IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-03111-CMA-KLM

JULIE REISKIN, et al., on behalf of herself and others similarly situated,

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT, a political subdivision of the State of Colorado,

Defendant.

REPRESENTATIVE PLAINTIFFS' UNOPPOSED MOTION FOR CERTIFICATION OF A CLASS FOR SETTLEMENT PURPOSES ONLY AND PRELIMINARY APPROVAL OF CLASS SETTLEMENT AGREEMENT

Representative Plaintiffs, Julie Reiskin, Douglas Howey, Tina McDonald, Randy Kilbourn, and Joe Beaver,[1] respectfully submit this Unopposed Motion for Certification of a Class for Settlement Purposes Only and Preliminary Approval of Class Settlement Agreement ("Motion").[2] After a year and a half of extensive, arm's-length negotiations over alleged violations of the requirements of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504") concerning accessibility for people who use wheelchairs, as defined in the ADA and in the Class

[1] The Settlement Agreement provides that, out of the eighteen current Plaintiffs, five will serve as Representative Plaintiffs of the settlement class for manageability purposes. All Plaintiffs have agreed to the proposed class settlement.

[2] Pursuant to D.C.COLO.LCIVR 7.1(a), counsel for Plaintiffs certifies that they have conferred in good faith with counsel for Defendant regarding this Motion. Defendant does not oppose the relief requested herein.

Settlement Agreement entered into by the Parties ("Settlement Agreement"),[3] Plaintiffs and Defendant Regional Transportation District ("RTD") have reached a comprehensive settlement that provides substantial benefits to the class.

To implement this Settlement Agreement, as fully explained herein, Plaintiffs respectfully request that the Court:

1. Certify the proposed class for settlement purposes only under Fed. R. Civ. P. 23(b)(2) and (b)(3), as detailed herein;

2. Appoint Representative Plaintiffs as the representatives of the class;

3. Appoint Kevin Williams and Andrew Montoya of the Colorado Cross-Disability Coalition ("CCDC") as Class Counsel;

4. Grant preliminary approval of the Settlement Agreement attached to this Motion;

5. Set dates for the submission of any objections to the Settlement Agreement or requests for exclusion from the damages release;

6. Grant approval of the Class Notice Procedures detailed in Section IV and Exhibits D, E, and F to the Settlement Agreement, and authorize the proposed notice dissemination plan described therein;

7. Enter an order enjoining class members from initiating or prosecuting any litigation relating to the claims resolved by the Settlement Agreement against RTD pending the Court's entry of Final Order and Judgment;

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[3] *See* 49 C.F.R. § 37.3 and I.19 of the Settlement Agreement. A fully executed copy of the Settlement Agreement is attached hereto as **Exhibit 1**.

8. Set a deadline for Class Counsel's Unopposed Motion for Attorneys' Fees and Costs;

9. Set a deadline for Plaintiffs' Unopposed Motion for Final Approval; and

10. Set a date for a Final Approval Hearing.

I. BACKGROUND

A. Legal Background

Title II of the ADA of 1990, 42 U.S.C. § 12131, *et seq.* prohibits discrimination on the basis of disability by public entities. RTD, a Special Statutory District, Colo. Rev. Stat. § 32-9-101 *et seq.*, is a "public entity" under the ADA. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability by recipients of federal financial assistance, such as RTD. The ADA, Section 504, and their respective implementing regulations, contain broad anti-discrimination mandates as well as specific requirements as to the construction, maintenance, and design of accessible seating on light rail vehicles ("LRVs"). For example, 49 C.F.R. § 37.5(a) states "[n]o entity shall discriminate against an individual with a disability in connection with the provision of transportation service." Like its statutory counterpart 42 U.S.C. § 12142(a), 49 C.F.R. § 37.79 requires "Each public entity operating a . . . light rail system making a solicitation after August 25, 1990, to purchase or lease a new . . . light rail vehicle for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." Under the Section 504 regulations, "[r]ecipients [of Federal financial assistance] . . . shall comply with all applicable requirements of the [ADA] (42 U.S.C. 12101-12213)

including the Department's ADA regulations (49 CFR parts 37 and 38) the regulations of the Department of Justice implementing Titles II and III of the ADA." 49 C.F.R. § 27.19(a).

