

Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

Allegheny

County

For Prothonotary Use Only:

Docket No:

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:

- Complaint
 Writ of Summons
 Petition
 Notice of Appeal
 Transfer from Another Jurisdiction
 Declaration of Taking

Lead Plaintiff's Name:
CARLSON LYNCH SWEET KILPELA & CARPENTER, LLP

Lead Defendant's Name:
BENJAMIN J. SWEET, THE SWEET LAW FIRM, P.C.,

Check here if you are a Self-Represented (Pro Se) Litigant

Name of Plaintiff/Appellant's Attorney: Jeffrey P. Ward, Esq., Cohen & Grigsby, P.C., 625 Liberty Ave., Pittsburgh, PA 15222-3152

Are money damages requested? : Yes No

Dollar Amount Requested: _____ within arbitration limits
(Check one) X outside arbitration limits

Is this a *Class Action Suit*? Yes No

SECTION B

Nature of the Case: Place an "X" to the left of the **ONE** case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- Intentional
 Malicious Prosecution
 Motor Vehicle
 Nuisance
 Premises Liability
 Product Liability (does not include mass tort)
 Slander/Libel/ Defamation
 Other:
 Misappropriation of Trade Secrets

CONTRACT (do not include Judgments)

- Buyer Plaintiff
 Debt Collection: Credit Card
 Debt Collection: Other

 Employment Dispute:
 Discrimination
 Employment Dispute: Other

 Other:

CIVIL APPEALS

- Administrative Agencies**
- Board of Assessment
 Board of Elections
 Dept. of Transportation
 Zoning Board
 Statutory Appeal: Other

- Judicial Appeals**
- MDJ - Landlord/Tenant
 MDJ - Money Judgment
 Other:

MASS TORT

- Asbestos
 Tobacco
 Toxic Tort - DES
 Toxic Tort - Implant
 Toxic Waste
 Other:

REAL PROPERTY

- Ejectment
 Eminent Domain/Condemnation
 Ground Rent
 Landlord/Tenant Dispute
 Mortgage Foreclosure
 Partition
 Quiet Title
 Other:

MISCELLANEOUS

- Common Law/Statutory Arbitration
 Declaratory Judgment
 Mandamus
 Non-Domestic Relations
 Restraining Order
 Quo Warranto
 Replevin
 Other:

PROFESSIONAL LIABILITY

- Dental
 Legal
 Medical
 Other Professional:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CARLSON LYNCH SWEET KILPELA &
CARPENTER, LLP,

Plaintiff,

v.

BENJAMIN J. SWEET, THE SWEET
LAW FIRM, P.C., and DEAN P. HENRY

Defendants.

CIVIL DIVISION

No. _____

Code:

COMPLAINT

Filed on behalf of Plaintiff,
Carlson Lynch Sweet Kilpela & Carpenter,
LLP

Counsel of Record:

Jeffrey P. Ward, Esquire
PA ID No. 34317
jward@cohenlaw.com
Lucy E. Hill, Esquire
PA ID No. 323731
lhill@cohenlaw.com

JURY TRIAL DEMANDED

Cohen & Grigsby, P.C.
Firm No. 621
625 Liberty Avenue
Pittsburgh, PA 15222-3152
Phone: (412) 297-4900

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CARLSON LYNCH SWEET KILPELA
& CARPENTER, LLP,

CIVIL DIVISION

Plaintiff,

No. _____

v.

COMPLAINT

BENJAMIN J. SWEET, THE SWEET
LAW FIRM, P.C., and DEAN P. HENRY,

Defendants.

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within **TWENTY (20)** days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERRAL SERVICE
The Allegheny County Bar Association
11th Floor Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
Telephone: (412) 261-5555

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CARLSON LYNCH SWEET KILPELA
& CARPENTER, LLP,

CIVIL DIVISION

Plaintiff,

No. _____

v.

COMPLAINT

BENJAMIN J. SWEET, THE SWEET
LAW FIRM, P.C., and DEAN P. HENRY,

Defendants.

COMPLAINT

Plaintiff Carlson Lynch Sweet Kilpela & Carpenter, LLP (“Carlson Lynch”), by and through its counsel, Cohen & Grigsby, P.C., hereby files this action against Defendants Benjamin J. Sweet (“Sweet”), The Sweet Law Firm, P.C., (“Sweet Law”), and Dean P. Henry (“Henry” and collectively with Sweet, and Sweet Law, “Defendants”) and in support thereof alleges the following:

INTRODUCTION

1. Plaintiff Carlson Lynch, a law firm, has handled claims under the Americans With Disabilities Act (“ADA”) for many years, and has spent considerable time and effort developing a profitable ADA legal practice.
2. Defendant Sweet, upon his expulsion as a partner from the Carlson Lynch law firm in January 2019, formed Defendant Sweet Law and has attempted to start a rival ADA practice.
3. As part of that attempt, he hired Defendant Henry, who was one of the investigators Carlson Lynch had employed to investigate possible ADA violations, and agreed with him to improperly procure a copy of Carlson Lynch’s trade secrets relating to its ADA practice.

4. Defendant Sweet and Sweet Law have used the confidential and trade secret information developed by Carlson Lynch's ADA investigators, including Henry, to file two ADA complaints.

5. This misuse of Carlson Lynch's confidential business information constitutes misappropriation of trade secrets, or in the alternative, the tort of procuring information through improper means. Further, their agreement to commit these torts constitutes civil conspiracy.

6. This Court should grant a preliminary injunction to prevent Defendants from further misusing Carlson Lynch's trade secrets, as well as an award of damages relating to the already pending actions wrongfully filed by Sweet and Sweet Law.

PARTIES

7. Plaintiff Carlson Lynch Sweet Kilpela & Carpenter, LLP is a Limited Liability Partnership organized under the laws of Pennsylvania, with its principal place of business in Pennsylvania, and is a citizen of Pennsylvania.

8. Defendant Benjamin J. Sweet is an individual domiciled in Pittsburgh, Pennsylvania, and is a citizen of Pennsylvania.

9. The Sweet Law Firm, P.C., is a professional corporation organized under the laws of Pennsylvania, with its principal place of business at 186 Mohawk Drive, Pittsburgh, Pennsylvania, and is a citizen of Pennsylvania.

10. Defendant Dean P. Henry is an individual domiciled in Pittsburgh, Pennsylvania, and is a citizen of Ireland.

JURISDICTION AND VENUE

11. The Court has subject matter jurisdiction over this action pursuant to Pa. Cons. Art. 5, § 5(b) and 42 Pa. C.S.A. § 931.

12. The Court has personal jurisdiction over Defendants pursuant to 42 Pa. C.S.A. § 5301(a)(1) and (2).

13. Venue is proper in this County pursuant to Pa. R. Civ. P. 1006(a)(1) and Pa. R. Civ. P. 2179(a)(2) and (3) because Defendants reside in, may be served in, and regularly conduct business in this county, and the cause of action arose in this county.

FACTUAL ALLEGATIONS

14. Beginning in or around September 1, 2014, Defendant Sweet was employed as a partner at Plaintiff's law firm.

15. Sweet was expelled from Plaintiff's law firm on January 3, 2019, by a unanimous vote of the remaining partners.

16. For several years prior to Sweet joining the firm in 2014, Carlson Lynch had been engaged in a successful practice litigating cases under Title III of the ADA.

17. After Sweet joined the firm in 2014, and after the other partners recognized that Sweet was unable to generate the fees he represented he could generate from his own cases, did not have a sufficient inventory of his own to fully occupy his professional time, and was not originating his own cases, Sweet was invited to work on cases in the Carlson Lynch firm's existing ADA inventory, including those cases challenging parking accessibility barriers at places of public accommodation, resulting in discrimination against people with mobility disabilities.

18. Since that time, Carlson Lynch invested significant resources to hire additional staff and otherwise build the infrastructure to continue its ADA practice, including hiring additional full time investigators. This investment by the firm permitted the scale of the ADA practice to be increased significantly.

19. Henry was one such full time investigator employed by Carlson Lynch.

20. As part of that practice, Carlson Lynch's staff investigators, including Henry, travelled around the country, at the expense of Carlson Lynch, using a specific process and protocol developed by the firm at substantial cost, to assess and record the accessibility of parking facilities and paths of travel at places of public accommodation.

21. The results of these costly investigations were maintained both individually by site and were also compiled and logged into a spreadsheet database (hereinafter collectively the "trade secrets"), which information was accessible only to a limited number of employees of Carlson Lynch due to its propriety and confidential nature, as well as its economic value to Plaintiff.

22. The spreadsheet database was not released to people outside of Carlson Lynch.

23. The individual site investigations were not released to people outside of the firm unless or until the firm filed litigation against the owner and/or operator of one of the sites. In that instance, only the specific defendant's individual site information was released in a controlled format as part of litigation discovery, but no other pre-litigation inspections of other places of public accommodation were revealed outside of the firm.

24. While Sweet was employed as a partner of Carlson Lynch, he had access to the pre-litigation investigations performed by, and the spreadsheet database compiled and maintained by, Carlson Lynch as part of its ongoing ADA public accommodation accessibility practice.

