UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No. 96-2028**
	)	
	)	
DAYS INNS OF AMERICA, INC., *et al*.	)	
	)	
Defendants.	)	
	)	

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

(ORAL ARGUMENT REQUESTED)

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I. INTRODUCTION

The United States filed this suit against Days Inns of America, Inc. ("DIA") and its parent company, HFS Incorporated ("HFS"), and the owners and architect of a newly constructed Days Inn hotel in Champaign, Illinois, alleging that those entities violated title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 through 12189 ("ADA" or the "Act"). The United States alleged that those parties violated title III of the ADA by designing and constructing the Champaign Days Inn to be inaccessible to individuals with disabilities, in violation of § 303(a) of the ADA, 42 U.S.C. § 12183(a).[1] The United States further alleges that the acts or omissions of DIA and HFS with respect to the Champaign Days Inn are typical of its standard practices or procedures, that numerous other new Days Inn hotels are inaccessible to individuals with disabilities, and that DIA and HFS have engaged in a pattern or practice of discriminatory conduct in violation of title III of the ADA.

DIA and HFS do not deny that the Champaign Days Inn and at least 13 other new Days Inn hotels across the nation are not accessible to individuals with disabilities, nor do they dispute the actions they did or did not take with respect to the design and construction of these hotels. Yet, DIA and HFS argue that the Court should excuse them from liability under § 303. They suggest that Congress intended to limit ADA liability to small businesses that own local hotel franchises -- such as Panchal & Patel, Inc., which owns the Champaign Days Inn -- and that Congress did not extend ADA liability to hotel franchisors such as DIA and HFS, which control and participate in the design and construction of new hotels nationwide.

Neither the ADA nor its legislative history suggests that § 303 liability should be limited

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[1]The United States entered into a consent decree with the owners and architect of the Champaign Days Inn, and those defendants are no longer parties to this action.

in the way that DIA and HFS suggest. The undisputed facts, as shown in the United States' Statement of Undisputed Facts, prove that DIA and HFS participated in, and exercised extensive control over, the design and construction of its newly constructed hotels, including the Champaign Days Inn. Thus, DIA and HFS engaged in a pattern or practice of violating § 303 by discriminating against individuals with disabilities, and they should be held liable for it. Accordingly, the United States asks that the Court enter summary judgment against DIA and HFS under Rule 56(c) of the Federal Rules of Civil Procedure,[2] and award injunctive relief and civil penalties against both DIA and HFS.

II. BACKGROUND

A. Section 303 of the ADA requires all newly constructed public accommodations and commercial facilities to be readily accessible to, and usable by, persons with disabilities.

The ADA is Congress' most comprehensive civil rights legislation since the Civil Rights Act of 1964. It provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). To that end, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The ADA's coverage is broad: it prohibits discrimination in employment, government programs and

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[2]A court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

services, transportation, telecommunications, and the goods and services offered to the public by private businesses.

Section 303 of the ADA, the provision governing new construction, is particularly broad. Congress found that architectural barriers were a form of discrimination that persons with disabilities "continually encounter[ed]." 42 U.S.C. § 12101(a)(5). To remove this form of discrimination, Congress mandated that all commercial facilities and public accommodations completed after January 26, 1993, be "readily accessible to and usable by" persons with disabilities. 42 U.S.C. § 12183(a). Congress intended all persons who design and construct new facilities to eliminate architectural barriers. As the legislative history makes clear,

> [t]he ADA is geared to the future -- the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities,[3] while requiring all new construction to be accessible.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63 (1990) (emphasis added).

To realize its goal of a fully accessible future, Congress required that all newly constructed facilities be designed and constructed according to architectural standards set by the Attorney General. 42 U.S.C. §§ 12183(a), 12186(b). Those Standards for Accessible Design ("Standards") are incorporated into the Department of Justice's regulation implementing title III of the ADA, 28 C.F.R. Part 36, Appendix A. The Standards set architectural requirements for newly constructed hotels that apply to all areas of the facility, from parking areas, exterior

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[3] See § 302(b)(2)(A)(iv) of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), requiring removal of architectural barriers to access in facilities built before the passage of the ADA only to the extent that removing such barriers is "readily achievable." "Readily achievable" is defined to mean "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9) (and setting forth factors to consider in determining whether it is readily achievable to remove barriers in a particular case).

walkways, and entrances to lobbies, interior stairways, corridors, and guest rooms.

B. The Champaign Days Inn and thirteen other newly constructed Days Inns are not accessible to or usable by individuals with disabilities.

It is undisputed that the Champaign Days Inn,[4] and 13 other newly constructed Days Inns, are not readily accessible to or usable by individuals with disabilities. See Facts ¶¶ 67-74; Declaration of William Hecker, A.I.A., Exh. 43; Hecker Report, Exh. 17.[5] The hotels, including the Champaign facility, were designed and constructed with numerous violations of the ADA's Standards occurring in every area of the facilities.[6] Id.

