UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THE UNITED STATES OF AMERICA, Plaintiff, versus ELLERBE BECKET, INC., Defendant.	)	Civil Action No.: 4-96-995 Judge Tunheim ORAL ARGUMENT REQUESTED

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Statutes:

The United States filed this action under the Americans with Disabilities Act (ADA) against Ellerbe Becket, Inc., an architectural firm headquartered in Minneapolis. The complaint alleges that Ellerbe has designed new sports arenas and stadiums in cities across the country that fail to comply with title III of the ADA, 42 U.S.C. §§ 12181 through 12189, and the title III implementing regulation, 28 C.F.R. Part 36, including the ADA's Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"), the architectural requirements applicable to new construction. In particular, the government alleges that Ellerbe has repeatedly designed stadiums and arenas with wheelchair seating locations that do not provide wheelchair users with lines of sight to the floor or field that are comparable to those for other spectators, as required by the Standards. The United States seeks a civil penalty and an injunction compelling Ellerbe to comply with the requirements of the ADA when designing stadiums and arenas in the future.

Ellerbe has moved to dismiss, arguing chiefly that the ADA imposes no responsibility on architects to design new facilities to be accessible to individuals with disabilities. Ellerbe also contends, among other things, that the requirement for "compare-able" lines of sight does not mean that wheelchair users must be able to see what other spectators are able to see. Rather, Ellerbe contends that despite the ADA it can continue to design stadiums and arenas in which wheelchair users will be able to see only the backs of people standing in front of them. Because

Ellerbe's positions cannot be squared with either the language or the purpose of the ADA, its motion to dismiss should be denied.

I. FACTUAL BACKGROUND

A. The United States' investigations of Ellerbe

The Department of Justice began investigating Ellerbe for violations of title III of the ADA in August 1994, when the Department received a complaint against the Rose Garden, an arena in Portland, Oregon, being designed by Ellerbe. Among other things, the complaint alleged that wheelchair seating locations in the arena were designed so that when other patrons stood up, wheelchair users would be unable to see the action on the floor. *See* Exhibit A. The Department soon received a second complaint, against another arena being designed by Ellerbe -- the Fleet Center, in Boston -- which also alleged that wheelchair seating locations did not provide lines of sight over standing spectators. The Department opened a second investigation, and so notified Ellerbe. *See* Exhibit B.[1]

[1]The Department also investigated the new Olympic Stadium in Atlanta, Georgia, a stadium which Ellerbe helped to design. As Ellerbe correctly points out in its brief, *see* Ellerbe's Memorandum in Support of Defendant's Motion to Dismiss at 4 (hereinafter "Ellerbe's Memorandum"), the Olympic Stadium ultimately turned out to be most accessible stadium in the United States. More than 95% of the wheelchair locations in that stadium provide lines of sight over standing spectators. However, providing lines of sight over standing spectators was a central subject of the negotiations between the Department and the owners and designers of the stadium, and Ellerbe's effort to take credit for the degree of accessibility of the stadium must be tempered by a recognition that the stadium was designed and constructed under the close scrutiny of the Department of Justice, and the threat of legal action to compel compliance with the ADA.

The Department's investigations of the Rose Garden and the Fleet Center included review of architectural drawings for both arenas, and confirmed that at both arenas wheelchair users would be unable to see when other patrons stood. As a result of these findings, the Department decided that it was appropriate to review the compliance of other arenas designed by Ellerbe. *See* 42 U.S.C. § 12188(b)(1)(A)(i) (directing the Attorney General to review the compliance of entities covered by title III of the ADA). Accordingly, the Department reviewed architectural drawings for other Ellerbe arenas, including the Gund Arena in Cleveland, Ohio, the Corestates Center in Philadelphia, Pennsylvania, (formerly known as the Spectrum II) and the Marine Midland Arena in Buffalo, New York (formerly known as the Crossroads Arena). In each case, the Department found that the arena had been designed with wheelchair seating locations that would not provide wheelchair users with lines of sight to the arena floor when other patrons stood.

On February 28, 1996, the Department wrote to Ellerbe's counsel to describe the findings of the investigation. *See* Exhibit C. The Department informed Ellerbe that it believed Ellerbe had engaged in a pattern or practice of illegal discrimination, and offered Ellerbe an opportunity to negotiate a settlement before suit was filed. In the event a settlement could not be reached, the Department advised that it would file suit in the District of Minnesota, where Ellerbe is headquartered. The United States and Ellerbe engaged in extensive settlement discus-

sions, but no settlement had been reached when the Paralyzed Veterans of America filed an action in June 1996 in the United States District Court for the District of Columbia, alleging that a new arena planned for downtown Washington -- the MCI Center, designed by Ellerbe -- failed to comply with the ADA's architectural requirements in various ways, including a failure to provide wheelchair seating locations with lines of sight over standing spectators. Paralyzed Veterans of America, et al. v. Ellerbe Becket Architects & Engineers, P.C., et al., (D.D.C. Civil Action No. 96-1354 (TFH)) (the "MCI Center" case). PVA sought a preliminary injunction halting construction of the MCI Center. Ellerbe moved to be dismissed from the action.

The United States was granted permission to file an *amicus* brief addressing the plaintiffs' application for a preliminary injunction, motions to dismiss by other defendants on various grounds, and Ellerbe's motion to dismiss. The United States was not allowed to participate in the oral argument on any of the pending motions. Ellerbe's motion was granted, and Ellerbe was dismissed from the MCI Center case on July 29, 1996. 945 F. Supp. 1 (D.D.C. 1996).[2] After Ellerbe was dismissed from the action, the United States and Ellerbe resumed negotiations toward a resolution of this matter, but were unable to reach an agreement. On October 10, 1996, the United States filed this action.

[2]As discussed more fully below, the MCI Center court ultimately ruled that the arena was designed in violation of the ADA because it fails to provide wheelchair seating locations with lines of sight over standing spectators. *See infra* at 23-24.

