IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

JULIE REISKIN,
JON JAIME LEWIS,
WILLIAM JOE BEAVER,
DOUGLAS HOWEY, and
COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit corporation,

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT, a/k/a RTD, a political subdivision of the State of Colorado

Defendant.

DEFENDANT RTD'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 12(b)(6) and 56, Defendant Regional Transportation District ("RTD") hereby moves to dismiss all claims with prejudice, or in the alternative for summary judgment. In support of its motion, RTD states as follows.

I. INTRODUCTION.

Plaintiff Colorado Cross Disability Coalition ("CCDC") and four named plaintiffs – Julie Reiskin, Jon Jaime Lewis, William Joe Beaver and Douglas Howey – allege that RTD violated the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA") and the Rehabilitation Act, 29 U.S.C. § 794 *et seq.* ("Rehabilitation Act") by failing to make RTD's light rail trains readily accessible to passengers who use wheelchairs. These

claims should be dismissed because less than one year ago, the plaintiffs released these claims when they executed a settlement agreement and dismissed their prior case before the U.S. District Court. The plain and unambiguous language of the settlement agreement reflects the parties' intent to resolve **all** legal claims based on RTD's fixed-route services. The common and ordinary meaning of "fixed-route services" includes both bus and light rail. Accordingly, RTD moves to enforce this settlement agreement and dismiss the claims under the defense of release on the basis of Rule 12(b)(6), or in the alternative, Rule 56.

II. FACTS.

RTD, a political subdivision of the State of Colorado, provides the Denver region's mass transit services, which include fixed-route bus and light rail service, demand response paratransit service for the disabled, and opening in 2016, commuter rail service. Complaint, ¶¶ 26, 31. The parties share a lengthy legal history in which CCDC and its members have been represented by CCDC's staff attorneys. *See, e.g.*, *Taylor v. RTD*, 00-Z-981 (D. Colo. 2001); *CCDC v. RTD*, 13 cv-02760 (D. Colo. 2013); *Reiskin v. City & County of Denver*, 14 cv-02285 (D. Colo. 2014).

In 2013, CCDC filed a lawsuit against RTD alleging RTD prevented disabled passengers from accessing the wheelchair area by allowing large items in that same area and leaving insufficient space for wheelchairs to maneuver. *See CCDC v. RTD*, Civil Case No. 13-cv-02760 (D. Colo. 2013), ECF Nos.1, 19-1. Plaintiffs Reiskin, Howey and Lewis allegedly suffered injuries as a result. *Id*. RTD moved to dismiss the claims on the ground that CCDC had not suffered any injury that could be remedied because RTD had

recently adopted a new policy and enforcement strategy upon which CCDC had agreed. *Id*. at ECF No. 9. In 2014, the parties settled and dismissed the case with prejudice. *Id.* at ECF No. 25.

RTD, CCDC, Reiskin, Howey, Lewis and other individuals associated with CCDC specifically named in the amended complaint executed a settlement agreement. *See Settlement Agreement*, attached hereto as **Exhibit A** ("Settlement Agreement").[1] The recitals of the Settlement Agreement reflect the parties' intent to fully resolve **all** claims:

> WHEREAS, without admission of liability, the Parties to this Agreement wish to settle and compromise all of their disputes and differences, whether known or unknown, asserted or unasserted and avoid further litigation of matters related to CCDC's members' use of RTD's services or programs or any other matters whatsoever.

Id. at Recitals. CCDC voluntarily executed the agreement on the advice of counsel. *Id.* at ¶ 9.b.

CCDC, its members and employees, along with the individuals who also executed the Settlement Agreement, received valuable consideration: $75,000, and furthermore, RTD agreed to take significant actions such as changing a number of policies, training employees, retaining an expert and conducting a public campaign – all at the behest of CCDC, Reiskin and Howey – to improve the transit services the individuals received. *See id.* at ¶¶ 2, 3. The benefit RTD received was an assurance that its legal disputes with CCDC, its members and employees were all resolved. CCDC and the named

[1] The authenticity of the Settlement Agreement is undisputed. RTD reasonably believes that CCDC does not deny that it entered into a settlement agreement or that the document represented as such is that agreement. CCDC has posted the Settlement Agreement and promoted its terms on CCDC's website. *See 2014.02.20 RTD Final Settlement Agreement*, CCDCONLINE.ORG, http://www.ccdconline.org/case/documents/02-21-2014/20140220-rtd-final-settlement-agreement (last visited Feb. 6, 2015).

