UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ACCESS NOW, INC, et. al, Plaintiffs, v. CUNARD LINE LIMITED, CO., and CARNIVAL CORPORATION, Defendants.	CASE NO. 00-723-CIV-MORENO

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

I. INTRODUCTION

In November 2000, plaintiffs Access Now, Inc. and Edward Resnick, a disabled individual who uses a wheelchair for mobility [hereinafter collectively referred to as "Access Now"] filed an amended complaint alleging violations of Title III of the Americans With Disabilities Act, 42 U.S.C. §§ 12181-12189 ("ADA"), due to accessibility barriers on eleven of defendant Carnival Corporation's ("Carnival") cruise ships docked in Florida. Less than one year later, in May 2001, the parties filed a proposed 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 class of disabled individuals nationwide. This agreement, if endorsed by the Court, would cover each of Carnival's 15 existing cruise ships and, at Carnival's discretion, an unlimited number of cruise ships in specified classes to be constructed in the future.

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 only once before (in Access Now, Inc. v. The May Dep't Stores, Co., C.A. 00-148-CIV-MORENO) objected to a voluntary settlement of ADA claims between private litigants. However, this settlement so favors Carnival, 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 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 defective class notice, to an overly broad release provision, to an excessively broad class definition that includes claims outside the amended complaint which the class representative has no standing to represent. 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 Carnival in perpetuity – thereby affording Carnival a license to discriminate against future disabled passengers.

Judicial endorsement of the Carnival Agreement would, moreover, compromise the Department of Justice's ability to effectively regulate a large segment of the cruise ship industry. As places of public accommodation, cruise ships must comply with all applicable Title III requirements. The Department of Justice is statutorily-tasked with the responsibility for issuing and enforcing regulations for Title-III covered public accommodations. Final regulatory design standards for new construction or alteration of passenger vessels (i.e. - ships built or altered after January 1993) are, however, still likely some time away. The Department is not "bound" by the Carnival Agreement, and whatever substantive requirements result from the Department's rulemaking process will apply to Carnival irrespective of the Agreement. However, as a practical matter, the Department's enforcement of these forthcoming regulations would be significantly hampered since: (i) class members would be precluded from bringing complaints alleging that Carnival had violated these regulations to the Department's attention; and, (ii) the Department could be foreclosed from using or referencing individual class members' complaints should it bring a future enforcement action under 42 U.S.C. § 12188(b)(1)(B) against Carnival alleging violation(s) of these regulations.

Taken together, the Carnival agreement's 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

The original Carnival complaint, filed in August 2000, alleged that then-defendant Cunard Limited violated Title III of the ADA due to the "existence of barriers to accessibility" on both the QE2 and the Caronia – two ships operated by Cunard, who is, in turn, owned by Carnival. See Complaint ¶ 10 (filed Aug. 28, 2000) (Docket #1). The complaint sought injunctive relief only on behalf of two named plaintiffs -- Access Now and Edward Resnick. Since then, the case has had several procedural twists, including multiple amendments to the complaint, so that the operative amended complaint now covers 11 ships owned or operated by Carnival (rather than Cunard) and a class definition that includes disabled persons nationwide. See, e.g., Amended Complaint (filed Nov. 1, 2000) (Docket #14); Second Agreed Motion to Amend Complaint to Add Class Allegations (filed May 18, 2001) (Docket #40).

At the behest of the Court, the Carnival parties also entered into settlement negotiations in early 2001. These negotiations bore fruit and, in mid-April 2001, the parties filed a proposed class action settlement agreement, as well as an accompanying motion for conditional class certification. See Joint Motion to Conditionally Certify Class Action, for Fairness Hearing, a Stay, and Settlement Hearing (filed April 18, 2001) (Docket # 31); Joint Notice of Agreement in Principle/Stipulation (filed Feb. 6, 2001) (Docket #25). However, at a status conference a few weeks later, the Court dismissed the

motion for conditional class certification (and accompanying settlement agreement) without prejudice based on the conditional class aspect of the parties' agreement. See Order Denying Motion to Amend Complaint and Order Denying Motion for Class Certification (filed May 2, 2001) (Docket #35). Thereafter, on May 18, the parties filed their renewed motion for class certification and a revised class action settlement agreement. See Joint Motion for Class Certification, a Fairness Hearing, a Stay, and Settlement Approval (filed May 18, 2001) (Docket # 41). The revised class action settlement agreement was attached to the Joint Motion and designated a as "Exhibit 1." See Joint Motion, Ex. 1 [hereinafter "Carnival Agreement"]. Other than deleting the "conditional" aspect of the previous agreement, the substance of the revised Carnival agreement does not materially deviate from the terms of the original agreement. In this Joint Motion, the parties sought certification of a class consisting of:

> all persons who have been or will qualify as having a "disability," as that term is defined by 42 U.S.C. § 12102(2), and who have been or will be a guest on or otherwise have been or will be adversely affected by the design or construction of or the policies, practices, or procedures relating to ticket sales, physical accessibility, or the provision of auxiliary aides and services for the following [15 Carnival cruise ships].

