IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-WM-2086

JULIE FARRAR-KUHN and CARRIE ANN LUCAS, for themselves and all others similarly situated,

Plaintiffs,

v.

CONOCO, INC.,

Defendant.

MEMORANDUM IN SUPPORT OF
JOINT MOTION FOR CLASS CERTIFICATION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs Julie Farrar-Kuhn and Carrie Ann Lucas, and Defendant Conoco, Inc., hereby submit this memorandum in support of their Joint Motion for Class Certification. As demonstrated below, the class in this case should be certified because:

- This is a civil rights case "seeking broad . . . injunctive relief for a numerous and . . . unascertainable . . . class of persons" for which Rule 23(b)(2) was "specifically" designed, 1 Robert Newberg, Newberg on Class Actions, § 4.11 at 4-39 (3d ed. 1992) (citing Fed. R. Civ. P. 23 advisory committee's note);
- Defendant's alleged violations affected and continue to affect a large number of people in a similar manner; and

- The factual and legal issues in the representative Plaintiffs' case, including whether Defendant violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., are common to all members of the class.

Thus the proposed class in this action should be certified under Rule 23(b)(1) and/or Rule 23(b)(2).

BACKGROUND

This action encompasses Conoco service stations and convenience stores that are owned by Defendant (collectively "Conoco Corporate Stations"). Currently there are approximately 200 such Stations in 11 states: Alabama, Colorado, Delaware, Georgia, Kansas, Missouri, Oklahoma, Tennessee, Texas, Utah and Virginia. See "Conoco Corporate Stores" (attached hereto as exhibit 1). Plaintiffs allege that Conoco Corporate Stations have various architectural barriers and policies that discriminate against persons who use wheelchairs or scooters for mobility in violation of the Americans with Disabilities Act ("ADA"). These alleged barriers include, without limitation, inaccessible "pay-at-the-pump" gas pumps, parking, tables, sidewalks, entrances, restrooms and aisles. Alleged discriminatory policies include, without limitation, failure to maintain access, failure to provide full-service at self-service prices to persons with disabilities who cannot operate gas pumps at Conoco Service Stations.

There are more than 300,000 persons who use wheelchairs and/or scooters for mobility in the 11 states in which the relevant Conoco Corporate Stations are located.[1] See Table 3, "Selected Population Characteristics for States and Counties Including Model-Based Estimates of the Prevalence of Specific Disabilities Among Persons 16 and Over," Household Survey Data on Employment and Disability, June 26, 1996, United States Department of Commerce, Bureau of the Census at 3-4, 7, 10, 13, 16 (attached hereto as exhibit 2). Plaintiffs Julie Farrar-Kuhn and Carrie Lucas are among those individuals who use wheelchairs who have encountered various accessibility problems while attempting to patronize certain Conoco Corporate Stations. Farrar-Kuhn Aff. at ¶¶ 1, 3 (attached hereto as exhibit 3); Lucas Aff. at ¶¶ 1, 3 (attached hereto as exhibit 4).

On October 27, 1999, Ms. Farrar-Kuhn and Ms. Lucas filed a complaint concerning wheelchair accessibility at Conoco Corporate Stations. On November 12, 1999, Plaintiffs, without objection, moved to amend the complaint to assert a nationwide class action under Rule 23(b)(1) and/or Rule 23(b)(2), and this motion was granted by order dated December 10, 1999. The class that the parties seek to be certified in this Joint Motion consists of:

> All persons with disabilities who use wheelchairs or scooters for mobility who, within four years of the filing of the Complaint in this case, have been denied, or are currently being denied, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any service station or convenience store that is owned by Conoco, Inc.

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[1] The breakdown by state is: Alabama (29,723 persons), Colorado (15,369 persons), Delaware (3,541 persons), Georgia (37,464 persons), Kansas (14,226 persons), Missouri (34,380 persons), Oklahoma (20,048 persons), Tennessee (33,103 persons), Texas (83,638 persons), Utah (6,908 persons) and Virginia (32,554 persons). See Ex. 2 at 3-4, 7, 10, 13, 16.

