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., Defendant.	CASE NO. 6:07-CV-1785-GAP-KRS

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

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

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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 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.

objections filed in the May case. See Objections of *Amicus Curiae* United States to Proposed 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.

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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).

(a) Class Definition Improperly Covers all Disney Resorts. The Disney agreement's 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, 945-

[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").

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.

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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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