UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL HARRIS and KARLA HUDSON,

Plaintiffs,

v.

Case Number 14-13630
Honorable David M. Lawson

WAYNE COUNTY AIRPORT AUTHORITY,

Defendant.
_____/

OPINION AND ORDER DENYING MOTION TO ENFORCE SETTLEMENT AGREEMENT

This matter is back before the Court on the plaintiffs' motion to enforce the terms of a settlement agreement that the parties entered into last fall, in order to effectuate a compromise of the plaintiffs' claims brought under the Americans With Disabilities Act. The case focused on the facilities of the Ground Transportation Center (GTC) at the Detroit Metropolitan Airport, and the accessibility of the airport terminal via those facilities to persons with disabilities who arrive at the airport by public transportation. The parties entered into a written settlement agreement, which, the plaintiffs allege, has not been performed fully by the defendant Airport Authority. The Court scheduled an evidentiary hearing on the present dispute, but also offered the parties the option to submit declarations, affidavits, and deposition transcripts in lieu of live testimony. The parties chose the latter option and the Court heard oral argument from counsel on April 28, 2015. The Court has reviewed the twenty declarations and affidavits submitted, as well as the parties' briefs. Although the plaintiffs have identified conditions that present difficulty to users of the GTC — particularly disabled users — they have not established that the defendant has violated the terms of the settlement agreement. Therefore, the Court will deny the motion.

I.

According to its strategic plan, the mission of the Wayne County Airport Authority is: "To operate safe, secure and dynamic air transportation facilities for our customers, creating economic vitality by providing global travel, cargo and business opportunities." The plaintiffs in this case are two persons with disabilities who have traveled through the Detroit Metropolitan Airport, arriving there by bus. They filed a complaint alleging that ground access by persons with disabilities is not "safe [and] secure." They filed their complaint on September 9, 2014, stating one count for violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132, and one count for violating Title V of the ADA, 42 U.S.C. § 12203(b). The plaintiffs sought to enjoin the defendant Airport Authority from relocating the pick-up and drop-off point for public transportation vehicles from a location just outside the international area of the airport's McNamara Terminal to a location outside and approximately 600 feet away from the indoor waiting area of the McNamara GTC.

Before the Airport Authority implemented the change in its procedure, busses that transported disabled travelers dropped off and picked up passengers near the international terminal door, which accessed the terminal proper. The change moved the bus pick-up and drop-off point to an area across a roadway from the terminal. The roadway is traversed by a pedestrian bridge, but the access point for the bridge is inside the GTC's enclosed lobby located 600 feet from the bus drop-off point.

The plaintiffs' motion for a temporary restraining order was denied, but the Court promptly scheduled the plaintiffs' motion for a preliminary injunction for an evidentiary hearing on October 17, 2014. The day before the hearing, the parties reached a settlement. On the date the motion was to be heard, they placed the essential terms of their compromise on the record. They later entered

into a written settlement agreement. The agreement was conditioned on execution of a parallel settlement and release agreement between the Airport Authority and two public transportation providers that would be affected by the move, which were Michigan Flyer and Indian Trails. Those entities executed the required release on November 4, 2014.

The original objective of the lawsuit was to compel the Airport Authority to reverse its decision to move the public transportation pick-up and drop-off point away from the international terminal. The settlement left the new location intact, but called for modifications apparently intended to cushion the impact of the change on persons with disabilities. Plaintiff Karla Hudson explained that her objective in entering into the settlement was to "create an environment that was safe for persons with disabilities and would offer similar protections from the harsh winter elements as existed at International Arrivals, albeit with a new and much longer walk."

Under the settlement agreement, the Airport Authority agreed to make a number of changes to the GTC area of the airport to improve accessibility and comfort for disabled passengers arriving or departing by public transportation. It appears undisputed that the airport completed most of the changes required by the agreement by the agreed deadlines. However, the plaintiffs maintain that the Airport Authority has failed to perform certain specific terms of the agreement, and that it made a critical, post-settlement change to operations at the GTC, which had the effect of substantially nullifying the benefit of other concessions made under the agreement.

