IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DAYS INNS OF AMERICA, INC., HFS INCORPORATED, RICHARD HAUK, KARLA HAUK, DAVID BAUMANN d/b/a CAD DRAFTING PLUS, and DOUBLE H ENTERPRISES, INC., Defendants.	)	Civil Action No. 96-5012

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS DAYS INNS OF AMERICA, INC. AND HFS INCORPORATED'S MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

I. INTRODUCTION

Despite undisputed evidence that they have participated in and exercised extensive control over the design and construction of several new Days Inn hotels that are inaccessible to individuals with disabilities, Days Inns of America, Inc. ("DIA") and HFS Incorporated ("HFS") contend that they bear no responsibility for those hotels under title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 through 12189 ("ADA"). Rather, they argue that responsibility for compliance with the ADA at Days Inn hotels rests only with Days Inn licensees like Richard and Karla Hauk. According to DIA and HFS, Congress' directive to end discrimination against individuals with disabilities does not apply to them: it is only the Hauks and others like them, DIA and HFS maintain, who must comply with the ADA, and take steps to ensure that new Days Inn hotels are accessible to all guests.

DIA's[1] argument rests on a fundamental misreading of the ADA and its legislative history. Despite DIA's protestations to the contrary, the ADA and its legislative history do not limit compliance with new construction requirements to those who own, operate or lease a new facility. To the contrary, Congress has made it illegal for any individual or entity to design and construct an inaccessible facility, whatever their relationship to the facility after its completion. In any event, even if DIA's reading of the ADA were correct, the United States has introduced abundant, undisputed evidence showing the ways in which DIA controls and directs the functioning of the hotels in its chain, such that DIA may fairly be held to "operate" those hotels within the meaning of title III.

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[1]As in the United States' Memorandum in Support of its Motion for Summary Judgment, defendants DIA and HFS are referred to collectively as DIA, unless the context requires otherwise.

In addition to its misreading of the statute, DIA advances a variety of other theories which, DIA insists, relieve it from any responsibility for ADA violations at new Days Inn hotels. For instance, DIA maintains that it has not ADA responsibility because it has assigned that responsibility to its licensees, under the terms of its license agreements. Even if those provisions of DIA's license agreements are valid, however, it is well established that the duty to comply with a federal civil rights law is not delegable. While such an assignment may give DIA an action against its licensees (whether for indemnification, contribution, or otherwise), it is no defense to an action under the ADA.

DIA also seeks to avoid liability by invoking state common law principles of agency. The government, however, has not advanced any claim based on an agency theory, or any other theory of vicarious liability. To the contrary, the United States has consistently maintained that, due to its extensive participation in and control over the design and construction of all new Days Inn hotels, including the Wall Days Inn, DIA has its own, independent responsibility to comply with the ADA's non-discrimination requirements. As the Wall Days Inn and numerous other new Days Inns demonstrate, DIA has consistently failed to meet that responsibility. Thus, the United States maintains that DIA is liable for its own violation of the ADA, not for some other person or entity's failure to comply with the statute.

II. COUNTERSTATEMENT OF THE CASE

DIA's statement of the case may be most remarkable for what it does not say. DIA offers no evidence to suggest that the Wall Days Inn or any other new Days Inn hotel is accessible to individuals with disabilities. DIA offers no evidence to contradict the United States' findings that

fourteen newly constructed Days Inn hotels, in eleven states (including the Days Inn hotel in Wall, South Dakota), fail to comply with the ADA's Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"), in numerous respects. DIA offers no evidence to deny that these violations of the Standards — which the United States found at every new Days Inn hotel it inspected — make it difficult or impossible for individuals with disabilities to gain access to the hotels and to use various features or elements of the hotel, subject individuals with disabilities to unequal treatment, and in many cases present significant safety hazards for individuals with disabilities. *See* United States' Memorandum in Support of its Motion for Summary Judgment ("U.S. Memorandum") at 2-6.

DIA's statement of the case also does not dispute the ways in which DIA participated in the design and construction of the Wall Days Inn, or the ways in which it participates in the design and construction of all new Days Inn hotels. *See* U.S. Memorandum at 7-12. DIA notes only that David Baumann designed the facility, that Double H Enterprises constructed it, and that both Baumann and Double H were hired by the Hauks. Memorandum of Days Inns of America, Inc. and HFS Incorporated in Support of Motion for Summary Judgment ("DIA's Memorandum") at 2. What is omitted is that it was DIA, acting through its salesman, Andy Anderson, who originally proposed to the Hauks that they build a new hotel, and who recommended Baumann and Double H to the Hauks. *See* U.S. Memorandum at 7-8. Baumann and Double H had worked on other Days Inn hotels previously, and had on-going relationships with Anderson. Id. at 8. DIA prepared a conceptual site plan for the hotel, which Mr. Hauk used to determine that the project was financially feasible, and prepared a projection of revenues and expenses for the hotel, which was provided to the bank to help secure financing for the project. Id. at 8-9. In designing

and constructing the hotel, Baumann and the engineer who designed the hotel's electrical and mechanical systems both referred to the Days Inn Planning and Design Standards Manual. Id. at 9. DIA reviewed preliminary architectural plans for the hotel, though it did not review those plans for compliance with the PDSM's barrier-free requirements. Id. at 9, 35. DIA monitored the progress of construction, and inspected the hotel upon its completion and several times since. Id. at 10. DIA offers no evidence to contradict any of these facts.[2]

Similarly, in discussing who "operates" the Wall Days Inn, DIA omits more facts than it includes. In conclusory fashion, DIA posits that Mr. Hauk makes significant decisions with respect to certain aspects of running the hotel. DIA's Memorandum at 2-3. DIA's Statement of Undisputed Material Facts ("DIA Facts"), while still largely conclusory, identifies several additional categories of functions that are included in the operation of a Days Inn hotel.[3] What DIA omits is that it exercises considerable control over virtually all of these areas, and other besides. *See* U.S. Memorandum at 25-34. For instance, DIA has complete control over marketing for hotels in the Days Inn chain, and under many of its many mandatory marketing

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[2]The closest DIA comes to disputing any of these facts is its statement that it was Baumann who designed the hotel, and Double H that constructed it, implying that it was only Baumann and Double H who designed and constructed the hotel. The inference that DIA wishes to draw, however, does not follow from the facts. For one thing, the facts clearly show that others were also involved in the design and construction of the hotel, including an engineering firm and various subcontractors (not to mention DIA). Indeed, DIA's own expert acknowledged that numerous individuals or entities "design" a building; the fact that an individual or entity does not do all of the design work for a facility does not mean that that individual or entity is not "designing" the facility. Deposition of Harold Dean Kiewel, ("Kiewel Dep."), Ex. 20, at 40-41, 127-29. (References to exhibits in the form "Ex. __" refer to exhibits provided with the United States' Statement of Material Facts.)

[3]These include: setting room rates, marketing, purchasing supplies and equipment, maintenance, keeping the premises in order, assuring the cleanliness of rooms, dealing with personnel issues, including hiring and firing employees, employee policies and compensation, and employee training, and keeping the hotel's books and records. DIA Facts ¶¶ 22, 23, 25. *See also* United States' Response to Days Inns of America, Inc. and HFS Incorporated's Statement of Material Facts ("U.S. Fact Response") ¶¶ 22, 23, 25.

programs, DIA sets room rates, or discounts for room rates. U.S. Facts ¶¶ 109-10. DIA determines what supplies and equipment must be provided at the hotel, and requires licensees to purchases some supplies from vendors approved by DIA. U.S. Facts ¶¶ 91.b, c, d, m; Wall License Agreement, Ex. 3, ¶ 15. DIA's Operating Policies Manual sets standards for maintenance, keeping the premises in order, cleanliness of rooms, and employee duties and uniforms. U.S. Facts ¶¶ 91.a, e, f, g, k, l, m. The Quality Assurance program scores hotels on their compliance with these requirements, and the results are published in the Sunburst rating system. U.S. Facts ¶¶ 92, 95-97, 103-04. The Hauks have modified their operating practices to comply with Days Inn requirements, and avoid QA deductions. U.S. Facts ¶¶ 101-02. DIA requires hotel managers and employees to attend DIA training programs. U.S. Facts ¶ 111. And the DIA license agreement specifies the form in which licensees must keep their books and records, and the financial reports they must provide to DIA, and allows DIA to audit their books at any time. U.S. Facts ¶ 88.d.

