

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

IRMA ALLEN, BARTLEY MICHAEL  
MULLEN, JR., et al.,

Plaintiffs,

Civil Action No. 19-cv-281

vs.

OLLIE'S BARGAIN OUTLET, INC.,

Defendant.

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Transcript of Proceedings held via video conference on Monday,  
February 22, 2021, in the United States District Court, 700  
Grant Street, Pittsburgh, PA 15219, before Honorable William  
S. Stickman, IV, United States District Judge.

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APPEARANCES:

For the Plaintiff: Carlson Lynch, LLP  
by R. Bruce Carlson, Esq.  
and Elizabeth Pollock-Avery, Esq.  
and Nicholas Colella, Esq.

For the Defendant: Ogletree, Deakins, Nash, Smoak &  
Stewart, P.C.  
by Richard L. Etter, Esq.

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Proceedings recorded by mechanical stenography;  
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P R O C E E D I N G S

(Held via video conference, 1:29 p.m.)

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3 THE COURT: Well, we are here on the record for oral  
4 argument in the matter of Allen, et al., versus Ollie's  
5 Bargain Outlet in the Rule 23 motion for class certification.  
6 The parties have stipulated on the record that they wanted to  
7 proceed via oral argument today based upon the material  
8 submitted of record and arguments which have been fully  
9 briefed rather than having a hearing.

10 I will allow the attorneys to enter their appearance, then  
11 we'll talk about how we'll handle argument. On behalf of the  
12 plaintiff, Mr. Carlson, I see you. Attorneys, please enter  
13 your appearance, please.

14 MR. CARLSON: Sure, Your Honor. Bruce Carlson on  
15 behalf of the plaintiff. With me are Liz Pollock and Nick  
16 Colella, who are also here on behalf of the plaintiff, Your  
17 Honor.

18 THE COURT: Okay.

19 MR. ETTER: Good afternoon, Your Honor. Rick Etter  
20 on behalf of the defendant.

21 THE COURT: Okay. Mr. Etter, part of the  
22 introduction is a sound check. It sounds like you're either a  
23 little bit far from your mike or you need to turn it up a  
24 little bit. Perfect.

25 MR. ETTER: Is this better?

1 THE COURT: That's much better.

2 MR. ETTER: Richard Etter on behalf of the defendant.

3 THE COURT: So, generally, the rule of thumb that I  
4 give is I allow about 20 minutes per side, 15 to 20 minutes  
5 per side based upon a number of issues at bar. I understand  
6 this is a certification hearing rather than just general oral  
7 argument. So I'm willing to allow more time as need be today.  
8 So in my view, I'm going to allow up to 30 minutes per side.  
9 Mr. Carlson, will you be arguing on behalf of the plaintiffs?

10 MR. CARLSON: I will, Your Honor.

11 THE COURT: Okay. You're free to reserve time if  
12 you'd like for the conclusion, a rebuttal. No need to do so.  
13 And I may very well interrupt and direct questions back to you  
14 since we're all on the Zoom. I understand that I'm the third  
15 judge on this case. Judge Fischer, then Judge Hardy and Judge  
16 Hardy had to recuse, so I come on here. I know I'm  
17 Johnny-come-lately to this. I can assure you I've fully read  
18 all the materials submitted to me. I haven't lived with the  
19 case. I wasn't with the case during discovery. I wasn't  
20 really with the case until a month and a half ago or two  
21 months, I suppose, I think, but I'm up to speed and I know  
22 what the issues are.

23 So, Mr. Carlson, if you'd like to focus in on the Rule 23  
24 factors, the floor is yours.

25 MR. CARLSON: Sure, Your Honor. And actually, with

1 the court's permission, I'd like to pull the lens back a  
2 little bit and talk a little bit about the factual record  
3 before we hit the Rule 23 elements.

4 THE COURT: Sure. You can take us any direction  
5 you'd like. I don't argue cases anymore. I just listen.

6 MR. CARLSON: Right. And I think we do a pretty  
7 thorough job of hitting Rule 23 in the briefings. So my hope  
8 is to give the court a little bit of filler that might not be  
9 so apparent from the briefing. To that end, Your Honor, I  
10 wanted to first kind of take the court through what the record  
11 evidence is regarding the conditions in defendant's stores.

12 So the case, when it started, we have two plaintiffs who  
13 live in the vicinity of the two what I would call subject  
14 stores, the stores that were actually visited by the named  
15 plaintiffs. One of those stores is located in Monaca; the  
16 other one's in New Castle. And both of the plaintiffs were  
17 regular customers at the stores. They were frequent shoppers  
18 there. And their experience was that when they visited the  
19 stores -- and both of them are wheelchair bound, by the way --  
20 that they encountered obstructions in the pass of travel.  
21 This impeded their ability to access the goods and services in  
22 the stores.

23 So what we did after the plaintiffs approached us about  
24 these issues is we sent our investigators in the first  
25 instance to the two stores that they visited frequently to

1 confirm their representations regarding the conditions in the  
2 stores. In addition to that, we sent the investigators to a  
3 number of additional stores to ascertain whether this was a  
4 pattern or an isolated situation that occurred in just the two  
5 stores that they frequented. The results of the investigation  
6 were that every store that the inspectors went to had similar  
7 conditions.

8 And just by the way, Your Honor -- and this isn't entirely  
9 clear from the briefing -- there's a lot of references to  
10 movable objects in the access aisles in the stores, but if you  
11 look at the photographs, both in the amended complaint and the  
12 subsequent iterations of investigations results, you'll see  
13 that there's also a significant number of fixed obstacles in  
14 the pass of travel. And that's relevant because it implicates  
15 different standards under the ADA. And what I mean by that is  
16 when you're talking about fixed objects, that implicates the  
17 specific scoping regulations of the ADA and specific  
18 measurements.

19 If you have a fixed object, a fixed obstacle, there needs  
20 to be 36 inches path of travel for somebody who's in a  
21 wheelchair. Whereas, when you're talking about movable  
22 objects, then you're not covered by the scoping regulations;  
23 you're covered by the more general accessibility mandate under  
24 the statute. And that is that the goods and services in the  
25 store need to still be independently accessible to somebody in

1 a wheelchair. And that's a distinction -- one of the cases we  
2 cite in our brief is a case against Kohl's from the District  
3 of Wisconsin and that case gets into that distinction.

4 But my point is that in this case that you're dealing with  
5 both categories of obstructions. And kind of a distinction  
6 between our case and a lot of other similar cases that have  
7 been filed around the country is that ultimately our  
8 investigators go out and they look at every store in the state  
9 of Pennsylvania, and we do a supplemental production related  
10 to that that's on the docket. And if Your Honor looks at the  
11 photographs that are generated from that inspection, it's  
12 apparent that there are both fixed obstacles and movable  
13 objects in the path of travel in every single -- I'm sorry,  
14 Your Honor.

