Case No. 16-16269

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, on behalf of itself, and ANN CUPOLO FREEMAN, RUTHEE GOLDKORN, and JULIE REISKIN, on behalf of themselves and a proposed class of similarly situated persons,

Plaintiffs-Appellants,

v.

HOSPITALITY PROPERTIES TRUST,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California, No. 3:15-cv-00221-JST, Honorable Jon S. Tigar

APPELLANTS' REPLY BRIEF

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I. Introduction.

More than 25 years after the passage of the Americans with Disabilities Act ("ADA"), the vast majority of the hotels owned by Hospitality Properties Trust ("HPT") at issue are in violation of the ADA's Equivalent Transportation Requirements.[1] Indeed, over 70% of those hotels provide no accessible transportation whatsoever.

This widespread pattern of violations would continue unchallenged but for the efforts of Plaintiffs, each of whom travels frequently, and each of whom has encountered during their travels hotels that do not provide accessible transportation.[2] They agreed to be testers and class representatives to try to cause HPT to comply with the ADA's transportation requirements, something that HPT has not done on its own.[3] Plaintiffs did so knowing full well this case would involve a great deal of time and effort on their part, and they did so without seeking any damages.[4] Their work in this case continues the "long and important role" testers have played in enforcing civil rights statutes. *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1102 (9th Cir. 2004).

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[1] 49 C.F.R. §§ 37.101, 37.105 & 37.171
[2] Appellees' Supplemental Excerpts of Record ("SER") (docket no. 25) 128, 132, 135.
[3] *Id.*
[4] *Id.* 129, 133, 137.

Plaintiffs demonstrate below that: (1) they have standing under Title III of the ADA (42 U.S.C.§ 12181 *et seq.*); (2) Plaintiffs' expert testimony should not be excluded; and (3) the proposed class meets the requirements for commonality, typicality, and Rule 23(b)(2).

II. Additional Background.

Plaintiffs address two discrete issues raised in Appellee's Answering Brief ("HPT Br.").

A. HPT's New "Operate" Argument.

HPT argues for the first time on appeal that the Equivalent Transportation Requirements only cover entities that directly "operate" hotel transportation services, and not hotel owners who contract with third parties that provide such services. HPT Br. 9-10. This is a common, classwide issue that supports class certification, the sole subject of this appeal. HPT is also wrong on the merits.

First, regulations define "operate" to include "the provision of transportation service by a public or private entity itself *or by a person under a contractual or other arrangement or relationship with the entity*." 49 C.F.R. § 37.3 (emphasis added). HPT indisputably has a contractual relationship with the management companies at HPT hotels that provide transportation services, and thus HPT "operates" those transportation services and must comply with the Equivalent Transportation Requirements.

Second, Department of Justice regulations governing public accommodations have incorporated the Equivalent Transportation Requirements, thereby extending their coverage to owners of places of public accommodation.[5]

B. HPT's Management Contracts Do Not Eliminate HPT's ADA Obligations.

HPT asserts that under its management contracts, management companies have sole responsibility for operating HPT's hotels. As a result, HPT contends that the court cannot order it to take any steps to ensure that its hotels comply with the Equivalent Transportation Requirements, and thus Plaintiffs' claims are not redressable, commonality does not exist, the class does not meet Rule 23(b)(2), and the hotel management companies are indispensable parties. *See* HPT Br. 23-24, 41-42, 56-59. These arguments fail for two reasons.

First, an owner of a public accommodation cannot contract away its ADA obligations. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 830 (9th Cir. 2000), considered whether lease provisions that placed ADA liability on the tenant shielded a property owner from its ADA obligations. *Botosan* recognized that 42 U.S.C. § 12182 prohibits discrimination "through contractual, licensing, or other

[5] 28 C.F.R. §§ 36.310(c) (requiring public accommodations that provide transportation services but that are not primarily engaged in the business of transporting people to comply with Department of Transportation regulations) & 36.104 (defining "public accommodation" to include owners of places of public accommodation).

arrangements," and that the legislative history made clear that "an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under the" ADA. *Id*. at 833. *Botosan* held that an owner "has an independent obligation to comply with the ADA that may not be eliminated by contract," and that any contract allocating responsibilities under the ADA "has no effect on the rights of third parties," specifically, people with disabilities protected by the ADA. *Id*. HPT owns the hotels at issue, and thus under *Botosan*, HPT's management contracts do not excuse HPT of its ADA obligations.

