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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANCIE E. MOELLER, et al.,

Plaintiffs,

No. C 02-5849 PJH

v.

ORDER

TACO BELL CORPORATION,

Defendant.

Before the court is the motion of defendant Taco Bell Corporation (“Taco Bell”) for an order decertifying the class, and the motion of the named plaintiffs for an order altering and amending the class certification order. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS Taco Bell’s motion in part and DENIES it in part, and DENIES plaintiffs’ motion.¹

BACKGROUND

This case was originally filed on December 17, 2002, as a proposed class action, challenging architectural barriers at corporate-owned Taco Bell restaurants in California. The complaint asserted a right to injunctive relief under the Americans With Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12181, et seq., as well as a state law claim for damages under the Unruh Act, Cal. Civ. Code § 51, et seq.

The original complaint alleged that the named plaintiffs were seeking “to maintain this action as a class action under Rule 23(b)(2) and/or Rule 23(b)(3).” Cplt ¶ 20. The complaint alleged further that “[m]oney damages alone are inadequate,” and that “the primary relief sought is injunctive relief.” Cplt ¶¶ 4, 25.

¹ As the motions are fully briefed, the court has heard numerous dispositive motions, and a trial has occurred, the court determined that a further hearing was unnecessary.

1 On August 4, 2003, plaintiffs amended the complaint to plead an additional state law
2 claim for relief under the California Disabled Persons Act (“CDPA”), Cal. Civ. Code § 54, et
3 seq. In all other respects, the first amended complaint (“FAC”) is identical to the original
4 complaint, including that the named plaintiffs are seeking “to maintain this action as a class
5 action under Rule 23(b)(2) and/or Rule 23(b)(3),” and that “the primary relief sought is
6 injunctive relief.” FAC ¶¶ 20, 25.

7 In September 2003, plaintiffs filed a motion seeking certification of a class under
8 Federal Rule of Civil Procedure 23(b)(2). The proposed class consisted of

9 [a]ll individuals with disabilities who use wheelchairs or electric scooters for
10 mobility who, at any time on or after December 17, 2001, were denied, or are
11 currently being denied, on the basis of disability, full and equal enjoyment of
the goods, services, facilities, privileges, advantages, or accommodations of
California Taco Bell.

12 The motion was granted on February 23, 2004. See Moeller v. Taco Bell Corp., 220
13 F.R.D. 604 (N.D. Cal. 2004). The order noted that “[t]he putative class seeks an injunction
14 ordering [d]efendant to adopt policies to ensure access for customers who use wheelchairs
15 and scooters, and to bring all of its facilities into compliance with [the ADA, the Unruh Act,
16 and the DCPA].” Id. at 605. The class was certified under Rule 23(b)(2) for injunctive relief
17 and minimum statutory damages under the Unruh Act and the CDPA. See id. at 608-14.
18 Plaintiffs did not seek certification of a Rule 23(b)(3) class, and the court did not address
19 any such alternative certification.

20 On October 4, 2004, the court appointed a Special Master, who surveyed the
21 approximately 220 restaurants at issue. The results of his surveys are in the court file.
22 See Docket Nos. 216 through 240. In February 2007, the plaintiffs moved for partial
23 summary judgment based on the Special Master’s measurements as to specified
24 architectural elements. On August 8, 2007, the court granted the motion in part and denied
25 it in part. See Moeller v. Taco Bell Corp., 2007 WL 2301778 (N.D. Cal. Aug. 8, 2007).

26 The case was reassigned to the undersigned district judge in April 2008. In June
27 2011, the court conducted an exemplar trial concerning Restaurant 4518 in San Pablo,
28 California. On October 5, 2011, following the benchmark trial regarding Restaurant 4518,

1 the court issued Findings of Fact and Conclusions of Law (“Findings”), ruling that “plaintiffs
2 have established that classwide injunctive relief is warranted, with regard to maintaining
3 compliance, both as to Taco Bell 4518, and as to all corporate Taco Bell restaurants in
4 California.” Moeller v. Taco Bell Corp., 816 F.Supp. 2d 831, 868-69 (N.D. Cal. 2011).

5 Following the Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes, ___ U.S.
6 ___, 131 S.Ct. 2541 (2011), Taco Bell filed the present motion seeking decertification of the
7 plaintiff class. Plaintiffs seek an order “altering and amending” the class certification order
8 to certify the claims for injunctive relief and the “issue” of liability for damages under Rule
9 23(b)(2), and to certify the “issue” of the amount of damages under Rule 23(b)(3).