A. Settlement Agreement

As to the remaining live points of disagreement between the parties, the settlement agreement states that the Airport Authority agreed to do each of the following:

> A. By November 17, 2014 the Defendant will cease using, and will remove from the pavement, the parking space one lane east of the New Spots [designated as pick-up and drop-off spots for use by public transportation at the GTC] so that the active loading and unloading of passengers occurs in the New Spots that are parallel and adjacent to the pedestrian path of travel only.
>
> . . .
>
> D. By December 15, 2014 the Defendant shall install heating elements within the three bus shelters most proximate to the New Spots such that a heating element is over the area of the shelters that do not have a bench that accommodates persons using wheelchairs.
>
> H. To allow disabled and non-disabled passengers to remain in the climate-controlled indoor waiting area of the GTC for as long as possible, the Defendant shall provide room for a customer service and information desk for Eligible Transportation Providers [such as Michigan Flyer], if those [providers] so choose to utilize such desk.

Settlement Agreement ¶¶ 1.A, 1.D, 1.H. Paragraph 1.H required the Airport Authority to make a number of other concessions to use of the proposed customer service desk by transportation providers, such as providing electrical power and data connections, and granting permits for the providers to install monitors to display route schedules. Those other contemplated arrangements are not at issue here.

The agreement provided that the parties released each other from all claims, known or unknown, relating to the pending litigation at the time of the agreement. However, it also reserved certain rights of both parties regarding future changes to the conditions at the airport:

> Nothing in this Settlement Agreement and Mutual Release limits the Defendant in any way from renovating any part of the Airport or changing the manner in which any part of the Airport operates in the future provided such changes are compliant with State and Federal law. However, the release of liability set forth in this [agreement] is limited to the present circumstances described [herein], and [] if the portions of the GTC subject to this Settlement Agreement and Mutual Release are materially altered in the future, the Plaintiffs are in no way waiving their rights to

> bring forth a subsequent action to compel enforcement of passenger accessibility mandated by state and federal law.

Agreement ¶ 3.

B. Claimed Breaches

The plaintiffs contend that the Airport Authority (1) failed to modify the "non-conforming slope" in a pedestrian walkway between "Door 401" and "Door 402" of the GTC; (2) failed to install or maintain heaters capable of effectively heating the outdoor bus shelters at the GTC; (3) failed to maintain the conditions of the "climate controlled waiting area" in the indoor part of the GTC, the availability of which was contemplated as a premise of the plaintiffs' agreement to compromise their claims; and (4) in an unanticipated change to GTC operations, began allowing certain buses operated by private carriers (but not public transportation vehicles operated by Michigan Flyer and Indian Trails), to load and unload directly outside Door 402, in an area that was (and evidently still is) striped and marked as a "no parking" and "no loading" zone.

The plaintiffs seek an order compelling specific performance of the settlement agreement in the following particulars:

> Specific performance of paragraph 1.F of the Settlement Agreement, modification of the non-conforming slope in the Pedestrian route between Door 402 and Door 401 as you walk towards the area designated for public transportation.
>
> Specific performance of paragraph 1.D of the Settlement Agreement, installation of heating elements that actually heat the shelters to a temperature sufficient to permit a person with a disability to wait safely in the shelter for Prospect assistance.
>
> Specific performance of paragraph 1.H of the Settlement Agreement, requiring that the waiting area inside the GTC be "climate controlled."
>
> Specific performance of paragraph 1.H of the Settlement Agreement, prohibiting the Defendant from utilizing the no-parking area outside of Door 402 as a de facto third parking space, rather than eliminating the third spot as the Agreement required, and consequently filling the GTC lobby with noxious fumes and cold air.

Plf.'s Mot. [dkt. #25] at 13. They also ask the Court to award them the attorney fees incurred in filing their motion.