C. DIA and HFS were extensively involved in, and had significant control over, the design and construction of the Champaign Days Inn, which is typical of its involvement in and control over the design and construction of all new Days Inn hotels.

As is set out more fully in the United States' Statement of Undisputed Facts, DIA had extensive control over, and involvement in, the design and construction of the Champaign Days Inn, by means of its license agreement (the "Champaign L.A."), Facts ¶¶ 30-31; its System Standards, which include hundreds of requirements for the design and construction of Days Inn

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[4]There is no dispute that the hotel qualifies as new construction under title III of the ADA, or that it is subject to § 303. The Champaign Days Inn is a place of lodging with five or more rooms; the last application for a building permit for the facility occurred after January 23, 1993, and the facility was first occupied after that date as well. Facts ¶¶ 10-11. See 28 C.F.R. § 36.401.

[5]Citations to "Facts" refer to the United States' Statement of Undisputed Material Facts in Support of Summary Judgment that were filed with this Memorandum. All references to "Exh." are to exhibits filed in support of the United States' Motion for Summary Judgment.

[6]In general, the violations fall into three categories: (1) conditions that result in unequal treatment for persons with disabilities; (2) conditions that make it difficult or impossible for individuals with disabilities to gain access to or use some area or feature of the hotel; and (3) conditions that present potential safety hazards for individuals with disabilities.

hotels, Facts ¶¶ 32-38; its review and approval of detail specifications and the architectural plans for the Champaign Days Inn, including several substantive changes to the drawings that incorporated, among other things, accessibility related changes and changes to reflect "industry standards," Facts ¶¶ 50-61; its monitoring of construction progress at the Champaign Days Inn, Facts ¶¶ 62-63; and its tri-annual inspections of the Champaign facility to ensure compliance with DIA's System Standards, Facts ¶¶ 66, 95-96, 103.

DIA's involvement in, and control over, the design and construction of the Champaign Days Inn, is by no means unique to that facility. To the contrary, the undisputed facts show that DIA has the same control over, and involvement in, the design and construction of all new Days Inns. DIA uses a standard form of license agreement for all of its licensees. Facts ¶¶ 20-29. And while DIA may alter some provisions of the standard agreement in some cases, many provisions are not negotiable, including the provision that requires licensees to prepare plans and specifications that comply with DIA's design standards. Facts ¶ 25.a. DIA's Planning and Design Standards Manual ("PDSM"), which contains hundreds of System Standards that all licensees must comply with, Facts ¶ 32, imposes requirements on all aspects of a hotel's design and construction, and includes prototype drawings for specific design elements in hotels and for hotels themselves. Facts ¶ 34-37. Most significantly, DIA's Design & Construction Department provides significant design and construction assistance to licensees and architects for new Days Inn hotels, including, among other things, preparing three-dimensional site plans for licensees to use to obtain financing and zoning approval, Facts ¶ 43.b; visiting sites of new hotels, Facts ¶ 43.a; referring potential franchisees to architects and contractors, Facts ¶ 43.d-e; providing technical assistance on design and construction matters, including accessibility

matters, Facts ¶ 43.f; contacting zoning officials for franchisees, Facts ¶ 43.g; and reviewing specifications and architectural drawings for compliance with DIA's design standards, model building codes, safety issues, accessibility issues and industry standards; Facts ¶¶ 41-42. In sum, DIA has extensive involvement in, and control over, the design and construction of all new Days Inn hotels, and it exercises these controls on a regular basis.

III. ARGUMENT

A. DIA has violated § 303 of the ADA by participating in the design and construction of hotels that are not accessible to persons with disabilities.

Section 303 provides that

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

42 U.S.C. § 12183(a)(1). Section 303 defines a discriminatory activity -- the design and construction of inaccessible facilities -- and makes it illegal to engage in that activity. It is thus one part of Congress' "clear and comprehensive national mandate" to eliminate discrimination against persons with disabilities: any party who is involved in, the design and construction of an inaccessible facility is involved in a discriminatory activity, and violates § 303.

Liability under § 303 depends on the facts of each case. In particular, it depends on: 1) whether the facility complies with the ADA Standards; and 2) whether the party participated in the design and construction of some portion of the facility that fails to comply with the ADA's Standards. Thus, while all parties who are involved in the design and construction of a facility are responsible for complying with § 303, the scope of a party's liability under § 303 is nonetheless limited because it is commensurate with the scope of that party's involvement in the

design and construction of inaccessible portions of the facility. For example, a plumbing subcontractor would only be liable for violations occurring within the scope of its involvement (e.g., violations in toilet rooms) -- **not** for violations in the parking lot.[7]

