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,
DIANA MILNE,
TINA MCDONALD,
JOSÉ TORRES-VEGA,
RANDY KILBOURN,
JOHN BABCOCK, 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 FOR PARTIAL DISMISSAL

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Regional Transportation District ("RTD") hereby moves to dismiss with prejudice the First and Second Claims (Violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act) brought by Plaintiffs Colorado Cross Disability Coalition ("CCDC"), Julie Reiskin, Douglas Howey and Jon Jaime Lewis and the Third Claim (Violation of C.R.S. § 13-17-101 *et seq*.) as to all plaintiffs.

I. INTRODUCTION.

In 2014, RTD made its best efforts to resolve its differences with Plaintiffs CCDC, Reiskin (CCDC's Executive Director), Howey, and Lewis to ensure that there was space available for passengers using wheelchairs to board RTD vehicles, thereby resolving these Plaintiffs' prior lawsuit alleging violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. At that time, these parties – represented by the same attorneys now representing them in this proceeding – agreed with RTD that light rail service did not have the same systemic concerns that CCDC identified with buses. However, all parties understood and expressly covenanted that they intended to resolve all claims arising out of RTD's "fixed route" services, which included bus and light rail. RTD justifiably believed this conflict with CCDC, Reiskin, Howey and Lewis was fully resolved when the parties executed a settlement agreement on February 20, 2014.

Nine months later, Plaintiffs filed this case, and RTD is in the same position it was prior to that settlement. Plaintiffs CCDC, Reiskin, Howey, and Lewis have annihilated the settlement agreement, wholly disregarding any benefit RTD was to receive from their release. Further, these Plaintiffs take no responsibility for any notice they reasonably should have had concerning the design of light rail vehicles, many of which are twenty years old and provide sufficient space for passengers using wheelchairs to board. Pursuant to Fed. R. Civ. P. 12(b)(6), RTD moves for a partial dismissal. The First and Second Claims by CCDC, Reiskin, Howey, and Lewis should be dismissed because their claims are barred by the release contained in that 2014 settlement agreement, in which they released all legal claims that may have been raised based on their use of RTD's fixed

route services, which includes light rail. In addition, the Third Claim should be dismissed as to all plaintiffs because C.R.S. § 13-17-101, *et seq.* does not provide a substantive claim for relief.

II. FACTS.

RTD, a political subdivision of Colorado, provides transit services to the Denver area. Amended Class Action Complaint ("Amended Complaint"), ECF No. 31, ¶¶ 38, 43. CCDC, a nonprofit corporation, advocates for the legal rights of the disabled and each of the individual plaintiffs are members or employees of CCDC. Amended Complaint, ¶¶ 19, 22, 26, 37. The parties share a lengthy legal history. *See, e.g.*, *Taylor v. RTD*, No. 00-cv-00981-2LW-CBS (D. Colo. 2001); *CCDC v. RTD*, No. 13-cv-02760-PAB-MJW (D. Colo. 2013); *Reiskin v. City & County of Denver*, No. 14-cv-02285-KMT (D. Colo. 2014).

In 2013, CCDC dismissed a lawsuit alleging that RTD prevented disabled passengers from accessing the wheelchair area of buses. *See CCDC v. RTD*, No. 13-cv-02760-PAB-MJW (D. Colo. 2013), ECF Nos. 1, 19-1. CCDC and individuals associated with CCDC specifically named in the suit – including Reiskin, Howey, and Lewis – executed a settlement agreement intending to fully resolve **all** claims. *See* Settlement Agreement dated February 20, 2014 ("Agreement"), attached as **Exhibit A**, at Recitals, ¶ 9.b.[1] In exchange for giving valuable consideration ($75,000 and certain

[1] The authenticity of the Agreement is undisputed. CCDC does not deny that it entered into a settlement agreement or that the document represented as such is that agreement. That said, when a motion to dismiss 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, and all parties must be given an opportunity to present materials pertinent to the motion. *See Price v. Philpot*, 420 F.3d 1158, 1167 (10th Cir. 2005).

changes in policies, training, and oversight), RTD received an assurance that its legal disputes were fully resolved. Agreement, ¶¶ 2, 3, 4.

