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

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

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

In opposing the United States' motion for summary judgment, DIA and HFS (collectively, "DIA") continue to ignore the central flaw in their legal argument — that their reading of sections 302 and 303 of the ADA effectively eliminates coverage of commercial facilities from the scope of section 303. In addition, DIA fails to come forward with evidence to contradict the United States' showing that the Wall Days Inn is inaccessible to individuals with disabilities, and that numerous other new Days Inn hotels are inaccessible as well. DIA also fails to come forward with admissible evidence to dispute the various ways in which it had control over, and participated in, the design and construction of the Wall Days Inn and other new Days Inn hotels. Rather, DIA opposes the United States' motion by repeatedly misrepresenting the record, and by attempting to distort the United States' position — and then calling those distortions vague, unreasonable, and unworkable. In doing so, DIA fails to establish that there is any genuine issue of material fact that precludes judgment as a matter of law.

ARGUMENT

A. DIA Continues to Ignore the Central Flaw in its Argument about the Coverage of Section 303 of the ADA.

Nowhere in its argument does DIA address the central flaw in its reading of sections 302 and 303 of the ADA. DIA never explains why section 303, which applies to both public accommodations and commercial facilities, should be limited to parties who own, operate, or lease public accommodations. DIA's reading of the statute would effectively eliminate commercial facilities from the coverage of section 303. *See* United States' Memorandum in Support of its Motion for Summary Judgment ("U.S. Memorandum") at 17-20; United States Memorandum in Opposition to Days Inns of America, Inc. and HFS Incorporated's Motion for Summary Judgment ("U.S. Opposition") at 7-9.

DIA's only answer is to call the government's position "hypertechnical." Memorandum of Days Inns of America, Inc. and HFS Incorporated in Opposition to Plaintiff's Motion for Summary Judgment ("DIA Opposition") at 13. Despite DIA's posturing, however, and its repeated insistence that the government's reading of section 303 makes no sense, a second federal court, also in the Eighth Circuit, has now concluded that the government's reading of section 303 is correct. In United States v. Ellerbe Becket, Inc., Civil No. 4-96-995 (D. Minn. October 2, 1997) (copy provided as Exhibit A to this memorandum), the United States sued the Ellerbe Becket architectural firm for repeatedly designing new sports stadiums and arenas in violation of the ADA's architectural requirements for new construction. Ellerbe moved to dismiss the action against it, arguing (as DIA does here), that architects are not covered by section 303 because the "plain language" of title III requires that section 303 be limited to parties who own, operate, or lease the facility in question. The court squarely rejected that argument:

> Congress clearly intended that commercial facilities be subject to the accessibility standards for new construction. *See* H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. 116 (1990) ("the use of the term 'commercial facilities' is designed to cover those structures that are not included within the specific definition of 'public accommodation.'"). Statutory language should be construed in a manner that gives effect to all terms so as to avoid rendering terms useless. *See Moskal v. United States*, 498 U.S. 103, 109-110 (1990). Ellerbe has not explained adequately how its interpretation would not result in an inexplicable gap in coverage of a class of buildings Congress clearly intended to be covered by the accessibility standards for new construction. Ellerbe responds by arguing that the list of entities liable should be imported into § 303(a) from § 302(a), but the phrase "of public accommodations" should be expanded to include "or commercial facilities." This argument undercuts Ellerbe's "plain language" logic.

Slip op. at 10-11. Noting that another federal court had come to the same conclusion, the Ellerbe court concluded that although the Ellerbe firm did not own, operate, or lease any of the facilities in question, it could nonetheless be held liable under section 303 of the ADA, and denied

Ellerbe's motion to dismiss. Id. at 6, 13. *See also* Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1178 (S.D. Fla. 1997) (same). In sum, far from being "hypertechnical," both the Ellerbe and Johanson courts have concluded that the government's position is firmly grounded in the language and structure of sections 302 and 303.[1]

B. The Undisputed Facts Demonstrate that DIA and HFS have Violated Section 303 of the ADA.

Although DIA has responded to many of the facts included in the United States' Statement of Undisputed Facts ("U.S. Facts"), DIA has not contested those facts. Rather than coming forward with evidence to dispute the facts stated by the government, DIA instead advances a variety of legal arguments. DIA has thus failed to establish that any genuine issue of material fact precludes judgment as a matter of law.[2]

1. The Facts Underlying the United States' Claims are Not Disputed.

DIA has not responded in any fashion to several of the facts established in the United States' statement of facts, and has not contested many more.[3] Accordingly, those facts are

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[1]The Ellerbe court added that even if it found that the language of sections 302 and 303 were ambiguous, it would reach the same result, because it would defer to the Department of Justice's interpretation of the statute. Ellerbe, slip op. at 11 n.4. *See also* U.S. Opposition at 9-10.

[2]In opposing a motion for summary judgment, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 (8th Cir. 1997).

