IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02754-WYD-NYW

KIRSTIN KURLANDER,
on behalf of herself and others similarly situated,

Plaintiff,

v.

KROENKE ARENA COMPANY, LLC,

Defendant.

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Kirstin Kurlander, by and through counsel, hereby moves for certification of the following class:

> All Pepsi Center patrons who are deaf or hard of hearing and unable to hear using assistive listening devices, who have been, since November 10, 2014, or in the future will be, denied full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of the Pepsi Center based on Defendant's failure to provide open captioning of aural content.

This putative class is sufficiently numerous and its members sufficiently difficult to identify that joinder would be impracticable. Putative class members share the common claim that the Pepsi Center's failure to provide open captioning of aural content violates Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*, and Plaintiff Kirstin Kurlander's individual claim is typical of those of the class. Finally, Ms. Kurlander is an adequate representative, with no conflicts with the class, and class counsel is an experienced disability rights and class action attorney. The class is properly certified under Rule 23(b)(2)

because, by failing to provide open captioning, Defendant has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . relief is appropriate respecting the class as a whole."

Pursuant to D.C.COLO.LCivR 7.1(A), the undersigned conferred with counsel for Defendant who stated that her client opposed this motion.

Background

The Pepsi Center, owned and operated by Defendant Kroenke Arena Company, LLC, is an indoor arena that seats approximately 17,000 to 21,000 people, depending on the event and configuration. It was constructed in the late 1990s, and opened on October 1, 1999.[1] The Pepsi Center is home to the National Hockey League's ("NHL's") Colorado Avalanche, the National Basketball Association's ("NBA's") Denver Nuggets, and the National Lacrosse League's Colorado Mammoth, and is also the venue of a number of concerts and other events each year. Amended Class Action Complaint (ECF No. 7) ¶ 2; Answer to Amended Class Action Complaint ("Answer," ECF No. 10) ¶ 2.[2] Defendant installed a new center-hung display (the "Display") at the Pepsi Center in 2013. Answer ¶ 3.

> The 60,000-pound, center-hung, state-of-the-art scoreboard contains four large screens -- two face the center seating areas, measuring approximately 27' high by 48' long, and two face each end of the seating bowl, measuring approximately 21' high by 25' wide. The display boards contain over 8.5 million pixels in total. Fans seated along the center areas will face a 1080p full HD screen that stretches from

[1] "Arena Facts," http://www.pepsicenter.com/arena-info/pepsi-center/arena-facts/ (last visited March 11, 2017) (hereinafter "Arena Facts").

[2] Plaintiff filed a Second Amended Class Action Complaint ("SAC") on March 20, 2017. (ECF No. 14.) The only difference between the SAC and the Amended Class Action Complaint is the deletion of Plaintiff's state law damages claim. *See* Notice of Filing Second Amended Complaint (ECF No. 13) ¶ 1. Because Defendant has not had the chance to answer, and because the amendment does not affect the cited paragraphs, Plaintiff cites to the Amended Class Action Complaint.

> 3-point line to 3-point line for basketball, and spans both blue lines for hockey. The scoreboard is one of the largest HD video boards in the NBA.

Denver Nuggets Basketball, 2016-2017 Media Guide at 4.[3]

Open captioning is not provided on the Display, Answer ¶ 3, or on any other scoreboard or display generally visible to patrons, Decl. of Kirstin Kurlander ("Kurlander Decl.") ¶ 9.

Many of the events at the Pepsi Center include both visual and aural content. For example, during a Colorado Avalanche ice hockey game, Pepsi Center patrons will not only be able to watch the players on the ice, they will hear the announcer introducing the players at the beginning of the game, telling them what penalties have been assessed during the game on which players, and announcing which player scored and which assisted following a goal. Similarly, Denver Nuggets fans will hear players being announced at the beginning of the game and when they enter and leave the game, fouls assessed against players and a running count of those fouls, and which players scored field goals and for how many points. Both hockey and basketball fans will also hear a good deal of non-game-related information at the Pepsi Center, for example, the presentation of the color guard and the national anthem, other songs (with lyrics), player interviews, contests, and promotions. Decl. of Amy Robertson ("Robertson Decl.") ¶ 8.[4]

Plaintiff Kurlander is profoundly deaf and, as a result, relies on auxiliary aids and services, such as captioning, to receive aural information. Kurlander Decl. ¶ 2. Ms. Kurlander

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[3] http://i.cdn.turner.com/nba/nba/.element/media/2.0/teamsites/nuggets/DenverNuggets_2016-17_MediaGuide.pdf (last visited March 12, 2017).

