IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-00865-MSK-BNB

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation,
LAURA HERSHEY,
CARRIE ANN LUCAS,
HEATHER REBEKAH RENEE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS
ADRIANNE EMILY MONIQUE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS,
ASIZA CAROLYN KOLENE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS, and
DANIEL WILSON,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO,

Defendant and Third Party Plaintiff,

v.

SEMPLE BROWN DESIGN, P.C.,

Third Party Defendant.

PLAINTIFFS' AND DEFENDANT/THIRD PARTY PLAINTIFF THE CITY AND COUNTY OF DENVER'S JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND FOR FAIRNESS HEARING

Plaintiffs and Defendant/Third Party Plaintiff the City and County of Denver hereby submit this Joint Motion for Preliminary Approval of Settlement Agreement and for Fairness Hearing.

After over two years of litigation, extensive document discovery, multiple site visits, and numerous settlement meetings, Plaintiffs and Defendant/Third Party Plaintiff the City and County of Denver (the "Settling Parties") have reached a proposed settlement of Plaintiffs' claims.[1] The Class Action Settlement Agreement ("Settlement Agreement"), a copy of which is attached as Exhibit 1 hereto, contemplates that Plaintiffs' claims will be resolved on a class action basis. Because the Settlement Agreement provides for comprehensive relief for the accessibility barriers alleged by the Plaintiffs and because it is the result of over a year of arm's length negotiations, it is fair, reasonable and adequate. The Settling Parties thus respectfully request, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, that this Court:

1. Grant preliminary approval of the Settlement Agreement;

2. Find that the proposed plan to provide notice to the class and the proposed form of notice satisfy the requirements of due process and Rule 23; and

3. Schedule a Fairness Hearing for the earliest convenient date 120 days after preliminary approval to determine whether the proposed Settlement Agreement is fair, reasonable and adequate and therefore should be approved.

Background

Plaintiffs -- individuals who use wheelchairs or scooters, a family member, and the Colorado Cross Disability Coalition ("CCDC") -- filed suit against Defendant/Third Party Plaintiff the City and County of Denver (the "City"), the owner and operator of the Ellie Caulkins Opera House ("Opera House") alleging violations of Title II of the Americans with

[1] Defendant/Third Party Plaintiff the City and County of Denver and Third Party Defendant Semple Brown Design, P.C. have also reached a settlement of the former's claims. That settlement is not part of the Class Action Settlement Agreement at issue in this motion.

Disabilities Act, 42 U.S.C. § 12131 *et seq.* (the "ADA"), section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the "Rehabilitation Act"), and the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-601 *et seq.* ("CADA") at the City-owned and operated Opera House.

The Opera House was designed and constructed in 2004 and 2005, and opened in October, 2005. It was constructed inside the shell of the old Quigg Newton Denver Municipal Auditorium, which was completely gutted and reconstructed.

Members of Plaintiff CCDC (a statewide disability advocacy organization) including Plaintiffs Laura Hershey, Carrie Ann Lucas and her daughters, and Daniel Wilson, almost immediately encountered barriers to wheelchair access. Before Plaintiffs filed suit, however, the Settling Parties spent approximately eight months attempting to resolve their differences. These discussions were amicable but ultimately unsuccessful and Plaintiffs CCDC, Hershey, Wilson and the Lucas family filed suit in May of 2006. This lawsuit challenged barriers to wheelchair and scooter access at the Opera House and several other City-owned venues that, together with the Opera House, comprise the Denver Performing Arts Complex.

In the ensuing two years, the Settling Parties have conducted extensive joint inspections of the Opera House and have exchanged and reviewed over 10,000 pages of documents, including hundreds of pages of oversized architectural and construction drawings. Over a year ago, Plaintiffs shared drafts of their expert reports with the City which reports are not due until a month from now. Last month, Plaintiffs filed -- and the City opposed -- a motion for partial summary judgment as to the number and location of wheelchair accessible seats in the Orchestra section of the Opera House. Depositions of key witnesses were set to begin on September 18, 2008 and were to continue for much of October.

Starting in August, 2007, the Settling Parties have repeatedly met to discuss settlement -- including a day-long mediation with the assistance of Judge Robbie Barr of the Judicial Arbiter Group and other in-person and telephonic discussions -- and have exchanged numerous draft settlement proposals. Plaintiffs have had the chance to meet and hear from the City's operational personnel and the City has had the opportunity to meet and hear from individual Plaintiffs and Plaintiffs' experts. These discussions were amicable and productive, but at all times arm's length and contested. In October, 2007, the Settling Parties were able to resolve their differences concerning venues other than the Opera House. They continued to meet and negotiate and ultimately, on September 19, 2008, reached agreement on the remaining Opera House claims.

Summary of the Settlement

The Settlement Agreement addresses and provides relief with respect to all issues raised in Plaintiffs' operative complaint.[2] Pursuant to the Settlement Agreement, the City:

- Has installed a platform lift on the House Right side of the Orchestra section and has committed to install such a lift on the House Left side to provide improved access to that section for patrons who use wheelchairs;
- Will implement additional policies designed to assist patrons using the lifts;
- Has committed to adjust lift lobby doors to either ensure that they are automatic doors or that they are held open by a magnet system;

[2] The operative complaint is the Third Amended and Supplemental Complaint. (Docket No. 99). Simultaneously with this motion, Plaintiffs move for leave to file a Fourth Amended and Supplemental Class Action Complaint, the only difference from the earlier complaint being the assertion of a class action.

