Case No. __________

United States Court of Appeals for the Ninth Circuit

STACIA STINER et al.

Plaintiffs and Petitioners,

v.

BROOKDALE SENIOR LIVING, INC. et. al.

Defendants and Respondents.

From The United States District Court,
Northern District of California,
Case No. 4:17-cv-03962-HSG,
Honorable Haywood S. Gilliam, Jr.

PETITION FOR PERMISSION TO APPEAL UNDER RULE 23(f)

SCHNEIDER WALLACE COTTRELL KONECKY LLP
Guy B. Wallace
gwallace@schneiderwallace.com
Mark T. Johnson
Travis C. Close
Rachel L. Steyer
2000 Powell Street, Suite 1400
Emeryville, California 94608-1863
Telephone: (415) 421-7100

ROSEN BIEN GALVAN & GRUNFELD LLP
Gay Crosthwait Grunfeld
ggrunfeld@rbgg.com
Jenny S. Yelin
Benjamin Bien-Kahn
Amy Xu
101 Mission Street, Sixth Floor
San Francisco, California 94105-1738
Telephone: (415) 433-6830

STEBNER GERTLER GUADAGNI & KAWAMOTO
A Professional Law Corporation
Kathryn A. Stebner
kathryn@sggklaw.com
Brian S. Umpierre
870 Market Street, Suite 1285
San Francisco, California 94102-2918
Telephone: (415) 362-9800

MARKS, BALETTE, GIESSEL & YOUNG, P.L.L.C.
David T. Marks
davidm@marksfirm.com
Jacques Balette
7521 Westview Drive
Houston, Texas 77055
Telephone: (713) 681-3070

Attorneys for Plaintiffs and Petitioners

TABLE OF CONTENTS

Page

INTRODUCTION 1
JURISDICTIONAL STATEMENT 3
QUESTIONS PRESENTED 4
STATEMENT OF FACTS 4
A. Brookdale's Facilities Are Inaccessible 5
B. Brookdale Fails to Plan for Safe Evacuation of Residents with Disabilities During Emergencies 6
C. Brookdale Discriminates in its Transportation Services 6
D. Brookdale Makes False and Misleading Statements and Omissions Regarding its Deficient Staffing System 7
PROCEDURAL HISTORY 9
RELIEF SOUGHT 10
STANDARD OF REVIEW 10
ARGUMENT 10
I. THE DISTRICT COURT MANIFESTLY ERRED IN DENYING CERTIFICATION OF PLAINTIFFS' DISABILITY ACCESS CLAIMS 10
II. THE DISTRICT COURT DISREGARDED COMMON EVIDENCE OF THE UNLAWFUL EMERGENCY EVACUATION POLICIES 16
III. THE DISTRICT COURT'S FAILURE TO CERTIFY A DAMAGES CLASS FOR PLAINTIFFS' TRANSPORTATION CLAIMS IS CONTRARY TO LAW 18
IV. THE DISTRICT COURT MANIFESTLY ERRED IN DENYING CLASS CERTIFICATION OF PLAINTIFFS' CLAIMS FOR FALSE AND MISLEADING STATEMENTS AND OMISSIONS 20
A. The District Court Should Have Certified a Rule 23(b)(2) Class 20
B. The District Court Should Have Certified a Rule 23(b)(3) Class 22
C. The District Court Should Have Certified the Elder Abuse Claim 24
CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Davis,
275 F.3d 849 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005) 14

Bradach v. Pharmavite, LLC,
735 F. App'x 251 (9th Cir. 2018) 21

Briseno v. ConAgra Foods, Inc.,
844 F.3d 1121 (9th Cir. 2017) 20

Cal. Found. for Indep. Living Ctrs. v. Cnty. of Sacramento,
142 F. Supp. 3d 1035 (E.D. Cal. 2015) 17

Californians for Disability Rts. v. Mervyn's LLC,
165 Cal. App. 4th 571 (2008) 11

Californians for Disability Rts., Inc. v. Cal. Dep't of Transp.,
249 F.R.D. 334 (N.D. Cal. 2008) 13, 14

Castaneda v. Burger King Corp.,
264 F.R.D. 557 (N.D. Cal. 2009) 15

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 10

Chapman v. Pier 1 Imps. (U.S.) Inc.,
631 F.3d 939 (9th Cir. 2011) 11, 12, 16, 19

Cherry v. City Coll. of S.F.,
No. C 04-04981 WHA, 2005 WL 6769124 (N.D. Cal. June 15, 2005) 13

Civil Rts. Education and Enforcement Ctr. v. Hospitality Properties Trust,
867 F.3d 1093 (9th Cir. 2017) 15, 16

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 24

Communities Actively Living Indep. & Free v. City of Los Angeles,
No. CV 09-0287 CBM (RZx), 2011 WL 4595993 (C.D. Cal. Feb. 10, 2011) 17

Davis v. Lab'y Corp. of Am. Holdings,
604 F. Supp. 3d 913 (C.D. Cal. 2022) 19

Disabled Rights Action Comm. v. Las Vegas Events, Inc.,
375 F.3d 861 (9th Cir. 2004) 16

Gray v. Golden Gate Nat'l Recreational Area,
279 F.R.D. 501 (N.D. Cal. 2011) 13, 14

Hinojos v. Kohl's Corp.,
718 F.3d 1098 (9th Cir. 2013) 23, 24

Kirola v. City & Cnty. of S.F.,
860 F.3d 1164 (9th Cir. 2017) 14

Kwikset Corp. v. Superior Ct.,
51 Cal. 4th 310 (2011)...24

Laufer v. Arpan LLC,
29 F.4th 1268 (11th Cir. 2022)...19

Lentini v. Cal. Ctr. for the Arts, Escondido,
370 F.3d 837 (9th Cir. 2004) 11, 16

McGee v. S-L Snacks Nat'l,
982 F.3d 700 (9th Cir. 2020) 23

Melendres v. Arpaio,
784 F.3d 1254 (9th Cir. 2015) 18

Moeller v. Taco Bell Corp.,
220 F.R.D. 604 (N.D. Cal. 2004) 13

Nguyen v. Nissan N. Am., Inc.,
932 F.3d 811 (9th Cir. 2019) 24

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC,
31 F.4th 651 (9th Cir. 2022)... 12, 19, 21, 22

Park v. Ralph's Grocery Co.,
254 F.R.D. 112 (C.D. Cal. 2008)..13

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001)..3

Pierce v. Cnty. of Orange,
761 F. Supp. 2d 915 (C.D. Cal. 2011) 14

Ruiz Torres v. Mercer Canyons Inc.,
835 F.3d 1125 (9th Cir. 2017) 20

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021)..19

United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.,
593 F.3d 802 (9th Cir. 2010) 24

Van v. LLR, Inc.,
61 F.4th 1053 (9th Cir. 2023) 22, 23, 25

White v. Square, Inc.,
7 Cal. 5th 1019 (2019) 19

STATUTES

28 U.S.C. § 1292 3

28 U.S.C. § 1332 3

42 U.S.C. § 12182 16

42 U.S.C. § 12201 3

Cal. Bus. & Prof. Code §§ 17200 *et seq.* 9

Cal. Civ. Code §§ 51 *et seq.* 9, 11

Cal. Civ. Code §§ 1750 *et seq.* 3, 9

Cal. Gov't Code § 4452 11

Cal. Welf. & Inst. Code §§ 15600 *et seq.* 9

Cal. Welf. & Inst. Code § 15610.30 3

RULES

Fed. R. App. P. 5 3

Fed. R. Civ. P. 23 .... passim

Fed. R. Civ. P. 30 21

REGULATIONS

28 C.F.R. § 36.202 16

28 C.F.R. § 36.401 11

28 C.F.R. § 36.402 11

28 C.F.R. § 36.403 11

28 C.F.R. § 36.406 .... 11, 12

49 C.F.R. § 37.165 7

INTRODUCTION

In this case, thousands of vulnerable senior citizens and people with mobility or vision disabilities seek redress for violations of their federal and state statutory rights. Seeking safe and affordable facilities to age in place, the putative class members have instead depleted their life savings and been subjected to neglect, financial abuse and loss of dignity. Brookdale Senior Living, Inc. ("Brookdale"), the largest provider of assisted living in the country, rejects the applicability of the Americans with Disabilities Act ("ADA") to its California facilities, and engages in pervasive discrimination against residents with disabilities. Brookdale also makes false promises to care adequately for residents of its facilities despite severe understaffing, in violation of California's consumer and elder abuse laws.

Contrary to governing law, the district court denied class certification of Plaintiffs' ADA claims regarding Brookdale's newly constructed or altered facilities on the erroneous basis that they did not have the same design. Under this reasoning, it would be impossible to certify a class in a multi-facility case because nearly all facilities have different designs (*e.g.*, prisons, restaurants). Courts have rejected the argument that "unique architecture" defeats commonality because what matters is whether a new or altered facility complies with the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), not whether the facilities are identical. Here, all fifty-two (52) of the newly constructed or altered facilities

inspected by Plaintiffs' experts contained numerous ADAAG violations. Brookdale does not contend that any of its facilities comply with ADAAG, and has not proffered any evidence of such compliance.

Similarly, the court erroneously denied certification of Plaintiffs' ADA challenge to Brookdale's emergency evacuation policy merely because there were different facility-level plans, even though expert testimony showed that the plans all suffered from the same defects, such as failing to plan adequately for evacuating residents with disabilities from upper floors.

Although the court granted certification under Fed. R. Civ. P. 23(b)(2) of Plaintiffs' claim that Brookdale's transportation policy violates the ADA, the court denied (b)(3) certification for lack of predominance based on a misapprehension of what constitutes Article III "injury" in a case involving disability discrimination.

The district court's decision to deny class treatment of Plaintiffs' consumer fraud claims is also manifestly erroneous. This Court has recognized that such cases are well-suited for class treatment because they involve common questions regarding whether false or misleading statements or omissions are "likely to deceive" a "reasonable consumer," and whether any such statements or omissions are material. Here, Brookdale promises to assess residents' needs for services and provide those services to them. These statements are false and misleading because Brookdale does not disclose that its staffing policies do not ensure there are enough

staff to deliver the promised services. As a result of Brookdale's deceptive conduct, residents are injured by paying Community Fees to Brookdale prior to entering its facilities that they otherwise would not have paid had they been told the truth.

The district court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification and Granting and Denying *Daubert* Motions and Motions to Strike ("Order") denies the putative class members the only viable tool available to them to adjudicate their claims, undermines Congress's intent that the ADA be "construed liberally" to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," and frustrates the purpose of California's consumer protection statutes. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676-77 (2001); 42 U.S.C. § 12201(b)(2); Cal. Civ. Code §§ 1750 *et seq*.; Cal. Welf. & Inst. Code § 15610.30.

The Order is manifestly erroneous and should be reversed. This Court should grant Plaintiffs' petition to appeal under Rule 23(f).

JURISDICTIONAL STATEMENT

The district court has subject-matter jurisdiction under 28 U.S.C. § 1332(d). This Court has jurisdiction under 28 U.S.C. § 1292(e), Federal Rule of Civil Procedure 23(f), and Federal Rule of Appellate Procedure 5. The district court issued the class certification Order on March 30, 2023.

QUESTIONS PRESENTED

1. Whether the district court erred in denying class certification when there is common proof that Brookdale has a policy and practice of violating the new construction and alterations requirements of the ADA and the Unruh Act.

2. Whether the district court erred in denying class certification when Brookdale's written policies and plans regarding emergency evacuation suffer from common defects.

3. Whether the district court erred in denying class certification under Rule 23(b)(3) for lack of standing under Article III when common proof exists that Brookdale's written transportation policy violates the ADA and injures class members.

4. Whether the district court erred in denying class certification of Plaintiffs' consumer fraud claims when Brookdale makes material, common nondisclosures about its defective staffing policies to prospective residents who then all pay money to Brookdale for its services.

STATEMENT OF FACTS

This is a putative class action on behalf of over 7,000 seniors and persons with disabilities who reside in assisted living facilities that are owned, operated, and/or managed by Brookdale. Order at 30-32.[1] Brookdale has owned or operated

[1] All "Dkt." citations are to the docket in N.D. Cal. Case No. 4:17-cv-03962 and

eighty-nine (89) assisted living facilities in California during the class period. Order at 2. Assisted living facilities offer room, board and assistance with activities of daily living. *Id.*

A. Brookdale's Facilities Are Inaccessible

Plaintiffs' accessibility experts inspected and reported on fifty-two (52) of the eighty-nine (89) Brookdale facilities, and identified thousands of ADAAG and California Building Code ("CBC") violations.[2] Dkts. 280; 284. Brookdale stipulated that the units inspected by Plaintiffs' experts were typical in all material respects affecting disability access of all other units at each facility. Dkt. 154, ¶ 7. It is undisputed that all of the inspected facilities are either newly constructed or altered within the meaning of the ADA and/or California law and none comply with ADAAG or CBC. Dkts. 280, ¶¶ 22-50, Exs. A-X; 284, ¶¶ 26-69, Exs. A-BB; 377-1, Ex. 3 at 30-32.[3] Indeed, Brookdale's corporate policy and practice is to leave access barriers in place until a resident requests their removal. Dkts. 238-4 at 31; 276-7, Ex. 50 at 1495-1496. Twenty-three (23) of the facilities that were

---

use the ECF pagination. Dkt. 593 is the publicly available version of the Order attached to this petition. The unredacted version is available at Dkt. 594.

[2] Plaintiffs attempted to inspect all 89, but could not due to the onset of the COVID-19 pandemic. Dkt. 194 at 3.

[3] The district court's decision to strike nearly all of Plaintiffs' reply evidence in its consideration of the class certification motion was improper. Plaintiffs also seek review of that component of the Order.

inspected are new facilities under the ADA, an additional twenty-six (26) are new facilities under the Unruh Act, and three (3) are altered facilities. Dkts. 280, ¶¶ 34-42; 284, ¶¶ 37-52; 377-1, Ex. 3. The record confirms that the access barriers cause significant harm to residents with disabilities, including falls and the inability to use bathrooms. *See, e.g.* Dkt. 278-3 at Ex. 3, ¶¶ 15-16, Ex. 6, ¶¶ 19-20, Ex. 20, ¶ 16, Ex. 22, ¶¶ 15,17, Ex. 28 ¶ 15, Ex. 35 ¶ 22, Ex. 74 ¶ 15; Dkt. 299, ¶ 29; Dkt. 506-6, Ex. 4, ¶¶ 20-22, Ex. 51, ¶ 19.

B. Brookdale Fails to Plan for Safe Evacuation of Residents with Disabilities During Emergencies

Brookdale's company-wide Emergency Evacuation Manual – that applies to *all* its facilities – fails to ensure that residents with disabilities can be safely evacuated in an emergency. Dkt. 276-7, ¶ 21, Ex. 8, Ex. 50 at 215-217. Facility-level evacuation plans suffer from the same deficiencies as the Manual. Dkt. 505-12, ¶¶ 5-24. They all lack a sufficient plan for evacuation from floors that are above or below ground, fail to include any plan regarding accessible transportation during an emergency, or do not provide for accessible assembly points or relocation sites. *Id.*

C. Brookdale Discriminates in its Transportation Services

Brookdale regularly provides transportation services to its thousands of residents for medical appointments and recreational activities. Order at 43-44. Brookdale's Fleet Safety Policy ("FSP") requires all scooter and power wheelchair

users to transfer out of their devices and into a manual wheelchair or passenger seat on the vehicle. This policy violates 49 C.F.R. § 37.165(e), which permits persons with mobility disabilities to remain in their mobility devices. *Id.* at 44. The FSP is mandatory and consistently enforced. Dkt. 505-9, ¶¶ 3-5, 12-20. In fact, Brookdale identified at most seven individuals who were allegedly allowed to remain seated in their electric mobility devices while riding on a Brookdale van or bus. *Id.* at ¶ 20; Dkt. 596-3 at 13.

D. Brookdale Makes False and Misleading Statements and Omissions Regarding its Deficient Staffing System

Brookdale requires all residents or their legal representatives to sign the same standardized Residency Agreement. Dkts. 238-2, ¶¶ 10-11; 278-9. The Residency Agreement promises that Brookdale will provide basic services, which include lodging, meals, and housekeeping, in exchange for payment of a Basic Service Rate, as well as personalized care services in exchange for a Personal Service Rate. *See, e.g.*, Dkt. 238-4 at 29-30. In order to move into the facility, a resident must pay either a Community Fee, or the first month's Basic Service Rate, or both. Dkts. 238-3 at 270-271, 294-296; 238-4 at 7-8, 34-35.

Brookdale consistently provides insufficient staff to deliver promised services to its residents. Dkts. 276-11; 468-3. Plaintiffs' witnesses described the dangerous and inhumane effects of Brookdale's lack of staff on residents, including: failures to respond for hours to residents who fell, often resulting in a

need for medical treatment, including hospitalization; long wait times for assistance with toileting and dressing, leaving residents to languish in their own urine and feces; failures to bathe and shower residents regularly; and untimely or missed medication administration. Dkts. 278-3; 291-300; 506-6. The California Department of Social Services issued 634 citations directly related to caregiver understaffing to sixty-nine (69) Brookdale facilities during the class period. Dkt. 505-10, ¶¶ 64-65, Ex. C.

This systematic understaffing stems from Brookdale's use of labor "benchmarks" for staffing all facilities using the same formula, which incorporates erroneous assumptions about how long any given task should take a staff member. Dkts. 276-7, ¶ 37, Ex. 24; 276-11; 277-6. All facility-level managers must staff to meet the labor benchmarks. Dkt. 276-7, ¶¶ 44-57, 59-62, Exs. 31-44, 46-49, 51 at 1941.

Brookdale does not disclose its staffing formula or inadequate staffing levels to prospective residents or their family members. Dkt. 276-7, Ex. 51 at 2271-72. Over 150 residents and family members testified that had they known about Brookdale's deficient staffing, they would not have agreed to move in and pay fees to Brookdale. Dkts. 278-3; 291-300; 506-6. Unfortunately, once residents move in, it is difficult to relocate because of the trauma and disruption that elderly people suffer from residence transfers. *See, e.g.*, Dkts. 294, ¶ 43; 298, ¶ 16.

PROCEDURAL HISTORY

Plaintiffs filed this case in 2017, asserting systemic violations of their rights under the ADA and California's Unruh Civil Rights Act (Cal. Civ. Code §§ 51 *et seq.*) ("Unruh Act"), the Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*) ("CLRA"), Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*), and elder financial abuse statute (Cal. Welf. & Inst. Code §§ 15600 *et seq.*). Dkt. 90.

Plaintiffs sought to certify three classes for injunctive relief pursuant to Rule 23(b)(2) and the first and third classes for damages pursuant to Rule 23(b)(3). Dkt. 278. First, Plaintiffs sought to certify the Mobility and Vision Impaired Class of all people with disabilities who resided at a Brookdale facility during the class period, and who have visual disabilities or use wheelchairs, scooters, canes, or other mobility aids, in order to challenge Brookdale's violations of the ADA and the Unruh Act with respect to physical accessibility, emergency evacuation, and transportation services. Plaintiffs also sought to certify a class of all persons with disabilities who resided at a Brookdale facility during the class period and who require assistance with activities of daily living to challenge Brookdale's failure to make a reasonable modification in its staffing policy pursuant to the ADA and the Unruh Act.[4] Lastly, Plaintiffs sought to certify a class of current and former

---

[4] Plaintiffs do not seek interlocutory review of the district court's denial of

Brookdale residents seeking to challenge Brookdale's deceptive scheme of failing to disclose that it has a policy and practice of understaffing its facilities.

RELIEF SOUGHT

The Court should grant Rule 23(f) review and, after full briefing, reverse the Order denying class certification.

STANDARD OF REVIEW

Rule 23(f) review is warranted where a class-certification decision "is manifestly erroneous" or "presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review." *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 959 (9th Cir. 2005). Review is warranted and necessary here.

ARGUMENT

I. THE DISTRICT COURT MANIFESTLY ERRED IN DENYING CERTIFICATION OF PLAINTIFFS' DISABILITY ACCESS CLAIMS

The district court erroneously denied certification of Plaintiffs' disability access claims for failure to satisfy commonality. Order at 35, 43. Plaintiffs proffered common proof of all of the substantive elements of their claim for new construction and alterations violations.

Under the ADA, public accommodations such as Brookdale have an

---

certification of the second class.

affirmative duty to ensure that any new or altered facilities that they own, operate and/or manage are in full compliance with the minimum access requirements of ADAAG. *Chapman v. Pier 1 Imps. (U.S.) Inc.*, 631 F.3d 939, 945-46 (9th Cir. 2011) (en banc); *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 849 (9th Cir. 2004). "New" facilities that were constructed after January 26, 1993 must comply with ADAAG. 28 C.F.R. § 36.401. The areas of a facility that were altered after January 26, 1992 must comply with ADAAG. 28 C.F.R. §§ 36.402; 36.403. Public accommodations are required to remediate *any* ADAAG violations in their newly constructed or altered facilities. 28 C.F.R. § 36.406(a)(5).

The Unruh Act imposes parallel obligations. Facilities that were newly constructed or altered after December 1981 must comply with the CBC. *Californians for Disability Rts. v. Mervyn's LLC*, 165 Cal. App. 4th 571, 585-86 (2008). Any violations of the CBC must be remediated. Cal. Gov't Code § 4452. A violation of ADAAG also constitutes a violation of the Unruh Act. Cal. Civ. Code § 51(f).

The district court correctly found that Brookdale is the operator of its California facilities and that those facilities are public accommodations covered by the ADA. Order at 31, 35. It is undisputed that all of the facilities inspected by Plaintiffs are new or altered under federal or state law. Dkts. 280, ¶¶ 22, 34-42, 46-49; 284, ¶¶ 27, 37-52, 56-68; 377-1, Ex. 3 at 30-32.

Plaintiffs submitted common proof of ADAAG and CBC violations through Brookdale's own admissions that it does not affirmatively comply with the ADA and expert testimony confirming the breadth of violations. *See, e.g.*, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668 (9th Cir. 2022) (en banc) (expert testimony is a sufficient form of common proof). Plaintiffs' experts inspected 52 Brookdale facilities and found that every one had multiple violations of ADAAG and the CBC, typically numbering in the hundreds. They documented each of the barriers, with measurements and photographs, in detailed reports for each facility that were submitted with Plaintiffs' motion. Dkts. 280-287. Brookdale's access expert reviewed these findings and identified only seven (7) specific barriers with which he disagreed. Dkt. 377-1, ¶¶ 13-14, 54-56, 58-59. Further, Brookdale has admitted that it does not have a process for identifying and removing barriers in its facilities, but instead leaves them in place, and only removes them upon resident request. Dkts. 238-4 at 31; 276-7, Ex. 50 at 1495-96. Indeed, Brookdale has never contended that ***any*** of its new or altered facilities comply with ADAAG or the CBC. *See, e.g.*, Dkt. 60. This is precisely the type of common proof required by Rule 23 to show liability for violations of the ADA and Unruh Act. Indeed, the existence of even a single ADAAG or CBC violation in a newly constructed facility or an area of alteration suffices to establish liability. *Chapman*, 631 F.3d at 945; 28 C.F.R. § 36.406.

The district court parted ways with the vast majority of other courts in this Circuit by failing to certify the class based on this type of common proof in a case involving multiple facilities. *See, e.g.*, *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 518-20 (N.D. Cal. 2011) (granting class certification in a case alleging inaccessibility of numerous and diverse park facilities) (collecting authorities); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 118, 120-21 (C.D. Cal. 2008) (rejecting "unique architecture" argument and granting class certification in a challenge to accessibility of 90 stores); *Californians for Disability Rts., Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 350 (N.D. Cal. 2008) (certifying a class challenging the accessibility of the pedestrian rights of way throughout California); *Cherry v. City Coll. of S.F.*, No. C 04-04981 WHA, 2005 WL 6769124, at *1 (N.D. Cal. June 15, 2005) (certifying a class challenging accessibility of the college's nine campuses); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 609-10 (N.D. Cal. 2004) (granting class certification and rejecting "unique architecture" argument in case alleging inaccessibility of 220 restaurants).

