IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-0244 CIV-KING/O'SULLIVAN

UNITED STATES OF AMERICA,

Plaintiff

vs.

NORWEGIAN CRUISE LINES, INC., a Florida Corporation, and NORWEGIAN CRUISE LINE LIMITED, a Bermuda Corporation,

Defendants.
_____/

PLAINTIFF UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER QUASHING DEFENDANTS' SUBPOENA

The United States comes before the Court to request it to exercise its authority under Rules 26(b)(2) and 26(c) of the Federal Rules of Civil Procedure to prevent the requested depositions of Department of Justice ("Department" or "DOJ") officials, or other government officials who might be designated to speak for the United States, noticed in an action pending in this Court. The Department requests a protective order because the depositions and accompanying requests for related documents are unlikely to lead to the discovery of admissible evidence, seek the discovery of privileged information or information more easily obtained elsewhere, and are unduly burdensome. These discovery requests are in essence a litigation tactic designed to harass federal government officials and to discourage and impede DOJ's civil law enforcement efforts. As shown more fully below, discovery of this sort seeks to intrude improperly into the deliberative processes of agency decision makers and litigators and into the government's exercise of prosecutorial discretion, and is therefore prohibited by the attorney-client

privilege, the deliberative process privilege, the work product doctrine, and the law enforcement/investigative files privilege. This court should grant the motion for a protective order and quash the testimony and document subpoenas.

I. Background

On January 19, 2001, the United States filed a Complaint in the United States District Court for the Southern District of Florida against Norwegian Cruise Lines, Inc., and Norwegian Cruise Line Limited ("Defendants"), owners and operators of a cruise line business. The Complaint alleged that Defendants violated Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181-12189, by imposing unfair terms and conditions of travel on persons with vision impairments, thus denying such persons equal enjoyment of its cruise ships. On May 15, 2001, the Court entered an Order setting September 10, 2001, as a trial date for the matter, with all discovery to be completed by August 12, 2001.

On July 19, 2001, Defendants' counsel issued a Subpoena to "Department of Justice, Office of Daniel I. Werfel, 1100 Vermont Avenue, N.W., Washington, D.C. 20005-6738 [sic]"[1] commanding the Department of Justice (DOJ) to designate "one or more officers, directors, or managing agents, or other persons who consent," to testify in the present case.[2] A Notice of Deposition served by

[1] Mr. Werfel is one of the DOJ attorneys assigned to this matter. Mr. Werfel's office at the Department of Justice is located at 1425 New York Avenue in Washington, D.C.

[2] The United States acknowledges that, under Rule 45 and Southern District of Florida Local Rules app. A, because the Defendants commanded the DOJ deponent, by a Notice of Taking Deposition Duces Tecum, to appear in Washington, D.C., this or some similar motion could also be filed in the United States District Court for the District of Columbia. Because the Defendants also

facsimile the same day sought the appearance in Washington on August 6, 2001, pursuant to Rule 30(b)(6), of "[t]he person with the most knowledge" to be deposed regarding topics including:

> 1. Suits filed by the Department of Justice against cruise lines or owners of cruise ships for violations of the Americans with Disabilities Act from January 1, 1992 to the present.
> 2. The final result of all suits filed by the Department of Justice against cruise lines or owners of cruise ships for violations of the Americans with Disabilities Act from January 1, 1992 to the present.
> 3. Congress' direction to the Attorney General and the Department of Transportation to issue regulations on or before July 26, 1991 to effectuate the Americans with Disabilities Act.
> 4. Guidance as to what would constitute a reasonable modification of the policies, practices or procedures set forth in the Complaint. . . .
> 5. Guidance as to what would constitute the appropriate criteria for screening out potential passengers on foreign flagged cruise ships without violating the Americans with Disabilities Act necessary for a foreign flagged cruise ship to provide the goods, services, facilities, privileges, advantages, or accommodations being offered. . . .
> 6. Guidance as to how a foreign flagged cruise ship is required to modify its policies, practices and procedures to avoid discrimination under the Americans with Disabilities Act.
> 7. Guidance as to the extent of the individualized inquiry necessary to determine the reasonableness of modifications to cruise ship policies, practices and procedures set forth in the Complaint. . . .
> 8. Guidance as to whether an individualized assessment must be made as to whether an individual with a disability constitutes a direct threat to himself/herself or to others on a foreign flagged cruise ship.
> 9. Guidance as to the extent of any individualized assessment that must be made to determine whether an individual with a disability constitutes a direct threat to himself/herself or to others on a foreign flagged cruise ship.
> 10. Guidance as to whether a private entity that does not own, lease, lease to or operate a place of public accommodation may properly be sued for discrimination under the Americans with Disabilities Act.
> 11. Guidance as to how owners of the foreign flagged cruise ship may reconcile the laws of its home state, international law applicable to cruise ships and the requirements imposed by the Americans with Disabilities Act.

