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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LUKE DAVIS, JULIAN VARGAS, and AMERICAN COUNCIL OF THE BLIND, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

LABORATORY CORPORATION OF AMERICA HOLDINGS, d/b/a LABCORP,

Defendant-Appellant.

No. 22-55873

D.C. No. 2:20-cv-00893-FMO-KS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted November 9, 2023
Pasadena, California

Before: FLETCHER and MENDOZA, Circuit Judges, and SCHREIER,** District Judge.

On May 23, 2022, the district court certified two classes in the instant action: a California class under Federal Rule of Civil Procedure 23(b)(3) seeking damages under California's Unruh Civil Rights Act (Unruh Act); and a nationwide class seeking relief under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Affordable Care Act. On June 13, 2022, the district court amended its class certification order to refine the class definitions. LabCorp filed an interlocutory appeal of the May 23 class-certification order under Rule 23(f), sua sponte challenging plaintiffs' Article III standing, as well as the propriety of the district court's certification order. We authorized the interlocutory appeal on September 22, 2022. We have jurisdiction under 28 U.S.C. § 1292(e) and Rule 23(f). Considering Article III standing de novo, *Crum v. Circus Circus Enters.*, 231 F.3d 1129, 1130 (9th Cir. 2000), and reviewing the district court's class-certification decision for abuse of discretion, *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018), we affirm.

1. LabCorp argues that plaintiffs lack Article III standing for their Unruh Act claim because class representative Vargas, along with class members, did not experience a cognizable injury and were not

** The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

concretely harmed. Although the district court did not directly address standing in either of its class-certification orders, "we have an independent duty to do so before turning to the merits." *Langer v. Kiser*, 57 F.4th 1085, 1091 (9th Cir. 2023). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In the disability discrimination context, we have found that "it is not necessary for standing purposes that the barrier completely preclude the plaintiff from entering or from using a facility in any way." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 947 (9th Cir. 2011). Instead, the plaintiff need only demonstrate that the barrier "interfere[s] with the plaintiff's 'full and equal enjoyment' of the facility." *Id.* (quoting 42 U.S.C. § 12182). Full and equal enjoyment requires "effective communication" with disabled individuals. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 906-07 (9th Cir. 2019); *see also* 28 C.F.R. § 36.303(c)(1).

Vargas established an injury sufficient to confer standing. Because a plaintiff must demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561 (1992), we assess whether plaintiffs have demonstrated standing under a "preponderance of the evidence" standard, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022). Vargas contends that he entered a LabCorp facility and

intended to check in using the kiosk but was unable to do so because the kiosk was not accessible to the blind. Instead, Vargas was forced to wait until he was noticed by a staff member who aided him with check-in. As a result of the inaccessibility of the kiosk, Vargas was unable to immediately preserve his place in the patient queue, as sighted patients could, or to access any other kiosk features, such as the ability to privately alter account information. Thus, Vargas was denied effective communication and, by extension, the full and equal enjoyment of LabCorp's services. This injury is adequately concrete to convey Article III standing.

2. The district court also did not abuse its discretion in certifying the Unruh Act class over LabCorp's objections to commonality, predominance, typicality, manageability, and superiority. To certify a class under Rule 23, plaintiffs must make two showings. First, plaintiffs must demonstrate commonality, numerosity, typicality, and adequacy of representation under Rule 23(a). "Second, the plaintiffs must show that the class fits into one of three categories." *Olean Wholesale Grocery Coop.*, 31 F.4th at 663. This case falls into the third category, which permits a class action if "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

LabCorp first challenges the district court's finding that common facts predominate the Unruh Act claim, arguing that the standing of each class member requires "an individualized inquiry" into whether each

class member has demonstrated "difficulty, discomfort, or embarrassment." But difficulty, discomfort, or embarrassment are required to recover damages only in construction-related Unruh Act claims. *See* Cal. Civ. Code § 55.56(c). Because this case concerns effective communication and not construction, such a showing for each plaintiff is not required. Nor is it required that each plaintiff suffer identical harm; rather, the relevant inquiry is whether class members were subject to the same injuring behavior. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017). Because all class members maintain that their injury resulted from the inaccessibility of a LabCorp kiosk, the commonality requirement is satisfied.[1]

Based on the same findings, we also uphold the district court's holding that common questions predominate. The district court identified six common issues, whose answers could determine key elements of the case. Finding that these questions predominate is not an abuse of the district court's discretion.

Next, LabCorp challenges the typicality of Vargas's claim, arguing that his experiences and the experiences of class members "varied significantly." Rule 23's typicality requirement, however, is a "permissive standard," satisfied when representative claims "are reasonably co-extensive with those of absent class members[.]" *Castillo v. Bank of Am., NA*, 980 F.3d 723, 729 (9th Cir. 2020) (quotations omitted).

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[1] LabCorp's allegation that some potential class members may not have been injured does not defeat commonality at this time. *See Olean*, 31 F.4th at 668–69 (holding that Rule 23 permits "certification of a class that potentially includes more than a de minimus number of uninjured class members").

Representative claims "need not be substantially identical[]" to the claims of absent members. *Id*. Here, like the absent class members, Vargas is blind, tried to access LabCorp services, and was unable to do so using a kiosk. Thus, his claim is typical of the class, and the district court did not abuse its discretion in so finding.

Lastly, LabCorp challenges the superiority of class adjudication, as required by Rule 23(b)(3). Though four factors determine superiority under the Rule, LabCorp disputes only the fourth factor: the manageability of the class. Fed. R. Civ. P. 23(b)(3)(A)–(D). LabCorp contends that the class is unmanageable because there is no proposed way of identifying which persons visiting LabCorp stations are legally blind.[2]

As the district court found, "identifying class members would not be difficult" because "Labcorp knows how many patients checked in, and has information on those patients from their provided ID and insurance." Though no specific method for identifying class members has been identified, claims administrators, auditing processes, and other techniques may be used to validate claims. And as the court managing the litigation process, the district

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[2] Though LabCorp also argues that the $4,000 damages amount available under the Unruh Act is significant enough to weigh against superiority under Rule 23(b)(3), such concerns are typically adjudicated under the Rule 23(a) factors. But, even if we were to consider LabCorp's argument, we agree with the district court that the $4,000 statutory damage amount is a minimal sum that "would be dwarfed by the cost of litigating on an individual basis" in this case, given the complexity of the litigation. *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010).

court is best situated to determine its own capacity to oversee the location of class members.

3. The district court did not abuse its discretion in certifying the nationwide class based on its determination that a nationwide injunction could provide relief to all members. The district court certified the nationwide class under Rule 23(b)(2), which permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole[.]" LabCorp argues that no single injunction could provide relief to all class members, because not all blind people prefer the same accommodations. But the class members in this action were not injured by LabCorp's failure to meet their preferences; instead, all class members were injured by the complete inaccessibility of LabCorp kiosks for blind individuals. As the district court reasoned, by adding technological accommodations, the kiosks could be rendered accessible to the blind, thus addressing the injuries of the entire class. Although some class members may still prefer not to use the kiosks, providing them the ability to make that choice in the first place relieves any current injury. The district court did not abuse its discretion in reaching the same conclusion.

4. Lastly, we decline to address LabCorp's argument that the district court erred in certifying two fail-safe classes. LabCorp appeals only the district court's May 23 order, and not the revised class definitions in its June 13 order. Although LabCorp's argument references the refined definitions from the June 13 order, only the May 23 order was attached to

LabCorp's interlocutory appeal, as is required by Federal Rule of Appellate Procedure 5. Further, LabCorp never attempted to amend or refile its interlocutory appeal to include the June 13 order. Therefore, LabCorp's argument is not properly before this court. *See Stockwell v. City and County of San Francisco*, 749 F.3d 1107, 1113 (9th Cir. 2014) ("We must police the bounds of our jurisdiction vigorously [concerning Rule 23(f) appeals] as elsewhere.")

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 22 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LUKE DAVIS; et al., Plaintiffs-Respondents, v. LABORATORY CORPORATION OF AMERICA HOLDINGS, and Does 1-10, Defendant-Petitioner.	No. 22-80053 D.C. No. 2:20-cv-00893-FMO-KS Central District of California, Los Angeles ORDER

Before: BRESS and VANDYKE, Circuit Judges.

Petitioner's motion for leave to file a reply in support of the petition for permission to appeal (Docket Entry No. 6) is granted. Petitioner's reply has been filed.

The court, in its discretion, grants the petition for permission to appeal the district court's order granting class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005). Within 14 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

APPENDIX C

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUKE DAVIS; et al., Plaintiffs-Appellees, v. LABORATORY CORPORATION OF AMERICA HOLDINGS, DBA (doing business as) Labcorp, Defendant-Appellant.	No. 22-55873 D.C. No. 2:20-cv-00893-FMO-KS Central District of California, Los Angeles ORDER

Before: W. FLETCHER and MENDOZA, Circuit Judges, and SCHREIER,[1] District Judge.

