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' RESPONSE TO DEFENDANT RTD'S MOTION TO STAY DISCOVERY

Plaintiffs, by and through the undersigned counsel, hereby submit this **Response to Defendant RTD's Motion to Stay Discovery** ("**Response**") and in support thereof state:

INTRODUCTION

The Regional Transportation District ("RTD") filed **Defendant RTD's Motion for Partial Dismissal ("Motion for Partial Dismissal")** [#39] on March 4, 2015, and filed **Defendant RTD's Motion to Stay Discovery** ("**Motion**") [#41] on March 5, 2015.

These motions relate to each other because RTD asserts discovery in this case should be stayed until the **Motion for Partial Dismissal** is decided. For a number of reasons set forth in this **Response**, the **Motion** should be denied and discovery in this case should go forward:

- For the reasons set forth in **Plaintiffs' Response to Defendant RTD's Motion for Partial Dismissal** [#47]**,** the **Motion for Partial Dismissal** should be denied in its entirety, meaning there should be no impediment to moving forward to discovery in this case.
- The **Scheduling Order** [#37], entered February 25, 2015, places strict deadlines on the parties' discovery schedule, and a Trial Planning Conference date has already been set. Plaintiffs are in agreement with those deadlines, assuming there is no stay of discovery.
- RTD has already expressed concern that it will not be able to conduct all discovery needed in this case (in its version of the proposed Scheduling Order, it proposed that all depositions of all Plaintiffs needed to be ten hours long, *see* **Scheduling Order** at 19, and RTD has already put the Court on notice that it intends to take the depositions of all identified Plaintiffs -- currently, nine individuals and an organization --with an additional four plaintiffs, if this Court grants **Plaintiffs' Motion for Leave to File Second Amended Class Action Complaint** [#43], filed March 10, 2015, and all persons identified in Plaintiffs' Rule 26(a)(1) Disclosures.

See **RTD's Response to Plaintiffs' Motion for Leave to File Second Amended Class Action Complaint** [#45] at pp. 6-8.

- Plaintiffs have captioned this case a class action. Plaintiffs do intend to seek class certification from this Court, after some discovery is conducted. In order for this case to move on in an orderly fashion, briefing on the issue of class certification will need to occur in the midst of discovery.
- Although RTD has suggested in its **Motion for Partial Dismissal** that it would like to pare down the issues in this case, discovery is the best method by which to do so. Recognizing the instant **Motion** is pending, Plaintiffs have not sent written discovery yet, but Plaintiffs are doing so soon with a Rule 34 Inspection of Premises request. The question of whether RTD's light rail trains' physical dimensions comply with the Department of Justice regulations is one of the central concerns of this case. It seems this case could be pared down by having the parties (and, if necessary, the Court) take and observe measurements of RTD's trains to see if they comply with those regulations. *See* 49 C.F.R., pt. 38, and, in particular, § 38.1 ("This part [38] provides minimum guidelines and requirements for accessibility standards in part 37 of this title for transportation vehicles required to be accessible by the Americans With Disabilities Act (ADA) of 1990 (42 U.S.C. 12101 et seq.") (emphasis added)); § 38.77(c) (on light rail trains, requiring "a route at least 32 inches wide so that at least two wheelchair or mobility aid users can enter the

vehicle and position the wheelchairs or mobility aids in areas, each having a minimum clear space of 48 inches by 30 inches, which do not unduly restrict movement of other passengers. Space [the 30 inch by 48 inches] to accommodate wheelchairs and mobility aids may be provided within the normal area used by standees and designation of specific spaces is not required."] Defendant's **Motion** stands in the way of this case moving forward to address such simple discovery.

- The parties cannot go forward with discovery with respect to all others involved in the case until RTD's **Motion for Partial Dismissal** is decided, since RTD seems to want to depose and otherwise conduct discovery regarding every Plaintiff and every individual identified in Plaintiffs' disclosures. *See* **RTD's Response to Plaintiffs' Motion for Leave to File Second Amended Class Action Complaint** at 6-8. In that response, RTD asserts that it:

> does not have access to the witnesses other than through depositions. Plaintiffs have now identified twenty-one individuals who have allegedly experienced problems with RTD light rail. With the Second Amended Complaint, there would be fourteen Plaintiffs if none are dismissed. In addition, Plaintiffs' Rule 26(a)(1) disclosures identify seven more individuals who are CCDC members but not Plaintiffs and who purportedly have similar experiences or are willing to test the accessibility of light rail trains.

Id. That is not accurate. There is simply nothing stopping RTD from engaging in written discovery or scheduling the depositions with respect to

the seventeen individuals who have allegedly experienced problems with the RTD light rail system.

ARGUMENT

I. Because Defendant RTD's Motion for Partial Dismissal Should Be Denied in its Entirety, This Court Should also Deny RTD's Motion for Stay of Discovery.