10 **DISCUSSION**

11 A. Legal Standards

12 Federal trial courts have broad discretion to manage the conduct of litigation and to
13 structure trials in a manner that expedites the proceedings while achieving the core
14 purposes of a trial and protecting litigants' rights. Trial courts have “both the duty and the
15 broad authority to exercise control over a class action and to enter appropriate orders
16 governing the conduct of counsel and the parties.” Hoffmann-La Roche Inc. v. Sperling,
17 493 U.S. 165, 171 (1989).

18 “A district court's order respecting class certification is ‘inherently tentative’ prior to
19 final judgment on the merits.” Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 633
20 (9th Cir. 1982). Thus, an order granting class certification may be altered or amended at
21 any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C); see also General Tel. Co. of
22 SW v. Falcon, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered, the
23 judge remains free to modify it in light of subsequent developments in the litigation.”). In
24 addition, “[w]hen appropriate, an action may be brought or maintained as a class action
25 with respect to certain issues.” Fed. R. Civ. P. 23(c)(4).

26 The court may decertify a class if the requirements for class certification under
27 Federal Rule of Civil Procedure 23 are not met. See General Tel. Co. of SW v. Falcon, 457
28 U.S. 147, 160 (1982); Gonzales v. Arrow Fin. Servs., 489 F. Supp. 2d 1140, 1153 (S.D.

1 Cal. 2007); O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404, 410 (C.D. Cal. 2000). The
2 decision on whether to decertify lies within the court's sound discretion. Knight v. Kenai
3 Peninsula Borough Sch. Dist., 131 F.3d 807, 816 (9th Cir. 1997).

4 A party seeking decertification of a class bears the burden of demonstrating that
5 class certification is no longer proper. Weigele v. Fedex Ground Package Sys., 267 F.R.D.
6 614, 617 (S.D. Cal. 2010). However, in order to maintain – or alter or amend – certification,
7 the party advocating certification bears the burden of demonstrating that the requirements
8 of Rule 23(a) and (b) are met. See Marlo v. UPS, 639 F.3d 942, 947 (9th Cir. 2011).

9 Rule 23(a) has four requirements, all of which must be met – numerosity,
10 commonality, typicality, adequacy of representation. Fed. R. Civ. P. 23(a). A party seeking
11 class certification must also meet one of the three criteria listed in Rule 23(b), which
12 provides that a party may maintain a class action if

13 (1) the prosecution of separate actions by or against individual members of
14 the class would create a risk of

15 (A) inconsistent or varying adjudications with respect to individual members of
16 the class which would establish incompatible standards of conduct for the
17 party opposing the class, or

18 (B) adjudications with respect to individual members of the class which would
19 as a practical matter be dispositive of the interests of the other members not
20 parties to the adjudications or substantially impair or impede their ability to
21 protect their interests; or

22 (2) the party opposing the class has acted or refused to act on grounds
23 generally applicable to the class, thereby making appropriate final injunctive
24 relief or corresponding declaratory relief with respect to the class as a whole;
25 or

26 (3) the court finds that the questions of law or fact common to the members of
27 the class predominate over any questions affecting only individual members,
28 and that a class action is superior to other available methods for the fair and
efficient adjudication of the controversy.

29 Fed. R. Civ. P. 23(b).

30 In addition, under Rule 23(c)(4), “[w]hen appropriate, an action may be brought or
31 maintained as a class action with respect to particular issues.” Fed. R. Civ. P. 23(c)(4)(A).

32 B. The Parties’ Motions

33 Taco Bell seeks decertification of the entire class. First, Taco Bell contends that

1 plaintiffs' monetary claims were improperly certified because, as the Supreme Court
2 clarified in Dukes, individualized monetary relief is not available to a Rule 23(b)(2) class,
3 and also because injunctive and declaratory relief cannot be applied to the class as a
4 whole.

5 Taco Bell also asserts that the class does not meet the Rule 23(a) commonality
6 requirement, as re-defined by the Supreme Court in Dukes, and also does not meet the
7 typicality or adequacy requirements. Finally, Taco Bell contends that to the extent that
8 plaintiffs will argue that the class definition should be modified to include a Rule 23(b)(3)
9 class, the damages claims are not amenable to class treatment under Rule 23(b)(3)

10 Plaintiffs seek an order "altering and amending" the class certification order so that
11 the class claims seeking injunctive relief, and the "issue" of liability for "minimum statutory
12 damages" can be certified under Rule 23(b)(2), and the "issue" of the amount of damages
13 to be actually recovered by each class member as to five "Key Barriers" can be certified
14 under Rule 23(b)(3). To this end, plaintiffs propose a redefined class consisting of

15 All individuals with disabilities who use wheelchairs or electric scooters for
16 mobility who, at any time on or after December 17, 2001, were denied, or are
17 currently being denied, on the basis of disability, full and equal enjoyment of
18 the goods, services, facilities, privileges, advantages, or accommodations of
19 California Taco Bell corporate restaurants based on any one of the following
non-compliant barriers: access aisles at van accessible parking; entry or
restroom door force; number or dimensions of accessible seating positions;
queue line; height of restroom amenities.

