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

REBECCA NOCERA, TRACY MICHEL, JENNIFER ROSSMAN, ANGELA RENEAU, FELICIA SAMMARCO, JOHN J. NOTTO, STEVEN WILLNER, and HEATHER SHARP, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOLLAR GENERAL CORPORATION D/B/A DOLLAR GENERAL, DOLGENCORP, LLC D/B/A DOLLAR GENERAL, DOLGEN NEW YORK, LLC, DG RETAIL, LLC, AND DOLGEN CALIFORNIA, LLC,

Defendants.

Case No. 2:18-cv-01222

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

Through their undersigned counsel, Plaintiffs Rebecca Nocera, Tracy Michel, Jennifer Rossman, Angela Reneau, Felicia Sammarco, John J. Notto, Steven Willner and Heather Sharp (collectively, "Plaintiffs"), respectfully submit this Memorandum of Law in Support of their Amended Unopposed Motion For Preliminary Approval of Class Action Settlement ("Unopposed Motion"). Defendants Dollar General Corporation d/b/a Dollar General, Dolgencorp, LLC. d/b/a Dollar General, Dolgen New York, LLC, DG. Retail, LLC, and Dolgen California, LLC

("Defendants" or "Dollar General") do not oppose the recitations of fact and law in this Unopposed Motion for the purposes of settlement only.[1]

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' 16,200 plus retail stores. *See Dollar General 2019 Annual Report*.[2] Dollar General does not concede that any of the alleged discriminatory practices or policies exist and maintains that it has not violated the ADA. However, Dollar General recognizes the financial costs and operational interruptions caused by protracted litigation.

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[1] As with any class settlement, Defendants do not waive their right to oppose any of the required elements of Rule 23 Class Certification or oppose any factual or legal liability arguments contained herein should litigation ensue.

[2] *available at* https://investor.dollargeneral.com/download/companies/dollargeneral/Annual%20Reports/AR_2019_Dollar%20General_Web%20 PDF.pdf (Dollar General operates 16,278 retail stores in 44 states as of January 13, 2020).

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

- Defendants agree to ensure that the placement of merchandise, shopping carts, boxes and/or other non-fixed items in areas of the stores, both inside and out, will not reduce or eliminate accessibility to any of the following paths of travel: parking in designated accessible parking spaces and adjoining access aisles; the entrances or exits of the stores; accessible routes within the stores (i.e., aisles or pathways to merchandise on the sales floor); access routes to publicly available restroom facilities; the route to or ability to use the publicly available fountains; and paths to any emergency exits and/or fire escape doors (the "Access Routes"). Defendants further agree that, if Access Routes are obstructed, they will follow the protocols set forth herein to promptly remedy the issue.

- Dollar General will provide the phone number of the toll-free customer assistance line on a customer-facing door poster or sign next to the universal persons with disabilities symbol and will implement a process directing all accessibility issues reported through the customer service line to be recorded in writing, investigated, and remediated.

- Dollar General will ensure all Regional Directors, District Managers, and Store Managers complete a computer-based ADA Title III training that encompasses the full scope of the injunctive relief and will provide all hourly employees with a one-page ADA Title III Compliance educational document regarding the requirements of the injunctive relief.

- In addition, the settlement contains monitoring and reporting provisions to ensure that Dollar General meets its obligations. Class Counsel will conduct audits of Dollar General'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 September 13, 2018, by and through her undersigned Plaintiffs' co-counsel Carlson Lynch, LLP ("Carlson Lynch"), Plaintiff Rebecca Nocera initiated this action by way of class action complaint alleging that Dollar General 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). On June 25, 2019, with consent of the parties, Judge Phipps consolidated the class action captioned *Michel* v. *Dollar Gen. Corp.¸et. al.*, No. 2:18-cv-1624, with the Pennsylvania Lawsuit, and a Consolidated Amended Complaint was filed. (ECF 29 and 31). On May 15, 2018, Plaintiff Jennifer Rossman, by and through her counsel Disability Rights New York ("DRNY"), initiated a class action lawsuit in the United States District Court for the Northern District of New York, civil action number 6:18-cv-00573 (the "New York Lawsuit"), alleging substantially similar claims against Defendants as in this action. Additionally, Plaintiffs Angela Reneau (citizen of Illinois), Felicia Sammarco (citizen of Illinois), John J. Notto (citizen of Illinois), Steven Willner (citizen of Florida), and Heather Sharp (citizen of California) all retained Carlson Lynch for substantially similar allegations of access barriers limiting or narrowing the accessible routes of Defendants' stores for people with mobility disabilities. Dollar General denies these allegations in their entirety.