In addition to DIA's control over these aspects of hotel operations, the Days Inn "hotel operating system" and Days Inn system standards include various other areas of hotel operations. The Days Inn OPM — the licensees' "Bible" — sets requirements for the grooming and attire for hotel employees, hours of operation for the front desk, services that must be provided to guests (and the fees that may or may not be charged for them), guest safety and security, and the forms of payment the hotel must accept. U.S. Memorandum at 26-27. Through its license agreements, DIA also controls when and whether licensees may modify or renovate their hotels (including the authority to compel the Hauks to undertake renovations costing up to $320,000), and requires the Hauks and other licensees to participate in DIA's national reservations system, mandatory

marketing programs, and various training programs. Id. at 30-33. DIA also controls how its licensees respond to guest complaints. Id. at 33-34.

In sum, as Mr. Hauk put it, "[y]ou don't have any choice" — in order to stay in the Days Inn system, he is required to comply with the Days Inn operating requirements. R. Hauk Dep., Ex. 26, at 418. He identified numerous areas of daily hotel operations which are governed by Days Inn requirements, and testified that because of those requirements, he runs the Wall Days Inn differently than he does his other hotels. Id. at 167-68, 402-21.

III. ARGUMENT

A. Section 303 of the ADA Broadly Prohibits the Design and Construction of Public Accommodations and Commercial Facilities that are not Accessible to Individuals with Disabilities.

Section 303 of the ADA — the ADA's mandate requiring all newly constructed facilities to be fully accessible — applies to any party that controls or participates in the design and construction of a new public accommodation or commercial facility. *See* U.S. Memorandum at 12-25. Put differently, section 303 of the ADA defines a prohibited activity — discriminating against individuals with disabilities by designing and constructing inaccessible facilities — and makes it illegal for anyone to engage in that activity. DIA's argument that it is only illegal for some parties to engage in this activity fails to comport with the language, structure, purpose, and legislative history of title III and section 303 in particular.[4]

[4]In the course of its argument, DIA repeatedly attempts to distort the United States' position. *See infra* Part III.A.3. One of DIA's distortions however, requires special mention: DIA claims that United States "has acknowledged that, for a party to be liable under Section 303, the party's conduct must have resulted in an ADA violation." DIA's Memorandum at 36. In support of this claim, DIA cites the testimony of the United States' Rule 30(b)(6) designee, Ms. Elizabeth Savage, at page 199. That portion of Ms. Savage's testimony, however, simply

1. DIA's argument is inconsistent with the language, structure, and purpose of title III of the ADA.

As the United States argued in its memorandum in support of its motion for summary judgment, section 303 of the ADA is not limited to parties who own, lease, or operate public accommodations. *See* U.S. Memorandum at 16-23. In suggesting that section 303 is so limited, DIA fails to explain how its reading of the statute can be reconciled with the structure of title III, the language of section 303 itself, or with Congress' aim to ensure that all new facilities would be designed and constructed to be accessible.

The most serious flaw in DIA's argument is that DIA fails to recognize, much less address, the disparity in the scope of sections 302 and 303. While section 303 applies to both commercial facilities and public accommodations, section 302 applies only to public accommodations, and to private entities that own, lease, or operate public accommodations. *See* U.S. Memorandum at 17-20. Accordingly, limiting section 303 to the parties identified in section 302 would effectively eliminate coverage of all commercial facilities except those that happened to be owned, leased, or operated by a public accommodation. Throughout its argument, DIA attempts to avoid this problem by referring only to "owners, operators, lessors, and lessees," thus attempting to sever this portion of section 302's language from the words that follow — the words that limit section 302 to places of public accommodation. *See* DIA's

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does not address the issue, and certainly does not support DIA's claim. Nonetheless, DIA argues that an element of causation inheres in section 303: a party's conduct, according to DIA, must cause a violation of the Standards. Id. The United States has never taken such a position; section 303 includes no such requirement. If a party engages in the activity prohibited by the statute — the design and construction of an inaccessible facility — that party has violated the law, and can be held liable. Indeed, Ms. Savage specifically testified that causation is not an element of liability under section 303. Deposition of Elizabeth Savage ("Savage Dep."), Ex. 48, at 121. All that is required is a showing that the violation of the Standards at issue falls within the scope of the party's conduct. *See* U.S. Memorandum at 14-15.

Memorandum at 9, 10, 12-13 n. 10. Thus, DIA implies, but never explicitly says, that the "owns, leases (or leases to), or operates" language of section 302 should not only be carried over to section 303, but that in doing so, it should also be revised and expanded, to apply to both public accommodations and commercial facilities.[5] Given that DIA repeatedly claims to be relying on the "plain language" of the statute — *see* DIA's Memorandum at 8, 11, 12 — it is not surprising that DIA attempts to avoid this problem, rather than addressing it explicitly.

The closest DIA comes to addressing the discrepancy between section 302 and section 303 is in a footnote discussing Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175 (S.D. Fla. 1997). *See* DIA's Memorandum at 12-13 n.10. There DIA notes the "important distinction" between coverage of types of facilities and coverage of entities responsible for compliance. While this is certainly an important distinction, what DIA does not acknowledge is that section 302's coverage of entities is defined, at least in part, by types of facilities — namely, entities that own, lease (or lease to), or operate a place of public accommodation. Thus, while there is a distinction to be made between covered facilities and covered entities, the point (which DIA misses) is that coverage under section 302 is defined in terms of both entities and facilities, which is why that definition cannot be transferred to section 303, because section 303's coverage includes facilities not covered by section 302.

In addition to attempting to distinguish Johanson, DIA relies in various ways on Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1 (D.D.C. 1996). First, DIA looks to PVA for support for DIA's basic premise that section 303

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[5]As discussed below, when Congress had the opportunity to make precisely this choice — to apply the "owns, leases (or leases to), or operates" language to commercial facilities — it chose not to do so. *See infra* 12-15.

applies only to those parties who own, lease, or operate the facility in question. DIA's Memorandum at 12. The PVA opinion, however, like DIA, fails to explain how section 303's coverage of commercial facilities can be reconciled with section 302's coverage of parties who own, lease, or operate public accommodations. *See* U.S. Memorandum at 24-25. Indeed, it was precisely this problem that caused the Johanson court to come to the contrary conclusion. 963 F. Supp. at 1178.

Second, DIA relies on PVA (and other cases) for the proposition that the Department of Justice's interpretation of section 303 is entitled to no deference. *See* DIA's Memorandum at 11-12. As with other parts of its argument, however, DIA is responding to an argument the government has not made. The United States does not contend that the statute is ambiguous; our case does not rest on a claim of deference. To the contrary, the United States' position is that there is only one reading of the statute that is consistent with the language of both section 302 and 303, and with the structure, purpose, and legislative history of the Act.[6] Of course, were the Court nonetheless to conclude that the statute is ambiguous, then the interpretation of the statute by the agency entrusted with its enforcement is entitled to substantial deference. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (where Congress has not directly addressed the precise question at issue, "considerable weight

[6]It is DIA, not the United States, that argues that title III is ambiguous. Although it couches its argument in terms of "plain language," DIA's argument hangs together only if the language of section 302 is amended, to resolve the conflict between the scope of section 302 and 303. In particular — although DIA does not acknowledge it — implicit in DIA's argument is the suggestion that the language in section 302 making liable an entity that "owns, leases (or leases to), or operates a place of public accommodation" be amended to make liable an entity that "owns, leases (or leases to), or operates a place of public accommodation or a commercial facility." The plain language of the statute includes no provision whatever regarding entities that own, lease, or operate commercial facilities. Because the language of the statute does not address such parties, then it necessarily follows from DIA's argument that the statute is ambiguous, and the government's position is entitled to substantial deference.

should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").[7]

Third, DIA relies on the PVA in support of an argument that because section 303 makes it illegal to "design and construct" an inaccessible facility, an entity can be held liable only if it both designs an inaccessible facility, and constructs it inaccessibly. DIA's Memorandum at 12, n.9. DIA posits that the United States does not claim that it participated in the construction of the facility, and contends that this provides an additional basis for summary judgment. There are two problems with DIA's argument. First, as a matter of fact, the government does claim, and the undisputed facts show, that DIA both monitored the progress of the construction of the Wall Days Inn, and that it inspected the Wall Days Inn upon the completion of construction. *See* U.S. Facts ¶¶ 75, 76, 111.c.i. Second, as a matter of law, DIA's reading of the "design and construct" language of section 303 creates a large loophole. Under such a reading, so long as a facility is designed to be in compliance with the ADA, the owner and contractor can freely depart from the designs during construction and eliminate accessible features without violating the ADA, because the building is not both designed and constructed in violation. Such a result would

