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 ON PROPOSED SETTLEMENT AGREEMENT

Plaintiffs Kevin Ball, et al. ("Plaintiffs"), by and through undersigned counsel, hereby file their response to the comments and objections filed by various organizations and individuals in response to the Proposed Settlement Agreement (the "PSA") in this case.

I. Background on the Comments Received by Plaintiffs' Counsel

In response to the publication of the PSA, Plaintiffs' counsel received a total of 45 written objections or comments. Some of the documents stated the reasons for objecting to the PSA, while others simply stated an intention to appear at the April 1 Fairness Hearing. Moreover, while the Notice of Proposed Settlement (the "Notice") requested only objections to the PSA, Plaintiffs' counsel also received several statements of support for the PSA.

The Coalition for Movie Captioning (the "CMC"), a group of deaf and hard of hearing organizations (as opposed to individuals) that previously filed an Amicus Brief in support of the Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed a document entitled "Comments and Objections," which raised 18 points in regard to the PSA. Also of note is that the Alexander Graham Bell Association of the Deaf and Hard

of Hearing ("A.G. Bell"), one of the member organizations of the CMC, filed a separate statement expressing support for the PSA.

Comments by individuals came from both inside and outside the geographic area covered by the Plaintiff class. Most of the comments were apparently made without the benefit of legal analysis of the PSA from counsel.[1] Rather, a large number adopted or specifically referenced the CMC's comments, some using a format provided by the CMC. In addition, a large number expressed a preference for open captioning over closed captioning.

Plaintiffs' counsel studied the submitted comments to determine whether the objections and concerns raised changed counsel's previous conclusion that the PSA is in the best interests of the Plaintiff class. While the comments include criticisms and suggestions worthy of response and discussion, as will be discussed below, they do not lead to the conclusion that the Plaintiff Class can obtain any significantly better relief through continued litigation of this matter. Accordingly, Plaintiffs' counsel continues to believe that the PSA is in the best interests of the Plaintiff class.

II. Responses to Specific Objections

A. The ADA Requires Plaintiffs to Select a Specific Accommodation, Rather Than to Simply Request More Access as Urged by the CMC

The CMC's first objection, which was echoed by several individuals, is that the PSA unnecessarily selects one specific accommodation, namely Rear Window Captioning ("RWC"), rather than request more "access" generally, including Open Captioning,

[1] Indeed, the only comments submitted containing a legal analysis of the PSA's terms were from A.G. Bell. To this end, Plaintiffs respectfully do not believe it a coincidence that A.G. Bell also urged that this Court approve the PSA.

and leave the decision as to the specific technology necessary to provide that access to the Defendants.[2]

However, the settled law under the ADA makes clear that Plaintiffs are legally required to identify a specific accommodation, at which time the burden shifts to the Defendants to demonstrate that the requested accommodation is "unduly burdensome" or constitutes a "fundamental alteration" of the service the Defendants provide. *See, e.g. Guckenberger v. Boston Univ., 974 F. Supp. 106, 146 (D. Mass. 1997).*

In this case, Plaintiffs' Complaint did not request RWC or any other specific accommodation, but simply demanded that Defendants provide a reasonable accommodation that would provide the Plaintiff Class with access, which is exactly what the CMC advocates. In their Motion to Dismiss the Complaint, Defendants argued that Plaintiffs were required to request a specific accommodation. Plaintiffs responded, and the Court held, that while such a choice was, in fact, required, it was premature to require such a choice prior to discovery. Accordingly, the Motion to Dismiss was denied.

Following that ruling, the parties engaged in extensive discovery, during which time Plaintiffs sought to determine the best possible technology available to Plaintiffs under the ADA. When Defendants moved for summary judgment, they again argued that Plaintiffs bore the burden of proving that a specific reasonable accommodation existed and that Defendants were violating the ADA by not providing it. At that point, Plaintiffs were squarely required to request a specific technology (i.e., accommodation) and prove that it was reasonable under the ADA. In fact, this Court's February 24, 2003 opinion

[2] RWC is a form of closed captioning, in so much that the captions are only seen by the deaf individual rather than the entire audience. In contrast, Open Captioning refers to captions that are visible to the entire audience.

denying Defendants' Summary Judgment Motion recounted the burden-shifting process. *See Ball v. AMC Entertainment, Inc.,* 246 F. Supp.2d 17, 21 (D. D.C. 2003).