Moreover, these management agreements do not prevent HPT from ensuring that its hotels comply with the Equivalent Transportation Requirements. To the contrary, these agreements require managers to comply with all federal statutes and regulations, and failure to do so constitutes a default which, if not cured by the manager, permits HPT to terminate the agreement.[6] Thus the management agreements are consistent with, for example, an injunction requiring HPT to notify its management companies that they must bring HPT's hotels into compliance with the Equivalent Transportation Requirements, and if they do not, to terminate the

[6] Appellants' Further Excerpts of Record ("FER") 13 (¶ 1.48), 14-15 (¶ 7.1), 16-18 (¶¶ 16.1(e), 16.2). These are from a management agreement HPT submitted to the district court that it attested was "typical of the other agreements with [its] Management Companies." FER 11 ¶ 3.

contracts and enter into new contracts requiring compliance with the Equivalent Transportation Requirements.

III. Plaintiffs Have Standing to Seek Injunctive Relief.

A plaintiff has standing to seek injunctive relief if she has suffered an injury in fact and faces a "real and immediate threat of repeated injury." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011). "[A] plaintiff can demonstrate sufficient injury to pursue injunctive relief when discriminatory architectural barriers deter him from returning to a noncompliant accommodation." *Id.* at 950.

Under *Chapman*, Plaintiffs have standing: (1) the hotels they called stated that although the hotels provide inaccessible transportation, they do not provide equivalent accessible transportation; (2) as a result, Plaintiffs are deterred from patronizing those hotels; and (3) they will patronize the hotels as testers once the hotels actually provide equivalent accessible transportation.[7] SER 129, 133, 135-37.

[7] HPT argues that Plaintiffs Goldkorn and Reiskin do not have standing because their claims are based on events in the amended complaint that occurred after the filing of the initial complaint. HPT Br. 17. This Court, however, held in *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1043-44 (9th Cir. 2015), that standing can be based on events set forth in an amended complaint that occur after the filing of the initial complaint.

A. Plaintiffs Have Standing as Testers Under Title III of the ADA.[8]

As discussed below, several of HPT's arguments turn on HPT's assertion that Plaintiffs did not have any motive apart from this lawsuit to use the transportation services at HPT's hotels. Plaintiffs' motive to use the services is to test them for compliance with the ADA, and thus this case raises the issue of whether testers – people whose purpose in attempting to patronize a defendant's establishment is "to determine whether defendant engaged in unlawful practices"[9] – have standing under Title III.

Although this Court has not addressed tester standing under Title III, it held in *Smith* that disabled testers have standing under the Fair Housing Act ("FHA") provision prohibiting disability discrimination, 42 U.S.C. § 3604(f)(2). In *Smith*, a nonprofit asked a disabled tester to test whether housing developments complied with FHA accessibility requirements. 358 F.3d at 1099. The tester – who did not have any interest in actually purchasing or renting property – identified several

[8] Ms. Reiskin has standing independent of her role as tester: she travels often, has traveled to the Bay Area in the past, will do so in the future to visit her family, and will stay at the hotels she called once they provide equivalent wheelchair-accessible transportation services. SER 135-7. *See, e.g.*, *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1037 (9th Cir. 2008) (holding that standing exists under the ADA "where a plaintiff demonstrates an intent to return to the geographic area where the accommodation is located and a desire to visit the accommodation if it were made accessible").

[9] *Tandy v. City of Wichita*, 380 F.3d 1277, 1285 (10th Cir. 2004) (holding that testers have standing under Title II of the ADA).

FHA violations, and the nonprofit sued the property developer. The district court dismissed the complaint, in part because the tester lacked standing. *Id.* at 1100, 1102.

Reversing, this Court recognized that testers "have played a long and important role in fair housing enforcement . . ." *Id*. at 1102. The Court's analysis focused on the language of the FHA. First, the enforcement provision – which broadly provides relief to "any person" who claims to have been injured by a discriminatory housing practice – demonstrated that Congress intended to provide a cause of action to testers regardless of whether they actually intended to buy or rent a house. *Id.* (addressing 42 U.S.C. § 3602(i)(1)). Second, the Court noted that section 3604(f)(2) prohibits a broad set of behavior, making it illegal to discriminate "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap…" *Id.* at 1104. The Court held that testers have standing under section 3604(f)(2) even though they have no desire to lease or purchase property. *Id.*

Title III uses language virtually identical to the FHA language relied on in *Smith* to find tester standing. The enforcement provision of Title III, like the FHA enforcement provision, provides relief to "any person" subjected to discrimination on the basis of disability in violation of Title III. 42 U.S.C. § 12188(a). In addition,

Title III, like section 3604(f)(2), prohibits a broad set of behavior, including discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of any place of public accommodation. *Id*. at § 12182(a).