One item appears to be no longer in dispute. Although the Airport Authority either resisted or was tardy in performing the contemplated modifications to the "non-conforming slope" on the walkway between Door 401 and Door 402, the plaintiffs' compliance expert Gary Talbot stated in his April 7, 2015 declaration that the modifications called for by the settlement agreement were performed, albeit after the December 31, 2014 deadline under the agreement, and not until after the plaintiffs filed their motion to enforce the settlement agreement. Mr. Talbot opined that "the modifications to the non-conforming slope made [in early April 2015] constitute the actual modification of this hazard that was required by December 31, 2014." Because the only substantive remedy sought by the plaintiffs is specific performance of the agreement, and it appears undisputed that this term of the agreement now has been fully performed, the Court will dismiss that part of the motion as moot. The other items, however, require attention.

II.

As the Sixth Circuit has explained, a district court possesses the inherent power to enforce the terms of a settlement agreement entered into by the parties to litigation:

> It is well established that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them. A federal court possesses this power even if that agreement has not been reduced to writing. Before enforcing settlement, the district court must conclude that agreement has been reached on all material terms. The court must enforce the settlement as agreed to by the parties and is not permitted to alter the terms of the agreement.

Brock v. Scheuner Corp., 841 F.2d 151, 154 (6th Cir. 1988) (quotations and citations omitted). "Settlement agreements are a type of contract and are therefore governed by contract law." *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992). "'The construction and

enforcement of settlement agreements are governed by principles of the state's general contracts law.'" *Ibid.* (quoting *Wong v. Bailey*, 752 F.2d 619, 621 (11th Cir. 1985)).

Under Michigan law, when construing a contract or one of its provisions, the intentions of the parties govern. *First Nat. Bank of Ypsilanti v. Redford Chevrolet Co.*, 270 Mich. 116, 121, 258 N.W. 221, 223 (1935). The first objective is to "honor the intent of the parties," *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 127 n.28, 517 N.W.2d 19, 29 n.28 (1994), and the prime source of that intent is the plain language of the agreement, *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 61, 664 N.W.2d 776, 787 (2003) ("Well-settled principles of contract interpretation require one to first look to a contract's plain language."). If the language is "clear and unambiguous," the Court need look no further. *Haywood v. Fowler*, 190 Mich. App. 253, 258, 475 N.W.2d 458, 461 (1991).

"'Where the language of the writing is not ambiguous the construction is a question of law for the court on a consideration of the entire instrument.'" *In re Landwehr's Estate*, 286 Mich. 698, 702, 282 N.W. 873, 874 (1938) (quoting *Griffin Mfg. Co. v. Mitshkun*, 233 Mich. 640, 642, 207 N.W. 814, 814 (1926)). A contract is unambiguous if it "fairly admits of but one interpretation." *Allstate Ins. Co. v. Goldwater*, 163 Mich. App. 646, 648-49, 415 N.W.2d 2, 4 (1987). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood*, 190 Mich. App. at 258, 475 N.W.2d at 461; *see also Dillon v. DeNooyer Chevrolet Geo*, 217 Mich. App. 163, 166, 550 N.W.2d 846, 848 (1996) ("Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided."). The Court should "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract

surplusage or nugatory." *Klapp v. United Ins. Grp. Agency, Inc.* 468 Mich. 459, 468, 663 N.W.2d 447, 453 (2003).

