintiffs who otherwise have standing to seek injunctive relief under title III do not lose that standing because their motive in patronizing a place of public accommodation is to test for compliance with title III.

Two federal appellate courts have addressed this issue, and both concluded, based on the statutory language of title III, that testers do have standing under that statute. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013); *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211-12 (10th Cir. 2014).

Both courts relied on the language of the enforcement provision of title III, which provides relief to "any person" who is being subjected to discrimination on the basis of disability, as demonstrating that standing exists for anyone who has suffered an invasion of the legal interest protected by title III "regardless of his or her motivation in encountering that invasion." *Colo. Cross Disability Coalition*, 765 F.3d at 1211; *Houston*, 733 F.3d at 1332.

In addition, *Houston* relied on 42 U.S.C. §§ 12182(a) and 12182(b)(2)(A)(iv), the substantive statutory provision at issue there, and held that the "legal right created by [these provisions] *does not* depend on the motive behind Plaintiff Houston's attempt to enjoy the facilities of the Presidente Supermarket. The text of §§ 12182(a) and 12182(b)(2)(A)(iv) provides no basis for the suggestion that Plaintiff Houston's motive is relevant to this legal right." 733 F.3d at 1332.

District courts in the Ninth Circuit and elsewhere have reached the same conclusion. *See, e.g.*, *Molski v. Price*, 224 F.R.D. 479, 484 (C.D. Cal. 2004) (holding that plaintiff whose motive for visiting a service station was in part "to check on the station's ADA compliance" had standing under title III); *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 947-48 (C.D. Cal. 2005) (same); *Klaus v. Jonestown Bank & Trust Co. of Jonestown, PA*, No. 1:12-CV-2488, 2013 WL 4079946, at *7 (M.D. Pa. Aug. 13, 2013) ("[N]umerous courts have rejected the notion that test plaintiffs, or other serial litigants, forfeit their own standing to sue for discrimination in Title III accessibility cases."); *Betancourt v. Federated Dept. Stores*, 732 F. Supp. 2d 693, 710 (W.D. Tex. 2010) ("Thus, a disabled tester who experiences the discrimination prohibited by the ADA has standing to seek relief.").

Although the Ninth Circuit itself has not yet directly addressed tester standing under title III, two of its decisions on closely-related topics strongly suggest that it would join the Tenth and Eleventh Circuits and find that testers have standing under title III.

First, the Ninth Circuit in *Chapman* held that courts must "take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with the Act.'" 631 F.3d at 946. Granting standing to testers is consistent with this approach.

Second, *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097 (9th Cir. 2004), considered whether disability testers have standing to seek injunctive relief under the Fair Housing Act. In *Smith*, a nonprofit organization established a program to test whether multi-family housing developments were in compliance with the FHA. *Id.* at 1099. One of the testers used a wheelchair, and in his role as a tester, he identified several architectural barriers in violation of the FHA, and the nonprofit organization subsequently brought suit against the developer of the property. *Id.* The plaintiffs conceded that the tester did not have any interest in actually purchasing or renting property. The developer moved to dismiss, arguing in part that the tester lacked standing, and the district court granted that motion.

On appeal, the Ninth Circuit reversed. The court began by noting that "[t]esters have played a long and important role in fair housing enforcement . . ." *Id.* at 1102. It then examined the language of the FHA, and held that it was sufficiently broad to provide standing to testers. *Id.* at 1104.

The Ninth Circuit's holding in *Smith* that disability testers have standing under the FHA strongly indicates that it would join the Tenth and Eleventh Circuits and hold that disability testers have standing under title III. This conclusion is bolstered by the analysis employed in *Smith*, which was identical to the analysis applied by the courts in *Houston* and *Colorado Cross Disability Coalition*. In all three cases, the courts' analysis focused on the language of the relevant statutes; significantly, the FHA language that caused the court in *Smith* to uphold tester standing is virtually identical to the title III language on which *Houston* and *Colorado Cross Disability Coalition* relied.

