IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. ______________

STEAK 'N SHAKE OPERATIONS, INC.,

Petitioner-Defendant,

vs.

CHRISTOPHER MIELO and SARAH HEINZL,
individually and on behalf of all others
similarly situated,

Respondents-Plaintiffs.

Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) and Fed. R. APP. P. 5 an Order of the United States District Court for the Western District of Pennsylvania Granting Class Certification
No. 2:15-cv-00180
Hon. Robert C. Mitchell, United States Magistrate Judge

Patrick J. Fazzini (ID No. 306664)
Maria Greco Danaher (ID No. 47036)
David H. Raizman (CA ID No.129407)
(Application for Admission Forthcoming)
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One PPG Place, Suite 1900
Pittsburgh, Pennsylvania 15222
(412) 394-3390
Fax: (412) 315-6040

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, petitioner Steak 'n Shake Operations, Inc. discloses that it is a wholly-owned subsidiary of Biglari Holdings, a publicly-owned company traded on the NYSE.

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INTRODUCTION AND RELIEF SOUGHT

In granting class certification in this action under Title III of the Americans with Disabilities Act ("ADA"), the District Court made multiple errors, starting with its erroneous relaxation of the "rigorous analysis" requirement mandated by the Supreme Court in *Walmart v. Dukes* 131 S. Ct. 2541, 2551 (2011), replacing it with a presumption of resolving all doubt "in favor of allowing the case to proceed as a class action." (Order at 8.)[1] Application of this erroneous standard may have contributed to the District Court's ensuing errors in (1) not requiring "significant proof of discrimination" because of an erroneous reluctance to address the merits, and (2) finding numerosity in the absence of any concrete or even circumstantial evidence and based solely on statistics and "common sense," while explicitly and erroneously "relaxing" the numerosity standard in "injunctive relief" cases.

The District Court's most impactful error was its effective holding that the ADA's "maintenance" regulation (28 C.F.R. § 36.211 – "Section 211") requires Title III places of public accommodation to permanently and persistently inspect, and then maintain, their facilities free of barriers. The District Court decided this novel issue of law, despite explicit guidance to the contrary from the Department of Justice ("DOJ"), the enforcing agency and author of the maintenance regulation, and despite the DOJ's authoring of a regulation under Title II of the ADA that

[1] Copies of the Court's April 27, 2017 Opinion and Order ("Order") are collectively attached at **Exhibit A**.

explicitly imposes a similar (though lesser and nonactionable) inspect-and-remediate duty on the public entities covered by Title II. Significantly, this novel issue has only been decided (and decided differently) by two Magistrate Judges in the Western District of Pennsylvania, leaving litigants there to a fate decided by that Court's "assignment wheel" and courts throughout the country without clear guidance on the meaning of Section 211.

The District Court's Order was clearly erroneous in all of these respects. Its decision to create a massive and fatally vague obligation under Section 211 was not only novel, but also sustains conflict *within* a judicial district in this Circuit and resolves the issue in a way that imposes on Steak 'N Shake "hydraulic pressure to settle" based on the "potentially ruinous liability" resulting from any judgment requiring it to permanently and continuously inspect and repair each of its more than 400 restaurants. The District Court itself recognizes that pressure; on May 10, 2017, it ordered Steak 'N Shake to bring a corporate representative with "full settlement authority" to the status conference that resumes the litigation below. (ECF No. 75.)

Steak 'N Shake respectfully requests that the Court grant it permission to appeal the District Court's Order, order full briefing on the merits and schedule this appeal for oral argument.

QUESTIONS PRESENTED

Did the District Court err in granting class certification by applying an erroneous presumption to resolve all doubt on the motion in favor of class certification when, in fact, it was Plaintiffs' burden to meet each class certification requirement with "sufficient evidence" after "rigorous analysis"?

Did the District Court erroneously grant class certification by making any one or more of the following errors, each of which would have independently led the District Court to deny class certification:

1. Finding commonality: (a) based on an erroneous reading of 28 C.F.R. § 36.211 to impose a duty on public accommodations to regularly inspect and repair facilities to keep them permanently and continuously free of barriers to access, (b) by declining to engage in a merits inquiry necessary to determine commonality, (c) by declining to require "significant proof of discrimination" to support commonality, and/or (d) by permitting unreliable evidence to support the scant showing of actual ADA violations at only eight of more than 400 restaurants?
2. Finding numerosity: (a) applying a "relaxed" standard for injunctive relief cases, and/or (b) relying strictly on census data and common sense?

STATEMENT OF FACTS

A. **Plaintiffs' Allegations and Narrow Showing**

On February 10, 2015, plaintiffs Christopher Mielo and Sarah Heinzl ("Plaintiffs") filed a Complaint alleging that each had visited a single restaurant operated by defendant Steak 'N Shake Operations, Inc. ("Steak 'N Shake") and had experienced difficulty using the accessible features of the parking lot at those two restaurants in violation of the ADA. (ECF No. 1.) Plaintiffs further allege that investigators identified ADA violations in the parking lots at six additional Steak 'N Shake restaurants in Pennsylvania and Ohio. (*Id*. at ¶ 21.) While Plaintiffs claim to repeatedly visit Steak 'N Shake restaurants on a regular basis (Order at 16), they have each only had difficulty at one restaurant each, the visits identified in the Complaint. (ECF No. 1 at ¶¶ 19-20; ECF No. 64 at 3-4; (Mielo Dep. 42:17-43:4, 48:1-3, 49:17-23, 50:19-51-17, 55:5-14, 53:19-25; Heinzl Dep. 30:19-31:11, 33:12-34:24, 40:15-21, 41:3-25, 42:2-18, 43:2-12, 55:1-19).) Accepting Plaintiffs' allegations and assertions as true, after multiple visits to Steak 'N Shake restaurants, they experienced difficulty on only one occasion each at two of Steak 'N Shake's more than 400 American restaurants, and their investigators identified parking lot violations at an additional six restaurants for a total of less than 2% of the restaurants.

Moreover, the limited evidence cited by the Court is itself questionable. Plaintiffs' own investigator admitted that he used improper techniques in finding violations at the eight stores visited by, for example, placing his slope measuring tool on ice, snow and other debris. (ECF No. 64 at 5, Riordan Dep. 57:4-13, Ex. 2 at 18-19, 21-24 & 33.) Then, Steak 'N Shake's expert offered uncontradicted testimony that Plaintiffs' investigators (a) failed to account for the recognized "construction tolerance" (of up to 1%) permitted under Section 104.1.1 of the DOJ's ADA Standards for Accessible Design (and Section 3.2 of its 1991 predecessor), which would have made compliant several of the alleged parking lot "violations" found by the investigators; and (b) disregarded evidence that the slopes of parking lots vary widely depending on seasonal conditions. (ECF No. 64-1; (Marinelli Decl. ¶¶ 6-8).)

Moving beyond Plaintiffs' minimal and questionable showing of actual ADA violations, the District Court found that Plaintiffs offered evidence that Steak 'N Shake "applies the same ADA maintenance policies and practices in a uniform way to the restaurants it owns and controls" (Order at 12), without reaching any conclusion at the certification stage as to whether those policies and practices are in any way unlawful. (*Id.* ("may harm" people with disabilities).) The District Court noted that Steak 'N Shake's policies and practices did not include measuring its parking lots and accessible routes for slope violations and erroneously asserted

a 2.1% slope requirement that disregards construction tolerances allowed by the ADA Standards. (*Id.* at 13.)

B. <u>Motion for Class Certification</u>

Based on this factual record, on November 4, 2016, Plaintiffs moved for class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure, and the matter was fully briefed. (ECF Nos. 44, 45, 60, 64, & 68.) In a 16-page Opinion and one-page Order dated and issued on April 27, 2017, the District Court (the Honorable Robert C. Mitchell, Magistrate Judge) granted that motion. (Ex. A.) Steak ‘N Shake has timely petitioned this Court within 14 days of that Order, as required under Rule 23(f) of the Federal Rules of Civil Procedure and Rule 5(a) of the Federal Rules of Appellate Procedure.

