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

GAYLE LEWANDOWSKI, JANET AGARDY, and MARISA MARTINEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FAMILY DOLLAR STORES, INC., FAMILY DOLLAR, INC., AND DOLLAR TREE STORES, INC.,

Defendants.

Case No. 2:19-cv-00858-MJH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Through their undersigned counsel, Plaintiffs Gayle Lewandowski, Janet Agardy, and Marisa Martinez (collectively, "Plaintiffs"), respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Action Settlement ("Unopposed Motion"). Defendants Family Dollar Stores, Inc., Family Dollar, Inc., and Dollar Tree Stores, Inc. (collectively, "Family Dollar" or "Defendants") do not oppose the recitations of fact and law in this Unopposed Motion for the purposes of settlement only.

I. INTRODUCTION

The Americans with Disabilities Act ("ADA") requires that places of public accommodation be accessible or made accessible to individuals who are dependent upon wheelchairs or other mobility devices.

Title III of the ADA generally prohibits discrimination against individuals with disabilities in the full and equal enjoyment of goods and services offered public accommodations, 42 U.S.C.

§ 12182(a), and prohibits places of public accommodation from denying individuals with disabilities the opportunity to access the goods or services offered by 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). This proposed class action is based upon Plaintiffs' allegations that Defendants' system-wide policies and practices permit and perpetuate systematic violations of ADA accessibility standards in the form of obstructed paths of travel with non-fixed items within Defendants' 15,600 plus retail stores. *See Dollar Tree 2020 Annual Report*.[1] The proposed settlement in this matter is calculated to ensure that those retail stores are, in fact, accessible in all paths of travel.

The relief achieved on behalf of the Class in this action provides systemic and comprehensive injunctive relief for the Class, including the following:

- Defendants will take commercially reasonable steps to maintain a minimum width of the path of travel of at least 36 inches for all of the following Pathways: parking in designated accessible parking spaces and adjoining access aisles; access route from the designated accessible parking spaces to the Store entrance; the entrances or exits of the stores; accessible routes within the store (*i.e.*, aisles or pathways to merchandise on the sales floor); access routes to, and use of, publicly available restroom facilities; the route to or ability to use the publicly available drinking fountains; and paths to any emergency exits and/or fire escape doors (collectively, the "Access Routes").

- Defendants will take commercially reasonable steps to maintain access to, and use of, publicly available restrooms at their Stores for Class Member(s) in accordance with 42 U.S.C. §12182(b)(2)(A)(iv) (for Stores that were designed and constructed for first occupancy prior to January 26, 1993) and 42 U.S.C. §12183(a)(1)(2) (for Stores constructed or restrooms that underwent an alteration as defined in the ADA on or after January 26, 1993). Maintaining access and use will include accessibility of paths of travel within the restrooms, sinks, under sink areas, maneuvering clearances (including knee and toe clearances), reach ranges to operable parts (including maximum force to

[1] *available at* https://www.dollartreeinfo.com/static-files/f1a166d5-12c2-478b-9f99-0c142f88d884 (Defendants operate more than 15,685 retail stores across the 48 contiguous states and five Canadian provinces under the Dollar Tree and Family Dollar brands as of December 31, 2020).

activate an operable part), mirrors, water closets (and all elements therein), in accordance with either the 1991 or 2010 ADA Standards for Accessible Design ("ADA Standards"), whichever is applicable to the restrooms at the Stores.

- Defendants will have an email address, website address, and/or a toll-free telephone number where customers can report alleged violations of the ADA. The email address, website, and/or toll-free telephone number will be advertised on a customer facing sign that contains language similar to the following statement: If you are disabled and need assistance while in our store, any of our Team Members will be pleased to provide the assistance you need. If you need additional assistance, please send your comments and questions [to email address, website address, and/or toll-free telephone number].

- Defendants will require all Regional Directors, District Managers, and Store Managers and hourly employees hired prior to the Effective Date of the Settlement Agreement to complete a computer-based ADA Title III training module. For all Regional Directors, District Managers, and Store Managers hired after the Effective Date of the Settlement Agreement, completion of the computer-based Title III ADA Compliance Training will be completed within the first six (6) months of employment.

- In addition, the settlement contains monitoring and reporting provisions to ensure that Family Dollar meets its obligations. Class Counsel will conduct audits of Family Dollar's compliance.