For example, the FHA enforcement provision at issue in *Smith*, like the enforcement provision of title III, provided relief to "any person," and the Ninth Circuit relied on that phrase to find tester standing under the FHA. *Smith*, 358 F.3d at 1102. This strongly suggests that the Ninth Circuit would reach the same conclusion when interpreting the identical language in the title III enforcement provision.

Similarly, the Ninth Circuit in *Smith* analyzed the substantive FHA provision at issue in that case to determine whether it included language indicating any intent to limit its protections based on the motive of the plaintiff, and concluded that there was no such limitation, thus supporting a finding of tester standing. *Smith*, 358 F.3d at 1103-04. Again, this mirrors the analysis conducted by the Eleventh Circuit in *Houston* to find tester standing under title III.

For these reasons, the Named Plaintiffs in this case have standing as testers to seek injunctive relief against Ashford.

B. The Proposed Class Meets Rule 23.

Named Plaintiffs seek certification of the following class for settlement purposes only:

> All individuals with disabilities who use wheelchairs or scooters for mobility who, from January 15, 2013 to the date of preliminary approval of the Settlement,

> have been denied the full and equal enjoyment of transportation services offered to guests at Hotels owned and/or operated by Ashford because of the lack of equivalent accessible transportation services at those Hotels.

Although Ashford does not oppose this motion, this Court still must determine that the proposed class meets all of the requirements of Rule 23(a), at least one of the provisions of Rule 23(b), and Rule 23(g), which governs appointment of class counsel. *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Here, Plaintiffs seek certification pursuant to Rule 23(b)(2). In addition, some courts have required that the class definition be precise, objective, and presently ascertainable.[8]

Plaintiffs established below that the class is ascertainable and meets the requirements of Rule 23. As an overview, however, the Ninth Circuit and numerous district courts in this Circuit have certified classes of individuals with disabilities challenging alleged violations of the ADA.[9] These include, for example:

- *Armstrong v. Davis*, 275 F.3d at 869-70, 879 (9th Cir. 2001) (affirming the certification of a class of prisoners and parolees with sight, hearing, learning, developmental, and mobility disabilities);
- *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112 (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. California Dep't of Transp.*, 249 F.R.D. 334 (N.D. Cal. 2008) (certifying class of persons with mobility and/or vision disabilities suing due to barriers along outdoor designated pedestrian walkways throughout the state of California which are owned and/or maintained by the California Department of Transportation);
- *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007) (certifying class of persons with visual impairments suing for alleged violations of accessibility requirements at online store);

[8] *See, e.g.*, *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). A number of courts have held that the ascertainment requirement does not apply to class actions seeking only injunctive relief under Rule 23(b)(2). *See, e.g.*, *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) ("[A]scertainability is not a requirement for certification of a(b)(2) class seeking only injunctive and declaratory relief . . . ."). The Ninth Circuit has not yet ruled on this issue.

[9] Plaintiffs are not seeking certification concerning the California claims because those California allegations are based on ADA violations, and the ADA provides Plaintiffs with the entire injunctive relief sought.

- *Moeller v. Taco Bell Corp.*, No. C 02-5849 PJH, 2012 WL 3070863, at *1 (N.D. Cal. July 26, 2012) (certifying for injunctive relief class of persons with mobility disabilities suing for alleged violations of architectural accessibility requirements at a fast food chain);

- *Siddiqi v. Regents of the Univ. of Calif.*, No. C 99-0790 SI, 2000 WL 33190435, at *11 (N.D. Cal. Sept. 6, 2000) (certifying classes of deaf and hard of hearing students suing for alleged violations of federal law);

- *Berlowitz v. Nob Hill Masonic Mgmt., Inc.*, No. C-96-01241 MHP, 1996 WL 724776, at *1, 5 (N.D. Cal. Dec. 6, 1996) (certifying class consisting of all persons in California with physical disabilities suing for alleged violations of architectural accessibility requirements at a concert arena);

- *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 460 (N.D. Cal. 1994), *modified*, 158 F.R.D. 439, 443, 460 (1994) (certifying a class of disabled persons who used wheelchairs or who walked using aids suing for alleged violations of architectural accessibility requirements of the ADA and the CDPA).