C. <u>The Certification Decision</u>

In addition to other errors that would be raised on appeal, the District Court rested its decision on multiple errant conclusions of law, starting with a presumption in favor of granting class certification: “Moreover, when doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action.” (Order at 8 (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985).) That approach turns on its head the Supreme Court’s mandate in *Wal-Mart v. Dukes* requiring “rigorous analysis” and “sufficient evidence” as to each of the Rule 23 requirements that class movants

must satisfy. *Dukes*, 131 S. Ct. at 2551-54. That improper approach appears to have infected the Court's other determinations and led to the manifestly erroneous conclusions of law outlined below.

Indeed, the Court applied an analogous, "relaxed" standard in deciding numerosity (Order at 11) and declined to reach necessary merits decisions required to determine commonality. (*Id.* at 12 ("The Plaintiffs have shown sufficient evidence – at this juncture – that Defendant applies the same ADA maintenance policies and practices in a uniform way to the restaurants it owns and controls, which *may* prove to be harmful to the class [sic] members protected rights." (emphasis added).)

REASONS FOR GRANTING PETITION

A. Standard of Review

The Third Circuit is "afforded wide latitude" in deciding a Rule 23(f) petition as "[p]ermission to appeal may be granted or denied on the basis of any consideration that the courts of appeals find persuasive." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001); *see also Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 376–77 (3d Cir. 2013). The Court has found reason to permit an interlocutory appeal under Rule 23(f) in each of the following circumstances: when the district court's class certification was "erroneous"; "when an appeal implicates novel or unsettled question of law; in this situation,

early resolution through interlocutory appeal may facilitate the orderly development of the law[]"; "when class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however, small, of potentially ruinous liability"; and when the appeal might "facilitate development of the law on class certification." *Newton*, 259 F.3d at 164–65. Each of those circumstances is present here.

B. The District Court Applied An Erroneous Presumption In Favor of Certification

The entirety of the District Court's class certification decision is tainted because it fatally admits in its general discussion of "Rule 23 Requirements" (Order at 7-9) that "when doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action." (Order at 8, citing *Eisenberg v. Gagnon*.) This contention plainly lost whatever merit it once had after *Dukes*, which explicitly subjects to rigorous scrutiny each of the Rule 23 requirements. *Dukes*, 131 S. Ct. at 2551; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

While the District Court also correctly relied on *Dukes* in understanding that "reviewing a motion for class certification 'will entail some overlap with the merits of the plaintiff's underlying claim'" (Order at 8), it apparently relies on inapposite rulings in *Amgen v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct.

1184 (2013) and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)[2] to avoid merits decisions and require "significant proof of discrimination" to support commonality.

C. **The District Court Erroneously Found Commonality Based on a Series of Erroneous Rulings, Including a Ruling on a Novel Issue Of Law That Will Impose Hydraulic Pressure to Settle By Threatening Potentially Ruinous Liability**

Plaintiffs attempt below to demonstrate commonality at 400 Steak 'N Shake restaurants by citing to scant evidence of questionable violations at eight restaurants and by citing a uniform maintenance policy and practice that they claim violates Section 211. Without the policy and practice they find unlawful under a novel reading of Section 211, there could be no way to establish commonality or "significant proof of discrimination" across 400 restaurants.

The District Court's brief discussion of the critical commonality requirement (s*ee* Order at 11-13) recites some black letter commonality law (*id.* at 11) and then recites Steak 'N Shake's commonality contentions. (*Id.* at 12.) The District Court's commonality reasoning is reduced to a single paragraph that finds (a) an uniform maintenance policy and practice that the District Court does not say violates Section 211, but that "may prove to be harmful to the class" (*id.*), and (b) Steak 'N

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[2] These decisions merely stand for the proposition that proposition that the Court must refrain from "free-ranging merits inquiries"; however, as the *Amgen* court, citing *Dukes*, expressly acknowledged: "[m]erits questions *may* be considered to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen,* 133 S. Ct. at 1195 (emphasis added). These cases do not excuse a court from inspecting the merits where necessary to evaluate the prerequisites for Rule 23 class certification.

Shake's policy and practice does not check for slope. (*Id.* at 13.) Not only are these already thin findings premised on a non-existent legal duty to inspect and repair facilities (including a silent requirement to check slopes), they are also based on an almost non-existent record of actual slope violations, generated by investigators who undisputedly used obviously defective techniques, and a patent misreading of the slope requirement when addressing asphalt or concrete.

The maintenance regulation on which Plaintiffs' showing of discrimination rests requires places of public accommodation to "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities." 28 C.F.R. § 36.211(a). Out of this general language, the District Court has fashioned a continuous and massive obligation for public accommodations to inspect its properties for compliance with *all* ADA requirements, including slopes, and repair all such conditions on an ongoing basis. This enormous obligation can be found nowhere in the language of the regulation, the regulatory history, or the Congressional history. (ECF No. 64 at 9-13.)

Significantly, the Department of Justice knew how to create such an obligation under Title II of the ADA, where it explicitly requires public entities to "self-evaluate" for barriers and then create a "transition plan" for remediation. 28 C.F.R. §§ 35.105(a), 150(d)(1). Just as significantly, there is no private right of

action to enforce these Title II duties. *See Lonberg v. City of Riverside*, 571 F.3d 846, 852 (9th Cir. 2009) (holding no private cause of action under Title II of the ADA to require a public entity to implement transition plan prescribed by Attorney General pursuant to 28 C.F.R § 35.150); *Ability Ctr. of Toledo v. City of Sandusky,* 385 F.3d 901, 914 (6th Cir.2004) (same); *Iverson v. City Of Boston*, 452 F.3d 94, 102 (1st Cir. 2006); *Cherry v. City Coll. of San Francisco,* No. C 04–4981 WHA, 2005 WL 2620560, *4 (N.D. Cal. Oct. 14, 2005) ("there is no indication that a public entity's failure to develop a transition plan harms disabled individuals, let alone in a way that Title II aims to prevent or redress. Indeed, it is conceivable that a public entity could fully satisfy its obligations to accommodate the disabled while at the same time fail to put forth a suitable transition plan.").

But the same regulator and enforcing agency did nothing nearly so explicit in writing Section 211, a regulation it actually intended to remind public accommodations to keep machinery and equipment (like lifts and elevators) in "working condition" (Section 211(a)) and to keep paths of travel clear of obstacles and debris. DOJ Preamble to Final Regulation, 56 Fed. Reg. 35544, 35562 (July 26, 1991) (emphasis added), reprinted at 28 C.F.R. Part 36, App. B, Section 36.211 (same focus on machinery and equipment and cleared paths in regulatory history).

In fact, in detailed guidance titled "Maintaining Accessible Features in Retail Establishments," published in 2009 (**Exhibit B**, also found at

https://www.ada.gov/business/retail_access.htm), the DOJ outlined its view of the Section 211 "maintenance" obligations and even provided a 25-point checklist, all in a manner consistent with the regulatory language and history and its focus on machinery, equipment and keeping paths free of obstacles. Nothing in any of that guidance requires the ongoing, comprehensive compliance duties the District Court would impose, let alone the measuring for slopes that is nearly the entire basis of Plaintiffs' slim showing.

The District Court's distinguishing of this guidance, which requires deference (*Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (It is well-established that the DOJ's interpretations of the ADA ***and its own regulations***, as both the regulator and enforcing body under Title III (42 U.S.C. §§ 12186(b), 12188(b), 12206), are entitled to substantial deference), is facially absurd. Reading one sentence in the third paragraph of the Introduction ("This document identifies ways that business can maintain their investment in access with little or no extra cost." (Ex. B at 1)), the District Court improperly reduces the guidance to *only* identifying "low-cost" maintenance obligations. (Order at 7.) This reading of the guidance takes the six words at the end of one sentence in the seven-page guidance ("with little or no extra cost") and elevates them to the *raison d'etre* for the guidance. Viewed another way, the District Court found that the maintenance guidance restricts itself to "low cost" obligations, while remaining completely

silent on the more costly obligations under Section 211. Not only does this approach make no sense, there is no support for that limitation anywhere in the document and plenty of support to the contrary. For example, the guidance identifies elevator and lift inspections as a checklist item (Ex. B at 7, Checklist Item No. 23); elevator and lift repairs clearly may involve something substantially more than "little or no extra cost." By way of further example, the guidance excludes the slope measurements that the District Court plainly reads into its Section 211, even though the actual measurement of slopes would fit in the "little cost" category. The District Court erred in not giving the guidance the deference to which it was entitled. The central error of law that the District Court makes here is that Section 211 was actually designed to create a "low cost" obligation, not the massive obligation that the District Court's ruling creates.