Two Courts of Appeals have addressed tester standing under Title III, and both concluded that such standing exists. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211-12 (10th Cir. 2014). Both courts relied on the broad language of Title III to find that tester standing exists, and both held that a plaintiff who suffers discrimination in attempting to utilize the goods and services of covered facilities has standing regardless of his or her motive in doing so. *Houston*, 733 F.3d at 1332-34 (holding that the right created under Title III "*does not* depend on the motive behind Plaintiff Houston's attempt to enjoy the facilities . . ."); *Colo. Cross-Disability Coal.* , 765 F.3d at 1211 (holding that "anyone who has suffered an invasion of the legal interest protected by Title III may have standing, regardless of his or her motivation in encountering that invasion")

For these reasons, Plaintiffs have standing as testers under Title III, and their motive for trying to patronize the hotels is irrelevant to standing.

B. Plaintiffs Have Suffered an Injury in Fact.

"[A] disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered 'actual injury.'" *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002). Here, Plaintiffs have suffered an injury because they desire to stay at, and test, the HPT hotels they called, but are not doing so because each hotel told them that the hotel does not provide equivalent accessible transportation. SER 129, 133, 135-37.

HPT argues that Plaintiffs have not been injured because they had no desire, apart from this lawsuit, to patronize the HPT hotels they visited. HPT Br. 17-18. As set forth above, that Plaintiffs' motive to patronize these hotels was to test them for compliance with the ADA does not deprive them of standing.

HPT also argues that to have standing, Plaintiffs, after being informed by telephone that the hotels do not provide equivalent accessible transportation, were required to visit the hotels to "personal[ly] encounter" and "observ[e]" the denial of equivalent accessible transportation. HPT Br. 18. This argument irreconcilably conflicts with the ADA's futile gesture provision.

Title III provides that a plaintiff need not "engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." 42 U.S.C. § 12188(a)(1). The

purpose of this provision is "to avoid unreasonable burdens on ADA plaintiffs." *Pickern*, 293 F.3d at 1136.

Here, Plaintiffs had actual notice that the hotels do not comply with the Equivalent Transportation Requirements because the hotels explicitly told them so during the calls. Plaintiffs did not have to engage in the "futile gesture" of actually staying at the hotels and being denied equivalent accessible transportation.

According to HPT, after their calls with the hotels, Plaintiffs should have traveled to the hotels to "personally encounter" and observe the hotel's refusal to provide accessible transportation services. Hotels only provide transportation services to guests, so Plaintiffs would have had to reserve and pay for a hotel room. Then, apparently, Plaintiffs should have requested equivalent accessible transportation services, at which point, they would receive in person the same information they previously received over the phone – the hotel does not provide such services.

This pointless but expensive and time-consuming process is antithetical to the purpose of the futile gesture provision, which is "to avoid unreasonable burdens on ADA plaintiffs." *Pickern*, 293 F.3d at 1136. Forcing persons with disabilities to visit a hotel in person to receive the same information they obtained over the phone is the epitome of a futile gesture.

HPT justifies its extreme position on the grounds that when Plaintiffs called the hotels, they spoke with "unknown individuals, whose positions at the hotels are unknown and whose basis (if any) for having actual knowledge of the transportation services is not established in any way." HPT Br. 18. This would be true had Plaintiffs visited the hotels and asked for accessible transportation services from some unknown person at the front desk.

More importantly, the onus is not on disabled persons to interrogate hotel personnel to try to ensure the information they are providing is accurate. Rather, the ADA obligates hotels to ensure that their employees are "trained to proficiency" concerning hotel transportation services. 49 C.F.R. § 37.173. This requires that "every employee of a transportation provider who is involved with service to persons with disabilities must have been trained so that he or she knows what needs to be done to provide the service in the right way. When it comes to providing service to individuals with disabilities, ignorance is no excuse for failure . . .". 49 C.F.R. § Pt. 37, App. D. Thus if the employees who told Plaintiffs that the hotels do not provide equivalent accessible transportation were wrong, and the hotels actually do provide such transportation, that would constitute a violation of the training requirements.

HPT relies on *Brooke v. Peterson*, 185 F. Supp. 3d 1203 (C.D. Cal. 2016), in which a disabled Arizona resident called several California hotels and was told that

the hotels did not have pool lifts. The court held that the plaintiff did not have standing because she never visited the hotels. *Id.* at 1211-12. The court interpreted the futile gesture provision as only excusing a plaintiff from *returning* to an inaccessible facility; a plaintiff was still required to *initially visit* that facility, even if that plaintiff had actual knowledge of an ADA violation at the facility. *See id*. at 1209.

