

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**MAHALA AULT, STACIE RHEA, and
DAN WALLACE,**

Plaintiffs

v.

Case No. 6:07-CV-1785-ORL-KRS

WALT DISNEY WORLD CO.,

Defendant.

**OBJECTIONS
OF DISABILITY RIGHTS ADVOCATES FOR TECHNOLOGY,
TINA BAUGHMAN, JERRY KERR AND APPROXIMATELY 100 DECLARANTS
IN OPPOSITION TO APPROVAL OF THE SETTLEMENT
AND TO CLASS CERTIFICATION**

Class Members Tina Baughman, Jerry Kerr, and the Disability Rights Advocates for Technology (“DRAFT”)¹ (collectively, the “Objectors”), by and through their undersigned counsel, file this statement in opposition to approval of the settlement and to class certification currently before this Court in the matter of *Ault, et al. v. Walt Disney World, Co.*, 07-CV-1785. As set forth hereinbelow, and in the Notice filed contemporaneously herewith, the Objectors intend to appear at the March 31, 2009 fairness hearing to state their objections.

INTRODUCTION AND BACKGROUND FACTS

Over 15 of the 25 named class members, all of whom are members of the national non-profit organization, DRAFT, specifically identified by the Plaintiff class representatives

¹ DRAFT is appearing on behalf of dozens of disabled individuals who have submitted declarations objecting to

as having special interest and expertise on the use of Segways by people with disabilities, and an additional 86 class members, vigorously oppose the proposed class-action settlement as unfair, inadequate, and unreasonable under Rule 23 (e). The Settlement contains multiple violations of the Americans with Disabilities Act, is inconsistent with controlling Supreme Court and pending Federal regulations, and benefits Disney World Co., not the plaintiff class.

Segway use is not merely a matter of a preference that need not be accommodated under the ADA. Crucially, the Disney device will not work for many class members. The Settlement's endorsement of the Disney device will keep many disabled Segway users out of the Disney parks just as effectively as the current Disney ban on Segways.

The Objectors respectfully request this Honorable Court to disapprove the Settlement for the following independent reasons:

- a. The class representatives have no standing to release all class members state and local law damage claims, and they did not fairly, adequately and vigorously represent the class.
- b. The settlement may not be certified under Rule 23(b)(2),
- c. The settlement waives and releases all state and local law claims of absent class members, without payment of damages,
- d. The settlement unreasonably surrenders all claims for no consideration, in that the Disney-created device was to be provided, with or without a settlement,
- e. The settlement violates the ADA's prohibition on an absolute ban on Segways ignoring the requirement of individual consideration, and it permits Disney to

the settlement at issue in this case. Those declarations in opposition are attached hereto as **Exhibit D** and incorporated herein by reference.

charge a prohibited fee for an accommodation,

- f. The settlement ignores United States Department of Justice's draft rules on Segway use in public places and other agency rules. The settlement would immunize Disney from compliance with Federal law on the use of Segways,
- g. The class representatives, together with Defendants, unfairly expanded the class definition in this case to cover a California Disney facility, without informing this Honorable Court that such expansion affected another Segway suit against Disney in California, thus denying this Court the opportunity to properly address the class definition issue and to respect the authority of its sister court in California.

The unfairness of the settlement is apparent in the dozens of attached Declarations demonstrating the Segway is a *necessity* for their medical and psychological needs.²

The deficiencies of this hurried settlement show. Plaintiffs sued to be able to use Segways in Florida at Disney parks, now surrender all rights at any Disney park in the United States. Plaintiffs alleged no damage claim under any state law, now surrender all such claims in the United States. Remarkably, the only consideration offered by defendants to the Plaintiff class is to rent them 15 Disney-created vehicles that defendants announced they were going to make available for public use months before the settlement was reached!

The parties' prior submissions did not disclose the lack of class support and did not reveal the profound legal deficiencies of their efforts. Also, the Court was not alerted that a parallel federal case against Disneyland in California was poised for summary judgment (filed by the plaintiff). To derail the California action, the parties' attorneys in this case jointly proposed a Second Amended Complaint expanding the action across the country to incorporate Disneyland. Then on Disney's request, the California court placed a *stay* on the

² To that extent, it is apparent that the three named Plaintiffs who apparently do not have a special need for the Segway, and who seek to surrender Segway use for all others, do not represent a cohesive certifiable class.