[3]DIA has not responded in any fashion to paragraphs 4, 6-18, 20-23, 26, 38-39, 44-49, 62, 66, 70-71, 75, 85-87, 94, 99-100, 102-103, 106, 116-119, or 128-130 of the United States' Statement of Material Facts. *See* DIA's Response to United States' Statement of Material Facts ("DIA Fact Response"). In addition, while DIA has responded to several other paragraphs, it has not offered any evidence to contradict, and does not claim to dispute, the facts underlying several other paragraphs, including ¶¶ 1-3, 19, 24, 27-31, 32 (except 32.a), 33-34, 40, 41 (except for DIA's claim that the comments its architects would make on plans for new Days Inn hotels were only "recommendations" or "suggestions" — *see infra* at 5-6), 42, 43, 50-61, 63-65, 67-69, 72-74, 76-84, 88 (except for

conclusively established for purposes of this action, D.S.D. LR 56.1(D), and they are sufficient to establish that the United States is entitled to summary judgment. DIA has not controverted, for instance, the facts demonstrating that the Wall Days Inn is a newly constructed hotel subject to the ADA's architectural accessibility requirements for newly constructed facilities. U.S. Facts ¶¶ 6-9. *See also* 42 U.S.C. §§ 12181(2), (7), 12183(a)(1); 28 C.F.R. §§ 36.401, 36.406. Similarly, DIA has not controverted the facts establishing that the Wall Days Inn and several other new Days Inn hotels are not accessible to individuals with disabilities, failing in many respects to comply with the ADA's Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"). U.S. Facts ¶¶ 77-78, 80-88.[4] *See also* U.S. Memorandum at 2-6. DIA also has not come forward with evidence to contradict the facts demonstrating its control over, and participation in, the design and construction of the Wall Days Inn, U.S. Facts ¶¶ 28-29, 44-76, or

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DIA's suggestion that Mr. Hauk testified that he and his wife are solely responsible for the operation of the Wall Days Inn — *see infra* at 6-7), 89-93, 95, 96 (except 96.h), 97-98, 101 (except for the issue of the extent to which the Hauks have modified their operating practices to provide 24 hour front desk service), 104-05, 107-115, and 121-127. In sum, there can be little question that the only remaining disputes are legal disputes, and that it is appropriate that this case be decided as a matter of law.

[4]DIA admits that it has no basis on which to dispute the findings of the United States' expert, Mr. William Hecker, with respect to the inaccessibility of the Wall Days Inn and the other new Days Inn hotels, but asserts that his findings are not admissible. DIA Fact Response ¶¶ 78-84. The assertion is baseless. The United States provided Mr. Hecker's expert report to DIA in advance of Mr. Hecker's deposition, and DIA questioned Mr. Hecker about those reports at length. Mr. Hecker testified, under oath, about the methods he used to survey the hotels in question, to determine how accessible (or inaccessible) they were to individuals with disabilities. Deposition of William Hecker ("Hecker Dep."), Ex. 52, at 125-33. He further testified, under oath, that the reports provided to DIA — the reports provided as Exhibits 17 and 18 to the United States' Statement of Material Facts — contained the findings of his surveys of each of the Days Inn hotels in question, and his opinions about the degree to which each hotel was or was not accessible to individuals with disabilities. Id. at 173-78. Nonetheless, out of an abundance of caution, to resolve any remaining question about the admissibility of Mr. Hecker's findings, or his expert reports, the United States has provided Mr. Hecker's declaration that the reports do, in fact, contain his findings and opinions. *See* Declaration of Mr. William Hecker, AIA ("Hecker Dec."), Ex. 51. (Simultaneously with the filing of this Reply Memorandum, the United States is filing two additional Volumes of Exhibits (Volumes X and XI, containing Exhibits 51 through 56) to the United States' Statement of Material Facts. These volumes contain Exhibits made relevant by DIA's opposition to the United States' Motion for Summary Judgment.)

other new Days Inn hotels. U.S. Facts ¶¶ 16, 18-24, 27, 30, 32.b, c, 33-34, 38-40, 42-43. *See also* U.S. Memorandum at 7-12.

2. DIA Repeatedly Misrepresents the Record.

On the relatively few occasions when DIA does attempt to dispute some fact established by the United States, DIA's claim frequently rests on a misrepresentation of the testimony of some witness, or a misrepresentation of the record as a whole. One of the most blatant examples of this practice occurs when DIA cites the testimony of two architects formerly employed by HFS for the proposition that when its architects review plans for new hotels, they make only "recommendations" or "suggestions." DIA Fact Response ¶ 41 (citing the testimony of W. Kraft and R. Tischler). DIA made a similar claim in its own statement of facts. *See* Days Inns of America, Inc. and HFS Incorporated's Statement of Undisputed Material Facts ("DIA Facts") ¶ 17. As the United States explained in its response to DIA's claim, the record simply does not support DIA's claim. The testimony of Mr. Keeble, DIA's Rule 30(b)(6) designee, and Mr. Hoagland, the former head of the Design and Construction Department, and the clear language of the Days Inn Uniform Franchise Offering Circular, the standard Days Inn license agreement, and the PDSM itself, all make clear that while some comments may have been only "suggestions" or "recommendations," others were indeed "requirements." *See* United States' Response to Days Inns of America, Inc. and HFS Incorporated's Statement of Undisputed Material Facts ("U.S. Fact Response") ¶ 17. The testimony of Mr. Kraft and Mr. Tischler is insufficient to create a genuine issue of material fact. Messrs. Kraft and Tischler were formerly employed by HFS as architects; they did not have management responsibilities. Keeble Dep., Ex. 19, at 149-50, 167-

68. Neither has any basis on which to contradict the testimony of their former boss, Mr. Hoagland, or of Mr. Keeble, who DIA designated to testify on its behalf, and whose testimony binds the company. *See, e.g.*, Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 150 (S.D.N.Y. 1997); Dravo Corp. v. Liberty Mutual Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995).