Both Carlson Lynch and DRNY engaged in extensive investigation and research before filing their clients' respective suits. After the Pennsylvania Lawsuit and New York Lawsuit were filed, the parties engaged in motions practice, discovery, and each engaged in mediation. The parties in the Pennsylvania Lawsuit mediated with Carole Katz on July 30, 2019. While the July 30, 2019 mediation in the Pennsylvania Lawsuit was unsuccessful, the parties to that action agreed to continue working towards a resolution of the action. The parties in the New York Lawsuit mediated with David Homer on September 17, 2019. Thereafter, the parties to the Pennsylvania Lawsuit and New York Lawsuit, along with Dollar General, began negotiation of a global resolution for those two actions, along with the (then) unfiled claims of Plaintiffs Reneau, Sammarco, Notto, Willner, and Sharp. On February 18, 2020, all parties engaged in another in-

person mediation with Carole Katz, involving both Carlson Lynch's and DRNY's clients' claims, to discuss a global, nationwide class resolution.

After extended negotiations that ultimately occurred throughout the course of over a year, and facilitated by Carole Katz – who remained actively involved in the continued negotiations after the February 2020 global mediation – the parties reached an agreement in principle on or about June 11, 2020 for a class resolution of all Plaintiffs' claims related to mobility accessibility barriers as a result of the placement of non-fixed items that limit or narrow paths of travel within or to Defendants' stores. The parties agreed to stay Plaintiff Rossman's New York Lawsuit, and that Plaintiff Rossman, along with Plaintiffs Reneau, Sammarco, Notto, Willner, and Sharp would file their claims in this Court in a Consolidated Second Amended Complaint ("SAC") for purposes of this nationwide class settlement. Plaintiffs SAC was filed on July 20, 2020. (ECF 56).[3]

Plaintiffs allege in the SAC that each Plaintiff has a mobility disability under the ADA, and each Plaintiff uses a wheelchair for mobility assistance. (SAC ¶¶ 31-38). Plaintiffs further allege that they are regular customers of Defendants' stores and have experienced access barriers in the form of merchandise, merchandise displays, carts, boxes, dollies, and other non-fixed items placed in accessible routes of Defendants' stores in manner that has limited Plaintiffs' ability to navigate through pathways of travel while using their wheelchairs. (SAC ¶¶ 45-84). The SAC alleges violations of the ADA, and seeks injunctive relief, along with attorneys' fees and costs. (SAC, p. 28).

[3] The parties have also agreed to stay/extend Defendants' time to answer or otherwise respond to the SAC in order to allow the Court to review and rule on the proposed class settlement herein before answering. Further, the parties agree that Defendants have not waived any defenses by Defendants' agreement to the filing of the SAC for purposes of this proposed settlement.

On December 10, 2020, 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, Dollar General 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 ensure that the placement of merchandise, shopping carts, boxes and/or other non-fixed items in areas of the stores, both inside and out, will not reduce or eliminate accessibility to any of the following paths of travel: parking in designated accessible parking spaces and adjoining access aisles; the entrances or exits of the stores; accessible routes within the stores (i.e., aisles or pathways to merchandise on the sales floor); access routes to publicly available restroom facilities; the route to or ability to use the publicly available fountains; and paths to any emergency exits and/or fire escape doors (the "Access Routes"). Defendants further agree that, if Access Routes are obstructed, they will follow the protocols set forth herein to promptly remedy the issue.

2. ADA Customer Service Assistance

Defendants will include a toll-free customer assistance line phone number on a customer-facing door poster or sign that includes the universal persons with disabilities symbol with language to the effect of, "We are committed to compliance with the Americans with Disabilities Act. Our employees are glad to help! If you need assistance, please ask a Dollar General associate or call 1-877-463-1553." Defendants will instruct its Customer Service intake representatives that all ADA accessibility issues reported through the Customer Service line must be recorded and promptly forwarded, in writing, to Defendants' applicable District Managers for prompt investigation and, if necessary, prompt remediation.

