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, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT,

Defendant.

PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs, by and through the undersigned counsel, hereby submit this Motion for Leave to File Second Amended Class Action Complaint, and in support thereof state:

CERTIFICATE OF COMPLIANCE WITH D.C.COLOLCivR 7.1A

Undersigned counsel conferred with RTD's counsel during a telephone call on March 3, 2015, at which time undersigned counsel informed counsel for RTD that Plaintiffs intended to file a Motion for Leave to File a Second Amended Class Action Complaint because other individuals who use wheelchairs and mobility devices had complaints similar to those of the

existing plaintiffs in the lawsuit concerning whether RTD's light rail trains comply with applicable disability discrimination statutes and regulations , and that those individuals had now retained Plaintiffs' counsel. Counsel for Defendant responded that unless she saw the actual complaint Plaintiffs intended to file, she could not respond as to whether Defendant would oppose the motion or not. By email, dated March 9, 2015, undersigned counsel also made counsel for Defendant aware that allegations would be added to the **Second Amended Class Action Complaint** to address the issue raised in the **Motion to Dismiss** [#19] that the allegations by the Individual Plaintiffs were not specific enough. Undersigned counsel has not heard back from counsel for the Defendant about that. As a result, Plaintiffs assume Defendant opposes this motion.

BACKGROUND

On March 4, 2015, RTD filed **Defendant RTD's Motion for Partial Dismissal** (the "**Motion**") [#39]. The **Motion** seeks only to dismiss the ADA and Section 504 claims brought by Plaintiffs Colorado Cross-Disability Coalition ("CCDC"), Julie Reiskin, Douglas Howey and Jon Jaime Lewis (there are currently six other Individual Plaintiffs in this lawsuit) and the Third Claim (Violation of Colo. Rev. Stat. § 13-17-101 *et seq.* as to all Plaintiffs.) Plaintiffs filed their **Complaint** on November 18, 2014 [#1]. On February 6, 2015, Defendant filed **Defendant RTD's Motion to Dismiss or, in the Alternative, for Summary Judgment** ("**First Motion**") [#19]. On February 17, 2015, Plaintiffs submitted their **Amended Class Action Complaint** [#30]. This Court denied Defendant's **First Motion** as moot. The Court held that the **Amended Class Action Complaint** was the operative complaint, and that the **First Motion** was directed at a complaint that had been supplanted and superseded. *See* **Order** [#29] at 3-4. Plaintiffs'

Amended Class Action Complaint added five additional individual Plaintiffs to the four original Individual Plaintiffs and one organizational Plaintiff, CCDC, who were all identified in the original **Complaint**. Now, Plaintiffs have discovered an additional four individuals who raise the same claims and issues that the original Plaintiffs and those in the first **Complaint** and **Amended Class Action Complaint** raised with respect to whether RTD's light rail service complies with Title II of the Americans with Disabilities Act ("ADA" or Title II"), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794(a) *et seq.* and a Colorado claim requesting that Defendant pay Plaintiffs' reasonable attorneys' fees and costs for having to respond to these frivolous and useless motions to dismiss. These individuals have been in contact with Plaintiffs' counsel, and have decided to retain them in this case. Altogether, this lawsuit (the **Amended Class Action Complaint**, and, if accepted, the **Second Amended Class Action Complaint)** identifies ten individuals who took no part in signing the settlement agreement pertaining to RTD's fixed route bus system whose claims against that fixed route bus system ended in February 2014.[1] Defendant has now filed its **Motion**, albeit a **Motion for Partial Dismissal** [#39]. The thrust of the **Motion** appears to be RTD's misguided belief that a settlement agreement signed in February of 2014 by some of the Plaintiffs involved in this lawsuit with respect to RTD's fixed route bus system somehow prevents those four Plaintiffs from raising claims against RTD's light rail system, an entirely different service that is the subject of the instant lawsuit. For reasons that will be discussed in

[1] In addition to the five individuals Plaintiffs added in the **Amended Class Action Complaint** and the four individuals Plaintiffs seek to add in the **Second Class Action Complaint**, another Plaintiff, William Joe Beaver, was listed as a Plaintiff in the original **Complaint**. Mr. Beaver was not a signatory to the settlement agreement about which Defendant complains.