These accessibility designs are necessary to permit people with mobility devices to access public transportation, specifically LRVs. Subpart D of Part 38 of Title 49 pertains to "Light Rail Vehicles and Systems;" *see, e.g.,* 49 C.F.R. §38.77(c) (requiring that "at all doors . . . [all interior features of LRVs] shall be located so as to allow a route at least 32 inches wide so that at least two wheelchair or mobility aid users can enter the vehicle and position the wheelchairs or mobility aids in areas, each having a minimum clear space of 48 inches by 30 inches, which do not unduly restrict movement of other passengers[;]" and 49 C.F.R. §38.83(a)(1) (requiring "[a]ll new light rail vehicles . . . shall provide . . . sufficient clearances to permit at least two wheelchair or mobility aid users to reach areas, each with a minimum clear floor space of 48 inches by 30 inches, which do not unduly restrict passenger flow.") The regulations implementing the requirements for LRVs also prescribe what LRV operators are required to do when an individual with a disability enters a vehicle and needs to sit in an accessible seating area. The regulations state how and under what conditions the LRV operator shall ask the persons seated in that area to move in order to allow the individual with a disability to occupy the accessibility seating area. 49 C.F.R. § 37.167(j).

In the putative class action that led to the proposed class settlement before the Court, Plaintiffs alleged RTD had violated requirements set forth under the ADA and Section 504 governing the design and construction of light rail vehicles as they are used

by individuals with disabilities who use wheelchairs and mobility devices. Plaintiffs alleged that RTD had failed to properly instruct and train its LRV operators to follow regulatory instructions regarding asking passengers to move from the wheelchair and mobility device locations as set forth in the regulations.

RTD denies all of Plaintiffs' allegations regarding violations of the disability rights laws, but, nevertheless, the Parties have decided to resolve their claims in a Settlement Agreement without proceeding to trial.

B. Factual Background

1. Plaintiffs' Experiences Leading to This Lawsuit.

Plaintiffs alleged that CCDC had received complaints from individual members who use wheelchairs and other mobility devices that experienced difficulties getting to and using the designated accessible seating areas on LRVs. They also alleged that LRV operators failed to request that individuals who do not appear to have disabilities to move from the accessibility area. CCDC also received complaints from individuals who use wheelchairs or mobility devices that they blocked traffic flow and other passengers while seated in the aisle or between the doors. CCDC investigated these claims and alleged that it found it had staff members who also have the same problems. CCDC members alleged that they complained to RTD regarding these issues, but nothing happened as a result. The original five Plaintiffs filed their lawsuit on November 18, 2014. *See* Complaint [ECF #1]. As this case continued, a total of eighteen CCDC members who use wheelchairs or mobility devices came forward and alleged similar

complaints against RTD's light rail operations. *See* Amended Complaint [ECF #23], Second Amended Complaint [ECF #55] and Third Amended Complaint [ECF #65].

Plaintiffs alleged in these Complaints that these barriers to accessibility prevented individuals who use wheelchairs and mobility devices from access to LRVs and prevented them from having equal access to RTD's public transportation system.

2. The Litigation

Both Parties propounded and responded to extensive written discovery, took and defended a total of 18 depositions, and agreed to and conducted a two-day Rule 34 inspection of the two types of LRVs. Both Parties filed dispositive motions.

3. Negotiation and Settlement

The Parties discussed settlement on several occasions before reaching agreement. Both Parties attended a two-day mediation session, which was not ultimately successful, in the Fall of 2015. In early 2016, the Parties began the settlement discussions that would eventually lead to the Settlement Agreement. As the negotiations began to yield fruit, the Parties requested this Court continue proceedings to allow them to complete the drafting process. The Parties signed a Memorandum of Understanding in March, 2016, and have been finalizing settlement negotiations and documents since that time.

4. Summary of Settlement Agreement Terms

The following summarizes the Settlement Agreement's principal terms, although the exact terms and language in the Settlement Agreement control:

Plaintiffs and RTD have negotiated a comprehensive Settlement Agreement for injunctive relief, which requires RTD to make changes to its 172 existing LRVs, to make them more accessible to individuals who use wheelchairs and mobility devices within sixty (60) months from the Final Settlement Date of the Agreement, with several milestones during that period, retrofitting a certain number of LRVs each year until all are completed. *See* Exhibit 1, Settlement Agreement, at II.A. RTD will provide a status report to Class Counsel on the progress of the Retrofit Project regarding the number of LRVs retrofitted immediately and work expected to be completed in the next 12 months. *Id.* at II.A.4. Representatives of Plaintiffs and Class Counsel will have the opportunity to view retrofitted LRVs within 12 months from the Final Settlement Date to take measurements and photographs to assess compliance. *Id.*