Carnival Agreement ¶ 1.1. (This class definition remained unchanged from the class proposed by the parties in the original Carnival settlement agreement.)

Accompanying this renewed motion for class certification was a proposed class notice. See [Proposed] Notice of Class Certification, Proposed Settlement, and Fairness Hearing (lodged May 18, 2001). The Carnival parties proposed that the class notice be distributed by: (i) mailing a copy of the settlement agreement and notice to each member of Access Now; (ii) publishing a copy of the notice in the Paralyzed Veterans of America's magazine (published under the name *PN magazine*), *New Mobility* magazine, and the newsletter of the National Federation for the Blind (published under the

name *Braille Monitor*); and (iii) posting a copy of the notice on the Access-Able.com web site. See Carnival Joint Motion, [Proposed] Order Granting Conditional Class Certification, Setting Hearing to Consider Approval of Settlement, and Staying Further Proceedings at 2-3.

Shortly thereafter, the district court granted the parties' pending motions for class certification and for a fairness hearing. See Order Granting Joint Motion for Class Certification and Setting Hearing to Consider Approval of Settlement (filed May 29, 2001) (Docket #47) [hereinafter "Class Order"]. In this brief Order, the Court held that the proposed class satisfied the requirements of Fed. R. Civ. P. 23(a) and 23(b). Id. at 3.[1] The Court also scheduled a settlement hearing for September 18, 2001. Id.[2] Finally, the Court approved the parties' proposed class notice and distribution scheme. Id. at 4; see also Notice of Class Certification, Proposed Settlement, and Fairness Hearing (filed May 29, 2001) (Docket # 48) [hereinafter "Class Notice"]. Objections to the Carnival agreement must be filed no later than 30 days prior to the settlement hearing. (i.e. - August 24, 2001). See Class Notice at 4-5.

III. ARGUMENT

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

Access Now and Carnival, as proponents of the class settlement, bear the burden of

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[1] While the Court's Class Order does not specify under which subparagraph of Rule 23(b) the Carnival class was being certified, the United States assumes for purposes of this memoranda that the class was certified under Rules 23(b)(1) and (b)(2) since these were the grounds on which the parties sought class certification. See Joint Motion at 2.

[2] The fairness hearing was subsequently rescheduled by the Court for Sept. 25, 2001 in light of the Jewish holidays. See Order Rescheduling Fairness Hearing (filed Jun. 6, 2001). (Docket #49).

demonstrating that the Carnival 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 v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983). As discussed below, the Carnival Agreement is so procedurally flawed that neither party can satisfy this burden. With problems ranging from an overbroad class definition that exceeds the scope of the Amended Complaint, to an overly expansive release provision that purports to release all future state and federal disability claims in perpetuity, 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 Class Action 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).[3] 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 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).[4]

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

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[3] 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.

[4] 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).

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.").

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

The Carnival Agreement suffers from several procedural deficiencies. These procedural problems include an excessively broad class definition that includes that includes claims outside the Amended Complaint which the named plaintiff has no standing to represent, as well as an overly expansive release provision that precludes class members from litigating future disability-related complaints arising under state or federal law against Carnival. Each of these areas are discussed more fully below.

(a) The class definition is too broad and goes beyond the scope of claims raised in the amended complaint

In this case, what began as an individual ADA-based action on behalf of Access Now and one mobility-impaired plaintiff (Resnick) against Carnival regarding the physical accessibility of eleven Carnival cruise ships docked in Florida, has now blossomed in the Carnival Agreement into a global class action settlement purporting to settle every present or future disability-based discrimination claim by a nationwide class of disabled individuals against all existing Carnival-owned cruise ships (15) and

an unlimited number of ships of certain classes to be built in the future. As a result, the Agreement reaches too far – both in terms of its class definition and the scope of covered claims – and should not, therefore, receive judicial approval.

The class definition set forth in the Carnival Agreement, and certified by the Court in May 2001, potentially covers every disabled individual in the country. As noted above, the Carnival class includes not only all persons with disabilities within the meaning of the ADA who have been (or will be) passengers on one of the Carnival cruise ships enumerated in the Agreement, but also all disabled individuals who "otherwise have been or will be adversely affected by the design or construction of or the policies, practices, or procedures relating to ticket sales, physical accessibility, or the provision of auxiliary aides or services[.]" See discussion supra p. 4; Carnival Agreement ¶ 1.1. This expansive class definition is procedurally problematic for two reasons.