individuals each executed a release of all claims much broader than the original claims alleged:

> **4. Releases by CCDC.** Except for obligations arising out of this Agreement, CCDC, Julie Reiskin, Douglas Howey, Marilyn Paulson, Pamela Carter, Paul Stewart and Jon Jaime Lewis, for themselves and on behalf of their successors, officers, affiliates, subrogees, principals, agents, partners, employees, associates, attorneys, representatives and assigns, does hereby voluntarily, intentionally, and knowingly fully release and discharge RTD and its affiliates, predecessors, successors, subrogees, assigns, parents, subsidiaries, heirs, insurers, attorneys and each of their respective officers, directors, board members, agents, representatives and employees, and any other related individual or entity, from any and all past, present or future claims[,] actions, causes of action, demands, rights, liabilities, costs, expenses, attorneys' fees (including but not limited to any claim of entitlement for attorneys' fees under any contract, statute, or rule of law allowing a prevailing party or plaintiff to recover attorneys' fees not otherwise provided for in this Agreement), damages, and controversies of every kind and nature **related to RTD's fixed-route services** that CCDC, Julie Reiskin, Douglas Howey, Marilyn Paulson, Pamela Carter, Paul Stewart and Jon Jaime Lewis may have, direct or indirect, known or unknown, foreseen or unforeseen, from the beginning of time through the date CCDC executes this Agreement (the "Released Claims").
>
> The Released Claims specifically include, but are not limited to, those which arise out of, relate to or are based upon: (i) **use of RTD's fixed-route services**, (ii) statements, acts or omissions by the parties whether in their individual or representative capacities, (iii) express or implied agreements (except as provided herein), (iv) any relationship between CCDC and/or RTD, (v) any claim for defense or indemnification, (vi) any claims that were or could have been raised against RTD in the Federal Lawsuit and/or State Lawsuit, under the common law or otherwise, (vii) all claims under the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. and section 504 of the Rehabilitation Act, as amended, 28 U.S.C. § 794, to the extent that those statutes apply to RTD, (viii) all claims under the Colorado Open Records Act, as amended, C.R.S. § 24-72-101 *et seq.*, and (ix) all other federal, state or municipal laws, rules and regulations to the extent that they apply to RTD and/or CCDC.

> Any claims that arise after the Effective Date are not included in the Released Claims.

Exhibit A, at ¶ 4 (emphasis added).

An unknown-facts clause included in the Settlement Agreement demonstrates that the released claims did not depend on the facts known at the time:

> **5. Unknown Facts**. This Agreement includes claims of every nature and kind, known or unknown, suspected or unsuspected. CCDC acknowledges that it may hereafter discover facts different from, or in addition to, those that it now knows to be true or believes to be true or believes to be true with respect to the Agreement, and CCDC agrees that this Agreement and the releases contained herein shall be and remain effective in all respects, notwithstanding such different or additional facts or the discovery thereof.

Id. at ¶ 5. Lastly, a covenant not to sue or encourage litigation protected RTD from CCDC pursuing future litigation against RTD:

> **6. Covenant Not to Sue or Encourage Litigation**. CCDC covenants that it will not initiate any lawsuit or proceeding, or otherwise assert any claim, action, cause of action, demand, right, or controversy of any kind that has herein been released. Nor will CCDC encourage any other individual to pursue any claim against RTD relating to the issues in the Federal Lawsuit or State Lawsuit, except the dispute resolution as provided in this Agreement. This Covenant Not to Sue does not include any claim or action arising out of or related to the enforcement of any provision of this Agreement.

Id. at ¶ 6. CCDC also provided a warranty that it was not aware of any pending claims:

> CCDC is not aware of any other claims or lawsuits it may have, which could be or are filed or currently pending against RTD that it has not already advised RTD.

Id. at ¶ 9.d.

