I IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

JULIE REISKIN, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT,

Defendant.

PLAINTIFFS' MOTION FOR DECLARATARY JUDGMENT THAT SETTLEMENT AGREEMENT APPLIES ONLY TO FIXED ROUTE BUSES,THAT DEFENDANT HAS NO DAMAGES CASE AND THIS CASE SEEKS INJUNCTIVE RELIEF ONLY

Pursuant to Rule 57, Federal Rules of Civil Procedure, and 28 U.S.C. § 2201, Plaintiffs, by and through undersigned counsel, hereby submit their Motion for Declaratory Judgment That Settlement Agreement Applies Only to Buses, That Defendant Has No Damages Case and This Case Seeks Injunctive Relief Only, meaning no jury is necessary for trial purposes. This case may be tried to the Court.

INTRODUCTION

Defendant filed a Motion for Summary Judgment ("Motion") [# 67], seeking to exclude four of the now eighteen Plaintiffs in this case.RTD alleges three individuals and Plaintiff Colorado Cross-Disability Coalition ("CCDC") signed a release in a lawsuit prior to this one, *Colorado Cross-Disability Coalition v. Regional Transportation District*,

13-cv-02760-PAB-MJW, that RTD alleges bars them from bringing claims in the instant lawsuit. Defendant is incorrect. This matter requires a declaration of the rights of the parties in the Settlement Agreement ("Agreement") (attached as Exhibit A). There are many reasons why the Agreement does not prohibit the four Plaintiffs from proceeding with their claims in the instant lawsuit: (1) Plaintiffs have alleged claims in the instant lawsuit that occurred after the prior lawsuit and release terminated (which occurred on February 20, 2014), and RTD has produced no evidence to dispute those claims, which necessitated discovery of these Plaintiffs' claims regardless of the prior Agreement; (2) Plaintiffs' claims in the prior lawsuit were strictly related to RTD's fixed route bus system, and their claims in the instant lawsuit are strictly related to RTD's light rail system; (3) Defendant can prove no damages. Because the individuals and CCDC have valid claims and are integral to this lawsuit, it is imperative that this Court determine their rights and whether that Agreement relates to the case at bar. Defendant has already taken written discovery and the depositions of the four Plaintiffs it seeks to remove from this case.[1] In addition, Defendant seeks damages in this case. It is entirely unclear under what theory Defendant alleges it would be entitled to damages. Any breach of the Agreement should be filed in state court. There is nothing in the Agreement that provides damages for Defendant. Defendant attempts to argue a claim

[1] During the Rule 30(b)(6) deposition of CCDC, over the objection of Plaintiffs' counsel, Defendant's counsel asked numerous questions of Julie Reiskin related to her personal use of light rail. *See, e.g.*, Ex. B, 56:23–59:18; 64:19–66:8; 78:15–79:16; 80:25–81:5; 90:17–94:7; 96:17–106:14; 108:16–112:16; 163:12–164:25.

for damages that does not exist. Plaintiffs seek a declaration of the rights under the prior Agreement and a declaration that Defendant is not entitled to damages or a jury.

ARGUMENT

I. Standard of Review.

"In a case or actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C. § 2201(a); *see also* ***Kunkel v. Cont'l Cas. Co****.,* 866 F.2d 1269, 1273 (10th Cir. 1989) (*citing* E. Borchard, *Declaratory Judgments* 299 (2d ed.1941)) ("[A] court in the exercise of its discretion should declare the parties' rights and obligations when the judgment will (1) clarify or settle the legal relations in issue and (2) terminate or afford relief from the uncertainty giving rise to the proceeding."). "[N]othing in the Declaratory Judgment Act prohibits a court from deciding a purely legal question of contract interpretation which arises in the context of a justiciable controversy presenting other factual issues**."** ***Kunkel****,* 866 F.2d at 1276.