First, the Carnival class definition purports to cover claims that are outside the scope of the Amended Complaint. This Complaint contains a single cause of action alleging that eleven Carnival cruise ships docked in Florida are in violation of the ADA due to the existence of certain enumerated physical barriers to accessibility, including: improperly installed ramps, doors, and doorways; inaccessible guest rooms and bathrooms; and inaccessible elevators and telecommunication devices that lacked the requisite accessible features and/or markings. See Amended Complaint ¶¶ 17-24. The Carnival Agreement, however, goes much further. The Agreement's expansive class definition includes not only claims regarding physical inaccessibility of the covered cruise ships, but also claims with respect to "policies, practices, or procedures concerning ticket sales . . . or the provision of auxiliary aides and services." In addition, the Carnival Agreement expands the scope of covered cruise

ships from the eleven ships docked in Florida that were named in the Amended Complaint, to all fifteen existing Carnival cruise ships (wherever docked) and an unlimited number of as-yet unbuilt "future ships" in the Spirit and Conquest classes. See Carnival Agreement ¶¶ 1.1, 1.2. Since the Agreement goes beyond the scope of claims raised in the Amended Complaint, and these "new" claims do not share the same factual or legal predicate as the claims alleged in this Complaint, they cannot properly be made part of the settlement agreement. See 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."); cf. TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460-61 (2nd Cir. 1982) (holding that class action settlement agreement enjoining class members from prosecuting claims that were not part of class complaint was properly approved by district court since the released claims arose out of the identical factual predicate as the claims in the complaint).[5]

Second, the Agreement's class definition not only goes beyond the claims raised in the Amended Complaint, but also includes persons (and claims) whom the named plaintiff – Resnick – has no standing to represent. It is axiomatic that Resnick, as the sole individual class representative, must have Article III standing to raise each class claim or subclaim on behalf of the class. See, e.g., Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000) ("[E]ach [class] claim must be

[5] While the Amended Complaint briefly mentions two Carnival documents discussing the corporation's ticketing policies for disabled passengers, see Amended Complaint ¶¶ 10-11, these materials are apparently discussed only to support the allegation that Carnival's cruise ships are not accessible to disabled passengers. Nowhere does this Complaint raise a cause of action alleging that Carnival violated the ADA by, for example, refusing to book disabled passengers absent a paying "able-bodied" adult companion.

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."); see also Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987) ("[A]ny analysis of class certification must begin with the issue of standing."); 1 Newberg on Class Actions §§ 2.05 -.06 (3d ed. 1992) (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). Yet the only injury-in-fact personally alleged by Resnick in the Amended Complaint concerns the physical inaccessibility of Carnival cruise ships for mobility-impaired customers such as himself. See Amended Complaint ¶¶ 9-11. Nowhere, for example, does Resnick allege that Carnival charged him a higher price for a cruise ticket than non-disabled passengers, prevented him from boarding unless accompanied by a fully-mobile adult companion, or refused to provide him with adequate or appropriate "auxiliary aides or services." Resnick thus properly cannot represent a class (or subclass) of individuals raising claims regarding Carnival's "ticketing policies" or provision of "auxiliary aides or services." As Chief Justice Burger cautioned in the context of a class action by a farmworkers' union:

> A named plaintiff cannot acquire standing to sue by bringing an action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on an injury which he does not share. Standing cannot be acquired through the back door of a class action.

Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring in part and dissenting in part). Thus, because Resnick has no standing to represent the expansive class set forth in the Carnival Agreement, the Agreement must be rejected. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 62-22 (1997) (holding that Rule 23's class action requirements apply to negotiated class action

settlement agreements, and stating that "[t]he safeguards provided by Rule 23(a) and (b) class-qualifying criteria . . . are not practical impediments - checks shorn of utility - in the settlement context.)

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

In addition to these class definition problems, the Carnival Agreement is also procedurally flawed due to its overly broad release provisions. These releases provisions are so expansive that they not only exceed the claims stated in the Carnival complaint, but also purport to preclude any future disability-related complaints by class members against Carnival regardless of the cause of action, type of relief sought, or conduct/barrier at issue. Simply put, the terms of this release are so one-sided in favor of Carnival that the Court could, on this basis alone, reject the Carnival Agreement.

Spanning more than two pages, the Carnival Agreement's broad release provisions collectively provide that, in exchange for Carnival making modifications to its cruise ships' accessibility as specified in the Agreement, see Carnival Agreement ¶¶ 2.1 - 2.2, class members forever release, with prejudice, any and all claims against Carnival under state or federal accessibility laws. See id. at ¶¶ 4.2 - 4.9. Of particular relevance here are two specific paragraphs addressing the scope of claims released by class members under the Agreement. First, in a paragraph entitled "Release and Covenant Not to Sue," the Agreement provides that class members, upon entry of final judgment

> shall forever release, remise, acquit, satisfy, and discharge Carnival and all other Released Persons from any and all claims that any one or more of them had, now has or in the future will or may have for injunctive relief under Title III of the ADA involving ships that are subject of this Settlement Agreement (hereinafter, collectively, the "Released Claims").

Carnival Agreement ¶ 4.2. Shortly thereafter, in the "Related Claims" paragraph, the Agreement further defines the "Released Claims" listed above as including, but not limited to:

> any and all actions, claims and causes of action arising out of or predicated upon allegations: a) that Carnival and/or any other Released Person did not comply with the ADA in violation of any federal law, Florida law, or any state law; b) that any modifications made pursuant to this Agreement comply with any and all ADA requirements; and c) of a failure to provide the proper disclosure in connection with marketing cruises of disabled persons.