25. Likewise, while Henry was employed as an investigator at Carlson Lynch, he also had access to the pre-litigation investigations performed by, and the spreadsheet database compiled and maintained by, Carlson Lynch as part of its ongoing ADA public accommodation accessibility practice, as well as first-hand knowledge of the investigations he himself performed on behalf of Carlson Lynch.

26. The aforementioned trade secrets are the lifeblood of Plaintiff's ADA public accommodation accessibility practice and the trade secrets maintained by Carlson Lynch have substantial pecuniary value to other firms that advocate for and practice on behalf of individuals with mobility disabilities.

27. Upon information and belief, after being expelled from Carlson Lynch, Sweet began Sweet Law, where he now practices as a lawyer and promotes himself on his firm's website as continuing to represent individuals with disabilities under the ADA.

28. On February 13, 2019, Henry resigned from his position as investigator for Carlson Lynch.

29. Prior to his departure, Henry and Sweet agreed that Henry would improperly take a copy of Carlson Lynch's trade secrets and provide them to Sweet and Sweet Law, and Henry did provide the trade secrets to Sweet and Sweet Law.

30. Defendants obtained the trade secrets by improper means and/or through an abuse of confidence, despite Defendants' knowledge that the information constitutes Carlson Lynch's trade secrets.

31. On Friday February 15, 2019, Defendants Sweet and Sweet Law filed an action in the District of Colorado styled as *Michael G. Murphy v. United States Beef Corporation d/b/a Arby's and Taco Bueno*, Case No. 1:19-cv-471, alleging violations of Title III of the ADA (the "U.S. Beef Complaint"). A copy of the U.S. Beef Complaint is attached hereto as **Exhibit A**.

32. Also on Friday February 15, 2019, Defendants Sweet and Sweet Law filed an action in the District of Colorado styled as *Michael G. Murphy v. The Kroger Co.*, Case No. 1:19-cv-472, alleging violations of Title III of the ADA (the "Kroger Complaint"). A copy of the Kroger Complaint is attached hereto as **Exhibit B**.

33. On February 19, 2019, Defendants Sweet and Sweet Law filed an action in the District of Colorado styled as *Michael G. Murphy v. Western Alta Holdings, LP, Co. d/b/a Alta Convenience/Pester Marketing*, Case No. 1:19-cv-498, alleging violations of Title III of the ADA (the “Alta Complaint,” and collectively with the U.S. Beef Complaint and the Kroger Complaint, the “ADA Complaints”). A copy of the Alta Complaint is attached hereto as **Exhibit C**.

34. Michael G. Murphy was never a client of Carlson Lynch prior to or since Sweet’s expulsion from the firm.

35. In the U.S. Beef Complaint, Sweet and Sweet Law state: “On Plaintiff’s behalf, investigators examined multiple locations owned, controlled, and/or operated by Defendants.” The U.S. Beef Complaint then identifies twelve site locations and their respective violations. *See* Exh. A, at ¶ 31.

36. Each of the ADA violations Sweet and Sweet Law identified in the U.S. Beef Complaint were investigations completed by Carlson Lynch and were based on information obtained through Carlson Lynch’s trade secrets.

37. Defendants used Carlson Lynch’s trade secrets for the information set forth in, and as support for, paragraph 31 of the U.S. Beef Complaint.

38. In the Kroger Complaint, Sweet and Sweet Law state: “On Plaintiff’s behalf, investigators examined multiple locations owned, controlled, and/or operated by Defendants.” The Kroger Complaint then identifies nine site locations and their respective violations. *See* Exh. B, at ¶ 34.

39. Each of the ADA violations Sweet and Sweet Law identified in the Kroger Complaint were investigations completed by Carlson Lynch and were based on information obtained through Carlson Lynch’s trade secrets.

40. Defendants used Carlson Lynch's trade secrets for the information set forth in, and as support for, paragraph 34 of the Kroger Complaint.

41. The Alta Complaint identifies five site locations and their respective violations. *See* Exh. C, at ¶ 31.

42. Each of the ADA violations Sweet and Sweet Law identified in the Alta Complaint were investigations completed by Carlson Lynch and were based on information obtained through Carlson Lynch's trade secrets.

43. Defendants used Carlson Lynch's trade secrets for the information set forth in, and as support for, paragraph 31 of the Alta Complaint.

44. Upon information and belief, since leaving Carlson Lynch, Sweet has not conducted any investigation of the sites listed in the ADA Complaints, nor has Sweet Law conducted any such investigation. Accordingly, Defendants' statements in the U.S. Beef Complaint and the Kroger Complaint, claiming that Plaintiff Murphy's investigators examined the sites identified, is false.

45. Defendants were and are aware of the confidential and propriety nature of Carlson Lynch's trade secrets; indeed, Defendants were reminded that the information constitutes Carlson Lynch's trade secrets in correspondence sent days before Sweet and Sweet Law filed the ADA Complaints.

46. In response to the correspondence referenced in the preceding paragraph, Defendant Sweet admitted that Plaintiff's trade secret information could not be used on behalf of a plaintiff, such as Murphy, who was never represented by Carlson Lynch.

COUNT I
Violation of Pennsylvania Uniform Trade Secrets Act
12 Pa. Cons. Stat. § 5301, et. seq.

47. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

48. The Pennsylvania Uniform Trade Secrets Act (the "Act") provides for injunctive relief and damages for the misappropriation of trade secrets. *See* 12 Pa. Cons. Stat. §§ 5303-04.

49. The investigative information, described above, constitutes trade secrets of Plaintiff.

50. Plaintiff's trade secrets are of economic value to Plaintiff and the investigative information constituting Plaintiff's trade secrets were obtained and compiled at great expense to Plaintiff.

51. Plaintiff kept its trade secrets from disclosure through all appropriate and necessary means, such that it was not generally known or available to individuals or entities outside of Plaintiff.

52. Plaintiff further limited the employees who had access to the trade secrets to those directly involved in the investigation and any resultant litigation.

53. Plaintiff made reasonable efforts under the circumstances to maintain the trade secrets' secrecy.

54. Defendants were and are aware of the propriety and confidential nature of Plaintiff's trade secrets.

55. Defendants are aware that Plaintiff's trade secrets were not to be disclosed to others.

56. Defendants are and were aware that they do not and did not have Plaintiff's consent to disclose or use Plaintiff's trade secrets.

57. Defendants acquired Plaintiff's trade secrets by improper means.

58. Defendants disclosed or used Plaintiff's trade secrets without the consent of Plaintiff and, in doing so, knew or had reason to know that their knowledge of the trade secret was (a) derived from or through a person who had utilized improper means to acquire it; (b) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; and/or (c) derived from or through a person who owed a duty to Plaintiff to maintain its secrecy or limit its use.

59. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff has suffered, is suffering, and will continue to suffer incalculable financial loss, imminent and permanent irreparable harm, loss of the confidentiality of its proprietary business information, business opportunity, and other continuing harm.

60. The losses and harm to Plaintiff are ongoing and cannot be remedied by damages alone.

61. Defendants' conduct in misappropriating Plaintiff's trade secrets was done to provide Defendants with a commercial advantage, which was derived by the misappropriation.

62. Defendants have acted intentionally, willfully, maliciously, and in reckless disregard to Plaintiff's rights.

63. Plaintiff has no remedy at law sufficient to fully compensate for the wrongs committed by Defendants.

WHEREFORE, Plaintiff requests judgment in its favor and against Defendants, and seeks relief as follows:

- A. Ordering injunctive relief for the actual and/or threatened misappropriation by Defendants, including the return of, destruction of any copies, and discontinued use of Plaintiff's trade secret;
- B. Ordering injunctive relief providing that the use of Plaintiff's trade secret in the cases already filed by Defendants to date be conditioned upon payment of any fees or income derived from those cases into escrow until appropriate royalties and/or damages to Plaintiff are determined;

- C. Ordering Defendants to pay damages for both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation;
- D. Ordering Defendants to pay exemplary damages and attorneys' fees, expenses, and costs, as a result of the willful and malicious appropriation of Plaintiff's trade secret;
- E. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- F. Ordering such other and further relief as may be just and proper.

COUNT II – IN THE ALTERNATIVE TO COUNT I
Procuring Information by Improper Means
Restatement of Torts § 759

- 64. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.
- 65. Count II is set forth in the alternative.
- 66. As set forth above, the trade secrets at issue constitutes confidential business information of Plaintiff.
- 67. Defendants are subject to an injunction and damages under Section 759 of the Restatement, which provides: "One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information." Restatement (First) of Torts § 759 (1939).
- 68. Defendants procured Carlson Lynch's confidential business information by improper means.
- 69. Defendants possess, disclosed, and used Carlson Lynch's confidential business information to advance their rival business interest.

70. Plaintiff's confidential business information is of economic value to Plaintiff and the investigative information constituting Plaintiff's confidential business information was obtained and compiled at great expense to Plaintiff.

71. Plaintiff kept its business information confidential through all appropriate and necessary means, such that it was not generally known or available to individuals or entities outside of Plaintiff.