Furthermore, this Court has the power to make a Declaratory Judgment under Rule 57, Federal Rules of Civil Procedure. "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The Court may order a speedy hearing of a declaratory-judgment action." Fed. R. Civ. P. 57*.*

II. Plaintiffs Have Claims After the Expiration of The Agreement.

Even if RTD is correct, Plaintiffs have injunctive relief claims dating after the

Effective Date of the Agreement and only released claims with respect to fixed route buses "from the beginning of time through the date CCDC executes this Agreement (the "Released Claims"). Agreement at p. 8, ¶ 4; *see also* Agreement at pp. 10-13 (showing claims were only released through February 2014). The four Plaintiffs cannot be removed from this case because of their ongoing claims, which necessitated Defendant taking discovery of these Plaintiffs. The Agreement references fixed route services, and Defendant RTD pretends that the release language somehow supersedes the rest of the Agreement, which refers to fixed route bus service. As will be explained below, there can be no question that the Agreement pertains only to fixed route bus service. For purposes of declaring the rights of the parties, a review of the Agreement in this case makes it abundantly clear that no part of the Agreement was intended to apply to RTD's light rail service, and that none of the four Plaintiffs should be dismissed from the current case, which focuses on light rail and not fixed route buses.

RTD requests that this Court dismiss all claims of these four Plaintiffs in their entirety. *See* Motion at 2 ("RTD respectfully requests that Plaintiffs CCDC, Julie Reiskin, Douglas Howey and Jon Jaime Lewis be dismissed with prejudice from this case."). First, the only claims that would have been released are those that occurred prior to signing of the Agreement. *See* Agreement at 9[2] ¶ 4. The release specifically states, "Any claims that arise after the Effective Date are not included in the Released Claims." *Id*. The Effective Date was February 20, 2014. *Id.* at 12-14 ("This Agreement may be

[2] All references to page numbers in exhibits will refer to the ECF page designations instead of the original document numbers.

executed in counterparts. Signed electronic and/or faxed signatures will be treated as originals.") *See id.* at 10 ¶ 14. All Plaintiffs at issue have alleged claims relating to the design and construction and services on light rail trains after the Effective Date. Third Amended Complaint ("TAC") [# 65], filed June 19, 2015, at 16 ¶ 94; 19 ¶ 111; 23 ¶ 141. Therefore, any claims these Plaintiffs have that occurred after the Effective Date are still viable. RTD has provided no factual evidence that contradicts these claims and did nothing during any of the depositions to distinguish between claims that occurred before the previous Agreement expired and claims that occurred after. For this reason alone, RTD's Motion must be denied. These Plaintiffs cannot be dismissed because, even under the release at issue, they have alleged claims that occurred after the expiration of the release, and there is no contrary evidence. "A party who does not have the burden of proof at trial must show the absence of a genuine fact issue." ***Lehman Bros.*** at 1358 (*citing* ***Concrete Works, Inc. v. City & County of Denver****,* 36 F.3d 1513, 1517 (10th Cir.1994), *cert. denied,* 514 U.S. 1004 (1995)). Plaintiffs have done so by demonstrating alleged discrimination that has occurred after the expiration of the Agreement. RTD has provided no contradicting evidence. "By contrast, a movant who bears the burden of proof must submit evidence to establish every essential element of its claim or affirmative defense." *See* ***In re Ribozyme Pharmaceuticals, Inc. Securities Litigation****,* 209 F.Supp.2d 1106, 1111 (D. Colo. 2002). RTD has failed to produce any evidence that such claims do not exist. "In either case, once the motion has been properly supported, the burden shifts to the nonmovant to show, by tendering

depositions, affidavits, and other competent evidence, that summary judgment is not proper." ***Concrete Works, Inc.,*** 36 F.3d 1513 at 1518. All the evidence must be viewed in the light most favorable to the party opposing the motion. ***Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Services,*** 165 F.3d 1321, 1326 (10th Cir. 1999), *cert. denied,* 528 U.S. 815 (1999). Viewing the evidence in the light most favorable to the four Plaintiffs, they cannot be dismissed from this case.