With respect to new light rail vehicles, RTD will ensure that the next twenty-nine (29) LRVs that will be put into service after the Settlement Agreement will provide even greater accessibility than the retrofitted vehicles as set forth in Exhibit B to the Settlement Agreement. *See id.* at II.B. Again, representatives of Plaintiffs and Class Counsel will have an opportunity view the vehicles to ensure compliance. *Id.*

RTD will provide training and retraining to its light rail operators, supervisors of light rail operators, and light rail controllers, and a representative of CCDC will have an opportunity to review training materials. *Id.* at II.C.

The Parties have agreed to a Pre-Litigation Procedure, under which any further litigation against RTD involving the Named Plaintiffs and Class Members working with or at the behest of any Named Plaintiff involving accessibility issues must comply. *Id* at

II.D. This procedure will require prior written notice that explains the nature of discrimination under the disability laws that the individuals involved believe violate those laws. The Pre-Litigation procedure requires a meet and confer session between the Parties to attempt to resolve the dispute. Only if this procedure fails may one of the above-referenced individuals bring a lawsuit against RTD. *Id.* Any person must bring litigation within 180 days of RTD's written response in accordance with this procedure. *Id.*

The Settlement Agreement calls for quarterly meetings between RTD and a representative of CCDC regarding light rail service to ensure cooperation and to promote a constructive dialogue concerning issues related to the ADA and light rail service. *Id.* at II.E. During these quarterly meetings, RTD will report on complaints received, the resolution of those complaints, and any changes to RTD policies and procedures as a result of those complaints from the previous quarter concerning light rail service. In addition, Class Counsel, on behalf of CCDC and the Civil Rights Education and Enforcement Center ("CREEC"),[4]commit to raise any questions as to which they are considering litigation in one of these meetings or in writing at least thirty (30) calendar days prior to filing except as related to the issues discussed in Section II(D)(6). *Id.* at II(E)(3).

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[4] An attorney with CREEC assisted with the settlement process, and thus committed to provide such notice. CREEC is otherwise not party to the Settlement Agreement.

Subject to Court approval, RTD will pay Class Counsel $375,000 in attorneys' fees and costs in certain installments over three years for the work performed by Class Counsel through Final Approval. *Id.* at VI.A.1.

The Settlement Agreement releases the injunctive claims and claims for actual or other damages of Class members, subject to this Court's approval of a Rule 23(b)(2) injunctive relief class and Rule 23(b)(3) opt-out damages class. *Id.* at III.A.2, XI. The Settlement Agreement provides that class members may opt-out of the damages release; it is for this reason that Plaintiffs seek certification pursuant to Rule 23(b)(3) as to that portion of the settlement.

The Settlement Agreement sets forth a Dispute Resolution process relating to the performance or interpretation of the provisions in Section II(A)-(C) of the Settlement Agreement. *Id.* at X. This process involves written notice of a dispute, a written response, and Class Counsel and RTD's Counsel meeting and conferring to attempt to resolve the dispute; if the Parties are unable to resolve their dispute, they agree to participate in at least one mediation session to be conducted, if possible, by Magistrate Judge Mix upon a motion under Local Rule 16.6(a). *Id.* at X.C.

The term of this Settlement Agreement shall be five (5) years from the Final Settlement Date, as defined in the Settlement Agreement, or the date on which all disputes raised pursuant to Section X of the Settlement Agreement are resolved, whichever is latest. *Id.* at XII.Q.

II. ARGUMENT

A. The Proposed Class Should Be Certified for Settlement Purposes Only.

1. Definition of the Proposed Class

The Representative Plaintiffs seek to certify the following class of pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3): "all Persons in Colorado who are qualified individuals with disabilities who use Wheelchairs, as that term is defined below, who have used, currently use, or may in the future use RTD's Light Rail Service." *Id.* at II.18. The definition of "Wheelchair" in the Settlement Agreement is:

> **Wheelchair.** "Wheelchair" shall have the meaning assigned to it in 49 C.F.R. § 37.3 and shall include all devices used by individuals with mobility impairments specifically to assist with ambulation, by way of example but not limitation, **manual and motorized wheelchairs, scooters, and walkers**, so long as such devices fit within the definition of Wheelchair provided in 49 C.F.R. § 37.3.