California case pending resolution of the Florida class-action settlement.

The settlement is onerous and repugnant. People who use wheelchairs may bring them into the park at no expense, but disabled patrons who use Segways would have to surrender the mobility device that is now second nature to them, then attempt to rent a device that may not be in stock.³ They could travel hundreds of miles to hear, “Sorry, they’re all rented out. Come back tomorrow.”⁴ Many could never use the Disney machine. Others would be forced to experiment with a new device, risking injury to everyone.

The spirit of the ADA embraces new technologies that will help individuals with disabilities in virtually every aspect of their life. Such a device is the Segway, that assists people who can stand and want to stand, but cannot walk for long distances. Incredibly, those who control Tomorrow Land would like to keep people with disabilities in yesterday.

MEMORANDUM OF LAW

I. STANDARDS FOR APPROVAL OF THE SETTLEMENT

In evaluating class action settlements under the “fair, adequate and reasonable” and “not the product of collusion” standard of Rule 23(e), courts consider six factors: (1) whether

³ The ESV’s would be offered on the same terms as the ECVs – \$35 per day plus a deposit, on a first-come first-served basis. Access to portions of the park is restricted. For instance, a person using defendant’s ECV or ESV is not allowed to take that vehicle into Downtown Disney (California) where there is merchandise and food facilities. (Personal electric wheelchairs are allowed there.) Persons renting one of defendant’s vehicles are required to first sign a Release and Indemnity Agreement. Appleton Dep., 95:25 – 96:16; 98:4 –99:15; 101:15 – 102:4.).

Various documents cited in this brief, such as the Appleton Dep. and certain United States Government agency policies and guidelines, are attached to the Declarations of David Geffen and Jerry Kerr, attached hereto as **Exhibits A** and **B**, respectively. The Appleton Deposition was taken in the California lawsuit against Disney, and with regard to the Segway ban.

⁴ Appleton Dep. 25:13 – 26:4.

the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members. *United States v. Alabama*, 271 Fed. Appx. 896 (11th Cir. 2008); Rule 23(e)(1)(A).⁵

The burden is on the parties to demonstrate that the settlement is fair and reasonable, not upon objectors to prove that it is not. *Holmes v. Continental Can Co*, 706 F. 2d 1144, 1147 (11th Cir. 1983). Because the settlement process is susceptible to abuse, courts have a “heavy duty to ensure that any agreement is ‘fair, adequate, and reasonable.’” *Piambino v. Bailey*, 757 F. 2d 1112, 1139 (11th Cir. 1985) (internal citation omitted), *cert. denied*, 476 U.S. 1169 (1986).

If the settlement is found faulty in any respect, the court has no choice but to reject it in its entirety. As the 11th Circuit recently explained,

Generally, courts may not modify the terms of the parties' voluntary settlement in the class action context. While Rule 23(e) “wisely requires court approval of the terms of any settlement of a class action[,] ... [t]he settlement must stand or fall as a whole.” *Brooks v. Ga. St. Bd. of Elections*, 59 F.3d 1114, 1119, 1120 (11th Cir.1995). Courts are not free to modify or delete terms of the parties' negotiated settlement. *Id.* at 1120.

Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 262 Fed. Appx. 215, 217 (11th Cir. 2008).

II. THE SETTLEMENT IS UNFAIR, INADEQUATE AND UNREASONABLE

⁵ *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

A. Class Members Were Excluded from Information on the Settlement, and Were Inadequately and Unfairly Represented

Lack of adversarial vigor and failure to adequately represent the class is apparent here. Among the Objectors is the very organization which Plaintiffs had urged was the *best* class representative for notice and for expertise in these issues. The objections are not at all surprising considering DRAFT members were never consulted about the terms of the settlement and were in fact ignored by Plaintiff's counsel when DRAFT learned of the settlement.⁶ Similarly, the secretive veil over the settlement terms included keeping Mr. Geffen in the dark not just about the settlement terms but of the fact that the settlement would absorb the lawsuit he had been pursuing for over a year.⁷ Even some of Plaintiffs' counsel were uninformed of the Settlement the day before the Settlement was filed. One of Plaintiff's counsel complained two days earlier that Disney's "take it or leave it" settlement proposal had put "a gun to our heads." Plaintiffs' counsel, other than Mr. Dempsey, had negotiated their fees even before the Settlement was finalized. (Dkt. #93, Ault Motion for Atty fees.).