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noticed the deposition under Rule 30(b)(6), however, and because this Court is already conversant with the legal issues involved in this lawsuit, the United States respectfully moves in this Court for a protective order that will quash the deposition and document subpoena.

> 12. The Title III regulations for which the Department of Justice is charged with responsibility under the Americans with Disabilities Act.

An "Exhibit Duces Tecum" attached to the Subpoena commanded DOJ to produce a number of documents at the same time as the deposition, including all "complaints" filed against cruise lines or owners of cruise ships for ADA violations since January 1, 1992; all final judgments, consent decrees, or other court documents indicating the "final result" of all such complaints, and all documents relating to items 3, 5, 6, 7, and 8 from the list of topics for deposition.

On July 25, 2001, Defendants served the United States with a Notice of Deposition directed to "Plaintiff, United States of America, The person with the most knowledge regarding the topics referenced below." This Notice identified 19 topics for inquiry at deposition, including the 12 listed in the July 19 Notice, duplicates of three of those topics, and four other topics, including

> 14. Regulations as to how a foreign flagged cruise ship is required to modify its policies, practices and procedures to avoid discrimination under the Americans with Disabilities Act.
> 15. Regulations as to the extent of the individualized inquiry necessary to determine the reasonableness of modifications to foreign flagged cruise ship policies, practices and procedures.
> 16. Guidance as to whether an individualized assessment must be made as to whether an individual with a disability constitutes a direct threat to himself/herself or to others on a foreign flagged cruise ship.
> 17. Guidance as to the extent of any individualized assessment that must be made to determine whether an individual with a disability constitutes a direct threat to himself/herself or to others on a foreign flagged cruise ship.

This second 30(b)(6) deposition is to be taken in Miami, Florida, and is also scheduled for August 6, 2001.

II. The Court Should Grant the United States' Motion for a Protective Order

Under Federal Rules of Civil Procedure 26(b)(2) and 26(c), a court may issue a protective order

to prevent a party from engaging in discovery that causes annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c). Here, Defendants seek to depose DOJ and other federal government officials for the sole purpose of discovering the United States' legal arguments. This discovery should not be permitted because the information Defendants seek is not reasonably calculated to lead to the discovery of admissible evidence; the proposed discovery of the government officials will intrude upon facts protected by the attorney-client privilege, the deliberative process privilege, the work product doctrine, and the law enforcement/investigative files privilege; Defendants possess other, less burdensome means of obtaining the information sought in the July 19 subpoena and July 25 notice; and the burden of the proposed discovery far outweighs any benefit.

A. Defendants' Discovery Requests Are Not Reasonably Calculated To Lead to the Discovery of Admissible Evidence

Rule 26(b)(1) was added to the Federal Rules of Civil Procedure in 1983 to deal with the problem of "over-discovery." Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 187 (1st Cir. 1989) (citing Fed. R. Civ. P. 26 advisory committee note (1983 amendments)). Foremost under Rule 26(b)(1), discovery requests must be *relevant*: regardless of whether the information sought will be admissible at trial, the discovery must appear "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). It is axiomatic, however, that such evidence or pre-evidence can only consist of *factual* material, not legal conclusions. "[T]he most fundamental principle of discovery [is] that the coercive power of discovery can be invoked to uncover facts, but the task of researching the law is left to the parties themselves." Indiana Coal Council v. Hodel, 118 F.R.D. 264, 265-66 (D.D.C. 1988); accord United States v. Block 44, 177 F.R.D. 695, 695 (M.D. Fla. 1997); In re

Olympia Holding Co., 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995).

