UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IT'S MY PARTY, INC.,	)	
	)	
Plaintiff,	)	
	)	
	)	**Civil Action No. L-01-3270**
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' MEMORANDUM IN REPLY TO PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF SETH HURWITZ

REPLY TO PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

For the reasons discussed in the United States' Motion to Dismiss, this action must be dismissed for lack of subject matter jurisdiction. The allegations IMP makes in its Opposition do not alter the inescapable legal conclusion that this action is based on no statutory ground that confers a waiver of the United States' sovereign immunity and that the action is not ripe for review.

First, the action is not based on any statute that waives federal sovereign immunity. While IMP, in its Opposition, lists again the statutes upon which it brings this action and cites, for the first time, the Administrative Procedure Act, IMP makes no argument and provides no case law to support that these statutes confer a waiver of sovereign immunity in this action. The reasons that these statutes fail to confer a waiver of sovereign immunity are explained in the United States' Motion to Dismiss. The only

possible basis for such a waiver is the Administrative Procedure Act ("APA"), and IMP fails to refute or even address any of the arguments or the case law discussed in the United States' Memorandum demonstrating that the action challenged by IMP is not a final action, and thus that the APA does not apply. The only argument IMP presents is that the Department of Justice ("DOJ") action it challenges is a final action because "determinate consequences to the Plaintiff [are] reasonably foreseeable upon suit brought for its failure to provide qualified signers upon demand." (Pl's Opp. at 7.) However, even if it were foreseeable that the United States would sue IMP (which it is not, as explained in the United States' Motion To Dismiss at 11), the initiation of litigation itself does not create determinate consequences sufficient to constitute a final agency action. *See U.S. v. Cinemark U.S.A.*, 99 CV 0705 (N.D. Ohio Mar. 22, 2000), slip op. at 6-8. A determinate consequence is something that fixes an obligation or imposes liability. *Georator v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979). IMP fails to address how the DOJ's settlement agreement with Sledge, Inc. (hereinafter "Sledge") creates determinate consequences for IMP. Without "final action," the APA provides no waiver of sovereign immunity in this action.

IMP also apparently alleges that the APA applies to this action, in the alternative, because the Americans with Disabilities Act ("ADA") makes the action IMP challenges reviewable by statute. (See Pl's Opp. at 7 ("Plaintiff contends that the ADA ... do [sic] constitute an action made reviewable by statute.")).[1] IMP, however, again provides no argument or case law in support of this statement. In fact, the ADA does not make federal agency action reviewable. An action is made reviewable by statute only

[1] This is the United States' best estimation of what IMP means by this statement.

when the substantive statute specifically authorizes such review. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be "final agency action.'") If the ADA did make agency action reviewable, the courts that have evaluated whether they had subject matter jurisdiction under the APA to hear actions involving interpretations of the ADA would not have needed to analyze whether a final agency action existed (since the APA would have applied if the action were made reviewable by the ADA).[2] Consequently, the APA does not apply and thus cannot confer a waiver of sovereign immunity.

Second, this action simply is not ripe because there is no current case or controversy. The complaint that led to the settlement agreement between DOJ and Sledge is moot, and no complaint against IMP has even been filed with DOJ. The requirement of ripeness "is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *New Jersey Hosp. Assn. v. United States*, 23 F. Supp. 2d 497, 502 (D. N.J. 1998) (quoting *Ohio Forestry Assn., Inc. v. Sierra Club*, 118 S. Ct. 1665, 1670-71 (1998)). Further, as the Supreme Court explained in *Ohio Forestry Association*, when the party "will have a sufficient opportunity to bring its challenge to the legality of a plan or regulation at some future time, when harm

[2] Courts that have undertaken this evaluation include *U.S. v. AMC Entertainment, Inc.*, CV 99-1034 (C.D. Cal. Sept. 8, 1999), slip op. at 10-11; *U.S. v. Cinemark U.S.A., Inc.*, 99 CV 0705 (N.D. Ohio Mar. 22, 2000), slip op. at 6; and *Cinemark U.S.A., Inc. v. U.S Department of Justice*, No. 3:99CV 0183, 2000 WL 915091, *6-7 (N.D. Tex. July 6, 2000).