In fact, giving Section 211 the meaning ascribed by the District Court without any explication of what is required would be a clear due process obligation. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) (FCC violated television networks' due process rights by failing to give them fair notice that, in contrast to a prior policy, the broadcast of certain content could subject them to civil penalties); *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 251 (3d Cir. 2015) (Where an agency interprets the meaning of its own regulation, private parties are entitled to know with "ascertainable certainty" an

agency's interpretation of its regulation and "the due process clause prevents ... deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.") (internal citations omitted).[3] Without the obligations the District Court would impose under Section 211, Steak 'N Shake's maintenance policies and practices could not form the basis for any, let alone "significant proof of discrimination" to support a finding of commonality.

Even if Section 211 did impose the duty found by the District Court, the court cites no evidence that Steak 'N Shake's *policies or practices* caused the scant violations found by Plaintiffs and their investigators, nor that these violations resulted from inadequate policies, thus failing to show that this arguably common policy/practice issue constitutes "significant proof of discrimination." *Cherry,* 2005 WL 2620560, *4 ("there is no indication that a public entity's failure to develop a transition plan harms disabled individuals, let alone in a way that Title II aims to prevent or redress. Indeed, it is conceivable that a public entity could fully satisfy its obligations to accommodate the disabled while at the same time fail to put forth a suitable transition plan.").

On the most basic evidentiary level, Plaintiffs have actually gathered facially defective proof at only eight stores by using obviously improper measuring

[3] The District Court supports its sweeping reading of Section 211 by stating that Steak 'N Shake's interpretation contravenes the purpose of the ADA, that facilities be *built and altered* so as to be readily accessible…." (Order at 7 (emphasis added).) Of course, the *maintenance* obligation in Section 211 has no bearing on the *construction or alteration* requirements in 28 U.S.C. §§ 12183.

techniques (ECF No. 64 at 5, Riordan Dep. 57:4-13, Ex. 2 at 18-19, 21-24, & 33 (placing slope meters on snow, ice or debris); ECF No. 64-11, Marinelli Decl. at ¶¶ 6, 7) and by failing to account for conventional tolerances recognized by the Section 104.1.1 of the ADA Standards. The District Court wholly disregards the undisputed scantiness of Plaintiffs' evidence of actual ADA violations, the facial problems with the measuring techniques used by Plaintiffs' investigators and the fact that slope measurements are subject to seasonal change. (Order at 3, 13; ECF No. 64-11, Marinelli Decl. at ¶¶ 6. 7.) Moreover, despite the undisputed testimony of Steak 'N Shake's expert that slope measurements of asphalt and concrete are subject to a 1% "tolerance" (ECF No. 64-11, Marinelli Decl. at ¶¶ 6, 7), permitting full compliance with slopes up to 3.1%, the District Court plainly and mistakenly applies 2.1% as the legal requirement. (Order at 3 ("This investigation identified architectural barriers in the parking facilities at eight of Defendant's restaurants within that geographic region, specifically, in some cases, accessible parking spaces and access aisles *with slopes exceeding the 2.1% limit*.") (emphasis added)); *cf.* ADA Standards for Accessible Design 104.1.1, found at 36 C.F.R. Part 1191, App. B & D, 104.1.1 (permitting conventional tolerances).

At its very core, Plaintiffs' evidence of violations is sorely lacking to establish discrimination at these eight locations, let alone the "significant proof of discrimination" required to support a finding of some unlawful, common policy.

D. The District Court Erroneously Relaxed The Standard for Numerosity in Injunctive Relief Cases and Then Erroneously Found Numerosity Based on Census Data and Common Sense Alone

The District Court's entire numerosity analysis is defective because it is erroneously premised on the uncited principle "that the numerosity standard may be relaxed in cases where injunctive and declaratory relief is sought" (Order at 11), disregarding the Supreme Court's mandate in *Dukes* for "sufficient evidence" and "rigorous analysis" must be applied to each of the Rule 23 requirements. *Dukes,* 131 S. Ct. at 2551-54. While Plaintiffs cited to *Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 55* (3d Cir. 1994) below, *Dukes* plainly nullifies at least this "relaxation" language from *Baby Neal*.

With the standard "relaxed," the District Court relied on "statistical census data concerning the number of persons with mobility disabilities, as well as [sic] and considerations of judicial economy" in supporting numerosity. (Order at 11.) The District Court cites to "sufficient circumstantial evidence," but cites to none because none existed in the record.[4] Plaintiffs offered only census data and so-called "common sense" when both "common sense" and "circumstantial evidence" suggest that numerosity is lacking. *Sheller v. City of Phila.,* 288 F.R.D. 377, 383 (E.D. Pa. 2013) (speculative, conclusory and common sense assertions that Parking Authority stopped and towed thousands of cars of innocent parties); *see also*

[4] The District Court wisely disregards as speculation the beyond-the-scope testimony of Steak 'N Shake's 30(b)(6) designee about how many persons with mobility disabilities visit its restaurants.

Jackson v. Se. Pennsylvania Transp. Auth., 260 F.R.D. 168, 187 (E.D. Pa. 2009). Not only do the Plaintiffs do nothing to prove that others individuals with disabilities experienced barriers at Steak 'N Shake restaurants, they themselves only experienced difficulty *once each* on an untold number of regular visits to Steak 'N Shake restaurants that the District Court expressly relied on for standing purposes. (Order at 15-16.) Plaintiffs' investigators' spotty "proof" of violations at only eight of over 400 Steak 'N Shake restaurants, all eight in the same region, likewise questions the assumption that absent class members would necessarily encounter barriers at other restaurants. Indeed, if Plaintiffs' own experiences are any indication, absent class members would only rarely, if ever, experience barriers at Steak 'N Shake restaurants, undermining even the reliance on the statistical data and the accompanying "common sense." There is simply no evidence of numerosity here, and Plaintiffs' census data and "common sense" do not even come close to meeting their burden.

E. Beyond the Manifest Errors Demonstrated Above, These Circumstances Present Additional, Recognized Bases For Interlocutory Review

The questions of what maintenance obligations exist under Section 211, how extensively and frequently they must be fulfilled and when they become actionable creates precisely the kind of novel and unsettled issues of law that call for clarification from a federal district court on interlocutory appeal. *Newton*, 259 F.3d at 164. As noted below, the Western District of Pennsylvania has had over four

dozen filings with similar allegations (ECF No. 64-3, ECF No. 64 at 22), and two different Magistrate Judges[5] in three different cases have ruled differently on the obligations. *Mielo v. Bob Evans Farms, Inc.*, No. CIV.A. 14-1036, 2015 WL 1299815 (W.D. Pa. Mar. 23, 2015); *Heinzl v. Cracker Barrel Old Country Stores, Inc.*, No. CV 14-1455, 2016 WL 2347367 (W.D. Pa. Jan. 27, 2016), *report and recommendation adopted as modified sub nom. Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 2:14-CV-1455, 2016 WL 1761963 (W.D. Pa. Apr. 29, 2016).