15 THE COURT: I did look at the photographs. The  
16 question was -- I just wanted to follow up. So the record  
17 illustrates that your investigators have provided information  
18 for the record on every Ollie's in Pennsylvania, is that  
19 correct?

20 MR. CARLSON: That is correct, Your Honor.

21 THE COURT: Okay.

22 MR. CARLSON: And every one of those stores, it had  
23 at least two -- what we would characterize as two violations.  
24 And so the picture that I'm trying to paint here is that this  
25 happened over an extended period of time from prior to the

1 date on which we filed the complaint in the first instance  
2 until that ultimate inspection which occurred in September of  
3 2020. And in each of those instances the conditions were the  
4 same.

5 THE COURT: Let me ask you -- and you might be  
6 getting here, but one of the arguments I wanted to focus you  
7 in on was the initial standing argument raised by the  
8 defendants that essentially and definitely for movable  
9 objects, you don't have standing because you can't point to a  
10 specific Ollie's formal policy about the way that the  
11 obstructions that you cite in photograph are set up. How do  
12 you address that?

13 MR. CARLSON: I think that's a red herring, Your  
14 Honor. I think that we clearly have standing. And if you  
15 look at the -- and particularly with respect to the fixed  
16 object. If you look at the Mielo decision, the court gets  
17 into all the issues that arise under standing.

18 THE COURT: The Mielo, is that the Steak 'n Shake?

19 MR. CARLSON: Yes, Mielo versus Steak 'n Shake.

20 THE COURT: Okay.

21 MR. CARLSON: Which I think is kind of the road map  
22 in this case because this case, you know, you have kind of a  
23 subtext that occurs in that Steak 'n Shake decision where you  
24 have the court declining to affirm certification in that  
25 instance but dropping footnotes and texts describing what

1 would need to occur for the case to be certifiable. That's  
2 this case.

3 THE COURT: So I was going to allow you to move  
4 forward, and you can go in any direction you want, but since  
5 you mention Mielo early in the argument, I do want to tell you  
6 that, as I read the briefing for today and read Mielo, I would  
7 like you -- it doesn't have to be now. Just so that it's out  
8 there.

9 I want you to hit at some point in your argument how the  
10 statistical analysis about people with mobility disabilities  
11 that you cite to in this case varies from the statistical  
12 analysis set forth in the Mielo case because the Circuit found  
13 that it wasn't enough to meet the preponderance standard in  
14 Mielo. I know your argument yours is and I know that that's  
15 fact specific.

16 MR. CARLSON: Right.

17 THE COURT: You don't have to do it now. I know  
18 you're good for it, but come back to it so it's finished for  
19 today.

20 MR. CARLSON: I'll take it right now, Your Honor.

21 THE COURT: Perfect.

22 MR. CARLSON: And what the court is referring to is  
23 numerosity under Rule 23?

24 THE COURT: Correct.

25 MR. CARLSON: And there are a couple of distinctions.



1 With respect to the census data specifically, what the  
2 court -- what the court says in Mielo is, you know, though we  
3 give the trial court some latitude with respect to doing this  
4 numerosity analysis, you still have to introduce evidence  
5 that's adequate so the court's not engaged in pure  
6 speculation. And what they suggested is that you need to get  
7 more granular.

8 So in the case that they cite specifically -- and I think  
9 this is in a footnote in Mielo. I forget which footnote it  
10 is. But they cite a case from Florida, and essentially what  
11 the court says in that instance -- I think it's an Eleventh  
12 Circuit decision. What the Eleventh Circuit says is that you  
13 can't rely upon national census data alone when you're trying  
14 to get a Florida class certified. That's not enough. You  
15 need to give us some Florida-specific data.

16 So the court, the Third Circuit in the Mielo case cites  
17 that case, the Eleventh Circuit case, with approval and says,  
18 you know, this is what we mean. You need to provide data that  
19 that is specific to the class that you're trying to have  
20 certified. So what we did here is we took the census data and  
21 we broke it down and made it much more granular in that we  
22 broke it down by ZIP Code where the defendant's stores are  
23 located so that you get data regarding how many individuals  
24 with mobility disabilities live in the immediate area where  
25 the stores are located.

1 THE COURT: So on that, so let's just say in the  
2 Monaca ZIP Code it shows -- I know you've given me the data.  
3 I don't have it off the top of my head. But let's say in the  
4 Monaca store's ZIP Code it shows that there are 2,000 people  
5 with mobility disabilities. Under the Mielo case, okay, how  
6 can I get from the position where I know how many people with  
7 mobility disabilities live in that ZIP Code to connecting the  
8 dots to those who go to an Ollie's who --

9 MR. CARLSON: Right.

10 THE COURT: -- who are hindered in their shopping  
11 experience at Ollie's because of the condition of the store  
12 and thus fall under the ADA's -- the bar?

13 MR. CARLSON: Right.

14 THE COURT: It might be, like Mielo says, it might be  
15 a good bet, but I think Mielo says I need more than that. And  
16 I know you argue, well, we've given you more granularity.  
17 What can you highlight that you've given me?

18 MR. CARLSON: I want to cheat a little bit and  
19 sidestep the census data alone, Your Honor, but by suggesting  
20 that that's not only the evidence that we have. You know it's  
21 kind of a belt and suspenders situation because the correct  
22 evidence that we have consists of two other categories of  
23 data.

24 The first thing that we have is complaints that have been  
25 made by other wheelchair users, putative class members,

1 regarding impeded pass of travel in Ollie's stores. And so  
2 there are 12 individuals in that category. In addition to  
3 that, there's a second category based upon video evidence. So  
4 the court required that defendant produce random kind of video  
5 camera angles for the two stores at issue for a seven-day  
6 period. From that seven days alone, there were 16 individuals  
7 in wheelchairs in those two Ollie's stores.

8 So you take those 28 individuals -- or that 16 for two  
9 stores only for a period seven weeks. So if you extrapolate  
10 that data across a universe of 350 stores, Your Honor, I think  
11 that that data alone gets us to numerosity, you know, without  
12 any kind of speculation at all. That's just a simple  
13 calculus, calculation.

14 THE COURT: Let me ask you a question based on that.  
15 If we see somebody in a wheelchair in an Ollie's, based upon  
16 the information that you've submitted on the record from your  
17 investigators, can we presume that they would have -- or do we  
18 actually need to show that those 16 people somehow had their  
19 experience hindered or am I presuming hindrance just because  
20 of the condition of the stores?