Carnival Agreement ¶ 4.4.

Taken together, the claims released by these two provisions are exceedingly broad. For while paragraph 4.2 purports to release "only" present or future Title III-based ADA claims (which is itself overly broad), paragraph 4.4 casts an even wider net by purporting to preclude future claims under ***both*** the ADA ***and*** state accessibility laws. Because of their broad scope, these release provisions are procedurally improper and threaten 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 Carnival Agreement's release provisions purported waiver of 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 Agreement's release provisions preclude recovery of compensatory or punitive damages by persons living in states permitting such relief. 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 of the ADA where only equitable relief is available for private actions.[6]

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[6] Compare, e.g., 42 U.S.C. § 12188 (ADA Title III remedies and procedures) with Ark. Code. Ann. § 16-123-107 (1999) (intentional acts of disability discrimination liable for compensatory and punitive damages); A.R.S. §§ 41-1492 - 41-1992.11 (providing private right of action for discrimination by public accommodation under Arizonans With Disabilities Act and permitting recovery of monetary damages); Cal. Civ. Code § 54.1 (2001) (permitting recovery of not less than $1,000 for each violation of state disability law); D.C. Code Ann. §§ 2-1402.31, 2-1403.16 (2000) (providing private right of action for injunctive and monetary relief for disability-based discrimination by a public accommodation); 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); Mo. Rev. Stat. §§ 213.065, 213.111 (2000) (prohibiting discrimination in places of public accommodation and authorizing courts to award "actual and punitive damages"); N.J. Stat. Ann. § 10:5-13 (West 2001) (authorizing prevailing parties in disability discrimination actions to recover "all remedies available in common law tort actions"); N.Y. Exec. Law §§ 296, 297 (McKinney 2001) (authorizing damages for violations of

Third, the release would bar future litigation by class members against Carnival concerning accessibility issues or architectural barriers left unaddressed by the Agreement. Operation of the release provision would, for example, thus preclude such future hypothetical actions as: (1) an ADA-based injunction action by a disabled passenger who uses a wheelchair claiming that he could not board the M/V Carnival Destiny at the Port of Miami because ramps and gangways for embarking and disembarking the ship were not accessible; (2) a class action for injunctive and monetary relief under both the ADA and state law by disabled individuals alleging that Carnival discriminated against blind and mobility-impaired passengers by requiring them to travel with ticketed "able-bodied" companions; (3) a complaint for monetary relief under California's Unruh Civil Rights Act by an HIV positive passenger alleging that Carnival discriminated against him by refusing to treat him in the M/V Elation's on-board medical facility and by ordering him to disembark at the next port of call after Los Angeles. In short, this release provision guarantees Carnival 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 addressed by the

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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); Utah Code Ann. §§ 13-7-3, 13-7-4 (2000) (discrimination by place of public accommodation subject to "civil action for damages and any other remedy available in law or equity"); Vt. Stat. Ann. §§ 4502, 4506 (2000) (prohibiting discrimination by public accommodations and authorizing private enforcement actions for injunctive relief, as well as compensatory or punitive damages).

Agreement. As with other aspects of the Agreement, this open-ended release provision thus provides a windfall to Carnival 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, including cruise ships. See 42 U.S.C. §§ 12181 - 12189; 28 C.F.R. pt. 36 (1994); see also Stevens v. Premier Cruise Lines, Inc., 215 F.3d 1237, 1241-43 (11th Cir. 2000) (holding that Title III of the ADA applies to foreign-flag cruise ships operating in United States waters). 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 any of the existing or future ships covered by the Agreement -- including, potentially, the filing of ADA-based complaints with the Department -- the Department's ability to fully and effectively enforce the ADA against Carnival would be undermined.

Taken together, the procedural deficiencies underlying the Carnival 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, 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).

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

The Carnival Agreement must also be rejected because the class notice is defective in terms of both its content and method of distribution. With a distribution scheme primarily relying on notice published in three limited-circulation magazines, only a tiny faction of the potentially millions of class members will be adequately informed of the Carnival Agreement prior to the settlement hearing. Such a limited distribution scheme satisfies neither due process nor Rule 23's statutory notice requirements. In addition, the content of the class notice is constitutionally suspect because nowhere does the notice describe either the substantive terms of the Agreement or the breadth of released claims. Given the critical role of class notice in the approval of class action settlements under Rule 23(e), these deficiencies – whether considered individually or collectively – preclude judicial endorsement of the Carnival Agreement.

1. The Notice's Limited Distribution Scheme Satisfies Neither Due Process Nor Rule 23's Statutory 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 identity 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 Newberg on Class Actions § 8.32.

