UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SUSAN MEINEKER, et al.,	)	
Plaintiffs,	)	
V.	)	Civil No. 1:98-CV-1526
HOYTS CINEMAS CORPORATION,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF

UNITED STATES' MOTION TO INTERVENE

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INTRODUCTION

In July 2003, the Second Circuit issued a summary order remanding this action back to this Court for additional proceedings on two primary issues: (i) whether the Department of Justice's interpretation of its regulation governing the placement of wheelchair seating locations at public accommodations such as movie theaters is entitled to deference, and (ii) if so, whether defendant Hoyts had sufficient notice of this interpretation such that it may be applied to the Crossgates Mall stadium-style theater complex at issue in this litigation. See Meineker v. Hoyts Cinemas Corp., -- Fed.Appx. –, 2003 WL 21510423 (2nd Cir. July 1, 2003). Because the nature of the Second Circuit's order necessarily implicates the Department of Justice's substantial interests in the proper interpretation and application of its regulations implementing the Americans With Disabilities Act (42 U.S.C. § 12101 et. seq.) ("ADA"), as well as its interest in assuring consistency between this action and other pending stadium-style theater litigation, the United States moves herein to intervene in these remand proceedings as of right or, in the alternative, permissively pursuant to Rule 24 of the Federal Rules of Civil Procedure.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Americans With Disabilities Act ("ADA") in 1990 to remedy pervasive and continuous discrimination against persons with disabilities. See 42 U.S.C. § 12101(a)-(b); see generally PGA Tour, Inc. v. Martin, 532 U.S. 661, 674-77, 121 S. Ct. 1879, 1889-90 (2001). One of the ADA's primary purposes is, therefore, "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities[.]" 42 U.S.C. § 12101(b)(1).

To address these problems, Title III of the ADA expressly prohibits disability-based discrimination by public accommodations and commercial facilities. See 42 U.S.C. §§ 12181-12189. Of particular relevance here, Title III mandates that so-called "newly constructed" public accommodations (i.e. - covered facilities designed or constructed for first occupancy after January 26, 1993) be "readily accessible to and usable by" persons with disabilities. See 42 U.S.C. § 12183(a)(1)("Section 303"); see also id. at § 12182(a) ("Section 302") (forbidding disability-based discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation"). Movie theaters -- such as the stadium-style theaters at the Crossgates Mall theater complex -- are expressly encompassed within Title III's non-discrimination mandate. Id. at § 12181(7)(C) (defining the term "public accommodation" to include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment"); see also United States v. Cinemark USA, Inc., No. 02-3100, -- F.3d --, slip op. at 10 (6th Cir. Nov. 6, 2003) (holding that "to require that wheelchair users be provided with comparable viewing angles, not just an unobstructed view of the movie screen, furthers the central goals of Title III of the ADA").

Congress granted primary enforcement authority for Title III of the ADA to the United States Department of Justice [hereinafter "Department" or "DOJ"], including the responsibility for promulgating regulations, issuing technical assistance materials, and filing lawsuits in federal court to enforce compliance with the statute and accompanying regulations. 42 U.S.C. §§ 12186(b), 12206, 12188(b). In 1991, pursuant to Congress' delegated regulatory authority, the Department issued final regulations - after notice-and-comment rulemaking - to regulate new

construction of, and alterations to, Title III-covered facilities. See 28 C.F.R. §§ 36.101 - 36.608 & App. A; see also 56 Fed. Reg. 35,546 (July 26, 1991). These regulations include architectural standards known as the ADA Standards for Accessible Design, 28 C.F.R. pt. 36, Appendix A ("Standards").

Section 4.33.3 of these Standards, in turn, establishes certain requirements governing the placement and location of wheelchair and companion seating in assembly areas such as movie theaters. Standard 4.33.3 provides, in pertinent part, that

> [w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location.

28 C.F.R. Pt. 36, App. A § 4.33.3 (1994) [hereinafter "Standard 4.33.3"]. It is the interpretation of Standard 4.33.3's comparability and integration requirements, as well as their application to the stadium-style theaters at the Crossgates Mall theater complex, that forms one of the central issues in this action.