B. Plaintiffs Have a Strong Likelihood of Success at Trial

The declarations demonstrate the Segway is an integral part of the independence needs of the disabled class members. It provides the health benefits of standing versus the

⁶ Kerr Decl. Note that the parties informed the Court that they do "not anticipate significant opposition" to the Settlement in the same document that they cite DRAFT particularly as an organization to receive notice. *Joint Motion for Conditional Class Certification and Preliminary Approval of Joint Stipulation of Settlement and Release* at 14, 16 (Dec. 5, 2008).

⁷ In late November, 2008, Defendant's California counsel informed the individual California case plaintiff's counsel, Mr. Geffen, that there was a pending proposal to resolve the Florida class-action settlement. Mr. Geffen had not previously been contacted about the proposed settlement by the attorneys for the class-action plaintiffs. Mr. Geffen spoke with Mr. Baker in August of 2008 relating to their respective cases and the attorneys promised to keep one another informed of any important developments. Plaintiffs' counsel, John Baker, would not return Mr. Geffen's phone calls after Mr. Geffen learned of the proposed settlement. Geffen Decl. ¶ 8.

pain and poor health consequences of prolonged sitting. It provides the benefit of greater visibility and eye to eye contact. It provides greater mobility when moving through crowds and is clearly superior for keeping track of family members at theme parks. The Segway, which can be, and is, adapted for the individual rider's disabilities, is not fungible with either wheelchairs or with the Disney-created device.

It is common that class members have never used wheelchairs or scooters, can not, or never intend to. Crucially, the Settlement's endorsement of the ESV will keep many disabled Segway users out of the Disney parks as effectively as the current Disney ban on Segways.

Rule 23 (b)(2) requires that the final injunctive relief is appropriate respecting the class *as a whole*. The Disney-made ESV is a "one-size-fits-all" solution that excludes a vast portion of the plaintiff class and discomforts the rest.⁸ It deprives class members of the mobility device that best accommodates their disabilities. Some of the class members have limited use of their hands and cannot operate the ESV hand controls. Some have modified their Segways to fit their specific mobility issues. Little people who rely on the child's model Segway could not possibly use the proposed ESV. The objecting class members will demonstrate the clear superiority of the Segway to the ESV for mobility and safety in court.

C. Possible Recovery (An Injunction Precluding Disney from Prohibiting Segways at its Parks) Is Far Greater than the Settlement Relief or the Alternative

The stakes here are huge not just for the plaintiff class members but for the entire disability community. A mobility device becomes second nature, like artificial limbs.

⁸ A substantial portion of the Declarants state that they cannot use the proposed ESV because of their specific physical needs. Virtually all of them decry the vast inferiority of the ESV in terms of maneuverability through crowds, lines, and bathrooms, and fear of injuring others and discomfort in having to learn to use a new

Allowing a national class action settlement of this nature will encourage businesses to decide for themselves a mobility device, or assistive aid, is “unsafe” and “unwelcome.” Anyone using an electric wheelchair could reasonably fear that businesses could require them to abandon their independence, if they provide a manual wheelchair and someone to push.

At least two months before the settlement, the Defendant had already “designed, constructed, and tested a prototype standing vehicle intended for use within the Walt Disney World resort.”⁹ Class members receive nothing that Defendant was not already giving.

Defendant’s two wheeled vehicle ban is based solely on concerns about *safety*.¹⁰ Therefore, the Settlement should have been a compromise on the *safety* issues raised by defendant, such as travel speed in the park, and not about allowing Segways in, which several government agencies have already agreed is a matter of right under the ADA. Defendant cannot reasonably argue that Segways are not safe under any circumstances at the park because: 1) Defendant has been employing the use of Segway for its employees for over four years and has developed a policy on safe use of Segways for its employees; 2) both theme parks promote the use of Segways in public exhibits, and 3) the theme parks offer regular Segway Tours of their parks to the public, with little more than an hour of training.¹¹ Defendant is aware that at least one other large theme park, Universal Studios, allows

mobility device on the day of their visit.