The "Released Claims" in the Agreement are much broader than the specific claims alleged in that case: the Agreement releases claims "of every kind and nature related to RTD's fixed-route services that CCDC, Julie Reiskin, Douglas Howey, . . . 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." Agreement, ¶ 4. The Released Claims specifically included claims "which arise out of, relate to or are based upon: (i) use of RTD's fixed-route services." Agreement, ¶ 4. The Released Claims did not depend on the facts known at the time. Agreement, ¶ 5. Furthermore, CCDC provided a covenant not to sue or encourage litigation, which protected RTD from future litigation. Agreement, ¶ 6. Lastly, CCDC provided a warranty that it was 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." Agreement, ¶ 9.d. Despite the above releases and warranties, nine months later the plaintiffs filed the present lawsuit.

III. THE FIRST AND SECOND CLAIMS BROUGHT BY CCDC, REISKIN, HOWEY, AND LEWIS ARE BARRED BY THE RELEASE.

Pursuant to Fed. R. Civ. P. 12(b)(6), the First and Second claims by CCDC, Reiskin, Howey, and Lewis should be dismissed, because the release in the prior Settlement Agreement bars those 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)). "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). Here, Plaintiffs do not dispute that the parties entered into an agreement; rather, they dispute the scope of that agreement. Plaintiffs' Motion for Leave to File Amended Class Action Complaint ("Mot. Leave"), ECF No. 22, at 4.

A. The Release Includes All Potential Claims That Existed At That Time Based On Any RTD Fixed-Route Service.

Since a settlement agreement is a contract, the standard principles of contract interpretation apply. *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 ex rel. Manger of Aviation*, 9 P.3d 373, 376 (Colo. 2000). General waivers are knowing and voluntary and held to be valid. *Galera v. Johanns*, 612 F.3d 8, 14 (1st Cir. 2010); *Hyzak v. Greybar*, 537 P.2d 1089, 1091-92 (Colo. App. 1975). Where claims are not explicitly excluded, a general release must be enforced. *Air-Sea Forwarders, Inc. v. U.S.*, 166 F.3d 1170, 1171-72 (Fed. Cir. 1999); *Hyzak*, 537 P.2d at 1091. Courts dismiss claims based on a general release when the purpose was to settle all legal claims that might arise between the parties. *See e.g., Fisher v. Owens-Corning Fiberglass Corp*., 868 F.2d 1175, 1176-77 (10th Cir. 1989) (dismissing released claims based on "plain and specific language chosen by the parties"). An expansive release will be enforced regardless of whether the claims had ripened at the time of its execution. *In re WorldCom, Inc.*, 296 B.R. 115, 122 (S.D.N.Y. 2003). Although resolution of pending

claims is a primary motivation for a settlement, when the release makes clear that it is not limited to the kinds of claims raised in that case, it will bar later, unrelated claims that existed at that time. *McKissick v. Yuen*, 618 F.3d 1177, 1186 (10th Cir. 2010) (general release in severance agreement barred later securities fraud action). A court's failure to enforce a release based on a plaintiff's allegation that he was unaware of the claims covered by the release would make it impossible to settle any case. *Fisher*, 868 F.2d at 1176.

Here, the parties chose a plain and specific general release demonstrating their intent to resolve **all potential legal claims** that existed at that time based on **any RTD fixed-route services**. Agreement, ¶ 4. CCDC, Reiskin, Howey, and Lewis[2] all released claims known or unknown, whether or not brought within the case they sought to resolve. Agreement, ¶ 5. It is irrelevant whether CCDC raised claims involving light rail in the prior case because the scope of the release is not so limited. Moreover, it makes no sense that RTD would have agreed to a settlement and taken the chance that it would be back in litigation less than one year later. *See In re Worldcom*, 296 B.R. at 120 (release should never be interpreted as a starting point for renewed litigation).