FACTUAL AND PROCEDURAL HISTORY

Hoyts's Crossgates Mall theater complex in Guilderland, New York opened for business in 1997. See Affidavit of Gretchen E. Jacobs in Support of United States' Motion to Intervene (served Nov. 10, 2003) ("Jacobs Aff."), Ex. 1, United States' [Proposed] Complaint In Intervention ¶¶ 4, 11 [hereinafter "U.S. Intervention Complaint"]; see also Meineker v. Hoyts Cinemas Corp., 216 F. Supp. 2d 14, 15 (N.D.N.Y. 2002) ("Meineker I") (summarizing seating layouts of stadium-style theaters at Crossgates Mall), vacated and remanded, -- Fed.Appx. –,

2003 WL 21510423 (2nd Cir. July 1, 2003). This complex consists of eighteen stadium-style movie theaters on two levels. U.S. Intervention Complaint ¶ 11. In each of these theaters there are two seating sections – one section containing several rows (i.e., 4-6 rows) of seating in the "traditional" section on a flat floor closest to the screen, and a "stadium" section located farther from the screen and elevated on a succession of tiers or risers (generally 12-18" in height). Id. The "traditional" and "stadium" sections of these theaters are separated by one or more sets of stairs and a wall and railings at least six-feet in height. Id. As both originally constructed and as currently operated, fourteen of the eighteen theaters have wheelchair seating areas exclusively located in the "traditional" section.[1] Id. at ¶¶ 12, 14. In the four largest theaters seating over 300 patrons, the wheelchair seating areas are located in both the traditional section and in the rear of the stadium section on a platform surrounded by railings. Id. at ¶ 13.

In September 1998, plaintiffs Susan Meineker and Sybil McPherson filed this action alleging that Hoyts's Crossgates Mall theater complex violated Title III of the ADA. See Complaint (filed Sept. 24, 1988) (Docket #1); see also First Amended Complaint (filed Feb. 4, 1999) (Docket # 8).[2] Both women, who use wheelchairs for mobility, had attended one or more movies at these theaters and sat in the wheelchair seating areas in the "traditional" section. First Amended Complaint at ¶¶ 12-45. They each had difficulty viewing the screen, complained of discomfort from craning their necks, and experienced distorted and blurry images from sitting so

[1] At some point between November 2000 and March 2001, Hoyts "renovated" the Crossgates Mall theaters by, inter alia, relocating some of the wheelchair and companion seating areas farther back (i.e., the 4th to 6th row) in the "traditional" section of the theaters. See DOJ Intervention Complaint ¶ 14. However, even after these "renovations," no wheelchair seating areas are located in the stadium sections of the fourteen smaller theaters within the complex. Id.

[2] Aside from the deletion of the class allegations, plaintiffs' original and amended complaints are substantively similar.

close to the screen. Id. Plaintiffs also complained about feeling isolated and alleged that the theaters lacked sufficient companion seating. Id. Plaintiffs seek injunctive relief and an order compelling Hoyts to make its Crossgates Mall theaters accessible as required by Standard 4.33.3 and the ADA. Id. at 9.

In late 2001, the parties filed cross-motions for summary judgment. Thereafter, in August 2002, this Court issued a memorandum opinion granting defendant Hoyt's motion for summary judgment. Meineker v. Hoyts Cinemas Corp., 216 F. Supp. 2d 14, 15 (N.D.N.Y. 2002) ("Meineker I"), vacated and remanded, -- Fed.Appx. --, 2003 WL 21510423 (2nd Cir. July 1, 2003). This Court, while recognizing the importance of viewing angles and comparability when interpreting Standard 4.33.3's lines-of-sight requirement, nonetheless concluded that all of the wheelchair seating areas at the Crossgates Mall theater complex complied with the ADA "because [they are] located amongst seating for the general public and afford[] viewing angles comparable to those afforded to a significant portion of the general public." Meineker I, 216 F. Supp. 2d at 18-19. For similar reasons, this Court also concluded that the wheelchair seating areas at this complex represented an integral part of the fixed seating plan. Id.