Nearly all of Defendants' July 19 and July 25 requests for deposition on the topics set forth in the 30(b)(6) Notice and the related subpoenaed documents fail this basic test of relevance; nearly all are requests for legal conclusions rather than facts, and thus barred by Rule 26(b)(1). For example, in 11 of the 16 topics, Defendants' planned inquiry is to elicit "guidance" as to various aspects of the ADA, apparently intended as bases for discussions of DOJ's conclusions regarding the interpretation and enforcement of the ADA. See July 19, 2001 Notice of Taking Deposition Duces Tecum [hereinafter July 19 Notice], topics 4-11; July 25, 2001 Notice of Taking Deposition [hereinafter July 25 Notice], topics 4-11, 16-18. Similarly, inquiry into topic 3, "Congress' direction to the Attorney General and the Department of Transportation to issue regulations on or before July 26, 1991 to effectuate the Americans with Disabilities Act," involves inquiries into DOJ's legal conclusions underlying the various regulations and the various roles of Congress and the Department of Transportation (DOT) in ADA enforcement.[3] See July 19 Notice, topic 3; July 25 Notice, topic 3. Discussion of topic 12, "[t]he Title III regulations for which the Department of Justice is charged with responsibility under the Americans with Disabilities Act," would most likely include inquiries by Defendants into DOJ regulatory processes. See July 19 Notice, topic 12; July 25 Notice, topics 12, 19. None of these proposed deposition topics, and requests for related documents are reasonably calculated to lead to the discovery of admissible evidence because they comprise discovery of "legal

[3] "Congress's direction" to these agencies is also a matter of public record and therefore may be obtained elsewhere. See infra Part II.C.1.

Additionally, the DOJ deponent could not, of course, opine as to DOT's ADA interpretations or enforcement policies.

interpretations" and not facts. Indiana Coal Council, 118 F.R.D. at 267. Because "[t]he Federal Rules are designed to provide parties access to the latter but not the former," id. at 267, the requested discovery should be denied.

B. Defendants' Discovery Requests Should Be Denied Because They Seek Information Protected by Privilege

Also outside the scope of discovery, as regulated by Rule 26(b)(1), are materials protected by any evidentiary privilege. See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, *not privileged*, that is relevant to the claim or defense of any party.") (emphasis added). Defendants seek communications and documents protected by at least four established evidentiary privileges: the attorney-client privilege, the deliberative process privilege, the attorney work product privilege, and the law enforcement/investigative files privilege.

1. Attorney-Client Privilege

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Upjohn v. United States, 449 U.S. 383, 389 (1981). It is absolute. Coleman v. American Broad. Cos., Inc., 106 F.R.D. 201, 204 (D.D.C. 1985); SEC v. Gulf & W. Indus., Inc., 518 F. Supp. 675, 680 (D.D.C. 1981). The purpose of the attorney-client privilege is to "encourage full and frank communication between the attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn, 449 U.S. at 389. The privilege also protects communications from attorneys to their clients if the communications "rely on confidential information obtained from the client." In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). "In the governmental context, the 'client' may be the agency and the attorney may be an

agency lawyer." In re Bruce R. Lindsey (Grand Jury Testimony), Nos. 98-3060, 98-3062, 98-3072, 1998 WL 418780, *14 (D.C. Cir. July 27, 1998); accord Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997); In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984); Sparton Corp. v. United States, 44 Fed. Cl. 557, 567 (Fed. Cl. 1999).

In the event that the Defendants' requested DOJ deponent would be an official with whom DOJ attorneys consult, much of the information sought by Defendants is protected by the attorney-client privilege. Any DOJ deposition designee would necessarily be an attorney. Each of the deposition topics is designed to delve into areas protected from disclosure. Both within the context of civil litigation in which the United States is a plaintiff, and in other enforcement and technical assistance activities, DOJ attorneys consult regularly with other DOJ staff on the legal issues like those described in the Notice. See July 19 Notice, topics 3-12; July 25 Notice, topics 3-19. Internal communications as to "complaints" and "final results," see July 19 Notice, topics 1, 2; July 25 Notice, topics 1-2, are also obviously protected by the attorney-client privilege, as well as Federal Rules of Evidence and Civil Procedure. See Fed. R. Evid. 408; Fed. R. Civ. P. 32, 33. Based upon the Defendants' lists of topics, the proposed depositions are unlikely to include any inquiries into factual matters which are not protected from disclosure by the attorney-client privilege.

