IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

KEVIN BALL, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:00CV00-867
	)	Judge Gladys Kessler
AMC ENTERTAINMENT, INC., ET AL.,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO COMMENTS
RAISED AT FAIRNESS HEARING ON PROPOSED SETTLEMENT

Plaintiffs and their counsel would like nothing better than to obtain open captioning under the ADA. They would also prefer to obtain captioning on every screen in the class area. Unfortunately, Plaintiffs and counsel are as limited by the ADA as is the Court, and the ADA is more or less clear that open captioning and captioning of every screen are not legally required.

Litigants and attorneys in Texas and Oregon refused to accept these realities and, as a result, deaf and hard of hearing families and children in those communities will continue to miss out on the magic of movies for years to come. Even worse, the legal precedent set by the failure of those cases will likely discourage other litigants from seeking more captioning in those jurisdictions for quite some time.

In stark contrast, the greater Washington, DC area is on the verge of obtaining more access to movies through the leading closed captioning equipment than any other city in the world. This access will come from only two of the theater companies operating in the area and will increase should either company build any new theaters or any other theater companies provide captioning. Moreover, Plaintiffs and their counsel will have created a precedent--including both a favorable legal decision and a practical set-

tlement--that could advance the cause of captioning nationwide. Importantly, they will have accomplished this without limiting in any manner the right or opportunity of others to seek a legislative change or a voluntary increase in open captioning by the theater industry.

Accordingly, while the witnesses at the April 1, 2004 Fairness Hearing are to be applauded for their active participation in this case – whatever their ultimate opinion on the PSA, the law and evidence in this case remain clear that the PSA is both fair and reasonable and in the best interests of the Plaintiff Class. It will fulfill the spirit of the ADA by allowing deaf and hard of hearing children, families and others to share the joy, companionship, and excitement of one of life's pleasures.

I. Factual Background

At the Fairness Hearing, Plaintiffs offered the testimony of three witnesses – Plaintiffs Aaron Fudenkse and John Stanton, and fact witness Larry Goldberg, co-inventor of Rear Window Captioning ("RWC") and Director of the Media Access Group at WGBH, in Boston, Massachusetts.[1] The Court then received the testimony of 8 witnesses representing organizations and 3 individuals testifying on their own behalf. With few exceptions, the testimony essentially echoed the written comments previously provided by the witnesses.

Plaintiffs' Counsel's duty in regard to the testimony parallels his duty in regard to the written comments – namely, to review the points raised to determine whether they change the initial conclusion that the Proposed Settlement Agreement ("PSA") is, in fact, fair and reasonable and in the Plaintiff Class's best interest. Although the testimony pro-

[1] Plaintiff Kevin Ball could not attend the Hearing due to the birth of his son. Attached hereto is his Affidavit in support of the PSA.

vided valuable discussion of worthy points, Plaintiffs' Counsel remains convinced that the PSA is not only fair, reasonable and adequate, but is a significant step forward that will improve the lives of thousands of area children and families.

II. Responses to Specific Testimony

A. Plaintiffs John Stanton, Aaron Fudenske and Kevin Ball

All three Plaintiffs testified that, like other deaf and hard of hearing people, they have waited for literally lifetimes for the opportunity to attend movies with friends and family. They movingly made clear that what so many people take for granted is, in fact, a unique opportunity to spend time with friends, family and one's community and to enjoy one of life's special experiences. This settlement will permit Mr. Fudenske to finally attend a movie with his daughter. It will also allow Mr. Stanton and Mr. Ball to attend movies with their families. In particular, by the time Mr. Ball's newborn son is old enough to attend movies, the PSA will be in full force and his father will be able to actually share in the movie experience with him. Plaintiffs fully support the PSA because they have lived with this case for over four years and understand both the legal and technological realities involved.

The Notice of Proposed Settlement did not solicit statements or testimony in support of the PSA, but only objections against it. However, Mr. Ball, Mr. Stanton and Mr. Fudenske spoke not only for themselves, but for the thousands of others who previously shared their frustration and who now share their hope and excitement.

B. Larry Goldberg

Larry Goldberg testified that RWC was the result of an extensive research and development program that looked at several captioning technologies and found RWC to be the most workable and practicable. That choice has since been validated by the

growth of RWC in comparison to any other closed captioning technology. Specifically, Mr. Goldberg testified that RWC is now installed in 123 theaters in the United States and Canada (Transcript at 29) and at "every single" Disney theme park attraction (Transcript at 25).

