Guy B. Wallace, State Bar No. 176151
gwallace@schneiderwallace.com
Mark T. Johnson, State Bar No. 76904
mjohnson@schneiderwallace.com
Jennifer U. Bybee, State Bar No. 302212
juhrowczik@schneiderwallace.com
Travis C. Close, State Bar No. 308673
tclose@schneiderwallace.com
Rachel L. Steyer, State Bar No. 330064
rsteyer@schneiderwallace.com
SCHNEIDER WALLACE
COTTRELL KONECKY LLP
2000 Powell Street, Suite 1400
Emeryville, CA 94608
Telephone: (415) 421-7100
Facsimile: (415) 421-7105

Gay Crosthwait Grunfeld, State Bar No. 121944
ggrunfeld@rbgg.com
Benjamin Bien-Kahn, State Bar No. 267933
Bbien-kahn@rbgg.com
Jenny S. Yelin, State Bar No. 273601
jyelin@rbgg.com
Amy Xu, State Bar No. 330707
axu@rbgg.com
Adrienne Spiegel Bar No. 330482
aspiegel@rbgg.com
ROSEN BIEN
GALVAN & GRUNFELD LLP
101 Mission Street, Sixth Floor
San Francisco, CA 94105-1738
Telephone: (415) 433-6830
Facsimile: (415) 433-7104

Kathryn A. Stebner, State Bar No. 121088
kathryn@stebnerassociates.com
Brian S. Umpierre, State Bar No. 236399
brian@stebnerassociates.com
STEBNER, GERTLER
GUADAGNI & KAWAMOTO
A Professional Law Corporation
870 Market Street, Suite 1285
San Francisco, CA 94102
Telephone: (415) 362-9800
Facsimile: (415) 362-9801

David T. Marks (pro hac vice)
davidm@marksfirm.com
MARKS, BALETTE, GIESSEL
& YOUNG, P.L.L.C.
7521 Westview Drive
Houston, TX 77055
Telephone: (713) 681-3070
Facsimile: (713) 681-2811

Attorneys for Plaintiffs, the Certified Class and the Proposed Subclasses

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STACIA STINER, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

BROOKDALE SENIOR LIVING, INC.; BROOKDALE SENIOR LIVING COMMUNITIES, INC.; et al.,

Defendants.

Case No. 4:17-cv-03962-HSG (LB)

CLASS ACTION

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CERTIFICATION OF FACILITY-LEVEL ACCESS SUBCLASSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 21, 2024
Time: 2:00 p.m.
Place: Courtroom 2
Judge: Hon. Haywood S. Gilliam, Jr.

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NOTICE OF MOTION

On March 21, 2024 at 2:00 p.m. in Courtroom 2 of the United States District Court in Oakland, California, Plaintiffs will move for an order granting certification of subclasses pursuant to Federal Rule of Civil Procedure 23(b)(2) and (b)(3) This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities, the accompanying Declarations and exhibits, the case file in this matter, and any further evidence or argument offered at the hearing on the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs –eight people with disabilities or their successors in interest—propose six subclasses for certification pursuant to Fed. R. Civ. Proc. 23(b)(2) and (b)(3) regarding their claims for violations of the disability access requirements of the Americans with Disabilities Act of 1990 ("ADA") and the Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code §§ 51 *et seq*. Each subclass is limited to one of the facilities at which one of the named Plaintiffs resides or resided. These "facility-level" subclasses address the concerns regarding commonality that this Court identified in its March 30, 2023 Order, and track the approach to class certification used by the district court in *Castaneda v. Burger King Corp.*, 264 F.R.D. 557, 572 (N.D. Cal. 2009) (certifying ten facility classes pursuant to Rule 23(b)(3) for injunctive relief and damages).

Plaintiffs' proposed disability access subclasses plainly satisfy commonality and predominance. As discussed below, courts routinely certify disability access class actions in the context of new construction and alterations claims. It is undisputed that all six of the facilities at issue are new, and that none of them comply with the minimum federal and state accessibility standards for new facilities. Plaintiffs' access experts have inspected all six of these facilities, and all of their common areas contain numerous violations of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") and the California Building Code ("CBC"). In addition, at each of these facilities Plaintiffs' experts inspected a sample of resident units that were selected by Defendants, and which Defendants stipulated were "typical, in all material respects affecting disability access" at "that Location." Stipulation And Order Regarding Accessibility Inspections, ECF 154 at ¶ 7. Defendants further stipulated that "no residential units at any Location that were not made available to Plaintiffs and their experts for

inspection have any features, elements or dimensions that prover greater access to persons with disabilities than those that were inspected." *Id.* As discussed in the accompanying Declarations of Plaintiffs' access experts Mr. Waters and Mr. Mastin, all of the resident units that they inspected that were part of the representative sample contained the same access barriers in violation of the ADAAG or the applicable iteration of the CBC. *See* discussion *infra* at § III(B)(1). Accordingly, it is plain that Defendants' facilities are in violation of the ADA and the Unruh Act, both of which require that a newly constructed facility be in full compliance with the minimum accessibility requirements of the ADA and the applicable iteration of the CBC, and which do not permit Defendants to own or operate new facilities that contain *any* violations of the ADAAG or the CBC.

Moreover, the record confirms that Defendants' inaccessible facilities have had a severe negative impact on the putative class members. Residents with mobility disabilities have difficulty in using the showers in their units because of the lack of accessible roll-in showers that comply with ADAAG or the CBC. Declaration of Rachel L. Steyer In Support of Plaintiffs' Motion for Certification of Facility-Level Access Subclasses ("Steyer Decl.) at ¶ 6; *see also* Declaration of Guy B. Wallace in Support of Plaintiffs' Motion for Certification of Facility-Level Access Subclasses ("Wallace Decl."), filed herewith, at ¶ 8, Ex. 7 at 89:9-89:21 (only one roll-in shower in the entire San Ramon facility). The residents also testify to the difficulty and frustration that they routinely experience as a result of sinks and lavatories that are inaccessible, and that make it difficult or impossible for them to wash their hands. *Id.* at ¶ 7. Some residents with mobility disabilities are unable to use the toilet because of the lack of clear space in the bathroom in their units or the lack of grab bars at the correct height. *See, e.g.*, Appendix of Class Member and Witness Declarations submitted herewith ("Appendix"), Decl. of Christopher Gail at ¶¶ 19-23; Decl. of Mary Helm at ¶ 25. Others express their frustration that they are unable to use the balconies or patios in their units because of high thresholds that cannot be negotiated with their wheelchairs. Steyer Decl. at ¶ 8. Still others recount falls and other injuries as a result of Defendants' refusal to comply with the ADA. *See, e.g.,* Appendix, Decl. of Yvonne Buff at ¶ 18; Decl. of Clarence Alvey at ¶ 11. Similarly, persons with visual impairments face numerous access barriers at the facilities at issue. *See, e.g.*, Declaration of Heather Fisher ISO Plaintiffs' Motion for Certification of Subclasses ("Fisher Decl.") ¶¶ 3-4, Ex. A at ¶ 32; Appendix, Decl. of Clarence Alvey at ¶ 14.

Plaintiffs seek certification of the following six subclasses. All subclasses proposed under Fed. R. Civ. Proc. 23(b)(2) are limited to current residents. The first three subclasses seek declaratory and injunctive relief under the ADA and the Unruh Act, as well as statutory minimum damages under the Unruh Act, pursuant to Rule 23(b)(2) and (b)(3). The fourth, fifth and six subclasses seek damages under the Unruh Act pursuant to Rule 23(b)(3):

1. All persons with disabilities who use wheelchairs, scooters, or other mobility aids or who have vision disabilities and who reside or have resided at the San Ramon residential care facility for the elderly located in California and owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.