Judge Mendoza has voted to deny the petition for rehearing en banc, and Judge Fletcher and Judge Schreier have recommended denying the petition for rehearing en banc. The full court was advised of the

[1] The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, Dkt. No. 62, is DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LUKE DAVIS, JULIAN VARGAS, *et al.*, Plaintiffs, v. LABORATORY CORPORATION OF AMERICA HOLDINGS, Defendant.	))))))))))	Case No. CV 20-0893 FMO (KSx) ***AMENDED* ORDER RE: MOTION FOR CLASS CERTIFICATION**

Having reviewed and considered all the briefing filed with respect to plaintiffs' Motion for Class Certification, (Dkt. 66, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, *see* Fed. R. Civ. P. 78(b); Local Rule 7-15; *Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND[1]

On January 28, 2020, Luke Davis ("Davis") and Julian Vargas ("Vargas" and together with Davis, "plaintiffs") filed this putative class action. (*See* Dkt. 1, Class Action Complaint). On September 3, 2020, plaintiffs and the American Council of the Blind ("ACB") filed the operative First Amended Class Action Complaint ("FAC"), (Dkt. 40), against Laboratory Corporation of America Holdings ("defendant" or "LabCorp"), asserting claims for violations of: (1) the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.*; (2) California's Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code §§ 51, *et seq.*; (3) California's Disabled Persons Act ("CDPA"), Cal. Civ. Code §§ 54, *et seq.*;[2] (4) Section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794(a); and (5) Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 8116. (Dkt. 40, FAC at ¶¶ 41-95). The Unruh Act and CDPA claims are brought by Vargas on behalf of himself and a putative California class, (*see id.* at ¶¶ 60-73), while the remaining federal claims are brought by plaintiffs on behalf of the Nationwide Injunctive Class. (*See id.* at ¶¶ 41-59, 74-95). Plaintiffs seek declaratory and injunctive relief, statutory damages, and attorney's fees. (*See id.* at Prayer for Relief). Plaintiffs do "not

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[1] Capitalization, quotation marks, punctuation, and emphasis in record citations may be altered without notation.

[2] Plaintiffs concede that their claim under the CDPA cannot be maintained, and request that the court dismiss it pursuant to Federal Rule of Civil Procedure 41 (a)(2). (*See* Dkt. 84, Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Summary Judgment [] at 5 n. 2). Accordingly, the court will not address any arguments regarding the CDPA claim.

seek class recovery for actual damages, personal injuries or emotional distress that may have been caused by defendant's conduct[.]" (*Id.* at ¶ 36).

Plaintiffs allege that LabCorp discriminates against them and other visually impaired individuals, "by refusing and failing to provide auxiliary aids and services to Plaintiffs, and by requiring [them] to rely upon other means of communication that are inadequate to provide equal opportunity to participate in and benefit from Defendant's health care services free from discrimination." (Dkt. 40, FAC at ¶¶ 1-2). Plaintiffs allege that they visited LabCorp's patient services centers ("PSCs") "and were denied full and equal access as a result of defendant's inaccessible touchscreen kiosks for self-service check-in." (*See id.* at ¶¶ 4, 21-22). According to plaintiffs, the touchscreen kiosks "do not contain the necessary technology that would enable a person with a visual impairment to [a] enter any personal information necessary to process a transaction in a manner that ensures the same degree of personal privacy afforded to those without visual impairments; or [b] use the device independently and without the assistance of others in the same manner afforded to those without visual impairments." (*Id.* at ¶ 5). Indeed, "Plaintiffs were informed by staff of defendant that the kiosks are not accessible to the blind." (*Id.*). As a result, "plaintiffs, members of [] ACB, [a national membership organization of approximately 20,000 blind and visually impaired persons,] and all other visually impaired individuals are forced to seek the assistance of a sighted person, and thereafter divulge their personal medical information to that sighted

person in a nonconfidential setting in order to register." (*Id.* at ¶¶ 5, 16).

LabCorp has approximately 2,000 PSCs throughout the country, 299 of which are located in California. (Dkt. 82, Exh. 32 (Deposition of Joseph Sinning) ("Sinning Depo") at JA1062). In October 2017, LabCorp launched "Project Horizon" to roll out check-in kiosks at its PSCs. (*Id.* at JA1071). In preparation for Project Horizon, LabCorp considered proposals from two companies for the kiosks. (Dkt. 80, Exh. 18 (Wright Depo) at JA477); (Dkt. 80, Exh. 26 at JA711-714). Although one of the companies proposed to provide kiosks that were ADA compliant, LabCorp selected the company, Alia, that did not provide ADA compliant kiosks. (Dkt. 80, Exh. 18, Deposition of Mark Wright ("Wright Depo") at JA464, JA477).

Approximately 1,853 PSCs nationwide have check-in kiosks, 280 of which are in California. (Dkt. 82, Exh. 32 (Sinning Depo) at JA1064). According to LabCorp, the "kiosks are only available for use during normal business hours, when there is also at least one employee present at each PSC who can operate front desk check ins as needed." (*Id.* at JA1065-66).

With respect to the instant Motion, plaintiffs seek an order certifying the following class and subclass pursuant to Rules 23(b)(2) and (3) of the Federal Rules of Civil Procedure:[3]

> All legally blind individuals in the United States who visited a LabCorp patient service center in the United States and were

[3] All "Rule" references are to the Federal Rules of Civil Procedure unless otherwise indicated.

> denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals. ["Nationwide Injunctive Class" or "Rule 23(b)(2) Class"]
>
> All legally blind individuals in California who visited a LabCorp patient service center in California and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals. ["California Class" or "Rule 23(b)(3) Class"].

(Dkt. 66, Motion at 2); (Dkt. 66-1, Joint Brief Concerning Plaintiff's Motion for Class Certification ("Joint Br.") at 30).

LEGAL STANDARD

Rule 23 permits a plaintiff to sue as a representative of a class if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions or 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). Courts refer to these requirements by the following shorthand:

"numerosity, commonality, typicality and adequacy of representation[.]" *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). In addition to fulfilling the four prongs of Rule 23(a), the proposed class must meet at least one of the three requirements listed in Rule 23(b). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 131 S.Ct. 2541, 2548 (2011).

"Before it can certify a class, a district court must be satisfied, after a rigorous analysis, that the prerequisites of both Rule 23(a) and" the applicable Rule 23(b) provision have been satisfied. *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.*, 31 F.4th 651, 664 (9th Cir. 2022) (*en banc*) (internal quotation marks omitted). A plaintiff "must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Id.* at 665.

On occasion, the Rule 23 analysis "will entail some overlap with the merits of the plaintiff's underlying claim[,]" and "sometimes it may be necessary for the court to probe behind the pleadings[.]" *Dukes*, 564 U.S. at 350-51, 131 S.Ct. at 2551 (internal quotation marks omitted). However, courts must remember that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 1194-95 (2013); *see id.*, 133 S.Ct. at 1195 ("Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied."); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n. 8 (9th Cir. 2011) (The court examines the merits of the underlying claim "only inasmuch as

it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims. . . . To hold otherwise would turn class certification into a mini-trial.") (citations omitted). Finally, a court has "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 810 (9th Cir. 2010) (internal quotation marks omitted); *see also Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1092 (9th Cir. 2010) (The decision to certify a class and "any particular underlying Rule 23 determination involving a discretionary determination" is reviewed for abuse of discretion.).

DISCUSSION

I. RULE 23(a) REQUIREMENTS.[4]

A. Numerosity.

A putative class may be certified only if it "is so numerous that joinder of all members is

[4] To the extent LabCorp may be challenging the nationwide class on the ground that it is a fail-safe class, the court rejects the challenge, as defendant merely referenced a "fail-safe class" in its "Introductory Statement," (*see* Dkt. 66-1, Joint Br. at 6); it provided no argument or authority to support its challenge. (*See*, *generally*, *id.* at 30-32, 34-45, 47-53); (Dkt. 86, Supplemental Memorandum in Support of LabCorp's Opposition to Motion to Certify Class); *see Beasley v. Astrue*, 2011 WL 1327130, *2 (W.D. Wash. 2011) ("It is not enough merely to present an argument in the skimpiest way, and leave the Court to do counsel's work – framing the argument, and putting flesh on its bones through a discussion of the applicable law and facts.").

impracticable[.]" Fed. R. Civ. P. 23(a)(1). "Although the size of the class is not the sole determining factor, . . . where a class is large in numbers, joinder will usually be impracticable." *A.B. v. Hawaii State Department of Education*, 30 F.4th 828, 835 (9th Cir. 2022) (internal quotation marks omitted); *see Jordan v. Cty. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds by Cty. of Los Angeles v. Jordan*, 459 U.S. 810, 103 S.Ct. 35 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the numerosity requirement). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members[.]" *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000); *see Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 473-74 (C.D. Cal. 2012) (same).

Based on plaintiffs' expert's analysis, plaintiffs contend that "there are at least 87,500 legally blind class members nationwide" and "at least 8,861 legally blind class members in California." (Dkt. 66-1, Joint Br. at 33); (Dkt. 81, Exh. 27 (Sean Chasworth Report) at JA722). In addition, plaintiffs rely on LabCorp's survey responses, which indicate that LabCorp received over 60 complaints from persons with low or no vision having difficulty using the kiosks. (*See* Dkt. 66-1, Joint Br. at 33). Additionally, according to plaintiffs, LabCorp has records showing that there were more than 130 complaints nationwide from individuals with low or no vision who claimed they could not use the kiosks. (*See id.* at 33-34).