For the reasons set forth below, Plaintiffs and Defendant respectfully request that this class be certified.

ARGUMENT

A class should be certified if it meets the numerosity, commonality, typicality and adequate representation requirements of Rule 23(a) and also falls within one of the three subdivisions of Rule 23(b). Courts in Colorado and elsewhere have found the Rule 23 requirements to be met and have certified classes virtually identical to the class proposed in the case at bar. Thus the class should be certified under Rule 23(b)(1) and/or Rule 23(b)(2).

I. Decisions Certifying Classes in Actions Under the ADA.

A number of courts have certified classes virtually identical to the proposed class in this case. For example, in Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 355 (D. Colo. 1999) ("Taco Bell"), a class action was brought against a fast-food chain alleging that the defendant's Colorado restaurants had "queue lines" -- paths cordoned off with barriers causing patrons waiting to order to form a single line -- that were inaccessible to persons who used wheelchairs or scooters in violation of the ADA. This Court certified the following class which is virtually identical to the class sought to be certified in the case at bar:[2]

> All Colorado residents with disabilities who use wheelchairs or electric scooters for mobility who, beginning on the date two years prior to the filing of the Class Action Complaint (October 1, 1997), were discriminated against on the basis of disability by Taco Bell's failure to have queue lines that comply with the Americans with Disabilities

[2] The Taco Bell class was limited to Colorado while the proposed class in this case covers at least 11 states. Because the proposed class here encompasses more people than the Taco Bell class, certification is even more appropriate in this case. See Fed. R. Civ. P. 23(a)(1) (requiring numerosity).

> Act Accessibility Guidelines in Colorado Taco Bell restaurants that Defendant owns, operates, leases to or leases from others.

Id. at 363.

In Colorado Cross-Disability Coalition v. Fey Concert Co., Civ. No. 97-Z-1586 (D. Colo. Sept. 16, 1998) ("Fey Concert Co.") (transcript of hearing attached hereto as exhibit 5), a class action was brought against the owners and operators of Fiddler's Green Amphitheatre, a large concert venue, on the grounds that the defendants had violated the ADA and state laws by, among other things, failing to provide a sufficient number of dispersed wheelchair-accessible spaces and by blocking those few wheelchair-accessible spaces that did exist with light and sound equipment. After a settlement was reached, the individual plaintiffs in Fey Concert Co. sought to certify the following subclass:

> All persons with permanent disabilities who use wheelchairs or electric carts for mobility who have been denied full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations at Fiddler's Green on the basis of disability.

The Court in Fey Concert Co. expressly recognized that, under Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2248-49 (1997), a class that is sought to be certified for settlement purposes must meet the same requirements under Fed. R. Civ. P. 23 that a litigated class must meet -- indeed a hearing was held to determine whether the proposed class met the Rule 23 requirements. Ex. 5 at 3-4. After considering the briefs and oral argument, the Court found that the Rule 23 requirements had been met: "I think the record is very clear that each of the Rule 23(a) factors is satisfied in this case. In addition, the 23(b) requirements, both under 23(b)(2) and 23(b)(3), are satisfied. . . . It sounds to me as though this is a very appropriate action for a

class; and indeed, if for any reason the settlement falls through, I will be prepared to try this case." Id. at 24-25. The Court then certified the class "for all purposes." Id. at 25.

The holdings in Taco Bell and Fey Concert Co. are in accord with the decisions of numerous courts across the country that have certified classes under the ADA:

- Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 460 (N.D. Cal.), modified, 158 F.R.D. 439, 464 (1994): Certifying a class of disabled persons who used wheelchairs or who walked using aids who sought removal of architectural barriers in theaters pursuant to the ADA and California state law.
- Leiken v. Squaw Valley Ski Corp., 3 AD Cas. 945, 954, 1994 U.S. Dist. LEXIS 21281 at *19 (E.D. Cal. June 28, 1994) (attached as exhibit 6): Certifying a class of physically disabled persons who were denied full and equal access to, or who were dissuaded from visiting, a recreational resort because of certain architectural barriers and because of the defendant's policy of prohibiting persons who use wheelchairs from riding a cable car to one part of the resort.
- Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani, 915 F. Supp. 622, 634 (S.D.N.Y. 1996): Certifying a class consisting of persons with disabilities who were deaf or hearing-impaired who brought suit under the ADA to prevent the defendants from replacing fire alarm boxes on New York City streets with notification alternatives that were not accessible to Deaf or hearing-impaired persons.