2. All persons with disabilities who use wheelchairs, scooters, or other mobility aids or who have vision disabilities and who reside or have resided at the Scotts Valley residential care facility for the elderly located in California and owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.

3. All persons with disabilities who use wheelchairs, scooters, or other mobility aids or who have vision disabilities and who reside or have resided at the Brookhurst residential care facility for the elderly located in California and owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.

4. All persons with disabilities who use wheelchairs, scooters, or other mobility aids or who have vision disabilities and who reside or have resided at the Tracy residential care facility for the elderly located in California and owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.

5. All persons with disabilities who use wheelchairs, scooters, or other mobility aids or who have vision disabilities and who resided at the Fountaingrove residential care facility for the elderly located in California that was owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.

6. All persons with disabilities who use wheelchairs, scooters, or other mobility aids or who have vision disabilities and who resided at the Hemet residential care facility for the elderly located in California that was owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.

The proposed subclasses are narrower than those alleged in the Fourth Amended Complaint (ECF 647 at ¶¶ 197-99) and that were the subject of the original motion for class certification. Because the proposed

classes are narrower, there is no need to amend the pleadings. *See, e.g.*, *Gold v. Lumber Liquidators Inc.*, No. 14-cv-05373-TEH, 2017 WL 2688077, at *3 (N.D. Cal. June 22, 2017) (collecting authorities).

Finally, granting Plaintiffs' motion will not disrupt the case schedule going forward. In their Declarations, Plaintiffs' access experts have updated their facility reports to ***reduce*** the number of access barriers they identified previously. Any remaining discovery regarding disability access issues will be limited in nature, and will not require any changes in the trial schedule. In particular, any further site inspections of the six facilities at issue need only cover the areas that were inspected previously, and will not need to include all residential units, as the Stipulation and Order Regarding Accessibility Site Inspections applies to all phases including "class certification and the merits." ECF 154 at ¶ 7.

II. STATEMENT OF THE ISSUES TO BE DECIDED

Whether the Court should certify subclasses of current and former residents of six Brookdale facilities (San Ramon, Scotts Valley, Brookhurst, Fountaingrove, Tracy, and Hemet) to pursue their claims under the ADA and the Unruh Act related to access barriers for persons with mobility and/or vision disabilities, pursuant to Rule 23(b)(2) and (b)(3).

III. STATEMENT OF FACTS

A. Defendants Operate and Control All Relevant Aspects of Their Assisted Living Facilities

Brookdale exercises extensive control over the day-to-day operations of its California facilities. *Stiner v. Brookdale Senior Living, Inc.*, 665 F. Supp. 3d 1150, 1183-84 (N.D. Cal. 2023); *see also* Wallace Decl. at ¶ 2, Ex. 1 (Defendants' Interrogatory Responses admitting that they own, operate, or manage the six facilities at issue). Of particular relevance herein, Brookdale exercises control over the maintenance of and physical alterations to its facilities, including those involving disability access. All significant construction or alterations to Defendants' facilities is done through Brookdale's capital expenditure plans (CAPEX). These plans are developed through Brookdale's Asset Management Division, a corporate department which reviews and approves proposals for alterations at particular facilities. *Id.* at ¶ 8, Ex. 7 at 49:16-18 (Brookdale's Rule 30(b)(6) designee, Kevin Bowman, then the Division Vice President of Operations for the West Division, testifying that he "support[s] and review[s] CapEx

[capital expenditure] plans from [Defendants' group responsible for] asset management in the communities and [] districts, regions."); *id.* at 49:19-50:6 (Bowman and Chris Odmark, Brookdale's Director of Asset Management for the West Division, review the capital expenditure plans. He provides recommendations that are then approved by Defendants' "senior leadership."); *id.* at 50:19-23 ("Brookdale's Senior Vice President of Asset Management, David Hammonds, *id.* at 45:9-10, also has a role in approving the capital expenditure plans for Brookdale facilities in California); *id.* at 53:16-20 (Mr. Odmark and a "member of the division operating committee" maintain the facility capital plans); *see also* Wallace Decl. at ¶¶ 9- 13, 16-17; Exs. 8-13, 15-16 (documents showing Brookdale's involvement in reviewing and approving proposals for alterations at its facilities). Brookdale's Rule 30(b)(6) designee on disability access testified that Brookdale corporate controls the physical improvements of its California facilities, including funding, approving and inspecting all significant construction and maintenance projects. *Id.* at ¶ 8, Ex. 7 (Bowman Depo. on June 23, 2021 at 49:1-50:23, 86:2-14, 126:17-127:9).

B. The Six Facilities Used by the Named Plaintiffs are Newly Constructed Under Federal or California Law and Contain Numerous Access Barriers to Residents with Disabilities

1. The Six Newly Constructed Facilities Violate the ADAAG and the CBC

Brookdale admits that its Brookhurst and its former Hemet and Fountaingrove facilities were constructed after the effective date of Title III of the ADA, January 26, 1993. Wallace Decl. ¶ 2, Ex. 1 at 4-5. The Hemet facility was constructed in 1998, and the Brookhurst and Fountaingrove facilities were constructed in 2001. ECF 377-1, Ex. 3 at 30-32[1] (Declaration of Douglas Anderson in Opposition to Plaintiffs' Motion for Class Certification ("Anderson Decl.")). These facilities must therefore be in full compliance with the 1991 ADAAG. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 945-46 (9th Cir. 2011) (en banc); 28 C.F.R. §§ 36.401; 36.406(a). They are not. Plaintiffs' experts, who are architects and California state certified specialists in accessibility (CASps), inspected these three facilities. Declaration of Gary Waters ISO Plaintiffs' Motion for Certification of Subclasses ("Waters Decl.") ¶¶ 6, 9, 17, 28-30; Declaration of Jeffrey Scott Mastin ISO Plaintiffs' Motion for Certification of Subclasses ("Mastin Decl.") ¶¶ 14, 15, 30, 34-35. All of them contained numerous access barriers that violate the

[1] All page citations for ECF filings are to the ECF pagination at the top right hand corner.

ADAAG. Waters Decl. ¶¶ 35-36, Ex. A; Mastin Decl. ¶¶ 30-33, 36-37, Exs. A, B. Defendants' access expert, Mr. Anderson, has never disputed this conclusion. *See generally* ECF 377-1.

In addition, all six of the facilities at issue were constructed after December 31, 1981, and therefore must comply with the California Building Code ("CBC"). *See, e.g.*, *Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831, 848 (N.D. Cal. 2011). The Scotts Valley and Tracy facilities were constructed in 1987, and the San Ramon facility was constructed in 1989. ECF 377-1, Ex. 3 at 31. However, none of the six facilities comply with the iteration of the CBC that was in effect at the time of construction. Waters Decl. ¶¶ 43-44, 51-53, 56-59, Exs. A-D; *see* Mastin Decl. ¶¶ 31, 36, 37, Exs. A, B. Again, Defendants' access expert has never disputed this conclusion. *See generally* ECF 377-1.

Plaintiffs' experts inspected a sample of the residential units in these six facilities that was "typical, in all material respects affecting disability access." ECF 154 at ¶ 7. None of the residential units that they inspected complied with the ADAAG or the CBC. They identified numerous barriers therein that do not comply with ADAAG or the CBC and that harm Brookdale residents who are frail elders with disabilities. As discussed in the Declarations of Mr. Waters and Mr. Mastin, the residential units that they inspected (which were selected by Defendants as their most accessible units), all had the same types of barriers. These include, among others: lack of compliant roll-in showers; lack of clear space in the bathroom; lack of accessible sinks; and a lack of accessible grab bars. Waters Decl. ¶¶ 43-44, 52-53, 60; Mastin Decl. ¶¶ 33, 37. The impact of these barriers is to deny residents with disabilities full and equal access to the bathrooms in their units by making it difficult or impossible for them to use the toilet, shower and/or wash their hands. Numerous other common barriers in the residential units are described in the Declarations of Mr. Waters and Mr. Mastin, including inoperable door hardware, windows and sliding doors that required excessive force to open, and closets that were too high for residents to reach. Waters Decl. ¶¶ 61-67; Mastin Decl. ¶¶ 33, 37.