With respect to the California Class, LabCorp contends that the "survey responses . . . cannot satisfy the numerosity requirement" because of the 23 responses, four praised the kiosks, "leav[ing] only 19

potential California class members identified in those responses, not all of which may be legally blind[.]"[5] (Dkt. 66-1, Joint Br. at 35). However, given the number of complaints, and "[b]ecause not every patient will lodge a complaint[,] . . . it is highly unlikely that the[] complaints [and survey responses] reflect every individual who encountered" accessibility issues with the kiosks. *See Vargas v. Quest Diagnostic Clinical Labs.*, 2021 WL 5989958, *5 (C.D. Cal. 2021) ("*Quest*"). Thus, the court finds that plaintiffs have met the numerosity requirement as to the California Class.

With respect to the Nationwide Injunctive Class, LabCorp does "not dispute that there is a likelihood of at least 40 instances nationwide of some legally blind individuals who might claim that they have had

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[5] LabCorp also claims, without any supporting argument, that the responses to its own survey are "inadmissible and unsworn[.]" (Dkt. 66-1, Joint Br. at 35). As an initial matter, defendant's reference to "inadmissible and unsworn" survey responses "is too cursory and undeveloped for the Court to fully understand and consider[.]" *See Wyles v. Sussman*, 2019 WL 3249590, *3 (C.D. Cal. 2019); *see also Beasley*, 2011 WL 1327130, at *2 ("It is not enough merely to present an argument in the skimpiest way, and leave the Court to do counsel's work – framing the argument, and putting flesh on its bones through a discussion of the applicable law and facts."). Further, putting aside the fact that LabCorp itself relies on its own survey responses in support of its own argument, (*see* Dkt. 66-1, Joint Br. at 35), LabCorp's argument is unpersuasive because "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." *Sali v. Corona Regional Medical Center*, 909 F.3d 996, 1004 (9th Cir. 2018); *see Vargas v. Quest Diagnostic Clinical Labs.*, 2021 WL 5989958, *4 n. 3 (C.D. Cal. 2021) (The "Ninth Circuit does not require that evidence submitted in connection with a class certification motion be admissible.").

difficulty using a kiosk for check-in[.]" (Dkt. 66-1, Joint Br. at 34). Instead, it takes issue with whether the individuals actually fall within the class definition since they were "not denied service – the medical testing services PSCs provide[.]" (*Id.*). However, this is a merits question which the court declines to address here. As such, the court finds that plaintiffs have met the numerosity requirement as to the Nationwide Injunctive Class.

B. Commonality.

Commonality is satisfied if "there are common questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). It requires plaintiffs to demonstrate that their claims "depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350, 131 S.Ct. at 2551; *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (explaining that the commonality requirement demands that "class members' situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief") (internal quotation marks omitted). "The plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." *Mazza*, 666 F.3d at 588 (internal quotation marks omitted). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis and internal quotation

marks omitted); *see Mazza*, 666 F.3d at 589. Proof of commonality under Rule 23(a) is "less rigorous" than the related preponderance standard under Rule 23(b)(3). *See Mazza*, 666 F.3d at 589 (characterizing commonality as a "limited burden[,]" stating that it "only requires a single significant question of law or fact[,]" and concluding that it remains a distinct inquiry from the predominance issues raised under Rule 23(b)(3)). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

Here, plaintiffs contend there are several common questions, including whether: (1) "LabCorp's kiosks are independently accessible to legally blind individuals"; (2) "LabCorp has implemented the inaccessible check-in kiosks system across its national network of more than 1,800 PSCs"; (3) "LabCorp trained its employees that use of the kiosks to check-in was mandatory"; (4) "use of the kiosk is a good or service LabCorp offers its customers"; (5) "LabCorp offers a qualified aid or auxiliary service to allow legally blind individuals to access the check-in kiosk service"; and (6) "LabCorp has remedied the inaccessible check-in kiosk across its system." (Dkt. 66-1, Joint Br. at 37). LabCorp "does not dispute that there is at least one common question of law at issue here."[6] (*Id.*). The court agrees. *See*, *e.g.*, *Quest*, 2021

[6] LabCorp contends that as to the Nationwide Injunctive Class, there is no single injunction or declaration that will provide relief to the class as a whole. (*See* Dkt. 66-1, Joint Br. at 37-38). However, as LabCorp appears to recognize, that issue should be addressed as part of assessing the Rule 23(b)(2) factors. (*See id.*

WL 5989958, at *5 (finding plaintiff satisfied commonality based on similar questions).

C. Typicality.[7]

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). The purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." *Wolin*, 617 F.3d at 1175 (internal quotation marks omitted). "The requirement is permissive, such that representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Wolin*, 617 F.3d at 1175 (internal quotation marks omitted). The typicality requirement is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the

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at 38). Similarly, with respect to the California Class, LabCorp contends only that common issues do not predominate. (*Id.*).

[7] Because the Supreme Court has noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge[,]" *General Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2371 n. 13 (1982), the court hereby incorporates the Rule 23(a) commonality discussion set forth above. *See supra* at § I.B.

defendant's liability." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011), *abrogated on other grounds in Comcast Corp, v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426 (2013) (internal quotation marks omitted).

Here, Davis and Vargas have the same claims as the absent class members. (*See* Dkt. 40, FAC at ¶¶ 41-95). Both are legally blind and seek to represent classes of other legally blind individuals who, like them, encountered allegedly inaccessible kiosks at LabCorp's PSCs. (*See* Dkt. 79, Exh. 13 (Deposition of Vargas) ("Vargas Depo") at JA150); (Dkt. 79, Exh. 14 (Deposition of Luke Davis ("Davis Depo") at JA228); (Dkt.66-1, Joint Br. at 30) (class definitions). As such, their claims are typical of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3); *Stearns*, 655 F.3d at 1019 ("[E]ach class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.").

Nonetheless, LabCorp contends that plaintiffs "failed to provide sufficient evidence that their own preference is typical for all the legally blind individuals they seek to represent, or that proposed class members suffered any injury related to inability to check-in on the kiosk." (Dkt. 66-1, Joint Br. at 39). However, LabCorp ignores typicality's permissive standard, *see Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) ("Under the rule's permissive standards, representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical.") (internal quotation marks omitted), and the Ninth Circuit's admonition that courts may "not insist that the named plaintiffs' injuries be identical with those of

the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Id.* (citation and internal quotation marks omitted); *see*, *e.g.*, *id.* at 686 ("It does not matter that the named plaintiffs may have in the past suffered varying injuries or that they may currently have different health care needs; Rule 23(a)(3) requires only that their claims be 'typical' of the class, not that they be identically positioned to each []other or to every class member.").

Moreover, the scope and extent of any proposed injunction has yet to be litigated, and thus, there is no basis to conclude that plaintiffs will seek an injunction covering only their "own preference[s.]" In any event, the court is confident that, assuming liability is established, it can, after obtaining the parties' input, fashion an appropriate injunction.

D. Adequacy.

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A two-prong test is used to determine adequacy of representation: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis*, 657 F.3d at 985 (internal quotation marks omitted). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Id.*

The adequacy of counsel is also considered under Rule 23(g).

Here, LabCorp challenges only the adequacy of plaintiffs, as it relates to the Rule 23(b)(2) class. (*See* Dkt. 66-1, Joint Br. at 42-43) (contending plaintiffs are inadequate "where a single injunction could not resolve all issues"). Because LabCorp "incorporates its challenges to Plaintiffs' typicality[,]" (*id.* at 42), the court rejects it for the reasons set forth above. *See supra* at § I.C.

In any event, the court finds this factor is satisfied. There are no known conflicts between the absent class members and plaintiffs and their counsel. (*See* Dkt. 66-1, Joint Br. at 42). Plaintiffs have vigorously pursued this action on behalf of the two classes, participated in discovery, including by each submitting to deposition, and will appear and testify at trial if necessary. (Dkt. 79, Exh. 13 (Vargas Depo) at JA203-206) (testifying regarding his role in this litigation and the reasons for pursuing the claims asserted); (Dkt. 79, Exh. 14 (Davis Depo) at JA336-40) (same as to the Nationwide Injunctive Class). Further, plaintiffs' counsel are experienced, (Dkt. 79, Exh. 2 (Declaration of Jonathan D. Miller) ("Miller Decl.") at ¶¶ 15-19) (outlining counsel's experience); (Dkt. 17, Exh. 3 (Declaration of Matthew K. Handley) ("Handley Decl.") at ¶¶ 10-13) (outlining counsel's experience), and have prosecuted this action vigorously.

II. RULE 23(b) REQUIREMENTS.

A "proposed class or subclass must also satisfy the requirements of one of the sub-sections of Rule 23(b), which defines three different types of classes."

Parsons, 754 F.3d at 674 (9th Cir. 2014) (internal quotation marks omitted). Here, plaintiffs seek certification under Rule 23(b)(2) and (b)(3). (Dkt. 66-1, Joint Br. at 30) (class definitions)

A. Rule 23(b)(2) Requirements – Nationwide Injunctive Class.

A class may be maintained under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" *Dukes*, 564 U.S. at 360, 131 S.Ct. at 2557. This provision applies "only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* "It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id.* "Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. " *Id.* at 360-61, 131 S.Ct. at 2557. "Thus, 23(b)(2) sets forth two basic requirements. First, the party opposing the class must have acted, refused to act, or failed to perform a legal duty on grounds generally applicable to all class members. Second, final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, [must be] appropriate." 2 *Newberg on Class Actions* § 4:26 (5th ed. 2014) (internal quotation marks omitted).

