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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARI SHIELDS, AMBER BOGGS and TERESA STOCKTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

WALT DISNEY PARKS AND RESORTS U.S., INC., DISNEY ONLINE, AND WALT DISNEY PARKS AND RESORTS ONLINE, DOES 1-10, INCLUSIVE,

Defendants.

Case No. CV10-5810-DMG (FMOx)

Class Action

JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO OBJECTIONS OF NATIONAL FEDERATION OF THE BLIND AND AMERICAN COUNCIL OF THE BLIND TO FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: August 3, 2012
Time: 9:30 a.m.
Courtroom: 7

Judicial Officer: Hon. Dolly M. Gee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES & REGULATIONS

I. INTRODUCTION

Plaintiffs Cari Shields and Amber Boggs, on their own behalf and on behalf of the classes they represent (collectively "Plaintiffs"), and defendants Walt Disney Parks and Resorts U.S., Inc., Disney Online and Walt Disney Parks and Resorts Online (collectively "Defendants" or "Disney") submit this memorandum in response to the nearly-identical objections of the National Federation of the Blind ("NFB") and the American Council of the Blind ("ACB") to the joint motion for final approval of the Class Action Settlement Agreement And Release (the "Settlement Agreement") in this action.[1]

Neither the NFB nor the ACB challenges the adequacy of the relief provided by the Settlement Agreement. Rather, they contend that "[t]he release provisions in this agreement are so overbroad that the Court should, on this basis alone, reject the agreement." (NFB Objection at 2.) But the Class Member Release merely grants Defendants the appropriate and necessary finality of the issues litigated and now resolved by the Settlement Agreement. It does not, as the objectors contend, preclude the prospect of unknown future claims unrelated to this case. Indeed, the release is specifically limited to "future claims with respect to the issues in this Action or the subject matter of this Settlement Agreement." (Settlement Agreement (Doc. No. 196-1) § VI at 27.) Nor does it exclude claims or remedies that could reasonably remain outstanding upon negotiating any class action settlement agreement, much less one of the nature and scope achieved here. The objectors, though, would have it that immediately upon the Settlement Agreement's becoming effective, new

[1] Two weeks after the Court's July 6 deadline for postmarking objections, the NFB and ACB Objections are the sole objections received by any of the parties. No class member has submitted an objection, nor has the United States Attorney General or any state or territorial attorney general, each of whom was given notice of the settlement pursuant to the Class Action Fairness Act.

actions could proceed against Defendants based upon the same factual and legal predicates at issue here, so long as they are brought under the common or statutory law of one or more of the other 49 states. That result is untenable – it amounts to no settlement at all -- and is not supported by legal authority.

No more tenable would be the ability to assert claims for monetary damages or other forms of relief under state laws. It is well-settled that when the predominant relief sought by the class is injunctive in nature (and here it is not only predominant, it is the only remedy sought), the minimum statutory damage claims under state disability laws are considered incidental and do not preclude Rule 23(b)(2) treatment. Here, there was no claim for monetary relief at all; rather, broad injunctive relief was demanded and, through the Settlement Agreement, was accommodated. As such, Rule 23(b)(2) treatment is wholly appropriate and, by definition, does not require a right to opt out.

The Release here is standard fare, seeking no more and no less than would be expected and approved in any similar class action settlement, and the objections should be rejected.[2]

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[2] Both NFB and ACB state that they are organizations whose members are blind and thus likely Class Members. However, only class members have standing to object to a class settlement agreement. Fed. R. Civ. P. 23(e)(5). "Others lack the requisite proof of injury necessary to establish the 'irreducible minimum' of standing." *Paterson v. Texas*, 308 F.3d 448, 451 (5th Cir. 2002) (holding that the state of Texas lacked standing, even in a representative capacity, to object to class action settlement because it had not suffered an injury); *Smith v. Arthur Anderson LLP*, 421 F.3d 989, 998 (9th Cir. 2005). No Rule 23 certification process exists for approval of any person or organization to act as a "representative" of another person as objector. *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 473-75 (S.D. Fla. 2002) (denying standing to objector membership organization whose members were class members and had standing to object). Thus, at most, the Court can consider points raised by NFB and ACB by deeming these objectors as *amici*. *See, e.g., In re AOL Time Warner Shareholder Derivative Litigation*, 2010 WL 363113, *4, n.6 (S.D.N.Y. 2010). But even then, if the settlement is approved, neither NFB nor ACB, as neither class member or intervenor, will have a right to appeal. Because NFB and ACB are not class members and have no standing to object, any reference to them in this Memorandum as "objectors," or to their letter submissions as "objections," is merely for convenience.