If "the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Port Huron Educ. Ass'n MEA/NEA v. Port Huron Area Sch. Dist.*, 452 Mich. 309, 323, 550 N.W.2d 228, 237 (1996). Where the terms of a contract are ambiguous, the Court must look to extrinsic facts along with the terms of the agreement to determine the parties' intentions. *Klapp*, 468 Mich. at 663 N.W.2d at 454. However, disagreement among the parties as to the meaning of a contract term does not necessarily create ambiguity as a matter of law, *Steinmetz Elec. Contractors Ass'n v. Local Union No. 58 Int'l Bhd. of Elec. Workers, AFL-CIO*, 517 F. Supp. 428, 432 (E.D. Mich. 1981), and courts should not read an ambiguity into an agreement where none clearly exists, *UAW-GM Human Res. Center v. KSL Recreation Corp.*, 228 Mich. App. 486, 491, 579 N.W.2d 411, 414 (1998) (citing *Smith v. Physicians Health Plan, Inc.*, 444 Mich. 743, 759, 514 N.W.2d 150, 163 (1994)).

The remedy sought by the plaintiffs through the present motion is specific performance of the settlement agreement. "Specific performance is an equitable remedy which may not be claimed as a matter of right." *Edidin v. Detroit Econ. Growth Corp.*, 134 Mich. App. 655, 660, 352 N.W.2d 288, 291 (1984). "Specific performance will not be decreed where enforcement of the decree would require continuous judicial supervision, or where there is an adequate remedy at law." *Ibid.* "Furthermore, the material terms of the agreement must be sufficiently certain so as to ensure that the court can 'proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed.'" *Id.* at 660-61, 352 N.W.2d at 291 (quoting *Czeizler v. Radke*, 309 Mich. 349, 358, 15 N.W.2d 665, 669 (1944)). However, "[a] court of equity in granting specific

performance may grant in its decree for specific performance such additional or incidental relief as is necessary to adequately sort out the equities of the parties." *Brotman v. Roelofs*, 70 Mich. App. 719, 732, 246 N.W.2d 368, 374 (1976) (citing *Van Camp v. Van Camp*, 291 Mich. 688, 289 N.W. 297 (1939); *Klais v. Danowski*, 373 Mich. 281, 129 N.W.2d 423 (1964)).

A. Bus Shelter Heaters

The plaintiffs argue that the intent of the agreement has been frustrated because the bus shelter heaters are demonstrably inadequate to provide sufficient heat in the shelters during severe cold conditions, when it are most needed. The parties do not dispute that heaters were added to the outdoor bus shelters over the wheelchair accommodating areas (the areas where benches previously had been removed). However, the plaintiffs' expert, Gary Talbot, reported that the air temperature in these occupied shelters was observed to be as low as 28 degrees during the winter, even with the heater on. The defendant conducted its own temperature measurements in the bus shelters, but instead of measuring the air temperature, as plaintiffs' expert did, the defendant's employees measured the surface temperature of a person's jacket, who was sitting in a wheelchair under the activated heating element. By that method, the defendant observed a clothing surface temperature of between 38 and 48 degrees in the three shelters, when the measured temperature of the unheated concrete floor of the shelters ranged between 23 and 28 degrees.

Mr. Talbot described this procedure as "junk science" and explained that it cannot reliably indicate the temperature in the bus shelters, because there would be no way to distinguish between heating of the clothing due to body heat of the person wearing it as compared to the heat from the overhead mounted heating element. Defense witness Tom McCarthy asserts that the procedure the defendant used was appropriate and valid, because the type of heaters used are quartz-element

"infrared" heaters, that "heat[] solid objects, not the air." McCarthy explained that the heaters specifically are designed not to heat air (which absorbs very little of the infrared radiation), but to deliver heat directly to people and objects near them, so the heaters would be expected to work fully well even where the air temperature remains low.

Even if radiant heaters were up to the task, Oded Norkin, vice president of Michigan Flyer, LLC, stated that "as of February 2, 2015, one of the shelters had only one working heater." Diane Moore, an employee of Prospect Services (a service provider that assists disabled passengers at the airport, under a contract with Delta Airlines), also reported that on February 16, 2015 "[s]everal Michigan Flyer customers complained to me that the heating element in one of the bus shelters would not turn on." The defendant contends that it never received any notice that any of the heaters were broken.