Given the relief achieved here, and for the additional reasons set forth below, Plaintiffs respectfully request that the Court grant preliminary approval of the settlement.

II. BACKGROUND OF THE LITIGATION

On July 17, 2019, by and through her undersigned counsel, formerly Carlson Lynch, LLP ("Carlson Lynch"), Plaintiff Gayle Lewandowski initiated this action by way of class action complaint alleging that Family Dollar violated Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (the "ADA"), and its implementing regulations based on Defendants' placement of non-fixed objects in locations at their stores that reduce or eliminate accessible routes of travel for people with mobility disabilities (the "Pennsylvania Lawsuit"). (ECF 1). Carlson Lynch engaged in extensive investigation and research before filing the Pennsylvania Lawsuit. The parties in the Pennsylvania Lawsuit engaged in mediation with mediator Arthur Stroyd on November 5, 2019. The parties were unsuccessful in that mediation.

On December 2, 2019, Plaintiff Janet Agardy, by and through her counsel Carlson Lynch, initiated a class action lawsuit in the United States District Court for the District of Colorado, civil action number 1:19-cv-03381 (the "Colorado Lawsuit"). The Colorado Lawsuit alleged claims against Defendants like those in the Pennsylvania Lawsuit based on Defendants' substantially similar acts of placing non-fixed objects in locations that reduce or eliminate accessible routes of travel for people with mobility disabilities at their stores. Carlson Lynch engaged in extensive investigation and research before filing the Colorado Lawsuit.

On January 29, 2020, Plaintiff Marisa Martinez, by and through her counsel Carlson Lynch, initiated a class action lawsuit in the Superior Court of the State of California for the County of Los Angeles, civil action number 20STCV03676 (the "California Lawsuit"). The California Lawsuit alleged that Defendants violated the California Unruh Civil Rights Act and the California Disabled Persons Act based on Defendants' substantially similar acts of placing non-fixed objects in locations that reduce or eliminate accessible routes of travel for people with mobility disabilities at their stores. Carlson Lynch engaged in extensive investigation and research before filing the California Lawsuit.

After engaging in extensive discovery and motions practice, the parties in each of the aforementioned lawsuits agreed to discuss a global settlement. On December 4, 2020, the parties participated in a mediation with Carole Katz and reached an agreement in principle for a class resolution of all Plaintiffs' claims related to accessibility barriers at Defendants' stores. The parties agreed to stay the aforementioned lawsuits and agreed that Plaintiffs would file a Consolidated First Amended Complaint ("FAC") in this Court.

Plaintiffs allege in the FAC that each Plaintiff has a mobility disability under the ADA, and each Plaintiff uses a wheelchair for mobility assistance. (FAC ¶¶ 6, 33-36). Plaintiffs further

allege that they are regular customers of Defendants' stores and have experienced access barriers ("Access Barriers") in the form of merchandise, merchandise displays, carts, boxes, dollies, and other non-fixed items placed in accessible routes ("Access Routes") of Defendants' stores in manner that has limited Plaintiffs' ability to navigate through pathways of travel while using their wheelchairs. (FAC ¶¶ 43-48). The FAC alleges violations of the ADA, and seeks injunctive relief, along with attorneys' fees and costs. (FAC ¶¶ 63-67, Prayer for Relief).

On October 20, 2021, the parties finalized terms of a written settlement agreement, which all parties have now executed. A copy of the Class Settlement Agreement is attached to Plaintiffs' Unopposed Motion as **Exhibit A** (hereinafter, "Settlement Agreement"). The Settlement Agreement becomes effective only upon final approval by this Court. The terms of the Settlement Agreement are discussed below.

III. THE TERMS OF THE SETTLEMENT

The Settlement Agreement is intended to effect a complete resolution and settlement of all claims and controversies relating to the assertions of Plaintiffs and the Class. In exchange for a release of claims by Plaintiffs and the Class, Family Dollar will agree to provide the injunctive relief as described, *infra*.