The CMC's objection, therefore, is not so much an objection to the PSA, but a divergence between the strategy of the CMC and the requirements of the ADA. Ironically, even if the CMC's objection to specificity could be sustained here, the end result would still be the same because the Plaintiffs would still have to identify a specific accommodation at trial. While the CMC's philosophical approach of pursuing increased access without requesting a specific accommodation may be appropriate in legislative, industry relations, and other contexts, it is unsuited for litigation under the ADA, which is clearly what governs Plaintiffs' burdens here.[3]

For these reasons, any objection to the PSA on the grounds that it selects a specific technology or accommodation is not a persuasive objection against the PSA.

B. <u>Open Captioning is Not Required Under the ADA</u>

Somewhat similar to the objection against identifying a specific accommodation, the CMC and several individuals also objected to the PSA because it does not seek to implement Open Captioning, which the CMC and many individuals prefer over RWC. *See* CMC Comments at 4 & n.4 (identifying only two Open Captioning systems as "alternatives" to RWC). While the Plaintiff representatives and their counsel agree that Open Captioning is the preferred form of captioning among deaf and hard of hearing movie-

[3] Moreover, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment cited *Guckenberger,* recognized that Plaintiffs had a burden of demonstrating the reasonableness of a specific accommodation, and then went on to demonstrate that RWC was such a reasonable accommodation. Subsequently, the CMC filed an Amicus brief in support of Plaintiffs. Therefore, the need for Plaintiffs to identify and prove that a specific accommodation is reasonable has been known to the Court and all parties, including the CMC as Amicus, for quite some time.

goers, and would pursue open captioning if feasible in this case, the law is clear that the ADA does not require it.

As this Court observed in its earlier opinion, the ADA "itself contains no explicit language regarding captioning in movie theaters[.]" *Ball,* 246 F. Supp.2d at 22. However, the legislative history of the ADA includes a clear statement that "open captioning" of movies is not required by the statute. *Id.* (citing H.R. Rep. No. 101-458(II), at 108 (1990)).

Furthermore, the Attorney General, whom the ADA assigned the task of interpreting the statute and setting standards for enforcement and compliance under Title III, has issued regulations expressly stating that "movie theaters are not required to present open captioned films." 28 C.F.R. Part 36 app. B(C) (1992). Moreover, as this Court previously noted, the Department of Justice has entered several settlements whereby it required public accommodations to provide closed captioning, including RWC. Nevertheless, it has never sought or obtained Open Captioning in any such settlement. *See, e.g., Ball,* 246 F. Supp.2d at 23 n.15 (noting that DOJ had settled action against the Disney Corporation in which Disney agreed to provide RWC to accommodate deaf patrons).

Additionally, commentators agree that Open Captioning is not required by the ADA. For example, Cheryl Hepner, Chair for the CMC, and the person who signed its Comments and Objections on the PSA in this case, wrote in the March/April 2003 issue of Hearing Loss: The Journal of Self Help for Hard of Hearing People, that "The Americans with Disabilities Act, passed in 1990, encouraged but did not mandate the captioning of films." This is consistent with the Affidavit filed in this case by Donna Sorkin, former Executive Director of both A.G. Bell and Self Help for Hard of Hearing People, two members of the CMC, and an appointee to the U.S. Architectural and Transportation

Barriers Compliance Board by President Clinton, in which she testified that "Although most people prefer open captioned movies, they recognize that the ADA does not require it."

This conclusion is also shared by individuals outside the deaf and hard of hearing community. For example, Larry Goldberg, Director of Media Access at WGBH Educational Foundation, and co-inventor of RWC, testified in an affidavit in this case that "RWC was created in part through a grant by the United States Department of Education. The grant was intended to assist in the development of a closed caption technology that would make movies' soundtracks accessible to hearing impaired persons." Mr. Goldberg's affidavit made clear that Department of Education grant was issued subsequent to the passage of the ADA and sought to develop a technology for closed captioning of movies because the ADA did not require open captioning of movies.