[4] It is possible that, if the Court is a sports fan, these facts would be appropriate for judicial notice; they are, in any event, unlikely to be contested. Plaintiff submits counsel's declaration with this information in an abundance of caution so as not to leave factual assertions unsupported by the record.

enjoys attending events at the Pepsi Center, and over the past few years, has attended a number of Mammoth lacrosse games, part of an Avalanche hockey game, a Harlem Globetrotters game, and several other events. *Id.* ¶¶ 3, 4, 11. When attending events at the Pepsi Center, she is unable to hear any aural content, including game information, announcements, music, and promotions. *Id.* ¶¶ 2, 7. In order for her to know what is announced -- for example, scores, penalties, players entering and leaving the game, promotions, interviews, or contests -- and what music is being played, she requires captioning, that is, that the aural content be rendered into text and displayed where she can see it. *Id.* ¶ 8.

Plaintiff also submits the declarations of Justin Buckhold, Jaclyn Tyrcha, Cliff and Julie Moers, and Tracy McGurran (on behalf of her minor son). All report similar experiences: that they are (or, in Ms. McGurran's case, that her son is) deaf, enjoy attending events at the Pepsi Center, cannot hear aural content over the public address system, and that effective communication would require open captioning on the Display. Decl. of Justin Buckhold ("Buckhold Decl.") ¶¶ 2, 10; Decl. of Jaclyn Tyrcha ("Tyrcha Decl.") ¶¶ 2, 7; Decl. of Cliff Moers ("C. Moers Decl.") ¶¶ 2, 8; Decl. of Julie Moers ¶¶ 2, 7; Decl. of Tracy McGurran ("McGurran Decl.") ¶ 2.

A number of sporting venues around the country provide open captioning on scoreboards or other displays, including Sun Devil Stadium at Arizona State University;[5] the University of Oregon;[6] the University of Missouri; Major League Baseball's ("MLB's") St. Louis Cardinals,

[5] Tyrcha Decl. ¶ 5.

[6] "LNS Captioning scores big in stadiums," http://www.bizjournals.com/portland/print-edition/2012/09/07/lns-captioning-scores-big-in-stadiums.html (last visited March 12, 2017). (because this is behind a paywall, it is attached as Exhibit 2 to the Robertson Declaration).

New York Mets, Milwaukee Brewers,[7] New York Yankees, and Philadelphia Phillies;[8] the Verizon Center, home of the Washington Capitals (NHL) and Washington Wizards (NBA);[9] the Minnesota Wild (NHL);[10] and the Cleveland Cavaliers (NBA).[11]

In September, 2015, Ms. Kurlander, through counsel, wrote to counsel for Defendant requesting open captioning on the Display. Robertson Decl. ¶ 3. The parties negotiated amicably for over a year but were unable to reach agreement; as a result, this lawsuit was filed on November 10, 2016. *Id.*

Although this goes to remedy rather than class certification, Plaintiff notes that, after the case was filed, Defendant began to provide *closed* captioning on five iPads available for check out, through a patron's smart device (for example, iPhone or other smart phone or tablet), and through suite television monitors. *See* Defendant's Responses to Discovery at 2-3, Response to Interrogatory No. 1 (Robertson Decl. Ex. 1). As Ms. Kurlander explains, this solution does not provide effective communication. Kurlander Decl. ¶¶ 11; *see also* Tyrcha Decl. ¶ 6; Buckhold Decl. ¶ 9; C. Moers Decl. ¶ 7.

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[7] "Daktronics Captioning Interface Helps Facilities Cater to the Needs of Every Fan," http://www.daktronics.com/Company/NewsReleases/Pages/CaptioningInterface.aspx (last visited March 12, 2017).

[8] "Lifeline for hearing-impaired at ballparks," http://www.espn.com/espn/page2/story?page=lukas/110607_stadium_closed_captioning (last visited March 12, 2017).