Jason Balk — a customer service agent of Michigan Flyer who works at the GTC counter location — stated that "[o]n multiple occasions, [he] saw passengers with disabilities forced to wait in [the] cold temperatures for Prospect Services for up to thirty minutes." Defense witness Dale Walker responds that "[a]lthough the response time can vary depending on the wait time for elevators, it would typically take a Prospect employee approximately five minutes to travel with a wheelchair from [their usual location at] a booth in the terminal to the public bus stops in the GTC."

The complaints registered by the plaintiffs appear to address two issues: provision of the promised equipment, and maintenance. The settlement agreement, by its terms, deals only with the former. The plaintiffs have not established that the defendant has failed to perform any specific material term of the agreement regarding installation of the bus shelter heaters. It is undisputed that the defendant has installed the second heating elements that the agreement specified, which extend

over the non-benched area of the shelters intended for use by persons in wheelchairs. The plaintiffs contend that the heaters installed are ineffective, but it appears undisputed that they are the same type that already were present over the benched portions of the same shelters. Moreover, the agreement does not set forth any specific, discernible terms regarding "effectiveness" of the heaters, such as any minimum temperature that must be maintained within the shelters. And the expert evidence is conflicting as to how well the heaters actually work. Based on the product literature furnished by the defendant, it appears that radiant heaters are commonly used in open-air applications, where the objective is to warm individuals by means of heating objects instead of the ambient air. It is plausible that infrared heaters of this type could provide adequate perceived and felt heat for a person standing under them, notwithstanding a much lower temperature of the surrounding air. It is also plausible that a very low air temperature still might expose passengers (particularly those in wheelchairs, with diminished sensation in their feet) to serious hazards.

Nevertheless, there is no intelligible standard set forth in the agreement describing any temperature that must be achieved in the shelters. Therefore, beyond requiring the installation of the heaters, the agreement is not "sufficiently certain so as to ensure that the court can 'proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed.'" *Edidin*, 134 Mich. App. at 660-61, 352 N.W.2d at 291. Moreover, the fact that the agreement only required additional heating elements to be installed to cover the full length of the shelters, and that it did not specify anything about their type or capabilities, strongly suggests that the parties intended installation of additional units of the same type already installed to constitute acceptable performance.

The plaintiffs contend that the heater in at least one shelter was broken on two or three occasions, but the defendant insists that it never was given notice of those failures. Even if the heaters were broken on a couple of occasions during the cold weather, that does not appear sufficient to support a finding that the defendant has not substantially performed its duty to install the heaters. And because the plaintiffs have not identified any heaters that currently are known to be inoperative, there is no performance that the Court could order.

Of course, the problem could be alleviated if the drop-off spots for the busses transporting disabled passengers were located closer to the entrance of the GTC enclosed space. It appears that the Airport Authority chose instead to direct those busses to drop-off spots that are the farthest point away from those doors. That choice does not seem to be consistent with an objective to operate a "safe, secure and dynamic air transportation facilit[y] for [its] customers." But the placement of the so-called "new spots" appears to be the product of the parties' negotiations, which is beyond the considerations of this motion. Perhaps rethinking the problem and revisiting other solutions might be in order.

B. Loading and Unloading Outside Door 402; Temperature Issues

The plaintiffs assert that, shortly after the parties concluded their settlement, the Airport Authority made an operational change at the GTC by starting to allow certain buses operated by private companies, but not public transportation providers such as Michigan Flyer, to load and unload passengers directly outside Door 402, which is a sliding door between the indoor GTC waiting area and the outside sidewalk. At the time the parties entered into the settlement, this area was striped as a no-parking and no-loading zone, and the plaintiffs contend that under the operational rules then in effect, no buses were allowed to load or unload directly outside Door 402.