Finally, there have been two other lawsuits against commercial movie theaters seeking captioning and in both cases the Plaintiffs either did not seek Open Captioning or, to the extent their complaint mentioned open captioning, the case was dismissed. *See Robert Todd, et al., v. American Multi-Cinema, Inc., et al., No. H-02-1944 (S.D. Tex. Aug. 6, 2003)* and *Cornilles v. Regal Cinemas, 2002 WL 31469787 (D. Or. 2002).*

Thus, while the representative Plaintiffs and Plaintiffs' counsel would be more than willing to pursue Open Captioning in this case, such a strategy would be a near certain recipe for failure. Instead, Congress, the Department of Justice, the U.S. Access Board, knowledgeable commentators, and other Courts are unfortunately in agreement that the ADA does not require open captioning of movies.

C. Of the Closed Captioning Technologies Actually Available Under the ADA, RWC Would Best Provide Access to the Plaintiff Class

In light of the requirement to request a specific accommodation and the clear mandate that Open Captioning is not required under the ADA, Plaintiffs attempted to identify the most appropriate closed captioning technology to request in this case. Plaintiffs sought an accommodation that maximized the captioning access to the Plaintiff class. As noted above, Plaintiffs did not request RWC in the complaint in this case. Moreover, Plaintiffs refused to request a specific technology as an accommodation in response to Defendants' Motion to Dismiss and, instead, made such a choice only after an extensive discovery process. In that process, Plaintiffs studied several technologies that provide closed captioning and ultimately reached the conclusion that RWC offered the optimum benefit to the Plaintiff class for several reasons.

1. Far More Movies are Available with RWC Than any Other Form of Closed Captioning

As documented by the schedule of available RWC movies attached as Exhibit 1, RWC has grown exponentially in popularity:

Year	Movies Available with RWC Captions
1997	2
1998	1
1999	9
2000	11
2001	17
2002	40
2003	67
2004	15[4] (with 43 future releases confirmed)
Totals	**162 released; 43 confirmed releases (as of March 4, 2004)**

In contrast, Plaintiffs' counsel is not aware of any other closed captioning technology that is even remotely available for as many movies. Nor has the CMC identified any more popular or appropriate closed-captioning technology. Thus, RWC will provide

[4] As of March 4, 2004; with 43 future releases confirmed.

the Plaintiff class with more access to more movies than any other closed captioning technology available.

2. RWC has Received Rave Reviews From Deaf and Hard of Hearing Users

The majority of objections to RWC compared RWC to Open Captioning. Again, Plaintiffs' counsel freely admits that Open Captioning is the captioning most demanded by deaf and hard of hearing individuals and, furthermore, that RWC is not a perfect captioning system.

However, given that Open Captioning is not a realistic option in this case, that comparison is unhelpful because those comparisons are premised on an assumption that both are equally available under the ADA. Thus, the present objections come from within a litigation context where RWC is being criticized by those who believe that it is being forced upon them instead of Open Captioning, both of which they believe are equally available.

More valuable evidence of the appeal of RWC are comments by those who have used it and evaluated it on its own merits, apart from a comparison to Open Captioning and independent of a litigation context. From those users, RWC has been met with enthusiastic approval. This is a large reason for RWC's dramatic growth.

Specifically, during the discovery process in this case, Plaintiffs' counsel became aware of widespread approval of RWC by deaf and hard of hearing users from MoPix, an organization within WGBH that is responsible for providing information about RWC. Attached as Exhibit 2 hereto are direct quotes submitted to WGBH from users of RWC. As a review of these comments makes clear, many users enthusiastically enjoyed RWC and passionately endorse it. The sentiment and emotions expressed demonstrate that

RWC succeeds in making movies accessible to deaf and hard of hearing persons. Those comments are consistent with the testimony of the corporate representative of Defendant AMC in this case. He testified that the only "complaints" Defendant AMC has received from its present RWC installations is that there are not enough RWC screens or movies (which is obviously a compliment as well as a criticism).

