

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

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

8

9 FRANCIE E. MOELLER et al,

10

Plaintiffs,

Case No. C 02 5849 MJJ ADR

11

v.

**PLAINTIFFS' REPLY BRIEF IN  
SUPPORT OF THEIR MOTION FOR  
CLASS CERTIFICATION**

12

TACO BELL CORP.,

13

Defendant.

**Date: October 21, 2003**

14

**Time: 9:30 a.m.**

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

Issues to Be Decided ..... 1

Facts ..... 2

I. Defendant Has Highly Centralized Policies. .... 2

II. The Differences in Defendant’s Restaurants are Largely Irrelevant ..... 3

Argument ..... 4

I. This Case Should Be Tried as a Class Action. .... 4

II. Defendant’s Commonality Argument Must Be Rejected ..... 5

A. Commonality is not Defeated by Alleged Differences in Defendant’s  
Restaurants. .... 6

B. The Requirements of Falcon are Easily Met in this Case. .... 7

C. The Class Shares Common Legal Issues. .... 8

III. Named Plaintiffs Have Met the Numerosity Requirement. .... 10

IV. Named Plaintiffs Will Adequately Represent the Class. .... 12

V. The Proposed Class Satisfies Rule 23(b)(2) ..... 14

Conclusion ..... 15

**TABLE OF AUTHORITIES**

**Cases**

1

2

3 Access Now, Inc. v. Walt Disney World Company, 211 F.R.D. 452 (M.D. Fla. 2001) . . . . . 7

4 Adamson v. Bowen, 855 F.2d 668 (10th Cir.1988) . . . . . 15

5 Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001) . . . . . 8

6 Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994) . . . 6, 9, 10, 12

7 Bates v. United Parcel Service, 204 F.R.D. 440 (N.D. Cal. 2001) . . . . . 12

8 Berlowitz v. Nob Hill Masonic Management, Inc., No. C-96-0141 MHP, 1996 WL 724776  
9 (N.D. Cal. Dec. 6, 1996) . . . . . 10

10 Califano v. Yamasaki, 442 U.S. 682 (1979) . . . . . 4

11 Colorado Cross-Disability Coalition v. Taco Bell Corporation, 184 F.R.D. 354  
12 (D. Colo. 1999) . . . . . 10

13 Gratz v. Bollinger, 123 S. Ct. 2411 (2003) . . . . . 4

14 Green v. Borg-Warner Protective Services Corporation, Nos. 95 Civ. 10419(RPP), 96 Civ.  
15 0038(RPP), 95 Civ. 5558(RPP), 96 Civ. 8740(RPP), 1998 WL 17719  
16 (S.D.N.Y. Jan. 16, 1998) . . . . . 10-11

17 General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982) . . . . . 5, 7, 8

18 Hanlon v. Chrysler Corporation, 150 F.3d 1011 (9th Cir. 1998) . . . . . 6

19 In re Catfish Anitrust Litigation, 826 F. Supp. 1019 (N.D. Miss.1993) . . . . . 13

20 In re West Coast Department Stores Antitrust Litigation, Civil No. C-79-2724 SW, 1979 WL  
21 1721 (N.D. Cal. Nov. 16, 1979) . . . . . 13

22 Kaplan v. Pomerantz, 131 F.R.D. 118 (N.D. Ill. 1990) . . . . . 13

23 Leiken v. Squaw Valley Ski Corp., Nos. CIV. S-93-505 LKK and CIV. S-93-1622 LKK, 1994  
24 U.S. Dist. LEXIS 21281 (E.D. Cal. June 28, 1994) . . . . . 12

25 Lieber v. Macy’s West, Case No. C-96 02955 MHP (BZ) (N.D. Cal.) . . . . . 12

26 Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) . . . . . 14, 15

27 Paper Systems Inc. v. Mitsubishi Corporation, 193 F.R.D. 601 (E.D. Wis. 2000) . . . . . 13

28 Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974) . . . . . 13

Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990) . . . . . 6

Surowitz v. Hilton Hotels, Inc., 383 U.S. 363 (1966) . . . . . 14

1 Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998) ..... 15

2 **Statutes**

3 42 U.S.C. 12181 ..... 8

4 42 U.S.C. 12183 ..... 8

5 Cal. Civ. Code § 54.1 ..... 9

6 **Regulations and Other Authorities**

8 28 C.F.R. § 36.406 ..... 8

9 Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ..... passim

10 Title 24 of the California Code of Regulations ..... passim

11 7A Charles Alan Wright et al., Federal Practice & Procedure § 1763 (2d ed. 1986) ..... 6

12 7A Charles Alan Wright et al., Federal Practice & Procedure § 1775 (2d ed. 1986) ..... 15

13 Fed. R. Civ. P. 23 ..... passim

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

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

8

9 FRANCIE E. MOELLER et al,

10

Plaintiffs,

Case No. C 02 5849 MJJ ADR

11

v.

