UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | Civil Action No.: 96-26 |
| DAYS INNS OF AMERICA, INC., et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

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

**(ORAL ARGUMENT REQUESTED)**

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## INTRODUCTION

DIA[1] does not dispute that it participated in, and exercised extensive control over, the design and construction of the Hazard Days Inn. DIA also does not dispute that the Hazard Days Inn is inaccessible to persons with disabilities. Instead, DIA argues that, even though it participated in and controlled the design and construction of the Hazard Days Inn, it should nonetheless escape liability because franchisors cannot be held liable for violating §303 of the ADA or because § 303 of the ADA is void for vagueness.

DIA's arguments are fatally flawed. DIA cannot point to any statutory language or legislative history that in any way suggests Congress intended to exempt franchisors from liability under § 303 while placing liability solely on the small businesses that own individual franchises. And, § 303 is not void for vagueness, since it gives DIA and other parties that participate in the design and construction of inaccessible buildings ample notice that failure to design and construct public accommodations and commercial facilities that are accessible to persons with disabilities violates the law.

Unable to point to any evidence that Congress intended to protect franchisors from ADA liability, DIA urges the Court to adopt a strained interpretation of the ADA that has already been rejected by two courts. The Court should resist DIA's urging because: as two courts have already recognized, DIA's construction of the ADA is inconsistent with the ADA's language, structure, purpose, and legislative history; the Department of Justice's interpretation of § 303 is entitled to substantial deference; and the facts show beyond dispute that DIA participated in, and

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[1]Since DIA has no employees and since all of DIA's functions are actually performed by HFS' employees, DIA and HFS will be referred to collectively as DIA. For these same reasons, HFS' contention that it should escape liability is meritless. Since all of DIA's acts from which liability arises were actually performed by HFS' employees, the acts are plainly binding on HFS as well as DIA.

exercised extensive control over, the design and construction of the Hazard Days Inn and other inaccessible Days Inns or, alternatively, that DIA operates the Hazard Days Inn.[2]

## ARGUMENT

### A. DIA's Construction of § 303 Is Inconsistent with the Statute and Legislative History.

In an attempt to avoid liability under § 303 for its undisputed role in the design and construction of the Hazard Days Inn and other inaccessible Days Inns, DIA urges the Court to limit liability under § 303, which expressly applies to public accommodations and commercial facilities, to the parties named in § 302, which is limited to persons who own, lease (lease to), or operate public accommodations. But DIA never explains why the Court should limit § 303's coverage to parties who own, operate, or lease public accommodations, effectively eliminating § 303's application to commercial facilities, when Congress expressly included commercial facilities within the scope of § 303. DIA Mem. at 5-11. DIA simply insists that the government's reading of § 303 makes no sense and leads to absurd results. Id. But a second federal court has now concluded that the government's reading of § 303 -- not DIA's -- is correct . In United States v. Ellerbe Becket, Inc., Civil No. 4-96-995 (D. Minn. October 2, 1997) (copy of slip opinion at Exhibit A), the United States sued an architectural firm for repeatedly designing new facilities in violation of the ADA's architectural standards for new construction. The architects moved to dismiss, arguing (as DIA does here) that the "plain language" of title III

[2]In a letter sent to the Court after its opposition to the United States' motion for summary judgment was filed, DIA also urges the Court to take judicial notice of the ruling in United States v. Days Inns of America, Inc. (D.S.D.), where the U.S. District Court for the District of South Dakota held, in a narrow ruling based on the facts of that specific case, that DIA did not have enough involvement in the design and construction of the Days Inn in Wall, South Dakota to make it liable for ADA violations at that facility. As discussed in Section E of this Memorandum, the Court should resist DIA's urgings to follow the approach taken by the South Dakota court, since the opinion of the South Dakota court is fact based and does not address the legal issues before this Court.

requires liability under § 303 to be limited to the parties who are named in § 302(a). The court rejected that argument and adopted the Department of Justice's construction of § 303:

> 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). [Defendant] 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. [Defendant] 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 [Defendant's] "plain language" logic.