[7]As the agency charged with enforcement of title III of the ADA, the Department of Justice has consistently taken the position that all parties involved in the design and construction of new facilities must conform their involvement, whatever its scope, to the requirements of the ADA. *See, e.g.*, U.S. Department of Justice, Civil Rights Division, Public Access Section, THE AMERICANS WITH DISABILITIES ACT Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities, November 1993, Ex. 49, § III-5.1000 at 46.

effectively nullify section 303, and the PVA court simply does not address the issue. *See* 945 F. Supp. at 2.[8]

By including the term "design" in section 303, Congress made clear that it was concerned with more than just the end result of the process. If, as DIA and PVA suggest, the focus were really intended to be only on those parties who are ultimately responsible for the facility, it would have made far more sense for Congress to have omitted the word design from the statute altogether, and simply to have made it illegal to construct an inaccessible facility.[9] Congress, however, did expressly include the term "design" when describing the prohibited activities — *see* U.S. Memorandum at 20 — and neither DIA nor the PVA decision explains how inclusion of the design function can be squared with their reading of the statute. It is more faithful to the language of the statute, and better serves the purposes of the Act, to read section 303's use of the conjunctive "and" to make it unlawful to design an inaccessible facility as well as to construct an inaccessible facility.

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[8]Indeed, title III's remedial provisions allow private actions to be brought before a new facility is built inaccessibly. The Act specifically provides that an action may be brought by any person "who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section [303]." 42 U.S.C. § 12188(a)(1). That Congress authorized actions against buildings before they are completed — based, presumably, on nothing more than the designs for the facility — further demonstrates the importance Congress attached to insuring that those who design new facilities do so in compliance with the ADA. If DIA's reading of the statute were correct, many individuals and entities who design new facilities would be excluded from coverage.

[9]Alternatively, Congress could explicitly have limited the coverage of section 303 to those entities that exercise control over the facility, or over its design and construction. Indeed, as DIA itself points out, in title II of the ADA Congress did exactly that with respect to the design and construction of new rail facilities. 42 U.S.C. § 12161(6) (imposing obligations on public entities that "exercise[] control over the selection, design, construction, or alteration" of the facilities in question). DIA's Memorandum at 10-11. Though it clearly knew how to do so, Congress did not limit the coverage of section 303 to those entities who have ultimate control over the design and construction of new facilities.

Finally, DIA's (implicit) suggestion that the "owns, leases (or leases to), or operates" language should be detached from "a place of public accommodation" and applied to section 303, to cover both public accommodations and commercial facilities, is inconsistent with the purpose of section 303. As explained in the United States' memorandum in support of its motion for summary judgment, achieving the aims of section 303 is far more certain if its prohibition applies to all parties engaged in the activity in question (the design and construction of new facilities). *See* U.S. Memorandum at 21-24. DIA does not explain why Congress would go to the trouble to define an illegal activity (the design and construction of inaccessible facilities), and yet allow a multitude of parties to engage in that activity with impunity (parties including not just franchisors, but also architects, engineers, and contractors). Congress has not taken such an approach in other civil rights statutes, and DIA offers no reason to believe that Congress intended the ADA to be any different. *See* U.S. Memorandum at 23-24.[10]

2. The legislative history also makes clear that sections 302 and 303 of the ADA were intended to apply to different facilities, and different parties.

DIA correctly points out that sections 302 and 303 were at one time part of the same section. DIA fails to recognize, however, that the changes made to those sections after they were separated suggest that section 302 and 303 were specifically modified in ways that caused them to apply not just to different facilities, but also to different parties.

[10]Indeed, section 302 of the ADA itself demonstrates that Congress has continued to take the same approach here. As discussed below, *see* Part III.A.2, as the legislation neared enactment, the scope of section 302's coverage was expanded to include not just those parties who operate public accommodations, but the parties that own and lease them as well. In doing so, Congress brought within the coverage of section 302 every party that might conceivably have responsibility for, or be in a position to ensure compliance with, the various non-discrimination requirements of section 302.

In early versions of the ADA legislation introduced in the Congress, the provisions that now constitute sections 302 and 303 of the ADA were included in what was then Title IV, Public Accommodations and Services Operated by Private Entities. *See, e.g.*, S. 933, 101st Cong. Title IV (May 9, 1989); H.R. 2273, 101st Cong. Title IV (May 9, 1989). Provisions governing both existing facilities and new construction were included in that section 402, which set forth the "general rule" that "[n]o individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability." S. 933 at § 402(a); H.R. 2273 at § 402(a). In those bills, the term "public accommodation" was defined to include both places used by the general public as customers, clients, or visitors, and potential places of employment. S. 933 at § 401(2)(A); H.R. 2273 at § 401(2)(A). Neither the House nor the Senate bill contained any language regarding the owners, operators, lessors, or lessees of the covered facilities.

Later in 1989, title IV was renumbered as title III (though it was still titled Public Accommodations and Services Operated by Private Entities), and the requirements for new construction and existing facilities were separated into two sections: the obligations for existing facilities were left in what had been section 402 of the legislation (now renumbered to be section 302), and the requirements for new construction were moved to new section 303. *See* S. Rep. 116, 101st Cong., 1st Sess. 58-60, 68-69 (1989). At the same time, "potential places of employment" were eliminated from the definition of "public accommodation," so that the term (and new section 302) applied only to twelve categories of "privately operated entities." Id. at 58-59. New section 303 was made applicable to both public accommodations (as redefined) and potential places of employment. Id. at 68-69.

It was not until 1990, shortly before the ADA was finally adopted, that the language in section 302 concerning "privately operated entities" was replaced with the final language regarding entities who "own, lease (or lease to), or operate" public accommodations. *See* H.R. Rep. 485, Part 3, 101st Cong. 2d Sess. 11 (1990). Significantly, this new language was added only to section 302, and not to section 303. Indeed, it is quite clear that that language was not intended in any way to define the scope of section 303; to the contrary, the change in the language of section 302 was specifically intended to clarify the coverage of section 302 itself, to make clear that the parties covered by that section were not only those who operated public accommodations, but also those who owned and leased them. As the House Committee on the Judiciary explained:

> The Committee adopted an amendment which clarifies that the prohibition against discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," applies to "any person who owns, leases (or leases to), or operates a place of public accommodation."
>
> This amendment makes it clear that the owner of the building which houses the public accommodation, as well as the owner or operator of the public accommodation itself, has obligations under this Act. For example, if an office building contains a doctor's office, both the owner of the building and the doctor's office are required to make readily achievable alterations. It simply makes no practical sense to require the individual public accommodation, a doctor's office for example, to make readily achievable changes to the public accommodation without requiring the owner to make readily achievable changes to the primary entrance to the building.

Id. at 55-56.

At the same time that the "owns, leases (or leases to), or operates," language was added to section 302, section 303 was also amended. Its coverage, which previously had included public accommodations and "potential places of employment," was redefined to include public

accommodations and "commercial facilities." Unlike section 302, however, no language was added to section 303 to indicate that those who own, operate or lease the facilities in question were the only parties with responsibilities under section 303. Certainly, if Congress had wished to restrict section 303's coverage in that manner, it could have done so at the same time that it "clarified" the coverage of section 302. In sum, there can be little question that Congress deliberately chose to draft sections 302 and 303 differently, and intended them to apply to different kinds of activities, different categories of facilities, and different parties.

3. DIA's construction of section 303 — not the government's — leads to absurd results.

Despite DIA's insistence to the contrary, the United States' reading of section 303 of the ADA leads to perfectly reasonable results — it imposes liability on all parties who engage in an activity declared illegal by the Congress: the design and construction of inaccessible facilities. As discussed in the United States' memorandum in support of its motion for summary judgment, such an approach is entirely consistent with the results obtained under other civil rights statutes. *See* U.S. Memorandum at 23-24.