21 MR. CARLSON: I think you're assuming it and I don't  
22 think the ADA requires more than that.

23 THE COURT: Okay.

24 MR. CARLSON: So I think the combination of the  
25 granular census data with the direct evidence, the two other

1 categories of information, I think that that satisfies the  
2 additional information that the Third Circuit requested in  
3 Steak 'n Shake. And if you recall, Your Honor, when you go  
4 back and look at what the Third Circuit said specifically in  
5 that case, it said, you know, it said the plaintiffs are most  
6 of the way here and the additional information that we're  
7 looking for does not constitute a Herculean task.

8 So I think that we were listening closely to what the  
9 Third Circuit said in that case, and we think that if we're  
10 not satisfying numerosity here, if you're not satisfying the  
11 additional burden that was identified in Steak 'n Shake, I  
12 don't know what case would. Because you have to recall, too,  
13 Your Honor, in the advisory committee that the Rules of Civil  
14 Procedure advisory committee in the advisory note to Rule 23,  
15 they talk about specifically the issue of numerosity and how  
16 in any civil rights case it's going to be a difficult task,  
17 under 23(b)(2), that is, it's going to be a difficult task to  
18 identify with precision the class members. The class is  
19 often, if not always, difficult to ascertain but numerous.

20 And I think you have to give the court some rational basis  
21 to reach that conclusion. I think that's what the Steak 'n  
22 Shake panel was saying and I think that's what we've tried to  
23 do here and, frankly, I think that we've accomplished that  
24 end.

25 But back again, Your Honor, to the other elements, I

1 wanted to talk about specifically what it is that we're asking  
2 the court to do here because, you know, the Rule 23 elements,  
3 they serve in effect as bumpers to make sure that the  
4 efficiency that can be gained by the Rule 23 device is  
5 appropriate in a given instance. So in a case like Steak 'n  
6 Shake where you have different categories of accessibility  
7 issues, parking lot, the way the class was defined there, then  
8 you had potentially bathroom, interior bathroom issues,  
9 different categories that the court thought was too cumbersome  
10 to be certified.

11 But what the court says, importantly, is that if you want  
12 to get the class certified, you need to narrow the class  
13 definition. If you limited the class definition to slope  
14 issues in parking lots, then that's a class that could be  
15 certified. That's what the Third Circuit says in Steak 'n  
16 Shake.

17 That's this case. We intentionally made the class  
18 definition narrow. We went out and looked at every store in  
19 the State of Pennsylvania to establish that this is not an  
20 isolated situation. There's a pattern and practice that is  
21 directly derivative of the policies of the defendant. And  
22 that, too, is a distinction, a critical distinction between  
23 this case and the Steak 'n Shake case, Your Honor, because in  
24 Steak 'n Shake, you have conditions in parking lots which are  
25 caused by acts of God, by weather conditions, by, you know,

1 buckling and thawing, freeze and thaw cycles. But here?  
2 Stark contrast, though, that what we're suggesting is that the  
3 conditions in the stores, in defendant's stores are directly  
4 attributable to the policies of the defendant. They're  
5 causing this. This isn't the weather. This isn't an act of  
6 God. This is defendant's specific policies regarding stocking  
7 and regarding daily inspections, regarding all these different  
8 corporate policies. That is directly causing this.

9 THE COURT: Let me ask you a question. In looking at  
10 your class definition -- and I have it in front of me and I  
11 understand what you're saying -- there is an "and" there,  
12 though. It is a two-part. First, it's all persons with  
13 qualified mobility disabilities who have attempted or will  
14 attempt to access the interior of any store owned or operated  
15 by the defendant within the U.S. Okay. That's the  
16 generalized. And have or will have experienced access  
17 barriers in interior paths of travel.

18 So for part two on this one, it's going back to the  
19 question I asked you looking at all persons and almost from  
20 the lens of the numerosity through the definition. Do you  
21 have cases that interpret Mielo or even independent of Mielo  
22 but in a similar vein where you have a situation like this  
23 where I can presume that anybody in a wheelchair has  
24 experienced access barriers, et cetera, et cetera?

25 Do you have a case where there's -- now, you may have

1 cited it and I did my diligent best to get caught up on this  
2 one as the case was assigned to me, but I don't recall off the  
3 top of my head and just for my curiosity now.

4 MR. CARLSON: I have something better than that, Your  
5 Honor. I have legislative language. I have statutory  
6 provision as part of the ADA.

7 THE COURT: What's the citation?

8 MR. CARLSON: That's the hard question.

9 THE COURT: Is it in your brief?

10 MR. CARLSON: It's not in my brief, but it's one of  
11 the basic --

12 THE COURT: Well, Mr. Carlson, my practice and I  
13 would say at the end, after the transcript is complete, I give  
14 both sides as a matter of right a week to do a short  
15 supplemental material. You can supplement then.

16 MR. CARLSON: But just for the -- I'll supplement  
17 regarding the cite, but the specific doctrine that I'm talking  
18 about, Your Honor, is what's called the deterrence effect  
19 doctrine. And that is, if you're somebody with a qualified  
20 disability and you're aware that there is an impediment to  
21 accessibility in a public accommodation, you're not obligated  
22 to engage in the futile gesture of rolling up in your  
23 wheelchair to that barrier. If there are barriers in the  
24 store and you know they're there, you're not obligated to  
25 confront them directly. So that legislative requirement

1 applies I think to your question, Your Honor. And it applies  
2 to the question of standing as well. And in fact, the Third  
3 Circuit adopts that concept in the Steak 'n Shake case.

4 THE COURT: Okay.

5 MR. CARLSON: And they adopted it I think in a  
6 footnote, and what they say is, you know, because the  
7 defendant argues, well, these plaintiffs, they're not even  
8 saying they're going to go back to these stores and this and  
9 that. And what the court says, of course, they're not saying  
10 that and they don't need to because, as the statute directly  
11 states, they're not obligated to engage in the futile gesture  
12 of directly confronting an obstacle that they already know  
13 exists. They don't need to engage in that academic exercise.  
14 They already know it's there. So they don't have to go and  
15 suffer that humiliation of not being able to get around the  
16 obstacle.