Similarly, DIA misrepresents the testimony of its own expert witness, Mr. Kiewel, with respect to the nature of the Days Inn PDSM. DIA cites a portion of his testimony for the proposition that the PDSM is not comprehensive, but simply defines DIA's position in the hotel market. DIA Fact Response ¶ 32.a. What DIA does not say is that Mr. Kiewel later re-confirmed that the PDSM was in fact "fairly comprehensive," that it included provisions for areas of the hotel that guests would never see, and that it included provisions that had nothing to do with defining DIA's position in the market. *See* U.S. Fact Response ¶ 8; Kiewel Dep., Ex. 20, at 163, 168-69, 176-79. *See also* U.S. Facts ¶ 33 (describing items addressed by PDSM); Tischler Dep., Ex. 25, at 88 (describing the Days Inn PDSM as the "most comprehensive" of all of the HFS hotel chains).

DIA also misrepresents the testimony of Richard Hauk. In addressing the issue of who it is that operates the Wall Days Inn, DIA introduces a portion of Mr. Hauk's testimony about a letter he wrote to the Department of Justice during the Department's investigation of the Wall Days Inn. DIA Fact Response ¶¶ 88-91. In that letter Mr. Hauk identified himself and his wife as the operators of the hotel, and, as the testimony quoted by DIA shows, confirmed that answer during his deposition. Id. What DIA does not include is that Mr. Hauk further testified that he did not consult a lawyer in preparing his response to that letter, and that he did not mean to offer

a legal opinion as to who was "operating" the hotel. R. Hauk Dep, Ex. 26, at 422-23. Moreover, Mr. Hauk also testified that he runs the Days Inn differently that he does his other hotels, because DIA requires him to do so. Id. at 167-68, 402-21. *See* U.S. Opposition at 4-6.[5]

C. The United States' Reading of Section 303 Does Not Make the Statute Void for Vagueness.

DIA continues to misrepresent or distort the United States' position, and the testimony of government witnesses, when it argues that the United States' reading of section 303 renders the statute so vague as to be unconstitutional. DIA Opposition at 5-9. DIA begins by quoting only a portion of the United States' memorandum regarding the test for liability under section 303, presenting that limited view of the government's position as if it were the whole of the matter. DIA Opposition at 5. The United States has never taken the position, however, that every party involved in the design and construction of an inaccessible facility is responsible for all ADA violations at that facility. Participating in, or having control over, the design and construction of the facility is only one element of the inquiry; before a party may be held liable under section 303, there must also be a showing that some feature or element of the facility fails to comply

[5]Finally, DIA also attempts not just to misrepresent the evidence developed in discovery, but to change it altogether. In response to DIA's argument that only those parties who own, operate, or lease the facility in question may be held liable for violations of section 303, the United States has argued in the alternative that DIA operates the Wall Days Inn and other Days Inn hotels. *See* U.S. Memorandum at 25-34. In a desperate attempt to stave off summary judgment on this issue as well, DIA has submitted an affidavit from Mr. William Keeble, DIA's Rule 30(b)(6) designee. Evidently unsatisfied with Mr. Keeble's four days of deposition testimony, DIA has now confected this affidavit, which purports to show that DIA's control over the daily operations of hotels in its system is insufficient to render it liable under DIA's reading of the statute. The affidavit is both insufficient to create a genuine issue of material fact, and plainly inadmissible, and the United States, simultaneously with the filing of this reply memorandum, is moving to strike Mr. Keeble's affidavit. As more fully set out in the motion to strike, the affidavit is not based on personal knowledge, offers inadmissible opinion and hearsay testimony, is conclusory, and is inconsistent with witnesses' sworn deposition testimony. *See* United States' Memorandum in Support of Its Motion to Strike Affidavit of William Keeble.

with the Standards, and that the failure to comply with the Standards fell within the scope of the party's involvement in the project. *See* U.S. Memorandum at 14-15.

Thus, DIA misses the point when it discusses the testimony of the United States' expert, Mr. William Hecker, regarding the various parties that may be involved in the design and construction of a new facility. DIA Opposition at 5-6. Mr. Hecker quite reasonably responded to DIA's increasingly strained hypothetical questions about what individuals or entities might be "involved in" the design of a new facility. What DIA did not ask Mr. Hecker, and what Mr. Hecker did not express any opinion on, was whether those same individuals or entities would have any liability under section 303 of the ADA for failures to comply with the Standards. That is, while DIA posed many hypotheticals involving individuals or entities with very attenuated connections to the design of the facility, DIA did not ask what the extent of the liability of those parties would be. Under the government's view of the statute — though DIA continues to refuse to acknowledge it — the scope of any party's liability is commensurate with the scope of that party's involvement in, or control over, the design and construction of the facility. *See* U.S. Memorandum at 14-15. Given that the examples offered by DIA concern parties whose involvement or control is quite attenuated, it is quite likely that those individuals and entities would have no liability at all under section 303. *See also* U.S. Opposition at 15-20.[6]

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[6]Part of DIA's distortion of the United States' position is its suggestion that the government would impose liability on a party who does no more than review (or even just look at) plans for the facility in question. DIA Opposition at 6 (giving examples of interns in an architectural office, a bank's board of directors, and students in an architectural class). Simply looking at a set of plans, without more, does not constitute "design" of a new facility in any meaningful sense, and does not fall within the coverage of section 303. DIA, of course, has done considerably more than just look at plans for new hotels, including the Wall Days Inn. Among other things, DIA has issued detailed design requirements for new hotels in its system, reviews plans for compliance with those requirements, requires licensees to make changes to their plans to meet those requirements, and inspects completed hotels to ascertain whether they meet those requirements. This is far different from the architectural student who sees a set of plans as

Similarly, DIA seizes on the testimony of the United States' Rule 30(b)(6) designee, Ms. Elizabeth Savage, and attempts to wring from it some inconsistency. DIA Opposition at 6-8.[7] Ms. Savage's testimony was entirely consistent with the position the United States has taken throughout this case: any party who participates in the design and construction of an inaccessible facility may be held liable under section 303, but the scope of that party's liability extends only as far as that party's involvement in, or control over, the design and construction of the facility. *See* Savage Dep., Ex. 48, at 81, 103 (testifying that "[y]our liability is coextensive with the scope of your involvement and participation," and that "[t]he test [under section 303] is that you are involved in the design and construction and that your liability is coextensive with the extent of your involvement.") Thus, a carpenter who frames doorways that are too narrow to comply with the Standards has participated in the design and construction of an inaccessible element of the facility, and can be held responsible under section 303 for doing so. That carpenter cannot, however, be held responsible for ADA violations in portions of the facility with which he had nothing to do.