The District Court's certification of a class, while interpreting Section 211 to require constant monitoring and repair of slopes and all other accessibility features of a public accommodation, applies "hydraulic pressure" on Steak 'N Shake to settle because of the threat of "potentially ruinous liability" when applied to Steak 'N Shake's more than 400 restaurants. The District Court apparently recognizes the settlement leverage it has created, having made the next event to occur in the trial proceeding a status conference, at which "[a] corporate representative of Steak 'N Shake Operations with full settlement authority must be personally present. . . ." (ECF No. 75.) Finally, a decision from this Court on interlocutory appeal will provide sorely-needed clarification in the rapidly-exploding area of ADA Title III class actions, where class representatives now routinely attempt to apply class

[5] In the *Cracker Barrel* case, the Honorable Mark R. Hornak, District Judge, adopted Magistrate Judge Mitchell's report and recommendation.

status to dozens, hundreds or even thousands of stores based on their experiences at one or two stores and the work of "investigators" at a dozen more. *Newton*, 259 F.3d at 164 ("facilitate development of the law on class certification."). If any ADA Title III violation at each location visited supports a class action, then the explosion of single-plaintiff Title III actions (Minh Vu et al., Seyfarth Shaw ADA Title III Lawsuits Increase by 37 Percent in 2016, ADA Title III News and Insights (2017), http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016) could easily become an explosion of Title III class actions. Appellate court guidance is needed.

Conclusion

For the reasons stated above, Steak 'N Shake respectfully requests that the Court permit it to appeal the grant of class certification, order full briefing on the appeal, and set the matter for oral argument.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Patrick J. Fazzini (ID No. 306664)
Maria Greco Danaher (ID No. 47036)
David H. Raizman, Esq. (CA I.D. No. 129407)
(Application for Admission Forthcoming)
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One PPG Place, Suite 1900
Pittsburgh, Pennsylvania 15222
(412) 394-3390
Fax: (412) 315-6040

Attorneys for Defendant - Petitioner

Dated: May 11, 2017

CERTIFICATE OF BAR MEMBERSHIP

I, Patrick Fazzini, hereby certify pursuant to Third Circuit Local Appellate Rule 28.3(d) and 46.1 that I am a member in good standing of the Bar of this Court.

Patrick J. Fazzini (ID No. 306664)

CERTIFICATE OF COMPLIANCE

This petition complies with the page and word count limitations of Fed. R. App. P. 5(c). In addition, this petition also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 32(c)(2) and the type style requirements of Fed. R. App. P. 32(a)(6).

Patrick J. Fazzini (ID No. 306664)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Permission to Appeal a Decision of the United States District Court for the Western District of Pennsylvania was served via e-mail and United States First Class Mail, Postage Prepaid on this 11th day of May, 2017 upon the following:

Edwin J. Kilpela, Esq.
ekilpela@carsonlynch.com
Benjamin J. Sweet, Esq.
bsweet@carsonlynch.com
Stephanie K. Goldin, Esq.
sgoldin@carlsonlynch.com
Kevin Abramowicz, Esq.
kabramowicz@carlsonlynch.com
Carlson Lynch Sweet Kilpela & Carpenter, LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222

Patrick J. Fazzini (ID No. 306664)

ADDENDUM

EXHIBIT A

(Opinion and Order of Magistrate Judge Robert C. Mitchell – Dkt. No. 73)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER MIELO and SARAH HEINZL, *individually and on behalf of all others similarly situated,*	)	Civil Action No. 15-180
Plaintiffs,	)	
	)	Magistrate Judge Robert C. Mitchell
v.	)	
	)	
STEAK 'N SHAKE OPERATIONS, INC.,	)	
Defendant.	)	

OPINION

Presently pending before the Court is a Motion for Class Certification filed on behalf of Plaintiffs Christopher Mielo and Sarah Heinzl (ECF No. 44). For the reasons stated herein, the motion will be granted.

Plaintiffs move the Court for an Order certifying this action as a class action pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, and seek certification of a class defined as follows:

> All persons with qualified mobility disabilities who were or will be denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any Steak 'n Shake restaurant location in the United States on the basis of a disability because such persons encountered accessibility barriers at Steak'n Shake restaurant where Defendant owns, controls and/or operates the parking facilities.

(ECF No. 44-1).

I. Factual and Procedural History

Plaintiffs Mielo and Heinzl bring this action individually and on behalf of all others similarly situated against Steak 'n Shake Operations, Inc., alleging violations of Title III of the Americans with Disabilites Act, 42 U.S.C. § 12101 et seq., (the "ADA") and its implementing regulations. Specifically, Plaintiffs allege that the various properties owned and managed by

Defendant are not fully accessible to and independently usable by individuals who use wheelchairs or are otherwise mobility disabled.

Discovery in this case ended on December 5, 2016. Plaintiffs' Motion for Class Certification (ECF No. 44) was filed on November 4, 2016 and was accompanied by a brief in support (ECF No. 45). Defendant filed a brief in opposition (ECF No. 60) and Plaintiffs filed a reply brief (ECF No. 68). On March 20, 2017, the Court held oral argument on the motion and took it under advisement. (ECF No. 72).

The following facts are not in dispute. Plaintiff Mielo is a self-employed business owner, who currently resides in Pittsburgh, Pennsylvania. He is a paraplegic and uses a wheelchair to ambulate. He has long been an advocate for individuals with disabilities. His work includes the "Unbreakable Drive" project, where he speaks to youth with disabilities throughout the United States, and his participation in the Pennsylvania Youth Leadership Network, where he is a board member and, among other things, helps advance leadership training, community outreach and diversity.

Plaintiff Heinzl attends graduate school in Arizona, and permanently resides in Pittsburgh, Pennsylvania. She is a paraplegic and uses a wheelchair to ambulate. She is involved in advocacy work for individuals with disabilities, including work for the Three Rivers Center for Independent Living, where she coordinated and taught youth events; serving as a board member for the Children's Hospital Advisory Network, where she assisted youth in transitioning from pediatric to adult care; working at the LEND program run through the University of Pittsburgh; and, participating in other fundraising and volunteer activities.

Both Mr. Mielo and Ms. Heinzl have visited various restaurants owned and/or operated by Defendant and have experienced difficulty accessing these restaurants as a result of

architectural barriers in the parking facilities. For example, Mr. Mielo had trouble accessing Defendant's 650 Waterfront Drive, East Munhall, Pennsylvania restaurant due to an excessively sloped parking space and access aisle at that location. Similarly, Ms. Heinzl experienced difficulty at Defendant's 410 Clairton Boulevard, Pleasant Hills, Pennsylvania restaurant due to excessive slopes in the parking spaces, access aisles, and in the route to the restaurant. Once identified, Plaintiffs' counsel instructed investigators to examine multiple of Defendant's restaurants located in Pennsylvania and Ohio. This investigation identified architectural barriers in the parking facilities at eight of Defendant's restaurants within that geographic region, specifically, in some cases, accessible parking spaces and access aisles with slopes exceeding the 2.1% limit.

II. Discussion

A. <u>The ADA</u>

Title III of the ADA "prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations." 42 U.S.C. § 12182(a); *Spector v. Norwegian Cruise Line Ltd.,* 545 U.S. 119, 128 (2005). Specifically, it requires "places of public accommodation" to "remove architectural barriers … in existing facilities … where such removal is readily achievable," 42 U.S.C. § 12182(b)(2)(A)(iv), and to "design and construct facilities for first occupancy [no] later than 30 months after July 26, 1990 that are readily accessible to and usable by individuals with disabilities," § 12183(a). Places of public accommodation include "a restaurant, bar, or other establishment serving food or drink," 42 U.S.C. § 12181(7)(B), and thus include Steak 'N Shake. Failure to meet these requirements constitutes a violation of the ADA which may be enforced by individuals bringing suit for injunctive relief in federal court, § 12188(a). The statute further states that "injunctive relief shall also include … modification of a

policy….” *Id.* “Under Title III of the ADA, private plaintiffs may not obtain monetary damages and therefore only prospective injunctive relief is available.” *Anderson v. Macy's, Inc.,* 943 F. Supp. 2d 531, 538 (W.D. Pa. 2013) (citation omitted). See 42 U.S.C. § 12188(a) (providing that the remedies available to individuals shall be those set forth in 42 U.S.C. § 2000a-3(a), which allows a private right of action only for injunctive relief for violations of Title II of the Civil Rights Act of 1964); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (noting that Title II allows for injunctive relief only).