2. Deliberative Process Privilege

The deliberative process privilege "allow[s] government agencies freely to explore possibilities, engage in internal debates or play devil's advocate without fear of public scrutiny." Assembly of the State of California v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992). It is based on the premise "that those who expect public dissemination of their remarks may well temper candor

with a concern for appearances . . . to the detriment of the decisionmaking process." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-151 (1975), quoting United States v. Nixon, 418 U.S. 683, 705 (1974); see also Dudman Communications Corp. v. Dept. of the Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987) (stating that the privilege "rests most fundamentally on the belief that were agencies forced to 'operate in a fishbowl' . . . the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer"). The privilege protects the quality of federal agency decisionmaking by serving

> to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege protects not only documents but the integrity of the deliberative process itself. See National Wildlife Fed'n v. Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988). The privilege protects "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. at 150 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)).

Communications are protected by the deliberative process privilege if they are "both 'predecisional' and 'deliberative.'" Wolfe v. Department of Health & Human Services, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc) (citing EPA v. Mink, 410 U.S. 73,88 (1973)). A communication is

"predecisional" if it occurred "in order to assist an agency decisionmaker in arriving at his decision." Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975). Communications are "deliberative" if, absent protection from public disclosure, "information of that type would not flow freely within the agency." Mead Data Central, Inc. v. U.S. Dep't of the Air Force, 566 F.2d at 256. Facts as well as deliberations are covered by the deliberative process privilege when "factual materials are 'inextricably intertwined' with policy making recommendations so that their disclosure would 'compromise the confidentiality of deliberative information that is entitled to protection'" under the privilege. Mink, 410 U.S. at 92; see also Ryan v. U.S. Dep't of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980).

In this case, the government officials Defendants would have testify would undoubtedly be DOJ or other government agency decision makers who participated in deliberative processes involved in developing various aspects of the ADA, and who would be asked to speak to those processes in the deposition. For example, assuming the term "guidance," as it is used in the deposition notice, means the eliciting of oral communications from a DOJ representative as to legal issues described within the topics, both generally and as to the present complaint, such testimony, even though it could only state facts about past agency action, and not immediate legal advice, would necessarily reveal the deliberative processes of the agency.[4] See July 19 Notice, topics 3-12; July 25 Notice, topics 3-12, 16-

[4] Even if the term "guidance" is meant to include publicly available regulations, commentary, technical assistance materials, and policy statements–and, indeed, the ADA itself–any deposition testimony discussing such materials would also reveal the ongoing processes by which DOJ formulates, publishes, and revises such materials. Such testimony is clearly covered by the deliberative process privilege.

18. Communications on these topics, and others requested by Defendants, see July 19 Notice, topics 1, 2; July 25 Notice, topics 1, 2, 13-15, 19, will hamper DOJ's ADA enforcement efforts. Cf. FTC v. Grolier, Inc., 462 U.S. 19, 31 (1983) (Brennan, J., concurring) (stating that the ability of an adverse party to "gain insight into an agency's general strategic and tactical approach to deciding when suits are brought . . . and on what terms they may be settled" should be protected against).

3. Work Product Doctrine

Rule 26(b)(3) incorporates the work product doctrine enunciated in Hickman v. Taylor, 329 U.S. 495 (1947), by "protect[ing] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation." Fed. R. Civ. P. 26(b)(3); see also Fed. R. Civ. P. 26(b)(3) advisory committee note (1983 amendment); SEC v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992). The purpose of the work product doctrine is to preserve the integrity of the adversary trial process by protecting the mental impression and legal strategy of an attorney as the attorney prepares a case in contemplation of litigation and trial. Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 775 (D.C. Cir. 1978). The privilege encourages effective legal representation by removing counsel's fears that thoughts and information will be discoverable by an adversary. Id.; see also Morelli, 143 F.R.D. at 47. In order to demonstrate that communications are protected by the work product doctrine, the information sought must pertain to legal work undertaken in anticipation of litigation or trial. Jordan, 591 F.2d at 753.

