Multiple Documents

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2	Main Document DOJ Disney Class Action Settlement Objections
3	Exhibit A - DOJ May Class Action Settlement Objections
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MAHALA AULT, STACIE RHEA, and DAN WALLACE, Plaintiffs, v. WALT DISNEY WORLD CO., Defendants.	CASE NO. 6:07-CV-1785-GAP-KRS

UNITED STATES' MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

This action commenced just over one year ago when three private plaintiffs who use Segways as mobility devices filed a complaint alleging that defendant Walt Disney World Company [hereinafter "Disney"] violated Title III of the Americans With Disabilities Act, 42 U.S.C. §§ 12181-12189 ("ADA") by failing to modify its policy banning Segways from the Walt Disney World theme parks in Florida. See Complaint (filed Nov. 9, 2007) (Docket # 1). On January 5, 2009, the Court provisionally approved a nationwide class action settlement agreement. See Joint Stipulation of Settlement and Release (filed Dec. 26, 2008) (Docket # 82-2) [hereinafter "Disney Class Settlement Agreement"].

In sum, the Disney Class Settlement Agreement, if approved by the Court, would require Disney to make a specified number of Disney-owned four-wheeled electric stand-up vehicles

("ESVs") available for rent by persons with disabilities at Disney resorts (though named plaintiffs would each get complimentary one-week use of an ESV), and pay the named plaintiffs over $ 80,000 in monetary relief and attorney's fees. See Disney Class Settlement Agreement ¶ 12. In return, class members agree to waive all present and future claims – whether arising under the ADA or state disability rights law – that relate to Disney's blanket prohibition of Segways (and similar two-wheel vehicles) at its resorts and theme parks nationwide. See id. at ¶¶ 8-9, 13-14. A fairness hearing has been scheduled for March 31, 2009. See Notice of Class Action Settlement and Fairness Hearing (filed Jan. 21, 2009) (Docket # 85-2).

The United States of America respectfully moves this Court for leave to participate as *amicus curiae* on issues relating to the Disney Class Settlement Agreement, including filing the accompanying written objections to this agreement and appearing at the settlement hearing. The Department of Justice ("Department") is the federal agency with primary responsibility for enforcing Title III of the ADA and its implementing regulations against public accommodations such as amusement parks. See 42 U.S.C. §§ 12181 - 12189; 28 C.F.R. pt. 36 (1994). The Department rarely objects to the voluntary settlement of ADA claims between private litigants. However, because the procedural flaws in the Disney Class Settlement Agreement raise serious due process concerns, because judicial endorsement of this agreement would undermine the effectiveness of the Department's current Title III rulemaking efforts which are nearing completion, and because the substantive terms of the agreement are fundamentally unfair to absent class members, *amicus curiae* United States seeks leave from the Court to appear in this action in order to object to this agreement.

Permitting persons or governmental entities to appear as friends of the court through the filing of amicus briefs "can contribute to [a] court's understanding" of the issues involved in a particular lawsuit. Harris v. Pernsley, 820 F.2d 592, 603 (3rd Cir. 1987). Indeed, the United States has routinely filed amicus briefs in both trial and appellate courts on a broad range of issues under Title III of the ADA. See, e.g., Miller v. The California Speedway Corp, 453 F.Supp.2d 1193 (C.D. Cal. 2006) (United States appearing as amicus concerning issue of whether Title III regulations required patrons at sporting events who use to wheelchairs to have lines of sight over standing spectators), rev'd, 536 F.3d 1020 (9th Cir. 2008); The Disability Rights Council of Greater Washington v. Ames Dep't Stores, Inc., Case No. 1:99CV0-2116 (D.D.C. June 6, 2000) (granting Department of Justice's motion to participate as *amicus* on exhaustion issue); Fiedler v. American Multi-Cinema, 871 F. Supp. 35 (D.D.C. 1994) (action involving location of wheelchair seating in movie theaters); Tatum v. National Collegiate Athletic Ass'n, 992 F. Supp. 1114 (E.D. Mo. 1998) (action involving application of ADA to intercollegiate athletic eligibility standards).

Moreover, federal courts frequently permit government agencies to participate as *amicus* for the purpose of raising objections to private settlement agreements, including proposed ADA class action settlement agreements. See, e.g., Access Now, Inc. v. The May Dep't Stores, Co., C.A. 00-148-CIV-Moreno (S.D. Fla. 2001) (granting United States' *amicus* motion for purposes of filing written objections to conditional ADA class action settlement agreement and appearing at fairness hearing); Access Now v. Carnival Corp., et al., C.A. No. 00-7233-Civ-Moreno (S.D. Fla. 2001) (same); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1028 (9th Cir. 1998) (allowing state attorneys general to file *amicus* objections to class action settlement regarding minivan rear liftgate latches); In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F. Supp.

450, 473 (D.N.J. 1997) (permitting state insurance commissioners to appear as *amicus curiae* in order to object to class action settlement involving life insurance sales practices, aff'd, 148 F.3d 283 (3rd Cir. 1998), cert. denied, 525 U.S. 1114 (1999).

Accordingly, both because the United States believes that its interests may be affected by the Disney Class Settlement Agreement, and because the United States believes its views will assist the Court's understanding of the procedural and substantive issues raised by this agreement, the United States requests that it be permitted to participate as *amicus curiae* for the limited purpose of filing objections to the Disney agreement and appearing at the settlement hearing. Accompanying this motion are the "Objections of *Amicus Curiae* United States to Proposed Disney Class Action Settlement Agreement" which the United States seeks to file in this action.

DATED: March 12, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2009, true and correct copies of **Objections of Amicus Curiae United States to Disney Proposed Class Action Settlement Agreement** were served electronically via CM/ECF and by Federal Express, postage pre-paid, on the following parties:

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UNITED STATES DISTRICT COURT
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OBJECTIONS OF *AMICUS CURIAE* UNITED STATES
TO PROPOSED DISNEY CLASS ACTION SETTLEMENT AGREEMENT

INTRODUCTION

On January 5, 2009, the Court provisionally approved a nationwide class settlement agreement in this action which commenced just over one year ago when the named plaintiffs filed their original complaint alleging that Walt Disney World Company ("Disney") violated Title III of the Americans With Disabilities Act, 42 U.S.C. §§ 12181-12189 ("ADA") by failing to modify its policy banning Segways (and other two-wheeled devices) from the four Walt Disney World theme parks in Florida even for persons with disabilities who relied on such devices for their mobility. See Joint Stipulation of Settlement and Release (filed Dec. 26, 2008) (Docket # 82, Ex. 1) [hereinafter "Disney Class Settlement Agreement"]; see also Complaint (filed Nov. 9, 2007) (Docket # 1).

The Department of Justice ("Department" or "DOJ") recently learned of the pendency of this provisional class settlement agreement. Under the ADA, the Department is statutorily tasked with the dual roles of promulgating regulations implementing Title III's public accommodation provisions, as well as serving as the federal agency with primary responsibility for enforcing Title III of the ADA and its implementing regulations. See 42 U.S.C. §§ 12186(b), 12188(b); 28 C.F.R. §§ 36.502 - 36.507 (1994). The Department rarely objects to the voluntary settlement of ADA claims between private litigants. However, because the procedural flaws in the Disney Class Settlement Agreement raise serious due process concerns, because judicial endorsement of this agreement would undermine the effectiveness of the Department's current Title III rulemaking efforts which are nearing completion, and because the substantive terms of the agreement are fundamentally unfair to absent class members, *amicus curiae* United States is compelled to object to its approval.

ARGUMENT

The terms of the Disney Class Settlement Agreement are not complex. In sum, this provisional class settlement provides that (1) Disney will make a total of 15 Disney-owned four-wheeled electric stand-up vehicles ("ESVs") available for rent at Disney resorts in Florida and California by persons with disabilities who require use of a stand-up mobility device at the same rental rate as other Disney-owned sit-down "electric convenience vehicles" (*e.g.*, electric scooters) beginning around April 2009;[1] (2) Disney will pay $4,000 each to the three named

[1] Deployment of ESVs for rental at Disney theme parks will not necessarily begin immediately. Disney does not, in fact, agree to make any of the agreed-upon 15 ESVs available for rental by class members on a specific date. Rather, the Disney Class Action Settlement Agreement merely states that "delivery of the devices . . . is expected to begin on April 1, 2009, with use beginning at a reasonably proximate date following delivery." Disney Class Action

plaintiffs (which sum they may, at their discretion, use at a Disney theme park) and provide them with complimentary one-week use of an ESV at a Disney resort; and (3) Disney will stipulate to payment of a total of $70,000 in fees to two of the three class counsel, while leaving attorney's fees for the third class counsel (representing plaintiff Ault) to be litigated. See Disney Class Settlement Agreement at ¶ 12. In return, the named plaintiffs and absent class members waive all present and future claims – whether arising under the ADA or state disability rights law – that relate to Disney's blanket prohibition of Segways (and similar two-wheel vehicles) at its resorts and theme parks nationwide. See id. at ¶¶ 8-9, 13-14.[2]

The United States strongly urges the Court to reject this Disney agreement on procedural and substantive grounds. Both because the Department only recently learned of this provisional class settlement agreement, and because the United States made similar objections to a proposed class action settlement agreement in another private ADA action (Access Now, Inc. v. The May Dep't Stores, Co., C.A. 00-148-CIV-Moreno (S.D. Fla.) ("May")), the United States herein provides the Court with cross-references (as appropriate) to relevant portions of its written objections filed in the May case. See Objections of *Amicus Curiae* United States to Proposed

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Settlement Agreement, ¶ 12(a). In any event, whenever these ESVs do become available for rental at the Disney resorts, their cost to class members (excluding named plaintiffs during their one-week complimentary period) would be $45.00 per day in rental fees, as well as a refundable credit card deposit of $100.00, based on Disney's current rental rate for Disney-owned electric scooters. See Wheelchair Rentals at Disney Theme Parks, http://disneyworld.disney.go.com/wdwi/en_CA/common/guestServicesDetail?id=GuestServicesWheelchairRentalsDetailPage&bhcp=1 (last visited March 10, 2009). This is a significant sum relative to the cost of park admission. For example, this daily ESV rate represents 60% of the base price for an adult one-day "Magic Your Way" ticket at the Magic Kingdom theme park ($75.00) and 65% of an adult one-day ticket at Disneyland ($69.00). See Disney Resorts and Theme Parks, http://home.disney.go.com/parks/ (last visited March 10, 2009).

[2] Segway® is a registered trademark of Segway Incorporated.

Class Action Settlement Agreement, Access Now v. May Dep't Stores Co., C.A. No. 00-148-CIV-Moreno (filed July 27, 2001) (copy attached as Exhibit A) [hereinafter "DOJ May Class Settlement Objections"]. Reference to the Department's written objections in the May litigation, the Department believes, will assist the Court in its deliberations concerning the propriety of the instant Disney agreement since many of the procedural issues presented by the provisional class settlement agreements in these two cases are nearly identical.[3] As with the district court in the May case, this Court should likewise reject the Disney Class Action Settlement Agreement due to its profound procedural and substantive defects which are summarized below.

1. ***The provisional Disney Class Action Settlement Agreement suffers from such weighty procedural flaws that approval of the agreement would significantly compromise the interests of both absent class members and the United States.*** The procedural defects underlying the Disney agreement are numerous. These procedural problems include an overbroad class definition that improvidently covers Disney's resorts nationwide, overly expansive release provisions that impermissibly waive class members' claims outside the scope of the underlying complaint, and the lack of any mechanisms for enforcement or compliance monitoring. Each of these procedural issues are discussed below.

(a) Class Definition Improperly Covers all Disney Resorts. The Disney agreement's

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[3] In the May litigation, the conditional class action settlement agreement sought to settle physical accessibility claims against May department stores on behalf of a nationwide class of shoppers with mobility disabilities and their companions. After reviewing the objections filed by the United States and other parties and conducting a fairness hearing, the district court ultimately rejected the class settlement agreement and vacated its prior order granting conditional class certification. See Order Vacating Order Concerning Class Certification, Notice and Scheduling, and Order Denying as Moot Motion to Intervene and Motion for extension of Time to File Objections, Access Now v. May Dep't Stores Co., C.A. No. 00-148-CIV-Moreno (filed Aug. 23, 2001) (copy attached as Exhibit B).

class definition is overbroad because it encompasses not only Disney's resorts in Florida (which the named plaintiffs have visited), but also the Disneyland Resort in California (which they have not). See Disney Class Settlement Agreement ¶ 5; see also Notice of Class Action Settlement and Fairness Hearing (filed Jan. 21, 2009) (Docket # 85-2). In the Second Amended Complaint, the named plaintiffs' factual allegations focus solely on the Walt Disney World Resort in Florida. See Second Amended Complaint ¶¶ 19-43 (filed Dec. 26, 2008) (Docket # 81-2). Nowhere in this operative complaint (or any other publicly-available documents filed in this action) do named plaintiffs state that they have visited – or even have any intent of visiting – the Disneyland Resort in California. See, e.g., id.; [Proposed] First Amended Complaint ¶¶ 19-43 (filed Dec. 5, 2008) (Docket # 77-2); Defendant's Opposition to Plaintiff's Motion for Class Certification Under Fed. R. Civ. P. 23, Exhs. 1, 6 & 7 (filed Sept. 30, 2008) (Docket ## 72-2, 72-7 & 72-8 (excerpts of deposition transcripts for plaintiffs Wallace, Ault, and Rhea); Complaint ¶¶ 15-33. Indeed, it appears from the record that expansion of the class definition to include the Disneyland Resort was requested by the settling parties solely for settlement purposes. See Agreed Motion for Leave to Amend Plaintiffs' First Amended Complaint to Add Class Allegations ¶ 2 (filed Dec. 26, 2008) (Docket # 81-1).

The are several problems with such a geographic expansion of the class definition. First, well-established Eleventh Circuit precedent holds that class representatives lack standing to raise claims on behalf of a class "unless at least one named plaintiff has suffered the injury that gives rise to that claim." Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000); see also Murray v. Auslander, 244 F.3d 807, 810-11 (11th Cir. 2001) (vacating district court's class certification and remanding for evidentiary determination whether at least one named plaintiff had standing to bring non-moot claim); In re Hydrochloride Antitrust Litigation, 160 F.Supp2d 1365, 1370-72 (S.D. Fla. 2001) (conducting state-by-state analysis of classwide antitrust claims and dismissing those claims arising under laws of states in which no named plaintiffs resided or purchased the branded drugs at issue). Moreover, should the Court endorse the Disney Class Settlement Agreement (and its overbroad class definition contained therein), the practical effect would be to moot unfairly another ADA action in the Central District of California that is expressly litigating the propriety of Disney's ban on Segways at the Disneyland Resort, but also is much farther along procedurally than this action. See Baughman v. Walt Disney World Co., C.A. No. 07-cv-01108-CJC-MLG (C.D. Cal. filed Sept. 1, 2007). Third, while it appears that Disney's Segway ban applies equally to all Disney resorts regardless of geographic location, there is absolutely no factual support in the public record to support the conclusion that the Disney resorts in both Florida and California (or even their respective theme parks therein) share such similar physical, operational, and typographic characteristics that unitary treatment in a class is warranted. In light of these considerations, expansion of the class definition in the Disney agreement to include Disney Resorts outside Florida is legally improper.

(b) Overbroad Release Provisions. The Disney Class Settlement Agreement's expansive terms, however, are not limited to its class definition. In addition, the release provisions in this agreement are so overbroad that the Court could, on this basis alone, reject the agreement. Under the collective reach of these provisions, class members waive – ***in perpetuity*** – any past, present, or future disability-related discrimination claims against Disney arising under federal, state, or local law that relate to Disney's policy banning Segways and other two-wheeled vehicles from all Disney resorts. See Disney Class Settlement Agreement, ¶¶ 8-9, 13-

14. Such an expansive release of Disney class members' claims is legally defective for several reasons.

First, release provisions in class settlement agreements that prospectively waive claims for future civil rights violations – whether arising under the ADA or other federal anti-discrimination laws – are highly disfavored since, contrary to public policy, a settling defendant otherwise would then be able to "purchase" a license to discriminate in the future. See DOJ May Class Settlement Objections at 21-22 (collecting cases).