**PLAINTIFFS' REPLY BRIEF IN  
SUPPORT OF THEIR MOTION FOR  
CLASS CERTIFICATION**

12

TACO BELL CORP.,

13

Defendant.

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

14

15

16

Plaintiffs' Motion for Class Certification ("Opening Brief" or "Opening Br.")

17

demonstrated that the accessibility barriers at issue in this litigation are widespread throughout Defendant's corporate restaurants. In its Response Brief in Opposition to Plaintiffs' Motion for Class Certification ("Defendant's Response" or "Def.'s Resp."), Defendant does not dispute this. Rather, Defendant seeks to apply class certification requirements that are not supported by Rule 23 or precedent and that are contrary to the numerous cases in the Ninth Circuit and elsewhere that have certified classes identical in all relevant respects to the proposed class in this case. Because Named Plaintiffs have demonstrated that the proposed class meets the requirements of Rules 23(a) and 23(b)(2), the class should be certified.

18

19

20

21

22

23

24

**ISSUES TO BE DECIDED**

25

26

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

27

28

1 **FACTS**

2 **I. Defendant Has Highly Centralized Policies.**

3 Named Plaintiffs demonstrated in their Opening Brief that Defendant’s accessibility  
4 policies, and its design and construction policies, are centralized.

5 Defendant does not dispute that its accessibility policies are centralized, but it contends  
6 that its design and construction policies are not centralized because “ultimate decisions  
7 affecting the design, layout and architectural features of a given store are made on an  
8 individualized basis by local managers and consultants . . .” (Def.’s Resp. at 6.) This  
9 contention is highly misleading because it relies on testimony discussing only one type of  
10 construction project: small remodeling projects at individual restaurants.<sup>1</sup>

11 Defendant’s policies governing other types of construction at Taco Bell -- including  
12 construction of new restaurants and multi-restaurant retrofit projects -- are highly centralized.

13 All newly-constructed Taco Bell restaurants are built in accordance with prototypes  
14 designed by the A&E department (located at Taco Bell’s corporate headquarters), and all large-  
15 scale retrofit projects are based on designs in “project books” prepared by the A&E department.  
16 (Deposition of Carlos Daniel Azalde (“Azalde Dep.”) at 18:14-20; 20:11-14; 30:11-18 (ex.  
17 1).)<sup>2</sup> Taco Bell then convenes meetings with its construction managers and facilities managers  
18 -- all of whom are employed by Taco Bell or its parent company, Yum!, Inc. -- to familiarize  
19 them with the prototypes or project designs, who then oversee the construction projects to  
20 make sure that they are done in compliance with the designs. (Azalde Dep. at 26:13-27:2;

21  
22 \_\_\_\_\_  
23 <sup>1</sup> For example, the indented quote from Mr. Azalde’s testimony on page seven of  
24 Defendant’s Brief is from a line of questions that began as follows:

25 Q: Moving on now to individual restaurants remodeling retrofits, were there any  
26 policies in place at Taco Bell Corporation to ensure that the applicable statutes  
27 or regulations concerning accessibility were met during that remodel of these  
28 individual restaurants?

26 Azalde Dep. at 32:12-17 (ex. 1).

27 <sup>2</sup> All references to exhibit numbers throughout the brief refer to Exhibits to the  
28 Second Declaration of Timothy P. Fox, filed concurrently with this brief.

1 27:24-28:16; 31:19-24 (ex. 1).) Contrary to Defendant’s implication, local contractors do not  
2 have the discretion to make any material modifications to these designs:

3 Q. You send out a prototype that calls for level entrances into the Taco Bell  
4 restaurant. The contractor, at the local level, decides to change the plans to  
5 insert steps with no ramps at all entrances. Is there something in place that  
6 would stop that from happening?

7 A. Yeah. The construction manager is there to ensure, again, that what’s built is  
8 for what was permitted. So the contractor can't take it upon himself to revise  
9 designs. The contractors generally will cut corners in which a construction  
10 manager should be able to catch deletions or omissions.

11 (Azalde Dep. at 27:11-23 (ex. 1)(emphasis added).)

12 In light of the relief sought in this case, it is Defendant’s policies concerning new  
13 construction and large-scale retrofit projects that are relevant. Named Plaintiffs seek an  
14 injunction requiring Taco Bell to build new restaurants in compliance with the Department of  
15 Justice Standards for Accessible Design (“DOJ Standards”)<sup>3</sup> and Title 24 of the California  
16 regulatory code (the “California Standards”), and to retrofit its existing restaurants so that they  
17 comply with these Standards. The fact that Taco Bell already has a centralized system in place  
18 governing new construction and large retrofit projects makes it particularly appropriate that the  
19 architectural barriers at its restaurants be addressed on a systemic, class-wide basis.