72. Plaintiff further limited the employees that had access to the confidential business information to those directly involved in the investigation and any resultant litigation.

73. Plaintiff made reasonable efforts under the circumstances to maintain the confidential business information's secrecy.

74. Defendants were and are aware of the propriety and confidential nature of Plaintiff's business information.

75. Defendants were and are aware that Plaintiff's confidential business information was not to be disclosed to, or used by, others.

76. Defendants were and are aware that they do not and did not have Plaintiff's consent to disclose or use Plaintiff's confidential business information.

77. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff has suffered, is suffering, and will continue to suffer incalculable financial loss, imminent and permanent irreparable harm, loss of the confidentiality of its proprietary business information, business opportunity, and other continuing harm.

78. The losses and harm to Plaintiff are ongoing and cannot be remedied by damages alone.

79. Defendants' conduct in procuring Plaintiff's confidential business information by improper means was done to provide Defendants with a commercial advantage.

80. Defendants have acted intentionally, willfully, maliciously, and in reckless disregard to Plaintiff's rights.

81. Plaintiff has no remedy at law sufficient to fully compensate for the wrongs committed by Defendants.

WHEREFORE, Plaintiff requests judgment in its favor and against Defendants, and seeks relief as follows:

- A. Ordering injunctive relief for the actual and/or threatened use or disclosure by Defendants of Plaintiff's confidential and propriety business information, including the return of, destruction of any copies, and discontinued use of Plaintiff's trade secrets;
- B. Ordering injunctive relief providing that the use of Plaintiff's trade secrets in the cases already filed by Defendants to date be conditioned upon payment of any fees or income derived from those cases into escrow until appropriate royalties and/or damages to Plaintiff are determined;
- C. Ordering Defendants to pay damages for both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation;
- D. Ordering Defendants to pay punitive damages, as a result of the willful and malicious appropriation and use of Plaintiff's trade secrets;
- E. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- F. Ordering such other and further relief as may be just and proper.

COUNT III
Civil Conspiracy

82. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

83. Defendants agreed to misappropriate Carlson Lynch's trade secret information and/or procure Carlson Lynch's confidential business information through improper means and use that information to further their rival business interest in Sweet Law.

84. Defendants acted unlawfully with the intent to injure Carlson Lynch by using its trade secret and confidential business information to compete with Carlson Lynch in its ADA legal practice.

85. Defendants lacked justification for taking or using Carlson Lynch's trade secret and confidential business information.

86. Defendants committed overt acts in furtherance of this conspiracy when they took Carlson Lynch's trade secrets, when they delivered them to Sweet Law, and when they filed the ADA Complaints using Carlson Lynch's trade secrets and/or confidential business information.

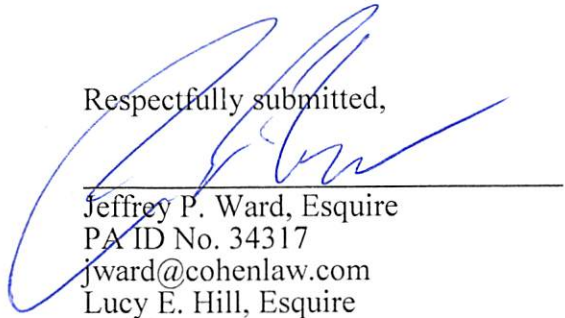
87. Defendants have acted intentionally, willfully, maliciously, and in reckless disregard to Plaintiff's rights.

WHEREFORE, Plaintiff requests judgment in its favor and against Defendants, and seeks relief as follows:

- A. Ordering Defendants to pay damages for both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation;
- B. Ordering Defendants to pay punitive damages, as a result of the willful and malicious appropriation and use of Plaintiff's trade secrets;
- C. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- D. Ordering such other and further relief as may be just and proper.

JURY DEMANDED ON ALL ISSUES SO TRIABLE

Respectfully submitted,



Jeffrey P. Ward, Esquire
PA ID No. 34317
jward@cohenlaw.com
Lucy E. Hill, Esquire
PA ID No. 323731
lhill@cohenlaw.com

Cohen & Grigsby, P.C.
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625 Liberty Avenue
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Dated: February 22, 2019
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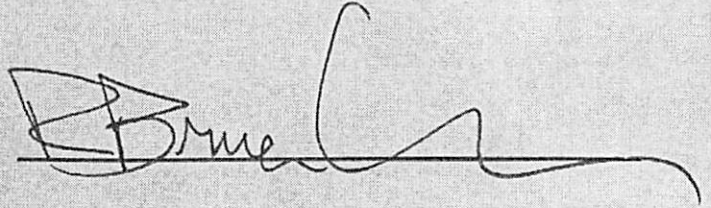
Attorneys for Plaintiff

VERIFICATION

I, R. Bruce Carlson, a partner at Carlson Lynch Sweet Kilpela & Carpenter, LLP, hereby verify that I have read the foregoing Complaint and that the averments of fact made therein are true and correct based upon my knowledge, information and belief.

I understand that the statements of fact set forth herein are made subject to the penalties of 18 Pa. C. S. § 4904 relating to unsworn falsification to authorities.

Signature:

A handwritten signature in black ink, appearing to read "R. Bruce Carlson", written over a horizontal line.

Date:

2/22/19

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Plaintiff

Signature: 

Name: Jeffrey P. Ward

Attorney No. (if applicable): 34317

EXHIBIT A

Benjamin J. Sweet
THE SWEET LAW FIRM, PC
186 Mohawk Drive
Pittsburgh, PA 15228
Phone: (412) 742-0631
ben@sweetlawpc.com

Attorneys for Plaintiff MICHAEL G. MURPHY, individually and on behalf of all others similarly situated

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

MICHAEL G. MURPHY, an individual,
individually and on behalf of all others similarly
situated,

Plaintiff,

v.

UNITED STATES BEEF CORPORATION,
d/b/a Arby's, d/b/a Taco Bueno, an Oklahoma
corporation,

Defendant.

Case No. 1:19-cv-471

NATIONWIDE CLASS ACTION COMPLAINT

COMES NOW, Plaintiff Michael Murphy, on behalf of himself and all others similarly situated, and asserts as follows:

INTRODUCTION

1. Plaintiff brings this action individually and on behalf of all others similarly situated against United States Beef Corporation, d/b/a Arby's, d/b/a Taco Bueno, (collectively "Defendants"), asserting violations of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the "ADA"), and its implementing regulations, in connection with accessibility

barriers in the parking lots and paths of travel at various public accommodations owned, operated, controlled, and/or leased by Defendants (“Defendants’ facilities”).

2. Plaintiff has a mobility disability and is limited in the major life activity of walking, which has caused him to use a wheelchair for mobility.

3. Plaintiff has visited Defendants’ facilities and was denied full and equal access as a result of Defendants’ inaccessible parking lots and paths of travel.

4. Plaintiff’s experiences are not isolated—Defendants have systematically discriminated against individuals with mobility disabilities by implementing policies and practices that consistently violate the ADA’s accessibility guidelines and routinely result in access barriers at Defendants’ facilities.

5. In fact, numerous facilities owned, controlled, and/or operated by Defendants have parking lots and paths of travel that are inaccessible to individuals who rely on wheelchairs for mobility, demonstrating that the centralized decision-making Defendants employ with regard to the design, construction, alteration, maintenance, and operation of its facilities causes access barriers and/or allows them to develop and persist at Defendants’ facilities.

6. Unless Defendants are required to remove the access barriers described below and required to change their policies and practices so that access barriers do not reoccur at Defendants’ facilities, Plaintiff and the proposed Class will continue to be denied full and equal access to those facilities as described and will be deterred from fully using Defendants’ facilities.

7. The ADA expressly contemplates injunctive relief aimed at modification of a policy or practice that Plaintiff seeks in this action. In relevant part, the ADA states:

[i]n the case of violations of . . . this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities Where appropriate, injunctive relief shall also include requiring the . . . modification of a policy

42 U.S.C. § 12188(a)(2).

8. Consistent with 42 U.S.C. § 12188(a)(2), Plaintiff seeks a permanent injunction requiring that:

- a. Defendants remediate all parking and path of travel access barriers at Defendants' facilities, consistent with the ADA;
- b. Defendants change their policies and practices so that the parking and path of travel access barriers at Defendants' facilities do not reoccur; and
- c. Plaintiff's representatives shall monitor Defendants' facilities to ensure that the injunctive relief ordered pursuant to Paragraph 8.a. and 8.b. has been implemented and will remain in place.

9. Plaintiff's claims for permanent injunctive relief are asserted as class claims pursuant to Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) was specifically intended to be utilized in civil rights cases where the plaintiffs seek injunctive relief for his or her own benefit and the benefit of a class of similarly situated individuals. To that end, the note to the 1996 amendment to Rule 23 states:

Subdivision(b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

THE ADA AND ITS IMPLEMENTING REGULATIONS

10. The ADA was enacted nearly 30 years ago and is intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

11. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life.