17 THE COURT: I understand.

18 MR. CARLSON: So in any event, moving forward then,  
19 Your Honor, what I wanted to -- I wanted to tell the court  
20 exactly what it is that we're asking for here because already  
21 in place is a series of standard operating procedures at  
22 defendant's stores which are top-down. And that is, they have  
23 requirements with respect to daily inspections. They have  
24 requirements with respect to stocking policies and positioning  
25 of fixed pillars, and they have these different weekly



1 inspections and then monthly inspections. And you know what  
2 they do with respect to the monthly inspection, they don't  
3 train any managers specifically regarding ADA, but they expect  
4 their managers to be aware that the ADA exists and they expect  
5 the managers to act upon what they call their, quote, unquote,  
6 best judgment regarding compliance with the ADA, yet they give  
7 these managers no training, Your Honor. So they're just  
8 guessing.

9 So then -- but in that context, that same context on a  
10 monthly basis, the store managers are required to do what they  
11 call a monthly safety review, and they go through the store.  
12 And one of the things that they're looking at, not from an ADA  
13 compliance perspective, but what they suggest this is related  
14 to safety, is whether a wheelchair will be able to pass  
15 through all the aisles in the store, but -- and the manager's  
16 supposed to use their best guess. They don't provide them  
17 with any actual training or data with respect to what that  
18 would require.

19 And my point is, Your Honor, that these policies are  
20 directly causing the issues that we're challenging, but those  
21 same policies can be slightly revised by way of an injunction  
22 which we would ask would accomplish these different things.  
23 That there would be an audit to assess primarily what the  
24 fixed issues are in the stores. Where are their posts and  
25 pillars that create or constitute permanent obstructions in

1 the aisles? And how could those be addressed to remove the  
2 barrier?

3 Then we would want there to be ADA training as part of the  
4 regular on-boarding process and, you know, the regular other  
5 standard operating procedures, and then we would want those  
6 requirements ultimately incorporated into the existing daily  
7 and weekly and monthly inspection requirements. These  
8 policies are already in place, you know. It would just be a  
9 minor thing to add these additional requirements to cause the  
10 stores to be in compliance with the ADA.

11 So, you know, if we tick through the specific Rule 23  
12 elements, we've already hit the first one, numerosity. Does  
13 the court have any other questions on that issue?

14 THE COURT: I don't.

15 MR. CARLSON: Okay. Then commonality is pretty  
16 straightforward. You know, our position is that the problems  
17 here are directly derivative of the defendant's policies.  
18 There's no training on ADA. The stocking policies caused the  
19 aisles to be congested in the way that's apparent from the  
20 photographs. That could be eliminated by a simple injunction  
21 that required that there not be stocking that caused those  
22 issues and, you know, a store opening inspection, a store  
23 closing inspection on a daily basis.

24 It's a simple thing to eliminate these issues, and most of  
25 defendant's industry peers already have that protocol in

1 place. This is not an uncommon thing. And Your Honor, in  
2 another case that your court has, in the Dollar General case,  
3 that's exactly what we're doing. In this case, because it's  
4 easily done, that injunction, you know, is pretty  
5 straightforward. That's why we're able to do it in a proper  
6 way in the Dollar General case, and that's why it's proper to  
7 certify the class here as well. So unless the court has any  
8 specific issues on commonality, I'll move past that.

9 THE COURT: I don't. I'd like you to focus on  
10 typicality because one of the arguments that has been raised  
11 is that you can't -- and I suppose that you're going to lead  
12 me back to the answer maybe that you gave for the numerosity  
13 presumption, and maybe even a different deterrence effect  
14 issue. Because one of the arguments they raise is that how do  
15 we know that the two named plaintiffs' claims, their  
16 experiences at Ollie's are typical of everybody else that was  
17 in a wheelchair that would be under the class that you have  
18 defined.

19 MR. CARLSON: I think the most fundamental response  
20 to that is that typical does not mean identical. Typical  
21 means in the same general category of violation that would  
22 confront the named plaintiffs versus the absent class members.  
23 And what the typicality requirement is intended to do, Your  
24 Honor, is to ensure that there are no conflicts between the  
25 named plaintiffs and the absent class members. Are they

1 experiencing a similar type of harm and will they be similarly  
2 benefited in the event that the court issues the injunction  
3 that the plaintiffs are requesting?

4 And I think that the answer to that question is obviously  
5 yes, in that if the court issues the injunction that the named  
6 plaintiffs are asking for here, that injunction will benefit  
7 the named plaintiffs. It will benefit those 12 individuals  
8 who made complaints to Ollie's. It would benefit the 16  
9 individuals in wheelchairs who we see on the seven days of  
10 videotapes in the two stores at issue, and it will benefit  
11 every unidentifiable class member in every way. Is it a  
12 situation where each of these putative class members is going  
13 to encounter identical obstacles? No, it's not. And it  
14 doesn't need to be. That's not what typicality requires.

15 THE COURT: Let me ask you about the 12 complainants.  
16 Are the named plaintiffs part of that 12?

17 MR. CARLSON: No.

18 THE COURT: No. Okay.

19 MR. CARLSON: Are you trying to shave us down, Your  
20 Honor?

21 THE COURT: No. I was just doing my arithmetic.

22 MR. CARLSON: All right. Then I'll move on unless  
23 the court has more questions on typicality.

24 THE COURT: No, I don't. I don't.

25 MR. CARLSON: Adequacy of representation, I don't

1 think they really -- I don't think the defendant really raises  
2 an issue there. The question there is two-pronged and that is  
3 are the named plaintiffs adequate representatives of the  
4 class, will they vigorously pursue the interests of the class,  
5 and are there any conflicts similar to typicality. And I  
6 think that that question, the answer to that question is  
7 readily apparent because the plaintiffs have, in fact, been  
8 active participants. They've been deposed. They've done  
9 everything that's required of them to prosecute the litigation  
10 and have been zealous advocates of the class, and that's what  
11 Rule 23 requires.

12 THE COURT: I don't have any problem with this prong.

13 MR. CARLSON: Okay.

14 THE COURT: I didn't really see, from the defense  
15 perspective, I didn't see vehement battles on that prong  
16 either. I saw vehement battles on the other prongs but not  
17 this one. So if you want to focus in on the remaining points  
18 of your argument in the last five or so minutes that you have.

19 MR. CARLSON: Sure, Your Honor. So, I mean, I'm  
20 coming back around to what I spoke of in the beginning, and  
21 that is the requirements, the specific requirements of this  
22 part of Rule 23 because, as the court is familiar with, you  
23 know, a 23(b)(2) case which seeks solely injunctive relief is  
24 a lot different than a case seeking monetary damages under  
25 Rule 23(b)(3). And here the question is has the defendant

1 acted or refused to act on grounds that apply to the class  
2 generally so that injunctive relief would be appropriate to  
3 the class as a whole?