Moreover, the release provisions in the Disney agreement impermissibly extinguish the right of absent class members to seek redress under state or local anti-discrimination laws even though such claims plainly fall outside the scope of the Second Amended Complaint. In the Second Amended Complaint, as with their two prior complaints in this action, the named plaintiffs assert only ADA-based claims predicated on Disney's failure to allow them to use their Segways as mobility devices while visiting the Walt Disney World Resort in Florida. Given the limited scope of this Complaint, well-established federal caselaw precludes the settling parties in Disney from compromising the claims of absent class members that arise out of other legal or factual predicates. See, e.g., National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9, 18 (2nd Cir. 1981) ("If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action should not be able to do so either.").

Third, the overly expansive scope of the Disney Class Settlement Agreement's release provision could also compromise the Department of Justice's independent authority to enforce the ADA. The Department of Justice is the federal agency with primary responsibility for enforcing Title III of the ADA and its implementing regulations against public accommodations. See 42 U.S.C. §§ 12181 - 12189; 28 C.F.R. pt. 36 (1994). In keeping with this responsibility, the Department has the statutory authority to conduct compliance reviews of entities covered by Title III, investigate alleged violations, and, when necessary and appropriate, commence a civil action in district court for equitable relief, civil penalties, and/or monetary damages for the aggrieved party or parties. 42 U.S.C. § 12188(b). Because this agreement includes broad language precluding class members from raising "any claims" in the future against Disney (including, potentially, the filing of ADA-based complaints with the Department), it could have the practical effect of hampering the Department's ability to fully and effectively enforce the ADA against Disney. The Department does not believe that *any* private settlement agreement can lawfully preclude either individuals from filing Title III-based complaints with the Department or the Department from carrying out its statutory enforcement obligations. Nonetheless, it could well be that some individuals still may be deterred by the broad language in the Disney agreement's release provisions from filing complaints with the Department, or, alternatively, Disney could read these broad release provisions as limiting the Department's ability to engage in future enforcement efforts (if necessary) relating to Disney's ban on Segways as mobility devices at the Disney resorts. Either result would have a deleterious impact on the Department's ability to enforce Title III of the ADA.

Finally, the broad linguistic sweep of the release provisions suggests that, were the Disney agreement endorsed by the Court, absent class members may be viewed as having waived their rights to seek ***all*** available forms of relief under state or local law, including substantial monetary relief. See Disney Class Settlement Agreement ¶¶ 9 ("The Settlement

Class . . . waives all rights and benefits afforded by any statutory law as to unknown claims[.]”), 13 (released claims include “any and all claims and causes of action” predicated on Disney’s ban on Segways at all resorts).[4] However, when a proposed class settlement purports to waive rights to substantial monetary relief (by virtue of compromising claims under state or local disability laws for which statutory, compensatory, and/or punitive damages may be available), constitutional considerations dictate that absent class members receive both personal notice and an opportunity to opt out of the proposed settlement agreement irrespective of whether the class action has been nominally certified under Fed. R. Civ. Proc. 23(b)(2) or 23(b)(3). See DOJ May Class Settlement Objections at 12-13 (collecting cases); see also Molski v. Gleich, 318 F.3d 937,

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[4] Indeed, because many states provide substantial monetary remedies for violations of state accessibility laws or regulations, some class members may find litigating their discrimination claims more advantageous under state law than under Title III the ADA where only equitable relief is available for private actions. Compare, e.g., 42 U.S.C. § 12188(a) (remedies for private Title III actions) with Ark. Code. Ann. § 16-123-107 (2008) (intentional acts of disability discrimination liable for compensatory and punitive damages); Cal. Civ. Code §§ 52(a), 54.3(a) (2007) (permitting recovery of statutory, action, and treble damages for violations of state disability law); Colo. Rev. Stat. § 24-34-602 (2008) (violators of Colorado Anti-Discrimination Act liable for damages ranging from $50-500 per occurrence); Fla. Stat. Ann. §§ 760.07, 760.11(5) (West 2004) (disability discrimination by place of public accommodation gives rise to cause of action for “compensatory damages, including . . . mental anguish, loss of dignity, and any other intangible injuries, and punitive damages”); Lou. Rev. Stat. Ann. § 46:2256 (West 1999) (disabled individuals subjected to unlawful discrimination “shall have the right to any and all remedies under the law” including compensatory damages, attorney’s fees, and costs); Mass. Gen. Laws. ch. 272, § 98, ch. 151B, § 5 (West 2003) (authorizing damages for disability-based discrimination); N.Y. Exec. Law §§ 296, 297 (McKinney 2000) (authorizing damages for violations of public access law); Or. Rev. Stat. §§ 659A.142, 659A.885 (2008) (authorizing compensatory damages and punitive damages not to exceed $2,500 for unlawful discrimination by public accommodation); R.I. Gen. Laws §§ 42-87-2, 42-87-4 (1998) (permitting victims of disability discrimination to bring actions for equitable relief, compensatory and/or punitive damages, “or for any other relief that the court deems appropriate”); S.C. Code Ann. § 43-33-540 (1983) (civil damages not to exceed $5,000 available for disabled individuals subject to discrimination); Tex. Hum. Res. Code Ann. § 121.004(b) (Vernon 1995) (cause of action for disability-based discrimination with “conclusive presumption of damages in the amount of at least $ 100”).

945-51 (9th Cir. 2003) (holding that district court committed reversible error by failing to afford class members personal notice and an opportunity to opt out of class action agreement settling disability-rights claims when released claims included actual and treble damages under California's Unruh Civil Rights Act). Since only a handful (*e.g.*, about 60) of the putative Disney class members received personal notice, and no class members have been afforded the opportunity to opt out of the Disney Class Settlement Agreement, it would be reversible error for the Court to endorse this agreement should it be viewed as releasing claims for monetary relief.

Taken together, the procedural deficiencies underlying the Disney agreement's broad release provisions – particularly the release of all future state or federal disability discrimination actions - counsel against judicial endorsement of this agreement. See, e.g., National Super Spuds, 660 F.2d at 18-19 (reversing district court's approval of class settlement agreement with over broad release provision that provided for uncompensated release of unliquidated potato futures contracts that were not encompassed within the class complaint concerning liquidated contracts); Petruzzi's, Inc. v. Darling-Delaware Co., Inc., 880 F. Supp. 292, 299-301 (M.D. Pa. 1995) (rejecting class settlement requiring release of all class members' claims when only one-half of class received any direct economic benefit from agreement).

(c) Lack of Enforcement or Compliance Monitoring Provisions. Lastly, the Disney is procedurally flawed because it lacks any mechanisms for enforcement or compliance monitoring. Indeed, the agreement fails to devote even a single sentence with respect to mechanisms for class members or class counsel to monitor Disney's compliance or, if necessary, seek enforcement in the event they view Disney as failing to comply with some of the agreement's terms. Absent such provisions, the only remedy for compliance and enforcement issues would be an action in federal court alleging breach of the settlement agreement – an expensive and time-consuming enforcement mechanism. While the absence of compliance monitoring or enforcement provisions may not alone be a reason to reject the Disney agreement, the lack of such provisions – when coupled with the agreement's other significant procedural problems – underscores the manifest injustice class members will likely suffer if the district court endorses the agreement. Cf. Van Horn v. Trickey, 840 F.2d 604, 608 (8th Cir. 1988) (affirming district court's approval of prisoners' class action challenging conditions at correctional center when settlement agreement provided, inter alia, strong compliance monitoring program by court-appointed committee of penal experts).

2. ***Judicial approval of the Disney Class Settlement Agreement would compromise the Department's ability to effectively regulate a large segment of the theme park industry.*** As places of public accommodation, theme parks – such as the Magic Kingdom, Epcot, Animal Kingdom, Disneyland, and California Adventure – must comply with all Title III requirements applicable to their provision of goods and services. 42 U.S.C. §§ 12181(7)(I), 12182; 28 C.F.R. §§ 36.102(a), 36.104. As noted above, the ADA affords the Department of Justice primary regulatory authority for Title III-covered public accommodations and commercial facilities. See supra p. 2; see also 42 U.S.C. §§ 12186(b). To this end, the Department is currently nearing the conclusion of the requisite rulemaking process for promulgation of revised regulations implementing Title III of the ADA. See, e.g., Notice of Proposed Rulemaking, 73 Fed. Reg. 34,508 (June 17, 2008) [hereinafter "Title III NPRM"] (excerpted copy attached as Exhibit C); Advanced Notice of Proposed Rulemaking, 69 Fed. Reg. 58,768 (Sept. 30, 2004).

Among the areas addressed by the Title III NPRM are electronic personal assistive mobility devices (referred to as "EPAMDs") of which the only currently-available device on the retail market is, as far as the Department understands, the Segway. See Title III NPRM, 73 Fed. Reg. at 34,518. The Title III NPRM discusses at length several of the considerations underlying the use of EPAMDs/Segways at public accommodations by persons with disabilities and, in addition, poses four EPAMD/Segway-related questions (NPRM Question Nos. 8, 13, 47, & 49) on which the Department was specifically seeking input through public comments. See Title III NPRM, 73 Fed. Reg. at 34,518 -19, 34,522 - 523 & 34,539 - 41. Moreover, in order to provide specific regulatory guidance on the status of EPAMDs/Segways under the ADA (as requested by some members of the disability community and covered entities), the Title III NPRM proposes revising the Title III regulations by adding: (i) a definition (in § 36.104) for the new regulatory term "other power-driven mobility device" which includes EPAMDs/Segways; (ii) a new subsection (§ 36.311(b)) underscoring the well-established general requirement that Title III-covered public accommodations must make reasonable modifications to their policies, practices, and procedures to permit use of such devices by persons with disabilities absent an affirmative demonstration by the covered entity that permitting the device would be unreasonable or would fundamentally alter its goods, services, facilities, or accommodations; and (iii) a new subsection (§ 36.311(c)) enumerating the factors public accommodations shall consider when assessing the "reasonableness" of permitting use of a class of power-driven mobility devices by persons with disabilities at their venues and facilities. See Title III NPRM, 73 Fed. Reg. at 34,539 - 41, 34,552 & 34,556.

Lastly, the Title III NPRM specifically highlights EPAMDs/Segways accommodation issues for theme parks by way of illustration using a hypothetical theme park:

> Example 1: Although people who do not have mobility disabilities are prohibited from operating EPAMDs at a theme park, the public accommodation has developed a policy allowing people with disabilities to use EPAMDs as their mobility device at the theme park. The policy states that EPAMDs are allowed in all areas of the theme park that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The public accommodation determined that the venue provides adequate space for a larger device such as an EPAMD and that it does not fundamentally alter the nature of the theme park's goods and services. The theme park's policies do, however, require that EPAMDs be operated at a safe speed limit. A theme park employee may inquire at the ticket gate whether the device is needed due to the user's disability and also inform an individual with a disability using an EPAMD that the theme park's policy requires that it be operated at or below the designated speed limit.

Title III NPRM, 73 Fed. Reg. at 34,540.

The public comment period for the Title III NPRM has now closed. Public interest on regulatory approaches for EPAMDs/Segways at public accommodations was keen, with the Department receiving about 160 written comments (excluding duplicative form letters) and the views of six speakers at the public hearing held on July 15, 2008 in Washington, D.C. See Transcript of ADA NPRM Public Hearing, http://www.ada.gov/NPRM2008/public_hearing_transcript.htm (statements of Kerr, Timm, Dickson, Kaplan, Maccini, and Madden). The Department is currently reviewing these comments and will be issuing final revised Title III regulations in the near future.

Approval of the Disney Class Settlement Agreement at this juncture would thus frustrate the regulatory process by "freezing" in place Disney's blanket policy banning Segways from all Disney resorts and theme parks since the agreement has no end date. To be sure, there are strong views on all sides regarding the extent to which mobility devices such as EPAMDs/Segways should be accommodated by Title III-covered facilities as reflected in the diversity of opinions expressed by Segways-related comments in response to the Title III NPRM. New mobility devices such as EPAMDs/Segways may well pose challenges for some facilities when balancing reasonable accommodation with legitimate safety considerations. That is why the Department is considering the inclusion of specific regulatory guidance in the revised Title III regulations that will both expressly affirm the general principle that public accommodations must reasonably accommodate use of EPAMDs/Segways by persons with disabilities, and specifically enumerate permissible factors that a public accommodation may consider in its accommodation calculus.[5] Neither Disney nor the named plaintiffs, however, should be permitted to short-circuit this regulatory process by agreeing to an ill-conceived class action settlement agreement stipulating in perpetuity to Disney's ban on the use of Segways (and similar two-wheeled devices) by persons with disabilities at all Disney resorts – irrespective of such seemingly pertinent considerations as the unique characteristics of each Disney theme park and resort (*i.e*., size, layout, attendance, pedestrian traffic flow, nature of rides or entertainment) or size and operational characteristics of the mobility devices at issue.

3. ***The substantive terms of the Disney Class Action Settlement Agreement are manifestly unfair to absent class members who receive virtually no benefits while, by contrast, named plaintiffs receive cash payments, complimentary one-week use of ESVs, and attorneys fees.*** Given the Disney agreement's considerable procedural shortcomings, it is not at all clear that, even if this agreement provided significant and evenhanded substantive benefits to class

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5 Indeed, both the General Services Administration and the Department of Transportation have already issued regulations or other forms of official guidance expressly permitting, with certain operational restrictions, persons with disabilities to use their Segways as mobility devices in federal buildings and transportation systems. See General Services Administration, Notice of Interim Policy, 73 Fed. Reg. 1223 (Jan. 7, 2008); Department of Transportation, Disability Law Guidance - "Use of 'Segways' on Transportation Vehicles (dated Sept. 1, 2005) (available at http://www.fra.dot.gov/ downloads/ Research/ Segways.pdf).

members, the settlement could be deemed fair and reasonable to absent class members. The Disney agreement's class benefits, however, are neither substantively significant nor equitably distributed. Rather, as noted previously, the agreement's terms grossly favor the named plaintiffs who each receive $4,000, complimentary one-week use of a Disney-owned ESV at any Disney resort, and attorney's fees. See discussion supra pp. 2-3. Other (absent) class members, on the other hand, receive only the "opportunity" to rent a Disney-owned ESV – in lieu of being able to use their personal Segways as mobility devices – whenever they visit a Disney resort. Id.[6] This Court should, therefore, summarily reject the Disney agreement as being fundamentally unfair to absent class members.

Proponents of class action settlements bear the burden of proving that the proposed settlement terms are fair, reasonable, and adequate to the class as a whole. See, e.g., Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983); Parker v. Time Warner Entertainment Co., 239 F.R.D. 318, 336 (E.D.N.Y. 2007); Petruzzi's Inc., 880 F. Supp. at 296; 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:42 (4th ed. 2002); see also Fed. R. Civ P. 23(e)(2) (district courts may only approve binding class settlement upon finding its terms "fair, reasonable, and adequate"). Moreover, where, as here, a proposed classwide

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[6] Nor can Disney be heard to argue that Disney-owned ESVs must be used at its theme parks and resorts – instead of class members' own Segways – because Segways represent inherently dangerous devices within a theme park environment. Two of Disney's competitors in the theme park industry (Busch Gardens Williamsburg and Universal Studios Hollywood) ***do*** permit patrons with disabilities to use their own Segways within their facilities. See Busch Gardens Williamsburg - Disabled Access Guide 2008, http://www.buschgardens.com/bgw/Access_Guide_2008_January.pdf (last accessed March 11, 2009); Universal Studios Hollywood - Rider's Guide for Rider Safety and Guests With Disabilities, http://www.universalstudioshollywood.com/pdf/guest_assistance_chart.pdf (last accessed March 11, 2009).

settlement treats the named plaintiffs more favorably, an inference of unfairness arises that can only be rebutted by a *factual* showing – and not mere argument of counsel – that such disproportionate benefits are based on legitimate considerations. See, e.g., Holmes, 706 F.2d at 1148-51; Plummer v. Chemical Bank, 668 F.2d 654, 659 (2nd Cir. 1982) (fairness of voluntary class settlements favoring class representatives find support in "evidentiary foundation" rather than "arguments and recommendations of counsel"); Petruzzi's Inc., 880 F. Supp. at 299 (cautioning that proposed class settlements affording preferential treatment to named plaintiffs require "careful judicial scrutiny" to ensure that absent class members are not being treated unfairly); Reynolds v King, 790 F. Supp. 1101, 1106 (M.D. Ala. 1990) (same); see also Fed. R. Civ. P. 23 advisory committee's notes (2003 Amendments) ("Subdivision (e) is amended to strengthen the process of reviewing proposed class action settlements . . . . [C]ourt review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.").