The undisputed facts show numerous violations of the Standards at the Champaign Days Inn and at several other new Days Inns. Facts ¶ 67-74. They also show that DIA has participated extensively in the design and construction of these hotels. Facts ¶ 39-66. As with other newly constructed hotels in its chain, DIA's involvement in the design and construction of the Champaign Days Inn began early, and extended to every aspect of the project. DIA's Design and Construction Department reviewed and approved specifications for the facility and specifically requested building plans. Facts ¶ 52. DIA reviewed and approved the plans sent by the architect, and made several changes to the plans -- including a change for accessibility. Facts ¶ 53-61. The DIA Design & Construction Manager who reviewed the plans spoke directly with the architect about the proposed changes to the plans. Facts ¶ 57. The architect for the Champaign project, testified that he discussed the changes with the owner, Mohan Panchal, and did in fact make changes that DIA indicated, including the accessibility-related change to the parking area. Facts ¶¶ 58, 61. The architect had referred to the PDSM during the course of the Champaign project. Facts ¶ 50. And, the license agreement between P & P and DIA set dates for the beginning and completion of construction, required P & P to prepare plans for the hotel that conformed to the PDSM, and required P & P to obtain DIA's approval of their plans for the

[7]Thus, architects would be liable for violations occurring in any area of a facility in which they prepared or reviewed the design or supervised the construction. But a roofing subcontractor would rarely if ever have any ADA liability, since the Standards impose no accessibility requirements for roofs.

hotel, which they did. Facts ¶ 31.a. DIA also monitored the progress of the construction, even going so far as to send a camera to the licensee for snapshots of the hotel's construction, and inspected the hotel upon its completion.[8] Facts ¶¶ 62-63.

The PDSM itself represents significant involvement by DIA in the design of the Champaign and other new Days Inn hotels: as DIA's expert architect put it, the PDSM is "comprehensive." Facts ¶ 34. It sets forth hundreds of design requirements for all areas of new Days Inn hotels, and includes sketches showing the design or layout of guest rooms and guest bathrooms. Facts ¶¶ 35-36. The PDSM sets requirements for all of the areas of the Champaign Days Inn in which violations of the Standards occurred. Similarly, the license agreement with P & P (which is typical of DIA's agreements with other licensees) requires them to submit architectural drawings and specifications for the hotel. Facts ¶ 25. Because the scope of DIA's control over and involvement in the design and construction of the Champaign Days Inn extended to every aspect of the hotel, the scope of its liability for ADA violations at the Champaign Days Inn is quite broad: along with the owner and architect (each of whom were also involved in the design and construction of all aspects of the facility), DIA is responsible for all of the violations of the Standards at the Champaign Days Inn.

B. The coverage of section 303 is much broader than simply design and construction by owners, operators, lessors, and lessees.

In addition to setting architectural requirements for the design and construction of new facilities, Title III of the ADA also prohibits a variety of forms of discrimination in the day-to-

[8]As the discussion in Part II.D., above, indicates, these kinds of involvement in the design and construction of new Days Inn hotels were not unique to the Champaign Days Inn, but rather were typical of DIA's involvement in the design and construction of all new Days Inn hotels.

day operation of certain businesses. Thus, in addition to the requirements for new construction set out in § 303, § 302 of the Act also includes a general prohibition of discrimination against individuals with disabilities, and imposes on public accommodations, but not on commercial facilities, other non-discrimination obligations with respect to their day-to-day operations. See 42 U.S.C. § 12182(a) and (b).[9]

1. Section 303 is broader than section 302, since it covers more types of facilities.

Unlike § 302, which applies only to public accommodations, § 303 applies to two types of facilities: "public accommodations" and "commercial facilities." 42 U.S.C. § 12183(a). The ADA defines "public accommodations" as entities (1) whose operations affect commerce, and (2) that fall into one or more of twelve categories of public accommodations set out in the Act. See 42 U.S.C. § 12181(7). This is a broad definition that includes, for example, hotels, bars, restaurants, stadiums, theaters, shopping malls, doctors' and lawyers' offices, museums, zoos, and many other facilities that provide goods or services.

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[9]Title III's general mandate prohibiting discrimination against individuals with disabilities in public accommodations is set out in § 302(a) of the Act, which provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Section 302(b) then construes § 302(a), defining discrimination on the basis of disability to include various acts or omissions. For instance, § 302(b) generally makes it unlawful for public accommodations to deny persons with disabilities opportunities to participate in and benefit from their services on a basis equal to that offered to other individuals. See 42 U.S.C. § 12182(b)(1)(A)(ii). Section 302(b) also prohibits several specific forms of discrimination, including, for instance, failing to provide auxiliary aids or services -- such as assistive listening devices, sign language interpreters, documents in Braille, and so on – and failing to remove architectural barriers to access, when doing either is necessary to ensure that individuals with disabilities are not excluded from or denied services by a public accommodation. See 42 U.S.C. § 12182(b)(2)(A).