B. Other factual issues

Although there has been no opportunity to conduct discovery in this matter, the United States can offer some evidence contradicting certain of Ellerbe's factual assertions. For instance, Ellerbe asserts that while it designed the arenas identified in the United States' complaint, it did not construct them. *See* Ellerbe's Memorandum at 4. While it may be true that Ellerbe has not served as a contractor for any stadium or arena, that does not mean -- and Ellerbe does not claim -- that Ellerbe has not routinely been involved in the construction phase of the stadiums and arenas it designs. To the contrary, it appears that Ellerbe has provided "construction administration" or similar services to its arena clients, services which continue throughout the construction process. For instance, an index to Ellerbe's project file for the Portland arena -- an index provided to the United States by Ellerbe in the course of the United States' investigation -- indicates that Ellerbe had substantial involvement in the construction of the Rose Garden. *See* Exhibit D.[3]

Ellerbe also asserts that in designing stadiums and arenas, it has always endeavored in good faith to comply with all of the ADA's architectural requirements, and that there is no evidence

[3]It appears from the index that Ellerbe corresponded, met with, and talked on the phone with the arena's contractors and subcontractors (Headings 4b, 4c, 4e); received and responded to "requests for information" (RFI) from contractors (Heading 4g); received and reviewed shop drawings and other submittals from contractors and subcontractors (Heading 4d); received and processed change orders (Heading 5a); conducted various field tests and made reports of its findings (Headings 6a, 6c, 6d, 6f); and maintained a "construction diary" (Heading 6b).

that it has acted recklessly or willfully. *See* Ellerbe's Memorandum at 21-22; Beckenbaugh Declaration ¶ 7. Despite this assertion, however, there is such evidence. In his deposition in the MCI Center case, Ellerbe architect Gordon Wood -- the firm's vice president and technical director -- testified that he serves as an advisor to all of Ellerbe's stadium and arena design teams, particularly with respect to issues of ADA compliance. Wood Deposition (MCI Center case) at 10, 15 (*see* Exhibit E).[4] Mr. Wood acknowledged that he has known of the Department's position since at least late 1994, and acknowledged his understanding that the Department of Justice is responsible for enforcing the ADA, and for providing interpretive assistance. Id. at 23. Mr. Wood testified, however, that he does not consider the Department's position on lines of sight authoritative and has "chose[n] to disregard it." Id. at 25. Indeed, he did not make any effort to communicate the Department's position to the MCI Center design team. Id. Further, when Ellerbe learned of the Department's

[4]Steven Allison, Ellerbe's senior project architect for the Rose Garden arena, confirmed the importance of Mr. Wood's role in Ellerbe's compliance with the ADA. Mr. Allison testified in his deposition in Independent Living Resources, et al. v. Oregon Arena Corporation, (D. Ore. Civil Action No. 95-84-AS) ("the Rose Garden case"), that if there are questions about compliance with the ADA at Ellerbe, "one of the people we talk to is Gordon Wood." *See* Allison Deposition (Rose Garden case) at 8, 10, 28 (excerpt provided as Exhibit F). He added that Mr. Wood, as the office's technical director, "keeps himself informed of [ADA] issues, and as he knows of information he disseminates it to the project teams." Id. at 29-30. If there were a question about ADA compliance issues, they would discuss it in-house, and Mr. Wood "would certainly be involved." Id. at 36.

position, it did not make its clients aware of that position. Id. at 34-36.[5]

II. THE ADA'S REQUIREMENTS FOR NEW CONSTRUCTION

The Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, is Congress' most comprehensive civil rights legislation since the Civil Rights Act of 1964. Its chief purpose 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). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses.

Congress found that architectural barriers constituted one of the types of discrimination "continually encounter[ed]" by individuals with disabilities. 42 U.S.C. § 12101(a)(5). To redress this form of discrimination, Congress mandated that all

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[5]Mr. Wood gave similar testimony in his deposition in the Rose Garden case, again stating that he was aware of the Department's position, but that he does not believe the ADA architectural standards require a line of sight over standing spectators, and that the Department's view is "just their opinion." Wood Deposition (Rose Garden case) at 34-36 (*see* Exhibit G). As with the MCI Center, he did not inform the Rose Garden design team of the Department's position. Id. Similarly, Mr. Allison, the senior project architect for the Rose Garden, added that "[i]nterpretations and requirements to me aren't necessarily the same thing," and while they would certainly inform their clients of "requirements," he was not sure whether they would inform a client of an "interpretation." Allison Deposition (Rose Garden case) at 61-62 (*see* Exhibit F).

commercial facilities and public accommodations completed after January 26, 1993, must be "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a). Congress intended strict adherence to the new construction requirements so that, "over time, access will be the rule rather than the exception." H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63 (1990) ("The ADA is geared to the future . . . . Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible.") (emphasis added). Congress required that all newly constructed facilities be designed and constructed according to architectural standards to be set by the Attorney General. 42 U.S.C. §§ 12183(a), 12186(b). The Attorney General's architectural standards are incorporated into the Department of Justice's regulation implementing title III of the ADA, 28 C.F.R. Part 36, and are known as the Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"). Among other things -- and as discussed in more detail below (*see infra* at 21) -- the Standards set requirements for the number, size, location, and other attributes of wheelchair seating locations for newly constructed stadiums and arenas. The United States' complaint alleges that Ellerbe has engaged in a pattern or practice of designing new arenas with wheelchair locations that do not meet the requirements of the Standards.