Less than 11 months later, the plaintiffs filed this lawsuit alleging violation of the

same statutes and on virtually the same theories: namely, RTD failed to provide wheelchair access to RTD's light rail service, which is one of RTD's fixed-route services. *See* Complaint, ¶ 12. At the time that they executed the Settlement Agreement, CCDC, its members and employees, understood that while the substance of the consideration provided by RTD in the Settlement Agreement related to its fixed-route bus service, the parties clearly understood that there was nothing to be done for fixed-route rail service. A recent letter from CCDC's legal staff to RTD's Custodian of Records (without notifying or copying RTD's counsel) requesting records pursuant to the Colorado Open Records Act demonstrates that at least CCDC's attorneys understand the distinction between "fixed-route bus service" and the broader term "fixed-route service," which also includes light rail and was the term used in the Settlement Agreement. *See* Letter from CCDC to RTD dated February 3, 2015, attached hereto as **Exhibit B**.[2]

III. LEGAL STANDARD.

A court may dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To withstand a Rule 12(b)(6) motion, a complaint must contain enough factual allegations, taken as true, "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1973 (2007). In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of the properly alleged facts in the complaint. *Hall v. Witteman*, 584 F.3d 859, 862 (10th Cir. 2009).

[2] As with Exhibit A, RTD has every reason to believe that the authenticity of this document is undisputed, in this case, because it is a letter with CCDC letterhead sent by a CCDC legal services employee.

In a Rule 12 motion, a court has broad discretion to determine whether to accept materials beyond the pleadings. *Prager v. LaFaver*, 180 F.3d 1185, 1189 (10th Cir 1999). If a plaintiff does attach or mention a document central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss. *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384-85 (10th Cir. 1997). A plaintiff cannot make itself invulnerable to a Rule 12(b)(6) motion by clever drafting and omission of prior agreements between the parties that release the claims presented. *See id*. "If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied." *Id.*

Under Rule 12(b), a defendant may raise an affirmative defense by a motion to dismiss for failure to state a claim, but when the defense is based upon matters outside the complaint, the court must consider the motion as one for summary judgment and grant the motion only if there is no genuine issue of fact. *Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965). When matters outside the pleadings are presented and not excluded by the court, the court must treat a motion to dismiss for failure to state a claim as one for summary judgment, and all parties must be given an opportunity to present materials pertinent to the motion. Fed. R. Civ. P. 12(b); *Price v. Philpot*, 420 F.3d 1158, 1167 (10th Cir. 2005). The court has discretion in determining whether a motion to dismiss should be converted into a motion for summary judgment and can consider whether proffered, extra-pleading material will likely facilitate disposition of the action. *Estate of Conner by Conner v. Ambrose*, 990 F. Supp. 606, 619 (N.D. Ind. 1997). A

motion to dismiss should be treated as a motion for summary judgment where it facilitates disposition of the case. *See DePugh v. Clemens*, 966 F. Supp. 898, 900 (W.D. Mo. 1997).

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Shero v. City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007); Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986) (quoting *First Nat. Bank of Ariz. v. Citites Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592 (1968)). "'[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Id. (*quoting *U.S. v. Diebold, Inc.,* 369 U.S. 654,655, 82 S.Ct. 993, 994 (1962)).

Here, the Settlement Agreement is essential to resolution of this motion because it demonstrates the plaintiffs' release of claims. After the plaintiffs have been given an opportunity to respond, the record will demonstrate that there is no genuine issue for trial; the plaintiffs have released the claims they assert in this case.

IV. ARGUMENT.

The plaintiffs, represented by counsel, knowingly and voluntarily released their claims. The Settlement Agreement language is clear and unambiguous: the parties intended to settle *all* legal claims that might arise out of CCDC's (including its members and employees) use of RTD's fixed-route services, which term includes both bus and light rail. As a result, the release bars the present claims.

"A release is the relinquishment of a vested right or claim to the person against whom the claim is enforceable." *Truong v. Smith*, 28 F. Supp. 2d 626, 630 (D. Colo. 1998) (citing *Neves v. Potter*, 769 P.2d 1047, 1049 (Colo. 1989); RESTATEMENT (SECOND) OF CONTRACTS § 284 (1981)). "Agreements exculpating one contracting party from liability have been held enforceable." *Truong*, 28 F. Supp. 2d at 630 (citing *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989)). "Once a claim is released, the release bars the injured party from seeking further recovery." *CMCB Enterprises, Inc. v. Ferguson*, 114 P.3d 90, 96 (Colo. App. 2005) (citation omitted).