In addition, numerous units contain balconies or patios that are inaccessible to residents with mobility disabilities because of high thresholds. Although not all residential units have a patio or a balcony, all of the patios or balconies that were inspected by Mr. Waters and Mr. Mastin were inaccessible as a result of high thresholds. Waters Decl. ¶¶ 46, 52, 59, 66, Exs. A-D; Mastin Decl. ¶¶ 33, 37, 38, 40, Exs. A, B.

The areas outside of the facilities, including the parking lots, paths of travel and the primary entrances, are also characterized by numerous harmful and dangerous barriers. Plaintiffs' experts observed barriers in Defendants' designated "accessible" parking spaces, including steep cross slopes. Waters Decl. ¶¶ 43, 44, 46, 48, Exs. A-D; Mastin Decl. ¶¶ 32, 27, Exs. A, B. The paths of travel and ramps leading to the facilities also contained steep slopes, as well as sections of pavement that were broken and uneven thus creating a falling or tripping hazards for residents. Waters Decl. ¶¶ 43, 44, 46, 67, Exs. A-D; Mastin Decl. ¶¶ 32, 36, Exs. A, B. As a result of these barriers, residents with disabilities encounter unlawful barriers that limit or deny equal access when they attempt to approach and enter these facilities.

The common areas inside Brookdale's new facilities also contained many barriers that limit or deny full and equal access to residents with disabilities. The public restrooms contain toilets that lack accessible grab bars, inaccessible sinks and coat hooks that are mounted too high. Waters Decl. ¶¶ 35, 43, 46, 52, 59-60, Exs. A-D; Mastin Decl. ¶¶ 32, 33, 36, 37, Exs. A, B. The dining rooms contain numerous barriers, including but not limited to tables that are too low and that do not provide adequate knee clearance for wheelchair users. Waters Decl. ¶¶ 35, 60, Exs. A-D; Mastin Decl. ¶¶ 32, 37, Exs. A, B. There is also a lack of tactile signage for persons who are blind. Waters Decl. ¶¶ 36, 43, 46, 53, 67, Exs. A-D; Mastin Decl. ¶ 31, 41, Exs. A, B.

Brookdale's facilities also contain numerous additional access barriers to persons with visual impairments, many of which are hazardous. Stairs do not have an upper approach and lower tread marked by contrast striping. Waters Decl. ¶¶ 36, 43, 46, 67. At many locations, tactile exit signs are not provided. *Id.* at ¶¶ 36, 43, 53, 60, 67; Mastin Decl. ¶ 41. At five of the six facilities at issue (Scotts Valley, Tracy, San Ramon, Brookhurst and Hemet), Plaintiffs' experts found abrupt changes in level and unprotected and unmarked drop offs, all of which pose tripping hazards to persons who have visual impairments. Waters Decl. ¶ 67; Mastin Decl. ¶¶ 32, 36, 41.

Brookdale has not submitted any evidence contesting the existence of the foregoing violations in its newly constructed facilities. The inaccessibility of Brookdale's facilities is the result of its policies and practices. *See, e.g.,* Wallace Decl. ¶ 8, Ex. 7 (Bowman Depo. on June 23, 2021 at 49:1-50:23, 86:2-14, 126:17-127:9). Brookdale's 30(b)(6) designee testified that Brookdale does not require ADAAG

compliance during construction, nor does it inspect for ADAAG compliance at the conclusion of projects. *Id.* at 61:15-62:20, 139:2-142:24. Further, Brookdale has not conducted any analysis of whether its facility comply with the ADAAG or CBC, nor do they have deadlines for the removal of ADAAG or CBC violations from its facilities as required by 28 C.F.R. § 36.406(a)(5) and Cal. Gov't Code § 4452. *Id.* at 54:12-56:19, 61:6-11, 106:5-21, 115:3-118:25.

Instead, in violation of the ADA, Brookdale waits for residents to request barrier removal and makes them pay for it. This policy is stated in Brookdale's corporate form Residency Agreements: "We, in our sole discretion, will permit reasonable alterations to the Suite if you have a disability and the proposed modification is necessary to afford you full enjoyment of the Suite. Structural or physical alterations, whether based on a handicap or not, may be made only upon our prior written approval … The cost of any alterations made by you shall be paid by you unless otherwise agreed to in writing." ECF 238-3 at 292 (Bowman Decl. ISO Motion to Deny Class Certification, Ex. 1-C). The Executive Directors for the facilities at issue testified that residents are required to request barrier removal. *See, e.g.*, Wallace Decl. ¶ 4 and Ex. 3 at 219:6-219:19 (Marie Harris, former Executive Director of Scotts Valley testified that residents needed to request barrier removal); Wallace Decl. ¶ 5 and Ex. 4 at 253:1-253:16 (Kimia Ataeian, former Executive Director of Brookhurst, testifying that a resident purchased and requested installation of an accessible toilet seat); Wallace Decl. ¶ 6 and Ex. 5 at 154:11-155:7 (Ferdinand Buot, former Executive Director of Fountaingrove, describing requests from the Family Council to provide automatic doors); *see also* Wallace Decl. ¶ 8, Ex. 7, Bowman Depo. on June 23, 2021 at 71:2-72:3; 168:23-170:10.

2. Brookdale's Systemic Inaccessibility Has a Severe Negative Impact on its Residents with Disabilities and Denies Them Full and Equal Access

The testimony of the named Plaintiffs and the putative subclass members underscores that the access barriers discussed herein deny them full and equal access to Brookdale's assisted living facilities. *See generally* Appendix submitted herewith at Exs. 1-10; Declaration of Jeanette Algarme ISO Plaintiffs' Motion for Certification of Subclasses ("Algarme Decl.") ¶¶ 3-4, Ex. A ¶¶ 23-26; Declaration of Michele Lytle ISO Plaintiffs' Motion for Certification of Subclasses ("Lytle Decl.") ¶¶ 3-4, Ex. A ¶ 21; Declaration of Loresia Vallette ISO Plaintiffs' Motion for Certification of Subclasses ("Vallette Decl.") ¶¶

3-4, Ex. A ¶¶ 22-23; Declaration of Joan Carlson ISO Plaintiffs' Motion for Certification of Subclasses ("J. Carlson Decl.") ¶¶ 3, 5, Ex. A ¶¶ 33-35; Declaration of Ralph Carlson ISO Plaintiffs' Motion for Certification of Subclasses ("R. Carlson Decl.") ¶¶ 3-4, Ex. A at ¶¶ 18-19; Declaration of Stacia Stiner ISO Plaintiffs' Motion for Certification of Subclasses ("Stiner Decl.") ¶¶ 3-4, Ex. A at ¶¶ 18-21; Declaration of Pat Lindstrom ISO Plaintiffs' Motion for Certification of Subclasses ("Lindstrom Decl.") ¶¶ 3-4, Ex. A at ¶ 12; Declaration of Bernie Jestrabek-Hart ISO Plaintiffs' Motion for Certification of Subclasses ("Jestrabek-Hart Decl.") ¶¶ 3, 5; Fisher Decl. ¶¶ 3-4, Ex. A at ¶ 12; Declaration of Wendy DeMello ISO Plaintiffs' Motion for Certification of Subclasses ("DeMello Decl.") ¶¶ 4, 8, Ex. A at ¶¶ 21-26; Declaration of Denise Margie ISO Plaintiffs' Motion for Certification of Subclasses ("Margie Decl.") ¶¶ 7-8.