“Whether a facility is ‘readily accessible’ is defined, in part, by the ADA Accessibility Guidelines (‘ADAAG’), which lay out the technical structural requirements of places of public accommodation.” *Chapman v. Pier 1 Imports (U.S.) Inc.*, 779 F.3d 1001, 1006 (9th Cir. 2015). The ADAAG is promulgated by the Department of Justice pursuant to 42 U.S.C. § 12186(b). There are two active ADAAGs, the 1991 ADAAG Standards (“1991 Standards”), 28 C.F.R. § pt. 36, App. D, and the 2010 ADAAG Standards (“2010 Standards”) 36 C.F.R. § pt. 1191, App. D.

Title III's implementing regulations further require places of public accommodation to “maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities[.]” 28 C.F.R. § 36.211(a). This ongoing obligation “broadly covers all features that are required to be accessible under the ADA.” See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34523 (June 17, 2008) (emphasis in original) (hereinafter “Department Comments”). While isolated or temporary accessibility failures due to maintenance or repairs are permitted, see 28 C.F.R. § 36.211(b), places of public accommodation may not allow inaccessibility to persist beyond a reasonable period of time, allow accessible

features to repeatedly fall out of compliance, or fail to arrange for prompt repair of inaccessible features violate the ADA. *See* 28 C.F.R. pt. 36 app. C § 36.211; Department Comments, 73 Fed. Reg. at 34523.

The Court has recognized Title III and its implementing regulations "contemplate an ongoing process of effective ADA compliance." *Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 14-cv-1455, 2016 WL 2347367, at *17 (W.D. Pa. Jan. 27, 2016). Other district courts have reached similar conclusions. *See, e.g., Sawczyn v. BMO Harris Bank Nat. Ass'n*, 8 F. Supp. 3d 1108, 1113-15 (D. Minn. 2014) (recognizing maintenance obligation in voluntary cessation context); *Thomas v. Branch Banking and Trust Co.*, 32 F. Supp. 3d 1266, 1271 (N.D. Ga. 2014); *Nat'l All. for Accessability, Inc. v. McDonald's Corp.*, No. 8:12-cv-1365, 2013 WL 6408650, at *7 (M.D. Fla. Dec. 6, 2013); *Moeller v. Taco Bell Corp.* ("Moeller" I"), 816 F. Supp. 2d 831, 869 (N.D. Cal. 2011) (holding class-wide injunctive relief warranted where defendant systematically violated ongoing maintenance obligation); *see also Cupolo v. Bay Area Rapid Transit,* 5 F. Supp.2d 1078, 1084-86 (N.D. Cal. 1997) (entering preliminary injunction to ensure defendant complied with duty to maintain in Title II context).

Plaintiffs contend that Defendant has adopted an ADA compliance policy that largely ignores its obligation to ensure its parking facilities become and remain accessible to individuals with disabilities. Specifically, when a restaurant is built, Defendant does not conduct an independent post construction assessment to determine whether architectural barriers actually exist in its parking facilities, but rather, relies exclusively on purportedly ADA complaint design plans as its sole means of ensuring a parking facility is constructed in compliance with the ADA. *See* Duffner Dep.31:7-33:1.[1] Plaintiffs contend that Defendant's policy of burdening its

[1] Q. Do you know of any formal written policy at Steak 'n Shake regarding ADA, Americans with Disabilities Act, accessibility in its parking facilities?

customers with the responsibility of identifying architectural barriers is in plain violation of Defendant's ongoing statutory duty to proactively maintain the accessible features of its restaurants. See 28 C.F.R. § 36.211; 28 C.F.R. pt. 36 app. C § 36.211; Department Comments, 73 Fed. Reg. at 34523. More fundamentally, forcing individuals with disabilities to complain about discrimination before anything is done to remediate discriminatory conditions conflicts with the ADA's purpose.

Defendant argues that we adopt an interpretation of the ADA that substantially limits the maintenance obligation of public accommodations under 28 C.F.R. § 36.211 to temporary mechanical failures and easily movable obstructions. Defendant argues that when Section 211 requires public accommodations to "maintain *in operable working condition* those features of facilities and equipment that are required to be readily accessible to and useable by persons with disabilities[.]", 28 C.F.R. § 36.211(a) (emphasis provided), what the Department of Justice intended was the public accommodations maintain machines and equipment "in operable working condition." Defendant cites to DOJ commentary when issuing the Final Title III Rules, 56 Fed. Reg. 7452 (July 26, 1991) (emphasis added), reprinted at 28 C.F.R. Part 36, App. C., which place emphasis on equipment and mechanical failures. Defendant also notes that the DOJ could have included the obligation to maintain accessible features had it wanted to, having done so in ADA's Title II context.

Defendant also notes that in June 2009, the DOJ published "technical guidance" on the "maintenance" obligation in Section 211 in the form of guidance and a detailed "checklist" entitled "Maintaining Accessible Features in Retail Establishments." This checklist does not

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A. No.

* * *

Q. Does Steak 'n Shake currently conduct a similar ADA-related audit or inspection of any sort with regard to its corporate-owned or leased facilities?

A. Only in response to specific complaints.

mention slope ratios or the use of a slope meter. However, it is clear that this guidance was intended to help businesses to maintain their investment as accessible "with little or no extra cost," rather than providing clear legal direction.

The DOJ's Notice of Proposed Rule Making issued on June 17, 2008 states as follows:

> The Department has noticed that some covered entities do not understand what is required by § 36.211, and it would like to take the opportunity presented by this NPRM to clarify. Section 36.211(a) broadly covers *all* features that are required to be accessible under the ADA, from accessible routes and elevators to roll-in showers and signage. It is not sufficient for a building or other feature to be built in compliance with the ADA, only to be blocked or changed later so that it is inaccessible.

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34523 (June 17, 2008) (emphasis in original). This interpretation is entitled to substantial deference, as Defendant admits. For the purpose of deciding the motion before us, we agree with Plaintiffs. Defendant's interpretation of Section 211 contravenes the purpose of the ADA, that facilities be built and altered so as to be readily accessible to and usable by individuals with mobility disabilities.

B. **<u>Rule 23 Requirements</u>**

"To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). In determining whether a class will be certified, the substantive allegations of the complaint must be taken as true. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The Court is not, however, limited to the pleadings. *See Newton v. Merrill Lynch, Pierce Fenner & Smith, Inc.,* 259 F.3d 154, 168–69 (3d Cir. 2001) ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class

action.”).

We have reviewed the various evidentiary submissions presented in the record. As the United States Supreme Court stated in *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 351, 131 S.Ct. 2541, 2551–52, 180 L.Ed.2d 374 (2011), the “rigorous analysis” demanded in reviewing a motion for class certification “will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. [T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.” (citing *General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Moreover, when doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action. *Eisenberg v. Gagnon,* 766 F.2d 770, 785 (3d Cir.1985). However, “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent -- but only to the extent -- that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied.” *Agmen Inc. v. Connecticut Retirement Plans and Trust Funds,* —— U.S. ——, —— 133 S.Ct. 1184, 1194–95, 1201 (2013) (holding that under the plain language of there-applicable Rule 23(b)(3), plaintiffs need not prove essential predicate of fraud-on-the-market theory at the class certification stage and rejecting the argument that the court hold a mini-trial at the class certification phase because denial of certification would not bind non-named class members); *see also Tyson Foods, Inc. v. Bouaphakeo,* -- U.S. --, ---, 136 S. Ct. 1036, 1047 (2016).

It is within this context that we have considered and rejected the Defendant’s arguments on the merits.

Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (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.

Fed. R. Civ. P. 23(a). "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. To certify a class the court must thus find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir.2008) (citing *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,* 546 F.3d 196, 202 (2d Cir.2008)). "[T]he decision to certify a class calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met." *Id.* at 307.