Indeed, the cautionary note sounded by the Eleventh Circuit concerning class settlements that afford preferential treatment to class representatives applies equally to this action: "We agree that 'where representatives plaintiffs obtain more for themselves by settlement than they do for the class for whom they are obligated to act as fiduciaries, serious questions are raised as to the fairness of the settlement to the class." Holmes, 706 F.2d at 1148 (quoting Plummer v. Chemical Bank, 91 F.R.D. 434, 441-42 (S.D.N.Y. 1981), aff'd, 668 F.2d 654 (2nd Cir. 1982)).

That the Disney Class Settlement Agreement is patently unfair to absent class members is beyond question. For not only does the agreement provide $4,000 cash payments and other in-kind economic benefits (*i.e.*, complimentary one-week use of Disney-owned ESV) to each named plaintiffs, but also such monetary relief is not even *statutorily permitted* for private causes of action under Title III of the ADA. Compare, e.g., 42 U.S.C. § 12188(a) (remedies for private Title III actions) with id. at § 12188(b) (2) (remedies available in Title III enforcement actions filed by the Attorney General); see also United States Department of Justice, Americans With Disabilities Act - Title III Technical Assistance Manual § III-8.2000 (Nov. 1993) ("Remedies available in a private suit may include a[n] . . . injunction, restraining order, or other order, but not compensatory or punitive money damages or civil penalties."); Wander v. Kaus, 304 F.3d 856, 858 (9th Cir. 2002) (money damages not available in private Title III actions). Indeed, the only purported substantive "benefit" absent class members do receive under the terms of the Disney agreement – the "opportunity" to rent one of 15 Disney-owned ESVs when visiting a Disney resort in Florida or California – has little, if any, classwide value. The many substantive flaws in the Disney agreement are highlighted below.

(a) Lack of Design or Operational Specifications for ESVs. Nowhere does the Disney agreement establish design or operational parameters for Disney-owned ESVs in order to ensure that such devices will, in fact, satisfy each class members' mobility needs by performing comparably to his or her personally-owned Segway. Class members are left with nothing more to go on than Disney's self-serving assurance that its ESV represents "a unique and innovative device . . . intended to replicate in dimension, purpose, and operation a common wheelchair or scooter while allowing individuals with a mobility disability to stand upright instead of sit[ting] down." Disney Class Notice at 2; see also Disney Class Settlement Agreement ¶ 12(e) ("The Settlement Class agrees that the ESV satisfies their claims to the benefits which a Segway allegedly provides, while meeting [Disney's] concern for the safety of all its guests."). The agreement thus compels class members to "give up" their rights to use their own personal mobility devices (Segways) with no assurance whatsoever either that they would be able to use the Disney-owned ESVs in light of their own respective impairments or physical limitations, or that the ESVs would permit them to enjoy the attractions at the Disney resorts with an equal measure of function, independence, and comfort as compared to their personal Segways.

(b) Imposition of Illegal Surcharge. The Disney agreement's requirement that class members pay rental fees for Disney-owned ESVs not only fails to provide any "benefit" to class members, but it is also legally suspect. The Title III regulations expressly prohibit public accommodations from imposing surcharges on persons with disabilities to cover the costs of compliance measures. See 28 C.F.R. § 36.301(c) ("A public accommodation may not impose a surcharge on [persons with disabilities] to cover the costs of measures, such as . . . reasonable modifications in policies, practices, and procedures, that are required to provide [persons with disabilities] the nondiscriminatory treatment" required by the ADA or Title III regulations); Title III Technical Assistance Manual § III-4.1400 (reiterating surcharge prohibition and providing of illustrative examples of measures by public accommodations taken to recoup compliance costs that would run afoul of "no surcharge" rule). Disney's attempt to recoup its costs of complying with Title III by requiring class members to pay substantial rental fees (currently, $ 45.00 per day and a refundable $100 credit cart deposit) when using Disney-owned ESVs, see supra p. 2 n. 1, represents an illegal surcharge in violation of the ADA. See, e.g., Duprey v. State of Connecticut, 28 F.Supp.2d 702, 707-10 (D. Conn. 1998) (holding fee for handicapped parking placards violated ADA and noting "[i]f the DMV wants to pass the costs of providing placards, rather than absorbing the costs itself, it must pass the cost on to all parkers, not just those individuals protected by the ADA"); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 717-18 (D. Or. 1997) (arena operator prohibited from charging higher price to patrons who use wheelchairs for tickets, even though wheelchair spaces require additional space, since such additional charge would constitute an illegal surcharge).

(c) No Guarantee that ESVs Will Be Available for Use by Class Members. Even assuming that Disney-owned ESVs would indeed adequately meet each class members' mobility needs, the Disney agreement still does not guarantee that ESVs will be available for rental by a class member when visiting one of the many Disney theme parks. Instead, this agreement merely requires Disney to make a total of 15 ESVs available for rental by class members at Disney resorts – with Disney free to distribute these devices among its theme parks at its discretion. See Disney Class Settlement Agreement at ¶ 12(a). Class members, for example, thus may travel long distances to visit a Disney resort with family or friends only to find that the theme park they wished to visit on a given day either does not have any Disney-owned ESVs or had already rented all available ESVs out for the day.

(d) Disney Already Planned to Deploy ESVs Months Before the Disney Agreement. Finally, and perhaps most important, several months ***before*** the settling parties agreed to terms on a classwide settlement of this action, Disney already was planning to make production models of its ESV available for rent at Disney resorts around April 1, 2009. See Defendant's Opposition to Plaintiff's Motion for Class Certification Under Fed. R. Civ. P. 23, Exhibit 3 (Cardinali Dec.) ¶ 6 ((Docket ## 72-4). Class members thus will receive the same "benefit" from Disney – that is, an opportunity to rent a Disney-owned ESV when visiting a Disney resort – irrespective of whether this Court endorses the Disney Class Settlement Agreement.

Taken together, these considerations strongly counsel that the Disney agreement cannot withstand the "careful judicial scrutiny" required of class settlement agreements that afford preferential treatment to class representatives. See, e.g., Molski, 318 F.3d at 953-56 (rejecting class settlement of ADA action on fairness grounds when class representatives received $5,000 in monetary relief and attorneys fees, while class absent class members received nothing more than assurance that defendant's service stations would "simply meet [their] legal obligations (or perhaps even less than that required) under the ADA); Crawford v. Equifax Payment Services, Inc., 201 F.3d 877, 882 (7th Cir. 2000) (reversing district court's approval of class action settlement because, among other things, the named plaintiff and class counsel "were paid handsomely to go away [while] the other class members received nothing . . . and lost the right to pursue class relief"); Reynolds, 790 F. Supp. at 1105-14(rejecting class settlement agreement when named plaintiffs received substantial monetary benefits, while other class members received only "token amounts").

CONCLUSION

Taken together, the Disney Class Settlement Agreement's significant procedural and substantive flaws strongly counsel against judicial approval of the settlement. While voluntary settlement of litigation is always a laudable goal, neither the parties nor this Court can sacrifice the claims of absent disabled class members in order to avoid litigation. The United States, therefore, objects to the Disney Class Settlement Agreement and urges the Court to disapprove this agreement.

DATED: March 12, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2009, true and correct copies of **Objections of Amicus Curiae United States to Proposed Disney Class Action Settlement Agreement** were served electronically via CM/ECF and by Federal Express, postage pre-paid, on the following parties:

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ACCESS NOW, INC, et. al, Plaintiffs, v. THE MAY DEPARTMENT STORES COMPANY, et. al., Defendants.	CASE NO. 00-148-CIV-MORENO

OBJECTIONS OF AMICUS CURIAE UNITED STATES
TO PROPOSED CLASS ACTION SETTLEMENT AGREEMENT

TABLE OF CONTENTS

I. INTRODUCTION

In July 2000, plaintiff Access Now filed an amended class action complaint alleging violations under the Americans With Disabilities Act ("ADA") in Lord & Taylor department stores nationwide due to inaccessible aisles and pathways, check-out counters, bathrooms, and fitting rooms. Less than a year later, in April 2001, the parties filed a conditional class action settlement agreement that purports to settle all accessibility claims -- both ADA-based claims as well as claims arising under state accessibility laws -- on behalf of a nationwide class of persons with mobility-related disabilities and their shopping companions. This agreement, if endorsed by the Court, would cover nearly all of defendant May Department Store Company's ("May") stores nationwide.

It is the role of the Attorney General to enforce the ADA "in the public interest" and to ensure that alleged violations are remedied. Moreover, private enforcement actions are authorized by Title III of the ADA. The Department of Justice has never before objected to a voluntary settlement of ADA claims between private litigants. However, this settlement so favors the large corporate defendant – May – and so limits future ADA enforcement actions on behalf of persons with disabilities, that the United States must object to its approval.

Amicus curiae United States of America strongly urges the Court to reject this settlement on numerous grounds. First, the class conditionally certified by the Court fails to satisfy Rule 23(a) of the Federal Rules of Civil Procedure and, therefore, cannot serve as the basis for a class action settlement. Since this Court has already rejected Access Now's motion for certification of a much smaller class covering approximately 80 Lord & Taylor stores for lack of commonality, it would be reversible error under Amchem v. Products, Inc., 521 U.S. 591 (1997) for the Court to now endorse a larger class covering nearly 400 May-owned department stores around the country.

Moreover, the May settlement is so procedurally flawed that its endorsement would compromise the legal interests of both the greater disability community and the United States. These procedural flaws range from constitutionally defective class notice, to an overly broad release provision, to a mechanism for "resolving" future disability-related claims that is heavily weighted in favor of May. Indeed, the agreement's release provision is so expansive that it would preclude ***any*** future state or federal disability-related discrimination complaints by class members against May in perpetuity – thereby affording May a license to discriminate against future disabled shoppers.

Given the May agreement's considerable procedural problems, it is not at all clear that, even if the agreement contained absolute substantive accessibility guarantees, class members would still be getting significant benefits from the settlement. The agreement, however, is no model for accessibility. Rather, as with other aspects of the agreement, its substantive terms significantly disadvantage disabled shoppers.

Taken together, the May agreement's procedural and substantive flaws strongly counsel against judicial approval of the settlement. While voluntary settlement of litigation is always a laudable goal, neither the parties nor this Court can sacrifice the claims of absent disabled class members in order to avoid litigation.

II. BACKGROUND AND PROCEDURAL HISTORY

In July 2000, Access Now filed an amended class action complaint against May Department

Stores Company ("May") alleging ADA violations in Lord & Taylor stores nationwide due to inaccessible aisles and pathways, cash/wrap counters, bathrooms and fitting rooms. Second Amended Complaint for Violation of Civil Rights and Discrimination Against Persons With Disabilities; Americans With Disabilities Act of 1990; Injunctive Relief (filed July 14, 2000) ("May Complaint").[1] Defendant May owns and operates 78 Lord & Taylor stores nationwide, six of which are located in Florida. Id. at ¶ 9. With respect to the class action allegations, the complaint names Access Now, as well as three disabled individuals (each of whom use a wheelchair for mobility), as representatives of a class consisting of "all persons who have been denied access to [Lord & Taylor's] goods and services due to the disability access violations described [in the complaint]." See May Complaint ¶ 12.

Two weeks later, Access Now filed a motion for class certification pursuant to Rule 23 of the Federal Rules. See Plaintiff's Motion for Class Certification Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), and Memorandum of Law Thereof (filed July 28, 2000)(Docket # 32). In this motion, Access Now sought to represent a class consisting of

> All persons with mobility disabilities who use a mobility aid such as a wheelchair, scooter, walker, cane and/or crutches, who are being denied the right to full and equal access to, and use and enjoyment of, any department store owned and/or operated by

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[1] Access Now's original complaint (filed in January 2000) and First Amended Complaint (filed in May 2000) were dismissed without prejudice by the district court for failure to allege specific ADA violations at each Lord & Taylor store. See Order Granting Motion to Dismiss Without Prejudice and Order Closing Case (entered Mar. 30, 2000) (Docket # 15); Order (entered May 3, 2000) (Docket #20). In June 2000, the Court also granted May's motion for a more definite statement. See Order (entered June 14, 2000). The Second Amended Complaint rectified these deficiencies by adding a ten-page section detailing ADA violations at each Florida Lord & Taylor location (by date, store, department, and type of violation). See May Complaint at ¶¶ 10-15. In all other material respects, the substantive allegations in the Second Amended Complaint are identical to Access Now's previous complaints.

> May Department Stores Company d/b/a Lord & Taylor due to the violations in this Complaint.

Id. at 15.

May opposed this motion for class certification on several grounds. See Defendant The May Department Stores Company D/B/A Lord & Taylor's Response to Plaintiffs' Motion for Class Certification (filed Aug. 24, 2000) (Docket # 38). First, May asserted that the motion was premature since there had not yet been any discovery in the case. Id. at 3-4. Second, even if not premature, May argued that class certification should be denied because there were no common issues of fact or law among the putative class members because each Lord & Taylor store was built and/or remodeled at different times, had different merchandise selections, had different department designs, and used different types of display fixtures. Id. at 7-12.

In October 2000, this Court issued a brief order denying Access Now's motion for class certification. See Order Denying Plaintiffs' Motion for Class Certification (filed Oct. 6, 2000) (Docket # 48) [hereinafter "Class Order I"]. In this Order, the Court held that Access Now failed to satisfy Rule 23(a)'s commonality requirement because, in essence, plaintiffs failed to establish a uniform design flaw or structural defect in Lord & Taylor stores nationwide. Instead, in the Court's opinion, the evidence established more differences than similarities among these Lord & Taylor stores:

> Plaintiffs' Complaint does not provide any detail concerning ADA violations outside the state of Florida, and only alleges specific violations – as opposed to a uniform policy – in Defendant's six stores in Florida. There are multiple distinctions between the violations in each of Defendant's six Florida stores, as well as between the departments within each store . . . . [E]ach of Defendant's stores nationwide is configured uniquely. Defendant built some stores, while it inherited other stores through acquisition. Different stores have different sales volumes, selections of merchandise, and sizes of departments and stores, as well as different department designs and use of different fixtures to display merchandise.

Class Order I at 4. Because Access Now failed to establish commonality, the Court addressed neither the remaining three prerequisites under Rule 23(a) nor class requirements under Rule 23(b)(2). Id. at 3. Thereafter, the case lay essentially dormant for several months except for various non-substantive scheduling motions. Significantly, the docket sheet reflects neither discovery by either party nor subsequent modification of the Court's order denying class certification.

On April 5, 2001, the parties filed a conditional class action settlement agreement, contingent on approval by the Court, which purports to settle all accessibility claims against May on behalf of a nationwide class of persons with mobility-related disabilities and their companions. See Stipulation and Agreement of Compromise and Settlement (filed April 5, 2001) (Docket # 59) [hereinafter "May Agreement" or "Agreement"]. In conjunction with the filing of the settlement agreement, the parties also filed a Joint Motion seeking conditional class certification under 23(b)(1) and (b)(2), a settlement hearing, as well as approval of the proposed class notice. See Docket # 58. This Motion also proposed that the class notice be distributed to class members through publication in *New Mobility* magazine and the Paralyzed Veterans of America's magazine (called *P.N. Magazine*), as well being posted on the Access-Able.com website. Id.