Plaintiffs seek to certify a Rule 23(b)(2) class with respect to their federal claims, particularly the ADA

claim. (*See* Dkt. 66, Motion at 2). LabCorp does not dispute that it "has acted or refused to act on grounds that apply generally to the class[.]" Fed. R. Civ. P. 23(b)(2); (*see*, *generally*, Dkt. 66-1, Joint Br. at 43-45). Instead, it challenges only the second Rule 23(b)(2) requirement, arguing that a single injunction will not provide relief to each member of the class. (*See* Dkt. 66-1, Joint Br. at 43-45). LabCorp claims that ACB's Rule 30(b)(6) witness, Claire Stanely, "acknowledge[d] that the injunction Plaintiffs seek would not provide relief to each member of the class."[8] (*Id.* at 44). Stanley, however, did not testify that a single injunction or remedy would not render the kiosks accessible. (*See*, *generally*, Dkt. 82, Exh. 35 (Stanley Depo) at JA1099-1100). Rather, when asked whether providing "speech output" would "resolve the accessibility concerns of everyone that is blind or visually impaired[,]" Stanley testified that "[n]o one accommodation is going to accommodate every person everywhere." (*Id.* at JA1099). In other words, Stanley's testimony does not mean that an injunction cannot be crafted that will be generally applicable to the class as a whole. *See Parsons*, 754 F.3d at 688 (The Rule 23(b)(2) indivisibility requirement is "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole.")

LabCorp appears to be "exaggerate[ing] what is required under Rule 23(b)(2)[,]" *Nightingale v. U.S.*

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[8] LabCorp makes a similar argument regarding plaintiffs' accessibility expert, Rachael Bradley Montgomery. (*See* Dkt. 66-1, Joint Br. at 44).

Citizenship and Immigration Services, 333 F.R.D. 449, 463 (N.D. Cal. 2019), because LabCorp's conduct need not have injured all class members in exactly the same way. In other words, "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010); *see Parsons*, 754 F.3d at 688 (The Rule 23(b)(2) "inquiry does not require an examination of the viability or bases of the class members' claims for relief, . . . and does not require a finding that all members of the class have suffered identical injuries."). "[I]t is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez*, 591 F.3d at 1125 (internal quotation marks omitted).

Moreover, as the Ninth Circuit has made clear, "the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions." *Parsons*, 754 F.3d at 686. In a civil rights action, the fact that the discriminatory conduct may have affected different members of the class in different ways does not prevent certification under Rule 23(b)(2). *See*, *e.g.*, *Gibson v. Local 40, Supercargoes and Checkers*, 543 F.2d 1259, 1264 (9th Cir. 1976) ("A class action may be maintained under [Rule] 23(b)(2) alleging a general course of racial discrimination by an employer or union, though the discrimination may have . . . affect[ed] different members of the class in different ways."). Here, there is no dispute that this case constitutes a typical civil rights class action. As one court in this District stated, in addressing nearly

identical class claims against another company that provides diagnostic testing services, this case is "a civil rights action against a party charged with unlawful, class-based discrimination based on the use of a specific auxiliary aid or service, and is a prime candidate for 23(b)(2) certification." *Quest*, 2021 WL 5989958, at *7. In short, the court finds that certification of the Nationwide Injunctive Class is appropriate under Rule 23(b)(2). *See id.*

B. Rule 23(b)(3) Requirements – California Class.

Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (internal quotation marks omitted). Fed. R. Civ. P. 23(b)(3) requires two different inquiries, specifically a determination as to whether: (1) "questions of law or fact common to class members predominate over any questions affecting only individual members[;]" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance.

"Though there is substantial overlap between [the Rule 23(a)(2) commonality test and the Rule 23(b)(3) predominance test], the 23(b)(3) test is far more demanding[.]"[9] *Wolin*, 617 F.3d at 1172 (internal quotation marks omitted). "The Rule 23(b)(3)

[9] Given the substantial overlap between Rule 23(a) and Rule 23(b)(3), and to minimize repetitiveness, the court hereby incorporates the Rule 23(a) discussion set forth above. *See supra* at § I.B.

predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 2249 (1997). "This calls upon courts to give careful scrutiny to the relations between common and individual questions in a case." *Tyson Foods, Inc, v. Bouaphakeo*, 577 U.S. 442, 453, 136 S.Ct. 1036, 1045 (2016). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* (citations and internal quotation marks omitted); *see Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545 (9th Cir. 2013) ("The predominance analysis under Rule 23(b)(3) focuses on the relationship between the common and individual issues in the case and tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.") (internal quotation marks omitted). The class members' claims do not need to be identical. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (allowing "some variation" between class members); *Abdullah*, 731 F.3d at 963 (explaining that "there may be *some* variation among individual plaintiffs' claims") (internal quotation marks omitted). The focus is on whether the "variation [in the class

member's claims] is enough to defeat predominance under Rule 23(b)(3)." *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund*, 244 F.3d at 1163; *see Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975) ("[C]ourts have taken the common sense approach that the class is united by a common interest in determining whether defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions[.]").

Where, as here, a plaintiff's claims arise under state law, the court "looks to state law to determine whether the plaintiffs' claims – and [defendant's] affirmative defenses – can yield a common answer that is 'apt to drive the resolution of the litigation.'" *Abdullah*, 731 F.3d at 957 (quoting *Dukes*, 564 U.S. at 350, 131 S.Ct. at 2551); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S.Ct. 2179, 2184 (2011) ("Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying cause of action.") (internal quotation marks omitted).

The Unruh Act provides that "[a]ll persons within the jurisdiction of [California] are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). The California Supreme Court has stated that the purpose of the Unruh "Act is to create and preserve a nondiscriminatory environment in California business establishments by banishing or eradicating arbitrary, invidious discrimination by such establishments." *White v. Square, Inc.*, 7 Cal.5th 1019, 1025 (2019) (internal quotation marks omitted).

"In enforcing the [Unruh] Act, courts must consider its broad remedial purpose and overarching goal of deterring discriminatory practices by businesses" and construe it "liberally in order to carry out its purpose." *Id.* (citations and internal quotation marks omitted).

"In general, a person suffers discrimination under the [Unruh] Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services." *White*, 7 Cal.5th at 1023; *Thurston v. Omni Hotels Mgmt. Corp.*, 69 Cal.App.5th 299, 307-08 (2021) (holding that plaintiff, who was blind, "had to show a 'bona fide intent'" to use defendant's services) (quoting *White*, 7 Cal.5th at 1032). "While . . . an Unruh Act claimant need not be a client or customer of the covered public accommodation, and . . . he or she need not prove intentional discrimination upon establishing an ADA violation," a "claimant's intent or motivation for visiting the covered public accommodation is []relevant to a determination of the merits of his or her claim." *Thurston*, 69 Cal.App.5th at 309.

"As part of the 1992 reformation of state disability law, the [California] Legislature amended the Unruh [] Act to incorporate by reference the ADA, making violations of the ADA per se violations of the Unruh [] Act." *Jankey v. Lee*, 55 Cal.4th 1038, 1044 (2012). "To prevail on a discrimination claim under Title 111 [of the ADA], a plaintiff must show that: (1) he is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability." *Arizona ex rel. Goddard v. Harkins*

Amusement Enterprises, Inc., 603 F.3d 666, 670 (9th Cir. 2010).

Under the Unruh Act, "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 . . . is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000)[.]" "The litigant need not prove she suffered actual damages to recover the [Unruh Act's] independent statutory damages of $4,000." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir. 2007). Plaintiffs contend that common questions predominate because they seek only statutory damages under the Unruh Act which are directly attributable to their theory of harm and can be determined without complicated calculations.[10] (Dkt. 66-1, Joint Br. at 46). They add that "should the need arise for class members to confirm eligibility to recover statutory damages under the Unruh Act, it is well-settled that this issue may properly be addressed by way of a claim form after class wide liability has been determined." (*Id.* at 46-47).

LabCorp contends that individualized issues abound, (Dkt. 66-1, Joint Br. at 48), because "[t]o recover statutory damages under the Unruh Act, a class member must show they 'personally encountered' an Unruh Act violation that caused them difficulty,

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[10] LabCorp does not challenge predominance under *Comcast*, 569 U.S. 27, 133 S.Ct. 1426. (*See*, *generally*, Dkt. 66-1, Joint Br. at 47-50). Nor could it since plaintiffs are merely seeking statutory damages under the Unruh Act.

discomfort, or embarrassment." (*Id.* at 47). According to LabCorp, "even if Vargas argued that checking in at the front desk caused him difficulty, discomfort, or embarrassment, his own experience cannot be imputed to other California residents who are legally blind[,]" (*id.* at 47-48), because "not all California PSC's [] have kiosks and for those that do, staffing varies widely[.]" (*Id.*). LabCorp's contentions are unpersuasive.