20 **II. The Differences in Defendant’s Restaurants are Largely Irrelevant.**

21 Defendant contends that alleged differences in the physical layout of its restaurants  
22 means that “[c]ertifying a class based on a plethora of alleged accessibility violations scattered  
23 across 220 locations would require an interminable parade of mini-trials . . .” (Def.’s Resp. at  
24 9.) This is wrong. Defendant does not explain how the alleged differences in restaurant  
25 layouts are relevant to the issues in this case, or why the alleged differences would require a  
26 “parade of mini-trials.” To the contrary, the issues here will largely be able to be resolved  
27 through a few key legal decisions that can then be applied in Defendant’s restaurants with a  
28 tape measure.

---

<sup>3</sup> See 28 C.F.R. pt. 36, app. A.

1 Take, for example, queue lines. Defendant claims that the alleged differences between  
2 queue lines in its restaurants is one reason why numerous mini-trials will be needed. (Def.'s  
3 Resp. at 8-9.) But, as Named Plaintiffs demonstrated in their Opening Brief, all of Defendant's  
4 queue lines installed before the early 1990s were narrower than 36 inches. (Opening Br. at 12.)  
5 This violated the California Standard in effect then and now that required cafeteria lines to be  
6 at least 36 inches wide, and this Standard has no exceptions based on the configuration of the  
7 queue line or the layout of the restaurant. (Id.) Thus a single decision by this Court on this  
8 point will apply to all restaurants with queue lines narrower than 36 inches without the need for  
9 separate mini-trials. Similarly, from the early 1990s until approximately 1998, the width at the  
10 turn in queue lines was only 42 inches, instead of 60 inches as required by the Standards. (Id.)  
11 Thus a decision by this Court on this issue will apply to a large number of restaurants.

12 This is also true with respect to, for example, the accessibility of Defendant's parking  
13 lots, which can be determined by a single ruling. Both sets of Standards require that alterations  
14 strictly comply with applicable accessibility requirements. (See Opening Br. at 5-6.) In  
15 December 1997, Taco Bell conducted a project to restripe and repair the parking lots at all of  
16 its corporate restaurants, and this project was supposed to include a review and correction of  
17 accessible parking. (Id. at 13.) Pursuant to the alterations provisions of both the California and  
18 DOJ Standards, as a result of this project, Defendant's parking lots must strictly comply with  
19 the applicable provisions of these Standards, and a single order to this affect will apply to all of  
20 Defendant's restaurants.

## 21 ARGUMENT

### 22 **I. This Case Should Be Tried as a Class Action.**

23 “[T]he class-action device save[s] the resources of both the courts and the parties by  
24 permitting an issue potentially affecting every [class member] to be litigated in an economical  
25 fashion.” Gratz v. Bollinger, 123 S. Ct. 2411, 2426 n.17 (2003) (quoting Califano v.  
26 Yamasaki, 442 U.S. 682, 701 (1979)). As demonstrated above and in Named Plaintiffs’  
27 Opening Brief, Taco Bell is a centrally-run company, with centralized design and construction  
28

1 policies, that operates 220 very similar restaurants. Only through the class action device can  
2 the ADA violations at these restaurants be tried and remedied efficiently. Although Plaintiffs  
3 do not believe that this case will require 220 “mini-trials,” the alternative is at least 220  
4 separate cases, in multiple fora, involving largely overlapping discovery of centralized policies  
5 and design documents, repeated briefing of similar issues, and potentially varying or even  
6 contradictory standards for each restaurant in California. This would be phenomenally  
7 wasteful of both judicial and party resources, and the difficulty of implementing different or  
8 conflicting standards would likely result in the perpetuation of violations.

9 The alternative that a class action offers is a single case, with unified discovery and a  
10 single set of motions and legal rulings to be applied to all 220 restaurants. The uniform  
11 standards such a ruling would produce would be straightforward to implement and monitor,  
12 achieving both procedural efficiency and substantive results.

13 **II. Defendant’s Commonality Argument Must Be Rejected.**

14 Named Plaintiffs in their Opening Brief identified numerous questions of law and fact  
15 common to the class. (Opening Br. at 17-21.) Defendant does not dispute that these questions  
16 exist, or that they are common to the class. Instead, Defendant -- relying on General Telephone  
17 Co. of the Southwest v. Falcon, 457 U.S. 147 (1982) -- asserts that the alleged physical  
18 differences in its restaurants defeat commonality. (Def.’s Resp. at 6-11.) As demonstrated  
19 above, this argument rests on incorrect factual premises. Taco Bell has centralized policies  
20 governing the design and construction of its physically very similar restaurants. Defendant’s  
21 argument also fails because it is (1) contrary to the proper analysis of the commonality issue,  
22 (2) based on an erroneous interpretation of Falcon, and (3) based on an erroneous interpretation  
23 of applicable standards.<sup>4</sup>

---

26 <sup>4</sup> Defendant’s argument that Named Plaintiffs’ have not met the typicality  
27 requirement is based on its argument that Named Plaintiffs have not met the commonality  
28 requirement. Def.’s Resp. at 14. Because, as demonstrated herein, Named Plaintiffs have  
established commonality, Defendant’s typicality argument must be rejected.