Because the parties intended to remedy perceived problems specifically concerning buses – and believed there were not similar problems with light rail – the Non-monetary Terms (Agreement, ¶3) concern buses. Paragraph 3 of the Agreement

[2] Members of a nonprofit corporation are not liable for contracts for which the corporation is liable, except if a member expressly becomes a party to the contract. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859, 867 (Colo. 2004). Reiskin, Howey and Lewis each separately signed the release and accordingly, were a party to the contract.

contains one reference to the term "fixed-route bus service" and eight references to the term "fixed route bus(es)." Simply because Paragraph 3 was limited to buses does not mean that Paragraph 4 – the release – should be as well. In contrast to Paragraph 3, the release does not even mention the term "bus". Agreement, ¶ 4. As a result, at the time they executed the release, the Plaintiffs understood there was a distinction between fixed route service and fixed-route bus service. CCDC cannot now claim that it failed to appreciate this distinction. CCDC is a sophisticated litigant represented by experienced counsel.[3] *See Simpson v. Lykes Bros. Inc.*, 22 F.3d 601, 603 (5th Cir. 1994) (express language in release not set aside when plaintiff represented by competent counsel). If CCDC intended to limit the release to bus service, as the non-monetary terms were so limited, CCDC should have used the term "fixed-route **bus** service" as it was used in Paragraph 3 or explicitly excluded light rail from the release.

Even now, CCDC still understands the difference between fixed route service in general and fixed-route bus service. In a recent letter requesting records unrelated to "fixed-route bus service", CCDC specifically made the same distinction between "fixed route service" and "fixed-route bus service" that the Agreement makes. *See* Letter dated February 3, 2013 and subsequent correspondence, attached as **Exhibit B**. Accordingly, the plain language of the Agreement demonstrates that all parties understood and intended the release to include light rail and to have resolved all potential legal claims concerning use of RTD's fixed route services.

[3] CCDC counsel Kevin Williams and Andrew Montoya have represented CCDC and other plaintiffs in other important litigation concerning the ADA. *See e.g. Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205 (10th Cir. 2014).

B. The Usual And Customary Meaning Of "Fixed Route" Includes Light Rail.

Any other interpretation of "fixed route" defies the term's usual and customary meaning. Terms used by the parties are given their usual and customary meaning. *Level 3 Comm'ns, LLC v. Liebert Corp.,* 535 F.3d 1146, 1154 (10th Cir. 2008). "[C]ommon usage prevails, and strained constructions should be avoided." *Id.* (quotations omitted). Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA") and the ADA's implementing regulations describe "fixed route" to include public transportation along a prescribed fixed route according to a fixed schedule. *See* 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 rail). Courts interpreting these statutes and regulations recognize that a fixed route system includes bus and light rail. *See, e.g., Boose v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 587 F.3d 997, 999 (9th Cir. 2009). Because CCDC relies upon this same statutory and regulatory framework for its claims in this case, CCDC cannot now claim it failed to appreciate the customary meaning of the term "fixed route service". *See* Amended Complaint, ¶¶ 8, 43, 172 (citing 49 C.F.R. §§ 37.3, 37.79 and 42 U.S.C. § 12141 *et seq*.) (requiring public entity operating a fixed route system to purchase accessible rail vehicles).

Importantly, CCDC appreciated that the term "fixed route" excluded at least one type of service because CCDC specifically negotiated to exclude claims arising out of RTD's paratransit service. The customary meaning of the term "fixed route" does not include paratransit service, which vehicles do not run along a fixed route. The ADA instead requires transit operators to provide paratransit as a complement to fixed route

service within a ¾ mile of either a bus route or rail station for disabled individuals who are unable to use fixed route service. *See* 42 U.S.C. § 12143; 49 C.F.R. §§ 37.131(a), 37.125, 37.129. By negotiating such an exclusion, CCDC demonstrated that it knew the ordinary meaning of the term "fixed route" and could have excluded claims arising out of light rail service, as it had done for paratransit, if CCDC had so intended.

C. The Light Rail Claims Existed At The Time The Agreement Was Executed.

The conduct about which Plaintiffs are complaining took place before the release was executed, and therefore, the claims existed at that time. *See Applied Genetics Intern., Inc. v. First Affiliated Securities, Inc.*, 912 F.2d 1238, 1245 (10th Cir. 1990) (release covers matters in existence at time release was executed). The Amended Complaint states that RTD purchased light rail vehicles with an inaccessible design in violation of 49 C.F.R. §§ 38.71, 38.77(c), 38.83(a)(1); and that RTD's policies, practices and procedures allow non-disabled passengers in the wheelchair space in violation of 49 C.F.R. § 37.167(j), 37.173, 38.75(a), 38.75(b). Amended Complaint, ¶¶ 172-91; Scheduling Order, ECF No. 37, at § 3.a. The release encompasses those matters because they existed at the time the Agreement was executed. If the claims were not in existence at that time, that fact is not readily apparent from the Amended Complaint and therefore, those claims fail to state a claim for relief.