⁹ *Opposition to Class Certification*, Decl. Peter Cardinali (filed September 30, 2008) (Doc 72, EX. 3, at 2).

¹⁰ Appleton’s main concern was about people going too fast. Appleton Dep. 51:1 – 4; 38:24 – 42:17. Defendant already allows persons with disabilities to use their iBOT, an extremely sophisticated wheelchair developed by the same inventor as the Segway, that folds the rear wheels under so a person can move around on two wheels. Appleton Dep. 83:2 – 8.

¹¹ Appleton Dep. 75:4 – 14; 76:8 – 22; 78:8 – 22; 80:12 – 19.

Segways. Defendant has not bothered to learn how Universal developed its Segway policy.¹²

Defendant's concern that Segways are too fast is not a legitimate basis for excluding Segways any more than it would be for excluding a fast power chair. A Segway has multiple speed settings, and can be operated as slow as an individual can walk. Just as with electric wheelchairs, operating a Segway at a speed that is safe for a given environment is governed not by the device, but by the behavior of the individual. Defendant can enforce policies limiting a person's speed to safe levels, just as with people who are running. See Kerr Decl.

Neither can it be argued that a Segway is *too large*. The footprint of the Segway is smaller than wheelchairs and scooters. The Segway has a zero turning radius providing superior maneuverability to a wheelchair, especially important in crowds. It has low-pressure tires so that it cannot injure someone by running over their foot. Moreover, because the operator is in a standing position, the Segway provides a better height advantage through crowds which is of special concern for parents trying to maintain contact with excited children at an amusement park. Segways weigh between 85 and 105 pounds (depending on the model), whereas most electric wheelchairs exceed 250 pounds. See Kerr Decl.

Segways/EPAMD's, the Department of Justice recognizes, can have particular benefits for people with disabilities – and assist in ways “which wheelchairs do not.”

While there may be legitimate safety issues for EPAMD users and bystanders, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. For example, individuals with severe respiratory conditions who can walk limited distances and individuals with multiple sclerosis have reported benefitting significantly from EPAMDs. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not.

¹² Appleton Dep 74:1 – 75 :2.

Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 CFR Part 36, Fed.Reg. 6/17/08, pgs 34508-34557 (Vol. 73, No.117), http://www.ada.gov/NPRM2008/t3NPRM_federalreg.htm

Plaintiff class representatives failed to press these indisputable matters.

D. Opposition to the Settlement Is Substantial

Class members have responded to the proposed settlement with a resounding “No,” in the 101 declarations from class members explaining their reliance upon Segways and the reasons why this device is required for their mobility, submitted herewith as **Exhibit D**. For example, the plaintiff in the California litigation, Tina Baughman, a Southern California resident and mother of three children, can stand for long periods but cannot use a wheelchair because her muscular dystrophy prevents her from standing from a sitting position without assistance. She desired to go to Disneyland alone with her eight-year-old daughter to celebrate her birthday but was told that she would have to use Disney’s ECV instead.

Baughman opposes the settlement. She is very comfortable on her Segway and fears injury to herself and others by having to rely upon the ESV because it is more difficult to maneuver, and she has never used it before. She has an event at Disneyland planned in May 2009. (See Baughman Declaration attached hereto as **Exhibit C** and incorporated herein by reference.) Each Objector’s experience is similarly compelling.

III. THE PROPOSED SETTLEMENT IS ILLEGAL

A. The Settlement Cannot Release Claims for Damages or Claims Under State Laws Other Than Florida’s

This case was originally brought challenging policies only at Disney parks in Orlando,

Florida, under Title III of the ADA. Complaint (Dkt # 1) First Amended Complaint (Dkt # 49.) Only when the parties had reached settlement did they jointly request to amend the complaint to include the Disneyland Resort (“Disneyland”) in California. (Dkt # 77.) In this Second Amended Complaint, the Named Plaintiffs continued to allege discrimination only at Disney World. *Id.* ¶¶ 19-43. While Named Plaintiffs are careful to state their specific intent to return to Disney World, *id.* ¶¶ 24-25, 34-35, 42-43, there is no allegation that Named Plaintiffs intend to patronize Disneyland in the future. *See generally id.* ¶¶ 19-43.