1 Finally, Defendant asserted that commonality was not met because Named Plaintiffs  
2 seek deterrence damages on behalf of the class.<sup>5</sup> This is not the case: Named Plaintiffs do not  
3 seek deterrence damages on behalf of the class. See Arnold v. United Artists Theatre Circuit,  
4 Inc., 158 F.R.D. 439, 453 (N.D. Cal.), modified, 158 F.R.D. 439, 443, 460 (1994) (holding that  
5 deterrence claims are not appropriate for class certification).

6  
7 **A. Commonality is not Defeated by Alleged Differences in Defendant’s**  
8 **Restaurants.**

9 The commonality requirement is “construed permissively.” Hanlon v. Chrysler Corp.,  
10 150 F.3d 1011, 1019 (9th Cir. 1998). “Class suits for injunctive or declaratory relief by their  
11 very nature often present common questions satisfying Rule 23(a)(2).” 7A Charles Alan  
12 Wright et al., Federal Practice and Procedure § 1763 (2d ed. 1986). Significantly, “[a]ll  
13 questions of fact and law need not be common to satisfy the rule.” Hanlon, 150 F.3d at 1019.  
14 Thus even if Defendant’s restaurants are different (which, as demonstrated above, is largely not  
15 the case), because it is undisputed that the class shares numerous common legal and factual  
16 questions, the proposed class satisfies the commonality requirement.

17 Fundamentally, Defendant’s focus on differences in its restaurants misses the point of  
18 the commonality analysis. The proper question is what legal and factual issues are common to  
19 the members of the putative class, not what legal and factual issues are common to the  
20 restaurants that are the subject of the lawsuit. Defendant’s focus would only make sense if  
21 California had only 220 people who used wheelchairs or scooters and each patronized one and  
22 only one Taco Bell restaurant not patronized by any other. This is, of course, not the case.  
23 Instead, each restaurant is open for business to the entire class, and the access barriers in each

---

24 <sup>5</sup> (Def.’s Resp. at 11-12.) Defendant also incorrectly contends that commonality  
25 is defeated because the class seeks any damages. Named Plaintiffs seek only the minimum  
26 statutory damages per violation, and because such damages are recoverable without proof of  
27 actual damages, the only damages issue not common to the class “is the simple question of the  
28 number of instances that individual class members were aggrieved” by Defendant’s violations.  
Arnold, 158 F.R.D. at 449; see also Six (6) Mexican Workers v. Ariz. Citrus Growers, 904  
F.2d 1301, 1306 (9th Cir. 1990) (holding that because statutory damages under Farm Labor  
Contractor Registration Act are not dependent on proof of actual injury, “the district court was  
not obligated to require individual proof of injury from each class member.”)

1 restaurant will affect the entire class in the same way. The fact that there are multiple barriers  
2 in multiple restaurants does not change this analysis. It may make the case more complex than  
3 a single-restaurant class action -- though, as explained above, far less complex and more  
4 efficient than 220 separate cases -- but it is not relevant to the question of commonality.

5 The only case cited by Defendant -- Access Now, Inc. v. Walt Disney World Co., 211  
6 F.R.D. 452 (M.D. Fla. 2001) -- in which a court refused to certify a class challenging  
7 architectural barriers at multiple sites is thus wrong, but also easily distinguishable. The  
8 plaintiffs in Access Now provided only “conclusory allegations” that the defendant’s policies  
9 violated the ADA. Id. at 454-55. In this case, Named Plaintiffs have specifically identified the  
10 deficiencies in Defendant’s policies. (Opening Br. at 11-13, 19-20.) In addition, the facilities  
11 at issue in Access Now included fifteen hotels, two theme parks and a monorail system, and  
12 each facility possessed a unique architectural style. Access Now, 211 F.R.D. at 453 n.2 & 455.  
13 In contrast, this case involves restaurants that share very similar architectural elements built in  
14 accordance with prototypes and centralized design and construction policies.