12. Title III of the ADA generally prohibits discrimination against individuals with disabilities in the full and equal enjoyment of public accommodations, 42 U.S.C. § 12182(a), and prohibits places of public accommodation, either directly or through contractual, licensing, or other arrangements, from outright denying individuals with disabilities the opportunity to participate in a place of public accommodation, 42 U.S.C. § 12182(b)(1)(A)(i), or denying individuals with disabilities the opportunity to fully and equally participate in a place of public accommodation, 42 U.S.C. § 12182(b)(1)(A)(ii).

13. Title III further prohibits places of public accommodation from utilizing methods of administration that have the effect of discriminating on the basis of a disability. 42 U.S.C. § 12182(b)(1)(D).

14. Title III and its implementing regulations define discrimination to include the following:

- a) Failure to remove architectural barriers when such removal is readily achievable for places of public accommodation that existed prior to January 26, 1992, 28 C.F.R. § 36.304(a) and 42 U.S.C. § 12182(b)(2)(A)(iv);
- b) Failure to design and construct places of public accommodation for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities, 28 C.F.R. § 36.401 and 42 U.S.C. § 12183(a)(1);
- c) For alterations to public accommodations made after January 26, 1992, failure to make alterations so that the altered portions of the public accommodation are readily accessible to and usable by individuals with disabilities, 28 C.F.R. § 36.402 and 42 U.S.C. § 12183(a)(2); and
- d) Failure to maintain those features of public accommodations that are required to be readily accessible to and usable by persons with disabilities, 28 C.F.R. § 36.211.

15. The remedies and procedures set forth at 42 U.S.C. § 2000a-3(a) are provided to any person who is being subjected to discrimination on the basis of disability or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of 42 U.S.C. § 12183. 42 U.S.C. 12188(a)(1).

16. The ADA also provides for specific injunctive relief, which includes the following:

In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include . . . modification of a policy . . . to the extent required by this subchapter.

42 U.S.C. § 12188(a)(2); 28 C.F.R. § 36.501(b).

JURISDICTION AND VENUE

17. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 12188.

18. Plaintiff's claims asserted herein arose in this judicial district, and Defendants do substantial business in this judicial district.

19. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2) in that this is the judicial district in which a substantial part of the events and/or omissions at issue occurred.

PARTIES

20. Plaintiff Michael G. Murphy is, and at all times relevant hereto was, a resident of Colorado. As described above, as a result of his disability, Plaintiff uses a wheelchair for mobility. Plaintiff was a competitive athlete. He suffered an injury in 2007 and is now paralyzed and relies on a wheelchair. Plaintiff continues his athletic endeavors and is currently competitive

in adaptive sports. He is therefore a member of a protected class under the ADA, 42 U.S.C. § 12102(2), and the regulations implementing the ADA set forth at 28 C.F.R. §§ 36.101 *et seq.*

21. Defendant United States Beef Corporation is, and at all times relevant hereto was, an Oklahoma corporation. Defendant owns and operates restaurants. Defendant is the largest franchisee of the Arby's and Taco Bueno chains, operating over 300 restaurants in nine states throughout the Midwest and West, including in the state of Colorado and in this District. Defendant has publicly stated plans to open 70 new Arby's restaurants by the year 2020, 35 of which are intended to be in the Denver, Colorado, area. See, e.g., <http://www.usbeefcorp.com/our-story/>.

22. Defendants are a public accommodation pursuant to 42 U.S.C. §12181(7).

FACTUAL ASSERTIONS

I. Plaintiff Has Been Denied Full and Equal Access to Defendants' Facilities

23. Plaintiff has visited Defendants' facilities located at Sheridan Boulevard in Denver, Colorado where he experienced unnecessary difficulty and risk due to excessive slopes in a purportedly accessible parking area.

24. Despite this difficulty and risk, Plaintiff plans to return to Defendants' facilities. Plaintiff likes Arby's and enjoys eating there several times a year. Plaintiff would like to return to this Arby's in the future, but is deterred from doing so given the limitations of the facility. Furthermore, Plaintiff intends to return to Defendants' facilities to ascertain whether those facilities remain in violation of the ADA.

25. As a result of Defendants' non-compliance with the ADA, Plaintiff's ability to access and safely use Defendants' facilities has been significantly impeded.

26. Plaintiff will be deterred from returning to and fully and safely accessing Defendants' facilities, however, so long as Defendants' facilities remain non-compliant, and so long as Defendants continue to employ the same policies and practices that have led, and in the future will lead, to inaccessibility at Defendants' facilities.

27. Without injunctive relief, Plaintiff will continue to be unable to fully and safely access Defendants' facilities in violation of his rights under the ADA.

28. As an individual with mobility disabilities who use wheelchairs, Plaintiff is directly interested in whether public accommodations, like Defendants' facilities, have architectural barriers that impede full accessibility to those accommodations by individuals with mobility-related disabilities.

II. Defendants Repeatedly Deny Individuals With Disabilities Full and Equal Access to Defendants' Facilities.

29. As the owner and manager of their properties, Defendants employ centralized policies, practices, and procedures with regard to the design, construction, alteration, maintenance, and operation of their facilities.

30. To date, Defendants' centralized design, construction, alteration, maintenance, and operational policies and practices have systematically and routinely violated the ADA by designing, constructing, and altering facilities so that they are not readily accessible and are usable, by failing to remove architectural barriers, and by failing to maintain and operate facilities so that the accessible features of Defendants' facilities are maintained.

31. On Plaintiff's behalf, investigators examined multiple locations owned, controlled, and/or operated by Defendants and found the following violations, which are illustrative of the fact that Defendants implement policies and practices that routinely result in accessibility violations:

- a. 4363 Sheridan Boulevard, Denver, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- b. 501 East 84th Avenue, Denver, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- c. 7010 Mesa Ridge Parkway, Fountain, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- d. 9657 Prominent Point, Colorado Springs, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- e. 5710 North Academy Boulevard, Colorado Springs, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- f. 328 East Fillmore Street, Colorado Springs, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- g. 1312 North Academy Boulevard, Colorado Springs, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- h. 3501 Nameoki Road, Granite City, IL
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- i. 5790 Belleville Crossing Street, Belleville IL
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- j. 10511 Page Avenue, Saint Louis, MO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;

- ii. The surfaces of one or more access aisles had slopes exceeding 2.1%.
- k. 1147 South Kirkwood Road, Saint Louis, MO
 - i. Projecting curb ramp exceeds allowable tolerance under ADA regulations;
- l. 11976 Paul Mayer Avenue, Bridgeton, MO
 - i. The surfaces of one or more access aisles had slopes exceeding 2.1%.
- m. 3501 Nameoki Road, Granite City, IL
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 5.0.
- n. 5790 Belleville Crossing Street, Belleville, IL
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 3.0.

32. The fact that individuals with mobility-related disabilities are denied full and equal access to numerous of Defendants' facilities, and the fact that each of these facilities deny access by way of inaccessible parking facilities, is evidence that the inaccessibility Plaintiff experienced is not isolated, but rather, is caused by Defendants' systemic disregard for the rights of individuals with disabilities.

33. Defendants' systemic access violations demonstrate that Defendants either employ policies and practices that fail to design, construct, and alter their facilities so that they are readily accessible and usable and/or that Defendants employ maintenance and operational policies and practices that are unable to maintain accessibility.

34. As evidenced by the widespread inaccessibility of Defendants' parking facilities, absent a change in Defendants' corporate policies and practices, access barriers are likely to reoccur in Defendants' facilities even after they have been remediated.

35. Accordingly, Plaintiff seeks an injunction to remove the barriers currently present at Defendants' facilities and an injunction to modify the policies and practices that have created or allowed, and will create or allow, inaccessibility to affect Defendants' network of facilities.

CLASS ASSERTIONS

36. Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) on behalf of themselves and the following nationwide class:

All persons with qualified mobility disabilities who were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any United States Beef Corporation location in the United States on the basis of disability because such persons encountered accessibility barriers due to Defendants' failure to comply with the ADA's accessible parking and path of travel requirements.

37. Numerosity: The class described above is so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective class members through this class action will benefit both the parties and this Court and will facilitate judicial economy.

38. Typicality: Plaintiff's claims are typical of the claims of the members of the class. The claims of Plaintiff and members of the class are based on the same legal theories and arise from the same unlawful conduct.

39. Common Questions of Fact and Law: There is a well-defined community of interest and common questions of fact and law affecting members of the class in that they all have been and/or are being denied their civil rights to full and equal access to, and use and enjoyment of, Defendants' facilities and/or services due to Defendants' failure to make their facilities fully accessible and independently usable as above described.

40. Adequacy of Representation: Plaintiff is an adequate representatives of the class because his interests do not conflict with the interests of the members of the class. Plaintiff will

fairly, adequately, and vigorously represent and protect the interests of the members of the class, and has no interests antagonistic to the members of the class. Plaintiff has retained counsel who are competent and experienced in the prosecution of class action litigation, generally, and who possess specific expertise in the context of class litigation under the ADA.

41. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the class, making appropriate both declaratory and injunctive relief with respect to Plaintiff and the class as a whole.