Brooke's holding was erroneous. Nothing in the plain language of the futile gesture provision distinguishes between the futile gesture of visiting a facility known to be noncompliant, and returning to a noncompliant facility. Indeed, this Court has held that the ADA does not require plaintiffs to engage in the "futile gesture" of "*visiting or returning* to an inaccessible place of public accommodation in order to satisfy the standing requirement." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1037 (9th Cir. 2008) (emphasis added). Further, *Brooke* contradicts important ADA principles, including that: (1) a plaintiff sustains an injury when she "become[s] aware of" or has "personal knowledge [of]" alleged ADA violations that deter her patronage;[10] (2) courts must "take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with

[10] *Pickern*, 293 F.3d at 1136-37 (interpreting futile gesture); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1042 n.5 (9th Cir. 2008).

the Act;'"[11] and (3) the purpose of the futile gesture provision is "to avoid unreasonable burdens on ADA plaintiffs."[12]

C. Plaintiffs Have a Real and Immediate Threat of Future Injury.

Plaintiffs face a real and immediate threat of injury because HPT's noncompliance is ongoing. *See Pickern*, 293 F.3d at 1138 (holding that a plaintiff threatened with existing ADA noncompliance suffers an "'imminent injury'" for purposes of standing). Indeed, HPT has never argued – in the district court or here – that the hotels it owns actually provide equivalent accessible transportation as required by the ADA.

Plaintiffs will visit the hotels after they are brought into compliance, and they do not know when that will occur. HPT argues that this deprives them of standing. HPT Br. 21-23. To the contrary, this Court held in *D'Lil* that:

> [A]ctual or imminent injury sufficient to establish standing [exists] where a plaintiff demonstrates an intent to return to the geographic area where the accommodation is located and a desire to visit the accommodation *if it were made accessible*. We have explicitly not required ADA plaintiffs to engage in the 'futile gesture' of visiting or returning to an inaccessible place of public accommodation in order to satisfy the standing requirement.

538 F.3d at 1037 (emphasis added and citations omitted).

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[11] *Chapman*, 631 F.3d at 946.

[12] *Pickern*, 293 F.3d at 1136. *Brooke* is also distinguishable because the ADA requirement that hotel personnel be trained to proficiency in responding to inquiries was not at issue in *Brooke*.

D. Plaintiffs' Claims Satisfy the Redressability Requirement.

"[A] plaintiff satisfies the redressability requirement when he shows that a *favorable decision* will relieve a discrete injury to himself." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis added). HPT's redressability argument fails because it is premised on Plaintiffs receiving an *unfavorable decision* on the merits.

Specifically, HPT, based on the REIT tax provisions and the management agreements, argues that only its management companies can provide the relief sought by Plaintiffs. HPT Br. 23-27. This argument improperly assumes that the district court will rule against Plaintiffs on these issues.[13]

"Redressability . . . has to do with the likelihood that the injury will be redressed if a favorable decision is rendered, not the likelihood that a favorable decision will be rendered." *Tulare Local Health Care Dist. v. Cal. Dep't of Health Care Servs.*, No. 15-cv-02711-SC, 2015 WL 5260437, at *3 (N.D. Cal. Sept. 9, 2015). As a result,

> [T]he [redressability] test ssumes that a decision on the merits would be favorable and that the requested relief would be granted; it then goes on to ask whether that relief would be likely to redress the party's injury . . . To analyze standing by asking whether the relief would be likely to be granted, as petitioners would have us do, would conflate the redressability test with a motion to dismiss for lack of jurisdiction.

[13] Indeed, the district court ruled in favor of Plaintiffs on this point, holding that the requirements of the ADA trump the REIT tax provision. Plaintiffs-Appellants' Excerpts of Record ("ER") (docket no. 11-1) at 11-12.

In re Thornburgh, 869 F.2d 1503, 1511 (D.C. Cir. 1989).

Here, if the court ultimately decides in Plaintiffs' favor, it will hold that the ADA transportation requirements apply notwithstanding HPT's arguments about the REIT tax provisions and the management agreements, or it will find that injunctive relief is consistent with the REIT tax provisions and the management agreements. Either way, an injunction will redress Plaintiffs' injuries.[14]

IV. Plaintiffs' Expert Testimony Should Not Be Excluded.

Plaintiffs' class certification motion relied on the expert testimony of Dr. Michael Quinn, a Pennsylvania State University professor with a Ph.D in Hospitality Management. Quinn has more than 20 years working in, studying, and teaching about the hotel industry, has participated in mystery shopper programs, and has reviewed and analyzed data from mystery shopper programs to evaluate hotel performance. FER 19-20.