Named Plaintiffs have no claim under the laws of any other state besides Florida. Despite this fact, the Settlement Agreement purports to release “any and all claims and causes of action arising out of or predicated upon allegations that Worldco’s actions or decisions relating to the use of Segways or other two-wheeled devices at the Disney Resorts do not comply with the ADA *or any other federal, state or local law or similar disability rights statute or regulation.*” *Sttlmnt Agrmnt* at 7, ¶13 (emphasis added); *see also id.* at 3, ¶ 8. “Disney Resorts” is defined to include both Disney World and Disneyland. *Id.* at 2.

Named Plaintiffs do not have standing to represent a class that includes individuals with claims under other states’ laws, nor do they satisfy the typicality and adequacy requirements with respect to such a class. Because such a class would be improper, the settlement agreement may not release claims under other states’ laws on behalf of that class. Finally, even if the parties were to scramble to find additional named plaintiffs with claims at Disneyland, it would be improper -- under Rule 23(b)(2) and 23(e) -- for the class to release damages claims without securing compensation for their release.

1. Named Plaintiffs do not have standing to represent individuals with claims

arising under the laws of States other than Florida. It is black letter law that, “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.” *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000); *see also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). In the present case, no named plaintiff has suffered an injury under any other state’s law than Florida; therefore these named plaintiffs may not assert -- much less release -- claims under other states’ laws.

In *Association for Disabled Americans v. 7-Eleven, Inc.*, No. 01-CV-0230, 2002 WL 546478 (N.D.Tex. Apr. 10, 2002), the parties sought court approval of a class action settlement under Title III of the ADA addressing barriers in 7-Eleven stores nationwide. The named plaintiffs were two individuals and an association, all of which were Florida residents. *Id.* at *5. In settlement, they sought to represent a class bringing claims under the ADA and “similar federal or state statutory, administrative, regulatory or common law relating to accessibility.” *Id.* at *1. The court disapproved the proposed class settlement in part because the named plaintiffs lacked standing to assert claims under the laws of states other than Florida explaining: “there is no evidence that the plaintiffs . . . have ever been to a 7-11 outside the state of Florida. Thus, plaintiffs have failed to demonstrate any injury in fact under the laws of any state other than Florida. . . . The plaintiffs lack standing to assert state law accessibility claims apart from those based on Florida law.” *Id.*; *see also In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365, 1370 (S.D. Fla. 2001).

The *7-Eleven* court ultimately concluded that while “[c]ourts have broad discretion in releasing potential claims in the context of a class action settlement. . . . However, even with

this broad discretion, . . . this Court [is not authorized] to release claims by way of a settlement that the plaintiffs would have no standing to raise in any court.” *Id.*, 2002 WL 546478, at *6 n.4. Likewise this Court is not authorized to release claims under the laws of states other than Florida. The release of claims under California law would be improper.

2. Named Plaintiffs do not satisfy the typicality and adequacy requirements of Rule 23(a)(3) and (4). The core concept of standing also intersects with the Rule 23(a) class action requirements of typicality and adequacy of representation. Fed. R. Civ. P. 23(a)(3) and 23(a)(4). As the Eleventh Circuit has held:

It should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class. As noted above, typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large. Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class.

Prado-Steiman, 221 F. 3d at 1279. Because the Named Plaintiffs in this case do not have standing to raise claims from states outside of Florida, they do not satisfy the Rule 23(a)(3) and (4) requirements of typicality and adequacy of representation.