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, 706 F.2d at 1155-59 (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 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 Carnival class notice cannot withstand scrutiny. First, since the Carnival Agreement's release provisions purport to bar future state law-based claims for monetary relief, see Carnival Agreement ¶¶ 4.2 - 4.5, 4.8, class members should have been afforded both individual (actual) notice and an opportunity to opt-out of the settlement. Because only a tiny fraction of class members received actual notice, and because no class members were afforded the opportunity to opt-out of the settlement, the Carnival Agreement must be rejected. See Carnival Agreement ¶ 3.6 (emphasizing that class members cannot opt-out of Carnival settlement); Class Order at 4.[7]

[7] Pursuant to the class notice distribution scheme approved by the Court, only the members of

As noted above, the Carnival 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. See discussion supra pp. 12-17. 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 Rules 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 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 Carnival class members were afforded neither of these procedural protections thus precludes

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Access Now received individual mailed copies of the class notice and settlement agreement. See Class Order at 4. Access Now is comprised of approximately 500 members, including both disabled and non-disabled individuals. See Amended Complaint ¶ 6; Ex. 1 (excerpts from Access Now's web site). Given that the putative Carnival class may well encompass millions of disabled individuals, it cannot be said that notice mailed to less than 500 class members is reasonably calculated to apprise *all* class members of the pendency of the settlement. See Eisen, 417 U.S. at 173 (individual notice satisfying procedural due process must be sent to "all class members whose names and addresses may be ascertained through reasonable effort" regardless of expense).

approval of the Carnival Agreement.[8]

Moreover, even assuming that the Carnival Agreement's expansive release provision does not necessitate these constitutionally-enhanced procedural measures, the notice is nonetheless defective under the more lenient "reasonableness" standard governing class notice under Rule 23(e). The primary flaw underlying the Carnival 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 disseminated by (i) mailing a copy of the settlement and class notice to each member of Access Now; (ii) publishing a copy of the class notice in PVA's magazine (published under the name *PN magazine*), *New Mobility* magazine, and the newsletter for the National Federation for the Blind (published under the name *Braille Monitor*); and (iii) posting an electronic copy of the notice on the "Access-Able.com" web site. See Class Order at 4.

Yet, taken together, these publications – *PN magazine*, *New Mobility*, and the *Braille Monitor* – have a combined *worldwide* print circulation of just over 83,000 subscribers – ***less than 1%*** of the approximately 53 million disabled persons the parties estimate to be potential class members. See Ex. 2; see also Memorandum of Law in Support of Joint Motion for Class Certification, Final Fairness

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[8] Nor can it be argued that publication of the Carnival class notice may be deemed to satisfy the requisite actual notice. For not only are the circulations of these magazines extremely limited, see discussion infra, 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").

Hearing, and Approval of Settlement at 8 (filed May 18, 2001) (Docket #42).[9] Moreover, while it is unknown how frequently the members of the disability community have accessed the electronic class notice on the Access-Able.com website, it is highly unlikely that this web site – or the notice posted thereon – will be accessed with sufficient frequency to reasonably apprise class members of the pendency of this settlement agreement.[10]

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

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[9] According to recently-released figures by the U.S. Census Bureau, about 1 in 5 Americans – or about 53 million people – identify themselves as having some type of disability. See United States Census Bureau, *Americans With Disabilities: 1997* (March 2001), available at http://www.census.gov/hhes/www/disable/sipp/disable97.html. This is also the figure cited in the parties' class certification brief. To be sure, it is impossible to know precisely how many of these 53 million disabled individuals have booked or will book a cruise on one of Carnival's cruise ships covered by the Agreement. However, given the breadth of the class definition – a definition that encompasses not only disabled individuals who have, or may in the future be, guests on a covered cruise ship, but also disabled persons "adversely affected" by Carnival's policies practices, or procedures regarding ticket sales, physical accessibility, or auxiliary aides or services – it is arguable that the class includes virtually every disabled Americans since every such person, whether or not they book a cruise, may be said to be "adversely affected" by Carnival's discriminatory practices or policies.

[10] As of the date of filing of this memorandum, the Carnival class notice had not been posted on the Access-Able.com web site. See Declaration of Gretchen E. Jacobs ¶ 3 (dated Aug. 17, 2001). In any event, according to statistics maintained by the website, this site is "visited" by approximately 15,000 - 20,000 users per month. See id. at ¶ 2. Thus, posting an electronic copy of the Carnival class notice on this web site – even indulging the unlikely scenario that every visitor to the site also accesses and reads the separately-linked notice – does not appreciably add to the circulation of the class notice. Even including all monthly visitors to this site, the class notice is still being disseminated through publication (83,000) and posting on the Access-Able.com web site (20,000) to less than 1% of the 53 million potential class members.

settlement. By comparison, notices approved under Rule 23(e) for nationwide (or even statewide) class actions generally cast a much wider net than the Carnival 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.[11]

Because publication of the Carnival notice fell far short of these well-established benchmarks for adequate notice under Rule 23(e), it is likely that only a small fraction of class members will be informed of the Carnival 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 Carnival Agreement.