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part of some academic exercise, or even a bank or other lender that obtains a copy of the plans for a new facility, but which does not promulgate and enforce its own detailed design requirements.

[7]DIA also complains that Ms. Savage changed certain portions of her deposition transcript, pursuant to Fed. R. Civ. P. 30(e). Ms. Savage's review of her deposition testimony, however, fully comports with the requirements of that Rule, which provides that the deponent has 30 days after the deposition "to review the transcript . . . and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them." Fed. R. Civ. P. 30(e). Ms. Savage returned the errata sheet provided by the court reporter within 30 days of her deposition, reciting the changes and the reasons for making them. Given that and changes are part of the witness' sworn deposition testimony, the Rule imposes no further requirement that the statement of changes be sworn or notarized. Most importantly, though, as noted previously, the changed portions of Ms. Savage's testimony were consistent with other portions of her testimony, and with other discovery responses provided by the United States. *See* U.S. Opposition at 24 n.17. In this respect, the changes made by Ms. Savage are unlike the assertions contained in Mr. Keeble's eleventh-hour affidavit, assertions which are not consistent with his sworn deposition testimony.

Moreover, DIA flatly misrepresents Ms. Savage's testimony with respect to the liability of the owner of the facility. DIA claims that Ms. Savage testified that an owner who was not "involved in" the design and construction of a new facility would have no liability for violations of the Standards at that facility. DIA Opposition at 7. That is precisely not Ms. Savage's testimony. Although it is not the portion of her testimony cited by DIA,[8] Ms. Savage was asked about the responsibility of an owner who purchases a completed building from the firm that has designed and constructed it — an owner that has no input into or control over the design or construction of the facility. Savage Dep., Ex. 48, at 128-29. Given that the statute only makes it illegal to "design" and "construct" inaccessible facilities — not to purchase an inaccessible facility — it is not at all clear that the owner in the hypothetical posed by DIA's counsel would have any responsibility for ADA violations at the facility. Ms. Savage expressed her skepticism that such a situation ever would arise, and answered — quite consistently with the United States' position — that the liability of the owner would depend on the facts. Id. at 130. Indeed, as soon as DIA's counsel modified the hypothetical to include some involvement or control by the owner (the review of schematic plans by the owner), Ms. Savage testified that that would make it more likely that the owner would have some responsibility under section 303. Id. at 130-31. Ms. Savage's testimony with regard to parties that supply construction materials was also consistent with the United States' position. *See* U.S. Opposition at 16. Ms. Savage was asked about the liability of an entity who simply supplies doors for a project; there were no other facts to suggest that the entity in question had any involvement in, or control over, the design of the facility, or

[8]Indeed, the portion of Ms. Savage's testimony first cited by DIA (pages 261-63) has nothing to do with the liability of the owner of a facility.

the construction of the facility. Savage Dep., Ex. 48, at 263. Ms. Savage responded that suppliers who do no more than supply materials are not involved in the "design" or "construction" of the facility, and therefore have no liability. Id. at 264. While DIA may not agree with the limits inherent in the United States' view of section 303, DIA is simply wrong to suggest that the government's reading of section 303 has no limits. To the contrary, the United States' consistently expressed position provides a carefully measured test of liability under section 303, assigning liability to those parties who engage in the conduct prohibited by Congress: the design and construction of inaccessible facilities.

In any event, even if DIA had been able to pose a hypothetical situation which confounded Ms. Savage — which it did not — doing so is insufficient to establish that the statute, or the government's reading of it, is void for vagueness. As the Supreme Court has explained, "we can never expect mathematical certainty from our language": rather, "it will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question." Grayned v. City of Rockford, 408 U.S. 104, 110, 110 n.15 (1972) (parentheses in original; internal quotation marks and citation omitted). *See also* United States v. Powell, 423 U.S. 87, 93 (1975) (holding that a statute is not unconstitutionally vague because doubts may be conceived "as to the applicability of the language in marginal fact situations"). Thus, there is no merit to DIA's complaint that Ms. Savage frequently responded to the hypothetical questions posed by DIA's counsel by indicating that the answers would depend on the facts of the case. A statute is not void for vagueness because its application requires a factual inquiry into a party's specific conduct.

Indeed, the cases make clear that neither section 303 nor the United States' interpretation of it are impermissibly vague. Because title III of the ADA is a civil statute regulating commercial conduct, it is subject to scrutiny less strict than that applied to criminal statutes, or statutes restricting free speech. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); Fogie v. Thorn Americas, Inc., 95 F.3d 645, 650 (8th Cir. 1996); Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 580 (S.D. Cal. 1993). Thus, section 303 (or the government's interpretation of it) can only be held void for vagueness if "no standard of conduct is specified at all." Hoffman Estates, 455 U.S. at 495 n.7 (1982). Further, in determining whether DIA has met this test, the Court must consider the words of the statute, and any limiting constructions proffered by the agency charged with enforcing the statute. Hoffman Estates, 455 U.S. at 495 n.5.