The *7-Eleven* court also rejected the proposed nationwide settlement on the grounds that the plaintiffs did not satisfy typicality: “the plaintiffs... do not possess claims typical of those who may claim they have suffered injuries under the accessibility laws of states other than Florida.” *Id.*, 2002 WL 546478 at *6. On that basis, the court held that certification of the requested class was inappropriate as well. In *Kakani v. Oracle Corp.*, No. 06-06493, 2007 WL 1793774 (N.D.Cal. June 19, 2007), the court held that named plaintiffs with claims only under California law could not adequately represent a class with claims under other

states' laws. *Id.* at *8-9. On those grounds and others, that court denied preliminary approval to a class action settlement purporting to release such claims. *Id.* at *2, *11.

The Named Plaintiffs here do not have claims typical of other putative class members with claims in other states, and cannot adequately represent such non-Florida class members. As the Eleventh Circuit explained with respect to the adequacy requirement, “[b]ecause all members of the class are bound by the res judicata effect of the judgment, a principal factor in determining the appropriateness of class certification is ‘the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class.’” *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (citations omitted). An agreement that binds all other class members nationwide to a waiver of all rights to pursue any available state damages actions for disability-based discrimination raises the question of whether the Named Plaintiffs are indeed representing “with ‘forthrightness and vigor’ those interests of other class members that [they do] not share and in which [they have] no stake. Indifference as well as antagonism can undermine the adequacy of representation.” *Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000).

B. Release of Damages Claims without Compensation to the Class Is Improper

The release in the proposed settlement agreement is so broad that it encompasses state law damages claims. *See* Settlement Agreement at 7 (releasing “any and all claims and causes of action [under] . . . the ADA or any other federal, state or local law or similar disability rights statute or regulation.”). This is not fair, reasonable or adequate. In California, for example, a plaintiff is entitled to recover statutory damages of \$1,000 or

\$4,000, Cal. Civ. Code §§ 52(a) & 54.3(a), upon showing plaintiff was “denied access on a particular occasion.” *Donald v. Café Royale, Inc.*, 266 Cal. Rptr. 804, 813 (Cal. App. 1990). A plaintiff is not required to demonstrate actual damages. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000). A violation of the ADA automatically constitutes a violation of these two statutes. *See* Cal. Civ. Code §§ 51(f), 54.1(d). Where a class member proves a violation, the claim for statutory damages will have a high likelihood of success, with a range of recovery from \$1,000 to \$4,000 for each denial of access. Yet the proposed settlement agreement gives class members nothing for such injuries. This is too far below the possible range of recovery for such a straightforward claim.

The 9th Circuit has held that a similar class settlement that released claims for damages under the statutes cited above but provided no compensation to the class was not fair, reasonable or adequate. *Molski v. Gleich*, 318 F.3d 937, 953-55 (9th Cir. 2003). The court concluded that “[b]ecause the consent decree released almost all of the absent class members’ claims with little or no compensation, the settlement agreement was unfair and did not adequately protect the interests of the absent class members.” *Id.* at 955.

In this case, an unknown number of disabled Disneyland visitors are giving up possibly multiple claims of \$1,000 or \$4,000 in return for no monetary relief, injunctive relief that is almost entirely without value, and a payment to Named Plaintiffs’ attorneys. For example, Ms. Baughman has already brought suit for several state law damages claims against Defendant. It is unreasonable to require Baughman and other class members to waive such damages in the absence of fair compensation.

C. Disney’s Ban on Segways Violates the Americans with Disabilities Act

Title III of the ADA provides:

No individual shall be discriminated against on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.
42 U.S.C. §12182(a).

Amusement parks are identified as one of the categories of private entities that are considered public accommodations for purposes of this subchapter. 42 U.S.C. S 12181(7)(I); 42 CFR 36.104 . Title III further defines "discrimination" to include:

. . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.

42 U.S.C. §12182(b)(2)(A)(ii) (emphasis added).

Disney's absolute ban on Segways violates the ADA. In *PGA Tours, Inc. v. Martin*, 532 U.S. 661 (2001), a professional golfer with a circulatory disorder resulting in malformation of his right leg brought an action against a non-profit professional golf association challenging the associations ban on the use of golf carts in tournaments. The association would not accommodate his need to use a golf cart instead of walking the course.

The Supreme Court held that permitting the disabled golfer to use a golf cart was not an accommodation which would "fundamentally alter the nature" of the events in which he was participating. Thus, the issue is not – as the parties' Joint Motion would have it – whether Segway users can have physical access on the Disney-made Disney-rented vehicles - - but whether allowing current Segways users into Disney's facilities would "fundamentally

alter the nature” of Disney’s operations. Obviously, it would not.