2. The Content of the Notice is Insufficient to Apprise Class Members of Either the Substance of the Agreement or the Breadth of Released Claims

Moreover, in addition to its limited distribution scheme, the content of the Carnival class notice

[11] 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.

cannot withstand scrutiny. First, and perhaps most important, the notice fails to inform class members that approval of the Agreement would have the effect of releasing any state-law based claims for monetary relief they may have against Carnival – both presently and in the future – for disability discrimination relating to one (or more) of the covered cruise ships.[12] This omission alone is sufficient to preclude endorsement of the Agreement. See National Super Spuds, 660 F.2d at 16-18 (rejecting class action settlement when, inter alia, the notice "did not adequately apprise class members [with unliquidated futures contracts] . . . that these too were being placed on the block"); Johnson, 598 F.2d at 438 ("Before an absent class member may be forever barred from pursuing an individual damage claim, however, due process requires that he receive some form of notice . . . that his damage claims may be adjudicated as part of it.")

Second, the class notice's generic description of the substantive terms of the Carnival Agreement does not pass constitutional muster. While a class notice is not required to provide a complete description of the underlying class settlement agreement, due process requires that the notice nonetheless give class members a basic understanding of the terms of the agreement. See, e.g., Mullane, 339 U.S. at 314 (due process requires that "notice must be of such a nature as reasonably to convey the required information"); National Super Spuds, 660 F.2d at 21 (constitutionally adequate

[12] Indeed, the notice is not only silent with respect to the release of state law claims, but gives the misleading impression that the Carnival litigation involves (and, thereby, releases) only ADA-based accessibility claims. In the "Description of the Litigation" section, the notice states that the "sole purpose" of plaintiffs in bringing this action was to bring Carnival's cruise ships into compliance with the ADA. Class Notice at. 3. The notice then goes on to state: "No monetary damages of any sort are sought or permitted for private litigants under Title III of the ADA." Taken togther, these statements suggest that the Carnival case raises only ADA claims and neither addresses, nor releases, causes of action for monetary damages under state accessibility laws.

notice must "'fairly apprise the . . . members of the class of the terms of the proposed settlement'" (quoting Grunin, 513 F.2d at 122); Mendoza, 623 F.2d at 1351-52 (class notices "must present a fair recital of the subject matter and proposed terms" of the settlement agreement) (internal quotations and citation omitted); Battle, 770 F. Supp. at 1522 (notice sufficient so long as it "properly identifie[s] the plaintiff class and generally describe[s] the terms of the settlement"). Such a description is important because it provides class members with sufficient information to make informed decisions regarding whether to investigate further and/or come forward to object. See Mullane, 339 U.S. at 314 (noting that due process right to notice "has little reality or worth unless one is informed that the matter is pending and can choose for himself to appear or default, acquiesce or contest"); Mendoza, 623 F.2d at 1352; Battle, 770 F. Supp. at 1522.

The Carnival class notice, however, falls far short of providing class members with a basic understanding of the Carnival Agreement's substantive accessibility provisions. Indeed, the notice contains only a *single sentence* describing its accessibility terms: "Under the terms of the Settlement Agreement, Carnival has agreed that it will make substantial modifications to its ships and to its policies relating to those ships in order to enhance their accessibility to individuals with disabilities." Class Notice at 3. Such a brief, generic description of the Agreement's accessibility provisions hardly provides class members with a sufficient understanding of the settlement terms to determine whether to object to the Agreement. Nowhere, for example, does the notice: (i) summarize the"substantial modifications" being made to the covered ships; (ii) identify the corporation's agreed-to policy changes; (iii) describe how these changes enhance onboard accessibility; or, (iv) detail the time frame(s) for these modifications and policy changes. Without these crucial pieces of information, due process is offended

because absent class members simply cannot make informed decisions about their legal rights.

C. Approval of the Carnival Agreement Would Frustrate the Ongoing Rulemaking Process Regarding Passenger Vessels Such as Cruise Ships

In addition to its role as the primary ADA enforcement agency for Title III-covered entities, see discussion supra p. 16, the Department of Justice is also tasked by Congress with the responsibility for promulgating regulations to implement the public accommodations requirements of Title III. See 42 U.S.C. § 12186(b). Since final regulatory design standards for passenger vessels – such as cruise ships – are still likely several years away, approval of the Carnival Agreement would compromise the Department of Justice's ability to enforce the design standards to be established by these future regulations.

Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). A "place of public accommodation," in turn, is defined as a facility, operated by a private entity, whose operations affect commerce and fall within one (or more) of the 12 broad categories of statutorily-enumerated facilities. Id. at § 12181(7). These categories include, inter alia, places of lodging, restaurants, places of exhibition or entertainment, service establishments, and places of recreation. Id.

The Department of Justice has concluded – and the Eleventh Circuit agreed in Stevens – that cruise ships constitute places of public accommodation and are, therefore, subject to Title III of the ADA. See, e.g., Stevens, 215 F.3d at 1241; 45 Fed. Reg. 35546 (July 26, 1991) reprinted in 28 C.F.R.

pt. B at 587 (preamble to final DOJ regulations noting that the term "facility" in 28 C.F.R. § 36.104 includes mobile public accommodations such as cruise ships, floating restaurants, and mobile health units); Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.). As places of public accommodation, cruise ships must comply with all Title III requirements, except new construction and alteration requirements, applicable to their provision of goods and services within the areas of the ship that function as public accommodations such as passenger cabins, restaurants, and retail shops. At present, these requirements include: (1) establishing non-discriminatory eligibility criteria that permit individuals with disabilities to fully and equally enjoy any cruise-related services, facilities, or accommodations; (ii) making reasonable accommodations in policies, practices or procedures for disabled passengers; (iii) ensuring that no individual with a disability is denied cruise-related services or otherwise treated differently than other individuals because of the absence of auxiliary aides or services; (iv) removing architectural or communications barriers that are structural in nature when such barrier removal is "readily achievable;" and (v) if not "readily achievable," using alternate means that are readily achievable. See 42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(i) - (v).

