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 themselves and others similarly situated,

Plaintiffs,

v.

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

Defendant.

PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

Plaintiffs, by and through their counsel, hereby submit this Unopposed[1] Motion for Final Approval of Class Action Settlement Agreement. Plaintiffs brought this class action lawsuit challenging the size, locations, and maneuvering clearances of seating for passengers who use wheelchairs and other mobility devices on light rail trains owned and operated by the Defendant Regional Transportation District ("Defendant" or "RTD"). Plaintiffs also challenged RTD's signage and RTD's policies regarding light rail operators. After two years of extensive litigation, the Parties resolved the case resulting in the Class

[1] Pursuant to D.C.COLO.LCivR 7.1(a), counsel for Plaintiffs certifies that they have conferred in good faith with counsel for Defendant Regional Transportation District ("RTD") regarding this Motion. While RTD has denied, and continues to deny, the wrongdoing and liability alleged by Plaintiffs in this action, and many of Plaintiffs' related allegations, it does not oppose the relief requested in this Motion pursuant to the Parties' class action settlement.

Settlement Agreement ("Agreement") filed with the Court as Exhibit 1 (Doc. # 151-1) to Plaintiffs' Unopposed Motion for Certification of a Class for Settlement Purposes Only and Preliminary Approval of Settlement Agreement ("Preliminary Motion") (Doc. # 151).

The Agreement contemplates that RTD will retrofit all existing 172 light rail vehicles ("LRVs") in accordance with Exhibit B to the Agreement. RTD also agrees that the next 29 vehicles it puts in service will also provide greater accessibility than the current vehicles as set forth in Exhibit C to the Agreement and that RTD will provide training and annual refresher training on the Americans with Disabilities Act ("ADA") for LRV operators, supervisors, and LRV controllers to ensure that riders who use wheelchairs are not discriminated against.

The Agreement contemplates that Plaintiffs' claims will be resolved on a class action basis. Because the Agreement provides for relief for the accessibility barriers alleged by the Plaintiffs, and because it is the result of extensive arm's-length negotiations, it is fair, reasonable, and adequate.

On April 3, 2017, this Court granted preliminary approval to the Agreement, found that the proposed plan to provide notice to the class and proposed form of notice satisfied the requirements of due process and Rule 23(c)(2), and ordered that Plaintiffs provide notice to the class by means of the Class Notice Procedures defined in the Agreement (Doc. # 155). The Court also set a fairness hearing for July 10, 2017. *Id.*

Notice was mailed, emailed, and posted in accordance with the Court's Order and the Agreement. Decl. of Tram Ha ("Ha Decl."), at 1 ¶ 4; Decl. of Jean Peterson

("Peterson Decl."), at 1 ¶ 4; Decl. of Jessica Fuller ("Fuller Decl."), at 1-2, ¶¶ 3-7. The notice provided that any requests for exclusion regarding damages were to be provided on or before May 17, 2017, and that objections to the settlement were required to be filed with the Court on or before June 16, 2017. No requests for exclusion from the damages provisions were received before (or after) May 17, 2017. Ha Decl., at 2 ¶ 5; Peterson Decl., at 1 ¶ 5; Fuller Decl., at 2 ¶ 8. No objections were received before (or after) June 16, 2016. Ha Decl., at 2 ¶ 5. For these reasons, and the reasons set forth below, Plaintiffs respectfully request, pursuant to Rule 23(e), that this Court grant final approval of the Agreement and award Plaintiffs' counsel $375,000 in fees and costs.

Background

I. Legal Background

Plaintiffs -- individuals who use wheelchairs for mobility and the Colorado Cross-Disability Coalition ("CCDC") -- filed suit against the Defendant alleging violations of Title II of the ADA, as amended, 42 U.S.C. § 12131 *et seq.* ("Title II" or "ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"), with regard to its light rail operations.

Title II 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 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 requirements 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 elected to resolve their claims in a Class Settlement Agreement without proceeding to trial.

A. Summary of the Settlement

Plaintiffs and RTD have negotiated a comprehensive Agreement for injunctive relief, which requires RTD to make changes to its 172 existing LRVs as set forth in Exhibit B to the Agreement, 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* Agreement, at II.A (Doc. # 151-1). Every twelve months following the Final Settlement Date, RTD will provide a status report to Class Counsel on the progress of the Retrofit Project regarding the number of LRVs retrofitted to date and work expected to be completed in the next twelve months. *Id.* at II.A.4. Two Representative Plaintiffs, one Class Counsel, and one paralegal may view one retrofitted LRV within twelve months from the Final Settlement Date to take measurements and photographs to assess compliance. *Id.* at II.A.5.

With respect to new LRVs, RTD will ensure that the next twenty-nine (29) LRVs added into its service after execution of the Agreement will also provide greater accessibility than current LRVs per the specifications set forth in Exhibit C to the Agreement. *Id.* at II.B. Again, two Representative Plaintiffs, one Class Counsel, and one paralegal 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, which any Named Plaintiff or any Settlement Class Member working with or at the behest of any Named Plaintiff involving accessibility issues must comply with prior to initiating litigation against RTD. *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. *Id*. Only after complying with the steps in this procedure may one of the above-referenced individuals bring a lawsuit against RTD. *Id.*

The 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"), 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 to the issues discussed in Section II(D)(6). *Id*. at II(E)(3).