[14] The cases relied on by HPT held, based on the facts of those cases, that *even if the plaintiffs prevailed*, whether their injuries would be redressed would depend entirely on third parties outside the control of the court. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (holding that even if the plaintiffs prevailed, whether they would receive tax advantages would depend on "the unfettered choices made by independent actors not before the courts"); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) (redressability requirement not met because even if the plaintiffs prevailed, whether they would receive benefits would depend on the discretion of third parties not before the court).

Quinn essentially conducted a mystery shopper program, in which he called 138 HPT hotels and asked questions a potential guest would ask about general transportation services and accessible transportation services. FER 7-8 (¶¶ 7-8). Mystery shopper programs mimic the experiences of potential guests who call hotels to determine whether hotel employees, when they interact with such guests, are following policies and procedures and are properly trained. FER 7 (¶¶ 5-6). A mystery shopper program was appropriate to assess HPT's equivalent transportation policies, practices and training. *Id.* (¶ 5). HPT's rebuttal expert agreed that "[m]ystery shopper programs are used to help measure the existence and quality of customer service or guest services provided by the employees of an institution." SER 117-18. Further, HPT's expert relied on an article that identified as a purpose of mystery shopper programs "[t]esting if customers are treated equally (e.g. testing against discrimination)." FER 2 (¶¶ 3-5), 5.

Of the 138 HPT hotels Quinn called that provide transportation services, 101 hotels stated they did not offer any accessible transportation services at all. Appellants' Opening Brief ("Opening Br.") 12 n.11. An additional 27 hotels stated they did not provide accessible transportation services that were equivalent to the inaccessible transportation services. *Id*. Overall, more than 90% of HPT hotels that provide transportation services told Quinn that they did not provide equivalent

accessible transportation services. *Id*. at 12. HPT did not submit *any* evidence rebutting this testimony.

Quinn concluded that HPT hotels do not have effective policies to ensure they provide accessible transportation services equivalent to their inaccessible transportation services. ER 106. He maintained this conclusion even if some of the hotels that employees said did not provide equivalent accessible transportation services actually did provide such services, because that would represent a failure in employee training. FER 8 (¶13).

A. HPT's Criticisms Are Inapplicable to Mystery Shopper Programs.

HPT erroneously equates mystery shopper programs – which are intended to mimic the experiences of potential guests – with "surveys," which are not.[15] This error leads HPT to assert that Quinn should have asked questions that potential guests would not ask. For example, HPT claims that instead of relying on the accuracy of the information provided by hotel employees, Quinn should have: made multiple calls to each hotel and asked to speak with multiple employees;

[15] *See* FER 9 (¶ 14). Resolution of the experts' disagreement on whether a mystery shopper program was appropriate is for the finder of fact, and is not a basis for disqualifying Quinn. *See, e.g., Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1196 (9th Cir. 2005) ("If two contradictory expert witnesses [can offer testimony that is reliable and helpful], both are admissible, and it is the function of the finder of fact, not the trial court, to determine which is the more trustworthy and credible.") (Citation omitted).

quizzed each employee about their position, tenure and knowledge; and asked them about hotel policies. HPT Br. 30, 32-33. Potential guests with disabilities would not ask such questions, nor should they have to assume that hotel employees are providing inaccurate information. As set forth above, the ADA requires hotels to train their employees to proficiency so they provide accurate information about hotel transportation services. *Supra* 11. If the employees were wrong when they told Quinn that their hotels do not provide equivalent accessible transportation, that is a violation of the ADA *training* requirements.

B. Quinn's Methodology, Data, and Conclusions Meet the Requirements of Federal Rule of Evidence 702.

Quinn's testimony meets the four requirements in FRE 702: (a) he has "specialized knowledge" based on his nearly 25 years working in, studying and teaching about the hotel industry, including on hotel operations and use of mystery shopper surveys, and his analysis of the data he collected will "help the trier of fact to understand" this data; (b) his testimony is based on calls he personally made to almost every hotel owned by HPT that provides transportation services to guests, and the accuracy of his summaries of those calls is not disputed; (c) mystery shopper programs are commonly used in the hotel industry to evaluate hotel performance; and (d) Quinn reliably applied these principles and methods to reach his conclusions.

C. HPT Applies the Wrong Standard to Quinn's Analysis.

HPT, incorrectly relying on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), argues that the court should exclude Quinn's testimony because it was not subject to peer review or pretesting, was not supported by standards generally accepted in the scientific community, and was not based on independent research outside of this litigation. HPT Br. 32-33.[16]

The *Daubert* factors do not apply to non-scientific testimony based on specialized knowledge: "Concerning the reliability of non-scientific testimony such as Caliri's, the '*Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind it.'" *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (citations omitted); *see also United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (same). "[I]n considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally." *Hankey*, 203 F.3d at 1168.