Pending issuance of final regulations, the Department of Justice has also determined that the regulations governing new construction or alterations in Title III-covered facilities do not apply to cruise ships, boats, or other conveyances.[13] As the Department noted in the preamble to the "new

[13] The ADA mandates more stringent accessibility standards for most public accommodations designed, constructed, or altered after January 26, 1993. See 42 U.S.C. § 12183; 28 C.F.R. §§ 16.401 - .402. The Department of Justice has promulgated final regulations governing so-called "new construction" which set forth detailed scoping requirements (i.e. - what has to be accessible) and technical standards (i.e. - how access is to be achieved) for these facilities. See 28 C.F.R. pt.36, appendix A, Standards for Accessible Design. Public accommodations constructed before January 1993 (and not subsequently altered after that date), must still comply with the ADA's non-

construction" regulations:

> [C]ommenters raised questions about the applicability of this part to places of public accommodation operated in mobile facilities (such as cruise ships, floating restaurants, or mobile health units). Those places of public accommodation are covered under this part . . . . Thus the requirements of subparts B [28 C.F.R §§ 36.201 - .213] and C [28 C.F.R §§ 36.301 - .310] would apply to those places of accommodation . . . . [¶] However, standards for new construction and alterations of such facilities are not yet included in the Americans With Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by § 36.406 and incorporated in appendix A. The Department will therefore not interpret the new construction and alterations provisions of subpart D [28 C.F.R §§ 36.401 - .407] to apply to the types of facilities discussed here, pending further development of specific requirements.

28 C.F.R. pt. 36, App. B at 587; see also ADA Title III Technical Assistance Manual III-5.3000.[14]

While the regulatory process has commenced with respect to accessibility standards for cruise ships, this process is not yet complete. In August 1998, the Access Board – an independent federal agency authorized by the ADA to develop minimum accessibility guidelines for buildings, facilities, and transportation vehicles – created the Passenger Vessel Access Advisory Committee ("PVAAC") to provide recommendations for regulations regarding accessibility guidelines for passenger vessels such as cruise ships. See Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report at 1-2 (Dec. 2000) available at http://www.access-board.gov/pvaac/commrept [hereinafter "PVAAC Final

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discrimination and "barrier removal" provisions, but they need not meet the ADA standards. See 42 U.S.C. §§ 12182(b)(2)(iv) - (v).

[14] With respect to Title III-covered facilities providing transportation services, the Department of Justice shares regulatory authority with the Department of Transportation ("DOT"). See 42 U.S.C. §§ 12184(a), 12186(a)(1). DOT is responsible for issuing regulations to implement Title III's transportation vehicle (as opposed to public accommodation) requirements. Id. at § 12186(a)(1). As with the Department of Justice, DOT has determined that the ADA covers passenger vessels such as cruise ships. 56 Fed. Reg. 45,584, 45,600 (1991). Like the Department of Justice, DOT is still in the process of establishing regulatory standards for new construction or alteration of passenger vessels. See 49 C.F.R. pt. 37, App. D, § 37.109; 49 C.F.R. § 37.5(f).

Report"].[15] For two years, PVAAC studied ways to achieve access for disabled persons on passenger vessels in light of various design considerations relating to the marine environment, as well as for the varying types and sizes of vessels. Id. In December 2000, PVAAC presented its report to the Access Board detailing its recommendations for accessibility guidelines governing passenger vessels and shore facilities. See PVAAC Final Report. It is anticipated that, once the Access Board subsequently issues its notice of proposed rulemaking, takes comments, then issues its final guidelines, the Department of Justice will assess the Board's final guidelines and determine whether to adopt them (in whole or in part) as the "new construction" standards for places of public accommodation on cruise ships. The Justice Department's final rulemaking process will include a notice of proposed rulemaking, a public comment period, development of a final rule, and then, finally, publication of the final rule.