The Parties have further agreed to a detailed dispute resolution process regarding enforcement of the terms described above, which requires a specific conferral process. *Id*. at X. If the Parties are thereafter 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.

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. Plaintiffs filed their fee petition on June 9, 2017, setting forth the factual and legal support for such a fee award. *See* Plaintiffs' Unopposed Motion for Reasonable Attorneys' Fees and Costs (Doc. # 156).

The Agreement releases the injunctive claims and claims for actual or other damages of Class members, subject to this Court's final 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 term of the Agreement shall be five (5) years from the Final Settlement Date, as defined in the Agreement, or the date on which all disputes raised pursuant to Section X of the Agreement are resolved, whichever is latest. *Id*. at XII.Q.

ARGUMENT

I. The Notice Procedures Satisfied Rule 23(e) and Due Process.

The Parties provided notice as ordered by the Court. Specifically, Defendant mailed and emailed the notice to ten disability rights organizations throughout Colorado, requesting that they post it widely. Fuller Decl. at 2 ¶ 7. Plaintiff CCDC and co-counsel CREEC posted the notice on their respective websites and distributed it through their email alert systems. Ha Decl. At 1 ¶ 4; Peterson Decl. at 1 ¶ 4 RTD also posted notice on its website and at light rail stations and ticket sales outlets in conformity with the Agreement and this Court's Order (Doc. #155). Fuller Decl. at 2 ¶ 5. For the reasons set forth in the Preliminary Motion (p. 23-24) and approved by this Court (Doc. # 155), Plaintiffs request that this Court hold that the notice program implemented by the Parties

was the best notice practicable under the circumstances and that it satisfies the requirements of due process and Rule 23.

II. The Settlement Agreement is Fair, Reasonable, and Adequate.

"The settlement of a class action may be approved where the Court finds that the settlement is fair, reasonable, and adequate." *Tuten v. United Airlines, Inc.*, 41 F.Supp.3d 1003, 1007 (D. Colo. May 19, 2014) (citing *Rutter & Wilbanks Corp. v. Shell Oil*, 314 F.3d 1180, 1186 (10th Cir. 2002)). "The Court reviews a proposed class action settlement by considering four factors: (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." *Id.* (citing *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993)).

A. The Settlement Agreement Was Fairly and Honestly Negotiated.

The settlement negotiations have been fair, honest, and at arm's-length, and there are numerous examples of this.

First, the Parties have "vigorously advocated their respective positions throughout the pendency of the case." *Lucas v. Kmart Corp*., 234 F.R.D. 688, 693 (D. Colo. 2006) (quoting *Wilkerson v. Martin Marietta Corp*., 171 F.R.D. 273, 284 (D. Colo. 1997)). This case has been litigated over the course of over two years, during which time the Parties engaged in extensive motions practice.

In addition, the settlement is the result of a long process of arm's-length negotiations. Because the settlement resulted from arm's-length negotiations between experienced counsel after both Parties conducted discovery, after a significant number of motions were brought and contested, and after extensive prior settlement discussions failed, the settlement should be presumed to be fair and adequate. *Lucas*, 234 F.R.D. at 693 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (holding that 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)))).

B. Serious Questions of Law and Fact Exist, Placing the Ultimate Outcome of the Litigation in Doubt.

This is a case of first impression. Nowhere are there published decisions regarding the design and construction of LRVs. Plaintiffs also raised novel issues concerning the obligations of LRV operators with respect to requesting that individuals who are in the designated wheelchair and mobility aid areas to move when an individual using a wheelchair or mobility aid boards the vehicle and whether the signage was appropriate. All of these issues are untested in other jurisdictions. As such, the questions were novel. The Defendant's efforts at having this case dismissed, decided on summary judgment, and its use of expert witness testimony demonstrate its strong belief that Plaintiffs' positions were incorrect on these issues because they were novel and not interpreted

elsewhere.

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

Following settlement, Defendant has agreed to retrofit all existing LRVs. This will be completed no later than sixty months from the Final Settlement Date on a schedule set forth in the Agreement. Had the parties tried the case before this Court on the question of accessibility of the LRVs, it could have taken significantly longer before the case would be resolved.

D. The Judgment of the Parties That the Settlement Is Fair and Reasonable.

The settlement "was negotiated by competent counsel during arm's-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))).

E. Plaintiffs' Request for Attorneys' Fees is Reasonable.

Plaintiffs filed an Unopposed Motion for Attorneys' Fees on June 9, 2017 (Doc. # 156). For the reasons set forth in that motion, Plaintiffs assert their claims for attorneys' and costs are reasonable.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Plaintiffs respectfully request that this Court: grant final approval of the Class Settlement Agreement; award Plaintiffs' counsel $375,000 fees and costs; and enter Final Judgment in this matter.

Respectfully submitted,

Dated: June 26, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following email address:

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