A. Injunctive Relief for the Benefit of the Class

The parties have agreed to the following injunctive relief:

1. ADA Access Compliance

Defendants agree to take commercially reasonable steps to maintain a minimum width of the path of travel of at least 36 inches for all of the following Pathways: parking in designated accessible parking spaces and adjoining access aisles; access route from the designated accessible parking spaces to the Store entrance; the entrances or exits of the stores; accessible routes within

the store (*i.e.*, aisles or pathways to merchandise on the sales floor); access routes to, and use of, publicly available restroom facilities; the route to or ability to use the publicly available drinking fountains; and paths to any emergency exits and/or fire escape doors (the "Access Routes"). Notwithstanding the foregoing, Defendants shall not be required to maintain the minimum width(s) of the Access Routes during temporary and/or isolated circumstances due to repairs, maintenance, setting up displays, reconfiguring products or displays, stocking merchandise, and/or other tasks associated with operating the Stores. Defendants further agree that, if Access Routes are obstructed, they will follow the protocols set forth herein to promptly remedy the issue.

Defendants further agree to take commercially reasonable steps to maintain access to, and use of, publicly available restrooms at their Stores for Class Member(s) in accordance with 42 U.S.C. §12182(b)(2)(A)(iv) (for Stores that were designed and constructed for first occupancy prior to January 26, 1993) and 42 U.S.C. §12183(a)(1)(2) (for Stores constructed or restrooms that underwent an alteration as defined in the ADA on or after January 26, 1993). Maintaining access and use will include accessibility of paths of travel within the restrooms, sinks, under sink areas, maneuvering clearances (including knee and toe clearances), reach ranges to operable parts (including maximum force to activate an operable part), mirrors, water closets (and all elements therein), in accordance with either the 1991 or 2010 ADA Standards for Accessible Design ("ADA Standards"), whichever is applicable to the restrooms at the Stores. In the event that the property in question is subject to a lease agreement, the allocation of such responsibilities under such lease agreement will limit Defendants' obligations hereunder, to the fullest extent permitted by law.

2. ADA Customer Service Assistance

Defendants will have an email address, website address, and/or a toll-free telephone number where customers can report alleged violations of the ADA. The email address, website,

and/or toll-free telephone number will be advertised on a customer facing sign that contains language similar to the following statement: If you are disabled and need assistance while in our store, any of our Team Members will be pleased to provide the assistance you need. If you need additional assistance, please send your comments and questions [to email address, website address, and/or toll-free telephone number]. When appropriate, in the reasonable judgment of Defendants, if the ADA complaint reported through the email address, website, and/or toll-free telephone number alleges a condition that does not comply with the applicable ADA standard, the issue will be investigated and, when appropriate, remediated.

3. Training on Accessibility Plan

Defendants will require all Regional Directors, District Managers, and Store Managers and hourly employees hired prior to the Effective Date of this Agreement to complete a computer-based ADA Title III training module. For all Regional Directors, District Managers, and Store Managers hired after the Effective Date of this Agreement, completion of the computer-based Title III ADA Compliance Training will be completed within the first six (6) months of employment.

B. Monitoring Provisions

The Settlement Agreement contains monitoring and reporting provisions to ensure that Family Dollar meets its obligations. Family Dollar will ensure that the District Managers will conduct checks on at least a quarterly basis at each store to ensure that the Pathways are free of Access Barriers as defined in the Agreement. Should the District Manager determine that there are any Access Barriers in any Access Routes, the District Manager will work with the Store Manager to remedy the specific issue within a reasonable time period under the circumstances.

Beginning on the one hundred eighty-first (181st) day after the Effective Date of the Settlement Agreement, Class Counsel or their agents may monitor Defendants' compliance with

the Settlement Agreement through inspections of Defendants' Stores, which monitoring may be performed without advance notice to Defendants.

C. Additional Relief; Payment of Incentive Awards to Plaintiffs and Reasonable Attorneys' Fees and Expenses to Class Counsel

The Settlement Agreement includes a payment to each of the named Plaintiffs in the following amounts: $2,500.00 to Gayle Lewandowski; $2,500.00 to Janet Agardy; and, $1,000.00 to Marisa Martinez (collectively, "Class Representative Payment"). The Class Representative Payment is granted in exchange for the release of the Named Plaintiffs' claims as described in the Settlement Agreement as well as for the service each Named Plaintiff provided in the course of the lawsuit.

Additionally, Family Dollar has agreed to pay Class Counsel's fees and expenses of $321,500.00 which reflects compensation for Class Counsel's work on this litigation to date, reasonable expenses incurred to date, and fees for future monitoring of Family Dollar's compliance with the Settlement Agreement. Class Counsel's fees and expenses were negotiated only after an agreement was reached on the injunctive relief provisions of the Settlement Agreement.