Brookdale residents or family members discuss numerous instances in which they have been denied full and equal access to Brookdale facilities because of barriers. Many class members have difficulty using the inaccessible bathrooms in their units. *See, e.g.*, Declaration of Rachel L. Steyer ISO Motion for Certification of Subclasses ("Steyer Decl.") ¶ 5. Similarly, residents with mobility disabilities have difficulty in using the showers in their units because of the lack of accessible roll-in showers that comply with ADAAG or the CBC. *Id.* at ¶ 6; Algarme Decl., Ex. A at ¶¶ 7-8. The residents also testify to the difficulty, fatigue and frustration that they routinely experience as a result of sinks, counters and/or tables that are inaccessible. *Id.* at ¶ 7. Others express their frustration that they are unable to use the balconies or patios in their units because of high thresholds that cannot be negotiated with their wheelchairs. *Id.* at ¶ 8. Still others recount falls and other injuries as a result of Brookdale's refusal to comply with the ADA. *See, e.g.,* Appendix, Decl. of Yvonne Buff at ¶ 18; Decl. of Clarence Alvey at ¶ 11; Algarme Decl., Ex. A at ¶¶ 7-8, 15-17.

Brookdale's Executive Directors acknowledge that they received complaints from residents who faced barriers in their facilities. *See* Wallace Decl. ¶ 4 and Ex. 3 at 223:23-224:9 (complaints about heavy resident and common area doors at Scotts Valley); *id.* at 219:6-219:19 (complaints about inaccessible grab bars, sinks, vanities, and thresholds at Scotts Valley); Wallace Decl. ¶ 6 and Ex. 5 at 154:11-155:7 (complaints from the Fountaingrove Family Council about need for automatic doors); Wallace Decl. ¶ 7 and Ex. 6 at 89:9-89:21 (only one roll-in shower in the entire San Ramon facility).

IV. ARGUMENT

A. The Proposed Class Representatives Have Standing To Represent the Proposed Subclasses

"In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). Plaintiffs seeking injunctive relief are not required to show that every class member has suffered injury, but need only show that the proposed class representatives have suffered injury. *See, e.g.*, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir.) (collecting authorities); *Rodriguez v. Hayes*, 591 F.3d 1105, 1125-26 (9th Cir. 2010); *Stiner*, 665 F. Supp. 3d at 1181-82 & n.9. This Court has already held that the named Plaintiffs have suffered "injury," and that they have standing to allege their access claims under the ADA and the Unruh Act. *Id.* at 1181-82.

Each of the named Plaintiffs has standing to represent the proposed subclasses for damages under the Unruh Act for the facilities at which they reside or resided. *See, e.g.*, Stiner Decl. at ¶¶ 2-4 (Ms. Stiner is a current resident of the San Ramon facility and has a mobility impairment); Algarme Decl. at ¶¶ 2-4, 6 (Ms. Algarme resided at the Brookhurst facility and has both mobility and visual impairments); Vallette Decl. at ¶¶ 1-4. 6 (Mr. Quinlan resided at the Hemet facility and had both mobility and visual impairments); Lytle Decl. at ¶¶ 2-4, 7 (Mr. Boris was a resident of Fountaingrove and had both mobility and vision impairments); Fisher Decl. at ¶¶ 1-3, 5 (Mr. Schmidt resided at the Tracy facility and has a visual impairment); Jestrabek-Hart Decl. at ¶¶ 2-3, 5 (Ms. Jestrabek-Hart resides at Scotts Valley and has a mobility impairment); Lindstrom Decl. at ¶¶ 1-4, 6 (Mr. Lindstrom resided at Scotts Valley and had mobility and visual impairments); J. Carlson Decl. at ¶¶ 2-3, 5-6 (Ms. Helen Carlson resided at Fountaingrove and had mobility and visual impairments); R. Carlson Decl. at ¶¶ 2-3, 6 (same).

Plaintiffs propose two additional class representatives for the damages subclasses for the San Ramon and Tracy facilities. For the San Ramon subclass, Plaintiffs propose that Wendy DeMello be a class representative for persons with visual impairments. DeMello Decl. ¶¶ 8, 10. For the Tracy subclass, Plaintiffs propose that Denise Margie be a class representative for persons with mobility impairments. Margie Decl. ¶¶ 1-3, 7-10. It is permissible to identify proposed class representatives in

connection with the class certification motion, or even subsequently. For example, the Eleventh Circuit has held that, when a court is presented with a motion for class certification, the court must first determine whether the case is appropriate for certification, and then "go on to decide whether any of the named plaintiffs are qualified to serve as class representative and, if not qualified, *whether a member of the class is willing and qualified to serve as class representative*." *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1216 (11th Cir. 2003) (emphasis added); *see also Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 197-98, 209-10 & n.26 (N.D. Cal. 2009).

The named Plaintiffs also have standing to seek injunctive relief for access barriers with respect to their proposed subclasses for the San Ramon, Scotts Valley, and Brookhurst facilities. Ms. Stiner is a current resident of San Ramon and Ms. Jestrabek-Hart is a current resident of Scotts Valley. They may therefore seek removal of access barriers on behalf of residents with mobility disabilities at their facilities. Although Ms. Algarme no longer resides at the Brookhurst facility, she has standing to seek injunctive relief regarding Brookhurst. Whether a plaintiff has standing to seek injunctive relief "depends upon the facts 'as they exist when the complaint is filed.'" *Langer v. Kiser*, 57 F.4th 1085, 1092 (9th Cir. 2023) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992)); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007). Ms. Algarme commenced suit on February 15, 2019, with the filing of the Third Amended Complaint ("TAC"). ECF 90. At that time, she was a resident of the Brookdale Brookhurst facility. *Id.* at ¶ 23; ECF 647 (Fourth Amended Complaint ("FAC")) at ¶ 23. Ms. Algarme encountered disability discrimination and numerous access barriers that denied her full and equal access to Brookhurst while she was a resident. ECF 90 at ¶¶ 34-36, 182, 189-91, 225-28, 231(h), (i), 232, 237-39, 241; *see also* Algarme Decl., Ex. A at ¶¶ 23-26. The FAC contains detailed allegations regarding the access barriers at Brookhurst. ECF 647 at ¶¶ 34-36, Ex. A at 105-110 (listing of specific barriers at Brookhurst).

To be eligible to obtain injunctive relief, Ms. Algarme must also "show a sufficient likelihood of injury in the future to establish standing." *Langer*, 57 F.4th at 1092. A plaintiff may show a sufficient likelihood of future injury by having an intent to return to visit the facility. *Id.* at 1099. Their "motivation" in doing so "is not relevant," and the court must "only evaluate whether a plaintiff has an intent to return . . .." *Id.* Ms. Algarme would return to visit the Brookhurst facility, but only if it were

made accessible to persons with mobility disabilities by the removal of all of the current access barriers. Supplemental Declaration of Jeannette Algarme ISO Motion for Certification of Facility-Level Access Subclasses, filed herewith, at ¶ 2. Under governing law, she is not required to "engage in the 'futile gesture' of trying to access a noncompliant place just to create an injury for standing." *Langer*, 57 F.4th at 1092 (quoting *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002)). Rather, she need only be "'currently deterred'" from visiting because of barriers. *Id.* In short, Ms. Algarme has standing to seek injunctive relief under governing law on behalf of residents with mobility and/or visual impairments.[2]

B. The Proposed Disability Access Subclasses For the Six Facilities Used By The Named Plaintiffs Satisfy the Requirements of Rule 23

1. The Disability Access Subclasses Are So Numerous That Joinder Is Impracticable

The proposed subclasses of residents with mobility and/or vision disabilities easily meet the numerosity requirement of Rule 23(a)(1). "[C]ourts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 606 (N.D. Cal. 2014). Here, according to Defendants' own assessment data, the number of putative class members who have mobility or vision disabilities comprises more than forty persons for these facilities for the time period between 2017 and 2020. *See, e.g.*, ECF 662-6 (Declaration of Cristina Flores PHD ISO Plaintiffs' Motion for Certification of Subclasses ("Flores Decl.")) at ¶¶ 119-120 (180 such residents at San Ramon); (219 such residents at Brookhurst); (219 such residents at Scotts Valley); (114 such residents at Fountaingrove); (42 residents with visual impairments at Tracy).