15 **B. The Requirements of Falcon are Easily Met in this Case.**

16 In Falcon, the plaintiff, a Mexican-American, alleged that he had not been promoted for  
17 discriminatory reasons. Falcon, 457 U.S. at 149. The class he sought to represent, however,  
18 was far broader than Mexican-American employees who were denied promotions. Rather, the  
19 proposed class, certified by the district court, consisted of ““all hourly Mexican American  
20 employees who have been employed, are employed, or may in the future be employed and all  
21 those Mexican-Americans who have applied or would have applied for employment had the  
22 Defendant not practiced racial discrimination in its employment practices.”” Id. at 151.

23 The Court found that the purpose of the Rule 23(a) requirements was to ““limit the class  
24 claims to those fairly encompassed by the named plaintiff’s claims.”” Id. at 156. The plaintiff  
25 in Falcon had brought an “across-the-board” class action, in that he sought to represent class  
26 members who had suffered types of discrimination that he did not suffer. In other words, there  
27 was a gap between his claim for discrimination in promotion, and the claims of the class  
28

1 members for discrimination in all employment practices. Id. at 157. The Court held that in  
2 across-the-board class actions, in order for the representative’s claims to fairly encompass the  
3 claims of class members, there must be evidence to bridge this gap, by, for example, showing  
4 that both claims resulted from a “general policy of discrimination.” Id. at 158, 159 n.15.

5 The case at bar is not an across-the-board class action. The Named Plaintiffs seek to  
6 represent only persons who, like them, use wheelchairs or scooters for mobility -- they do not  
7 seek to represent persons with other types of disabilities.<sup>6</sup> The Named Plaintiffs seek to  
8 represent persons who, like them, suffered discrimination as a result of architectural barriers at  
9 Defendant’s restaurants -- they do not seek to represent persons with disabilities who suffered  
10 employment discrimination. Thus the Named Plaintiffs’ claims fairly encompass the claims of  
11 class members as required by Falcon.

12 **C. The Class Shares Common Legal Issues.**

13 Although such an analysis would not defeat class certification, Defendant is wrong that  
14 this case will require a store-by-store analysis. Defendant’s contention is based on three legal  
15 issues (see Def.’s Resp. at 9-10); in each case, Defendant has misconstrued the relevant statute.

16 First, Defendant contends that the “readily achievable” standard under the ADA, see 42  
17 U.S.C. § 12181(b)(2)(A)(iv), will require store-specific evaluations. (Id.) As discussed in the  
18 Opening Brief, restaurants built after January 1993, and alterations that took place after January  
19 1992, must comply with the DOJ Standards,<sup>7</sup> and the readily achievable standard does not  
20 apply to these restaurants.

21 Further, many architectural barriers violated California Standards, which have been in  
22 place since 1970. The readily achievable standard is irrelevant to these barriers. For example,  
23 as set forth above, Defendant’s pre-ADA queue lines violated the California Standards, and  
24 thus must be made accessible regardless of whether it is readily achievable to do so.

25 \_\_\_\_\_  
26 <sup>6</sup> Indeed, the Ninth Circuit has affirmed certification of a class consisting of  
27 persons with differing disabilities. See Armstrong v. Davis, 275 F.3d 849, 869-70, 879 (9th  
28 Cir. 2001), cert. denied, 537 U.S. 812 (2002).

<sup>7</sup> 42 U.S.C. § 12183(a); 28 C.F.R. § 36.406.

1 Finally, even where a readily achievable analysis is necessary, this analysis involves  
2 questions that are common to the class. For example, the readily achievable issue “hinges, in  
3 part, on various corporation-wide factors such as the availability of resources” and thus  
4 presents a question common to the class. Arnold, 158 F.R.D. at 449. In addition, because  
5 Defendant’s restaurants are very similar, the costs and methods of removing particular types of  
6 barriers will be similar among its restaurants. For example, if in pre-1993 restaurants, lowering  
7 drink dispensers is evaluated under the readily achievable standard, the cost of doing so will be  
8 virtually identical among the restaurants, thereby creating another issue common to the class.

9 Second, Defendant contends that store-specific determinations will be necessary  
10 because the California Disabled Persons Act (“CDPA”) allegedly permits deviations from that  
11 Act if they are necessary to comply with other existing laws. (Def.’s Resp. at 10.) This is an  
12 apparent reference to Cal. Civ. Code § 54.1(a)(1), which states that “[i]ndividuals with  
13 disabilities shall be entitled to full and equal access . . . to accommodations, advantages,  
14 facilities [of] places of public accommodation . . . subject only to the conditions and limitations  
15 established by law, or state or federal regulation, and applicable alike to all persons.” This  
16 section has never been interpreted to allow a public accommodation to deviate from the  
17 California Standards, and Defendant fails to cite a single statute or regulation that it contends  
18 would prevent it from complying with the Standards. Even if such a statute or regulation  
19 existed, its interpretation and application to Taco Bell restaurants are issues common to the  
20 class.