Slip op. at 10-11. Noting that another federal court had come to the same conclusion, the Ellerbe court concluded that although the architect did not own, lease (lease to), or operate any of the facilities in question, it could nonetheless be held liable under § 303. Id. at 6, 13. See also Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1178 (S.D. Fla. 1997) (same). In sum, both the Ellerbe and Johanson courts have concluded that the Department of Justice's position is firmly grounded in the language, structure, purpose, and legislative history of §§ 302 and 303 and have squarely rejected the same arguments that DIA makes to this Court. The United States respectfully requests this Court to do the same.[3]

B. **The United States' Construction of § 303 Is Entitled to Deference.**

DIA argues at length that the Department of Justice's construction of § 303 is entitled to no deference because DIA's interpretation of § 303 allegedly relies on the plain language of the

[3]Even the court in United States v. Days Inns of America, Inc. (D.S.D.) found that § 303 must be read to include parties other than persons who own, lease (lease to), or operate public accommodations and commercial facilities. Slip. op. at 8-10.

statute, the Court should not defer to the Department of Justice's technical expertise, and the Department's interpretation of § 303 is allegedly unreasonable and nothing more than a litigating position. These arguments are equally meritless.

Contrary to DIA's assertions, DIA's interpretation of § 303 does not rely on the plain language of the statute. DIA argues that, since § 303 contains a reference to § 302(a), liability under § 303 should be limited to persons who are named in § 302(a) -- i.e. persons "who own, lease (or lease to), or operate a place of public accommodation." But, recognizing that a direct incorporation of the limiting language of § 302(a) into § 303 would impermissibly eliminate § 303's coverage of commercial facilities, DIA asks the Court not only to incorporate the limiting language from § 302(a) but also to amend it so that it applies to persons who own, lease (lease to), or operate commercial facilities in addition to the parties actually named in § 302(a). Thus, DIA argues that § 303's reference to § 302(a) incorporates language other than the plain language of § 302(a) that limits liability solely to "any person who owns, leases (or leases to), or operates a place of public accommodation." Clearly, DIA's construction of § 303, which incorporates language from § 302(a) that the Court must somehow amend to suit DIA's purposes, does not rely on the plain language of the statute, since DIA recognizes that the Court cannot simply incorporate the limiting language of § 302 as drafted by Congress.

Recognizing that its own argument implicitly admits that § 303 is ambiguous, DIA argues that the Court should not defer to the Department of Justice's expertise in interpreting the statute it administers because the ADA's language is not technical in nature. But the Supreme Court has not limited deference to agency interpretations involving technical matters. As the Supreme Court recently explained, courts must defer to agency interpretations of statutes they administer

not because of an agency's expertise on technical matters but "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1733 (1996). Accord Auer v. Robins, 117 S.Ct. 905, 909 (1997) (holding that courts must defer to an agency's permissible construction of a statute it administers where Congress has not directly spoken on the question at issue). Since DIA implicitly admits by virtue of its complex statutory construction argument that § 303's reference to § 302(a) is ambiguous, deference to the Department's interpretation of 303 is plainly warranted in this case.

DIA argues that the Department's construction of § 303 is not entitled to deference because it is unreasonable. But DIA's assertion of unreasonableness is plainly meritless, since two courts have already ruled that the Department's interpretation of § 303 is not only a reasonable one but, in fact, the correct one. Johanson, 963 F. Supp. at 1175; Ellerbe, slip op. at 11 n.4 (holding that although the government's interpretation of § 303 is plainly supported by traditional methods of statutory of construction, Department's interpretation of statute is a reasonable one that would be entitled to deference).[4]

Desperate to convince the Court not to defer to the Department's reasonable construction of § 303, DIA argues that the Department's construction of the statute is nothing more than a

[4]Even the court in South Dakota refused to accept DIA's construction of § 303, holding instead that the franchisor did not do enough in that case, as a factual matter, to be responsible for ADA violations at the Wall Days Inn.

litigating position adopted for the purposes of this lawsuit. DIA's argument fails for two reasons. First, the Department's interpretation of § 303 is not a mere litigating position adopted for this case. The Department first advanced its construction of § 303 in its Technical Assistance Manual which was published in November 1993 -- years before this lawsuit was filed. U.S. Department of Justice, Civil Rights Division, Public Access Section, The Americans with Disabilities Act Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities ("Technical Assistance Manual") § III-5.1000 at 45-46 (November 1993) (relevant excerpt attached as Exhibit B to this Memorandum). Moreover, the Department has consistently applied its construction of § 303 in other cases — i.e., in amicus briefs filed in Johanson and Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1 (D.D.C. 1996) and in opposing a motion to dismiss in Ellerbe. But, even if the Department's construction of § 303 had been a mere litigating position, it would nonetheless still be entitled to deference. Auer v. Robbins, 117 S. Ct. at 911 (holding that an agency interpretation first advanced in a legal brief is nonetheless entitled to deference so long as it "reflect[s] the agency's fair and considered judgment on the matter in question" and is not a post hoc rationalization "advanced by an agency seeking to defend past agency action against attack"). Since the Department first advanced its interpretation of the statute long before it filed suit against DIA, there is no reason whatsoever to suspect that the Department's construction of § 303 does not reflect "its fair and considered judgment" or that it is in any way a "post hoc rationalization" of past actions. Thus, if the Court finds § 303 to be ambiguous, as DIA implicitly suggests it is, deference to the Department's construction of § 303 is plainly warranted.