- Anderson v. Department of Pub. Welfare, 1 F. Supp. 2d 456, 462 (E.D. Pa. 1998): Certifying a class of individuals with impairments which substantially limited their mobility and/or vision who were participants in a managed health care program who brought suit under the ADA to obtain certain accessibility improvements in the program.
- Clark v. California, No. C96-1486 FMS, 1998 WL 242688 at *6 (N.D. Cal. May 11, 1998) (attached as exhibit 7): Refusing to decertify a class of developmentally disabled inmates seeking certain accessibility improvements in a prison system pursuant in part to the ADA.
- Kathleen S. v. Department of Pub. Welfare, No. Civ. A. 97-6610, 1998 WL 83973 at *3 (E.D. Pa. Feb. 25, 1998) (attached as exhibit 8): Certifying a class of persons institutionalized at a state hospital who brought suit under the ADA to force the defendant to provide services in the most integrated setting appropriate to the needs of the class members.
- Neff v. VIA Metro. Transit Auth., 179 F.R.D. 185, 196 (W.D. Tex. 1998): In an action against a metropolitan transit authority alleging failure to provide an appropriate, accessible public transportation system, certifying a class consisting of individuals with disabilities covered by the ADA and Rehabilitation Act eligible to use transportation services and facilities provided by the defendant.
- Thrope v. Ohio, 173 F.R.D. 483, 491 (S.D. Ohio 1997): Certifying a class consisting of Ohio residents who purchased handicap parking placards who were

seeking, under the ADA, to force defendant to provide such placards without charge.

- Berlowitz v. Nob Hill Masonic Management, Inc., No. C-96-0141 MHP, 1996 WL 724776 at *5 (N.D. Cal. Dec. 6, 1996) (attached as exhibit 9): In an action seeking removal of architectural barriers under the ADA and state law, certifying a class consisting of all persons in California with physical disabilities who were denied the right to full and equal access to, and use and enjoyment of, a concert arena.
- Henrietta D. v. Giuliani, No. 95-CV-0641, 1996 WL 633382 at *16 (E.D.N.Y. Oct. 25, 1996) (attached as exhibit 10): In an action seeking, pursuant to the ADA, modifications to government benefits program for persons with HIV or AIDS, certifying a class of persons who were New York City residents, were Medicaid eligible and who met the medical condition of having either (1) CDC-defined AIDS, or (2) an HIV-related condition and a need for home care services.
- Deck v. City of Toledo, Case No. 3:98 CV 7451, 1999 U.S. Dist. LEXIS 17853 at *2 (N.D. Ohio Nov. 18, 1999) (attached as exhibit 11): In an action seeking to enforce compliance with the ADA standards for curb ramps, certifying a class of "all persons with disabilities who use ambulatory devices for mobility and who have used in the past or will use in the future intersections and sidewalks resurfaced in Toledo at any time after January 26, 1992."

- Duprey v. Department of Motor Vehicles, 191 F.R.D. 329, 342 (D. Conn. 2000): In an action challenging imposition of a $ 5.00 fee for removable windshield placards that permit holders of the placards to use parking spaces reserved for persons with disabilities, certifying a class of "[a]ll purchasers of windshield placards . . . since August 29, 1993, and all persons who will in the future be required to pay money for windshield placards unless and until declaratory and injunctive relief protects against the requirement of payment as a condition of access to parking accommodations reserved for persons with disabilities."
- Engle v. Gallas, Civil Action No. 93-3324, 1994 U.S. Dist. LEXIS 7935 at *18 (E.D. Pa. June 10, 1994) (attached as exhibit 12): In an action challenging the accessibility of a municipal court, certifying a class of persons with disabilities.

Like the classes set forth above, the proposed class in the case at bar satisfies the requirements of Rule 23.