21 Finally, Defendant asserts that store-by-store evaluations will be necessary because  
22 deviations from the California Standards are permissible when compliance would create an  
23 unreasonable hardship. (Def.’s Resp. at 10.) This is simply wrong. A public accommodation  
24 must apply to the relevant enforcing agency for the unreasonable hardship exception at the time  
25 of construction, and the “[t]he details of any finding of unreasonable hardship [by the enforcing  
26 agency] shall be recorded in the files of the enforcing agency.” Cal. Standards § 222-U (see ex.  
27 2). Defendant has presented no evidence that it has ever applied for an undue hardship

1 exception, nor has it produced such evidence in discovery. Having never applied for this  
2 exception, Defendant cannot seek to rely on it after the fact.

3 **III. Named Plaintiffs Have Met the Numerosity Requirement.**

4 As set forth in Named Plaintiffs' Opening Brief, joinder in this case is impracticable  
5 because: (1) census figures, in combination with Taco Bell's annual transaction counts,  
6 demonstrate as a matter of common sense that the class is large; (2) the class is geographically  
7 dispersed; and (3) the class members are difficult to identify. (Opening Br. at 16-17.)

8 Defendant does not dispute that the class is geographically dispersed or that class  
9 members are difficult to identify. Rather, Defendant challenges Named Plaintiffs' use of  
10 census information, and contends that Named Plaintiffs have not identified a sufficient number  
11 of class members to establish numerosity. (Def.'s Resp. at 12-14.)

12 Numerous cases involving violations of DOJ or California Standards have relied on  
13 population statistics to show numerosity. See, e.g., Colorado Cross-Disability Coalition v.  
14 Taco Bell Corp., 184 F.R.D. 354, 358 (D. Colo. 1999); Arnold, 158 F.R.D. at 448; Berlowitz v.  
15 Nob Hill Masonic Mgmt., Inc., No. C-96-0141 MHP, 1996 WL 724776, at \*3 (N.D. Cal. Dec.  
16 6, 1996). The nature of such cases make population statistics particularly appropriate to  
17 establish numerosity. The evidence presented by Named Plaintiffs indicates (1) that a large  
18 number of persons who use wheelchairs or scooters have visited Defendant's restaurants, and  
19 (2) that many or all of Defendant's restaurants have architectural barriers (a fact not disputed in  
20 Defendant's Response.) From this evidence, and as a matter of common sense, a large number  
21 of persons who use wheelchairs or scooters have encountered architectural barriers.

22 The cases cited by Defendant are different. In these cases, unlike architectural barrier  
23 cases, there is no evidence that the population group actually suffered discrimination or was  
24 otherwise harmed. For example, in Green v. Borg-Warner Protective Services Corp., Nos. 95  
25 Civ. 10419(RPP), 96 Civ. 0038(RPP), 95 Civ. 5558(RPP), 96 Civ. 8740(RPP), 1998 WL  
26 17719, at \*1 (S.D.N.Y. Jan. 16, 1998), homeless persons who lived at shelters sought class  
27 certification based on excessive force by security personnel at the shelters. The court held that

1 the fact that 4,000 people resided in shelters each day was not sufficient to establish numerosity  
2 because there was no evidence that their rights were being violated. Id. at \*3.

3 Because Named Plaintiffs have demonstrated that many or all of Defendant's  
4 restaurants have architectural barriers, the only way that this class is not numerous is if  
5 virtually none of Defendant's 50 million transactions involved persons who use wheelchairs or  
6 scooters. This conclusion defies common sense. There are approximately 151,580  
7 non-institutionalized Californians 16 years of age or older who use wheelchairs. This  
8 represents .68% of the population of California, and this number does not include  
9 institutionalized people who use wheelchairs, people under the age of 16 years who use  
10 wheelchairs, or people who use scooters for mobility, all of whom are potential members of the  
11 class. Applying this percentage to the total number of transactions at Taco Bell corporate  
12 restaurants in 2002 results in an estimate of 340,000 transactions involving customers who use  
13 wheelchairs. (See Resps. to Def.'s First Set of Interrogs. & Reqs. for Produc. of Docs. to Pls.,  
14 Interrog. Resp. No. 2 ("Interrog. Resp. No. 2")(ex. 3).) This is a very conservative estimate  
15 because it does not include the categories described above, nor does it include transactions  
16 within the statute of limitations for years other than 2002.

17 Although one customer may account for several transactions during a year, even based  
18 on the far-fetched assumption that each class member ate at Taco Bell 100 times in 2002, the  
19 number of class members would exceed 3,000. (See Interrog. Resp. No. 2 at 3. (ex. 3).)