While "public accommodations" has been defined broadly, it is not as broad as the category of "commercial facilities." That category includes all facilities intended for non-residential use whose operations affect commerce. See 42 U.S.C. § 12181(2).[10] While this definition includes many facilities that are also public accommodations,[11] it also includes a broad range of facilities that are **not** public accommodations, such as factories, warehouses, many office buildings, and other buildings in which employment may occur. Congress chose this expansive coverage of commercial facilities deliberately. The lawmakers recognized that while employees at commercial facilities would have the protections of the provisions of title I of the ADA, 42 U.S.C. §§ 12111 through 12117 (governing private employers, and requiring them to make reasonable accommodations for employees with disabilities), it nonetheless made sense to impose a blanket requirement for architectural accessibility on facilities that were potential places of employment, but were not places of public accommodation. As the House Committee on Education and Labor pointed out,

> [t]o the extent that new facilities are built in a manner that make(s)them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodation to particular employees.

H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. 117 (1990).

Because § 303's coverage is broader than the coverage of § 302, it would do violence to

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[10]Excepted from the definition of commercial facilities are aircraft, certain railroad facilities and equipment, and certain facilities covered or exempted from coverage under the Fair Housing Act. 42 U.S.C. § 12181(2).

[11]The Champaign Days Inn, for instance, is a non-residential facility whose operations affect commerce, and thus a "commercial facility." It is also a "public accommodation," as it falls within one of the ADA's categories of public accommodation -- "an inn, hotel, motel, or other place of lodging," within the meaning of § 301(7)(A). See 42 U.S.C. §§ 12181(7)(A).

the statutory scheme to read § 303's reference to § 302(a) to mean that only those who have obligations under § 302 -- i.e., owners, lessors, lessees and operators of public accommodations -- can be held liable for new construction violations under § 303. Under such a reading, the only people who could be held liable for design and construction violations of commercial facilities would be those who own, lease, or operate public accommodations. For strictly commercial facilities -- many office buildings, for instance, do not contain places of public accommodation -- there is no party who would meet this definition and, therefore, no party to be held accountable for ADA violations. Such a result cannot be reconciled with § 303's explicit reference to "commercial facilities" or with Congress' desire to ensure that all new commercial facilities would be covered. As the report of the House Committee on Education and Labor explains:

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

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

A House Judiciary Committee amendment moving the requirement for accessible alterations from § 302 to § 303 provides further evidence that Congress intended § 303 to have broader coverage than § 302. As the Committee Report explains:

> [t]he Committee adopted an amendment to move the section governing alterations for existing facilities from Section 302(b)(2)(vi), which only covered public accommodations, to Section 303 which covers both public accommodations and commercial facilities.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63.[12] The Committee clearly understood that § 303 covered a wider universe than § 302 and wanted to ensure that the requirements for alterations, like those for new construction, applied to the many office buildings, factories, warehouses, and other potential places of employment that are not public accommodations. As the Committee noted,

> if alterations were not included in Section 303, governing commercial facilities, the anomalous situation could arise of a new accessible building being renovated to include barriers to access.

Id.

In sum, Congress deliberately chose to draft §§ 302 and 303 differently, and intended them to apply to different kinds of activities, different categories of facilities, and different parties. Thus, the reading of § 303's reference to § 302(a) that is most consistent with legislative intent is that § 303 refers to § 302(a) only to indicate that the failure to design and construct accessible facilities constitutes another type of "discrimination on the basis of disability," and not to identify the parties that may be held liable under § 303. This interpretation gives full effect to all of the words in § 303. See Moskal v. United States, 498 U.S. 103, 109-10 (1990) (holding that statutes should be interpreted to give effect to every clause and word of the statute) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955) (same)).[13]

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[12]The section in question became § 303(a)(2), which defines illegal discrimination to include a failure, when altering a facility or portion of a facility, to make those alterations in a manner such that the altered portions of the facility are readily accessible to and usable by individuals with disabilities. 42 U.S.C. § 12183(a)(2).

[13]Moreover, limiting § 303 coverage to those parties identified in § 302 makes no sense from a practical perspective. While parties who own, operate, or lease public accommodations are the obvious choice for the obligations related to the day to day operation of the businesses imposed

2. The use of the word "design" in § 303 makes clear that § 303 is intended to apply to parties not covered by § 302.

By including the word "design" in § 303, Congress made clear that § 303 is not limited to parties who own, operate, or lease the facility in question. If only those parties were to be covered, then entities that design new facilities, but typically do not own, operate, or lease them -- including architects, engineers, and other design professionals -- would be excluded from liability under § 303. A general exclusion of design professionals, however, cannot be squared with Congress' use of the word "design" in the text of the statute. Congress could have written § 303 without using the word "design," addressing itself only to the end result by simply making it illegal to "construct" inaccessible facilities. By including the design function in the prohibited conduct, however, Congress deliberately brought within the Act's coverage those entities who design new facilities -- architects, engineers, interior designers, and all other parties who design facilities. Limiting § 303 to the owners, operators, lessors, and lessees named in § 302 would thus nullify a large portion of the coverage marked out by Congress. Limiting the coverage of § 303 in that way would significantly limit the ability of § 303 to achieve its purpose.

