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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BERNARD WALKER AND CHRISTINA ADAMS,	)	
Plaintiffs,	)	**Case No. C 98-2926 THE Civil Rights**
vs.	)	
CARNIVAL CRUISE LINES; CARNIVAL CORPORATION; UNIQUE TRAVEL AGENCY; and ANDRE'S TRAVEL AGENCY,	)	**Hearing: Date: November 20, 2000 Time: 10:00 a.m. Judge: Hon. Thelton E. Henderson**
Defendants.	)	

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE
IN OPPOSITION TO DEFENDANT CARNIVAL'S
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The question presented here is whether Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§12181-12189, applies to foreign-flag cruise ships that do business in the United States. The answer to this question will determine whether it is unlawful for cruise ships to discriminate against people on the basis of disability in any of the various ways prohibited by Title III. Thus, it will determine whether cruise ships may impose unnecessary eligibility criteria for the purpose of screening out passengers who have disabilities, or whether they may simply deny boarding outright to any persons with disabilities. 42 U.S.C. §12182(a), §12182(b)(2). It will determine whether cruise ships may treat passengers with disabilities differently than other passengers, by, for example, charging higher prices or requiring all persons with disabilities to travel with a companion. 42 U.S.C. §12182(b)(1)(A). It will determine whether cruise ships may refuse to reasonably modify the manner in which they provide their services and amenities in order to afford passengers with disabilities a fair opportunity to participate in and benefit from their cruise experience. 42 U.S.C. §12182(b)(2). In short, the question of Title III's applicability will determine whether cruise ships will be allowed to remain "disability-free" zones, or whether they will be required to provide an equivalent level of service to passengers with disabilities as they provide to all of their other paying customers.

Carnival has moved for summary judgment in this case on the broad ground that Title III of the ADA, as a matter of law, is inapplicable to foreign-flag cruise ships. As illustrated by the examples above, a finding that Title III does not apply to cruise ships will deprive persons with disabilities of the only basis they have under federal law to challenge any of the many different kinds of discrimination on the basis of disability. Such a restrictive interpretation of the ADA's coverage would have an unnecessarily harsh and potentially far-reaching effect on the legal rights of people with disabilities in the United States. At the same time, it is clear that the real object of Carnival's concern is only one of the many specific non-discrimination provisions in Title III that apply to cruise ships: the provision requiring cruise ships to remove access barriers where it is "readily achievable" to do so – that is, when such removal can be easily accomplished "without much difficulty or expense." 42 U.S.C. §12182(b)(2)(iv); 28 C.F.R. §36.304.

Overstating for the purpose of its present motion the burden that this one requirement imposes upon cruise ships, Carnival proceeds to conflate its analysis of these two distinct issues – whether the ADA applies to cruise ships at all, and how the Title III provision requiring barrier removal should be applied in this specific case.

Whether or not it is readily achievable for Carnival to remove any particular access barrier on its "Holiday" cruise ship with respect to the specific allegations made in this case is a largely fact-based determination, which cannot and need not be resolved as part of this motion. The only issue this Court should determine at this time is whether Title III of the ADA – including all of its applicable non-discrimination and equal opportunity provisions – applies to foreign-flag cruise ships. If it does, Carnival is not entitled to summary judgment and Plaintiffs must be permitted to proceed with their claims of unlawful discrimination.

ISSUES TO BE DECIDED

1. Whether cruise ships are "places of public accommodation" and/or provide "specified public transportation" such that they are subject to Title III of the ADA.

2. Whether foreign-flag cruise ships that do business in United States ports and internal waters are subject to the ADA.

RELEVANT FACTS

1. Plaintiffs Bernard Walker and Christina Adams (hereinafter and collectively, "Plaintiffs") are persons with disabilities within the meaning of the ADA. Plaintiff Bernard Walker has quadriplegia, and Plaintiff Christina Adams has Multiple Sclerosis and is legally blind. They both use wheelchairs for mobility. Walker v. Carnival Cruise Lines, 107 F. Supp.2d 1135, 1136-1137 (N.D. Cal. 2000). During the summer of 1997, Plaintiffs and their families each took separate, 3-4 day trips on the "Holiday," a cruise ship that picks up passengers from Los Angeles, California, makes brief stops at ports on Catalina Island, California and in Ensenada, Mexico, and then returns to Los Angeles. Ibid.; Carnival's Brief, p. 2. Although Plaintiffs had been assured that the rooms they had reserved (which are advertised in Carnival's brochures as "modified for [the] disabled") and the "Holiday" ship as a whole were fully accessible to persons with disabilities, they quickly discovered otherwise. As a result, they

ended up spending much of their 3-4 day cruises miserably confined to their inaccessible rooms, unable to enjoy or participate in the ship's various services and activities. They allege suffering personal injuries, embarrassment and humiliation, and a wholly disappointing cruise experience as a result of Carnival's failure to make its services and amenities fully open and accessible to people with disabilities. Walker at 1137.