The *Martin* Court held that the refusal of the association to consider the golfer’s personal circumstances runs counter to both the language and purpose of the ADA; the ADA requires individualized consideration of the needs, preferences and situation of the individual disabled person. 532 U.S. at 688 (“refusal to consider Martin’s personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA.”). An “individualized inquiry” must be made:

To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.

532 U.S. at 688.

Disney World Co receives millions, or tens of millions, of visitors/customers every year.¹³ The parties agree that only a very small number are people with disabilities who use Segways (Disney is providing only 15 nationwide). The administrative burden of dropping the blanket ban, and adopting an individualized approach is minimal. In *PGA Tours, Inc. v. Martin*, the Court specifically concluded that the fact that considering the golfer’s requested accommodation (the cart) might be difficult to evaluate with regard to his personal situation was specifically held to be irrelevant to ADA analysis; Title III of the ADA is not limited to easy requests. 532 U.S. at 690-691.¹⁴

¹³ The LA Times says 14.9 million to Disneyland in 2007. <http://travel.latimes.com/daily-deal-blog/index.php/social-amusement-park-1492/#more-1492>. Disney has other California parks and numerous parks in Florida as well.

¹⁴ In reaching this conclusion, the Court notes that no one but Martin had sued over the golf cart ban in the three years since he requested use of the cart. Here, there is no suggestion that Disney Worldco is inundated with Segway requests.

As this Court evaluates the extreme and intrusive ban on Segway use for “reasonableness” against the teachings of *PGA Tours, Inc. v. Martin* and the Department of Justice’s position discussed below, it is apparent that the Settlement’s ban violates the ADA.

D. The Settlement Ignores the Department of Justice’s Proposed Regulations Affecting Segway Use and Would Immunize Disney World Co. from Complying with the Regulations.

The United States Department of Justice is charged with issuing regulations on the application of the Americans with Disabilities Act. The Department of Justice stated in its 2008 Notice of Proposed Rulemaking on the obligations of public accommodations under Title III of the ADA (supra at 9http://www.ada.gov/NPRM2008/t3NPRM_federalreg.htm) that, **“A blanket exclusion of all devices that fall under the definition of other power-driven mobility devices in all locations would likely violate the proposed regulation.”** (discussing Sec. 36.311(c)).

The Department of Justice recognizes that the Segway is a unique Electronic Personal Assistive Mobility Device:

In addition to devices such as wheelchairs and mobility scooters, individuals with disabilities may use devices that are not designed primarily for use by individuals with disabilities, such as electronic personal assistive mobility devices (EPAMDs). (The only available model known to the Department is the Segway[supreg].) *Id.*¹⁵

Acknowledging that some are concerned about its safety, the Department of Justice nevertheless concludes that a blanket ban would generally be unacceptable; instead, public accommodation entities must adopt policies which consider the individual needs of people

¹⁵The Justice Department defines the EPAMD as the Segway.

with disabilities and respect the devices chosen by the individuals.¹⁶

The Department's proposed definition of "Mobility devices" at Sec. 36.311 has as its default that the place of public accommodation "shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities," Sec. 36.311(a), and "shall establish policies to permit the use of other power-driven mobility devices by individuals with disabilities," Sec. 36.311(c). This proposed regulation follows regulations already adopted by the **Department of Transportation** allowing the use of Segways on all forms of public transportation¹⁷ and regulations adopted by the **Government Services Administration** which allow Segways in all federal buildings¹⁸

E. The Settlement Requires An Illegal Surcharge

Further evidence that the proposed settlement is unfair, is its requirement to pay a surcharge for the use of the mobility aids, in direct violation of Title III of the ADA.

A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to

¹⁶ The Department's explanation of its definition of EPAMD's and related devices emphasizes the individual's choice: "The definition is designed to be broad and inclusive because the Department recognizes the diverse needs and preferences of individuals with disabilities and does not wish to impede individual choice except when necessary."