3. Limiting the coverage of § 303 to the parties identified in § 302 would frustrate Congress' purpose in adopting the ADA.

In construing statutory language, the Court must look to the statute's remedial purposes, and construe the statute in a way that will allow it to achieve those purposes.[14] Limiting the

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by § 302, *see* n.19, supra, parties who lease or operate a facility frequently will have nothing whatsoever to do with the initial design and construction of the facility. Indeed, it is not at all clear how one would even identify who "operates" a facility that has not yet been built.

[14]See Peyton v. Rowe, 391 U.S. 54, 65 (1968) (civil rights legislation should be liberally construed to effectuate its remedial purpose); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)

coverage of § 303 to the parties identified in § 302 would greatly limit the ability of § 303 to achieve Congress' stated purpose of ensuring that all new facilities are designed and constructed to be accessible, and result instead in a great many more inaccessible buildings.

To be fully effective, the ADA's new construction obligation must apply not only to the parties who own, operate, or lease the facility in question, but to all of the parties involved in the design and construction of the facility. If all parties who engage in the illegal activity -- the design and construction of inaccessible buildings -- are held liable for doing so, the level of compliance with the statute will be considerably higher than it would be if only some of those parties are held responsible. For instance, if only those who own, operate, or lease facilities have any responsibility under § 303, an owner who decides to erect a building that is not accessible to individuals with disabilities, and asks an architect to design it without regard to the ADA's architectural requirements, and a contractor to build it that way, is quite likely to find an architect and contractor who will do as he asks. Neither the architect nor the contractor would have any reason to refuse: under a limiting construction of § 303, they would have no liability under the ADA to any person with a disability, and no liability to the owner, because they were following the owner's express instructions. As a result, it is much more likely that the facility will be designed and built inaccessibly -- and will only be made accessible if a lawsuit is filed to compel

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("remedial legislation should be construed broadly to effectuate its purposes"). "[R]emedial statutes are to be liberally construed to effectuate their purposes." Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 n.54 (D.C. Cir. 1984). See also Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 18 (1st Cir. 1994) (broadly construing the ADA); Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (same), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994) (same).

compliance.[15] Such a result is not what Congress intended: in legislative history, Congress expressly recognized that it is far easier and less expensive to incorporate accessible features into a building from the beginning than to go back later and retrofit the facility after construction is complete.[16] And Congress chose not to create a scheme under which compliance will be achieved only as a result of costly litigation. Such a scheme would burden not just individuals with disabilities and the courts, but the rest of our society as well, when construction of a facility is halted, or a completed facility is shut down, for the purpose of undertaking remedial work to bring it up to ADA Standards.

The goal of § 303 cannot be fully realized unless it is read to cover all parties who participate in the design and construction of new facilities. Under this broad construction of § 303, fewer inaccessible facilities will be constructed because architects will be economically motivated to refuse, because they can be held liable for violating § 303. And even if an architect

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[15]Since private parties can only obtain injunctive relief -- not compensatory damages -- under § 303, many persons with disabilities will simply not file suit to enforce the statute.

[16]Congress recognized that modifying or retrofitting a facility after it is built can be very costly (which is why Congress imposed only a limited obligation to remove architectural barriers to access in facilities in existence prior to the ADA's effective date -- *see* 42 U.S.C. § 12182(b)(2)(A)(iv)), and therefore sought to have new facilities designed and constructed to be accessible from the beginning.

> Because retrofitting existing structures to make them fully accessible is costly, a far lower standard of accessibility has been adopted for existing structures -- a standard of "readily achievable." Because it costs far less to incorporate accessible design into the planning and constructing of new buildings and of alterations, a higher standard of "readily accessible to and usable by" person with disabilities has been adopted in the ADA for new construction and alterations.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 60 (1990).

were willing to design an inaccessible facility, any contractor would be economically motivated to refuse to build it, since the contractor would also be subject to § 303 liability. It thus becomes significantly more difficult to have a building designed and constructed to be inaccessible to individuals with disabilities, and the statute is far more likely to achieve the goals set by Congress, if § 303 is construed to cover all parties involved in design and construction.