Id. at II.19 (emphasis in original).

2. Legal Standard for Class Certification

Class certification is appropriate when the class satisfies the four requirements of Rule 23(a) and one of the requirements of Rule 23(b). Here, Plaintiffs seek certification, for settlement purposes, under Rule 23(b)(2) and 23(b)(3).

3. The Proposed Class Meets the Requirements of Rule 23.

Although RTD does not oppose Plaintiffs' Motion, this Court must still determine that the proposed class meets all of the requirements of Fed. R. Civ. P. 23(a) and at least one of the provisions of Rule 23(b). Fed. R. Civ. P. 23(a) provides:

> (1) [T]he 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 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.

See J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1288 (10th Cir. 1999). Plaintiffs seek certification under Fed. R. Civ. P. 23(b)(2), alleging that Defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2); *J.B. ex rel. Hart*, 186 F.3d at 1288. With respect to the damages release, Plaintiffs seek certification pursuant to Rule 23(b)(3).

These rules reflect the fact that "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Stransky v. HealthONE of Denver, Inc.*, 929 F. Supp. 2d 1100, 1104 (D. Colo. 2013) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100-01 (1981)). In *Gulf Oil*, the Supreme Court recognized that "[c]lass actions serve an important function in our system of civil justice[.]" *Gulf Oil Co.*, 452 U.S. at 99. District Courts should favor the procedure of class actions. *Colorado Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 356 (D. Colo. Feb. 3, 1999) (citing *Esplin v. Hirschi*, 402 F.2d 94, 99 & 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969)).

a. The Class is So Numerous That Joiner of All Class Members is Impracticable.

Rule 23(a)(1) requires a showing that "[t]he class is so numerous that joinder of all members is impracticable." Plaintiffs are seventeen (17) individuals who meet the class definition; there are many more individuals who meet that definition and ride RTD LRVs on a daily basis who cannot be identified easily.

> In class action suits there must be presented some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement. There is, however, no set formula to determine if the class is so numerous that it should be so certified. The determination is to be made in the particular circumstances of the case. The duty of establishing those particular circumstances rests with the party who asserts the existence of the class and that party must produce some evidence or otherwise establish by reasonable estimate the number of class members who may be involved.

Moore's Federal Practice, 2nd Ed., V. 3B, s 23.05(3), and cases cited. *Rex v. Owens ex rel. State of Okl.*, 585 F.2d 432, 436 (10th Cir. 1978). “Class actions have been deemed viable in instances where as few as 17 to 20 persons are identified as the class.” *Rex,* 585 F.2d at 436 (internal citations omitted).

Here, U.S. Census data indicates that currently 5.4% of the population in Colorado are individuals with ambulatory disabilities.[5] Given that RTD reported 103,377,797 boardings from December 2014 to November 2015,[6] it is reasonable to conclude that the class of individuals who use Wheelchairs who use Light Rail is too numerous to join in a single suit. “[C]ourts regularly rely on the . . . [census] data presented by plaintiffs in making numerosity determinations.” *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 347 (N.D. Cal. 2008); *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014) (relying on reasonable inferences from census data); *Colorado Cross-*

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[5] 2014 Disability Status Report Colorado, Yang-Tan Institute on Employment and Disability at the Cornell University ILR School (citing to US Census Bureau’s American Community Survey), http://www.disabilitystatistics.org/StatusReports/2014-PDF/2014-StatusReport_CO.pdf (last visited Nov. 14, 2016).

[6] Facts and Figures, RTD, http://www.rtd-denver.com/factsAndFigures.shtml (last visited Nov. 14, 2016).

Disability Coal. v. Taco Bell Corp., 184 F.R.D. 354, 358 (D. Colo. 1999) ("Census data are frequently relied on by courts in determining the size of proposed classes.).

b. There are Questions of Law or Fact Common to the Class And the Claims of the Representative Plaintiffs are Typical of the Claims of the Class.

The requirements of commonality and typicality "tend to merge" and are often addressed together. *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co*., 765 F.3d 1205, at 1216 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011)). Here, there are numerous questions of law or fact common to the class:

- Whether the access to and usability of the accessible seating areas of the existing LRVs meets the requirements of the ADA and Section 504;
- Whether the access to the planned new LRVs will meet the requirements of the ADA and Section 504; and
- Whether RTD policy regarding ensuring access for class members to the accessible seating areas complies with the ADA and Section 504.

