

1 FOX & ROBERTSON, P.C.
Timothy P. Fox, Cal. Bar No. 157750
2 910 - 16th Street
Suite 610
3 Denver, Colorado 80202
Tel: (303) 595-9700
4 Fax: (303) 595-9705

5 Attorneys for Plaintiffs

6

7

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

9

10 FRANCIE E. MOELLER et al,

11 Plaintiffs,

Case No. C 02 5849 MJJ ADR

12 v.

**PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

13 TACO BELL CORP.,

**Date: October 21, 2003
Time: 9:30 a.m.**

14 Defendant.

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27 Case No. C 02 5849 MJJ ADR

28 Plaintiffs' Motion for Class Certification

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1 FOX & ROBERTSON, P.C.
Timothy P. Fox, Cal. Bar No. 157750
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3 Denver, Colorado 80202
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4 Fax: (303) 595-9705

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12 TACO BELL CORP.,

13 Defendant.

Case No. C 02 5849 MJJ ADR

**PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Date: October 21, 2003
Time: 9:30 a.m.

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16 **NOTICE**

17 On October 21, 2003, at 9:30 a.m., or as soon thereafter as this motion may be heard,
18 before the Honorable Martin J. Jenkins, Plaintiffs will, and hereby do, move for an order
19 certifying a class in the above-captioned action. This motion is based on this Notice of
20 Motion, and all accompanying attachments hereto.

21 **RELIEF SOUGHT**

22 Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs
23 seek an order certifying the following class:

24 All individuals with disabilities who use wheelchairs or electric scooters for mobility
25 who, during a time period to be determined by this Court, were denied, or are currently
26 being denied, on the basis of disability, full and equal enjoyment of the goods, services,

27 Case No. C 02 5849 MJJ ADR
28 Plaintiffs' Motion for Class Certification

1 facilities, privileges, advantages, or accommodations of California Taco Bell corporate
2 restaurants.¹

3 Plaintiffs further request that the Court appoint the Named Plaintiffs Francie Moeller,
4 Ed Muegge, Katherine Corbett and Craig Yates as class representatives, and the law firm of
5 Fox & Robertson, P.C. as class counsel.

6 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

7 **ISSUES TO BE DECIDED**

8 Whether the proposed class in this case should be certified pursuant to Rules 23(a) and
9 23(b)(2) of the Federal Rules of Civil Procedure.

10 **SUMMARY OF ARGUMENT**

11 Named Plaintiffs bring this case to remedy architectural barriers at Defendant’s
12 corporate owned and/or operated Taco Bell restaurants in California that discriminate against a
13 large number of Taco Bell patrons who use wheelchairs or scooters. The putative class seeks
14 an injunction ordering Defendant Taco Bell Corp. (“Taco Bell”) to adopt policies to ensure
15 access for customers who use wheelchairs or scooters, and to use its centralized design and
16 construction program to bring all of its stores into compliance with the Americans with
17 Disabilities Act, 42 U.S.C. § 12101 et seq. (“ADA”), the Unruh Civil Rights Act, Cal. Civ.
18 Code § 51 et seq. (“Unruh” or “the Unruh Act”), and the California Disabled Persons Act, Cal.
19 Civ. Code § 54 et seq. (the “CDPA”). The putative class also seeks, among other relief, the
20 minimum statutory damages per offense under Unruh and the CDPA.

21 This case epitomizes the type of case for which class action treatment -- and
22 certification under Rule 23(b)(2) in particular -- is appropriate, as the architectural barriers at
23 Defendant’s restaurants, and Defendant’s policies that result in such barriers, affect the Named
24 Plaintiffs and class members in the same manner and are appropriate targets for final,

25 _____
26 ¹ These restaurants are identified in exhibit 3 to the Declaration of Timothy P.
Fox (“Fox Decl.”).

1 company-wide, injunctive relief. In addition, there are no individualized damage issues,
2 because each class member seeks the minimum statutory damages per offense under Unruh
3 and the CDPA, to which they are entitled without proof of actual damages.

4 **FACTS**

5 **A. Named Plaintiffs.**

6 Named Plaintiffs Francie Moeller, Ed Muegge, Katherine Corbett and Craig Yates are
7 among the more than 150,000 Californians who use wheelchairs or scooters for mobility. (See
8 ex. 2 at 2.)² The Named Plaintiffs are all active members of their communities, and all are
9 dedicated to advocating for the rights of persons with disabilities. Ms. Moeller, for example, is
10 a past chair of the Bay Valley District Organization of Business and Professional Women, and
11 is the current Chair of the Disability Caucus of the California Democratic Party. (See Moeller
12 Decl. ¶ 2 (ex. 11).) Mr. Muegge taught disability advocacy classes at Sonoma State University
13 and Santa Rosa Junior College, while Ms. Corbett has, on several occasions, testified at
14 legislative hearings on issues relating to persons with disabilities. (See Muegge Decl. ¶¶ 3-4
15 (ex. 12); Corbett Decl. ¶ 2 (ex. 13).) Mr. Yates is a Parks and Recreation Commissioner for
16 the City of San Rafael and is on the Advisory Boards of Golden Gate Transit and the
17 Metropolitan Transit Commission, and both Boards oversee issues concerning use of public
18 transit systems by the elderly and persons with disabilities. (See Yates Decl. ¶¶ 3-4 (ex. 14).)

19 The Named Plaintiffs eat at Taco Bell restaurants owned or operated by Defendant, and
20 all have encountered numerous accessibility barriers at these restaurants which are discussed in
21 detail in Section D(2) below.

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25 ² All references to exhibit numbers throughout the brief refer to Exhibits to the
26 Declaration of Timothy P. Fox, filed concurrently with this motion. For convenience, all
27 references to deposition testimony in this brief are abbreviated as [Witness' Last Name] Dep.
28 All references to declarations are abbreviated as [Witness' Last Name] Decl.

1 **B. Legal Context**

2 Although it is premature to address the merits of this litigation, an understanding of the
3 legal context will be helpful in understanding the appropriateness of class certification.