II. THE COURT SHOULD REJECT THE OBJECTIONS AND GRANT FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

A. Standard Of Review.

"The initial decision to approve or reject a class action settlement is committed to the sound discretion of the trial judge." *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir. 1982). The Court's decision must be made "in light of the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "[V]oluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice*, 688 F.2d at 625. A class action settlement should be approved when it is fundamentally fair, reasonable and adequate. *Id.*

In undertaking such a review, the trial court should not "reach any ultimate conclusions on the contested issues of fact or law which underlie the merits of the dispute for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlement." *Id.* "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. Of course, the very essence of a settlement is compromise. . . ." *Id.* "Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximation and rough justice.'" *Id. citing City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974). Applying these standards to the facts and circumstances surrounding this proposed settlement establishes beyond any doubt that the parties have reached a settlement that is fair, reasonable and adequate.

B. Future Claims.

The objectors have mischaracterized the final sentence of the release to "preclude[] class members from bringing *any* future claims for discrimination," (emphasis added). (NFB Objection at 2; ACB Objection at 2.) It does no such

thing:

> This release is intended to bind all Settlement Classes and Class Members and to preclude such Class Members from asserting or initiating future claims *with respect to the issues in this Action or the subject matter of this Settlement Agreement.*

(Settlement Agreement (Doc. No. 196-1) at 27 (emphasis added).) Thus, their concerns about giving up inchoate future claims unrelated to the issues here are entirely unfounded. Defendants have not sought, and have not received, anything approaching a "license to discriminate in the future." (NFB Objection at 2; ACB Objection at 2.) As the plain wording of the release makes clear, it simply precludes future claims premised on the same factual or legal predicates as the underlying claims in this case.

As such, the release of future claims is not only fair and reasonable, it is well-supported by legal precedent. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006) (affirming dismissal of a class action against credit card companies predicated on the same injuries claimed and settled in an earlier class action). Indeed, "federal class action settlements routinely include releases waiving future claims." *Ass'n For Disabled Americans,* 211 F.R.D. at 471 n.10; *see also McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1254 (11th Cir. 2001) (approving release of future claims in tobacco litigation); *Williams v. General Elec. Capital Auto Lease, Inc.,* 159 F.3d 266, 274 (7th Cir.1998) (". . . nothing in the Supreme Court's *Amchem* decision suggested that the federal courts lacked the Article III power to settle future claims of class members. . . . It is not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other."); *In re Orthopedic Bone Screw Prods. Liability Litig.,* 176 F.R.D. 158, 170-71 (E.D. Pa. 1997) (certifying class including "[a]ll persons and entities wherever located, who have or may in the future have any claim" against defendants).

Likewise, courts have routinely upheld releases by future class members. As

the Ninth Circuit has observed, "The inclusion of future class members in a class is not itself unusual or objectionable." *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010); *Californians for Disability Rights, Inc. v. California Dep't of Transp,* 2010 WL 2228531, *3 (N.D. Cal. June 2, 2010) (certifying a settlement class defined as "all persons with Mobility and/or Vision Disabilities who currently or *in the future* will use or attempt to use any Pedestrian Facility or Park and Ride Facility under Caltrans' Jurisdiction" (emphasis added)); *Neff v. Metro Transit Authority,* 179 F.R.D. 185, 193 (W.D. Tex. 1998) (approving class action settlement consisting of a class of current and future individuals with disabilities "who are eligible now or may be eligible in the future for defendant's transportation); *Siddiqi v. Regents of Univ. of Cal.,* 2000 WL 33190435, *4 (N.D. Cal. Sept. 6, 2000) (certifying a class of "[a]ll deaf and hard of hearing students who since February 24, 1996 have enrolled or *will enroll* as a student...." (emphasis added)); *Crawford v. Gould,* 56 F.3d 1162, 1163 (9th Cir. 1995) (certifying class of current and future patients involuntarily committed to California psychiatric hospitals).