A general release ordinarily will release present but not future claims. 29 Williston on Contracts § 73:10 (4th ed. 2014). In determining the scope of a general release, the question is whether the plaintiff is knowingly giving up the right to sue on some claims, or all claims that are in the general release that are predictable. *See Wagner v. NutraSweet*

Co., 95 F.3d 527, 533 (7th Cir. 1996) (when release is broadly worded, plaintiff is giving up on claims that could arise under any law). A general release typically covers all claims of which a party has actual knowledge or that could have been discovered upon reasonable inquiry. *Hampton v. Ford Motor Co*., 561 F.3d 709, 715 (7th Cir. 2009).

Here, CCDC, Reiskin, Howey, and Lewis either had actual knowledge of the claims the release covered or they could have discovered those claims on reasonable inquiry. The design of the light rail vehicles has not changed significantly since light rail service began approximately twenty years ago. Amended Complaint, ¶¶ 10, 105. Reiskin experienced "nearly all of the problems described in [the] Amended Class Action Complaint, both before and after the last twelve months."[4] Amended Complaint, ¶ 48. Given that each regularly uses light rail, they cannot now claim they were unaware of the conduct upon which the Amended Complaint is based. Amended Complaint, ¶¶ 46, 53, 65. CCDC, Reiskin, Howey, and Lewis had notice. Moreover, the Amended Complaint identifies no specific, new facts that occurred after February 2014 that would give rise to the claims alleged. As a result, the scope of the release must include the light rail claims.

CCDC seems to believe that its light rail claims are outside the release because the conduct took place both before and after the date of execution. Mot. Leave, 4. If critical facts supporting the legal claims occurred **after** the Agreement, the Amended Complaint does not make that apparent. The allegations are so conclusory that they do

[4] Plaintiff Lewis experienced "**most**" and Howey experienced "**many**" of the problems. Amended Complaint, ¶¶ 55, 67. The Amended Complaint does not explain what Plaintiffs mean by the variations between "nearly all," "most", or "many" referring to problems experienced by Reiskin, Lewis and Howey.

not meet the *Twombly/Iqbal* standard and therefore, fail to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp.v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations must inform the defendant of the actual grounds of the claim. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012); *Robbins v. Oklahoma,* 519 F.3d 1242, 1248 (10th Cir. 2008). The complaint must "make clear exactly **who** is alleged to have done **what** to **whom**, to provide each individual with fair notice as to the basis of the claims . . . ." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) (quotations omitted) (emphases in original). In order to survive a motion to dismiss, a complaint must identify the relevant legal obligations, point to specific statutory or regulatory provisions giving rise to those legal obligations, explain what the defendant must do to comply, identify how the defendant violated those obligations, and provide sufficient, detailed facts. *See Christenson v. Citimortgage*, 2014 WL 4637119, at *7, No. 12-cv-02600-CMA-KLM (D. Colo. Sept. 16, 2014) (Not Reported) (dismissing claims because of a "dearth of factual support" concerning systemic violations).

Here, Plaintiffs allege serious systemic violations but have provided virtually no detailed facts as to how the relevant legal provisions give rise to the claimed legal obligations, such as who did what to whom and when. Despite having had an opportunity to amend the Complaint, Plaintiffs allege only that unspecified "problems" occurred "both before and after the last twelve months"; such vague and conclusory language makes it impossible for RTD to defend itself, namely to identify what conduct occurred before or after the effective date of the Agreement. Amended Complaint, ¶¶ 48, 55, 67; *see also* Mot. Leave, at 4 ("most" but not all of the Plaintiffs encountered discrimination). Plaintiffs

identify one incident with a specific date and other identifying facts but neither Reiskin, Howey, nor Lewis were involved. Amended Complaint, ¶ 81. The Amended Complaint does not make clear whether any new facts occurred after the Agreement that would demonstrate that CCDC, Reiskin, Howey, and Lewis would not have had notice of these matters at the time they executed the release. Accordingly, either the claims existed at the time the release was executed, or Plaintiffs have failed to state a claim for relief.

