

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

AMERICAN DISABILITY ASSOCIATION, INC. )  
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 Plaintiffs, ) CASE NO. 01-6529-CIV-HUCK  
 ) Magistrate Judge Brown  
 )  
 v. )  
 )  
 BFS RETAIL & COMMERCIAL OPERATIONS, )  
 LLC, )  
 )  
 Defendant. )  
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**OBJECTIONS OF *AMICUS CURIAE* UNITED STATES TO  
PROPOSED CLASS ACTION CONSENT DECREE**

**I. INTRODUCTION**

On April 4, 2001, the American Disability Association (“Plaintiff”) sued BFS Retail & Commercial Operations (“BFRC”, “BFS”, or “Defendant”), on behalf of itself and a class of persons with disabilities for alleged violations of Title III of the Americans with Disabilities Act (ADA). Plaintiff has since negotiated a Proposed Consent Decree with Defendant and has submitted that Decree to the Court for its approval. It is the role of the Attorney General to enforce the ADA “in the public interest” and to ensure that alleged violations are remedied. *Amicus curiae* United States objects to this Proposed Consent Decree and strongly urges the Court to reject it. The terms of the Consent Decree do not fairly represent persons with disabilities across the United States who may now or in the future have claims against the defendant for accessibility violations.

The United States has five specific objections to the Proposed Consent Decree. First, the

class definition is overbroad to the extent that the Proposed Consent Decree does not provide a remedy for a substantial number of people who fall within the class definition, and who would be precluded from bringing their claims against Defendant. Second, neither the plaintiff association nor the single member of the association identified in the complaint has standing to represent the overbroad class that will be bound by the proposed agreement. Third, the release is overbroad in two ways: it releases the Defendant from accessibility claims that were not even raised in the Complaint, and it releases claims based on state or local law which also were not at issue in this case. Fourth, the release improperly seeks to release not only claims arising in the past, but also those arising in the next seven years. Fifth, the Decree would potentially limit the power of the Justice Department to enforce the ADA by limiting the ability of persons with disabilities to file complaints with the Department about ADA violations. While voluntary settlement of litigation is always a laudable goal, neither the parties nor this Court should sacrifice the claims of persons with disabilities across the country whose interests are neither adequately represented nor addressed by the Proposed Consent Decree.

## **II. BACKGROUND AND PROCEDURAL HISTORY**

On April 4, 2001, Plaintiff sued BFRC, alleging that Defendant discriminated against a class of disabled persons in violation of Title III of the ADA by “not making its Retail Tire and Service Stores accessible to customers with disabilities.”<sup>1</sup> In preparation for the lawsuit, and during pendency of the suit, Plaintiffs sent experts to various states to examine the architectural barriers confronting individuals with disabilities. Defendant also claims to have conducted surveys to assess architectural barriers. As represented in the Proposed Consent Decree, prior to filing of the lawsuit,

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<sup>1</sup>Paragraph 1.2, Proposed Consent Decree.

BFRC had

undertaken steps to have its Retail Tire and Service Stores surveyed for the purpose of determining what, if any, modifications or alterations were recommended for them to be in compliance with the ADA and ADA-Related laws...<sup>2</sup>

BFRC subsequently received the survey reports and reportedly began to implement the recommendations. The parties eventually negotiated this Proposed Consent Decree, which purports to enhance the implementation of the recommendations and set forth a schedule for implementation of the removal of architectural barriers.

The Consent Decree defines the class as:

All persons who have a claim or cause of action through final approval of the Consent Decree that they have been denied full and equal access to or been discriminated against under title III of the ADA, ADA-Related Laws, or regulations promulgated thereunder, or under similar federal, state, or local law, rule order, or ordinance (excluding claims for all damages, other than statutory damages) at or in connection with one or more of BFRC Retail Tire and Service Stores, because they are persons with mobility disabilities, dexterity, vision, or hearing disabilities or any other disability covered by Title III of the ADA who could otherwise assert such a claim against BFRC.