SUBSTANTIVE VIOLATION

42. The assertions contained in the previous paragraphs are incorporated by reference.

43. Defendants' facilities were altered, designed, or constructed after the effective date of the ADA.

44. Defendants' facilities are required to be altered, designed, and constructed so that they are readily accessible to and usable by individuals who use wheelchairs. 42 U.S.C. § 12183(a).

45. Further, the accessible features of Defendants' facilities, which include the parking lots and paths of travel, are required to be maintained so that they are readily accessible to and usable by individuals with mobility disabilities. 28 C.F.R. § 36.211.

46. The architectural barriers described above demonstrate that Defendants' facilities were not altered, designed, or constructed in a manner that causes them to be readily accessible to and usable by individuals who use wheelchairs and/or that Defendants' facilities were not maintained so as to ensure that they remained accessible to and usable by individuals who use wheelchairs.

47. Furthermore, the architectural barriers described above demonstrate that Defendants have failed to remove barriers as required by 42 U.S.C. § 12182(b)(2)(A)(iv).

48. Defendants' repeated and systemic failures to design, construct, and alter their facilities so that they are readily accessible and usable, to remove architectural barriers, and to maintain the accessible features of their facilities constitute unlawful discrimination on the basis of a disability in violation of Title III of the ADA.

49. Defendants' facilities are required to comply with the Department of Justice's 2010 Standards for Accessible Design, or in some cases the 1991 Standards. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.406; 28 C.F.R., pt. 36, app. A.

50. Defendants are required to provide individuals who use wheelchairs full and equal enjoyment of their facilities. 42 U.S.C. § 12182(a).

51. Defendants have failed, and continue to fail, to provide individuals who use wheelchairs with full and equal enjoyment of their facilities.

52. Defendants have discriminated against Plaintiff and the class in that they have failed to make Defendants' facilities fully accessible to, and independently usable by, individuals who use wheelchairs in violation of 42 U.S.C. § 12182(a) as described above.

53. Defendants' conduct is ongoing and continuous, and Plaintiff has been harmed by Defendants' conduct.

54. Unless Defendants are restrained from continuing their ongoing and continuous course of conduct, Defendants will continue to violate the ADA and will continue to inflict injury upon Plaintiff and the class.

55. Given that Defendants have not complied with the ADA's requirements to make Defendants' facilities fully accessible to, and independently usable by, individuals who use

wheelchairs, Plaintiff invokes his statutory right to declaratory and injunctive relief, as well as costs and attorneys' fees.

PRAYER FOR RELIEF

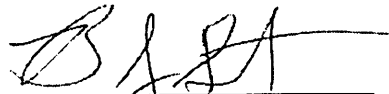
WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, pray for:

- a. A declaratory judgment that Defendants are in violation of the specific requirements of Title III of the ADA described above, and the relevant implementing regulations of the ADA, in that Defendants' facilities, as described above, are not fully accessible to, and independently usable by, individuals who use wheelchairs;
- b. A permanent injunction pursuant to 42 U.S.C. § 12188(a)(2) and 28 C.F.R. § 36.501(b) that: (i) directs Defendants to take all steps necessary to remove the architectural barriers described above and to bring their facilities into full compliance with the requirements set forth in the ADA, and its implementing regulations, so that the facilities are fully accessible to, and independently usable by, individuals who use wheelchairs; (ii) directs Defendants to change their policies and practices to prevent the reoccurrence of access barriers post-remediation; and (iii) directs that Plaintiff shall monitor Defendants' facilities to ensure that the injunctive relief ordered above remains in place.
- c. An Order certifying the class proposed by Plaintiff, naming Plaintiff as class representative, and appointing his counsel as class counsel;
- d. Payment of costs of suit;
- e. Payment of reasonable attorneys' fees pursuant to 42 U.S.C. § 12205 and 28 C.F.R. § 36.505; and

- f. The provision of whatever other relief the Court deems just, equitable, and appropriate.

Dated: February 15, 2019

Respectfully Submitted,



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EXHIBIT B

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Attorneys for Plaintiff MICHAEL G. MURPHY, individually and on behalf of all others similarly situated

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

MICHAEL G. MURPHY, individually and on behalf of all others similarly situated,

Case No. 1:19-cv-472

Plaintiff,

v.

THE KROGER CO.,

Defendant.

NATIONWIDE CLASS ACTION COMPLAINT

COMES NOW, Plaintiff Michael Murphy, on behalf of himself and all others similarly situated, and asserts as follows:

INTRODUCTION

1. Plaintiff brings this action individually and on behalf of all others similarly situated against The Kroger Co., (“Defendant”), asserting violations of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the “ADA”), and its implementing regulations, in connection with accessibility barriers in the parking lots and paths of travel at various public accommodations owned, operated, controlled, and/or leased by Defendant (“Defendant’s facilities”).

2. Plaintiff has a mobility disability and is limited in the major life activity of walking, which has caused him to use a wheelchair for mobility.

3. Plaintiff has visited Defendant's facilities and was denied full and equal access as a result of Defendant's inaccessible parking lots and paths of travel.

4. Plaintiff's experiences are not isolated—Defendant have systematically discriminated against individuals with mobility disabilities by implementing policies and practices that consistently violate the ADA's accessibility guidelines and routinely result in access barriers at Defendant's facilities.

5. In fact, numerous facilities owned, controlled, and/or operated by Defendant have parking lots and paths of travel that are inaccessible to individuals who rely on wheelchairs for mobility, demonstrating that the centralized decision making Defendant employ with regard to the design, construction, alteration, maintenance, and operation of its facilities causes access barriers and/or allows them to develop and persist at Defendant's facilities.

6. Unless Defendant is required to remove the access barriers described below, and required to change its policies and practices so that access barriers do not reoccur at Defendant's facilities, Plaintiff and the proposed Class will continue to be denied full and equal access to those facilities as described and will be deterred from fully using Defendant's facilities.

7. The ADA expressly contemplates injunctive relief aimed at modification of a policy or practice that Plaintiff seeks in this action. In relevant part, the ADA states:

[i]n the case of violations of . . . this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities Where appropriate, injunctive relief shall also include requiring the . . . modification of a policy

42 U.S.C. § 12188(a)(2).

8. Consistent with 42 U.S.C. § 12188(a)(2), Plaintiff seeks a permanent injunction requiring that:

- a. Defendant remediate all parking and path of travel access barriers at Defendant's facilities, consistent with the ADA;
- b. Defendant change its policies and practices so that the parking and path of travel access barriers at Defendant's facilities do not reoccur; and
- c. Plaintiff's representatives shall monitor Defendant's facilities to ensure that the injunctive relief ordered pursuant to Paragraph 8.a. and 8.b. has been implemented and will remain in place.

9. Plaintiff's claims for permanent injunctive relief are asserted as class claims pursuant to Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) was specifically intended to be utilized in civil rights cases where the Plaintiff seeks injunctive relief for his or her own benefit and the benefit of a class of similarly situated individuals. To that end, the note to the 1996 amendment to Rule 23 states:

Subdivision(b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

THE ADA AND ITS IMPLEMENTING REGULATIONS

10. The ADA was enacted nearly 30 years ago and is intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

11. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life.

12. Title III of the ADA generally prohibits discrimination against individuals with disabilities in the full and equal enjoyment of public accommodations, 42 U.S.C. § 12182(a), and prohibits places of public accommodation, either directly or through contractual, licensing, or other arrangements, from outright denying individuals with disabilities the opportunity to participate in a place of public accommodation, 42 U.S.C. § 12182(b)(1)(A)(i), or denying individuals with disabilities the opportunity to fully and equally participate in a place of public accommodation, 42 U.S.C. § 12182(b)(1)(A)(ii).

13. Title III further prohibits places of public accommodation from utilizing methods of administration that have the effect of discriminating on the basis of a disability. 42 U.S.C. § 12182(b)(1)(D).

14. Title III and its implementing regulations define discrimination to include the following:

- a) Failure to remove architectural barriers when such removal is readily achievable for places of public accommodation that existed prior to January 26, 1992, 28 C.F.R. § 36.304(a) and 42 U.S.C. § 12182(b)(2)(A)(iv);
- b) Failure to design and construct places of public accommodation for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities, 28 C.F.R. § 36.401 and 42 U.S.C. § 12183(a)(1);
- c) For alterations to public accommodations made after January 26, 1992, failure to make alterations so that the altered portions of the public accommodation are readily accessible to and usable by individuals with disabilities, 28 C.F.R. § 36.402 and 42 U.S.C. § 12183(a)(2); and
- d) Failure to maintain those features of public accommodations that are required to be readily accessible to and usable by persons with disabilities, 28 C.F.R. § 36.211.

15. The remedies and procedures set forth at 42 U.S.C. § 2000a-3(a) are provided to any person who is being subjected to discrimination on the basis of disability or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of 42 U.S.C. § 12183. 42 U.S.C. 12188(a)(1).

16. The ADA also provides for specific injunctive relief, which includes the following:

In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include . . . modification of a policy . . . to the extent required by this subchapter.

42 U.S.C. § 12188(a)(2); 28 C.F.R. § 36.501(b).

JURISDICTION AND VENUE

17. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 12188.