Plaintiffs' response to the **Motion for Partial Dismissal (**if Plaintiffs must even respond after the Court rules on the instant motion), quite simply, Defendant is factually wrong concerning what that settlement agreement covered, but, for purposes of this **Motion for Leave to File Second Amended Class Action Complaint**, Defendant's second attempt to dismiss claims should also be moot. It supplants the **Amended Complaint**. Besides that, it, like the original **Complaint** [#1], addresses RTD's light rail service, and not its fixed route bus service (the subject matter of the February 2014 settlement), it addresses claims brought by the four individuals who were signatories to the prior settlement agreement about RTD's fixed route bus system that ended at the time they signed that settlement agreement, and it seeks to add additional individuals who are not parties to the lawsuit that resulted in the settlement agreement pertaining to RTD's fixed route bus service.

Perhaps recognizing that the **First Amended Class Action Complaint** [#30] included six individual Plaintiffs who were not in any way involved in the fixed route bus system lawsuit settlement, and recognizing that if this **Motion for Leave to File Second Amended Class Action Complaint** is granted, an additional four individual Plaintiffs will be added who also have nothing to do with the prior settlement, Defendant has scaled back on its **Motion** considerably and only asks the court for a partial dismissal.

There are numerous reasons to deny RTD's **Motion**, which will be addressed in Plaintiffs' response to the **Motion**, if this Court even feels it is necessary for Plaintiffs to file a response, but also, as said, should this Court grant this **Motion for Leave to File Second Amended Class Action Complaint**, Defendant's **Motion** would be moot. In addition, the fact that Plaintiffs now seek to add several additional individuals who allege that they experienced

the same unlawful, discriminatory problems on light rail, coupled with the fact that one of the individuals named in the original complaint, William Joe Beaver, was not a signatory to the settlement agreement means that even if RTD is successful in its **Motion** (which Plaintiffs argue it should not be), this case will still go forward.

In addition, even if RTD is correct, the settlement agreement at issue only pertains to claims up to and including the time of the settlement agreement, and not any claims occurring after that time. The settlement agreement itself says that the plaintiffs in that agreement released claims "from the beginning of time through the date CCDC executes this agreement." The released claims of the individuals who were parties to the prior lawsuit ended in February of 2014 (*see* Settlement Agreement, attached as Exhibit A to Defendant's **Motion** [#39-1] at p. 8 of the settlement agreement, p. 9 of the exhibit ("Any claims that arise after the Effective Date are not included in the Released Claims")), and the operative Complaint specifically alleges discriminatory events occurring on light rail trains after February 20, 2014 (*see, e.g.* **Amended Class Action Complaint** [#30] at ¶¶ 1, 48, 55, 67 and pp. RTD-CCDC/LR 000011-13). *See also Wright v. Sw. Bell Tel. Co*., 925 F.2d 1288, 1293 (10th Cir. 1991) (release is insufficient to release future claims about which neither party knew). It is difficult to comprehend why RTD would waste so much time with motions to dismiss when the claims in this case will go forward, regardless of whether RTD is victorious on its Motion.[2]

ARGUMENT

[2] On four separate occasions, undersigned counsel has made counsel for RTD aware that its motions to dismiss would do nothing to prevent this case from going forward, were nothing but a waste of time and were frivolous. *See* Exhibits A-C filed with this motion. That is why Plaintiffs have requested this court award them fees and costs for having to spend time arguing against Defendant's motions to dismiss, which do nothing to prevent this lawsuit.

Under Rule 15, Federal Rules of Civil Procedure, Plaintiffs may amend their Complaint once as a matter of course within 21 days of serving it, or 21 days after service of a responsive pleading or a motion under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). Plaintiffs did so when they filed their **Amended Class Action Complaint** [#30]. "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave" (Fed. R. Civ. P. 15(a)(2)); *see also Foman v. Davis*, 371 U.S. 178,182 (1962) ("Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded."). Defendant has not provided its consent to this filing. Although the parties' counsel did confer regarding the filing of this **Second Amended Class Action Complaint**, Defendant's counsel has conditioned any consent on reviewing the **Second Amended Class Action Complaint** in advance. Undersigned counsel has found no authority and, despite a specific request from undersigned counsel, counsel for Defendant has provided no authority stating that Plaintiffs' counsel must provide the amended complaint to opposing counsel in advance of filing it. The local rule only requires that counsel discuss the motion and confer regarding whether it will be opposed or not. Undersigned counsel explained to counsel for the Defendant that Plaintiffs were seeking to add individuals in the **Second Amended Class Action Complaint** who had experienced the same alleged discriminatory violations of RTD's light rail service. Undersigned counsel also explained to counsel for the Defendant that it was adding more specificity to the individual allegations of Individual Plaintiffs that counsel for the Defendant found lacking in the **Amended Class Action Complaint.** That is what the newly amended complaint seeks to do. Undersigned counsel conferred with counsel for the Defendant about these exact issues.