Indeed, although DIA asserts that is is "absurd" to hold a contractor or subcontractor liable for constructing an inaccessible facility, DIA does not explain why it considers such a result to be absurd. *See* DIA's Memorandum at 18-19. To the contrary, it is entirely logical for the parties who design and construct the building — the parties who are in the best position to ensure ADA compliance — to bear the responsibility for that compliance. Interestingly, while DIA suggests that it would be absurd to hold contractors liable under section 303, DIA does not

suggest that it would be absurd to hold architects liable. Presumably, DIA agrees with the government that it makes sense to hold architects liable for designing inaccessible facilities.[11]

In an another attempt to distort the government's position, DIA consistently ignores the limits inherent in the United States' claim under section 303, suggesting that the government would impose liability of "virtually unlimited scope." DIA's Memorandum at 19. DIA is simply wrong. The United States' theory of liability is limited in at least two ways. First, a party must in some way be involved in the design and construction of the facility. Thus, several of the examples of "absurdities" offered by DIA will never arise. *See* DIA's Memorandum at 18-19. For instance, the bank that makes a construction loan does not, without more, "design" the facility in any way, or "construct" the facility in any way, and thus has no responsibility under section 303. Similarly, the workers who deliver bricks and lumber to the construction site do not, without more, "design" the facility in any sense, or "construct" it, and they too are outside the reach of section 303. Second, although DIA refuses to acknowledge it, the United States has consistently maintained that the liability of any party involved in the design and construction of the facility is limited to the scope of that party's involvement in the design and construction. *See* U.S. Memorandum at 14-15.[12] The government simply does not seek, as DIA intimates, to hold a

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[11]Indeed, at one point DIA affirmatively took the position that both architects and contractors were subject to joint and several liability under section 303. *See* Letter dated April 12, 1995 from John Russell, President and Chief Operating Officer of Days Inns of America, Inc., to Mr. Richard Hauk, Ex. 47, at 1 ("Failure to design and construct the facility in accordance with [the ADA's architectural] standards will expose the owner, operator, lessor or lessee of the hotel, as well as the architect and construction contractors, to liability under the ADA to correct those deficiencies. Each of these parties is 'jointly and severally' liable." (Emphasis added.))

[12]Indeed, although DIA did not like the answers it got, and went to considerable lengths to try to confuse the issue, the United States Rule 30(b)(6) designee, Ms. Savage, testified quite clearly that "[y]our liability is coextensive with the scope of your involvement and participation." Savage Dep., Ex. 48, at 81. *See also* id. at 103 ("The test [under section 303] is that you are involved in the design and construction and that your liability is coextensive with the extent of your involvement.")

plumber responsible for failures to comply with the ADA throughout the facility, or to impose disproportionate liability on any party or individual.

Equally baseless is DIA's claim that the United States sets an impossible standard, by imposing liability on parties with no legal ability to insure ADA compliance. Under the government's view of the statute, no party has a responsibility that exceeds its authority. Rather, the responsibility borne by any party for compliance with section 303 of the statute is coextensive with that party's involvement in or control over the design and construction of the facility at issue. Thus, a building contractor is not made the guarantor of ADA compliance: if some feature or element of the project fails to comply with the Standards, the contractor might seek to have the owner make the necessary changes, but if the owner refuses, the contractor's responsibility is to refuse to do the work (or, put differently, to refuse to construct an inaccessible facility, or refuse to participate in the construction of an inaccessible facility). If the owner gets some other contractor to complete the facility in a way that does not comply with the Standards, the contractor that refused to do so has no liability (because that contractor did not construct, or participate in the construction of, an inaccessible facility). Similarly, if an architect is instructed by an owner to design a facility that does not comply with the Standards in some respect, and the architect cannot persuade the owner to do otherwise, the architect's responsibility is to refuse to do the work — to refuse to design an inaccesible facility. If the owner finds some other architect who will do the work, the first architect has no responsibility, because he or she did not design, or participate in the designing of, an inaccessible facility. What the architect and contractor may <u>not</u> do is to decide that whether the facility will comply with the ADA is entirely up to the owner, and go along with the owner's desire to design and construct a facility that will exclude or

discriminate against individuals with disabilities. That is, an owner's instruction to do something that violates the ADA cannot remove the architect or contractor from the ADA provision making it illegal to design and construct inaccessible facilities.[13]

The same rules apply to DIA. Like an architect or contractor, DIA may not ultimately be able to compel an owner to comply with the ADA — the owner could decide to breach or terminate its agreement with DIA[14] — such that DIA is not the guarantor of ADA compliance by the licensee. That limitation, however, does not mean that DIA has no obligation under the ADA. In its license agreements, DIA reserves to itself considerable authority over the design and construction of new Days Inn hotels. *See* U.S. Memorandum at 7, 10-11. Having done so, DIA cannot also avoid all responsibility for ADA compliance.[15] That is, DIA cannot simply encourage its licensees to comply and be done with it; it must, to the extent of its authority over the project, exercise that authority to ensure that the new hotel will be accessible to individuals with disabilities. Thus, when it issues design standards, those standards must comply with the requirements of the ADA's Standards for Accessible Design. When it reviews plans, it must review them for compliance with the ADA, and if the plans do not comply with the ADA, it must

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[13]The same rules would apply under any federal statute. If, for instance, an owner directed a contractor to employ only white construction workers, or to ignore OSHA requirements, or to dispose of hazardous materials improperly, those instructions would not allow a contractor to engage in activity prohibited by federal law.

[14]It is, of course, extremely unlikely that an owner would do so. The owner pays a significant fee for the privilege of joining the Days Inn chain — for hotels of 100 or fewer guest rooms, an intial fee of up to $35,000, plus a reservation fee of up to $10,000 — and if those fees are not refundable if the licensee breaches the agreement. *See* UFOC, Ex. 1, at 9; Wall License Agreement, Ex. 3, ¶¶ 7(a), (b). Thus, as was explained by Mr. Hoagland, who was DIA's Vice President for Franchise Services and Design and Construction from 1992 through 1996, DIA was able to prevail on its licensees to make changes the designs for their hotels because "if the person has invested into the franchise, you know, they're not about to stop the project, they're going to keep going with it . . . ." Hoagland Dep., Ex. 21, at 73-74.

[15]As discussed below, the duty to comply with federal civil rights statutes is not delegable. *Infra* at 20-23.

require licensees to bring them into compliance, or withhold its approval of those plans. When it inspects completed hotels, it must inspect them for compliance with the ADA, and if an inspection reveals a failure to comply with the Standards, DIA must require the licensee to correct the non-complying condition, or refuse the licensee admission to the Days Inn system. Just as with architects and contractors, none of this makes DIA the guarantor of ADA compliance by its licensees: if a licensee insists on violating the ADA, despite DIA's efforts to achieve compliance, DIA satisfies its obligations under the ADA by refusing to participate (or refusing to continue to participate) in the design and construction of an inaccessible hotel. DIA is thus the guarantor only of its own conduct, which unquestionably is an obligation DIA has the authority to meet.

Indeed, it is DIA's proposed reading of the statute, not the government's, that produces absurdities. For instance, DIA posits that owners, operators, lessors and lessees are the parties "in the best position to assure compliance." DIA's Memorandum at 19. DIA, however, does not explain how it comes to this conclusion, and the answer is not apparent. While an owner certainly may be in a position of ultimate control over the design and construction process, that is hardly the same thing as being in a position to ensure that the facility complies with the ADA's architectural requirements. While owners may well be generally aware of the ADA, they typically will not be familiar with specific ADA requirements (or other requirements imposed by zoning ordinances, building codes, environmental laws, and the like), and will simply be unable to ascertain in many cases whether some feature or element of the facility meets the ADA. This, of course, is precisely why an owner hires an architect, engineer, or other design professional,

and a construction contractor or other building professional, and why it makes sense to hold those entities responsible for ADA compliance along with the owner.

The absurdities inherent in DIA's position are even more pronounced with respect to the entities who operate or lease a facility — entities which DIA claims are "in the best position" to assure ADA compliance. Frequently, the entities who will operate or lease a new facility are not even identified at the time the facility is being designed and constructed, and it is absurd to suggest that those entities are in any position, let alone the "best" position, to assure ADA compliance. Indeed, although it does not acknowledge it, DIA creates a "Catch 22" problem: with respect to the United States' evidence that DIA operates the Wall Days Inn, DIA responds that all of that evidence relates to the period of time after the facility was designed and constructed, and is thus insufficient to establish DIA's liability. DIA's Memorandum at 27 ("the 'controls' identified by DOJ all occurred after the design and construction of the Wall Facility"). DIA does not say, however, what evidence would be acceptable to establish that it operates the Wall Days Inn, or how one would ever be able to identify who "operates" a hotel that has not yet been built. *See* U.S. Memorandum at 20 n.17. In sum, DIA's position is really that just the owners of new facilities should have any responsibility under section 303 — an approach Congress rejected even under section 302.