The district court erroneously concluded that because Brookdale's facilities do not have a standardized design and the barriers vary, the trial of this claim would require barrier-by-barrier adjudications. Order at 41-43. But this concern about manageability is unfounded. Plaintiffs' experts' findings and conclusions can be presented at trial through their testimony, photographs, and representative

examples of the barriers they identified. Both this Court and numerous district courts in this Circuit have recognized that it is permissible to rely upon representative proof to establish liability in an ADA class action, and that it is not necessary to adjudicate every barrier. *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005); *Gray*, 279 F.R.D. at 516; *Cal. Dep't of Transp.*, 249 F.R.D. at 345 (rejecting argument that each barrier must be litigated individually).

In fact, district courts have successfully tried ADA class actions involving multiple facilities with differing types of buildings and barriers that were more complicated than this one. *See, e.g.*, *Kirola v. City & Cnty. of S.F.*, 860 F.3d 1164, 1169-72 (9th Cir. 2017) (involving the trial of a certified class challenging the accessibility of 2,000 miles of sidewalk, 28 libraries, 9 public pools, and 220 parks with 400 different structures); *Pierce v. Cnty. of Orange*, 761 F. Supp. 2d 915, 919-20 (C.D. Cal. 2011).

Similarly, the named plaintiffs in a multi-facility class action have standing to raise access barriers at all facilities falling within the class definition. They may present evidence, including expert testimony, on behalf of the class, negating the need for class member testimony about every facility. *Kirola*, 860 F.3d at 1176; Order at 27-28 & n.9.

Despite this body of law, the district court relied on *Castaneda v. Burger*

King Corp., 264 F.R.D. 557 (N.D. Cal. 2009) to find no commonality. Order at 37. *Castaneda* is distinguishable. First, the restaurants at issue in *Castaneda* were operated by multiple franchisees, raising questions of whether the defendant exercised control over the franchised restaurants. *Castaneda*, 264 F.R.D. at 560, 574. Here, Brookdale operates all its California facilities. Order at 30-31. Second, the court in *Castaneda* was not presented with expert findings establishing widespread ADAAG violations across all of the facilities at issue. Additionally, the court in *Castaneda* did not deny class certification in its entirety. Rather, it certified ten classes comprised of patrons of the restaurants visited by the plaintiffs. *Castaneda*, 264 F.R.D. at 572.

The district court compounded its error with its misplaced reliance on *Civil Rts. Education and Enforcement Ctr. v. Hospitality Properties Trust*, 867 F.3d 1093 (9th Cir. 2017) ("*CREEC*"). Based on the unsupported conclusion that Brookdale delegates responsibility for facility "maintenance, structural changes, and legal compliance to various other entities," the court cited *CREEC* for its finding that Brookdale's policy is one of "'delegation, not of non-compliance.'" Order at 42. The court therefore incorrectly concluded that a policy of disregarding ADAAG and CBC violations cannot create commonality without evidence that Brookdale intentionally discriminates, such as by discouraging executive directors from removing barriers. *Id.* at 42-43.

This conclusion is plainly wrong. First, under the ADA, plaintiffs are not required to show discriminatory intent. *Chapman*, 631 F.3d at 944-45; *Lentini*, 370 F.3d at 847. Second, as the operator of the facilities, Brookdale may not evade its responsibility for complying with the ADA by contractual, licensing, or other arrangements. 42 U.S.C. § 12182(b)(1)(A)(i)-(iii); *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 873 (9th Cir. 2004); 28 C.F.R. § 36.202. Third, this case is factually distinguishable from *CREEC*, where the defendant was ***not*** the operator of the public accommodations and was precluded by law from having any role in their operation or management. *CREEC*, 867 F.3d at 1096-97, 1103. Brookdale ***is*** the operator of its assisted living facilities and has the authority, and the duty, to remove ADAAG and CBC violations from those facilities. Moreover, the record shows that Brookdale did exercise control over the maintenance of and physical alterations to its facilities, including those involving disability access. Dkt. 505-4, ¶¶ 145-158. Finally, the comparison of Brookdale's purported delegation of its obligation to "various other entities" to the REIT's delegation of responsibility in *CREEC* disregards the court's own finding that those entities are wholly owned subsidiaries controlled by Brookdale. Order at 31 & n.11.

II. THE DISTRICT COURT DISREGARDED COMMON EVIDENCE OF THE UNLAWFUL EMERGENCY EVACUATION POLICIES

The district court manifestly erred in denying certification of Plaintiffs'

claims that Brookdale's evacuation policies discriminate against residents with mobility disabilities on the basis that the commonality requirement was not met. Order at 55. Relying solely on a conclusory finding that Brookdale's facilities have their own evacuation plans, the court failed to analyze whether the alleged differences among the facility plans were material or even relevant to the evacuation needs of persons with mobility disabilities. *Id.* In fact, Plaintiffs' expert performed a detailed analysis and concluded that the facility plans, like the corporate policy, all suffered from the same deficiencies. Dkt. 505-12, ¶¶ 5-24. The court ignored that this analysis is precisely the type of common evidence appropriate for adjudication on a class-wide basis.

An emergency plan that does not adequately anticipate and account for the needs of persons with disabilities violates the ADA and the Unruh Act. *See, e.g.*, *Cal. Found. for Indep. Living Ctrs. v. Cnty. of Sacramento*, 142 F. Supp. 3d 1035, 1064 (E.D. Cal. 2015); *Communities Actively Living Indep. & Free v. City of Los Angeles*, No. CV 09-0287 CBM (RZx), 2011 WL 4595993, at *16 (C.D. Cal. Feb. 10, 2011). The "common body of evidence" on which these claims can be resolved includes the declaration and testimony of Plaintiffs' expert June Kailes based on her detailed analysis of the corporate Emergency Manual and facility-level plans. Ms. Kailes catalogued the common defects in these plans, including the lack of a sufficient plan for evacuation from floors that are above or below

ground; no plan regarding accessible transportation; and no specification for accessible assembly points or relocation sites. Dkts. 468-4, ¶¶ 18-33; 505-12, ¶¶ 5, 7-12. This policy-based challenge is well-suited for class treatment under both Rule 23(b)(2) and (b)(3). The district court erred in denying certification of this claim.

III. THE DISTRICT COURT'S FAILURE TO CERTIFY A DAMAGES CLASS FOR PLAINTIFFS' TRANSPORTATION CLAIMS IS CONTRARY TO LAW

The district court erred when it declined to certify Plaintiffs' transportation claims for the Wheelchair and Scooter Users Subclass for damages under Rule 23(b)(3). The Order wrongly concludes that Plaintiffs cannot proceed on a classwide basis to recover damages for Brookdale's unlawful Fleet Safety Policy ("FSP") because Plaintiffs would have to demonstrate Article III injury for each class member. Order at 53-54. Yet as the district court concedes, only one named Plaintiff needs to show standing at the class certification stage for each claim and each type of relief sought. *Id.* at 27 (quoting *Melendres v. Arpaio*, 784 F.3d 1254, 1261-62 (9th Cir. 2015)). Indeed, the court concluded that the allegations of the named Plaintiffs "constitute concrete ADA injuries in this Circuit" and that the "Named Plaintiffs have standing to bring the claims asserted by the Mobility and Vision Impaired … Class[]." Order at 27-28.

The district court demonstrates a fundamental misunderstanding of what is

required to establish injury-in-fact in an ADA case involving a discriminatory policy. The district court's reliance on *Chapman*, which dealt with physical access barriers, was erroneous. Order at 53-54 (relying on *Chapman*, 631 F.3d at 947). The injury to any class member subjected to a discriminatory policy, like the FSP, is the same: it is "the emotional injury that results from illegal discrimination." *Laufer v. Arpan LLC*, 29 F.4th 1268, 1274 (11th Cir. 2022) (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021)). Any subclass member who was subjected to or was deterred by the FSP suffered from discrimination under the Unruh Act and has Article III standing. *See, e.g.*, *Davis v. Lab'y Corp. of Am. Holdings*, 604 F. Supp. 3d 913, 926 (C.D. Cal. 2022); *White v. Square, Inc*., 7 Cal. 5th 1019, 1023-24 (2019).

There is overwhelming evidence that Brookdale consistently enforces the FSP, *see, e.g.*, Dkts. 278-2 at 13; 278-3; 505-9, ¶¶ 3-5, 12-20, and the district court recognized that at least three named Plaintiffs suffered an injury sufficient to confer Article III standing. Order at 27-28.

The court's focus on proof of individual harm fails to recognize that variation in individual damages does not defeat predominance, so long as there are common issues of liability. *Olean*, 31 F.4th at 669. Here, predominance is satisfied because the liability issues can be resolved through evidence common to the class including expert testimony and the FSP itself. Brookdale has only been

able to identify three facilities at which and at most seven residents for whom exceptions were allegedly made to the FSP. Dkt. 505-9, ¶¶ 17-20; *but see* Dkt. 596-3 at 13. These facilities could be excepted from the subclass definition if necessary. Further, it is well-settled that predominance is not defeated by the inclusion of a small number of potentially uninjured persons in the class. *See, e.g.*, *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2017).

Once liability is determined using common proof, the number of instances when individual class members' rights were violated, thereby giving rise to the $4,000 statutory minimum damages per violation, can be determined through a claims form process under penalty of perjury, with protections built in to allow Brookdale to challenge claims from absent class members. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017). Using only the records Brookdale has produced, Plaintiffs' experts already identified "109 putative class members who used a motorized wheelchair and 162 who used a scooter" who were subject to the FSP. Order at 49.

IV. THE DISTRICT COURT MANIFESTLY ERRED IN DENYING CLASS CERTIFICATION OF PLAINTIFFS' CLAIMS FOR FALSE AND MISLEADING STATEMENTS AND OMISSIONS

A. The District Court Should Have Certified a Rule 23(b)(2) Class

The district court erred in denying certification under Rule 23(b)(2) by failing to analyze Plaintiffs' proposed common questions and proof, including

whether Brookdale's conduct is "likely to … deceive[]" a reasonable consumer. *Bradach v. Pharmavite, LLC*, 735 F. App'x 251, 254-55 (9th Cir. 2018). Plaintiffs submitted extensive evidence showing that Brookdale's standardized Residency Agreements (reviewed and signed by all class members or their legal representatives) contain uniform false or misleading statements that are likely to deceive a reasonable consumer, including that Brookdale will evaluate residents to determine what services they need, and then provide those services. Dkts. 278-3; 291-300; 506-6. This is misleading because, as confirmed by its Rule 30(b)(6) designee, Brookdale does not disclose to any residents that its staffing policies do not ensure that there will be enough staff to provide promised services. Dkt. 276-7, Ex. 51 at 2271-72. Nor did the court make any findings regarding the materiality of that nondisclosure to a reasonable consumer, and whether an inference of classwide reliance therefore arises. The district court disregarded Plaintiffs' common proof capable of establishing common answers to the elements of their claims, even though a single such question meets commonality and is sufficient for certification under (b)(2). *Olean*, 31 F.4th at 666-67.

Notwithstanding the substantial common evidence in the record, the court denied (b)(2) certification stating only that "classwide injury remediable by a common injunction cannot be shown with common proof." Order at 74, n.23. That conclusion directly contradicts controlling precedents holding that "classwide

injury" is ***not*** required for certification under Rule 23(b)(2), and that only the named Plaintiffs need show Article III injury, not class members. *Olean*, 31 F.4th at 682, n.32 (collecting authorities).[5] Further, the district court disregarded the classwide injunction Plaintiffs proposed for the benefit of all class members should they prove liability for Brookdale's material misrepresentations and non-disclosures to prospective residents, *i.e.*, disclosure of the defects in its staffing policies to the residents. Dkt. 596-1 at 48. Finally, the class definition may be modified to encompass only those who paid the Community Fee if necessary. Order at 66.

B. The District Court Should Have Certified a Rule 23(b)(3) Class

The district court denied (b)(3) certification of Plaintiffs' fraud claims based on an erroneous analysis of Article III "injury" that led it to find no predominance. Order at 66-69 & n.19.

Most class members paid a Community Fee to Brookdale prior to moving in. Common evidence of these payments is contained in Brookdale's business records. Dkt. 468-6, ¶¶ 23, 48, 55. More than 150 residents and family members declared they would not have paid money to Brookdale had it disclosed the deficiencies in

[5] The district court found that the named Plaintiffs suffered an "economic injury." Order at 29-30. Thus, consideration of individualized injuries under Rule 23(b)(3)'s predominance requirement to deny (b)(2) certification was erroneous. *Van v. LLR, Inc.*, 61 F.4th 1053, 1061 (9th Cir. 2023).

its staffing policies. Dkts. 278-3; 291-300; 506-6. The court found identical statements from the named Plaintiffs sufficient to establish Article III standing. Order at 29-30. Together, this is classwide evidence of "overpayment" capable of resolving the Article III inquiry. *See, e.g.*, *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 706-07 (9th Cir. 2020); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104, 1108 (9th Cir. 2013). Class members' payment of even "a fraction of a cent" to Brookdale in connection with their decisions to move into one of its facilities is sufficient to show Article III injury. *Van*, 61 F.4th at 1064. The district court is wrong that the products liability distinction renders *Hinojos* inapplicable here. Order at 66-67.

The Order disregards ample common evidence of overpayment, including Plaintiffs' expert Patrick Kennedy's analysis of the value of the Community Fee paid upon entering Brookdale and the documentary evidence of such payments. Order at 67-69; Dkt. 468-6, ¶¶ 47-48, 54, 62-65. Further, Plaintiffs are not required to quantify the amount of each class member's injury at the class certification stage. *Van*, 61 F.4th at 1063-64.

Personal Service Rate Fees that residents pay after the Community Fee is collected constitute further consequential damages. Dr. Kennedy proposed a method for calculating them on a classwide basis that offsets any value received by the consumer subsequent to the initial transaction. Dkt. 468-6, ¶¶ 56-61, 66-70.

This method is consistent with governing law. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 35-36 (2013); *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818 (9th Cir. 2019).

The district court's conclusion that class members must individually prove they were denied services misstates Plaintiffs' claims and is contrary to law. Order at 71-72; *Nguyen,* 932 F.3d at 819-20; *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 807-09 (9th Cir. 2010). Focusing on the delivery of individual services ignores that under Plaintiffs' claims and applicable law, "what was promised" focuses entirely on Brookdale's conduct in light of the reasonable consumer expectations created by its material misrepresentations and omissions about its defective staffing policies. Order at 72; Dkt. 596-3 at 16. In fact, both this Court and the California Supreme Court have explicitly rejected the "benefit of the bargain" rationale adopted by the district court. *Hinojos*, 718 F.3d at 1107 (citing *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 332 (2011)). The district court's predominance findings disregard the upfront legal injury residents sustain and the overcharges they pay due to Brookdale's deceptive conduct. *Nguyen*, 932 F.3d at 820; *Hinojos*, 718 F.3d at 1107.

C. The District Court Should Have Certified the Elder Abuse Claim

The district court's only basis for erroneously denying certification of

Plaintiffs' Elder Financial Abuse claims was that determining whether Brookdale had wrongfully obtained the money of an elder might require individualized inquiries into whose money (the elder's or a family member's) was paid. Order at 74. The district court cited no evidence in the record of a single instance of that taking place, *id*., nor did Brookdale raise this argument in its Opposition, Dkt. 596-2. Such hypothetical speculation regarding potential individualized inquiries is an improper basis to deny class certification. *Van*, 61 F.4th at 1066-67.

CONCLUSION

The Court should grant Plaintiffs' petition for review.

DATED: April 13, 2023

Respectfully submitted,

SCHNEIDER WALLACE
COTTRELL KONECKY LLP

By: */s/ Guy B. Wallace*
Guy B. Wallace

Attorneys for Plaintiffs and Petitioners

STATEMENT OF RELATED CASES

Heredia et al. v. Sunrise Senior Living, LLC et al., No. 22-55332, currently pending before this Court, includes similar issues to those discussed above, in Section IV of Plaintiffs' petition. The defendants in *Sunrise Senior Living*, another assisted living chain, have appealed the district court's certification of the plaintiffs' claims regarding false and misleading statements and omissions regarding the staffing of their facilities.

DATED: April 13, 2023

Respectfully submitted,

SCHNEIDER WALLACE
COTTRELL KONECKY LLP

By: */s/ Guy B. Wallace*
Guy B. Wallace

Attorneys for Plaintiffs and Petitioners

CERTIFICATE OF COMPLIANCE

This petition complies with the word limit of Circuit Rules 5-2(b) and 32-3(2) because it contains 5,599 words, excluding the portions exempted by Rules 5(b)(1)(E) and 32(f) of the Federal Rules of Appellate Procedure.

The petition complies with the typeface and type-style requirements of Rule 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Time New Roman font.

DATED: April 13, 2023

Respectfully submitted,

SCHNEIDER WALLACE
COTTRELL KONECKY LLP

By: */s/ Guy B. Wallace*
Guy B. Wallace

Attorneys for Plaintiffs and Petitioners

CERTIFICATE OF SERVICE

I certify that on April 13, 2023, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that on the same day, I caused the petition to be served by email and by U.S. Mail upon the following:

Erica Rutner
John A. Bertino
MOORE & LEE, LLP
110 SE 6th Street, Suite 1980
Fort Lauderdale, FL 33301
Email: e.rutner@mooreandlee.com
j.bertino@mooreandlee.com

Michael D. Jacobsen
SEYFARTH SHAW LLP
233 South Wacker Drive, Suite 8000
Chicago, Illinois 60606-6448
Email: mjacobsen@seyfarth.com

Kristina M. Launey
SEYFARTH SHAW LLP
400 Capitol Mall, 23rd Floor
Sacramento, California 95814
Email: klauney@seyfarth.com

Justin T. Curley
Ryan McCoy
SEYFARTH SHAW LLP
560 Mission Street, 31st Floor
San Francisco, California 94105
Email: jcurley@seyfarth.com
rmccoy@seyfarth.com

Attorneys for Defendants and Respondents

DATED: April 13, 2023

SCHNEIDER WALLACE
COTTRELL KONECKY LLP

By: */s/ Guy B. Wallace*
Guy B. Wallace

Attorneys for Plaintiffs and Petitioners

Attachment A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STACIA STINER, et al., Plaintiffs, v. BROOKDALE SENIOR LIVING, INC., et al., Defendants.	Case No. 17-cv-03962-HSG **REDACTED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND GRANTING AND DENYING *DAUBERT* MOTIONS AND MOTIONS TO STRIKE** Re: Dkt. Nos. 278, 346, 347, 348, 350, 353, 355, 504, 510, 511, 525

This is a putative class action lawsuit in which Plaintiffs allege that Defendants Brookdale Senior Living, Inc. and Brookdale Senior Living Communities, Inc. (collectively, "Brookdale" or "Defendants") operate their facilities in California in a manner that violates federal and state disability laws. Before the Court is Plaintiffs' motion to certify three different classes on several different theories. Dkt. No. 278 ("Mot."). Brookdale opposes that motion. *See* Dkt. Nos. 441 Ex. A ("Opp.")[1] and 506 ("Reply"). The Court held a hearing on the motion. For the reasons discussed below, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' motion. Also pending before the Court are several evidentiary motions, discussed in more detail below.

I. BACKGROUND

A. Factual Allegations

Defendant Brookdale Senior Living Inc. is a for-profit corporation that maintains its

[1] The Court granted Defendants' request to replace the incorrectly filed opposition (Dkt. No. 363) and replaced it with the redacted version attached as Exhibit A to Defendants' Motion to Remove Incorrectly Filed Document (Dkt. No. 441). *See* Dkt. No. 448.

United States District Court
Northern District of California

principal place of business in Brentwood, Tennessee. TAC ¶ 24. Brookdale is the largest provider of assisted living for senior citizens and persons with disabilities in the nation and has the largest number of assisted living facility residents within the state of California. *Id.* ¶ 27. Assisted living facilities offer room, board, and daily assistance for seniors and persons with disabilities with certain activities of daily living (or "ADLs"), such as preparing meals, shopping, transportation, preparing and taking medication, housekeeping, laundry, bathing, toileting, grooming, and dressing. *Id.* ¶ 28. Plaintiffs allege that there are more than 5,000 residents in Brookdale's eighty-nine facilities in California (the "Facilities"). *Id.* ¶ 27.

Among those residents are the plaintiffs in this case. Plaintiffs are elderly or dependent individuals living in California who have significant care needs and disabilities and require assistance with activities of daily living. *Id.* ¶ 2. According to Plaintiffs, they chose to stay in a Brookdale facility because they believed Brookdale's promises to provide the care and assistance that would allow them to age with dignity. *Id.* But they allege that they have instead encountered a system of understaffed facilities that fails to consistently provide a basic level of care. *Id.* Specifically, Plaintiffs allege that Brookdale's facilities are not accessible by people with disabilities, and that its policies regarding transportation, emergency evacuation, and staffing prevent these residents from fully accessing and enjoying the Facilities. *Id.* ¶¶ 3–4. They also allege that Brookdale conceals material facts about and misrepresents the quality of care at the Facilities, in violation of California's consumer protection statutes. *Id.* ¶ 6.

Plaintiffs accordingly brought this lawsuit, in which they seek to represent the following three classes, as amended in their motion for class certification:

> **1.** All persons with disabilities who use wheelchairs, scooters, or other mobility aids or who have vision disabilities and who reside or have resided at a residential care facility for the elderly located in California and owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.
>
> **2.** All persons with disabilities who require assistance with activities of daily living and who reside or have resided at a residential care facility for the elderly located in California and owned, operated and/or managed by Brookdale during the three years prior to the filing

United States District Court
Northern District of California

> of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.
>
> **3.** All persons who resided or reside at one of the residential care facilities for the elderly located in California and owned, operated and/or managed by Brookdale during the period from May 16, 2015 through the conclusion of this action, and who contracted with Brookdale or another assisted living facility for services for which Brookdale was paid money, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.

Mot. at 13 (emphasis in original).

i. Mobility and Vision Impaired Class

The Mobility and Vision Impaired Class would consist of all persons with disabilities who resided at a Brookdale residential care facility in California during the class period and who have visual disabilities or use wheelchairs, scooters, canes, or other mobility aids. TAC ¶ 197.

Plaintiffs' theory underlying this class is that Brookdale has a corporate policy and practice of violating the ADA and the Unruh Act by rejecting the applicability of those laws to its facilities and operating its facilities as though those laws do not exist. Mot. at 11.[2] Plaintiffs allege that they have inspected fifty-two (52) of Brookdale's facilities and have found them all to be filled with various access barriers that violate the ADA and the Unruh Act. *Id.* at 12. They also allege that Brookdale has corporate policies regarding transportation and emergency evacuation services that violate the ADA and the Unruh Act. *Id.*

ii. Disabilities Class

The Disabilities Class would consist of all persons with disabilities who resided at a Brookdale residential care facility for the elderly in California during the class period and who require assistance with activities of daily living. TAC ¶ 197.

Plaintiffs' theory underlying this class is that Brookdale has violated the ADA and the Unruh Act by systemically understaffing the Facilities. Mot. at 12. As a result, Plaintiffs allege, residents are routinely denied essential services regarding their activities of daily living, such as assistance with toileting, dressing, grooming, bathing, ambulation, escorting, medication administration, and housekeeping. *Id.* They also allege that Brookdale has refused their requests

[2] All citations to the record refer to ECF pagination.

United States District Court
Northern District of California

to make a reasonable modification in policy and practice to provide sufficient staffing. *Id.* Instead, they contend, Brookdale continues to staff its facilities based on corporate staffing procedures that are not reasonably designed to ensure the level of staffing necessary to deliver the services its residents need. *Id.*

iii. Misleading Statements and Omissions Class

The Misleading Statements and Omissions Class[3] would consist of all persons who resided at a Brookdale residential care facility in California during the class period and who contracted with Brookdale or another assisted living facility for services for which Brookdale was paid money. TAC ¶ 197.

Plaintiffs' theory underlying this class is that Brookdale made misrepresentations and concealed material facts about the quality and availability of care at the Facilities. *Id.* ¶ 6. Specifically, Plaintiffs allege that Brookdale represents that it will assess its residents' needs for services, which leads reasonable consumers to expect that it will then staff each facility accordingly to deliver personalized care to meet those needs. *Id.* But instead, Plaintiffs contend, Brookdale systemically understaffs its facilities, cuts caregiver hours, and fails to train workers, all to boost its profitability while the residents in Brookdale's care are forced to endure increasingly expensive monthly charges and worsening care. *Id.* Plaintiffs contend that this conduct violates California's consumer protection statutes and amounts to elder financial abuse.[4]

B. Procedural Posture

In July 2017, Plaintiffs Patricia and Christopher Eidler, Stacia Stiner, Mary-Catherine Jones, and Helen Carlson filed this lawsuit against Brookdale. Dkt. No. 1.[5] In September 2017,

[3] The parties refer to this class in several different ways, including the "false or misleading statements class" (*see e.g.*, TAC ¶ 197), the "false and misleading statements and omissions class" (*see e.g.*, Mot. at 44) and the "contracting class" (*see e.g.*, Opp. at 28). In the interest of clarity, the Court will refer to it as the "Misleading Statements and Omissions Class" for purposes of this order.