2. The "Holiday" cruise ship, which until last year was registered in Panama and is currently registered in the Bahamas, is owned and operated by Carnival Cruise Lines and Carnival Corporation (hereinafter and collectively, "Carnival"). Carnival's Brief, p. 2-3. Carnival is "the largest, most popular and most profitable cruise line in the world," earning over $1 billion in net income last year. Carnival's 1999 Annual Report, p. 2. Although Carnival is incorporated in Panama, it has its principal place of business in Florida. Walker at 1136. As an integral part of the cruise experience, Carnival's cruise ships, including the "Holiday," offer numerous types of services and amenities to their passengers, including but not limited to lodging, restaurants, bars, coffee shops, retail stores, Broadway-style shows, movie theaters, social activities, computer rooms, gyms, health spas, swimming pools and hot tubs, gaming casinos and arcades, arrangements for "shore excursions" and day care facilities.

3. On July 27, 1998, Plaintiffs filed suit against Carnival in this Court, alleging various violations of the ADA as well as California law. Plaintiffs allege that Carnival violated several of the non-discrimination provisions in Title III of the ADA, including: (1) discrimination against individuals with disabilities "in the full and equal enjoyment of the [cruise ship's] goods, services, facilities, privileges, advantages, or accommodations" (42 U.S.C. §12182); (2) "failure to make reasonable modifications in policies, practices or procedures when such modifications are necessary to afford [the cruise ship's] goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities" (42 U.S.C. §12182(b)(2)(A)(ii)); (3) "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services..." (42 U.S.C. §12182(b)(2)(A)(iii)); (4) "failure to remove architectural barriers, and communication barriers that are structural in nature, in existing

facilities...where such removal is readily achievable" (42 U.S.C. §12182(b)(2)(A)(iv)); and (5) where it is not, "failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable" (42 U.S.C. §12182(b)(2)(A)(v)). Plaintiffs' Complaint, p. 18-19.

4. On September 15, 2000, Carnival filed a Motion for Final Summary Judgment, asserting that Title III of the ADA does not apply to the "Holiday" cruise ship because the ADA does not apply to foreign-flag cruise ships.

ARGUMENT

I. THE ADA APPLIES TO CRUISE SHIPS

A. Cruise Ships Are "Places Of Public Accommodation"

Title III of the ADA prohibits discrimination "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." 42 U.S.C. §12182(a). A "place of public accommodation" is defined as a facility, operated by a private entity, whose operations affect commerce and fall within one or more of the 12 broad categories of facilities listed in the statute. See 42 U.S.C. §12181(7). These categories include, inter alia, places of lodging, establishments serving food or drink, places of exhibition or entertainment, sales establishments, service establishments, and places of exercise or recreation. Ibid.

The Department of Justice has determined that a cruise ship is a place of public accommodation, and is therefore subject to Title III of the ADA. 28 C.F.R. Pt. 36, App. B at 587 (finding "places of public accommodation operated in mobile facilities, such as cruise ships...[to be] covered under this part, and...included in the definition of 'facility.'"); Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.). Cruise ships, which typically contain many if not all of these kinds of establishments, function as one or more of the types of places of public accommodations enumerated in 42 U.S.C. §12181(7). As the Department of Transportation cogently observed, making its own determination that cruise ships are places of public accommodation, "[c]ruise ships are self-contained floating communities." 56 Fed. Reg. 45,584, 45,600 (1991). "In addition to transporting passengers, cruise ships house, feed, and entertain

passengers and thus take on aspects of public accommodations." Ibid. The only two federal courts to address the question thus far have both held that a cruise ship is a place of public accommodation, subject to the requirements of Title III of the ADA. See Stevens v. Premier Cruise Lines, 215 F.3d 1237, 1241 (11th Cir. 2000); Deck v. American Hawaii Cruises, Inc., 51 F.Supp.2d 1057, 1061 (D. Haw. 1999). As the Eleventh Circuit stated in Stevens:

> Because Congress has provided such a comprehensive definition of "public accommodation," we think that the intent of Congress [to apply Title III to cruise ships] is clear enough...Cruise ships, in fact, often contain places of lodging, restaurants, bars, theaters, auditoriums, retail stores, gift shops, gymnasiums, and health spas. And a public accommodation aboard a cruise ship seems no less a public accommodation just because it is located on a ship instead of upon dry land. In other words, a restaurant aboard a ship is still a restaurant. Very important, Congress made no distinctions – in defining "public accommodation" – based on the physical location of the public accommodation. We conclude, therefore, that those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for the purposes of Title III.

Stevens at 1241.[1] Moreover, this Court must defer to the Department of Justice's interpretation of the ADA as long as it represents a reasonable construction of the statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984); American Rivers v. F.E.R.C., 201 F.3d 1186, 1197 (9th Cir. 2000). This is so even if this Court might have reached a different result were it confronted with the question in the first instance. See McLean v. Crabtree, 173 F.3d 1176, 1181 (9th Cir. 1999) ("Instead, [the Court] simply ask[s] 'whether [it is] compell[ed] to reject' the agency's construction"), citing Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1069 (9th Cir. 1998). The determination of the Department of Justice that cruise ships are places of public accommodation is reasonable.[2]

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[1] Carnival's argument that cruise ships are not covered by the ADA because Title III does not specifically mention "vessels, boats or ships" is without merit. Entities embraced within the ADA's broad definitions are just as clearly covered by the ADA as those that are specifically mentioned by name. See, e.g., Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1954-6 (1998) (Title II covers state prisons); Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1128-9 (11th Cir. 1999) (Title III applies to places of public accommodation owned or operated by Indian tribes).