B. DIA's Duty to Comply With the ADA's New Construction Requirements is Not Delegable.

One of DIA's primary defenses to the United States' claim is that ADA compliance at Days Inn hotels is somebody else's problem. According to DIA, its license agreements have assigned the responsbility for ADA compliance to its licensees, and thus relieve DIA of any

responsibility for compliance. DIA's Memorandum at 4-5, 22-24. It is well settled, however, that the duties of non-discrimination imposed by federal civil rights statutes are not delegable.[16]

Once DIA undertook to participate in, and exercise control over, the design and construction of new Days Inn hotels, it also undertook the responsibility to ensure, to the extent of its control and participation, that new Days Inn hotels comply with the ADA. Having involved itself extensively in the design and construction of these hotels, DIA, like any other private party, cannot escape a responsibility imposed by a federal statute by contracting it away. The cases make clear that the duties imposed under federal non-discrimination statutes — including the Fair Housing Act, on which section 303 is modelled — are not delegable. To the extent that DIA has attempted to rely on its licensees to ensure that new hotels in its chain comply with the ADA, it has done so at its own peril. If its licensees have failed to make the hotels comply, both they and DIA are responsible.

Several federal courts have held that the duties not to discriminate imposed by federal civil rights statutes, and particularly the Fair Housing Act, are not delegable. *See* Walker v.

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[16]The Supreme Court has defined a non-delegable duty as follows:

> The concept of a nondelegable duty imposes upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well-being of those persons to whom the duty runs. The duty is not discharged by using care in delegating it to an independent contractor. Consequently, the doctrine creates an exception to the common-law rule that a principal normally will not be held liable for the tortious conduct of an independent contractor. So understood, a nondelegable duty is an affirmative obligation to ensure the protection of the person to whom the duty runs.

General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 395-96 (1982) (citations omitted). The General Bldg. Contractors Ass'n case addressed the question of whether 42 U.S.C. § 1981 imposed a nondelegable duty on an employer. After defining the term, the Court went on to hold that because § 1981 does not speak in terms of duties, but only declares specific rights held by all persons in the United States, it imposed no such duty. 458 U.S. at 396. Nothing in the Court's opinion, however, is contrary to the holdings of several other federal courts that other federal civil rights statutes do impose nondelegable duties not to discriminate. *See infra* at 21-22.

Crigler, 976 F.2d 900, 904 (4th Cir. 1992) (adopting "general rule" applied by other federal courts that duty not to discriminate under Fair Housing Act is non-delegable); Coates v. Bechtel, 811 F.2d 1045, 1051 (7th Cir. 1987) (in cases under Fair Housing Act and § 1982, courts have imputed wrongful acts of real estate agent to property owner, even if not authorized or ratified); Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 141 (6th Cir. 1985) (holding that realtor could not escape liability for acts of real estate agents by proving that the agents "were independent contractors, over whom under common law it has no control" or proving that the realtor instructed its agents in the law and urged them to comply with it); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980) (duty to obey laws relating to racial discrimination is non-delegable); Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974) (holding the owner of an apartment building responsible for the discriminatory conduct of a resident manager "both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable," quoting United States v. Youritan Construction Co., 370 F. Supp. 643, 649 (N.D. Calif. 1973), *aff'd in part and rev'd in part on other grounds*, 509 F.2d 626 (9th Cir. 1975)); Saunders v. General Svcs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1987) (under Fair Housing Act, duty not to discriminate is non-delegable); Harrison v. Otto G. Heinzeroth Mortgage Co., 430 F. Supp. 893, 896-97 (N.D. Ohio 1977) (same); United States v. L&H Land Corp., 407 F. Supp. 576, 580 (S.D. Fla. 1976) (same); Zuch v. Hussey, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975) (same); United States v. Real Estate Devel. Corp., 347 F. Supp. 776, 785 (N.D. Miss. 1972) (same). Thus, while the provisions in DIA's license agreements and other disclaimers of responsibility may give DIA a third-party action against the owners of the hotels or others, if those third parties fail to discharge the duties they and DIA have allocated among themselves,

those provisions allocating responsibility among DIA and other parties are no defense to an action under title III of the ADA.

Moreover, if it were not enough that the federal courts have consistently refused to allow parties to escape federal statutory requirements by assigning them to someone else, the ADA specifically addresses the issue. One of the provisions of section 302 of the Act specifically provides that "[a]n individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration (i) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12182(b)(1)(D). The legislative history makes clear that under title III of the ADA, "an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under the Act[,] . . . [and] a covered entity may not use a contractual provision to reduce any of its obligations under this Act." H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. (1990) at 104.

C. DIA's Reliance On Neff v. American Dairy Queen is Misplaced.

Assuming for the sake of argument that DIA were correct in its reading of sections 302 and 303, and that the coverage of section 303 was limited to owners, operator, lessors and lessees, the United States maintains that DIA operates the Wall Days Inn (and other Days Inn hotels). *See* U.S. Memorandum at 25-34. Despite the considerable evidence that DIA operates the Wall Days Inn and other hotels in the Days Inn system, however, DIA relies on Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), cert. denied, ____ U.S. ____, 116 S.

Ct. 704 (1996), for the proposition that it does not operate those hotels.[17] That reliance is misplaced. In Neff, the plaintiff alleged that two Dairy Queen restaurants, both built before passage of the ADA, and therefore subject to the requirement in section 302(b) of the ADA to remove architectural barriers to access, were nonetheless inaccessible to persons who use wheelchairs. Id. at 1064. The plaintiff argued that the franchisor, American Dairy Queen ("ADQ"), "operated" the restaurants, and should therefore be held liable for the restaurants' failures to remove the barriers to access. Id. at 1065. The Fifth Circuit held, on the basis of its conclusion that ADQ had minimal control over the removal of structural barriers, that ADQ did not operate a place of public accommodation within the meaning of the Act. Id. at 1066, 1068-69. In reaching this conclusion, the Fifth Circuit too narrowly construed what it means to operate a place of public accommodation, and adopted a reading of the statute that cannot be reconciled with the statutory lanaguage and leads to absurd results. Moreover, several factors distinguish this case from the situation presented in Neff.

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[17]DIA also argues that the United States does not contend that DIA controls the day-to-day operations of the Wall Days Inn, or other Days Inn hotels. DIA's Memorandum at 26. In making this argument, DIA relies solely on the uncorrected version of Ms. Savage's deposition transcript, and disregards a variety of other statements by the United States that it does contend that DIA controls the daily operations of the hotels in its system, including the Wall Days Inn. Indeed, DIA itself has recognized as much, acknowedging that in its responses to interrogatories, the United States has identified various ways in which DIA controls the operations of Days Inn hotels. DIA's Memorandum at 27. *See* United States' Reponses to Days Inns of America, Inc.'s Third Set of Interrogatories and Requests for Production, Ex. 50, at 1-9.

Ms. Savage's testimony was not to the contrary. She testified that DIA exercised control over the operations of Days Inn hotels in a variety of ways, including the reservations system, the operating policies manual, other manuals, training programs, QA inspections, the Sunburst rating system, DIA's central handling of guest complaints, and others. Savage Dep., Ex. 48, at 283-85. Indeed, in quoting Ms. Savage in its memorandum (and in citing her deposition in support of this paragraph), DIA did not consult the errata sheet compiled by Ms. Savage upon reviewing the deposition transcript (and has not provided that errata sheet as an exhibit). That errata sheet makes clear that Ms. Savage's testimony is that the United States does in fact contend that DIA controls or directs the day-to-day functioning of hotels in the Days Inn system, including theWall Days Inn. *See* id., errata sheet.

1. *Neff* is wrongly decided.

There is a major flaw in the Neff Court's reasoning: in deciding what the term "operate" means under title III, the Court focussed solely on the question of who has control over the ability to remove architectural barriers, rather than the more general question of who has power or control over all of the operations of the facility.[18] In doing so, Neff produces a rule that cannot be reconciled with the other provisions of section 302(b), and that leads to absurd results.