Proposed Consent Decree, ¶ 2.38 (emphasis added). In short, the class includes every person with a disability in the United States who may have a claim against BFRC, including those who have accessibility issues entirely unrelated to architectural barriers.

In addition, the Consent Decree provides that all members of the class will, in exchange for the relief provided in the Decree, relinquish their right to assert claims against Defendant under Title III of the ADA as well as all applicable state and local laws. The Decree states:

The Released Claims are all claims asserted by named Plaintiff and/or the Settlement Class in the lawsuit, any and all past and/or present claims, rights, demands, charges, complaints, actions, causes of action, obligations or liabilities of any and every kind, known or unknown, for injunctive relief, statutory, damages, declaratory relief or

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<sup>2</sup>Paragraph 10.1, Proposed Consent Decree.

attorneys fees, whether based upon Title III of the ADA or based upon any state or local law, rule or regulation, order, or ordinance relating to or concerning access for persons with Mobility Disabilities, dexterity, vision or hearing disabilities at the BFRC Retail Tire and Service Stores covered by this Decree. Released claims also include claims regarding Accessibility Enhancements and the elements of the BFRC Retail Tire and Service Stores affected thereby that arise during the term of this Decree.....

Proposed Consent Decree, ¶ 23.2. The Decree further provides that:

Plaintiff and Class Counsel acknowledge that compliance with this Decree will constitute full satisfaction of the claims of the Plaintiff, Class Counsel, and Settlement Class (excluding claims for all damages, other than statutory damages) relating to accessibility issues and compliance with any federal, state, or local law, rule or regulation, order, ordinance, or common law relating to or concerning accessibility for persons with disabilities.

Proposed Consent Decree, ¶ 5.

### **III. ARGUMENT**

#### **A. LEGAL STANDARDS FOR DEFINING A CLASS FOR A PROPOSED CONSENT DECREE**

As proponents of the Proposed Consent Decree, the parties bear the burden of demonstrating that the Proposed Decree represents a fair and reasonable resolution of class members' discrimination claims. See, e.g., In re General Motors Corp. Pick-Up Fuel Tank Products Liability Litigation, 55 F. 3d 768, 785 (3rd Cir. 1995), cert. denied, 516 U.S. 824 (1995); Holmes, 706 F. 2d 144, 1147 (11th Cir. 1983). The Eleventh Circuit has repeatedly cautioned that "the [class action] settlement process is more susceptible than adversarial adjudications to certain types of abuse." Pettway v. American Cast Iron Pipe Co., 576 F. 2d 1157, 1214 (5th Cir. 1978), cert.denied, 439 U.S. 1115(1979).<sup>3</sup> As a result, the Court has a "heavy duty to ensure that any agreement is 'fair, adequate,

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<sup>3</sup>In Bonner v. City of Prichard, 661 F.2d 1206 (5<sup>th</sup> Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit decided prior to October 31, 1981.

and reasonable.” Piambino v. Bailey, 757 F. 2d 1112, 1139 (11th Cir. 1985) (internal citation omitted), cert. denied, 476 U.S. 1169 (1986); see also Holmes v. Continental Can Co., 706 F. 2d 1144, 1147 (11<sup>th</sup> Cir. 1983); United States v. City of Hialeah, 899 F. Supp. 603, 606 (S.D. Fla. 1994), aff’d, 140 F.3d 968 (11th Cir.. 1998); accord Grunin v. Int’l House of Pancakes, 513 F. 2d 114, 123 (8th Cir.) (“Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members... [T]he court cannot accept a settlement that has not been shown to be fair, reasonable, and adequate.”), cert. denied, 423 U.S. 864 (1975).