Mr. Goldberg confirmed that RWC is the leading closed captioning technology and that no other comparable closed captioning technology is on the horizon. All others remain as mere concepts or are prohibitively too expensive for the real world.

Finally, Mr. Goldberg testified that increased implementation of RWC will provide funding for WGBH, a non-profit organization, to improve RWC and address the concerns that have been raised regarding its use. (Transcript at 33). Mr. Goldberg was clear that proceeds from the sale of RWC are devoted to the improvement of the system, meaning that the RWC to be installed under the PSA will improve over time. Thus, the viewer screen, goose-neck, and data wall may all be improved with additional use and funds.

In the end, Mr. Goldberg was a highly qualified and credible witness who admitted the imperfections of RWC, but stated that those imperfections are the result of creating an affordable and usable closed captioning system. It is his work in creating such a system that will make movies accessible to more and more deaf and hard of hearing citizens. With the continued growth of RWC, even more people will enjoy movies, through both more screens and an improved product.

C. <u>Gary Thompson</u>

Appearing on behalf of the Alexander Graham Bell Association for the Deaf and Hard of Hearing ("A.G. Bell"), Mr. Thompson demonstrated solid support for the PSA within the CMC itself, as well as the community as a whole. Readily acknowledging

A.G. Bell's preference for open captioning, Mr. Thompson tempered that preference with a sound knowledge of the law under the ADA, the risks and delay involved in litigation, and, most importantly, a realistic view of both the good and bad characteristics of RWC. His balanced and realistic approach to the PSA likely spoke for the many members of our community who were not requested to attend the Hearing, but who likely support the PSA.

D. Cheryl Heppner

On behalf of the CMC, Ms. Heppner testified that the CMC supports the PSA, but with reservation:

> The Coalition for Movie Captioning supports the proposed settlement agreement to the extent that it may result in increased access to AMC and Loews movie theaters. However, our support is not without reservation.

Transcript at p. 45.

Further, Ms. Heppner's testimony made clear that the primary reason for the CMC's "reservation" is not any failure of the PSA, but rather the CMC's goal as an organization: "Our goal is for all first run-movies, new movies, to be accessible and for our members to be able to attend theater showings in any theater …." Transcript at p. 44 (emphasis added).

While the CMC's goal of captioning all movies in all theaters is laudable and possibly attainable through legislative or industry relation efforts, that goal is highly impracticable under the ADA, as currently drafted and interpreted. The Plaintiff class (including those who support the PSA, but whose presence at the Fairness Hearing was not sought) is entitled to relief if it meets the standards of the ADA, not the standards of the CMC.

Moreover, nothing in the PSA will prevent the CMC from working to obtaining more open captioning, through legislation or industry relations efforts. In fact, large turn-outs from the deaf and hard of hearing community may demonstrate the potential market the theaters can tap into with a voluntary increase in open captioning.

Ms. Heppner also reiterated many of the other comments contained in the CMC's previously filed written comments, without substantial change. Plaintiffs have already responded to those individual comments, and hereby incorporate those responses herein.

Again, Plaintiffs' Counsel appreciates the participation and views of the CMC, as well as its goal of captioning all movies at all times. In fact, one of the benefits of the PSA is that RWC screens will provide access for ***all*** showings of a RWC movie, starting on opening night. However, as noted above, a request for open captioning or a request for captioning in all theaters has been soundly defeated in two other court cases and is simply not attainable under the ADA at present. Accordingly, Plaintiffs' Counsel continues to believe that the PSA is in the best interests of the Plaintiff Class because it achieves the best possible relief consistent with the ADA.

E. <u>Jim House</u>

Mr. House testified on behalf of Telecommunications for the Deaf, Inc., and also as a Vice Chair for the CMC. His two comments were that when he and his wife attempted to see a RWC movie, he had to drive to Baltimore, and his wife suffered a sore neck from using the RWC equipment.

The PSA will directly remedy Mr. House's first complaint by providing a significant number of RWC screens in the Washington area, which will hopefully be more convenient to Mr. House and others living near him. Plus, although he is correct that the De-

fendants do not operate in Anne Arundel County, that county is within the class area and any new theaters built there by either Defendant will have RWC.

Mr. House's wife's complaint about using is RWC is legitimate, but must be evaluated within the context of the available technologies under the ADA, the many compliments that RWC has generated (as evidenced by Exhibit 2 to Plaintiffs' previously filed response to the written objections to the PSA), and Mr. Goldberg's testimony that nothing will improve the technology of RWC or increase its ease of use as much as the funding provided by more installations.