Indeed, Congress chose this broad approach to remedy discrimination in other civil rights statutes. While the language varies from statute to statute, Congress has not restricted discrimination by only a few parties; instead, Congress has consistently drafted its legislation to contain broad prohibitions of discrimination by all parties involved. Thus, Congress has not limited liability for discrimination to only one entity, choosing instead to prevent discrimination by all entities involved in the prohibited act. The most analogous example of this approach is in the Fair Housing Act, which makes various discriminatory activities illegal without limiting the parties who may be held responsible for engaging in those acts. See Robert G. Schwemm, Housing Discrimination Law and Litigation § 12.3(1) at 12-22 (1990 and Supp. 1995) (Fair Housing Act "simply declare[s] certain housing practices to be unlawful without specifying who may be held responsible for these practices. Thus, anyone who commits one of the acts proscribed by the statute's substantive provisions is liable to suit," unless specifically exempted).

Significantly, § 303 of the ADA mirrors a provision in § 804 of the Fair Housing Act that identifies an illegal activity -- the design and construction of inaccessible housing facilities -- and does not specify, or limit, the parties to be held liable for engaging in that activity.[17] In

[17]Section 804(f)(3)(C) of the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(C), provides that

modeling §303 of the ADA on § 804(f)(3)(C) of the Fair Housing Act, Congress clearly chose to approach the design and construction of inaccessible public accommodations and commercial facilities in the same way that it had approached the design and construction of inaccessible housing facilities: by defining an illegal activity without specifying, or limiting, the parties who are liable for engaging in that activity. Indeed, since Congress "invoked the sweep of its authority" in enacting the ADA, to establish a "clear and comprehensive national mandate" to eliminate discrimination against persons with disabilities, it would be surprising if Congress had chosen not to draft § 303 so broadly, but only to limit liability to a few parties.

4. Other courts interpreting § 303 have agreed with the United States' position.

To date, three federal courts have considered the scope of § 303. While the first court concluded that § 303 was limited to parties who own, lease, or operate facilities, both courts that have since considered the issue have rejected that conclusion, holding, instead, that § 303 extends to all parties who engage in the design and construction of an inaccessible facility.

The first case was Paralyzed Veterans of America v. Ellerbe Becket Architects & Eng'rs, P.C., 945 F. Supp. 1 (D.D.C. 1996), in which the court dismissed § 303 claims against an architectural firm on the grounds that § 303's reference to § 302 limits the parties responsible for complying with § 303 to those who own, lease, or operate the facility. The PVA opinion, however, is not persuasive. Its central flaw is that it does not explain why § 303, which plainly

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> For purposes of this subsection, discrimination includes in connection with the design and construction of covered multifamily dwellings for first occupancy after [March 13, 1991], a failure to design and construct those dwellings in such a manner that the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons . . . .

applies to public accommodations and commercial facilities, should be limited to parties who own, lease, or operate public accommodations. The opinion does not even acknowledge this discrepancy, much less try to account for it. Rather, the court states only that "the limitation in § 302 to owners, operators, and lessors also applies to § 303 and thereby excludes architects . . . ." Id. at 2. But because § 302 applies only to owners, operators, and lessors of public accommodations and not to commercial facilities, this analysis leads to the patently incorrect result of eliminating any meaningful coverage of commercial facilities from § 303.

In addition, the PVA court erred when it assumed, without explanation, that the aims of the statute could effectively be achieved even if owners of new facilities were the only parties responsible for ADA compliance. Id. As previously noted, limiting the scope of § 303 to owners, operators, lessors and lessees would mean that the aims of § 303 would only be achieved as a result of a multitude of legal actions to compel retrofitting of facilities designed and constructed to be inaccessible, a prospect Congress specifically wished to avoid.

More persuasive are the more recent rulings in United States v. Ellerbe Becket, Inc., ___ F. Supp. ____, 1997 WL 610275 (D. Minn. Oct. 2, 1997) (copy provided as Exhibit A to this memorandum), and Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175 (S.D. Fla. 1997). In the Ellerbe Becket case, 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, arguing (as DIA does here), that architects are not covered by § 303 because the "plain language" of title III requires that § 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.

Ellerbe, 1997 WL 610275 at *5. The court denied Ellerbe's motion to dismiss, holding that Ellerbe could nonetheless be liable under § 303 even though it did not lease any of the facilities in question. Id. at *4-5, *7.[18]

In the Johanson case, the plaintiff filed suit under § 303 alleging that a new arena was being designed to be inaccessible to persons with disabilities. Again, the architects were named as defendants, and moved to dismiss on grounds that they did not own, operate, or lease the facility. The court denied the motion, reasoning that if § 303's coverage were limited to owners, operators, lessors, and lessees, "it is conceivable that no entity would be liable for construction of a new commercial facility which violates the ADA." Id. at 1178.

Two district courts have now rejected the reasoning advanced by the PVA court and by DIA in this case and have concluded that the government's position is firmly grounded in the language and structure of §§ 302 and 303. The United States asks this Court to do the same.

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[18]The Ellerbe court added that it "would reach the same conclusion if it found that the silence of § 303(a) with respect to parties responsible for violations, along with the reference to § 302(a) in § 303(a), constituted an ambiguity in the statute." Ellerbe, 1997 WL 610275 at *7 n.4 citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

C. Even if section 303 were limited to owners, operators, lessors, and lessees, DIA is still liable for violating the ADA.