II. The Proposed Class Meets the Requirements of Rule 23(a).

Rule 23(a) requires that (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. The proposed class in the case at bar meets these requirements.

A. The Proposed Class Is So Numerous That Joinder Is Impracticable.

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. There are a number of factors that are relevant to whether joinder is impracticable, including the class size, the geographic diversity of class members, the relative ease or difficulty in identifying members of the class for joinder, the financial resources of class members and the ability of class members to institute individual lawsuits. Taco Bell, 184 F.R.D. at 357; see also Anderson, 1 F. Supp. 2d at 461; 1 Robert Newberg, Newberg on Class Actions, § 3.06 at 3-27 -35 (3d ed. 1992) (and cases cited therein) (hereinafter "Newberg"). Each of these factors show that joinder is impracticable in the case at hand.

The class is large. In determining class size, the exact number of potential members need not be shown. See, e.g., Joseph v. General Motors Corp., 109 F.R.D. 635, 639 (D. Colo. 1986). Rather the court may make "common sense assumptions" to support a finding that joinder would be impracticable. Civic Ass'n of the Deaf, 915 F. Supp. at 632; see also Leiken, ex. 6 at 949; 1 Newberg § 3.03 at 3-17 & n.58 (and cases cited therein). "Census figures are frequently relied on by courts in determining the size of proposed classes." Taco Bell, 184 F.R.D. at 358; see also Anderson, 1 F. Supp. 2d at 461 (holding in ADA class action that "statistics [from census] tending to show that joinder would be impracticable may be sufficient to satisfy Rule 23(a)(1)"); Berlowitz, ex. 9 at *3 (relying on statistical information concerning the number of people in California who use wheelchairs to find numerosity in ADA class action); Vergara v. Hampton, 581 F.2d 1281, 1284 (7th Cir. 1978) (finding that the numerosity requirement was satisfied in part by census information), cert. denied 441 U.S. 905 (1979).

Here, both parties agree that the class is large:

- Defendant owns approximately 200 Conoco Corporate Stations in 11 states. See ex. 1.
- Census figures demonstrate that in these 11 states, there are over 300,000 noninstitutionalized persons age 16 or older[3] who use wheelchairs. Ex. 2 at 3. Thus if only one out of twenty persons who use wheelchairs in these states patronized a Conoco Corporate Station owned by Defendant, the class would consist of over 15,000 persons.
- In addition, it is likely that persons who use wheelchairs who reside outside of these 11 states have patronized Conoco Corporate Stations while traveling through these states, thereby increasing the size of the class.

The class is geographically diverse. "The fact that a class is dispersed over several counties weighs in favor of a finding of numerosity." Taco Bell, 184 F.R.D. at 358 (citation omitted). In the case at hand, the proposed class covers eleven states and thus joinder would be difficult or impossible.

The class members are difficult to identify. Of particular import where, as here, the class consists of persons with disabilities impacted by architectural barriers, joinder is impracticable where it is very difficult to identify individual class members. See, e.g., id. at 358-59; Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1022 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982)

[3] This number does not include institutionalized persons who use wheelchairs, persons under the age of 16 who use wheelchairs, or persons who use scooters for mobility, all of whom are potential members of the class.

(joinder impracticable in part because neither party could identify class members); 1 Newberg § 3.05 at 3-18 -19 & n.61 (and cases cited therein). In Arnold, for example, the court held that "by the very nature" of the class of persons with disabilities affected by the defendant's architectural barriers, its members were "unknown" and could not be "readily identified" and thus joinder of class members was impracticable. Arnold, 158 F.R.D. at 448.

It is difficult for class members to bring individual suits. Finally, joinder is impracticable because it is difficult or impossible for class members to bring individual suits. For example, according to census information, 23.7% of persons aged 15 to 64 years who use wheelchairs have household incomes below the poverty level, a much higher percentage than the overall population. Table 9, "Low-Income Status of Persons 15 to 64 Years Old, By Type Of Disability: 1991-92," Americans with Disabilities: 1991-92, Data From the Survey of Income and Program Participation, John McNeil, U.S. Department of Commerce, Bureau of the Census at 33 (attached hereto as exhibit 13). Thus many class members simply cannot afford to bring individual actions. See Taco Bell, 184 F.R.D. at 359.