[2] Although the Eleventh Circuit in Stevens did not need to rely on deference to the Department of Justice because it found that the "plain language of Title III makes Congress' intent sufficiently clear," it noted that "in the light of the Justice Department's position, our ultimate

As places of public accommodation, cruise ships must comply with all Title III requirements applicable to their provision of goods and services, such as nondiscriminatory eligibility criteria, reasonable modifications in policies, practices, and procedures, provision of auxiliary aids, removal of architectural barriers in existing facilities where readily achievable, and alternatives to barrier removal that are readily achievable. 42 U.S.C. §12182(b)(2)(A); 28 C.F.R. Pt. 36, App. B at 587; Technical Assistance Manual III-1.2000(D) (1994 Supp.).[3] Cruise ships are not required to comply with any specific accessibility standards for new construction or alterations, however, because no federal standards for the construction or alteration of accessible ships have been developed. 28 C.F.R. Pt. 36, App. B at 587; Technical Assistance Manual III-5.3000. As noted by Carnival, the Access Board is currently developing such guidelines. 63 Fed. Reg. 15,175 (1998). Although the Court need not address at this juncture the secondary issues regarding application of Title III's requirements to cruise ships, Plaintiffs' allegations in this case fall well within the scope of the requirements that the Department of Justice has determined are applicable to cruise ships.

B. Cruise Ships Provide "Specified Public Transportation Services"

In addition to being "places of public accommodation," cruise ships are also "specified public transportation services," which are covered by Section 12184 of the ADA. See Deck, supra.[4] Section 12184 prohibits discrimination on the basis of disability in "specified public

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conclusion – that Plaintiff's complaint states a claim under Title III – would remain the same, even if the language of Title III were vague and ambiguous." Stevens at fn. 6.

[3] The Department of Justice's regulations, interpretive guidance, and technical assistance manuals are also entitled to deference. See, e.g., Bragdon v. Abbott, 118 S. Ct. 2196, 2209 (1998); Stinson v. United States, 508 U.S. 36, 45 (1993); Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 584-585 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1184 (1998); Innovative Health Systems v. City of White Plains, 117 F.3d 37, 45 n.8 (2nd Cir. 1997); Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113, 123 (3rd Cir. 1998); Johnson v. City of Saline, 151 F.3d 564, 570 (6th Cir. 1998).

[4] In Stevens, the Eleventh Circuit found it unnecessary to decide whether cruise ships were also "specified public transportation," given its finding that they were fully covered as "places of public accommodation." Id. at fn. 3.

transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. §12184(a). Specified public transportation is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service...on a regular and continuing basis." 42 U.S.C. §12181(10) (emphasis added). The ADA directs the Department of Transportation to issue regulations to implement 42 U.S.C. §12184. 42 U.S.C. §12186(a)(1). The Department of Transportation has determined that cruise ships are covered by Section 12184 of the ADA. 56 Fed. Reg. 45,584, 45,600 (1991) (stating that "the ADA...cover[s] passenger vessels, including ferries, excursion vessels, sightseeing vessels, floating restaurants, cruise ships, and others," and also noting that "[c]ruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce."). The Department of Transportation has incorporated the Department of Justice regulations that govern cruise ships – including those requiring barrier removal – into its regulations. See 49 C.F.R. Pt. 37, App. D § 37.109 at 488; 49 C.F.R. 37.5(f). Like the Department of Justice, the Department of Transportation has not yet established new construction or alteration standards applicable to cruise ships. Ibid.

Carnival argues that the "Holiday" is not "primarily engaged in the business of transporting people," asserting that it "serves only an incidental transportation function, while its primary function is to provide entertainment and relaxation for its guests." Carnival's Brief, p. 5. This is disingenuous – that cruise ships "go somewhere" and transport passengers from one place to another is unquestionably an essential component of the cruise experience. That it provides other services and amenities is not determinative – the coverage of the statute is not limited to entities that are exclusively engaged in providing transportation.[5] Moreover, contrary to Carnival's suggestion, transportation services offered to the public are covered even if they are

[5] Alternatively, even if a cruise ship's operations as a place of public accommodation were viewed as its primary activity, transportation that is incidental to the operation of a place of public accommodation is subject to both the Department of Justice regulations for public accommodations and the Department of Transportation's requirements pertaining to vehicles and transportation systems. 28 C.F.R. 36.310.

not primarily used to get people to work – the equal opportunity goals of the ADA are served regardless of whether the ultimate purpose of the transportation is utility or pleasure. Thus, in addition to being covered as "places of public accommodation," cruise ships are also covered insofar as they provide "specified public transportation services" and are thus subject to all applicable requirements of Title III of the ADA.