20 Further, the Colorado Taco Bell Class Action involved 40 restaurants, or less than 20%  
21 of the number of restaurants at issue in this case, and challenged only two architectural barriers.  
22 The percentage of persons who use wheelchairs in Colorado is smaller than in California. (Ex.  
23 4 at P26.) Approximately 115 class members responded to the settlement notice. Because the  
24 damages that each class member received in Colorado (\$50) is much smaller than the amount  
25 that each California class member may be entitled to (either \$1,000 or \$4,000 per instance of  
26 discrimination), it is virtually certain that the response rate will be higher in California. (See

1 Pls.' First Supplement to their Resps. to Def.'s First Set of Interrogs. & Reqs. for Produc. of  
2 Docs. to Pls. at 2 (ex. 5).)

3 Finally, the class action in Lieber v. Macy's West, Case No. C-96 02955 MHP (BZ)  
4 (N.D. Cal.), like the case at bar, was brought on behalf of a class of Californians with mobility  
5 disabilities based on alleged architectural barriers at a department store chain. The action  
6 settled, and approximately 1,350 class members with compensable claims responded to the  
7 settlement notice. Because there were only 72 department stores at issue in Macy's, or less  
8 than 1/3 of the number of restaurants at issue in this case, the number of class members in this  
9 case likely significantly exceeds the number of class members in Macy's. (See Interrog. Resp.  
10 No. 2 at 3 (ex. 3).)

11 Defendant also contends that Named Plaintiffs have not identified a sufficient number  
12 of class members to establish numerosity. (Def.'s Resp. at 12-14.) This ignores the fact that  
13 the difficulty of identifying class members supports class certification. See, e.g., Arnold, 158  
14 F.R.D. at 448 (holding that numerosity requirement was met, in part because "[b]y the very  
15 nature of this class, its members are unknown and cannot be readily identified."). As one court  
16 put it in responding to the identical argument made here: "No authority supports limiting the  
17 putative class to those who have come forward with actual or potential claims. The difficulties  
18 of identifying additional class members at this stage in the litigation support certification,  
19 rather than undercutting it." Leiken v. Squaw Valley Ski Corp., Nos. CIV. S-93-505 LKK and  
20 CIV. S-93-1622 LKK, 1994 U.S. Dist. LEXIS 21281, at \*13 n.8 (E.D. Cal. June 28, 1994).

21 **IV. Named Plaintiffs Will Adequately Represent the Class.**

22 Defendant does not dispute that (1) Named Plaintiffs do not have conflicts of interest  
23 with the proposed class, and (2) Named Plaintiffs are represented by qualified counsel. This  
24 satisfies the adequate representation requirement. Bates v. United Parcel Serv., 204 F.R.D.  
25 440, 447 (N.D. Cal. 2001).

26 Defendant claims that Named Plaintiffs are inadequate representatives because there is  
27 no evidence that they have the financial resources to litigate this action. (Def.'s Resp. at 18.)

1 Numerous courts have held that a named plaintiff's financial status is irrelevant to class  
2 certification. See, e.g., In re West Coast Dep't Stores Antitrust Litig., Civil No. C-79-2724  
3 SW, 1979 WL 1721, at \*1 (N.D. Cal. Nov. 16, 1979) (holding that "inquiry into the financial  
4 affairs of the named plaintiff [was] irrelevant and not within the proper scope of discovery");  
5 Sanderson v. Winner, 507 F.2d 477, 479 (10th Cir. 1974) ("We generally eschew the question  
6 whether litigants are rich or poor."). This is particularly true where, as here, Named Plaintiffs'  
7 counsel is advancing litigation costs. See, e.g., Kaplan v. Pomerantz, 131 F.R.D. 118, 125  
8 (N.D. Ill. 1990).

9 Defendant also contends that Named Plaintiffs are inadequate representatives because  
10 they purportedly are unfamiliar with the design and construction specifications set forth in the  
11 Standards. (Def.'s Resp. at 15-18.) In other words, although all of the Named Plaintiffs  
12 testified in detail about the architectural barriers they encountered, their inability to state the  
13 precise width of queue lines, or the maximum door force, required by the Standards, renders  
14 them inadequate. This is an absurd standard not required by Rule 23.

15 It is astonishing to hear Taco Bell -- a multi-billion dollar corporation with internal  
16 legal and architecture departments under a legal obligation to comply with the Standards that  
17 has consistently demonstrated an ignorance of those Standards -- complain that the Named  
18 Plaintiffs are inadequate representatives because they cannot recite the design specifications.