[2] Defendants have previously argued that Plaintiffs "specifically disclaimed injunctive relief for Algarme in the most recent amendment of their complaint." ECF 672 at 35 (citing FAC, ECF 647 at 97-99 as compared to the TAC, ECF 90 at 104-106). Defendants are incorrect. The changes Defendants cite encompass the omission of Ms. Algarme's name from four paragraphs of the Fourth Amended Complaint: 290, 291, 297, and 298. The changes in paragraphs 290 and 291 merely reflect that Ms. Algarme no longer lives at the Brookhurst facility, a fact that, while accurate, is irrelevant to her entitlement to seek injunctive relief. ECF 647 at ¶¶ 290, 291. The deletion of Ms. Algarme's name from paragraphs 297 and 298 was a scrivenor's error and not intended to disclaim her entitlement to injunctive relief. *See* Wallace Decl. at ¶ 20. In fact, the FAC expressly alleges that Plaintiffs seek injunctive relief on their ADA and Unruh Act claims, without excluding Ms. Algarme. ECF 647 at ¶¶ 233, 242, Prayer, ¶¶ 2, 3. When a party's intention is clear from the larger context of its pleading and the record, as it is here, courts disregard a scrivener's error and construe the pleading as if the mistake had not been made. *See, e.g.*, *Great Basin Mine Watch v. U.S. EPA*, 401 F.3d 1094, 1099 (9th Cir. 2005); *Bumpus v. Realogy Brokerage Grp. LLC*, No. 3:19-cv-03309-JD, 2022 WL 1489470, at *1 (N.D. Cal. May 11, 2022).

The Hemet facility has a capacity of 110 residents, similar to that of the other five facilities. Wallace Decl. at ¶ 19. Under applicable law, this Court can draw the reasonable inference that the Hemet subclass is of comparable size to that of the other five facilities at issue. *See, e.g.*, *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 347 (N.D. Cal. 2008) (court may make common sense assumptions regarding numerosity). Defendants' production of resident assessment data for Hemet was incomplete and did not cover the entire class period, and therefore did not provide Dr. Flores with a reliable basis for determining the number of putative class members for that facility. Wallace Decl. at ¶ 19.

2. There Are Numerous Common Questions Of Law And Fact That Are Capable Of Common Answers And That Are Apt To Drive The Resolution Of The Litigation

Plaintiffs can also show that "there are questions of law and fact common to the class," Fed. R. Civ. P. 23(a)(2), and that "class members have 'suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). The commonality requirement is "construed permissively." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citations omitted). "So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2)…. Thus, [w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (citations omitted). The Ninth Circuit has emphasized that "[a]ll questions of fact and law need not be common to satisfy the [commonality requirement]. The existence of shared legal issues with divergent factual predicates is sufficient[.]" *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 807 (9th Cir. 2020) (quoting *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012)). Here, the key legal questions raised are common ones, such as whether Brookdale's facilities comply with federal and state disability access standards. The answers to such core legal questions will not vary from class member to class member, and will "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (citations omitted).

In its Order, this Court stated that disability access claims involving single facilities are "generally well-suited for class certification because they present common questions about the

defendant's facility, polic[i]es, and practices, while permitting hundreds or even thousands of plaintiffs to pool claims which may be uneconomical to bring individually." *Stiner*, 665 F. Supp. 3d at 1187. In a single facility case, all class members face "identically alleged access barriers" within an "identical facility," and share a "common interest in assuring that all the features at the particular [facility] are in compliance" with the ADA. *Castaneda*, 264 F.R.D. at 572; *see also Nevarez v. Forty Niners Football Co.*, 326 F.R.D. 562, 586 (N.D. Cal. 2018).

Here, at least the following important common questions capable of common answers are presented with respect to each of the six facilities at issue:

- **Whether Brookdale's Assisted Living Facilities are Covered by the ADA**

The ADA prohibits discrimination in places of "public accommodation." 42 U.S.C. § 12182(a). Places of public accommodation are defined under Title III to include twelve categories, one of which is "senior citizen center[s]." 42 U.S.C. § 12181(7). This Court previously held that Defendants' facilities are public accommodations covered by the ADA. *See Stiner v. Brookdale Sr. Living, Inc.*, 354 F. Supp. 3d 1046, 1058-59 (N.D. Cal. 2019). While Defendants continue to argue (albeit without authority) that Brookdale is not covered by the ADA, this Court has already held that the resolution of this important threshold issue can be resolved on a classwide basis. *Stiner*, 665 F. Supp. 3d at 1187. For each facility, the question will generate a common answer that will drive resolution of the case, even if not as the primary mover. *See id.* (citing *Dukes*, 564 U.S. at 350). A full race cannot be run without completing the first lap.

- **When Was Each Facility Constructed and What Access Standard Applies**

The particular disability access standard that applies to each facility is determined by its date of construction. Each facility at issue was newly constructed under federal and/or state law in a particular year. Facilities constructed after January 26, 1993 must comply with the minimum requirements of the ADAAG. *See* 28 C.F.R. § 36.406(a); *see*, *e.g.*, *Chapman*, 631 F.3d at 945-46. Facilities constructed after December 31, 1981 must comply with the specific iteration of the CBC that was in effect at the time of the facilities' construction. *See, e.g., Moeller*, 816 F. Supp. 2d at 848. The construction date of each of the six facilities and which federal and/or state access standard applies can be determined

through common proof including expert testimony and the construction records for the facility. Here, the parties' access experts have reviewed the construction histories for each of these facilities based on building department records and have determined the access standards that apply to each facility. Waters Decl. ¶¶ 34, 41, 51, 56; Mastin Decl. ¶¶ 25, 26; ECF 377-1, (Anderson Decl.), Ex. 3 at 30-32. The parties' experts agree upon the access standards that apply to each facility as follows:

Brookdale Facility	Year of Construction	Applicable Title 24 Ed.
Scotts Valley	1987	1985 Ed., effective 1985
Tracy	1987	1985 Ed., effective 1985
San Ramon	1989	1989 Ed., effective July 1, 1989
Hemet	1998	1995 Ed., effective Jan. 1, 1996
Brookhurst	2001	1998 Ed., Effective July 1, 1999
Fountaingrove	2001	1998 Ed., Effective July 1, 1999

ECF 377-1, Anderson Decl., Ex. 3. Accordingly, there is common proof of the access standard that applies to each facility which is apt to drive the resolution of this litigation for all members of each putative subclass.

- **Whether Brookdale's New Facilities Comply with the 1991 ADAAG and/or the California Building Code**

Under the ADA Title III regulations, public accommodations such as Brookdale are required to ensure that any new or altered facilities that they own, operate and/or manage are in full compliance with federal and state accessibility standards. *See, e.g.*, *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 849 (9th Cir. 2004); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000) (citing legislative history of the ADA). Under the ADA, "new" facilities constructed after January 26, 1993 must comply with the 1991 ADAAG. 28 C.F.R. § 36.401. Newly constructed or altered facilities must also comply with the requirements of state law, including any requirements under the CBC that are more stringent than federal law with respect to disability access. Cal. Gov't Code § 4459(a), (c); 42 U.S.C. § 12201(b).