[16] HPT also argues that Quinn's testimony should be struck on the grounds that his methodology was "used and developed solely for the purpose of this litigation." HPT Br. 32. To the contrary, both Quinn and HPT's expert agree that mystery shopper programs are commonly used in the hotel industry. FER 5 (¶ 5); SER 117 (¶ 11)

Here, a number of factors demonstrate that Quinn's methodology and conclusions are reliable, including: (1) his extensive work and study of hotel operations, and his expertise in that field is undisputed; (2) mystery shoppers indisputably are commonly used in the hotel industry; and (3) Quinn's testimony concerning the substance of his calls is undisputed.

D. Quinn Is Qualified to Render His Testimony.

Rule 702 "contemplates a broad conception of expert qualifications." *Hangarter*, 373 F.3d at 1016 (citation omitted). Here, Quinn has worked in, studied, and taught about the hotel industry for more than 20 years. HPT, confusing mystery shopping programs with "surveys," argues that Quinn is not qualified "in survey design, and so he is not qualified to opine on those matters." HPT Br. 34. HPT does not dispute that Quinn is an expert on hotel operations and evaluating hotel performance, and he is being proffered as an expert on these topics.

E. Quinn's Data Support His Conclusions.

Quinn called 138 HPT hotels that provide transportation services to guests, and employees at 128 hotels stated that they do not provide equivalent accessible transportation services. Opening Br. 12 n.11. These 128 hotels either do not provide equivalent accessible transportation services, or they do but have not adequately trained their employees to provide basic and important information

about those services. Either way, Quinn logically concluded that these hotels did not have in place practices or procedures to ensure the provision of equivalent accessible transportation services.

Quinn on occasion was told by one employee that the hotel does not provide accessible transportation, and by another that the hotel does provide accessible transportation. Defendant faults Quinn for not further investigating to determine which statement was accurate. HPT Br. 36. This misses the point. The ADA requires hotels to train employees to provide accurate information. When two employees give contradicting answers as to whether the hotel provides accessible transportation, the inescapable conclusion is that one employee was not adequately trained to provide basic information about accessible transportation services.[17]

V. The Class Meets the Commonality Requirement.

A. The Class Shares Crucial Common Questions.

The class meets the commonality requirement because there are common issues, the determination of which "will resolve an issue that is central to the

[17] At a minimum, Quinn's testimony should be admitted as factual testimony relevant to whether HPT hotels have in place effective policies ensuring provision of equivalent accessible transportation services. Even if every single statement made by a hotel employee to Quinn that the hotel does not have equivalent accessible transportation is untrue, the statements would still demonstrate widespread violations of the ADA training requirements. *See, e.g.*, *United States v. Webster*, 649 F.2d 346, 349 (5th Cir. 1981) (holding that "where the alleged fact may be so regardless of whether the statement is true or false, the statement is not hearsay").

validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). HPT's arguments are wrong for several reasons.

First, HPT uses the wrong legal standard. HPT Br. 39. It claims commonality requires more than a single common issue, despite the Supreme Court's statement in *Dukes* that "[e]ven a single common question will do." 564 U.S. at 359 (quotations omitted). HPT also claims that after *Dukes*, the commonality requirement is no longer construed permissively. But *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) – which directly applied *Dukes* – held that the commonality requirement should be construed permissively.

Second, HPT fails to refute common issues identified by Plaintiffs. One crucial common issue is whether the REIT tax provisions and HPT's management agreements preclude injunctive relief against HPT, as HPT argues. HPT asserts that it is not making that argument (HPT Br. 44), but this cannot be squared with: (1) HPT's argument to the district court that "any injunction ordering HPT in some way to operate the shuttle services cannot be lawfully made;"[18] and (2) its contentions in this appeal that Plaintiffs' injuries are not redressable, and the requirements of Rule 23(b)(2) are not met, because an injunction cannot be entered against HPT. HPT Br. 24-26, 57.

[18] ER 26.

The class also shares the common factual questions of whether – based on common, symptomatic evidence – HPT has engaged in a widespread pattern of violations of the Equivalent Transportation Requirements, and whether HPT's violations of these requirements are attributable to policies or practices at its hotels. In either case, systemic injunctive relief is warranted. Opening Br. 7-8, 17-22, 26.