RTD claims in its **Motion for Partial Dismissal** that the claims of three individual Plaintiffs, who use wheelchairs and/or similar mobility devices, and the claims of CCDC should be dismissed because CCDC and these individuals signed a release to a settlement agreement ("**Agreement**") [#39-1], which RTD argues relieves RTD of liability in the case at bar, with respect to the claims of four of the fourteen putative plaintiffs up to and including February 2014. Plaintiffs set forth reasons why RTD's **Motion for Partial Dismissal** should be denied in their **Response to Defendant RTD's Motion for Partial Dismissal**, filed on March 25, 2015. Primary among these reasons is the fact that the Settlement Agreement at issue in that case dealt strictly with RTD's fixed route bus system, and the case at bar deals strictly with RTD's light rail system, which are two completely different services with two completely different regulatory schemes. *Compare, e.g.*, 49 C.F.R., pt. B, §§ 38.21-38.39 (which provides the regulations under the ADA for buses and vans) *with* 49 C.F.R., pt. D, §§ 38.71-38.87 (which provides the regulations under the ADA for light rail vehicles). Nevertheless, even if this Court grants RTD's **Motion for Partial Dismissal**, there are six other individual Plaintiffs who have raised claims against RTD in the operation of its train system in the operative complaint, and, if this Court grants **Plaintiffs' Motion for Leave**

to File Second Amended Class Action Complaint, there will be four more individual plaintiffs bringing disability civil rights claims against RTD related to the provision of its rail service. RTD is simply wrong with respect to its assertion that the three individuals and CCDC who were signatories to the previous settlement agreement pertaining to fixed route buses are prevented from now bringing claims as to rail service, which the Plaintiffs in this instant action have explained in-depth in their **Response to the Motion for Partial Dismissal**. Even if RTD is right with respect to those four Plaintiffs, those Plaintiffs still have claims against RTD for its alleged failure to comply with disability rights laws in the operation of its light rail service for any claim that occurred after February 20, 2014. *See* **Agreement** at 9 ("Any claims that arise after the Effective Date are not included in the Released Claims."). The Effective Date of the **Agreement** was February 20, 2014. The parties can and should certainly go forward with discovery of the claims these four Plaintiffs have had in that last year, as well as the claims of the other six current Plaintiffs and four prospective plaintiffs.

II. The Scheduling Order In This Case Does Not Allow Enough Time for the Parties to Wait Until the Motion to Dismiss Is Decided to Begin Discovery.

As noted above, a **Scheduling Order** [#37] was entered in this case on February 25, 2015. In a case involving thirteen individuals and an organization that represents the rights of people with disabilities in a putative class action, the parties have a discovery cutoff date of January 25, 2016. Along with addressing the claims of each of the individual Plaintiffs involved, the parties are going to have to address briefing of class certification. Plaintiffs intend to send their first round of written discovery requests very soon and a Rule 34 Inspection of Premises request to get things moving. Given this

litigation's complexities, which RTD itself recognizes, it does not make sense to delay at all. *See* **RTD's Response to Plaintiffs' Motion for Leave to File Second Amended Class Action Complaint** at 1-3 (providing RTD's concerns about the amount of discovery needed in this case).

III. There Is No Prejudice to Defendant by Going Forward With Discovery.

This case seeks injunctive relief only and not damages. *See* **Comparison of Second Amended Complaint to Amended Complaint** [#43-1], Claims for Relief and Prayer for Relief at pp. 42-51. This case also seeks the recovery of reasonable attorneys' fees and costs as permitted by these disability civil rights statutes. As discussed, Defendant now has at its disposal many mechanisms for discovery, which would not unduly drive-up the cost of attorneys' fees with respect to the four Plaintiffs, whose claims from before February 20, 2014 Defendant seeks to remove from this case. For example, Defendant could send written discovery concerning the other Plaintiffs in this case. Defendant could work with undersigned counsel on scheduling depositions of those individuals not involved in the prior litigation. Moreover, given the similarities among all current and prospective plaintiffs' claims with respect to whether the light rail trains comply with the applicable ADA regulations, the discovery Plaintiffs intend to seek does not depend upon whether Defendant's **Motion for Partial Dismissal** is successful or not. Plaintiffs will seek the same information from RTD in either instance. Thus, with respect to these claims, RTD would not avoid any particular discovery costs or burdens even if its **Motion for Partial Dismissal** is granted in its entirety.

It is Defendant, not Plaintiffs, who have been driving up the cost of this litigation. As Plaintiffs have noted in much of their briefing, even if Defendant is successful in its motions to dismiss (there have been two so far), this case will go forward with or without those four Plaintiffs, and it will go forward with any claims those four Plaintiffs have that occurred after the signing of the Settlement Agreement. It does not make sense for Defendant to continue to try to remove a miniscule set of claims on behalf of four Plaintiffs (in a field of a possible thirteen), whose counsel can continue representing them in the current lawsuit involving light rail claims. Rather than submit another seemingly useless motion to dismiss, Defendant could currently submit discovery requests and work with Plaintiffs' counsel on the deposition schedule. It has been Defendant's choice to do otherwise.[1]

IV. Defendant Has Not Made The "Particular And Specific Demonstration Of Fact" Required For This Court To Order A Stay Of Discovery.