[4] Specifically, Plaintiffs allege that Brookdale has violated the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et. seq*., engaged in unlawful, unfair, and fraudulent business practices in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and committed Elder Financial Abuse, Cal. Welf. & Inst. Code § 15610.30. TAC ¶ 6.

[5] The First Amended Complaint added Bonita Hager and Lawrence Quinlan as plaintiffs, the Second Amended Complaint added Plaintiffs Edward Boris, Bernie Jestrabek-Hart, Arthur and

United States District Court
Northern District of California

Brookdale filed a motion to compel certain Plaintiffs to arbitration. *See* Dkt. Nos. 23 (Motion to Compel Arbitration), 59 (Renewed Motion to Compel Arbitration). Brookdale also filed a motion to dismiss and a motion to strike. Dkt. Nos. 60, 61. The Court denied Brookdale's motion to compel arbitration and motion to strike and granted in part and denied in part Brookdale's motion to dismiss in January 2019. Dkt. No. 85. Brookdale appealed that order, and the Ninth Circuit affirmed the denial of the motion to compel arbitration as to Helen Carlson's claims and to Lawrence Quinlan's ADA and Unruh Act claims but reversed as to Quinlan's CLRA, UCL, and elder financial abuse claims. *See* Dkt. No. 185; *Stiner v. Brookdale Senior Living*, Inc., 810 F. App'x 531, 535 (9th Cir. 2020). Plaintiffs now move for class certification. Dkt. No. 278.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23 governs class actions, including the issue of class certification. Class certification is a two-step process. To warrant class certification, a plaintiff "bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("A party seeking class certification must affirmatively demonstrate [her] compliance with the Rule.").

Rule 23(a) provides that a district court may certify a class only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012), *overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th

---

Patricia Lindstrom, and Ralph Schmidt, and the Third Amended Complaint added Jeanette Algarme. Dkt. Nos. 20, 52, 90. Plaintiffs voluntarily dismissed the claims of Plaintiffs Eidler, Hager, and Jones. Dkt. Nos. 39, 40, 41.

United States District Court
Northern District of California

Cir. 2022).

If the four prerequisites of Rule 23(a) are met, a court also must find that the plaintiff "satisf[ies] through evidentiary proof" one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). 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. This provision applies "only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* Under Rule 23(b)(3), "questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). To determine whether a putative class action satisfies the requirements of Rule 23(b)(3), courts consider:

> (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)(A)–(D).

The Court's "class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim.'" *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 465–66 (2013) (citing *Dukes*, 564 U.S. at 350–51). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage," and "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 466; *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) ("[A] district court *must* consider the merits if they overlap with the Rule 23(a) requirements."). The issue to be decided on a certification motion is whether the case should be "conducted by and on behalf of the

individual named parties only" or as a class. *See Dukes*, 564 U.S. at 348.

III. DISCUSSION

Before turning to the motion for class certification, the Court will address the various pending evidentiary motions.

A. *Daubert* Motions

Both parties filed several motions to exclude the testimony of experts. Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion or otherwise" where:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Expert testimony is admissible under Rule 702 if it is both relevant and reliable. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). "[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue." *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007); *see also Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) ("The requirement that the opinion testimony assist the trier of fact goes primarily to relevance.") (internal quotation marks omitted).

Under the reliability requirement, the expert testimony must "ha[ve] a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565. To ensure reliability, the court must "assess the [expert's] reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance." *Id.* at 564. These factors are "helpful, not definitive," and a court has discretion to decide how to test reliability "based on the particular circumstances of the particular case." *Id.* (internal quotation marks and footnotes omitted). "When evaluating specialized or technical expert opinion testimony, the relevant reliability concerns may focus upon personal knowledge or experience." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006) (internal quotation marks

United States District Court
Northern District of California

omitted).

The inquiry into the admissibility of expert testimony is "a flexible one" in which "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano*, 598 F.3d at 564. "When the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010). The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements are satisfied. *Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996); *see also* Fed. R. Evid. 702 Advisory Cttee. Notes.

The Ninth Circuit has held that "in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018). "But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage." *Id.* Admissibility is also not sufficient: even if the evidence is admissible, the district court must then evaluate its persuasiveness during the class certification analysis. *See Ellis*, 657 F.3d at 982 (explaining that "the district court seems to have confused the *Daubert* standard it correctly applied to [Defendant's] motions to strike with the 'rigorous analysis' standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible."). The Ninth Circuit has also stated that it "license[s] greater evidentiary freedom at the class certification stage" and that courts should not "rely[ ] on formalistic evidentiary objections" to "exclude[ ] proof that tend[s] to support class certification." *Sali*, 909 F.3d at 1006.

i. Motion to Exclude the Declaration and Testimony of June Kailes

Defendants move to exclude the declaration and testimony of June Kailes. Dkt. No. 346. The motion is fully briefed: Plaintiffs filed an opposition, Dkt. No. 438, and Defendants filed a

reply, Dkt. No. 486.

June Kailes "hold[s] a Bachelor's degree in Psychology from Hofstra University and a Master's degree in social work from the University of Southern California." Dkt. No. 277-1 ("Kailes Decl.") ¶ 2. Since 1985, Ms. Kailes has "worked as a disability policy consultant and trainer" for various entities, offering "consulting and training services . . . related to integrating access and functional needs into emergency planning, response, and recovery." *Id.* Based on her review of Brookdale's emergency evacuation policies and plans, Ms. Kailes opines that Brookdale's emergency planning documents "reveal[] serious gaps in planning and many deficiencies with regard to Brookdale's ability to meet the needs of its residents with mobility and/or vision disabilities before and during an evacuation." *Id.* ¶ 18. Ms. Kailes also opines that "Brookdale's emergency plans and procedures also fail to ensure that accessible transportation is provided to residents with mobility disabilities." *Id.* ¶ 27.

Brookdale argues that: 1) Ms. Kailes "considered limited, cherry-picked evidence and failed to account for actual practices in place at the communities she purported to review," 2) Ms. Kailes "failed to employ her admitted normal methodology for analyzing emergency evacuation plans," 3) "contrary to the opinions offered in her declaration, Kailes admitted that the ADA does not require emergency evacuation plans to contain any particular elements," and 4) Ms. Kailes "fails to offer facts or opinions and provides only speculation that is inadmissible under relevant case law authority and applicable rules." Dkt. No. 346 at 8.

Brookdale first argues that Ms. Kailes's opinion should be excluded because her methodology lacks a reliable scientific process. But the Ninth Circuit has made clear that "[w]hen evaluating specialized or technical expert opinion testimony, the relevant reliability concerns may focus upon personal knowledge or experience." *Sandoval-Mendoza*, 472 F.3d at 655. The Court is persuaded that Ms. Kailes's opinions are adequately based upon her extensive personal knowledge and experience.

The Court further finds that none of Brookdale's other arguments show that Ms. Kailes's opinions lack a "reliable foundation" or "relevan[ce] to the task at hand" for purposes of class certification. *Daubert*, 509 U.S. at 597; *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d

United States District Court
Northern District of California

807, 813 (9th Cir. 2014) ("The judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable." (quotations omitted)).

The Court **DENIES** Brookdale's motion to exclude the opinion of Ms. Kailes.

ii. Motion to Exclude the Declaration and Testimony of Douglas J. Cross

Defendants also move to exclude the declaration and testimony of Douglas J. Cross. Dkt. No. 347. The motion is fully briefed: Plaintiffs filed an opposition, Dkt. No. 439, and Defendants filed a reply, Dkt. No. 485.

Mr. Cross holds a "Bachelor's degree in Urban Planning from the University of Cincinnati," is a "Certified Trainer for the Community Transportation Association of America (CTAA) for Passenger Service and Safety (PASS), a program for training drivers in proper assistance techniques for serving people with disabilities," and has worked since 2004 "as a transportation consultant and trainer for government entities and private businesses." Dkt. No. 468-5 ("Cross Decl.") ¶¶ 2–4. Based on his review of Brookdale's Fleet Safety Policy and other documents, Mr. Cross opined that Brookdale's policies "are out of compliance with applicable DOT regulations implementing the ADA by requiring residents who use electric wheelchairs, power chairs, or scooters to transfer to a bus seat or a manual wheelchair" and that Brookdale's policies also violate the ADA "by prohibiting scooter users and users who are not in 'approved' devices from boarding vehicles via lifts or ramps." *Id.* ¶ 15.

Brookdale argues that Mr. Cross's testimony should be excluded because 1) his methodology is flawed, 2) he failed to base his opinions on sufficient data, 3) he "failed to examine how the very Fleet Safety Policy he claims violates the ADA comports with industry standards regarding boarding vehicles while seated on scooters," and 4) his opinions are impermissible legal conclusions. Dkt. 347 at 8–9.

Brookdale argues that Mr. Cross failed to take into account deposition testimony and other evidence indicating that "community-specific practices vary from the written policies" he analyzed and that he failed to "seek out alternative sources of information." *Id.* at16. Brookdale contends that "[l]acking any evidence that the Fleet Safety Policy was actually applied, Cross built his opinions on methodological errors, guesswork, and assumptions." *Id.* at 18. Brookdale further

United States District Court
Northern District of California

1 argues that Mr. Cross failed "to incorporate relevant industry warnings regarding scooter use into
2 his opinions of the Fleet Safety Policy." *Id.* at 21. The Court finds that these considerations go to
3 the weight that Mr. Cross's opinions should be given, not their admissibility. *Cf. Doyle v.*
4 *Chrysler Grp. LLC*, No. SACV 13-00620 JVS, 2015 WL 353993, at *6 (C.D. Cal. Jan. 21, 2015)
5 ("That counsel identified the relevant record for [the expert's] review is not unusual and does not
6 render the opinion testimony inadmissible as unsupported by sufficient facts or data. Deficiencies
7 related to the failure of an expert to consider portions of the record not identified by counsel can
8 easily be highlighted upon cross-examination of the expert; thus, any such deficiencies in this
9 instance go to weight rather than admissibility.").

10 Brookdale also argues that Mr. Cross's "opinions that the Fleet Safety Policy, other
11 operating procedures, and training guidelines are out of compliance with applicable DOT
12 regulations implementing the ADA by requiring residents who use electric wheelchairs, power
13 chairs, or scooters to transfer to a bus seat or a manual wheelchair, as well as his opinion that
14 Brookdale's accessible transportation policies also violate the ADA and its regulations by
15 prohibiting scooter users and users who are not in approved devices from boarding vehicles via
16 lifts or ramps are legal conclusions." Dkt. No. 347 at 22–23 (quotations omitted). Brookdale
17 further argues that Mr. Cross's opinion that "Brookdale Senior Living is covered by Title III of the
18 ADA" is an impermissible legal opinion. *Id.* at 23. Plaintiffs counter that Mr. Cross's testimony
19 is helpful to the Court because he understands the concerns that went into formulating the
20 regulations and how "they apply to real-world circumstances." Dkt. No. 439 at 24. Plaintiffs also
21 contend that "a witness may refer to the law in expressing an opinion without that reference
22 rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the
23 jury in understanding the facts in evidence even though reference to those facts is couched in legal
24 terms." *Id.* at 24 (quoting *Hangarter v. Provident Life & Accident Ins. Co.,* 373 F.3d 998, 1017
25 (9th Cir. 2004)).

26 The Court agrees with Brookdale: Mr. Cross's opinions that Brookdale's policies or
27 practices are out of compliance with the ADA and its regulations are improper legal conclusions
28 and therefore grants the motion as to these opinions. *See A.G. v. Paradise Valley Unified Sch.*

Dist. No. 69, 815 F.3d 1195, 1207 (9th Cir. 2016) ("[A]n expert witness cannot give an opinion as to her *legal conclusion,* i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." (emphasis in original) (internal citations omitted) (quoting *Hangarter,* 373 F.3d at 1016)); *see also id.* (determining that the district court committed error when it relied on expert testimony that "some of the services that plaintiffs claim were necessary were not legally required by federal or state statute" because the expert "was not in a position to provide an expert *legal* opinion" (emphasis in original) (internal citations omitted)).

The Court **GRANTS IN PART and DENIES IN PART** Brookdale's motion to exclude the testimony of Mr. Cross as set forth above.

iii. Motion to Exclude the Declaration and Testimony of Jeffrey Mastin and Gary Waters

Defendants next move to exclude the declarations and testimony of Jeffery Mastin and Gary Waters. Dkt. No. 348. The motion is fully briefed: Plaintiffs filed an opposition, Dkt. No. 440, and Defendants filed a reply, Dkt. No. 488.

Mr. Mastin has a five-year architectural degree from California Polytechnic State University, is a licensed architect in California, and has been a specialist in disability accessibility since 1999. Dkt. No. 284 ("Mastin Decl.") ¶ 2. Mr. Waters received his Bachelor of Architecture from California Polytechnic Institute, is a licensed architect in California (with a license renewal pending) and provides "access management consulting services." Dkt. No. 280 ("Waters Decl.") ¶ 3, 6.

Mr. Mastin conducted access surveys of several of Brookdale's California facilities and reviewed other evidence, "including relevant documents and deposition testimony." Mastin Decl. ¶ 79. Based on his review of the evidence and his experience, he concluded that "Brookdale has a policy and practice of disregarding its obligations under the ADA and the Unruh Act by failing to take the necessary steps to identify and remediate barriers to access in its California facilities that violate those provisions of law and their accompanying federal and state regulations and access standards." *Id.*

United States District Court
Northern District of California

Mr. Waters also conducted site inspections of Brookdale facilities. Waters Decl. ¶ 57. Based on his own and Mr. Mastin's site inspections, Mr. Waters concluded that "Brookdale's facilities contain repeated violations of the 2010 ADAS, the 1991 ADAAG and the CBC, which appear throughout their facilities" and that "the widespread, repeated violations of these minimum standards in all parts of Brookdale's facilities make it inevitable that any person with a mobility and/or vision disability who resides at Brookdale's facilities will encounter significant access barriers that will impact their entire experience and deny them full and equal enjoyment of the facility and its accommodations." *Id.* at ¶ 57, 61.

Brookdale argues that Mr. Mastin's and Mr. Waters' opinions should be excluded because 1) they "used unorthodox methods to conduct their work," 2) they "conducted their inspections without knowing the dates the communities were constructed, when any alterations occurred, or ultimately which standards they would use to discern whether any alleged access barriers exist," and 3) they both "impermissibly offer legal conclusions unconnected to any analysis and based solely on their interpretation of the law." Dkt. No 348 at 7–8.

First, Brookdale argues that "[t]he methodology employed by both Mastin and Waters to assess potential barriers deviated from what they described as their own normal process and from the methodology accepted in the scientific community." *Id.* at 10. One of Brookdale's main issues with Mr. Mastin's and Mr. Waters' methodology is that they failed to take measurements of certain access barriers. *Id.* at 11–17. Plaintiffs point out, however, that 1) Mr. Mastin never stated that he would usually measure *every* feature or element so he did not deviate from his usual methodology, 2) Defendants do not offer evidence that "it is the standard practice of other experts in the field . . . to measure every element of every feature," 3) due to their experience, Mr. Mastin and Mr. Waters "are well equipped to determine by observation, without precise measurements, whether certain features are far outside of the dimensions required to be accessible," and 4) "Defendants present no actual evidence, nor do they even contend, that the underlying data and factual findings on which Mr. Mastin and Mr. Waters based their opinions included barriers that were not measured and documented by them during the inspection process." Dkt. No. 440 at 11–14. Plaintiffs also explain the reasons and justifications for Mr. Waters's method for measuring

door closing speeds. *See* Dkt. No. 440 at 15–17. The Court agrees that the opinions satisfy *Daubert*. "[B]ased on the particular circumstances of [this] particular case," the Court finds that Mr. Mastin and Mr. Waters had "a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 564–65.

Brookdale also argues that Mr. Mastin and Mr. Waters "failed to ascertain the relevant standards, if any, applicable to each facility prior to their inspections." Dkt. No. 348 at 17. But for purposes of assessing reliability under *Daubert*, the Court agrees with Plaintiffs' argument that "knowing the standard to apply is irrelevant at the time of the inspection because the data that is collected at the inspection is not going to change regardless of the facility's construction date." Dkt. No. 440 at 19.

Finally, Brookdale argues that Mr. Mastin and Mr. Waters "inappropriately offer legal conclusions based on *ipse dixit* without any expert analysis" when they opine that "certain communities are covered by Title III of the ADA." Dkt. No. 348 at 18–19 (emphasis in original). Based on the same analysis described above regarding Mr. Cross, the Court also finds that this constitutes an improper legal opinion and grants the motion as to this opinion. *See A.G.*, 815 F.3d at 1207; *Hangarter,* 373 F.3d at 1016. In any case, the Court does not need to and did not rely on it for purposes of this order. As Plaintiffs point out, the Court has previously "held that Brookdale facilities are public accommodations subject to the ADA." *Stiner v. Brookdale Senior Living, Inc.*, 383 F. Supp. 3d 949, 956 (N.D. Cal. 2019).

The Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion to exclude the declaration and testimony of Mr. Mastin and Mr. Waters as set forth above.

iv. Motion to Exclude the Declaration and Testimony of Cristina Flores

Defendants move to exclude the declaration and testimony of Cristina Flores. Dkt. No. 350.[6] The motion is fully briefed: Plaintiffs filed an opposition, Dkt. No. 445, and Defendants filed a reply, Dkt. No. 483–4.

[6] Dkt. No. 350 is the pending motion before the Court but it is a fully redacted document. A public version of this document is available at Dkt. No. 591-2 and the Court cites to this docket entry going forward.

United States District Court
Northern District of California

United States District Court
Northern District of California

Dr. Flores is a licensed Registered Nurse in California. Dkt. No. 276-10 ("Flores Decl.") ¶ 7. Dr. Flores has a Bachelor of Sciences in Nursing from California State Dominguez Hills, a Masters in Gerontology—Long Term Care Administration from San Francisco State University, and a Ph.D. in Nursing Health Policy from the University of California, San Francisco. *Id.*

Dr. Flores reviewed Brookdale policy and practice documents, Brookdale deposition testimony, Brookdale facility-specific raw data, and summaries of Brookdale-specific raw data. *Id.* ¶ 22. Dr. Flores used this information as the basis for a "simple math analysis," *id.*, which "mathematically calculates the labor time required each day to deliver all required line-item services to residents and compares this to the actual labor time available each day," *id.* ¶ 33. Dr. Flores concluded that the six facilities she studied were all "chronically understaffed, and as a consequence, Brookdale residents were placed at a substantial and ongoing risk for not receiving required and promised services." *Id.* ¶ 59. Dr. Flores also opined that "[i]nformation obtained to date from the California Department of Social Services' Community Care Licensing (CCL) Division confirms the staffing issues." *Id.* ¶ 79.

First, Brookdale argues that "Flores' opinion that Brookdale's 'staffing methodology' is 'defective' lacks any sound or reliable basis." Dkt. No. 591-2 at 12. Brookdale argues that Dr. Flores's methodology is defective because 1) Dr. Flores allegedly relies on a "misinterpretation" of Brookdale's data, 2) Dr. Flores's "opinion about the sufficiency of total task times is contradicted by her conclusion in other cases" and 3) Dr. Flores allegedly "retracted her opinion that Brookdale does not allocate the tasks times it previously found were necessary." *Id.* at 12, 17, 19.

Brookdale further argues that Dr. Flores's opinions about the DSS staffing citations are unreliable and unhelpful. *Id.* at 22. Brookdale also takes issue with Dr. Flores's "simple math" analysis. *Id*. Brookdale argues that this method did not account for certain scenarios (such as "the impact of combining care tasks together" and "the impact of having caregivers assist multiple residents simultaneously"). *Id.* at 22–23. Brookdale also contends that Dr. Flores's simple math analysis is unhelpful because it "does nothing to advance a material aspect of this case." *Id.* at 24. According to Brookdale, the simple methodology "does not satisfy even one of the *Daubert*

factors." *Id.* at 26. Finally, Brookdale argues that Dr. Flores did not reliably apply her simple math analysis to the facts of the case. *Id.* at 28.

The Court is not persuaded by Brookdale's arguments. The Court finds that none of Brookdale's arguments show that Dr. Flores's opinions lack a "reliable foundation" or "relevan[ce] to the task at hand" for purposes of class certification. *Daubert*, 509 U.S. at 597; *Pyramid Techs.*, 752 F.3d at 813. Dr. Flores's personal knowledge and experience provide sufficient support for her opinions. Further, disputes regarding the data Dr. Flores took into account go to the weight of her opinion rather than its admissibility. *See* Fed. R. Evid. 702 Advisory Committee Note (2000 Amendment) ("When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."). In sum, "[b]ased on the particular circumstances of [this] particular case," the Court finds that Dr. Flores's opinions had "a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565.

The Court **DENIES** Brookdale's motion to exclude the opinion of Dr. Flores.

v. Motion to Exclude the Declaration and Testimony of Dale Schroyer

Defendants move to exclude the declaration and testimony of Dale Schroyer. Dkt. No. 353.[7] The motion is fully briefed: Plaintiffs filed an opposition, Dkt. No. 444, and Defendants filed a reply, Dkt. No. 482.

Mr. Schroyer is "a systems engineer and Senior Consultant" at ProModel/MedModel. Dkt. No. 277-5 ("Schroyer Decl.") ¶ 4. Mr. Schroyer has a Bachelor of Science degree in Mechanical Engineering from the University of Michigan—Ann Arbor and a Master's degree in Management Science from Lesley University. *Id.* ¶ 26. Mr. Schroyer based his "DES testing, failure analysis, and opinions" on Brookdale facility-specific raw data and floor plans (for the selected facilities),

[7] Dkt. No. 353 is the pending motion before the Court but it is a fully redacted document. A public version of this document is available at Dkt. No. 591-1 and the Court cites to this docket entry going forward.

United States District Court
Northern District of California

summaries of voluminous Brookdale facility-specific raw data, Brookdale policy and practice documents, and general inputs and programming logic. *Id.* ¶ 32. Mr. Schroyer ran "over 1.3 million MedModel DES tests and failure analyses . . . related to the 6 Brookdale California facilities (an average of over 210,000 engineering tests per facility) for those days during the 3-year timeframe for which Brookdale produced complete or substantially complete data." *Id.* ¶ 76 (emphasis removed). According to Mr. Schroyer, this testing showed a "pattern and practice of significant understaffing at each of the tested facilities" which placed "residents of the 6 selected Brookdale facilities . . . at a substantial and ongoing risk for not receiving required services." *Id.* ¶ 77.

Brookdale admits that "DES is not an inherently unreliable tool for evaluating and guiding staffing decisions in certain industries" but argues that Mr. Schroyer's opinions should be excluded because "there is too great an analytical gap" between the opinions he offers and the model on which he relied." Dkt. No. 591-1 at 11. Brookdale argues that Mr. Schroyer had "no reliable basis for using his DES model" to conclude that there was systematic understaffing at the communities and that "it was physically impossible for the staff to deliver the care required" by the residents. *Id.* at 12.

Brookdale also argues that Mr. Schroyer "expressly disregarded the rigors he admits are required to generate reliable conclusions from the DES model." *Id.* at 15. Brookdale contends that Mr. Schroyer's model was based on unverified assumptions and invalid data, and that Mr. Schroyer "failed to conduct at least two critical types of validation experts employ in the field when conducting a reliable and rigorous DES model." *Id.* at 15, 23.

The Court does not find Brookdale's arguments persuasive. In his declaration, Mr. Schroyer explains the use of MedModel in Assisted Living Facilities. *See* Schroyer Decl. ¶¶ 18–20; *see also* Dkt. No. 443-5 ("Schroyer Opp. Decl.") ¶ 16. The Court is satisfied with Mr. Schroyer's explanations and does not find Defendants' arguments on reply that Mr. Schroyer's application of the DES Model to the ALF industry was flawed to be persuasive. *See* Dkt. No. 482 at 7–11. Further, Plaintiffs point out that Mr. Schroyer addresses the general *Daubert* factors. Dkt. 444 at 13–16. Mr. Schroyer also enumerates the "numerous validation techniques utilized in

United States District Court
Northern District of California

the Brookdale DES testing." Schroyer Opp. Decl. ¶ 40.