The language of section 303 itself provides ample notice of the conduct that it prohibits: the design and construction of inaccessible facilities. Moreover, the government has consistently interpreted section 303 to apply to all parties who engage in that conduct. The preamble to the Department of Justice's regulation implementing title III of the ADA indicated that the section could apply to "architects, contractors, developers, tenants, owners, and other entities," and that the Department intended to enforce the section consistently with its broad prohibition of the design and construction of inaccessible facilities:

> The Department will interpret this section in a manner consistent with the intent of the statute and with the nature of the responsibilities of the various entities for design, for construction, or for both.

28 C.F.R. Part 36, Appendix B, § 36.401. In addition, the Department of Justice specifically addressed the scope of section 303's coverage in its Technical Assistance Manual for title III.

The TA Manual poses a hypothetical situation in which portions of a new facility are constructed inaccessibly, and warns that not just the owner, but also the architect and contractor who designed and constructed those portions of the facility may be held liable under section 303. 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 § III-5.1000 at 45-46 (November 1993) (Ex. 49).[9] In sum, there is simply no basis for DIA's claim that the statute and the Department of Justice's interpretation of it fail to provide adequate notice of either what conduct is prohibited, or who may be held liable.

D. DIA's Various Other Objections to the United States' Reading of Section 303 are Equally Baseless.

DIA also advances a hodgepodge of mistaken and irrelevant legal arguments, several of which appear in DIA's response to the United States' Statement of Undisputed Facts. For instance, DIA responds to facts relating to its control over the design and construction of new Days Inn hotels by arguing that although it had control over some aspect of the design and construction of the hotel, DIA failed to exercise that control.[10] DIA then contends that because it

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[9]The Technical Assistance Manual is issued by the Department pursuant to statutory mandate, *see* 42 U.S.C. § 12206(a), (c), and is thus, along with the issuance of the title III implementing regulation, one of the mechanisms by which the Attorney General is to "flesh out the statutory framework" of title III. Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997). Indeed, the Pinnock court relied in part on the Department's Technical Assistance Manual for title III to hold that the statute was not void for vagueness. Pinnock, 844 F. Supp. at 581. In Pinnock, a defendant charged with violating section 302 of the ADA challenged title III of the statute as being unconstitutionally vague. The court rejected this challenge, concluding that "the terms of title III are marked by well-reasoned flexibility and breadth," and that "[w]hen considered in conjunction with the Department of Justice guidelines, these terms are not unconstitutionally vague." Id.

[10]For instance, DIA argues that it reviewed only preliminary plans for the hotel, that its comments on those plans were not incorporated into the design of the hotel, and that it was never provided with final plans for the hotel. DIA Opposition at 3-4. DIA does not dispute, however, that it had the authority, under the terms of its license agreement,

failed to exercise its authority, that element of its control over the design and construction of the Wall Days Inn contributes nothing to establishing its liability. *See, e.g.*, DIA Opposition at 17 n.7, n.8; DIA Fact Response ¶¶ 27.a, c, d, 29.c, d, e, f, g. That DIA failed to exercise its authority, however, does not relieve it of responsibility. When DIA reserved to itself control over the design and construction of new Days Inn hotels, including the Wall Days Inn, DIA also acquired the responsibility to comply with the ADA's requirements for new construction. *See* U.S. Opposition at 17-19. And because section 303 defines illegal discrimination to include the failure to design and construct new facilities to be accessible to individuals with disabilities, 42 U.S.C. § 12183(a)(1), it is precisely DIA's failure to act — its failure to exercise the authority it had, to make new Days Inn hotels accessible to individuals with disabilities — that is the source of DIA's liability. It is no defense for DIA to argue that by failing to act, it is not liable. Put differently, once DIA inserted itself into the process of designing and constructing new Days Inn hotels, it inserted itself into the group of parties responsible for designing and constructing those hotels to be accessible to individuals with disabilities. When it failed to act to correct ADA violations at new Days Inn hotels, DIA violated section 303.[11]

Similarly, DIA responds to the existence of ADA violations at the Wall Days Inn and the other newly constructed Days Inn hotels by pointing out that for several of the ADA violations, the feature or element of the hotel in question also violates some provision of the Days Inn

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to require the Hauks to submit final plans for the hotel, and to make any changes specified by DIA's architect. The reason DIA never received or reviewed final plans for the Wall hotel is that it never asked for them. Keeble Dep., Ex. 19, at 904-05; Zelazny Dep., Ex. 22, at 102-05; Baumann Dep., Ex. 28, at 107, 221.

[11]Similarly, it is no defense for DIA to argue that it has left the matter of complying with the ADA to its licensees. The duty to comply with the ADA, as with other federal civil rights statutes, is not delegable. *See* U.S. Opposition at 25-28.

Planning and Design Standards Manual. *See, e.g.,* DIA Fact Response ¶¶ 77, 78.b, d, i, o. While DIA's response does not in any way contradict the United States' contention that the feature or element of the hotel in question fails to comply with the Standards, it does establish that DIA not only failed to act to comply with the ADA, but did not even enforce its own "barrier-free" requirements. *See* U.S. Facts ¶ 124.