4 And so when you look at that question in the abstract and  
5 kind of compare it to the different specific elements of  
6 Rule 23, again, I think what is intended by the authors of  
7 Rule 23 is that they're trying to provide bumpers so that the  
8 efficiency that was intended by Rule 23 is actually being  
9 accomplished. It actually makes sense to do this case as a  
10 class action. And I think that the answer to that question  
11 here is, obviously, yes because we're asking for a simple  
12 injunction that would inure to all of the class members  
13 equally. Every class member would benefit from the class --  
14 or from the injunction. It would be easily implemented and --

15 THE COURT: Let me hit you -- and I'll let you go  
16 over your time. Let me hit you with a question, though. Sort  
17 of the way I distilled the argument from the other side based  
18 upon the 26(b) factor, also kind of tying into some of the  
19 more threshold standing arguments that were made, which was  
20 can we really say that, that the relief would be able to solve  
21 all the problems when they're arguing there is no uniform  
22 policy or procedure that caused all the problems?

23 It's just an individualized -- I don't know what you would  
24 call it -- just the way the stores operate, the way they  
25 decorate or stock the shelves that have led to this. It

1 wasn't part of a policy. So would the imposition of a policy  
2 now be able to clear that up from a practical perspective?

3 MR. CARLSON: Yeah, I think the answer is yes. And I  
4 think that we run the risk, when we go through kind of the  
5 intellectual exercise of discussing these things, of becoming  
6 too exacting. Because the question is can we guarantee that  
7 any injunction is going to force any defendant to do what they  
8 say they're going to do under the injunction? No. If they  
9 violate it, of course, we can come back to the court and have  
10 that injunction enforced.

11 But how is this any different to a situation where, say  
12 that we're going to -- we, the corporate defendant, are going  
13 to commit each of our different districts, regions,  
14 whatever -- we know there's this federal minimum wage thing  
15 out there, but we're going to let everybody do what they want  
16 to do, pay people what they want to pay them and, you know,  
17 that's -- we're just going to leave it up to the discretion of  
18 the local stores?

19 So the question is in that context would an injunction be  
20 appropriate. The answer is obviously yes. And it's obviously  
21 yes here as well, Your Honor. They're violating the law.  
22 They're choosing -- they know the ADA's out there. They're  
23 choosing not to train their people, but they do have top-down  
24 standard operating procedures. And all they need to do is add  
25 one line to those operating procedures where they say, okay,

1 this is what the ADA requires. We're going to train our  
2 district managers on this. And then every day when the store  
3 opens, we're going to check and make sure that the aisles are  
4 passable. Every day when we close the store, we're going to  
5 check and we're going to make sure that the aisles are  
6 passable.

7 And what we would ask, we would ask the court to issue an  
8 injunction like that, though we're not obligated at this  
9 procedural juncture to describe specifically what the  
10 injunctive relief is that we want. I know the court wants to  
11 hear that. That's why I'm talking about it. But we would ask  
12 for something of that nature. And then we would also ask  
13 that, once that's in place, to permit us to do monitoring to  
14 make sure that they're actually following through with what  
15 they've promised.

16 THE COURT: Thank you, Mr. Carlson.

17 MR. CARLSON: Thank you very much, Your Honor.

18 THE COURT: Thank you. Mr. Etter.

19 MR. ETTER: So in conducting the rigorous analysis  
20 that's applied under Rule 23, one of the things you need to do  
21 is first look at the elements that the plaintiff --

22 THE COURT: Mr. Etter, I'm going to ask you to get as  
23 close to your screen as possible. When you lean back a little  
24 bit or go side to side, you garble.

25 MR. ETTER: Then I'll get louder. I'll make it



1 louder for you, too.

2 THE COURT: Perfect.

3 MR. ETTER: One of the things for the analysis we  
4 have to look at the elements that the plaintiffs are required  
5 to prove. And the court, Your Honor, has stated in the  
6 Migyanko versus Kohl's Corporation matter to lay out the  
7 elements of the claims that are raised by plaintiffs in this  
8 case. And to state a claim under Title III of the ADA here,  
9 the plaintiff must show, one, determination on a basis of a  
10 disability; two, in the full and equal enjoyment of goods,  
11 services, et cetera; and three --

12 (Audio difficulties. Court reporter interrupts.)

13 MR. ETTER: Can I call in by phone quick? Would that  
14 make it easier maybe?

15 THE COURT: Yeah, if you can call into the Zoom via  
16 the phone. But when you do that, you're going to have to  
17 disable your speaker on the computer. We'd get a terrible  
18 echo.

19 MR. ETTER: I'm sorry. I don't know what the issue  
20 is.

21 THE COURT: That's all right. I stopped your clock,  
22 by the way.

23 (Pause in proceedings.)

24 THE COURT: Mr. Etter, are you there?

25 MR. ETTER: I'm here.

1 THE COURT: Much better.

2 MR. ETTER: So this is working for everybody?

3 THE COURT: Yes.

4 MR. ETTER: Okay. I'm getting feedback here. Let me  
5 make sure I have this one off. Sorry. We're good?

6 THE COURT: Yeah. Jane, is that okay with you?

7 THE COURT REPORTER: Yes. Thank you.

8 THE COURT: All right. Go for it.

9 MR. ETTER: Thank you. So the key being for the  
10 purposes of the elements for the claims in this case is the  
11 need to establish discrimination on the basis of the  
12 disability. And we'll talk about this later, but it gets to  
13 one of the points Your Honor raised, and that is, is there a  
14 need to actually show that these individuals were unable to  
15 access something or is it enough to just show that there was  
16 failure to comply with the scoping standards. And the answer  
17 is you need to show actual disability here.

18 In the argument counsel pointed out that a number of the  
19 obstructions were fixed obstructions. That's not what the  
20 testimony or the amended complaints state. And in fact, when  
21 asked, the investigators said they made no determination at  
22 all as to whether or not things were fixed or temporary. It  
23 suggested we can just look at the photos and make that  
24 determination on our own. I mean, that's just not feasible  
25 because you can't just look at it and say, yes, that's fixed;

1 no, that's not fixed.

2 The allegations and all the testimony from plaintiffs and  
3 their investigators throughout have been that these are --  
4 would be considered typically temporary obstructions, boxes,  
5 the temporary displays that were set up in the aisles, the  
6 stock that was falling on the floor, shopping carts, things  
7 that are not within the scoping requirement. In fact, in  
8 their --

9 THE COURT: Let me ask you about that, though. I  
10 mean, the scoping requirement. I know that there is a  
11 different statutory regimen, I would suppose, for fixed versus  
12 temporary obstructions, but if you're in a wheelchair, does it  
13 make a difference to you whether Ollie's decides to put the  
14 racks too closely or you just can't go down the aisle because  
15 they always have stuff on the floor?