When assessing the propriety of a class action settlement agreement, the court must assess whether the proposed settlement is collusive or contrary to public policy, and cannot sanction such a proposed settlement. See, e.g., United States v. City of Alexandria, 614 F. 2d 1358, 1362 (5th Cir. 1980); City of Hialeah, 899 F. Supp. At 609; Shurford v. Alabama State Bd. Of Educ., 897 F. Supp. 1535, 1547 (M.D. Ala. 1995). Furthermore, should the Court find the Proposed Decree collusive or contrary to public policy, the Court must reject it in its entirety – it does not have the authority to modify the terms. See, e.g., Brooks v. Georgia State Bd. of Elections , 59 F. 3d 1114, 1119-20 (11th Cir. 1995); Holmes, 706 F. 2d at 1160 (“Courts are not permitted to modify settlement terms or in any manner to rewrite the agreement reached by the parties.”)

**B. SPECIFIC OBJECTIONS BY THE UNITED STATES TO THE PROPOSED CONSENT DECREE**

1. The Class Definition Is Too Broad Because The Remedies Only Benefit A Subset Of The Class

The class definition set forth in the Proposed Consent Decree, and certified by the Court, covers every individual with a disability in the United States. The class includes not only persons with disabilities within the meaning of the ADA who have been (or will be) patrons in BFRC stores,

but also all disabled individuals who “are persons with mobility disabilities, dexterity, vision, or hearing disabilities or any other disability covered by Title III of the ADA who could otherwise assert such a claim against BFRC.” Proposed Consent Decree, ¶ 2.38 (emphasis added).

This class definition is overbroad because the Proposed Consent Decree does not address accessibility problems of a large segment of the class, as, for example, those persons with vision or hearing impairments. The remedies contained in this Decree focus primarily on the removal of certain architectural barriers.<sup>4</sup> However, there are many persons whose disabilities require accommodations unrelated to architectural barriers. For example, disabled people seeking effective communication or reasonable modifications of policy to permit them to use the Defendant’s stores (e.g. providing statements and other messages in large text or braille, allowing persons with disabilities to be accompanied by service animals, or providing auxiliary aids for effective communication that are as simple as paper and pencil or perhaps to provide sign language interpreters for certain complex transactions), receive no relief under this Decree, yet they will forgo their rights to bring a claim for such relief. This outcome does not comport with the requirement

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<sup>4</sup> It is axiomatic that, “the reasonableness and appropriateness of the consent decree must be measured against the allegations of the complaint and the relief which might have been granted if the case had gone to trial.” City of Alexandria, 614 F.2d at 1362, citing, Cotton v. Hinton, 559 F.2d 1326, 1330 (5<sup>th</sup> Cir. 1977). The relief sought is based upon specific allegations in a class complaint and the relief sought in the class complaint must correspond with the relief awarded under a stipulated consent decree. The Complaint in this lawsuit seeks accessible parking for persons with disabilities (¶ 24); accessible path to and through primary entrances in the service center, counter areas, restrooms, water dispensers, public telephones, and other facilities (¶ 24); proper signage throughout the stores (¶ 24); and within toilets, accessible route, proper signage, proper door width and hardware, maneuvering clearances, toilets with grab bars at appropriate heights, controls, dispensers, and mirrors all at appropriate heights and otherwise accessible (¶ 24). However, the scope of the Proposed Consent Decree far exceeds those alleged violations and releases all claims, under state, local or federal law for any person covered by title III of the ADA. Proposed Consent Decree, ¶¶ 2.38, 23.2.

that consent decrees binding class members be “fair, adequate, and reasonable.” Piambino, 757 F.2d at 1139.

2. Even If The Association Has Standing To Sue On Behalf of Its Members, It Has Not Satisfied the Standing Requirements For Class Actions

An association typically has standing to sue to redress injuries suffered by its own members. Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999). However, an association seeking to represent a class must have members who allege injuries sufficient to satisfy Article III standing requirements for each class claim or subclaim on behalf of the class. See, e.g., Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000) (“[E]ach [class] claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.”); see also Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987) (“[A]ny analysis of class certification must begin with the issue of standing.”); 1 Newberg on Class Actions §§ 2.05 -06 (3d ed. 1992) (representative plaintiffs must be members of the class they seek to represent and cannot acquire standing to sue by bringing action on behalf of others who suffered injury) (collecting cases).