III. The Settlement Agreement Focuses Solely on Buses, Not on Light Rail.

The words "bus" or "buses" are used 131 times throughout the Agreement and its attached Policy. *See generally* Agreement and Ex. A to the Agreement. The words "light rail" do not appear once. The words "fixed route," "fixed route bus" or "fixed route buses," and "fixed route bus system," (collectively) appear 15 times. Exhibit A to the Agreement, entitled "Boarding Individuals with Disabilities who Use Mobility Aids to Ensure Access Policy," (hereinafter, "Policy") states as its purpose, "RTD will ensure individuals who use Mobility Aids, including Wheelchairs, have equal access to its buses and to the Securement Areas." Policy at 15 (emphasis added). The entire Policy relates to how bus operators must deal with passengers who use wheelchairs and others in the wheelchair and securement areas who improperly try to use those areas.

A glaring example of the distinction between the former Agreement and the current lawsuit is that only buses, not light rail trains, have "securement areas." *Compare* 49 C.F.R. § 38.23(a) (requiring securement locations and devices for wheelchairs on all buses under Subpart B of the regulations pertaining to buses) *to* 49

C.F.R., Subpart D (governing Light rail Vehicles and Systems, which do not require securement devices at all). In the Policy, the word "securement" appears 34 times. As in the Agreement itself, the words "light rail" do not appear at all in the Policy that RTD employees are required to follow and enforce as a result of the Agreement.

Furthermore, RTD agreed to numerous obligations with respect to its fixed route bus system that have nothing to do with the operation of its light rail system, and the parties did not address any aspect of the light rail system. First: "Within 30 calendar days following the Effective Date, RTD will adopt a policy to ensure individuals who use Mobility Aids, including Wheelchairs, have equal access to its buses and to the Securement Areas, substantially in the form of Exhibit A ("Policy")." Agreement at 3 § 3.a. (emphasis added). The Agreement does not address access to light rail trains whatsoever, and, as noted, there are no "securement areas" on light rail trains to address, meaning all training for RTD employees in the Policy addressed bus training, not light rail training. As it states in the Agreement, this new policy will apply to "all bus operators" (emphasis added), "bus operator training staff" (emphasis added) and other RTD employees who deal with the fixed route bus service, but not with light rail. *See id.* at 3 § 3.a. Contractors must be bound by its terms. *Id.* RTD has contractors for its bus system, but not for its rail system. *See also id*. at 4-5 § 3.b.v.

The Agreement goes on to address ADA training, which applies to "every new bus operator, bus operator training staff, bus operator manager, street supervisor, dispatcher, and customer service representative (or similar positions for contractors)"

(emphasis added), but not training of light rail operators. *Id*. at 3 § 3.b.i. The ADA training course required by the Agreement "will be incorporated into the initial training for each of the job positions identified in this sub-paragraph." *Id.* Again, no mention of light rail operators is made. Refresher training is also required for "[e]very existing bus operator, bus operator, training staff, bus operator manager, street supervisor, dispatcher" (emphasis added) and other positions related to the operation of RTD's fixed route bus system, but not its light rail system. *Id.* at 4 § 3.b.ii.

The Agreement also anticipates CCDC involvement. *Id*. at 4. § 3.b.iv. CCDC has been involved with RTD under the terms of the Agreement. At no time during these meetings has light rail services ever come into play. *See* Declaration of Douglas Howey ("Howey Decl.") [# 47-2] at 2 ¶ 5-8, submitted with Plaintiffs' Response to Defendant RTD's Motion for Partial Dismissal [# 47], both filed March 25, 2015. In addition, ongoing bus training is anticipated under the Agreement: "Beginning in 2015 and for 3 years thereafter, the RTD Bus Operator Training Manager will meet with a CCDC staff member with the purpose of collaborating on the curriculum for the ADA Training and ADA Refresher Training" (emphasis added). Agreement, at 4 § 3.b.iv. CCDC's involvement was to be with the "RTD Bus Operator Training Manager" (emphasis added), not the light rail manager. Again, no mention of light rail training is made.