4 **1. The Americans with Disabilities Act.**

5 The ADA was enacted in 1990 “to provide a clear and comprehensive national mandate
6 for the elimination of discrimination against individuals with disabilities .” 42 U.S.C.
7 § 12101(b)(1); see also PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (holding that the
8 ADA provides a “broad mandate” to eliminate discrimination against people with disabilities).
9 The statute recognizes that “the Nation’s proper goals regarding individuals with disabilities
10 are to assure equality of opportunity, full participation, independent living, and economic
11 self-sufficiency for such individuals.” 42 U.S.C. § 12101(a)(8). Title III of the ADA prohibits
12 discrimination on the basis of disability in places of public accommodation such as Taco Bell
13 restaurants, both with respect to the accessibility of their physical facilities and with respect to
14 their policies and practices.

15 The ADA required the Department of Justice (“DOJ”) to issue regulations carrying out
16 the non-transportation requirements of Title III. 42 U.S.C. § 12186(b). Pursuant to this
17 statutory mandate, the DOJ promulgated Standards for Accessible Design (“DOJ Standards”).
18 See 28 C.F.R. pt. 36, app. A.³ The DOJ Standards contain detailed design specifications for
19 public accommodations covering a variety of architectural elements, including, for example,
20 parking lots, food service lines, accessible routes, and restrooms. See generally id.

21 The accessibility requirements of Title III and the DOJ Standards vary depending on
22 the dates that facilities were constructed or altered. Facilities built after January 26, 1993, are
23 required to be “readily accessible to and usable by” individuals who use wheelchairs, and these
24 facilities must comply with the DOJ Standards. 42 U.S.C. § 12183(a)(1); 28 C.F.R.

25 ³ The DOJ’s Title III regulations are “entitled to deference.” Bragdon v. Abbott,
26 524 U.S. 624, 646 (1998).

1 § 36.406(a). When facilities that were built before that time are altered in certain ways after
2 January 26, 1992, the altered portion and -- to a certain extent -- the path of travel to the altered
3 portion must comply with the DOJ Standards. 28 C.F.R. §§ 36.402(b)(2); 36.406(a). In
4 facilities built prior to January 26, 1993 and not altered since January 26, 1992, Taco Bell is
5 required to remove architectural barriers where it is “readily achievable” to do so. 42 U.S.C.
6 § 12182(b)(2)(A)(iv).⁴ Readily achievable barrier removal must comply with the DOJ
7 Standards, unless doing so would make the removal not readily achievable. See 28 C.F.R.
8 § 36.304(d)(1) (incorporating the alteration standards set forth in § 36.402). In addition, Taco
9 Bell must “maintain in operable working condition those features of facilities and equipment
10 that are required to be readily accessible to and usable by persons with disabilities.” 28 C.F.R.
11 § 36.211.

12 **2. The Unruh Act and CDPA.**

13 Both the CDPA, which was enacted in 1968, and the Unruh Act, which was amended
14 in 1987 to cover persons with disabilities, prohibit discrimination on the basis of disability in
15 the full and equal access to the services, facilities and advantages of public accommodations.
16 Cal. Civ. Code §§ 51(b) (Unruh) & 54.1(a)(1) (CDPA). A prevailing plaintiff is entitled to,
17 among other relief, statutory minimum damages of \$4,000 for each violation of the Unruh Act,
18 and statutory minimum damages of \$1,000 for each violation of the CDPA. Cal. Civ. Code
19 §§ 52(a) (Unruh) & 54.3(a) (CDPA). A plaintiff is entitled to recover the statutory minimum
20 damages regardless of whether the plaintiff has suffered any actual damages. Botosan v. Paul
21 McNally Realty, 216 F.3d 827, 835 (9th Cir. 2000) (holding that “proof of actual damages is
22 not a prerequisite to recovery of statutory minimum damages” under the CDPA and Unruh
23 Act). The putative class seeks the statutory minimum damages for each offense.

24
25 ⁴ The question of what is readily achievable turns primarily on the nature and
26 cost of the barrier removal and the resources of the public accommodation involved, including
27 “the overall financial resources of any parent corporation or entity.” 28 C.F.R. § 36.104; see
28 also 42 U.S.C. § 12181(9).

1 All buildings constructed⁵ or altered⁶ after July 1, 1970, must comply with standards
2 governing the physical accessibility of public accommodations. D’Lil v. Stardust Vacation
3 Club, No. CIV-S-00-1496DFL PAN, 2001 WL 1825832, at *7 (E.D. Cal. Dec. 21, 2001).
4 From December 31, 1981 until the present, the standards have been set forth in Title 24 of the
5 California regulatory code (the “California Standards”). People ex rel. Deukmejian v. CHE,
6 Inc., 197 Cal. Rptr. 484, 491 (Cal. Ct. App. 1983). In addition to setting forth design and
7 construction standards, the California Standards require public accommodations to maintain in
8 operable working condition those features of facilities and equipment that are required to be
9 accessible to and usable by persons with disabilities. Cal. Standards § 1101B.3.

10 A violation of a California Standard constitutes a violation of both the CDPA and the
11 Unruh Act. See, e.g., Arnold v. United Artists Theatre Circuit, Inc., 866 F. Supp. 433, 439
12 (N.D. Cal. 1994). A violation of the ADA also constitutes a violation of both statutes. See
13 Cal. Civ. Code §§ 51(f) & 54(c).

14 **C. The Colorado Litigation.**

15 In 1999, the United States District Court for the District of Colorado certified a class
16 very similar to the one sought to be certified in this case. Colo. Cross-Disability Coalition v.
17 Taco Bell Corp., 184 F.R.D. 354, 357, 363 (D. Colo. 1999) (the “Colorado Class Action”).
18 The certified class, which was represented by the undersigned counsel, consisted of individuals
19 who used wheelchairs or scooters and challenged the use of inaccessible “queue lines” at Taco
20 Bell restaurants in Colorado. A “queue line” is “a path cordoned off with barriers causing
21 patrons to form a single line” while waiting to place their order. Id. at 355. The Colorado
22 class sought injunctive and statutory damages. Id. at 356. The case subsequently settled on
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25 ⁵ Cal. Health & Safety Code § 19956.

26 ⁶ Cal. Health & Safety Code § 19959.

1 terms that required Taco Bell to bring the queue lines in all of its Colorado restaurants into
2 compliance with the DOJ Standards. (Fox Decl. ¶ 4).