HPT asserts that commonality does not exist in the absence of a formal written policy, and struggles to distinguish all of the cases in which this Court has held otherwise. *See* Opening Br. at 19-21. HPT contends that these cases involved "de facto policies," and claims that there is a meaningful distinction between the "*absence* of any policy [and] the *presence* of unwritten *de facto* policies." HPT Br. 46 (emphasis in original). HPT fails to explain how any such distinction, if it exists, makes a difference for purposes of Rule 23. In any event, this Court and others have frequently held that the requirements of Rule 23 are met where a defendant has engaged in a *practice* of discrimination, even when such practices are not embodied in any written policy. *See, e.g., Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1162-53, 1165 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2835 (2015) (commonality established based on the common factual question of whether defendant had a "practice or unofficial policy" of failing to compensate employees); *see also* Opening Br. 19-21.

Finally, HPT's answering brief raises (for the first time on appeal) additional common crucial questions establishing commonality: (1) whether the ADA transportation requirements apply only to "operators;" and (2) if so, whether HPT is an operator. *See* HPT Br. 9-10.

B. Commonality Is Established by Significant Proof of a General Practice of Discrimination.

Plaintiffs also established commonality by submitting "significant proof" that HPT operated under a general practice of discrimination, evidence demonstrating that more than 90% of HPT's hotels that provide transportation services are in violation of the Equivalent Transportation Requirements. Opening Br. 29-31.

HPT, citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), asserts that this evidence is insufficient because Plaintiffs did not submit statistical evidence and anecdotes of class members who "recounted specific instances of discrimination" other than Plaintiffs. HPT Br. 48. Nothing in *Dukes* requires a plaintiff to use a particular method to satisfy Rule 23(a)(2). Rather, "in all class actions, commonality cannot be determined without a precise understanding of the nature of the underlying claims." *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014). While statistical and anecdotal evidence may demonstrate a policy of discrimination in employment cases, which focus on "the reason for a

particular employment decision," *Dukes*, 564 U.S. at 352, Plaintiffs do not need to show a discriminatory reason – or any reason – why each HPT hotel lacks equivalent accessible transportation. Rather, Plaintiffs have shown that violations of the ADA's accessible transportation requirements are systemwide: violations *are happening* at more than 90% of HPT's hotels. This is more than enough to show a systemwide policy or practice of discrimination. *See* Opening Br. 7-8.

C. Purported Differences Among HPT's Hotels Do Not Defeat Commonality.

HPT argues that commonality is defeated because litigating this case as a class would require multiple hotel-specific factual questions to determine whether the hotels are subject to the Equivalent Transportation Requirements, and, if so, whether they are complying with those requirements. HPT Br. 42, 47-48. This is incorrect.

First, the factual issues are not nearly as complex as HPT suggests. For example, Plaintiffs established that all of the HPT hotels are covered by the Equivalent Transportation Requirements based on HPT's responses to *two interrogatories*. *See* Opening Br. 10. Similarly, Plaintiffs established that 128 of these hotels do not comply with the Equivalent Transportation Requirements based on Quinn's testimony. Further, the district court need not analyze the

circumstances of each hotel to enter a systemic injunction, which is warranted based on symptomatic evidence of a pattern of discrimination. Opening Br. 17-19.

Second, these hotel-specific factual determinations are common among class members and thus support commonality.[19]

Finally, that there are numerous common factual questions, or that these questions are complex, does not defeat commonality. Rule 23 requires that the class share common questions, but it does not additionally require that those common questions be simple or effortlessly resolveable, and such a requirement should not be imputed. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017)("Because the drafters specifically enumerated "[p]rerequisites," we may conclude that Rule 23(a) constitutes an exhaustive list."). To the contrary, certifying classes that share time-consuming or complicated questions is consistent with the purposes of Rule 23 because certification eliminates both the inefficiencies of numerous courts having to consider the same time-consuming questions, and the risk that numerous courts considering complicated questions will reach inconsistent outcomes. *See* Opening Br. 24.

[19] Opening Br. 19-21. Even assuming *arguendo* that hotel-specific questions are "individualized," commonality requires the presence of common questions, not the absence of individualized questions. "[E]ven a single common question" will establish commonality. *Dukes*, 564 U.S. at 359.

VI. The Class Satisfies Typicality.

The class satisfies the typicality requirement because the nature of the claims of Plaintiffs and class members is the same: "all suffer a refusal or failure to afford them accommodations as required by statute, and are objects of discriminatory treatment on account of their disabilities." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).

HPT asserts that typicality does not exist because of purported factual differences among the hotels, and because the Plaintiffs were informed by telephone that hotels do not provide equivalent transportation services, whereas some class members may have received that information in person. HPT Br. 50-52. This assertion is wrong; as long as the nature of the claims of the class and Plaintiffs is the same, typicality is not defeated by factual differences between those claims. *See, e.g.*, *Parsons*, 754 F.3d at 685 (holding that "[t]ypicality refers to the nature of the claim or defense of the class representative, *and not to the specific facts from which it arose or the relief sought*") (Emphasis added and citation omitted); *Ellis*, 657 F.3d at 985 n.9 (holding that "[d]iffering factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality").