That same day, the Court issued an order granting preliminary approval of the settlement agreement. See Order Concerning Class Certification, Notice, and Scheduling (filed April 5, 2001) (Docket #60) [hereinafter Class Order II"]. In this Order, the Court approved the parties' proposed order and, inter alia, (i) conditionally certified the class proposed in the May Agreement under Rule 23(b)(1) and (b)(2), (ii) scheduled a settlement hearing for August 21, 2001, and (iii) approved the parties' proposed class notice and methods of distribution. Id. The Court's order also specified that objections to the agreement must be filed and received by class counsel no later than 20 days prior to the settlement hearing (i.e. - August 1, 2001). Id. at 4. Finally, the Court enjoined class members from prosecuting any accessibility action against May in any other court or jurisdiction pending the outcome of the May settlement hearing. Id. at 5.

III. ARGUMENT

A. The Class Conditionally Certified By the Court Fails to Satisfy Rule 23(a) and, Therefore, Cannot Serve as the Basis for a Class Action Settlement Agreement

This Court need look no further than the requirements of Rule 23 of the Federal Rules of Civil Procedure to determine that the May Agreement must be rejected. Since the Court itself has already concluded that Access Now's proposed nationwide class consisting of Lord & Taylor shoppers with mobility disabilities failed Rule 23(a)'s commonality requirement, it would be reversible error under Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) for the Court now to approve a class action settlement agreement containing an even broader class definition covering virtually all May department stores nationwide.

Rule 23(a) mandates that, in order to obtain class certification, plaintiffs must first satisfy the now-familiar four prerequisites of numerosity, commonality, typicality, and adequacy of representation. See, e.g., Murray v. Auslander, 244 F.3d 807, 810 (11th Cir. 2001); Pickett v. Iowa Beef Processors, Inc., 209 F.3d 1276, 1279 (11th Cir. 2000); Heaven v. Trust Company Bank, 118 F.3d 735, 737 (11th Cir. 1997); Jackson v. Motel 6 Multipurpose, Inc., 130 F3d 999, 1003-04 (11th Cir. 1997). In addition, the class proponents must demonstrate that at least one of the alternative requirements of Rule 23(b) have been met. See, e.g., Fed. R. Civ. P. 23(b)(1)-(3); Murray, 244 F.3d at 810 & n. 3;

Jackson, 130 F.3d at 1005. The party moving for class certification – here, Access Now - bears the burden of establishing the propriety of class certification. See, e.g., Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228, 1233 (11th Cir. 2000); Heaven, 118 F.3d at 737.

As the Supreme Court held in Amchem, moreover, Rule 23's requirements apply with equal force to the *settlement* of classwide claims. In Amchem, the parties – asbestos victims and manufacturers – attempted to globally settle all asbestos cases through a nationwide administrative claims processing scheme established in the settlement agreement. 521 U.S. at 602-05. As here, the Amchem settlement class did not receive formal certification by the district court under Rule 23. Rather, the district court conditionally certified the class proposed in the settlement agreement, conducted a fairness hearing, and then declared certification appropriate because the settlement otherwise appeared to be a "fair, reasonable, and adequate compromise[.]" Id. at 607- 08. The Supreme Court (as did the Third Circuit) flatly rejected the district court's approach, holding that "[f]ederal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted - that if a settlement is 'fair,' then certification is proper." Id. at 622.[2]

In light of Amchem, the Court's conditional certification of the nationwide class set forth in the May Agreement was improper. First, in October 2000, this Court rejected Access Now's motion for certification of a class consisting of Lord & Taylor shoppers with mobility disabilities for failure to satisfy Rule 23(a)'s commonality requirement. See discussion supra pp. 3-5. As the Court noted,

[2] The Supreme Court went on to conclude in Amchem that the certified class of asbestos victims failed Rule 23 because, inter alia, the class was too diverse (ranging from individuals with exposure-only claims to persons suffering from end-stage asbestosis) and the agreement failed to take into account differences in state law.

Access Now failed to establish a uniform corporate policy of ADA violations with respect to even the six Florida-based Lord & Taylor stores, let alone Lord & Taylor stores nationwide. Id. Yet, six months later, without any apparent class-related discovery or modification of the previous order rejecting class certification, the Court granted the parties' motion for conditional class certification and scheduled a settlement hearing. Given Amchem's mandate that "settlement only" classes must abide by Rule 23's requirements, this grant of conditional class certification was in error.

Second, equally troubling is the fact that the class set forth in the May Agreement is far broader – in terms of both the number of class members and covered department stores – than the class previously rejected by the Court. The May Agreement's class definition includes not only persons with mobility disabilities who have experienced or may experience discrimination at May department stores, but also companions of disabled shoppers who have suffered or may suffer similar discrimination. Agreement ¶ 1. In addition, while the scope of Access Now's motion for class certification was "limited" to 78 Lord & Taylor stores nationwide, see Motion for Class Certification at 15; Complaint ¶ 1, the May Agreement extends coverage to ***all*** May Department stores nationwide except for Robinsons-May stores operated in California. See May Agreement ¶ G.[3] According to May's web site (www.mayco.com), the company owns and operates department stores through eight separate "operating divisions" — including Lord & Taylor, Robinsons-May, Hecht's, Foley's, and Filene's. See Ex. 1. Altogether, May has 382 department stores nationwide excluding the California-based

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[3] The May Agreement carved out an exception for Robinsons-May stores operating in California due to an apparent concession to an accessibility action currently being litigated in the United States District Court for the Central District of California. See Shimozono, et. al. v. Robinsons-May, Inc., C.A. No. 00-CV- 4261 (C.D. Cal. filed April 21, 2000).

Robinsons-May division. Id. Thus, the Agreement expands the scope of affected May properties by over 300 department stores nationwide. Since the court has already determined that there is insufficient commonality between even the six Florida-based Lord & Taylor stores to support class certification, Class Order at 3-4, there can be no doubt that a more expansive class encompassing 382 May department stores nationwide falls far short of satisfying Rule 23's requirements.

These procedural defects underlying the class conditionally certified by the Court thus preclude final approval of the May Agreement. For however laudable the goal of voluntary settlements, or however beneficial the terms of the agreement may be to certain parties, a class action settlement that fails to meet the procedural standards set forth in Rule 23 cannot receive judicial approval. As the Supreme Court warned in Amchem: "The safeguards provided by Rule 23(a) and (b) class-qualifying criteria . . . are not practical impediments - checks shorn of utility - in the settlement context." 521 U.S. at 620-22; see also Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) ("Several circuits have held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness.") (collecting cases); Austin v. Hopper, 15 F. Supp. 2d 1210, 1224 (M.D. Ala. 1998) ("[T]he fairness of the [settlement] agreement is irrelevant if the court finds that plaintiffs fail to meet the criteria for class certification.").

B. The Class Notice Is Defective and Will Reach Only A Minuscule Portion of Class Members

Yet even assuming that the class set forth in the May Agreement could be properly certified under Rule 23(a), the Agreement must still be rejected because the class notice violates due process and otherwise fails to meet Rule 23's notice requirements.

Because class action litigation under Rule 23 has a preclusive effect on class members, both procedural due process and statutory considerations require that notice of a proposed settlement be disseminated to the class prior to final judicial approval. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974); Fed. R. Civ. P. 23(c)(2), 23(e). At a minimum, due process demands that such notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Beyond this basic due process standard, the nature and degree of notice required largely depends on the types of claims covered by the settlement and the identify of interests among class members. For class actions seeking (or seeking to compromise) only claims for injunctive or declaratory relief where there is likely to be a high degree of class cohesiveness and unity (i.e. - classes certified under Rule 23(b)(1) or (b)(2)), Rule 23(e) vests broad discretion in district courts with respect to the content and mechanics of class notice. See Fed. R. Civ. P. 23(e) (authorizing district courts to order class notice "in such manner as the court directs"). Federal courts have thus generally upheld published notices in such actions so long as they adequately inform interested parties of the pendency of the lawsuit, provide a summary of the agreement's general terms, and inform parties of their respective rights thereunder. See, e.g., Mendoza v. United States, 623 F.2d 1338, 1350-51 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981); Allen v. Alabama State Bd. of Educ., 190 F.R.D. 602, 606-07 (M.D. Ala. 2000); Stanley v. Darlington County School Dist., 879 F. Supp. 1341, 1372-73 (D.S.C. 1995), rev'd in part on other grounds, 84 F.3d 707 (4th Cir. 1996); 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 8.32 (3d ed. 1992).

On the other hand, in class actions where individual interests are stronger and class interests less cohesive -- typically, claims for monetary relief certified under Rule 23(b)(3) -- both Rule 23(c) and due process demand stronger procedural protections for absent class members. See, e.g., Holmes v. Continental Can Co., 706 F.2d 1144, 1155-59(11th Cir. 1983) (explaining differences in procedural protections afforded (b)(2) and (b)(3) classes in terms of class cohesiveness); Battle v. Liberty National Life Ins. Co., 770 F. Supp 1499 (N.D. Ala. 1991) (comparing due process and statutory notice requirements under Rule 23(b)(2) and Rule 23(b)(3)), aff'd, 974 F.2d 1279 (11th Cir. 1992), cert. denied, 509 U.S. 906 (1993); Stanley, 879 F. Supp. at 1372 (noting "more rigorous" class's notification standards enumerated by Rule 23(c)). Thus, in these cases, both due process and Rule 23(c)(2) mandate that absent class members be given both (i) "the best notice practicable under the circumstances, including individual notice to all members that can be identified through reasonable efforts," and (ii) an opportunity to exclude themselves or "opt-out" of the class and lawsuit. Fed R. Civ. P. 23(c)(2); see also Eisen, 417 U.S. at 173-76 (individual notice must be sent to identifiable class members under Rule 23(c)(2) regardless of expense).

Viewed through the lens of these statutory and due process requirements, the May class notice cannot withstand scrutiny. First, since the May Agreement's release provision purports to bar future state law-based claims for monetary relief, see May Agreement at 4-5, class members should have been afforded both individual (actual) notice and an opportunity to opt-out of the settlement. Because neither of these procedural protections were given to class members, the May Agreement must be rejected.

The May Agreement's release provision is exceedingly broad, barring class members from litigating not only future ADA-based equitable actions, but also claims for compensatory or punitive damages under applicable state accessibility laws. May Agreement at 4-5; see also discussion infra pp. 21-24.[4] Where, as here, a class action settlement agreement purports to bar future litigation of individual monetary claims, this Circuit has held that due process requires that class members receive actual – rather than published – notice and an opportunity to opt-out irrespective of whether the class has been nominally certified under 23(b)(1) or (b)(2). See Holmes, 706 F.2d at 1153-61 (reversing district court's approval of proposed class action settlement because class members in (b)(2) class not provided opportunity to opt-out and separately litigate Title VII-based back pay claims); Johnson v. General Motors Corp., 598 F.2d 432, 437 (5th Cir. 1979) (holding that, although actual notice was

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[4] Indeed, because many states provide substantial monetary remedies for violations of state accessibility laws or regulations, some class members may find litigating their discrimination claims more advantageous under state law than under Title III the ADA where only equitable relief is available for private actions. Compare, e.g., 42 U.S.C. § 12188 (ADA Title II remedies and procedures) with Ark. Code. Ann. § 16-123-107 (1999) (intentional acts of disability discrimination liable for compensatory and punitive damages); Cal. Civ. Code § 54.1 (2001) (permitting recovery of not less than $1,000 for each violation of state disability law); Colo. Rev. Stat. § 24-34-602 (1998) (violators of Colorado Anti-Discrimination Act liable for damages ranging from $50-500 per occurrence); Fla. Stat. Ann. §§ 413.08, 760.07, 760.11(5) (West 1998) (disability discrimination by place of public accommodation gives rise to cause of action for "compensatory damages, including . . . mental anguish, loss of dignity, and any other intangible injuries, and punitive damages"); Lou. Rev. Stat. Ann. § 2256 (West 2001) (disabled individuals subjected to unlawful discrimination "shall have the right to any and all remedies under the law" including compensatory damages, attorney's fees, and costs); Mass. Gen. Laws. Ann. ch. 272 § 98 (West 2001) (authorizing damages for disability-based discrimination); N.Y. Exec. Law §§ 296, 297 (McKinney 2001) (authorizing damages for violations of public access law); Or. Rev. Stat. §§ 659.121, 659.425(2000) (authorizing compensatory damages and punitive damages not to exceed $2,500 for unlawful discrimination by public accommodation); R.I. Gen. Laws §§ 42-87-2, 42-87-4 (2000) (permitting victims of disability discrimination to bring actions for equitable relief, compensatory and/or punitive damages, "or for any other relief that the court deems appropriate"); S.C. Code Ann. § 43-33-540 (Law Co-op 2000) (civil damages not to exceed $5,000 available for disabled individuals subject to discrimination); Tex. Civ. Code Ann. § 121.004(b) (Vernon 1995) (imposing $100 penalty for each violation of Texas Architectural Barriers Act).

not required to bind absent class members in a 23(b)(2) class action seeking only injunctive and declaratory relief, "due process requires that it be provided before individual monetary claims may be barred"); Battle, 770 F. Supp. at 1517 (surveying Eleventh Circuit caselaw and concluding that "due process required individual notice and the right to opt-out before the personal pecuniary claims of absent class members could be barred, even [when] the case has been certified under (b)(2)") (internal quotations omitted). That May class members were afforded neither of these procedural protections thus precludes approval of the May Agreement.[5]

Additionally, even assuming that the May Agreement's expansive release provision does not necessitate these constitutionally-enhanced procedural measures, the class notice is nonetheless defective under the more lenient "reasonableness" standard governing class notice under Rule 23(e). The primary flaw underlying the May class notice concerns its limited means of distribution. The Court's Class Order adopts the parties' proposed publication scheme and provides that notice need only be published in *PVA* and *New Mobility* magazines, as well as being posted on the "Access-Able.com" web site. See Class Order II at ¶ 6. Yet, taken together, PVA's magazine (published as *PN Magazine*) and *New Mobility* magazine have a combined *worldwide* circulation of just over

[5] Nor can it be argued that publication of the May class notice in *New Mobility* and *PN magazine* may be deemed to satisfy the requisite actual notice. For not only are the circulations of these two magazines extremely limited, see discussion infra p. 14, but publication – even in the largest circulation newspapers or magazines – is rarely a constitutionally acceptable substitute for individual, mailed notice. See, e.g., Eisen, 417 U.S. at 175 ("'[N]otice by publication ha[s] long been recognized as a poor substitute for actual notice and . . . its justification [is] 'difficult at best.'") (quoting Schroeder v. City of New York, 371 U.S. 208, 213 (1962)); Mullane, 339 U.S. at 313-15 (holding publication of notice in local newspaper constitutionally insufficient, and noting "[i]t would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts").

54,000 subscribers – ***less than 1%*** of the 7.4 million disabled persons plaintiffs themselves estimate to be putative class members. See Exs. 2-3; Plaintiff's Motion for Class Certification at 4 (Docket # 32).[6] Moreover, while it is unknown how frequently the members of the disability community access the Access-Able.com website, it is highly unlikely that this web site – or the notice to be posted thereon – will be accessed with sufficient frequency to reasonably apprise class members of the pendency of this settlement agreement. Finally, "publication" on the Access-Able.com web site is additionally suspect because the site bills itself as "providing access information for mature and disabled travelers" – hardly a site likely to draw significant attention from disabled individuals who may shop at May department stores nationwide.

With this understanding, the class notice ordered by the district court can hardly be deemed reasonably calculated to reach all putative class members. Again, while actual notice is not constitutionally required under Rule 23(e), common sense dictates that a notice reaching less than 1% of putative class members is neither fair nor reasonably calculated to apprise *all* class members of the settlement. Equally troubling is the fact that the May parties made no attempt to augment their paltry publication scheme through outreach to the greater disability community or extensive press coverage; indeed, the May Agreement contains a "gag order" expressly *prohibiting* the parties from publicizing or otherwise discussing the terms of the settlement agreement. See May Agreement ¶ 12.[7]

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[6] Since Access Now's estimate of over 7 million disabled class members does not include "companions" of disabled shoppers who are also encompassed within the May Agreement's class definition, the class's actual size is likely significantly higher.