18. Plaintiff's claims asserted herein arose in this judicial district, and Defendant does substantial business in this judicial district.

19. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2) in that this is the judicial district in which a substantial part of the events and/or omissions at issue occurred.

PARTIES

20. Plaintiff Michael G. Murphy is, and at all times relevant hereto was, a resident of Colorado. As described above, as a result of his disability, Plaintiff uses a wheelchair for mobility. Plaintiff resides in Denver, Colorado. Plaintiff suffered an injury in 2007, and is now paralyzed and relies on a wheelchair for mobility. Plaintiff is a competitive athlete training for the U.S. Ski Team in the sport of mono skiing, and hopes to participate in the 2020 Olympics.

Plaintiff is also a motivational speaker, writer, and athlete. Plaintiff is a member of a protected class under the ADA, 42 U.S.C. § 12102(2), and the regulations implementing the ADA set forth at 28 C.F.R. §§ 36.101 *et seq.*

21. Defendant The Kroger Co. was founded in 1883 and incorporated in 1902. As of February 3, 2018, it is one one of the largest retailers in the world based on annual sales, according to its Form 10-K filed with the Securities and Exchange Commission on April 18, 2018.

22. The company has a current market capitalization of more than \$22 billion. As of February 3, 2018, Kroger employed approximately 449,000 full- and part-time employees and operated stores in over 35 states. Kroger operates approximately 2,782 supermarkets and 782 convenience stores nation-wide. Kroger's current strategy emphasizes ownership of store real estate. As of February 3, 2018, approximately 45% of its supermarkets, and approximately 55% of the convenience stores, are operated in Company-owned facilities.

23. Krogers does business through its subsidiaries including, but not limited to the following: Baker's, City Market, Dillons, Food 4 Less, Foods Co., Fred Meyer, Fry's, Gerbes, Harris Teeter, King Soopers, Jay C Food Store, Kroger, Owens Market, Pay-Less Super Markets, QFC, Ralphs, and Smith's Food and Drug.

24. In Colorado Kroger owns and operates 143 food stores, 97 convencince stores and 9 jewelry stores. Denver is also the headquarters for Kroger's King Soopers and City Market divisions. King Soopers is a subsidiary of Dillon Companies, which is a wholly owned subsidiary of The Kroger Company operating in the Rocky Mountains of the United States. Plaintiff's pre-litigation investigation was limited to Defendant's Kroger and King Soopers facilities.

25. Defendant is a public accommodation pursuant to 42 U.S.C. §12181(7).

FACTUAL ASSERTIONS

I. Plaintiff Has Been Denied Full and Equal Access to Defendant's Facilities

26. Plaintiff has visited Defendant's facilities located at 2810 Quebec St, Denver, CO 80207 including within the last year, where he experienced unnecessary difficulty and risk due to excessive slopes in a purportedly accessible parking area and other ADA accessibility violations as set forth in more detail below.

27. Despite this difficulty and risk, Plaintiff plans to return to Defendant's facilities. The store is one of the primary places Plaintiff and his wife like to shop when they are in Denver. It is conveniently located near their home and is a nice store. Plaintiff and his wife regularly visit this location several times a year. Furthermore, Plaintiff intends to return to Defendant's facilities to ascertain whether those facilities remain in violation of the ADA.

28. As a result of Defendant's non-compliance with the ADA, Plaintiff's ability to access and safely use Defendant's facilities has been significantly impeded.

29. Plaintiff will be deterred from returning to and fully and safely accessing Defendant's facilities, however, so long as Defendant's facilities remain non-compliant, and so long as Defendant continues to employ the same policies and practices that have led, and in the future will lead, to inaccessibility at Defendant's facilities.

30. Without injunctive relief, Plaintiff will continue to be unable to fully and safely access Defendant's facilities in violation of his rights under the ADA.

31. As an individual with a mobility disability who uses a wheelchair, Plaintiff is directly interested in whether public accommodations, like Defendant's facilities, have

architectural barriers that impede full accessibility to those accommodations by individuals with mobility-related disabilities.

II. Defendant Repeatedly Denies Individuals With Disabilities Full and Equal Access to Defendant's Facilities

32. As the owner and manager of its properties, Defendant employs centralized policies, practices, and procedures with regard to the design, construction, alteration, maintenance, and operation of its facilities.

33. To date, Defendant's centralized design, construction, alteration, maintenance, and operational policies and practices have systematically and routinely violated the ADA by designing, constructing, and altering facilities so that they are not readily accessible and are usable, by failing to remove architectural barriers, and by failing to maintain and operate facilities so that the accessible features of Defendant's facilities are maintained.

34. On Plaintiff's behalf, investigators examined multiple locations owned, controlled, and/or operated by Defendant and found the following violations, which are illustrative of the fact that Defendant implements policies and practices that routinely result in accessibility violations:

- a. 8200 S Holly Street, Centennial, CO
 - i. Multiple violations of ADA regulations in the purportedly accessible parking area;
- b. 2810 Quebec Street, Denver, CO,
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- c. 17751 Cottonwood Drive, Parker, CO
 - i. Multiple violations of ADA regulations in the purportedly accessible parking area;
- d. 9983 Wadsworth Parkway, Westminster, CO

- i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;
- e. 7132 Hamilton Ave, Cincinnati OH
 - i. Multiple violations of ADA regulations in the purportedly accessible parking area;
- f. 5878 Harrison Ave, Cincinnati OH
 - i. Multiple violations of ADA regulations in the purportedly accessible parking area;
- g. 1886-1922 Needmore Ave, Dayton OH
 - i. Multiple violations of ADA regulations in the purportedly accessible parking area;
- h. 12164 Lebanon Road, Cincinnati OH
 - i. Multiple violations of ADA regulations in the purportedly accessible parking area;
- i. 7823 SE 28th St Mercer Island, WA
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%;

35. The fact that individuals with mobility-related disabilities are denied full and equal access to numerous of Defendant's facilities, and the fact that each of these facilities deny access by way of inaccessible parking facilities, is evidence that the inaccessibility Plaintiff experienced is not isolated, but rather, is caused by Defendant's systemic disregard for the rights of individuals with disabilities.

36. Defendant's systemic access violations demonstrate that Defendant either employs policies and practices that fail to design, construct, and alter its facilities so that they are readily accessible and usable and/or that Defendant employs maintenance and operational policies and practices that are unable to maintain accessibility.

37. As evidenced by the widespread inaccessibility of Defendant's parking facilities, absent a change in Defendant's corporate policies and practices, access barriers are likely to reoccur in Defendant's facilities even after they have been remediated.

38. Accordingly, Plaintiff seeks an injunction to remove the barriers currently present at Defendant's facilities and an injunction to modify the policies and practices that have created or allowed, and will create or allow, inaccessibility to affect Defendant's network of facilities.

CLASS ASSERTIONS

39. Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) on behalf of himself and the following nationwide class:

All persons with qualified mobility disabilities who were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any Tanger outlet location in the United States on the basis of disability because such persons encountered accessibility barriers due to Defendant's failure to comply with the ADA's accessible parking and path of travel requirements.

40. Numerosity: The class described above is so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective class members through this class action will benefit both the parties and this Court and will facilitate judicial economy.

41. Typicality: Plaintiff's claims are typical of the claims of the members of the class. The claims of Plaintiff and members of the class are based on the same legal theories and arise from the same unlawful conduct.

42. Common Questions of Fact and Law: There is a well-defined community of interest and common questions of fact and law affecting members of the class in that they all have been and/or are being denied its civil rights to full and equal access to, and use and

enjoyment of, Defendant's facilities and/or services due to Defendant's failure to make its facilities fully accessible and independently usable as above described.

43. Adequacy of Representation: Plaintiff is an adequate representative of the class because his interests do not conflict with the interests of the members of the class. Plaintiff will fairly, adequately, and vigorously represent and protect the interests of the members of the class, and he has no interests antagonistic to the members of the class. Plaintiff has retained counsel who are competent and experienced in the prosecution of class action litigation, generally, and who possess specific expertise in the context of class litigation under the ADA.

44. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to the class, making appropriate both declaratory and injunctive relief with respect to Plaintiff and the class as a whole.

SUBSTANTIVE VIOLATION

45. The assertions contained in the previous paragraphs are incorporated by reference.

46. Defendant's facilities were altered, designed, or constructed after the effective date of the ADA.

47. Defendant's facilities are required to be altered, designed, and constructed so that they are readily accessible to and usable by individuals who use wheelchairs. 42 U.S.C. § 12183(a).

48. Further, the accessible features of Defendant's facilities, which include the parking lots and paths of travel, are required to be maintained so that they are readily accessible to and usable by individuals with mobility disabilities. 28 C.F.R. § 36.211.

49. The architectural barriers described above demonstrate that Defendant's facilities were not altered, designed, or constructed in a manner that causes them to be readily accessible to and usable by individuals who use wheelchairs and/or that Defendant's facilities were not maintained so as to ensure that they remained accessible to and usable by individuals who use wheelchairs.