C. Title III's "Barrier Removal" Provision Applies to Cruise Ships

Carnival argues that the provision in Title III requiring "readily achievable" barrier removal does not apply to cruise ships. This is incorrect. In the preamble to its Title III regulations, the Department of Justice stated that cruise ships are places of public accommodation and are subject to subparts B and C of its regulations (28 C.F.R. 36.201-36.310).[6] 28 C.F.R. Pt. 36, App. B at 587. Similarly, in its interpretive guidance, the Department of Transportation explained that "ferries and other passenger vessels operated by private entities are subject to the requirements of [49 C.F.R. 37.5] and applicable requirements of 28 C.F.R. Pt. 36, the [Department of Justice] rule under title III of the ADA." 56 Fed. Reg. 45,584, 45,744 (1991) (codified at 49 C.F.R. Pt. 37, App. D § 37.109 at 488).

These regulations establish enforceable accessibility requirements for cruise ships. The regulations require covered entities, including cruise ships, to comply with the "barrier removal" provision as set forth in 42 U.S.C. §12182(b)(2)(A)(iv) for public accommodations and in 42 U.S.C. §12184(b)(2)(C) for entities primarily engaged in transportation. 28 C.F.R. 36.304; 49 C.F.R. 37.5(f); Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.). These barrier removal provisions require covered entities to "remove architectural barriers, and communication barriers that are structural in nature, in existing facilities...where such removal is readily achievable." 42 U.S.C. §12182(b)(2)(A)(iv). Barrier removal is considered "readily achievable" if it is "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. §12181(9). The regulations give 21 examples of measures that, depending on the facts,

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[6] An agency's interpretation of its own regulations is controlling unless it is plainly erroneous or inconsistent with the regulations. See Auer v. Robbins, 519 U.S. 452, 461 (1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

may or may not be "readily achievable" for a given facility to implement, including, inter alia, installing or providing temporary ramps; removing high-pile, low density carpeting; repositioning such items as shelves, telephones and paper-towel dispensers and adding full-length mirrors; adding raised markings on elevator control buttons; installing flashing alarm lights; providing alternative accessible paths; installing accessible door hardware; installing grab bars in bathrooms; installing raised toilet seats and rearranging toilet partitions to increase maneuvering space; insulating pipes under sinks to prevent burns; and rearranging tables, chairs and other furniture. 28 C.F.R. 36.304(b).[7]

The readily achievable standard "focuses on the business operator and addresses the degree of ease or difficulty of the business operator in removing a barrier; if barrier removal cannot be accomplished readily, then it is not required." S. Rep. No. 116, 101st Cong., 1st Sess. 65-66 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 109-110 (1990). Title III provides that the primary factors to be considered in determining whether an action is readily achievable are "the nature and cost of the action," "the overall financial resources of the facility," including "the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility," "the overall financial resources of the covered entity," including "the number, type and location of its facilities," and "the type of operation or operations of the covered entity." 42 U.S.C. § 12181(9). In addition, the regulations implementing Title III make clear that "legitimate safety requirements that are necessary for safe operation" must also be considered as an essential part of the determination whether a given action is "readily achievable."[8] As far as

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[7] The barrier removal requirement, which is one of various general non-discrimination provisions in Section 302 of Title III (42 U.S.C. §12182(b)(2)(A)(iv)), is in no way contingent upon the new construction and alteration requirements in Section 303 (42 U.S.C. §12183), which currently do not apply to cruise ships. Thus, the absence of specific design standards for new construction and alteration of cruise ships does not render the barrier removal requirement (much less all of Title III) void for vagueness, and there is no need for this Court to defer its jurisdiction pending the adoption of standards implementing those provisions of Title III.

[8] Thus, a cruise ship may demonstrate that a proposed modification is not readily achievable because it would pose a safety hazard. For example, if a proposed modification would violate an applicable safety standard mandated by federal law or an international treaty, such as the International Convention for the Safety of Life at Sea (SOLAS), then that modification would not be readily achievable, and it would not be required under the ADA. See Title III Technical

the ADA is concerned, then, the meaning of the barrier removal requirement with respect to any given access barrier is ultimately driven, not by compliance with any particular design standard, but by whether a proposed modification is "readily achievable" for the covered entity to implement.

III. THE ADA APPLIES TO FOREIGN-FLAG CRUISE SHIPS WHEN THOSE SHIPS ARE IN UNITED STATES PORTS OR OTHER INTERNAL WATERS

A. Foreign-Flag Cruise Ships Are Generally Subject To United States Laws When They Are In United States Ports Or Other Internal Waters

Virtually all cruise ships serving United States ports are foreign-flag vessels. 56 Fed. Reg. 45,584, 45,600 (1991). Nothing in the plain language of the ADA excludes from coverage foreign-flag cruise ships that do business in the United States. In addition, while many foreign-flag cruise ships are actually owned and operated by U.S. corporations, even if they are not, places of public accommodation and transportation services that are owned by foreign corporations are not exempted from the ADA's coverage if they are operated in the United States. 42 U.S.C. §12182, §12184. Unless specifically exempted by the statute in question, entities doing business in the United States must comply with all generally applicable laws, including laws that prohibit discrimination. See, e.g., Goyette v. DCA Adver., Inc., 830 F. Supp. 737, 745 (S.D.N.Y. 1993); Ward v. W & H Voortman, Ltd., 685 F. Supp. 231, 232 (M.D. Ala. 1988). When a cruise ship enters United States ports and internal waters, it is doing business in the United States.[9] Therefore, cruise ships operating in United States ports and internal waters

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Assistance Manual III-1.2000(D) (1994 Supp.) ("unless there are specific treaty prohibitions that preclude enforcement...places of public accommodation aboard ships must comply with all of the Title III requirements, including removal of barriers to access where readily achievable"); see also 56 Fed. Reg. 45,584, 45,600.