Indeed, courts have reasoned that because relief obtained in a Rule 23(b)(2) class action seeking primarily injunctive relief necessarily inures "to the class as a whole" (Fed. R. Civ. P. 23(b)(2)), "unknown future class members should be properly considered and included as part of the class." *Neff,* 179 F.R.D. at 193. If not included, future class members would present the prospect of "unnecessary harm and repetitive litigation" because they would be free to challenge the actions agreed to by the parties to apply to the class as a whole. *Dixon v. Bowen,* 673 F. Supp. 123, 127 (S.D.N.Y. 1987).

C. State or Local Law Claims.

The same rationale supports the release of state and local law claims that were not specifically asserted in the action. Without a release, a class action defendant would never find peace, remaining vulnerable to claims under every legal

theory under federal, state or local law other than the ones exactly articulated in the class action complaint. This is why any effective release secured in any litigation always extends beyond the claims stated and covers claims "based on the identical factual predicate as that underlying the claims in the settled class action. . . ." *Class Plaintiffs*, 955 F.2d at 1287-89; *Matsushita Elec. Indus., Co. Ltd. v. Epstein*, 516 U.S. 367, 376-77 (1996); Oswald *v. McGarr,* 620 F.2d 1190, 1198 (7th Cir. 1980) (settlement may include release of claims not before the court). Indeed, "federal class action settlements containing a release of state law claims are both common and presumptively valid." *Ass'n For Disabled Americans,* 211 F.R.D. at 471 (approving ADA consent decree that likewise released all claims under state disability access laws); *see TBK Partners, Ltd. v. Western Union Corp.,* 675 F.2d 456, 460 (2d Cir. 1982) (approving 23(b)(2) shareholder class action settlement also releasing state law appraisal claims).

Objectors' reliance upon *Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981) to suggest that under federal authority the scope of a release is limited to the claims specifically pled in the complaint is unavailing. In *Nat'l Super Spuds*, the court certified a class of individuals who purchased potato futures liquidated during a specified time. *Id.* at 11. The class did not include holders of unliquidated contracts, and the complaint did not include claims on their behalf. The settlement sought to release claims related to liquidated and unliquidated contracts, and when holders of the unliquidated contracts objected, the court did not approve the settlement. *Id.* at 16-19. But as later Second Circuit decisions have explained, the "heart" of the court's concern in *Super Spuds* was "the danger that class representatives not sharing a common interest with other class members would sacrifice the interests of those class members at no cost to themselves." *Anderson v. Nextel Retail Stores, LLC,* 2010 WL 8591002, *9 (C.D. Cal. April 12, 2010) (citing *TBK Partners Ltd v. W. Union Corp.,* 675 F.2d 456 (2nd Cir. 1982)). That concern is totally inapplicable here: the Settlement

Agreement releases only claims of visual disability discrimination common to all class members, regardless of the statute, regulation, common law or legal theory under which such claims are made.

D. Incidental Damages Claims.

In addition to the more general complaint that the release might be read to preclude future claims based upon unpled state statutory schemes (discussed above), the objectors complain also that, under the release, "absent class members would waive their rights to seek available forms of relief under state or local law, including substantial monetary relief." More specifically, the objectors assert that the release of class [sic] member's claims with no compensation or opportunity to opt out is patently unfair." (NFB Objection at 4.) However, there is no opt-out right in Rule 23(b)(2) class actions such as this, where injunctive relief predominates over the monetary claims. *See, e.g., Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541, 2558 (2011) (Because "the relief sought must perforce affect the entire class at once," it is a "mandatory class[]: The Rule provides no opportunity for …(b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action.").

When the principal (here, the only) remedies are injunctive in nature, the minimum statutory damages claims under state disability laws such as the Unruh Act and the Disabled Persons Act are considered incidental to injunctive relief and do not preclude Rule 23(b)(2) treatment. For example, in *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 123 (C.D. Cal. 2008), a class of users of wheelchairs or scooters for mobility alleged that they were unable to access parking lots, restrooms and counters at Ralph's store locations. *Id.* at 115. Plaintiffs sought an injunction "ordering Ralph's to adopt policies to ensure access for customers who use wheelchairs or scooters, and use its centralized policies to bring all of its stores into compliance," as well as "minimum statutory damages per offense." *Id.* at 117. The court certified the class as a Rule 23(b)(2) class, finding that the claims for