F. <u>Tom Dowling</u>

Mr. Dowling spoke on behalf of the Northern Virginia Resource Center for the Deaf and Hard of Hearing in Fairfax, Virginia. His primary basis to objecting to the PSA is that seeks a "sole technology." Transcript at 53. In elucidating on this objection, Mr. Dowling testified that approximately 10 years ago, NVRC organized testing of available captioning equipment as alternatives to open captioning. Mr. Dowling testified that the results of those studies demonstrated a strong preference for open captioning.

Plaintiffs have repeatedly acknowledged the preference for open captioning among the deaf and hard of hearing communities. Plaintiffs will merely add here that NVRC's study was performed before the development of RWC. Moreover, the results of NVRC's study might have been different if it incorporated the legal reality that Plaintiffs now face, which is that open captioning is not attainable under the ADA. Also, Mr. Dowling (like other witnesses) did not identify any other closed captioning technology.

As noted before, neither Plaintiffs nor their Counsel has any unique affinity for RWC. Instead, Plaintiffs and Counsel investigated all available technologies with the sole objective of pursuing the "best" technology available under the ADA. At present,

and for the foreseeable future, RWC is unquestionably the leading closed captioning technology, for a multitude of reasons. Moreover, although RWC is admittedly not perfect, the complaints against it must be measured against the positive comments it has generated through the years, and previously provided to the Court.

G. Gary Viall

Mr. Viall also spoke on behalf of NVRC. His first objection was to the number of reflector screens available under the PSA in the event a deaf or hard of hearing patron arrived with a large group of other deaf or hard of hearing patrons. The PSA certainly contains no prohibition on special requests for large parties. Plus, Defendant theaters have a clear financial incentive to meet demand as best as possible. And while the inconvenience of having to make such special arrangements is a burden, it is not significantly different from the inconvenience that any large group of people face when attempting to orchestrate a night out together, whether to a movie, restaurant or other event.

Finally, Mr. Viall's complaint that captioned movies are currently few in number and shown long after their release and on inconvenient dates is a complaint against open captioned movies that will be remedied to a degree by RWC, which provides captions for far more movies and for every showing of the movie on a RWC screen.

H. Joan Cassidy

Ms. Cassidy is an officer of the Potomac chapter of the Association of Late Deafened Adults ("ALDA"). Ms. Cassidy testified to complaints about the use of RWC, leading ultimately to her conclusion that "everybody agrees that open captionings are best and what most people want." Transcript at 59. Again, Plaintiffs do not disagree

with Ms. Cassidy, but the context here remains what accommodations are available under the ADA.

One issue that needs addressing is Ms. Cassidy's testimony that the PSA has "no requirement for announcements in newspapers or advertising." Id. To the contrary, the PSA requires both Defendants to advertise and publicize all RWC showings in the same manner as is currently being done for the RWC screen operated by Defendant AMC in Springfield, VA. Those efforts include newspaper and internet advertising. Again, Plaintiffs' counsel requested that specific advertising and publicity effort for the new RWC screens because discovery revealed a general level of satisfaction with those efforts.

I. Greg Hlibok

Mr. Hlibok testified on behalf of the Maryland Association for the Deaf.[2] His primary testimony was a request for open captioning. Mr. Hlibok bolstered this complaint by opining that RWC is "a form of segregation" because it makes deaf and hard of hearing patrons more easily noticeable. Transcript at 64. While fully respecting Mr. Hlibok's opinion, Plaintiffs and their Counsel do not concur with his "segregation" assessment. It will suffice here only to note that the "segregation" that presently takes place is far worse – specifically, deaf and hard of hearing people are now left at home while others enjoy movies. RWC will provide people with access and options and allow each individual to make their own personal decision in this regard.

[2] In his written comments submitted to the Court in advance of the hearing, Mr. Hlibok identified himself as Corresponding Secretary of the Howard County Association of the Deaf, Inc. However, in his testimony he stated his belief that Howard County was not covered by the class area (which is incorrect) and identified himself as a representative of the Maryland Association for the Deaf.

Finally, while mentioning "other alternatives," Mr. Hlibok did not identify any closed captioning technology other than RWC.

J. <u>Kelby Brick</u>

Mr. Brick's testimony on behalf of the National Association for the Deaf contained numerous inaccuracies that require correction here. To that end, attached hereto is an Affidavit from Larry Goldberg clarifying some of the erroneous points raised by Mr. Brick.