50. Furthermore, the architectural barriers described above demonstrate that have failed to remove barriers as required by 42 U.S.C. § 12182(b)(2)(A)(iv).

51. Defendant's repeated and systemic failures to design, construct, and alter its facilities so that they are readily accessible and usable, to remove architectural barriers, and to maintain the accessible features of its facilities constitute unlawful discrimination on the basis of a disability in violation of Title III of the ADA.

52. Defendant's facilities are required to comply with the Department of Justice's 2010 Standards for Accessible Design, or in some cases the 1991 Standards. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.406; 28 C.F.R., pt. 36, app. A.

53. Defendant is required to provide individuals who use wheelchairs full and equal enjoyment of its facilities. 42 U.S.C. § 12182(a).

54. Defendant has failed, and continue to fail, to provide individuals who use wheelchairs with full and equal enjoyment of its facilities.

55. Defendant has discriminated against Plaintiff and the class in that it has failed to make Defendant's facilities fully accessible to, and independently usable by, individuals who use wheelchairs in violation of 42 U.S.C. § 12182(a) as described above.

56. Defendant's conduct is ongoing and continuous, and Plaintiff has been harmed by Defendant's conduct.

57. Unless Defendant is restrained from continuing its ongoing and continuous course of conduct, Defendant will continue to violate the ADA and will continue to inflict injury upon Plaintiff and the class.

58. Given that Defendant has not complied with the ADA's requirements to make Defendant's facilities fully accessible to, and independently usable by, individuals who use wheelchairs, Plaintiff invokes his statutory rights to declaratory and injunctive relief, as well as costs and attorneys' fees.

PRAYER FOR RELIEF

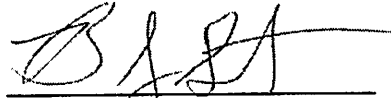
WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, prays for:

- a. A declaratory judgment that Defendant is in violation of the specific requirements of Title III of the ADA described above, and the relevant implementing regulations of the ADA, in that Defendant's facilities, as described above, are not fully accessible to, and independently usable by, individuals who use wheelchairs;
- b. A permanent injunction pursuant to 42 U.S.C. § 12188(a)(2) and 28 C.F.R. § 36.501(b) that: (i) directs Defendant to take all steps necessary to remove the architectural barriers described above and to bring its facilities into full compliance with the requirements set forth in the ADA, and its implementing regulations, so that the facilities are fully accessible to, and independently usable by, individuals who use wheelchairs; (ii) directs Defendant to change its policies and practices to prevent the reoccurrence of access barriers post-remediation; and (iii) directs that Plaintiff shall monitor Defendant's facilities to ensure that the injunctive relief ordered above remains in place.

- c. An Order certifying the class proposed by Plaintiff, naming Plaintiff as class representative, and appointing his counsel as class counsel;
- d. Payment of costs of suit;
- e. Payment of reasonable attorneys' fees pursuant to 42 U.S.C. § 12205 and 28 C.F.R. § 36.505; and
- f. The provision of whatever other relief the Court deems just, equitable, and appropriate.

Dated: February 15, 2019

Respectfully Submitted,



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EXHIBIT C

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Attorneys for Plaintiff MICHAEL G. MURPHY, individually and on behalf of all others similarly situated

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

MICHAEL G. MURPHY, individually and on behalf of all others similarly situated,

Case No. 1:19-cv-498

Plaintiff,

v.

WESTERN ALTA HOLDINGS, LP, Co., d/b/a
ALTA CONVENIENCE/PESTER
MARKETING, a Texas Limited Partnership

Defendant.

NATIONWIDE CLASS ACTION COMPLAINT

COMES NOW, Plaintiff Michael Murphy, on behalf of himself and all others similarly situated, and asserts as follows:

INTRODUCTION

1. Plaintiff brings this action individually and on behalf of all others similarly situated against Western Alta Holdings, LP Co. d/b/a Alta Convenience, (“Defendant”), asserting violations of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the “ADA”), and its implementing regulations, in connection with accessibility barriers in the

parking lots and paths of travel at various public accommodations owned, operated, controlled, and/or leased by Defendant (“Defendant’s facilities”).

2. Plaintiff has a mobility disability and is limited in the major life activity of walking, which has caused him to use a wheelchair for mobility.

3. Plaintiff visited Defendant’s facilities and was denied full and equal access as a result of Defendants’ inaccessible parking lots and paths of travel.

4. Plaintiff’s experiences are not isolated—Defendant has systematically discriminated against individuals with mobility disabilities by implementing policies and practices that consistently violate the ADA’s accessibility guidelines and routinely result in access barriers at Defendant’s facilities.

5. In fact, numerous facilities owned, controlled, and/or operated by Defendant have parking lots and paths of travel that are inaccessible to individuals who rely on wheelchairs for mobility, demonstrating that the centralized decision making Defendant employs with regard to the design, construction, alteration, maintenance, and operation of its facilities causes access barriers and/or allows them to develop and persist at Defendant’s facilities.

6. Unless Defendant is required to remove the access barriers described below, and required to change its policies and practices so that access barriers do not reoccur at Defendant’s facilities, Plaintiff and the proposed Class will continue to be denied full and equal access to those facilities as described and will be deterred from fully using Defendant’s facilities.

7. The ADA expressly contemplates injunctive relief aimed at modification of a policy or practice that Plaintiff seeks in this action. In relevant part, the ADA states:

[i]n the case of violations of . . . this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities Where appropriate, injunctive relief shall also include requiring the . . . modification of a policy

42 U.S.C. § 12188(a)(2).

8. Consistent with 42 U.S.C. § 12188(a)(2), Plaintiff seeks a permanent injunction requiring that:

- a. Defendant remediate all parking and path of travel access barriers at Defendant's facilities, consistent with the ADA;
- b. Defendant change its policies and practices so that the parking and path of travel access barriers at Defendant's facilities do not reoccur; and
- c. Plaintiff's representatives shall monitor Defendant's facilities to ensure the injunctive relief ordered pursuant to Paragraph 8.a. and 8.b. has been implemented and will remain in place.

9. Plaintiff's claims for permanent injunctive relief are asserted as Class claims pursuant to Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) was specifically intended to be utilized in civil rights cases where the Plaintiff seeks injunctive relief for his or her own benefit and the benefit of a Class of similarly situated individuals. To that end, the note to the 1996 amendment to Rule 23 states:

Subdivision(b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a Class, and final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the Class as a whole, is appropriate Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a Class, usually one whose members are incapable of specific enumeration.

THE ADA AND ITS IMPLEMENTING REGULATIONS

10. The ADA was enacted nearly 30 years ago and is intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

11. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life.

12. Title III of the ADA generally prohibits discrimination against individuals with disabilities in the full and equal enjoyment of public accommodations, 42 U.S.C. § 12182(a), and prohibits places of public accommodation, either directly or through contractual, licensing, or other arrangements, from outright denying individuals with disabilities the opportunity to participate in a place of public accommodation, 42 U.S.C. § 12182(b)(1)(A)(i), or denying individuals with disabilities the opportunity to fully and equally participate in a place of public accommodation, 42 U.S.C. § 12182(b)(1)(A)(ii).

13. Title III further prohibits places of public accommodation from utilizing methods of administration that have the effect of discriminating on the basis of a disability. 42 U.S.C. § 12182(b)(1)(D).

14. Title III and its implementing regulations define discrimination to include the following:

- a) Failure to remove architectural barriers when such removal is readily achievable for places of public accommodation that existed prior to January 26, 1992, 28 C.F.R. § 36.304(a) and 42 U.S.C. § 12182(b)(2)(A)(iv);
- b) Failure to design and construct places of public accommodation for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities, 28 C.F.R. § 36.401 and 42 U.S.C. § 12183(a)(1);
- c) For alterations to public accommodations made after January 26, 1992, failure to make alterations so that the altered portions of the public accommodation are readily accessible to and usable by individuals with disabilities, 28 C.F.R. § 36.402 and 42 U.S.C. § 12183(a)(2); and
- d) Failure to maintain those features of public accommodations that are required to be readily accessible to and usable by persons with disabilities, 28 C.F.R. § 36.211.

15. The remedies and procedures set forth at 42 U.S.C. § 2000a-3(a) are provided to any person who is being subjected to discrimination on the basis of disability or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of 42 U.S.C. § 12183. 42 U.S.C. 12188(a)(1).

16. The ADA also provides for specific injunctive relief, which includes the following:

In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include . . . modification of a policy . . . to the extent required by this subchapter.

42 U.S.C. § 12188(a)(2); 28 C.F.R. § 36.501(b).

JURISDICTION AND VENUE

17. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 12188.

18. Plaintiff's claims asserted herein arose in this judicial district, and Defendant does substantial business in this judicial district.

19. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2) in that this is the judicial district in which a substantial part of the events and/or omissions at issue occurred.

PARTIES

20. Plaintiff Michael G. Murphy is, and at all times relevant hereto was, a resident of Colorado. As described above, as a result of his disability, Plaintiff uses a wheelchair for mobility. Plaintiff resides in Denver, Colorado. Plaintiff suffered an injury in 2007, and is now paralyzed and relies on a wheelchair for mobility. Plaintiff is a competitive athlete training for the U.S. Ski Team in the sport of mono skiing, and hopes to participate in the 2020 Olympics.