¹⁷ "[W]hen a [Segway] is being used as a mobility device by a person with a mobility-related disability, then the transportation provider must permit the person and his or her device onto the vehicle. This is analogous to the situation in which a transportation provider that has a general policy that does not permit pets to enter, but must permit a person with a disability to bring a service animal into a vehicle." (Federal Transit Authority, "Use of "Segways" on Transportation Vehicles", DOT Disability Law Guidance, October 27, 2008, (http://www.fta.dot.gov/civilrights/ada/civil_rights_3893.html),)(Geffen Decl., Par. 5, Exh. 4).

¹⁸ GSA has adopted enforcement regulations that require a top speed limit, and operation of the Segway in a manner that does not compromise the safety of the user, the building occupants, or the building infrastructure. Security personnel are allowed to monitor the safe operation of the Segway. (Geffen Decl., Interim Segway Personal Transporter Policy, December 3, 2007.)

cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 36.301(c). *See also* 28 C.F.R. Part 36 App., §§ 36.303, Sec.36.301(c); *Massachusetts v. E*Trade Access, Inc.*, 464 F. Supp. 2d 52, 59 (D. Mass. 2006); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 717–718 (D. Or. 1997).

Surcharges are prohibited even though compliance may result in additional cost. ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities, § III-4.1400 (DOJ 1993).

The inclusion of such a prohibited surcharge is more questionable considering the DOJ has included such a prohibition in its own settlement *with the instant Defendant*. *See Agreement Between the United States of America and Walt Disney World Co. Under the Americans with Disabilities Act Concerning the Use of Auxiliary Aids at Walt Disney World*, ¶ 2(d), <http://www.ada.gov/disagree.htm> (“WDW will of course impose no surcharge on persons with disabilities to cover the cost of providing any auxiliary aids, in accordance with 42 U.S.C. §12182(b)(2)(A)(i).”).

The Objectors are not arguing that the surcharge requirement should be corrected by eliminating any cost for the use of mobility devices in the Defendant’s parks. Instead, the Objectors focus on the Settlement’s inclusion of an illegal surcharge as further evidence that the Settlement is simply not fair, reasonable, or adequate under applicable Rule 23 standards.

F. Safety Concerns Cannot Here Justify the Complete Ban on Segways

The ADA permits denial of an accommodation to an individual who poses a direct threat to the health or safety of others, but the rule requires individualized application, and not outright bans. The ADA defines a direct threat to be "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." 42 U.S.C. §12182(b)(3); *Bragdon v. Abbott* 524 U.S. 624, 639 (1998); *PGA Tours, Inc. v. Martin, supra*.

The direct threat defense requires defendant to first perform an *individualized assessment*, which means a thorough investigation of the individual's request for accommodation, based on objectively reasonable judgment that relies on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; and the probability that the potential injury will actually occur. If a reasonable judgment results in the conclusion that a significant threat to safety exists, the entity must then determine whether the significant threat can be eliminated by a modification to existing policies.¹⁹

An absolute ban obviously contradicts the individualized assessment requirement. In any event, Disney makes no attempt to eliminate *significant* risks by modifying its policies, practices, or procedures. Appleton Dep. 32:17 –34:10. Instead, Disney attempts to

¹⁹ The regulations at 28 CFR part 36.208 state:

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

(b) Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. (c) In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation *must make an individualized assessment*, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

circumvent its ongoing obligation to individually evaluate and accommodate the needs of individuals with disabilities by creating a no exceptions, no appeal policy.

IV. LOCAL RULE 3.01(J) REQUEST FOR ORAL ARGUMENT

The Objectors respectfully request that the Court permit oral argument and presentation of live testimony and a short video regarding the foregoing motion. Undersigned counsel estimate that no more than a total of three (3) hours would be needed.

V. CONCLUSION

The Objectors respectfully request that this Honorable Court vacate the class certification and deny approval of the settlement.

Respectfully submitted this 12th day of March 2009.

s/Aaron C. Bates
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**Motion for Admission Pro Hac Vice to be filed*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12th, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to all parties named on the attached Service List or in some other authorized manner for those counsel or parties who are not authorized to receive notices electronically.

s/ Aaron C. Bates
Aaron C. Bates

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