This case shares the relevant qualities with those cases such that it is equally appropriate for class certification.

1. The Proposed Class Is Ascertainable.

In Rule 23(b)(2) class actions, "it is often the case that any relief obtained on behalf of the class is injunctive and therefore does not require distribution to the class. Because 'defendants are legally obligated to comply [with any relief the court orders] . . . it is usually unnecessary to define with precision the persons entitled to enforce compliance.'" Newberg on Class Actions § 3:7 (5th ed.) (citation omitted). Identification of individual class members is not required; to the contrary, the fact that class members are difficult or impossible to identify individually supports class certification under Rule 23(b)(2). *See, e.g.*, Committee's Notes to Rule 23(b)(2) (stating that Rule 23(b)(2) is intended to address "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.").

Here, the class is clearly defined to identify the relevant time period (January 15, 2013 until the date of preliminary approval), the people who are included in the class (persons who use wheelchairs or scooters for mobility), what those people must have experienced (denial of full and equal enjoyment of transportation services because of the lack of equivalent accessible

transportation services), and where those experiences must have occurred (at Hotels owned and/or operated by Ashford). A number of courts have found any ascertainability requirement met by similar class definitions. *See, e.g.*, *Nat'l Fed'n of the Blind v. Target Corp.*, No. C 06-01802 MHP, 2007 WL 1223755, at *4 (N.D. Cal. Apr. 25, 2007) (finding ascertain ability requirements met by class defined as "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").

2. The Proposed Class Meets the Requirements Of Rule 23(a).

Rule 23(a) establishes four prerequisites for class action litigation, which are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.

i. The proposed class satisfies the numerosity requirement.

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Several factors are relevant to the court's determination that the joinder of all the members is impracticable, including the size of the class, location of class members, difficulty in identifying those class members, and size of each class member's claim. *See* 7A Fed. Prac. & Proc. Civ. § 1762 (3d ed.). In analyzing these factors, a court may make common sense assumptions and reasonable inferences. *See, e.g.*, *Californians for Disability Rights*, 249 F.R.D. at 347; *Colo. Cross Disability Coal.*, 765 F.3d at 1215. Finally, "the numerosity requirement is relaxed" where, as here, the class seeks only injunctive relief. *Arnott v. U.S. Citizenship & Immig. Servs.*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) (citing *Sueoka v. United States*, 101 Fed. Appx. 649, 653 (9th Cir. 2004)).

The class is numerous. Numerosity does not require a plaintiff to establish the exact number of persons in the class. *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 444 (N.D. Cal. 2001) (citing *Arnold*, 158 F.R.D. at 448). A class or subclass with more than 40 members "raises a presumption of impracticability [of joinder] based on numbers alone." *Hernandez v. Cnty. of Monterey*, 305 F.R.D. 132, 152-53 (N.D. Cal. 2015). Courts "regularly rely on" census data in making numerosity determinations. *Californians for Disability Rights*, 249 F.R.D. at 347; *see also Arnold*, 158 F.R.D. at 448.

Here, there are a large number of facilities covered by the class (73 hotels) at which millions of persons have stayed during the class period (approximately 18 million room nights sold since January 1, 2013). In addition, census figures demonstrate that more than 3.6 million people use wheelchairs for mobility in the United States. McGarry Decl. Ex. 1 (July 2012 U.S. Census Bureau report on Americans with disabilities). If just 15 of those 3.6 million wheelchair users each year stayed at, or were deterred from staying at, one of the Ashford Hotels at issue since 2013, the numerosity requirement is met. As a matter of common sense, joinder is impracticable based on the size of the class alone. Nevertheless there are a number of other factors establishing numerosity.