These questions and others form the questions of law or fact that are common to the class in this case.

"A finding of commonality requires only a single question of law or fact common to the entire class." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010). "'[E]very member of the class need not be in a situation identical to that of the named plaintiff'' to meet Rule 23(a)'s commonality or typicality requirements. Factual differences between class members' claims do not defeat certification where common

questions of law exist." *Id.* (quoting *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir.1982)).

Ultimately, the common questions "must be of such a nature that [they are] capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The Settlement Agreement in this case has amply demonstrated that the putative class meets this standard.

c. Representative Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interest of the Proposed Class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Courts generally examine the experience of class counsel and whether there are any conflicts between class counsel and representative plaintiffs*. See, e.g., In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 688 (D. Colo. 2014). In this case, Class Counsel are experienced in the field of disability rights litigation and have litigated and worked on class actions in the past, including those with monitoring provisions and the type of dispute at issue here. Declaration of Kevin W. Williams ("Williams Decl."), attached as **Exhibit 2**, at 2 ¶¶ 4,5; Declaration of Andrew C. Montoya ("Montoya Decl."), attached as **Exhibit 3**, at 2-3 ¶ 3. With regard to conflicts, Class Counsel are attorneys for a non-profit organization that has as its mission advocating for social justice for people with all types of disabilities. Williams Decl. at 2 ¶¶ 4, 6. CCDC is a Plaintiff in the case, but not a Representative Plaintiff for purposes of the class settlement. Class Counsel in this case

have worked for many years as counsel following that mission without any conflicts of any kind. Williams Decl. at 2 ¶¶ 4, 7; Montoya Decl. at 2 ¶¶ 5, 7. Adequate representation is usually presumed in the absence of contrary evidence. 216 Robert Newberg, Newberg on Class Actions, § 7.24 at 7–80 to –81 (3d ed. 1992); *see also Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, at 349 (N.D. Cal. 2008) (citations omitted).

The Representative Plaintiffs in this case have common interests with members of the putative class. Representative Plaintiffs are long-time Denver residents who use wheelchairs or other mobility aids. The Representative Plaintiffs are all users of RTD's light rail service on a regular basis; many use public transportation as their only means of getting around the city. They are all members of the proposed class, and they seek a common remedy, which will be provided through the actions required of RTD in the Settlement Agreement in this case. The Representative Plaintiffs seek to ensure increased accessibility to the accessible spaces on the existing light rail trains and, under this Settlement Agreement, those that will soon be put into service. These interests are all shared with the putative class and consistent with remedying the violations that this class action seeks to address.

Furthermore, the Representative Plaintiffs will vigorously prosecute the interests of the class through qualified counsel. Proposed Class Counsel Kevin Williams and Andrew Montoya of CCDC have successfully represented numerous plaintiffs in class actions of individuals with disabilities in state and federal court and across the country, having been found by the relevant courts to meet adequate representation requirements

under Rule 23. Williams Decl. at 2 ¶ 5; Montoya Decl. at 2 ¶ 5. Class counsel are thoroughly familiar with the ADA and the issues concerning the protection of the rights of people with disabilities. They have thoroughly investigated this case, measuring all relevant aspects of the trains at issue, reviewing hundreds of pages of documents, and taking and defending numerous depositions. Class Counsel also have the resources to litigate this case, as demonstrated by the settlement achieved in this case, which provides substantial and important injunctive relief to the class and by all of the other class action cases in which counsel have been involved.

Thus, Plaintiffs have met the adequacy requirement of Rule 23(a)(4).

d. It is Appropriate to Certify the Class Under Rule 23(b)(2).

A class is proper under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of appropriate Rule 23(b)(2) class actions. *Amchem Prods.*, 521 U.S. at 614 (1997) (citations omitted). The requirements of Rule 23(b)(2) are "almost automatically satisfied in actions primarily seeking injunctive relief." *Kanter v. Casey*, 43 F.3d 48, at 58 (3d Cir. 1994). Accordingly, numerous courts have certified classes consisting of individuals with mobility disabilities seeking removal of barriers or because policies of the defendant were found to apply to a class of individuals with disabilities. *See, e.g., Colorado Cross-Disability Coal.*, 765 F.3d at 1217 (barriers to wheelchair accessibility); *Colorado Cross-Disability Coal.*, 184 F.R.D. at 360

(D. Colo. 1999) (same); *Lightbourn v. Cty. of El Paso, Tex.*, 118 F.3d 421 (5th Cir. 1997) (mobility impaired and visually impaired voters brought class action, alleging Texas voting machines did not provide accessibility or privacy); *Bates v. United Parcel Serv.*, Inc., 511 F.3d 974, 988 (9th Cir. 2007) (policies barring deaf drivers from working for UPS); *Armstrong v. Davis*, 275 F.3d 849, 864-872 (9th Cir. 2001) (policies that discriminate against disabled prisoners and parolees).