3. Training on Accessibility Plan

Defendants will ensure that all Regional Directors, District Managers, and Store Managers hired prior to the Effective Date of the Settlement Agreement complete a computer-based ADA Title III training that encompasses the full scope of the injunctive relief detailed herein, the content of which may be reviewed by Class Counsel prior to finalization. Defendant shall consider Class Counsel's recommendations regarding such changes but is not required to make any substantive changes based on Class Counsel's review. 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 part of the onboarding process.

Dollar General agrees that all hourly employees hired prior to the Effective Date of the Settlement Agreement at Defendants' stores will receive training through a one-page ADA Title III Compliance educational document regarding the requirements of the injunctive relief detailed herein, the content of which may be reviewed by Class Counsel prior to finalization. Defendants shall consider Class Counsel's recommendations regarding such changes but are not required to

make any substantive changes based on Class Counsel's review. For all employees encompassed by this provision that are hired after the Effective Date of the Settlement Agreement, the one-page ADA Compliance document will be made part of their onboarding materials.

B. Monitoring Provisions

The Settlement Agreement contains monitoring and reporting provisions to ensure that Dollar General meets its obligations. Dollar General will ensure that the District Managers monitor the stores' compliance with this agreement by including an inspection for any Access Barriers in any Access Routes during each District Manager Quarterly Store Compliance Visit. 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 immediately if possible, but no later than within 24 hours. If for an unforeseen reason the District Manager and the Store Manager cannot work to remedy the issues within 24 hours, Dollar General will advise Class Counsel of the additional need for time to cure.

No later than March 31st for each year during the Term of the Settlement Agreement, Dollar General shall provide Class Counsel with a summary report compiling the District Manager Quarterly Store Compliance Visit Reports performed during the year that shows the itemized total for all ADA access results in the following or similar form: (a) All Clear or (b) Appropriate Corrective Action Taken ("Annual Summary Report"). In the event that an Access Barrier is identified and Appropriate Corrective Action is taken, the Annual Summary shall include a brief description of the identified Access Barriers. The Annual Summary Report shall include an update as to any changes to the districts (i.e., new stores, closed stores, changed district boundary lines, etc.) for purposes of monitoring the compliance under this agreement.

Beginning on the ninety-first (91st) day after the Effective Date, 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. The Parties agree to the following with respect to the monitoring:

- Class Counsel or their agent may inspect up to three percent (3%) of all Defendants' stores (for a total of 480 stores) during the Term of the Settlement Agreement.
- During the Term of the Settlement Agreement, Class Counsel may perform up to one (1) inspection and one (1) follow-up inspection per specific Store location. However, if Access Barriers are identified in any Access Route upon follow-up inspection of a specific Store location, the aforementioned restriction on the number of inspections permitted by Class Counsel at that specific Store location is removed.
- Class Counsel will inspect no more than eight (8) stores in a single district in a calendar month. To facilitate this agreement, within ninety (90) days after the Effective Date, Defendants will provide Class Counsel with a listing of all stores with their addresses, and their respective districts.

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

The Settlement Agreement includes a payment of $1,000.00 to each Named Plaintiff. This 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, Dollar General has agreed to pay Class Counsel's fees and expenses of $385,000.00 which reflects compensation for Class Counsel's work on this litigation to date, reasonable expenses incurred to date, and fees for future monitoring of Dollar General'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 Dollar General 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 Dollar General 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;[4] *see also* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P70-131, CURRENT POPULATION REPORTS at 8, 17 (July 2012)[5]; Erickson et al., 2015 Disability Status Report: United States at p. 10, Cornell University Yan Tan Institute on Employment and Disability (2016).[6] As of January 13, 2020, Defendants are engaged in the management, operation, and development of over 16,200 retail stores in 44 states. *See Dollar General 2019 Annual Report*.[7] 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 16,200 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

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[4] *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)

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

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

[7] *Supra*, n. 2.

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 Dollar General has violated Title III of the ADA, for purposes of settlement only Defendant agrees 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 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 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* Resume of Carlson Lynch LLP, attached to Plaintiffs' Unopposed Motion as Exhibit B. 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., 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. <u>The Settlement Agreement is Fair, Reasonable, and Adequate</u>

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 Nat. Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) ("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 Dollar General stores throughout the country. The agreement further provides for monitoring to ensure that Dollar General'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 Exhibit C 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.dollargeneraladasettlement.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: January 27, 2021

Respectfully submitted,

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