The class is geographically dispersed. Joinder may be impracticable where a class is geographically dispersed. *See, e.g.*, *Evans v. Linden Research, Inc.*, No. C 11-01078 DMR, 2012 WL 5877579, at *10 (N.D. Cal. Nov. 20, 2012). Here, the proposed class is geographically dispersed, covering Hotels in 20 states.

Class members are difficult or impossible to identify. The fact that members of the proposed class are difficult to identify individually supports a finding that joinder is impracticable. *See id.*; *see also Park*, 254 F.R.D. at 120.

For these reasons, the proposed class meets the numerosity requirement.

ii. The proposed class satisfies the commonality requirement.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." This requirement is "construed permissively," and "[a]ll questions of fact and law need not be common to satisfy the rule." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). "Even a single common question will do," as long as it is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 2556 (2011) (internal quotation marks omitted). Thus, "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal

issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012).

Commonality exists where a defendant allegedly failed to have in place practices or policies required by law. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 664, 678 (9th Cir. 2014) (affirming certification of a class based on common questions that included the defendant's alleged failure to provide medication, treatment, and other medical care to prisoners).

Here, there are a number of issues central to each class member's claim that can be resolved on a classwide basis, most notably concerning the impact, if any, of 26 U.S.C. § 856 and 26 C.F.R. § 1.856-4—the REIT tax provisions—on Defendant's obligations under the ADA. As set forth above, the REIT tax provisions place limitations on the ability of a real estate investment trust to operate hotels that it owns and still receive favorable tax status. These provisions raise a number of questions common to every class member, including:

- Do these provisions actually cause a real estate investment trust to lose its favorable tax status simply by modifying its hotel practices and procedures to comply with the ADA?
- If so, is this a defense to claims brought under the ADA?
- Even if these provisions are interpreted to prevent a real estate investment trust from modifying its hotel practices and procedures while still maintaining its tax status, is there other relief that this Court can order to ensure compliance with accessible transportation regulations that do not put the tax status at risk, such as, for example, requiring Defendant to purchase wheelchair accessible vans for its Hotels?

These types of issues establish commonality. *See, e.g.*, Newberg on Class Actions § 3:27 (5th ed.) ("A claim that the opposing party 'has acted or refused to act on grounds that apply generally to the class' necessarily presents a common question of fact; similarly, a claim that injunctive or declaratory relief is appropriate for the class as a whole presents a common question of law.").

Finally, the fact that individual class members may have experienced alleged violations in different ways—some may have been told that no accessible transportation is provided, others may have had to wait longer for accessible transportation than nondisabled guests wait, and/or some class members may have been told that they must pay for accessible transportation whereas the hotel provides inaccessible transportation at no cost—does not defeat commonality where, as here, Plaintiffs allege a systemwide practice of discrimination. *See, e.g.*, *Armstrong*, 275 F.3d at 868 (Rejecting argument that "a wide variation in the nature of the particular class members' disabilities precludes a finding of commonality," and holding that "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members."); *Marilley v. Bonham*, No. C-11-02418-DMR, 2012 WL 851182, at *4 (N.D. Cal. Mar. 13, 2012) ("Neither factual differences between the proposed class members nor the plurality of implicated statutes defeats commonality where class members share such a common question."); *Shields v. Walt Disney Parks and Resorts US, Inc.*, No. CV 10-05810 DMG (JEMx), 2011 WL 7416335, at *25 (C.D. Cal. June 29, 2011) (holding that the variety of communication preferences among the visually impaired class members did not defeat class certification because "[a]n injunction applicable to all class members could include multiple remedial measures to remedy the violation of a common right."); *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012) ("As in other cases certifying class actions under the ADA and Rehabilitation Act, commonality exists even where class members are not identically situated.").

iii. The claims of the named plaintiffs satisfy the typicality requirement.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The purpose of the requirement "is to assure that the interest of the named representative aligns with the interests of the class. Typicality is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Covillo v. Specialtys Cafe*, No. C-11-00594 DMR, 2013 WL 5781574, at *6 (N.D. Cal. Oct. 25, 2013) (citations and internal quotation marks omitted).