III. ARGUMENT

A. The legal standard for granting a motion to dismiss.

In considering a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, and should not grant the motion unless it is beyond doubt that the plaintiff can prove no set of facts that would warrant relief. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994); Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994).[6] Thus, Ellerbe's motion must be decided against the factual background alleged in the United States' complaint: Ellerbe has repeatedly designed new stadiums and arenas which are not accessible to and usable by individuals with disabilities, because wheelchair users in those stadiums and arenas are not able to see what other spectators can see. Indeed, nowhere in its motion to dismiss does Ellerbe claim that the stadiums and arenas it has designed provide wheelchair users with lines of sight over standing spectators. Nowhere does Ellerbe claim that wheelchair users who attend events in its facilities can see what other spectators can see. The facilities designed by Ellerbe -- in Boston, Philadelphia, Washington, Cleveland, Portland, and elsewhere -- have all been designed for different owners. It is Ellerbe that is the common denominator

[6]In the event that the Court treats Ellerbe's motion to dismiss as a motion for summary judgment (pursuant to Fed. R. Civ. P. 12(b) and 56), the standard is the same: the court should construe all evidence in favor of the non-movant, and grant the motion only if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. RSBI Aerospace, Inc. v. Affiliated FM Insurance Co., 49 F.3d 399, 401 (8th Cir. 1995) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 247, 255 (1986)).

among inaccessible arenas from coast to coast. Ellerbe nonetheless contends that it should bear no responsibility for its pattern or practice of designing facilities which effectively exclude wheelchair users from the events held there.

B. Architects who design buildings to be inaccessible to or unusable by individuals with disabilities can be held liable under title III of the ADA.

1. The ADA's new construction requirements are broadly drawn, and apply to all parties involved in the design and construction of inaccessible facilities.

As discussed above, title III of the ADA requires new facilities to be designed and constructed to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. § 12183(a)(1). The requirement applies to two categories of facilities: "public accommodations" and "commercial facilities." Id. The ADA defines commercial facilities very broadly as all facilities intended for non-residential use whose operations affect commerce (with the exception of certain railroad facilities and equipment, and certain facilities covered by the Fair Housing Act). *See* 42 U.S.C. § 12181(2). The category of public accommodations, while still large, is not as broadly inclusive as "commercial facilities." The statute defines "public accommodations" to be entities (1) whose operations affect commerce, and (2) that fall into one or more of twelve categories of public accommodations set out in the Act. *See* 42 U.S.C. § 12181(7).[7]

[7]Many facilities meet both definitions. Each of the sports stadiums and arenas designed by Ellerbe, for instance, is a non-residential facility whose operations will affect commerce, and thus each is a "commercial facility." In addition, each stadium or arena is a "public accommodation," as each falls within at

Title III of the ADA, however, does not only set architectural requirements for the design and construction of new facilities. It also prohibits a variety of forms of discrimination in the day-to-day operation of certain businesses. That is, in addition to the requirements for new construction set out in section 303, section 302 of the Act imposes on public accommodations, but not on commercial facilities, various other non-discrimination obligations with respect to their day-to-day operations. *See* 42 U.S.C. § 12182(a) and (b).[8]

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least two of the statute's categories of public accommodation: each is a "stadium, or other place of exhibition or entertainment," within the meaning of section 301(7)(C), and each is also an "auditorium, convention center, lecture hall, or other place of public gathering," within the meaning of section 301(7)(D). *See* 42 U.S.C. §§ 12181(7)(C), (D).

[8]Title III's general mandate prohibiting discrimination against individuals with disabilities in public accommodations is set out in section 302(a) of the Act, which provides that

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Section 302(b) then construes section 302(a), defining discrimination on the basis of disability to include various acts or omissions. For instance, 302(b) generally makes it unlawful for public accommodations to deny individuals with disabilities opportunities to participate in and benefit from their services on a basis equal to that offered to other individuals. *See* 42 U.S.C. § 12182(b)(1)(A)(ii). Section 302(b) also prohibits several specific forms of discrimination, including, for instance, failing to provide auxiliary aids or services -- such as assistive listening devices, sign language interpreters, documents in Braille, and so on -- and failing to remove architectural barriers to access, when doing either is necessary to ensure that individuals with disabilities are not

Ellerbe's argument that the ADA does not cover architects rests entirely on a cross-reference in section 303 to section 302(a). Section 303 provides, in pertinent part, that

> as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) of this title includes
>
> (1) a failure to design and construct facilities for first occupancy later than [January 26, 1993] that are readily accessible to and usable by individuals with disabilities . . .

42 U.S.C. § 12183(a). The reference to section 302(a) will not bear the construction Ellerbe puts upon it.

It does violence to the statutory scheme to read the cross reference in section 303 to mean that only those who have obligations under 302 -- the owners, lessors, lessees and operators of public accommodations -- can be held liable for new construction violations under section 303. Under that reading, the only people who could be held liable for design and construction violations of commercial facilities would be those who own, lease, or operate public accommodations. For strictly commercial facilities -- many office buildings, for instance, do not contain places of public accommodation -- there is no party who would meet this definition and, therefore, no party to be held accountable for ADA violations. Such a result cannot be harmonized with the language in 303 that explicitly includes "commercial facili-

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excluded from or denied services by a public accommodation. *See* 42 U.S.C. § 12182(b)(2)(A).

ties" within the scope of the new construction requirements.[9] Ellerbe does not explain either 1) how its "plain language" reading of the statute can be squared with the inclusion of commercial facilities in section 303, or 2) if they cannot be squared, why this Court should adopt a reading of the statute which eliminates an entire category of buildings from the coverage marked out by Congress.[10]

The most sensible reading of section 303's reference to section 302(a) is that section 303 refers to section 302(a) only to indicate that the failure to design and construct accessible

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[9]The legislative history is clear that section 303 was intended to cover all commercial facilities. As the report of the House Committee on Education and Labor explains:

> In many situations, the new construction will be covered as a "public accommodation," because in many situations it will already be known for what business the facility will be used. The Act also includes, however, the phrase "comercial facilities," to ensure that all newly constructed commercial facilities will be constructed in an accessible manner. That is, the use of the term "commercial facilities" is designed to cover those structures that are not included within the specific definition of "public accommodation."