Plaintiff is also a motivational speaker, writer, and athlete. He is therefore a member of a protected Class under the ADA, 42 U.S.C. § 12102(2), and the regulations implementing the ADA set forth at 28 C.F.R. §§ 36.101 *et seq.*

21. Defendant Western Alta Holdings, LP Co. is the parent company of Pester Marketing/dba Alta Convenience Stores. Alta Convenience operates 117 convenience stores through multiple states including Nebraska, Colorado, Kansas and New Mexico. Hundreds of people are employed at the 90 Alta Convenience Stores located in Colorado. Pester Marketing/Alta Convenience Stores is based in Denver, Colorado, while Western Alta Holdings LP Co. is based in San Antonio, Texas.

22. Defendant is a public accommodation pursuant to 42 U.S.C. §12181(7).

FACTUAL ASSERTIONS

I. Plaintiff Has Been Denied Full and Equal Access to Defendant's Facilities

23. Plaintiff has visited Defendant's facilities located at 9999 W 38th Ave., Wheat Ridge, Colorado, including within the last year, where he experienced unnecessary difficulty and risk due to excessive slopes in a purportedly accessible parking area and other ADA accessibility violations as set forth in more detail below.

24. Despite this difficulty and risk, Plaintiff plans to return to Defendant's facilities, at least six times a year. It is convenient for him to stop by regularly to continue to test Defendant's facilities' compliance with the ADA because Plaintiff and his wife regularly drive near Defendant's facilities. Furthermore, Plaintiff intends to return to Defendant's facilities to ascertain whether those facilities remain in violation of the ADA.

25. As a result of Defendant's non-compliance with the ADA, Plaintiff's ability to access and safely use Defendant's facilities has been significantly impeded.

26. Plaintiff will be deterred from returning to and fully and safely accessing Defendant's facilities, however, so long as Defendant's facilities remain non-compliant, and so long as Defendant continues to employ the same policies and practices that have led, and in the future will lead, to inaccessibility at Defendant's facilities.

27. Without injunctive relief, Plaintiff will continue to be unable to fully and safely access Defendant's facilities in violation of his rights under the ADA.

28. As an individual with a mobility disability who uses a wheelchair, Plaintiff is directly interested in whether public accommodations, like Defendant's facilities, have architectural barriers that impede full accessibility to those accommodations by individuals with mobility-related disabilities.

II. Defendants Repeatedly Deny Individuals With Disabilities Full and Equal Access to Defendant's Facilities

29. As the owner and manager of their properties, Defendant employs centralized policies, practices, and procedures with regard to the design, construction, alteration, maintenance, and operation of their facilities.

30. To date, Defendant's centralized design, construction, alteration, maintenance, and operational policies and practices have systematically and routinely violated the ADA by designing, constructing, and altering facilities so that they are not readily accessible and are usable, by failing to remove architectural barriers, and by failing to maintain and operate facilities so that the accessible features of Defendants' facilities are maintained.

31. Investigators examined multiple locations owned, controlled, and/or operated by Defendant and found the following violations, which are illustrative of the fact that Defendant implements policies and practices that routinely result in accessibility violations:

- a. 9190 Huron Street Thornton, CO,

- i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%; and
- b. 15201 East Hampden Avenue Aurora, CO
 - i. Projecting curb ramp exceeds allowable tolerance under ADA regulations;
- c. 9999 West 38th Avenue Wheat Ridge, CO
 - i. Projecting curb ramp exceeds allowable tolerance under ADA regulations;
- d. 2775 Briargate Boulevard Colorado Springs, CO
 - i. The surfaces of one or more purportedly accessible parking spaces had slopes exceeding 2.1%; and
 - ii. The surfaces of one or more access aisles had slopes exceeding 2.1%.
- e. 5050 Boardwalk Drive Colorado Springs, CO
 - i. Projecting curb ramp exceeds allowable tolerance under ADA regulations.

32. The fact that individuals with mobility-related disabilities are denied full and equal access to numerous of Defendant's facilities, and the fact that each of these facilities deny access by way of inaccessible parking facilities, is evidence that the inaccessibility Plaintiff experienced is not isolated, but rather, is caused by Defendant's systemic disregard for the rights of individuals with disabilities.

33. Defendant's systemic access violations demonstrate that Defendant either employs policies and practices that fail to design, construct, and alter its facilities so that they are readily accessible and usable and/or that Defendant employs maintenance and operational policies and practices that are unable to maintain accessibility.

34. As evidenced by the widespread inaccessibility of Defendant's parking facilities, absent a change in Defendant's corporate policies and practices, access barriers are likely to reoccur in Defendant's facilities even after they have been remediated.

35. Accordingly, Plaintiff seeks an injunction to remove the barriers currently present at Defendant's facilities and an injunction to modify the policies and practices that have created or allowed, and will create or allow, inaccessibility to affect Defendants' network of facilities.

CLASS ASSERTIONS

36. Plaintiff brings this Class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) on behalf of himself and the following nationwide Class:

All persons with qualified mobility disabilities who were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any Alta Convenience location in the United States on the basis of disability because such persons encountered accessibility barriers due to Defendants' failure to comply with the ADA's accessible parking and path of travel requirements.

37. Numerosity: The Class described above is so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective Class members through this Class action will benefit both the parties and this Court and will facilitate judicial economy.

38. Typicality: Plaintiff's claims are typical of the claims of the members of the Class. The claims of Plaintiff and members of the Class are based on the same legal theories and arise from the same unlawful conduct.

39. Common Questions of Fact and Law: There is a well-defined community of interest and common questions of fact and law affecting members of the Class in that they all have been and/or are being denied their civil rights to full and equal access to, and use and enjoyment of, Defendants' facilities and/or services due to Defendants' failure to make their facilities fully accessible and independently usable as above described.

40. Adequacy of Representation: Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the members of the Class. Plaintiff will

fairly, adequately, and vigorously represent and protect the interests of the members of the Class, and he has no interests antagonistic to the members of the Class. Plaintiff has retained counsel who are competent and experienced in the prosecution of Class action litigation, generally, and who possess specific expertise in the context of Class litigation under the ADA.

41. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, making appropriate both declaratory and injunctive relief with respect to Plaintiff and the Class as a whole.

SUBSTANTIVE VIOLATION

42. The assertions contained in the previous paragraphs are incorporated by reference.

43. Defendant's facilities were altered, designed, or constructed after the effective date of the ADA.

44. Defendant's facilities are required to be altered, designed, and constructed so that they are readily accessible to and usable by individuals who use wheelchairs. 42 U.S.C. § 12183(a).

45. Further, the accessible features of Defendant's facilities, which include the parking lots and paths of travel, are required to be maintained so that they are readily accessible to and usable by individuals with mobility disabilities. 28 C.F.R. § 36.211.

46. The architectural barriers described above demonstrate that Defendant's facilities were not altered, designed, or constructed in a manner that causes them to be readily accessible to and usable by individuals who use wheelchairs and/or that Defendant's facilities were not maintained so as to ensure that they remained accessible to and usable by individuals who use wheelchairs.

47. Furthermore, the architectural barriers described above demonstrate that Defendant has failed to remove barriers as required by 42 U.S.C. § 12182(b)(2)(A)(iv).

48. Defendant's repeated and systemic failures to design, construct, and alter their facilities so that they are readily accessible and usable, to remove architectural barriers, and to maintain the accessible features of their facilities constitute unlawful discrimination on the basis of a disability in violation of Title III of the ADA.

49. Defendant's facilities are required to comply with the Department of Justice's 2010 Standards for Accessible Design, or in some cases the 1991 Standards. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.406; 28 C.F.R., pt. 36, app. A.

50. Defendant is required to provide individuals who use wheelchairs full and equal enjoyment of their facilities. 42 U.S.C. § 12182(a).

51. Defendant has failed, and continues to fail, to provide individuals who use wheelchairs with full and equal enjoyment of their facilities.

52. Defendant has discriminated against Plaintiff and the Class in that it has failed to make Defendant's facilities fully accessible to, and independently usable by, individuals who use wheelchairs in violation of 42 U.S.C. § 12182(a) as described above.

53. Defendant's conduct is ongoing and continuous, and Plaintiff has been harmed by Defendant's conduct.

54. Unless Defendant is restrained from continuing its ongoing and continuous course of conduct, Defendant will continue to violate the ADA and will continue to inflict injury upon Plaintiff and the Class.

55. Given that Defendant has not complied with the ADA's requirements to make Defendant's facilities fully accessible to, and independently usable by, individuals who use

wheelchairs, Plaintiff invokes his statutory rights to declaratory and injunctive relief, as well as costs and attorneys' fees.

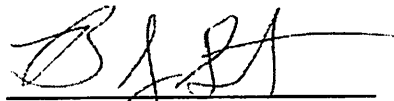
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Dated: February 19, 2019

Respectfully Submitted,



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