For these reasons, the class is so numerous that joinder is impracticable and thus satisfies Rule 23(a)(1).

B. The Class Members Share Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact common to the class which predominate over questions peculiar to individual members of the class. This does not mean that every issue must be common to the class so long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory. Joseph v. General Motors Corp., 109

F.R.D. 635, 639-40 (D. Colo. 1986); Cook v. Rockwell Int'l Corp., 181 F.R.D. 473 , 480 (D. Colo. 1998) (holding that questions are common where they "arise from the same set of broad circumstances" and do not create conflicts among class members).

"Where a class of persons sharing a common disability complain of the identical architectural barrier based on the same alleged violations of law, commonality is unquestionably established." Taco Bell, 184 F.R.D. at 359. As the court in Arnold stated:

> Inadequate wheelchair accommodations at particular theaters are very likely to affect all wheelchair-users in the same way . . . Thus the state of such accommodations at defendant's various theaters, and the legal adequacy of those accommodations, are issues of fact and law common to all those disabled persons affected by them.

Arnold, 158 F.R.D. at 449. And in Leiken, ex. 6 at 949 (citation omitted), the court stated that "[t]he application of the exclusionary policy and the existence of structural barriers comprise a 'common nucleus of operative facts' which supports certification." Finally, in holding that the commonality requirement was met, the court in Civic Association of the Deaf, 915 F. Supp. at 632-33, stated: "The Plaintiffs describe a common course of conduct by the Defendants in removing the street alarm boxes and in failing to provide adequate notification alternatives." See also Berlowitz, ex. 9 at *3 (in holding that the commonality requirement was met in architectural barrier case, the court stated that the primary legal and factual questions revolve around the acts and omissions of defendants).

Like the classes certified in Taco Bell, Arnold, Leiken and Civic Association of the Deaf, the proposed class in this case shares many issues of fact and law: (1) the class complains of the same architectural barriers and policies; (2) Plaintiffs allege that by these architectural barriers

and policies, Defendant discriminated against all members of the class; and (3) the determination of whether these barriers and policies violate the ADA is the same whether there is one plaintiff or a class of plaintiffs. Nor are there individual questions of law or fact. Thus the class meets the requirements of Rule 23(a)(2).

C. The Claims of the Representative Plaintiffs Are Typical of the Claims of the Class.

Rule 23(a)(3) requires that the claims asserted by the representative plaintiff be typical of the claims of the class. According to the Tenth Circuit, "the typicality requirement is ordinarily not argued. . . . It is to be recognized that there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the other class members are based on the same legal or remedial theory." Penn v. San Juan Hosp., Inc., 528 F.2d 1181, 1189 (10th Cir. 1975).

In this case, both the representative plaintiffs and the members of the class "suffer from disabilities which, although not identical, require the use of a wheelchair or scooter for mobility. Thus, the effect of the disability is shared by all class members. Further, the representative plaintiffs contest the legality of architectural barriers under the same statutes as the class. [T]herefore . . . the claims of the representative plaintiffs are typical of the class." Taco Bell, 184 F.R.D. at 360; see also Arnold, 158 F.R.D. at 450 ("Indeed, in a public accommodations suit such as this one where disabled persons challenge the legal permissibility of architectural design features, the interests, injuries, and claims of the class members are, in truth, identical such that any class member could satisfy the typicality requirement for class representation."); Leiken, ex.

6 at 949 (Finding typicality where the representative plaintiff's "alleged injuries are the result of conduct common to the class, for which she seeks predominantly class-wide relief."); Civic Ass'n of the Deaf, 915 F. Supp. at 633 (Finding typicality where the representative plaintiffs, "like every other member of the proposed Class, are or represent deaf or hearing-impaired individuals. As a result of removal of the street alarm boxes, the members of the Class have had or will have impaired their ability to report fires from City streets.").