The work product doctrine applies not only to documents, but also to deposition testimony. See In re Sealed Case, 856 F.2d at 273 (citing cases). It applies to DOJ attorneys acting as counsel for the United States. NLRB v. Sears, 421 U.S. 132, 154 (1975); cf. J.H. Rutter Rex Mfg. Co. v. NLRB, 473

F.2d 223, 234 (5th Cir. 1973). Depositions of government attorneys who are involved in various aspects of law enforcement actions pose particularly difficult work product issues because it is difficult to examine an attorney to obtain facts about a lawsuit without intruding into the attorney's mental processes and litigation strategy -- areas that are entitled to almost absolute protection under the work product doctrine. See Morelli, 143 F.R.D. at 47 (quoting Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985).[5]

Defendants' deposition notices and production of related documents include areas of inquiry that will likely encroach upon material protected by the work product privilege. If Defendants' are allowed to interrogate DOJ or other government officials on "what would constitute the appropriate criteria for screening out potential passengers on foreign flagged cruise ships without violating [the ADA]," see July 19 Notice, topic 5; July 25 Notice, topic 5, for example, or "how a foreign flagged

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[5] In Morelli, the court noted that "the touchstone of the work-product inquiry is whether the discovery demand is made 'with the precise goal of learning what the opposing attorney's thinking or strategy may be,'" Morelli, 143 F.R.D. at 46-47 (quoting In re Grand Jury Subpoenas, 959 F.2d 1158, 1166 (2d Cir. 1992), and granted the protective order. After reviewing the areas of proposed examination, the court concluded that

> opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses. Such material is accorded almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's through processes and in ensuring that each side relies on its own in preparing their respective cases.

Id. at 47 (quoting Sporck v. Peil, 759 F.2d 312, 316 (3rd Cir. 1985)); accord United States v. District Council of New York City, 1992 WL 208284, *6 (S.D.N.Y. 1992) (refusing to compel representatives of U.S. Attorneys' Office to answer questions at Rule 30(b)(6) deposition that would reveal attorney work product); SEC v. World-Wide Coin Investments, Ltd., 92 F.R.D. 65, 67 (N.D. Ga. 1981) (barring deposition of SEC trial counsel).

cruise ship is required to modify its policies, practices, and procedures to avoid discrimination under [the ADA]," see July 19 Notice, topic 6; July 26 Notice, topic 6, Defendants would be granted discovery on the prosecution of the United States' suit against them. Defendants would be allowed entry to the litigation strategies the United States would consider, the strengths and weaknesses of such cases, and other information that falls within the work product privilege. Similarly, any inquiry based on Defendants' request for production of "all complaints against cruise lines or owners of cruise ships for violations of [the ADA]," see July 19 Notice, topic 1 to the extent the phrase is meant to include confidential administrative complaints filed with DOJ itself, would also include inquiry into DOJ attorney work product and is similarly barred. See also July 19 Notice, topics 2-11; July 25 Notice, topics 1-11, 13, 16-18.

4. Law Enforcement/Investigative Files Privilege

Federal regulations strictly prohibit the disclosure of information where the disclosure would reveal investigatory records compiled for law enforcement purposes and would interfere with enforcement proceedings or disclose investigative techniques and procedures such that their effectiveness would be impaired. See 28 C.F.R. § 16.26(5). Courts have upheld the privilege from disclosure of such records. Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977); NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 242-43 (1978); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980). The law enforcement privilege presumptively protects investigative files and testimony about investigative files from disclosure. In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988); Black v. Sheraton Corp. of America, 564 F.2d 531, 545 (D.C. Cir. 1977). The privilege is designed "to prevent disclosure of law enforcement techniques and procedures, to preserve the

confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." In re Department of Investigation of the City of N.Y., 856 F.2d 481, 484 (2d Cir. 1988); accord United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981) (quoting Black, 564 F.2d at 831). See also Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552(b)(7)(C)-(D).

The privilege is not an absolute one, however, but rather requires the Court to balance the discovering party's "need for particular documents against the public interest in nondisclosure." Black, 564 F.2d at 547; In re Sealed Case, 856 F.2d at 272. The party seeking discovery bears the burden of demonstrating a particularized need that outweighs this public interest. In Re Sealed Case, 856 F.2d at 272; Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984); Collins v. Shearson/American Express, Inc., 112 F.R.D. 227, 228 (D.D.C. 1986). Courts have considered a number of factors in weighing these competing interests, including the extent to which disclosure will discourage citizens from giving information to law enforcement agents; the impact the disclosure will have on the persons who have given information to the government; whether the investigation, or litigation, is complete; whether the information sought is factual or an evaluative summary; whether the discovering party is the target of an investigation or defendant in an ensuing litigation; whether the party claiming the privilege has litigated in good faith; whether the discovery sought is available through other discovery or other sources; and the importance of the information to the plaintiff's case. See In re Sealed Case, 856 F.2d at 272 (citing Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973)).