is 'more imminent and more certain,' the matter at issue is not ripe for adjudication by the courts." *New Jersey Hosp. Assn.* 23 F. Supp. 2d at 502 (quoting *Ohio Forestry*, 118 S. Ct. at 1670-71). Consequently, in *New Jersey Hospital Association*, the court found the plaintiff's complaint, alleging that DOJ was using threats of suit under the False Claims Act in a coercive matter to resolve disputes regarding overpayment of benefits to the plaintiff's member hospitals, was not ripe because the Department of Justice had not decided whether or not to file a False Claims Act suit against the member hospitals. 23 F. Supp. 2d at 503.

Likewise, the parameters of IMP's obligations to hearing impaired patrons under the ADA is not a case or controversy ripe for this Court's determination. There is no concrete factual dispute for the court to consider, and any judicial review at this stage would involve only abstract disagreements. The threat of enforcement that IMP alleges is at most a contingency, which is insufficient to overcome the ripeness hurdle. *Id.* at 504.

MOTION TO STRIKE PORTIONS OF THE AFFIDAVIT OF SETH HURWITZ

The United States hereby moves this Honorable Court to strike from the record any evidence of conduct or statements made by Department of Justice attorneys during compromise negotiations between the United States and Sledge contained in Seth Hurwitz's affidavit, Plaintiff's Exhibit 1, Paragraphs 19 through 22, Paragraph 26, and Paragraph 28. Federal Rule of Evidence 408 prohibits the admission of statements made in settlement discussions that relate to the "liability for or invalidity of the claim or its amount." Whether to permit the evidence for another purpose is within the discretion of the trial court. *Bituminous Const., Inc. v. Rucker Enterprises, Inc.*, 816 F.2d 965, 968 (4th Cir. 1987). "To determine whether statements are covered by the rule, the inquiry is whether the statements or conduct

were intended to be part of the negotiations for compromise." *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988) (citations omitted). Seth Hurwitz's affidavit meets this standard because it contains hearsay descriptions of statements made by Department of Justice attorneys during settlement negotiations with Sledge.

The Fourth Circuit has interpreted Rule 408 to require the exclusion of evidence made by attorneys in the course of settling prior related litigation. For instance, in *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d at 654, the court excluded statements made during the course of settlement negotiations of separate and prior claims between the parties. The court reasoned that because the prior claims had to do with the same transaction that was the subject of the case at hand, evidence surrounding the settlement of those claims should be excluded under Rule 408, even if the claims were based upon different causes of action. The court explained that "it is the general practice of the federal courts to hold inadmissible ... the attempted use of a completed compromise of a claim arising out of the same transaction between a third person and a party to the suit being litigated." *Id.* (alterations in original) (internal citations omitted); *see also United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (settlement by the plaintiff with another defendant of a closely related but separate claim held inadmissible under Rule 408).

In the instant case, Plaintiff seeks to introduce evidence of comments made by Department of Justice attorneys in the course of settling a related complaint with Sledge. Since Plaintiff seeks a declaratory judgment that the Settlement Agreement reached between the United States and Sledge reflects incorrect interpretations of the ADA, the present claim is clearly related to the subject matter of the settlement between the United States and Sledge. As such, any alleged conduct or statements by

Department of Justice attorneys made during the course of settlement negotiations with Sledge should be stricken from the record.

Further, the United States moves that this Honorable Court strike Paragraphs 14 through 16 of Seth Hurwitz's affidavit because they consist of the affiant's legal conclusions, contain hearsay, and/or present opinions of the affiant not limited to opinions or inferences which are rationally based on the perception of the witness, and are therefore inadmissible under Federal Rules of Evidence 602, 801, and 701.

Dated: May 13, 2002

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2002, I served a copy of the foregoing MEMORANDUM IN REPLY TO PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO STRIKE AFFIDAVIT OF SETH HURWITZ upon Defendant's counsel in IT'S MY PARTY, INC. V. UNITED STATES OF AMERICA, Civil Action No. L-01-3270, by sending it via facsimile and first class mail, postage pre-paid, to the following address:

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Dated this 13th day of May, 2002

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