The claims brought in this case are within the type of claims that Rule 23(b)(2) was intended to cover. Here, Plaintiffs seek broad declaratory and injunctive relief – system-wide improvements in RTD's accessibility to its LRVs and policy changes with respect to the operators – on behalf of a large and amorphous class of all Denver residents and visitors who use wheelchairs or other mobility devices who are being denied meaningful access to RTD's LRVs based on alleged policy and design violations. Additionally, the proposed Rule 23(b)(2) class seeks only class-wide declaratory and injunctive relief to address the alleged deficiencies and does not seek class damages. Therefore, certification of the proposed class under Rule 23(b)(2) is proper.

e. An Opt-Out Class Should be Approved for Settlement Purposes under Rule 23(b)(3) Regarding the Release of Potential Damages Claims.

While Plaintiffs' lawsuit did not seek damages, the Parties agreed in settlement, that it was reasonable for the class to release damages remedies provided that individual class members could opt-out of that release if they wished to preserve their damages claims under the ADA or Section 504. See Settlement Agreement ¶ V(A)(1).

"Under Rule 23(b)(3) . . . the Court may certify a class if the questions of law or fact common to the class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Nakkhumpun v. Taylor*, No. 12-CV-01038-CMA-CBS, 2015 WL 6689399, at *3 (D. Colo. Nov. 3, 2015). "The predominance inquiry 'focuses on the question of liability. . . .[I]f the liability issue is common to the class, common questions are held to predominate over individual questions.' The purpose is to avoid a class action degenerating into a series of individual trials." *Id.* (quoting *Maez v. Springs Auto. Grp. LLC*, 268 F.R.D. 391, 397 (D. Colo. 2010)).

Here, the key liability issue is common to the class: do the dimensions of LRV cars comply with Title II of the ADA and Section 504. This question predominates over any individual liability questions class members may have.

Certification of a class here is superior to other methods of adjudication as the case raises a single liability question and -- in the proposed Settlement Agreement -- implements a single, class-wide injunctive solution. Class members who wish to pursue damages claims will, pursuant to Rule 23(b)(3), be able to opt-out of the damages release and pursue those claims individually.

B. <u>The Class Settlement Should Be Preliminarily Approved</u>.

The purpose of the preliminary approval stage is to ascertain whether there is a reason to notify the class members of the proposed settlement and proceed with the fairness hearing. *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) (citing *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982)).

"If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies . . . and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing . . . ." Manual for Complex Litigation, § 30.41, at 236–37 (3d ed.1995). The Settlement Agreement in this case easily satisfies this standard.

The terms of the Settlement Agreement are summarized in the Background section above. Under Fed. R. Civ. P. 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Here, the proposed Settlement Agreement satisfies the standard for preliminary approval.

Under F.R.C.P. 23(e)(2),[7] a class action settlement must be "fair, reasonable and adequate." *Lucas*, 234 F.R.D. at 693 . "Under F.R.C.P. 23[(e)(2)], the trial court must determine whether the settlement is fundamentally fair, adequate, and reasonable." In the Tenth Circuit, the following factors are to be analyzed in determining whether this standard is met:

> (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.

Lucas, 234 F.R.D. at 693 (citing *Rutter & Wilbanks Corp. v. Shell Oil Co, 314 F.3d 1180, 1188 (10th Cir. 2002).*). This settlement meets all of these requirements.

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[7] Formerly Fed. R. Civ. P. 23(e)(1)(C).

1. The Settlement Agreement was Fairy and Honestly Negotiated.

This case has been litigated over the course of a year and a half, during which time both Parties engaged in extensive written and deposition discovery, and filed a number of contested discovery and dispositive motions. *See Lucas*, 234 F.R.D. at 693. The settlement agreement itself took months to negotiate, and came only after several previous attempts at negotiating -- including a failed mediation. There have been multiple meetings, emails and telephone calls, and both sides have been represented by multiple counsel with expertise in the ADA and complex class action litigation. Both Parties gave up aspects of what they would have attempted to achieve through a trial. In addition, the Parties negotiated at arm's-length regarding whether the LRVs needed to be accessible according to Plaintiffs' allegations now or in the future. The Parties also negotiated terms of the Settlement Agreement in exchange for significant relief in redesigning and retrofitting the LRVs -- namely, provisions that require notice and meeting and conferring prior to bringing any further accessibility lawsuits against RTD.