[9] Ports are part of a nation's internal waters. See United States v. Louisiana, 394 U.S. 11, 40 (1969).

are subject to all generally applicable federal laws.[10]

The fact that a cruise ship sails under a foreign flag or is registered in a foreign country does not exempt it from the generally applicable laws of the countries in which it does business. "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country." Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957); accord Cunard S.S. Co. v. Mellon, 262 U.S. 100, 124 (1923); Mali v. Keeper of the Common Jail, 120 U.S. 1, 12 (1887); Armement Deppe, S.A. v. United States, 399 F.2d 794 (5th Cir. 1968), cert. denied, 393 U.S. 1094 (1969). In Cunard, the Supreme Court held:

> The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them.

Cunard, 262 U.S. at 124.[11] No court has held that foreign-flag ships that enter United States ports are presumptively exempt from all United States laws merely because of their foreign registry.

The Department of Justice has determined that cruise ships must comply with the ADA "to the extent that [their] operations are subject to the laws of the United States." 28 C.F.R. Pt. 36, App. B at 587. Because foreign-flag vessels are "subject to the laws of the United States" when they are in United States ports or other internal waters, this means that foreign-flag cruise

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[10] This is consistent with customary international law of the sea, which limits the authority of coastal states to regulate ships in innocent passage through their territorial waters, but permits regulation of ships that enter ports or other internal waters. See United Nations Convention on the Law of the Sea, done at Montego Bay, Dec. 10, 1982, 21 I.L.M. 1261 (1982).

[11] In this respect, Carnival's assertion that "it is almost as if the passenger is stepping into a foreign country at the moment of embarkation" is wholly without merit. It is also belied by the fact that, at the same time it claims to be exempt from any obligation imposed by U.S. law, Carnival grants itself – in the fine print of its passenger ticket contract – "the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provided thereby." Carnival's Brief, p. 11; Carnival's Guest Ticket Contract, p. 7. Carnival would thus have the U.S. passenger stripped of the protections of U.S. law at the same time that it assures itself the benefit of those laws.

ships are subject to the requirements of the ADA when they are in the ports or internal waters of the United States. The Department of Justice Technical Assistance Manual provides that foreign-flag ships "that operate in United States ports may be subject to domestic law, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement." Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.).[12] The Department of Transportation has similarly determined that the United States "appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports" except to the extent that enforcing ADA requirements would conflict with any international treaty. 56 Fed. Reg. 45,584, 45,600 (1991). Because the ADA is generally applicable federal legislation and the plain language of Title III does not exempt foreign-flag ships from its coverage, Carnival can avoid coverage only by establishing that some canon of statutory construction requires this Court to exempt foreign-flag cruise ships that do business in the United States from the requirements of the ADA. No such presumption against application of the ADA applies in this case.

B. The Presumption Against Extraterritoriality Does Not Apply

It is true that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (ARAMCO) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).[13] Under the ARAMCO standard, Title III of the ADA does not apply extraterritorially. However, the Supreme Court's decision in Cunard makes clear that activity that occurs on a foreign-flag

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[12] Courts ordinarily construe statutes and treaties to avoid a conflict between them and to give effect to both laws. See, e.g., Posadas v. National City Bank, 296 U.S. 497, 503 (1936). If Plaintiffs prevail, then, the Court should not order any relief that conflicts with any treaty obligations of the United States, such as the International Convention for the Safety of Life at Sea (SOLAS). See SOLAS (Consolidated Ed. 1997); 56 Fed. Reg. 45,584, 45,600 (1991). See discussion in section II(C)(2) of this brief.

[13] In ARAMCO, the Court applied this presumption in ruling that Title VII did not prohibit employment discrimination against United States citizens working for a U.S. employer in Saudi Arabia, and cited the ADA as a statute that had "[never] been held to apply overseas." Id., 499 U.S. at 244, 251. Following the decision in ARAMCO, Title I of the ADA was amended to cover employees employed by covered entities in foreign countries. See 42 U.S.C. 12111(4); 42 U.S.C. 12112(c).

ship within United States internal waters or ports is not extraterritorial. Id., 262 U.S. at 123-124. In Cunard, the Court held that the Volstead Act, which outlawed the importation and transportation of alcoholic beverages within the United States, prohibited foreign-flag vessels from bringing alcohol into American ports. After concluding that the Act did not apply extraterritorially, the Court held that the Act did apply to vessels while they were docked in an American port or otherwise operating in American waters. Id. at 124. The Court found it irrelevant to its analysis that the alcoholic beverages were kept sealed in storage to be used only when the ship was outside United States waters. Id. at 130. Because the beverages were brought into United States ports and harbors, the statute applied. Ibid.