LabCorp's argument boils down to determining whether each class member used or was exposed to a kiosk at one of LabCorp's PSCs. But predominance is not concerned with determining who may be entitled to class membership, *i.e.*, identifying legally blind class members who attempted to or were discouraged from using LabCorp's kiosks. Rather, the superiority prong is where that issue is considered. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) (declining to impose a separate administrability requirement to assess the difficulty of identifying class members, in part, because the superiority criterion already mandates considering "the likely difficulties in managing a class action") (internal quotation marks omitted).[11] Here, defendant's concern as to whether a particular class member "personally encountered" a check-in kiosk – *i.e.*, identifying those who are entitled to class membership – will not predominate over the more important common questions of fact and law

[11] To the extent that LabCorp may be arguing that predominance is lacking due to a lack of ascertainability, (*see* Dkt. 66-1, Joint Br. at 47-50), it is without merit. *See Briseno*, 844 F.3d at 1133 ("[T]he language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification[.]").

such as whether: (1) "LabCorp's kiosks are independently accessible to legally blind individuals"; (2) "LabCorp has implemented the inaccessible check-in kiosks system across its national network of more than 1,800 PSCs"; (3) "LabCorp trained its employees that use of the kiosks to check-in was mandatory"; (4) "use of the kiosk is a good or service LabCorp offers its customers"; (5) "LabCorp offers a qualified aid or auxiliary service to allow legally blind individuals to access the check-in kiosk service"; and (6) "LabCorp has remedied the inaccessible check-in kiosk across its system." *See supra* at § I.B.

In addition, although Vargas "need not prove [that] []he suffered actual damages," *Molski*, 481 F.3d at 731, to prevail on his Unruh disability discrimination claim, LabCorp argues that predominance cannot be established because eligibility for statutory damages cannot "be addressed by way of a claim form after class wide liability has been determined[.]" (*See* Dkt. 66-1, Joint Br. at 49) (internal quotation marks omitted). In effect, LabCorp argues that predominance cannot be established because the entitlement to statutory damages will have to be done on an individual basis after liability is established. (*See id.*). However, it is well-settled that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). In other words, "the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (internal quotation marks omitted); *see also Comcast*, 569 U.S. at 35, 133 S.Ct. at 1433 (noting

that damages "[c]alculations need not be exact" at the class-certification stage). As the Ninth Circuit recently reiterated, "a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones." *Olean Wholesale Grocery Cooperative, Inc.*, 31 F.4th at 669. Here, the court can bifurcate the case into a liability and damages phase and, assuming there is a liability determination, create a claims process by which to validate individualized claim determinations. *See*, *e.g.*, *Briseno*, 844 F.3d at 1131 ("Defendant[] will have . . . opportunities to individually challenge the claims of absent class members if and when they file claims for damages. At the claims administration stage, parties have long relied on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to validate claims. Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability.") (citation and internal quotation marks omitted); *Mullins v. Direct Digital LLC*, 795 F.3d 654, 667 (7th Cir. 2015) (parties regularly rely on "claims administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court" to validate claims); *Nevarez v. Forty Niners Football Co., LLC*, 326 F.R.D. 562, 577 (N.D. Cal. 2018) ("Class members can certify whether they were present at the Stadium and whether they encountered an actionable

Unruh Act violation.") (citing Cal. Civ. Code § 55.56); *see also Tyson Foods*, 577 U.S. at 461, 136 S.Ct. at 1050 (recognizing that bifurcation could resolve problems regarding uninjured class members); 4 *Newberg on Class Actions*, § 11:6, at 21 (5th ed. 2014) ("Courts have employed either issue certification (certifying only the question of liability for class treatment) or bifurcation (separating liability from damages and trying liability first, then damages) as the means to effectuate the goal of aggregated treatment.") (footnote omitted).

Further, even assuming it was proper to consider, under the predominance prong, the issue of identifying class members, the court is not persuaded that the "personally encountered" and "difficulty, discomfort, or embarrassment" standard upon which LabCorp relies, (*see* Dkt. 66-1, Joint Br. at 47), has application to the specific Unruh Act disability discrimination claim in this action.[12] That standard, which is set forth in California Civil Code § 55.56[13] of the Construction Related Accessibility Standards Compliance Act ("CRAS"), *see* Cal. Civ. Code §§ 55.51-55.57, provides in relevant part that statutory damages under § 52(a) may "be recovered in a

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[12] With respect to the intent to use LabCorp's services, *see White*, 7 Cal.5th at 1023, LabCorp does not challenge that requirement. (*See*, *generally*, Dkt 66-1, Joint Br. at 47-50). In any event, that requirement would not defeat a finding of predominance. *See Quest*, 2021 WL 5989958 at *8 (noting that "there is no real question that the putative class members had a bona fide intent to use [defendant's] services" because plaintiff proposed to use defendant's records to identify class members).

[13] Unless otherwise indicated, all section references are to the California Civil Code.

construction-related accessibility claim against a place of public accommodation only if a violation or violations of one or more *construction-related* accessibility standards denied the plaintiff full and equal access to the place of public accommodation on a particular occasion. A violation personally encountered by a plaintiff may be sufficient to cause a denial of full and equal access if the plaintiff experienced difficulty, discomfort, or embarrassment because of the violation." Cal. Civ. Code § 55.56(a)-(c) (emphasis added); *see Mundy v. Pro-Thro Enterprises*, 192 Cal.App.4th Supp. 1, 5 (2011) ("Section 55.56 is part of a comprehensive statutory scheme that was enacted in 2008 with the intent of increasing voluntary compliance with equal access standards while protecting businesses from abusive access litigation. The provisions in [§§] 55.51 through 55.57 apply only to a construction-related accessibility claim, which is defined as a violation of a construction-related accessibility standard under federal or state law[.]") (citations and internal quotation marks omitted); *Hernandez v. Polanco Enterprises, Inc.*, 624 F.Appx. 964, 965 (9th Cir. 2015) ("Under California law, [plaintiff] must prove – in addition to the ADA violation – that she 'personally encountered the violation [of a construction-related accessibility standard] on a particular occasion' and that it caused her 'difficulty, discomfort, or embarrassment,' thus denying her full and equal access to a place of public accommodation.") (quoting Cal. Civ. Code § 55.56(a)-(c)) (first alteration added).

The two cases cited by LabCorp for the proposition that it is necessary for a class member to establish that he or she personally encountered an Unruh Act

violation that caused difficulty, discomfort or embarrassment, (*see* Dkt. 66-1, Joint Br. at 47), are both construction-related accessibility cases. *See Doran v. 7 Eleven, Inc.*, 2011 WL 13143622, *1 (C.D. Cal. 2011) ("*Doran I*"), *aff'd*, 509 F.Appx. 647 (9th Cir. 2013) (noting that plaintiff was a "paraplegic" and that defendant had previously "remov[ed] all barriers related to his disability"); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 830 (9th Cir. 2000) (plaintiff was a paraplegic asserting claims based on "lack of a designated parking space for disabled persons").[14] Similarly, the three ADA cases LabCorp relies on as examples of where class certification was denied, (*see* Dkt. 66-1, Joint Br. at 47-49) – *Vondersaar v. Starbucks Corp.*, 2015 WL 629437, *4 (C.D. Cal. 2015), *aff'd*, 719 F.Appx. 657 (9th Cir. 2018); *Moeller v. Taco Bell*, 2012 WL 3070863, *14 (N.D. Cal. 2012); *Antoninetti v. Chipotle Mexican Grill, Inc.*, 2012 WL 3762440, *5-*6 & n. 1 (S.D. Cal. 2012) – do not compel

[14] Although the court in *Quest* recognized that § 55.56 "applies specifically to construction-related accessibility claims[,]" 2021 WL 5989958, at *8, it also appeared to accept defendant's argument that "both federal and California courts have [] articulated the same standard without reference to section 55.56." (*Id.*). LabCorp has not cited, nor has the court found a California published case that has addressed this standard outside of the construction-related accessibility context. On the contrary, the cases suggest otherwise. *See*, *e.g.*, *Mundy*, 192 Cal.App.4th Supp. at 5 ("The provisions in [§§] 55.51 through 55.57 apply only to a construction-related accessibility claim, which is defined as a violation of a construction-related accessibility standard under federal or state law[.]") (citations and internal quotation marks omitted); *Munson v. Del Taco, Inc.*, 46 Cal.4th 661, 677-78 (2009) (noting that §§ 55.53-55.57 were enacted to "protect[] businesses from abusive access litigation" arising from construction-related accessibility claims).

the conclusion that predominance is lacking here because, unlike those cases, this case does not involve construction-related accessibility claims. *See Quest*, 2021 WL 5989958, at *8 (noting that these cases "have certain notable similarities: all three involved disabled plaintiffs who alleged that counter heights and other physical barriers to access in fast food establishments violated the ADA and the Unruh Act").[15] The cases relied upon by LabCorp involved various accessibility issues at different restaurants while Vargas's Unruh Act claim is based on LabCorp's kiosks, which are identical. While LabCorp maintains that "[n]ot all California PSC's [sic] even have kiosks[,]" and "for those that do, staffing varies widely depending on location and a PSC's size: some locations have a dedicated patient intake representative ('PIR') who sits full time at the front desk to check in patients; others have phlebotomists to conduct both check in and testing; and some PSCs are located inside Walgreens stores where there is always a dedicated

[15] These cases are also distinguishable because, as the court in *Nevarez* observed, *Moeller* and *Antoninetti* are procedurally distinct in that the class certification motions were decided "after the defendants' liability had been adjudicated, which meant that the most important common question had already been resolved." *Nevarez*, 326 F.R.D. at 586 (emphasis omitted). The same holds true with respect to *Quest*, where the court had already resolved a motion for summary judgment. *See Vargas v. Quest Diagnostics Clinical Laboratories, Inc.*, 2021 WL 5989961, *11 (C.D. Cal. 2021). Here, the court has not yet ruled on a summary judgment motion. Further, unlike the instant case, the kiosks in *Quest* were not identical because at some point, defendant "began to roll out a change to its kiosks that allow[ed] visually-impaired patients to swipe the touchscreen using three fingers, which checks the patient in and alerts a phlebotomist that the patient has arrived." *Quest*, 2021 WL 5989958, at *1.