16 MR. ETTER: Absolutely it does not make a difference,  
17 Your Honor, but that needs to be established, right, for each  
18 class member. In fact, plaintiffs even include that as one of  
19 the three elements in their definition for the class that the  
20 person has actually been denied access. And so it's not that  
21 you can't prove it or that you need to prove it through only  
22 scoping regulations or not. The real question is whether or  
23 not they were denied access, not was there a compliance issue  
24 with respect to the scoping standards. So that's the thing to  
25 keep in mind as we go through each of the elements.

1           And for typicality, the testimony or the statement from  
2 counsel were that it just really needs to be the same general  
3 type of violation. That's not the case, and this isn't in  
4 dispute. In fact, the parties both agreed on this in our  
5 briefing, and that is that you have to show two things. One,  
6 they must demonstrate that the injury that they suffered is  
7 attributable to a system-wide policy or practice --

8           THE COURT: Let me ask you about that. Because this  
9 is something you focus on in your brief I wanted to ask you  
10 about. So I reviewed the material and the photographs  
11 submitted by the plaintiffs in the case, and I mean, it looks  
12 like they've given me a handful or a representative sampling.  
13 And I know how it's probably the ones that are most favorable  
14 to their case, which everybody does. But that being said, it  
15 looks like in every store they went to in Pennsylvania they  
16 found the same thing. And the photographs here, it doesn't  
17 make a difference if it's Monaca or Beaver or whatever, it  
18 looks like it's the same thing.

19           So is there the ability of the court, when you're dealing  
20 with a retail establishment, to extrapolate when every store  
21 in the state and every photograph that's been submitted to me  
22 by the investigators, keeping in mind the investigators  
23 submitting photographs are going to help their case, look the  
24 same? Can't I say, well, we can presume or we can take that  
25 as the preponderance that they need to establish that all the

1 stores are like this?

2 MR. ETTER: So the first thing I'll say is that, when  
3 you look at those pictures -- and they make it quite clear and  
4 the testimony's clear that the stores themselves are not the  
5 same. They're very drastically -- some of them -- they're  
6 usually leases of old stores from other companies. So there's  
7 no singular footprint. There isn't a standardized layout.  
8 The only commonality would be that there are temporary  
9 products that are at times sold in an aisle, but the idea that  
10 just because there is something that's less than 36 inches  
11 wide, which is all you can get from the photos, right? The  
12 only argument is that this essentially shows that in every  
13 store there's at least one location that is less than 36  
14 inches wide.

15 Well, that doesn't answer any factor that goes to the  
16 liability on the issues here. Because that might be the case,  
17 but if no individual with mobility disability ever was unable  
18 to get through there, it's irrelevant for purposes of the ADA.  
19 There's no violation and that individual would not be in the  
20 class. So when you're looking at --

21 THE COURT: Let me ask you this, kind of going  
22 forward on that one. Taking your argument to its logical  
23 conclusion, and I know that I used to hate the slippery slope  
24 argument when I was in your chair, but, you know, you guys are  
25 both very good at this. Would it be possible ever to have a

1 class action against multiple retail locations of the same  
2 retailer for movable obstructions?

3 MR. ETTER: So for non-fixed obstructions you say?

4 THE COURT: Non-fixed obstructions.

5 MR. ETTER: Certainly. If you could identify that  
6 that was the result of a policy or practice and also identify  
7 sufficiently numerous people who actually were unable to  
8 access it, then yes. But just saying, oh -- and we'll get to  
9 this with the numerosity. But the fact that some of this  
10 stuff is not at least 36 inches wide necessarily supports the  
11 conclusion that people in fact have been unable to access any  
12 of the aisles. In fact, the two plaintiffs themselves, one  
13 testified that she could typically get through anything that's  
14 30 inches or less and the other plaintiff could probably get  
15 through something that's 27 inches or less.

16 THE COURT: So we'll get to the numerosity second. I  
17 want to talk about the policy first because you made much  
18 about that in your threshold standing argument. To what  
19 extent -- do we have to have a policy in writing? Can it be  
20 system-wide acquiescence? What kind of policy do I need to  
21 see in your position?

22 MR. ETTER: It doesn't have to be a policy. It could  
23 be a policy or practice. It would not have to necessarily be  
24 a writing for that to be established, but it would have to be  
25 shown to be the cause. And it would also have to be something

1 that's violative of Title III. The big issue you run into  
2 here is that the Third Circuit and Judge Mitchell has made  
3 clear that as a matter of law there is no requirement to  
4 establish a policy or practice to search for and correct  
5 existing barriers as a normal matter, which is exactly the  
6 relief that counsel just laid out they're looking for. It's  
7 something that we're not required to do under the ADA, and a  
8 number of courts have spent time analyzing that.

9 So it's not that -- you can certainly have a policy or  
10 practice that could establish one. I'm sure there is a type.  
11 I don't think it's the case that you can never do that, but  
12 here there's been no evidence. In fact, they sent out  
13 investigators to every single store in Pennsylvania. If there  
14 was a policy that would be sufficient to establish it for all  
15 stores, what would be the need to send investigators to every  
16 single one of them?

17 THE COURT: So let me ask you that, though. Is that  
18 the proof in pudding, though? That there might not be a  
19 formal policy, but if every Ollie's in Pennsylvania,  
20 regardless of the footprint of the store it's in -- like you  
21 said, they move into former retailers. If every Ollie's in  
22 Pennsylvania has the same problem, isn't that essentially a de  
23 facto if not a de jure policy?

24 MR. ETTER: If that were the case, Your Honor, then  
25 there would be a claim under this section against every

1 company in the world because Congress recognized -- or in the  
2 United States. Congress recognized, as did their implementing  
3 regulations in the legislative history, that it's not possible  
4 to prevent all of these type of obstructions from occurring.  
5 It is simply impossible. And therefore, there's no  
6 requirement that we're going to put in place a policy that you  
7 have to prevent them from happening, nor, as the Third Circuit  
8 and Judge Mitchell said, are we going to require you to  
9 actively go out and search them. What your obligation is is  
10 that if you learn about an obstruction, you correct it, which  
11 is why the important factor here is what is -- going to be one  
12 analysis --

13 THE COURT: But are you arguing two different things,  
14 you and Mr. Carlson? I know that there's no -- I know that  
15 you're arguing that Congress didn't put an affirmative duty to  
16 prevent an obstruction. Mr. Carlson is saying that, from what  
17 I gather in his argument and his briefs, well, this isn't  
18 about non-preventing; this is about creating, that your stores  
19 create the obstruction. So where is the line between the two,  
20 creating something and not preventing something?