Plaintiffs timely appealed this Court's summary judgment ruling. The United States was subsequently granted permission by the Second Circuit to participate as *amicus curiae*. In April 2003, the Second Circuit heard oral argument on the Meineker appeal.[3] A few months later, on

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[3] During the pendency of the Meineker appeal, in late March or early April 2003, the Regal Entertainment Group and Regal Cinemas, Inc. [hereinafter collectively referred to as "Regal"] acquired certain of Hoyts's stadium-style theater complexes, including the Crossgates Mall theater complex. See U.S. Intervention Complaint ¶ 15. As a result, Regal now owns, leases, and operates the Crossgates Mall theater complex as part of the Regal theater group under the "Regal" brand name. Id. The United States' proposed complaint-in-intervention thus names not only Hoyts as a party-defendant, but also Regal. See Fed. R. Civ. P. 25(c) (permitting, in case of transfer of corporate interests, substitution or addition of party or parties acquiring interest as party-litigants).

July 1, 2003, the Second Circuit issued a summary order vacating Meineker I and remanding for further proceedings. See Jacobs Aff., Ex. 6, Meineker v. Hoyts Cinemas Corp., -- Fed.Appx. --, 2003 WL 21510423 (2nd Cir. July 1, 2003) ("Meineker II"). This summary order contained little substantive discussion. Instead, the Second Circuit noted that the United States' appearance in this action for the first time on appeal raised two issues:

> (1) whether the DOJ's interpretation of § 4.33.3 - requiring lines of sight comparable to those afforded most of the general public and seating integral to the area where most of the general public chooses to sit - is entitled to deference, and (2) if its interpretation is entitled to deference, whether defendant received reasonable notice of that interpretation at the time of construction or renovation such that the DOJ's interpretation may be applied to the Crossgates theaters.

Meineker II, 2003 WL at *2. (footnotes omitted). The Circuit concluded that remand back to this Court was necessary to address the foregoing issues. Id. at *3. The Circuit also noted that "[r]emand is particularly appropriate . . . . [because] the parties' post-argument submissions raise complex factual issues that illustrate the need for further proceedings in the District Court." Id.

After receipt of the Second Circuit's Meineker II summary order and mandate, the Disability Rights Section -- the section within the Department's Civil Rights Division with authority to enforce and administer the ADA -- began assessing whether or not the United States should move to intervene in these Meineker remand proceedings in light of Meineker II. Jacobs Aff. ¶ 2.

At a September 25th scheduling conference, this Court set forth various deadlines for the Meineker remand proceedings, including a discovery cut-off of May 1, 2004 and a dispositive motion cut-off of July 1, 2004. See Order (filed Sept. 26, 2003) (Docket # 87). The Court also denied Hoyts's motion to stay this action pending resolution of cross-appeals pending before United States Court of Appeals for the First Circuit in a related stadium-style theater case

(United States v. Hoyts Cinemas Corp., et al.). Id. at 2. Finally, the Court set a deadline of October 27, 2003 for Hoyts to either move to join the United States as a party and/or serve a subpoena pursuant to Rule 45 on the Department of Justice. Id.

Thereafter, on October 27, 2003, Hoyts served the Department of Justice with a motion for involuntary joinder as a party-plaintiff (see Docket ## 88 - 90), as well as an unexecuted copy of a subpoena *duces tecum* pursuant to Rule 45 of the Federal Rules of Civil Procedure issued to the United Sates Attorney for the Northern District of New York which seeks production of privileged documents listed on a privilege log complied by the United States in the Hoyts litigation. Jacobs Aff. ¶ 14 & Ex. 7.[4]

On November 4, 2003, the Disability Rights Section received authorization from the Assistant Attorney General for the Civil Rights Division, Mr. R. Alexander Acosta, to move on behalf of the United States to intervene in this action as a party-plaintiff. See Jacobs Aff. ¶ 6. Counsel for the United States immediately informed the parties' respective counsel that the United States would be moving imminently to intervene as a party-plaintiff in these remand proceedings. See Jacobs Aff. ¶¶ 7, 10 & Ex. 2. Counsel for plaintiffs stated that he did not oppose the United States' intervention in this action. Jacobs Aff. ¶ 10. Counsel for defendant Hoyts, however, informed the Department that Hoyts would be opposing the United States' motion since Hoyts had already filed its motion for involuntary joinder. See Jacobs Aff. ¶ 8 & Ex. 3.