3 **D. Defendant Taco Bell Corp.**

4 **1. Background.**

5 Taco Bell, a subsidiary of Yum! Brands, Inc. (“Yum”), sells Mexican fast food
6 products throughout the United States and elsewhere. Taco Bell is a highly-centralized
7 company headquartered in Irvine, California. According to Defendant’s discovery responses,
8 it directly owns and/or operates 220 restaurants in California (“corporate restaurants”). (See
9 ex. 3.) Although there are other California Taco Bell restaurants operated by Defendant’s
10 franchisees, Plaintiffs seek class certification in this case only with respect to patrons of the
11 corporate restaurants.

12 **2. Accessibility Problems At Defendant’s California Restaurants.**

13 To date, discovery in this case has been restricted to class certification issues, and thus
14 Plaintiffs have not yet had an opportunity to investigate fully Taco Bell’s violations of the
15 ADA and California law. Nevertheless and as set forth below, the experiences of the Named
16 Plaintiffs and the limited discovery that has occurred to date demonstrate a consistent pattern
17 of accessibility problems at Defendant’s California restaurants.

18 **a. *Inaccessible Queue Lines.***

19 As was the case in Colorado prior to the Colorado Class Action, queue lines in many
20 California Taco Bell restaurants are inaccessible to people who use wheelchairs or scooters.
21 The Named Plaintiffs have all encountered queue lines that were too narrow for them to
22 traverse. (Moeller Decl. ¶ 5; Muegge Decl. ¶ 9; Corbett Decl. ¶ 4; Yates Decl. ¶ 6 (exs. 11-14,
23 respectively).) Defendant contends that persons with disabilities can access the service counter
24 through a separate route to the side of the queue line, but this system is segregated from all
25 other customers and is frequently blocked by a chain. See Colo. Cross-Disability Coalition,
26 184 F.R.D. at 355-56. Even when it works as intended, this system makes it difficult or

1 impossible for a person using a wheelchair or scooter to determine where they are in line with
2 respect to non-disabled people standing in the queue line, with the result that it either angers
3 non-disabled customers who believe that disabled patrons in the alternative wheelchair access
4 are “cutting” in line, or causes persons with disabilities to be served after nondisabled
5 customers are served. See id. It also frequently requires people who use wheelchairs or
6 scooters to have to shout to get the attention of Taco Bell employees in order to receive
7 service. See id.

8 Several requirements under both Standards apply to queue lines. For example, as
9 cafeteria or food service lines, they must be at least 36 inches wide. DOJ Standards § 5.5; Cal.
10 Standards § 1104B.5(5). In addition, queue lines with lanes that are between 36 and 42 inches
11 wide and that require a turn around an obstruction must provide a 60-inch diameter space at the
12 turn. See DOJ Standards § 4.2.3; Cal. Standards § 1118B.3.

13 ***b. Inaccessible Entrances.***

14 The California Standards provide that the maximum effort to open an exterior door not
15 exceed 8.5 pounds of force. Cal. Standards § 1133B.2.5. All of the Named Plaintiffs have
16 encountered doors that were difficult or impossible for them to open. (Moeller Decl. ¶ 5;
17 Muegge Decl. ¶ 9; Corbett Decl. ¶ 4; Yates Decl. ¶ 6 (exs. 11-14, respectively).) Plaintiffs’
18 counsel measured the force necessary to open the exterior doors at five Taco Bell restaurants,
19 and all five restaurants were significantly out of compliance. (Miot Decl. ¶¶ 2, 4, 5, 7-9 (ex.
20 15).) This violation prevents many class members from even entering restaurants
21 independently.

22 ***c. Inaccessible Condiment and Drink Dispensers.***

23 Both the DOJ and California Standards have requirements covering drink and
24 condiment dispensers. See, e.g., DOJ Standards §§ 4.2 & 5.6; Cal. Standards §§ 1104B.5(6) &
25 1122B.4. The Named Plaintiffs have all encountered drink and/or condiment dispensers that
26

1 were difficult or impossible for them to reach. (Moeller Decl. ¶ 5; Muegge Decl. ¶ 9; Corbett
2 Decl. ¶ 4; Yates Decl. ¶ 6 (exs. 11-14, respectively).)

3 ***d. Inaccessible Dining Rooms.***

4 Dining rooms are subject to several requirements under both sets of Standards. See,
5 e.g., DOJ Standards § 5; Cal. Standards §§ 1104B.5 & 1122B. One requirement, for example,
6 is that “at least 5 percent, but not less than one, of the fixed tables [in the dining area] shall be
7 accessible. . .” DOJ Standards § 5.1 (emphasis added). All of the Named Plaintiffs have
8 experienced accessibility problems in Taco Bell dining rooms. (Moeller Decl. ¶ 5; Muegge
9 Decl. ¶ 9; Corbett Decl. ¶ 4; Yates Decl. ¶ 6 (exs. 11-14, respectively).) For example, in many
10 restaurants, it is impossible for more than two people who use wheelchairs to sit together.
11 (See, e.g., Moeller Dep. at 35:16-22 (ex. 17); Corbett Dep. at 85:17-86:13 (ex. 18).)

12 ***e. Inaccessible Restrooms.***

13 Both sets of Standards include requirements applicable to restrooms. See, e.g., DOJ
14 Standards §§ 4.16 (water closets), 4.17 (toilet stalls), 4.18 (urinals), 4.19 (lavatories and
15 mirrors), 4.22 (toilet rooms), 4.24 (sinks) and 4.26 (handrails and grab bars); Cal. Standards
16 § 1115B. Among other requirements, these Standards require that restroom doors have
17 accessibility signage, and that piping under sinks be insulated to prevent burning persons in
18 wheelchairs. DOJ Standards § 4.24.6; Cal. Standards §§ 1115B.5 & 1504.2.2. All of the
19 Named Plaintiffs have had accessibility problems in Taco Bell restrooms,⁷ and these problems
20 include a lack of accessibility signage on restroom doors and uninsulated sink pipes. (Yates
21 Dep. at 40:14-21 (ex. 19); Photograph of Novato restaurant (ex. 20); Corbett Dep. at 48:24-
22 49:7 (ex. 18).)