"minimum statutory damages" were incidental to the claim for injunctive relief. *Id.* at 118 ("where plaintiffs seek minimum statutory damages in addition to injunctive relief to remove access barriers, courts have considered damages incidental to injunctive relief and certified a class under Rule 23(b)(2)".) *See also Moeller v. Taco Bell*, 220 F.R.D. 604, 613 (N.D. Cal. 2004) (certifying Rule 23(b)(2) class in disability access case) ("[Plaintiffs] are seeking only the statutory minimum of damages under the Unruh Act and the CDPA. [footnote omitted] The Court cannot say that Plaintiffs' claims for monetary damages predominate over its claims for injunctive relief."); *Williams v. City of Antioch*, 2010 WL 3632197, *10 (N.D. Cal. Sept. 2, 2010) ("Plaintiffs' claims under Cal. Civ. Code § 52 for statutory minimum damages for the class and compensatory damages for the five named Plaintiffs, while significant in terms of monetary amount, do not preclude Rule 23(b)(2) certification because the predominant form of relief Plaintiffs seek by this action, as a whole, is injunctive relief to change Defendant's policies."). Therefore, in the absence of any claims for monetary relief and in the face of sweeping injunctive relief, it is easy to conclude that Rule 23(b)(2) treatment is appropriate here and, by definition, does not require a right to opt out.

Objectors point to the Ninth Circuit's decision in *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003), *overruled on other grounds in Dukes v. Walmart, Inc.*, 603 F.3d 571 (9th Cir. 2010), to support their contention that damages claims should not be released without the right to opt out. But *Molski* expressly rejects such a *per se* rule. *Id.* at 948-49 ("we disagree that [*Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)] requires adoption of this per se rule, . . ."). Instead, the *Molski* court reasoned: "[T]he Supreme Court did not adopt a per se rule requiring due process protections for absent class members when *any* monetary damages are claimed . . . Moreover, we have implicitly refuted Appellants' argument for the adoption of a per se rule. In recent cases, we have indicated that certification of a mandatory class [*i.e.*, with no opt-out right] may be appropriate *even when*

monetary damages are involved.") (emphasis added); *see also id.* at 947 ("we have recognized that '[c]lass actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages'").

Rather than create a new rule that the right to opt out must be given when *any* monetary damages are sought, the *Molski* court applied the existing rule concerning the application of Rule 23(b)(2) -- *i.e.*, that Rule 23(b)(2) applies when injunctive relief is sought, but "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." *Molski*, 318 F.2d at 947 (*citing* Fed. R. Civ. P. 23(b)(2) advisory committee's note (1966) (emphasis added)). The Court further noted that in determining whether the monetary damages claims in a particular case are sufficiently substantial to be deemed "non-incidental" and thus not suitable for Rule 23(b)(2) treatment, courts do not apply a bright-line test but rather have the discretion to consider the particular facts of each case. *Id.* at 950 ("Rather than adopting a particular bright-line rule, we have examined the specific facts and circumstances of each case.").

Ultimately, the *Molski* court withheld approval for the settlement in that case because the damages claims were not incidental. Unlike here, the *Molski* court was presented with a situation where actual and treble damages were at issue and 33 putative class members filed objections and requested to opt out of the class and pursue individual damages. The settlement in that case was the product of minimal discovery and a short period of negotiations between the parties, and was reached prior to formal class certification, thus calling for greater scrutiny. *Id.* at 955-56. Those facts and the resultant holding are readily distinguishable from the instant case. In contrast to the *Molski* court's express reliance on the substantial damages being sought against ARCO (*Molski*, 318 F.3d at 950-51), Plaintiffs here solely seek injunctive relief. Therefore, the Court's holding in *Molski* is neither binding nor even instructive in this case.

NFB's reliance on *Petruzzi's, Inc. v. Darling-Delaware Co., Inc.*, 880 F. Supp. 292 (M.D. Pa. 1995) is also misplaced. In *Petruzzi,* a supermarket brought a class action against fat and bone companies for restraint of trade in violation of the Sherman Antitrust Act. *Id.* at 293. The settlement there sought a release of all claims against one of the two remaining fat and bone companies, but provided benefits to some, but not all, class members. As a result, the release would have left many class members without a remedy. *Id.* at 300. Unlike the plaintiffs in *Petruzzi,* the injunctive relief in this case will benefit all current and future class members, who are not seeking monetary damages. As such, they are not being asked to release claims without significant benefits.

III. CONCLUSION

For the reasons set forth above, the Parties respectfully request the Court reject the objections and grant final approval of the proposed Settlement Agreement.

Dated: July 20, 2012

Respectfully submitted,

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