[7] Indeed, the existence of the May Agreement's "gag order," coupled with the limited means of distribution for the class notice, raises the specter that the settling parties are attempting to "bury" the Agreement and have it be approved with as little scrutiny as possible from absent class members or

By comparison, notices approved under Rule 23(e) for nationwide (or even statewide) class actions generally cast a much wider net than the May notice by dissemination through a combination of methods, including: mailing notices to class members; publishing notices in large newspapers or magazines with circulations covering the affected geographic areas; providing copies of notices to advocacy organizations with statewide constituencies; posting notices in locations frequented by class members; and/or ensuring extensive media coverage of the settlement. See, e.g., Mendoza, 623 F.2d at 1350-52; Allen, 190 F.R.D. at 606; Wyatt ex rel. Rawlins v. Sawyer, 105 F. Supp. 2d 1234, 1240 (M.D. Ala. 2000); Stanley, 879 F. Supp. at 1372-73.[8]

Because publication of the May notice fell far short of these well-established benchmarks for adequate notice under Rule 23(e), it is likely that only a tiny fraction of class members will be informed of the May Agreement prior to the settlement hearing. That the notice will not likely reach the vast majority of class members thus raises serious constitutional concerns sufficient to preclude judicial endorsement of the May Agreement.

Setting aside the problems with the notice's distribution scheme, the class notice — both as approved by the Court and as actually published — also contains a significant misstatement regarding

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other parties.

[8] For example, in Allen, Rule 23(e)'s notice requirements were held satisfied in an action challenging Alabama's teacher certification process when the class notice was published in eight major daily newspapers, mailed to presidents of all Alabama colleges and universities offering teaching credentials, and posted at these institutions. 190 F.R.D. at 606. In Wyatt, notice regarding settlement of a class action challenge to the Alabama mental health system was held sufficient when the notice was mailed to patients, legal guardians, and mental health advocacy organizations with statewide constituencies; published in newspapers within each city housing a mental health facility; and, discussed extensively in press releases and news conferences. 105 F. Supp. 2d at 1240.

the terms of the May Agreement. The notice states – incorrectly – that "the Settlement allows members of the Settlement Class to exclude themselves from the Settlement Class should they so desire, thereby allowing them to pursue the claims alleged in the Lawsuit." See Ex. 4 (copy of published notice from *PN magazine*). As noted above, however, the May Agreement nowhere provides opt-out rights by which class members would be able to avoid the preclusive effects of the settlement. See discussion supra pp. 12-13. Because opt-out rights could have a significant impact on a person's decision whether to support or oppose the May Agreement, this mistake is itself grounds for the district court to withhold approval of the Agreement. Cf. Lazy Oil Co. v. Witco Corp., 95 F. Supp. 2d 290, 306 (W.D. Pa.) (alleged omissions or misstatements in class notice insufficiently material to have influenced or altered class members' response to proposed settlement), aff'd, 166 F.3d 581 (3rd Cir. 1997).

C. The Terms of the May Agreement Are Neither Fair, Adequate, Nor Reasonable to All Class Members and the Agreement Should Not Receive Judicial Approval

Access Now and May, as proponents of the class settlement, bear the burden of demonstrating that the May Agreement represents a fair and reasonable resolution of class members' discrimination claims. See, e.g., In re General Motors Corp. Pick-Up Fuel Tank Products Liability Litigation, 55 F.3d 768, 785 (3rd Cir. 1995), cert. denied, 516 U.S. 824 (1995); Holmes, 706 F.2d at 1147. As discussed below, the May Agreement is so procedurally and substantively flawed that neither party even comes close to satisfying this burden. With problems ranging from an overly broad release provision, to a "future claims" provision that provides (at best) a second-class method for redressing class members' future disability-related complaints against May, to tepid substantive terms that provide only limited accessibility guarantees to class members, the Agreement is simply too flawed to be deemed fair to all class members. The Court must, therefore, reject the settlement agreement.

1. Standard of Review: The Court Has A Heavy Duty to Ensure the Fairness of a Negotiated Settlement Agreement

While Rule 23(e) mandates judicial approval of negotiated class action settlement agreements, the rules do not provide any standards for such approval. As a consequence, determining the propriety of a settlement is committed to the sound discretion of the district court. See, e.g., Sterling v. Stewart, 158 F.3d 1199, 1201 (11th Cir. 1998); Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984).

Although judicial discretion to approve a settlement is broad, it is not, however, without limits. In particular, the Eleventh Circuit has cautioned that "the [class action] settlement process is more susceptible than adversarial adjudications to certain types of abuse." Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1214 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).[9] As a result, the Court has a "heavy duty to ensure that any agreement is 'fair, adequate, and reasonable.'" Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985) (internal citation omitted), cert. denied, 476 U.S. 1169 (1986); see also Holmes, 706 F.2d at 1147; United States v. City of Hialeah, 899 F. Supp. 603, 606 (S.D. Fla. 1994), aff'd, 140 F.3d 968 (11th Cir. 1998); accord Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir.) ("Under Rule 23(e) the district court acts as a fiduciary who

[9] In Bonner v. City of Prichard, 661 F.2d 1206 (5th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit decided prior to October 31, 1981.

must serve as a guardian of the rights of absent class members . . . [T]he court cannot accept a settlement that has not been shown to be fair, reasonable, and adequate."), cert. denied, 423 U.S. 864 (1975).[10]

When assessing the propriety of a class action settlement agreement, the court's discretion is also limited in two other respects. First, the court cannot sanction a proposed settlement that is either collusive or contrary to public policy. See, e.g., United States v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980); City of Hialeah, 899 F. Supp. at 609; Shurford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1547 (M.D. Ala. 1995). Second, the Court does not have the authority to modify the terms of a class action settlement agreement; the agreement must be approved or rejected as a whole. See, e.g., Brooks v. Georgia State Bd. of Elections, 59 F.3d 1114, 1119-20 (11th Cir. 1995); Holmes, 706 F.2d at 1160 ("Courts are not permitted to modify settlement terms or in any manner to rewrite the agreement reached by the parties.").

[10] The Eleventh Circuit has also identified several factors for district courts to consider when assessing the fairness of class actions settlement agreements. These factors are: the likelihood of success at trial; the range of possible recoveries; the complexity, expense and likely duration of the lawsuit; the substance and degree of opposition to the settlement; and the stage of the proceedings at which the settlement was achieved. Bennett, 737 F.2d at 986; see also Leverso v. Southtrust Bank, 18 F.3d 1527, 1530 & n. 6 (11th Cir. 1994); In re Motorsports Merchandise Antitrust Litigation, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000); Austin v. Hopper, 15 F. Supp. 2d 1210, 1219 (M.D. Ala. 1998).

2. The May Agreement Is So Procedurally Flawed That Endorsement of the Agreement Would Undermine the Legal Interests of Disabled Persons Nationwide

The May Agreement's procedural deficiencies are legion. These procedural problems include: a vague and overly broad class definition; an overly expansive release provision that precludes class members from litigating future disability-related complaints against May; a mechanism for resolving future accessibility issues that is heavily skewed in May's favor; and an ineffective compliance monitoring provision. Each of these areas are discussed more fully below.

(a) The class definition is vague and overly broad

The class definition set forth in the May Agreement, and conditionally approved by the Court in April 2001, defines the May class as:

> All individuals with Mobility Disabilities who have or may have experienced discrimination because of a Mobility Disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations at or within stores operated by May and all individuals and entities who have or may have been or may be excluded or otherwise denied by May equal goods, services, facilities, privileges, advantages, accommodations or other opportunities at or within stores operated by May because of the known Mobility Disability of an individual with whom the individual or entity is known to have a relationship.

May Agreement ¶ 1; Class Order II at 2. Plagued by poor draftsmanship, the Agreement's class definition cannot withstand scrutiny.

As a general matter, a proper class definition should be sufficiently definite to enable a court to determine whether a particular individual is (or is not) a member of the class. See, e.g., Davoll v. Webb, 194 F.3d 1116, 1146 (10th Cir. 1999); 5 James Wm. Moore, Moore's Federal Practice

§§ 23.20 - .21 (1997). Moreover, class definitions should be no broader than necessary to effect the relief prayed for in the complaint. See Murray v. Auslander, 244 F.3d 807, 813 (11th Cir. 2001) (reversing class certification with instructions to modify overbroad class definition). Each of these factors are significant because the class definition is used to determine persons who are (1) entitled to relief, (2) bound by the judgment, and (3) entitled to notice. Moore's Federal Practice § 23.21[3].

The May class definition bears none of these hallmarks. First, the Agreement defines the phrase "mobility disability" as "a physical impairment that substantially limits an individual's mobility[.]" May Agreement ¶ H(4). This definitional circularity leads to uncertainty. Is class membership limited to those persons who use wheelchairs (as do the representative plaintiffs)? Or does the class also include persons who use other mobility aids such as scooters, walkers, or crutches? The Agreement does not adequately define the class so as to identify who is included within its ambit.

Second, the class definition suffers from overbreadth since it includes not only persons with "mobility disabilities," but also "individuals] or entit[ies] . . . known to have a relationship" with a person with a "known disability." While the ADA prohibits discrimination on the basis of "association" with a person with a disability, 42 U.S.C. § 12182 (b)(1)(E), nowhere does the Second Amended Complaint allege that May discriminates (or has discriminated in the past) against companions of disabled shoppers. The proposed class definition thus not only goes beyond the claims raised in the Second Amended Complaint, but also includes persons whom the representative plaintiffs have no standing to represent. See, e.g., Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000) ("[E]ach [class] claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."); Newberg on

Class Actions §§ 2.05 -.06 (representative plaintiffs must be members of the class they seek to represent and cannot acquire standing to sue by bringing action on behalf of others who suffered injury) (collecting cases).

(b) The Agreement's release provision is overbroad, precluding all disability-related discrimination actions by class members – whether based on state or federal law – in perpetuity

The scope of the May Agreement's release provision is so expansive that it not only exceeds the claims stated in the May complaint, but also purports to preclude any future disability-related complaints by class members against May department stores regardless of the cause of action, type of relief sought, or conduct/barrier at issue. Indeed, the terms of this release are so one-sided in favor of May that the Court could, on this basis alone, reject the May Agreement.

The May Agreement's release provision states that, in exchange for May making relatively modest modifications to its stores' accessibility as specified in the Agreement, see May Agreement ¶¶ 1(a)-(d), class members forever release, with prejudice:

> all claims . . . of any nature whatsoever, whether [arising under] state or federal [law], regarding discrimination in the full and equal access to and/or enjoyment of facilities, goods, services or accommodations . . . [at stores] owned or operated by May . . . and whether for compensatory damages, consequential damages, restitution, punitive damages, contempt, penalties, injunctive relief, declaratory relief, or otherwise[], whether known or unknown, which could have been or might in the future be asserted by any of the Plaintiffs or member of the Settlement Class . . . aris[ing] out of May's alleged non-compliance with [state or federal] Accessibility Laws[.]

May Agreement at 4-5; see also id. at ¶ 3.

Because of its broad scope, the release provision is procedurally improper and threatens to negatively impact the legal interests of the greater disability community. First, public policy considerations dictate that prospective waivers of individuals' civil rights – whether arising out of the ADA or other anti-discrimination statutes – are highly disfavored. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) ("[There can be no prospective waiver of an [individual's] rights under Title VII."); Adams v. Philip Morris, Inc., 67 F.3d 580, 584 (6th Cir. 1995) ("A[] [party] cannot purchase a license to discriminate"); Uherek v. Houston Light and Power Co., 997 F. Supp. 789, 792 (S.D. Tex. 1998) ("A party may validly waive [Title VII] claims that exist on the day she signs a release, but not future claims."); see also Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 10-12 (1st Cir. 1997) (holding past ADA claims subject to waiver so long as release was knowing, voluntary, and "given in exchange for additional benefit"). Thus, because the May Agreement's release provision purporting to waive all future state or federal accessibility claims by class members violates public policy, the Agreement must be rejected. See, e.g., City of Alexandria, 614 F.2d at 1362 (noting judicial duty to ensure class action settlement agreements are neither illegal nor contrary to public policy); Shurford, 897 F. Supp. at 1547 (same).

Moreover, by extinguishing all future federal and state disability-related actions by class members, the provision precludes recovery of compensatory or punitive damages by persons living in states permitting such relief. See discussion supra p. 12 & n. 4 (collecting state laws authorizing damages for violation of state disability statutes).

Third, the release would bar future litigation by class members against May concerning accessibility issues or architectural barriers left unaddressed by the Agreement — such as ramps, elevators, signage, doors, or the availability of accessible parking spaces. Operation of the release provision would, for example, thus preclude such future hypothetical actions as: (1) an injunction action by a disabled shopper who uses a wheelchair alleging that a Filene's store in New York would not permit her to shop with her service animal; (2) a claim by a wheelchair user in Maryland that she could not shop at a local Hecht's store because it was improperly ramped and did not have accessible elevators; and (3) a class action by a Texas advocacy organization seeking injunctive relief and damages on behalf of disabled shoppers who use mobility aids alleging that Lord & Taylor stores in the state lacked accessible parking spaces, drinking fountains, telephones, as well as self-service computer kiosks for May's bridal registry system. In short, this release provision guarantees May absolute immunity from any and all future disability-related litigation by class members — whether arising under federal or state law, whether for damages or injunctive relief, and whether or not the future claims concern accessibility issues left unaddressed by the Agreement. As with other aspects of the Agreement, this open-ended release provision thus provides a windfall to defendant May at the expense of future legal claims of the larger disability community.

Finally, the overly expansive scope of the release provision could also compromise the Department of Justice's independent authority to enforce the ADA. The Department of Justice is the federal agency with primary responsibility for enforcing Title III of the ADA and its implementing regulations against public accommodations. See 42 U.S.C. §§ 12181 - 12189; 28 C.F.R. pt. 36 (1994). In keeping with this responsibility, the Department has the statutory authority to conduct compliance reviews of entities covered by Title III, investigate alleged violations, and, when necessary and appropriate, commence a civil action in district court for equitable relief, civil penalties, and/or monetary damages for the aggrieved party or parties. 42 U.S.C. § 12188(b). Because the Agreement precludes class members from raising "any claims" in the future against May department stores (including, potentially, the filing of ADA-based complaints with the Department), the Department's ability to fully and effectively enforce the ADA against May would be undermined.

Taken together, the procedural deficiencies underlying the May Agreement's broad release provision – particularly the release of all future state or federal disability discrimination actions - thus counsel against judicial endorsement of this Agreement. See, e.g., National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9, 18-19 (2nd Cir. 1981) (reversing district court's approval of class settlement agreement with over broad release provision that provided for uncompensated release of unliquidated potato futures contracts that were not encompassed within the class complaint concerning liquidated contracts); Petruzzi's, Inc. v. Darling-Delaware Co., Inc., 880 F. Supp. 292, 299-301 (M.D. Pa. 1995) (rejecting class settlement requiring release of all class members' claims when only one-half of class received any direct economic benefit from agreement).

(c) The Agreement's mechanism for resolving future disability-related complaints is burdensome and unlikely to afford complete relief to class members

In lieu of litigating claims barred by the May Agreement's release provision, the Agreement purports to provide a mechanism whereby class members may bring future complaints to the attention of May and, subsequently, the district court. However, as with other aspects of the Agreement, the "benefits" conferred by this complaint resolution mechanism are largely illusory and, in any event, weighted heavily in favor May.

The "future claims" provision of the May Agreement provides, in pertinent part, that:

> [if] member(s) of the Settlement Class believe at some future date that May violated any [state or federal] Accessibility Law, they will notify May in writing . . and provide May sixty (60) days, or longer if the purported violation reasonably requires longer than sixty (60) days, to cure the alleged violation. If after the cure period a member of the Settlement Class disputes whether May cured the purported violation, the member will contact counsel for May . . . and attempt to resolve the dispute. If the member and May's representative[] do not reach agreement within sixty (60) days . . . the parties agree that the United States District Court for the Southern District of Florida will retain exclusive jurisdiction to determine whether or not May violated any [state or federal] Accessibility Law and if so, whether May cured the violation[.]

May Agreement ¶ 2. This claims-resolution scheme is the exclusive forum for future disability-related claims by class members against any May department store nationwide (with the exception of Robinsons-May stores in California). See id. at 4, 7 (provisions regarding release and "final settlement").