[9] McGurran Decl. ¶ 7; Capitals Club Red 365 Insider 10/08/14 at 1, http://capitals.nhl.com/v2/ext/STHLR/Planholder-Update/CapitalsClubRed365Insider100814.pdf (last visited March 12, 2017).

[10] http://www.xcelenergycenter.com/guest-services/ada (last visited March 12, 2017).

[11] http://www.theqarena.com/arena-info/accessibility-info (last visited March 12, 2017).

Legal Background

Title III of the ADA prohibits owners and operators of places of public accommodation such as the Pepsi Center from discriminating on the basis of disability in the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182(a).[12] Such places are prohibited from affording people with disabilities "the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals," *id.* § 12182(b)(1)(A)(ii), and are required to provide "auxiliary aids and services" "as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals," *id.* § 12182(b)(2)(A)(iii), and to ensure "effective communication" with individuals with disabilities, 28 U.S.C. § 36.303(c)(1).

Because the "full and equal enjoyment" of the Pepsi Center includes all of the aural information provided over the public address system, effective communication for those who cannot hear that information must convey all of it in captions. Without captioning, deaf Pepsi Center patrons are provided services, privileges, advantages and accommodations that are not equal to those afforded hearing patrons, and are thus treated differently from them, in violation of §§ 12182(b)(1)(A)(ii) and 12182(b)(2)(A)(iii). As the Fourth Circuit has held in the context of FedEx Field, a professional football stadium:

> effective communication requires defendants to provide auxiliary aids beyond assistive listening devices, which are useless to plaintiffs, to convey the: (1) game-related information and referee calls; (2) emergency and public address

[12] The Parties have stipulated that Ms. Kurlander is a qualified individual with a disability and that the Pepsi Center is a place of public accommodation as those terms are used in the ADA, and that Defendant owns and operates the Pepsi Center. Scheduling Order, (ECF No. 12) ¶ 4(b), (c), (d).

> announcements broadcast over the public address system; and (3) the words to music and other entertainment broadcast over the public address system. Plaintiffs need access to this aural content to have full and equal access to the goods and services that defendants provide at FedEx Field.

Feldman, 419 Fed.Appx. 381, 391 (4th Cir. 2011). That court noted specifically that, "[a]dvertisements and public service announcements are . . . part of the services and privileges that defendants provide" and that full and equal enjoyment included access to the lyrics to music broadcast over the public address system. *Id.*

The remedy for violation of Title III of the ADA is entirely injunctive; that statute does not have a damages remedy. *See* 42 U.S.C. § 12188(a)(1) (incorporating by reference 42 U.S.C. § 2000a-3(a)).

ARGUMENT

Plaintiff moves for certification of the following class:

> All Pepsi Center patrons who are deaf or hard of hearing and unable to hear using assistive listening devices, who have been since November 10, 2014, [13] or in the future will be, denied full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of the Pepsi Center based on Defendant's failure to provide open captioning of aural content.

"A district court may certify a class if the propsed class satisfies the requirements of Rule 23(a) and the requirements of one of the types of classes in Rule 23(b)." *DG ex rel Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010). The putative class here meets all the requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the

[13] This date is two years before the filing of the Complaint in this action, and reflects the applicable statute of limitations. *See* Colo.Rev.Stat. § 13–80–102(1)(g) (establishing a two-year statute of limitations for federal claims "where no period of limitations is provided in [the] federal statute.").

> representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The proposed class also satisfies the requirements of Rule 23(b)(2) because "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).