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[4] Hoyts's motion for joinder bears a return date of "December 19, 2003." However, this date appears to be in error since this Court's monthly motions calendar lists the third Thursday of each month (i.e., December 18, 2003) as its regularly-scheduled civil motions hearing day. Pursuant to Local Rule 7.1(b)(1), the United States will thus be filing its opposition to Hoyts's joinder motion on or before December 4, 2003.

ARGUMENT

I. The United States Should Be Permitted To Intervene As of Right Because of the Nature of the Second Circuit's Remand Order in Meineker II and the Department of Justice's Unique Regulatory and Enforcement Responsibilities Under Title III of the ADA

Rule 24(a)(2) of the Federal Rules of Civil Procedure sets forth the requirements for intervention as of right. As construed by the Second Circuit, a party moving for intervention as of right must:

> (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.

See, e.g., Brennan v. New York City Bd. of Educ., 260 F.3d 123, 128-29 (2d Cir. 2001); Catanzano by Catanzano v. Wing, 103 F.3d 223, 232 (2nd Cir. 1996); Tachiona ex rel. Tachiona v. Mugabe, 186 F. Supp. 2d 383, 394 (S.D.N.Y. 2002). Federal courts, including those in the Second Circuit, have emphasized that Rule 24's intervention requirements should be construed flexibly and liberally in favor of intervention. See, e.g., Turn Key Gaming, Inc. v. Oglala Sioux Tribe, 164 F.3d 1080, 1081 (8th Cir. 1999) ("Rule 24 should be construed liberally, and doubts resolved in favor if the proposed intervenor."); Tachiona, 186 F. Supp. 2d at 394 (describing Rule 24 intervention standard as "a flexible and discretionary one"); German v. Federal Home Loan Mortgage Corp., 899 F. Supp. 1155, 1166 (S.D.N.Y. 1995) (noting "liberal construction" of intervention requirements).

Here, the United States' intervention request comfortably satisfies Rule 24(a)(2)'s requirements for intervention as of right. The United States is timely seeking to intervene in this shortly after the issuance of the Second Circuit's Meineker II mandate and before any substantive proceedings on remand have been conducted by this Court. Moreover, the United

States Department of Justice -- as the agency with primary regulatory and enforcement responsibilities under Title III of the ADA -- has direct and significant interests in this action that cannot be adequately protected by private parties. Lastly, the Second Circuit's Meineker II order plainly contemplates the United States' participation in the remand proceedings. Taken together, these considerations strongly counsel in favor of granting the United States' motion to intervene as of right.

A. The United States' Motion for Intervention Is Timely

As an initial matter, the United States' intervention motion -- filed just over three months after the issuance of the Second Circuit's mandate -- can hardly be considered untimely. As with Rule 24(a)(2)'s other requirements, timeliness defies precise definition (or chronological parameters) and is, instead, committed to the sound discretion of the district court based on the circumstances of each case. See, e.g., National Ass'n for Adv. of Colored People v. New York, 413 U.S. 367, 366-67, 93 S. Ct. 2591, 2603 (1973); Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 182 (2nd Cir. 2001); Fields v. State Office of Mental Retardation and Dev. Disabilities, 164 F.R.D. 313, 317 (N.D.N.Y. 1995). Factors considered by courts in the Second Circuit when assessing the timeliness of a motion to intervene include:

> (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.

United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2nd Cir. 1994); Commack Self-Service Kosher Meats, Inc. v. Rubin, 170 F.R.D. 93, 100 (E.D.N.Y. 1996).

The United States' intervention motion plainly satisfies this timeliness standard. First, the United States is moving to intervene only three months after the issuance of the Second

Circuit's Meineker II mandate in late July 2003.[5] Second, no substantive briefs have yet been filed in these remand proceedings, thus neutralizing any argument that the United States' entry as a party-plaintiff will unduly delay the litigation. Third, for the reasons discussed below, the United States' interests would be severely impaired were intervention denied. See discussion infra pp. 12-15. Fourth, the Second Circuit's summary order plainly appears to contemplate participation by the United States on remand.