IV. THE COURT SHOULD ISSUE THE PROPOSED ORDER PRELIMINARILY APPROVING THE CLASS SETTLEMENT

A review of a proposed class action settlement generally occurs in two steps. First, "[t]he judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." *Manual for Complex Litigation* (Fourth) § 21.632 (2004). Second, "[t]he judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.* If the proposed settlement falls "within the range of possible approval" then the Court should grant

preliminary approval and authorize the parties to give notice of the proposed settlement to class members. *Gautreaux v. Pierce*, 690 F.2d 616, 621 n. 3 (7th Cir. 1982). Stated another way, a preliminary approval is a "determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Assoc.-Eastern Railroads*, 627 F.2d 631, 634 (2d Cir. 1980). For the reasons discussed below, the proposed Settlement Agreement satisfies the standards for preliminary approval and warrants the dissemination of notice apprising Class Members of the Settlement Agreement.

A. The Proposed Class Should be Certified for Settlement Purposes

Before granting preliminary approval of a settlement in a case where a class has not yet been certified, the Court should determine whether the proposed class is appropriate under Rule 23 for settlement purposes. *See Amchem Prods. v. Windsor*, 521 US 591, 620 (1997). The four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – as well as at least one of the three requirements of Rule 23(b), should be satisfied. *Weiss v. York Hosp.*, 745 F.2d 786, 807 (3d Cir. 1983). Here, Plaintiffs maintain, and Family Dollar will not oppose for settlement purposes only, the proposed class meets all of the requirements of Rule 23(a) and satisfies the requirements of Rule 23(b)(2). Plaintiffs request, and Family Dollar does not oppose for settlement purposes only, that the Court certify the proposed settlement class.

1. Plaintiffs Have Satisfied all Prerequisites of Rule 23(a)

a. Numerosity

As a prerequisite to certification, the Court must determine that the proposed class "is so numerous that joinder of all members is impracticable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 (3d Cir. 2001); Fed. R. Civ. P. 23(a)(1). Impracticality does not mean impossibility; it means that class certification is proper in light of the difficulty of joining all

members of the putative class. *Cureton v. Nat'l Collegiate Athletic Assn.*, 1999 WL 447313, *5 (E.D. Pa. July 1, 1999). The inquiry is focused on judicial economy. *See Phila. Elec. Co. v. Anaconda Amer. Brass Co.*, 43 F.R.D. 452, 463 (E. D. Pa. 1968) (finding "no necessity for encumbering the judicial process with 25 lawsuits if one will do."). The Third Circuit has consistently held that although "[n]o minimum number of plaintiffs is required to maintain a suit as a class action," a plaintiff can generally satisfy Rule 23(a)(1)'s numerosity requirement by establishing that "*the potential number* of plaintiffs exceeds 40." *Mielo v. Steak 'N Shake Operations*, 897 F.3d 467, 486 (3d Cir. 2018) (citing *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001)) (emphasis added).

A finding that the numerosity requirement is satisfied is compelled by common sense and available data regarding the number of mobility impaired individuals in the United States. Census data shows that roughly 30.6 million people have difficulty walking or climbing stairs, or used a wheelchair, cane, crutches, or walker; about 3.6 million of those people use a wheelchair. *See* U.S. Access Board, Regulatory Analysis;[2] *see also* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P70-131, CURRENT POPULATION REPORTS at 8, 17 (July 2012)[3]; Erickson et al., 2015 Disability Status Report: United States at p. 10, Cornell University Yan Tan Institute on Employment and Disability (2016).[4] As of December 31, 2020, Defendants are engaged in the management, operation, and development of over 15,600 retail stores in 48 states. *See Family*

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[2] *available at*: https://www.access-board.gov/guidelines-and-standards/recreation-facilities/outdoor-developed-areas/final-guidelines-for-outdoor-develop ed-areas/regulatory-analyses (citing Americans with Disabilities: 2010, available at: http://www.census.gov/prod/2012pubs/p70-131.pdf)

[3] *available at* http://www.census.gov/prod/2012pubs/p70-131.pdf

[4] *available at* http://www.disabilitystatistics.org/StatusReports/2015-PDF/2015-StatusReport_US.pdf

Dollar 2020 Annual Report.[5] Given Defendants' large network of stores and the sheer number of persons with mobility disabilities in the United States, Plaintiffs believe this Court is well within its discretion to conclude that available statistical evidence permits a common-sense inference that the numerosity requirement has been met. Both general knowledge and common-sense assumptions may be applied to the numerosity determination. *Snider v. Upjohn Co*., 115 F.R.D. 536, 539 (E.D. Pa. 1987).