H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. 116 (1990) (emphasis in original).

[10]In addition, limiting section 303 coverage to those parties identified in section 302 makes no sense from a practical perspective. While parties who own, operate, or lease public accommodations are the obvious choice for the obligations related to the day to day operation of the businesses imposed by section 302, *see* n.8, *supra*, parties who lease or operate a facility frequently will have nothing whatever to do with the initial design and construction of the facility. Ellerbe does not explain why Congress would choose those parties to carry out the ADA's new construction requirements.

facilities constitutes another type of "discrimination on the basis of disability," and not to identify the parties that may be held liable under section 303. This interpretation gives full effect to the terms of the provision. *See* Moskal v. United States, 498 U.S. 103, 109-10 (1990) (courts should interpret statutes in a manner that gives effect to every clause and word of the statute) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955) (same)).

Such a reading, moreover, is entirely consistent with the differing characters of sections 302 and 303. As noted above, section 303 differs from section 302 in that 302 defines a variety of prohibited activities -- imposition of discriminatory eligibility criteria, failure to modify policies and practices, failure to provide auxiliary aids and services, failure to remove architectural barriers, and others. *See* 42 U.S.C. § 12182(b)(1), (2); *supra* n.8. Because the nature of these prohibitions varies so greatly, it is not clear from the prohibitions themselves who is responsible for compliance, and a failure to specify who is responsible would undoubtedly produce finger-pointing between parties with connections to the facility. Accordingly, it made sense to identify, for the variety of obligations imposed in section 302, what parties were responsible for those obligations. Section 303, by contrast, addresses only one category of activity: the design and construction of inaccessible facilities. The parties responsible for complying with section 303 are evident from the nature of the activity itself: those who are involved in the design and construction of a new

facility. There is no need to further define -- either to expand or to limit -- the category of responsible parties, because the definition of the prohibited activity inherently carries with it an identification of the responsible parties.[11]

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[11]Ellerbe repeatedly insists that its reading of section 303 is compelled by the "plain language" of the statute. *See* Ellerbe's Memorandum at 5, 7, 8, 11, 13. At the same time, however, Ellerbe advances an argument which departs from the "plain language" of the statute. In urging that the statute must be construed to give effect to all of its terms, Ellerbe posits that "entities liable for discrimination as identified in § 302(a) are `persons who own, lease (or lease to) or operate' places of public accommodation or commercial facilities." Ellerbe's Memorandum at 9 (emphasis added). The words "commercial facilities" do not appear anywhere in section 302. Without mentioning it, Ellerbe thus suggests expanding the "plain language" of section 302, to bring other parties within the scope of section 302, and disguise the difficulty presented by its approach.

While Ellerbe does not acknowledge it, it is possible to argue that title III is ambiguous as to who is responsible for complying with section 303. That is, because section 303 itself does not identify who the responsible parties are, and because the identification of parties contained in section 302 is limited in scope in a way that makes it incompatible with section 303, there is no clear answer to the question of who is responsible for compliance with section 303. In such a case, of course, the interpretation of the statute by the agency entrusted with enforcement of the statute is entitled to substantial deference. 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 should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

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, § III-5.1000 at 46. *See* Exhibit H.

Ellerbe relies heavily on the opinion dismissing it from the MCI Center case, Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1 (D.D.C. 1996), the only case to address this issue. That opinion, however, is not persuasive, for the same reasons that Ellerbe's argument is not persuasive. For instance, the decision does not explain why section 303, which plainly applies to public accommodations and commercial facilities, should be limited to parties who own, lease, or operate public accommodations. The opinion does not even acknowledge this discrepancy, much less try to account for it. Rather, the court states only that "the limitation in § 302 to owners, operators, and lessors also applies to § 303 and thereby excludes architects . . . ." Id. at 2. But because section 302 applies only to owners, operators, and lessors of public accommodations and not to commercial facilities at all, this analysis, as discussed above, leads to the patently incorrect result of eliminating from section 303 any meaningful coverage of commercial facilities. The correct reading is one that gives full effect to both sections -- interpreting the cross-reference to 302 in section 303 to mean that a failure to design and construct accessible facilities is merely an additional form of discrimination to be included in section 302's definition of discrimination.

2. By specifically including the term "design" in section 303, Congress clearly signalled its intent to bring those who design new facilities -- architects and other designers -- within the scope of section 303's coverage.

The language of section 303 itself indicates that architects fall within the scope of its coverage. By including the term "design," Congress clearly intended that those entities who design new facilities -- architects, engineers, and other designers of all types -- have obligations under the ADA. Congress could have written this paragraph without using the word "design," addressing itself only to the end result by making it illegal only to "construct" inaccessible facilities. By including the design function in the description of the prohibited conduct, however, Congress brought within the Act's coverage not just those parties who are ultimately responsible for the construction of a new facility, but also those parties who play a role in the design of a building. Thus, section 303 is properly read to prohibit designing an inaccessible facility as well as constructing an inaccessible facility. The language applies to the entire process of building a facility -- the "design and construction" of a public accommodation or commercial facility, and requires all parties involved in that process to conform their involvement, whatever its scope, to the requirements of the ADA.

Ellerbe argues that only those parties that both "design and construct" new facilities can be held liable under section 303. Because Ellerbe is only the designer, the argument goes, it

cannot be held responsible for ADA violations at the arena since it is not involved in the construction of the arenas. *See* Ellerbe's Memorandum at 11-12. Initially, Ellerbe's argument fails as a factual matter. As discussed above, *supra* at 5, Ellerbe provides services which continue throughout construction of the facility. Moreover, as a matter of law, Ellerbe's parsing of the language of section 303 creates a large loophole. Under Ellerbe's proposed reading of section 303, 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 effectively nullify section 303.[12]

The Paralyzed Veterans opinion does not address this loophole. Rather the Court simply concludes that

> the phrase "design and construct" is distinctly conjunctive. It refers only to parties responsible for both functions, such as general contractors or facilities owners who hire the necessary design and construction experts for each project.