Another telling aspect of the Agreement pertains to RTD's requirements with respect to signs. Section 3.c. of the Agreement applies to "Signage on Buses" (emphasis added). The ADA requires signage on buses and on light rail, *compare* 49

C.F.R. § 38.27 (requirements for priority seating signs on buses) *with* 49 C.F.R. § 38.75 (requirements for priority seating signs on light rail trains), and yet the Agreement only addresses signage on buses. Similarly, in the Agreement, there is an entire section devoted to the requirements pertaining to signage "on all fixed-route buses" (emphasis added) at "securement area[s]." *See* Agreement, at 5 § 3.c. As part of the Agreement, RTD agreed to "adopt a written procedure that directs RTD staff on how to preserve video evidence on fixed-route buses either upon receipt of a customer complaint concerning a bus operator's failure to follow the Policy or any incident in which the bus operator contacts dispatch using the 'ADA PAX PASS-UP' button[.]" Agreement at 5 § 3.d.i. (emphasis added). Although cameras exist on light rail trains, the Agreement failed to address any written procedure related to cameras on such trains. In addition, there is no such thing as an "ADA PAX PASS-UP" button on a light rail train. The Agreement specifically included assurance from RTD that when it procured buses in the future, it would ensure the installation of video cameras that met certain minimum specifications; RTD also agreed to retrofit the remaining vehicles in its "fixed-route bus fleet" to meet the same minimum specifications. Agreement at 5-6 § 3.d.iii. (emphasis added). No such obligation exists with respect to light rail trains.

Furthermore, the Agreement contains a section entitled "Reporting and Cooperation." *Id*. at 6 § 3.e. RTD is required to provide CCDC with an Initial Report. According to the Agreement at 6 § 3.e.i.:

> The Initial Report will include the following information: (1) each incident in which a bus operator presses the 'ADA PAX PASS-UP' button; and (2)

> each incident in which a passenger complains that an operator has violated the Policy. For each of (1) or (2) above, the Initial Report will include the following information: date, time, route and stop, time the next bus was due, whether a transfer was offered and accepted, whether the ADA PAX PASS-UP form was provided, whether alternative transportation was provided, whether RTD attempted to preserve video evidence, and whether video evidence was available.

(Emphasis added.) Once again, nothing in the requirements for the Initial Report or within the Initial Report produced by RTD had anything to do with light rail. *See* Initial Report, attached as Ex. C. RTD is also required to provide CCDC with an Annual Securement Area Report to address issues pertaining to buses. *Id*. at 6-7 § 3.e.iii. RTD is not obligated to provide any report with respect to its light rail operations. RTD agreed to engage in "a public outreach campaign with the purpose of (i) encouraging non-disabled passengers to make room for passengers using wheelchairs who need to use the securement area to board the bus, and (ii) informing passengers of the Policy ("Outreach Campaign"). *Id.* at 7 § 3.f. (emphasis added). The Outreach Campaign will include posters onboard fixed-route vehicles . . . ." *Id.* Even the complaint process set forth in the Agreement (*id.* at 7-8 § 3.g.) envisions that complaints will involve the RTD Deputy Assistant General Manager of Bus Operations. *See also id.* at 8-9 § 3.j. regarding "Dispute Resolution." Quite simply, nowhere in the Agreement is there any mention of meeting with any person connected with RTD's light rail operations. As required under the Agreement, RTD retained an expert to review its bus operations and provided a report to CCDC concerning these bus operations. According to the Agreement, "[t]he purpose of the ADA Expert's scope of work will be to ensure that

individuals with disabilities who use mobility aids have equal access to fixed-route buses[,]" *id*. at 8 § 3.h. (emphasis added), not with light rail service. *See* Initial Report.

In its Response to Plaintiffs' Motion to Dismiss RTD's Counterclaim [# 66] ("Response") at 2, RTD argues the following: The release in the Agreement is much broader than the specific claims alleged in that case. RTD does not explain why CCDC or these individual Plaintiffs, individuals RTD refers to as "sophisticated litigants experienced in settling cases," *see* Response at 14, would be so willing to sign a release that gave RTD a free pass on any possible disability-related violations on any rail service, but that is the explanation it provides. The Agreement itself is completely focused on RTD's fixed route bus system, but, for some reason, according to RTD, the Plaintiffs decided to release claims concerning all aspects of RTD's light rail and, apparently, if one follows the logic, the commuter rail system that is soon to come. *See, e.g.*, the upcoming North Metro Rail Line, http://www.rtd-denver.com/NorthMetroRailLine.shtml, the upcoming Northwest Rail Line, http://www.rtd-denver.com/NorthwestRailLine.shtml, the upcoming Southeast Rail Line extension http://www.rtd-denver.com/SoutheastRailLine.shtml, and the upcoming Southwest Rail Line extension, http://www.rtd-denver.com/SouthwestRailLine.shtml.[3] Although these services are yet to be used by anyone, apparently, according to RTD's strained interpretation of the Agreement, these Plaintiffs released whatever claims they