Even if § 303 were limited to the parties identified in § 302, the undisputed facts show that DIA is still liable under § 303. Given the degree of control that DIA exercises over all aspects of the operation of the Champaign Days Inn and the other hotels in the Days Inn System, DIA "operates" these hotels within the meaning of § 302.[19]

1. The "Days Inn System" and the "System Standards."

When a licensee buys a franchise from DIA, he buys the "Days Inn System," a comprehensive "hotel operating system" that sets hundreds of mandatory "System Standards" that control the manner in which a Days Inn must be operated. Facts ¶ 75. As the Statement of Undisputed Facts shows in exhaustive detail, the mandatory Days Inn System and DIA System Standards, which DIA can change at any time, address all aspects of the operation of a Days Inn, including: operating policies that "must be strictly observed by each property in the Days Inn System"[20] and requirements for grooming and attire for hotel employees, employee uniforms, hours of operation of the front desk, services that must be provided to guests, the forms of payment the hotel must accept, guest safety and security, swimming pools, restaurants, free

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[19]The term "operates" is not defined in the statute. One common dictionary defines the term to mean "to control or direct the functioning of," "to conduct the affairs of," or "to bring about or effect." Webster's II New Riverside University Dictionary 823 (1988). Similarly, Black's Law Dictionary defines "operate" as "to perform a function, or operation, or produce an effect." Black's Law Dictionary 984 (5th ed. 1979).

[20]The operating policies are continued in DIA's Operating Policies Manual, which "was set up to tell the franchisee exactly what their responsibilities were as far as in operations, different requirements that the company required of them . . . . [I]t was their Bible to live by when they're at the hotel as far as operating the hotel under Days Inns' standards." Deposition of James Stansburry, Ex. 17**[?]**, at 114.

continental breakfasts, supplies and furnishings in guest rooms, the responsibilities of the hotel's general manager, employee relations, employee performance, housekeeping, and maintenance. Facts ¶¶ 92-94.

2. Enforcement of the System Standards: the Quality Assurance program.

DIA actively enforces the Days Inn System and its System Standards through its mandatory quality assurance ("QA") program and Sunburst rating system. Facts ¶¶ 81, 95-113. Under its QA program, DIA inspects hundreds of items at the Champaign Days Inn and other Days Inns at least three times a year. Facts ¶¶ 95-96, 103. If a hotel fails a QA inspection, it must improve its operations within 30 days or be subject to suspension from the DIA reservation system and termination of its license. Facts ¶ 101. If a hotel passes a QA inspection, its score determines the Sunburst rating that the hotel receives in the Days Inn Directory, a publication that DIA provides to the public. Facts ¶ 111. As Mr. Keeble explained,

> [t]he big importance [of the Sunburst rating system] is franchisees have bought into it, and the big impact that we've seen is franchisees have bought into the concept, bought into the idea, and they -- they work to get that Sunburst rating up. They want it to be higher because it's a source of personal pride and it could very well be a good marketing tool for them as well. And yes, it will attract more guests and it might attract higher-paying guests, as well.

Facts ¶ 112. Mr. Panchal testified that the QA system and the Sunburst rating system are important to his business because they inform potential guests about the quality of his property. Facts ¶ 113. QA takes on even greater significance at the Champaign Days Inn because the license agreement between P & P and DIA provides that DIA cannot issue a major or minor renovations notice to P & P unless the QA score dips below 425. Facts ¶ 108.

3. Other means by which DIA controls or directs the functioning of the hotels in its system.

DIA exercises even further controls over the operations of the Champaign Days Inn and other Days Inn hotels. First, in addition to controlling the initial design and construction of new Days Inns, DIA can prevent its licensees from modifying the hotel or require its licensees to make hotel renovations. Facts ¶¶ 90, 108. Second, DIA operates a mandatory national reservations system that produces 25-30% of the room reservations for Days Inn hotels system-wide. Facts ¶¶ 83, 114-117. Third, DIA's licensees are required to participate in a variety of marketing and promotional programs conducted by DIA. Under some of these programs, DIA requires each Days Inn to honor discount programs or provide specified services and benefits to guests. Facts ¶¶ 84, 118-120. Mr. Panchal objected to these discounts but must provide them all the same. Facts ¶ 120. Fourth, DIA conducts several mandatory training programs for the general managers and employees of individual Days Inns. Facts ¶¶ 85-86, 121-127. DIA also issues a wide range of training manuals for licensees, including manuals on housekeeping, hotel maintenance, guest services, telephone etiquette, and many other topics. Facts ¶ 127. These training manuals provide detailed instruction on how to operate individual Days Inns. Id. Fifth, DIA also controls its licensees' handling of guest complaints. Facts ¶¶ 136-143. DIA requires its licensees to respond to all guest complaints, including meritless ones, and to report to DIA on their resolution. Facts ¶¶ 138-139. Mr. Panchal has indicated to DIA that he wants more of a role in responding to guest complaints regarding the Champaign hotel. Facts ¶ 142. He has also had to reimburse DIA for guest complaints that it responded to regarding the Champaign hotel. Facts ¶ 141. DIA involves itself in the operations of the Champaign hotel and all Days Inn hotels