If Brookdale's newly constructed facilities are not in full compliance with federal and state access standards, then Defendants have violated the ADA and the Unruh Act, thereby establishing liability to all subclass members at each of the six facilities. Plaintiffs' access experts have conducted site inspections of each facility to determine whether they are in compliance with federal and state

access standards. Plaintiffs' experts inspected a sample of the residential units in these facilities that was "typical, in all material respects affecting disability access…." *See* ECF 154 at ¶ 7. They also inspected the common areas of each of these facilities. *See id.* at ¶ 1 & Exs. A, B. **None of them are compliant.** Waters Decl. ¶¶ 28-67, Exs. A-D; Mastin Decl. ¶¶ 30-41, Exs. A, B. Each facility suffers from non-compliant parking, entrances, paths of travel, ramps, restrooms, residential units, dining rooms and other common areas.

Whether the foregoing conditions exist, and whether they violate federal and/or California access standards, are predominant common questions that are capable of common answers for all subclass members at each of the six facilities based on the measurements and data from Plaintiffs' site inspections. All subclass members at each facility "face[] identically alleged access barriers" within that particular facility. *Castaneda*, 264 F.R.D. at 572. As the *Castaneda* court held, commonality and predominance are satisfied because "[a]ll mobility-impaired patrons of a particular restaurant who use wheelchairs face identical facilities and identical access barriers. Their common interest in assuring that all the features at the particular restaurant are in compliance will predominate over any individual differences among them. Addressing any barriers at each store with injunctive relief lends itself to a single adjudication." *Id.*

The named Plaintiffs may obtain injunctive relief on behalf of themselves and the other putative subclass members even if they have not personally encountered each of the barriers that exist at the facility at which they reside. The Ninth Circuit has held that once a person with a mobility or vision disability has encountered a barrier at a facility, she is *not* required to encounter *other* barriers at the facility in order to obtain injunctive relief to remedy *all* of the barriers at the facility. *See, e.g., Chapman*, 631 F.3d at 950-51. Nothing in the ADA requires prior encounters with ADAAG violations for the plaintiff in an access case to establish liability or to obtain injunctive relief requiring their removal. *See, e.g.*, *Chapman*, 631 F.3d at 951; *Frame v. City of Arlington*, 657 F.3d 215, 235-36 & n.104 (5th Cir. 2011) (en banc); *Disabled Ams. For Equal Access, Inc. v. Ferries del Caribe, Inc.*, 405 F.3d 60, 64-65 & n.7 (1st Cir. 2005). Accordingly, it is not necessary for the named Plaintiffs and the subclass members at a particular facility to have encountered the same barriers in order to satisfy commonality or to obtain injunctive relief within each facility.

Defendants have argued that facility-level access classes should be denied because access barriers may vary within the facilities. According to Defendants, "the trier of fact would have to engage in individual inquiries regarding each discrete feature on a unit-by-unit basis to determine liability." ECF 672 at 31; *see also id.* at 30 & nn.16-17. Defendants are incorrect. Every court to have addressed the issue has rejected the argument that variation in barriers within facilities defeats commonality and typicality, and that disability access class actions should be limited to challenges to identical barriers. *See, e.g.*, *Nevarez* , 326 F.R.D. at 580 (finding predominance satisfied and observing that class treatment is appropriate even if a case involves "thousands of barriers" that are "not identical" and where "no named plaintiff claimed to have encountered every barrier"); *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 510-14 (N.D. Cal. 2011); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 120-21 (C.D. Cal. 2008) (granting class certification in case challenging 90 stores statewide, and finding commonality met because "[d]espite differences from store to store, the alleged accessibility barriers affect all wheelchair users in the same way."); *Californians for Disability Rights*, 249 F.R.D. at 344-46 (certifying class of persons with mobility disabilities challenging access to pedestrian rights of way with varying barriers throughout California); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 609-10 (N.D. Cal. 2004) (granting class certification in challenge to accessibility of 220 restaurants throughout California despite the fact that the plaintiffs challenged "a multitude of architectural designs, based on approximately 30 different prototypes with different interior layouts and features"); *Arnold v. United Artists Theatre Cir., Inc.*, 158 F.R.D. 439, 448-49 (N.D. Cal. 1994) (certifying class of mobility disabled persons challenging access to 70 different movie theatres in California, and noting that commonality was satisfied for the "subclass" of patrons who used each particular theatre because all class members faced the same barriers therein).

To Plaintiffs' knowledge, no court in the Ninth Circuit has adopted Defendants' extreme argument that access classes must be limited to cases that challenge identical barriers within a single facility. And no court in the Ninth Circuit has ever held that barrier variation within a single facility defeats commonality. Defendants' reliance on *Castaneda* is misplaced. In *Castaneda*, the court specifically found that the barriers in the various restaurants varied in type, that the restaurants did not have a standardized design, and did not make any finding that the barriers within restaurants were the

same. *Castaneda*, 264 F.R.D. at 568-69. Yet the court concluded that commonality and predominance were met with respect to the ten restaurants used by the named plaintiffs, and that ten facility-level (b)(3) classes should be certified. *Id.* at 572. Indeed, in *Stiner*, this Court acknowledged that commonality is satisfied with respect to single facility access classes because "they present common questions about the defendant's facility, polic[i]es and practices." *Stiner*, 665 F. Supp. 3d at 1187; *see also Nevarez*, 326 F.R.D. at 586; *Arnold*, 158 F.R.D. at 449.

Defendants have never cited any authority for their argument that barrier variation within a single facility defeats class treatment. Adopting Defendants' extreme and erroneous position that barrier variation within a facility defeats commonality would go a long way toward barring all ADA access class actions, frustrating Congress's "broad mandate" "to eliminate discrimination against disabled individuals, and to integrate them 'into the economic and social mainstream of American life.'" *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

In a similar vein, Defendants have argued that the large number of ADAAG and CBC violations in their facilities defeat commonality because of the alleged need for barrier-by-barrier adjudications at trial. ECF 672 at 31. However, there is no need to adjudicate all of the alleged ADAAG and CBC violations in Defendants' facilities in order to establish classwide liability under the ADA or the Unruh Act. To ensure that disability access class actions remain manageable, courts often impose reasonable limits on the number of barriers that can be presented at trial, limit the parties to a sample of barriers to be adjudicated, and proceed by way of representative proof. Courts have repeatedly rejected Defendants' argument that commonality cannot be met because of the alleged need to adjudicate every access barrier. *See, e.g.*, *Smith v. City of Oakland*, 339 F.R.D. 131, 140 (N.D. Cal. 2021); *Nevarez*, 326 F.R.D. at 580 (rejecting the argument that typicality not was not satisfied even though "thousands of barriers were not identical and no named plaintiff claimed to have encountered every barrier"); *Gray*, 279 F.R.D. at 516; *Californians for Disability Rights*, 249 F.R.D. at 345 (rejecting argument that each barrier must be litigated individually because the concept that "in order to prove the existence of the forest the plaintiffs must individually prove the existence of each tree—is anathema to the very notion of a class action"); *see also* Fed. R. Civ. Proc. 23(d)(1)(A) (permitting court to set limits on repetitive or cumulative proof in class action trials).

