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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCIE MOELLER, et al.,

Plaintiffs,

v.

TACO BELL CORPORATION,

Defendant.

No. C 02-5849 MJJ

ORDER DENYING DEFENDANT'S MOTION FOR MODIFICATION OF CLASS DEFINITION

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(c)(1), Defendant moves the Court to modify the Rule 23(b)(2) class previously certified by the Court. Defendant argues that continued discovery in this action has revealed that the existing class should be modified to exclude state law damages for three reasons: 1) new evidence demonstrates that there are no common issues of fact with regards to damages determinations; 2) the class representative's damages claims are not typical of the class; and 3) the damages issues predominate over the injunctive relief requested. For the following reasons, Defendant's motion is **DENIED**.

FACTUAL BACKGROUND

Because the parties are familiar with the factual and procedural history of the case, it will not be repeated here except as necessary to explain the disposition of the current motion. Following the Court's certification of Plaintiffs' class, the parties engaged in two mediation sessions. As a product of these sessions, the parties agreed ("the Agreement") to a pilot program to survey 20 of

1 Defendant's California restaurants (the "Pilot Stores"). The Agreement stated that the dimensions of
2 the Pilot Stores gathered during the surveys were to serve as stipulations of facts between the parties.
3 The Agreement also stated that the dimensions of the Pilot Stores were not to be used as examples of
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5 current conditions as other Taco Bell restaurants. A neutral expert surveyed each of the Pilot Stores
6 using a survey form prepared by the parties that contained approximately 499 accessibility elements
7 for each restaurant. The results of these surveys have been submitted to the Court and form the basis
8 of Defendant's current motion. Additionally, the Court has appointed a Special Master to conduct
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10 site visits at the remaining restaurants to determine the dimensions of the accessibility elements at
11 each restaurant.

12 **LEGAL STANDARD**

13 Federal Rule of Civil Procedure 23(c)(1)(C) states that an order certifying a class "may be
14
15 altered or amended before final judgment." The district court has broad discretion in deciding
16 whether to modify or decertify a class, but the court "must define, redefine, subclass and decertify as
17 appropriate in response to the progression of the case from assertion to facts." *Richardson v. Byrd*,
18 709 F.2d 1016, 1019 (5th Cir. 1983). In other words, "[s]ince the class certification is usually made
19 early in the case, it may become necessary to modify the class definition after further discovery or
20
21 other events which alter the parameters of the class." *Irwin v. Mascott*, 2001 U.S. Dist. LEXIS 3285,
22 at *13 (N.D. Cal. Feb. 27, 2001). In this sense, "all class certifications are essentially temporary
23 until a final judgment is entered." *Id.* at *12-13.

24 **ANALYSIS**

25 To maintain a class action under Rule 23, the plaintiff class must satisfy four requirements
26
27 under Rule 23(a):

28 (1) the class is so numerous that joinder of all members is impracticable,

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> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Federal Rule of Civil Procedure 23(a). Defendant argues that Plaintiffs' damages claims fail to satisfy the commonality and typicality requirements under Rule 23(a) and must therefore be excluded from the injunctive relief class. Defendant also argues that Plaintiffs' damages claims fail to satisfy the requirements of Rule 23(b)(2) because these claims predominate over Plaintiffs' claims for injunctive relief.

A. Commonality

Rule 23(a)(2) requires that there be questions of law or fact that are common to the class. The Ninth Circuit has held that the commonality requirement is "construed permissively," *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), that "[a]ll questions of fact and law need not be common to satisfy the rule," *id.*, and that the requirements for finding commonality under Rule 23(a)(2) are "minimal." *Id.* at 1020.

Defendant initially argues that Plaintiffs' damages claims fail to satisfy the commonality requirement because the following are not common questions in a damages analysis: 1) whether a particular element at a particular restaurant currently complies with ADAGG or Title 24 for purposes of injunctive relief; 2) whether actual barriers hindered an individual's access to or enjoyment of a particular restaurant on a particular occasion. Plaintiff counters that the commonality requirement of Rule 23(a)(2) does not require that every factual and legal question be common to the class; rather, Rule 23(a)(2) simply requires that there be some common questions.

Defendant has failed to present relevant new evidence to the Court in support of its

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commonality arguments and therefore these arguments are unpersuasive for the same reasons stated in the Court's class certification order. "Thus the only damages issue not common to the class is the simple question of the number of instances that individual class members were aggrieved by inadequate accommodations at Defendant's restaurants during the period covered by the lawsuit." *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 610 (N.D. Cal. 2004); *see also Arnold v. United Artists Theatre, Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994). Moreover, the Fourth Circuit has noted that "Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations." *Gunnells v. Health Plan Serv., Inc.* 348 F.3d 417, 427-28 (4th Cir. 2003); *see also Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question that does not defeat class action treatment.") .