Based on this evidence it shows that the number of class members who have visited Defendants' more than 15,600 stores during the class period well exceeds 40 individuals, satisfying Rule 23(a)(1).

b. Commonality

The record evidence in this matter demonstrates that there are factual and legal issues common to Plaintiffs and all class members. As explained below, Defendants' standard operating procedures are uniform and used across all of Defendants' stores. Plaintiffs contend Defendants' policies and practices fail to ensure that its stores maintain accessible paths of travel. Although Defendants deny Plaintiffs' allegations and any contention that Family Dollar has violated Title III of the ADA, for purposes of settlement only Defendants agree that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).

A putative class will satisfy "Rule 23(a)'s commonality requirement if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Natl. Football League Players Concussion Injury Litig.*, 821 F.3d 410, 426–27 (3d Cir. 2016), *as amended* (May 2, 2016) (internal citations omitted). "[A] common question is one where the same evidence will suffice for each member to make a *prima facie* showing or the issue is susceptible

[5] *Supra*, n. 2.

to generalized class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). Only a single common question is required. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("We quite agree that for purposes of Rule 23(a)(2) even a single common question will do."). The "claims must depend upon a common contention . . . that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* at 350.

Requests for system-wide injunctive relief often, if not always, present questions of law or fact common to the class. Indeed, since the "scope of injunctive relief is dictated by the extent of the violation established," plaintiffs seeking a system-wide injunction must prove more than their individual claims or "a few isolated violations affecting only" themselves. *See Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001); *see also Lewis v. Casey*, 518 U.S. 343, 358 (1996) (similar). Instead, plaintiffs must demonstrate that their injury is attributable to system-wide policies or practices and that similar violations are "in fact widespread enough to justify system-wide relief." *Armstrong*, 275 F.3d at 870 (quoting *Lewis*, 518 U.S. at 359). Accordingly, claims for injunctive relief against system-wide policies and practices are not only susceptible to but require generalized, class-wide proof. *See, e.g.*, *Moeller v. Taco Bell Corp. ("Moeller II")*, 816 F. Supp. 2d 831, 859 (N.D. Cal. 2011) ("A court need not address every violation in order to conclude that violations are sufficiently widespread to necessitate a system-wide injunction. Rather, a court can enter such an injunction based on evidence that is symptomatic of the defendant's violations, including individual items of evidence that are representative of larger conditions or problems.").

In *Mielo*, the Third Circuit examined commonality in the context of how the class definition in that matter could potentially encompass a much broader spectrum of ADA claims than intended. *Mielo*, 897 F.3d at 484. As the court explained, the class definition in *Mielo* was too broad because

it "covers not only persons who allege that they experienced ADA violations within a Steak 'n Shake parking facility but also class members who encountered 'accessibility barriers at any Steak 'n Shake restaurant'… This could include claims, for instance, regarding the bathroom of a Steak 'n Shake that had maintained a perfectly ADA-compliant parking facility." *Id.* at 488.

Here, the class definition is specifically limited to non-fixed accessibility barriers placed by Defendants in customer paths of travel at Defendants' stores. This definition properly accounts for the *Mielo* court's concerns of overbreadth because the claims depend upon a common contention—the inability to fully and equally enjoy/access the goods and services offered because of such non-fixed items placed by Defendants in such routes. This common contention, moreover, is of such a nature that it would be capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke, making certification of the proposed settlement class appropriate. *Dukes* 564 U.S. at 349–50.

In the present case, Plaintiffs contend that Defendants' common practices result in ongoing accessibility barriers; Plaintiffs and the class are all individuals with mobility disabilities who face common physical barriers when they confront inaccessible stores containing Access Barriers in Access Routes, and Plaintiffs seek common injunctive relief. *See also Allen v. Ollie's Bargain Outlet, Inc.,* No. 2:19-cv-281 (W.D. Pa. Mar. 26, 2021), *Hernandez v. AutoZone, Inc.*, 323 F.R.D. 496 (E.D.N.Y. 2018) (certifying a nationwide class of mobility disabled individuals noting that defendant's ADA compliance policy that permitted its parking facilities to fall out of compliance with the ADA was ineffective and affected all members of the class); *Gray v. Golden Gate Nat. Recreational Area*, 279 F.R.D. 501, 517 (N.D. Cal. 2011) (certifying a class of individuals with mobility disabilities because "there [was] evidence of multiple people suffering the same injury