19 In any event, Taco Bell's argument has been rejected by numerous courts. "[C]ourts  
20 have held that a representative plaintiff must be conscientious, [but] there is no requirement  
21 that the representative plaintiff be knowledgeable of either the allegations or the legal theories  
22 on which the lawsuit rests." Paper Sys. Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 609 (E.D.  
23 Wis. 2000); see also In re Catfish Anitrust Litig., 826 F. Supp. 1019, 1037 (N.D. Miss. 1993)  
24 ("An antitrust litigant is not expected to appreciate the finer points of the Sherman Act, Clayton  
25 Act, or the Federal Rules of Civil Procedure governing class action certification."); Kaplan,  
26 131 F.R.D. at 122 ("As long as the plaintiff has some basic knowledge of the lawsuit and is  
27 capable of making intelligent decisions based upon his lawyers' advice, there is no reason that  
28

1 he may not delegate further factual and legal investigation to his attorneys.”). Thus in Surowitz  
2 v. Hilton Hotels Corp., 383 U.S. 363, 366, 373-74 (1966), the Supreme Court held that the  
3 named plaintiff satisfied the adequate representation requirement even though her deposition  
4 showed that she did not understand the complaint at all, was unable to explain the statements  
5 made in the complaint, had a very small degree of knowledge as to what the lawsuit was about,  
6 and was ignorant of the defendants’ names and the nature of their alleged misconduct.

7 Even though Named Plaintiffs have not committed the Standards to memory, they are  
8 clearly committed to the rights of persons with disabilities, and to the class in this case, and  
9 Defendant has presented no facts to the contrary. They are adequate representatives.

10 **V. The Proposed Class Satisfies Rule 23(b)(2).**

11 As set forth in Named Plaintiffs Opening Brief, the Ninth Circuit in Molski v. Gleich,  
12 318 F.3d 937, 949-50 (9th Cir. 2003), decided the precise question before this Court, holding  
13 that a class of persons with disabilities seeking injunctive relief under the ADA, and statutory  
14 damages under the Unruh Civil Rights Act and the CDPA, met the requirement of Rule  
15 23(b)(2). (Opening Br. at 22-23.) The court in Molski also held that notice should be sent to  
16 the class, and Named Plaintiffs have no objection if the Court believes that notice is  
17 appropriate in this case.

18 Defendant does not contend that the proposed class fails to meet Rule 23(b)(2). Rather,  
19 Defendant claims that in notes 15 and 16 of the Molski opinion, the Ninth Circuit adopted a  
20 “functional equivalent” of a Rule 23(b)(3) analysis, and Defendant then argues that the class in  
21 this case does not meet the Rule 23(b)(3)’s requirement that “questions of law and fact  
22 predominate over any questions affecting only individual members.” (Def.’s Resp. at 21-22.)  
23 Note 15 discusses the method of determining whether Rule 23(b)(2)’s requirement that  
24 injunctive relief predominate over monetary relief is satisfied. Molski, 318 F.3d at 950 n.15.  
25 Note 16 discusses due process concerns raised when a class settlement waives class members’  
26 claims to treble damages. Id. at 951 n.16. Nothing in notes 15 or 16 (or anywhere else in the  
27  
28

1 decision) even suggests that the Ninth Circuit was adopting a Rule 23(b)(3) analysis to evaluate  
2 a Rule 23(b)(2) class.

3 The Ninth Circuit in Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998), specifically  
4 rejected the argument that the Rule 23(b)(3) requirements apply to a Rule 23(b)(2) class:

5 We note that with respect to 23(b)(2) in particular, the government's dogged focus on  
6 the factual differences among the class members appears to demonstrate a fundamental  
7 misunderstanding of the rule. Although common issues must predominate for class  
8 certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). It is  
9 sufficient if class members complain of a pattern or practice that is generally applicable  
10 to the class as a whole. Even if some class members have not been injured by the  
11 challenged practice, a class may nevertheless be appropriate. See 7A Charles Alan  
12 Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1775 (2d  
13 ed. 1986) ("All the class members need not be aggrieved by or desire to challenge the  
14 defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)."); see  
15 also Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir.1988) (emphasizing that although  
16 "the claims of individual class members may differ factually," certification under Rule  
17 23(b)(2) is a proper vehicle for challenging "a common policy").

18 Moreover, the claims raised by the plaintiffs in this action are precisely the sorts of  
19 claims that Rule 23(b)(2) was designed to facilitate. As the Advisory Committee Notes  
20 explain, 23(b)(2) was adopted in order to permit the prosecution of civil rights actions.

21 Id. at 1047.

22 Named Plaintiffs seek certification under Rule 23(b)(2), and thus the requirements of  
23 Rule 23(b)(2), and not those of Rule 23(b)(3), apply. As demonstrated by Molski (and the  
24 numerous other cases cited in the Opening Brief), the proposed class satisfies Rule 23(b)(2).

### 25 CONCLUSION

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

28 FOX & ROBERTSON

BY: /s/ Timothy P. Fox  
Timothy P. Fox

Dated: October 8, 2003