## C. The Undisputed Facts Prove that DIA and HFS Have Violated § 303.

Although DIA has responded to many of the facts, DIA has not contested those facts. Rather than coming forward with evidence to dispute the facts stated by the government, DIA instead advances a variety of legal arguments. DIA has thus failed to establish any genuine issue of material fact that would preclude judgment as a matter of law.[5]

### 1. DIA Does Not Dispute the Facts Supporting the United States' Claims.

Although DIA makes numerous legal arguments about the facts on which the government relies in its motion for summary judgment, DIA does not dispute the facts which establish that it participated in, and exercised extensive control over, the design and construction of the Hazard Days Inn. DIA does not dispute that an HFS employee identified the site for the Hazard Days Inn, convinced the owner of the site to construct a Days Inn on the property, and introduced the owner of the site to a contractor who had prior experience in building, owning, and operating a Days Inn. DIA also does not dispute that the Hazard Days Inn was built using blueprints that had previously been used to construct other Days Inn hotels, that DIA's licensee procured these blueprints from a DIA broker, and that the architect retained by the owner made only a few changes to the blueprints. In addition, DIA does not dispute that an HFS Design and Construction Manager reviewed and approved the blueprints used to construct the Hazard Days Inn, indicating changes for compliance with DIA's design standards that are contained in the Days Inn Planning and Design Standards Manual ("PDSM") (and indicating one change to

[5]In opposing a motion for summary judgment, the non-moving party bears the burden of coming forward with specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

improve the accessibility of a lavatory), or that the contractor incorporated these changes into the final design and construction of the Hazard Days Inn. Further, DIA does not dispute that an HFS employee visited the construction site while the Hazard Days Inn was under construction, that DIA has an interest in monitoring the construction of the Hazard Days Inn to ensure that it was completed on schedule, that another HFS employee toured and inspected the Hazard Days Inn after it was constructed but before it was opened for business as a Days Inn, and that HFS Quality Assurance inspectors have routinely toured and inspected the Hazard Days Inn at least three times each year since it opened for business.

DIA also does not dispute the basic facts that the government relies on to prove that DIA operates the Hazard Days Inn -- i.e., that DIA establishes extensive system standards for the operation of Days Inn hotels, that DIA's license agreement with Hazard Management Group, Inc. ("HMG") requires the Hazard Days Inn to be operated in accordance with those system standards, that the Hazard Days Inn is operated according to DIA's system standards, that HFS Quality Assurance inspectors conduct unannounced inspections of the Hazard Days Inn at least three times a year to ensure that the Hazard Days Inn is, in fact, operated according to DIA's system standards, and that HMG has changed the manner in which it operates the Hazard Days Inn in response to directives from DIA's Quality Assurance inspectors.

Accordingly, DIA has failed to introduce evidence disputing the fact that DIA participated in, and exercised extensive control over, the design and construction of the Hazard Days Inn or, alternatively, that DIA operates the Hazard Days Inn.

**2. DIA Has Repeatedly Misrepresented the Record.**

DIA frequently misrepresents the testimony of a witness or the record as a whole in an attempt to defeat the United States' motion for summary judgment. For example, DIA cites the testimony of two architects formerly employed by HFS for the proposition that when its architects review plans for new hotels, they make only "recommendations" or "suggestions." But the record simply does not support DIA's claim. The testimony of William Keeble, DIA's Rule 30(b)(6) designee, and Robert Hoagland, the former head of HFS' Design and Construction Department, and the clear language of the Days Inn Uniform Franchise Offering Circular, the standard Days Inn license agreement, and the PDSM itself, all make clear that while some comments may have been only "suggestions" or "recommendations," others were indeed "requirements." Keeble Dep., Exh.11, at 226-27, 229, 815, 819; Hoagland Dep., Exh. 10, at 73-74; PDSM, Exh. 4, at 2, 7-8; UFOC, Exh. 1, at 21, 23-24. Not only does DIA misrepresent the testimony, but the testimony cited by DIA is insufficient to create a genuine issue of material fact. The witnesses who offered testimony disputing earlier admissions by a former DIA officer and DIA's Fed. R. Civ. P. 30(b)(6) designee were formerly employed by HFS as architects; they did not have management responsibilities. Keeble Dep., Ex. 11, at 149-50, 167-68. Thus, these witnesses have no basis on which to contradict the testimony of their former boss, Mr. Hoagland, or of Mr. Keeble, who DIA designated to testify on its behalf, and whose testimony binds the company. See, e.g., Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 150 (S.D.N.Y. 1997); Dravo Corp. v. Liberty Mutual Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995).