Numerous courts have held that the typicality requirement is met in cases like this one involving alleged violations of title III of the ADA. *See, e.g.*, *Arnold*, 158 F.R.D. at 450; *Park*, 254 F.R.D. at 121.

The Named Plaintiffs' claims, like those of members of the class, all arise from the same course of events—Defendant's failure to provide equivalent accessible transportation. Likewise, the Named Plaintiffs' claims, like those of the members of the class, rest on identical legal theories and arguments. Thus the typicality requirement is met.

iv. The proposed representatives meet the adequate representation requirement.

The final requirement of Rule 23(a), adequate representation, requires that the proposed representatives do not have conflicts of interest with the proposed class. Fed. R. Civ. P. 23(a)(4); *Bates*, 204 F.R.D. at 447; Newberg on Class Actions § 3.58 (5th ed.) ("All that is required [to fulfill the adequate representation requirement] – as the phrase 'absence of conflict' suggest – is sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class.").

Neither Named Plaintiffs nor their counsel has conflicts of interest with the proposed class. Both Named Plaintiffs are members of the class that they seek to represent and both seek to remedy alleged violations of the ADA. They also seek the same relief as the class: comprehensive injunctive relief that ensures Ashford's compliance with the law. Neither Named Plaintiff seeks any monetary damages.

v. The proposed class counsel meet the requirements of Rule 23(g).

In addition, class counsel meet the requirements of Rule 23(g), which requires the Court to appoint class counsel based on the following factors: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. These factors weigh decisively towards appointing the proposed class counsel in this case.

Attached are declarations demonstrating the adequacy of the proposed class counsel in this case: Tim Fox, Sarah Morris, Bill Lann Lee, Julie Wilensky, Julia Campins, Hillary Benham-Baker, and Kevin Williams. Together these attorneys have litigated dozens of class actions, including numerous class actions under the ADA and other disability rights statutes. The attorneys and their firms and organizations have been appointed as class counsel, having been found by the relevant courts to meet the adequate representation requirements under Rule 23.

Counsel are thoroughly familiar with the ADA, having litigated not only class actions under that statute, but also numerous individual cases as well. They have thoroughly investigated this case, calling nearly every Ashford hotel that provides transportation to its guests, calling third parties that Ashford relies on to provide accessible transportation, and reviewing documents provided by Ashford during the mediation process. They have the resources to litigate this case, as demonstrated by the settlement achieved in this case, which provides a substantial and important injunctive relief to the class. If this settlement is not approved, class counsel have the resources to continue to litigate this case vigorously on behalf of the proposed class.

3. The Proposed Class Satisfies Rule 23(b)(2).

Certification under Rule 23(b)(2) is proper where "the party opposing the class has 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." The Supreme Court in *Wal-Mart* recognized that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." 131 S. Ct. at 2557 (citation omitted). Rule 23(b)(2) is satisfied where "'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)).

Numerous courts have certified classes under Rule 23(b)(2) alleging violations of title III. *See, e.g., Shields*, 279 F.R.D. at 557-60; *Colo. Cross Disability Coal.*, 765 F.3d at 1217.

Here, Plaintiffs allege that Ashford has a practice of not providing equivalent accessible transportation services at Hotels it owns that generally provide transportation services to guests,

and plaintiffs seek only injunctive and declaratory relief. Because this civil rights case involves allegations that Ashford "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief" is appropriate for the class as a whole, the class meets the requirements of Rule 23(b)(2).