Walgreens staff member to assist patients," (Dkt. 66-1, Joint Br. at 48), the variations are not as significant as LabCorp makes them out to be. First, of the 299 PSCs in California, (Dkt. 82, Exh. 32 (Sinning Depo) at JA1064), only 19 do not have kiosks. (*Id.*). Second, with respect to PIRs, there is evidence that LabCorp has "very few PIRs" and instead, "[t]he vast majority of the people working in [the PSCs] doing patient care and intake are phlebotomists." (*Id.* at JA1067-68). In other words, LabCorp is aware of which PSCs in California have kiosks, when they were installed and made operational, and how each PSC is staffed.

Finally, even if the standard set forth in § 55.56 applied in this case, it would not defeat a finding of predominance. In *Nevarez*, the plaintiffs, who required the use of wheelchairs, 326 F.R.D. at 569, sued several defendants, including the owners and operators of Levi's Stadium, asserting claims under the ADA and the Unruh Act. *See id.* at 568-71. The plaintiffs alleged that they faced barriers in accessing the stadium, including a lack of accessible seating, narrow security checkpoints, heavy doors, and inaccessible counters. *See id.* at 569-70, 578. The plaintiffs sought to certify a Rule 23(b)(3) class of persons who use wheelchairs, scooters or other mobility aids who "purchased, attempted to purchase, or for whom third parties purchased accessible seating," and who were denied equal access to the stadium. *Id.* at 572. The plaintiffs sought "statutory minimum damages of $4,000 per actionable violation of the Unruh Act[.]" *Id.* at 571.

With respect to the predominance requirement, the defendants made the same argument LabCorp makes here – namely that "individual questions predominate

because each class member will have to prove that they 'personally encountered' an Unruh Act violation that caused 'difficulty, discomfort, or embarrassment' to the class member." *Nevarez*, 326 F.R.D. at 585 (quoting Cal. Civ. Code §§ 55.56(b)-(c)). Then-district Judge Koh rejected the defendants' contention that application of § 55.56 defeated predominance, noting that defendants kept "records of class members' purchases of accessible seating that include[d] names and contact information." *Id.* at 586. Similar to *Nevarez* and, as discussed below, *see infra* at § II.B.2., there should be minimal logistical difficulties to identifying class members given the uniformity of the kiosks, and the fact that LabCorp "knows how many patients checked in, and has information on those patients from their provided ID and insurance[.]" (Dkt. 66-1, Joint Br. at 21 n. 4).

In short, the court finds that plaintiff has established that common questions of fact and law predominate over individualized questions.

2. Superiority.

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin*, 617 F.3d at 1175 (internal quotation marks omitted). To determine superiority, the court must look at

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Of the four superiority factors, LabCorp appears to dispute only the fourth factor regarding whether the case is manageable as a class action.[16] (*See* Dkt. 66-1, Joint Br. at 51-53). First, LabCorp relies on "[t]wo of the decisions[, *Antoninetti* and *Moeller*,] already discussed in Labcorp's predominance section" to argue that "class procedures" are "not superior for adjudicating" plaintiffs' Unruh Act claim, "considering the individualized issues involved in assessing damages and the hefty per-claimant minimum statutory damages amounts incentivizing lawsuits." (*Id.* at 51). LabCorp's argument and the cases it relies on were addressed and rejected in the previous section. *See supra* at § II.B.1. Further, it should be noted that LabCorp provides no explanation or authority as to why the statutory minimum damages amount under the Unruh Act qualifies as "hefty" and, even assuming it did qualify as a "hefty" damages amount, LabCorp does not explain why that matters in terms of assessing whether a class action is manageable. (*See*, *generally*, Dkt. 66-1, Joint Br. at 51). In any event, the $4,000 statutory damages amount is a minimal sum

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[16] Given the substantial overlap between LabCorp's predominance argument, which appears to primarily challenge the feasibility of maintaining a Rule 23(b)(3) class, the court hereby incorporates the predominance discussion set forth above. *See supra* at § II.B.1.

that "would be dwarfed by the cost of litigating on an individual basis[.]" *Wolin*, 617 F.3d at 1175; *see Local Joint Exec. Bd. of Culinary/Bartender Trust Fund*, 244 F.3d at 1163 (stating that "[i]f plaintiffs cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover"). In other words, the superiority requirement strongly "weighs in favor of class certification." *Wolin*, 617 F.3d at 1175 (discussing Rule 23(b)(3)(A) superiority factor). As the *Nevarez* court stated, "[a]lthough class members are entitled to $4,000 in damages per Unruh Act violation that sum pales in comparison with the cost of pursuing litigation. Consequently, this factor points towards certification." 326 F.R.D. at 589; *see Local Joint Exec. Bd. of Culinary/Bartender Trust Fund*, 244 F.3d at 1163 (In cases where a number of individuals seek only to recover relatively small sums, "[c]lass actions may permit the plaintiffs to pool claims which would be uneconomical to bring individually.").

Second, with respect to LabCorp's contention that the class would not be manageable given that plaintiffs "have not indicated how they would locate [] class members[,]" (Dkt. 66-1, Joint Br. at 51 -52), it is a "well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns." *Briseno*, 844 F.3d at 1128 (internal quotation marks omitted); *Nevarez*, 326 F.R.D. at 590 (same). Moreover, "[t]here is no requirement that the identity of class members . . . be known at the time of certification." *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2016); *see id.* ("If there were [an identification

requirement], there would be no such thing as a consumer class action."). In any event, identifying class members here would not be difficult. LabCorp "knows how many patients checked in, and has information on those patients from their provided ID and insurance[.]" (Dkt. 66-1, Joint Br. at 21 n. 4). While it may not know at this point "which persons would fall into the category of legally blind[,]" (*id.*), making that determination at a later stage of the proceedings would not be an unduly burdensome task. Indeed, LabCorp was able to determine that Davis was mistaken with respect to the dates of one of his visits to a LabCorp PSC. (*See* Dkt. 266-1, Joint Br. at 23); (Dkt. 79, Exh. 14 (Davis Depo) at JA268-69). Certainly a similar undertaking could be done at the appropriate juncture.

Based on the foregoing, IT IS ORDERED THAT:

1. The Motion (**Document No. 66**) is **granted** as set forth in this Order. The court certifies the following classes:

> Nationwide Injunctive Class: All legally blind individuals in the United States who visited a LabCorp patient service center in the United States during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals.
>
> California Class: All legally blind individuals in California who visited a LabCorp patient service center in California

> during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals.[17]

2. The court hereby appoints Luke Davis and Julian Vargas as the representatives of the Nationwide Class and Vargas as the representative of the California Class.

3. The court hereby appoints the law firms of Nye, Stirling, Hale & Miller, LLP and Handley, Farah & Anderson, PLLC as class counsel.

Dated this 13th day of June, 2022.

/s/
Fernando M. Olguin
United States District Judge

[17] Since the class definitions discussed by the parties did not address the temporal scope of the two classes, the court added the language "during the applicable limitations period" to the definition. *See Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1139 (9th Cir. 2016) (acknowledging that "the district court may . . . adjust the scope of the class definition, if it later finds that the inclusiveness of the class exceeds the limits of [the defendant'] legal liability").

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LUKE DAVIS, JULIAN VARGAS, *et al.*, Plaintiffs, v. LABORATORY CORPORATION OF AMERICA HOLDINGS, Defendant.	Case No. CV 20-0893 FMO (KSx) **ORDER RE: MOTION TO REFINE CLASS DEFINITION**

Having reviewed and considered all the briefing filed with respect to plaintiffs' Motion to Refine Class Definitions, (Dkt. 107, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, *see* Fed. R. Civ. P. 78(b); Local Rule 7-15; *Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.[1]

[1] Capitalization, quotation marks, punctuation, and emphasis in record citations may be altered without notation.

BACKGROUND[2]

On May 23, 2022, the court granted Luke Davis ("Davis") and Julian Vargas's ("Vargas" and together with Davis, "plaintiffs") motion for class certification in connection with their complaint against Laboratory Corporation of America Holdings ("defendant" or "LabCorp"), and certified the following classes:[3]

> Nationwide Injunctive Class: All legally blind individuals in the United States who visited a LabCorp patient service center in the United States during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals.
>
> California Class: All legally blind individuals in California who visited a LabCorp patient service center in California during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals.

(*See* Dkt. 97, Court's Order of May 23, 2022, at 24).

Approximately one month before the court issued its decision, the Ninth Circuit, in an *en banc* decision, stated that "[a] court may not . . . create a 'fail safe'

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[2] The court hereby incorporates its Order of June 13, 2022 (Dkt. 103, "Amended Class Cert. Order").

[3] Because of the similarly of the class definitions, the court will refer to them in the singular.

class that is defined to include only those individuals who were injured by the allegedly unlawful conduct."[4] *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods, LLC*, 31 F.4th 651,669 n. 14 (9th Cir. 2022) (*en banc*). LabCorp provided the court with a copy of its Rule 23(f) Petition for Permission to Appeal Order Granting Class Certification ("Petition") in which it argues, among other things, that the court erred in certifying "fail-safe" classes. (*See* Petition at 13-14). Plaintiffs now seek to redefine the certified classes "to remove any claim . . . that the current class definitions contain 'fail safe' language[.]" (Dkt. 107-1, Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Refine Class Definitions ("Memo") at 2).