Similarly, in EEOC v. Kloster Cruise Ltd., 939 F.2d 920 (11th Cir. 1991) the Eleventh Circuit held that an employer operating a foreign-flag cruise ship had to comply with an agency subpoena issued in connection with the investigation of complaints filed by two cruise ship employees who brought employment discrimination complaints under Title VII. Id. at 924. Rejecting the argument that the EEOC clearly lacked jurisdiction to investigate the complaint, the court held that the EEOC was entitled to discover information that would be relevant to its jurisdiction, such as "the nature and extent of [the employer's] business operations in Miami, the extent to which the employment activities occurred in Miami, and whether the acts of alleged discrimination occurred in Miami." Id. at 923. See also EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109, 1111 (M.D. Fla. 1990) (presumption against extraterritoriality did not require dismissal of Title VII claim alleging that plaintiff had been denied employment on foreign-flag ship, where plaintiff alleged that her application had been submitted to the employer's Miami office and had been rejected in the United States). Because the alleged discriminatory conduct took place within the United States, the presumption against extraterritoriality did not apply.

Moreover, when a cruise ship is doing business within the internal waters and ports of the United States, the principle of extraterritoriality is not implicated simply because the ship is owned by a foreign company or flies under a foreign flag. Application of the presumption against extraterritoriality is triggered by where the conduct takes place, not by the nationality of the actor. See Stevens, supra at 1242 (rejecting the argument "that foreign-flag ships in United

States waters are 'extraterritorial'... [since] '[b]y definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders,'" citing Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (emphasis added in Stevens.) In Massey, the Court held that the presumption against extraterritoriality does not apply where the conduct that is being regulated by a statute occurs within the United States. See also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia J., dissenting) (presumption against extraterritoriality does not apply to tort occurring on board ship in American waters).

Here, Plaintiffs are not seeking an extraterritorial application of the statute. Plaintiffs allege that they were subjected to discrimination in the United States when they booked the cruise in reliance upon Carnival's representation that the ship was accessible to persons with disabilities, and when they boarded the ship in Los Angeles and discovered that the ship and most of its activities were not accessible to people with disabilities.[14] Had Plaintiffs realized this prior to booking the trip, they would have stayed home. See Plaintiffs' Complaint, p. 8. Moreover, they and their families continue to carry with them the harmful effects of the discrimination they suffered – of being unreasonably foreclosed from access to a place of public accommodation and transportation service that is available to all other paying customers – as they carried on with their lives in the United States.[15] Thus, in this case both the relevant

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[14] This is supported by the fact that nearly all of the services and amenities that are open and available to passengers while a cruise ship is traveling in international waters are also open and available while the ship is docked in United States ports and traveling in its internal waters. See Declaration of Brenda Rein. The exceptions to this rule are those amenities – such as casinos and duty free shops – that are restricted by United States law, consistent with the fact that federal law governs the ships while they are in U.S. ports and internal waters.

[15] Carnival cites several cases for the proposition that when enacting a federal statute, "Congress is primarily concerned with domestic conditions." Carnival's Brief, p. 9-10, citing Foley Bros., supra at 285. This is no doubt correct. When Congress enacted the ADA, it was primarily concerned with eliminating the economic and social inequality that "some 43,000,000 Americans" with disabilities have historically endured simply because of their disability. 42 U.S.C. §12101(a)(1). In particular, by enacting Title III, Congress intended to further social equality by ensuring that Americans with disabilities would have full and equal access to all of the "goods, services, facilities, privileges, advantages [and] accommodations" that have historically been offered to people without disabilities by private entities doing business in the United States. 42 U.S.C. §12182(a). If cruise ships were permitted to offer their services to all

conduct and the relevant harm took place within the territorial United States. Applying the ADA in this instance does not represent an extraterritorial application of the statute.[16]

C. The Presumption Against Conflict With International Law Is Not Applicable

Carnival argues that a second legal presumption applies to prevent application of the ADA to foreign-flag cruise ships operating in the United States – namely, the presumption against the application of federal law where it conflicts with international law. See Hartford Fire, supra at 815-816 (Scalia J., dissenting) ("[t]his canon is 'wholly independent' of the presumption against extraterritoriality.") The relevant question, therefore, is whether applying the ADA to foreign-flag cruise ships that do business in United States ports or other internal waters would conflict with international law.

1. Application of the ADA Does Not Intrude Upon the Internal Management and Affairs of Foreign-Flag Vessels

Carnival argues that applying the ADA to foreign-flag cruise ships would interfere with the ship's "internal management and affairs" and would thereby create the "possibility for international discord." Carnival's Brief, p. 14; see Benz, supra, and McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963). In those cases, the Court construed the

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American passengers, excepting only those with disabilities, the ADA's goal of ensuring social equality in the United States would be disserved.