II. The Proposed Settlement Should Be Preliminarily Approved

The terms of the Proposed Settlement Agreement are set forth in the Settlement Agreement, a copy of which is attached as Exhibit A to the Proposed Preliminary Approval Order. The following summarizes the principal terms of the Settlement:

A. Injunctive Relief

Plaintiffs and Ashford have negotiated a comprehensive scheme for injunctive relief.[10] The injunctive relief of the Settlement Agreement requires all Ashford Hotels to come into compliance with the regulations described above. The Settlement Agreement sets forth what compliance means, with specific attention to ensuring that any third-party transportation providers utilized by Ashford Hotels to provide equivalent accessible transportation truly do provide such *equivalent* accessible transportation. Settlement Agreement ¶ 5.a. Moreover, the Settlement Agreement explicitly requires that *accurate* information be provided to potential hotel guests, so that no guests are erroneously deterred. *Id.* ¶ 5.c. Ashford will provide information to Plaintiffs regarding the current status of the Hotels that provide transportation services to their guests, as well as any applicable third party transportation providers. *Id.* ¶ 4. Finally, Ashford will notify all management companies—the companies that directly manage Ashford's Hotels—about the Settlement Agreement and the management companies' obligations under the law, as well as any hotel's non-compliance with either. *Id.* ¶ 6.

To ensure that Ashford Hotels come into compliance, the Settlement provides a multistage monitoring process that involves both a third-party monitor and monitoring by Plaintiffs' Counsel. First, the third-party monitor will contact 50% of Ashford Hotels that provide

[10] The Complaint sought only injunctive relief and attorneys' fees and costs. The Settlement Agreement does not provide for any damages, and only releases individual damages claims for the individual named plaintiffs through the date of preliminary approval. The proposed recovery to the class is in all other requests identical to the recovery to the individual named plaintiffs.

transportation services to guests every four months for the first two years of the Settlement Agreement's term to test their compliance. *Id.* ¶ 7.b. Subsequent monitoring cycles will also include Hotels that failed to provide accurate information or equivalent accessible services during the previous cycle. *Id.* ¶ 7.c. This stepped-up monitoring ensures that problem Hotels are closely monitored. Second, the monitor will send a tester to 15% of the Hotels who, during those telephone conversations, claim to have equivalent accessible transportation to confirm that the Hotel does indeed provide equivalent, accessible transportation. *Id.* ¶ 7.b. Finally, any hotel that is found to be out of compliance during the first two years of monitoring will be subjected to a third year of monitoring unless it can prove that it has purchased its own accessible transportation vehicle. *Id.* ¶ 7.d. Hotels whose non-compliance is confined to inaccurate information will be subjected to the third year of monitoring only if they were found to be out of compliance a second time. *Id.* ¶ 7.d. This comprehensive monitoring program is thorough and addresses the issues that Plaintiffs have uncovered during their investigation.

Ashford will continue to provide information to the Plaintiffs throughout this process. *Id.* ¶ 7.e. Additionally, Ashford will provide notices to the hotel managers of their hotels' non-compliance. After three instances of non-compliance, Ashford has committed to either discontinuing transportation services at that particular hotel or purchasing a wheelchair-accessible vehicle for use at that hotel. *Id.* ¶ 8.c. This final part of the monitoring and compliance process closes the loop so that all hotels should be in full compliance with the ADA by the end of the third year of the Settlement Agreement, if not long before.[11]

The parties have mutually agreed upon Progressive Management Resources, Inc. (PMR) as the third-party monitor. PMR is a firm with substantial experience in compliance and monitoring with respect to public accommodations. Campins Decl. Ex. 2 (PMR website). Ashford will pay the fees and costs of monitoring.[12]

[11] Ashford will also request that future management agreements between Ashford and the hotel management companies include explicit requirements to comply with the accessible transportation requirements under the ADA. Settlement ¶ 8.d.

[12] To the extent that those fees and costs include fees and costs incurred by Plaintiffs' counsel, they are subsumed into Plaintiffs' forthcoming attorneys' fees request, as explained in Section II.C.