The monetary terms are fair and adequate. Representative Plaintiffs are not receiving any incentive payments for representing the class. While class members are releasing claims for damages under the ADA and Section 504, the Parties have agreed -- and Plaintiffs request above -- that the class be certified pursuant to Rule 23(b)(3) for purposes of that release, so class members with damages claims can opt-out and bring those claims individually.

The Parties reached full agreement on injunctive terms before undertaking negotiations addressing Plaintiffs' attorneys' fees and costs.

Class Counsel's fees -- which will be the subject of a separate fee petition -- are also fair and adequate for the year and a half of extensive litigation leading up to this Settlement Agreement. Importantly, Class Counsel's fees do not distract or diminish the extensive injunctive relief afforded to the Class. "The fact that the parties . . . did not discuss attorneys' fees until all other issues were virtually finalized, is also indicative of a fair and arm's-length process." *Lucas*, 234 F.R.D. at 693. *See, e.g.*, Manual for Complex Litig., Fourth § 21.7 at 335 (2004) ("Separate negotiation of the class settlement before an agreement on fees is generally preferable."). Finally, the Parties have entered into this proposed settlement because they "believe that the settlement is fair and adequate." *Tuten v. United Airlines*, *Inc*., No. 12-CV-1561-WJM-MEH, 2013 WL 8480458, at *3 (D. Colo. Oct. 31, 2013). Because these facts establish that the Settlement Agreement is fundamentally fair, adequate, and reasonable, preliminary approval should be granted.

2. Serious Questions of Fact and Law Were in Doubt.

Serious questions of fact and law were in doubt: Were the existing designs of LRVs in compliance? Were operators asking required questions of those seated in accessibility seating areas when those who needed them boarded? Were changes required to the accessible areas of future LRVs? Was appropriate signage placed in appropriate areas? These are all serious questions of fact and law -- several of which were the subject of pending dispositive motions -- that remained in doubt if this case were to have continued to trial.

3. The Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief After Protracted Litigation.

The Parties vigorously disagreed on the question whether the LRVs were in compliance with the regulations. Dispositive motions on these questions were pending, but no trial date was in place. However the contested questions were resolved on motion or at trial, they were likely to be appealed, adding cost and time to the existing litigation.

In contrast, the Settlement Agreement will ensure that more accessible LRVs will be in service within a year of Final Settlement Date and that all LRVs will be improved within five years. The Settlement Agreement will ensure more accessible LRVs far sooner than continued litigation and appeal.

4. In the Judgment of the Parties, the Settlement is Fair and Reasonable.

The settlement is fair and reasonable. Williams Decl. at 2 ¶ 8. The settlement "was negotiated by competent counsel during arms-length negotiations," and serious questions of law exist as to RTD's compliance with important civil rights laws. *Tuten,* 2013 WL 8480458, at *3 (D. Colo. Oct. 31, 2013). "As with any class action, litigation in this case would likely be expensive and time consuming." *Id.* The Parties to this litigation have "vigorously advocated their respective positions throughout the pendency of the case." *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997). "Because the settlement resulted from arm's-length negotiations between experienced counsel after significant discovery had occurred, the Court may presume the settlement to be fair, adequate, and reasonable." *Lucas*, 234 F.R.D. at 693; *see also, e.g., Wal–*

Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir.) (A "'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" (quoting Manual for Complex Litigation, Third § 30.42 (1995))).

As evidenced by the fully executed Settlement Agreement, approved by both Parties and their counsel, the judgment of the Parties is that the settlement is fair and reasonable. "Counsel's judgment as to the fairness of the agreement is entitled to considerable weight." *Marcus v. Kansas Dept. of Revenue*, 209 F.Supp.2d 1179, 1183 (D. Kan. 2002). Here, the Parties' counsel -- among whom are attorneys with substantial experience in complex class action litigation and disability class actions -- unanimously support this settlement. *Lucas*, at 695.