The claims-resolution mechanism set forth in the May Agreement is wholly deficient for several reasons. First, the provision requiring class members to notify May before seeking assistance from the district court provides a disincentive for corporate compliance with disability laws because May need not rectify accessibility problems or ADA violations until receiving complaints from class members. Indeed, the notification provision in the Agreement is particularly onerous since class members must notify *both* individual May stores *and* May's office of general counsel prior to bringing their complaints to the attention of the district court. In addition, the specified "cure periods" – totaling at least 120 days from the date of the complaint – are not only excessively long, but subject as well to extension at the sole discretion of May.

Second, and perhaps most important, the May Agreement's attempt to confer "exclusive jurisdiction" on the district court to hear all future disability-related complaints against May by class members is suspect on both legal and practical grounds. There is no sound reason why -- for any reason other than May's convenience -- class members residing in Oregon, Nebraska, or any other state outside Florida, should have to travel across the country to adjudicate their claims. Indeed, the time and expense required to litigate claims in a distant forum would alone likely dissuade even the heartiest class member from litigating any future discrimination claims. Thus, while forum selection clauses in settlement agreements are generally enforceable, they are nonetheless subject to challenge where, as here, the agreed-upon forum is so inconvenient that it would effectively deprive litigants of their day in court. See, e.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) ("[F]orum-selection clauses in . . . contracts are subject to judicial scrutiny for fundamental fairness."); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972) (forum-selection provision invalid when "trial in the contractual forum [would] be so gravely difficult and inconvenient that [the plaintiff would] for all practical purposes be deprived of his day in court"); Walker v. Carnival Cruise Lines, 107 F. Supp. 2d 1135, 1138-1144 (N.D. Cal. 2000) (declining to enforce form forum selection clause printed on passenger ticket in ADA action because litigating in contractual forum (Florida) would cause plaintiffs "fundamental unfairness" due to their physical disabilities and limited finances); Thomas v. Rehabilitation Services of Columbus, Inc., 45 F. Supp.2d 1375, 1378 (M.D. Ga. 1999) (contractual choice-of-forum clause held unenforceable in Title VII action because clause, if enforced, would have caused plaintiff-employee to incur greater expense litigating in forum 100 miles away from where relevant conduct occurred).

Finally, even assuming the May Agreement's forum selection clause is otherwise enforceable, this provision governs only the place of any future action, not its substance. There is still the sticky issue of what (if any) disability-related claims could still be prosecuted in light of the Agreement's broad release provision. See discussion supra pp. 21-24. Here, there is no easy answer. On the one hand, the release provision could be interpreted as extinguishing all future disability-related claims except those actions filed by class members in the Southern District of Florida that relate to the enforcement of the Agreement. On the other hand, the interplay between the release provision and the "future claims" provision (paragraph 2), could also be read as permitting class members to file state or federal disability claims in the future, but requiring them to file such claims only in the Southern District of Florida. Either interpretation, however, poses a substantial risk of compromising the legal interests of disabled class members who either cannot bring suit at all, or, at best, can only do so after notifying May twice, awaiting a lengthy "cure period," and journeying to south Florida to litigate their claims.

Finally, even if class members surmounted these litigation hurdles and actually filed a complaint in the Southern District of Florida, there is some question as to what (if any) remedies would even be available to them. According to the Agreement, the district court's "exclusive jurisdiction" over future claims is limited to "determin[ing] whether or not May violated any Accessibility Law and if so, whether May cured the violation." May Agreement ¶ 2. The Agreement thus purports to read out of the court's remedial quiver items expressly authorized by the ADA or federal law such as attorney's fees, costs, and injunctive relief, as well as state-law based compensatory or punitive damages. Taken togther, these procedural and logistical considerations make the May Agreement's claims-resolution scheme – at best – a "second class" method for redressing class members' future disability-related complaints against May.

(d) The Agreement lacks an effective mechanism for monitoring compliance

The May Agreement's compliance provision consists of a single sentence: "May shall designate the store manager at each of its stores to monitor compliance with [the substantive terms] of this Settlement [Agreement]." May Agreement ¶ 1(e). While store managers should presumably be part of monitoring their respective stores' compliance measures, such monitoring should be supplemented by an expert, or, at a minimum, some party not paid by May who represents the interests of class members to effectively ensure that May is fully complying with the terms of the Agreement. Such outside monitoring is particularly important where, as here, the parties are permitted neither to publicize the terms of the Agreement (other than in the class notice), nor to post the Agreement at May's department stores. See May Agreement ¶ 12 (Publicity provision). While the absence of an effective monitoring program may not alone be a reason to reject the Agreement, the lack of such a program – when coupled with the Agreement's other significant procedural problems – underscores the manifest injustice class members will likely suffer if the district court endorses the Agreement. Cf. Van Horn v. Trickey, 840 F.2d 604, 608 (8th Cir. 1988) (affirming district court's approval of prisoners' class action challenging conditions at correctional center when settlement agreement provided, inter alia, strong compliance monitoring program by court-appointed committee of penal experts).

3. The May Agreement's Substantive Accessibility Provisions Provide Only Limited Benefits to Disabled Class Members

Given the May Agreement's considerable procedural problems, it is not at all clear that, even if the Agreement guaranteed substantive accessibility, class members would still be getting significant benefits from this settlement. The Agreement, however, is no model for accessibility. Rather, as with other aspects of the Agreement, its substantive terms fail to provide adequate relief for persons with disabilities.

Paragraphs 1(a) - (d) of the May Agreement set forth all of the parties' agreed-upon modifications to May department stores nationwide. In summary, this paragraph of the Agreement:

- Provides for 36" accessible routes along perimeter walls, from hard aisles to cash/wraps, from hard aisles to fitting rooms, and from hard aisles to accessible rest rooms, within 12 months (Agreement ¶¶ 1(a)(i)-(iv));
- Provides for 32" accessible routes within alternating rows of movable fixtures in merchandise pads within 12 months (Agreement ¶¶ 1(a)(v)-(vi));
- Provides that May will, within 12 months, taper or gather tablecloths underneath tables displaying merchandise so that tablecloths do not obstruct a 32" or 36" route of travel (Agreement ¶ 1(b));
- Provides for accessible cash/wraps and "showcase islands" or, alternatively, clipboards at these locations, within 18 months (Agreement ¶ 1(c));
- Provides for accessible fitting rooms and rest rooms that do not "materially deviate" from ADAAG specifications within 36 months (Agreement ¶ 1(d)).

These are the May Agreement's only substantive accessibility provisions. With respect to tolerances, the Agreement provides that deviations of 5% or less shall be deemed in compliance with any agreed-upon provision or standard. May Agreement ¶ I.

One of the Agreement's more glaring substantive deficiencies is the excessively long "modification" period affording May from 12-36 months to bring their stores into compliance with the terms of Agreement. For example, paragraphs ¶ 1(b)-(c) of the Agreement give May twelve months after final judgment to gather tablecloths on display tables, as well as eighteen months to lower "Cash/wrap" (i.e. - checkout) counters or provide an accessible clip board.

Second, the Agreement makes no distinction between accessibility standards for old *versus* new construction or alteration at (or within) May stores even though Title III of the ADA and its implementing regulations mandate more stringent standards for public accommodations (such as department stores) constructed/altered after January 1993. See, e.g., 42 U.S.C. §§ 12181-83; 28 C.F.R. §§ 36.101 - 36.406 (1994); 28 C.F.R. pt. 36, Appendix A (ADA Accessibility Guidelines) [hereinafter "ADAAG"].

Third, the May Agreement makes no accessibility guarantees with respect to other types of architectural features such as elevators, drinking fountains, telephones, ramps, doors, parking lots, or self-service computer kiosks even though the ADAAG sets forth specific requirements for these features. See ADAAG §§ 4.1 (new construction scoping requirements), 4.10 (elevators), 4.15 (drinking fountains), 4.31 (telephones), 4.8 (ramps), 4.13 -.14 (doors and entrances), 4.6 (parking and passenger loading zones) , 4.34 and (automated teller machines).

Fourth, the May Agreement contains an ill-advised tolerance provision that provides an absolute "safe harbor" for deviations of 5% or less regardless of whether such deviations would adversely affect the usability or safety of the affected feature. For example, the ADAAG requires that dressing and fitting rooms entered through a door provide a minimum clear opening of 32 inches, as well as 60 inches of clear floor space, so that a shopper using a wheelchair can enter the dressing room, turn, and transfer him or herself onto a seated bench to try on clothes. See ADAAG §§ 4.35; see also id. at § 4.13; 4.2.3. Yet the 5% "safe harbor" tolerance provision in the Agreement means that fitting room doors need only be 30.4 inches, and clear floor space need only be 57 inches, to be deemed "in compliance" with the Agreement. A 30 inch doorway, however, would not only violate the ADAAG, but would also likely prevent many shoppers using wheelchairs from even being able to enter the fitting room. See ADAAG § (requiring doorways to have minimum clear opening width of 32 inches).

In the final analysis, while the United States does not oppose judicial approval of the May Agreement based solely on these and other substantive deficiencies, the Agreement's tepid class benefits underscore the one-sided nature of this settlement.

4. Other Considerations Counseling Against Approval

As noted above, see discussion supra p. 18 & n.10, one of the factors to consider when assessing the fairness of a class settlement concerns the stage of proceedings and amount of discovery completed prior to settlement. Because the May litigation was settled before the parties had conducted any discovery, and before any significant adversarial briefing on the substantive legal issues underlying the complaint, this factor weighs strongly against settlement approval.

The stage-of-proceedings consideration in the fairness calculus is intended to insure that the parties had an adequate appreciation for the merits of the case before negotiating a settlement. See, e.g., General Motors, 55 F.3d at 813-814; In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F. Supp. 450, 538 (D.N.J. 1997) (same), aff'd, 148 F.3d 283 (3rd Cir. 1998), cert. denied, 525 U.S. 1114 (1999). In addition, this factor has the salutary effect of ensuring that the court – through adversarial briefing or other means – has a sufficient understanding of the substantive legal issues to adequately evaluate the terms of the settlement agreement. See General Motors, 55 F.3d at 814.

For these reasons, federal courts typically require meaningful discovery and briefing to have been completed before approving class action settlements. See, e.g., In re Prudential, 962 F. Supp. at 538 (stage-of-proceedings factor satisfied when class counsel did not commence serious settlement negotiations until eighteen months of "vigorous litigation" which included several rounds of substantive briefing, review of over one million pages of documents and hundreds video and audio tapes, and the depositions of Prudential's senior managers); In re Motorsports, 112 F. Supp. at 1338(finding parties adequately informed of merits of their respective cases to approve class settlement agreement when, prior to settlement, they had taken over 70 depositions, filed numerous motions, and developed expert testimony); In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 314 (N.D. Ga. 1993) (finding stage-of-proceedings factor satisfied when parties had taken both fact and expert depositions, reviewed voluminous documents, and settled case on eve of trial).

Here, however, discovery was not just sparse, it was apparently non-existent. The record reflects no depositions, document requests, or other formal discovery. Nor, apparently, has Access Now surveyed any of the May department stores outside Florida to determine the nature and extent of their respective accessibility problems. Indeed, May itself opposed Access Now's motion for class certification in July 2000 on the ground that the motion was premature because no discovery had yet been conducted by either party. See discussion supra p. 4. Absent such discovery, it cannot be said that counsel had invested sufficient time and attention to the merits of the case to have a reasoned opinion of not only its settlement value, but also whether settlement itself was even the most prudent course of action. See General Motors, 55 F.3d at 813-14 (holding that district court erroneously approved class settlement when class counsel had not conducted any independent investigation or discovery).

Indeed, the cautionary note sounded by the Third Circuit in General Motors regarding the dangers of settling class actions at a premature stage applies equally here: "[T]he inchoate stage of the case development reduces our confidence that the proceedings had advanced to the point that counsel could fairly, safely, and appropriately decide to settle the action." 55 F.3d at 814.

It also bears noting that the May case is not the only ADA-based action that Access Now has settled.[11] Since October 1997, Access Now has filed over 330 ADA-based complaints in Florida federal courts alone. See Ex. 6 (PACER printout). Many of these cases have been settled as class actions with nationwide applicability. See, e.g., Access Now, Inc. v. AHM CGH, Inc., 2000 WL 1809979 (S.D. Fla. July 12, 2000); Access Now, Inc. v. Ambulatory Service Center Group, Ltd., 197 F.R.D. 522 (S.D. Fla. 2000); see also Access Now, Inc. v. Cunard Line Limited, Co., C.A. No. 00-723-CIV-Moreno (S.D. Fla. filed Aug. 28, 2000) (pending class action settlement agreement). Indeed, of the over 300 ADA-based complaints Access Now has filed in Florida district courts, **every** action concluded to date (235/330) has been disposed of by settlement agreement or other method short of trial. See Ex. 6 (PACER printout); Ex.. 5 at p. 4 (statement by Access Now representative).

The United States, like Access Now and other disability-rights advocacy organizations, is committed to strong enforcement of Title III of the ADA in order to ensure full accessibility of public accommodations for disabled individuals. However, settlement of class-wide ADA claims must not become so paramount that the rights of disabled class members are unduly compromised in the

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[11] Access Now's web site (www.adaaccessnow.org) states that one of the organization's primary goals is to "obviate the necessity and expense of going to trial" through settlement agreements. See Ex. 5 at p.1.

process. As one district court in this Circuit noted when rejecting a class action settlement agreement:

> The paramount question before the court is whether the proposed settlement is fair to ***all*** members of the plaintiff class. The court cannot sacrifice claims of absent class members in order to avoid litigation.

Reynolds v. King, 790 F. Supp. 1101, 1111 (M.D. Ala. 1990) (emphasis in original). Bearing this caution in mind, the Court must be wary of Access Now's willingness to agree to this global settlement of a nationwide class action on terms that are be a disservice to the legal interests of absent class members and the public interest.

IV. CONCLUSION

For the foregoing reasons, the United States objects to the May settlement agreement and urges the Court to disapprove this agreement.

DATED: July 27, 2001

Respectfully submitted,

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EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-0148-CIV-MORENO

ACCESS NOW, INC., EDWARD S. RESNICK, DAN MURPHY, and CYNTHIA JONES, on their own behalf and on behalf of all those similarly situated,

Plaintiffs,

vs.

THE MAY DEPARTMENT STORES CO., a New York corporation, d/b/a LORD & TAYLOR,

Defendants.
_______________________________/

FILED by Se D.C.
AUG 23 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S. D. OF FLA.

ORDER VACATING ORDER CONCERNING CLASS CERTIFICATION, NOTICE AND SCHEDULING, AND ORDER DENYING AS MOOT MOTION TO INTERVENE AND MOTION FOR EXTENSION OF TIME TO FILE OBJECTIONS

THIS CAUSE came before the Court upon the Fairness Hearing held on **August 21, 2001**, Dean Davis, Peter Giovagnoli, Mary Giordano, and Carol Williams' Motion to Intervene **(D.E. No. 70)**, filed on **July 30, 2001**, and The (Florida) Advocacy Center for Persons with Disabilities, Inc.'s Motion for an Extension of Time, Upon Good Cause Shown, to File Objections to the Proposed Class Settlement **(D.E. No. 83)**, filed on **August 3, 2001**,

THE COURT has considered the objections raised at the Fairness Hearing and in writing, the current motions, and the pertinent portions of the record, and is otherwise fully advised in the premises. The Court notes that it only granted class certification on April 5, 2001 (after already denying Plaintiff's Motion for Class Certification on October 6, 2000)

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because the parties had negotiated what appeared to be a fair nationwide settlement with respect to Title III violations at all of Defendant's stores. In view of Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), it would be reversible error for this Court to permit this settlement to go forward under circumstances where class certification is not otherwise justified. Therefore, it is

ADJUDGED that the Order Concerning Class Certification, Notice, and Scheduling is VACATED. This case shall be reset on the Court's trial calendar under separate order filed concurrently with this order. It is also

ADJUDGED that the motion to intervene and motion for extension of time are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of August, 2001.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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EXHIBIT C

or were specialized equipment that individuals with disabilities should purchase for themselves.