Plaintiff will analyze each of the requirements of Rule 23(a) and Rule 23(b)(2) separately below. As an overview, numerous courts have certified classes of individuals who are deaf or hard of hearing challenging ineffective communication.[1]

I. The Proposed Class Satisfies Rule 23(a).

A. The Proposed Class Is So Numerous That Joinder is Impracticable.

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." There is "no set formula to determine if the class is so numerous that it should be so certified." *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014) ("*Abercrombie*"). Indeed, Rule 23(a)(1) is not necessarily "'a question of

[1] *See, e.g. Williams v. Conway*, 312 F.R.D. 248, 254 (N.D. N.Y. 2016) (certifying class of deaf prisoners challenging ineffective communication); *Holmes v. Godinez*, 311 F.R.D. 177, 223-24 (N.D. Ill. 2015) (same); *Greater Los Angeles Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, 2014 WL 12561074, at *12 (C.D. Cal. May 6, 2014) (certifying class of deaf moviegoers challenging lack of captioning); *Siddiqi v. Regents of Univ. of So. Cal.*, 2000 WL 33190435, at *11 (N.D. Cal. Sep. 6, 2000) (certifying class of deaf and hard of hearing students challenging university's policies and procedures); *Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (certifying class of deaf individuals challenging accessibility of municipal 911 and street alarm box system); *Tugg v. Towey*, 864 F. Supp. 1201, 1204 (S.D. Fla. 1994) (certifying class of deaf/hearing impaired individuals who receive mental health counseling services); *Clarkson v. Coughlin*, 145 F.R.D. 339, 347-48 (S.D.N.Y. 1993) (certifying class of deaf and hearing-impaired inmates to challenge discriminatory policies of the New York State Department of Correctional Services).

numbers.' Rather, there are … several 'factors that enter into the impracticability issue.'" *Id.*; *see also Colorado Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 358 (D. Colo. 1999) ("*CCDC v. Taco Bell*") (holding that a class of individuals with mobility disabilities satisfied numerosity based on estimates of class size, as well as geographic diversity and the difficulty of identifying class members). This court "may make 'common sense assumptions' to support a finding that joinder would be impracticable." *Id.* (internal citations omitted); *see also Greater Los Angeles Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, 2014 WL 12561074, at *7 (C.D. Cal. May 6, 2014) ("*GLAD*") ("where 'general knowledge and common sense indicate that [the class] is large, the numerosity requirement is satisfied'") (internal citations omitted).

The putative class here consists of past and future deaf and hard of hearing patrons of the Pepsi Center, whose hearing is such that they are not able to use assistive listening devices. In 2012, the Colorado Commission for the Deaf and Hard of Hearing estimated that 8.6% of the population of Colorado was hard of hearing, and 0.9% was deaf.[14] The U.S. Census estimates that 2.6% of the population of Denver has a "hearing difficulty."[15] The 2015 Annual Disability Statistics Compendium estimates that 10.8% of the population of the United States has "difficulty hearing," and 1.7% has "severe" difficulty hearing.[16] The population of the City and County of Denver is approximately 643,000 and the larger Denver metropolitan area, over 2.7

[14] Colorado Commission for the Deaf and Hard of Hearing, "Info Sheets: The Deaf and Hard of Hearing Population in Colorado," http://ccdhh.com/PDF/Infosheets/Demographics%2012.pdf (last visited March 12, 2017).

[15] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Disability Characteristics. Robertson Decl. Ex. 3.

[16] University of New Hampshire, Institute on Disability, "2015 Annual Disability Statistics Compendium," at 191, https://disabilitycompendium.org/sites/default/files/user-uploads/Events/2015%20Annual%20Disability%20Statistics%20Compendium.pdf (last visited March 12, 2017).

million. Robertson Decl. Exs. 3-4. These figures suggest that there are somewhere between 5,700 and 45,000 individuals in Denver or the metropolitan area are deaf, and between 16,000 and 290,000 are hard of hearing.

The Pepsi Center seats between 17,000 and 21,000 people and hosts over 200 events per year. *See* Arena Facts. Avalanche, Nuggets, and Mammoth games alone total 91 events.[17] Regular season attendance at Avalanche games at Pepsi Center through the 2016 season totaled over 10 million;[18] the same figure for the Nuggets was over 11 million.[19] While Plaintiff cannot offer a precise count of the number of deaf patrons at the Pepsi Center since November 10, 2014, these figures when viewed in the light of common sense suggest that the class is numerous, hard to identify, and virtually impossible to join as plaintiffs. For example, the court in *GLAD* certified a class of deaf patrons of a chain of seven movie theaters in southern California. 2014 WL 12561074, at * 13. In holding that the class met the numerosity requirement, the court evaluated census data reflecting the number of deaf individuals in the Los Angeles area and statistics reflecting the number of moviegoers there, and concluded that "while the exact size of the class is unknown, both statistical evidence and common sense ultimately indicate that the class is large enough to make joinder impracticable." *Id.* at *8. In addition, where, as here, only

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[17] http://www.nba.com/nuggets/schedule (41 Nuggets games); https://nhl.bamcontent.com/images/assets/binary/281827250/binary-file/file.pdf (41 Avalanche games); https://www.coloradomammoth.com/schedule/ (nine Mammoth games). (All visited last on March 12, 2017.)