In addition, Plaintiffs seek to add parties to the **Second Amended Class Action Complaint** pursuant to Rule 20, Federal Rules of Civil Procedure. As set forth below, Plaintiffs meet all of the requirements for "Permissive Joinder of Parties" under Rule 20.

1. Leave to Amend

As said, leave to amend "shall be freely given when justice so requires." *Id.*;

> The Court must heed Rule 15's mandate that leave is to be "freely given when justice so requires." Fed. R. Civ. P. 15(a); *Foman*, 371 U.S. at 182; *Duncan [v. Manager, Dept. of Safety, City and County of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005)] at 1315. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182. Leave to amend should be refused "only on a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Duncan*, 397 F.3d at 1315; *see Foman*, 371 U.S. at 182.

S.E.C. v. Misner, No. 07-cv-01640-REB-MEH, 2008 WL 638387, at *2 (D. Colo. Mar. 5, 2008) (Judge Blackburn approving Magistrate Judge Hegarty's recommendation that the complaint at issue be amended in part); *see also MKBS, LLC v. Fin. Associates, Inc*., No. 10-CV-01326-REB-KLM, 2010 WL 4929028, at *1 (D. Colo. Nov. 30, 2010) (this Court, applying *Foman*, granted plaintiff's motion for leave to file a second amended complaint). As noted above, those individuals who were signatories to the prior agreement have claims concerning RTD's light rail service that have occurred since that agreement was signed. Even according to the terms of the fixed bus route settlement agreement, nothing prevents these plaintiffs from bringing these claims after that agreement was signed.

In addition, this Court should not "delve deeply into the merits of Plaintiff's claim at this stage of the proceedings." *MKBS, LLC*, 2010 WL 4929028, at *2. "At this stage, it is simply not appropriate for the Court to weigh the facts and evidence to resolve any disputes between the

parties." *Id.* (citing *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)). "The Court's sole function now is to determine whether Plaintiff has provided a plausible basis for liability if its version of the facts is assumed to be true." *Id.*

As said, "[u]nder Fed. R. Civ. P. 15(a)(2), '[r]efusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of the amendment.'" *Whitington v. Ortiz*, 307 Fed. Appx. 179, 196 (10th Cir. 2009) (citing *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). Absent such a showing by the party opposing amendment, denial of a motion for leave to file an amended complaint constitutes an abuse of discretion. *See Whitington*, 307 Fed. Appx. at 196; *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007). "The purpose of the Rule is to provide litigants 'the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006). Even if Defendant's **Motion** is successful, it will prevent four of the fourteen potential Plaintiffs from bringing claims that existed prior to February 2014. All of the other Plaintiffs' claims should go forward, and all of the claims of the four Plaintiffs, at whom the **Motion** is directed, after February 2014 should go forward.

In addition, the Federal Rules of Civil Procedure, Rule 20, allows for "Persons Who May Join or Be Joined." Fed. R. Civ. P. 20(a). According to that rule, "[p]ersons may join in one action as plaintiffs, if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or

occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." *Id*.

As set forth in the proposed **Second Amended Class Action Complaint**, the new Plaintiffs claims are nearly identical to those of the Plaintiffs already in the case. Their claims, like the claims of the Plaintiffs in the **Amended Complaint** arise out of the exact same factual circumstances -- the fact that RTD's light rail trains do not meet the minimum requirements of the regulations required by the Federal Transit Administration and the fact that RTD's light rail operators do not follow the requirements of those same regulations -- and they seek the same injunctive relief arising out of the same series of transactions and occurrences committed by RTD. Therefore, this Court should join these individuals as Plaintiffs in this case.

2. Undue Prejudice

"[P]rejudice under Rule 15 'means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party[,]'" *Texas Instruments, Inc. v. BIAX Corp.*, 2009 WL 3158155, No. 07-cv-02370-WDM-MEH, at *3 (D. Colo. September 28, 2009) (quoting Rule 15), and is "the most important . . . factor in deciding a motion to amend the pleadings[.]" *Gorsuch, Ltd. v. Wells Fargo Nat'l Bank Ass'n*, No. 11-cv-00970-PAB-MEH, 2013 WL 6925132 *14 (D. Colo. Dec. 13, 2013). "Perhaps the most important factor listed by the Court and the most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter his pleading." 6 Wright, Miller & Kane, Federal Practice and Procedure § 1487 (2d ed. 1990).