3. RWC is the Most Accepted Closed Captioning Technology

In addition, as demonstrated by the affidavits from studio and distribution company executives that were attached to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, movie studios and distributors have expressed enthusiastic approval of RWC and a willingness to make the vast majority, if not all, major releases RWC accessible. In fact, Sony Picture Studios has publicly adopted a policy of captioning for RWC all of its major releases, from this point on. Moreover, the primary reason that more movies have not been captioned for RWC is the lack of theaters outfitted for RWC. In fact, as Mr. Goldberg testified in his previously filed affidavit, his organization, which attempts to increase the number of RWC captioned movies, has actually agreed to the studios not captioning certain movies for RWC to avoid having too many RWC films at any one time for the existing RWC equipped theaters. Therefore, with this settlement and other efforts to increase RWC screens, the number of RWC captioned movies available should increase.

RWC is also the most accepted and workable close captioning technology for theaters. Presently, there are 88 commercial movie theaters with RWC in North America (58 in the United States and 30 in Canada) and that number is expected to rise.

4. RWC Makes All Showings Available to Class Members

Another of the benefits of RWC is that movies for which RWC captions are provided are accessible with RWC for **all** showings, from opening night to the last day of a movie's run. Thus, RWC avoids the delay that accompanies open captioned movies due to theaters' reluctance to show open captioned movies during initial release periods and on popular days and times. This feature will increase the access to movies for the Plaintiff class, by accommodating class members' schedules as much as possible.[5]

5. Plaintiffs Would Pursue RWC at Trial

Finally, Plaintiffs' counsel has a duty to represent the Plaintiff class as aggressively as possible, with a goal of obtaining the best relief possible. It is that goal and that duty that lead counsel to believe this settlement is in the best interests of the Plaintiff class for the sole reason that the PSA will allow the Plaintiff class to obtain the relief it would seek at trial now, without the risk and delay of trial and without the risk of an appeal.

Specifically, should the PSA not be approved, and should this case proceed to trial, Plaintiffs would still be required to request a specific accommodation and provide evidence that that accommodation is required under the ADA. In light of the inability to obtain Open Captioning under the ADA, and the fact that RWC is the clearly established leader among closed captioning technologies, Plaintiffs would most likely request RWC. Thus, far from being a reluctant acceptance of a lesser remedy, the PSA allows the Plaintiff class to get the best relief possible and the exact same relief it would obtain at trial, but without the risk and delay of trial and a possible appeal.

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[5] Some comments lamented that the PSA's requirement that only 10 reflector screens would limit the number of deaf individuals who could see a particular showing at one time. That will be addressed more specifically below. However, it also bears mentioning

D. The Other Objections Raised Also do not Support Not Approving the PSA

The discussion above addressed the first of the CMC's 18 comments/objections, which appeared to be the primary objections raised against the PSA, both by the PSA and others. The CMC's other 17 objections, which several individuals incorporated by reference, represent worthwhile and genuine opinions, but they are not significant enough to prevent this Court from approving the PSA.

1. The PSA Specifically Permits Modification in Light of New Technologies

The CMC's second objection to the PSA is that it does not incorporate alternative technologies. However, contrary to the CMC's observation, Plaintiff was successful in incorporating new technologies into the PSA as much as reasonably possible.

Specifically, Plaintiffs sought not only to obtain increased access to movies now, but also to allow for the implementation of new technologies that may provide for better closed captioning techniques. Defendants would not, with admittedly good reason, agree now to install a technology that does not know exist and for which the costs, upkeep, size and overall nature are not known. Therefore, as a result of arms-length negotiations between the parties, the PSA specifically provides that should a new technology evolve that is mutually acceptable to both Plaintiffs and Defendants, the parties may agree to use that new technology rather than RWC.