[3] Although RTD's new commuter trains are not yet in service, RTD unveiled them to the public on December 2, 2014. *See* http://www.denverpost.com/news/ci_27054763/rtds-new-rail-cars-fastracks-system-unveiled-public (all websites last accessed December 25, 2015).

may have had as to these RTD rail services, whether such service exists yet or not.

With respect to construction of the meaning of a contract, it is this Court's obligation to determine the intent of parties: "When a [contract] is unambiguous, its meaning must be ascertained in accordance with its plainly expressed intent." ***M & G Polymers USA, LLC v. Tackett***, 135 S.Ct. 926, 929 (2015) (citing 11 R. Lord, Williston on Contracts § 30:6, p. 108. p. 933). "[I]nterpretation of a contract is a question of law." ***Arapahoe Cnty. Water & Wastewater and Pub. Improvement Dist. v. HDR Eng'g, Inc.***, No. 08–cv–01788–WYD, 2011 WL 5025022, at *2 (D. Colo. Oct. 21, 2011) (*citing* ***Premier Farm Credit, PCA v. W–Cattle, LLC***, 155 P.3d 504, 517 (Colo. App. 2006)). "In construing [a contract], the primary obligation 'is to effectuate the intent of the contracting parties according to the plain language and meaning of the contract.'" *Id*. (quoting ***Albright v. McDermond***, 14 P.3d 318, 322 (Colo. 2000)). "'The overriding rules of contract interpretation require a court to apply the plain meaning of the words used, subject to interpretation from the context and circumstances of the transaction.'" ***Port-a-Pour, Inc. v. Peak Innovations, Inc***. 49 F.Supp.3d 841, 859-860 (D. Colo. 2014); ***Arapahoe Waste Water et al,*** at *2 (quoting ***Albright***, 14 P.3d at 322)). It seems particularly odd to claim Defendant's understanding of the Agreement is the correct one, considering that now these three individuals, CCDC and 17 other individuals who use wheelchairs or walkers have come forward to complain that RTD's light rail service, in fact, does violate disability-related laws. During the times that RTD was conducting training with respect to the Agreement, Douglas Howey, a Plaintiff in both lawsuits

against RTD (the one that settled and the instant lawsuit), was attending the trainings on behalf of CCDC and received training slides demonstrating that RTD's training sessions were focused only on fixed route buses and not light rail. *See* Howey Decl. at 2 ¶ 6-8 *and corresponding* Exhibit B [# 49], filed on March 25, 2015 in connection with Plaintiffs' Response to Motion for Partial Dismissal [# 47]. Each and every Plaintiff in this case, including CCDC's Executive Director and its attorneys (as well as RTD's employees and attorneys) had every reason to believe that the previous case was and is limited to RTD's fixed route bus service. If light rail was to be included, these "sophisticated litigants" would have included the extremely detailed provisions pertaining to light rail in the same extreme detail as those in the Agreement now pertaining to RTD's bus service. It simply strains logic for RTD and CCDC to come to such specific terms with respect to bus service, leave all other rail service unaddressed and then bring a lawsuit against RTD on behalf of CCDC and 17 individuals for its failures to comply with the light rail regulations.

Although the definition of "fixed route" service may include rail services, no one would dream of using the term "fixed route" with respect to rail service. This would be akin to saying, "wheeled car," or "winged plane." "Fixed route" is an identifier that is only useful when distinguishing one type of RTD service from another (fixed route versus demand responsive) and only becomes useful when talking about RTD's obligation to provide paratransit service. Of course light rail (just like the upcoming commuter rail) travels on a fixed route, but there was no reason for the signatories to the Agreement to