D. Allowing CCDC To Proceed Defeats The Intent Of The Agreement.

By its actions and words, CCDC appears to believe that notwithstanding the Agreement, which includes a covenant not to sue or encourage litigation (Agreement, ¶ 6), CCDC can proceed with this case by merely adding more plaintiffs, all of which have some affiliation as members, directors, or employees of CCDC.[5] *See* Mot. Leave, at 3; Letters to RTD attached collectively as **Exhibit C**. Allowing CCDC to proceed with this case – or to represent certain plaintiffs – renders the Agreement, or any settlement agreement that CCDC executes, meaningless. *See In re WorldCom*, 296 B.R. at 120 (release should not lead to more litigation). Colorado interprets a contract by giving "effect to all provisions so that none will be rendered meaningless." *FirsTier Bank, Kimball, Neb. v. F.D.I.C.*, 935 F. Supp. 2d 1109, 1124 (D. Colo. 2013) (citations omitted).

CCDC released all claims "on behalf of their successors, officers, **affiliates**, subrogees, principals, agents, partners, **employees**, **associates**, **attorneys**, representatives and assigns." Agreement, ¶ 4 (emphasis added). By participating in this case as either a party or an attorney, or even behind the scenes with substitute plaintiffs

[5] Reiskin, Lewis, Beaver are CCDC employees. Amended Complaint, ¶¶ 19, 22, 24. The other Plaintiffs are members. Amended Complaint, ¶¶ 26, 28, 30, 32, 34, 36.

drawn from its membership, CCDC would be improperly participating – and presumably claiming attorneys' fees – involving claims CCDC knowingly and voluntarily released and covenanted not to encourage. That is a perverse result that disfavors settlement and discourages RTD from entering into a settlement agreement with CCDC in the future. *Giles v. The Inflatable Store, Inc.*, No. 07-cv-00401-PAB-KLM, 2009 WL 801729, at *5 (D. Colo. Mar. 24, 2009) (Not Reported) (recognizing law favors resolution of disputes by settlement rather than by litigation); *Smith v. Zufelt*, 880 P.2d 1178, 1185 (Colo. 1994) (defer to results that encourage settlement of disputes). CCDC, its employees, affiliates, attorneys and associates must be dismissed from this case both as parties and counsel, and must not be permitted to participate in or encourage litigation over the released claims.

V. THERE IS NO SUBSTANTIVE CLAIM PURSUANT TO C.R.S. § 13-17-101.

Pursuant to Fed. R. Civ. P. 12(b)(6), the Third Claim should be dismissed as to all Plaintiffs. A claim for attorneys' fees under Colo. Rev. Stat. § 13-17-101 cannot be brought as a substantive claim. *Purzel Video GmbH v. St. Pierre*, 10 F.Supp.3d 1158 (D. Colo. 2014) (citing *Philbosian v. First Financial Securities Corp.,* No. 82–K–773, 1983 WL 1409, at *2 (D. Colo. Feb. 9, 1983) ("[T]he intent and application of § 13–17–101 et seq. is not to create a substantive claim for relief on its own. It is merely grounds for the award of monetary damages after the substantive claims have been resolved which can be set forth in the prayer for relief.")). As a result, the Third Claim should be dismissed as to all Plaintiffs for failure to state a claim.

VI. CONCLUSION

CCDC, Reiskin, Howey and Lewis are forcing RTD to defend yet another lawsuit with claims RTD reasonably understood were resolved less than one year ago. These Plaintiffs knowingly and voluntarily released their claims in exchange for valuable consideration. The common and ordinary language defining the Released Claims includes the claims alleged in this case, and those claims existed at the time CCDC, Reiskin, Howey and Lewis executed the Agreement. Accordingly, the First and Second Claims by CCDC, Reiskin, Howey, and Lewis 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 whatsoever from CCDC, its employees, affiliates, attorneys and associates. Lastly, the Third Claim should be dismissed as to all Plaintiffs because the Colorado statute does not provide a substantive claim. For the reasons set forth above and pursuant to Fed. R. Civ. P. 12(b)(6), RTD respectfully requests that the claims identified in this motion be dismissed with prejudice.

Respectfully submitted this 4th day of March 2015.

REGIONAL TRANSPORTATION DISTRICT

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS was served on March 4, 2015 via email addressed to:

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Andrew C. Montoya amontoya@ccdconline.org

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.