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[4] The court was aware of, and even cited, the *Olean* decision in its class certification order. (*See*, *e.g.*, Dkt. 97, Court's Order of May 23, 2022, at 4, 17). However, the court did not address whether plaintiffs' proposed class definition constituted a fail-safe class because defendant did not raise the argument for the court to rule on it. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016) (an "argument must be raised sufficiently for the trial court to rule on it" to preserve it for appellate review); (Dkt. 103, Amended Class Cert. Order at 5 n. 4) ("To the extent LabCorp may be challenging the nationwide class on the ground that it is a fail-safe class, the court rejects the challenge, as defendant merely referenced a 'fail-safe class' in its 'Introductory Statement[,]'); (*see* Dkt. 66-1, Joint Br. at 6); it provided no argument or authority to support its challenge."); *Beasley v. Astrue*, 2011 WL 1327130, *2 (W.D. Wash. 2011) ("It is not enough merely to present an argument in the skimpiest way, and leave the Court to do counsel's work – framing the argument, and putting flesh on its bones through a discussion of the applicable law and facts.").

DISCUSSION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure,[5] "[a]n order that grants . . . class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372 (1982) ("Even after a certification order is entered, the [court] remains free to modify it in the light of subsequent developments in the litigation."); *Owino v. CoreCivic, Inc.*, 36 F.4th 839, 847 (9th Cir. 2022) (same). A "fail-safe" class is "one that is defined so narrowly as to preclude[] membership unless the liability of the defendant is established." *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1138 n. 7 (9th Cir. 2016) (internal quotation marks omitted). "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Olean*, 31 F.4th at 669 n. 14 (quoting *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012)); *Messner*, 669 F.3d at 825 (explaining that a fail-safe class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim"). However, a fail-safe class "can . . . be solved by refining the class definition rather than by flatly denying class certification on that basis." *Olean*, 31 F.4th at 669 n. 14 (internal quotation marks omitted); *see also* 1 *Newberg on Class Actions* § 3:6 (5th ed.) (2021 Supp.) ("[E]ven those courts that disapprove of fail-safe classes recognize that a court can simply fix

[5] All "Rule" references are to the Federal Rules of Civil Procedure unless otherwise indicated.

the class definition instead of denying class certification.").

> Plaintiffs seek to redefine the class as follows:
>
> Nationwide Injunctive Class: All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in the United States during the applicable limitations period, but were unable to use the LabCorp Express Self-Service kiosk.
>
> California Class: All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in California during the applicable limitations period, but were unable to use the LabCorp Express Self-Service kiosk.

(*See* Dkt. 107-1, Memo at 8). Relying on *Mullins v. Direct Digital, LLC*, 795 F3d. 654 (7th Cir. 2015), (*see* Dkt. 107-1, Memo at 7), plaintiffs contend that the redefined class definition is not fail-safe because the requirements for class membership are subject to objective criteria. (*Id*. at 8). More specifically, they contend that the definition comports with the requirement that "[i]t identif[y] a particular group of individuals [] harmed in a particular way [] during a specific period in particular areas." (*Id*. at 7) (quoting *Mullins*, 795 F.3d at 660-61). However, the portion of the *Mullins* decision relied on by plaintiffs relates to whether the class definition is too vague. *See* 795 F.3d at 659-61 (noting that "classes that are defined too vaguely fail to satisfy the 'clear definition' component" of ascertainability and finding that the class definition was "not vague" because "[i]t identifie[d] a particular group of individuals [] harmed in a particular way []

during a specific period in particular areas"). It was not, with respect to the quoted test, addressing a fail-safe class.[6] *See*, *generally*, *id*.

With respect to fail-safe classes, the *Mullins* court explained that "[t]he key to avoiding this problem is to define the class so that membership does not depend on the liability of the defendant." *Mullins*, 795 F.3d at 660. Here, the proposed class definition is defined "so that membership does not depend on the liability of the defendant." *See id*. In other words, if LabCorp "prevails, *res judicata* will bar class members from re-litigating their claims." *Id*. at 661. Moreover, there is "a reasonably close fit between the class definition and [plaintiffs'] chosen theory of liability." *Torres*, 835 F.3d at 1138 n. 7.

In its Opposition, LabCorp divides its brief into three separate sections. The first section argues that "the currently certified classes are fail-safe." (Dkt. 110, Opp. at 2); (*see id*. at 2-5). However, it's unclear why LabCorp is making this argument since plaintiffs' Motion seeks to "remove any doubt" as to whether the current class definition is arguably a fail-safe class within the meaning of *Olean*. (*See* Dkt. 107-1, Memo at 7).

The second section of LabCorp's opposition asserts that "the fail-safe classes cannot be 'refined' into classes with fail-safe memberships." (Dkt. 110, Opp. at 5); (*see id*. at 5-8). LabCorp asserts that, although plaintiffs "have dropped some of the language more

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[6] As such, the court will not address LabCorp's arguments, (*see* Defendant [LabCorp's] Memorandum in Opposition to Plaintiffs' Motion [] ("Opp. ") 7-8), regarding plaintiffs' reliance on *Mullins*'s objective criteria test.

closely tied to their theory of ADA violations . . . , and now define class membership as all legally blind persons 'unable to use' the kiosk[,]" (*id*. at 6), plaintiffs are "still seeking certification of the same fail-safe class of persons who Plaintiffs believe have ADA claims . . . because an independently accessible kiosk was not available to them." (*Id*. at 6-7). LabCorp asserts, for instance, that "if members of the California class are shown to have no Unruh Act claim, they will fall out of the proposed definition." (*Id*. at 7). LabCorp's assertions are unpersuasive.

As an initial matter, LabCorp does not explain how or why the refined definition constitutes a fail-safe class or why class members will fall out of the class definition if LabCorp were to prevail on the certified claims. [7] (*See*, *generally*, Dkt. 110, Opp. at 6-8). Indeed, LabCorp's Opposition – which makes little, if any, effort to explain how or why the revised class definition is fail-safe – focuses on challenging the revised class definition as overbroad. (*See id*. at 6-7). For example, LabCorp contends that the class "cannot be certified so broadly as to include persons 'unable to use' a LabCorp kiosk, including, for example:

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[7] Nor could it because, unlike the prior class definition, which generally tracked the ADA, (*see* Dkt. 103, Amended Class Cert. Order at 3-4, 24) (certifying classes composed of blind persons who "were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals"); 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation[.]"), the revised class definition markedly does not. (*See* Dkt. 107-1, Memo at 8).

(i) persons visiting a patient service center . . . without an operational kiosk; or (ii) persons who preferred to (and did) check in at the front desk, as 25% of all Labcorp PSC patients do; or (iii) persons who (like Plaintiff Vargas) were directed to check in at the front desk and never attempted to use a kiosk or may have even known a kiosk existed at a particular PSC." (*Id.* at 6). In other words, LabCorp contends that the "revised [class] definition[] [is] overbroad" in that it includes class members who were not harmed as a result of LabCorp's conduct. (*See id.* at 6-7). LabCorp's contentions are unpersuasive.

As an initial matter, LabCorp provides no evidence or citation to the record to support its contentions. (*See*, *generally*, Dkt. 110, Opp. at 6). LabCorp's contention that plaintiffs' refined class definition is overbroad because it "include[s] individuals in all of these situations," (*id.*), is inaccurate because "even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct." *Torres*, 835 F.3d at 1136. "Ultimately, [LabCorp's] argument reflects a merits dispute about the scope of . . . liability, and is not appropriate for resolution at the class certification stage of this proceeding." *Id.* at 1137.

In any event, there is no doubt that the conduct at issue here is uniform as the crux of plaintiffs' legal challenge is that LabCorp's kiosks are not ADA compliant and, therefore, are inaccessible to visually impaired users. (*See* Dkt. 40, FAC at ¶¶ 4-6, 29); (Dkt. 103, Amended Class Cert. Order at 8) (noting that the commonality requirement was met, in part, based on contention that "LabCorp trained its employees that use of the kiosks to check-in was

mandatory"); (Dkt. 79, Exh. 12 (Deposition of Joseph Sinning ("Sinning Depo") at JA61-62) (testimony that use of kiosks was "not optional"); (*id.* at JA63); (Dkt. 80, Exh. 20 (Deposition of Bartholomew Coan) ("Coan Depo") at JA518-524); (Dkt. 80, Exh. 17 at JA445); *see*, *e.g.*, *Vargas v. Quest Diagnostics Clinical Labs, Inc.*, CV 19-8108 DMG (MRWx) ("*Quest*") (Dkt. 228 at 5) ("The 'common policy' here is Quest's widespread rollout of its kiosks, which on their own are inaccessible to visually impaired users."). Thus, the "situations" LabCorp describes "merely highlight[] the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members."[8] *Torres*, 835 F.3d 1136. However, "such fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class,

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[8] Indeed, LabCorp's focus on making absolutely sure that only those individuals who were actually harmed can be members of the class seeks to impose an ascertainability requirement that is not allowed under Ninth Circuit law, *see Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126, 1133 (9th Cir. 2017) ("[T]he language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification[.]"), and is inconsistent with important policy objectives of class actions by denying class members with the only meaningful possibility they may have to recover anything at all. *See Mullins*, 795 F.3d at 667-68 (The problem "with this dilution argument [that a class may include class members with invalid claims] is that class certification provides the only meaningful possibility for bona fide class members to recover anything at all. . . . [¶] By focusing on making absolutely certain that compensation is distributed only to those individuals who were actually harmed, the heightened ascertainability requirement has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing.") (internal quotation marks omitted).

particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition." *Id*. at 1137; *see Olean*, 31 F.4th at 669 n. 14 ("[T]he court may redefine the overbroad class to include only those members who can rely on the same body of common evidence to establish the common issue.").