[16] Courts have also held the presumption against extraterritoriality to be inapplicable when, inter alia (1) failure to apply the statute in a foreign setting will result in adverse effects within the United States; or (2) the regulated conduct is intended to cause, and results in, substantial effects within the United States. In re Simon, 153 F.3d 991, 995 (9th Cir. 1998), cert. denied, 119 S. Ct. 1032 (1999); Massey, supra at 531 (citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952)); Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984). Courts have also held that the presumption is not implicated by a course of conduct, part of which takes place in the United States. See, e.g., United States v. Inco Bank & Trust Corp., 845 F.2d 919, 920 n.4 (11th Cir. 1988). Because in this case Carnival's conduct is not extraterritorial, it is not necessary to determine whether any of these exceptions to the presumption against extraterritoriality are applicable.

National Labor Relations Act (NLRA), 29 U.S.C. 151 et seq., not to regulate the labor relations of a foreign-flag ship with its foreign crew, even when the ship was in an American port.

Customary international law recognizes that "the law of the flag state ordinarily governs the internal affairs of a ship," and nations, therefore, generally refrain from regulating such matters even when the ship enters their ports. See McCulloch, 372 U.S. at 21; accord Mali, supra at 12. The Supreme Court has applied these principles in a series of cases interpreting the scope of the NLRA, a statute which regulates a wide variety of activities that affect "commerce." See McCulloch, 372 U.S. at 15. Although the NLRA is broad enough to reach foreign-flag ships, the Court construed it not to regulate the labor relations between a foreign ship and its foreign crew, even when the ship is temporarily docked in a United States port.[17] See also Windward Shipping Ltd. v. American Radio Ass'n, 415 U.S. 104 (1974).

That rationale does not apply to this case, which does not involve "the pervasive regulation of the internal order of a ship," see McCulloch, 372 U.S. at 19 n.9, but rather the protection of passengers who are United States citizens and who are embarking and disembarking in United States ports. See Stevens at 1242 (concluding that the "internal management and affairs of a foreign-flag ship" were not implicated and that the real issue was "whether Title III requires a foreign-flag cruise ship reasonably to accommodate a disabled, fare-paying, American passenger while the ship is sailing in American waters.") In subsequent cases, for example, the Supreme Court has held that the NLRA governs the interaction of

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[17] In McCulloch, the Court explained that applying the Act in such circumstances would contravene "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." 372 U.S. at 21. The Court found that application of U.S. law would unnecessarily interfere with the internal relations between the ships' foreign owners and their foreign crews, and emphasized that applying the NLRA to foreign seamen employed on a foreign-flag ship would not advance the Act's purpose of protecting United States workers. Id. at 18; see also Dowd v. International Longshoremen's Ass'n, 975 F.2d 779, 788-89 (11th Cir. 1992) (finding this presumption to govern the applicability of a statute to "the practices of owners of foreign vessels which are temporarily present in an American port with regard to foreign employees working on those vessels.") The Court, therefore, held that it would be inappropriate to construe the Act to regulate the labor relations between a foreign ship and its foreign crew, unless Congress had clearly expressed such an intention. Ibid.

foreign-flag ships with American citizens and businesses, even though the Act does not specifically state that it applies to foreign-flag vessels. See International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970) (NLRA protected union picketing protesting substandard wages paid by foreign-flag vessel to American longshoremen working in American ports); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 218 (1982) (NLRA prohibited secondary boycott by unions refusing to unload shipments from Soviet ships destined for American importers).

The above international law principles do not require courts to construe the ADA to exclude from coverage foreign-flag ships that enter United States ports. Accessibility of a ship to United States passengers is not internal to a ship's operations; it does not affect "only the vessel or those belonging to her." See Mali, 120 U.S. at 12. Rather, accessibility concerns the relations of the cruise line with United States residents who use its services. Because application of the ADA directly protects the interests of United States residents, the principles cautioning restraint when regulating the relations between foreign ships and their foreign crew are not applicable. Moreover, unlike the situation in McCulloch and Benz, applying the ADA to foreign-flag cruise ships that enter United States ports furthers the explicit purpose of the Act, to protect the rights of Americans with disabilities. See 42 U.S.C. §12101.

This conclusion draws support from the fact that United States citizens and residents may bring Title VII actions against foreign-flag cruise lines without conflict with international law. In Kloster Cruise, the Eleventh Circuit held that the EEOC did not clearly lack jurisdiction to investigate a Title VII complaint alleging that a foreign-flag cruise line with business operations in the United States had fired two American citizens in violation of federal law. In rejecting the argument that McCulloch and its progeny required that the subpoena be quashed, this Court held that the application of Title VII to the employment of United States citizens was "sufficiently dissimilar" to the "pervasive regulation of the internal order of a ship" at issue in McCulloch, 372 U.S. at 19 n.9. Kloster Cruise, supra at 923-924. See also Bermuda Star Line, supra at 1111 (rejecting argument that the employment of United States citizens on cruise ship was an internal matter that should be governed by law of the flag).

Finally, Carnival fails to explain the numerous instances in which courts have upheld the application of United States law to foreign-flag ships, even in the absence of any explicit statutory provision stating that such ships are covered by the applicable statute. See, e.g., Ariadne Shipping Co., supra; Armement Deppe, supra; United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358 (S.D. Fla. 1998). Carnival suggests that in all of these cases, the statutes being applied were "directed at matters external to the ships," and cites Cunard as an example where Congress' legislative concern related to the liquor that would be imported into the United States, rather than to the ship itself. Carnival's Brief, fn. 22. In this context, Congress' legislative concern in Title III was not the regulation of ships, but the elimination of discrimination against people with disabilities due to its harmful effects upon United States society.