think, after paragraphs and paragraphs (the Agreement is ten pages long) of information related specifically to the operation of RTD's fixed bus route and a 35 page Policy to address how bus operators provide service to bus customers who use wheelchairs, that they were signing away any rights they had with respect to all of RTD's fixed route rail systems. RTD would have us believe that after each of the Plaintiffs read ten pages of an Agreement that refers only to buses and logically uses the terminology "fixed route services" and/or "fixed-route services" solely in reference to buses, that those Plaintiffs believed "fixed route" or "fixed-route" that that applied to light rail, and that each of the Plaintiffs willingly understood that he or she was waiving any and all present and future claims regarding rail, and even the well-advertised but not-yet-in-use commuter rail, without any requirement whatsoever that RTD do anything to ensure its rail services or other fixed route services are in compliance with disability rights laws.

RTD is mistaken. RTD provides what it believes is the consideration it provided for such a broad release -- a monetary amount to cover damages, attorneys' fees and costs and "changes in RTD policies, training and oversight" -- but it is clear from the four corners of the document that all changes in policies, training and oversight were related to bus service. The Agreement does not show that RTD provided any consideration related to RTD's obligations with respect to its rail services. Claiming that CCDC twice[4] spent so much time thoroughly negotiating policy changes, training, daily operation, dispute resolution, etc., with respect to RTD's fixed route bus system and negotiated

[4] The previous Consent Decree can be found on CCDC's website at http://ccdconline.org/case/265 (last accessed December 25, 2015).

nothing with respect to RTD's many rail services borders on the ridiculous. *See, e.g.,* ***In re Kahn***, 133 F.3d 932 (10th Cir. 1998) ("This view of the settlement agreement-that Schigur gave up a $169,000 claim for nothing, when the sole purpose of the adversary claim was to receive something-is absurd[.]").In summary, claims that were released at the time of the Agreement simply did not encompass RTD's rail services at all. This contract could not be any more unambiguous regarding its application to bus service and not light rail. RTD's employees understood that their bus personnel had obligations with respect to treatment of passengers under the Agreement, RTD's training staff understood that it had specific obligations with respect to its fixed route bus service under the Agreement, RTD's expert provided a report specifically related to the provision of fixed route bus service. "Fixed route" within the meaning of this Agreement has nothing to do with light rail and everything to do with buses.

IV. RTD Attempts to Evade the "Four Corners" of the Settlement Agreement.

When looking at the interpretation of a contract, this Court should look to Colorado state law for guidance. ***United Fire & Cas. Co. v. McCrerey & Roberts Const. Co., Inc***., No. 06-cv-00037-WYD-CBS, 2007 WL 867988, at *3 (D. Colo. Mar. 20, 2007) (order vacated on reconsideration sub nom), ***United Fire & Cas. Co. v. Boulder Plaza Residential, LLC***, No. 06-cv-00037-PAB-CBS, 2010 WL 420046 (D. Colo. Feb. 1, 2010) aff'd, 633 F.3d 951 (10th Cir. 2011); ***Budd v. American Excess Ins. Co.***, 928 F.2d 344, 346-47 (10th Cir. 1991). Also, "normally, contracts will be interpreted according to the 'generally prevailing meaning' of its terms, and a court will

not look beyond the 'four corners of the agreement' unless those terms are ambiguous[.]" ***Alward v. Vail Resorts***, No. 1:04-CV-00860-WDM-PA, 2006 WL 894958, at *5 (D. Colo. Mar. 31, 2006) (citing ***Pepcol Mfg. Co. v. Denver Union Corp***., 687 P.2d 1310, 1314 (Colo. 1984)). Under Colorado law, a "release is an agreement to which the general contract rules of interpretation and construction apply." ***Xedar Corp. v. Rakestraw***, No. 12-cv-01907-CMA-BNB, 2013 WL 93196, at *3 (D. Colo. Jan. 8, 2013) (citing ***Chase v. Dow Chemical Co***., 875 F.2d 278, 281 (10th Cir. 1989)). This Agreement pertains only to RTD fixed route bus services and has nothing to do with light rail services or train design. The four corners of the Agreement make this clear. There is no ambiguity, and, therefore, this Court need not look beyond the Agreement itself to determine that these Plaintiffs did not release claims that have any effect whatsoever on the case at bar. Even the training materials put out by RTD, which were attached as Exhibit B [# 49] (filed March 26, 2015) to the Howey Decl. [# 47-2] (filed March 25, 2015) say in big bold letters, "Revised policy will enhance use of <u>wheelchair securement area and priority seating on RTD buses as intended</u>. *See* Exhibit B [# 49] at 39. Just because the word "bus" was omitted in one sentence of the entire Agreement does not mean the Agreement covers all of RTD's rail systems.