Again, neither Plaintiffs nor Defendants can realistically bind themselves now to the implementation of new technologies that do not yet exist. Thus, the best the PSA (or any settlement agreement) can do is to provide for the parties to implement such ad-

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that because RWC enables every showing to be captioned, Plaintiffs believe that such a scenario would be quite rare.

vancements if mutually acceptable. Should there be a disagreement between the parties on any new technology, Plaintiffs retain their right to petition the Court to modify the PSA due to changed circumstances, and the Defendants retain their right to oppose any such modification. Thus, the CMC's objection is not persuasive because the PSA has incorporated future technologies as much as realistically possible.

2. The Locations Selected Best Serve the Plaintiff Class

The CMC's third and tenth objections relate to the location within the class area of the RWC installations required by the PSA. While the reaching of a settlement and agreement upon the terms of the PSA was the direct result of arms-length bargaining, on the issue of the location of RWC screens, the interests of Plaintiffs and Defendants were the same -- namely, to place the RWC screens in a manner that would maximize the use of those screens. Such placement allows Plaintiffs' counsel to provide maximum access to the Plaintiff class and, at the same time, allows Defendants to maximize the revenue they will receive from the RWC installations.

Accordingly, the parties reviewed every AMC and Loews theater in the class area and selected the newest, largest and most popular theater houses and avoided older, smaller, and less popular theaters. In addition, the parties specifically selected theaters that show the types of movies that generally come with RWC captions (i.e., mainstream releases), rather than those that do not (e.g., independent films). Furthermore, the parties considered the specific characteristics of each theater; for example, Defendant AMC's Uptown Theater was not appropriate because the dimensions of the back wall of the theater could not house the LED board necessary for RWC.

Finally, the parties attempted to select theaters that would spread the RWC screens among the class area in a reasonable manner. Of course, some areas did not have

an AMC or Loews theater nearby, but the parties attempted to provide the screens in the most accessible manner. Some of the CMC's objections or comments regarding the theaters selected are simply not well-founded. For example, the CMC's comments include the following statement:

> CMC notes that some parts of the Class Area in which members of plaintiffs' class reside do not appear to have any AMC or Loews theaters. No AMC/Loews theaters appear to exist in Howard County or Anne Arundel County, MD; City of Falls Church or City of Fairfax, VA; or Loudoun County, VA.

CMC Comments at p. 4. This statement, while factually accurate, does not provide any legitimate comment or objection, but merely states a fact that the parties attempted to deal with, and did deal with.[6] Thus, Plaintiffs feel confident that the selection of specific theaters in the PSA will maximize accessibility to the Plaintiff class.

3. The PSA's Definition of Newly Built Theaters is an Appropriate Result of Arm's Length Negotiations

The CMC's fourth objection/comment is to the definition of "new build" theaters, which the PSA requires to include at least one RWC screen. The CMC requests a definition of "new build" that includes theaters purchased by Defendants from other theater companies. The PSA does not include such purchased theaters, but does include all theaters built by either Defendant.

The PSA's provision is the result of arms-length negotiations between Plaintiffs' counsel and Defendants' counsel. Plaintiffs sought to maximize the number of screens, but Defendants were not willing to commit to installing RWC on a speculative number of

[6] To the extent that the CMC suggests that Defendants must build new theaters in areas in which they do not currently operate in order to provide accessibility to deaf individuals in those areas, Plaintiffs believe that such an assertion goes well beyond the ADA's mandate.

screens. The compromise reached was that all new theaters built by either Defendant in the class area will have a RWC screen. This is a fair and reasonable compromise.

4. An Opt Out Provision is Incompatible with Injunctive Relief

The CMC's fifth and sixth objections are that the PSA does not provide for "opting out" by class members or that future residents are not class members. However, while the Federal Rules of Civil Procedure mandate that persons be allowed to opt out of class actions brought for **monetary relief** under Rule 23(b)(3), opting out is generally not available for class actions brought for injunctive or declaratory relief under Rule 23(b)(2), such as the instant lawsuit. *See generally Kilpatrick v. Page,* 193 F. Supp.2d 145, 157-58 & n.9 (D.D.C. 2002). Similarly, the only way that absent members would not be bound by a Rule 23(b)(2) class is upon a showing that the named plaintiffs did not adequately represent the absent class members' interests in the instant suit. *See, e.g., Major League Baseball Properties, Inc. v. Price,* 105 F. Supp. 2d 46, 54-55 (E.D.N.Y. 2000); *Hansberry v. Lee,* 311 U.S. 32 (1940). No such suggestion has been made and, respectfully, any such suggestion here would be untenable.