Because final regulations with respect to cruise ships have not yet been issued, the net effect of the Carnival Agreement will be to hamper the Department of Justice's ability to enforce these future regulations. To be sure, the Department is not "bound" by the Carnival Agreement, and whatever substantive requirements result from the Department's rulemaking process will apply to Carnival irrespective of the Agreement. However, as a practical matter, the Department's enforcement of these

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[15] Created in 1973, the Access Board is an independent federal agency with responsibility for, among other things, ensuring the barrier-free design of federal buildings and other projects subject to the Architectural Barriers Act. See Rehabilitation Act of 1973, Pub. L. No, 93-112, § 502 (1973) (codified at 29 U.S.C. § 792); see also http://www.access-board.gov/about/boardhistory.htm (summarizing history and jurisdiction of the Access Board). The Board's present membership includes representatives from 12 federal agencies, one of whom is the Department of Justice. See 29 U.S.C. § 792(a)(1)(B). Under the ADA, the Access Board is authorized to issue minimum design guidelines under Titles II and III that the Department of Justice must not go beneath; however, by law, the Department must issue final rules to enforce Titles II and III. See 42 U.S.C. § 12204.

forthcoming regulations would be significantly hampered since: (i) class members would be precluded from bringing complaints alleging that Carnival had violated these regulations to the Department's attention; and, (ii) the Department could be foreclosed from using or referencing individual class members' complaints should it bring a future enforcement action under 42 U.S.C. § 12188(b)(1)(B) against Carnival alleging violation(s) of these regulations. Indeed, the Agreement plainly anticipates the issuance of future regulations and specifically precludes class members from using violation of such regulations by Carnival as a basis for suit against the corporation. See Carnival Agreement ¶ 4.8 ("Plaintiffs agree not to claim any violation of any future statute, regulation, or other requirement as to cruise vessels as a result of the modifications agreed to herein."); see also id. at ¶¶ 4.2, 4.4 (defining released claims). Given that Carnival bills itself as "the largest, most popular, and profitable cruise line in the world," Carnival Corporation, 2000 Annual Report 2 (2000) (excerpted copy attached as Ex. 4), and that the expansive class definition potentially encompasses over 50 million disabled persons nationwide, the Agreement's purported exemption of Carnival from compliance with future regulations applicable to "new construction" on cruise ships could significantly undermine the force and effect of these regulations.

While it is, of course, impossible at this time to predict precisely what accessibility standards will be established by future regulations, it is nonetheless instructive to compare the Agreement's substantive terms with the recommended guidelines set forth in the PVAAC Final Report. For example, with respect to the Holiday class of ships, the Agreement requires Carnival to provide six so-called "fully-accessible" cabins, and ten "semi-accessible" cabins, for a total of 16 "accessible" cabins. See Carnival Agreement ¶ 1.1 (designating names and classes of cruise ships covered by the settlement agreement); see also id. at Ex. 1, § III(A); Ex. 2, § 2. The PVAAC Final Report, on the other hand,

would require a minimum of 21 ***fully-accessible*** staterooms on ships of this size. See PVAAC Final Report, Ch. 7, § 224.2 & Table 224.2; see also Lloyd's Register of Ships: 1999-2000 Millenium Issue, Vol. A-G 854 (1999) (specifications for Carnival's Celebration Holiday-class cruise ship) (Ex. 5); Lloyd's Register of Ships, Vol. H-O 190, 497 (specifications for Carnival's Holiday and Jubilee Holiday-class cruise ships) (Ex. 6).[16] The PVAAC Final Report, moreover, provides detailed technical and scoping recommendations for accessible passenger cabins – including the living, dining, and sleeping areas; toilet and bathing facilities; cabinets; sinks; and storage rooms – areas with respect to which the Carnival Agreement is largely silent. Compare, e.g., PVAAC Final Report, ch. 7, §§ 224.1 - 905.4 with Carnival Agreement, Ex. 1, § III(A)-(E). Again, while it is unknown at this time what technical and scoping requirements final regulations while codify for new construction or alterations of cruise ships, this limited comparison suggests that the accessibility standards set forth in the Carnival Agreement may ultimately prove to be less demanding than the standards imposed by final regulations. Disabled passengers traveling on Carnival's cruise ships would thus be receiving a "second-class" cruising experience as compared to either other Carnival passengers, or disabled passengers on other cruise lines – a result plainly at odds with the ADA's non-discriminatory mandate.

D. Other Considerations Counseling Against Approval

Finally, it bears noting that the Carnival case is not the only ADA-based action that Access

[16] According to Lloyd's Register of Ships, each of Carnival's three existing Holiday-class ships – Jubilee, Celebration, and Holiday – have approximately 720 cabins. See id. For passenger vessels of this size, the PVAAC Final Report recommends 3% of the total number of cabins (referred to as "staterooms") to be fully accessible to disabled passengers. See PVAAC Final Report, ch. 7, Table 224.2.

Now has recently settled. Since October 1997, Access Now has filed over 330 ADA-based complaints in Florida federal courts alone. See Ex. 7 (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. The May Dept. Stores, Co., C.A. No. 00-148-CIV-Moreno (S.D. Fla. filed Aug. 5, 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. 7 (PACER printout); Ex.. 1 at p. 4 (statement by Access Now representative).[17]

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 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

[17] 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. 1 at p.1.

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 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 Carnival settlement and urges the Court to disapprove this agreement.

DATED: Aug. 17, 2001

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of August, 2001, true and correct copies of **Objections of Amicus Curiae United States to Proposed Class Action Settlement Agreement** were served by Federal Express, postage pre-paid, on the following parties:

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