As explained *supra*, in objecting to certification of the class, Defendant argues Plaintiffs have completely mischaracterized the sweep and intent of 28 C.F.R. § 36.211 ("Section 211"). Defendant argues that absent a policy requirement, commonality is not met, and it does have a legal obligation with respect to the class. According to Defendant there is no evidence at all of "systematic discrimination" at the eight locations visited by Plaintiffs' investigators, let alone across the more than 400 restaurants in the chain. As to numerosity, Defendants contend Plaintiffs rely on mere statistics and assumptions on numerosity and fail to provide direct evidence. Defendants argue Plaintiffs' adequacy as class representatives is undermined by the differing interests from the class. Finally, Defendant contends Plaintiffs lack standing to seek injunctive relief because each experienced barriers at only one of several locations visited, has no intention of returning and has not since the Complaint was filed.

1. Rule 23(a)(1): Numerosity

The numerosity requirement is satisfied only where, looking at the totality of the circumstances, joinder is sufficiently impracticable. *Baby Neal*, 43 F.3d at 56. Our appellate court has held that "[n]o minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001). The court must find based on a preponderance of the evidence that plaintiff has met the numerosity requirement. *Hydrogen Peroxide*, 552 F.3d at 307. Rule 23 does not require a plaintiff to offer direct evidence of the exact number and identities of the class members, but in the absence of direct evidence, a plaintiff must show sufficient circumstantial evidence specific to the problems, parties, and geographic areas actually covered by a class definition to allow the court to make factual findings respecting numerosity. *Marcus v. BMW of North America, LLC,* 687 F.3d 583, 596 (3d Cir. 2012). Mere speculation is insufficient. *Id.* Only then may the court rely on "common sense" to forgo precise calculations and exact numbers. *Id.* (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig*., 962 F.Supp. 450, 468, 510 (D. N.J. 1997)).

Defendant argues that Plaintiffs have failed to prove numerosity because there is insufficient direct or circumstantial evidence specific to the problems, parties, and geographic areas actually covered by a class definition to allow the court to make factual findings respecting numerosity. According to Defendant Plaintiffs haven't shown evidence on which an estimate of the number of class members who encountered barriers at Steak 'N Shake restaurants can be rationally based, characterizing Plaintiffs' "showing" as consisting of national census data, a witness' unqualified speculation and common sense.

Defendant distinguishes this case from *Cracker Barrel*, wherein Heinzl expanded her investigation to include more than 100 of Cracker Barrel's properties located throughout seven states. 2016 WL 2347367, at *6. This investigation identified a total of 107 Cracker Barrel stores with ADA noncompliant parking facilities, which violated the ADA in multiple ways. Here, Plaintiffs proffer evidence with respect to far fewer locations and some demonstrate ADA compliance.

Nevertheless, given that the numerosity standard may be relaxed in cases where injunctive and declaratory relief is sought, and based on the statistical census data concerning the numbers of persons with mobility disabilities, as well as and considerations of judicial economy, we find that plaintiffs have met their burden with respect to numerosity. Plaintiffs have shown sufficient circumstantial evidence specific to the problems, parties, and geographic areas actually covered by a class definition. Joinder of individual claims and parties would simply not be practicable given the specific facts of this case, which includes a potentially high number of individuals with mobility disabilities from multiple states.

2. Rule 23(a)(2): Commonality

The commonality requirement in Rule 23(a) "does not require an identity of claims or facts among class members; instead, [it] 'will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.' " *Johnston v. HBO Film Management, Inc.,* 265 F.3d 178, 183 (3d Cir. 2001) (quoting *In re the Prudential Ins. Co. of Am. Sales Practices Litig*., 148 F.3d 283, 310 (3d Cir. 1998)). "Rule 23 does not require that the representative plaintiff have endured precisely the same injuries that have been sustained by the class members, only that the harm complained of be common to the class." *Hassine v. Jeffes,* 846 F.2d 169, 177 (3d Cir.1988).

Defendants argue that Plaintiffs have failed to prove commonality for a number of reasons. First, Defendants contends that commonality cannot be supported by an alleged violation of a non-existent obligation under 28 C.F.R. § 36.211, arguing that Section 211 does not create an ongoing obligation to cause architectural compliance with the ADA Standards, nor does it require a public accommodation to guarantee its facilities' permanent adherence to each of the ADA Standards (including slope restrictions). Moreover, Defendant contends that Plaintiffs lack the requisite "significant proof" that Steak 'N Shake's purported ADA compliance plan has resulted in a "general policy of discrimination." *Dukes*, at 2553, 2556. According to Defendant, its compliance efforts mirror and exceed those recommended in the DOJ's Maintenance Guidelines. Defendants do not view the few noncompliant measurements taken at eight restaurants as showing an ineffective policy, or that the noncompliant measurements were caused by the policy. Finally, Defendant argues that even if the instances of noncompliance were sufficient evidence of a systemic policy of discrimination, the Court would still be faced with at least a handful of individualized inquiries at each of the more than 400 locations, thereby destroying commonality, because the injunctive relief sought would require defendant to remediate its past effects.

Yet thus far the evidence suggests that this case should proceed as a class action, as the exploration of defendant's policy will produce common questions with common answers. The Plaintiffs have shown sufficient evidence – at this juncture -- that Defendant applies the same ADA maintenance policies and practices in a uniform way to the restaurants it owns and controls, which may prove to be harmful to the class members protected rights. To the extent Defendant relies on its existing practice of having a technician perform a circular route of the properties, we note that the facility inspection sheet attached to the Declaration of Che Parker

(ECF No. 64-12) appears not to mention the ADA component of slopes in parking spaces and ramps. And corporate designee Scott Duffner states that Steak 'N Shake monitors its parking lots for signs of spalling or heaving (such as cracks or potholes) but not necessarily identification of or remediation of slope ratios and other relevant disability access violations. Instead the identification of slope issues appears to have been left to the filing of lawsuits such as this. The harm is common to the class.

We therefore find that Plaintiffs have met their burden with respect to the commonality prong.

3. Rule 23(a)(3): Typicality

"Typicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985). Ensuring that absent class members will be fairly protected requires the claims and defenses of the representative to be sufficiently similar not just in terms of their legal form, but also in terms of their factual basis and support. *See, e.g., East Texas Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). "[D]iffering fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir.1988).

Defendant contends that typicality is not present in this case because there is no common policy spanning its more than 400 locations, unique and varied parking lot designs, differing parties controlling the parking lots and differing parking requirements of certain states. Moreover, certain proposed class members in specific states potentially hold the right to

monetary damages, in addition to those central herein, which are claims for injunctive relief.

We find that Plaintiffs have met their burden with respect to typicality. Here, as explained *supra*, each class member would be challenging the same policy and the claims of the class representatives and class members are based on the same theory. *Dukes*, 564 U.S. at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."). To answer these concerns Plaintiffs' counsel has suggested that an injunction could be crafted properly to preserve claims of those class members who wish to pursue state court damage remedies, such that only federal claims would be extinguished.

4. Rule 23(a)(4): Adequacy of Class Representation

The adequacy inquiry "has two components designed to ensure that absentees' interests are fully pursued." *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir.1996), *aff'd,* Amchem, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). First, the adequacy inquiry "tests the qualifications of the counsel to represent the class." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 532 (3d Cir. 2004) (internal citations omitted). The second component of the adequacy inquiry seeks "to uncover conflicts of interest between named parties and the class they seek to represent." *Id.*

As we have recognized before, Plaintiffs have an established record of working to better the lives of individuals with disabilities through advocacy and litigation efforts. We see no compelling evidence of any conflict of interest which would be sufficient to challenge the adequacy of representation prong. The interests of the named Plaintiffs and the proposed class members are fundamentally aligned and Plaintiffs' counsel has the necessary experience and

expertise[2] to represent the interest of the class.

5. Rule 23(b)

"Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.' Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). "Rule 23(b)(2) applies … when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 360 (2011).

Defendant argues that a single injunction cannot possibly provide final relief to putative class members due to the need to make individual determinations. We disagree. As explained above, Plaintiff has proffered evidence that Defendant's policy of ADA compliance is ineffective and that it affects all members of the class.[3] If successful on the merits, a single injunction would provide relief to each member of the class by ensuring within a reasonable period of time that Defendant's parking facilities are barrier free and properly maintained going forward. This case is clearly the type of institutional reform action for which Rule 23(b)(2) was designed.