The Court finds that Mr. Schroyer's opinions are not so inherently unreliable or irrelevant that they should be excluded at the class certification stage. *Cf. Sali,* 909 F.3d at 1006. (noting that the Ninth Circuit "license[s] greater evidentiary freedom at the class certification stage").

The Court **DENIES** Brookdale's motion to exclude the opinion of Mr. Schroyer.

vi. Motion to Exclude the Declaration and Testimony of Patrick Kennedy

Defendants move to exclude the declaration and testimony of Patrick Kennedy. Dkt. No. 355. The motion is fully briefed: Plaintiffs filed an opposition, Dkt. No. 442, and Defendants filed a reply, Dkt. No. 487.

Dr. Kennedy has a Bachelor of Arts in Economics from the University of California, San Diego and a Doctorate in Economics from Stanford University. Dkt. No. 468-6 ("Kennedy Decl."), Ex. A. Dr. Kennedy opines that "class wide damages can be reliably quantified using a commonly applied methodology and reliable data." Kennedy Decl. ¶ 71.

Brookdale makes four arguments regarding an alleged mismatch between Dr. Kennedy's model and Plaintiffs' theory of injury and the model's ability to accurately quantify damages that are based on actual injury. Brookdale first argues that Dr. Kennedy's opinion should be excluded because he "fails to measure damages from Plaintiffs' claim of purported misrepresentation." Dkt. No. 355 at 13. Brookdale explains that "[a]lthough Plaintiffs base their claims on a supposed representation that they would receive particular services, Kennedy fails to measures damages associated with services Defendants failed to provide or Plaintiffs allegedly failed to receive." *Id.* Plaintiffs respond that "Dr. Kennedy proposes a damages model designed to determine the difference between what was paid by class members and what a reasonable consumer would have paid without the allegedly misrepresented or omitted information" which aligns with their theory of injury. Dkt. No. 442 at 13–18.

Second, Brookdale argues that "[s]ince Kennedy's model only measures damages relating to an alleged 'staffing shortfall,' it cannot account for variables that affect the price of services." Dkt. No. 355 at 17. Plaintiffs respond that "[t]he market prices used by Dr. Kennedy were set by Brookdale (the supplier)" and "reflect the meeting point between supply-side willingness to sell

United States District Court
Northern District of California

United States District Court
Northern District of California

and the demand-side willingness to pay." Dkt. No. 442 at 19. Plaintiffs also note that "the court in *Heredia* found at the class certification stage that it was appropriate to base a damages analysis on the defendants' own pricing model and found no fault with the model proposed there by Dr. Kennedy, the same model he proposes here." *Id.* at 20 (citing *Heredia v. Sunrise Senior Living, LLC*, No. 818CV01974JLSJDE, 2021 WL 6104188, at *12 (C.D. Cal. Nov. 16, 2021)).

Third, Brookdale argues that "[t]he Court also should exclude Kennedy's model because it assigns damages to individuals irrespective of whether they suffered any injury. As a result, it is irrelevant and not helpful to the Court in determining whether to certify any class." Dkt. No. 355 at 19. Plaintiffs respond that Defendants' argument is premised on a misunderstanding of Plaintiffs' theory of injury. Dkt. No. 442 at 21.

Fourth, Brookdale argues that "[a] model quantifying the amount paid for services on a given day and relying on a community's alleged 'staffing shortfall' to provide or not provide an offset is simply not relevant to the claims asserted in this case." Dkt. No. 355 at 27.

The Court finds that these arguments, which relate to what Dr. Kennedy's model does and does not measure and whether it aligns with Plaintiffs' theory of injury, go to the weight to be given to Dr. Kennedy's model and not its admissibility.

Brookdale also argues that Dr. Kennedy's model "is entirely reliant on the inputs from the work of Flores and Schroyer" and "[t]o the extent those inputs are flawed, for example, because Flores and Schroyer considered only hours worked by certain non-exempt personnel, or failed to take into consideration any effects of the COVID-19 pandemic, Kennedy's model is also flawed." Dkt. No. 355 at 23. The Court finds that this argument also goes to the weight to be given to Dr. Kennedy's model and not its admissibility: the Court has determined that Dr. Flores's and Mr. Schroyer's opinions are admissible, so unless Dr. Kennedy used them impermissibly, his use of their findings does not make his opinions inadmissible.

On the issue of whether Dr. Kennedy impermissibly used Dr. Flores's and Mr. Schroyer's opinions, the Court agrees with Plaintiffs that "[h]ere, Dr. Kennedy, a damages expert, looks to the findings and conclusions of Mr. Schroyer and Dr. Flores about the staffing of Brookdale's facilities to explain how those findings and conclusions could be used in his damages model. He

is not offering an opinion on Brookdale's staffing methodology or the staffing shortfalls that Dr. Flores identified. Nor could he do so, as he lacks expertise in that area." Dkt. No. 442 at 24. The Court finds that Dr. Kennedy's reliance on Dr. Flores's or Mr. Schroyer's opinions did not run afoul of *Daubert*.

Brookdale then argues that "Kennedy's opinions as to statutory damages are exercises in simple math without reliable inputs" that are "not properly the subject of expert testimony." Dkt. No. 355 at 26. The Court disagrees, because Dr. Kennedy's opinion could "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a).

The Court finds that none of Brookdale's arguments show that Dr. Kennedy's opinions lack a reliable foundation or relevance to the task at hand for purposes of class certification. The Court thus **DENIES** Brookdale's motion to exclude the testimony of Dr. Kennedy.

vii. Motion to Exclude Certain Testimony and Opinions of Douglas Anderson

Plaintiffs move to exclude the declaration of Douglas Anderson. Dkt. No. 516-1.[8] The motion is fully briefed: Defendants filed an opposition, Dkt. No. 526, and Defendants filed a reply, Dkt. No. 534.

Mr. Anderson is a "a Partner at LCM Architects ("LCM"), a Chicago-based architectural firm that specializes in accessible design requirements of Title III of the Americans with Disabilities Act . . . and federal, state, and local disability access laws." Dkt. No. 377-1 ¶ 1. Based upon his review of Plaintiffs' experts' reports and his own "on-site review of actual conditions," Mr. Anderson opined that Mr. Mastin's and Mr. Waters' findings had several shortcomings, including, among other things, a flawed survey methodology, the use of nontraditional tools, and survey and reporting errors. *Id.* ¶¶ 47–60.

Plaintiffs argue that Mr. Anderson's following opinions should be excluded: 1) "[a] facility's construction history must be researched before an onsite survey of the facility can be undertaken," 2) "Plaintiffs' experts improperly used new construction standards in the 1991 ADAAG and 2010 ADAS and the 2016 and 2019 CBC to evaluate compliance of all 40 facilities

[8] Plaintiffs originally filed the motion as Dkt. No. 510 but submitted a corrected version at Dkt. No. 516-1.

United States District Court
Northern District of California

they inspected," 3) "[a] modification to a facility qualifies as an equivalent facilitation if a resident requested it," 4) "[i]n residential facilities generally, only limited areas are open to the public and covered by the ADA," 5) "Brookdale's facilities are not susceptible to a common analysis of their accessibility because they were not constructed from prototype plans and were constructed at different times, by different owners, managers, contractors, and architects," 6) "'Plaintiffs' experts did not follow proper methodology for surveying existing facilities in that they evaluated the Communities as new construction using the 2016 CBC and the 1991 and 2010 ADA Standards.' 'None of the standards used by Plaintiffs' experts may apply to the construction of these facilities – and certainly none of these communities should have been surveyed as newly-constructed facilities,'" and 7) "we found many incorrect measurements in our review of Plaintiffs' experts' reports such as the toilet compartment at North Euclid pictured below." *See generally* Dkt. No. 516-1.

Plaintiffs make several arguments in support of their motion but the Court finds that none of them show that Mr. Anderson's opinions lack a reliable foundation or relevance to the task at hand for purposes of class certification. The majority of Plaintiffs' arguments, for example, critique Mr. Anderson's selection of the documents he chose to review to evaluate Plaintiffs' experts' methodology. *See* Dkt. No. 516-1 at 5–9. As Defendants argue, this goes to the "the weight of his testimony, not admissibility." Dkt. No. 526 at 13 (citing *Hangarter*, 373 F.3d at 1017.

The Court finds Plaintiffs' other arguments similarly unpersuasive and **DENIES** their motion to exclude the testimony of Dr. Anderson.

viii. Motion to Exclude Certain Testimony and Opinions of Sheldon Jacobson and Ali Saad

Plaintiffs next move to exclude certain testimony and opinions of Sheldon Jacobson and Ali Saad. Dkt. No. 511. The motion is fully briefed: Defendants filed an opposition, Dkt. No. 523, and Plaintiffs filed a reply, Dkt. No. 538-2.

Dr. Jacobson is a Founder Professor of Engineering in the Department of Computer Science and Director of the Simulation and Optimization Laboratory at the University of Illinois at

Urbana-Champaign. Dkt. No. 377-2 ¶ 5. He has a Bachelor of Science and a Master of Science in Mathematics from McGill University and wrote his PhD dissertation on Discrete Event Simulation ("DES") output analysis at Cornell University. *Id.* He has also taught DES courses at multiple education institutions. *Id.*

Dr. Saad is a labor economist and applied statistician and holds a Ph. D. in economics from the University of Chicago and a B.A. in history and economics from the University of Pennsylvania. *See* Dkt. No. 591-3 ¶¶ 1–2.

Plaintiffs first argue that some opinions by Dr. Jacobson and Dr. Saad should be excluded because they are not staffing experts. *See* Dkt. No. 511 at 6–18. Plaintiffs also specifically argue that Dr. Saad's opinions about the inputs used by Dr. Flores and Mr. Schroyer should be excluded because he is not an expert in staffing or any aspect of the operation of ALFs, has no experience or expertise in DES, and his firm did not perform any DES simulation to test Mr. Schroyer's DES Model. *See id.* at 14–18. Plaintiffs also argue that Dr. Saad's data related opinions should be excluded because "Dr. Saad's data analysis and programming suffers from errors and miscalculations and improper assumptions, rendering his critique of Plaintiffs' experts unreliable and irrelevant." Dkt. No. 511 at 18.

Brookdale generally responds that the motion should be denied because it "cites to and relies on four new expert reports, including reports from two brand new experts never previously disclosed." Dkt. No. 523 at 7. The Court agrees with Defendants that the new reports are untimely, and improper to the extent they contain any new opinions.

As to the substance of the reports, Defendants argue that neither Dr. Jacobson nor Dr. Saad need to be experts in staffing or the ALF industry more broadly to be qualified to provide their opinions. The Court agrees that both experts are qualified to provide their respective opinions. "Rule 702 requires that a testifying expert be qualified as an expert by knowledge, skill, experience, training, or education" but "contemplates a *broad conception* of expert qualifications." *Hangarter*, 373 F.3d at 1015 (emphasis in original). Dr. Jacobson's opinions are mostly focused on a critique of Dr. Schroyer's DES analysis. As an engineering professor who has taught several courses on DES and who wrote his dissertation on DES output analysis, *see* Dkt. No. 377-2 ¶ 5,

United States District Court
Northern District of California

1 Dr. Jacobson is qualified to give the opinions he provides. Dr. Saad's declaration largely critiques
2 Dr. Kennedy's damages model (and Dr. Flores's and Mr. Schroyer's opinions, to the extent Dr.
3 Kennedy used their opinions as input). The Court finds that as a labor economist and applied
4 statistician, Dr. Saad is qualified to provide the opinions he does. In reply, the Plaintiffs highlight
5 specific opinions that they believe Dr. Jacobson and Dr. Saad were not qualified to make. *See* Dkt.
6 No. 538-2 at 6–14. These arguments go to the weight of the opinions rather than to their
7 admissibility.

8 Brookdale argues that Plaintiffs' substantive reasons for excluding Dr. Saad's and Dr.
9 Jacobson's opinions are largely supported by the untimely new expert reports. Dkt. No. 523 at 23.
10 Brookdale also argues that "disagreement amongst experts is an insufficient basis for exclusion."
11 *Id*. The Court agrees. The issues Plaintiffs take with Dr. Jacobson's and Dr. Saad's opinions go
12 to the weight of the opinions rather than the admissibility.

13 Accordingly, the Court **DENIES** Plaintiffs' motion to exclude the testimony of Dr.
14 Jacobson and Dr. Saad.

15 **B. Motions to Strike**

16 **i. Objections to Reply Evidence**

17 Brookdale contends that Plaintiffs' reply brief is accompanied by nine new expert
18 declarations, three new attorney declarations, and hundreds of new exhibits, none of which were
19 included with Plaintiffs' original motion for class certification. *See* Dkt. No. 518 at 2. Brookdale
20 objects to Plaintiffs' new reply evidence and asks the Court to decline to consider the evidence in
21 ruling on the Motion. *Id.*

22 The stipulated Scheduling Order and subsequent modifications required Plaintiffs to
23 submit any expert witness testimony in support of their Motion, in the form of expert declarations
24 or otherwise, with their Motion in August 2021. *See* Dkt Nos. 206, 315. The parties' schedule
25 also required Plaintiffs to produce their expert witnesses for deposition no later than December 14,
26 2021, which was 75 days after they filed the Motion. *See* Dkt. No. 315. The Court set an
27 extremely extended briefing schedule that accommodated expert discovery so that all expert issues
28 could be vetted before the reply. In accordance with the Scheduling Order, Plaintiffs' Motion

disclosed seven expert reports in support of class certification, and Defendants timely deposed these experts in advance of their Opposition to the Motion and related *Daubert* motions. *See* Dkt Nos. 279–300, 518 at 3.

On May 19, 2022, Plaintiffs filed their Reply. Dkt. No. 506. Defendants contend, and Plaintiffs have not disputed, that Plaintiffs accompanied their Reply with: (i) nine new expert reports; and (ii) three attorney declarations attaching hundreds of new exhibits. *See id.* Plaintiffs do not dispute that they submitted new evidence in the form of expert and attorney declarations with the Reply. Instead, they contend that their reply declarations and evidence are proper because they "respond directly to the arguments made in Defendants' brief or their expert declarations filed in opposition to class certification." *See* Dkt. No. 527 at 2.

Generally, "reply briefs are limited in scope to matters either raised by the opposition or unforeseen at the time of the original motion." *Burnham v. City of Rohnert Park*, 1992 WL 672965, at *1 n. 2 (N.D. Cal. May 18, 1992) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)). New evidence submitted as part of a reply is improper because it does not allow the defendant an adequate opportunity to respond. *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1027 (C.D. Cal. 2018) (citations omitted). For this reason, the district court may decline to consider new evidence or arguments raised in reply, and generally "should not consider the new evidence without giving the non-movant an opportunity to respond." *Id.* (citations omitted); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("We agree with the Seventh Circuit, which held that '[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond.'")

In deciding this order, the Court only considered limited, discrete parts of the Wallace Reply Declaration and the Kailes Reply Declaration, and considered the entirety of the Kennedy Reply Declaration. The Court considered certain parts of the Wallace Reply Declaration that directly respond to the argument that Defendants made in their opposition that they did not operate or manage Brookdale's California assisted living facilities. *See* Opp. at 17–18; Dkt. No. 506-1 ("Wallace Reply Decl.") ¶¶ 2–49 and related exhibits. The Court also considered the Kailes

United States District Court
Northern District of California

Reply Declaration for its contention that the emergency evacuation plans were all deficient in similar ways, *see e.g.*, Dkt. No. 506-12 ("Kailes Reply Decl.") ¶¶ 5–24, which was a response to Defendants' opposition argument that Plaintiffs would not be able to show that there was a common emergency policy, *see* Opp. 32–36. Finally, the Court also considered Dr. Kennedy's reply declaration which refuted Defendants' proposed damages model as inapposite*, see* Dkt. No. 506-13 ("Kennedy Reply Decl.") ¶¶ 5–40, and restated opinions that Dr. Kennedy provided in his initial declaration. The Court does not find that any of these discrete arguments or evidence are improper new reply material. *Cf. Sali*, 909 F.3d at 1006 (explaining that a district court should have considered certain declarations for the purposes of class certification instead of leaning "on evidentiary formalism in striking those declarations as 'new evidence' submitted in reply").

The Court therefore **DENIES** Defendants' motion to strike as to these limited, directly responsive aspects of the record. The Court finds that the remainder of the evidence was improperly submitted based on the scheduling order and the agreed-upon process, which did not contemplate (or even discuss) the submission of massive amounts of new material, proffered by brand new experts, on reply. *See In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 501 (N.D. Cal. 2008) (finding that "[s]lipping . . . new arguments into a rebuttal report was a clear-cut form of sandbagging and was simply unfair"). However, given the ultimate basis for the Court's ruling on the class certification motion, as detailed below, it did not need to consider or rely on any of the other evidence Defendants seek to strike. Accordingly, the Court **DENIES AS MOOT** Defendant's motion as to the remainder of the evidence.

ii. Motion to Strike the Supplemental Declaration of Ali Saad

Plaintiffs filed a motion to exclude the supplemental declaration of Ali Saad. Dkt. No. 504. The motion is fully briefed: Defendants filed an opposition, Dkt. No. 517, and Defendants filed a reply, Dkt. No. 528.

The Court does not rely on the supplemental declaration of Dr. Saad in this order and therefore **DENIES AS MOOT** Plaintiffs' motion to strike.

iii. Motion to Strike Improper Attorney Declarations

Defendants filed a motion to strike the reply declarations of Plaintiffs' counsel Guy B.

United States District Court
Northern District of California

1 Wallace (Wallace Reply Decl.), Rachel L. Steyer (Dkt. No. 506-5 ("Steyer Reply Decl.")), and
2 Benjamin Bien-Kahn (Dkt. No. 506-7 ("Bien-Kahn Reply Decl.")). Dkt. No. 525. The motion is
3 fully briefed: Plaintiffs filed an opposition, Dkt. No. 543, and Defendants filed a reply, Dkt. No.
4 544.

5 Defendants argue that Plaintiff's counsel "assert numerous improper conclusions and
6 arguments in their Declarations in violation of Local Rule 7-5(b). Dkt. No. 525 at 4. Plaintiffs in
7 turn argue that Defendants violated the local rules with their motion because the "Local Rules
8 prohibit the submission of any additional memoranda or papers without prior court approval after the
9 filing of the reply in support of a motion, other than either a five-page pleading with evidentiary
10 objections or a notice of new authority." Dkt. No. 543 at 2 (citing L.R. 7-3(d)).

11 Local Rule 7-5(b) provides that "[a]n affidavit or declaration may contain only facts . . . and
12 must avoid conclusions and argument." L.R. 7-5(b). The Court agrees with Brookdale that these three
13 declarations include "numerous improper conclusions and arguments . . . in violation of Local Rule 7-
14 5(b)." Dkt. No. 525 at 4. The Court, however, does not rely on any of the declarations at issue in this
15 order, with one discrete exception: the Court considered parts of the Wallace Reply declaration that
16 responded to Brookdale's ownership argument. The Court finds that paragraphs 2–49 of the
17 Wallace declaration do not contain improper conclusions or arguments and are admissible.

18 The Court **DENIES** Defendants' motion to strike as to paragraphs 2–49 of the Wallace
19 Reply Declaration and related exhibits, and **DENIES** the motion **AS MOOT** as to the other parts
20 of the Wallace Reply Declaration, the Steyer Reply Declaration, and the Bien-Kahn Reply
21 Declaration.

22 **C. Standing**

23 As a preliminary matter, Brookdale contends that Plaintiffs' proposed classes are
24 improperly defined to include numerous individuals who have not suffered any "concrete" injury
25 under Article III. Opp. at 24. To determine who (if anyone) suffered a concrete harm, Brookdale
26 contends, the Court will have to engage in a host of highly individualized inquiries specific to each
27 putative class member. *Id.* at 25. For the reasons explained below, the Court will address
28 Brookdale's argument as part of the Rule 23 analysis.

To establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the alleged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). And to fulfill the first element, a plaintiff must have suffered an injury that is both "concrete and particularized." *Id.* at 339. Further, "Article III standing requires a concrete injury even in the context of a statutory violation." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (quoting *Spokeo,* 578 U.S. 330 at 341). "And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *Id.* at 2208. In this Circuit, "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met." *Melendres v. Arpaio*, 784 F.3d 1254, 1261–62 (9th Cir. 2015). Any remaining issues about the relationship between the class representative and class members—including dissimilarity in injuries suffered—"are relevant only to class certification, not to standing." *Id.* at 1262.

i. Claims Asserted by the Mobilities and Vision Impaired Class and the Disabilities Class

All the Named Plaintiffs state that they were or are residents with disabilities who have encountered numerous barriers that, they contend, denied them full and equal access to Brookdale's facilities. Mot. at 37; *see also* Dkt. No. 291 ("Stiner Decl.") ¶¶ 19, 20; Dkt. No. 293 ("Carlson Decl.") ¶ 18; Dkt. No. 295 ("Vallette Decl.") ¶ 23; Dkt. No. 296 ("Lytle Decl.") ¶ 21; Dkt. No. 299 ("Jestrabek-Hart Decl.") ¶¶ 28; Dkt. No. 298 ("Lindstrom Decl.") ¶ 12; Dkt. No. 297 ("Fisher Decl.") ¶ 32; Dkt. No. 300 ("Algarme Decl") ¶ 23. These allegations constitute concrete ADA injuries in this Circuit. *See Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1175 (9th Cir. 2017) ("The standard for injury in fact is whether [plaintiff] has encountered at least one barrier that interfered with her access to the particular public facility and whether she intends to return or is deterred from returning to that facility."); *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 950 (9th Cir. 2011) (en banc). As to the transportation claims, Named Plaintiff Algarme states that she was required to transfer from her wheelchair to a seat on the facility's transportation

United States District Court
Northern District of California

van. *See* Algarme Decl. ¶ 21. Named Plaintiffs Stiner and Jestrabek-Hart make similar claims, *see* Stiner Decl. ¶ 17 and Jestrabek-Hart Decl. ¶¶ 23, 25, and Named Plaintiff Carlson's representative states that the fact that the facility's van only had space for one or two wheelchairs limited how often Carlson and other residents could use the transportation services, *see* Carlson Decl. ¶ 20. As to the emergency evacuation claims, Named Plaintiff Jestrabek-Hart alleges that as a result, in part, of Brookdale's "failure to plan for emergencies," she had to wait for "three to four hours before firefighters arrived to assist people who could not walk up the stairs" during a power outage in 2018. Jestrabek-Hart Decl. ¶ 31. Named Plaintiff Jestrabek-Hart further alleges that she was unable to use her continuous positive airway pressure (CPAP) machine during the outage because Brookdale Scotts Valley only had one generator-powered electrical outlet, "which was located on the first floor near the nurse's office." *Id.* ¶ 32. Regarding the understaffing claims, each of the Named Plaintiffs also alleges that they did not receive timely assistance with an activity of daily living. *See* Stiner Decl. ¶ 10; Carlson Decl. ¶ 13; Vallette Decl. ¶ 15; Lytle Decl. ¶ 14; Jestrabek-Hart Decl. ¶ 12; Lindstrom Decl. ¶ 9; Fisher Decl. ¶ 21; Algarme Decl. ¶ 11.