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25 _____
26 ⁷ (Moeller Decl. ¶ 5; Muegge Decl. ¶ 9; Corbett Decl. ¶ 4; Yates Decl. ¶ 6 (exs.
11-14, respectively).)

1 the DOJ and/or California Standards. (Fox Decl. ¶¶ 7-10, Miot Decl. ¶¶ 3-5, 7, 9-10 (ex. 15).)
2 In addition, many of the restaurants had no, or had inadequate, “Van Accessible” and/or
3 towing signage. (Fox Decl. ¶¶ 6-8, 10; Miot Decl. ¶¶ 3, 5-6, 9-10 (ex. 15).)

4 **3. Taco Bell’s Policies.**

5 Taco Bell has highly centralized policies governing the design, construction and
6 maintenance of its restaurants. For example, Taco Bell restaurants are constructed in
7 accordance with a series of standardized prototypes. (Azalde Dep. at 20:9-21 (ex. 10).) These
8 prototypes are developed by Taco Bell’s Architecture and Engineering (“A&E”) department,
9 which is part of Taco Bell’s “corporate” division located at its corporate headquarters in Irvine,
10 California. (Azalde Dep. at 13:16-22; 18:14-20; 20:11-14 (ex. 10).) In addition, Taco Bell’s
11 accessibility policies were created, promulgated and monitored by the A&E department and
12 Taco Bell’s ADA task force, which included senior managers of Taco Bell. (See, e.g., Azalde
13 Dep. at 24:6-19; 30:11-32:4; 38:3-41:4 (ex. 10).)

14 Taco Bell’s primary method of addressing the accessibility of its restaurants is through
15 its American with Disabilities Act Facilities Compliance Guide (“Compliance Guide”), which
16 was prepared by the A&E department. (Ex. 5; Azalde Dep. at 48:8-9 (ex. 10).) The
17 Compliance Guide -- which was sent to everyone in the company¹² -- includes a “Facilities
18 Checklist” covering certain accessibility issues. (Ex. 5 at 02-0018.) The Compliance Guide
19 and Facilities Checklist are used in connection with Taco Bell’s design of new restaurants,
20 modifications to old restaurants, and final inspection of completed construction. (Resps. to
21 First Set of Interrogs.& Reqs. for Prod. of Docs. to Taco Bell Corp. at 7 (ex. 9).)

22 Several of the architectural barriers encountered by class members result directly from
23 Taco Bell’s policies. For example, the problems that Named Plaintiffs have had in finding
24 accessible seating for groups of more than two persons using wheelchairs results from the fact

25
26 ¹² Azalde Dep. at 48:10-16 (ex. 10).

1 that many or all of Defendant’s prototypes make accessible five percent of the seats, rather
2 than five percent of the tables, in its restaurants. (See Fox Decl. ¶¶ 16-17) As a result, in
3 many restaurants, there are no tables with more than two accessible seats, thus precluding more
4 than two persons who use wheelchairs or scooters from sitting together. Id. Indeed, in many
5 restaurants, there are no tables with more than one accessible seat, thereby preventing even two
6 persons who use wheelchairs or scooters from sitting together. Id.

7 Similarly, Taco Bell’s inaccessible queue lines result from centralized policies and
8 prototypes. When Taco Bell started using queue lines in its restaurants in approximately
9 1984,¹³ the California Standards already required food service lines (known as “cafeteria lines”
10 at the time) to be at least 36 inches wide. Cal. Admin. Code § 2-611(c)(4) (1982) (ex. 8).
11 Carlos Azalde, Taco Bell’s Rule 30(b)(6) designee on queue lines in both the Colorado Class
12 Action and the present litigation, affirmed that the food service line provision applied to queue
13 lines. (Azalde Colorado Class Action Dep. at 35:13-19 (ex. 16).) Nevertheless, from 1984
14 until the early 1990s, all Taco Bell restaurants were built with queue lines that were narrower
15 than 36 inches. (Azalde Dep. at 93:11-16 (ex. 10).) From the early 1990s until approximately
16 1998,¹⁴ the width of queue line lanes was widened to 36 inches, but the width at the turn was
17 only 42 inches,¹⁵ instead of the required 60 inches. See supra p. 8. Thus most or all of the
18 queue lines in Taco Bell restaurants built prior to 1998 violate both the DOJ and California
19 Standards.

20 Other accessibility problems encountered by class members result from Taco Bell’s
21 failure to include various accessibility requirements in its company-wide policies. For
22 example, the Compliance Guide and Facilities Checklist do not address: the requirement that

24 ¹³ Azalde Dep. at 15:2-4 (ex. 10).

25 ¹⁴ Azalde Dep. at 92:6-13 (ex. 10).

26 ¹⁵ Fox Decl. ¶ 18.

1 accessible parking spaces should be located as close as possible to the entrance and should not
2 require persons with disabilities to travel behind parked cars; the required width of van
3 accessible spaces under the California Standards; the requirement that “Van Accessible” and
4 towing signs be installed in parking lots;¹⁶ or the requirement that the maximum effort to open
5 an exterior door not exceed 8.5 pounds of force. In addition, Taco Bell did not even consider
6 the accessibility of the height of drink and condiment dispensers until approximately 1995.
7 (Azalde Dep. at 86:17-21; 82:18-19 (ex. 10).) Even then, the prototypes only set forth the
8 height of the table on which the drink dispenser sits and did not address the height of the
9 dispenser itself. (K50 Prototype plan (ex. 6 at CA0011).)

10 Finally, some accessibility problems result from Taco Bell’s failure to enforce its
11 accessibility policies. For example, in December 1997, Taco Bell conducted a project to
12 restripe and repair the parking lots at all of its corporate restaurants, and this project was
13 supposed to include a review and correction of accessible parking. (Azalde Dep. at 108:4-
14 111:25 (ex. 10).) Had the project been carried out in accordance with Taco Bell’s Compliance
15 Guide, all parking lots would now have the number of accessible spaces required by the
16 Compliance Guide, and all access aisles for van accessible spaces would now be at least 96
17 inches wide as set forth in the Compliance Guide. (Compliance Guide at 02-009 (ex. 5).)
18 Instead, numerous parking lots still do not have the required number of accessible spaces,¹⁷ and
19 of the 13 parking lots in which Plaintiffs’ Counsel measured the dimensions of the designated
20 accessible spaces, 8 did not have van accessible spaces with access aisles that were at least 96
21 inches wide. (Fox Decl. ¶¶ 7-8, 10; Miot Decl. ¶¶ 3-5, 9-10 (ex. 15).)