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

Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring in part and dissenting in part). See also Amchem Products, Inc. v. Windsor, 521 U.S. 591, 62-22 (1997) (holding that Rule 23's class action requirements apply to negotiated class action settlement agreements, and stating that “[t]he safeguards provided by Rule 23(a) and (b) class-qualifying criteria . . . are not practical impediments - checks shorn of utility - in the settlement context.”)

In this case, the Association’s standing is predicated on a single individual who has a mobility impairment. Even if this person were properly named as a class representative, this individual’s injury is clearly not representative of the nationwide class of persons with disabilities who will be bound by this Consent Decree. As discussed, the class includes groups of persons with disabilities who may have experienced different types of discrimination at Defendant’s stores due to the different types of disability (e.g. deafness or blindness). Thus, because the American Disability Association has not alleged injuries to its members representative of the wide range of claims resolved by the Proposed Consent Decree, it has no standing to represent the expansive class set forth in the Proposed Consent Decree. Accordingly, the Proposed Consent Decree must be rejected.

3. The Proposed Decree’s Release Provision Is Overly Expansive, Precluding Claims Not At Issue In This Litigation As Well As Claims Based On State and Local Law

The release provision of the Consent Decree is extremely broad, and covers not only “all claims asserted . . . in the lawsuit,” but also all other claims “whether based upon Title III of the ADA or based upon any state or local law, rule, or regulation, order, or ordinance relating to or concerning access for persons with Mobility Disabilities, dexterity, vision, or hearing disabilities.” Consent Decree, ¶ 23.2.

Because the Agreement goes beyond the scope of claims raised in the Complaint, and these “new” claims do not share the same factual or legal predicate, the Consent Decree may not include these claims. See National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9, 18 (2nd Cir. 1981) (“If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action should not be able to do so either.”); cf. TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460-61 (2nd Cir. 1982) (holding that

class action settlement agreement enjoining class members from prosecuting claims that were not part of class complaint was properly approved by district court since the released claims arose out of the identical factual predicate as the claims in the complaint).

The Proposed Decree is also flawed because it releases claims based on state and local law, none of which were at issue in this case. Proposed Consent Decree, ¶ 23.2. Many states provide substantial monetary remedies in the form of compensatory and/or punitive damages for violations of state accessibility laws or regulations, and some class members may find litigating their discrimination claims more advantageous under these laws rather than under Title III of the ADA, which only allows equitable relief for private actions.<sup>5</sup> The release in the Proposed Consent Decree

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<sup>5</sup>Compare, e.g., 42 U.S.C. § 12188 (ADA Title III remedies and procedures) with Ark.Code Ann. §16-123-107 (1999) (intentional acts of disability discrimination liable for compensatory and punitive damages); A.R.S. ¶¶ 41-1492-14-1992.11. (Providing private right of action for discrimination by public accommodation under Arizonans with Disabilities Act and permitting recovery of monetary damages); Cal. Civ. Code ¶54.1(2001)(permitting recovery of not less than \$1,000 for each violation of state disability law); D.C. Code Ann. ¶¶2-1402.31, 2-1403.16 (2000) (providing private right of action for injunctive and monetary relief for disability-based discrimination by a public accommodation); Colo. Rev. Stat. ¶ 24-34-602 (1998) (violators of Colorado Anti-Discrimination Act liable for damages ranging from \$50-\$500 per occurrence); Fla. Stat. Ann. ¶ 413.08, 760.07, 760.11(5) (West 1998) (disability discrimination by place of public accommodation gives rise to cause of action for “compensatory damages, including...mental anguish, loss of dignity, and any other intangible injuries, and punitive damages”); Lou. Rev. Stat. Ann. ¶ 2256 (West 2001) (disabled individuals subjected to unlawful discrimination “shall have the right to any and all remedies under the law” including compensatory damages, attorney’s fees, and costs); Mass. Gen. Laws Ann. ch 272 ¶ 98 (West 2001) (authorizing damages for disability-based discrimination); Mo. Rev. Stat. ¶¶ 213.065, 213.111 (2000) (prohibiting discrimination in places of public accommodation and authorizing courts to award “actual and punitive damages”); N.J Stat. Ann. ¶ 10:5-13 (West 2001) (authorizing prevailing parties in disability discrimination actions to recover “all remedies available in common law tort actions”); N.Y. Exec. Law ¶¶ 296, 297 (McKinney 2001) (authorizing damages for violations of public access law); Or. Rev. Stat. ¶¶ 659.121, 659.425 (2000) (authorizing compensatory damages and punitive damages not to exceed \$2,500 for unlawful discrimination by public accommodation); R.I. Gen. Laws ¶¶ 42-87-2, 42-87-4 (2000) (permitting victims of disability discrimination to bring actions for equitable relief, compensatory and/or punitive damages, “or for any other relief that the court deems appropriate”); S.C. Code Ann. ¶ 43-33-540 (Law Co-op 2000) (civil damages not to exceed \$5,000 available for