The Court accordingly concludes that the Named Plaintiffs have standing to bring the claims asserted by the Mobility and Vision Impaired and the Disabilities Classes, and that is enough to satisfy Article III at the class certification stage. *See Melendres*, 784 F.3d at 1261.[9] However, the Court will consider the extent to which it will eventually have to engage in

---

[9] Under *TransUnion*, "[e]very class member must have Article III standing in order to recover individual damages" because Article III "does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." 141 S. Ct. at 2207–08 (2021) (citations omitted). But that case did not address whether every class member must be shown to have standing at the class certification stage. *See id.* at 2208 n.4 ("We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class." (emphasis in original)). On this point, the Ninth Circuit had previously said that "[n]o class may be certified that contains members lacking Article III standing." *Mazza*, 666 F.3d at 594. But more recently, after the Supreme Court's decision in *TransUnion*, the Ninth Circuit clarified that that statement "does not apply when a court is certifying a class seeking injunctive or other equitable relief." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir. 2022). At bottom, although *TransUnion* calls into question whether courts at the class certification stage should assess the standing of putative class members, it ultimately provides no basis for this Court to disregard binding Ninth Circuit law on point. *See also Lauderdale v. NFP Ret., Inc.*, No. SA-CV-2:13-01-JVS-KESX, 2022 WL 1599916, at *4 (C.D. Cal. Feb. 16, 2022) ("Nothing in *TransUnion* indicates that it changed settled Ninth Circuit law regarding what it is required to demonstrate standing at the class certification stage.").

individualized inquiries to determine whether each of the putative class members has standing as part of the Rule 23 inquiry.

ii. Claims Asserted by the Misleading Statements and Omissions Class

Regarding the claims brought by the Misleading Statements and Omissions Class, Defendants argue that Plaintiffs' "'legal injury' theory is not sufficient to establish standing" under *TransUnion* for the misleading statements and omissions class because "exposure to Defendants' alleged staffing policies, without more, cannot give rise to an actual injury. Nor can an alleged risk that those policies will result in a deprivation of promised services give rise to an actual injury." Opp. at 27. This class alleges economic harm. *See e.g.*, TAC ¶ 284 ("As a direct and proximate result of Defendants' conduct, Plaintiffs . . . have been harmed and continue to be harmed. Among other things, they paid money to Defendants to enter the facilities and/or for services that were not provided or that were substandard to those promised by Defendants."). Plaintiffs argue in their class certification motion that "[t]he payment of money coupled with exposure to Brookdale's (undisclosed) defective staffing policies constitute legal injury for all class members." Mot. at 48.

The Named Plaintiffs aver in declarations that they would not have made the purchase at the price they did (or perhaps even at all) but for Brookdale's alleged misrepresentations and/or omissions. *See* Stiner Decl. ¶ 26; Carlson Decl. ¶ 23; Vallette Decl. ¶ 32; Lytle Decl. ¶ 11; Jestrabek-Hart Decl. ¶ 36; Lindstrom Decl. ¶ 15; Fisher Decl. ¶ 36; Algarme Decl. ¶ 28. The Named Plaintiffs also aver in those declarations that they experienced certain deprivations of services. *See e.g.*, Stiner Decl. ¶¶ 8-16; Carlson Decl. ¶¶ 12-17; Vallette Decl. ¶¶ 11-21; Lytle Decl. ¶¶ 12-20; Jestrabek-Hart Decl. ¶¶ 10-21; Lindstrom Decl. ¶¶ 8-11; Fisher Decl. ¶¶ 17-31; Algarme Decl. ¶¶ 7-14.

Defendant's argument is foreclosed by Ninth Circuit authority holding that "when a consumer purchases merchandise on the basis of [a misrepresentation], and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL . . . because he has suffered an economic injury." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013).

United States District Court
Northern District of California

Hinojos is not clearly irreconcilable with *TransUnion*, and the Court therefore must follow it here: the Named Plaintiffs have individual standing to bring their misleading statements and omissions class claims under this theory of injury. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc) (cautioning that only in cases of "clear irreconcilability" can district courts "consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled"); *see also Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (explaining that "[t]his is a high standard," which "requires [the district court] to look at more than the surface conclusions of the competing authority" (quotation omitted)).

As with the other claims, the Court will consider the extent to which it will eventually have to engage in individualized inquiries to determine whether each of the putative class members has standing as part of the Rule 23 inquiry.

D. Class Certification

i. Preliminary Matters

a. Numerosity

Brookdale contends that Plaintiffs have not "established a sufficient number of individuals who qualify for membership in their proposed classes." Opp. at 15. Plaintiffs' proposed classes are defined to include only those "persons . . . who reside or have resided at a residential care facility for the elderly located in California and *owned, operated and/or managed* by Brookdale." Mot. at 13 (emphasis added). By that definition, Brookdale argues, there are zero class members because the Facilities are actually owned and operated by various other entities who are not parties to this lawsuit. *See* Opp. at 16–18; Dkt. No. 427 (Def. Ex. 271). In response, Plaintiffs argue that Brookdale's argument fails because it has repeatedly represented that it operates, manages, or controls the Facilities—both in public and in sworn filings during the four years of this litigation. Reply at 8.[10]

[10] In support of its argument, Plaintiffs filed a request seeking judicial notice of certain Brookdale SEC forms and court filings from other cases. Dkt. No. 507 ("RJN"). Brookdale objected to the RJN, Dkt. No. 524, and Plaintiffs filed a reply, Dkt. No. 536. The Court takes "judicial notice of [these] matters of public record," but does not "take judicial notice of disputed facts contained in

United States District Court
Northern District of California

The Court agrees with Plaintiffs. As Plaintiffs note, Brookdale's Answer, discovery responses, other filings in this case, and public statements plainly admit to controlling or operating the facilities where Plaintiffs live or lived. *See* Wallace Reply Decl. ¶¶ 2–49; *see also* Dkt. No. 110 ("Answer") ¶ 2 ("Defendants admit that they operate communities in California where the named Plaintiffs live or lived."). Moreover, Brookdale's own sources of evidence indicate that many (if not all) of the various entities that Brookdale contends license or operate the Facilities are its subsidiaries and/or predecessors-in-interest. For example, most of the Facilities at issue in this case are either licensed or managed by "Emeritus Corporation." *See* Dkt. No. 427 (Def. Ex. 271). And Brookdale has represented—in this very lawsuit—that it acquired Emeritus Corporation in 2014 and has characterized Emeritus as one of its wholly owned subsidiaries.[11]

Brookdale's characterization of these admissions is that it only admitted ownership of the Facilities because Plaintiffs' interrogatories defined "Brookdale" broadly to include any "subsidiary, division, related company, officer, director, partner, employee, agent, board of directors, board member, and representative" of the named defendants. Opp. at 18; Dkt. No. 411-8 at 4. But that of course does not explain why Brookdale admitted to owning or operating the Facilities in any of the other filings, including the Answer. *See generally* Answer. Given these admissions and the other evidence in the record, Brookdale cannot now dodge a finding of numerosity by arguing that there are no class members because it does not own, operate, or manage the residences at issue.

Accordingly, each of the classes has enough proposed members to satisfy Rule 23(a)(1),

---

such public records." *Khoja v. Orexigen Therapeutics,* 899 F.3d 988, 999 (9th Cir. 2018) (citation and quotations omitted). Although the Court does not take judicial notice of the *truth* of Brookdale's representations, it does take judicial notice of the fact that Brookdale *made* these representations in settings in which accuracy is obviously important. *See Plaskett v. Wormuth,* 18 F.4th 1072, 1084 n.6 (9th Cir. 2021 (explaining that "[w]e do not take judicial notice of the truth of the factual assertions contained in the parties' correspondence with one another or with the EEOC, but only of the fact that the parties have *made* these competing representations" (emphasis in original)).

[11] *See, e.g.*, Dkt. Nos. 23-2 ¶¶ 4–5 ("The Brookdale Fountaingrove community was previously operated by Emeritus Corporation. Brookdale Senior Living Inc. acquired Emeritus Corporation in 2014 and, as a result, became the successor-in-interest to the residency agreements entered into by Emeritus Corporation."); 34 at 9 ("As a result of the merger, Emeritus became a wholly owned subsidiary of defendant Brookdale Senior Living Inc. As the parent of Emeritus, Brookdale can enforce agreements to which Emeritus is a party[.]") (internal citations omitted).

which requires that the putative class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs contend, and Brookdale does not dispute, that there are: (1) 3,693 persons who reside or have resided at the facilities and have mobility or vision disabilities; (2) more than 3,617 persons who reside or have resided at the facilities and require assistance from caregivers to perform basic activities of daily living; and (3) 7,111 persons who reside or have resided at the facilities and have agreed to the Residency Agreements and opted out of arbitration. *See* Mot. at 32, 41, 44. These numbers readily meet the numerosity requirement. *See True Health Chiropractic Inc. v. McKesson Corp.*, 332 F.R.D. 589, 606 (N.D. Cal. 2019) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." (alterations adopted and citations omitted)).

b. Adequacy of Representation

The Rule 23(a)(4) adequacy determination turns on two questions: (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? *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Similarly, Rule 23(g) requires courts to 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. Fed. R. Civ. P 23(g)(1)(A).

1. Named Plaintiffs' Adequacy

The Court finds that adequacy has been shown as to the Named Plaintiffs. The record contains no evidence that the Named Plaintiffs have a conflict of interest as to any other putative class member. Further, the Named Plaintiffs' claims are co-extensive with those of the putative class members and they have each submitted declarations attesting to their willingness to vigorously prosecute the action on behalf of the class. *See* Carlson Decl. ¶¶ 25–27; Vallette Decl. ¶¶ 33–35; Lytle Decl. ¶¶ 30–32; Fisher Decl. ¶¶ 37–39; Lindstrom Decl. ¶¶ 18–19; Jestrabek–Hart Decl. ¶¶ 39–41; Algarme Decl. ¶¶ 29–31. The Court therefore appoints Plaintiffs Stacia Stiner; Loresia Vallette, representative of the Lawrence Quinlan Estate; Heather Fisher, guardian ad litem

United States District Court
Northern District of California

United States District Court
Northern District of California

for Ralph Schmidt; Patricia Lindstrom, as successor in interest to the Estate of Arthur Lindstrom; Michele Lytle, Trustee of the Boris Family Revocable Trust; Bernie Jestrabek-Hart; Jeanette Algarme; and Ralph Carlson, Trustee of the Beverly E. Carlson and Helen V. Carlson Joint Trust, as class representatives.

2. Counsel's Adequacy

The Court finds that adequacy has also been shown as to Plaintiffs' counsel. The Court is not aware of, and Brookdale does not raise, any conflicts between Plaintiffs' counsel and the proposed class. Likewise, Brookdale does not dispute that Plaintiffs' counsel has and will continue to prosecute the action vigorously on behalf of the class. Plaintiffs' counsel have submitted several declarations attesting to their experience with class action lawsuits asserting disability rights violations and elder abuse. *See, e.g.*, Dkt. No. 278-1 ("Wallace Decl.") ¶¶ 4–10; Dkt. No.289 ("Stebner Decl.") ¶¶ 3–7; Dkt. No. 290 ("Marks Decl,") ¶¶ 6–7. Plaintiffs' counsel also represent that they are "committed to the full preparation of this case . . . willing to take this case to trial should that become necessary . . . . [and] committed to acting in the best interests of the putative classes." *See e.g.*, Wallace Decl. ¶ 13.

The Court therefore finds that the adequacy requirement is satisfied as to all classes and claims. The Court appoints the law firms of Schneider Wallace Cottrell Konecky LLP, Rosen Bien Galvan & Grunfeld LLP, Stebner & Associates, and Marks Balette Giessel & Young, P.L.L.C as class counsel in this case.

ii. Mobility and Vision Impaired Class

The Mobility and Vision Impaired Class would consist of all persons with disabilities who reside or have resided at a Brookdale residential care facility in California during the class period and who have visual disabilities or use wheelchairs, scooters, canes, or other mobility aids. Mot. at 13. This proposed class seeks to bring three different categories of ADA discrimination claims. First, they allege that the Facilities are filled with "access barriers" that violate the ADA and the Unruh Act ("Access Barriers Claims"). *Id.* at 12. They also allege that Brookdale has corporate policies regarding transportation and emergency evacuation services that violate the violate the ADA and the Unruh Act on their face ("Transportation Claims" and "Emergency Evacuation

United States District Court
Northern District of California

Claims"). *Id.*

To prevail on these ADA discrimination claims, the Mobility and Vision Impaired Class must establish that: (1) they are disabled within the meaning of the ADA; (2) Brookdale is a private entity that owns, leases, or operates a place of public accommodation; and (3) Brookdale "discriminated" against them by denying them "full and equal enjoyment" of places of public accommodation because of their mobility and visual disabilities. *See Lopez v. Catalina Channel Express, Inc.*, 974 F.3d 1030, 1033 (9th Cir. 2020); *Chapman*, 631 F.3d at 945 (citing 42 U.S.C. § 12182(a)).

a. Access Barriers Claims

The Access Barriers Claims allege that Brookdale discriminated against the Mobility and Vision Impaired Class under Title III of the ADA by failing to remove "architectural barriers" in its Facilities where such removal was "readily achievable." *Id.* § 12182(b)(2)(A)(iv). Readily achievable means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). And whether an element is an "architectural barrier" is defined, in part, by the ADA Accessibility Guidelines ("ADAAG"), which lay out the technical structural requirements of places of public accommodation.[12] *See Chapman*, 631 F.3d at 945. Promulgated by the U.S. Attorney General, these guidelines provide the objective standards for a facility's architectural features. *Id.* The ADAAG's requirements are precise and the difference between compliance and noncompliance with them is often a matter of inches. *Id.*

Plaintiffs allege that they have inspected fifty-two (52) of Brookdale's facilities and have found them all to contain various access barriers whose removal is readily achievable. Mot. at 12. For example, Plaintiffs contend that these facilities had ramps and curb ramps that were too steep or uneven, designated parking spaces that were not level, restrooms that lacked compliant grab

[12] In 2010, the U.S. Department of Justice published final regulations revising existing ADA regulations and updating the 1991 ADA Accessibility Guidelines. *See Johnson v. Simper Investments, Inc.*, No. 20-CV-01061-HSG, 2021 WL 4749410, at *4 (N.D. Cal. Oct. 12, 2021); *Johnson v. Wayside Property, Inc.*, 41 F. Supp. 3d 973, 976 n.3 (E.D. Cal. 2014) ("All architectural and structural elements in a facility are required to comply with the 1991 Standards to the extent that compliance is readily achievable; by contrast, the 2010 standards apply only to elements that have been altered in existing facilities, or that fail to comply with the 1991 Standards, on or after March 15, 2012.").

United States District Court
Northern District of California

bars and paper dispensers, bedrooms with clothing rods and thermostats mounted too high for wheelchair users, and dining room furniture that lacked compliant knee clearance for wheelchair users. *Id.* at 17–19.

The dispositive question is whether Plaintiffs' Access Barrier Claims present questions of law or fact that are common to the entire Mobility and Vision Impaired Class. Fed. R. Civ. P. 23(a)(2). Plaintiffs raise three questions that they contend can generate common answers apt to drive the resolution of the litigation. The Court finds that none of those questions satisfy the commonality requirement and accordingly will not certify the Mobility and Vision Impaired Class to pursue the Access Barrier Claims.

A common question exists where "the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citations and quotation marks omitted). An individual question, by contrast, is presented when "members of a proposed class will need to present evidence that varies from member to member." *Id.* Plaintiffs bear the burden of showing the existence of common questions and "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (quotation omitted) (emphasis in original).

1. Whether the Facilities Are "Public Accommodations" as Defined by the ADA.

Plaintiffs first contend that the threshold question of whether the Facilities are "public accommodations" as defined by the ADA is common to the entire Mobility and Vision Impaired Class. Mot. at 33. Because the answer to this question will resolve "an important threshold issue," they contend, it is "therefore apt to drive the resolution of this case for all class members." *Id.*

It is true that this question of law can be resolved on a classwide basis. The Court has already found at the motion to dismiss stage that Brookdale's facilities are public accommodations subject to the ADA. *See Stiner v. Brookdale Senior Living, Inc.*, 354 F. Supp. 3d 1046, 1058–59 (N.D. Cal. 2019). But whether the Facilities are subject to the ADA is not a question that can

"drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (citations omitted). It is potentially dispositive, of course, since Plaintiffs have no ADA claim if they cannot at minimum prove that the ADA applies to the Facilities. But whether the ADA applies is the first lap of what would be a very long race. The harder questions, like whether the Facilities are compliant with the ADA and whether any of the Plaintiffs suffered harm because of those alleged violations, would remain. *See Castaneda v. Burger King Corp.*, 264 F.R.D. 557, 564 (N.D. Cal. 2009) (finding that the threshold question of whether a defendant is legally responsible for accessibility violations to be a "straightforward" and "simple issue" that nonetheless could not drive resolution of the class's claims).

2. Whether the Facilities Violated the ADA or CBC Standards and Whether Brookdale Has Failed to Conduct "Readily Achievable" Barrier Removal.

Next, Plaintiffs contend that whether the Facilities violated the ADA or California Building Code (CBC) standards are "overarching predominant common questions that are capable of common answers for all class members based on the measurements and data from Plaintiffs' site inspections." Mot. at 34. Relatedly, Plaintiffs contend that whether Brookdale has failed to conduct "readily achievable" barrier removal is another important question common to all class members. *Id.* After reviewing the vast record before it, the Court cannot agree. Whether Brookdale's Facilities contain access barriers that violate the ADA and CBC is an "individual question" because members of the proposed Mobility and Vision Impaired Class "will need to present evidence that varies from member to member" to prove their cases. *Tyson Foods, Inc.*, 577 U.S. at 453 (citations omitted).

The typical disability class action lawsuit proceeds against a single facility on behalf of disabled consumers who use that facility. These cases are generally well-suited for class certification because they present common questions about the defendant's facility, polices, and practices, while permitting hundreds or even thousands of plaintiffs to pool claims which may be uneconomical to bring individually. *See, e.g.*, *Nevarez v. Forty Niners Football Co.*, LLC, 326 F.R.D. 562, 589 (N.D. Cal. 2018) (certifying a Rule 23(b)(3) class of persons using wheelchairs who alleged that Levi's Stadium in Santa Clara, California was not fully accessible to disabled

United States District Court
Northern District of California

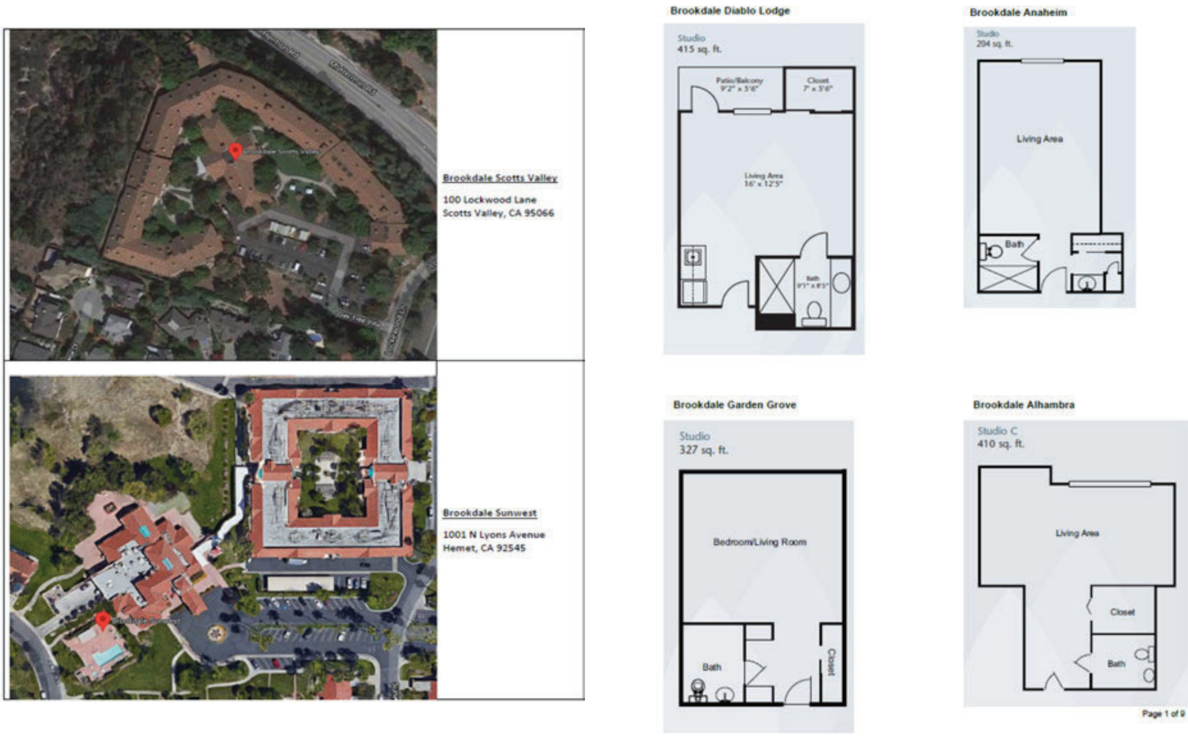
individuals). But lawsuits that seek to simultaneously challenge architectural features of dozens of different facilities are entirely different. In those cases, physical differences between the different locations may make it impossible to identify a common body of evidence that each proposed class member can rely on to resolve their claim.

As a case study, consider *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009). In that case, Judge Alsup declined to certify an ADA class of mobility-impaired persons who sought to challenge 92 different Burger King restaurants in California because, without a common body of evidence, the jury would have had to engage in "bone-crushing feature-by-feature and store-by-store analyses" to determine whether each store violated the ADA or CBC. *Id.* at 564. To properly litigate the case, both sides' experts would need to make (and then argue about) hundreds of measurements at each of the 92 restaurants—measurements that would vary depending on the configuration of each location. *Id.* at 567. Without a common core of salient facts, Judge Alsup reasoned, litigating 92 locations in a single case would be impossible. *Id.* at 569.

Castaneda's relevance to this case is obvious. The Access Barrier Claims here are sprawling in scope. They include a proposed class of thousands of individuals who lived at more than 80 different facilities over the past eight years. *See* Mot. at 32, 41, and 44. And the evidence shows that the proposed class members live or lived in facilities with widely differing layouts and units with different architectural features. *See* Dkt. No. 377-1 (Def. Ex. 416), Exs. 3, 7, 8 at 30–32, 43–66, 67–75.