The Parties agree that the case law in this Circuit, and that which has been followed and utilized by the District Court of Colorado, requires the party seeking the stay to make a particularized showing in support of its request. *See* **Motion** at 3-4 (citing *String Cheese Incident, LLC v. Stylus Shows, Inc*., No. 02-cv-01934-LTB-PA, 2006 WL 894955, at *2 (D. Colo. Mar. 30, 2006); *Trs. of Springs Transit Co. Emp's Ret. and Disability Plan v. City of Colo. Springs*, No. 09-cv-02842-WYD-CBS, 2010 WL 1904509, at *4 (D. Colo. May 11, 2010)).

[1] That is why Plaintiffs continue to seek fees and costs for having to defend these useless and frivolous motions.

"[A] stay of discovery is generally disfavored[.]" *Hawg Tools, LLC v. Newsco Int'l Energy Servs., Inc.*, No. 14-cv-03011-REB-MJW, 2015 WL 1087051, at *1 (D. Colo. Mar. 9, 2015); *Imrie v. Thomas*, No. 08-cv-01209-LTB-KLM, 2008 WL 4543064, at *1 (D. Colo. Oct. 10, 2008). In fact, the Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings. *String Cheese Incident, LLC*, at *2. In determining the propriety of a stay, this Court applies the following factors: (1) Plaintiffs' interest in proceeding expeditiously with the action and the potential prejudice to Plaintiffs resulting from a delay; (2) the burden on the Defendants; (3) the convenience of the Court; (4) the interests of persons not parties to the litigation; and (5) the public interest. *Hawg Tools, LLC,* at *1; *Wells*, at *2 (citing *String Cheese Incident, LLC*, at *2). If need be, "[w]hen a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved." *Imrie*, at *1 (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc*., 200 F.3d 795, 804 (Fed. Cir. 1999). There is no dispositive issue lingering in the **Motion for Partial Dismissal**. There is only the question of when the plaintiffs in the case that led to the Settlement Agreement can bring their claims against RTD's light rail service.

Applying these factors, Plaintiffs have an interest in moving forward expeditiously, as they intend to certify a class and then represent the class in this case. Therefore, the sooner the merits of this case are addressed, the better for the class of individuals who are affected and will be served. As noted, there certainly is no burden, whatsoever, on the Defendant who can move forward with discovery in any number of ways that are not impacted by the **Motion for Partial Dismissal**. This case will proceed

in some form or fashion even if RTD obtains everything it seeks from its **Motion for Partial Dismissal.** As said, RTD recognizes that its motion is not dispositive. *See, e.g., Denson v. Maufeld*, No. 09-cv-02087-WYD-KLM, 2010 WL 1330336, at *1 (D. Colo. Apr. 5, 2010) (citing *Siegert v. Gilley,* 500 U.S. 226, 231-32, (1991) (noting that courts have routinely recognized that a stay of discovery may be appropriate while a dispositive issue is being resolved). Instead, this Court has an interest in moving forward, and has set forth a **Scheduling Order** directing the parties as to its intentions, including the date for a pretrial conference. Again, the parties have a lot of work to do here, which a stay can only complicate. The interests of any person who uses a wheelchair or mobility device on RTD's rail services are impacted by this case, which, again, militates toward moving forward. Finally, the public interest is served by making a determination of whether the public transportation system available in Denver, Colorado complies with disability rights statutes or not.

RTD makes the argument that if its **Motion for Partial Dismissal** is granted, "CCDC's in-house legal counsel could no longer represent the remaining Plaintiffs or potential class because allowing CCDC's counsel to proceed with this case is tantamount to allowing CCDC to proceed." **Motion** at 4. Again, for the reasons stated herein, as well as in Plaintiffs' **Response to Defendant RTD's Motion for Partial Dismissal**, RTD is simply wrong with respect to what the four Plaintiffs at issue released, but even under the best case scenario for RTD, only claims that came before the signing of the Settlement Agreement would have been released. CCDC's counsel has every right to represent CCDC and the other three individuals for any claims that

occurred after February 2014. In addition, RTD cannot prevent Plaintiffs' counsel from representing the other individual Plaintiffs and their claims due to a release in a Settlement Agreement to which these Plaintiffs were not parties. RTD cites no authority for its position that that is the case. RTD does not explain to this court how it is that, CCDC's counsel will be "removed from the case [.]" *See* **Motion** at 5. RTD has made no motion to this Court requesting removal of CCDC counsel, and Plaintiffs' counsel is not aware of any authority that would cause such a motion to be successful.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny **Defendant RTD's Motion to Stay Discovery** in its entirety.

DATED: March 26, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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