A valid and unambiguous release defeats the cause of action and the court must dismiss the claim. *Truong*, 28 F. Supp. 2d at 630 (citation omitted). If it is clear and unambiguous that the plaintiffs understood they were waiving their rights and in exchange for signing the release received valuable consideration, the court must dismiss the claims. *See Wysocki v. IBM*, 607 F.3d 1102, 1106-07 (6th Cir. 2010), *cert. denied*, 131 S.Ct. 945 (2011) (dismissing USERRA claim against former employee and enforcing release of claims).

Because a settlement agreement is a contract, the standard principles of contract interpretation apply. *See Truong*, 28 F. Supp. 2d at 630. "The primary goal of contract interpretation is to determine and give effect to the intent of the parties." *Ad Two, Inc. v. City & County of Denver*, 9 P.3d 373, 376-77 (Colo. 2000). Terms used by the parties are given their usual and customary meaning. *Level 3 Comm'ns v. Liebert Corp.,* 535 F.3d 1146, 1154 (10th Cir. 2008) (Colorado law requires applying "well-established principles of contractual interpretation"). Courts should determine the parties' mutual intent. *Id.*

(citations omitted). "In other words, common usage prevails, and strained constructions should be avoided." *Id.* (quotations omitted).

In dismissing claims barred by a release similar to Paragraph 4 in the Settlement Agreement, the Tenth Circuit emphasized the parties chose plain and specific language:

> By signing the release and dismissing the 1985 complaint with prejudice, the plaintiff surrendered any cause of action he had against the defendants . . . This conclusion is inescapable from the language of the release. In addition to stating that the plaintiff releases 'any and all actions, claims, demands and suits whatsoever which we now have or may have, known or unknown, developed or undeveloped,' . . . The plain and specific language chosen by the parties shows that the plaintiff released the very claim he now seeks to assert.

Fisher v. Owens-Corning Fiberglass Corp., 868 F.2d 1175, 1176 (10th Cir. 1989). In *Fisher*, as here, the purpose of the release was to settle all legal claims that might arise between the parties. *Id.* at 1177.

Here, the conclusion also is inescapable: CCDC, Reiskin, Howey and Lewis understood they released their claims, known or unknown. The plain and specific language the parties chose includes a release much broader than the original claims brought in that case, including claims that "arise out of, relate to or are based upon . . . use of RTD's fixed-route services". *See* Exhibit A, ¶ 4. The parties intended to resolve **all potential legal claims** that CCDC, its members, employees and affiliates could have raised at that time based on **any RTD fixed-route service**.

The released claims are not limited to fixed-route **bus** service. The usual and customary meaning of the term "fixed route" describes both bus and light rail service along a prescribed fixed route:

> *Fixed route system* means a system of transporting individuals . . . including, but not limited to, specified public transportation service, on which a vehicle is operated along a prescribed route according to a fixed schedule.

49 C.F.R. § 37.3; *see also* 42 U.S.C. § 12141(3); 42 U.S.C. § 12142(a) (defining discrimination for a public entity operating a fixed route system to include bus and light rail); *Boose v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 587 F.3d 997, 999 (9th Cir. 2009) (recognizing that a fixed route transit system includes bus and light rail).

The Complaint itself demonstrates that the customary meaning of "fixed route service" includes both bus and light rail. The Complaint relies on the same regulations and statutes that define fixed route services. *See* Complaint, ¶¶ 6, 31, 116 (citing 49 C.F.R. § 37.3 or 42 U.S.C. § 12141 *et seq*.). The Complaint acknowledges that RTD's light rail service **is** part of a fixed route system within the meaning provided in 49 C.F.R. § 37.3. *See* Complaint, ¶¶ 31, 116 (alleging RTD violated 42 U.S.C. § 12142(a) and 49 C.F.R. § 37.79, which require a public entity operating a fixed route system to purchase new light rail vehicles that are accessible).

The release is not limited to fixed-route bus service because there is no mention of the term "bus" in Paragraph 4 of the Settlement Agreement. *See Fisher*, 868 F.2d at 1176 (conclusion that plaintiff was unaware of claims covered by the release would make it impossible to settle any case). The plaintiffs are sophisticated litigants represented by experienced counsel. If they intended to limit the released claims to bus service, it was incumbent upon them to use the term "fixed-route bus service". CCDC cannot now claim it failed to appreciate the customary meaning of the term. In a recent letter, CCDC

specifically made the distinction between "fixed route service" and "fixed-route bus service" by requesting records unrelated to "fixed-route bus service". *See* Exhibit B.