Here, the nature of the claims of Plaintiffs and class members is virtually identical. All seek injunctive relief based on violations of the Equivalent Transportation Requirements. Typicality is thus met.

VII. The Class Satisfies Rule 23(b)(2).

Plaintiffs seek a single injunction providing classwide relief to remedy HPT's failure to act on grounds that apply generally to the class. "'Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." *Dukes*, 564 U.S. at 361 (citation omitted).

HPT argues that the class does not meet Rule 23(b)(2) because relief would vary from hotel to hotel. HPT Br. 54. To the contrary, all 142 HPT hotels are subject to the same set of legal requirements, and virtually none of those hotels complies with those requirements. An injunction requiring HPT to implement the same set of policies and practices at all such hotels would not have any variation among the hotels, nor would an injunction requiring HPT to purchase accessible vans for each noncompliant hotel.

HPT also argues that the injunctive relief proposed by Plaintiffs does not meet the specificity requirements of Rule 65(d). HPT Br. 55. This Court, however, has rejected this precise argument, holding that at the class certification stage,

plaintiffs need only describe the "general contours of an injunction." *Parsons*, 754 F.3d at 689 n.35.

Finally, HPT asserts that no injunctive relief can be entered because it does not have the right under its management agreements to impose operational policies, and (for the first time on appeal) that managers are indispensable parties. HPT Br. 56-59. Those arguments are based on the false premise that the management agreements outweigh the requirements of the ADA, a contention that was rejected by the district court and that is contrary to this Court's decision in *Botosan*. *See supra* 3-4. These arguments are also contrary to the ADA transportation regulations, which explicitly cover entities that contract with third parties providing transportation services. *Supra* 2.

In any event, the management agreements require managers to operate HPT's hotels in accordance with federal statutes and regulations, and, if managers fail to do so, give HPT the right to terminate those agreements. *See supra* 4-5. Thus the court can order HPT to notify its managers that they must bring their hotels into compliance with the Equivalent Transportation Requirements, and if the managers fail to do so, HPT can terminate the agreements.

HPT relies on *Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260 (9th Cir. 2015), but that case is inapplicable here because it concerned a defendant's ADA obligations over property that it neither owned nor leased. The

plaintiff in *Kohler* sued the tenant of a mall based in part on ADA violations in the mall parking lot. *Id.* at 1262. The tenant argued that because its lease did not include the parking lot, it did not have any ADA obligations with respect to the parking lot. *Id.* at 1263-64. The plaintiff, citing *Botosan*, asserted that the tenant could not use the lease to contract away its ADA obligations. *Id.* at 1264. This Court rejected this argument, holding that because the parking lot was outside of the lease, the tenant did not have any ADA obligations to begin with, and thus no such obligations to contract away. *Id. Kohler* simply reflects the common sense principle that a tenant does not have ADA obligations concerning property not included in its lease. A property *owner* such as HPT, on the other hand, has ADA obligations covering all of the property that it owns, which, under *Botosan*, it cannot contract away.

As a result, numerous courts have held that when a plaintiff sues a property owner under Title III, a tenant is not a necessary or indispensable party regardless of the provisions of any agreements between the owner and the tenant. *See, e.g.*, *Paulick v. Starwood Hotels & Resorts Worldwide, Inc.*, No. C-10-01919 JCS, 2012 WL 2990760, at *14 (N.D. Cal. July 20, 2012) (holding that "under *Botosan*, it is the landlord who is the indispensible party and not the tenant"); *Moore v. Chase, Inc.*, No. 14-cv-01178-SKO, 2016 WL 866121, at *13 (E.D. Cal. Mar. 7, 2016) (rejecting owner's argument that tenant was a necessary party and holding that the

"ADA . . . provides that a landlord, as an owner of the property, remains liable for ADA compliance even on property leased to, and controlled by, a tenant").

Here, HPT undisputedly owns the hotels at issue, and thus is obligated to comply with all ADA requirements covering those hotels. Under *Botosan*, it cannot attempt to contract away those obligations through its management contracts.

VIII. Conclusion.

For the reasons above, Plaintiffs respectfully request that this Court reverse the district court, and hold that the proposed class meets the requirements of Rule 23(a) and 23(b)(2), and remand this case for further proceedings.

Dated: February 9, 2017

Respectfully submitted,

CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,987 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size, size 14, and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: February 9, 2017 s/Timothy Fox

CERTIFICATE OF SERVICE

I, Timothy P. Fox, certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on February 9, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Timothy P. Fox