Although the area still is striped with that designation, defense witness Matthew McGowan asserts that the Authority "has always used the curb outside Door 402 as an overflow spot for charter buses, over-height vehicles, and smaller shuttle buses." However, Oded Norkin explained that:

> From 2006-2010, this space was not striped and was designated for Michigan Flyer and other transportation companies as a pick-up/drop-off zone.
>
> In 2010, Former Airport Deputy CEO Jack Vogel forced Michigan Flyer and all other bus carriers out of this location, stating that loading in that space forces the door to remain open for prolonged periods of time, which allows cold air and vehicle fumes into the GTC waiting area, and use of Door 402 creates excessive pedestrian congestion, causing a safety hazard as the line of passengers waiting to board the buses blocks the exit.
>
> In 2010 the area outside Door 402 was striped as a no-parking and no-loading zone, and it remains striped that way today.
>
> Immediately following the execution of the Settlement Agreement on October 17, 2014, instead of eliminating the third drop-off space for Public Transportation pursuant to the Agreement, the Airport began allowing some buses that would otherwise be required to park at the south end of the GTC, but not Michigan Flyer, to use the no-parking and no-loading space.

Norkin decl. ¶¶ 37-40.

Jason Balk, a Michigan Flyer counter service employee, stated that during January and February, "because of the frigid temperatures I experienced while working in the indoor waiting area of the GTC, I had to wear three to four layers of clothing to work, including thermal underwear, sweat pants, several shirts, a jacket, and knit caps." Balk stated that cold temperatures prevailed in the GTC not only due to the use of Door 402, which caused it to remain open much of the time, but also because the revolving door (Door 401), "[broke] down and remain[ed] stuck in the open position on several occasions since December 2014, which floods the indoor area of the GTC with cold air." Balk kept a thermometer on the counter where he worked and recorded temperatures at various hours on more than 30 days between January 7 and March 5, 2015. The temperatures ranged

from a low of 28 degrees at noon on February 15, 2015 to a high of 68 to 70 degrees "all day" on January 19 and 20, 2015. The observations included extended periods where the indoor temperature was in the 40s or high 30s, such as on January 10, 2015 between noon and 9:00 p.m., February 15, 2015 between noon and 8:00 p.m., February 18, 2015 between 3:00 and 8:00 p.m., and during similar periods on February 20th, 23rd, and 24th.

The defendant responds that, notwithstanding the nominal temperatures observed in the GTC, the area is served by numerous heating devices, and according to Tom McCarthy, the temperatures recorded inside were "well above the outside temperatures, generally by forty degrees or more."

Finally, several of the plaintiffs' witnesses contend that the defendant "concealed" an engineering report from them that concluded that substantial upgrades to the heating in the GTC were needed in order to maintain "climate controlled" conditions effectively in that part of the airport. They represent that had they known of these problems they would not have entered into the settlement agreement. The defendant responds that it did not "conceal" either the need for, or its existing plans to make, upgrades to the configuration and heating systems of the GTC, in order to address the challenges of maintaining comfort in the space during the extreme cold events that have occurred during recent years. Defense witness Michael J. Rudzinski asserts that planned upgrades to the GTC for this purpose are in the process of receiving funding approval, and that the Fiscal Year 2015 budget for the airport, which was discussed at an open public meeting on August 21, 2014 and was approved on September 18, 2014, "expressly lists this improvement project." The budget, which is available on the defendant's website, describes the "Ground Transportation Center Heating System Reconfiguration" as follows:

> Ground Transportation Centers, due to their function and level of use create challenges for maintaining sufficient heating during extreme cold events. Both customer comfort and facility utilities may be affected. The Authority, through this project, seeks to upgrade the heating system in the Ground Transportation Center at both terminals.

Rudzinski decl., Ex. A, Fiscal Year 2015 Budget at 7.

The plaintiffs have not established that the use of the area outside Door 402 for loading and unloading constitutes a failure of performance of the defendant's obligation to "cease using, and [] remove from the pavement, the parking space one lane east of the New Spots so that the active loading and unloading of passengers occurs in the New Spots that are parallel and adjacent to the pedestrian path of travel only." The plain terms of that provision do not indicate that the removal of the third parking space had anything to do with maintaining particular conditions of comfort in any waiting area. Instead, this provision appears to have been addressed to the concern that use of the third space could endanger disabled passengers by forcing them to cross a lane of traffic and pass between parked buses in order to reach the curb. The plaintiffs have not shown any way in which the defendant's performance failed to achieve that objective.