2. Application of the ADA to Foreign-Flag Vessels Does Not Abrogate Any International Treaties

Carnival has also failed to demonstrate that application of the ADA to cruise ships will conflict with the provisions of any applicable international treaty. See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.") In this context, Article 10 of the Convention on the High Seas requires states to take steps to ensure that ships that fly their flag are constructed in a manner that ensures safety at sea. Convention on the High Seas, Apr. 29, 1958, art. 10, T.I.A.S. No. 5200, 450 U.N.T.S. 82. SOLAS establishes minimum safety standards for the construction, equipment, and operation of ships. See Craig Allen, Federalism in the Era of International Standards (Part II), 29 J. Mar. L. & Com. 565, 578 (1998). Nothing in the plain language of the Convention on the High Seas or SOLAS prevents states from imposing accessibility requirements on ships that enter their ports. Nor has Carnival shown how applying the ADA's general non-discrimination provisions to its ships would conflict with any international safety standard established in SOLAS or in any other international convention to which the United States is a party.

Instead, focusing only on the specific requirement in Title III regarding barrier removal, Carnival argues that certain safety regulations in SOLAS "conflict with existing ADA Title III

standards." Carnival's Brief, p. 16 (emphasis added), citing 28 C.F.R. Part 36 App. A §§ 4.13.8 and 4.13.9. However, as discussed, the specific design standards to which Carnival refers (the standards for doorway thresholds and door-opening hardware applicable to newly constructed or altered buildings) do not apply to cruise ships. 28 C.F.R. Pt. 36, App. B at 587. Moreover, to the extent that there may be any conflict between SOLAS and any proposed accessibility standard under the ADA is a question to be resolved at trial. If Carnival can demonstrate that a particular structural modification proposed by Plaintiffs would cause a conflict with the requirements of an international treaty (or even simply that it would create a safety hazard), such modification, by definition, would not be "readily achievable," and would not be required by the ADA.[18]

Furthermore, customary international law does not prevent states from imposing accessibility requirements on ships that enter their ports. Customary international law gives states broad authority to regulate ships that enter their ports. See Allen, supra, 29 J. Mar. L. & Com. at 570 (1998). For example, the United Nations Convention on the Law of the Sea[19] precludes states from imposing design and construction requirements that do not give effect to generally accepted international standards on ships that are in innocent passage in their waters. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 21(2), 21 I.L.M. 1261, 1274. This restriction does not apply, however, when the ship enters the ports or other internal waters of a foreign state. See United Nations Convention, supra, art. 11, 18, 25(2), 21 I.L.M. at 1273-1275; President's Transmittal of the United Nations Convention on the Law of the Sea, Oct. 7, 1994, 34 I.L.M. 1393, 1406.

Absent a treaty obligation to the contrary, customary international law authorizes nations

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[18] This approach is consistent with the general principle that when two applicable laws overlap, courts should give effect to both laws to the extent possible. See, e.g., Morton v. Mancari, 417 U.S. 535, 551 (1974); Posadas, supra, 296 U.S. at 503. At this stage, however, any such conflict is purely speculative and cannot be used as a basis for dismissing Plaintiffs' complaint. See NLRB v. Dredge Operators, Inc., 19 F.3d 206, 213-214 (5th Cir. 1984) (holding that claims of potential conflict with foreign law were not ripe where no conflict had yet occurred).

[19] The United States has not yet ratified the Convention, but, pursuant to the President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983), it is recognized to reflect customary international law to which the United States adheres.

to regulate all matters concerning ships that enter their ports, excepting only those internal matters that affect "only the vessel or those belonging to her, and d[o] not involve the peace or dignity of the country, or the tranquility of the port." See Lauritzen v. Larsen, 345 U.S. 571, 585-586 (1953); see also United States v. Louisiana, supra 470 U.S. at 98 (nation has same "complete sovereignty" over internal waters as over land territory). Accessibility of a cruise ship that calls at a United States port to pick up and drop off passengers is not a matter that is internal to the ship. It directly serves the interest of American citizens and residents to be protected from unlawful discrimination on the basis of disability.

CONCLUSION

For the foregoing reasons, Carnival's Motion for Summary Judgment on the grounds that the ADA does not apply to foreign-flag cruise ships should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. Christine Fotopulos, declare:

I am over the age of 18 and not a party to the within action. I am employed by the U.S. Department of Justice, Civil Rights Division, Disability Rights Section. My business address is 1425 New York Avenue, Suite 4039, Washington, D.C. 20005.

On October 21, 2000, I served a true and correct copy of the attached document

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE IN OPPOSITION TO DEFENDANT CARNIVAL'S MOTION FOR SUMMARY JUDGMENT

on each person or entity named below by enclosing a copy in an envelope addressed as shown below and depositing the same with Federal Express for priority overnight delivery.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: October 21, 2000, at Washington, D.C.

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