In addition, such an "opt out" provision would be meaningless and unenforceable. Unlike a Rule 23(b)(3) class involving monetary payouts to individual members, it would be wholly impracticable for Defendants or the Court to monitor whether someone who opted out of the PSA nevertheless used the RWC technology that is installed. Instead, the entire public will share in the benefits of the PSA and the RWC screens installed.

Also, this objection is somewhat of a red herring because class members will be bound by the results of this litigation as a result of the Court's certification of this case as a class action. *See, e.g., Knowles v. War Damage Corporation*, 171 F.2d 15 (D.C. Cir.1948), cert. denied, 336 U.S. 914 (1949). Thus, the plaintiff class will be bound not

only by a PSA, but also by any subsequent judgment should the case proceed to trial. The protection to the Plaintiff class comes from the judgment of the Court (both on the motion for class certification and the motion for approval of the settlement), the judgment of the lead Plaintiffs and their counsel, and the ability of this approval process to identify any legitimate objections to the settlement.

Finally, as a practical matter, Rule 23's prohibition on opting out of class actions seeking only injunctive relief is good policy. No settlement of any claim for injunctive relief (which this necessarily is because the ADA does not provide for compensatory damages in cases by private citizens), would occur if each class member were permitted to opt out. A defendant would have no incentive to incur a significant investment to meet its ADA obligations if it could be sued a virtually limitless number of times for countless different accommodations.

5. The PSA Provides the Class Area With More RWC Screens Than Any Other City in the World

The CMC's seventh objection is apparently that the PSA does not provide for enough RWC screens.

However, under the PSA, the class area would have 12 RWC screens installed and operating within 24 months. Moreover, if any of those theaters should close, Defendants agree to move the RWC equipment to another theater, meaning that the number of RWC screens will never go below 12. Also, both Defendants also agree to place a RWC screen in all theaters they build and open after the date of approval of the PSA, which may lead to even more RWC screens. Finally, this is only from two theater chains operating in the class area and may be supplemented by other chains.

Thus, the PSA will provide the class area with more RWC screens than any other city or area in the world. And that total will be from merely two theater chains in the area. By contrast, several significantly larger U.S. metropolitan areas have far fewer RWC screens, including all installations from all theater companies in their area:

Area	No. of RWC Screens
Los Angeles	9
Chicago	5
Boston	5
San Francisco	4
New York	3

The CMC also alleges that the PSA would result in a small percentage of Defendants' screens being equipped with RWC. However, the PSA was the result of arms-length negotiations, and, as noted above, the percentage of RWC screens in the class area will greatly exceed far more populated cities. Although the CMC's goal of achieving 100% captioning access to theaters is a laudable and commendable goal (and one shared wholeheartedly by Plaintiffs), it is unrealistic under the ADA at present. Indeed, a similar request for 100% captioning accessibility was rejected in another lawsuit. *See Todd,* No. H-02-1944 (S.D. Tex. Aug. 6, 2003) at 4-5 & n.5, 8-9. With a requirement of at least 12 RWC screens (and possibly more) from only two theater chains in the area, the PSA will put the Metropolitan Washington, DC area ahead of any other city in the world. It is therefore more than fair and reasonable.

6. The PSA Provides Ample Incentive and Penalties for Defendants to Fully Comply

The CMC's eighth, ninth and seventeenth comments/objections concern Defendants' (1) due diligence under the PSA, (2) duty to replace worn out and used RWC

equipment, and (3) provision of training and supervision for their employees, respectively.

While these are all valid concerns that Plaintiffs' counsel shares, the specific provisions requested by the CMC are legally unnecessary. Inherent in any contract, including a settlement agreement, is the duty of each side to act in good faith. Plaintiffs' counsel will immediately petition this Court to enforce the PSA should Defendants fail to act with due diligence, fail to keep the RWC equipment in good working order, or fail to operate it properly. To support such quick and strong enforcement, the PSA specifically provides that Plaintiffs' counsel is entitled to petition the court for attorneys' fees for any such action, if good grounds exist.