Another of DIA's responses to the undisputed facts is to contend that although DIA does prepare conceptual site plans, architectural renderings, prototype drawings, and other similar plans and drawings, DIA does not prepare final construction drawings for hotels, and that the materials it does prepare cannot be used by themselves to construct any facility. *See, e.g.,* DIA Fact Response ¶¶ 34, 42.b, d, 61. Implicit in DIA's response is the suggestion that to "design" a facility, one must prepare the final construction drawings for the facility. DIA's own architectural expert testified, however, that the process of designing a building does not include only the preparation of final construction drawings. He identified several earlier stages in the process — stages which identify and resolve various design issues — and testified that each of these stages is a necessary part of designing a building. Kiewel Dep., Ex. 20, at 219-23. Indeed, he specifically testified that many of the design services provided by DIA, including preparation of conceptual site plans, issuance of the PDSM, and preparation of prototype drawings, were typical of the early and middle stages of designing a building (stages commonly known as schematic design and design development). Id. at 228-39. *See also* U.S. Opposition at 4 n.2.[12]

[12]Indeed, throughout its papers, DIA implicitly assumes, with respect to a variety of issues, that only one person or entity has or can have responsibility for particular legal requirements with respect to the design and construction of a new facility. There is no basis, however, for DIA's repeated suggestions that because some architect "designed" the hotel, and some contractor "constructed" it, those are the only parties who "designed" and "constructed" the hotel, or

Moreover, DIA has not controverted the testimony of Mr. Hauk that he used DIA's conceptual site plan to determine whether it was financially feasible to go forward with the project. U.S. Facts ¶ 61.a.

In the course of arguing that its preparation of a conceptual site plan for the Wall hotel was not part of "designing" the Wall Days Inn, DIA cites the testimony of Charles Hayes, principal of Double H Enterprises, for the proposition that preparing a conceptual site plan is not part of designing a facility. DIA Fact Response ¶ 61. Once again, DIA flatly misrepresents deposition testimony. While it is true that Mr. Hayes acknowledged that it would not be possible to use the conceptual site plan to build a hotel, Hayes Dep, Ex. 29, at 164-65, he testified that preparing a site plan was part of the process of designing a building, and that before final construction drawings can be prepared, other preliminary drawings would have to be completed first, to set the building footprint and basic room layout, and to determine the number of rooms and parking spaces at the hotel. Id. at 167-69. He referred to one of these preliminary drawings as the "site," or the "conceptual site," and specifically testified that he considered this preliminary work to be part of the process of designing a hotel. Id.

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the only parties who have any legal obligations with respect to the design and construction of the hotel. Indeed, Mr. Kiewel himself testified that no one person designs an entire facility; rather, the design team may include not just the architect of record, but also various engineers and other designers. Kiewel Dep. Ex. 20, at 40-44. He added that even though none of these individuals, including the architect of record, designs the entire facility, each of them nonetheless "designs" the facility, and each of them has legal responsibilities. Id. at 40-44, 127-29. Similarly, Mr. Kiewel testified that numerous parties, including the owner, the general contractor, various subcontractors, and others, typically are involved in the construction of a new facility — as he put it, they are "participating in the construction" — and that each of them was "constructing" the facility. Id. at 216-19.

DIA again misrepresents deposition testimony when it argues that architects and contractors need not be held liable under the ADA to ensure that they will design and construct accessible facilities, because they have independent professional obligations to comply with the law. DIA Opposition at 12. The only support DIA offers for this position is the deposition testimony of the United States' expert, Mr. Hecker. Mr. Hecker specifically testified, however, that he did not know if failing to comply with applicable laws would cause an architect to lose his or her license. Hecker Dep., Ex.52, at 39.[13] Indeed, as DIA's own expert testified, state codes of professional conduct (including South Dakota's) generally require only that architects refrain from designing facilities which both violate applicable laws and materially affect public safety. Kiewel Dep., Ex. 20, at 121-25. Accordingly, Mr. Kiewel acknowledged that an architect might well be able to design a facility that does not comply with the ADA without violating the architect's code of professional responsibility. Id. at 121-25, 144.[14]

Finally, DIA fails satisfactorily to explain why Congress included the term "design" in section 303 if Congress did not intend for section 303 to apply to entities that design new facilities (even if those entities do not own, operate, or lease the facilities in question). *See* U.S. Memorandum at 20. DIA's only response is to point out that, in issuing the regulation to implement title III of the ADA, the Department of Justice relied on the presence of the term "design" to include, in the section of the regulation dealing with the effective date of section 303,

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[13]Further, the question was objected to as calling for a legal conclusion, and Mr. Hecker was instructed to answer the question only insofar as he could answer it as an architectural matter. Hecker Dep., Ex. 52, at 39.

[14]DIA also errs in suggesting that if an architect or contractor fails to comply with the ADA, an owner will always have recourse under traditional tort or contract theories. DIA Opposition at 12-13. If the owner has instructed the architect and contractor to design and build a facility that does not comply with the ADA, it is unlikely that the owner would have any action against parties that have followed his instructions.

a provision regarding applications for building permits. DIA Opposition at 13-14. While DIA's account of why that provision was included in the regulation is correct, it is irrelevant. The various implications of the use of the term "design" are not mutually exclusive: that Congress' use of the term "design" had implications for determining when the Act takes effect in no way suggests that that term does not also have implications for who the Act covers.

E. DIA has Engaged in a Pattern or Practice of Illegal Discrimination

In addition to violating section 303 of the ADA with respect to the Willows Days Inn in particular, the undisputed facts further show that DIA has repeatedly participated in the design and construction of inaccessible Days Inn hotels. *See* U.S. Memorandum at 10-12. Neither DIA's opposition memorandum nor its response to the United States' fact statement addresses the United States' pattern or practice claim. DIA has filed, however, a document captioned Supplemental Response to United States' Statement of Material Facts ("DIA Supplemental Fact Response"), in which DIA asserts, without citing any authority, that the United States has failed to carry its burden to establish that DIA has engaged in a pattern or practice of illegal discrimination. DIA Supplemental Fact Response ¶ 3, at 1. In addition, DIA again misrepresents the facts and testimony relating to its involvement in the design and construction of three other new Days Inn hotels. Id. ¶ 3.a, b, c, d.