21 MR. ETTER: And you hit it on the head, Your Honor,  
22 what the issue is with Mr. Carlson's argument is that the  
23 argument is it causes it because it fails to prevent it, which  
24 is just an end run around what's required because the  
25 effective relief he just asked for and that is a policy to



1 every day go out and inspect in the morning and in the evening  
2 at the end of the day and make sure that it's still compliant  
3 because things could happen throughout the day, and Congress  
4 has said that is too onerous.

5 In fact, if you look at the Nocera settlement that they  
6 supplied, even the Department of Justice when it comes in  
7 doesn't say you're required to prevent this from occurring.  
8 It says make every effort to do this because they recognize  
9 how do you prevent a customer who just decides they want to  
10 throw something on the ground when they walk away, how can any  
11 policy ever prevent that from happening?

12 THE COURT: I don't think this is a case about  
13 customers leaving refuse in the aisles. I think this is a  
14 case about Ollie's putting merchandise -- so let me give you a  
15 hypothetical. I own Judge Stickman's widget store. And I  
16 rent a 5,000-square-foot store, but I want to be able to get  
17 as much merchandise in there. Rather than renting a  
18 7,500-square-foot store, I'll just put temporary displays down  
19 the middle of the aisle, change them seasonally, whatever.  
20 Wheelchair-bound people can't go up and down the aisles. Is  
21 that actionable? Because they're movable. They're not fixed.

22 MR. ETTER: Absolutely. If a wheel-chaired person  
23 comes and says I've tried to access that aisle and I can't get  
24 through, that absolutely is actionable. That is the crux here  
25 is that they're asking you to assume, just like they are from

1 the other statistics, that because there's aisles that aren't  
2 up to 36 inches, that that necessarily means that individuals  
3 with mobility issues are having problems accessing stuff.

4 Well, if you look at the 12 complaints that have been  
5 received -- this is through two different hot lines, complaint  
6 hot lines. Ollie's received only -- nationwide, only 12  
7 complaints, or actually, it's 11 -- 11 complaints since 2015.  
8 So does that suggest that there's some widespread issue that's  
9 causing people to not be able to access? No, it actually  
10 suggests exactly the opposite.

11 And so, although there might be a common question of is  
12 there aisles in each store that are 36 inches -- that are less  
13 than 36 inches wide, okay, so even if there's a common answer  
14 to that, that's not a common answer that goes to an issue of  
15 liability. Because you have to ask, was that part of the path  
16 of travel? Was there an alternative accessible route? Was it  
17 a permanent fixture or nonpermanent fixture? Because all of  
18 those are what you're required to show an actual violation of  
19 Title III.

20 And so it's not enough that they failed to do the scoping  
21 requirements because, again, remember we're talking about, as  
22 you'll see, and I know we'll supplement, there's a permanent  
23 fixture, there might be one or two mentioned there, but the  
24 vast majority of these are nonpermanent fixtures.

25 THE COURT: So, well, I do think -- and you hit on

1 the number of the complaints. I want to address I think the  
2 numerosity. It's one of the four pillars I have to decide on.  
3 I get what the Mielo case said. I understand it. Stats  
4 aren't enough. Mr. Carlson is saying we don't just have stats  
5 here. We have stats plus two named plaintiffs plus 11 or  
6 12 -- but I'll give him 12 for the purposes of today's  
7 argument and we'll look into the record on that one -- 11 or  
8 12 complaints. That gets us to 14. Plus video of 16  
9 wheelchair-bound individuals in Ollie's stores in a certain  
10 time frame. That gets us to 30.

11 So are the stats plus 30 known cases, is that enough to  
12 get over the Mielo? Or under Mielo do I need to actually have  
13 specific evidence of 40-plus plaintiffs to certify under the  
14 Third Circuit rule?

15 MR. ETTER: I think under Mielo you have to have  
16 sufficient evidence of at least 40 or more plaintiffs so that  
17 you don't have to rely on speculation.

18 THE COURT: Do you have a case that says that? I'll  
19 ask the same question I asked Mr. Carlson when I put him on  
20 the spot. Do you have a case that says that? Since Mielo was  
21 2018. I know it's only 2 1/2 years old.

22 MR. ETTER: The rule itself says that, Your Honor. I  
23 mean that's what it says is the issue there is no need to rely  
24 on speculation. But can I -- I mean, I think the bigger issue  
25 is -- and I'll address all three of your points because it's

1 not as it's represented. And so number one most critical  
2 thing is just because it's a 23(b)(2) case doesn't mean it's  
3 any more of a lenient standard on numerosity. Mielo made that  
4 crystal clear. So the Third Circuit made that clear. So it's  
5 the same standard.

6 So looking at the data from the U.S. Census Bureau, not  
7 only do you have the initial issue that it requires undue  
8 speculation, what the language in the Third Circuit says --  
9 and this is quoting -- where a putative class is some subset  
10 of a larger pool, the trial court may not infer numerosity  
11 from the number in the larger pool.

12 It doesn't say a really large larger pool. It talks about  
13 just a larger pool. The fact that they've shrunken down the  
14 pool to somewhat of a smaller geographic area still doesn't do  
15 away with the need to speculate, but even more importantly  
16 than that --

17 THE COURT: I'm going to stop you there, though,  
18 because here's what he says, though. By he I mean  
19 Mr. Carlson. Sorry, Mr. Carlson. Mr. Carlson says that so  
20 Mielo, they did nothing, they did nothing to connect the dots.  
21 They gave a fair number of disabled individuals in the United  
22 States, 16.9 to 20.9 or something in that line. Mr. Carlson  
23 breaks it down ZIP Code to ZIP Code and then says in two  
24 specific stores that they had video evidence produced in  
25 discovery, we add 16 in a wheelchair. So if that's two, not

1 even looking at the 12 complaints we have, if that's two, then  
2 can't I say that in the more than 200 stores, I believe, if I  
3 recall, throughout the United States, eight individuals per  
4 store, which is 16 in two, that gets you over 40? Isn't that  
5 enough over Mielo or is that still speculative in your view?

6 MR. ETTER: It's still speculative. And here's why,  
7 Your Honor. So if you look at, first of all, the census data  
8 that they used is of no value at all because where it's from  
9 is -- and then they cite this in the citation. It comes from  
10 the U.S. Census Bureau's American Community Survey.

11 THE COURT: Let's say I agree with you, I agree with  
12 you the census data has no value, but we have video from a  
13 limited time period in two stores that has 16 individuals.  
14 Can I extrapolate that over the body of Ollie's which is --  
15 what's the number of Ollie's again, 250-some stores?