The court began, properly enough, with the well-established canon of statutory construction that where Congress does not define the term at issue, courts "construe it in accord with its ordinary and natural meaning." Neff, 58 F.3d at 1066 (citations omitted). The court appropriately considered such definitions of "operates" as "[t]o control or direct the functioning of." Id. at 1065. From these definitions, however, the court proceeded to an inappropriately narrow test, looking only to whether the entity had control over the prohibited activity (the removal of architectural barriers), not to whether the entity had control over, or directed the functioning of, the place of public accommodation (which is what the language of section 302(a) requires).

> Neff and the United States as *amicus curiae* point to numerous non-structural aspects of the San Antonio Stores' operations that they contend ADQ controls, such as accounting, personnel uniforms, use of trademarks, etc. While ADQ's control over these aspects may be relevant in other contexts, we hold that because it does not relate to the allegedly discriminatory conditions at the San Antonio Stores, it does not bear on the question of whether ADQ "operates" the franchises for the purposes of the ADA's prohibition on discrimination in public accommodations.

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[18]Indeed, DIA itself has acknowledged that operating a hotel includes a variety of decisions and functions, none of which has anything to do with removal of architectural barriers to access. *See supra* 4 n.3, 4-6. DIA does not explain how to reconcile its definition of who operates a facility with Neff, which, as DIA puts it, "teaches that an 'operator,' for purposes of liability under the ADA, is someone who actually causes a facility to comply or not comply with the ADA's requirements." It is difficult to imagine a definition of operates which is farther removed from the ordinary or common meaning of the term (which is what Neff initially suggests is the way the term must be construed). 58 F.3d at 1066.

Id. at 1066. Having deemed all other evidence of the franchisor's control over the operation of the restaurant irrelevant, the Neff court looked only to one provision in the franchise agreement at issue: a provision which gave American Dairy Queen the right to disapprove or veto structural changes to the facility. The court found this provision to be "essentially negative in character," and thus insufficient to support a claim that ADQ operated the restaurant. Id. at 1068.

Neff's narrow inquiry — looking only to see who had authority to make physical changes to the facility — makes no sense, and is not consistent with the language of the statute. Section 302(a) of the ADA prohibits discrimination by any entity that "owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. §§ 12182(a). Section 302(b) of the Act then defines several particular types of activity considered to be discrimination. Under the Neff approach, the entities who would be covered under section 302(b) would vary from prohibition to prohibition, because, under the Neff approach, the question would not be whether an entity operates the public accommodation in a general sense (as is implied by section 302(a)), but rather whether the entity has control over the activity in question in the particular sub-paragraph of section 302(b) (things such as imposing eligibility criteria, modifying policies and practices, or providing auxiliary aids and services). *See* 42 U.S.C. §§ 12182(b)(2)(A)(i), (ii), (iii). Neff thus suggests that rather than making a single determination of who is covered under section 302(a), coveraged must be determined separately for each of section 302(b)'s particular prohibitions. Nothing in the language of statute supports such an odd conclusion.[19]

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[19]The Neff court does not explain, for instance, how (by any definition of "operates") a party who has control over the ability to make physical changes to the facility, but who has no other control over the business conducted there, nonetheless "operates" the facility. If such a party does "operate" the facility, the Neff court fails to explain either 1) why it makes sense to hold that party responsible for the other obligations of section 302(b) as well

Other courts confronted with this question have understood that section 302 requires an inquiry not into whether the party in question has authority over the particularly activity in question, but rather whether that party can direct or control the operation of the facility itself. *See, e.g.*, Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1335 (N.D. Cal. 1994) ("[t]he use of language relating to ownership or operation implies a requirement of control over the place providing services.") (emphasis added)). Indeed, the cases by the Neff court support not Neff's conclusion that the key inquiry is into whether an entity has control over the particular activity covered by the Act, but rather whether the entity meets a more general definition. For instance, in Carparts Distribution Center Inc. v. Automotive Wholesalers Ass'n of New England, 37 F.3d 12 (1st Cir. 1994), the First Circuit considered whether a self-funded medical reimbursement plan was covered as an "employer" under title I of the ADA. The court did not look just to the plan's control over the alleged discriminatory act, as Neff implies. To the contrary, the court in Carparts underscored its obligation to construe the ADA broadly, and offered several possible theories under which the plan — which in no way "employed" the plaintiff in the traditional sense — could be found covered by the Act. Id. at 16-18. Similarly, in Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994), the court noted the broad language and remedial purposes of the ADA, and extended coverage under title III to an on-call admitting physician, finding him individually liable for his discriminatory actions. Id. at 78. In determining whether the physician was an "operator of the hospital" within the meaning of the ADA, the court considered not only

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— such as providing auxiliary aids and services, or modifying the business' policies and practices, or 2) if the party is not to be held liable for those obligations, why not (since the party has already been held to be "operating" the facility).

whether the physician had the power and discretion to perform the allegedly discriminatory act, but whether he was in a position of authority at the hospital generally. Id.[20]

2. This case is distinguishable from *Neff*.

In any event, this case is readily distinguishable from Neff. The Neff court based its holding entirely on the language of the franchise agreement in that case; the court did not consider any other evidence of ADQ's control over the restaurants. 58 F.3d at 1065, 1067. And because the plaintiff conceded that the franchise agreement was unambiguous, the court held that the only question presented — the construction of an unambiguous contract — was one of law.[21] In general, however, courts have held that the nature and extent of control exercised by a franchisor over a franchisee is a question of fact, and the parties have certainly treated it as a fact question in this case. *See* U.S. Facts ¶¶ 85-115; DIA Facts ¶¶ 19-25. *See also* Oberlin v. Marlin American Corp., 596 F.2d 1322, 1326 (7th Cir. 1979) (legal status of relationship between franchisor and franchisee depends of facts of relationship); Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 785-86 (3rd Cir. 1978) (treating question, arising under state law of agency, of whether franchisor operated retail store as one of fact).

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[20]Although it came to a contrary conclusion, the Aikins court applied a similar analysis in finding that a physician did not operate a hospital within the meaning of the ADA. The court found that because he not only had no control over the specific prohibited activity — the requirement to provide auxiliary aids and services to individuals who are deaf — but also because he was "not on the hospital's board of directors, and [had] no authority to enact or amend hospital policy," he did not "operate" the hospital within the meaning of title III. 843 F.Supp. at 1335.

[21]Neff, 58 F.3d at 1065 ("Neff's only summary judgment evidence, and the only basis for her claim . . . is the Nacogdoches Store franchise agreement. . . . Neff has not alleged that the . . . franchise agreement is ambiguous. Indeed, the parties do not dispute the meaning of the terms of the agreement. . . ") (Citations omitted.).

In this case, the degree of control that DIA exercises over its licensees, including Richard and Karla Hauk, is evidenced not just by the license agreement, but by a variety of other documentary evidence, and the testimony of several witnesses. As discussed above, the undisputed evidence shows that DIA exercises considerable control over virtually all aspects of the operation or management of the Wall Days Inn, including marketing, setting room rates, front desk operations, employee training, employee relations, employee uniforms and job duties, dealing with walk-up business, providing wake up calls and continental breakfasts, fees charged for local telephone calls, fax services, and use of baby cribs, purchasing supplies and equipment, maintenance, assuring the cleanliness of rooms, maintaining books and records, and others. *See supra*, at 4-6; *see also* U.S. Memorandum at 25-34; United States' Response to Days Inns of America, Inc. and HFS Incorporated's Statement of Undisputed Material Facts ¶¶ 21-25. In addition to these items (which are items raised by DIA in its statement of undisputed facts), the undisputed facts further show that DIA exercises control over a variety of other hotel functions or operations, including the hotel's reservations system (U.S. Facts ¶¶ 105-08), provision of no-smoking rooms and making courtesy calls to guests (U.S. Facts ¶¶ 110.d, e), training for hotel managers (U.S. Facts ¶¶ 111.a, b), and handling guest complaints (U.S. Facts ¶¶ 113-15). By means of its Operating Policies Manual, its Quality Assurance program, and the Sunburst rating system, DIA controls hundreds of aspects of the daily operation of hotels in its chain. *See* U.S. Facts ¶¶ 89-104. In sum, the evidence that DIA operates the Wall Days Inn and other Days Inn hotels is considerably different than the evidence offered by Neff that American Dairy Queen operated the restaurants at issue in that case.