Plaintiffs' Counsel will also be involved in monitoring. Settlement Agreement ¶ 7.b.i. They will do so through any members of the class that visit Ashford hotels as well as through monitoring by Plaintiffs' Counsel of the third-party transportation providers that hotels use to provide transportation to disabled guests to ensure that the services provided by the third parties are actually equivalent to the services provided to guests without disabilities. In addition, Plaintiffs' Counsel will review monitoring reports by PMR, and raise issues as needed with Ashford.

Finally, the parties have also agreed to a multi-stage dispute resolution process in which disputes that the parties cannot resolve themselves will be brought to a mediator, and if the disputes cannot be resolved in mediation, they can be brought to the Court for resolution during the term of the Settlement Agreement. *See* Settlement Agreement ¶ 14.

B. Class Release

The Settlement Agreement does not release any claims on behalf of class members for damages. Nor does it release any claims against any potential defendants who could have been sued in this litigation other than Ashford. *See id.* ¶ 15.

C. Attorneys' Fees and Costs and Costs of Administration and Monitoring of the Settlement

The parties have agreed that Class Counsel may seek an award of attorneys' fees and costs that have been or will be incurred in litigation, seeking final approval, and future monitoring during the term of the settlement in the amount of $165,000 and that Ashford will not oppose such request. Should the Court preliminarily approve the proposed Settlement Agreement, Plaintiffs intend to apply for such an award before their application for final approval of the Settlement and sufficiently in advance of the class members' deadline to object to the proposed Settlement. This amount explicitly includes and covers monitoring of the settlement, which will involve review of the agreed-upon monitor's reports as well as independent monitoring of the third-party providers of transportation for those hotels that do not have accessible vans. Plaintiffs currently estimate that the fees associated with this future monitoring for the three-year term of

the Agreement constitute approximately $30,000 of the $165,000 total requested fee award. Campins Decl. ¶ 6.

D. The Proposed Settlement Merits Preliminary Approval.

Rule 23(e) requires a district court to determine whether a proposed class action settlement is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). At final approval, this involves an analysis of a number of different factors. *See, e.g., id*. Preliminary approval is an initial assessment of the fairness of the proposed settlement made by a court on the basis of written submissions and presentations from the settling parties.

Preliminary approval of a settlement and notice to the proposed class is appropriate: "[i]f [1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citing Manual for Complex Litigation, Second § 30.44 (1985)). "In addition, '[t]he court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid.'" *Id.* (citing Newberg on Class Actions § 11.25 (1992)).

Here, the proposed Settlement satisfies the preliminary approval requirements. Plaintiffs' Counsel believe that the proposed Settlement is an excellent result, reached after thorough investigation and extensive negotiations and with assistance of a JAMS mediator who is a retired federal Magistrate Judge. Campins Decl. ¶¶ 5, 7. No class representatives or segments of the class are receiving any preferential treatment.

1. Injunctive Relief

The Settlement will provide substantial injunctive relief to the Class. By means of this Settlement Agreement, all Ashford hotels that provide transportation services to guests will provide either a wheelchair-accessible vehicle or truly equivalent accessible transportation. The

hotels will be held accountable through a monitoring process that ensures that each hotel is monitored at least three times, and the monitoring will increase if any hotel is found out of compliance at any time during the term of the Agreement. The monitoring consists both of calls to the hotels to verify that they are providing the required services and that they are providing accurate information with respect to those services, and in-person visits to a random selection of the hotels that purport to provide equivalent accessible transportation through a third-party transportation provider. After three infractions by a particular hotel, Ashford has committed to either discontinue all transportation services at the hotel, or to purchasing an accessible vehicle for use at that hotel so that there can be no further difficulties in providing equivalent accessible transportation through a third-party transportation provider.