Similarly, DIA misrepresents the importance of the PDSM to this case. DIA contends

that the PDSM is not relevant to this case because the architect and contractor in this case testified that they did not use it. But DIA intentionally overlooks the fact that an HFS Design and Construction Manager reviewed the blueprints for the Hazard Days Inn for the very purpose of ensuring that those blueprints complied with the DIA design standards that are contained in the PDSM. Thus, DIA's reliance on the testimony of the architect and contractor is misplaced and does not diminish the evidentiary value of the PDSM in this case.

Finally, DIA misrepresents the testimony of its own expert witness, Harold Kiewel, with respect to the nature of the PDSM. DIA cites a portion of his testimony for the proposition that the PDSM is not comprehensive. What DIA does not say, however, is that Mr. Kiewel later re-confirmed that the PDSM was in fact "fairly comprehensive," that it included provisions for areas of the hotel that guests would never see,[6] and that it included provisions that had nothing to do with defining DIA's position in the market. Kiewel Dep., Exh.15, at 163, 168-69, 176-79. Tischler Dep., Exh. 17, at 88 (describing the Days Inn PDSM as the "most comprehensive" of all of the HFS hotel chains).

**D. The United States' Reading of § 303 Does Not Make the Statute Void for Vagueness.**

DIA contends that the Department of Justice's interpretation of § 303 renders the statute so vague as to be unconstitutional. This argument is plainly meritless.

DIA argues that the Department's interpretation of § 303 is impermissibly vague because the Department's Fed. R. Civ. P. 30(b)(6) designee testified that she could not answer certain

[6]The fact that the PDSM's design standards cover areas not seen by the public proves both that the PDSM is exhaustive and that, contrary to DIA's contentions, it goes further than might otherwise be required to protect DIA's trade and service marks for purposes of the Lanham Act.

hypothetical questions posed by DIA's counsel about liability under § 303 without knowing more facts. But a witness' inability to apply a statute to a complex hypothetical fact situation posed by counsel during a deposition is not evidence that a statutory interpretation is impermissibly vague.[7] As the Supreme Court has explained, "we can never expect mathematical certainty from our language": rather, "it will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question." Grayned v. City of Rockford, 408 U.S. 104, 110, 110 n.15 (1972) (parentheses in original; internal quotation marks and citation omitted). *See also* United States v. Powell, 423 U.S. 87, 93 (1975) (holding that a statute is not unconstitutionally vague because doubts may be conceived "as to the applicability of the language in marginal fact situations"). Thus, there is no merit to DIA's complaint that Ms. Savage frequently responded to the hypothetical questions posed by DIA's counsel by indicating that the answers would depend on the facts of the case. A statute is not void for vagueness because its application requires a factual inquiry into a party's specific conduct.

Indeed, the cases make clear that neither § 303 nor the United States' interpretation of it are impermissibly vague. Because title III of the ADA is a civil statute regulating commercial conduct, it is subject to scrutiny less strict than that applied to criminal statutes, or statutes

[7]DIA filed a motion to compel the United States' Fed. R. Civ. P. 30(b)(6) designee to answer these hypothetical questions with the U.S. District Court for the Eastern District of California. That court ruled that it was unfair for DIA's counsel to pose such hypothetical questions in a deposition and to expect the witness to provide an on-the-spot answer that was binding on the United States. See November 7, 1997 Order denying DIA's motion to compel, which is attached hereto as Exh. C. Plainly the answers to these improper questions are not evidence of vagueness but merely evidence that DIA was seeking to take unfair advantage of the United States' Fed. R. Civ. P. 30(b)(6) designee by posing hypothetical questions that a Fed. R. Civ. P. 30(b)(6) witness is not required to answer.

restricting free speech.[8] Thus, § 303 (or the government's interpretation of it) can only be held void for vagueness if "no standard of conduct is specified at all." Hoffman Estates, 455 U.S. at 495 n.7 (1982). Further, in determining whether DIA has met this test, the Court must consider the words of the statute, and any limiting constructions proffered by the agency charged with enforcing the statute. Hoffman Estates, 455 U.S. at 495 n.5.