The representative Plaintiffs in the case at bar, like the members of the proposed class, use a wheelchair or scooter for mobility, they face the same form of discrimination as all class members, and they are bringing claims identical to those of the class. Therefore the proposed class meets the typicality requirement of Rule 23(a)(3).

D. The Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

The final requirement of Rule 23(a), adequate representation, requires that the representative plaintiffs have common interests with the class members and that the representative plaintiffs will vigorously prosecute the interests of the class through qualified counsel. Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 386 (D. Colo. 1993). Adequate representation is usually presumed in the absence of contrary evidence. Id. (quoting 2 Newberg § 7.24 at 7-80 to -81).

The representative Plaintiffs in this case, like the members of the proposed class, seek redress for the architectural barriers and policies that discriminate against them and the class

members. Thus the interests of the representative Plaintiffs do not conflict with those of the class.

In addition, the representative Plaintiffs and their counsel have prosecuted, and will continue to prosecute, the interests of the class vigorously. Plaintiffs' counsel are qualified to represent the class and have the resources necessary to do so. Fox Aff. at ¶ 9 (attached hereto as exhibit 14). Amy Robertson, of the undersigned law firm of Fox & Robertson, graduated from Yale Law School where she was Executive Editor of the Yale Journal of International Law. Robertson Aff. at ¶¶ 2-3 (attached hereto as exhibit 15). After clerking for the Hon. Richard L. Williams of the United States District Court for the Eastern District of Virginia, Ms. Robertson worked in the litigation departments at the law firms of Dorsey & Whitney in Minneapolis, Wilmer, Cutler & Pickering in Washington, D.C., and Rothgerber, Appel, Powers & Johnson LLP in Denver. Id. at ¶¶ 4-6. Ms. Robertson's partner, Timothy Fox, graduated from Stanford Law School where he was a member of the Stanford Law Review and President of his class. Ex. 14 at ¶¶ 2-3. He has worked in the litigation departments at the law firms of Wilmer, Cutler & Pickering in Washington, D.C. and Davis, Graham & Stubbs LLP in Denver. Id. at ¶¶ 4-5. Kevin Williams, who is the general counsel of the Colorado Cross Disability Coalition, graduated third in his class from the University of Denver College of Law, has been published on the topic of the ADA, and is the current Co-Chair of the Colorado Bar Association Disability Law Forum Committee. Williams Aff. at ¶¶ 1-2 (attached hereto as exhibit 16). Together Ms. Robertson, Mr. Fox and Mr. Williams have provided representation in connection with numerous class action and ADA cases. Ex. 14 at ¶ 7; ex. 15 at ¶ 8; ex. 16 at ¶ 1. Mr. Fox and Mr.

Williams are thoroughly familiar with issues concerning people with disabilities because both are tetraplegics and both have used electric wheelchairs for over 10 years. Ex. 14 at ¶ 10; ex. 16 at ¶ 3. Finally, in both Taco Bell and Fey Concert Co., Fox & Robertson, P.C. and Kevin Williams were found by the Court to be appropriate counsel for the class pursuant to Fed. R. Civ. P. 23(a). Taco Bell, 184 F.R.D. at 361; ex. 14 at ¶ 8; ex. 5 at 15.

For the reasons set forth above, the proposed class satisfies the requirements of Rule 23(a).

III. The Proposed Class Is Proper Under Rule 23(b)(1).

Rule 23(b)(1) authorizes class actions where "the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1) (emphasis added). "[I]t is quite common for suits brought under subdivision (b)(1) to meet both the test for clause (A) and for clause (B) of that provision. " 7A C. Wright & A. Miller, Federal Practice & Procedure § 1772 (2d ed. 1990 and 1997 Supp.).

Both clauses of Rule 23(b)(1) are satisfied where, as in the case at bar, "some type of prohibitory or mandatory relief is being sought since a decree of this type easily could create potential conflicts for the opposing party if it were awarded or denied in individual actions. Its

breadth also might affect the rights of all concerned class members, not simply those before the court in a particular action." Id. Rule 23(b)(1) also "clearly embraces cases in which the party is obliged by law to treat the class members alike," id. at § 1773, and thus applies here because Defendant is obligated by the ADA to treat all members of the class alike.