through its Franchise Services Department. Facts ¶¶ 128-136. Finally, DIA's license agreements require the Champaign Days Inn and other Days Inns to keep books and records specified by DIA, to provide financial statements to DIA, to allow DIA to audit their books at any time, and to obtain DIA approval of any food or beverage service at the hotel and any outside management company used to run the hotel. Facts ¶¶ 82, 87-88.

D. The Court should assess civil penalties against DIA and HFS.

In addition to authorizing injunctive relief, the ADA also authorizes the Court, in a case brought by the Attorney General, to assess a civil penalty against an entity that has violated title III, to vindicate the public interest. 42 U.S.C. § 12188(b)(2)(C). Such a penalty may be in any amount up to $50,000.00 for a first violation, and up to $100,000.00 for a subsequent violation.[21]

Civil penalties serve two purposes: 1) to punish wrongful conduct, Tull v. United States, 481 U.S. 412, 422 n.7 (1987); United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992), and 2) to deter other potential violators. United States v. ITT Continental Baking Co., 420 U.S. 223, 231, 232-33 (1975); United States v. Reader's Digest Ass'n, Inc., 662 F.2d 955, 966-67 (3d Cir. 1981). Thus, a civil penalty must not be so small as to be an acceptable cost of doing business, as that would nullify its effectiveness in punishing wrongdoing and deterring illegal conduct. ITT Continental Baking, 420 U.S. at 231-32; Reader's Digest Ass'n, 662 F.2d at 966-67, 967 n.16. Thus, when civil penalties are sought, a defendant's financial condition is a relevant factor to consider. Federal Election Comm'n v. Furgatch, 869 F.2d 1256, 1258 (9th Cir.

[21]Similar cases brought by the United States, each alleging violations of § 303 of the ADA, are pending against DIA and HFS in four other federal courts. Facts ¶¶ 2-3. Accordingly, this case may or may not be the first in which DIA and HFS are held to have violated title III of the ADA.

1989) (in determining size of civil penalty, one relevant factor is defendant's ability to pay). See also Reader's Digest Ass'n, 662 F.2d at 967 (same); United States v. Danube Carpet Mills, Inc., 737 F.2d 988, 993 (11th Cir. 1984) (same). In addition, under the terms of the ADA, in determining the amount of a penalty the court must consider whether the entity made any good faith effort to comply with the statute. 42 U.S.C. § 12188(b)(5).

Here, there is no evidence that DIA or HFS made any good faith effort to comply with the requirements of § 303, or to ensure that new hotels joining its chain were readily accessible to and usable by individuals with disabilities. Facts ¶¶ 37-38, 42-43, 51-61, 67-74, 144-150. Despite provisions requiring their licensees to comply with all federal laws and regulations, including the ADA, DIA and HFS have routinely admitted hotels into the Days Inn System, including the Champaign Days Inn, that they knew or should have known were inaccessible. The ADA violations at these hotels were not minor, isolated, or hidden; rather, there were numerous violations of the Standards in every part of the Champaign Days Inn, and the same is true of all of the other Days Inns examined by the United States. Facts ¶¶ 67-74. No one at HFS or DIA makes any effort to check to see whether Days Inns comply with ADA requirements, despite the license agreement provision requiring the hotel to comply with federal law. Facts ¶ 149-150. As far as DIA and HFS are concerned, ADA compliance is someone else's problem.

Finally, given the size and resources of these defendants, a significant civil penalty is warranted. HFS is the world's largest franchisor of hotels, and DIA is the world's largest franchisor of economy or "mid-market" hotels. Facts ¶ 6. Not surprisingly, HFS has substantial annual revenues -- over $400 million in 1995 -- and profits: in 1995, HFS had retained earnings

of $83.6 million. Facts ¶ 153. With respect to the Champaign Days Inn in particular, DIA and HFS collected approximately $122,000 in royalties and advertising fees from the Champaign hotel during the first three years of its existence. Facts ¶¶ 151-152. Given that the hotel has now been open for an additional year, the total is likely to be closer to $ 165,000. The United States urges the Court to impose civil penalties on DIA and HFS of sufficient magnitude to render their conduct with respect to the Champaign Days Inn unprofitable, and to deter others from engaging in a pattern or practice of discrimination like that engaged in by DIA and HFS.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court enter summary judgment in its favor, and grant the relief requested in its Complaint.

Respectfully submitted,

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Dated: October 27, 1997