It may be true, as the plaintiffs assert, that the Door 402 loading zone was not in use (or at least not in regular use) before the agreement. But even if that is the case, the agreement does not contain any provisions addressing the use or non-use of that area, and it expressly reserves to the defendant the right to change the use of any part of the airport. The plaintiffs point out that they reserved the right to bring future actions to compel compliance with state or federal law if the use of the GTC was materially altered. But they have not explained how, if at all, the use of Door 402 violates any state or federal law. And they have not established that the area outside Door 402 was

a "portion[] of the GTC subject to this Settlement Agreement and Mutual Release," that was "materially altered" by the change in usage.

The use of the area for loading and unloading certainly seems to have had a significant effect on the conditions in the GTC. But nothing about that use establishes that the defendant failed to perform the specific, agreed upon duty, which was simply to "remove" and "cease using" the third parking space in the area around the spots designated for public transportation pick-up and drop-off. And the enforcement of the plaintiffs' desired relief — ordering the defendant to stop using the area outside Door 402 — would require the Court to invent and apply a term that was not expressed in the original agreement, regarding usage of an area that was not mentioned in its provisions.

The plaintiffs also have not shown that the defendant has failed to perform any specific duty imposed under paragraph 1.H of the agreement, which only explicitly requires the defendant to provide a "customer service desk" in the GTC indoor waiting area. As to the duty to provide "provide room for a customer service and information desk for Eligible Transportation Providers [such as Michigan Flyer], if those [providers] so choose to utilize such desk," it appears undisputed that the defendant fully has performed (although the parties also appear to have a disagreement, which appears to be somewhat beyond the scope of the agreement, about allowed signage in the desk area). The plaintiffs contend that this change in operations at the GTC frustrates the intent of the agreement to provide a "climate controlled" area inside the GTC where disabled passengers can wait. However, as with the temperature conditions of the bus shelters, the agreement contains no intelligible standard to which the Court could order the defendant to conform in maintaining any particular conditions in the GTC area. Paragraph 1.H does not specify any tangible set of conditions that the defendant must maintain in the GTC, and it does not even explicitly require the defendant

to keep the GTC in a "climate controlled" condition; although that certainly seems to have been a circumstance that the parties assumed would prevail in the area, as a premise of their entry into the agreement.

Nevertheless, it does seem a worthy question why, if the defendant now allows other buses to load and unload outside Door 402, it does not extend the same usage to Michigan Flyer, which evidently is the service most used by disabled passengers. As the plaintiffs point out, if loading and unloading outside Door 402 generally is permitted, then that location now constitutes the "shortest accessible route," and it is a location that would allow disabled passengers to wait in the *relatively* more comfortable conditions of the inside GTC waiting area, while having immediate access to arriving buses, or being able to proceed immediately inside when dropped off. That result certainly would be consistent with the defendant's mission. However, the defendant's alternate choice does not contravene the settlement agreement reached in this case.

III.

It appears that the defendant has considerably frustrated the plaintiffs, if not the specific terms of the agreement, by making the change to usage of the Door 402 area. It also appears to be an open question whether the heaters installed in the bus shelters are as effective as the parties assumed they would be when they made the agreement. However, the plaintiffs have not shown that the defendant has violated or failed to perform any specific term of the settlement agreement reached last fall in this case, or that there is any relevant intelligible standard set forth under the agreement to which the Court could order the defendant to conform.

Accordingly, it is **ORDERED** that the plaintiffs' motion to enforce settlement agreement [dkt. #25] is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: July 27, 2015

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on July 27, 2015.

s/Susan Pinkowski
SUSAN PINKOWSKI