22
23 ¹⁶ Some of these parking requirements are discussed in Taco Bell’s 1997 “Site
24 Development Manual,” which applies to new construction. Based on the numerous
25 accessibility problems in Defendant’s parking lots observed by Plaintiffs’ Counsel and
encountered by the Named Plaintiffs, this Manual has not been used with respect to existing or
altered restaurants. Further, the Manual does not discuss the width requirements under the
California Standards for van accessible spaces, or the towing sign requirement.

26 ¹⁷ Fox Decl. ¶ 13.

1 **ARGUMENT**

2 **A. Introduction**

3 Named Plaintiffs seek certification of the following class:

4 All individuals with disabilities who use wheelchairs or electric scooters for mobility
5 who, during a time period to be determined by this Court, were denied, or are currently
6 being denied, on the basis of disability, full and equal enjoyment of the goods, services,
7 facilities, privileges, advantages, or accommodations of California Taco Bell corporate
8 restaurants (identified in ex. 3).

9 It is inappropriate to pass on the merits of the claims at the class certification stage.

10 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178 (1974). Rather, the Court must
11 determine whether the proposed class satisfies the four prerequisites of Rule 23(a), as well as
12 one of the three subsections of Rule 23(b). Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022
13 (9th Cir. 1998). Named Plaintiffs seek certification pursuant to Rule 23(b)(2) because
14 Defendant has “acted or refused to act on grounds generally applicable to the class, thereby
15 making appropriate final injunctive relief or corresponding declaratory relief with respect to
16 the class as a whole.” Fed. R. Civ. P. 23(b)(2).

17 Named Plaintiffs will analyze each of the requirements of Rule 23(a) and Rule 23(b)(2)
18 separately below. As an overview, however, numerous courts in the Ninth Circuit have
19 certified classes of individuals with disabilities challenging architectural barriers and/or
20 deficient policies. These include, for example:

- 21 • Armstrong v. Davis, 275 F.3d 849, 869-70, 879 (9th Cir. 2001), cert. denied,
22 537 U.S. 812 (2002) (Affirming the certification of a class of prisoners and
23 parolees with sight, hearing, learning, developmental and mobility disabilities
24 alleging violations of the ADA and the Rehabilitation Act);
- 25 • Bates v. United Parcel Serv., 204 F.R.D. 440, 448 (N.D. Cal. 2001) (Certifying
26 nationwide class of hearing impaired employees of the defendant for alleged
27 violations of the ADA);

- 1 • Siddiqi v. Regents of the Univ. of Calif., No. C 99-0790 SI, 2000 WL
2 33190435, at *11 (N.D. Cal. Sept. 6, 2000) (Certifying classes of deaf and hard
3 of hearing students for alleged violations of federal law, including the ADA and
4 Rehabilitation Act);
- 5 • Jorgensen v. Jack in the Box Rests., No. C95-0406 SAW, slip op. at 3 n.4, 7
6 (N.D. Cal. Feb. 28, 1997) (ex. 7) (Certifying class of persons with mobility
7 disabilities seeking monetary and injunctive relief under the ADA, Unruh Act,
8 CDPA and other state laws for alleged violations of architectural accessibility
9 requirements);
- 10 • Berlowitz v. Nob Hill Masonic Mgmt., Inc., No. C-96-0141 MHP, 1996 WL
11 724776 at *1, 5 (N.D. Cal. Dec. 6, 1996) (Certifying class consisting of all
12 persons in California with physical disabilities who were denied the right to full
13 and equal access to, and use and enjoyment of, a concert arena seeking
14 injunctive and monetary relief under the ADA, Unruh Act, CDPA and other
15 state laws for alleged violations of architectural accessibility requirements);
- 16 • Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 460 (N.D. Cal.
17 1994), modified, 158 F.R.D. 439, 443, 460 (1994) (Certifying a class of
18 disabled persons who used wheelchairs or who walked using aids who sought
19 monetary and injunctive relief for alleged violations of architectural
20 accessibility requirements of the ADA and the CDPA);
- 21 • Leiken v. Squaw Valley Ski Corp., Nos. CIV. S-93-505 LKK and CIV. S-93-
22 1622 LKK, 1994 U.S. Dist. LEXIS 21281, at *18-19 (E.D. Cal. June 28, 1994)
23 (Certifying a class of physically disabled persons seeking monetary and
24 injunctive relief for alleged architectural barriers that violated the ADA, Unruh
25 and the CDPA).

1 These cases are in accord with numerous decisions by courts across the country certifying
2 classes of individuals with disabilities challenging architectural barriers, transportation
3 barriers, and/or discriminatory policies.¹⁸

4 **B. The Proposed Class Meets the Requirements of Rule 23(a).**

5 **1. The Proposed Class Is So Numerous That Joinder Is Impracticable.**

6 Rule 23(a)(1) requires that a class be so numerous that joinder of all members is
7 impracticable. “Plaintiffs do not need to state the exact number of potential class members,
8 nor is a specific number of class members required for numerosity.” Bates, 204 F.R.D. at 444
9 (citing Arnold, 158 F.R.D. at 448). A court may make common sense assumptions to support a
10 finding that joinder would be impracticable. Colo. Cross-Disability Coalition, 184 F.R.D. 354
11 at 358; 1 Robert Newberg, Newberg on Class Actions, § 3:3 at 225 (4th ed. 2002) (hereinafter
12 “Newberg”) (“Where the exact size of the class is unknown but general knowledge and
13 common sense indicate that it is large, the numerosity requirement is satisfied.”). “Census data
14 are frequently relied on by courts in determining the size of proposed classes.” 1 Newberg