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[12]Further support comes from one of title III's remedial provisions, which allows 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.

945 F. Supp. at 2. If this exclusive focus on those ultimately responsible for the facility were correct, 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. Congress, however, did expressly include the term "design" when describing the prohibited activities, and neither Ellerbe nor the Paralyzed Veterans decision explains how its inclusion 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.

3. Holding architects responsible for designing buildings that exclude individuals with disabilities is consistent with the purposes of the ADA.

Under well-established canons of statutory construction, in addition to examining the text of the statute the Court must also look to its remedial purposes.[13] Architects play key roles in

[13]*See* Peyton v. Rowe, 391 U.S. 54, 65 (1968) (civil rights legislation should be liberally construed in order to effectuate its remedial purpose); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"). "[R]emedial statutes are to be liberally construed to effectuate their purposes." Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 n.54 (D.C. Cir. 1984). *See also* Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 18 (1st Cir. 1994) (broadly construing the ADA); Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (same), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994) (same).

the design and construction of new facilities, particularly in cases involving large sports stadiums and arenas, where an owner relies heavily on architects, engineers, contractors, and other building professionals with highly specialized expertise. In such a case, an owner will in many instances simply be unable to judge whether the building professionals to whom he or she has entrusted the project are complying with the statute, particularly if, as the evidence suggests Ellerbe has done, the architect disregards the law or authoritative interpretations of it, or fails to inform his client of the applicable requirements or interpretations. *See* discussion *supra*, at 6-7. In most cases, owners will not realistically be in a position to identify and prevent ADA violations during the design and construction of the facility, and errors will have to be addressed after construction is complete, when it may be considerably more difficult and expensive to remedy ADA violations.

In addition to architects and other design professionals, entities other than those who own, operate, or lease the facility in question may exert considerable influence or control over the design and construction of a new facility. For instance, a franchisor of a chain of hotels or restaurants may dictate or control the design plans for facilities in its chain, but typically will not own or lease the facilities, and may have too little control over the operations of the facilities after they are built to be held to be "operating" the facilities within the meaning of title III. Under Ellerbe's reading of the statute,

such an entity would have no responsibility to comply with the ADA, despite its control over the design of the facility.

C. In sports stadiums and arenas, where other spectators can be expected to stand, wheelchair seating locations must provide wheelchair users with lines of sight over standing spectators.

1. Title III of the ADA requires all new sports stadiums and arenas to be readily accessible to and usable by individuals with disabilities.

As discussed above (see pp. 7-8, *supra*), section 303 of the ADA requires that newly constructed facilities be "readily accessible to and usable by individuals with disabilities . . . in accordance with standards set forth . . . in regulations issued under this subchapter." 42 U.S.C. § 12183(a). The standards referred to -- the Attorney General's Standards for Accessible Design -- specifically address the placement of wheelchair seating locations in newly constructed stadiums and arenas, requiring that

> [w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and <u>lines of sight comparable to those for members of the general public</u>. . . .

28 C.F.R Part 36, Appendix A, § 4.33.3 (emphasis added).

The Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that wheelchair locations in newly constructed arenas must provide a line of sight over standing spectators in facilities where spectators may be expected to stand during the events.

2. The Department of Justice's interpretation of title III of the ADA and the title III regulation is reasonable.

The Department's reading of section 4.33.3 of the Standards makes perfect sense: if other spectators can see over standing spectators (by standing up themselves), then spectators using wheelchairs must also be able to see over standing spectators, or they will not have a "comparable" line of sight. Put differently, the developers, architects, and engineers who design new stadiums can no longer rely on the assumption that when patrons stand, all patrons will still be able to see, by standing up themselves. Rather, they must replace that assumption with a design feature that recognizes that most wheelchair users cannot stand in order to see over others in front of them. Just as the ADA does not allow a new facility to be designed and constructed with an entrance that requires wheelchair users to stand, walk, or climb stairs, so does the ADA forbid an arena to be designed and constructed so that wheelchair users must be able to walk or stand in order to see what is happening on the court or the ice or the stage.

The Department's reading of the "comparable" lines of sight language of the Standards is buttressed by the language and purpose of the statute itself. The new construction provision requires that new facilities be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a). The legislative history of the Act explains that this provision is intended to assure "both ready access to the facility and usability of its features and equipment and of the goods,

services, and programs available therein." S. Rep. 116, 101st Cong., 1st Sess. 69 (1989). The central purpose of a sports stadium or arena is to provide a facility in which large numbers of people can gather and view an athletic or other event. At many of those events -- basketball games, music concerts, and others -- spectators will stand for much or all of the event, including the most interesting and exciting portions of the event. Having a line of sight over standing spectators will be critical to enjoyment of events at the facility. To sanction designs which relegate wheelchair users to looking at the backs of the people in front of them during those periods is to diminish the ability of wheelchair users to participate in and enjoy the event. It is precisely the kind of discrimination that the ADA is intended to prevent.

The only court to consider the issue -- the Paralyzed Veterans court (the MCI Center case) -- has come to precisely this conclusion. In a bench ruling denying a defense motion for summary judgment, the court ruled that the ADA does require sports arenas to provide wheelchair users with lines of sight over standing spectators.[14] The court found that "the ADA requires a higher degree of accommodation" than previously was

[14]Paralyzed Veterans of America v. Ellerbe Becket Architects and Engineers, P.C., No. 96-1354 (TFH), (D.D.C. Oct. 21, 1996) (cited herein as "transcript of bench op.") (copy provided as Exhibit I). On December 20, 1996, the court issued a written opinion "as an additional explanation of its bench opinion." Paralyzed Veterans of America v. Ellerbe Becket Architects and Engineers, P.C., No. 96-1534 (TFH), 1996 WL 748420, at *1 (D.D.C. Dec. 20, 1996).

required, and that the ADA is "a new remedial law adopted by the Congress of the United States to put those who are disabled in as equal a position as possible with the general public." Transcript of bench op. at 7, 12. The court added that if the Justice Department's interpretation of the "comparable" lines of sight requirement were not correct,

> there would be really no new requirements under the ADA, it seems to the Court, and that this new construction then could go along as other construction always has, which would simply not bring any relief to people in the plaintiffs' position that I believe that the statute was meant to cover.