Hoyts, however, apparently still believes that the United States' intervention motion is nonetheless untimely. In his November 6th letter conveying Hoyts's opposition to the United States' intervention motion, defense counsel points to two events as "evidence" of the United States' tardiness. First, Hoyts alleges that the Department of Justice ignored this Court's January 2001 "invitation" to intervene in the first round of Meineker proceedings. See Jacobs Aff., Ex. 3 at 1. Second, Hoyts claims that the United States – if it were inclined to intervene in these remand proceedings – should have done so before Hoyts filed its joinder motion in late October 2002. Id.

Neither of Hoyts's arguments undermine the propriety or timeliness of the United States' intervention motion. Hoyts's assertion that the Court "invited" the Department's intervention in

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[5] While Hoyts may argue that the September 1998 date (when the original complaint was filed) - rather the July 2003 date (when the Circuit mandate issued) - should control the timeliness calculus, such an argument would be misplaced. See Roeder v. Islamic Republic of Iran, 195 F. Supp.2d 140, 156 (D.D.C. 2002) ("The appropriate starting point for the timeliness inquiry is not the date that the would-be intervenor became aware of the existence of the litigation, but the date the intervenor became aware of the implications of the litigation."), aff'd, 333 F.3d 228 (D.C. Cir. 2003). Not until the issuance of Meineker II was the United States made aware that deference and due process issues could play such a prominent role on remand. Indeed, neither plaintiffs nor Hoyts even briefed or argued these issues during the initial round of district court proceedings. These issues only moved into the forefront of the litigation during the Meineker II appellate proceedings.

January 2001 is, simply put, false. At no time – either in January 2001 or subsequently - has the Department received - nor did it expect to receive -- any "invitation" or other notification from this Court seeking to have the United States intervene in any Meineker proceedings. Jacobs Aff. ¶ 9. Indeed, the January 2001 Order to which Hoyts makes apparent reference contains no reference whatsoever to intervention by any outside party, let alone discussion of a purported "invitation" to the United States to intervene. See Order (entered Jan. 22, 2001) (Docket # 21); see also Jacobs Aff., Ex. 5, Reply Brief for Plaintiffs-Appellants Susan Meineker and Sybil McPherson 4-5 (2nd Cir. Jan. 7, 2003) (discussing Hoyts's misrepresentations regarding telephonic hearing conducted by Judge Hurd in January 2001).

The Department, moreover, moved as expeditiously as possible to intervene on behalf of the United States in this action after review of the Meineker II summary order and mandate. The Disability Rights Section (as with other DOJ components) is only authorized to initiate enforcement actions such as the filing of a complaint-in-intervention -- or even make appearances on behalf of the United States or the Department – with the express approval of the appropriate Department official who, in this case, is the Assistant Attorney General for the Civil Rights Division ("AAG"). See, e.g., 28 U.S.C. §§ 516-18 (2003); 28 C.F.R. § 0.50; see also 42 U.S.C. § 12188(b) (authorizing Attorney General to investigate complaints and file Title III-based enforcement actions); Jacobs Aff. ¶ 4. Due to turnover in the AAG's office, there was no Senate-confirmed AAG available to approve this request until at least late August 2003. Id. at ¶¶ 3-6. After a reasonable time required to get things in order in his new assignment, the new AAG -- Mr. R. Alexander Acosta -- approved the Disability Rights Section's intervention in this action on behalf of the United States in early November 2003. Id. at ¶¶ 5-6. While thus

unfortunate that Hoyts's motion for joinder (filed in late October 2003) and the United States' intervention motion (filed in early November 2003) have now "crossed paths" on the docket sheet, the mere fact that Hoyts's joinder motion was filed earlier provides no basis for holding the United States' intervention motion untimely particularly where, as here, the Department moved to intervene as quickly as possible within the legal constraints of the requisite approval process.

Therefore, because the United States timely moved for intervention as required by Rule 24(a)(2) shortly after the issuance of the Second Circuit's mandate and within days of receiving the requisite authorization from the Assistant Attorney General for the Civil Rights Division, the motion for intervention should be deemed timely. See, e.g., Heaton v. Monogram Bank of Georgia, 297 F.3d 416, 422-24 (5th Cir. 2002) (finding FDIC motion to intervene in remand proceedings timely since motion was filed shortly after issuance of appellate mandate and agency's participation as a party was necessary to protect both its regulatory program and the public interest); see also Abondolo v. GGR Holbrook Medford, Inc., 285 B.R. 101, 109-10 (E.D.N.Y. 2002) (holding United States' intervention motion in third-party action timely, despite pendency of litigation for several years, since United States acted quickly to intervene after learning of alleged fraudulent conveyance and its participation was necessary to protect tax lien against property at issue in litigation).