In addition, courts frequently allow proof of ADAAG and CBC violations through expert testimony. Under Ninth Circuit precedent, there is no need for a person with a mobility disability to encounter each barrier in order to show injury. A disabled plaintiff may rely upon expert testimony regarding unencountered barriers to establish liability and be entitled to injunctive relief requiring the removal of unencountered barriers that were proven through expert testimony. *See, e.g.*, *Chapman*, 631 F.3d at 943-44, 947-51; *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1044, 1047 (9th Cir. 2008). This rule applies regardless of whether the plaintiff has personal knowledge of the barriers identified by their expert. *Id.* Accordingly, it will not be necessary for Plaintiffs to present a large number of class member witnesses to prove their claims at trial.

- **Whether Brookdale Has Failed to Comply With Its Duty to Remove ADAAG and CBC Violations From Its New Facilities Under the ADA and California Law**

Brookdale has an affirmative legal duty to remove ADAAG and CBC violations from its newly constructed facilities. Under the ADA Title III regulations, Brookdale was required to remediate any ADAAG violations in its newly constructed facilities (Hemet, Brookhurst and Fountaingrove). 28 C.F.R. § 36.406(a)(5)(i). Under California law, Brookdale is required to remediate any CBC violations in the six facilities at issue within 90 days of their discovery. Cal. Gov't Code § 4452 ("Any unauthorized deviation from such regulations or building standards shall be rectified by full compliance within 90 days after discovery of the deviation."). Yet, as discussed, Brookdale has a policy and practice of failing to ensure ADAAG compliance during construction, failing to inspect for ADAAG compliance at the conclusion of projects, and failing to set deadlines for the removal of ADAAG violations from its facilities.

Instead, in violation of the ADA, Brookdale waits for residents to request barrier removal and makes them pay for it. This policy is stated in Brookdale's corporate form Residency Agreements: "The cost of any alterations made by you shall be paid by you unless otherwise agreed to in writing." *See supra* at § III.B.1; ECF 238-3 at 292 (Ex. 1-C); *see also* Wallace Decl.¶ 10, Ex. 9 (Bowman Depo. on June 23, 2021 at 71:2-72:3; 168:23-170:10). Courts have rejected "access upon request" policies because they shift the burden of identifying and removing access barriers onto persons with disabilities. *See, e.g.*, *Huezo v. L.A. Cmty. Coll. Dist.*, 672 F. Supp. 2d 1045, 1061-62 (C.D. Cal. 2008). Moreover, Title III of the ADA prohibits public accommodations from imposing a surcharge to cover the cost of

removal of access barriers. 28 C.F.R. § 36.301(c). The U.S. Department of Justice Technical Assistance Manual ("TAM") similarly prohibits such surcharges. *See* TAM at III-4.1400. Under the ADA and California law, the duty and burden is on Brookdale to identify and remediate ADAAG and CBC violations in its new facilities, and not the residents. *See, e.g.*, 28 C.F.R. § 36.406(a)(5); Cal. Gov't Code § 4452.

Courts have routinely granted class certification in cases in which similarly deficient policies and practices were at issue. *See, e.g.*, *Gray*, 279 F.R.D. at 512-14 (collecting authorities); *Park*, 254 F.R.D. at 120-21 (certifying class; common questions included "whether defendant created a policy to ignore accessibility for the mobility impaired in its restrooms and parking lots unless it was sued"); *Cherry v. City Coll. of S.F.*, No. C 04-04981 WHA, 2005 WL 6769124, at *6 (N.D. Cal. June 15, 2005) (certifying class; common issues included "[w]hether [defendant] ha[d] adopted a systemic policy of leaving architectural barriers in place and relying solely on 'accommodations upon request'"). Thus, whether Brookdale's policy and practice of leaving barriers in place until residents request their removal violates the ADA is another predominant common question supporting class treatment.

Defendants have argued that disability access compliance and barrier removal in their facilities is addressed through a "policy of delegation" to its facilities and their Executive Directors. ECF 596-2 at 26 & n.13. This is not supported by the record. *See* §§ III.A. and III.B., *supra*. But even under Defendants' version of the facts, the operator of each facility, *i.e.*, Brookdale, would be legally responsible for barrier removal under the ADA and the Unruh Act, and liable for failing to satisfy its affirmative duty to operate its facilities in compliance with those laws. Whether it has done so with respect to each of the facilities at issue herein is a common issue that predominates in this action.

3. The Named Plaintiffs Satisfy the Typicality Requirement

Rule 23(a)(3) requires that the claims of the class representative be typical of those of the class. "Typicality focuses on the class representative's claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative 'aligns with the interests of the class.' The requirement is permissive, such that 'representative claims are "typical" if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal citations omitted).

Plaintiffs' claims are typical of those of the subclasses they seek to represent. All of the named Plaintiffs are or were residents of one of the six facilities at the time when they brought or joined this action, and all have mobility and/or vision disabilities. All have encountered barriers that denied them full and equal access to the facilities at which they reside or resided, and that caused them difficulty or discomfort. *See* Stiner Decl., Ex. A ¶¶ 2, 5-6, 17-23; R. Carlson Decl., Ex. A ¶¶ 4-5, 18-21; Vallette Decl., Ex. A ¶¶ 5-6, 22-24; Fisher Decl., Ex. A ¶¶ 5-33; Lytle Decl., Ex. A ¶¶ 21-22; Lindstrom Decl., Ex. A ¶¶ 12-13; Jestrabek-Hart Decl., Ex. A ¶¶ 4-7, 10-32; Algarme Decl., Ex. A ¶¶ 7-27; Margie Decl. ¶¶ 2-3, 7-8; DeMello Decl. ¶¶ 2, 4, 8, Ex. A ¶¶ 2, 4, 21-26 .

Plaintiffs' claims arise from the same course of conduct by Defendants, and are based on the same legal theories. They have also suffered the same or similar injuries as the other class members. As the *Castaneda* court stated in holding that typicality was satisfied, "[t]he named plaintiffs here, like members of each proposed class they represent, all use wheelchairs or scooters for mobility and by definition have encountered the same allegedly discriminatory barriers at the same particular store." *Castaneda*, 264 F.R.D. at 572; *see also Nevarez*, 326 F.R.D. at 580. Accordingly, typicality is satisfied.

4. The Proposed Subclass Representatives and Class Counsel Are Adequate

This Court previously found that the proposed subclass representatives and class counsel meet the adequacy requirement of Fed. R. Civ. P. 23(a)(4). *Stiner*, 665 F. Supp. 3d at 1185.

5. Plaintiffs Satisfy the Requirements of Rule 23(b)(2)

Plaintiffs' proposed subclasses may be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The primary role of this provision has always been the certification of civil rights class actions." *Parsons*, 754 F.3d at 686; *see also*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Classwide injury is not required for certification under Rule 23(b)(2), and only the named Plaintiffs need show Article III injury, not class members. *See, e.g.*, *Olean*, 31 F.4th at 682, n.32 (collecting authorities).

The claims brought herein are precisely the type of claims that Rule 23(b)(2) was intended to address. Plaintiffs seek declaratory and injunctive relief including, *inter alia*, that the facilities at issue

be made accessible in compliance with the ADAAG and the CBC. *Nevarez*, 326 F.R.D. at 590-91.

6. Plaintiffs Satisfy the Requirements of Rule 23(b)(3) With Respect to Their Proposed Damages Subclasses on Behalf of Persons with Mobility and/or Vision Disabilities

a. Common Questions of Law and Fact Predominate Over Individual Questions

The Ninth Circuit has held that predominance is a "comparative" concept. More important questions "apt to drive the resolution of the litigation are given more weight," and predominance can be established by "just one common question" even if "other important matters will have to be tried separately." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557-58 (9th Cir. 2019) (en banc) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). Predominance does not require that all questions be common ones, and the existence of "individualized questions about injury or entitlement to damages" do not inherently defeat predominance. *Olean*, 31 F.4th at 669.