Defendant also argues that commonality is defeated because the Court must engage in a "case-by-case" punitive damages analysis of each class member's claim to determine whether an award of statutory minimum damages violates due process. Defendant argument fails because statutorily prescribed damage awards are distinct from punitive damage awards. *See Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) (stating that punitive damage factors should not apply in analyzing whether statutory penalties violate due process); *see also Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communications, L.P.*, 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004) (same).

In the alternative, Defendants argue that, even if a punitive damages analysis does not apply, due process requirements are still applied to statutory damages. Defendant states that "[w]hen [a] punitive damages award is combined with strict liability for non-compliance under the ADA, there is

the real potential for a due process violation, especially when plaintiffs attempt to aggregate claims for a single violation in a class action." The Court recognizes that statutory damages may, in an severe case, raise due process concerns. "It is possible that statutory damages could violate due process if 'the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.'" *DirecTV v. Spillman*, 2004 WL 1875045, * 4 (W.D. Tex. 2004) (quoting *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919)); *see also Parker v. Time Warner Entm't Co.*, 331 F.3d 13 (2d Cir. 2003) ("It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions. If so, such a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements."). However, at this early stage of the proceedings, the Court is unable to determine whether the ratio between actual and statutory damages is disproportionate. Accordingly, Defendant's due process concerns are, at best, premature.[1]

B. Typicality

Rule 23(a)(3) requires that Plaintiffs' damages claims are typical of those of the class. The Ninth Circuit does "not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001). "In a public accommodations suit . . . where disabled persons challenge the legal permissibility of architectural design features, the interests, injuries, and

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[1]Even if Defendant could demonstrate that the statutory damages at issue raise due process concerns, it is unclear whether such concerns would affect the class certification analysis. The Second Circuit recently noted that "in a sufficiently serious case the due process clause might be invoked, *not to prevent certification*, but to nullify that effect and reduce the aggregate damage award." *Parker*, 331 F.3d at 22 (emphasis added).

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claims of the class members are, in truth, identical such that any class member could satisfy the typicality requirement for class representation." *Arnold*, 158 F.R.D. at 450.

Defendants argue that the typicality requirement is not met in this case because Plaintiffs' entitlement to damages will depend on each individual's particular disability, the particular accessibility violation alleged, and whether the technical violation actually constituted a barrier to the particular plaintiff. Plaintiffs contend that Rule 23(a)(2) does not require that the named Plaintiffs' injuries be identical with those of other class members.

Plaintiffs are correct. The Court previously rejected similar arguments made by the Defendant, and stated that typicality requires "only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same injurious course of conduct." *Moeller*, 220 F.R.D. at 611 (quoting *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001)). Accordingly, an individualized damages determination does not necessarily destroy the typicality requirement. *See In re Paxil Litig.*, 218 F.R.D. 242, 246 (C.D. Cal. 2003) (holding that typicality does not require that "[t]he physical, emotional, or monetary damages sustained by Plaintiffs . . . be identical or even similar, so long as those differences do not negatively affect the viability of the legal theories under which they proceed."); *see also Gunnells*, 348 F.3d at 427-28. The named plaintiffs' damages claims arise from the same legal and remedial theory as the class and thus satisfy the typicality requirement of Rule 23(a)(3).

C. Predominance

Defendant argues that Plaintiffs' class does not satisfy the requirements of Rule 23(b)(2) because Plaintiffs' damages claims predominate over their claims for injunctive relief. Defendant contends that the predominance test is not met because 1) class damages may be large, and 2) adjudicating damages allegedly will be difficult to manage. The Court has previously considered,

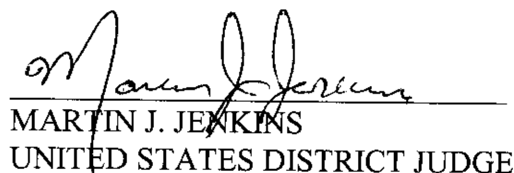
and rejected, these arguments. "[Plaintiffs] are seeking only the statutory minimum of damages under the Unruh Act and the CDPA. The Court cannot say that Plaintiffs' claims for monetary damages predominate over its claims for injunctive relief." *Moeller*, 220 F.R.D. at 613. Defendant has not presented new discovery that would affect the Court's previous analysis.

CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant's motion for modification of class definition.

IT IS SO ORDERED.

Dated: December 7, 2004



MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

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