Finally, we note that Defendant argues that Plaintiffs lack standing to seek injunctive relief because they have no specific intent to return to its restaurants. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110

[2] Although it appears Defendant does not contest that Plaintiffs' counsel will adequately represent the interest of the class, we note that counsel are well-known to the court and are most qualified.

[3] Commentators have also noted that the language of (b)(2) does not even require that the defendant's conduct be directed or damaging to every member of the class. See 1 Newberg & Conte § 4.11, at 4–37.

S.Ct. 596, 107 L.Ed.2d 603 (1990).

The record evidence supports a finding that Plaintiffs have standing. They have visited Steak 'N Shake locations in the past and have experienced architectural barriers there, such as having their wheelchairs roll due to sloping. They each live in close proximity to some of the Defendant's locations, and enjoy the restaurants' food and service. And, as courts have noted in published opinions, the decision to visit such establishments is typically impulsive, supporting a likely intent to return. Their injury would likely be redressed by a favorable judicial decision. We therefore find that Plaintiffs have standing to sue.

III. Conclusion

For the reasons stated herein, the Plaintiffs' Motion for Class Certification will be granted.

Date: April 27, 2017

/s/ Robert C. Mitchell
Robert C. Mitchell
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER MIELO and SARAH HEINZL, *individually and on behalf of all others similarly situated*, Plaintiffs,	)	Civil Action No. 15-180
	)	Magistrate Judge Robert C. Mitchell
v.	)	
STEAK 'N SHAKE OPERATIONS, INC., Defendant.	)	

ORDER

AND NOW, to-wit, this 27th day of April, 2017, Plaintiffs' Motion for Class Certification (ECF No. 44) is GRANTED and the following Class is certified:

> All persons with qualified mobility disabilities who were or will be denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any Steak 'n Shake restaurant location in the United States on the basis of a disability because such persons encountered accessibility barriers at any Steak 'n Shake restaurant where Defendant owns, controls and/or operates the parking facilities.

IT IS FURTHER ORDERED that Plaintiff Christopher Mielo and Plaintiff Sarah Heinzl are appointed as the representative Plaintiffs for the Class and the law firm Carlson Lynch Sweet Kilpela & Carpenter, LLP is appointed as counsel for the Class. This Court will hereafter enter such further and additional orders relating to the class proceedings as may be required to advance the administration and disposition of this case.

/s/ Robert C. Mitchell
Robert C. Mitchell
United States Magistrate Judge

EXHIBIT B

(U.S. Department of Justice: Maintaining Accessible Features in Retail Establishments)

U.S. Department of Justice
Civil Rights Division
Disability Rights Section

Expanding Your Market

Maintaining Accessible Features in Retail Establishments

ADA Business Connection

Inoperable elevators, locked accessible doors, or routes that are obstructed by furniture or merchandise make buildings inaccessible to and unusable by customers with disabilities.

Introduction

More than 50 million Americans with disabilities are potential customers for retail businesses across the country. These 50-million-plus customers, along with their families and friends, patronize clothing boutiques, mall outlets, grocery stores, and more, if the businesses are accessible. This market grows even larger if the 78 million baby boomers in this country – who do not always require but benefit from accessibility – are included. Accessibility makes good business sense: an accessible retail establishment brings in new customers and keeps them coming back again and again.

The Americans with Disabilities Act (ADA) requires businesses that serve the public to remove barriers from older buildings and to design and build new facilities to provide access to customers with disabilities. A key component of ADA compliance is maintaining those features so they remain usable. Businesses spend money to remove barriers. And, businesses need to protect that investment. Even brand-new buildings designed for complete accessibility can become inaccessible without proper attention. If key elements – often including the parking, building entrance, route into and through the establishment, access to the store's goods and services, restrooms, cashier stations, and egress – are not maintained, then access is reduced or eliminated. A poorly placed trash can or a locked door can make a building unusable. Now *that* is a waste of money.

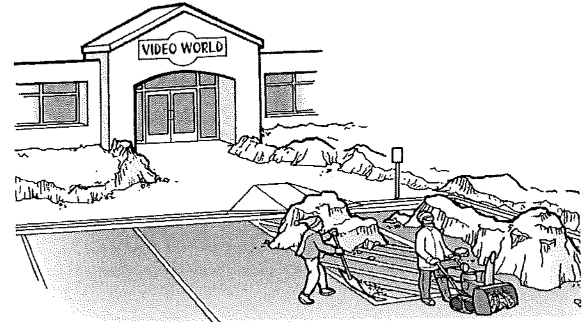
This document identifies ways that businesses can maintain their investment in access with little or no extra cost. Issues will vary, of course, with individual retail establishments.

Visit the U.S. Department of Justice's *ADA Business Connection* website at **www.ada.gov** for more information about accessibility in retail establishments, including "Reaching Out to Customers with Disabilities," the Department's ADA online course.

Americans with Disabilities Act

ADA Business Connection

Accessible Parking



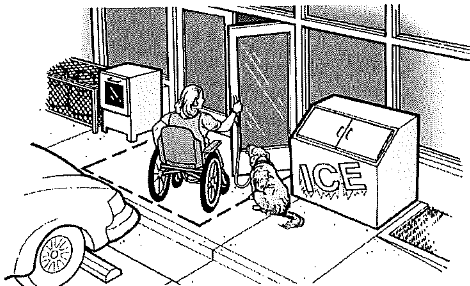
Clearing snow from all elements of an accessible parking space is essential to keeping it usable.

In order for an accessible parking space to be usable, all elements of the space must be free of obstructions: the vehicle space, the access aisle, the curb ramp, and the route that connects the parking to the accessible entrance of the building. Lack of maintenance of any one of those elements can make the whole space inaccessible. For example, for a wheelchair user to exit her car, she must place her wheelchair in the access aisle, transfer from the car seat to her wheelchair, and then roll backward in the access aisle to provide clearance to close the car door. If another car parks in the aisle or if a plow loads the aisle with snow, the wheelchair user does not have sufficient room to get out of her car. That parking space the owner just paid to have correctly restriped is now useless to her.

Maintenance List

- Remove obstacles, including shopping carts, maintenance equipment, and cars without designated license plates or placards, from parking spaces and access aisles as soon as possible.
- Clear completely snow, ice, mud, and leaves from accessible parking spaces whenever plowing or clearing the rest of the parking area. Be sure that cleaning crews do not pile snow or gravel in the accessible parking spaces, access aisles, and curb ramps.
- Maintain curb ramps and sidewalks to prevent large cracks and uneven surfaces from forming.
- Keep the accessible route from the parking area to the store's entrance clear of obstacles that either block or narrow the route.

Accessible Route Into and Through the Business



An accessible route to a door with maneuvering clearance maintained on the door's latch side makes entry possible for the customer who uses a mobility device.

While accessible routes through a store are originally well-planned, promotional, seasonal, and other special displays that surround entrances and spill into aisles may substantially reduce their accessibility. Customers with disabilities will not be able to shop in a store if the route through an entry plaza is too narrow because of a display of snow blowers, if the maneuvering clearance alongside the entrance door is blocked by a sale book rack, or if a route contains scattered trip hazards from impulse items displayed on cloth-covered tables or in baskets on the floor.

Maintenance List

- During business hours, unlock all doors at accessible entrances, even if they are not main entrances to the store. Mount clear, well-maintained signage at the main entrance to direct people to the accessible entrance.

- If construction or repair requires customers to detour around taped-off areas or to step up on plywood walkways, ensure that the temporary route is accessible or that there is an alternate temporary accessible route with proper signage.

- Ensure that boxes, vending machines, display racks, or other equipment do not block the maneuvering clearances required at the doors of accessible entrances.

- Arrange seasonal merchandise, baskets of impulse items, and extra clothes racks so that they do not block or protrude into the accessible route through the store.

Accessible checkout areas are connected to an accessible route and have sufficient clear floor space for a person using a wheelchair.

- Eliminate billowy, long table covers that spill into the accessible route. These create trip hazards for customers with low vision and snag under patrons' crutches, canes, and walkers and in their wheelchair wheels.