Id. at 16-17. The court concluded that, as a matter of law, "the Americans with Disabilities Act does require such enhanced sightlines at substantially all wheelchair locations in a new arena." 1996 WL 748420, *1.

3. The Department of Justice's interpretation of the ADA's architectural requirements is entitled to deference.

Significantly, in arguing that wheelchair users need not be able to see over other patrons, Ellerbe nowhere argues that wheelchair users at the arenas it has designed are actually able to see what other spectators are able to see. Instead, Ellerbe argues only that the Department's position with respect to the "comparable" lines of sight requirement does not have the force of law and is not binding. *See* Ellerbe's Memorandum at 18-21. Ellerbe is correct that the Department's interpretations of title III of the ADA and the title III regulation do not themselves have the force of law. It is well established, however, that the courts must give substantial deference to an agency's interpreta-

tion of its own regulations. Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994) (internal quotes omitted). This means, the 8th Circuit has held, that the agency's interpretation "must be given controlling weight unless plainly erroneous or inconsistent with the regulation." Board of Regents of the University of Minnesota v. Shalala, 53 F.3d 940, 943 (8th Cir. 1995) (citing Thomas Jefferson). The court added that "this broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program." Id. (internal brackets and quotation marks omitted). *See also* Wilkes v. Gomez, 32 F.3d 1324, 1329 (8th Cir. 1994) (same).

Ellerbe contends that the Architectural and Transportation Barriers Compliance Board is the authoritative agency with respect to the ADA's architectural standards, and points to various statements by the Board or its representatives suggesting that the Board differs with the Department of Justice on the question of comparable lines of sight. The Paralyzed Veterans court, however, has already rejected this argument. The court noted that the Board "has declined to address the issue of lines of sight over standing spectators," but added that whatever the Board's treatment of that issue,

> it is clear that the Board is not the authoritative agency on this matter. Under the ADA, the Board is merely given the role of setting minimum guidelines for the Attorney General's regulations to follow. Nowhere is the Board listed as one of the agencies having primary responsibility for either enforcing the Act or for interpreting it; at most it has a supplementary role. . . .

> Instead, the Justice Department is the authoritative agency, and the [Standards for Accessible Design], not the [Board's ADA Accessibility Guidelines], are the authoritative guidelines. Therefore, it is the interpretation of the Department of Justice -- the agency with the authority to enact binding regulations and to enforce the Act -- that shapes the meaning of the regulations.

Paralyzed Veterans, 1996 WL 748420, *2. (citation omitted). The court found the Department of Justice's reading of the comparable lines of sight requirement to be reasonable, and consistent with the terms of the architectural standards and the Act itself. Id. at *4. In addition, the Department's interpretation does not "add new duties or rights to the statute, such that A[dministrative] P[rocedure] A[ct] requirements are triggered." Id. "Therefore," the court held, "the interpretation outlined by the Justice Department is entitled to deference from this Court." Id.[15]

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[15]Other courts have also deferred to the Department of Justice's interpretations of its ADA regulations. In Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994), the court resolved a dispute over the meaning of a provision in the Standards by relying on the Department of Justice's interpretation in its Technical Assistance Manual for title III. The court noted that

> [t]he United States Department of Justice is charged by statute with the implementation of Title III of the ADA, 42 U.S.C. § 12186(b), and to that end it has promulgated conventional regulations and published literature interpreting the regulations, including a "technical assistance" manual, pursuant to 42 U.S.C. § 12206(c)(3) . . . . Although the parties do not agree as to the force and effect each is to be given, the Court will deem them as regulations and interpretations of regulations, the latter to be given controlling weight as to the former.

Id. at 36 n.4. The court concluded that "[a]s the author of the regulation, the Department of Justice is also the principal arbiter as to its meaning," and adopted the reading of section 4.33.3 advanced by the government. Id. at 38 (citing Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381 (1994)).

D. The United States' claim is properly before this Court.

Raising an assortment of issues -- forum shopping, preclusion, comity, standing, ripeness, and the first-filed rule -- Ellerbe argues that this case is not properly before this Court, and should be dismissed. None of Ellerbe's arguments has merit.

First, the United States is not forum shopping, or, as Ellerbe puts it, "[h]opping from circuit to circuit looking for a favorable forum." Ellerbe's Memorandum at 16. Ellerbe ignores two facts. First, the United States has filed only one action, and can hardly be accused of "hopping from circuit to circuit." Second, as discussed above, *see supra* at 3, the United States informed Ellerbe in February 1996 of its intent to bring an enforcement action in this district, where Ellerbe is headquartered. The government thus registered its intent to sue,

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See also Ferguson v. City of Phoenix, 931 F. Supp. 688 (D. Ariz. 1996) (deferring to the Department's Technical Assistance Manual for title II of the ADA (which applies to state and local governments) with respect to the requirements for making 911 emergency systems accessible to individuals with hearing impairments); Innovative Health Sys. v. City of White Plains, 931 F. Supp 222 (S.D.N.Y. 1996) (Department of Justice's title II TA Manual entitled to controlling weight unless plainly erroneous or inconsistent with the regulations); Orr v. Kindercare, Civ. No. S-95-507 EJG/GGH (E.D. Cal. June 9, 1995), slip op. at 5-6 (copy provided as Exhibit J) (Attorney General's interpretations of the title III regulations are entitled to substantial deference). *Cf.* Pinnock v. International House of Pancakes, 844 F.Supp. 574 (S.D. Cal. 1993), *cert. denied*, 114 S. Ct. 2726 (1994) (rejecting a constitutional challenge to title III of the ADA as void for vagueness in part by considering clarification of statute found in administrative regulations and the title III TA Manual).