Like some individuals with disabilities, some commenters who opposed a requirement for accessible golf cars also expressed concern about the lack of safety standards. There were also concerns that repair costs for greens or for accessible golf cars would be more significant than with traditional golf cars. One commenter suggested that courses exceeding certain slope and degree standards be exempted from having single-user cars. Others argued that, in practice, the safety issue and the issue of damage to courses are negligible.

The Department has decided not to add a regulation specifically addressing accessible golf cars at this time. As with free-standing equipment, the Department believes that the existing regulation is adequate to address this issue. The Department may gain additional guidance in the future from the experience of the Department of Defense, which is planning to provide two accessible golf cars at each of the 174 golf courses that the Department of Defense operates, except those at which it would be unsafe to operate such golf cars because of the terrain of the course. *See* U.S. Department of Defense, *Report to Congress: Access of Disabled Persons to Morale, Recreation, and Welfare (MRW) Facilities and Activities* (Sept. 25, 2007).

Wheelchairs and other power-driven mobility devices. Since the passage of the ADA, choices of mobility aids available to individuals with disabilities have vastly increased. In addition to devices such as wheelchairs and mobility scooters, individuals with disabilities may use devices that are not designed primarily for use by individuals with disabilities, such as electronic personal assistive mobility devices (EPAMDs). (The only available model known to the Department is the Segway®.) The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices for locomotion in pedestrian areas. These new or adapted mobility aids benefit individuals with disabilities, but also present new challenges for public accommodations and commercial facilities.

EPAMDs illustrate some of the challenges posed by new mobility devices. The basic Segway® model is a two-wheeled, gyroscopically stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. The EPAMD can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed for power-operated wheelchairs of 6 miles per hour. In a study of trail and other nonmotorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of people using EPAMDs ranged from 68¼ inches to 79½ inches. *See* Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 2004), available at *http://www.tfhrc.gov/safety/pubs/04103.* Thus, EPAMDs can operate at much greater speeds than wheelchairs, and the average user is much taller than most wheelchair users.

EPAMDs have been the subject of debate among users, pedestrians, disability advocates, state and local governments, businesses, and bicyclists. The fact that the device is not designed primarily for use by or marketed primarily to individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of whether individuals with disabilities should be allowed to operate them in areas and facilities where other powered devices are not allowed. Those who question the use of EPAMDs in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users. Although the question of their safety has not been resolved, many states have passed legislation addressing EPAMD operation on sidewalks, bicycle paths, and roads. In addition, some states, such as Iowa and Oregon, have minimum age requirements, or mandatory helmet laws. New Jersey requires helmets for all EPAMD users, while Hawaii and Pennsylvania require helmets for users under a certain age.

While there may be legitimate safety issues for EPAMD users and bystanders, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. For example, individuals with severe respiratory conditions who can walk limited distances and individuals with multiple sclerosis have reported benefitting significantly from EPAMDs. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. *See* Rachel Metz, *Disabled Embrace Segway,* New York Times, Oct. 14, 2004.

The Department has received questions and complaints from individuals with disabilities and covered entities about which mobility aids must be accommodated and under what circumstances. While some individuals with disabilities support the use of unique mobility devices, other individuals with disabilities are concerned about their personal safety when others are using such devices. There is also concern about the impact of such mobility devices on facilities, such as the weight of the device on fragile floor surfaces.

The Department intends to address these issues and proposes to adopt a policy that sets the parameters for when these devices must be accommodated. Toward that end, the Department proposes new definitions of the terms "wheelchair"—which includes manually and power-driven wheelchairs and mobility scooters—and "other power-driven mobility device" and accompanying regulatory text. The proposed definitions are discussed in the section-by-section analysis of § 36.104, and the proposed regulatory text is discussed in the section-by-section analysis of § 36.311.

Much of the debate surrounding mobility aids has centered on appropriate definitions for the terms "wheelchair" and "other power-driven mobility devices." The Department has not defined the term "manually powered mobility aids." Instead, the proposed rule provides a list including wheelchairs, walkers, crutches, canes, braces, or similar devices. The inclusion of the term "similar devices" indicates that the list is not intended to be exhaustive. The Department would like input as to whether addressing "manually powered mobility aids" in this manner (*i.e.*, via examples of such devices) is appropriate. The Department also would like information as to whether there are any other non-powered or manually powered mobility aids that should be added to the list and an explanation of the reasons they should be included. If an actual definition is preferred, the Department would welcome input with regard to the language that might be used to define "manually powered mobility aids," and an explanation of the reasons this language would better serve the public.

Auxiliary aids and services: captioning and video interpreting services. Section 36.303 of the title III regulation requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech, and their companions.

The Department has investigated hundreds of complaints alleging that public accommodations have failed to provide effective communication, many of which have resulted in settlement agreements and consent decrees. During the course of its investigations, the Department has determined that public accommodations sometimes misunderstand the scope of their obligations under the statute and the regulation. Moreover, the number of individuals with hearing loss continues to grow in this country as a large segment of the population ages and as people live longer.

The Department is proposing several changes to § 36.303 to update the regulatory language in response to numerous technological advances and breakthroughs in the area of auxiliary aids and services since the regulation was promulgated sixteen years ago. The most significant changes are in the language regarding video interpreting services and the provision of effective communication for companions. In addition, the Department is discussing in its preamble to § 36.303 options for adding captioning and narrative description that may eventually result in proposed textual changes. The specific amendments are described below in § 36.303 of the section-by-section analysis.

Certification. The current title III regulation provides that state or local governments may apply to the Department for certification that state laws or local building codes comply with or exceed the minimum accessibility requirements of the ADA. The current submission requirements and certification process, however, have proved onerous for state and local governments and for the Department. Many have urged the Department to streamline the certification process and make it less cumbersome for state and local jurisdictions.

In keeping with the Department's efforts to clarify legal obligations under the ADA and harmonize requirements with other federal laws and model codes, the proposed rule includes amendments to subpart F (§§ 36.601–36.608) to streamline the certification process. The proposed changes are intended to provide more flexibility in the certification process and shorten the overall time involved. The Department believes that the adoption of the 2004 ADAAG will help achieve these goals because it has been further harmonized with model codes. The specific changes to subpart F are described below in the section-by-section analysis.

Section-By-Section Analysis and Response to Comments

This section provides a detailed description of the Department's proposed changes to the title III regulation, the reasoning behind the proposals, and responses to public comments received on the topic. The section-by-section analysis follows the order of the title III regulation itself, except that if the Department is not proposing a change to a regulation section, the unchanged section is not mentioned.

Subpart A—General

Section 36.104 Definitions

"1991 Standards" and "2004 ADAAG"

The Department is proposing to add to the proposed regulation definitions of both the "1991 Standards" and the "2004 ADAAG." The term "1991 Standards" refers to the currently enforceable ADA Standards for Accessible Design, codified at 28 CFR part 36, App. A. The term "2004 ADAAG" refers to Parts I and III of the *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines,* which were issued by the Architectural and Transportation Barriers Compliance Board on July 23, 2004, at 69 FR 44084 (to be codified at 36 CFR 1191), and which the Department is proposing to adopt in this NPRM. These terms are included in the definitions section for ease of reference.

"Existing Facility"

Under the ADA, a facility is initially classified as one of three types: (1) An existing facility; (2) an altered facility; or (3) a newly designed and constructed facility. In the current regulation, title III defines new construction at § 36.401(a) and alterations at § 36.402. In contrast, the term "existing facility" is not defined, although it is used in the statute and the regulations for titles II and III. 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150.

The Department's enforcement of the ADA is premised on a broad understanding of "existing facility." The classifications of facilities under the ADA regulation are not static. Rather, a building that was newly designed and constructed at one time—and therefore subject to the accessibility standards in effect at the time—becomes an "existing facility" after it is completed. At some point in its life, it may also be considered "altered" and then again become "existing."

The added definition of "existing facility" in the proposed regulation clarifies that the term means exactly what it says: A facility in existence on any given date is an existing facility under the ADA. If a facility exists, it is an existing facility whether it was built in 1989, 1999, or 2009.

"Other Power-Driven Mobility Device"

The proposed regulation defines the term "other power-driven mobility device" as "any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf carts, bicycles, electronic personal assistance mobility devices (EPAMDs) (*e.g.*, Segway®), or any mobility aid designed to operate in areas without defined pedestrian routes." The definition is designed to be broad and inclusive because the Department recognizes the diverse needs and preferences of individuals with disabilities and does not wish to impede individual choice except when necessary. Power-driven mobility devices are included in this category. Mobility aids that are designed for areas or conditions without defined pedestrian areas, such as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians, are also included in this category.

Question 8: Please comment on the proposed definition of other power-driven mobility devices. Is the definition overly inclusive of power-driven mobility devices that may be used by individuals with disabilities?

The Department's proposed regulatory text on accommodating wheelchairs and other power-driven mobility devices is discussed below in § 36.311 of the section-by-section analysis.

risks." *See* AVMA position statement, *Nonhuman Primates as Assistance Animals* (2005), available at *http://www.avma.org/issues/policy/nonhuman_primates.asp.* The potential for nonhuman primates to transmit dangerous diseases to humans has been documented in scientific journals.

Although unusual species make up a very small percentage of service animals as a collective group, their use has engendered broad public debate and, therefore, the Department seeks comment on this issue.

Question 10: Should the Department eliminate certain species from the definition of "service animal"? If so, please provide comment on the Department's use of the phrase "common domestic animal" and on its choice of which types of animals to exclude.

Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the "common domestic animal" prong of the proposed definition?

Comfort animals. It is important to address the concept of comfort animals or emotional support animals, which have become increasingly popular, primarily with individuals with mental or psychiatric impairments, many of which do not rise to the level of disability. Comfort animals are also used by individuals without any type of impairment who claim the need for such animals in order to bring their pets into places of public accommodation.

The difference between an emotional support animal and a legitimate psychiatric service animal is the service that is provided (*i.e.*, the actual work or task performed by the service animal). Another critical factor rests on the severity of the individual's impairment. For example, only individuals with conditions that substantially limit them in a major life activity currently qualify for coverage under the ADA, and only those individuals will qualify to use a service animal. *See* 42 U.S.C. 12102(2) (defining disability); 28 CFR 36.104 (same). Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Many Americans have some type of physical or mental impairment (*e.g.*, arthritis, anxiety, back pain, imperfect vision, etc.), but establishing a physical or mental disability also requires there to be a substantial limitation of a major life activity. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulations were promulgated, service animals have been trained to assist individuals with many different types of disabilities. In some cases, individuals with minor impairments who are not individuals with disabilities under the Act have mistakenly concluded that any type of impairment qualified them for the ADA's protection of the right of individuals with disabilities to use service animals.

Change "service animal" to "assistance animal." Some commenters asserted that "assistance animal" is a term of art and should replace "service animal." While some agencies, like the Department of Housing and Urban Development (HUD), use the term "assistance animal," that term is used to denote a broader category of animals than is covered by the ADA. The Department believes that changing the term used under the ADA would create confusion, particularly in view of the broader parameters for coverage under the Fair Housing Act (FHA) *cf.*, HUD Handbook No. 4350.3 Rev–1, Chg–2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at *http://www.hudclips.org.* Moreover, the Department's proposal to change the definition of "service animal" under the ADA is not intended to affect the rights of people with disabilities who use assistance animals in their homes under the FHA. In addition, the Department wishes to use the term "psychiatric service animal" to describe a service animal that does work or performs a task for the benefit of an individual with a psychiatric disability. This contrasts with "emotional support" animals that are covered under the Air Carrier Access Act, 49 U.S.C. 41705 *et seq.*, and its implementing regulations. 14 CFR 382.7 *et seq.; see also* 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on air transportation), and that qualify as "assistance animals" under the FHA, but do not qualify as "service animals" under the ADA.

"Video Interpreting Services" (VIS)

The Department has added a definition of "video interpreting services (VIS)," a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image.

VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day by allowing people in different locations to engage in live, face-to-face communications. Moreover, VIS is particularly helpful where qualified interpreters are not readily available (*e.g.*, for quick response to emergency hospital visits, in areas with an insufficient number of qualified interpreters to meet demand, and in rural areas where distances and an interpreter's travel time present obstacles).

Along with the addition of the definition of VIS, other amendments to the communications section are discussed below in § 36.303.

"Wheelchair"

The Department proposes the following definition of "wheelchair" in § 36.104: "Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven."

The proposed definition of "wheelchair" is informed by several existing definitions of "wheelchair." Section 507 of the ADA defines wheelchair in the context of whether to allow wheelchairs in federal wilderness areas: "the term 'wheelchair' means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area." 42 U.S.C. 12207(c)(2). The Department believes that while this definition is appropriate in the limited context of federal wilderness areas, it is not specific enough to provide clear guidance in the array of settings covered by title III.

The other existing federal definition of wheelchair that the Department reviewed is in the Department of Transportation regulation implementing the transportation provisions under title II and title III of the ADA. The Department of Transportation's definition of wheelchair is "a mobility aid belonging to any class of three- or four-wheeled devices, usable indoors, designed for and used by individuals with mobility disabilities, whether operated manually or powered." 49 CFR 37.3. The Department has adopted much of the language from this definition.

Under the proposed definition, wheelchairs include manually operated and power-driven wheelchairs and mobility scooters. Mobility devices such as golf cars, bicycles, and electronic personal assistance mobility devices (EPAMDs) are inherently excluded from the proposed definition. Typically, the devices covered under the proposed definition are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas. However, it could include a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. "Typical indoor and outdoor pedestrian areas" refer to locations and surfaces used by and intended for pedestrians, including sidewalks, paved paths, floors of buildings, elevators, and other circulation routes, but would not include such areas as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians.

The Department does not propose to define specific dimensions that qualify a device as a wheelchair. The Department of Transportation's definition includes a subpart defining "common wheelchair" to provide guidance for public transit authorities on which devices must be transported. A "common wheelchair" is a wheelchair that "does not exceed 30 inches in width and 48 inches in length measured two inches above the ground, and does not weigh more than 600 pounds when occupied." 49 CFR 37.3. The narrower definition of "common wheelchair" was developed with reference to the requirements for lifts to establish parameters for the size and weight a lift can safely accommodate. *See* 49 CFR part 37, App. D (2002). The Department does not believe it is necessary to adopt stringent size and weight requirements for wheelchairs.

The Department requests public input on the proposed definition for "wheelchair."

Question 12: As explained above, the definition of "wheelchair" is intended to be tailored so that it includes many styles of traditional wheeled mobility devices (e.g., wheelchairs and mobility scooters). Does the definition appear to exclude some types of wheelchairs, mobility scooters, or other traditional wheeled mobility devices? Please cite specific examples if possible.

Question 13: Should the Department expand its definition of "wheelchair" to include Segways®?

Question 14: Are there better ways to define different classes of mobility devices, such as the weight and size of the device that is used by the Department of Transportation in the definition of "common wheelchair"?

Question 15: Should the Department maintain the non-exhaustive list of examples as the definitional approach to the term "manually powered mobility aids"? If so, please indicate whether there are any other non-powered or manually powered mobility devices that should be considered for specific inclusion in the definition, a description of those devices, and an explanation of the reasons they should be included.

Question 16: Should the Department adopt a definition of the term "manually powered mobility aids"? If so, please provide suggested language and an explanation of the reasons such a definition would better serve the public.

The proposed regulation regarding mobility devices, including wheelchairs, is discussed below in the section-by-section analysis for § 36.311.

Subpart B—General Requirements

Section 36.208 Direct Threat

The proposed regulation moves the definition of direct threat from § 36.208(b) to the definitions section at § 36.104. This is an editorial change. Consequently, § 36.208(c) would become § 36.208(b) in the proposed regulation.

Section 36.211 Maintenance of accessible features

The general rule regarding the maintenance of accessible features, which provides that a public accommodation must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by qualified individuals with disabilities, is unchanged. However, the Department wishes to clarify its application and proposes one change to the section.