(lack of access) and evidence that the injuries were caused by system-wide policies and practices of failing to comply with [federal disability] access requirements"); *Lucas v. Kmart Corp.*, No. 99-cv-01923, 2005 WL 1648182, at *1 (D. Colo. July 13, 2005) (certifying class of disabled individuals challenging numerous Access Barriers across 1,500 locations where the plaintiffs showed that the defendant had "centralized policies and practices that created architectural and related barriers and impeded the ability of wheelchair-bound shoppers from using or enjoying access to Kmart"); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 121 (C.D. Cal. 2008) (certifying class and finding commonality where despite some differences from store to store the accessibility barriers were all of the same type and affected all wheelchair users the same way).

A company-wide injunction is appropriate so that any existing ADA violations are identified and remediated, and future ADA violations are less likely to occur. Whether and to what extent Defendants' policies and practices have failed to ensure Defendants' stores are readily accessible presents common questions with only one answer: Defendants' policies and practices regarding ADA compliance are either adequate or they are not. Either way, as mentioned above, this proceeding would generate a common answer, the determination of which "will resolve an issue . . . central to the validity of each one [of the class members'] claims in one stroke." *Dukes*, 564 U.S. at 350. For these reasons, commonality is satisfied.

c. Typicality

Plaintiffs assert claims that are typical of those of the putative class members. Typicality under Rule 23(a)(3) is satisfied when a plaintiff's claim is "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). This "ensures the interests of the class and the class representatives are aligned 'so that the latter will work to benefit the entire class through the pursuit of their own goals.'" *In re Natl. Football League Players Concussion Injury Litig.*, 821 F.3d at 427–28 (internal

citations omitted). The Third Circuit has set a low threshold for typicality. *Id*. "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." *Id*.

Plaintiffs' and the putative class members' ability to access and independently use Defendants' stores have been impeded due to accessibility barriers in Defendants' paths of travel. Like the putative class members, Plaintiffs assert that these experiences are the result of Defendants' policies and practices, which facilitate discriminatory conditions that impede Plaintiffs' access to Defendants' goods and services. Plaintiffs' claims for declaratory and injunctive relief to remedy Defendants' violations of the ADA are typical of the claims of the putative class members because they all have been or will be denied access based on this company-wide deficiency.

Furthermore, Plaintiffs' interests align with the interests of the putative class because Plaintiffs and each class member seek injunctive relief requiring Defendants to implement company-wide changes to its policies and procedures.

d. Adequacy

Plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4) "tests the qualifications of class counsel and the class representatives. It also aims to root out conflicts of interest within the class to ensure that all class members are fairly represented in the negotiations." *In re Natl. Football League Players Concussion Injury Litig*., 821 F.3d at 428. The "linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Id*. at 431. Here, there is an alignment between Plaintiffs' interests and incentives and the rest of the class.

First, there is no evidence of any conflicts of interest between Plaintiffs and the proposed class. To the contrary, Plaintiffs and class members share the same injuries and seek the same relief – declaratory and injunctive relief requiring Defendants to alter their policies and practices related to their stores' paths of travel. Plaintiffs have worked with their counsel to advance the interests of the proposed class by sharing their experiences, initiating this lawsuit, participating in the discovery process, and testifying at depositions. Plaintiffs have thereby demonstrated their commitment to pursuing this lawsuit on behalf of and adequately representing the proposed class. Second, Plaintiffs' attorneys are qualified, knowledgeable, and able to conduct this litigation. Plaintiffs' attorneys are seasoned litigators, with expertise in class action litigation, and specialized expertise in ADA class action litigation. *See* Resumes of Lynch Carpenter LLP, and Carlson Brown attached to Plaintiffs' Unopposed Motion as **Exhibits B1 and B2**. Moreover, Plaintiffs' attorneys have been appointed as Class Counsel by courts in this District and elsewhere for nationwide classes of individuals with mobility disabilities seeking system-wide injunctive relief under Title III of the ADA. *See, e.g., Ollie's Bargain Outlet, Inc.,* No. 2:19-cv-281 (W.D. Pa. Mar. 26, 2021); *Heinzl v. Cracker Barrel Old Country Stores, Inc.,* No. 2:14-cv-1455, 2016 WL 2347367 (W.D. Pa. Jan. 27, 2016), report and rec. adopted 2016 WL 1761963 (W.D. Pa. Apr. 29, 2016); *Hernandez*, 323 F.R.D. 496; *Jahoda, et al. v. Redbox Automated Retail*, LLC, No. 2:14-cv-1278-LPL, Doc. No. 72-1 (W.D. Pa. Oct. 16, 2017); *Flynn v. Concord Hospitality Enterprises Co*., No. 2:17-cv-1618-LPL, Doc. No. 41 (W.D. Pa. Nov. 27, 2018).