- Has committed to install two additional accessible seating positions and adjacent companion seats in the Orchestra level;
- Has adjusted the location of accessible seating in upper levels;
- Has committed to make a series of changes (most of which have already occurred) to Opera House restrooms to provide improved access for individuals who use wheelchairs;
- Has committed to add accessible tables to the Kevin Taylor Restaurant;
- Has committed to ensure that an existing ramp in the Chambers Grant Salon remains open and available to patrons who use wheelchairs when the area accessed by the ramp is open to the public; and
- Has committed to maintain the Opera House in the condition required by the Settlement Agreement.

Settlement Agreement ¶ III.

In the Settlement Agreement, the Settling Parties agreed to seek this Court's approval to settle on a class action basis. *Id.* ¶ VII. The Settlement Agreement defines the proposed Settlement Class as:

> all persons with disabilities as defined by the Americans with Disabilities Act including persons who are currently or have been in the past four years residents of the State of Colorado who use wheelchairs or scooters for mobility who, within four years prior to the filing of the complaint in this Lawsuit, were denied or are being denied, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the Ellie Caulkins Opera House.

Id. ¶ II.D. Simultaneously with this motion, Plaintiffs are filing an unopposed motion to certify this class.

The Settlement Agreement does not provide for an award of damages to the proposed Settlement Class; accordingly, the claims released by the Settlement Class are limited to claims for injunctive relief and associated attorneys' fees and costs. *Id.* ¶ X.A. The Settlement Class does not release any claims for damages. *Id.* ¶ X.B. The Settlement Agreement provides for damages to the named plaintiffs in the following amounts: Laura Hershey: $1,500.00; Carrie Ann Lucas: $3,500.00; Heather Rebekah Renee Lucas: $1,500.00; Adrianne Emily Monique Lucas: $2,000.00; Asiza Carolyn Kolene Lucas $500.00; and Daniel Wilson $1,500.00. *Id.* ¶ V. These individuals are releasing their claims for damages. *Id.* ¶ X.B.

Finally, with respect to attorneys' fees, the Settlement Agreement states that "[t]he City agrees to pay Plaintiffs' reasonable attorneys' fees and costs attributable to Plaintiffs' pursuit of claims relating to the accessibility of the Opera House to individuals who use wheelchairs and scooters against Defendant The City and County of Denver plus a proportionate share of costs incurred by Plaintiffs pursuing other defendants that cannot be determined to pertain to any particular defendant." *Id.* ¶ VI.A. The Settling Parties will negotiate in good faith to try to agree on a proposed amount to submit to the Court in an uncontested fee petition. *Id.* ¶ V.B. Plaintiffs have agreed that the amount they request will not exceed $330,000. *Id.* ¶ V.C.

ARGUMENT

I. The Settlement Agreement Should be Granted Preliminary Approval.

The purpose of the preliminary hearing is to ascertain whether there is any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing. *See, e.g., 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 . . ." 4 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* ("Newberg") § 11:25 at 38 (4th ed. 2002) (citing *Manual for Complex Litigation* (Third) § 30.41).

The Settlement Agreement in this case easily satisfies this standard. A class action settlement must be "fair, reasonable and adequate," Fed. R. Civ. P. 23(e)(2), which in the Tenth Circuit involves an analysis of the following 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.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002); *quoted in Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). The proposed Settlement Agreement meets each of these four prongs.

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 indicia of this.

First, the Settling Parties have "vigorously advocated their respective positions throughout the pendency of the case." *See Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997); *see also Lucas*, 234 F.R.D. at 693 (same). As set forth in greater detail above, this case has been litigated over the course of over two years, during which time both Settling Parties engaged in extensive written discovery and Plaintiffs filed a motion for summary judgment which the City opposed.

In addition, the ultimate Settlement Agreement took over a year to negotiate, and came only after previous attempts at negotiating a settlement had failed. There have been multiple meetings and both sides have been represented by multiple counsel with expertise in both the ADA and complex litigation. The Settling Parties exchanged numerous drafts of the Settlement Agreement, each side advocating forcefully for language advantageous to his or her clients. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) (finding that the negotiations leading to a class action settlement had been at arm's length in part because they had occurred over several months and had involved several in-person meetings).

Because the settlement resulted from arm's length negotiations between experienced counsel after significant discovery had occurred, the settlement should be presumed to be fair and adequate. *See, e.g., 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.

Although it is not appropriate at this stage of the litigation to evaluate the merits, *Wilkerson*, 171 F.R.D. at 284, there are several potential issues that could significantly impact this case if it is litigated.