Similarly, the 8th Circuit has relied on the EEOC's Technical Assistance Manual in interpreting title I of the ADA (governing employment discrimination). *See* Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112, 1113, 1114 (8th Cir. 1995).

and its choice of forum, well before the Paralyzed Veterans brought their action in Washington.

Raising issues of preclusion and comity, Ellerbe next contends that the decision of the Paralyzed Veterans should be binding, and prevent this court from deciding the issue independently. The United States, however, was not a party to, and is not bound by the judgment dismissing Ellerbe from the MCI Center case. The United States participated in that case only as an *amicus curiae*, and thus had only a limited opportunity to be heard, and has no right or opportunity to appeal the district court ruling. *See*, *e.g.,* Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 808 (3d Cir. 1991) (amicus has no right to review by appeal, and cannot request relief not sought by the parties).[16] Recognizing that "[p]articipation as an amicus curiae does not provide the requisite degree of control" to warrant binding the amicus with the judgment in the case, Kerr-McGee Chem. Corp. v. Hartigan, 816 F.2d 1177, 1181 (7th Cir. 1987), the courts have held that amici are not bound by the judgments in the cases in which they participate. *See, e.g.,* Kerr-McGee, 816 F.2d at 1180-81, 1180-81 n.4; Munoz v. Imperial County, 667 F.2d 811, 816 (9th Cir.) (same), *cert. denied*, 459 U.S. 825 (1982).

[16]Even the authority cited by Ellerbe recognizes that the right to appeal is one of the crucial aspects of being a party, justifying preclusion of relitigation of the same question by a party. *See* Ellerbe's Memorandum at 15-16 (citing Weis, J., concurring in Goodman's Furn. Co. v. United States Postal Serv., 561 F.2d 462, 465 (3d Cir. 1977)).

Further, actions brought by private parties do not bind the government. As the 5th Circuit has explained, "the United States will not be barred from independent litigation by the failure of a private plaintiff," because "the United States has an interest in enforcing federal law that is independent of any claims of private citizens." United States v. East Baton Rouge Parish School Board, 594 F.2d 56, 58 (5th Cir. 1979). "[A]ny contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention." Id. *See also* EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291 (7th Cir. 1993) (EEOC's interests are broader than those of individuals injured by discrimination; "private litigants cannot adequately represent the government's interest in enforcing the prohibitions of federal statutes"); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1361 (6th Cir.) (EEOC sues to vindicate the public interest, which is broader than the interests of the individual parties in the prior action), *cert. denied*, 423 U.S. 994 (1975).[17]

[17]Ellerbe mistakenly relies on Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996). *See* Ellerbe's Memorandum at 14 n.6. In Tyus the 8th Circuit held that a prior action under the Voting Rights Act brought by private plaintiffs would bar the current action by another group of private plaintiffs, on a theory of "virtual representation." The Tyus court, however, carefully limited its holding, ruling that the doctrine would apply "only when it finds the existence of some special relationship between the parties justifying preclusion." Id. at 455. Ellerbe has not alleged, and cannot show, that there is any such relationship between the Paralyzed Veterans and the United States. Moreover, as discussed in the text, the federal courts have uniformly held that the

And while comity is certainly important, the Supreme Court has recognized that "the government is often involved in litigating issues of national significance where conservation of judicial resources is less important than `getting a second opinion.'" United States v. Mendoza, 464 U.S. 154, 158 (1984). The Court rejected the attempt of a private party to collaterally estop the government from relitigating an issue, because doing so

> would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

Id. at 160.[18]

United States has a special, independent interest in enforcement of federal law, an interest that cannot be represented by a private party. *See, e.g.,* Harris Chernin, 10 F.3d at 1291 (no privity between private party and EEOC such that private party's claim for relief under title VII would bar EEOC from bringing action seeking injunction to prevent further violations).

[18]Ellerbe attempts to distinguish Mendoza by arguing that since parties other than the United States can bring actions under title III, preventing the government from going forward will not thwart the development of the case law. Ellerbe's Memorandum at 16 n.7. Ellerbe does not explain, however, why a private party should be allowed to proceed with an action, but not the Attorney General -- the officer charged by Congress with enforcing the statute. This discrepancy is particularly problematic given that private parties cannot bring the same kinds of actions under title III that the Attorney General can: only the Attorney General can seek compensatory damages for persons aggrieved by violations of the statute, and only the Attorney General can seek civil penalties against wrongdoers. *See* 42 U.S.C. § 12188(b)(2)(B), (C). Moreover, only the Attorney General has authority to bring actions (like this one) to address a pattern or practice of discrimination, and secure the broader relief available in such actions. *See* 42 U.S.C. § 12188(b)(1).

Ellerbe's jurisdictional arguments are no more persuasive. Its contention, for instance, that the United States does not have standing to bring this action is really an argument that the United States has failed to state a claim: Ellerbe's "standing" argument is that the ADA does not require a line of sight over standing spectators, so that there is no injury and therefore no standing. The argument has no independent force, resting entirely on the question of the meaning of the comparable lines of sight requirement. Similarly, what Ellerbe labels a "ripeness" argument is really an attack on the ability of the Attorney General to bring actions alleging a "pattern or practice" of discrimination, as provided by title III of the ADA. *See* 42 U.S.C. § 12188(b)(1)(B)(i).[19] Ellerbe argues that because no other court has yet determined that an arena designed by Ellerbe violates the ADA, the United States cannot bring an

[19]Ellerbe errs when it characterizes this action as one in which "DOJ alleges . . . that Ellerbe failed to design five facilities" with comparable lines of sight. Ellerbe's Memorandum at 17. This action alleges that Ellerbe has engaged in a pattern or practice of illegal discrimination; the five facilities identified in paragraph 9 of the Complaint are only illustrative examples of Ellerbe's pattern of conduct.