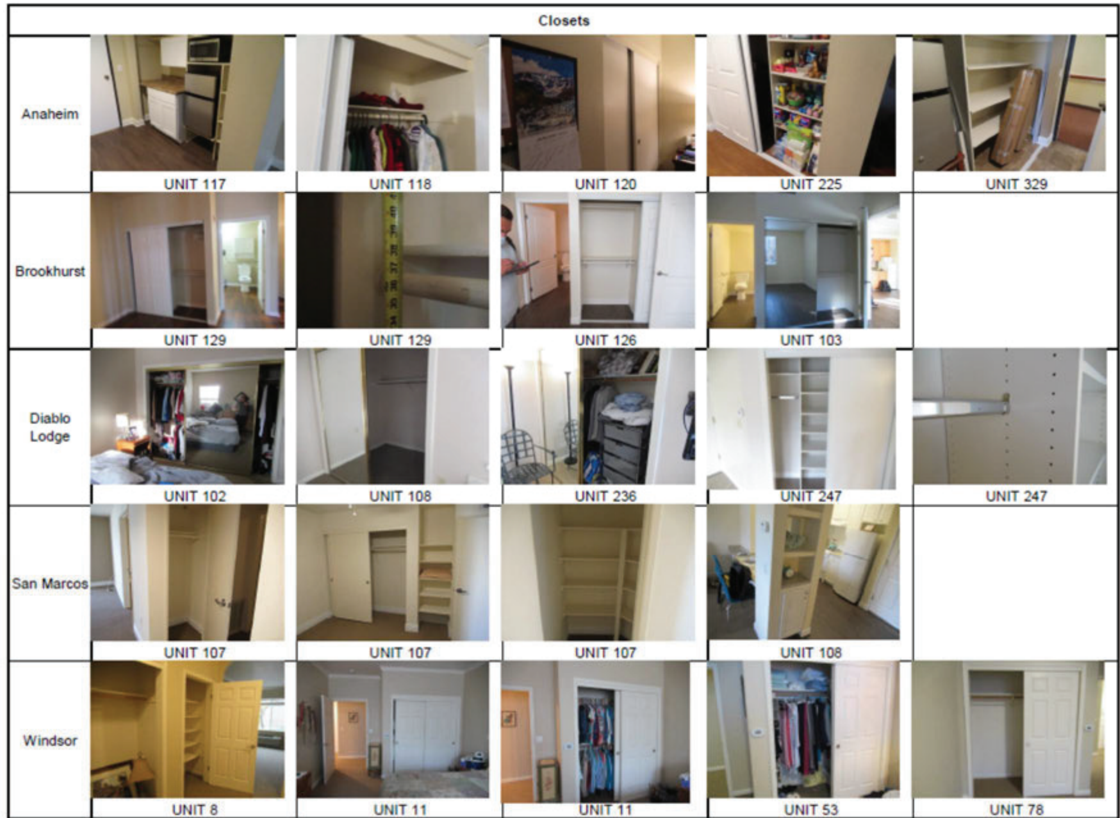
United States District Court
Northern District of California

1 For example, the Facilities have varying construction histories and different layouts, and
2 the individual studio units within those different facilities also appear to have different layouts.
3 To take just one example, compare an aerial photograph of Brookdale Scotts Valley with one of
4 Brookdale Sunwest and consider four different studios in four different Brookdale facilities:



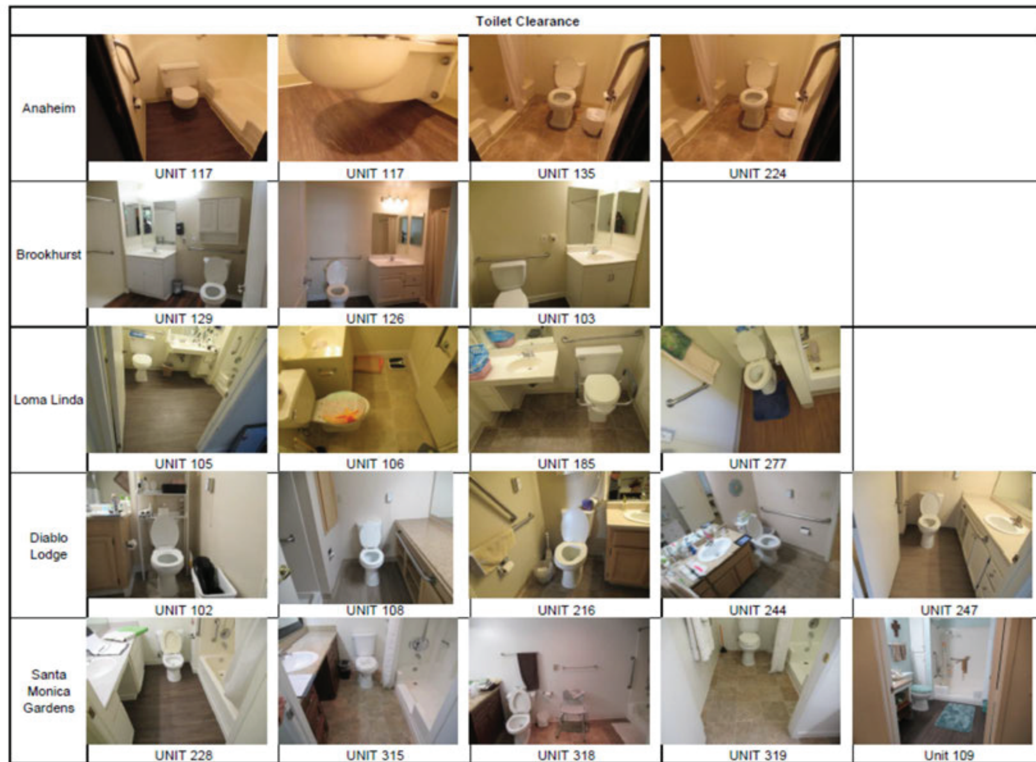
17 *Id.*, Exs. 7, 8 at 43–66, 67–75. Making the analysis harder, Plaintiffs do not challenge a narrow
18 category of design features. Across dozens of facilities, they contest "non-compliant parking,
19 entrances, paths of travel, ramps, restrooms, residential units, dining rooms" and more. Mot. at
20 34. Moreover, the record shows that the elements Plaintiffs allege are "access barriers" may also
21 vary in configuration and measurements not only by facility, but even by unit within each facility.
22 While Plaintiffs seek to challenge the closets in the Facilities for having hanging and storage space
23 placed out of the reach of a wheelchair user, for instance, they have not presented evidence of
24 common design characteristics among those closets. TAC ¶ 35. Here again, the evidence shows
25 variation by facility and sometimes even by unit:
26
27
28

United States District Court
Northern District of California



See Dkt. No. 377-1 (Def. Ex. 416), Ex. 9 at 81. The same is true about Plaintiffs' allegation that wheelchair users "do not have sufficient turning space in the bathrooms" and therefore cannot use their toilets unless they are able to transfer out of their wheelchair. TAC ¶ 35. The layouts of the bathrooms in the Facilities plainly vary:

United States District Court
Northern District of California



Dkt. No. 377-1 (Def. Ex. 416), Ex. 9 at 80.

This says nothing about the merits of the Access Barrier Claims, of course. Some architectural features in some units may violate the ADA and CBC, while others in different units may not. At this stage, the Court is only concerned with whether Plaintiffs' proposed question—which is whether Brookdale's Facilities contain access barriers that violate the ADA and CBC—can be answered by the same body of evidence. Since the members of the proposed Mobility and Vision Impaired Class appear to have encountered different architectural elements in different units and in different facilities, they could not simply rely on the same measurements or data to prove their Access Barrier Claims.[13]

[13] Plaintiffs disagree and contend that all class members can rely on the measurements and data from Plaintiffs' experts' site inspections. Mot. at 34. Plaintiffs' experts inspected 52 of Brookdale's facilities before their facilities were closed to further inspections because of the pandemic, and they contend that the Facilities have pervasive physical access barriers. *See id.* at 15 n.2. But the breadth of the experts' effort does not prove that Brookdale's liability (or lack thereof) can be shown with a common body of evidence. The class members may be able to

United States District Court
Northern District of California

The Court does not suggest that an ADA class action lawsuit can *never* proceed against an entity with multiple (or even dozens of) different facilities. But for such a lawsuit to be feasible, the proposed class would have to identify the common body of evidence that they can all use to prove their case. That is, they must show the glue that can hold together their factually different claims.

That glue could be a common blueprint or design characteristics across the multiple facilities. This is intuitive. When the challenged architectural features have substantial similarities across facilities, there is no need for the "bone-crushing" store-by-store and feature-by-feature analyses of which Judge Alsup warned in *Castaneda*. In that scenario, one common body of evidence exists. *See Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 610 (N.D. Cal. 2004) (certifying a class of mobility-impaired patrons who challenged access barriers at hundreds of Taco Bell restaurants because all the stores were built in accordance with centrally designed blueprints that resulted in common alleged accessibility violations), *amended in part*, No. C 02-5849 PJH, 2012 WL 3070863 (N.D. Cal. July 26, 2012). But here, the Facilities themselves cannot hold together the proposed Mobility and Vision Impaired Class's factually different claims. As explained above, Plaintiffs have failed to show that they challenge architectural features that are substantially similar in design across facilities.

A large multi-facility disabilities class may also band together to challenge a common offending policy or centralized decision-making. This also makes sense. When a centralized policy is responsible for common accessibility barriers, all class members can rely on evidence about the illegality of that policy to make their case. Thus, in *Californians for Disability Rights v. California Department of Transportation*, a court in this District certified a class to challenge thousands of barriers in different physical locations. 249 F.R.D. 334, 349 (N.D. Cal. 2008). The court found a common question in whether and to what extent the defendant had violated the ADA "through the use of improper design guidelines and the failure to ensure compliance with even

---

borrow the same experts to present their measurements and data, but that of course does not mean that they could use the same body of evidence to prove their cases.

United States District Court
Northern District of California

1 those deficient guidelines." *Id.* at 346. Similarly, in *Gray v. Golden Gate Nat. Recreational Area*,
2 a court certified a class to challenge accessibility barriers at a large national park because the
3 defendants had "centralized control over decision-making with respect to accessibility" within the
4 park. 279 F.R.D. 501, 513 (N.D. Cal. 2011).

5 Plaintiffs contend that they have identified a common offending policy here. As they see
6 it, Brookdale has a policy and practice of disregarding the existence of access barriers and of
7 failing to remove them. *See* Reply at 18. On a closer look, though, this "policy" is simply a
8 restatement of Plaintiffs' cause of action. It is not evidence of a uniform policy or practice.

9 The Ninth Circuit rejected a similar theory in *C.R. Educ. & Enf't Ctr. v. Hosp. Properties*
10 *Tr.*, 867 F.3d 1093, 1104 (9th Cir. 2017) ("*CREEC*"). The plaintiffs there, like Plaintiffs here,
11 sought to certify an ADA class on the ground that the defendant maintained an "unwritten, de
12 facto policy of non-compliance" at its 142 hotels that resulted in "widespread ADA violations."
13 *Id.* The defendant, however, contracted with management companies to operate the hotels and,
14 under those contracts, required the companies "to comply with all laws in their fulfillment of their
15 management agreement obligations." *Id.* The district court found it "unclear" how the
16 defendant's "lack of a policy" could serve as the "glue" holding together the plaintiffs' claims, and
17 it denied certification. *Id.* The Ninth Circuit affirmed, finding that the hotel operator before it
18 merely had a "policy of delegation, not of non-compliance," and a "policy *against having* uniform
19 practices [was] decidedly not a common issue." *Id.* at 1104–05.

20 Here, the Court finds that Plaintiffs have failed to identify a common offending policy or
21 centralized decision-making responsible for common accessibility barriers at the Facilities. Like
22 the defendant in *CREEC*, Brookdale operates the Facilities with lease and management
23 agreements that assign responsibility for maintenance, structural changes, and legal compliance to
24 various other entities. *See, e.g.*, Dkt. Nos. 366-1 (Def. Ex. 312) at 280, 369 (Def. Exs. 331–32).
25 In other words, to the extent Brookdale has a uniform policy on ADA compliance, it is a "policy
26 of delegation, not of noncompliance." *CREEC*, 867 F.3d at 1104. *CREEC* accordingly forecloses
27 Plaintiffs' argument that Brookdale's alleged *de facto* or informal policy of disregarding the
28 existence of access barriers can serve as the "glue" holding together their sprawling Access Barrier

United States District Court
Northern District of California

Claims. *Id.*

Undeterred, Plaintiffs point to deposition testimony in which Brookdale officials, including those testifying on behalf of Brookdale as a corporate representative, have taken the position that the Facilities are not covered by the ADA. *See* Dkt. No. 276-5 (Unredacted Motion to Certify the Class) at 16. They argue that each member of the class has effectively been exposed to a corporate-wide policy of noncompliance. The Court disagrees.

The legal theory has at least some potential merit. The *CREEC* panel recognized that a defendant's intentional noncompliance with the ADA could amount to an unofficial policy of discrimination, which could be a common issue weighing in favor of class certification. *CREEC*, 867 F.3d at 1105. The problem is that notwithstanding Brookdale's apparent legal judgment that the ADA does not apply to it, there is no factual basis in the record to conclude that Brookdale intentionally does not comply with the ADA. There is no evidence, for instance, of Brookdale discouraging executive directors at Facilities from removing access barriers on the grounds that the ADA does not apply. At bottom, Plaintiffs have failed to establish a pattern of intentional discrimination orchestrated by Brookdale.

In the end, Plaintiffs have not identified the kind of evidence of common architecture, barriers to access, or policies that can make the proposed question of whether Brookdale's new or altered facilities comply with federal and California disability laws capable of resolution by classwide proof. Proving that each of Brookdale's facilities violated the ADA or CBC would instead require dozens of complicated trials within a trial. Plaintiffs have not met their burden of identifying a single common question that can drive the resolution of the Access Barrier Claims.

The Court therefore declines to certify the Mobilities and Vision Impaired Class to pursue the Access Barrier Claims.

b. Transportation Claims

The Mobility and Vision Impaired Class also contends that Brookdale's policies and practices regarding transportation on its vans and buses violate the ADA and the Unruh Act. Mot. at 20. Brookdale provides transportation services to its residents using buses and vans. Mot. at 35. Residents use those buses and vans to attend events like shopping trips, medical and other

appointments, scenic drives and other scheduled outings. *Id.* Plaintiffs' Transportation Claims involve two separate and distinct theories: one regarding the Fleet Safety Policy and another regarding the number of accessible buses and vans available at each facility. The Court finds that the Transportation Claims are not suitable for Rule 23(b)(3) certification under either theory but are suitable for Rule 23(b)(2) certification under the Fleet Safety Policy theory.

Plaintiffs first contend that Brookdale's Fleet Safety Policy violates federal regulations. That policy requires scooter and power wheelchair users to transfer out of their scooter or wheelchair and onto either manual wheelchair or a passenger seat within the van or bus in order to ride. *See* Dkt. No. 276-7 ("Unredacted Wallace Decl.") ¶ 18, Ex. 5 at 99, Ex. 6 at 124–25; Ex. 7 at 132. Residents, including some named plaintiffs, have testified that Brookdale enforces this requirement. *See* Dkt. No. 278-2, Table 7-8.

Plaintiffs contend that Brookdale's "Fleet Safety Policy" is directly contrary to relevant Department of Transportation regulations promulgated to implement Title III of the ADA, which provide that a public accommodation *may only request* that the user of a wheelchair or scooter transfer from their mobility device. *See* 49 C.F.R. § 37.165(e). They therefore contend that the Fleet Safety Policy on its face violates Title III of the ADA.[14]

Plaintiffs also contend that the Facilities generally have too few accessible vans and buses, which in practice denies residents with mobility disabilities "full and equal access to and enjoyment of" Brookdale's transportation services and therefore violates Title III of the ADA. Mot. at 20. As alleged, the Facilities typically only have one or two accessible vans or buses per facility which, in turn, can only transport up to two wheelchair or scooter users at a time. *Id.* Plaintiffs allege that this is not enough capacity to meet the needs of the relatively large number of wheelchair and scooter users who reside at most of Brookdale's facilities, which often number ten

---

[14] It is not clear to the Court whether Plaintiffs are proceeding under a Title III access barrier claim or a Title III policy modification claim, but this is not an issue the Court needs to address at the class certification stage, particularly as it is unlikely that the particular theory of discrimination would make much practical difference at this stage. *Cf. Karczewski v. DCH Mission Valley LLC, 862 F.3d 1006, 1012* (9th Cir. 2017) (stating that "even assuming that some factual scenarios plausibly could fit within more than one of Congress' five illustrative examples of discrimination, we fail to see what problems that would cause").

United States District Court
Northern District of California

or more per facility. *Id.*

1. Rule 23(a) Analysis

a. Commonality

Plaintiffs bear the burden of showing both that there are questions of law or fact common to the class and 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). Beginning with commonality, Plaintiffs contend that whether Brookdale's Fleet Safety Policy and alleged practice of maintaining one or two vehicles per facility complies with the ADA and the Unruh Act raises common questions capable of common answers. Mot. at 35. The Court agrees that the Transportation Claims based on the Fleet Safety Policy can be resolved based on a common body of evidence. On the other hand, the Transportation Claims based on the number of vans available at each facility cannot.

In the Fleet Safety Policy, Plaintiffs have identified a common offending policy that by its plain terms applies across all facilities. *See* Unredacted Wallace Decl., Ex. 6 at 129 ("The procedures outlined apply to communities and corporate offices; and to associates who drive vehicles for company business[.]"). Because Plaintiffs' Transportation Claims are functionally a facial challenge to the legality of Brookdale's Fleet Safety Policy, this issue is susceptible to generalized, classwide proof. *See Achem Prod. Inc. v. Windsor*, 521 U.S. 591, 623 (1997). This issue hinges on a central question of law that is capable of classwide resolution. A common body of evidence exists as to this theory.

Brookdale disagrees. It contends that commonality is not met because Plaintiffs have not shown a "common practice of adopting or following the Fleet Safety Policy or any other transportation policy" across the Facilities. Opp. at 34. But as explained above, Plaintiffs have provided sufficient evidence that the Fleet Safety Policy is a corporate-wide policy, and variation in the implementation of a corporate policy does not defeat commonality. As the Ninth Circuit has explained, "[t]he unsurprising fact that some . . . decisions are made locally does not allow a company to evade responsibility for its policies." *Staton v. Boeing Co.*, 327 F.3d 938, 956 (9th Cir. 2003); *see also Maney v. State*, No. 6:20-CV-00570-SB, 2022 WL 986580, at *16 (D. Or. Apr. 1, 2022) ("Courts consistently certify classes . . . where class members' claims are based on a

centralized policy or procedure, even when those policies or procedures are filtered down through multiple layers of implementation and management.”). In the end, the Court finds that the Transportation Claims based on the Fleet Safety Policy raise common questions capable of common answers.

On the other hand, Plaintiffs’ theory regarding the number of vans available at each facility is not susceptible to classwide proof. Plaintiffs have provided evidence that most of the facilities had one or two accessible vehicles. *See* Mastin Decl. ¶ 78 (“Almost all the facilities employed one shuttle vehicle equipped with a lift that can accommodate no more than two wheelchair users. Some facilities had two such shuttles.”). Plaintiffs also argue that their assertion that Brookdale lacks sufficient accessible vans and buses can be proven (or disproven) by comparing the number of existing accessible spaces in Brookdale’s vehicles per facility to the total population of mobility disabled persons who require such accessible spaces. *See* Dkt. No. 558 (“Hearing Transcript”) at 36–37. To the extent that Plaintiff is suggesting that the number of accessible spaces and the number of mobility disabled people can be compared on a company-wide basis, this comparison would be effectively meaningless. Even a company-wide shortfall would provide no insight into whether any given *facility* had a shortage of accessible vehicles. That could only be determined by comparing the number of mobility disabled residents at each facility to the number of accessible transportation vehicles available at that facility. And to the extent that this is the approach that Plaintiffs are suggesting, it is clearly a facility-by-facility inquiry. Accordingly, this theory is not susceptible to common, classwide proof.

b. Typicality

The typicality requirement is satisfied as to the Fleet Safety Policy theory. Typicality focuses on the class representative’s claim—but not the specific facts from which the claim arose—and ensures that the interests of the class representative align with the interests of the class. *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (citation 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. *Id.*

Plaintiffs’ claims are reasonably co-extensive with those of the Mobility and Vision

United States District Court
Northern District of California

Impaired Class. All the named plaintiffs are or were residents with mobility disabilities (except Plaintiff Schmidt, who is blind) or represent such persons. Mot. at 37. All allegedly were or are subject to Brookdale's transportation policies and practices. *Id.* Ms. Stiner and Ms. Jestrabek-Hart are current residents of Brookdale and would therefore have standing to seek injunctive relief. *Id.* Plaintiffs' claims thus arise from the same general course of conduct by Brookdale and are based on the same legal theories. Accordingly, their Transportation Claims based on the Fleet Safety Policy are typical of those of the proposed class.

Because the numerosity and adequacy requirements are also satisfied, see discussion *supra* at § III.D.i., Plaintiffs have met their burden as to each of the four requirements of Rule 23(a) with respect to the Mobility and Vision-Impaired Class as to the Fleet Safety Policy theory. The Court will next assess whether that class meets at least one of the requirements of Rule 23(b).

2. Rule 23(b)(2) Analysis

The Mobility and Vision Impaired Class seeks injunctive relief requiring Brookdale to provide full and equal access to and enjoyment of its transportation services and activities. *See* Mot. at 38. A class may seek injunctive relief 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. This provision does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. *Id.* And 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.

The Ninth Circuit has explained that Rule 23(b)(2)'s requirements are "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." *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 971 (9th Cir. 2019) (quoting *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014)). Where all members of the putative class are allegedly exposed to harm from a specified set of centralized policies and practices, the defendants are alleged to have "acted or refused to act on grounds that apply generally to the class." *Id.* (quoting Fed. R. Civ. P. 23(b)(2)).

That reasoning applies here. Plaintiffs have not brought claims that must be redressed through individual injunctions. Rather, a single, indivisible injunction ordering Brookdale to bring its Fleet Safety Policy into compliance with the ADA "would provide relief to each member of the class" and thus satisfy Rule 23(b)(2). *Dukes*, 564 U.S. at 360. Moreover, as the Ninth Circuit has also made clear, "the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions" generally and cases against parties charged with unlawful, class-based discrimination specifically. *Parsons*, 754 F.3d at 686 (citing *Windsor*, 521 U.S. at 614, (1997)). In these cases, the fact that the alleged discriminatory conduct may have affected different members of the class in different ways does not prevent certification under Rule 23(b)(2). *See Davis v. Lab'y Corp. of Am. Holdings*, 604 F. Supp. 3d 913, 926 (C.D. Cal. May 23, 2022). This is such a case. Brookdale is alleged to offer transportation services that cannot be fully used by those with vision and mobility impairments. It therefore is alleged to have acted "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. The Court finds that the Mobility and Vision Impaired Class meets the requirement of Rule 23(b)(2) as to the Fleet Safety Policy theory.

Accordingly, the Court certifies the Wheelchair and Scooter Users Subclass, defined as follows, under Rule 23(b)(2) to pursue the Transportation Claims as to the Fleet Safety Policy theory:

> All persons with disabilities who use wheelchairs, scooters, or other powered mobility aids and who reside or have resided at a residential care facility for the elderly located in California and owned, operated and/or managed by Brookdale during the three years prior to the filing of the Complaint herein through the conclusion of this action, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration.[15]

---

[15] Nothing in the record suggests that the redefined Wheelchair and Scooter Users Subclass would not meet the numerosity requirement. Defendants themselves state that "Plaintiffs' disability expert identified only 109 putative class members who used a motorized wheelchair and 162 who used a scooter." Opp. at 35. Even if these numbers were halved, the redefined class would easily clear Rule 23(a)'s numerosity requirement. *See True Health Chiropractic Inc*, 332 F.R.D. at 606 ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members.").

3. Rule 23(b)(3) Analysis

The Mobility and Vision Impaired Class also seeks to recover damages based on the Transportation Claims. This requires two different inquiries. Under Rule 23(b)(3), the Court must assess 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). As explained below, the Court finds the redefined Wheelchair and Scooter Users subclass does not meet the Rule 23(b)(3) requirements.

a. Predominance

Rule 23(b)(3) only allows damages class actions if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry presumes that common issues of fact or law exist and focuses on whether the common questions "present a significant aspect of the case and . . . . can be resolved for all members of the class in a single adjudication." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019) (en banc). If so, there is "clear justification for handling the dispute on a representative rather than on an individual basis." *Id.* (citations omitted). If just one common question predominates, "the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately." *Id.* (citations omitted).

The Court has found that whether Brookdale's Fleet Safety Policy violates the ADA and the Unruh Act raises common questions capable of common answers. The next step is to give "careful scrutiny" to the relationship between those common questions and any individual questions. *Tyson Foods, Inc.*, 577 U.S. at 453. As Brookdale sees it, individual questions predominate because "the vast majority" of Plaintiffs' originally proposed class could not have encountered or been impacted by Brookdale's transportation policies. Opp. at 35. As Brookdale notes, Plaintiffs' own expert identified only 109 putative class members who used a motorized wheelchair and 162 who used a scooter—which, if true, would mean that a maximum of 7% of the Mobility and Vision Impaired Class could even have encountered a policy regarding mobility aid

transfers. *Id.*

The Court agrees that, for purposes of pursuing the Transportation Claims, the putative class as first proposed was significantly overinclusive. But "the problem of a potentially over-inclusive class can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc., On Behalf of Itself & All Others Similarly Situated*, 143 S. Ct. 424 (2022) (internal citations and quotation marks omitted). Here, the Court adopts the same amended class definition it used to certify the Rule 23(b)(2) class, namely users of motorized wheelchairs, scooters, or other powered mobility aids, see discussion *supra* at § III.D.ii.b.2, for the purpose of its Rule 23(b)(3) analysis. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017) ("Rule 23(c) enables district courts to divide classes into subclasses or certify a class as to only particular issues.").

Brookdale has another objection. It essentially argues that this subclass would still face predominant individualized questions about how many class members suffered an injury. Opp. at 35. It argues that, whatever the Fleet Safety Policy says on its face, in practice "many Plaintiffs and disabled residents confirmed that their [Facilities] allowed them to sit on their scooters while boarding vehicles and during transit." *Id.* As Brookdale sees it, this evidence shows that determining which, if any, of the class members suffered an injury as a result of the challenged Fleet Safety Policy would require a series of individualized inquiries. *Id.*

Unsurprisingly, Plaintiffs have the exact opposite take. In their view, if they prevail on their facial challenge to Brookdale's Fleet Safety Policy, then every class member who is a wheelchair or scooter user necessarily suffered an injury. *See* Hearing Transcript at 29–31. As the Court understands it, Plaintiffs' theory of injury proceeds as follows. Their damages claims arise under the Unruh Act, which authorizes statutory damages for each and every ADA violation "up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000)[.]" Cal. Civ. Code § 52(a); *id.* § 51(f); *see also Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 673 (2009). The Unruh Act does not require class members to prove that they suffered

1 "actual damages" to recover the minimum statutory damages of $4,000; all the class members
2 need to prove is an ADA violation. *See Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir.
3 2007) ("The litigant need not prove she suffered actual damages to recover the independent
4 statutory damages of $4,000."). So if Brookdale violated the ADA by providing unequal
5 transportation services to residents who use wheelchairs and scooters, then each of those residents
6 suffered an ADA injury by virtue of the provision of an unequal service, and thus may recover
7 statutory damages under the Unruh Act. To Plaintiffs, then, the existence of injury is a common
8 question that weighs in favor of predominance and certification, not an individual one.