Consideration of these factors mandates nondisclosure of the testimony and documents at issue here, including any documents containing any "suits" or "complaints," including administrative

complaints, or "final results" of such complaints, filed with or by DOJ. See July 19 Notice, topic 1, 2; July 25 Notice, topic 1, 2.[6] The Defendants apparently seek information on the status or outcome of other DOJ investigations, which in turn may shed light upon DOJ ADA enforcement in this matter–an ongoing litigation brought by the United States in good faith regarding Defendants' ADA violations. Such information is vital to the decision-making processes in all DOJ enforcement activities, including the present action. Disclosure of this information, if compelled by Defendants' subpoena, will likely have a chilling effect on the willingness of complaining witnesses or other witnesses to participate in this or other DOJ ADA enforcement actions. Because all these factors point towards nondisclosure of many of the materials and communications sought by Defendants, and because of the public interest in continuing, effective ADA enforcement by DOJ, the Court should grant this Motion and quash Defendants' subpoena.

C. Defendants' Discovery Requests Are Outside the Permissible Scope Of Federal Discovery

"The scope of discovery is not limitless." Envirosafe Servs. Inc. v. Envirosure Management Corp., 1998 WL 62876, *1 (W.D.N.Y. June 9, 1988) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351-52 (1978)). Rule 26(b) includes limits on the general scope of federal discovery. According to the Rule, discovery methods must be limited if a court determines that (i) discovery sought is unreasonably cumulative or duplicative, or is obtainable from a more convenient or less burdensome source; (ii) the discovering party has had ample opportunity by prior requests to obtain the information

[6] Of course, oral communications or documents that may be included within Defendants' other topic categories may also qualify for protection under this privilege.

sought; or (iii) the burden of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(2)(i)-(iii). In this case, each of these inquiries counsels protection of any nonprivileged government testimony and documents requested by Defendants.

1. Defendants Have Access to Less Burdensome Means of Discovery

In general, materials available as public records are nondiscoverable because they may be obtained from a more convenient source. See, e.g., Bleecker v. Standard Fire Ins. Co., 130 F. Supp.2d 726, 738-39 (E.D.N.C. 2000); I.H. Bass v. Gulf Oil Corp., 304 F. Supp. 1041, 1049-51 (S.D. Miss. 1969); Speedrack, Inc. v. Baybarz, 45 F.R.D. 254, 256 (E.D. Calif. 1968); cf. Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 557 (S.D.N.Y. 1994) (allowing deposition testimony where questioning sought information potentially leading to relevant evidence, including public record information). Requests to produce public records, or to depose witnesses about such records, "basically involve legal research [and are] therefore . . . not a proper subject of discovery." Fagan v. District of Columbia, 136 F.R.D. 5, 8 (D.D.C. 1991); accord Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181, 193-94 (D.D.C. 1998). Similarly, almost all of the nonprivileged materials Defendants seek here, and have identified as bases for deposition topics, including all regulations, Congressional regulatory "direction," "guidance," "complaints," "suits," and "final results" of complaints, are commonly publicly available through law libraries, electronic databases, and the Internet, and are not appropriate for discovery. See July 19 Notice, topics 1-12; July 25 Notice, topics 1-19.

Furthermore, the Defendants have already taken advantage of other, less intrusive means of obtaining any discoverable facts that could conceivably be revealed through the newly-proposed discovery. Indeed, a number of the items sought through Defendants' requests for testimony and

documents in the July 19 subpoena have been also been the subject of Defendants' earlier Interrogatories, Requests for Production and Admissions, and Freedom of Information Act request. Compare, e.g., Defendants' Second Set of Interrogatories, Interrogatory No. 9:

> Assuming that Title III of the ADA applies to foreign flagged cruise ships, a point which NCL does not concede, please explain, with specificity and provide citations where applicable to specific authority, precisely what type of "criteria" would be sufficient to satisfactorily demonstrate to the Department of Justice that the imposition or application of eligibility criteria which screen out or tend to screen out an individual with a disability would be necessary for the provisions of the goods, services, facilities, privileges, advantages or accommodations.