In order to establish that DIA's conduct constitutes a pattern or practice of discrimination, the United States must prove

> more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that . . . discrimination [is] the company's standard operating procedure[,] the regular rather than the unusual practice.

International Bhd. Teamsters v. United States, 431 U.S. 324, 336 (1977). Thus, the United States is not required to offer evidence with respect to each particular example of discrimination that is part of the pattern or practice of illegal conduct; rather its burden is to establish that a pattern or practice existed. Id. at 360. *See also* Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 469-70 (8th Cir. 1984) (in addition to evidence relating to specific instances of discrimination, government in pattern or practice case will typically adduce more general evidence relating to defendant's standard policies or practices).[15] And while the evidence must establish that the conduct at issue was the defendant's standard policy or practice, there is no minimum number of examples of that conduct that must be provided. Indeed, if a single example can be shown to be typical of the defendant's conduct, it suffices to establish the pattern or practice. *See* Johnson v. Hale, 13 F.3d 1351, 1354 (9th Cir. 1994) (defendant's single statement that she would not rent to the black plaintiffs because of race "itself confesses a pattern of discrimination"); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971) (holding that the number of individual acts of discrimination is not determinative, and that no mathematical formula is workable; rather, "[e]ach case must turn on its own facts"); United States v. Real Estate Devel. Corp., 347 F. Supp. 776, 783 (N.D. Miss. 1972) ("No minimum number of incidents is required . . . .").

The undisputed facts establish that DIA's standard policy or practice is to enter into license agreements that give it extensive control over the design and construction of all new Days

[15]Because various civil rights statutes all employ the same "pattern or practice" language, the courts have held that the same standard of proof applies under each of the statutes. *See, e.g.*, United States v. DiMucci, 879 F.2d 1488, 1497 n. 11 (7th Cir. 1989)(in Fair Housing Act case court noted that phrase "pattern or practice" appears in several federal civil rights statutes, and is interpreted consistently from statute to statute, citing Teamsters, 431 U.S. at 336 n. 16); United States v. Balistrieri, 981 F.2d 916, 929 n.2 (7th Cir. 1992) (same).

Inn hotels, and to involve itself in various ways in the design and construction of individual facilities (including things like visiting sites; recommending architects and contractors; assisting with construction financing; providing design services like conceptual site plans, architectural renderings, or prototype drawings; reviewing plans for compliance with DIA's design standards (as expressed in the PDSM) and requiring changes to those plans; monitoring the progress of construction; and inspecting completed facilities). *See* U.S. Memorandum at 10-12. DIA's control over and participation in the design and construction of the Wall Days Inn is thoroughly consistent with this pattern. *See* U.S. Memorandum at 7-10. And the undisputed facts show that the Wall Days Inn fails to comply with the Standards for Accessible Design in numerous respects, that numerous other new Days Inn hotels fail to comply with the Standards, and that the violations of the Standards at the Wall Days Inn are largely typical of violations found at other new Days Inn hotels. *See* U.S. Memorandum at 2-6. Indeed, DIA has come forward with no evidence to suggest that any new Days Inn hotel complies with the Standards. In sum, the United States has clearly carried its burden, and has established that DIA has engaged in a pattern or practice of illegal discrimination.[16]

DIA once again attempts to distort the record, this time with respect to the facts relating to other new Days Inn hotels. What the record shows is that as with the Wall Days Inn, DIA's involvement in the design and construction of those hotels was also quite extensive. For instance, the plans for the new Days Inn hotel in Hazard, Kentucky, had originally been used to

[16]Similarly, assuming for the sake of argument that DIA's reading of the statute were correct — that only those who own, lease, or operate the facility are responsible for its design and construction — the undisputed facts also show that DIA's control over the operations of the Wall Days Inn is typical of its control over the operations of all of the hotels in its system. *See* U.S. Memorandum at 25-34.

build a new Days Inn hotel in Indiana, and were sold to Wilgus Napier, the owner of the Hazard hotel, by a DIA franchise broker. Deposition of Wilgus Napier ("Napier Dep."), Ex. 53, at 31-33. Mr. Napier and his architect, Douglas Kidd, made minor changes to those plans, and used them to build Days Inn hotels in Berea, Kentucky, and Mount Vernon, Kentucky, before using them to build the hotel in Hazard. Id. at 38-39, 47-48. *See also* Deposition of J. Douglas Kidd, Ex. 54, at 29-30, 36-39, 42-45. Thus, the plans for the Hazard Days Inn were not only sold by a DIA broker, but, by the time they were used to build the Hazard hotel, had been reviewed and approved by DIA, in connection with the Berea Days Inn. Napier Dep., Ex. 53, at 36-38. Given that before they built the Hazard Days Inn Mr. Napier and Mr. Kidd had designed and constructed two other new Days Inn hotels, both of which were accepted into the Days Inn system, it is not surprising that Mr. Kidd felt no need to refer to the Days Inn PDSM in designing the Hazard hotel.