2. The Rule 23(b)(2) Requirements are Satisfied.

The putative class that Plaintiffs seek to certify is precisely the type of class contemplated by Rule 23(b)(2), and the relief sought will benefit the entire class. "[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2)

classes. *Amchem*, 521 U.S. at 614. Indeed, Rule 23(b)(2) specifically applies to "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." Fed. R. Civ. P. 23(b)(2), Advisory Committee Notes (1996); *see also Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 59 (3d Cir. 1994) ("the injunctive class provision was designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.") (citations omitted). A class may be certified under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Finally, "courts should look to whether 'the relief sought by the named plaintiffs [will] benefit the entire class.'" *Stewart*, 275 F.3d at 228 (citing *Baby Neal*, 43 F.3d at 59); see also *Dukes*, 564 U.S. at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted.").

Here, because Defendants apply generally applicable policies and practices to all of its stores, a single injunction—ordered by this Court and monitored by Plaintiffs—would provide relief to each member of the class. *See Heinzl*, 2016 WL 2347367, at *22 ("Plaintiff has proffered evidence that Defendants' policy of ADA compliance is ineffective and that it affects all members of the class. A single injunction would provide relief to each member of the class"); *Mielo*, 897 F.3d at 482 (holding "the adoption of a policy similar to the three examples offered by Plaintiffs would likely remedy Plaintiffs' alleged injuries"); *Hernandez*, 323 F.R.D. at 496 (a policy that permitted the defendant's parking facilities to fall out of compliance with the ADA affected all members of the class). Accordingly, the proposed injunction here, providing for enhancements to Defendants' current policies and practices that impact paths of travel and for monitoring of the

impact of those revised policies and practices prospectively by both Defendants' management and Plaintiffs and their counsel, provides relief to each class member.

B. The Settlement Agreement is Fair, Reasonable, and Adequate

A strong judicial policy favors resolution of litigation short of trial. *See Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 700 (W.D. Pa. 2015) ("There is an overriding public interest in settling class action litigation[.]"); *In re General Motors Pick-Up Truck Fuel Tank Prod. Liability Litigation*, 55 F.3d 768, 784 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) ("*GM Trucks*") ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"). Class settlement "is to be encouraged by the courts, particularly in complex settings that will consume substantial judicial resources and have the potential to linger for years." *Jackson*, 136 F. Supp. 3d at 700; *see also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1314 n.16 (3d Cir. 1993). A federal district court within the Third Circuit has articulated the rationale for this policy as follows:

> [W]hen parties negotiate a settlement they have far greater control of their destiny than when a matter is submitted to a jury. Moreover, the time and expense that precedes the taking of such a risk can be staggering. This is especially true in complex commercial litigation.

Weiss v. Mercedes-Benz, 899 F.Supp.1297, 1300-01 (D.N.J. 1995), *aff'd without op.*, 66 F.3d 314 (3d Cir. 1995).

The proposed class settlement in this case enjoys a presumption of fairness because it is the product of arm's-length negotiations, facilitated by one of this Court's approved mediators, and was conducted by experienced counsel who are fully familiar with all aspects of class action litigation. *In re Natl. Football League Players Concussion Injury Litig.*, 821 F.3d at 436 ("We apply an initial presumption of fairness … when … (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; [and] (3) the proponents of the settlement are experienced in

similar litigation. . . ."); *see also* Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 13.15 (5th ed.); *Manual for Complex Litigation* § 21.64 (4th ed. 2004).

The Settlement Agreement is fair, adequate, and reasonable and falls well within the "range of possible approval," particularly in light of the substantial risks and costs associated with further litigation. All Class Members will benefit from the injunctive relief set forth in the Settlement Agreement. Without exception, the agreement will provide Class Members with the injunctive relief that they seek: equal accessible Access Routes at Family Dollar stores throughout the country. The Settlement Agreement further provides for monitoring to ensure that Family Dollar's stores are, in fact, providing accessible Access Routes.