In Civic Ass'n of the Deaf, 915 F. Supp. at 625, the plaintiffs brought suit under the ADA to prevent the defendants from replacing fire alarm boxes on New York City streets with notification alternatives that were not accessible to Deaf or hearing-impaired persons. The plaintiffs sought certification under Rule 23(b)(1) of a class deaf or hearing-impaired persons who use a TDD to communicate via telephone and who reside, work, or are present in the City and use its sidewalks, streets, highways, or public places. In certifying the class under Rule 23(b)(1)(A), the court held:

> Were all deaf or hearing-impaired individuals to sue on their own behalf, any judgment rendered against Defendants could be inconsistent, depending on the circumstances of the individual suing. Therefore, the risk set out in subparagraph (A) clearly applies.

Id. at 634.

And in Engle v. Gallas, Civil Action No. 93-3324, 1994 U.S. Dist. LEXIS 7935 at *2-3 (E.D. Pa. June 10, 1994) (attached as exhibit 12), the plaintiffs challenged the accessibility of a municipal court under the ADA. The court certified a class under Rule 23(b)(1):

> I find that the class meets condition 23(b)(1)(B), in that the prosecution of separate actions would create a risk that individual adjudications would be dispositive of interests or substantially impair the interests of class members not a party to the litigation. Engle and Calder are not the only individuals in the Philadelphia area who would be affected by an injunction of the current Municipal Court policies pertaining to individuals who cannot physically access the court. Other members of the defined class should be given an opportunity to protect their interests.

Id. at *18.

In this case, like Civic Ass'n of the Deaf and Engle, if each class member brought suit on his or her own behalf, there would be a considerable risk of inconsistent judgments. Further, because Defendant has the same obligations under the ADA to every individual who uses a wheelchair for mobility, individual lawsuits by individuals who use wheelchairs would as a practical matter be dispositive of the interests of the other members not parties to the adjudications. For these reasons, the class should be certified under Rule 23(b)(1).

IV. The Proposed Class Is Proper Under Rule 23(b)(2).

A class is proper under Rule 23(b)(2) if the party opposing the class "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ." and the representatives are seeking "final injunctive relief or corresponding declaratory relief." As demonstrated below, the proposed class in this case is a "paradigm of the type of action for which the (b)(2) form was created" and thus the class should be certified pursuant to Rule 23(b)(2). See Arnold, 158 F.R.D. at 452.

"A class action in which all members of the class complain of the identical architectural barrier necessarily involves acts that are generally applicable to the class." Taco Bell, 184 F.R.D. at 361 (citing Arnold, 158 F.R.D. at 452, and Civic Ass'n of the Deaf, 915 F. Supp. at 634). Indeed, the Advisory Committee Notes to the 1966 amendment to Rule 23 demonstrate that subdivision (b)(2) was intended to reach precisely the type of class proposed here: "Illustrative are various actions in the civil-rights field where a party is charged with

discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."

In the case at bar, Plaintiffs allege that Defendant's architectural barriers and policies discriminate against all persons who use wheelchairs and scooters and thus that Defendant has acted in a manner applicable to the entire class. Further, the members of the class are incapable of specific enumeration. Finally, Plaintiffs seek injunctive and declaratory relief -- but not monetary relief -- on behalf of the class. Therefore the class should be certified under Rule 23(b)(2).[4]

[4] Because the parties seek certification under Rule 23(b)(1) and 23(b)(2), and because Plaintiffs do not seek monetary relief for the class, the parties do not believe that notice to the class is necessary at this time. See Vaszlavik v. Storage Technology Corp., 175 F.R.D. 672, 685 (D. Colo. 1997) ("Because plaintiffs seek only a Rule 23(b)(2) certification for the liability phase, notice to class members is not necessary . . ."); Fed. R. Civ. P. 23(c)(2) (requiring notice only for classes certified under Rule 23(b)(3)).

CONCLUSION

For the reasons set forth above, Plaintiffs Julie Farrar-Kuhn and Carrie Ann Lucas and Defendant Conoco, Inc. respectfully request that their Motion for Class Certification be granted.

Respectfully submitted,

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