There is no question that United States' pattern or practice action meets traditional ripeness requirements. *See, e.g.,* In re Workers' Compensation Refund, 46 F.3d 813, 821 (8th Cir. 1995) (determining whether case is ripe requires consideration of fitness of issues for judicial decision and hardship to parties of withholding court consideration). Ellerbe does not deny that it has routinely designed arenas to have wheelchair locations that do not provide lines of sight over standing spectators, including the arenas identified in the Complaint. Nor does Ellerbe deny that it will continue to design stadiums and arenas in the future, or suggest that it has changed or will change its practice of providing wheelchair locations without lines of sight over standing spectators.

action alleging Ellerbe has engaged in a pattern or practice of discrimination.[20] Ellerbe's Memorandum at 17. Ellerbe thus contends that the Attorney General cannot bring a pattern or practice action until there is a judgment or finding in some other action that the conduct at issue violates the statute. Ellerbe cites no authority for this proposition, and neither the ADA nor the cases contain such a requirement. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324, 336, 336 n.16 (1977).[21]

Lastly, the "first-filed rule" has no application here. As the cases cited by Ellerbe make clear, that rule applies when one party files multiple claims against the same defendant in different courts, or when two parties each file claims against the other, and do so in different courts. *See* Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985); Northwest Airlines, Inc. v. American Airlines, Inc., 792 F. Supp.

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[20]In any case, the factual predicate for Ellerbe's "ripeness" argument is no longer true. On December 20, 1996, the Paralyzed Veterans court ruled that the design for the MCI Center violates the ADA, and ordered the arena to be redesigned. Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., No. 96-1354 (TFH), 1996 WL 748416 (D.D.C. Dec. 20, 1996).

[21]It is important to note that, with respect to the relief sought, there is no overlap between this action and the other actions involving arenas designed by Ellerbe. The United States does not seek any relief with respect to the arenas involved in the other actions; the only injunctive relief sought here involves stadiums and arenas designed after the filing of this action. Also, because only the Attorney General can seek a civil penalty, and the United States is not a party to any of the other actions, this is the only action in which such a penalty might be assessed. *See* 42 U.S.C. § 12188(b)(2) (court may assess civil penalty in action brought by Attorney General).

655 (D. Minn. 1992). The United States has filed only one action, and Ellerbe has filed no action at all. Even if the rule applied, the only conclusion could be that this is the "first-filed" action.

E. This is an appropriate case for imposing a civil penalty and granting injunctive relief.

In addition to authorizing the court to grant equitable relief, title III of the ADA authorizes the court, in cases brought by the Attorney General, to vindicate the public interest by assessing a civil penalty against an entity found to have violated the statute. 42 U.S.C. § 12188(b)(2)(C). When considering whether to assess a civil penalty or determining the amount of a penalty, the court must consider the defendant's good faith. 42 U.S.C. § 12188(b)(5).[22]

Ellerbe asserts that "there is no evidence that Ellerbe willfully, intentionally or recklessly disregarded the law," offering the conclusory statement in the declaration of Thomas Beckenbaugh that Ellerbe has made a good faith effort to comply with the ADA in designing the arenas in question. *See* Ellerbe's Memorandum at 22; Beckenbaugh Dec. ¶ 7. As the deposition

[22]Civil penalties serve two purposes: 1) to punish wrongful conduct, Tull v. United States, 481 U.S. 412, 422 n.7 (1987); United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992), and 2) to deter other potential violators. United States v. ITT Continental Baking Co., 420 U.S. 223, 231, 232-33 (1975); United States v. Reader's Digest Ass'n, Inc., 662 F.2d 955, 966-67 (3d Cir. 1981). Thus, a civil penalty must not be so small as to be an acceptable cost of doing business, as that would nullify its effectiveness in punishing wrongdoing, and in deterring illegal conduct. ITT Continental Baking, 420 U.S. at 231-32; Reader's Digest Ass'n, 662 F.2d at 966-67, 967 n.16.

testimony cited above shows, however, there is already strong evidence that Ellerbe did willfully or recklessly disregard the Department of Justice's interpretation of the comparable lines of sight requirement. *See supra* pp. 6-7. Gordon Wood testified twice that he knew of the Department's position, disagreed with it, and disregarded it to the point of not bringing it to the attention of Ellerbe's design teams. He and Mr. Allison also testified that Ellerbe may not even have advised their clients of the Department's position. Discovery may yield further evidence of a reckless or willful disregard for the ADA.

Finally, Ellerbe argues that injunctive relief is not appropriate here because enjoining Ellerbe "will not bind other design professionals" or other parties. Ellerbe's Memorandum at 22-23. The standard for granting an injunction, however, does not include a requirement that it be effective against the world; the ADA authorizes the court to grant "any equitable relief" that the court considers appropriate, *see* 42 U.S.C. § 12188(b)(2)(A), and preventing further violations by this defendant is sufficient reason to grant an injunction. *See* Martin v. Feilen, 965 F.2d 660, 672 (8th Cir. 1992) ("serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction" (*quoting* Beck v. Levering, 947 F.2d 639, 641 (2d Cir. 1991), *cert. denied*, 504 U.S. 909 (1992))). To the extent that other parties need to be deterred from designing and constructing new arenas that do not comply with the ADA, they can be deterred by imposing a substantial civil penalty on Ellerbe. As the cases

cited above point out, deterring misconduct by others is one of the chief purposes of civil penalties. *See* n.22, *supra*.

IV. CONCLUSION

For the reasons stated above, the United States respectfully urges the court to deny Ellerbe's motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States' Memorandum in Opposition to Defendant's Motion to Dismiss was served upon

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