The Department has noticed that some covered entities do not understand what is required by § 36.211, and it would like to take the opportunity presented by this NPRM to clarify. Section 36.211(a) broadly covers *all* features that are required to be accessible under the ADA, from accessible routes and elevators to roll-in showers and signage. It is not sufficient for a building or other feature to be built in compliance with the ADA, only to be blocked or changed later so that it is inaccessible. A common problem observed by the Department is that covered facilities do not maintain accessible routes. For example, the accessible routes in offices or stores are commonly obstructed by boxes, potted plants, display racks, or other items so that the routes are inaccessible to people who use wheelchairs. Under the ADA, the accessible route must be maintained and, therefore, these items are required to be removed. If the items are placed there temporarily—for example, if an office receives multiple boxes of supplies and is moving them from the hall to the storage room—then § 36.211(b) excuses such "isolated or temporary interruptions." Other common examples of features that must be maintained, and often are not, are platform lifts and elevators. Public accommodations must ensure that these features are operable and, to meet this requirement, regular servicing and making repairs quickly will be necessary.

The Department proposes to amend the rule by adding § 36.211(c) to address the discrete situation in which the scoping requirements provided in the proposed standards may reduce the number of required elements below that are required by the 1991 Standards. In that discrete event, a public accommodation may reduce such accessible features in accordance with the requirements in the proposed standards.

Section 36.302 Modifications in Policies, Practices, or Procedures

Section 36.302(c) Service Animals

The Department's regulation now states that "[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." 28 CFR 36.302(c)(1). In general, the Department is proposing to retain the scope of the current regulation while clarifying its longstanding policies and interpretations.

The Department is proposing to revise § 36.302(c) by adding the following sections as exceptions to the general rule on access. Proposed § 36.302 would:

1. Expressly incorporate the Department's policy interpretations as outlined in published technical assistance *Commonly Asked Questions about Service Animals* (1996) (*http://www.ada.gov/qasrvc.htm*) and *ADA Business Brief: Service Animals* (2002) (*http://www.ada.gov/svcanimb.htm*) and add that a public accommodation may ask an individual with a disability to remove a service animal from the premises if: (1) The animal is out of

businesses requested specific guidance on what measures were required for barrier removal. Commenters were concerned that, absent a standard, unsafe or ineffective design practices might be undertaken. The Department's current rule reflects the view of many commenters that requiring public accommodations to comply with the alteration standards, where readily achievable to do so, promotes certainty and good design.

SBREFA requires the Department to consider alternative means of compliance for small businesses. 5 U.S.C. 603(c). To comply with this obligation, the Department is soliciting public comment on the possibility of providing a safe harbor to qualified small businesses that have spent at least one percent (1%) of their gross revenues to remove architectural, communication, or transportation barriers.

Question 46: Should the Department adopt a presumption whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during the previous tax year, the entity spent at least one percent (1%) of its gross revenues on barrier removal? Why or why not? Is one percent (1%) an appropriate amount? Are gross revenues the appropriate measure? Why or why not?

Section 36.308 Seating in Assembly Areas

The Department is proposing to revise this section to be consistent with revisions in the proposed requirements applicable to new construction and alterations. The purpose of the section is unchanged: To establish the barrier removal requirements for assembly areas. Sections 36.308(a)(1) and (b) have been revised to include an express requirement to provide companion seats and designated aisle seats.

Section 36.308(a)(1)(ii)(A) and (B) have been revised to provide that wheelchair and companion seats must be an integral part of the seating area, dispersed to all accessible seating levels, and that the locations must provide viewing angles to the screen, performance area, or other focal point that are equivalent to or better than the average viewing angles provided to all other spectators.

Proposed § 36.308(a)(1)(iii) provides that companion seats may be fixed or movable and that they shall be equivalent in size, quality, comfort, and amenities to the other seats in the assembly area.

A new § 36.308(c)(1) has been added to provide that when an assembly area has designated seating sections that provide spectators with distinct services or amenities that are not generally available to other spectators, the facility must ensure that wheelchair seating spaces and companion seating are provided in each specialty seating area. The number of wheelchair seating spaces and companion seating provided in specialty seating areas shall be included in, rather than being additive to, wheelchair space requirements set forth in table 221.2.1.1 in the proposed standards.

Proposed § 36.308(c)(2) requires that, to the extent possible, wheelchair users shall be permitted to purchase companion tickets on the same terms that tickets are made available to other members of the public. In assembly areas with seating capacities exceeding 5,000, each of five designated wheelchair spaces shall have at least three companion seats (*i.e.*, five groups of four seats, each group including a wheelchair space) in order to provide more flexible seating arrangements for families and other small groups. The group companion seats required by this section may be located adjacent to either the wheelchair location or other companion seats. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.

Section 36.309 Examinations and Courses

Section 309 of the ADA is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 or title II of the ADA, and to ensure that individuals with disabilities are not excluded from educational, professional, or trade opportunities because examinations or courses are offered in a place or manner that is not accessible. *See* 42 U.S.C. 12189. Through its enforcement efforts, the Department has discovered that the requests made by testing entities for documentation regarding the existence of an individual's disability and her or his need for a modification or an auxiliary aid or service are often inappropriate or burdensome. The proposed rule attempts to address this problem.

Section 36.309(b) as revised states that while it is appropriate for a testing entity to require that an applicant document the existence of a disability in order to establish that he or she is entitled to testing modifications or aids, the request for documentation must be appropriate and reasonable. Requested documentation should be narrowly tailored so that the testing entity can ascertain the nature of the disability and the individual's need for the requested modification or auxiliary aid. Generally, a testing entity should accept without further inquiry documentation provided by a qualified professional who has made an individualized assessment of the applicant. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program. When an applicant's documentation is recent and demonstrates a consistent history of a diagnosis, there is no need for further inquiry into the nature of the disability. A testing entity should consider an applicant's past use of a particular auxiliary aid or service.

Finally, a private entity should respond in a timely manner to requests and should provide applicants with a reasonable opportunity to supplement their requests with additional information, if necessary. Failure by the testing entity to act in a timely manner and making requests of unnecessary magnitude could result in the sort of delay that amounts to a denial of equal opportunity or equal treatment.

Section 36.311 Mobility Devices

Proposed § 36.311 has been added to provide additional guidance to public accommodations about the circumstances in which power-driven mobility devices must be accommodated.

As discussed earlier in this NPRM, this proposal is in response to growing confusion about what types of mobility devices must be accommodated. The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized for locomotion purposes riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices that are not designed for indoor use or exclusively used by people with disabilities. Indeed, there has been litigation about whether the ADA requires covered entities to allow people with disabilities to use their EPAMDs like users of traditional wheelchairs. Individuals with disabilities have sued several shopping malls in which businesses refused to allow a person with a disability to use an EPAMD. *See, e.g.*, Sarah Antonacci, *White Oaks Faces Lawsuit over Segway*, State Journal-Register, Oct. 9, 2007, available at *http://www.sj-r.com/news/*

stories/17784.asp; Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at *http://www.wate.com/Global/story.asp?s=3643674*. The Department believes clarification on what the ADA requires is necessary at this juncture.

Section 36.311(a) reiterates the general rule that public accommodations shall permit individuals using wheelchairs, scooters, and manually powered mobility aids, including walkers, crutches, canes, braces, and similar devices, in any areas open to pedestrians. The regulation underscores this general proposition because the great majority of mobility scooters and wheelchairs must be accommodated under nearly all circumstances in which title III applies.

Section 36.311(b) adopts the general requirement in the ADA that public accommodations must make reasonable modifications to their policies, practices, and procedures when necessary to enable an individual with a disability to use a power-driven mobility device to participate in its services, programs, or activities unless doing so would result in a fundamental alteration of their services, programs, or activities.

If a public accommodation restricts the use of power-driven mobility devices by people without disabilities, then it must develop policies addressing which devices and under what circumstances individuals with disabilities may use power-driven mobility devices for the purpose of mobility. Under the Department's proposed regulation in § 36.311(c), public accommodations must adopt policies and procedures regarding the accommodation of power-driven mobility devices other than wheelchairs and scooters that are designed to assess whether allowing an individual with a disability to use a power-driven mobility device is reasonable and does not result in a fundamental alteration to its programs, services, or activities. Public accommodations may establish policies and procedures that address and distinguish among types of mobility devices.

For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing EPAMDs by members of the general public.

Section 36.311(c) lists permissible factors that a public accommodation may consider in determining whether the use of different types of power-driven mobility devices by individuals with disabilities may be permitted. In developing policies, public accommodations should group power-driven mobility devices by type (*e.g.*, EPAMDs, golf cars, gasoline-powered vehicles, wheelchairs designed for outdoor use, and other devices). A blanket exclusion of all devices that fall under the definition of other power-driven mobility devices in all locations would likely violate the proposed regulation.

The factors listed in § 36.311(c)(1) through (3) may be used in order to develop policies regarding the use of other power-driven mobility devices by people with disabilities. The dimensions, weight, and other characteristics of the mobility device in relation to a wheelchair or scooter, as well as the device's maneuverability and speed, may be considered. Another permissible consideration is the potential risk of harm to others by the operation of other power-driven mobility devices. The use of gasoline-powered golf cars by people with disabilities inside a building may be prohibited, for example, because the exhaust may be harmful to others. A mobility device that is unsafe to others would not be reasonable under the proposed regulation. Additionally, the risk of harm to the environment or natural or cultural resources or conflicts with federal land management laws and regulations are also to be considered. The final consideration is the ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

While a public accommodation may inquire into whether the individual is using the device due to a disability, the entity may not inquire about the nature and extent of the disability, as provided in § 36.311(d).

The Department anticipates that, in many circumstances, allowing the use of unique mobility devices by individuals with disabilities will be reasonable to provide access to a public accommodation's services, programs, and activities, and that in many cases it will not fundamentally alter the public accommodation's operations and services. On the other hand, the use of mobility devices that are unsafe to others, or unusually unwieldy or disruptive, is unlikely to be reasonable and may constitute a fundamental alteration.

Consider the following examples:

Example 1: Although people who do not have mobility disabilities are prohibited from operating EPAMDs at a theme park, the public accommodation has developed a policy allowing people with disabilities to use EPAMDs as their mobility device at the theme park. The policy states that EPAMDs are allowed in all areas of the theme park that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The public accommodation determined that the venue provides adequate space for a larger device such as an EPAMD and that it does not fundamentally alter the nature of the theme park's goods and services. The theme park's policies do, however, require that EPAMDs be operated at a safe speed limit. A theme park employee may inquire at the ticket gate whether the device is needed due to the user's disability and also inform an individual with a disability using an EPAMD that the theme park's policy requires that it be operated at or below the designated speed limit.

Example 2: A luxury cruise ship has developed a policy regarding the use of EPAMDs by individuals with disabilities on the ship. In developing the policy, the public accommodation has considered the dimensions of the EPAMD, including its height, in relation to the common areas of the ship and the safety of other passengers. Since the cruise ship in this example is large, there are many areas where a person using an EPAMD can be easily accommodated, including decks and spaces where passengers routinely walk and exercise, under certain weather conditions. However, the dimensions of the ship, as on most such vessels, are more compact than analogous features of facilities on land and may contain thresholds and other features that present obstacles to some EPAMDs. Therefore, with respect to some areas, such as the passageways in cabin areas where the spaces are narrow and ceilings are low, the cruise ship may determine that allowing an individual with a disability to use an EPAMD for mobility would result in a fundamental alteration to some of the cruise ship areas. In these constricted areas, the cruise ship staff may offer a wheelchair or other means of locomotion where the EPAMD would be inappropriate. If the cruise ship in this example is smaller, it may be necessary for the staff to restrict the use of EPAMDs in most or all areas.

The Department is seeking public comment on the proposed definitions and policy concerning wheelchairs and other mobility devices.

Question 47: Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.

Question 48: Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain *vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?*

Question 49: Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?

Subpart D—New Construction and Alterations

Subpart D establishes the title III requirements applicable to new construction and alterations. The Department is proposing to amend this subpart to adopt the proposed standards and to make related changes to give effect to these changes, as described below.

Section 36.403 Alterations and Path of Travel

The Department is proposing one change to § 36.403 on alterations and path of travel by adding a path of travel safe harbor. Proposed § 36.403(a)(1) states that if a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the proposed standards solely because of an alteration to a primary function area served by that path of travel. The Department is not proposing any additional changes to §§ 36.402 through 36.405, which establish requirements for alterations. Some commenters suggested that the definition of alteration be modified to provide more guidance on what actions trigger application of the proposed standards generally, and the extent to which an alteration triggers an additional path of travel obligation.

Consequently, the Department is proposing a safe harbor to clarify alteration requirements as they pertain to path of travel. One commenter noted that changing a door lock on a hotel guest room would trigger requirements to make the path of travel accessible. This suggestion is expressly rejected by the language of the existing regulation in § 36.403(c)(2), which makes clear that "alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function." Commenter suggestions that painting and wallpapering be expressly excluded from the definition of alterations are similarly unnecessary as both the 1991 Standards and the proposed standards provide in the definition of "alteration" that "[n]ormal maintenance, reroofing, painting or wallpapering * * * are not alterations unless they affect the usability of the building or facility."

Section 36.406 Standards for New Construction and Alterations

Section 36.406(a)(2) Applicable Standards

Section 306 of the ADA, 42 U.S.C. 12186, directs the Attorney General to issue regulations to implement title III that are consistent with the guidelines published by the Access Board. Commenters suggested that the Department should not adopt the 2004 ADAAG, but should develop an independent regulation. The Department is a statutory member of the Access Board and was actively involved in the development of the 2004 ADAAG. Because of the Department's long involvement in the process to develop the 2004 ADAAG, the Department does not believe that it is necessary or appropriate to begin that lengthy process anew. Nevertheless, during the process of drafting this NPRM, the Department has reviewed the 2004 ADAAG to determine if additional regulatory provisions are necessary. As a result of this review, the Department has decided to propose new sections, which are contained in §§ 36.406(b)–(g), to clarify how the Department will apply the proposed standards to social service establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

The Department is proposing to adopt the proposed standards and to establish the effective date and triggering event for the new coverage. Specifically, the Department is proposing to amend § 36.406(a) by dividing it into two sections. Proposed § 36.406(a)(1) specifies that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences less than six months after the effective date of the proposed rule. Proposed § 36.406(a)(2) specifies that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences six months or more after the effective date. The Department is also proposing to delete the advisory information now published in a table at § 36.406(b).

The ANPRM gave notice that the Department must determine when the proposed standards will apply to newly constructed facilities following the publication of a final rule by establishing: (1) The effective date after publication of the final rule; and (2) the triggering event for compliance with the proposed standards (*i.e.*, the event or action that compels compliance with the proposed standards).

Attachment A to this proposed rule is an analysis of the major changes in the proposed standards and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. In addition to those comments, the Department also received some comments that raised issues concerning the scope of the coverage of the proposed standards, the Department's decision to adopt them, and the established methods of interpretation. Comments discussing the costs and benefits of the proposed standards will be addressed in the discussion of the Department's regulatory impact analysis. Comments on the effect of the proposed standards on existing facilities will be discussed in conjunction with the analysis of § 36.304 of this proposed rule. The remaining comments addressed global issues, such as the Department's proposal to adopt the 2004 ADAAG as the ADA Standards for Accessible Design without significant changes and the application of the proposed standards to employee areas.

Several commenters, including individual business owners and organizations representing business interests, questioned the application of the proposed standards to employee work areas, maintaining that all employment issues should be subject to title I of the ADA, 42 U.S.C. 12111 *et seq.* These comments indicate a fundamental misunderstanding of the statutory scope of title III coverage and the scope of the 1991 Standards.

The commenters correctly observed that title I prohibits discrimination against individuals with disabilities employed in a business that has fifteen or more employees. Title III has no direct effect on that employer/employee relationship, but does establish requirements for the design, construction, or alteration of both public accommodations and commercial facilities, 42 U.S.C. 12183. As the Department explained in the preamble to its 1991 NPRM to implement title III:

> Commercial facilities are those facilities that are intended for nonresidential use by a private entity and whose operations affect commerce. * * * [T]he new construction and alteration requirements of subpart D of the [1991] rule apply to all commercial facilities, whether or not they are places of public accommodation. Those commercial facilities that are not places of public

General Information

Case Name	Ault et al v. Walt Disney World Co.
Docket Number	6:07-cv-01785
Status	Closed
Court	United States District Court for the Middle District of Florida
Nature of Suit	Civil Rights: Americans with Disabilities - Other
Related Opinion(s)	254 F.R.D. 680