- Plan all routes so that any hanging or mounted displays, wall-mounted shelving, lighting, or decorations provide required head clearance and cane detection for customers who are blind or have low vision.

- Staff the accessible sales counters and check-out aisles during all business hours. These areas must have their aisles clear and their lowered counter spaces free of equipment and merchandise to be usable.

- Ensure that accessible exits – including accessible emergency exits – are maintained at all times. Remove boxes, extra furniture, and other objects that may obstruct the route to the exits and the required door and floor clearances at them. Ensure that the doors have working accessible hardware and are unlocked during all business hours. If the store has evacuation equipment to assist people who cannot use stairs, make sure it is available, unobstructed, and in working condition.

Accessible Restrooms, Fitting Rooms, and Elevators

Equally important to the customer experience is the ability to move comfortably within the establishment and to try out or try on the merchandise. Maintenance of accessible restrooms and fitting rooms, customer service and product demonstration areas, and lifts and elevators is essential for all customers to fully enjoy the shopping experience and buy merchandise.

Maintenance List

- Unlock accessible public restrooms, toilet stalls, and fitting rooms and make sure they are available to customers with disabilities during business hours. They cannot be used as temporary storage areas or staff locker space.
- Eliminate furniture or equipment, such as shelving, large trash cans, and chairs, that take up required maneuvering space in fitting rooms and restrooms.
- Routinely refill the accessible paper towel and soap dispensers when all other dispensers are refilled.
- Maintain lifts and elevators regularly. Repair them whenever necessary, and return them to service as quickly as possible.
- Remove trash receptacles and cigarette urns from under elevator hall call buttons and beside doors to ensure access to controls and sufficient maneuvering clearance.

Accessible Customer Information

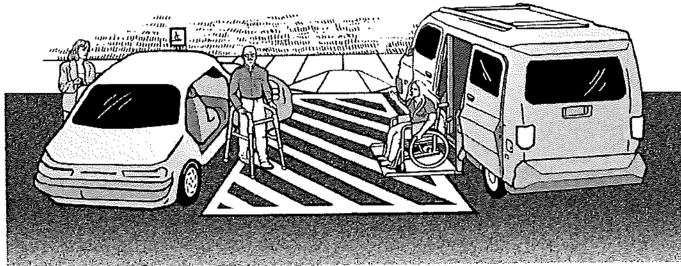
Alternate formats of printed information for customers have to be kept up to date to be useful. Offering a Braille brochure with old telephone numbers or a large-print equipment rental application with wrong rental return requirements will only frustrate and confuse customers.

One way to maintain accessible features is to consistently educate all staff about them. Tell employees the location and purpose of accessible retail elements and impress upon them the importance of keeping the features usable. Provide employees with procedures for correcting problems. Together staff can ensure that the store's investment in accessibility brings the greatest possible return.

All employees must be aware of the accessible features and services their business offers and knowledgeable about ensuring the customer has access to them.

Checklist for Maintaining Accessible Features

Date of completion of the last checklist: ______________________
Name of person completing the current checklist: ______________________
Date of completion of the current checklist: ______________________



YES / NO 1. Are all accessible parking spaces, access aisles, curb ramps, and connecting accessible routes clear of obstacles including vehicles without proper designation, shopping carts, gravel, snow, mud and debris, or leaf piles?

YES / NO 2. Are the surfaces of all elements of the accessible parking area and accessible route smooth and free of large cracks and broken or raised areas?

YES / NO 3. Are the signs for the accessible parking spaces still readable and mounted so they are not obscured by parked vehicles?

YES / NO 4. Is the full width (minimum 3 feet) of the entire accessible route up to the business entrance clear of obstacles?

YES / NO 5. Is the surface of the accessible route to the entrance smooth and free of large cracks and broken or raised areas?

YES / NO 6. If the accessible route is not the main route to the business, are the directional signs to the accessible route still readable and located at the main entrance and key points along the alternate route?

YES / NO 7. Are all sidewalks and walkways to the business entrance free of any objects (e.g., overhanging trees, flags, hanging planters) with bottom edges that are between 27 inches and 80 inches above the walkway and extend more than 4 inches into the route?

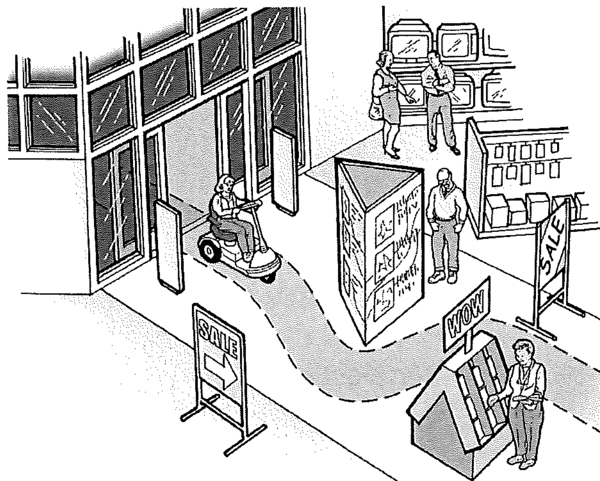
YES / NO 8. Are the lower edges of all objects that hang over the sidewalks or walkways (e.g., banners, strings of lights) 80 inches or more above the route?

YES / NO 9. If the accessible entrance is not the main entrance, is it unlocked during all business hours? Is the sign directing people to the accessible entrance still readable?

YES / NO 10. Is the accessible entrance into the building free of obstacles that block the clear wall and floor space needed for opening the door (between 18 and 42 inches on the latch side of the door, depending on direction of approach and door swing)? Obstacles might include merchandise, customer seating, or vending machines.

YES / NO 11. Is the full width (minimum 3 feet) of the entire accessible route into and through the business clear of obstacles and trip hazards?

YES / NO 12. Are all the aisles into and through the business free of any objects (e.g., cantilevered display fixtures, trees in container pots, signs) with bottom edges that are between 27 inches and 80 inches above the walkway and extend more than 4 inches into the aisle?



YES / NO 13. Are the lower edges of all objects that hang over the aisles (e.g., seasonal lighting, display merchandise) 80 inches or more above the route?

YES / NO 14. Are the accessible checkout aisles and sales counters staffed during all business hours?

YES / NO 15. Is the full length (minimum 3 feet) of the lowered counter of the accessible checkout aisles or sales counters clear of merchandise and equipment?

YES / NO 16. Are accessible product demonstration fixtures and areas (e.g., listening stations for recordings, try out areas for electronics) clear of obstacles that block floor or knee clearance?

YES / NO 17. Are the signs for the accessible restrooms and fitting rooms still readable and mounted next to the latch side of the door, at 5 feet to centerline of the sign?

YES / NO 18. Are accessible public restrooms, toilet stalls, and fitting rooms unlocked when all other facilities are unlocked? Or, if keys are required for all facilities, are the keys for the accessible facilities available in an accessible location?

YES / NO 19. Are the entrances to accessible public restrooms and fitting rooms free of obstacles that block the clear wall and floor space needed for opening the door (between 18 and 42 inches on the latch side of the door, depending on direction of approach and door swing)? Obstacles might include boxes, shelving, or chairs.

YES / NO 20. Is the required floor and wall space inside public restrooms and fitting rooms blocked by obstacles such as trash cans, chairs, or shelving?

YES / NO 21. Are all the accessible dispensers in the public restrooms filled?

YES / NO 22. Are there any obstacles that block access to lift or elevator controls? Obstacles may include trash receptacles or cigarette urns.

YES / NO 23. Are all the business's elevators and lifts in working order?

YES / NO 24. Are all materials that are in alternate formats (e.g., Braille, large print, electronic) up to date and available to customers on request?

YES / NO 25. Have all new employees been informed about the business's accessible features and accessible customer service practices?

Additional Questions for Individual Businesses

For specific information about how to comply with the ADA and reach this nearly untapped audience of people with disabilities, visit the U.S. Department of Justice's *ADA Business Connection* website at **www.ada.gov;** or, call the toll-free ADA Information Line:

800-514-0301 (voice); 800-514-0383 (TTY)

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Duplication is encouraged.