First, in several instances, Mr. Brick identified as "closed captioning" an open captioning system known as DTS-CSS. Transcript at p. 67, line 3; page 67, line 19; page 70, line 6; page 71, line s4-5. Specifically, Mr. Brick referred to DTS-CSS as a "closed captioning" technology that was being implemented on a wide-scale basis in the United Kingdom ("UK"). Mr. Brick claimed that DTS-CSS could be considered "closed captioning" because the captions are not permanently embedded onto a film print and are only visible when the DTS-CSS system is activated. Mr. Brick analogized DTS-CSS to closed-captioning in television. However, as Mr. Goldberg's affidavit makes clear, while DTS-CSS is being implemented in the UK, it is an ***open*** captioning technology because, once activated, the captions are visible to the entire audience. [3]

Moreover, closed captioning in the context of movies differs significantly from closed captioning in the context of television. In television, open captions are included in

[3]In addition to clear definitions in the captioning industry, as evidenced by Mr. Goldberg's affidavit, virtually every brief filed in this case made clear that "open captioning" in the movie context provides captions that are visible to the entire audience, while "closed captioning" provides captions that are visible to only the deaf individual. Indeed, Plaintiffs' Response to the written comments regarding the PSA was mailed to all persons and organizations that provided written comments or objections —including Mr. Brick – and reiterated the definitions of "open captioning" and "closed captioning." See Plaintiffs' Response at p 3, n. 2.

the signal sent by the broadcaster and are seen on every television set, whereas closed captioning permits an individual television set to display captions or not. In the movie context, open captions appear on the screen and are viewable to everyone in the audience, whereas closed captions are visible only at individual seats that choose to view them. When DTS-CSS is activated, the captions are visible to the entire audience and are, therefore, open. DTS-CSS provides no mechanism for closed captioning, but is, in fact, completely compatible with RWC in that the same equipment that sends captions to the RWC data wall is used to send the DTS-CSS open captions to the projector for display on the movie screen.

Mr. Brick also incorrectly implied that the installation of the DTS-CSS screens in the UK had been mandated by UK disability access law or regulation. Transcript at 69. In fact, the DTS-CSS screens were the result of a National Lottery held by a unit of the UK government. That program will result in the disbursement of funds to various theaters to defray the cost of implementing DTS-CSS. An internet link containing information about the lottery is included in Mr. Goldberg's affidavit. Clearly, there is a world of difference between a national lottery that provides funding to theaters (as the UK scheme provides), and requiring theaters alone to bear the entire cost of the captioning access (as the ADA requires).

Also, Mr. Brick was incorrect when he suggested that UK law required 10% of theaters to provide captioning. Transcript at 71. While the UK does indeed have its own ADA counterpart, known as the Disability Discrimination Act ("DDA"), it was enacted in 1995 and comes into full force later in 2004. The DDA does not explicitly require theaters to offer captions of movie showings, open or closed. A link to the full text of the DDA is included in Mr. Goldberg's affidavit.

Additionally, Mr. Brick used incorrect data for his comparison of the amount of captioning available under the PSA with that that will be available in the UK as a result of the national lottery. Specifically, Mr. Brick testified that:

> The United Kingdom is smaller in land mass that the state of Maryland, D.C. and Virginia. The population of Maryland, Washington, and Virginia is twice the number of people who live in the United Kingdom.

Transcript at 67.

However, the population of the United Kingdom is 58,789,194, whereas the population of Maryland is 5,375,156, the population of Virginia is 7,187,734 and the population of the District of Columbia is 571,822, for a total of 13,134,712. Thus, contrary to Mr. Brick's assertion that the combined population of Maryland, Virginia and the District of Columbia is "twice" that of the UK, it is actually 22%, or less than a quarter, of the UK. Moreover, if England were substituted for the UK, its population of 49,138,831 is nearly 4 times that of Maryland, Virginia and the District.

Also, the land mass of the United Kingdom is 94,248 square miles, whereas the Maryland's land mass is 9,774 square miles, Virginia's is 39,594 square miles, and the District of Columbia's is 61 square miles, for a total of 49,429 square miles. Thus, contrary to Mr. Brick's assertion that the UK is "smaller in land mass than the state of Maryland, D.C. and Virginia," the UK's land mass is nearly double the land mass of the three jurisdictions. Again, if England were substituted for the UK, its land mass is 50,351 square miles, making it also larger than Maryland, Virginia and the District.[4]

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[4] The information regarding the UK and England is from http://europa.eu.int/comm/justice_home/ejn/homepage/homepage_uni_en.htm. The information regarding Maryland, Virginia, and the District of Columbia is from http://quickfacts.census.gov/qfd/states/24000.html, http://quickfacts.census.gov/qfd/states/51000.html, and http://quickfacts.census.gov/qfd/states/11000.html, respectively.