16
17 ¹⁸ See, e.g. Lightbourn v. County of El Paso, Texas, 118 F.3d 421, 423, 426 (5th
18 Cir. 1997); Alexander A. ex rel. Barr v. Novello, 210 F.R.D. 27, 38 (E.D.N.Y. 2002); Access
19 Now, Inc. v. Claire’s Stores, Inc., No. 00-14017-CIV., 2002 WL 1162422, at *3 (S.D. Fla.
20 May 7, 2002); Ass’n for Disabled Ams. v. Amoco Oil Co., 211 F.R.D. 457, 459, 466 (S.D. Fla.
21 2002); Marcus v. Kan., Dep’t of Revenue, 206 F.R.D. 509, 511, 513 (D. Kan. 2002); Neiberger
22 v. Hawkins, 208 F.R.D. 301, 318-20 (D. Colo. 2002); Nat’l Org. on Disability v. Tartaglione,
23 No. CIV. A. 01-1923, 2001 WL 1258089, at *5 (E.D. Pa. Oct. 22, 2001); Access Now, Inc. v.
24 AHM CGH, Inc., Case Number: 98-3004 CIV, 2000 U.S. Dist. LEXIS 14788, at *16-17 (S.D.
25 Fla. Jul. 12, 2000); Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd., 197 F.R.D. 522,
26 530 (S.D. Fla. 2000); Bacal v. Southeastern Pa. Transp. Auth., Civil Action No. 94-6497, 1995
WL 299029, at *8-9 (E.D. Pa. May 16, 1995); Boulet v. Cellucci, 107 F. Supp. 2d 61, 63, 81
(D. Mass. 2000); Duprey v. Conn. Dep’t of Motor Vehicles, 191 F.R.D. 329, 339-42 (D. Conn.
2000); Neff v. VIA Metro. Transit Auth., 179 F.R.D. 185, 196 (W.D. Tex. 1998); Anderson v.
Dep’t of Pub. Welfare, 1 F. Supp. 2d 456, 462 (E.D. Pa. 1998); Kathleen S. v. Dep’t of Pub.
Welfare, Civ. Act. No. 97-6610, 1998 U.S. Dist. LEXIS 2027, at *8-9 (E.D. Pa. Feb. 25,
1998); Guckenberger v. Boston Univ., 957 F. Supp. 306, 326-27 (D. Mass. 1997); Thrope v.
Ohio, 173 F.R.D. 483, 486, 491 (S.D. Ohio 1997); Civic Ass’n of the Deaf of New York City,
Inc. v. Giuliani, 915 F. Supp. 622, 634 (S.D.N.Y. 1996); Henrietta D. v. Giuliani, No. 95-CV-
0641, 1996 WL 633382, at *16 (E.D.N.Y. Oct. 25, 1996); McKay v. County Election
Comm’rs For Pulaski County, Arkansas, 158 F.R.D. 620, 626 (E.D. Ark. 1994).

1 § 3:3 at 226; see also Colo. Cross-Disability Coalition, 184 F.R.D. at 358; Arnold, 158 F.R.D.
2 at 448; Berlowitz, 1996 WL 724776, at *3.

3 Census figures demonstrate that there are approximately 151,580 non-institutionalized
4 people 16 years of age or older in California who use wheelchairs. (Ex. 2 at 2.) This number
5 does not include institutionalized people who use wheelchairs, people under the age of 16
6 years who use wheelchairs, or people who use scooters for mobility, all of whom are potential
7 members of the class. Further, the 220 restaurants covered by the proposed class had more
8 than 50 million transactions in 2002 alone. (Fox Decl. ¶ 14.) As a matter of common sense,
9 then, the class in this case is large.

10 In addition, the class is geographically dispersed, stretching from San Diego to Napa,
11 and the class members are difficult to identify. Both of these factors support a finding that
12 joinder in this case is impracticable. See, e.g., 1 Newberg, § 3:6 at 250-52 (and cases cited
13 therein) (joinder is impracticable where the class is geographically dispersed); Leiken, 1994
14 U.S. Dist. LEXIS 21281, at *13 (joinder is impracticable where class members are difficult to
15 identify).

16 This evidence is similar to, but even more compelling than, the evidence relied upon in
17 the Colorado Class Action to find numerosity. For example, that case involved only 38
18 restaurants, only 12 million customer transactions, a smaller geographic area (the Colorado
19 front range), and a statewide population of only about 15,369 wheelchair users. Colo. Cross-
20 Disability Coalition, 184 F.R.D. at 358.

21 For these reasons, joinder in this case is impracticable and the class satisfies Rule
22 23(a)(1).

23 **2. There Are Questions of Law and Fact Common to the Proposed Class.**

24 Rule 23(a)(2) requires that there be questions of law or fact that are common to the
25 class. “[T]he Ninth Circuit considers the requirements for finding commonality under Rule
26 23(a)(2) to be ‘minimal.’” Bates, 204 F.R.D. at 445 (quoting Hanlon, 150 F.3d at 1020). It is

1 sufficient for class members to have shared legal issues but divergent facts or, similarly, to
2 share a common core of facts but base their claims for relief on different legal theories. Bates,
3 204 F.R.D. at 445.

4 **a. Common Architectural Barriers.**

5 Numerous courts have held that where people who use wheelchairs encounter the same
6 types of barriers at a number of commonly-owned or affiliated public accommodations,
7 commonality is established and class certification is appropriate. See, e.g., Colo. Cross-
8 Disability Coalition, 184 F.R.D. at 359-60; Ambulatory Surgery, 197 F.R.D. at 526; Arnold,
9 158 F.R.D. at 449; Leiken, 1994 U.S. Dist. LEXIS 21281, at *14.

10 In Arnold, for example, a class of mobility-impaired persons challenged architectural
11 barriers at more than seventy of the defendant's California theaters. 158 F.R.D. at 444. In
12 holding that the commonality requirement was met, the court found:

13 Inadequate wheelchair accommodations at particular theaters are very likely to affect
14 all wheelchair-users in the same way. The same is true with respect to the affect of
15 accommodations for the semi-ambulatory on semi-ambulatory movie- goers. Thus the
16 state of such accommodations at defendant's various theaters, and the legal adequacy of
17 those accommodations, are issues of fact and law common to all of those disabled
18 persons affected by them.