20 The court agrees that the Supreme Court's decision in Dukes mandates
21 decertification of the damages portion of the class as certified. Rule 23(b)(2) "does not
22 authorize class certification when each class member would be entitled to an individualized
23 award of monetary damages." Dukes, 131 S.Ct. at 2557. Here, it is undisputed that the
24 monetary relief sought by plaintiffs under state law in this action is individualized, as it is
25 based on denial of access as to each class member, with damages to be awarded "per
26 occasion." Under Dukes, no claim for individualized relief may be combined with a class
27 injunction under Rule 23(b)(2). See id. at 2557-58.

28 With regard to injunctive relief, however, the court agrees with plaintiffs that the

1 class meets the requirements of Rule 23(a). In particular, the court finds, as set forth in the
2 February 23, 2004 class certification order, and also supported by the August 8, 2007
3 summary judgment order and the October 5, 2011 Findings, that there are sufficient
4 “questions of law or fact common to the class” to warrant certifying a class for injunctive
5 relief. Given the narrow scope of the court’s prior ruling regarding entitlement to injunctive
6 relief, see Moeller v. Taco Bell, 816 F.Supp. 2d at 868-69, the claims are sufficiently
7 common to satisfy Rule 23(a)(2). The court also finds, as set forth in the class certification
8 order, that plaintiffs have satisfied the typicality and adequacy-of-representation
9 requirements of Rule 23(a)(3) and (4).

10 The primary dispute raised by the present motions is whether plaintiffs’ state law
11 damages claims can be certified. Plaintiffs’ state law claims under the Unruh Act and the
12 CDPA seek individualized relief or an individualized award of money damages. As noted
13 above, certification is not proper under Rule 23(b)(2), because damages must be
14 determined on an individualized basis. See Dukes, 131 S.Ct. at 2557 (claims for
15 individualized relief do not satisfy the requirements of Rule 23(b)(2)).

16 The state law claims also cannot be certified under Rule 23(b)(3) – both because the
17 claims are individualized and unique, and questions of law and fact common to the
18 members of the class do not predominate over questions affecting only individual
19 members, and because a class action would not be superior to other available methods of
20 adjudication, in view of the problems in managing such a class.

21 Plaintiffs impliedly concede that certification is not proper under either Rule 23(b)(2)
22 or Rule 23(b)(3), and propose instead a “hybrid” certification. Plaintiffs argue that the court
23 should certify “issues” under Rule 23(c)(4) – specifically, that the court should certify the
24 issue of liability under Rule 23(b)(2) and should certify the issue of damages under Rule
25 23(b)(3).

26 The court finds, however, that the issue of classwide liability cannot be separately
27 certified under Rule 23(b)(2) through the application of the Rule 23(c)(4) issue-certification
28 procedure. California courts have held that to maintain an action under the CDPA, a

1 plaintiff must establish that he or she was denied equal access to a public facility on a
2 particular occasion. See Donald v. Café Royale, Inc., 218 Cal. App. 3d 168, 183 (1990);
3 see also Raycraft v. Lee, 177 Cal. App. 4th 1211, 1223 (2009); Urhausen v. Longs Drug
4 Stores California Inc., 155 Cal. App. 4th 254, 263-66 (2007); Boemio v. Love’s Rest. 954 F.
5 Supp. 204, 207-08 (S.D. Cal. 1997).² Thus, the issue of liability for damages cannot be
6 determined on “grounds generally applicable to the class.” Fed. R. Civ. P. 23(b)(2).

7 Similarly the issue of classwide damages cannot be separately certified under Rule
8 23(b)(3) through the application of Rule 23(c)(4), because damages for California disability
9 claims are inextricably intertwined with individualized liability questions, and it is thus
10 impossible to make an across-the-board conclusion as to the recovery of damages by any
11 class member. An individual class member’s claim for damages cannot be adjudicated
12 simply by demonstrating the mere presence of an alleged non-compliant feature.³ Each
13 class member must show how he or she was personally affected and was denied full and
14 equal access by the defendant. See, e.g., Urhausen, 155 Cal. App. 4th at 266.