would preclude these actions in their entirety, even for class members who received no benefit from this agreement, such as those people with vision or hearing impairments. This is an unjust outcome that should not be sanctioned by this Court.

4. The Proposed Decree Improperly Releases Future Claims For the Seven-Year Term of the Decree

The language of the Proposed Decree provides defendant broad protection from any claims for disability based discrimination for the next seven years. The Decree states that “[r]eleased claims also include claims regarding Accessibility Enhancements and the elements of the BFRC Retail Tire and Service Stores affected thereby that arise *during the term of this Decree.*” Proposed Consent Decree, ¶ 23.2. Such prospective waivers of individuals’ civil rights - whether arising out of the ADA or other anti-discrimination statutes - are highly disfavored. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) (“[There can be no prospective waiver of an [individual’s] rights under Title VII.”); Adams v. Philip Morris, Inc., 67 F. 3d 580, 584 (6<sup>th</sup> Cir.1995) (“A [party] cannot purchase a license to discriminate”); Uherek v. Houston Light and Power Co., 997 F. Supp. 789, 792 (S.D. Tex. 1998) (“A party may validly waive [Title VII] claims that exist on the day she signs a release, but not future claims.”); see also Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F. 3d 9, 10-12 (1<sup>st</sup> Cir.1997) (holding past ADA claims subject to waiver so long as release was knowing, voluntary, and “given in exchange for additional benefit”). Thus, because the Decree’s release provisions waive all accessibility claims by class members for

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disabled individuals subject to discrimination); Tex. Civ. Code Ann. ¶ 121.004(b) (Vernon 1995) (imposing \$100 penalty for each violation of Texas Architectural Barriers Act); Utah Code Ann. ¶¶ 13-7-3, 13-7-4 (2000) (discrimination by place of public accommodation subject to “civil action for damages and any other remedy available in law or equity”); Vt. Stat. Ann. ¶¶ 4502, 4506 (2000) (prohibiting discrimination by public accommodations and authorizing private enforcement actions for injunctive relief, as well as compensatory or punitive damages).

the next seven years, the Agreement violates public policy and must be rejected. See, e.g., City of Alexandria , 614 F.2d at 1362 (noting judicial duty to ensure class action settlement agreements are neither illegal nor contrary to public policy.); Shurford, 897 F. Supp. At 1547 (same).

5. The United States Objects to the Proposed Decree Because It Potentially Limits Justice Department Enforcement of the ADA

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

### CONCLUSION

The deficiencies underlying the Decree’s expansive class definition and overbroad release provision - particularly the release of present and 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). For the foregoing reasons, the United States objects to the Proposed Consent Decree and urges the Court to require amendment of the Decree through appropriate procedures.

Respectfully submitted,

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