The language of § 303 itself provides ample notice of the conduct that it prohibits: the design and construction of inaccessible facilities. Moreover, the government has consistently interpreted § 303 to apply to all parties who engage in that conduct. The preamble to the Department of Justice's regulation implementing title III of the ADA indicated that the section could apply to "architects, contractors, developers, tenants, owners, and other entities," and that the Department intended to enforce § 303 in a manner consistent with its broad prohibition of the design and construction of inaccessible facilities.[9] In addition, the Department specifically addressed the scope of § 303's coverage in its Technical Assistance Manual for title III. The Manual poses a hypothetical situation in which portions of a new facility are constructed inaccessibly, and warns that not just the owner, but also the architect and contractor who designed and constructed those portions of the facility may be held liable under § 303. Technical

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[8] Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); Fogie v. Thorn Americas, Inc., 95 F.3d 645, 650 (8th Cir. 1996); Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 580 (S.D. Cal. 1993).

[9] In explaining its interpretation of § 303, the Department of Justice stated:

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

28 C.F.R. Part 36, Appendix B, § 36.401.

Assistance Manual § III-5.1000 at 45-46 (Exh. B hereto).[10] In sum, there is simply no basis for DIA's claim that the statute and the Department of Justice's interpretation of it fail to provide adequate notice of either what conduct is prohibited, or who may be held liable.

**E. The Ruling in the South Dakota Action Has No Relevance to this Case.**

On November 10, 1997, DIA wrote a letter asking the Court to take judicial notice of a ruling issued in the United States' action against DIA in the U.S. District Court for the District of South Dakota, Western Division. In that ruling, which was issued on October 29, 1997, the district judge granted DIA's motion for summary judgment, holding that the facts in that specific case did not show that DIA designed, constructed, or operated the Days Inn in Wall, South Dakota ("Wall Days Inn"). But that ruling, which was based on the specific facts related to the design and construction of the Wall Days Inn, is not relevant to this case, which involves the design, construction, and operation of the Hazard Days Inn, for two basic reasons.[11]

First and foremost, the Court's decision in the South Dakota case was undeniably limited to the facts of that specific case -- the Court did not interpret § 303 of the ADA. And, the facts in this case are significantly different from the facts in the South Dakota case, with DIA having significantly greater involvement in the design, construction, and operation of the Hazard Days

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

Inn than it had in the Wall Days Inn. For example, unlike the South Dakota case, the evidence here shows that DIA reviewed the final blueprints for the Hazard Days Inn, that DIA made changes to those blueprints including a change relating to an accessibility feature, and that the owner and contractor actually incorporated those changes into the final design and construction of the Hazard Days Inn.

Second, the decision in the South Dakota action is fatally flawed because it purports to apply § 303 of the ADA to the facts at issue in that case without providing any conclusions or guidance as to the conduct that § 303 prohibits or the proper interpretation of § 303.

Third, the decision in the South Dakota action is internally inconsistent. First, it declines to revisit the interpretation of § 303 reached in Ellerbe and Johanson which adopt the Department of Justice's construction of the statute, implicitly recognizing that these rulings are correct, while concluding as a matter of law that DIA did not design and construct the Wall Days Inn. Yet, the Department's position in Ellerbe and Johanson was the same as the position advanced in the South Dakota case and the position advanced here -- i.e., that involvement in the design and construction of inaccessible facilities is sufficient to trigger potential liability under § 303. But, without stating any legal rationale for its decision, the South Dakota court declined to accept the Department's interpretation of the terms design and construct -- even though the Department is the agency entrusted by Congress with the interpretation of these terms.

Finally, the South Dakota court plainly misunderstood the government's position with respect to the interpretation of § 303. The opinion notes that both parties agree that § 303 incorporates the language from § 302 which limits liability to owners, operators, lessors, and lessees. Slip op. at 7 n.7. Yet, as the briefs in this Court and those in the South Dakota case

plainly demonstrate, the United States has consistently taken the opposite position -- i.e., that the limiting language of § 302 is not incorporated into § 303.

Thus, the opinion of the South Dakota court is simply not relevant to, or helpful on, the issues before this Court. The United States, therefore, submits that the ruling of the South Dakota court is not persuasive authority in this case.

## CONCLUSION

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

Respectfully submitted,

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