19 Id. at 449.

20 In this case, the proposed class challenges the accessibility of a number of architectural
21 elements, including, for example, parking lots, entrances, queue lines, condiment and drink
22 dispensers, dining areas and restrooms. Like Arnold, the state of such elements at Defendant's
23 restaurants, and the legal adequacy of such elements, are issues of fact and law common to all
24 class members.

25 **b. Common Policies and Practices.**

26 Courts in a variety of situations have held that questions concerning allegedly

1 discriminatory policies,¹⁹ the lack of required policies,²⁰ and/or failure to enforce required
2 policies²¹ present factual and legal questions that meet the commonality requirement.

3 In this case, the proposed class challenges a number of Defendant’s policies, lack of
4 required policies, or failure to enforce required policies, and thus a number of common factual
5 and legal questions exist, including:

- 6 • Did Defendant’s pre-1998 policy require installation of queue lines that are
7 inaccessible to class members, and if so, did that policy violate the ADA, Unruh
8 Act and/or CDPA?
- 9 • Does Defendant have a policy of only making five percent of its seats, but not
10 five percent of its tables, accessible to class members, and if so, does that policy
11 violate the ADA, Unruh Act and/or CDPA?
- 12 • Has Defendant failed to create, or failed to enforce, policies concerning the
13 accessibility of its parking lots, including for example, policies relating to the
14 number, dimensions and location of accessible parking spots, as well as the

15
16 ¹⁹ See, e.g., 1 Newberg § 3:10 at 283 (“Common issues in actions charging
17 discrimination on the basis of race or sex are the presence of a discriminatory rule or practice
18 and a general policy of discrimination.”); see also Armstrong, 275 F.3d at 868 (“We have
19 previously held, in a civil-rights suit, that commonality is satisfied where the lawsuit
20 challenges a system-wide practice or policy that affects all of the putative class members.”);
21 Bates, 204 F.R.D. at 445-46 (holding that commonality was met where the class challenged the
22 employer’s policy requiring all employees to pass certain hearing standards.)

23 ²⁰ See, e.g., Lightbourn, 118 F.3d 421; Tartaglione, 2001 WL 1258089. In
24 Lightbourn and Tartaglione, both of which involved challenges by classes of individuals with
25 disabilities to inaccessible polling places, the commonality requirement was met because the
26 defendants did not have policies in place “direct[ing] local election officials to comply with
27 [29 U.S.C. § 794] and the ADA” by making polling places accessible. Lightbourn, 118 F.3d at
28 426; see also Tartaglione, 2001 WL 1258089, at *3 (allegation that defendant failed to have
policies ensuring that voters with mobility impairments had access to neighborhood polling
places was an allegation that defendant “engaged in a common course of conduct on a
classwide . . . basis”).

²¹ See, e.g., Cesar v. Pataki, No. 98CIV.8532 (LMM), 2000 WL 1154318, at *5-
6 (S.D.N.Y. Aug. 14, 2000) (holding that commonality requirement was met where there was a
common question as to whether the defendants’ failure to enforce and to assure compliance
with various statutory mandates violated Title VI.).

1 accessibility signage required in parking lots? If so, do such failures violate the
2 ADA, Unruh Act and/or CDPA?

- 3 • Has Defendant failed to create, or failed to enforce, policies concerning the
4 accessibility of the entrances to its restaurants, including for example, policies
5 concerning the force necessary to open doors at its entrances? If so, do such
6 failures violate the ADA, Unruh Act and/or CDPA?
- 7 • Has Defendant failed to create, or failed to enforce, policies concerning the
8 accessibility of its condiment and drink dispensers, dining rooms, and
9 restrooms? If so, do such failures violate the ADA, Unruh Act and/or CDPA?

10 These policies, lack of required policies, and failure to enforce required policies, all
11 result from a centralized decision-making process, making certification particularly
12 appropriate. See, e.g., Faulk v. Home Oil Co., 184 F.R.D. 645, 655 (M.D. Ala. 1999) (“[T]he
13 locus of decisionmaking authority is an important consideration when determining whether
14 class certification is appropriate for systemic discrimination claims involving multiple
15 facilities.” (citations omitted)). For example, Defendant’s accessibility policies and prototype
16 designs were all formulated at Defendant’s corporate headquarters in Irvine by management
17 personnel. This satisfies the commonality requirement. See, e.g., Buchanan v. Consolidated
18 Stores Corp., --- F.R.D. —, No. CIV.A. DKC 99-3736, 2003 WL 21800960, at *8 (D. Md. July
19 21, 2003) (“The individuals who made the [challenged] decisions did so from Defendants’
20 central headquarters in Pittsfield, Massachusetts, on behalf of their employer. The evidence of
21 centralized decisionmaking is, therefore, sufficient for the court to conclude that Plaintiffs have
22 fulfilled the commonality requirement.”).

23 Finally, because class members seek only the minimum statutory damages per offense,
24 damage issues for each class member are almost identical. As the court in Arnold put it:

25 Even with respect to damage claims, the most important issues -- the state of
26 accommodations at defendant’s various theaters during the three year statute of
limitations period prior to the filing of this suit, and the legal sufficiency thereof -- are

1 common to the subclass. The only damages issue not common to the subclass is the
2 simple question of the number of instances that individual class members were
3 aggrieved by inadequate accommodations at defendant's theaters during the period
4 covered by the lawsuit. (No individual quantum of damages issues will be presented,
for plaintiffs have stated that they will seek no more than the statutory minimum of . . .
damages for violations of California Civil Code § 54.1 and § 51, their only causes of
action that carry damage remedies.)

5 Arnold, 158 F.R.D. at 449.

6 For these reasons, the proposed class satisfies the commonality requirement of Rule
7 23(a)(2).

8 **3. Named Plaintiffs' Claims Are Typical of the Claims of the Class.**

9 Rule 23(a)(3) requires that the claims of the Named Plaintiffs be typical of those of the
10 class. The Ninth Circuit does “not insist that the named plaintiffs’ injuries be identical with
11 those of the other class members, only that the unnamed class members have injuries similar to
12 those of the named plaintiffs and that the injuries result from the same, injurious course of
13 conduct.” Armstrong, 275 F.3d at 869. “[I]n a public accommodations suit . . . where disabled
14 persons challenge the legal permissibility of architectural design features, the interests,
15 injuries, and claims of the class members are, in truth, identical such that any class member
16 could satisfy the typicality requirement for class representation.” Arnold, 158 F.R.D. at 450
17 (emphasis in original). Similarly, the court in Jorgensen held:

18 Indisputably, [the named plaintiff] is typical of the class as defined. She suffers a
19 mobility disability, manifested by her use of a wheelchair. She was hampered in her
20 ability to use a Jack in the Box restaurant due to its allegedly unaccommodating
21 structure (a narrow doorway). This and other physical obstacles would, presumably,
22 hinder the ability of persons with many types of mobility disabilities from fully
23 enjoying the goods and services offered by Defendants and would deter mobility
24 disabled persons from attempting to visit similarly unaccommodating Jack in the Box
25 restaurants.