[18] "2016-2017 Colorado Avalanche Media Guide," at 145 https://nhl.bamcontent.com/images/assets/binary/282170090/binary-file/file.pdf (last visited March 18, 2017).

[19] "Denver Nuggets Basketball 2016-17 Media Guide," at 278 (sum of "Regular Season Attend." column from 1999-00 season to 2015-16 season), http://i.cdn.turner.com/nba/nba/.element/media/2.0/teamsites/nuggets/DenverNuggets_2016-17_MediaGuide.pdf (last viewed March 18, 2017).

injunctive relief is sought, "the requirements of numerosity often 'relax.'" *Id.* (internal citation omitted).

For these reasons, the putative class satisfies Rule 23(a)(1).

B. There are Questions of Law and Fact Common to the Class and Plaintiff's Claim is Typical of Those of the Class.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. "The class's "common contention 'must be of such a nature that it is capable of classwide 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.'" *Abercrombie*, 765 F.3d at 1216 (quoting *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013) and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "Where a class of persons sharing a common disability complain of the identical architectural barrier based on the same alleged violations of law, commonality is unquestionably established." *CCDC v. Taco Bell*, 184 F.R.D. at 359.

Rule 23(a)(3) requires that Plaintiff's claims be typical of the claims of the class. Questions of commonality and typicality "tend to merge," and it is thus appropriate to address them together. *Abercrombie*, 765 F.3d at 1216 (quoting *Wal-Mart*, 564 U.S. at 349 n.5).

Here, a single common question unites the class: Does Title III of the ADA require Defendant to provide open captioning on the Display or other easily visible displays in the Pepsi Center? Resolution of this question will resolve the issue central to the claims of the class. Where a single question of ADA compliance is common to the class, Rule 23(a)(2) is satisfied. *See Abercrombie*, 765 F.3d at 1216.

Plaintiff's claim is typical of -- in fact, identical to -- the claims of the class: she, too, claims that Defendant violates Title III by failing to provide captioning on the Display. Where the representative plaintiff and members of the class have similar disabilities and challenge the legality of barriers under the same statute, "the claims of the representative plaintiff[] are typical of the class." *CCDC v. Taco Bell*, 184 F.R.D. at 360; *see also Lucas v. Kmart Corp.*, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (holding that where the focus of an ADA lawsuit is final injunctive relief against the defendant benefitting the class as a whole, "the prerequisites of commonality and typicality are met"). The putative class thus satisfies Rule 23(a)(2) and (3).

C. Plaintiff and her Counsel will Fairly and Adequately Protect the Interests of the Class.

Rule 23(a)(4) requires that the representative plaintiff fairly and adequately protect the interests of the class. "This requirement entails the resolution of two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Decoteau v. Raemisch*, 304 F.R.D. 683, 689 (D. Colo. 2014) (quoting *Rutter & Willbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002)). Plaintiff bears the initial burden of demonstrating adequacy, after which the burden shifts to the defendant; "[a]bsent evidence to the contrary, a presumption of adequate representation is invoked." *Decoteau*, 304 F.R.D. at 689 (internal citations omitted).

Here there are no conflicts between Plaintiff's claims and those of the class. She seeks an injunction on behalf of the class, but does not seek damages on her own behalf. She makes one additional claim beyond those that are the subject of the class claim -- that she not be required move to inferior seats for shows for which she requested an interpreter, Amended Complaint

(ECF No. 7) ¶ 24. This claim in no way conflicts with those of the class; indeed, resolution of this claim may stand to benefit other members of the class. Plaintiff has considerable experience advocating for effective communication, and she and the undersigned have the resources to prosecute the case vigorously. Kurlander Decl. ¶ 12; Robertson Decl. ¶ 13.