Moreover, Defendants are aware that should they fail to fully comply with the PSA, they will incur not only their own legal costs and Plaintiffs' attorneys' fees, but also have to answer to the Court and explain their failure to comply with an agreement they voluntarily entered.

Finally, the PSA requires Defendants to make a substantial investment in RWC equipment. In addition to wishing to avoid attorneys' fees for both sides, they will have a financial interest in maximizing the revenue received from such an investment and also in developing good will in the community. No publicity could be more damaging than that caused by the Defendants' violation of a court-ordered agreement (which they petitioned the Court to approve) to provide access to deaf and hard of hearing patrons, including children and families.

7. Installation in Mid-Sized Auditoria Will Maximize Access

For its tenth objection, the CMC criticizes the PSA's placement of RWC equipment in mid-sized auditoria in the selected theaters. However, on the issue of which

screen in each theater to equip with RWC, the parties' interests again coincided – namely, to maximize access by the class, which will, in turn, result in maximum revenues for the Defendants. That will best be achieved by installing RWC in mid-sized, as opposed to the largest auditoria for several reasons.

First, many RWC movies will not be "blockbusters" and therefore will not be shown in the largest auditoria in a theater. Thus, installing RWC only on the largest screen will result in no RWC access to those movies. However, all "blockbuster" movies eventually make their way to a mid-sized auditorium. Therefore, installing RWC in mid-sized auditoria will result in the most movies being shown with RWC (i.e., both "blockbuster" movies and non-"blockbuster" movies), whereas equipping the largest screens will make many RWC movies go unseen. While Plaintiffs readily admit that there will be a short delay until "blockbusters" make it to the mid-sized screens, some blockbusters open up on several screens, including a mid-sized screen, which will eliminate that delay entirely. In other instances, that delay is a reasonable trade-off for maximizing the number of RWC movies.

Finally, the CMC's request for portable captioning equipment, while laudable, is not feasible. During the discovery period in this case, Plaintiffs specifically sought a portable closed captioning technology to eliminate the choice of auditoria, but none is available.

8. <u>The Number of Reflector Screens Provided is Appropriate</u>

The CMC's twelfth objection is to the PSA's provisions regarding the number of reflector screens available. It must first be remembered that the numbers provided in the PSA are an absolute minimum and nothing prevents the Defendants from providing more, particularly if Defendants believe they can increase revenue by having more deaf

and hard of hearing patrons. Moreover, without a crystal ball, there is no way of knowing the exact usage. The parties therefore relied on the best information available regarding future demand – the usage at the RWC screens already operated by Defendant AMC – and arrived at 10 screens.

Second, this provision was specifically crafted to provide Defendants with flexibility to meet demand, but also to avoid a "best efforts" or similarly ambiguous subjective requirement, which would invite disagreement and litigation. To that end, the PSA provides obligates Defendants to provide a sufficient number of overall viewers (10 per RWC equipped auditorium in the class area), to ensure that every one is made available for use, and then grants Defendants flexibility to meet demand at each theater, provided that at least 5 reflectors are maintained at every RWC location. This allows the meeting of demand and also avoids bickering over subjective standards like "good faith" or "best efforts" by insulating Defendants from liability so long as they utilize the total number of viewers required and equip each RWC screen with at least 5 viewers.

This provision fairly balances the need for flexibility to meet demand with the need to avoid future litigation and disagreement.

9. The PSA Provides an Appropriate Mechanism in the Event of Future Charges to Defendants for RWC Captions

Presently, RWC captions are provided to theaters at no cost. The CMC's thirteenth and fourteenth objections are that the PSA does not obligate the Defendants to absorb the cost of RWC captions to the point of the ADA's "undue burden" standard, should a price be charged to theaters in the future.