For example, as demonstrated by Plaintiffs' motion for partial summary judgment -- which the City opposed -- the Settling Parties disagreed sharply concerning the proper number and location of accessible seating in the Orchestra section. In addition, while the City agreed --

in settlement -- to install new lifts to transport patrons who use wheelchairs to the Orchestra level, it continued to assert its view that the original vertical conveyance complied with applicable standards.

The outcome of either of the issues discussed above would have had a direct impact on the outcome of this litigation and the injunctive relief that could be obtained for the Settlement Class.

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

If this case were to be fully litigated, in all probability it would be many years before it would be resolved. Third Party Defendant Semple Brown Design, P.C. was only added to the case in March of this year, and depositions had not yet started. Trial was originally set by Judge Babcock for July, 2009; the parties do not know whether this Court would maintain that trial date. In addition, it is likely that any party not prevailing in the trial would file an appeal, a prospect complicated by the three different parties' interests being contested in this case.

By contrast, the Settlement Agreement provides substantial, guaranteed relief, including improved vertical access to the Orchestra level, additional seating in that level, and improved access to restrooms, the Kevin Taylor Restaurant, and the Chambers Grant Salon. Importantly, the City has committed to complete these measures by the end of this year.

Finally, the fact that class members retain their claims for damages is further proof of the fairness of the settlement. *See, e.g., Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 170 (S.D. Ohio 1992) (approving class action settlement in part because of limited nature of damages release, such that class members retained most of their rights).

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

"Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002); *see also Lucas*, 234 F.R.D. at 695 (same). Here, the Settling Parties' counsel -- among whom are attorneys with substantial experience in complex litigation and disability class actions -- unanimously recommend this settlement as fair, adequate and reasonable. (*See* Decl. of Amy F. Robertson ¶ 6; Decl. of Kevin W. Williams ¶ 6; Decl. of Robert G. Wheeler ¶ 4; Decl. of Elizabeth A. Starrs ¶ 4.)

II. The Notice, Notice Program and Objections Procedures Should Be Approved.

The Settling Parties also respectfully request that the Court approve the notice program that they propose to implement and hold that it satisfies the requirements of due process and Rule 23. The Settling Parties further ask the Court to approve the form of notice that they propose using to effectuate notice to the members of the Settlement Class. Finally, the Settling Parties request that the Court approve the procedures for class members to object to the Settlement Agreement.

Simultaneous with the filing of this joint motion for preliminary approval, plaintiffs are filing a motion to certify the Settlement Class for settlement purposes under Rule 23(b)(2). The notice requirements for a class certified under Rule 23(b)(2) are left in large part to the discretion of the Court. Fed. R. Civ. P. 23(c)(2)(A).

"The hallmark of the notice inquiry . . . is reasonableness." *Sollenbarger v. Mountain States Tel. and Tel. Co.*, 121 F.R.D. 417, 436 (D.N.M. 1988); *see also Lucas*, 234 F.R.D. at 696 (same). This is not a case like many other class actions where there is a list of shareholders of a

company or purchasers of a product that can be obtained through reasonable efforts. To the contrary, the Settling Parties are not aware of any available list of individuals who use wheelchairs or scooters and patronize the Opera House. Nor do the Settling Parties believe that one could be created without months of effort and huge expenditure. Under such circumstances, individual notice is not required. *Sollenbarger,* 121 F.R.D. at 437 (publication notice sufficient to subgroup of class when efforts required for creating list of individuals would be excessive under the circumstances); *see also* 3 *James Wm. Moore, et al., Moore's Federal Practice 3d* § 23.103[2][b], at 23-390. The Settling Parties here propose to mail notice to disability-related organizations around the state and to publish the notice in the Denver Post and Rocky Mountain News. In addition, Plaintiff CCDC has a membership of over 3,000, including people with disabilities, their friends, family members and allies, making it the largest disability rights organization in the state. The notice in this case will be provided by CCDC through its email alert system -- which reaches many of its members -- on its website, and by posting in its offices. (Williams Decl. ¶ 6.)

The Settling Parties also respectfully request that the Court approve the form of notice and hold that it satisfies Rule 23 and due process. *See, e.g., Besinga v. United States*, 923 F.2d 133, 136-37 (9th Cir. 1991) (requirements of due process and F.R.C.P. 23(c)(2)(B) are similar). The proposed notice describes the Settlement Class, summarizes the proposed settlement, and explains to class members their right to object and be heard in open court. *See* Settlement Agreement Ex. 3.

Finally, the Settling Parties respectfully request that this Court approve the procedures for presenting objections, which give class members one month from the publication of the notice to

object, and require that class members file written objections in order to be heard at the Fairness Hearing. Settlement Agreement ¶ VII.C; Ex. 3.

CONCLUSION

For the foregoing reasons, the Settling Parties in this matter respectfully request that this Court:

1. Grant preliminary approval of the Settlement Agreement;

2. Find that the proposed plan to provide notice to the class and the proposed form of notice satisfies the requirements of due process and Rule 23;

3. Schedule a Fairness Hearing for the earliest convenient date 120 days after preliminary approval to determine whether the proposed Settlement Agreement is fair, reasonable and adequate and therefore should be approved.

Respectfully submitted,

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Dated: October 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2008, I electronically filed the foregoing document and associated declarations with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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