3. Even if *Neff* were correctly decided, and applicable here, DIA would be responsible under the *Neff* "test" for the failure of the Wall Days Inn to be readily accessible to and usable by individuals with disabilities.

To the extent that Neff announces a coherent test for ADA responsibility, at most that test requires a showing that DIA had control over the discriminatory conduct or conditions at issue. 58 F.3d at 1066-67 ("the relevant inquiry in a case such as this one is whether ADQ specifically controls the modification of the franchises to improve their accessibility to the disabled").[22] Presumably, in a case alleging violations of section 303 of the ADA, the relevant inquiry under Neff would be whether DIA specifically controlled the design and construction of the Wall Days Inn.[23] Put differently, if control over the modification of an existing facility to improve accessibility for individuals with disabilities was what was required to make ADQ an "operator" of the facility in Neff, then (odd as this may seem) control over the accessible design and construction of a new facility would make DIA an "operator" of the Wall Days Inn.

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[22]Although DIA relies on this same portion of the Neff opinion — *see* DIA's Memorandum at 20 — DIA appears to contend that under Neff, even a showing of control over the discriminatory conduct at issue is not enough. Rather, DIA contends that there must also be some showing that the franchisor "caused" the facility not to comply with the ADA. While DIA plainly reads into Neff an element that is not there, even if DIA's interpretation were correct, and it was necessary to show not just that DIA had control over the discriminatory conduct at issue, but also that DIA actually caused the violations of the ADA, the United States has made that showing. The undisputed facts show that DIA caused the Wall Days Inn to be inaccessible: the PDSM which DIA provided to the Baumann and Double H was not consistent with the ADA, U.S. Facts ¶¶ 35-37, 49, 70; when DIA reviewed plans for the Wall hotel, it did not review them for compliance with the ADA, or for compliance with DIA's own barrier-free requirements, U.S. Facts ¶¶ 122-26; and when DIA inspected and admitted the Wall hotel into the Days Inn system, it ignored or failed to note blatant violations of the ADA, and failed to require the Hauks to bring the facility into compliance with the ADA, as required by the license agreement and the PDSM. U.S. Facts ¶¶ 16, 77, 78, 100, 111.c.i.

[23]Whatever else it does, Neff certainly does not address the question of who may be held liable under section 303 of the ADA. The restaurants at issue in Neff predated the ADA, and the provision of the ADA at issue was the provision requiring the removal of architectural barriers to access in existing facilities. 58 F.3d at 1064, 1064 n.1. *See also* 42 U.S.C. § 12182(b)(2)(A)(iv). The Neff Court thus had no occasion to address the scope of coverage of section 303.

The undisputed facts make clear that DIA exercised extensive control over the design and construction of the Wall Days Inn and the other hotels in its system. DIA originally proposed that a new hotel be built on the site of the Wall Days Inn, recommended an architect and contractor to the owner, provided its PDSM to the architect and contractor, provided a conceptual site plan to the owner (which he used to decide to go forward with the project), provided the Hauks' lender with a projection of revenues and expenses for the new hotel, required the Hauks to prepare plans that conformed to the Days Inn design standards (which include accessibility requirements), reviewed those plans and noted changes on them (including changes to improve the accessibility of the hotel), monitored the progress of construction, and inspected the hotel upon its completion, before admitting it to the Days Inn system. *See* U.S. Memorandum at 7-10; U.S. Facts ¶¶ 29, 44-76, 92, 93, 100, 111.c.i. Under the terms of both the license agreement and the PDSM, DIA required the Hauks to design and construct the hotel in compliance with the ADA, and the license agreement gives DIA the affirmative authority to require the Hauks to modify the hotel (both to gain intial admittance to the Days Inn system, and to renovate the hotel later in the life of the agreement). *See* U.S. Memorandum at 30; U.S. Facts ¶¶ 88.l, m; Wall License Agreement, Ex. 3, ¶ 5. If the Hauks refuse to comply with their obligations under the license agreement, DIA can suspend the Hauks from the Days Inn reservation system, or terminate the agreement (and require the Hauks to forfeit their investment in the franchise). Thus, even if the Neff test were to be applied here, DIA has sufficient control over the design and construction of the Wall Days Inn to make it an "operator" of the Wall Days Inn.

D. DIA Exercises Considerably More Control Over its Licensees than is Required by the Lanham Act.

In the course of addressing the issue of whether it operates the Wall Days Inn and other hotels in its system, DIA acknowledges that it "admittedly has exercised some control over the Wall and other franchise facilities," but suggests that it has done only what it is required to do by the Lanham Act, 15 U.S.C. §§ 1051, 1061, and 1127 *et seq*., to preserve the validity of its trade and service marks. DIA's Memorandum at 28. *See also* DIA's Memorandum at 27 ("the controls [exercised by DIA] are related to DIA's legitimate interests in assuring the offering of uniform and quality services under its service mark"). There are two problems with DIA's argument: first, it makes no difference why a party involves itself in the design and construction of a new facility, or the operation of a facility — it matters only that they have done so. Second, DIA exercises far more control over its licensees than is required by the Lanham Act.

The government makes no claim that DIA's involvement in the design and construction of the Wall Days Inn, or any new Days Inn, is in any way improper or illegitimate. To the contrary, the United States freely acknowledges the legitimacy of DIA's interests in quality, uniformity, and consistency, among others. Indeed, the United States included in its own statement of undisputed facts several items relating to DIA's strong interests in how and when licensees design and construct new Days Inn hotels, and in how hotels in the Days Inn system are operated. *See* U.S. Facts ¶¶ 27.e.i, 27.f.i, 104.a, 111.b, 115. Just as the Hauks, Baumann, and Double H all had legitimate interests in the how and when the Wall Days Inn was designed and constructed, so does DIA. Similarly, DIA has legitimate interests in how the Wall Days Inn is operated, just as the Hauks do. That the interests are legitimate, however, does not mean that

they somehow insulate the party in question from compliance with the ADA. Presumably, even DIA would acknowledge, for instance, that the Hauks have legitimate interests in the way the Wall Days Inn is operated, but would not contend that the Hauks therefore do not "operate" the hotel within the meaning of the ADA.

Second, as the cases cited by DIA make clear, the Lanham Act imposes relatively modest requirements with respect to the protection of trade and service marks; it certainly does not require the level of control exercised by DIA. It is certainly true that the Lanham Act requires licensors of trademarks to oversee the quality of their licensees' products, to protect the integrity of their marks, and to ensure that licensees do not sell to an unsuspecting public goods bearing the mark that are of inferior quality. *E.g.,* Oberlin v. Marlin American Corp., 596 F.2d at 1327 ("licensor must control the operations of its licensees to ensure that the trademark is not used to deceive the public"; purpose of Act is "to ensure the integrity of registered trademarks"); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 387 (5th Cir. 1977) ("If a trademark owner allows licensees to depart from its quality standards, the public will be misled, and the trademark will cease to have utility as an informational device.").

These same cases make clear, however, that the control over licensees required by the Lanham Act is quite limited. The Oberlin Court explained that "the scope of the duty of supervision associated with a registered trademark is commensurate with [the] narrow purpose" of the Lanham Act to avoid deception. 596 F.2d at 1327. A licensor is not required to control the day-to-day operations of a licensee "beyond that necessary to ensure uniform quality of the product or service." Id. Similarly, the Kentucky Fried Chicken Court explained that "[r]etention of a trademark requires only minimal quality control," and the party seeking to establish that the

control has been inadequate must "carry [a] heavy burden." 549 F.2d at 387. *See also* Dawn Donut Co., Inc. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959) (licensor must take "some reasonable steps to prevent misuses of his trademark").