Similarly, DIA had extensive involvement in the design and construction of the new Days Inn hotel in Willows, California. As had Mr. Baumann, the architect for the Willows hotel, Arvind Iyer, had designed other Days Inn hotels, which was one of the reasons he was hired by the owners of that hotel. Deposition of Arvind Iyer ("Iyer Dep."), Ex. 55, at 86-89; Deposition of Bankim Patel ("B. Patel Dep."), Ex. 56, at 35, 198.[17] Although DIA attempts to hide the fact, Mr. Iyer testified that he received the Days Inn PDSM in October 1992, about one and a half months before the plans for the Willows Days Inn were put out for bid. Id. at 328, 330. He also acknowledged that an architect at his firm had referred to the PDSM on at least one occasion

[17]Mr. Patel was one of the two original owners of the Willows Days Inn. B. Patel Dep., Ex. 56, at 17-18, 27-28.

during the construction of the hotel, to answer a question from the contractor about sound transmission through the hotel's walls. Id. at 335-36. Further, he submitted plans for DIA's review, and incorporated DIA's comments into the final plans for the facility. Id. at 243-46; B. Patel Dep., Ex. 56, at 67-72, 78.[18]

In the end, even if the architects for the other three Days Inn hotels identified by DIA had never received the PDSM, each of those hotels (like the Wall Days Inn) was still required by the terms of the license agreement for that hotel to comply with the design requirements of the PDSM. The plans for each hotel were reviewed by DIA (or were subject to review by DIA) for compliance with those requirements. *See* DIA's Fact Response ¶ 41. Thus, even if there were a genuine dispute on the question of whether those architects had received the PDSM, or what use they had made of it, summary judgment would still be appropriate. DIA's control over, and participation in, the design and construction of those hotels (and other new Days Inn hotels) was not limited to issuance of the PDSM. The undisputed facts demonstrate that DIA's control and participation were far more extensive than that, so that the role of the PDSM is not dispositive, and its absence from any particular case in no way jeopardizes the United States' showing that DIA has engaged in a pattern or practice of discrimination.

[18]Although the transcript of his deposition is not yet available, Brian Pape, the architect for the Champaign Days Inn, testified that he had a copy of the PDSM, and that he referred to it for a general review of DIA's design standards. He further testified that he had also designed other Days Inn hotels, and that after DIA reviewed the plans for the Champaign Days Inn, he discussed those plans with DIA architect Richard Tischler. Once Mr. Pape's transcript becomes available, the United States will provide it to the court.

F. DIA and HFS are Effectively the Same Entity.

The undisputed facts show that DIA and HFS are so closely intertwined as to be effectively the same entity. *See* U.S. Facts ¶¶ 10-11, 116-19. DIA is a wholly owned subsidiary of HFS; HFS issues a consolidated annual report for itself and DIA, containing consolidated financial statements. Id. ¶¶ 11, 118. They have the same principal place of business, and share office space. Id. ¶¶ 10, 117. Perhaps most importantly, DIA has no employees of its own; all DIA functions are carried out by officers or employees of HFS. Id. ¶ 119. Neither DIA nor HFS disputes any of these facts. Every action DIA takes, from soliciting potential licensees, to reviewing plans for new hotels, to inspecting the completed facilities, is undertaken by an employee of HFS, at the direction of HFS' management. HFS owns and controls DIA and the Days Inn system, and is every bit as responsible as DIA for the violations of the ADA at new Days Inn hotels.

G. DIA Has Not Acted in Good Faith, and a Civil Penalty is Appropriate.

DIA's opposition memorandum does not address the United States' request for the imposition of a civil penalty. Moreover, DIA has not come forward with any evidence either to contradict the facts established by the government, or affirmatively to establish that DIA made any good faith effort to comply with the ADA. To the contrary, DIA admits that when it reissued the PDSM in January 1992 (the same month the ADA's new construction requirements began to go into effect), it did not check the "barrier free" requirements in the PDSM to see if they were consistent with the ADA's Standards for Accessible Design. U.S. Facts ¶ 121; DIA Fact Response ¶ 121. DIA also admits that it takes no steps to ascertain whether the hotels in its chain

are accessible to individuals with disabilities. U.S. Facts ¶ 126; DIA Fact Response ¶ 126. DIA also admits that it does not review plans for new hotels either for compliance with the ADA, or with DIA's own barrier-free requirements. U.S. Facts ¶ 122; DIA Fact Response ¶ 122. Indeed, the only claim DIA makes in this regard is that it has encouraged its licensees to comply with the ADA. DIA Facts ¶ 13. As the United States pointed out in its response, however, the evidence cited by DIA does not support its claim. U.S. Fact Response ¶ 13. Indeed, that "evidence" consists of a memorandum that, according to Mr. Keeble, was not distributed to Days Inn licensees, and two other memoranda (one of which was prepared by the government, not DIA) for which there is no evidence showing when, how, or to whom they were distributed, if they were distributed at all. Id. DIA has thus fallen far short of making any credible showing of good faith, and a substantial civil penalty should be imposed.[19]

[19]DIA has also not disputed the facts concerning the size of the company, or its revenues and profits. *See* U.S. Facts ¶¶ 116, 130. DIA also fails to dispute the fact that it has received more than $90,000 in total payments from the Wall Days Inn. *See* U.S. Facts ¶¶ 128-29; U.S. Memorandum at 36. Finally, DIA has not made any argument at all in response to authority cited by the United States for the proposition that civil penalties must not be so small as to be an acceptable cost of doing business. *See* U.S. Memorandum at 34-35.

CONCLUSION

For the reasons stated above, and in the United States' other memoranda, the United States respectfully requests that the Court grant its motion for summary judgment.

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Dated: October 8, 1997

CERTIFICATE OF SERVICE

I hereby certify that true copies of the United States' Reply Memorandum in Support of its Motion for Summary Judgment, and Volumes X and XI of the Exhibits to the United States' Statement of Material Facts were served upon

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