9 The Court finds itself not entirely persuaded by either of these two extremes. The extent to
10 which any class member suffered a concrete injury as a result of Brookdale's transportation
11 policies raises individual questions. And the Court must ensure that only those who suffered a
12 concrete injury ultimately recover damages. But the Court may not deny class certification merely
13 because the proposed class may contain some uninjured class members.

14 To begin with, Plaintiffs are correct that the Unruh Act does not require them to show that
15 they suffered any personal exclusion or "difficulty, discomfort, or embarrassment" to recover the
16 statutory damages they seek. *See Davis*, 604 F. Supp. 3d at 929. But as a matter of Article III
17 standing, "an important difference exists between (i) a plaintiff's statutory cause of action to sue a
18 defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering *concrete*
19 *harm* because of the defendant's violation of federal law." *TransUnion*, 141 S. Ct. at 2205
20 (emphasis added). The California Legislature is free to authorize plaintiffs to recover from
21 defendants who violate a provision of the ADA, "[b]ut under Article III, an injury in law is not an
22 injury in fact." *Id.* The Supreme Court has made clear that only those plaintiffs who have been
23 "concretely harmed" by a defendant's statutory violation may sue that private defendant over that
24 violation in federal court, and every class member must have full Article III standing in order to
25 recover individual damages. *Id.* at 2205, 2208.

26 Given these principles, Plaintiffs' position goes too far. Even if Brookdale's policies and
27 practices are facially unlawful under the ADA, a litigant still must have Article III standing to
28 challenge them. *See Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) ("Even if the

1 ADA labeled all violations of that act and its implementing regulations as discrimination—which
2 it does not—*TransUnion* makes clear that a statutory violation alone, however labeled by
3 Congress, is not sufficient for Article III standing") (internal citations omitted); *Mielo v. Steak'n*
4 *Shake Operations Inc.*, 897 F.3d 476, 479 (3d. Cir. 2018) ("To the extent that Plaintiffs allege only
5 a harm in the mere existence or absence of particular corporate policies, Plaintiffs lack standing.").
6 The proposed class members do not have to prove that Brookdale's transportation policies
7 *completely precluded* them from using the transportation services, of course. *See Chapman*, 631
8 F.3d at 947 ("Under the ADA, when a disabled person encounters an accessibility barrier violating
9 its provisions, it is not necessary for standing purposes that the barrier completely preclude the
10 plaintiff from entering or from using a facility in any way."). But to have Article III standing to
11 challenge Brookdale's transportation policies and practices, each class member still must show
12 how those policies and practices in some way interfered with their full and equal enjoyment of
13 Brookdale's transportation services. *See id.* ("[T]he barrier need only interfere with the plaintiff's
14 'full and equal enjoyment' of the facility . . . . [And] a 'barrier' will only amount to such
15 interference if it affects the plaintiff's full and equal enjoyment of the facility on account of his
16 particular disability."). So even if Brookdale's Fleet Safety Policy is found to violate the ADA on
17 its face, the Court does not see how a power wheelchair user who, for example, was nevertheless
18 always allowed to sit on their scooter while boarding vehicles and during transit could, without
19 more, have Article III standing to recover under the Unruh Act. *See Doran v. 7-Eleven, Inc.*, 524
20 F.3d 1034, 1047 (9th Cir. 2008) (explaining that "[a]n ADA plaintiff who has encountered or has
21 personal knowledge of at least one barrier related to his or her disability when he or she files a
22 complaint, and who has been deterred from attempting to gain access to the public accommodation
23 because of that barrier, has suffered an injury in fact for the purpose of Article III").
24 The Court need not decide the merits of Plaintiffs' Transportation Claims at this stage. *See*
25 *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants
26 courts no license to engage in free-ranging merits inquiries at the certification stage."). It is
27 enough to recognize that whether and to what extent the members of the proposed class were
28 concretely injured by Brookdale's transportation policies raises evidentiary questions that likely

will vary by class member. In other words, the Transportation Claims raise important "individual questions." *See Tyson Foods, Inc.*, 577 U.S. at 453 ("An individual question is one where members of a proposed class will need to present evidence that varies from member to member[.]").

At the same time, the Court rejects Brookdale's view that any class pursuing the Transportation Claims would necessarily have too many uninjured members to be certified. Even if, as Brookdale alleges, there might be "many" or "numerous" uninjured members in the putative class, at least in this Circuit there is no per se rule preventing district courts from certifying a class that may include more than a *de minimis* number of uninjured class members. *Olean*, 31 F.4th at 669 ("[W]e reject the dissent's argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members."). Rather, "[w]hen individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." *Id.* at 668.

Here, the Court finds that such individualized inquiries do predominate. As redefined, the subclass includes only wheelchair, scooter, and other powered mobility aid users. But an individualized inquiry would be needed to determine whether class members actually suffered an injury sufficient to confer Article III standing to bring a claim because the standard at issue focuses on whether the Fleet Safety Policy "affect[ed] the plaintiff's full and equal enjoyment of the facility on account of his particular disability." *Chapman*, 631 F.3d at 947. As a result, individualized inquiry is necessary to determine Brookdale's *liability* to any given class member as a threshold matter. This class does not meet the predominance requirement because it "raises complicated questions of who was ever exposed to [the policy], and whether those who were exposed were harmed in a way giving rise to liability." *Castillo v. Bank of Am., NA*, 980 F.3d 723, 733 (9th Cir. 2020). In *Castillo*, a case where Plaintiff alleged that Defendant underpaid its workers, the Ninth Circuit affirmed the district court's denial of class certification, reasoning that:

> This case differs from *Tyson Foods* because [Plaintiff] cannot provide a common method of proof to establish [Defendant's] classwide liability. Unlike in *Tyson Foods*, here there is no common proof of liability, because a large portion of the proposed class was never exposed to the challenged formulas or was not underpaid, and thus could not have been injured by those formulas in the first place.

Id. at 732. Here, the Court cannot determine even roughly how many class members were injured based on common proof. Plaintiffs have provided the Fleet Safety Policy as evidence of Brookdale's classwide liability. But the policy is not enough to establish liability as to individual class members, because they have not suffered an injury unless the policy affected their full and equal enjoyment of the facility, a highly individualized inquiry. In other words, individualized issues regarding who knew of or encountered enforcement of the Fleet Safety Policy predominate over common ones. *See Doran*, 524 F.3d at 1047.

Accordingly, the Court declines to certify the Wheelchair and Scooter Users Subclass under Rule 23(b)(3) to pursue the Transportation Claims.

c. Emergency Evacuation Claims

The Mobility and Vision Impaired Class also contends that Brookdale's emergency evacuation policies discriminate against residents with mobility disabilities. Specifically, they claim that the emergency manuals and disaster plans used by the Facilities: (1) fail to identify the specific steps regarding how residents who are wheelchair or scooter users will be transferred into evacuation chairs and then transported up or down the stairs and out of the facility; (2) fail to ensure that accessible transportation is provided to residents with mobility disabilities; and (3) fail to specify that residents with mobility and/or vision disabilities will be evacuated to assembly points or relocation sites that are accessible to them. Mot. at 21–22. To support these claims, Plaintiffs rely heavily on the Kailes Declaration, in which Ms. Kailes provides specific examples of alleged deficiencies in Brookdale's Emergency Manuals and explains that she reviewed supplemental Emergency and Disaster Plans "for a sample of facilities," which she also determined to be inadequate. *See* Kailes Decl. ¶¶ 24–26.

The Court finds that the Emergency Evacuation Claims fail at the threshold because

Plaintiffs have not shown that they can be resolved based on a common body of evidence. The Emergency Manual is not the kind of "common offending policy" that can drive resolution of Plaintiffs' claims. It instead reads like a general guidelines document. *See* Unredacted Wallace Decl., Ex. 8 at 148 (Emergency Manual "establish[es] responsibilities and to provide general guidelines for communication and corporate support during weather-related and other emergencies which may require evacuation or notification to families.") (internal punctuation omitted). Critically, the Emergency Manual makes clear that it is not intended to replace *facility-specific* plans. *See id.* ("**The procedures in this document do not replace the community-specific Emergency Preparedness Plan**") (emphasis in original). And it is undisputed that the Facilities in fact adopt their own emergency evacuation plans, which vary by facility. *See, e.g.*, Dkt. No. 411-6 (Def. Ex. 507). Thus, Brookdale argues that many facility emergency evacuation plans "in fact cover the specific issues that Plaintiffs claim are lacking." *See* Opp. at 35–36; *see also id.* at 31–32 ("For example, the Bakersfield Community plan speaks to the use of stair chairs to assist residents with mobility impairments who need to be evacuated from upper and lower levels in the event of an emergency, with each stair chair holding one to two people.") (citing Dkt. No. 493-34 (Def. Ex. 454) at 100). Plaintiffs respond that "[a]ll plans suffer from similar deficiencies" and cite to Ms. Kailes's reply declaration as support for the argument that "[n]either Defendants' Emergency Manual nor its facility plans are sufficient to provide residents with disabilities with equal access to emergency evacuation services." Reply at 11 (citing Kailes Reply Decl. ¶¶ 5–24). The Court does not find Ms. Kailes conclusory statements that all facility emergency plans are deficient in the same way to be persuasive in light of the evidence Brookdale has provided that facilities adopt their own emergency evacuation plans. Since the putative class members are subject to dozens of different local policies and practices, the factfinder could not resolve the Emergency Evacuation Claims based on a common body of evidence.

The Court finds that the commonality requirement is not met as to the Emergency Evacuation Claims and thus declines to certify a class as to those claims. *See CREEC*, 867 F.3d at 1104–06 (finding that "policy *against having* uniform practices [was] decidedly not a common issue").

United States District Court
Northern District of California

iii. Disabilities Class

The Disabilities Class would consist of all persons with disabilities who reside or have resided at a Brookdale residential care facility for the elderly in California during the class period and who require assistance with activities of daily living. TAC ¶ 197. This class alleges that Brookdale violated Title III of the ADA by failing and refusing to make reasonable modifications to its caregiving staffing policies and practices ("Reasonable Modification Claims"). *See* Mot. at 41–42. Although Plaintiffs' motion seeks to certify a Rule 23(b)(3) class to pursue damages, *see id.* at 44, at oral argument Plaintiffs' counsel withdrew this request. *See* Hearing Transcript at 56 ("THE COURT: Just to be clear, though, are you withdrawing the request for (b)(3) certification of a damages class as to that second class? MR. WALLACE: Yes."). The Reasonable Modification Claims are subtle and require some context to understand. The Court first provides that context and then finds that the Reasonable Modification Claims are not suitable for class certification under Rule 23(b)(2).

Plaintiffs allege that Brookdale systemically understaffs the Facilities. *See* Mot. at 12. As a result, they contend, residents are routinely denied essential services regarding their activities of daily living, like help with toileting, dressing, grooming, bathing, ambulation, escorting, medication administration, and housekeeping. *Id.* Plaintiffs also allege that Brookdale has refused their requests to make a reasonable modification in policy and practice to provide sufficient staffing. *Id.* Instead, they contend, Brookdale continues to staff the Facilities based on corporate staffing procedures that are not reasonably designed to ensure the amount of staffing necessary to deliver the services residents need. *Id.*

On those grounds, Plaintiffs allege that Brookdale has violated Title III of the ADA by failing and refusing to make reasonable modifications in policy or practice that are necessary for Plaintiffs to have "full and equal enjoyment of the goods, services, facilities, privileges, advantages, [and] accommodations" of Brookdale's assisted facilities. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.302(a). To prevail on their reasonable accommodation claims, Plaintiffs must show: (1) they are disabled as that term is defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant employed a

discriminatory policy or practice; and (4) the defendant discriminated against the plaintiffs based on the plaintiffs' disability by (a) failing to make a requested reasonable modification that was (b) necessary to accommodate the plaintiffs' disability. *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004).

a. Overview

An overview of how Brookdale staffs its Facilities is necessary to understand Plaintiffs' claims. [REDACTED] Unredacted Wallace Decl., Ex. 20 at 1069. [REDACTED] *See id.*, Ex. 25 at 1231; Ex. 23 at 1165; Ex. 26 at 1273; Ex. 27 at 1286; Ex. 28 at 1301; Ex. 51 at 1900. [REDACTED] *Id.*, Ex. 23 at 1165; Ex. 26 at 1273; Ex. 51 at 1905. [REDACTED] *Id.*, Ex. 26 at 1273. [REDACTED]. *Id.*, Ex. 23 at 1165; Ex. 26 at 1273; Ex. 27 at 1286; Ex. 30 at 1322. [REDACTED] *Id.*, Ex. 24 at 1192, 1198. [REDACTED] *Id.*, Ex. 24 at 1195.

Plaintiffs' central allegation is that the "Brookdale Norms" values (also "norms" or "task times") that Brookdale uses to calculate the Labor Benchmarks for the Facilities are "far too low" and are "not realistically calculated" to provide caregivers with enough time to perform particular tasks. Mot. at 27. As alleged, these "systemic" flaws in Brookdale's corporate staffing policies

United States District Court
Northern District of California

place all residents at "substantial and unreasonable risk" of not receiving promised services, including assistance with activities of daily living. *Id.* at 28. And as evidence, Plaintiffs cite declarations of residents and their families describing the effects of staffing shortages, which allegedly include falls resulting in broken bones or hospitalization; missed meals resulting in weight loss, dehydration, and UTIs; long response times to call buttons leaving residents to lie on the floor for hours before being discovered; missed bathing; soiled clothing and unchanged diapers; and other harms to resident safety and dignity. *Id.*

There is significant disagreement about the extent to which the Labor Benchmarks impact staffing conditions at each Facility. Brookdale characterizes "Service Alignment" as just a "support function" and contends that Plaintiffs have not shown that it maintains any organization-wide staffing policy or practice. Opp. at 38. But the evidence shows that Facility leaders face at least some pressure to comply with the Labor Benchmarks. [REDACTED] . Unredacted Wallace Decl., Ex. 24 at 1198. [REDACTED] *Id.* [REDACTED] *See, e.g.*, *id.*, Exs. 31–42. [REDACTED] *Id.*, Exs. 46–49, Ex. 51 at 1941. [REDACTED] *Id.*, Ex. 46 at 1408.

[REDACTED] *See* Opp. at 38 (citing Dkt. Nos. 365-1 (Def. Ex. 225), 376-1 (Def. Ex. 392) at 40–48). [REDACTED]

United States District Court
Northern District of California

1 [redacted]. *See id.* [redacted]
2 [redacted]
3 [redacted] *Id.* at 35.

Plaintiffs allege that they, on behalf of the proposed class, have requested that Brookdale make a "reasonable modification" in its policies and practices regarding caregiver staffing to increase the amount of such staffing so that it is always enough to provide the assisted living services specified in the residents' assessments. *See* Mot. at 41–42. Specifically, Plaintiffs' staffing expert, Dr. Cristina Flores, analyzed the task times Brookdale uses to calculate the Labor Benchmarks and concluded that the times related to bathroom assistance and escorting/mobility assistance are "unreasonably low" and "simply not credible." Flores Decl. ¶ 71. Plaintiffs contend that modifying Brookdale's staffing policies and procedures so that they are based on reasonable task times for those care services is necessary to accommodate their disabilities and is "eminently reasonable." Mot. at 42. And Brookdale's alleged failure to make this reasonable accommodation, Plaintiffs contend, violates Title III of the ADA. *See Fortyune*, 364 F.3d at 1082.

b. Rule 23(a) Analysis

Plaintiffs bear the burden of showing both that there are questions of law or fact common to the class and 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). Beginning with commonality, Plaintiffs contend that whether the ADA requires Brookdale to increase the amount of caregiver staffing is a common question capable of a common answer. *See* Mot. at 41; Reply at 24. But the Court is not convinced that this question is capable of classwide resolution.

Courts have been wary of certifying claims based on a defendant's failure to adequately staff its facilities because such claims tend to require granular and individualized inquiries about injury and causation. To determine whether and to what extent a class member suffered an injury that was caused by understaffing, for example, a factfinder would have to assess how each facility was staffed, the acts or omissions of staff, and the impact of the alleged wrongful acts or omissions on a particular resident. This inquiry would vary by facility, by disability, by resident, and perhaps even by shift. These kinds of individualized issues have been found to preclude class

certification. *See, e.g.*, *Bartels v. Saber Healthcare Grp., LLC*, No. 5:16-CV-283-BO, 2020 WL 6173566, at *2 (E.D.N.C. Oct. 21, 2020) (denying certification of understaffing claims in light of individualized issues as to (1) staffing levels across facilities and the time period; and (2) the putative class members' care plans and needs); *Kohn v. Am. Hous. Found., Inc.*, 178 F.R.D. 536, 543 (D. Colo. 1998) (denying certification of understaffing claims against a skilled nursing facility because of individualized questions as to whether the class members were exposed to and harmed by defendant's alleged understaffing); *Passucci v. Absolut Center for Nursing and Rehabilitation at Allegany, LLC*, No. 2010/6955, 2014 WL 7912858, at *21 (N.Y. Sup. Ct. Jan. 10, 2014) (denying certification of understaffing claims in light of individualized issues as to how each facility was staffed, the acts or omissions of short staff, and the impact of the alleged wrongful acts or omissions on the patients).

Plaintiffs' novel Reasonable Modification Claims attempt to avoid this result by reframing the injury that the proposed class members suffered. Their theory of injury is that the class members have suffered discrimination as defined by Title III of the ADA because they asked for a joint "reasonable modification"—i.e., that Brookdale change its policies and practices regarding caregiver staffing to increase the amount of such staffing—that is "necessary" to accommodate the class members' disabilities. And whether the request that they have made is "reasonable," they contend, is a determination that can be made on behalf of the Disabilities Class as a whole.

The fundamental problem with this theory is that although Plaintiffs try to repackage the injury they suffered from Brookdale's alleged understaffing, they have traded one fact-specific and individualized inquiry for another. To determine whether a modification is "reasonable," the factfinder must engage in a "fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it." *Fortyune*, 364 F.3d at 1083; *see also Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 844 (9th Cir. 2004) ("[T]he determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry."). By nature, this is "an individualized inquiry." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) ("To comply with this command, an individualized inquiry must be made to

United States District Court
Northern District of California

determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person[.]"); *see also Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 893 (3d Cir. 2022).

In the Court's view, assessing the reasonableness and necessity of a modification request in practice requires an analysis similar to the one that applies to the substantive understaffing claims discussed above. That is, to determine whether and to what extent increasing staffing at a facility is necessary to give a particular class member "full and equal access" to that facility, a factfinder would have to assess how each facility was staffed, the acts or omissions of staff, and the impact of the alleged wrongful acts or omissions on a particular resident. Since the Disabilities Class contains different residents in differently staffed facilities who live with different disabilities and therefore require help with different activities of daily living, the Court concludes that the reasonableness and necessity of some global level of increased staffing cannot be resolved in one stroke for each of the claims.[16]

The Court thus finds that "whether Defendants have made reasonable modifications in policies and practices with respect to caregiver staffing," Mot. at 41, is not a question capable of "generat[ing] common answers apt to drive the resolution of the litigation," *Dukes*, 564 U.S at 350, because the "reasonableness" determination is heavily enmeshed in individualized questions of fact. The commonality requirement therefore is not met as to the Disability Class, and the Court denies certification as to that class.

iv. Misleading Statements and Omissions Class

The Misleading Statements and Omissions Class would consist of all persons who resided or reside at a Brookdale residential care facilities for the elderly located in California during the

[16] Plaintiffs propose to prove their case with expert testimony showing that the disparity between workload and staffing hours at Brookdale's facilities is so large that it is mathematically and physically impossible for caregivers at these facilities to deliver all care and services required by residents. *See* Flores Decl. ¶ 63; Schroyer Decl. ¶ 92. As Defendants point out, however, even assuming that Flores's method for assessing staffing is proper, it showed "wide discrepancies in both the existence and extent of [the] alleged time deficits" which "illustrates that staffing levels are not determined by either the Service Alignment benchmarks or any other common 'staffing model.'" Opp. at 40. Accordingly, Plaintiffs also have not shown that facilities are similarly staffed, particularly in light of the evidence Brookdale has provided that executive directors retain discretion in how they staff their facilities. *See* Opp. at 21.

class period and "who contracted with Brookdale or another assisted living facility for services for which Brookdale was paid money, including their successors-in-interest if deceased, excluding any persons who are subject to arbitration." Mot. at 13. This class alleges that Brookdale violated the CLRA, UCL, and California's elder abuse statute by making false and misleading representations and omissions in resident contracts and other documents regarding the provision of services. *See* TAC ¶¶ 242–287. Plaintiffs seek both declaratory and injunctive relief, as well as damages pursuant to Federal Rule of Civil Procedure 23(b)(2) and (b)(3). Mot. at 13.

a. Legal Standards for Commonality and Predominance

Plaintiffs bear the burden of showing that there are questions of law or fact common to the class. Fed. R. Civ. P. 23(a). To grant class certification pursuant to Rule 23(b)(3), the Court must also find "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The commonality and predominance inquiries have significant overlap. *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (explaining that "there is substantial overlap between" the tests for commonality and predominance); *Olean*, 31 F.4th at 664 (stating that "[t]he requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a): the plaintiffs must prove that there are questions of law or fact common to class members that can be determined in one stroke . . . in order to prove that such common questions predominate over individualized ones" (quotations and citations omitted)). The Supreme Court, however, has made clear that Rule 23(b)(3)'s predominance requirement is "even more demanding" than the commonality requirement of Rule 23(a). *See Comcast*, 569 U.S. at 34 (citing *Windsor*, 521 U.S. at 623–24). Accordingly, the Court will focus its analysis on Rule 23(b)(3) predominance requirement, which "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Windsor*, 521 U.S. at 594.

b. Plaintiffs Fail to Show Predominance

Plaintiffs contend that there are four common questions of law or fact that are apt to drive resolution of the claims: 1) whether Brookdale's statements and omissions regarding facility staffing were deceptive or likely to mislead a reasonable consumer, 2) whether Brookdale's

United States District Court
Northern District of California

United States District Court
Northern District of California

deceptive statements or omissions would be material to a reasonable consumer, 3) whether Brookdale has wrongfully taken the property of elderly residents, and 4) whether Brookdale's conduct has caused classwide injury. Mot. at 44–46. Defendant argues that none of these issues present common or predominant questions. Opp. at 42–48. The Court agrees with Defendant, and will explain why in two sections: 1) CLRA and UCL claims, and 2) the Elder Financial Abuse claim.

1. CLRA and UCL Legal Standards

"The CLRA prohibits a number of unfair methods of competition and unfair or deceptive acts or practices . . . ." *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1310 (9th Cir. 2022) (quotation omitted). "Unlike the UCL, the CLRA demands that each potential class member have both an actual injury and show that the injury was caused by the challenged practice . . . . However, if a material misrepresentation has been made to the entire class, an inference of reliance arises as to the class." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069–70 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 582 U.S. 23 (2017). "This rule applies to cases regarding omissions . . . as well." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). "A misrepresentation [or omission] is judged to be material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009) (quotation omitted).

"The UCL "bars 'unfair competition' and defines the term as a 'business act or practice' that is (1) 'fraudulent,' (2) 'unlawful,' or (3) 'unfair,'"…(e)ach of which (are) independent ground(s) for liability." *Shaeffer v. Califia Farms, LLC*, 258 Cal. Rptr. 3d 270, 276 (Ct. App. 2020). Plaintiffs' claims under both the CLRA and the UCL "are governed by the reasonable consumer test." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quotation omitted). "Under the reasonable consumer standard, [Plaintiffs] must show that members of the public are likely to be deceived." *Id.* (quotations omitted). "However, the question of likely deception does not automatically translate into a class-wide question." *Berger*, 741 F.3d at 1068 (quotation omitted).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California

a. Plaintiffs' Theory of Injury

As with their "reasonable modification" claim, Plaintiffs propose a theory of injury that they claim does not require individualized examination of whether any particular resident received particular services at any particular time. They begin by arguing that:

> In their standard form contracts with the residents, Defendants represent that they will assess the residents' needs for services, and then provide them with those services. These statements are false and misleading to a reasonable consumer as a result of Defendants' corporate policy and practice of understaffing which often results in the denial of care services.