There is no prejudice to the Defendant here. This case is in its very early stages and the parties have just exchanged their Rule 26(a)(1) disclosures. Discovery has just begun. Even if

Defendant is successful in its Motion, the case will go forward, and Defendant will have to go through the exact same process for all allegations made against its light rail system by the signatories to the settlement agreement at issue in the Motion, and with respect to the other five Individual Plaintiffs added when the **Amended Complaint** [#30] was accepted for filing, and possibly the claims of those four new Individual Plaintiffs who seek to join in this litigation now. Plaintiffs simply seek to add the substantially similar claims of the four new Individual Plaintiffs to this case, which would preserve the Court's, Plaintiffs' and Defendant's resources rather than forcing the Court to manage, and Defendant to separately defend against, separate -- albeit nearly identical -- suits.

3. Undue Delay, and Bad Faith or Dilatory Motive

In *Foman,* the Supreme Court listed "undue delay" as one of the justifications for denying a motion to amend. *Foman,* at 182. While "[p]rejudice and timeliness are obviously closely related," *Minter v. Prime Equipment Co*., 451 F.3d 1196, 1205 (10th Cir. 2006), they are analytically distinct. There is no delay, bad faith, or dilatory motive here. As explained above, the prior settlement agreement dealt specifically with buses and not light rail trains, and the signatories to the original agreement have brought claims against light rail that occurred after the signing of that agreement. In addition, on four separate occasions, undersigned counsel attempted to prevent counsel for Defendant from filing these useless motions to dismiss. Plaintiffs' Amended Complaint added the substantially similar claims of additional individuals, none of whom were signatories to the prior agreement. By the instant motion, Plaintiffs seek to add the substantially similar claims of four *more* individuals who, since the filing of the Amended Complaint, contacted and retained Plaintiffs' counsel to bring their claims.

Also, given the posture of the case -- prior to the beginning stages of discovery -- Plaintiffs have not caused delay, undue or otherwise.

4. Futility

Amendment of a complaint may also be denied if the amendment sought would be futile. *Frank*, 3 F.3d at 1365; *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) (citing *Lind v. Aetna Health, Inc*., 466 F.3d 1195, 1199 (10th Cir. 2006)). "A district court is clearly justified in denying a motion to amend as futile only if the proposed amendment cannot withstand a motion to dismiss or otherwise fails to state a claim." *Darris v. Pugliese*, No. 08-cv-02624-PAB-KMT, 2009 WL 3162630 *2 (D. Colo. Sept. 30, 2009). Here, Plaintiffs' proposed **Second Amended Class Action Complaint** seeks to add individuals who, like the Plaintiffs in the original **Complaint** and first **Amended Class Action Complaint**, allege that they experienced unlawful discrimination on the basis of their disabilities by RTD in the provision of its light rail service. Plaintiffs' **Amended Class Action Complaint** (now the operative complaint, *see* **Order** [#29] at 3) also added allegations discussing issues that occurred since the filing of the original Complaint. The proposed **Second Amended Class Action Complaint** adds additional details about the current Plaintiffs' allegations to address an issue raised in Defendant's latest **Motion** at pp. 10-11 and includes allegations related to the four individuals who seek to join this case as Plaintiffs. Each and every Plaintiff provides sufficient and detailed allegations of their experiences on repeated trips using light rail. Such amendment is not futile.

5. Failure to Cure Deficiencies by Amendments Previously Allowed

Amendment may also be denied if the party seeking to amend fails by amendment to cure deficiencies in the complaint previously allowed. *Frank*, 3 F.3d at 1365. This justification for denying leave to amend does not apply in this case.

CONCLUSION

None of the reasons for denying leave to amend under Rule 15(a)(2), United States Supreme Court precedent and Tenth Circuit precedent exist in this case, and, therefore, leave to amend should be granted. The grounds for granting joinder of parties in Rule 20 militate toward adding these Plaintiffs.

WHEREFORE, Plaintiffs respectfully request that this Court grant this Motion for Leave to File the Second Amended Class Action Complaint, accept the Second Amended Class Action Complaint (filed with this motion) for filing, and order any other relief that this Court deems necessary, proper and just.

DATED: March 10, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

Jenifer Ross-Amato
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Mindy Marie Swaney
mindy.swaney@rtd-denver.com

/s/ Lauren Haefliger
Colorado Cross-Disability Coalition
Legal Program Assistant