V. Defendant Is Not Entitled to Recovery of Damages in This Lawsuit, and This Case Should Be Tried to the Court and Not a Jury.

Apparently, Defendant seeks "damages" as part of its Counterclaim in this case and seeks a jury to resolve issues related to damages. Although Plaintiffs could seek damages in this case under both Title II and Section 504, see 42 U.S.C. § 12133 & 29

U.S.C. 794a(b), they have chosen to forego a damages remedy in favor of seeking strictly injunctive relief from this Court, requesting only that this Court order Defendant to bring its light rail vehicles into compliance with these two disability rights statutes. As a result, no jury is needed to decide the issues before this Court.

As was already explained above, the four Plaintiffs Defendant seeks to have dismissed from this lawsuit cannot be dismissed from this lawsuit because they have claims that extend beyond the date of the Agreement. It would be impossible for counsel for Defendant to demonstrate what damages, if any, could be attributed to these four Plaintiffs. Defendant needed to take their depositions regardless of how the Court rules on this motion or Defendant's Motion for Partial Summary Judgment. In addition, counsel for Defendant is inside counsel. Defendant could also have waited to take the depositions of the four Plaintiffs in this case to save it from having to spend any time or resources until this Court decided Defendant's Motion for Partial Summary Judgment. Defendant chose not to do so, thereby failing to mitigate its damages, if any.

Defendant has not explained how, under the contract at issue, it is entitled to recover damages at all , and the Defendant can only claim damages under the existing lawsuit if it proves that Plaintiffs' claims are "vexatious, frivolous, or brought to harass or embarrass the defendant." **211 Eighth, LLC v. Town of Carbondale**, 12-cv-00049-REB-MJW, 2013 WL 1365837, at *1 (D. Colo. Apr. 4, 2013). As this Court noted in that case, "This is a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." **Id**. (citing **Mitchell**

v. City of Moore, Oklahoma, 218 F.3d 1190, 1203 (10th Cir.2000). Although they could, under Title II of the ADA and Section 504 of the Rehabilitation Act, be a "prevailing party" in this case, they can only do so if they can prove Plaintiffs' claims were "frivolous, unreasonable, or groundless, or that the Plaintiffs continued to litigate after it clearly became so." **Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n**, 434 U.S. 412, 422 (1978); **Thorpe v. Ancell**, 367 Fed. Appx. 914, 919 (10th Cir. 2010) ("the Supreme Court has imposed a different standard for awarding attorneys' fees to prevailing defendants in civil rights cases."); ***E.E.O.C. v. St. Louis-San Francisco Ry. Co.***, 743 F.2d 739, 744 (10th Cir. 1984) (quoting ***Christiansburg Garment Co.,*** 434 U.S. at 422; *see also* ***Montgomery v. Yellow Freight System, Inc.***, 671 F.2d 412, 414 (10th Cir. 1982). Plaintiffs do not seek a jury in this case and request this case be heard by the Court. *See* TAC [# 65] at 76.

Under Rule 26, Federal Rules of Civil Procedure, Defendant is required to "provide a computation of each category of damages claimed by the party -- who must also make available for inspection and copying under rule 34 the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent it suffered[.]" Fed. R. Civ. P. 26(a)(1)(A)(iii). Defendant has provided nothing to Plaintiffs to justify its damages.

CONCLUSION

Wherefore, Plaintiffs respectfully request this Court grant this motion in all respects, including declaring that the prior contract pertained only to buses and not rail service

and that Defendant has no claim for damages in this case, meaning no jury is required to decide the injunctive relief claims.

DATED: December 27, 2015 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on December 27, 2015, I filed the foregoing document using the CM/ECF electronic filing system, which will serve the foregoing by electronic mail upon the following:

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