The System Standards imposed by DIA in its Operating Policies Manual and its Planning and Design Standards Manual — and as enforced by its Quality Assurance program and Sunburst rating system — far exceed the quality control requirements of the Lanham Act. The OPM, for instance, sets remarkably detailed requirements for all aspects of the daily operations of Days Inn hotels, including specifying all furnishing, fixtures, and supplies for guest rooms (including requirements for the size of the television screen, the number of skirt hangers (Montrose style number 17BTN with an O ring or equivalent), the number of ashtrays, the number of sheets of stationery, the size, weight, color, and fiber content of all towels and linens (maximum shrinkage allowed is ten percent), the size of the ice bucket, the size of the soaps, and a requirement that the shower curtain have matching plastic hooks). U.S. Facts ¶¶ 91.b, c, d. It sets requirements for guest services, including provision of wake-up service, a fax machine, complimentary coffee, free local phone calls, free ice, free use of baby cribs, and a complimentary continental breakfast consisting of fruit juices, freshly brewed coffee, decaffeinated coffee, hot water and tea bags, breakfast pastries, muffins, croissants, or local specialities. U.S. Facts ¶¶ 91.i, o. The OPM also sets housekeeping and maintenance requirements — including a requirement that each hotel establish a schedule for cleaning the lint traps in their dryers — and the QA inspections evaluate dozens of items for cleanliness and proper working condition. U.S. Facts ¶¶ 91.k, 94-96.

Similarly, the PDSM contains hundreds of detailed specifications for the design and construction of the hotel, many of which are not essential to ensuring the quality of services

provided by Days Inn franchisees. In addition to numerous requirements for guest rooms, the hotel lobby, and other public areas, the PDSM includes site requirements (among other things, requirements for paving materials, loading docks, dumpster pads, and swimming pool filtering systems); structural requirements (including, among other things, requirements for soil borings, the hotel's structural frame, roofing materials, and for insulation in the exterior walls); requirements for employee areas (including, among others, requirements for the hotel laundry, linen storage area, and the capacity of washers and dryers, for the maintenance area, and for what equipment and materials are to be stored in various storage spaces); and requirements for the hotel's electrical system (including requirements for circuit breakers, wiring conduits, transformer locations, and for lightning protection). U.S. Facts ¶ 33. DIA's expert witness acknowledged that the PDSM contained requirements for areas of the hotel that guests would never see, and acknowledged that the manual contained numerous requirements which had nothing to do with defining Days Inn's market position. Kiewel Dep., Ex. 20, 168-69, 176-79.[24] In sum, there can be little question that the requirements DIA imposes on its licensees far exceed what is required by the Lanham Act.

[24]It is not surprising that the PDSM exceeds what is required by the Lanham Act, given that the PDSM was originally developed not for the purposes of quality control for franchisees, but in connection with actual construction projects undertaken by DIA's predecessor in interest. *See* U.S. Facts ¶ 31. The manual was later distributed to franchisees, a practice which DIA continued when it took control of the company. U.S. Facts ¶ 31.a.

E. DIA's Argument Based on Agency Law is Inapplicable Here.

Remarkably, DIA devotes considerable effort to arguing that it does not meet the requirements for liability under principles of the law of agency, which is a theory of liability advanced by the plaintiff in Neff, but not by the United States. DIA's Memorandum at 20, 26, 30-36. DIA insists, at length, that control of the type exercised by DIA has been held insufficient to make franchisors vicariously liable, under state law, for personal injuries suffered on the premises of individual franchise locations. In support of this argument, DIA cites a series of decisions from state courts, opining on state law. *See* DIA's Memorandum at 30-36 (citing cases from North Carolina, California, Georgia, Michigan, Virginia, Iowa, Maryland, and Texas). The problem with DIA's argument is that it is wholly inapplicable here. Rulings by state courts on agency law in personal injury cases are not relevant to DIA's liability under the terms of a federal statute. The United States contends that DIA has itself violated that statute: DIA's liability arises from its own actions and omissions — actions and omissions with respect to the design and construction of numeorus inaccessible Days Inn hotels, including the Wall Days Inn. The United States does not contend that DIA should be held vicariously liable — under agency law or any other theory — for the actions of some other party, whether it be the Hauks, Baumann, Double H, or any other owners, architects, or contractors. Thus, unlike Hayman v. Ramada Inn, Inc., 357 S.E.2d 394, 397 (N.C. App. 1987), and the other cases cited by DIA, liability here does not depend upon the existence of an agency relationship. *See* DIA's Memorandum at 30.

It is not clear from DIA's memorandum, but it may be that DIA relies upon the state law agency cases for a different purpose: as a means of defining the term "operate." There are several problems, however, with such an approach to defining the statutory language of the

ADA. First, the cases cited by DIA make clear that they rest, in large part, on policy choices that are embodied in the state law of agency. That is, they recognize that there is a legitimate interest to be served by allowing franchisors to exercise some control over their franchisees, without making the franchisees, which are otherwise independent contractors, into the agents of the franchisors. *See, e.g.*, Cislaw v. Southland Corp., 4 Cal. App. 4th 1284, 6 Cal. Rptr. 2d 386, 391 (Cal. Ct. App. 1992) ("The cases, taken as a whole, implicitly recognize that the franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent."). What DIA does not explain, however, is why this policy judgment, embedded in state law, should be imported into the ADA. There is no basis on which to conclude that the Congress wished to afford some special protection to franchisors; to the contrary, the Congress made clear that it intended to change the law, and to impose requirements not previously in place. The chief purpose of the ADA is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), and to that end, Congress acted to "invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). There is no suggestion anywhere in the Act or its legislative history that Congress intended to carve out a special protection for franchisors, exempting them from the requirements placed on

all other American businesses.[25]

Moreover, to the extent that DIA is urging the Court to employ a specialized definition of "operates," as developed in the agency caselaw, DIA does not explain why the Court should not simply use the common and ordinary definition of the term. It is well settled that one of the fundamental canons of statutory construction is that, unless otherwise defined, words appearing in a statute are to be interpreted as taking their ordinary, natural, or common meaning. *See*, *e.g.*, Smith v. United States, 508 U.S. 223, 228 (1993); Perrin v. United States, 444 U.S. 37, 42 (1979); Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1066 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 704 (1996). Accordingly, the term "operate" must be given its ordinary meaning, not some meaning developed in a specialized line of cases dealing with another area of the law.

Indeed, the argument drawn from the state law cases aside, DIA itself has offered a common or ordinary definition of the term "operates." DIA's own witness — its Rule 30(b)(6) designee, Mr. William Keeble — suggested that using the common or ordinary definition of the term was entirely appropriate. As he put it, when asked by DIA's counsel what constitutes the

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[25]Indeed, it is well established that federal, not state, law must define the contours of federal civil rights protections. As the Sixth Circuit observed, when confronted with an issue of whether state law of agency would govern a claim under the Fair Housing Act, "prior decisions in other areas of civil rights direct us to use federal — not state — law." Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974) (discussing prior cases). That Court went on to explain that

> [a]n examination of the [Fair Housing] Act reveals a broad legislative plan to eliminate all traces of discrimination within the housing field. To allow such a purpose to be controlled by state law might well defeat this objective. We believe that in such a situation this Court is not restricted by the law of the various states, and that it should apply federal law.

Id. (citation omitted).

day-to-day operation of a Days Inn franchised hotel, he replied that it's "not a whole lot different than the day-to-day operation of any facility or any business." Keeble Dep., Ex. 19, at 768. *See also* DIA's Memorandum at 34. DIA has also enumerated what it believes to be many of the aspects of the day-to-day operations: as discussed above, these include setting room rates, marketing, purchasing supplies and equipment, maintenance, keeping the premises in order, assuring the cleanliness of rooms, dealing with personnel issues, including hiring and firing employees, employee policies and compensation, and employee training, and keeping the hotel's books and records. *See supra* 4 n.3. And as discussed above, DIA exercises considerable control over these and other aspects of the hotel's operations, such that it meets even DIA's common or ordinary definition of what it means to operate a Days Inn hotel. *See supra* at 4-6.

IV. CONCLUSION

For the reasons stated, the United States respectfully requests that this Court deny DIA's motion for summary judgment.

REQUEST FOR ORAL ARGUMENT

The United States respectfully requests that the Court grant oral argument on DIA's motion for summary judgment.

Respectfully submitted,

ISABELLE KATZ PINZLER
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
RENEE M. WOHLENHAUS, Acting Deputy Chief
Disability Rights Section
Civil Rights Division

_____
THOMAS M. CONTOIS
MARGARITA M. PRIETO
JEANINE M. WORDEN
ROBERTA STINAR KIRKENDALL
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
Post Office Box 66738
Washington, D.C. 20035-6738
(202) 514-0196

DIANA RYAN
Assistant United States Attorney
226 Federal Building
515 Ninth Street
Rapid City, South Dakota 57701

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