with July 19, 2001 Notice of Taking Deposition Duces Tecum, topic No. 5 ("Guidance as to what would constitute the appropriate criteria for screening out potential passengers on foreign flagged cruise ships without violating the [ADA] necessary for a foreign flagged cruise ship to provide the goods, services, privileges, advantages, or accommodations being offered."). Such duplicative discovery requests violate Rule 26(b)'s limitations on cumulative discovery, and the Court should therefore deny Defendants' requests. See, e.g., Naartex Consulting Corp. v. Watt, 722 F.2d 779, 788 (D.C. Cir. 1983) (district court properly denied additional discovery when plaintiff already had an ample opportunity for discovery); United States v. Upton, Civ. No. 3:92-CV-00524(AWT), 1995 WL 264247, *1 (D. Conn. Jan. 26, 1995) (district court denied depositions of Internal Revenue Service agents because defendants had documents reflecting the information sought and the burden of the depositions outweighed the likely benefit).

2. Balancing of Interests Favors United States

Finally, "a court may use Rule 26(b) to limit discovery of agency documents or testimony of agency officials if the desired discovery is relatively unimportant when compared to the government

interests in conserving scarce government resources." Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774, 779-80 (9th Cir. 1994). In civil cases where parties have sought the deposition of federal government officials, courts have required parties seeking such depositions to make a showing that such depositions are "essential to prevent prejudice or injustice." United States Board of Parole v. Merhige, 487 F.2d 25, 29 (4th Cir. 1973), cert. denied, 417 U.S. 918 (1974); Peoples v. United States Dep't of Agriculture, 427 F.2d 561, 567 (D.D.C. 1970); Russ v. Ratliff, 68 F.R.D. 691, 692 (E.D. Ark. 1975) (subpoena for F.B.I. agent to appear for deposition and produce investigative report quashed). The reason for such a high standard is that federal agency decision makers are generally relieved from the burdensomeness of depositions, absent a showing that such a deposition is necessary to prevent injustice, in order to "allow them to spend their time on the performance of official functions, and to protect them from inquiries into the mental processes of agency-decision making." Cornejo v. Landon, 524 F. Supp. at 122; see also United States v. Morgan, 313 U.S. 409, 422 (1941).[7]

The United States has the same concerns here should Defendants' discovery requests be permitted. Virtually any civil action arising under Title III of the ADA will involve regulations issued by DOJ. In addition, because DOJ is authorized to receive and investigate Title III complaints, some of these same actions will also involve matters that have been the subject of DOJ investigations. 42 U.S.C. § 12188. Permitting the discovery by respondents and defendants in enforcement actions into

[7] Some of the testimony sought by Defendants may likely come from high level government officials. It is well-established that such officials should not generally be required to testify concerning their official actions. See United States v. Morgan, 313 U.S. 409, 422 (1941); Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586-87 (D.C. Cir. 1985).

all aspects of investigations and the regulatory processes would slow the work of the agency to a crawl. Hundreds of ADA complaints are received by DOJ every year; if in even a small fraction of those an agency official is required to respond to discovery, there would be no time for enforcement or other work the Department is obligated by Congress to perform. If Defendants are allowed to take the deposition they seek here, private litigants will expect to be able to routinely depose federal agency attorneys about the interpretation of law in every private action that involves federal laws. Such a result would seriously undermine the effectiveness of the government's civil law enforcement efforts.

This balancing of interests might result in a different outcome were the Defendants seeking relevant factual materials in their deposition and discovery requests. This is not that case. Although Defendants undoubtedly will argue that the legal conclusions they seek are important to competent litigation of their case, Defendants' interests cannot outweigh those of the United States as litigant in this particular matter, as well as the public interest in effective DOJ ADA enforcement, in nondisclosure of this essentially nonfactual material.

III. Conclusion

For the reasons stated above, the United States respectfully requests that its Motion for a Protective Order Quashing Defendants' Subpoena be granted.

JOHN L. WODATCH
Chief
L. IRENE BOWEN
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July 27, 2001

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Plaintiff United States' Memorandum of Law In Support of Its Motion for a Protective Order Quashing Defendants' Subpoena was served by facsimile and overnight express mail on this 27th day of July 2001 to the following counsel:

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