Here, the predominance test is satisfied because significant aspects of the case (indeed resolution-driving issues) can be resolved through evidence common to the subclasses. First, Defendants' liability for owning, operating or managing their facilities in violation of applicable federal and state disability access standards will be resolved through public records regarding the construction dates of the facilities and the parties' disability access site inspections. Plaintiffs' inspections have produced objective measurements and data that show that Brookdale's newly constructed facilities violate the 1991 ADAAG and the CBC, which are the minimum standards for accessibility for newly constructed facilities under federal and California law. This establishes Defendants' liability under the ADA and the Unruh Act as to all members of the proposed damages subclasses. *See, e.g., Chapman*, 631 F.3d at 945-46; *Nevarez*, 326 F.R.D. at 584-86; *Castaneda*, 264 F.R.D. at 561, 572. Whether Defendants complied with the new construction requirements of the ADA and the Unruh Act therefore raises quintessential common questions that predominate over any individual questions. Indeed, courts have held that claims for violations of the ADAAG and the CBC raise predominant common questions of law and fact, and that certification of a damages class under Rule 23(b)(3) is therefore appropriate. *See, e.g., Nevarez*, 326 F.R.D. at 584-85; *Castaneda*, 264 F.R.D. at 572, 574.

Second, Plaintiffs' proposed statutory damages class satisfies the Ninth Circuit's requirements that the damages "are directly attributable to their legal theory of the harm," and that they can be determined "without excessive difficulty." *Just Film*, 847 F.3d at 1121. Plaintiffs seek only statutory

minimum damages on a class basis, and do not seek any actual or compensatory damages. The damages suffered by the class flow directly from Defendants' conduct in violating the access requirements of the ADA. A violation of the ADA constitutes a violation of the Unruh Act. Cal. Civ. Code § 51(f); *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 673 (2009) ("[L]ike the language of the amendment itself, [the legislative history] demonstrates an intent to incorporate ADA accessibility standards comprehensively into the Unruh Civil Rights Act and thus to provide a damages remedy for any violation of the ADA's mandate of equal access to public accommodations.").

Courts consider each particular occasion that involved an access barrier to be a separate Unruh Act violation, with each such occasion entitling the plaintiff to recover $4,000 in minimum statutory damages. *See, e.g.*, Cal. Civ. Code §§ 52(a), 55.56(e); *Nevarez*, 326 F.R.D. at 584-85. Thus, each Plaintiff and each member of the putative subclasses is entitled to statutory minimum damages of $4,000 per violation. The members of the damages subclasses can be identified from Brookdale's assessment data, which specifically identify the residents who use mobility devices or who have visual impairments. *See* ECF 662-6 (Flores Decl. ¶ 119). To the extent that it is necessary for the subclass members to confirm eligibility to recover statutory damages under the Unruh Act, or the number of instances in which they encountered a barrier that caused them difficulty, discomfort or embarrassment, courts have held that this issue may be addressed by way of a claims form after classwide liability has been determined. Indeed, the use of claims forms to determine individual damages is routinely permitted including in the context of disability access and cases under the Unruh Act. *Briseno v. ConAgra Foods Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017); *Nevarez*, 326 F.R.D. at 576-77; *Davis v. Lab. Corp. of Am. Holdings*, 604 F. Supp. 3d 913, 930-33 (C.D. Cal. 2022), *aff'd* 2024 WL 489288, at *3 (9th Cir. Feb. 8, 2024). This Court has also used the claims form procedure for purposes of determining individual damages in class action matters. *See, e.g.*, *Dickey v. Advanced Micro Devices, Inc.*, No. 15-CV-04922-HSG, 2019 WL 251488, at *7 (N.D. Cal. Jan. 17, 2019).

Finally, at class certification, Plaintiffs are not required to show that all class members will be entitled to recover damages at the recovery stage. Rather, Plaintiffs are only required to show that it will be possible to "winnow out" any uninjured class members. *Olean*, 31 F.4th at 669. As discussed, a claims form can be used to identify which class members are eligible to recover statutory minimum

damages under Cal. Civ. Code § 55.56(a)-(c). *Nevarez*, 326 F.R.D. at 576-77, 580. As in *Nevarez*, Plaintiffs here only seek statutory minimum damages for encounters with particular barriers that caused the resident "difficulty, discomfort, or embarrassment." Cal. Civ. Code § 55.56(a)-(c). A copy of the straightforward claims form that was approved by the court in *Nevarez* is attached as Exhibit 17 to the Wallace Declaration. Wallace Decl. ¶ 18, Ex. 17. Plaintiffs do ***not*** seek to recover statutory damages based on deterrence under Cal. Civ. Code § 55.56(d), which requires plaintiffs to have actual knowledge of barriers that they have not encountered, but that deterred them from using a facility. Thus, there is no need to determine whether class members had personal knowledge of specific unencountered barriers within the facilities.

b. Class Certification Is Superior to Other Means of Resolving This Dispute

Plaintiffs also satisfy each of the Rule 23(b)(3) superiority factors, including: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

With respect to the first factor, there is no indication that class members have an interest in individually controlling their own cases, as the cost of litigating individual actions would be prohibitively high. With respect to the second factor, Plaintiffs are unaware of any other cases challenging Brookdale's compliance with the ADA. The third factor – the desirability of concentrating the litigation in this forum—is also met, because substantial judicial resources are conserved by determining common issues in a single adjudication. Plaintiffs also meet the fourth factor because trial will not pose any unique case management problems. *Nevarez*, 326 F.R.D. at 589-90.

C. Plaintiffs' damages model meets applicable requirements

A party seeking Rule 23(b)(3) certification must show that "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). As the Ninth Circuit has repeatedly held, however, *Comcast* did not abrogate the well-established rule that uncertain "damages calculations alone cannot defeat class certification." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513-514 (9th Cir. 2013). Rather, *Comcast* requires only that Plaintiffs are "able to show that their

damages stemmed from the defendant's actions that created the legal liability." *Id.* at 514.; *see also Just Film, Inc.*, 847 F.3d at 1121 (Rule 23 requires only that "damages can be determined without excessive difficulty and attributed to [plaintiff's] theory of liability").

With respect to Plaintiffs' damages claims under the Unruh Act, to the extent that it is necessary for the class members to confirm eligibility to recover damages, this can be addressed by a claims process after classwide liability has been determined. *Nevarez*, 326 F.R.D. at 576-77 (collecting authorities); *see supra* at § IV.B.6.a. In his Declaration, Dr. Kennedy describes a well-accepted method for analyzing the claims forms and calculating interest. Kennedy Decl. ¶¶ 13-17.

Finally, Plaintiffs' damages models complies with *Comcast*. The category of monetary relief requested—statutory damages—"stem[] from the defendant's actions that created the legal liability." *Nguyen v. Nissan N. Am. Inc.*, 932 F.3d 811, 817 (9th Cir. 2019) (quoting *Leyva*, 716 F.3d at 514). This category of damages, the amounts requested can be reasonably calculated on an aggregate and per-resident basis. Kennedy Decl. ¶¶ 16-17. The calculations will be made based on the claims forms that are submitted. *Id.* at ¶¶ 14, 16; discussion *supra* at § IV.B.6.a.

V. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that their motion be granted.

Dated: February 9, 2024

Respectfully submitted,

/s/ Guy B. Wallace
Guy B. Wallace
Attorneys for Plaintiffs, the Certified Class and the Proposed Subclasses

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States District Court, Northern District of California, by using the Court's CM/ECF system on February 9, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

Dated: February 9, 2024

/s/ *Guy B. Wallace*
Guy B. Wallace