V. THE PROPOSED NOTICE TO PUTATIVE CLASS MEMBERS IS APPROPRIATE.

Rule 23(e) provides that "the court must direct notice [of a proposed settlement] in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e). Unlike class actions certified under Rule 23(b)(3), actions certified under Rule 23(b)(2) contain "no rigid rules to determine whether a settlement notice to class members satisfies constitutional and Rule 23(e) requirements." Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 8:15 (5th ed.); *see also* Fed. R. Civ. P. 23(c)(2). In cases certified under Rule 23(b)(2), "…the stringent requirement of Rule 23(c)(2) that members of the class receive the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts,' is inapplicable." *Kaplan v. Chertoff*, 2008 WL 200108, at *12 (E.D. Pa. Jan. 24, 2008) citing *Walsh v. Great Atl.& Pac Tea Co.*, 726 F.2d 956, 962 (3d Cir. 1983). "Rule 23(e) makes some form of post-settlement notice mandatory, although the form of notice is discretionary because Rule [23](b)(2) classes are cohesive in nature." *Id.* citing *Wetzel v. Liberty 1Q2341`233. Ins. Co.*, 508 F.2d 239, 240-50 (3d Cir. 1975). *See also*, *Kyriazi v. W. Elec.*

Co., 647 F.2d 388, 393 (3d Cir. 1981) (same); *Mulder v. PCS Health Sys., Inc.*, 216 F.R.D. 307, 318 (D.N.J. 2003) (same).

Courts in the Third Circuit have found notice to be adequate where it is "well-calculated to reach representative class members" and describes the nature of the litigation, defines the class, explains the settlement's general terms, provides information on the fairness hearing, describes how class members can file objections, describes where complete information can be located and provides contact information. *Kaplan*, 2008 WL 200108 at *12 citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 327 (3d Cir. 1998); *see also*, *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013); *In re Processed Egg Prod. Antitrust Litig.*, 302 F.R.D. 339, 354 (E.D. Pa. 2014); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods.,* 226 F.R.D. 498, 517-18 (E.D. Pa.2005).

Here, the Parties have agreed upon a form of notice to the class and methods to disseminate the notice that is specifically targeted to members of the mobility-disabled community and that more than satisfy the requirements of Rule 23.

The proposed form notice, attached as Exhibits C and D to the Settlement Agreement (the "Notice"), defines the Class, explains the Settlement Agreement's general terms, provides information on the fairness hearing, describes the forty-five (45-day) objection period and how Class Members can file objections, describes where complete information can be located and provides contact information so that Class Members can contact Class Counsel with questions.

The parties suggest that the Notice be distributed as follows:

1. Class Counsel shall send the Notice via electronic mail or U.S. Mail to the following organizations serving individuals with mobility disabilities: (i) American Association of People with Disabilities (AAPD); (ii) Disabled American Veterans; (iii)

Paralyzed Veterans of America; (iv) Disability Rights Education & Defense Fund (DREDF); (v) National Center on Health, Physical Activity and Disability (NCHPAD); (vi) National Council on Independent Living; (vii) National Disability Rights Network; (viii) The Consortium for Citizens with Disabilities; (ix) Spina Bifida Association of America; (x) National Organization on Disability; (xi) National Brain Injury Association of America; (xii) Disability Rights Advocates; (xiii) Disabled Veterans National Foundation; (xiv) National Multiple Sclerosis Society; (xv) United Cerebral Palsy; (xvi) United Spinal Association; (xvii) Amputee Coalition; (xviii) Independent Living Research Utilization (ILRU); (xix) Disabled in Action; and (xx) Association of Programs for Rural Independent Living.

2. Class Counsel shall publish the Notice on a public website dedicated to the Class Settlement, (www.adasettlementfamilydollar.com), which website will also include the relevant pleadings in this action, as well as the settlement and preliminary approval documents.

For the reasons set forth above, the content and distribution of the proposed Notice fairly, accurately, and reasonably informs Class Members of the Settlement Agreement and, therefore, satisfies all applicable requirements.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter the Proposed Order granting preliminary approval of the proposed settlement and certifying the proposed settlement class. Plaintiffs further request that the Court schedule a fairness hearing on final settlement approval as the Court's calendar permits.

Dated: October 26, 2021

Respectfully submitted,

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