Further, Mr. Brick's analysis overlooked the fact that the geographic area covered by the PSA does not include large parts of both Maryland and Virginia, including large cities such as Baltimore, Richmond, and Virginia Beach. For all of these reasons, the comparison provided by Mr. Brick would need to be substantially reworked before being relied on as a legitimate objection to the PSA.

Accordingly, Mr. Brick's testimony failed to raise any valid objection against the PSA.

K. Katrina Mansell

Ms. Mansell was the first individual class member to testify and she urged the Court to consider "implementing open captioning to all theaters in all the United States of America" (Transcript at 72), and to "pass a law that all theaters have the accessibility of open captioning for all of us." Id.

While appreciating Ms. Mansell's efforts and viewpoint, for reasons already discussed, Plaintiffs and Plaintiffs' Counsel must take a different approach in this case.

L. Rosaleen Crawford

Ms. Crawford is a 13 year old class member who articulated both frustration with the lack of captioning available today and anticipation for the captioning that the PSA will provide. Specifically, Ms. Crawford lamented that her friends now enjoy movies many weeks before her, thereby excluding her from the experience of seeing, enjoying, and discussing movies together. Likewise, she testified that she and her mother have sought that same opportunity, but their wait for open captioning was been fruitless. Finally, Ms. Crawford demonstrated the positive impact that the PSA will make in people's lives: "There's an AMC theater right near my home in Silver Spring, and if there's RWC there, it's better than what we have now." Transcript at 75.

In sum, Ms. Crawford testified well to the frustration that has led to this case and the improvement in people's lives that the PSA will foster.

M. Shane Feldman

Finally, Mr. Shane Feldman testified that he strongly prefers open captioning and also raised some objections to the use and availability of RWC, many of which echoed those already raised in this litigation.

One point that requires clarification is that Mr. Feldman quoted Plaintiff John Stanton as saying that RWC is not "practical." Transcript at 78. However, review of the Hearing transcript confirms that Mr. Stanton testified that RWC is "not perfect" (id. at 14), rather than not practical.

In addition, Mr. Feldman provided the Court with documents demonstrating the increase in installations of DTS-CSS. As noted above, DTS-CSS is an open captioning technology that does not include any means for providing closed captioning. Moreover, it uses the same hardware as RWC, so there is nothing incompatible between the two systems. While there is nothing in the PSA that prevents either Defendant from voluntarily showing open captioned movies through DTS-CSS or in any other fashion, history unfortunately shows that the amount of open captioning voluntarily provided by Defendants has been inadequate. Thus, even with an increase in DTS-CSS, RWC is necessary to obtain any real, enforceable access to movies.

III. Conclusion

The April 1, 2004 Hearing opened the floor for all objections to the PSA to be raised. The witnesses who testified should be applauded for their participation, regardless of the particular position they took. However, nothing stated at the hearing alters the fact that the PSA is fair and reasonable and completely in the best interests of the Plain-

tiff Class. The PSA will put the Metropolitan Washington area in the unique position of having more access to captioned movies than any other city in the world, through the leading closed captioning technology that is used by Disney and over 100 other theaters in North America. Moreover, the PSA accomplishes this without limiting the rights of deaf and hard of hearing organizations of theaters to work for a voluntarily increase in open captioning or for legislative change. In the final analysis, and as noted above, the PSA will fulfill the spirit of the ADA: It will allow deaf and hard of hearing children, families and others to share the joy, companionship, and excitement of one of life's pleasures.

Dated: April 10, 2004

RESPECTFULLY SUBMITTED,

/s/ Thomas J. Simeone

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2004, I served a copy PLAINTIFFS' RESPONSE TO COMMENTS ON PROPOSED SETTLEMENT AGREEMENT, by electronic mail, upon the following counsel of record:

Steven John Fellman, Esquire
David K. Monroe, Esquire
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I further certify that I mailed a copy of the foregoing, by first class mail, postage prepaid, on all persons and organizations that provided written comments or objections to Plaintiffs' counsel.

/s/ Thomas J. Simeone

Thomas J. Simeone