C. The Class Notice, Objection, and Exclusion Procedures Should Be Approved.

As part of the settlement of a class action, this Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1). Because Plaintiffs are requesting certification pursuant to Rule 23(b)(3), such notice must be "the best notice that is practicable under the circumstances." Rule 23(c)(2)(B).

The Class Notice Procedures, as defined by the Settlement Agreement, are reasonable and fairly calculated to alert class members of the settlement and inform them of their rights as required by Fed. R. Civ. P. 23 and the Due Process clause of the United States and Colorado Constitutions.

The Settlement Agreement provides for posted notice, website notice, and mailed notice:

- RTD shall post notice, in a form substantially similar to Exhibit D to the Settlement Agreement, (1) on all mini-high ramps at each station providing Light Rail Service in a location easily visible to passengers; (2) at RTD ticket sales outlets at Denver Union Station, Civic Center, two locations in Boulder, and if these sales outlets are temporarily closed, at the temporary replacement ticket outlet for that location; (3) the Special Discount Card location at 1600 Blake Street ("Posted Notice"). The Posted Notice shall be displayed for no less than thirty (30) consecutive calendar days. RTD shall bear the costs associated with Posted Notice.

- There shall be appropriate website notice. RTD, CCDC, and CREEC shall post notice, in a form substantially similar to the Posted Notice on their respective websites ("Website Notice"). The Website Notice shall remain posted for no less than thirty (30) consecutive calendar days. RTD will establish a link to the page on which the Website Notice appears on its Light Rail Service website page (www.rtd-denver.com/lightrail.shtml) as well as its Accessibility website page (www.rtd-denver.com/Accessibility.shtml). CCDC and CREEC will each put a link to the page on which the Website Notice appears on their respective main pages (www.ccdconline.org and www.creeclaw.org). RTD, CCDC, and CREEC shall bear the costs, if any, associated with Website Notice on their respective websites.

- RTD shall send via U.S. Mail notice, in a form substantially similar to Exhibit E to the Settlement Agreement ("Mailed Notice"), to no more than ten (10) Colorado disability rights organizations listed in Exhibit F to the Settlement Agreement. As reflected in Exhibit E, the Mailed Notice shall include a request that such notice be posted on the organization's bulletin boards for at least thirty (30) business days. RTD shall bear the costs associated with Mailed Notice to the addresses, as provided on Exhibit F. CCDC and CREEC shall e-mail notice, in a form substantially similar to the Mailed Notice, to their members ("E-mailed Notice"). CCDC and CREEC shall bear the costs, if any, associated with E-mailed Notice.

Within ten days of the filing of this Motion , RTD will serve on the Attorney General of the United States and the Attorney General of Colorado the documents listed in 28 U.S.C. § 1715(b) of the Class Action Fairness Act ("CAFA Notice"). The Parties

agree that, for purposes of CAFA Notice, it is not feasible to provide the names of all Settlement Class Members pursuant to 28 U.S.C. § 1715(b)(7)(A) and, therefore, the procedure set forth in 28 U.S.C. § 1715(b)(7)(B) will be utilized.

"If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Parties believe notice in this case comports with fairness and due process. The Class Notice Procedures detailed above and fully defined in Section IV of the Settlement Agreement summarize the proposed settlement, and explain to class members their right to exclude themselves from the damages release portion of the settlement, or object to the settlement and be heard in open court.

D. The Parties Hereby Notify the Court of a Confidential Opt-Out Agreement.

Rule 23(e)(3) requires the Parties to "file a statement identifying any agreement made in connection with" the proposed settlement. As set forth in Paragraph V(B) of the Settlement Agreement, the Parties have entered a confidential opt-out agreement that "specif[ies] that if timely requests for exclusion are received from a specified number or percentage of Rule 23(b)(3) Settlement Class Members, Defendant shall have the right, in its sole discretion, to proceed with a Rule 23(b)(2) settlement class only." Settlement Agreement ¶ V(B)(1). This confidential opt-out agreement "will not provide a basis for Defendant to terminate the Rule 23(b)(2) class settlement." *Id.* ¶ V(B)(2). It is being filed under separate cover with a motion to restrict public access.

III. CONCLUSION

WHEREFORE, for the reasons set forth in this Motion and the attached proposed Settlement Agreement, the Representative Plaintiffs respectfully request that the Court grant this Motion, enter the proposed Preliminary Approval Order attached as Exhibit A to the Settlement Agreement, and grant such further relief as the Court deems just and proper under the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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