As noted above with the CMC's objections to the provision regarding new technologies, it is not realistic to obligate any party to bear a cost that is completely specula-

tive at this point. Instead, the PSA provides that the parties will re-visit this issue should theaters begin to be charged for RWC captions. Should the cost be minor, the parties anticipate no change to the PSA. However, if the cost should be what the Defendants' consider unreasonable, then they will most likely petition the Court for modification of the PSA due to changed circumstances. Plaintiffs retain their rights to oppose such a modification. This provision therefore essentially incorporates the "undue burden" determination that the CMC seeks, but merely provides the parties with an opportunity to avoid involving the Court.

10. <u>The PSA Will Eliminate the Need for a Trial</u>

The CMC's fifteenth objection (or comment) is that the question of what is an undue burden for Defendants has not been answered. Plaintiffs simply respond that in any settlement before trial, there are factual issues that are not resolved by a finder of fact.

11. The PSA Provides for Notice of RWC Movie Showings <u>in a Manner That has Already Been Found Satisfactory</u>

The CMC's sixteenth objection is that the PSA does not provide for notice of the showing of RWC movies to the public.

To the contrary, the PSA expressly provides that the Defendants will advertise such showings in the newspaper and on the internet, and provide information regarding such showings to other websites and organizations, in the same manner as is currently done for the two RWC screens that Defendant AMC now operates in the class area.

Plaintiffs insisted on such publication of RWC movie showings because throughout the discovery period in this case, both formally and informally, there was never any suggestion that such notification efforts were inadequate or deficient in any way. In ad-

dition, it should be noted that several independent web pages and resources provide RWC movie times to patrons, separate and apart from Defendant AMC's own efforts. Thus, it simply does not appear that there will be any difficulty in making the Plaintiff Class aware of RWC movie showings.

12. The Appointment of a Special Master is Unnecessary and Potentially Troublesome

Finally, the CMC's eighteenth comment/objection is a request to be appointed a Special Master to oversee Defendants' compliance with the PSA. Plaintiff readily states that CMC's offer of future assistance is generous and welcomed. However, formal appointment if a Special Master is not necessary. This is not a case requiring the specialized skill of a particular expert (i.e., appraiser, accountant). Instead, upon approval of the PSA, and especially after this period of public comment, the deaf and hard of hearing community will be well-suited to note any non-compliance by Defendants and inform Plaintiffs' counsel, either directly or through the CMC or various other organizations with which Plaintiffs' counsel has developed a good working relationship (e.g., the CMC, AGBell, WGBH, Gallaudet University). Combined with the PSA's provision of attorneys' fees to Plaintiffs' counsel should Court action be necessary to enforce its terms, there is a sufficient enforcement mechanism in the PSA as drafted.

Moreover, the appointment of a special master raises issues of standing in regarding to raising issues of non-compliance with the Court. Plaintiffs' counsel is and will remain the only person authorized to represent the Plaintiffs before the Court. Appointment of a special master will complicate the monitoring of compliance by raising questions as to whom, if anyone, will represent the Plaintiff Class should an enforcement issue arise.

Again, Plaintiffs' counsel fully appreciates any assistance the CMC will offer, and pledges to work closely with the CMC to ensure that the PSA is fully enforced. However, there is no evidence of a genuine need for appointment of a special master.

III. Conclusion

For the foregoing reasons, Plaintiff's Counsel responds to the Objections and Comments received with the confirmed belief that the PSA is in the best interests of the Plaintiff class. It will provide the Plaintiff Class with the best possible relief, and the best relief it can hope to obtain at trial, without any further delay or risk. The primary objections about selecting a specific technology or not providing Open Captioning, while appropriate in other contexts, are not persuasive under the ADA. Finally, the various other objections raised, while worthy of discussion, do not in any way demonstrate that further litigation will (or can) result in any better relief for the Plaintiff class. Accordingly, Plaintiffs' counsel respectfully requests that the Court approve the PSA.

Dated: March 25, 2004

RESPECTFULLY SUBMITTED,

/s/ Thomas J. Simeone

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 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

GALLAND, KHARASCH, GEENBERG, FELLMAN & SWIRSKY, P.C.
1054 Thirty-First Street, NW
Washington, DC 20007-4492

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