Mot. at 12. Plaintiffs also allege that Brookdale failed to disclose its allegedly "deficient staffing policies." Mot. at 45. Plaintiffs directly disavow that their claim is one "for compensation for specific undelivered services." Reply at 25. Instead, Plaintiffs contend that their theory is that "the residents were deceived into paying upfront move-in fees and were subsequently overcharged for services." *Id.* Plaintiffs further assert that "[w]here, as here, the basis for the CLRA claim is that the defendant's product or service is allegedly defective, the defect itself is the injury even if the defect is latent. That legal injury is sufficient to support class certification without proof as to the specific circumstances of any particular class member." Mot. at 31 (quotations omitted). Accordingly, Plaintiffs contend that whether specific residents individually experienced under-staffing is irrelevant to their claim. Mot. at 48.[17]

The Court understands why Plaintiffs characterize their theory this way. First, as the discussion of the "reasonable accommodation" claim makes clear, any theory based on whether individual class members *actually* did or didn't receive services necessarily would implicate a large number of individualized inquiries that clearly would preclude class treatment. And second, Plaintiffs' initial framing of the case as alleging that Defendant "subjects all residents, regardless

---

[17] The Court notes that this exact theory is being considered by the Ninth Circuit in a case against another senior living services company in which a class was certified. *See Heredia v. Sunrise Senior Living, LLC*, No. 8:18-CV-01974-JLS-JDE, 2021 WL 6104188, at *15 (C.D. Cal. Nov. 16, 2021). The *Heredia* appeal, in which one of Plaintiffs' lead counsel in this case is co-counsel, has been fully briefed and raises many of the same issues that confront the Court here. If not for the age of this case and the advanced age of the named Plaintiffs and the putative class members, the Court would strongly consider staying this matter pending the Ninth Circuit's decision in *Heredia*. But those considerations counsel for deciding the motion now, with the understanding that the *Heredia* ruling may mandate reconsideration at some point.

of disability, to a substantial risk that they will not receive the care and services they require and have paid for on any given day," TAC ¶ 67, was jeopardized as a basis for standing when the Supreme Court decided *TransUnion* over two years after the complaint was filed.

But notwithstanding the practical necessity of the current framing, Plaintiffs fail to meet their burden of proving that the misleading statements and omissions claims are suitable for class treatment, because they present no evidence that shows by a preponderance of the evidence that common issues predominate on the foundational question of which class members suffered Article III injury.

b. Plaintiffs Present no Evidence, as Opposed to Allegations, Establishing Classwide Injury

As discussed earlier in this order, "[w]hen individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." *Olean*, 31 F.4th at 668. This Court must "determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages." *Id.* at 669. *Olean* also confirmed that "[b]ecause the Supreme Court has clarified that 'every class member must have Article III standing in order to recover individual damages,' . . . Rule 23 also requires a district court to determine whether individualized questions into this standing issue would predominate over common questions . . . ." *Id.* at 668 n.12 (citations omitted).

The core contention of Plaintiffs' current theory is that every single member of the Misleading Statements and Omissions Class "overpaid"—without regard to how much they paid, what they paid for (for example, move in fees, personal service fees, or select and therapeutic services fees), or what services were detailed in each individual resident's Personal Service Plan and Personal Service Rate Report. Plaintiffs' theory depends on the conclusion that a resident who contracted for services requiring one hour per week of care and a resident who contracted for services requiring 80 hours per week of care both paid too much based on Plaintiffs' claimed misrepresentations and omissions. Plaintiffs contend the same is true of residents whether or not

they paid a move-in or "Community Fee," which, without dispute, is not uniformly collected by Defendant. *See* Kennedy Decl. ¶ 63 (noting that executive directors at each facility can decide whether to charge or waive the community fee).

Under *Olean*, the Court must make a "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the class-wide evidence to *prove* the common question in one stroke." 31 F. 4th at 666 (emphasis added) (citation and internal quotation marks and brackets omitted). It follows that Plaintiffs have the burden of presenting evidence sufficient to back up their assertion that all class members, regardless of their specific circumstances, can be shown to have suffered injury without individualized inquiry.

Plaintiffs posit that they can do so based on the fact that all class members paid *something*, for *some* services, and the asserted corollary that whatever they paid, it was too much. Plaintiffs argue that the Ninth Circuit's reasoning in *Hinojos v. Kohl's Corp.* establishes that this showing is enough to establish standing for all class members. *See* Reply at 17 ("The payment of money constitutes 'monetary harm' that clearly establishes injury in fact under Article III." (citing *TransUnion* and *Hinojos*)). In *Hinojos*, the Ninth Circuit held that "when a consumer purchases merchandise on the basis of [a misrepresentation], and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL [and CLRA] . . . because he has suffered an economic injury."[18] *Hinojos*, 718 F.3d at 1107.

As an initial matter, it is not clear to the Court that the *Hinojos* rationale from cases involving products, including allegedly defective products, fits well in a case involving a complex, highly individualized suite of services like residential elder care services. In a case like *Hinojos*, at the time the consumer purchases the product, its attributes are fixed. At the moment of purchase, then, both the representation (what was promised) and the actual condition of the product (what was delivered) are known, even if there is a latent alleged defect that never actually manifests. For example, in *Mazza v. American Honda Motor Co., Inc.*, the Ninth Circuit

[18] Regarding the CLRA, the court reasoned as follows: "Because the [CLRA's] 'any damage' standard includes even minor pecuniary damage, we conclude that any plaintiff who has standing under the UCL's . . . 'lost money or property' requirement will, *a fortiori,* have suffered 'any damage' for purposes of establishing CLRA standing." *Hinojos*, 718 F.3d at 1108.

considered a case involving an allegedly defective car braking system. Plaintiffs argued that "class members paid more for the [system] than they otherwise would have paid, or bought it when they otherwise would not have done so, because Honda made deceptive claims and failed to disclose the system's limitations." 666 F.3d at 595. While the court characterized the issue as "not a simple or a clear cut matter," it found "in the light of our prior precedent" that "[t]o the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact'" sufficient to establish class standing. *Id.* (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011)).

By contrast, when different members of the putative class contracted for substantially varying levels of service at customized prices, based on their individualized assessments, "what was delivered" will only become clear later, when a resident does or doesn't receive the promised level of care. To the extent Plaintiffs' theory is that the quality of the services actually was fixed at the time of purchase because it incorporated a "design flaw" that gave rise to a "risk" that Defendant wouldn't be able to later provide the promised services, without regard to whether they actually did, it is difficult for the Court to reconcile that reading of *Hinojos* with *TransUnion*'s later holding that exposure to a risk of harm is not enough to establish Article III standing. The *Heredia* appeal and the eventual appeal in this case will give the Ninth Circuit the opportunity to consider how these lines of cases apply in a circumstance like this one.

But even apart from these doctrinal questions, Plaintiffs' class bid suffers from a more fundamental problem: even if their theory of harm could under some circumstances establish injury *in concept*, they present no *evidence* establishing that it is true in this case. As discussed above, Plaintiffs' current theory is that "the residents were deceived into paying upfront move-in fees and were subsequently overcharged for services." Reply at 25. *Olean* thus requires them to present evidence showing that all class members were so "overcharged," either now or before those class members can recover damages.[19] So the question is, where is that evidence? The

[19] The Ninth Circuit recently reiterated that it remains an open question "whether every class member must demonstrate standing before a court certifies a class," and that district courts "may be required to address this issue." *Van v. LLR, Inc.*, No. 21-36020, 2023 WL 2469909, at *11 n.12 (quotation omitted) (9th Cir. Mar. 13, 2023). But even though the standard remains unsettled,

United States District Court
Northern District of California

complaint and counsel's arguments in briefs articulating the theory plainly are not *evidence* of the sort required by *Olean*. *See* Mot. at 46 (asserting that "all class members have been injured as a result of Brookdale's defective staffing policy and model which is not reasonably designed to deliver the services promised to all residents," and contending without specifying any underlying evidence that "the question can be resolved through common proof, including Brookdale's documents and expert testimony"). And as the Seventh Circuit recently observed, neither is an asserted "truism" that a "good" product or service is worth more than an allegedly "bad" product or service. *See Flynn v. FCA US LLC*, 39 F.4th 946, 952 n.1 (7th Cir. 2022) (explaining that the allegations in plaintiffs' complaint "cast their argument in the form of a truism: they maintained that consumers would pay less for an 'unsafe' car than they would a 'safe' car," but that "it was their burden to produce *evidence* in response to a factual challenge to standing") (emphasis in original).

The closest Plaintiffs come to offering evidence in support of their overpayment theory is the declarations of their damages expert, Dr. Patrick Kennedy. *See* Kennedy Decl., Kennedy Reply Decl. But a close review of these documents reveals that Dr. Kennedy does not provide any evidence supporting the existence of a classwide overpayment: he simply *assumed* Plaintiffs' theory that there was an overpayment was true, then proposed a methodology (also flawed for the reasons explained later) for *valuing* that purported overpayment. Dr. Kennedy first acknowledged the complaint's theory: "Plaintiffs claim that residents live with a substantial risk that they will not receive the care and services that they have paid for and that they need." Kennedy Decl. ¶ 20 (citing TAC ¶¶ 6–7). Dr. Kennedy then stated his "understanding" that "under applicable law, the appropriate measure for calculating damages or restitution . . . is the excess of what Plaintiffs paid to the Defendant over the value, if any, of what the Plaintiffs received." *Id.* ¶ 21. He continued that "I understand that a focus is on the difference between what was paid and what a reasonable consumer would have paid at the time of the transaction without the allegedly misrepresented or

---

here the Court finds that Plaintiffs simply have presented no evidence sufficient to meet their burden of showing that common issues predominate as to standing, which fails *Olean*'s explicit requirement.

1 omitted information." *Id.*

2 Critically, though, what is missing from Dr. Kennedy's declarations is any effort to explain
3 *why or how* the putative class members uniformly paid more than a "reasonable consumer" would
4 have if they had received the purportedly omitted information. His declaration catalogues at
5 length the sorts of fees that residents actually pay when they enter one of Defendants' facilities.
6 *Id.* ¶¶ 23–35. And in a generic sense, he opines that there is a connection between the services
7 Defendant agrees to provide and the prices charged. *See, e.g., id.* at ¶ 34 (positing that "the
8 Personal Service Rate (the amount charged to each resident for care services) establishes the
9 market value of care services as bargained for, consistent with the level of care identified by
10 Brookdale in the individualized assessment"). But as to the central question of why these
11 *payments* constituted *injury* to all of the putative class members (i.e., why they exceeded what a
12 reasonable consumer would have paid *ex ante*), Dr. Kennedy again simply relies on Plaintiffs'
13 *allegations*:

14 > According to Plaintiffs, Brookdale's misrepresentations regarding its provision of staffing that is necessary to provide the services its
15 > residents need and for which the residents are paying is material to the reasonable consumer. Plaintiffs claim that if they had known
16 > Brookdale would charge them based on their personal service plan, but not provide adequate staffing to provide the necessary level of
17 > care, they would not have entered Brookdale's facilities, or they would have insisted on paying a lower price.

18 *Id.* at ¶ 45 (citing TAC ¶¶ 90–91). The Reply Declaration similarly relies on the allegations, not
19 evidence. While there Dr. Kennedy says: "As described in my initial Declaration, if Plaintiffs had
20 been informed that Brookdale allegedly had a system that was not sufficiently staffed to provide
21 the services that were agreed upon and paid for, then Plaintiffs would therefore have paid less than
22 they actually paid," Kennedy Reply Decl. at ¶ 9, the cited reference is to part of paragraph 45,
23 which, as quoted above, simply described Plaintiffs' allegations.

24 Neither Dr. Kennedy or any other expert purports to explain why everyone in the putative
25 class was injured, without regard to their personal circumstances. Dr. Kennedy did not, for
26 example, conduct a survey or apply any other method to try to substantiate or quantify the up-front
27 difference to a reasonable consumer between the value of the promised services as represented and
28 their value given the purported misrepresentations or omissions. *Cf. Earl v. Boeing Co.*, 53 F.4th

United States District Court
Northern District of California

1 897, 902 (5th Cir. 2022) (expert used conjoint analysis to support claim that demand for flights on
2 purportedly defective airplane model would have been lower if consumers knew the information
3 defendant allegedly fraudulently concealed; court found analysis insufficient to show any Article
4 III injury).

5 Dr. Kennedy says he used "actual market prices," Kennedy Reply Decl. ¶ 32, but the
6 problem is that his analysis can't show why or how payment of those prices was economic injury.
7 Instead, he proceeded by quantifying the amounts paid by potential members in Community Fees
8 and Personal Service Rate fees, then offsetting these amounts "for the potential value received."
9 *See* Kennedy Decl. ¶ 71. Dr. Kennedy's proposed damages calculation takes into account Mr.
10 Schroyer's finding that "the number of hours required to perform the daily line-item services at
11 each [of the six facilities tested] exceeded the number of staffing hours available on a daily basis,
12 resulting in an average daily staffing shortfall of 41.5% per facility." *Id.* ¶ 60 (citation omitted).
13 In Dr. Kennedy's opinion, "[t]he value bargained for would reflect 100 percent of the amount paid
14 for care services. The staffing shortfall percentages can then be used to estimate the amount that
15 residents would have paid if they had information regarding the extent of the shortfall." *Id.* ¶ 67.

16 In other words, Dr. Kennedy's theory of *ex ante* injury is explicitly linked to what *actually*
17 *ended up happening* with respect to facility staffing, down to the level of particular facilities on
18 particular days, which is the exact opposite of what Plaintiffs purport to be focused on. *See id.*
19 ¶¶ 61 (explaining that "this methodology can be applied by day, by facility and by type of care
20 service provided," such that it supposedly "provides the ability to calculate class wide damages at
21 whatever level of detail is required"); 70 (contending that the "above-described calculations can
22 also be performed on a *class member-by-class mem*ber basis in order to accurately determine
23 overall class wide damages and the allocation to each class member" (emphasis added)). This
24 mismatch between the purported injury (upfront overpayment detached from any actual failure to
25 provide services) and the method for quantifying it (granular analysis in the aggregate of staffing
26 levels that ended up actually being provided) collides with the principle that a plaintiff's damages
27 theory must be consistent with her theory of liability, which would also pose a damages problem if
28 the case were certified. *See Comcast*, 569 U.S. at 37 (stating that "[t]he first step in a damages

United States District Court
Northern District of California

study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact of *that event*" (emphasis in original) (quotation omitted)).[20]

At bottom, nowhere does Dr. Kennedy explain why this post-hoc analysis of individualized staffing patterns constitutes classwide common proof of the existence of the purported "discount" that a reasonable consumer would have insisted upon had the allegedly omitted facts been disclosed. The Court finds that this failure is fatal under the "rigorous analysis" it is required to conduct.

Relatedly, even setting aside Plaintiffs' failure to produce evidence to support classwide standing as to their "overpayment" theory, the Court further finds that individualized issues regarding what was promised and what was delivered would predominate over common issues. Without dispute, the thousands of putative class members here underwent personalized assessments, contracted for widely divergent customized suites of services, and paid resultingly different amounts for those services. *See, e.g.*, Dkt. No. 376 at 18, 24–29 (Residency Agreement Addendum detailing individualized and itemized "select services" and "therapeutic services" with "monthly recurring prices" ranging between $0 (if answer to threshold question about need is "no") and $2,595 for "Dressing Change for 2 or more Stage I or II Wound"). They also no doubt received different levels of services on a day-to-day basis, which is why Plaintiffs disavow any suggestion that their class certification motion is based on what anyone actually received. But given the highly complex and highly individualized services at issue, the Court finds that the

[20] Plaintiffs cite the Ninth Circuit's holding in *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015), in support of their damages model. Mot. at 40. But *Pulaski* highlights the problems with their approach here. In that case, online advertisers alleged that Google misled them about the prospect that their ads could be placed on certain types of undesirable webpages called "parked domains and error pages." *Id.* at 983. The Ninth Circuit found that the plaintiffs' restitution model satisfied *Comcast* because Google's "Smart Pricing ratio," which the company had created as part of its pricing model, was designed "to adjust the advertiser's bids to the same level that a 'rational advertiser' would bid if the national advertiser had sufficient data about the performance of ads on each website." *Id.* at 982, 989. For this reason, "[b]ecause restitution under the UCL and FAL measures what the advertiser would have paid at the outset, rather than accounting for what occurred after the purchase, using a ratio from Google's data that adjusts for web page quality is both targeted to remedying the alleged harm and does not turn on individual circumstances." *Id.* at 989. By contrast, Plaintiffs' damages model here does not just "account[] for what occurred after the purchase": it openly and entirely relies on post-purchase staffing occurrences, and thus inherently implicates consideration of "individual circumstances."

1 "reasonable consumer" standard cannot paper over the reality that the specifics of the promises
2 made to class members and whether they suffered any injury in light of those promises would
3 predominate, and require thousands of granular individual mini-trials. *See Stearns*, 655 F.3d at
4 1020 (explaining that there is no predominance where "there was no cohesion among the members
5 because they were exposed to quite disparate information from various representatives of the
6 defendant"); *Van*, 2023 WL 2469909, at *12 (where defendant provided evidence that at least
7 some class members were uninjured, district court had to "determine whether the plaintiff has
8 proven by a preponderance of the evidence that the questions of law or fact common to class
9 members predominate over any questions affecting only individual member—that is, whether a
10 class-member-by-class-member assessment of the individualized issue will be unnecessary or
11 unworkable" (citation omitted)); *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469 (9th Cir.
12 2023) (ordering class decertified because any common question as to vendor misclassification was
13 "outweighed by the individual questions going to injury and damages").

14 Plaintiffs' theory relies on the idea that as long as each class member paid any amount, for
15 any quantity and type of services, at any facility, there is no need to look to the details of what
16 they actually contracted for or what they received to proceed with a mass trial on behalf of
17 thousands of differently situated residents. But that theory ignores that these substantial variations
18 are meaningful, and would have to be examined on an individualized basis. In *Lara v. First Nat'l*
19 *Ins. Co. of Amer.*, 25 F.4th 1134, 1138 (9th Cir. 2022), for example, the Ninth Circuit affirmed the
20 denial of certification, in part based on plaintiffs' failure to establish predominance. That case was
21 about the defendant insurance company's methodology for valuing totaled cars, and plaintiffs
22 argued that the methodology resulted in them being underpaid for their cars and constituted both a
23 breach of contract and an unfair trade practice under Washington law. *Id.* at 1136–38. The court
24 found that "figuring out whether each individual putative class member was harmed would
25 involve an inquiry specific to that person," specifically "looking into the actual pre-accident value
26 of the car and then comparing that with what each person was offered, to see if the offer was less
27 than the actual value." *Id.* at 1139. Because "proof of these injuries [would] be individualized,"
28 and would predominate, the district court did not abuse its discretion in declining to certify the

class. *Id.* at 1139–40. And the Ninth Circuit rejected plaintiff's argument that "these individualized issues of harm are 'damages issues' that can be tried separately," because "if there's no injury, then the breach of contract and unfair trade practices claims must fail," which was "not a damages issue [but instead] a merits issue." *Id.* at 1140. The Court finds the reasoning of *Lara* persuasive here, and finds that it supports the conclusion that the predominance requirement has not been met.[21]

For all of these reasons, the Court finds that Plaintiffs have not met their legal or evidentiary burden of showing that the Misleading Statement and Omissions Class satisfies Rule 23(b)(3)'s predominance requirement. *See Dukes*, 564 U.S. at 350 (2011) (explaining in the context of the lower Rule 23(a) commonality requirement that "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation," and that "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers.").

The Court therefore denies the motion to certify the Misleading Statements and Omissions class as to the CLRA and UCL claims.

2. Elder Financial Abuse

Plaintiffs bring a claim on behalf of the Misleading Statements and Omissions Class under California's Elder Abuse statute, California Welfare and Institutions Code § 15610.30. *See* TAC ¶¶ 263–73. Under the statute,

> "financial abuse" of "an elder or dependent adult occurs when a person or entity," among other things, "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." . . . A person or entity is "deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if . . . the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult."

[21] Plaintiffs characterize *Lara* as "a breach of contract case based on a 'benefit of the bargain' analysis," Reply at 17, and purport to distinguish it on that basis. But that characterization is not accurate: as reflected in the above synopsis, *Lara* also involved an unfair trade practices claim that parallels the California claims here, and the Ninth Circuit affirmed the district court's conclusion that individual questions as to injury predominated with respect to that claim as well as the breach of contract claim.

United States District Court
Northern District of California

Heredia, No. 818CV01974JLSJDE, 2021 WL 6104188, at *11 (C.D. Cal. Nov. 16, 2021) (quoting Cal. Welf. & Inst. Code § 15610.30). The statute applies to the "real or personal property of an elder or dependent adult . . . regardless of whether the property is held directly or by a representative of an elder or dependent adult." Cal. Welf. & Inst. Code § 15610.30(c).

Plaintiffs motion to certify this class fails for a much less complex reason than did the prior class: determining *whose* property Brookdale obtained, a critical question in determining whether the statute even applies to any given class member, is not subject to classwide proof. If a 65-year-old resident paid Brookdale directly, then Brookdale would be liable under the statute (assuming all other elements were shown).[22] But if the 40-year old independent adult daughter of the same resident paid for her mother's care directly, using her own personal property, Brookdale would not be liable under the statute, even if it violated its substantive provisions. Accordingly, liability cannot be established on a classwide basis. The Court finds that individualized questions regarding Brookdale's liability and who can recover under the statue would predominate over any common questions. The Court therefore denies the motion to certify the Misleading Statements and Omissions class as to the elder financial abuse claim as well.[23]

IV. CONCLUSION

Accordingly, the Court **GRANTS IN PART and DENIES IN PART** Plaintiffs' motion for class certification as set forth above.

The Court **DENIES** Brookdale's motion to exclude the opinion of Ms. Kailes.

The Court **GRANTS IN PART and DENIES IN PART** Brookdale's motion to exclude the testimony of Mr. Cross as set forth above.

The Court **GRANTS IN PART AND DENIES IN PART** Brookdale's motion to exclude the declaration and testimony of Mr. Mastin and Mr. Waters as set forth above.

[22] For the purposes of the statute, "'[e]lder' means any person residing in this state, 65 years of age or older." Cal. Welf. & Inst. Code § 15610.27.

[23] Based on its conclusion that classwide injury remediable by a common injunction cannot be shown with common proof, the Court also denies certification under Rule 23(b)(2), recognizing that there is no predominance requirement under that section. *See* Fed. R. Civ. P. 23(b)(2) (detailing required showing that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

United States District Court
Northern District of California

The Court **DENIES** Brookdale's motion to exclude the opinion of Dr. Flores.

The Court **DENIES** Brookdale's motion to exclude the opinion of Mr. Schroyer.

The Court **DENIES** Brookdale's motion to exclude the testimony of Dr. Kennedy.

The Court **DENIES** Plaintiffs' motion to exclude the testimony of Dr. Anderson.

The Court **DENIES** Plaintiffs' motion to exclude the testimony of Dr. Jacobson and Dr. Saad.

The Court **DENIES AS MOOT** Plaintiffs' motion to strike the supplemental declaration of Dr. Saad.

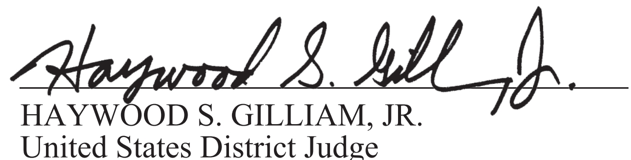
The Court **DENIES IN PART** and **DENIES AS MOOT IN PART** as set forth above Brookdale's motion to strike Wallace Reply Declaration, the Steyer Reply Declaration, and the Bien-Kahn Reply Declaration.

The Court has redacted parts of the publicly available version of this order in accordance with the parties' previous motions to seal. Any party who contends that any part of those sections should remain under seal must file a declaration within 14 days providing detailed word-by-word proposed redactions and the "compelling reasons" for maintaining these parts of the order under seal. *See Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010) (quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). If the parties fail to provide a timely and sufficient basis for sealing the material, an unredacted version of the order will be placed on the public docket. The Court notes that in its view all or nearly all of the high-level descriptions in the order need not be sealed, even when the underlying documents are.

The Court **SETS** a case management conference on April 25, 2023, at 1:00 p.m. The Court further **DIRECTS** the parties to submit a joint case management statement by April 18, 2023. The conference will take place in Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, CA.

IT IS SO ORDERED.

Dated: 3/30/2023



HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California