16 MR. ETTER: 350.

17 THE COURT: 350. So can I do 350 times 8? How about  
18 350 times 1? 350 times 1 is 350 individuals.

19 MR. ETTER: Sure. The fallacy with the premise I  
20 think is that the video footage does not show anybody who  
21 meets the proposed definition because the proposed definition  
22 requires somebody with a mobility disability. The fact that  
23 someone's in a wheelchair requires you to speculate that  
24 they're disabled. There's many reasons somebody could be in a  
25 wheelchair. It's not enough to say, you use a wheelchair;

1 therefore, you're disabled.

2 Assuming that's a sufficient inference, though, which we  
3 contend it's not, beyond that, the last part of their proposed  
4 definition is the person must have actually experienced an  
5 accessibility issue and been denied access. None of the  
6 individuals on the video were denied access. There's no  
7 evidence. So, of course, that requires you'd have to  
8 speculate that they were denied some kind of access.

9 THE COURT: I asked Mr. Carlson a lot of questions.  
10 I think that I focused a lot on that. And the plaintiffs'  
11 view on this is that the stores were in such a state of  
12 obstruction that you can essentially presume that if somebody  
13 is in a wheelchair, they will have access denied to them to  
14 the full shopping experience that they would otherwise have  
15 had or require under the ADA. And Mr. Carlson went forward  
16 and is going to give me the specific citation, but he cited  
17 the detrimental effect doctrine. Address that for me, please.

18 MR. ETTER: Well, the detrimental effect doctrine is  
19 a standing issue. It doesn't go to the class issue. I mean,  
20 how could we know whether these people out there that are in  
21 the putative class believe that there's some kind of  
22 detrimental effect, I mean? But I don't think it's a  
23 reasonable inference to say, oh, there's all of these areas  
24 that are less than 36 inches wide; therefore, they must --  
25 there must be mobility disabled individuals who weren't able

1 to access. And the reason that's not a reasonable inference  
2 is because, since October 21st, 2015, more than five years and  
3 over 350 stores, only 11 complaints have ever been made that  
4 somebody in a wheelchair was unable to access.

5 And even going to the plaintiffs themselves, Mr. Mullen  
6 testified that he was able to find an alternate route around  
7 every obstruction that he ran into and, therefore, he  
8 hasn't -- he himself can't even state a violation of Title III  
9 because he was able to get around it. The idea that, oh, I  
10 had to go a longer way, which is what his explanation was when  
11 I asked him, well, how do you have a violation? Well, I  
12 shouldn't have to go this longer route halfway around the  
13 store.

14 But the legislative history makes clear that that's not  
15 the case. You only have to have one accessible route and you  
16 only have to provide access into the general area.  
17 Individuals with disabilities, you don't have to move around  
18 the fixed and nonfixed features even to make sure that those  
19 individuals can reach every actual product. As long as they  
20 get a sufficient sampling.

21 THE COURT: What's a sufficient sampling?

22 MR. ETTER: Well, the example they use is you're able  
23 to identify we have red, green and blue jeans. You can see  
24 them. You figure you know what your size is. You could ask  
25 somebody to go and get it. That's the example in the

1 legislative history itself.

2 But also I want to get to the complaints quick because,  
3 focusing on the numerosity aspect, there were 11 complaints  
4 that were made. Three of those individuals didn't even claim  
5 to have a disability. So again, you're going to have to  
6 speculate that they would even fall within the definition.  
7 Three of the other -- three to four of the others say that the  
8 only issue they ever had was when another customer was coming  
9 down the aisle.

10 That, again, is not something that's an obstructional or  
11 violation of the ADA to say that when there's a person coming  
12 down, only two people can get past each other and someone in a  
13 wheelchair has to wait. So that just makes the point that  
14 even getting into the numbers they're using -- and we spend  
15 some time in our brief analyzing this -- this is going to be  
16 an individualized analysis for each of these 12 e-mails. You  
17 know, you look at what are the questions. As they talk about  
18 is it 36 inches; is it temporary; is it fixed; is there an  
19 alternative route? All of these things are going to require a  
20 store-by-store analysis, which is why even when you have the  
21 Department of Justice coming in and doing this, they have  
22 trouble putting together a legal injunction that would address  
23 all of the problems.

24 And the only proposal that counsel has made is a comply  
25 with the ADA, essentially, requirement, which we know is



1 improper in the Third Circuit, but more than that, they say,  
2 to be able to meet the requirements under Rule 23, they have  
3 to show that the proposed injunction would actually fix the  
4 issue. Well, what they're proposing and they pointed at, the  
5 Nocera settlement. Well, Carlson and Lynch has, since that  
6 settlement, sued Dollar General saying that even though that  
7 requirement's in place, you have the training, you have the  
8 policies, you are still allowing these access barriers to  
9 occur in different paths of travel.

10 And the argument that, oh, all of the other companies that  
11 do similar things already have these policies and practices in  
12 place, that's all we're asking is what Mr. Carlson said, well,  
13 if that's true, that's another admission then that these  
14 policies and practices aren't going to work in their mind  
15 because they've sued Kohl's, they've sued Dollar General,  
16 they've sued Family Dollar and they've sued Dollar Tree and a  
17 number of others who all apparently are cohorts who have these  
18 policies and practices in place.

19 So there is no ability to grant an injunction here because  
20 there's no private right of action to require a public  
21 accommodation to establish a policy to inspect and correct  
22 existing barriers, which is exactly what they're asking.

23 THE COURT: Okay.

24 MR. ETTER: Thank you, Your Honor.

25 THE COURT: Okay. Well, I have been satisfied by

1 both arguments today. My rule of thumb is that the court  
2 reporter will produce a transcript; both sides will split the  
3 cost. Seven days after the transcript is placed of record  
4 each side may submit a supplemental filing, if they want,  
5 simultaneously, seven days after, not to exceed 15 pages in  
6 this case we'll give you, to address any questions that the  
7 court had today or any supplementation of the questions that I  
8 had or opposing counsel may have.

9 So I thought it was very well argued today. I came in  
10 with some questions at both sides. I was able to kick the  
11 tires a little bit on the questions that I had when I finished  
12 reading the briefs. I'll look forward to your supplement, if  
13 any, and then you'll have a decision from us in short order.

14 (Proceedings concluded at 2:32 p.m.)

15 -----

16 C E R T I F I C A T E

17 I, JANE PROUD, RDR, CRR, certify that the  
18 foregoing is a correct transcript from the record of  
proceedings in the above-entitled case.

19 S\ Jane Proud  
20 JANE PROUD, RDR, CRR  
Official Court Reporter  
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23  
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25