15 Put another way, because damages must be based on an individualized
16 determination of liability, common questions of law and fact regarding entitlement to
17 damages do not predominate over questions affecting only individual members. It is not
18 only damages that are individualized, but also liability and causation, because the issue is
19 whether an individual class member has any claim at all. See Pryor v. Aerotek Scientific,
20 LLC, 278 F.R.D. 516, 532-33 (C.D. Cal. 2011). Such fact-specific individual liability and
21 damages questions cannot be determined on a classwide basis. Rodriguez v. Gates, 2002
22 WL 1162675 at *11 (C.D. Cal. May 30, 2002); see also Dunbar v. Albertson’s, Inc., 141
23 Cal. App. 4th 1422, 1427 (2006).

24
25 ² The court effectively acknowledged this fact in the summary judgment order, when
26 it stated that “[i]t is true that to be entitled to monetary damages the class members must
27 demonstrate a denial of ‘equal access.’” Moeller v. Taco Bell Corp., 2007 WL 2301778 at *16
28 (citing Donald, 218 Cal. App. 3d at 183).

³ As only one named plaintiff testified at the trial of the exemplar store, the Findings for
the most part chronicle the non-compliant features rather than examining how individual
plaintiffs were personally affected by such non-compliant features.

1 Plaintiffs contend that the calculation of damages will be a simple matter of adding
2 up the number of times each class member was aggrieved by noncompliant barriers. The
3 court notes, however, that while the class has been found to be sufficiently numerous and
4 ascertainable, plaintiffs have actually made no showing as to how many people are in the
5 class. At one point, plaintiffs estimated (based on statistics regarding the number of people
6 in California who use wheelchairs or scooters) that the class could include as many as
7 150,000 class members. See 220 F.R.D. at 608. Presumably this does not include the
8 people in wheelchairs who live in other states, but may have stopped at a Taco Bell while
9 traveling through California.

10 At a minimum, however, it appears that more than 1000 class members have
11 contacted plaintiffs' counsel about the case, after having read the "Taco Bell Class Action
12 Website" that is sponsored by class counsel. The website states that "[t]he class is seeking
13 up to \$4,000 for each time a class member encountered a barrier at a covered Taco Bell[,]"
14 adding that "a class member may be entitled to collect damages for each time he or she
15 had difficulty parking, had difficulty getting to the counter because of a narrow queue line,
16 had difficulty using the restroom because it was too small or obstructed, or encountered
17 other barriers."

18 Thus, because of the intersection between liability for separate violations and the
19 damages calculation, there would need to be a finding – for each class member in this
20 potentially huge class – regarding which Taco Bell store or stores he/she visited, how many
21 times he/she visited each store, when the visits occurred, what "Key Barriers" he/she
22 encountered, and what his/her disability was and whether the "Key Barrier" precluded
23 access for him/her at that particular Taco Bell. Based on this, the court finds – even apart
24 from the fact that the liability and damages issues are inextricably intertwined – that
25 certifying a (b)(3) class for the issue of damages would not constitute a superior method for
26 adjudicating the controversy.

27 It is true that "there is no rule against 'hybrid certification' under both Rule 23(b)(2)
28 and 23(b)(3)." Beck v. The Boeing Company, 60 Fed. Appx. 38, 39, 2003 WL 683797 at *1

1 (9th Cir. Feb. 25, 2003). Rule 23(c)(4) recognizes that it may be appropriate to achieve the
2 fairness and efficiencies of class-wide adjudication as to one or more issues that are
3 common to all class members, even if other issues are litigated separately by individual
4 class members. Nevertheless, “issue certification should never be undertaken lightly, or
5 used to ‘fix’ manifest Rule 23(b)(3) predominance problems presented where key issues
6 going to liability require individualized proof.” McLaughlin on Class Actions (2011) § 4:43.

7 **CONCLUSION**

8 In accordance with the foregoing, Taco Bell’s motion is GRANTED in part and
9 DENIED in part. The motion to decertify the claims for injunctive relief is DENIED. The
10 motion to decertify the damages claims is GRANTED. Plaintiffs’ motion is DENIED.

11 With regard to the form of the injunction, it is unclear, with this latest round of
12 briefing, whether plaintiffs are seeking injunctive relief as to all barriers or as to the five
13 “Key Barriers” only. Thus, no later than August 31, 2012, each side shall submit a
14 proposed injunction with respect to the Rule (b)(2) class.

15 The named plaintiffs are entitled to a trial as to damages under state law. No later
16 than August 31, 2012, the parties shall submit a proposed status statement regarding
17 discovery, if any; scheduling; the length of the proposed trial; and whether the damages
18 claims are to be tried to a jury. Depending on the number of days requested, the court will
19 advise the parties as to available dates.


20 Any of the unnamed plaintiffs who wish to proceed with damages claims may file a
21 separate lawsuit.

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23 **IT IS SO ORDERED.**

24 Dated: July 26, 2012

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PHYLLIS J. HAMILTON
United States District Judge

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