22 Jorgensen, No. C95-0406 SAW, slip op. at 5-6 (ex. 7).

23 In this case, the Named Plaintiffs, like members of the proposed class, all use
24 wheelchairs or scooters for mobility and have encountered discriminatory barriers and policies
25 at Defendant’s restaurants. The effect of these barriers and policies is the same for the Named
26

1 Plaintiffs as for the class: it impairs their ability to eat at Defendant’s restaurants. Named
2 Plaintiffs challenge these barriers under the same statutes and remedial theories as the class.
3 Therefore, the Named Plaintiffs’ claims satisfy the typicality requirement of Rule 23(a)(3).

4 **4. Named Plaintiffs Will Fairly and Adequately Protect the Interests of the**
5 **Class.**

6 The final requirement of Rule 23(a), adequate representation, requires (1) that the
7 proposed representatives do not have conflicts of interest with the proposed class and (2) that
8 the representatives are represented by qualified counsel. Bates, 204 F.R.D. at 447. Adequate
9 representation is usually presumed in the absence of contrary evidence. 3 Newberg § 7:24 at
10 78.

11 The Named Plaintiffs in this case do not have conflicts of interest with the proposed
12 class. All are members of the class that they seek to represent, all seek to remedy allegedly
13 discriminatory architectural barriers and policies, all have a history of advocating for the rights
14 of persons with disabilities, and all will vigorously prosecute this case on behalf of the class.
15 (See generally Moeller, Muegge, Corbett and Yates Decls. (exs. 11-14).)

16 Plaintiffs’ counsel is qualified to represent the class. Plaintiffs’ counsel has extensive
17 experience in litigating disability rights actions and has been certified as class counsel in three
18 class actions under the ADA and other disability rights statutes, including the Colorado Class
19 Action against this Defendant. (Fox Decl. ¶ 3). Plaintiffs’ counsel has spoken and written
20 widely on the rights of persons with disabilities. (Id.) Finally, undersigned counsel is
21 thoroughly familiar with issues concerning people with disabilities because he is a tetraplegic
22 as a result of a sports injury and has used an electric wheelchair for over 15 years. (Id. at ¶ 2.)

23 **C. The Proposed Class Is Proper Under Rule 23(b)(2).**

24 Once a class has satisfied all four of the prerequisites of Rule 23(a), it must satisfy one
25 of the subsections of Rule 23(b). The class proposed herein satisfies Rule 23(b)(2) if Taco
26 Bell “acted or refused to act on grounds generally applicable to the class, thereby making

1 appropriate final injunctive relief or corresponding declaratory relief with respect to the class
2 as a whole . . .” and the representatives are seeking “final injunctive relief or corresponding
3 declaratory relief.” A class that seeks monetary relief as well as injunctive relief should be
4 certified under Rule 23(b)(2) if injunctive relief is the predominant form of relief sought by the
5 class. Molski v. Gleich, 318 F.3d 937, 949-50 (9th Cir. 2003).

6 The Ninth Circuit in Molski specifically addressed the question before this Court:
7 whether the requirements of Rule 23(b)(2) are met when a class of persons with disabilities
8 challenges architectural barriers and seeks injunctive and monetary relief under the ADA,
9 Unruh and CDPA. The court held that injunctive relief was the predominant form of relief
10 sought by the class, and thus the class met the requirements of Rule 23(b)(2). Id. at 950.
11 Several other courts have certified under Rule 23(b)(2) classes of persons with disabilities
12 seeking injunctive and monetary relief for alleged violations of the ADA, Unruh and CDPA.
13 See, e.g., Arnold, 158 F.R.D. at 461-62; Leiken, 1994 U.S. Dist. LEXIS 21281, at *15-16;
14 Jorgensen, slip op. at 3 n.4; Berlowitz, 1996 WL 724776, at *1, 5.

15 This result is consistent with the purpose of Rule 23(b)(2). “[S]ubdivision (b)(2) was
16 added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights
17 area,” in large part because “the class suit is a uniquely appropriate procedure in civil rights
18 cases, which generally involve an allegation of discrimination against a group as well as the
19 violation of rights of particular individuals.” 7A Charles Alan Wright et al., Federal Practice
20 and Procedure § 1775-76 (2d ed. 1986). Indeed, the Supreme Court has found that “[c]ivil
21 rights cases against parties charged with unlawful, class-based discrimination are prime
22 examples” of Rule 23(b)(2) classes. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614
23 (1997) (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697).

24 In this case, Named Plaintiffs allege that numerous architectural barriers exist at
25 Defendant’s restaurants, that these barriers result from Defendant’s centralized policies
26 concerning the design and accessibility of its restaurants, and that these barriers deny a large

1 number of people the full and equal enjoyment of the restaurants. The predominant relief
2 sought by the class is removal of those barriers, and correction of the discriminatory policies
3 that resulted in the barriers. Further, this case is identical in all relevant respects to Molski,
4 Arnold, Leiken, Jorgensen and Berlowitz, in which the courts held that the classes met Rule
5 23(b)(2)'s requirements. Thus the proposed class in this case should be certified pursuant to
6 Rule 23(b)(2).

7 **CONCLUSION**

8 For the reasons set forth above, Named Plaintiffs request that this Court, pursuant to
9 Rules 23(a) and 23(b)(2), certify a class in this case.

10
11 FOX & ROBERTSON

12
13 BY: /s/ Timothy P. Fox
14 Timothy P. Fox

15 Dated: September 16, 2003