In an effort to address the *Olean* Court's concerns regarding fail-safe classes and because plaintiffs do not object to the court further refining the class definition, (Dkt. 111, Reply at 10 n. 4), the court will define the class as follows:

> Nationwide Injunctive Class: All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in the United States during the applicable limitations period, and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk.
>
> California Class: All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in California during the applicable limitations period, and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk.

The revised definition addresses any concerns regarding an over-inclusive class, while also avoiding a fail-safe definition. *See Messner*, 669 F.3d at 825 ("Defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem is more of an art than a science."); *Torres*, 835 F.3d at 1138 n. 7 (Ninth Circuit "require[s] no more than a reasonably close fit between the class definition

and the chosen theory of liability."). The revised class definition is similar to the one recently adopted by Judge Gee in the *Quest* case. *See Quest*, CV 19-8108 DMG (MRWx) (Dkt. 228 at 6). The difference in definitions stems from the fact that the defendant in *Quest* introduced a three-finger swipe function at some point in the process. *See id*.; *see also Vargas v. Quest Diagnostics Clinical Labs.*, 2021 WL 5989958, *1 (C.D. Cal. 2021) ("Beginning in 2020, Quest began to roll out a change to its kiosks that allows visually-impaired patients to swipe the touchscreen using three fingers, which checks the patient in and alerts a phlebotomist that the patient has arrived."). Here, no such action was taken. Also, in this case, there is evidence that LabCorp implemented its kiosks across its national network of more than 1,800 PSCs, and that LabCorp trained its employees that use of the kiosks to check-in was mandatory. (*See* Dkt. 103, Amended Class Cert. Order at 3, 8); (Dkt. 79, Exh. 12 (Sinning Depo) at JA61-62) (testimony that use of kiosks "not optional"); (*id*. at JA63); (Dkt. 80, Exh. 20 (Coan Depo) at JA518-524); (Dkt. 80, Exh. 17 at JA445).

Moreover, the revised class definition does not impact the court's determinations regarding class certification. As the court previously found, common questions of fact and law predominate over individualized questions. (*See* Dkt. 103, Amended Class Cert. Order at 15-22); (*see id*. at 8) (common questions of fact and law include, but are not limited to, whether: (1) "LabCorp's kiosks are independently accessible to legally blind individuals"; (2) "LabCorp has implemented the inaccessible check-in kiosks system across its national network of more than 1,800 PSCs"; (3) "LabCorp trained its employees that

use of the kiosks to check-in was mandatory"; (4) "use of the kiosk is a good or service LabCorp offers its customers"; (5) "LabCorp offers a qualified aid or auxiliary service to allow legally blind individuals to access the check-in kiosk service"; and (6) "LabCorp has remedied the inaccessible check-in kiosk across its system."). Indeed, during the class certification proceedings, LabCorp did "not dispute that there is at least one common question of law at issue here." (*Id*. at 8) (*quoting* LabCorp's portion of Dkt. 66-1, Joint Brief Concerning Plaintiff's Motion for Class Certification at 37).

The third and final section of LabCorp's opposition contends that "no refinement to the Rule 23(b)(3) California sub-class can render it certifiable." (Dkt. 110, Opp. at 8); (*see id*. at 8-13). Most of this section of LabCorp's brief seeks to reargue the propriety of the court's certification order. (*See id*. at 8-13). For instance, LabCorp refers to Judge Gee's denial of class certification of the *Quest* plaintiffs' Rule 23(b)(3) class, and her subsequent denial of plaintiffs' request for reconsideration of that decision. (*See id*. at 9-11). But as the court previously explained, there are significant and fundamental factual and procedural differences between this case and the *Quest* case.[9] (*See*, *e.g.*, Dkt. 103, Amended Class Cert. Order at 20 n. 15) (noting that the *Quest* court had already

[9] Given that LabCorp is now contradicting its prior position that this case is "fundamentally different from the *Quest* [] case[,]" (Dkt. 90, Defendant['s] Opposition to Plaintiffs' Request for Judicial Notice at 4), it appears, as plaintiffs argue, that LabCorp is seeking to "improve its litigation position by attempting to align the facts of this case with the facts in *Quest*[.]" (Dkt. 111, Reply at 7).

resolved a summary judgment motion, and that the kiosks in *Quest* were not identical to those in this action). Nothing about the *Quest* Court's denial of the plaintiffs' request for reconsideration changes this court's conclusion that certification under Rule 23(b)(3) was proper in this case.

In any event, LabCorp did not timely file a motion for reconsideration, *see* Local Rule 7-18 (motion for reconsideration "must be filed no later than 14 days after entry of the Order that is the subject of the motion or application"), or make any effort to satisfy any of the requirements for reconsideration. (*See*, *generally*, Dkt. 110, Opp.); *see* Local Rule 7-18 (grounds for reconsideration are (1) material difference in fact or law; (2) emergence of new material facts or change of law; or (3) manifest showing of a failure to consider material facts).

The only argument LabCorp raises in the final section of its brief that relates to the refined class definition is its contention that, "with fail-safe Rule 23(b)(3) classes now barred in this Circuit, Plaintiffs' new proposed definition of persons who were 'unable to use' a kiosk would obviously include non-injured legally blind persons – such as those who preferred to and did check in at the PSC front desk, or those who visited a PSC without an operational kiosk." (Dkt 110, Opp. 11-12). But this is the same argument LabCorp raised in the previous section of its brief. (*See*, *e.g.*, *id.* at 6) (contending that the refined class definition is overbroad because it includes "persons 'unable to use' a LabCorp kiosk, including, for example: (i) persons visiting a patient service center . . . without an operational kiosk; or (ii) persons who preferred to (and did) check in at the front desk, as 25% of all

Labcorp PSC patients do"). For the reasons set forth above, the court rejects this argument. Moreover, the court has already determined that such individualized issues would not predominate, and that a class action is superior to other methods for fairly and efficiently adjudicating the present controversy. (*See* Dkt. 103, Amended Class Cert. Order at 13-24). In short, the redefined Rule 23(b)(3) class definition does not undermine the court's previous determinations.

Finally, LabCorp, in a one-sentence concluding paragraph, states that "the *Olean* Court recently recognized the Supreme Court's directive that '[e]very class member must have Article III standing in order to recover individual damages,' and cautioned: 'Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions.'" (Dkt. 110, Opp. at 13) (quoting *Olean*, 31 F.4th at 669 n. 12 (quoting *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2208 (2021))). However, LabCorp says nothing further on this issue, much less argue why or how the standing requirement defeats predominance. (*See*, *generally*, Dkt. 110, Opp. at 13). "It is not enough merely to present an argument in the skimpiest way, and leave the Court to do counsel's work – framing the argument, and putting flesh on its bones through a discussion of the applicable law and facts." *Beasley*, 2011 WL 1327130, at *2; *see also Yamada*, 825 F.3d at 543 (an "argument must be raised sufficiently for the trial court to rule on it" to preserve it for appellate review).

In any event, as the court previously noted, (*see* Dkt. 103, Amended Class Cert. Order at 18), the Ninth Circuit in *Olean* reiterated its previous holding "that

a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones." 31 F.4th at 669. The *Olean* Court rejected the notion "that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." *Id*.; *see also id*. at 668-69. Just as the court previously concluded that predominance is not defeated by individualized questions regarding damages, it also persuaded that predominance is not defeated by individualized inquiries into standing. *See Torres*, 835 F.3d at 1137 n. 6 (For standing, "it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase.").

CONCLUSION

In short, the *Olean* Court's statement regarding fail-safe classes does not change the court's findings and conclusions that the Rule 23(a), (b)(2) and (b)(3) factors have been satisfied.[10] Therefore, the court declines to decertify the class, (*see* Dkt. 110, Opp. at 13) (concluding with request that court decertify the classes), and the court's Amended Order Re: Motion for Class Certification otherwise stands.

Based on the foregoing, IT IS ORDERED THAT:

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[10] In other words, in refining the class definition, this Order does not materially alter the composition of the class or materially change in any manner the Amended Order Re: Motion for Class Certification.

1. Plaintiffs' Motion to Refine Class Definition **(Document No. 107)** is **granted** as set forth in this Order.

2. Page 24, Lines 13-23 of the Court's Amended Order of June 13, 2022 (Dkt. 103) is replaced with the following:

> Nationwide Injunctive Class: All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in the United States during the applicable limitations period, and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk.
>
> California Class: All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in California during the applicable limitations period, and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk.

3. Counsel for the parties shall forthwith provide a copy of this Order to the Ninth Circuit Court of Appeals.

Dated this 4th day of August, 2022.

/s/
Fernando M. Olguin
United States District
Judge

APPENDIX F

United States Constitution
Article III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX G

Federal Rule of Civil Procedure 23

Rule 23. Class Actions

(a) PREREQUISITES. 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.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would

be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a

proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements*. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections*.

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable

attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).