2. The Provision for Attorneys' Fees and Costs Is Fair.

The parties have agreed, subject to this Court's approval, to an award of fees and costs totaling $165,000. Settlement Agreement ¶ 11. In litigating this matter, Plaintiffs' Counsel have taken substantial risk and aggressively investigated a problem involving widespread ADA noncompliance that has never been litigated before. To Plaintiffs' knowledge, this Settlement Agreement is the first of its kind in the nation and sets the standard for hotel transportation for guests with disabilities. Campins Decl. ¶ 7. The fees agreed to, $165,000, is expected to be at or below Plaintiffs' Counsel's lodestar at the conclusion of the three years of the settlement term. Plaintiffs' Counsel have expended substantial time to date, and will be involved in monitoring during the settlement term for which Ashford has agreed to pay attorneys' fees. Such subsequent monitoring by Plaintiffs' Counsel is appropriate, as is compensation for this work. *See, e.g.*, *Balla v. Idaho*, 677 F.3d 910, 918 (9th Cir. 2012) (holding that injunction monitoring is often necessary and fees are appropriate); *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558-59 (1986) (holding that plaintiffs' counsel's post-judgment monitoring "was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining

the consent decree."). Plaintiffs' Counsel will support their fee request with more detail in the motion for attorneys' fees and costs.

E. The Proposed Form of Notice and Notice Plan Satisfy Due Process and Should Be Approved.

Under Federal Rule of Civil Procedure 23(e)(1), the court "must direct notice in a reasonable manner to all class members who would be bound by a propos[ed settlement]." Class members are entitled to receive "the best notice practicable" under the circumstances. *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985) (citing Fed. R. Civ. P. 23(c)(2)). Notice is satisfactory "if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal citation and quotation marks omitted). "The hallmark of the notice inquiry . . . is reasonableness." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 696 (D. Colo. 2006) (citing *Sollenbarger v. Mountain States Telephone & Telegraph Co.*, 121 F.R.D. 417, 436 (D.N.M. 1988)); *see also, e.g., Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

The notice standard is easily satisfied here. The parties propose dissemination of notice through known disability advocacy groups, which is the most reasonable manner to ensure that class members receive word of the settlement. This is not a case like many other class actions where there is a list of shareholders of a company, employees, or purchasers of a product that can be obtained through reasonable efforts. To the contrary, the Settling Parties are not aware of any available list of individuals who use wheelchairs or scooters and patronize Ashford hotels. Nor do the Settling Parties believe that one could be created without months of effort and huge expenditure. Under such circumstances, individual notice is not required. *Lucas*, 234 F.R.D. at 696 (citing *Sollenbarger*, 121 F.R.D. at 437 (publication notice sufficient to subgroup of class when efforts required for creating list of individuals would be excessive under the circumstances). *Compare* Fed. R. Civ. P. 23(c)(2)(B) (regarding *individual* notice for classes certified under Rule 23(b)(3)) *to* Fed. R. Civ. P. 23(c)(2)(A) and 23(e)(1) (discussing "reasonable" and "appropriate" notice).

The proposed notice describes the Settlement Class, summarizes the proposed settlement, and explains to class members their right to object and be heard in open court. Ex. B.

Notice Plan: Plaintiffs here propose to email notice to disability-related organizations throughout the country. In addition, Plaintiffs will provide the notice to those persons with disabilities who have contacted CREEC about problems with accessible hotel transportation.

Notice Deadline: Plaintiffs request that the Court order notice to be issued not more than 10 days after preliminary approval of the Settlement ("Notice Deadline").

Deadline to file Motion for Attorneys' Fees: Forty-five days after the Notice Deadline.

Deadline to submit Objections to the Settlement: Sixty days after the Notice Deadline.

Final Approval hearing: March 10, 2016, or eighty days after the Notice Deadline set by the Court, whichever is later, or as soon thereafter as the Court may set the hearing.

CONCLUSION

For the reasons above, the parties respectfully request that the Court grant the Proposed Preliminary Approval Order filed concurrently.

Dated: November 5, 2015

Respectfully Submitted,

By: /s/Julia Campins

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