Defendant has stipulated that "Plaintiff's counsel, through the Civil Rights Education and Enforcement Center, is experienced in class actions and will adequately represent the interests of Plaintiff and any Class so certified." Scheduling Order (ECF No. 12) ¶ 4(h); *see also generally* Robertson Decl. Plaintiff and the undersigned will fairly and adequately protect the interests of the class, and thus satisfy Rule 23(a)(4).

II. The Proposed Class Is Properly Certified Pursuant to Rule 23(b)(2).

Plaintiff seeks certification pursuant to Rule 23(b)(2) because Defendant 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). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360.

Plaintiffs seeking certification pursuant to Rule 23(b)(2) must meet two requirements: They "must demonstrate defendants' actions or inactions are based on grounds generally applicable to all class members, [and] must also establish the injunctive relief they have requested is appropriate for the class as a whole." *Stricklin*, 594 F.3d at 1199 (internal citations omitted). The putative class meets both of these requirements. Defendant's refusal to provide open captioning applies to the entire class of deaf and hard of hearing patrons who are not able to

use assistive listening devices, and the injunctive relief -- requiring Defendant to provide open captioning on the Display -- would be appropriate for this entire class.

The Advisory Committee Notes to the 1966 amendment to rule 23 demonstrate that subdivision (b)(2) was intended to reach precisely the type of class proposed here: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Ultimately, "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." *Wal-Mart*, 564 U.S. at 361 (internal citation omitted).

III. Undersigned Counsel is Appropriate Class Counsel Pursuant to Rule 23(g).

Rule 23(g)(1) requires that "a court that certifies a class must appoint class counsel," and lists factors to be considered in making such an appointment. Fed. R. Civ. P. 23(g). Plaintiff's counsel is appropriate class counsel in light of those factors:

The work counsel has done in identifying or investigating potential claims in the action (Rule 23(g)(1)(A)(i)): The undersigned and her organization spent over a year negotiating with Defendant in an attempt to achieve the result sought here without litigation. During that time, the undersigned also devoted much work to the research cited in the Background section above. Robertson Decl. ¶ 3-4.

Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action and counsel's knowledge of the applicable law (Rules 23(g)(1)(A)(ii) and (iii)): The undersigned has been litigating class and individual actions under

the Americans with Disabilities Act since 1996, with significant success in both types of case. *See* Robertson Decl. ¶¶ 11-12.

The resources that counsel will commit to representing the class (Rule 23(g)(1)(A)(iv): As demonstrated by the many class actions that the undersigned has litigated to success, Plaintiff's counsel is well-prepared to devote to this case the resources necessary to achieve a successful outcome. Robertson Decl. ¶¶ 11-13.

The factors above support appointment of the undersigned as Class Counsel. *See, e.g., Richey v. Ells*, 2013 WL 179234, at *2 (D. Colo. Jan. 17, 2013) (holding that appointment as class counsel was appropriate where attorneys had significant experience as counsel for the type of class at issue "and have a history of obtaining favorable results"); *see also Decoteau,* 304 F.R.D. at 689 (stating, with respect to undersigned counsel, among others, "Plaintiffs' counsel has significant experience litigating civil rights actions.").

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court:

1. Certify a class defined as "All Pepsi Center patrons who are deaf or hard of hearing and unable to hear using assistive listening devices, who have been, since November 10, 2014, or in the future will be, denied full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of the Pepsi Center based on Defendant's failure to provide open captioning of aural content;"
2. Appoint Plaintiff as class representative; and
3. Appoint undersigned counsel as class counsel.

Respectfully Submitted,

/s/ Amy F. Robertson
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Civil Rights Education and Enforcement Center
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Denver, CO 80203
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Date: March 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2017 I electronically filed the foregoing document along with the declarations of Kirstin Kurlander, Jacyln Tyrcha, Justin Buckhold, Cliff Moers, Julie Moers, Tracy McGurran, and Amy Robertson; and a proposed order, with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

Susan Klopman
sklopman@hklawllc.com

Counsel for Defendant

/s/ Jean Peterson

Jean Peterson, Paralegal
Civil Rights Education and Enforcement Center