If CCDC knew that it had pending claims related to light rail service, it should have included language specifically excluding those claims from the release. Importantly, by using the term "fixed route", the plaintiffs **did** negotiate a carve-out from the release – but it was related to paratransit service. The ADA requires transit operators to provide paratransit as a complement to fixed route service, whether the fixed route service is by bus or light rail:

> *Paratransit* means comparable transportation service required by the ADA for individuals with disabilities who are unable to use fixed route transportation systems.

49 C.F.R. § 37.3. Transit providers must provide paratransit service within a ¾ mile of either a bus route or light rail station. *See* 49 C.F.R. 37.131(a); *see also* 42 U.S.C. § 12143 (requiring fixed route operators to provide paratransit comparable to fixed route in terms of service area and response times). In contrast to a prescribed route available to the public, paratransit is demand responsive and available solely to disabled individuals who are unable to use fixed route services. *See* 49 C.F.R. §§ 37.125, 37.129. CCDC did not want to release potential claims related to RTD's paratransit service, and therefore, the parties inserted the term "fixed route."

Both sides – represented by counsel – clearly understood when they executed the Settlement Agreement that there were no potential claims concerning light rail service that needed to be excluded from the released claims. CCDC agreed to a warranty stating that it was unaware of any pending or potential claims related to the released claims. *See*

Exhibit A, ¶ 9.d. Even if CCDC was unaware, it does not change the scope of the released claims, because CCDC agreed to an unknown facts clause plainly releasing "claims of every nature and kind, known or unknown, suspected or unsuspected." Exhibit A, at ¶ 5.

Any claims that arose **after** the Settlement Agreement would not be barred, but the present claims **did** arise prior to that time. The Complaint states that the design of the light rail vehicles has not changed significantly since light rail service began approximately 20 years ago. Complaint, ¶ 8. Moreover, because each individual plaintiff allegedly rides light rail regularly, they should have known about any service-related problems in February 2014. *See* Complaint, ¶ 34 (Reiskin uses light rail 3 to 4 times each week), ¶39 (Lewis uses light rail ten times per month), ¶44 (Beaver uses light rail 8 times per week), and ¶49 (Howey uses light rail 1 to 2 times per month).

Lastly, individuals unaffiliated with CCDC may have claims not barred by the Settlement Agreement but CCDC (including its staff attorneys) should not be permitted to prosecute those claims on their behalf. For example, plaintiff Beaver did not execute the Settlement Agreement but he is a long-time CCDC employee. *See* Complaint, ¶ 22. CCDC released all claims "on behalf of their successors, officers, affiliates, subrogees, principals, agents, partners, employees, associates, attorneys, representatives and assigns" when it executed the Settlement Agreement. Exhibit A, ¶ 4. As an employee of CCDC, Beaver is bound by the Settlement Agreement, and therefore has released all claims "related to RTD's fixed-route services." While Beaver may have unreleased claims brought in his own capacity, CCDC may not represent him. Moreover, CCDC should not be permitted to add additional plaintiffs. In either circumstance, CCDC would be

improperly participating as de-facto attorneys (and presumably claim attorneys' fees) involving claims CCDC knowingly and voluntarily released.

In conclusion, CCDC is forcing RTD to defend yet another lawsuit – this time, alleging virtually the same issues the parties reasonably understood were resolved less than one year ago. CCDC, Reiskin, Howey and Lewis knowingly and voluntarily released their claims in exchange for valuable consideration. The plain and unambiguous language defining the released claims includes the claims alleged in this case. Accordingly, those claims are barred and for that reason, those claims should be dismissed. If the alleged class action were to survive without CCDC, Reiskin, Howey or Lewis, then it must proceed without any involvement from CCDC or its affiliates.

IV. CONCLUSION

For the reasons set forth above and pursuant to Fed. R. Civ. P. 12(b)(6) or in the alternative, Fed. R. Civ. P. 56, RTD respectfully requests that the complaint be dismissed with prejudice.

Respectfully submitted this 6th day of February 2015.

REGIONAL TRANSPORTATION DISTRICT

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This document was filed electronically. The original document and signature are on file in the undersigned attorney's office.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS was served on February 6, 2015 via email addressed to:

Kevin W. Williams kwilliams@ccdconline.org

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Colorado Cross-Disability Coalition

/s/ Jenifer Ross-Amato
Jenifer Ross-Amato
This document was filed electronically. The original document and signature are on file in the undersigned attorney's office.