B. The United States' Significant Interests In this Litigation Cannot Be Adequately Protected by the Existing Private Parties

Turning to Rule 24(a)(2)'s latter three requirements for intervention as of right, there can be no serious question that the United States has significant and legally cognizable interests in these remand proceedings that -- in light of the United States' unique role in the administration

and enforcement of Title III of the ADA -- cannot be adequately protected by the private parties.

For an "interest" to be cognizable under Rule 24(a)(2), the Second Circuit has noted that such an interest must be "'direct, substantial, and legally protectable.'" Brennan, 260 F.2d at 130 (quoting Washington Elec. Co-op., Inc. v. Massachusetts Municipal Wholesale Elec. Co., 922 F.2d 92, 97 (2nd Cir. 1990)); see also Donaldson v. United States, 400 U.S. 517, 531, 91 S.Ct. 534, 535 (1971) (finding that interest, for purposes of intervention as of right, must be "significantly protectable"). Beyond these broad parameters, however, the interest requirement defies more specific definition and depends on the facts and practicalities of each case. See Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2nd Cir. 1984); see also Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of Interior, 100 F.3d 837, 841 (10th Cir. 1996) (characterizing interest test as "'a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process'") (quoting Neusse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)); Fed. R. Civ. P. 24 advisory committee note (1966 Amendments) ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene[.]").

That the United States has substantial interests at issue in the Meineker remand proceedings is beyond peradventure. First, as the agency with primary regulatory and enforcement authority under Title III of the ADA, the Department of Justice plainly has not only an interest in the outcome of this particular litigation, but also a broader interest as well in ensuring the proper and consistent application of its own ADA regulations. The United States' direct interests in this litigation thus include: asserting its own claims against Hoyts under Title

III of the ADA for violating Standard 4.33.3 with respect to the wheelchair seating locations at the Crossgates Mall theater complex; ensuring that this Court affords appropriate deference to its interpretation of Standard 4.33.3; and, protecting the United States' broader interests in maintaining consistency in the interpretation and application of Standard 4.33.3 among various federal circuits. This latter consideration is particularly important where, as here, the Crossgates Mall theater complex is currently the subject of litigation both here and in the United States Court of Appeals for the First Circuit. See United States v. Hoyts Cinemas Corp., 256 F. Supp. 2d 73 (D. Mass.) ("Hoyts") (granting summary judgment in favor of United States and holding that theater defendant violated Standard 4.33.3 by placing wheelchair locations outside the stadium sections of its stadium-style theaters, but limiting application of holding to theaters constructed or "refurbished" after initiation of Hoyts enforcement action), appeals docketed, Nos. 03-1646, 03-1787 (1st Cir. June 5, 2003).

The United States' significant interests, moreover, cannot be adequately represented by the private plaintiffs in this action. Not only are private plaintiffs precluded from seeking the same range of remedies as the United States under Title III of the ADA, compare 42 U.S.C. § 12188(a) (remedies available to private litigants) with 42 U.S.C. § 12188(b) (enforcement authority of Attorney General), but also such private litigants are necessarily presumed to act on behalf of their clients' interests -- rather than the public interest -- as does the United States. See, e.g., Heaton, 297 F.3d at 424 (reversing district court's denial of intervention request by FDIC under Rule 24(a)(2), noting that "[i]t cannot be assumed that the existing [private] parties to the litigation would protect the FDIC's and the public's interest" in the proper regulation of the federal deposit insurance system); Coalition of Arizona/New Mexico Counties, 100 F.3d at

845 (distinguishing between public and private interests when assessing intervention motion under Rule 24(a)(2)); Ceres Gulf v. Cooper, 957 F.2d 1199, 1203 (5th Cir. 1992) (finding that Director of the Office of Workers' Compensation Programs had sufficiently distinct interest in consistent application of regulatory scheme and protection of administrative jurisdiction over workers' compensation claims, as compared to private parties, to warrant intervention as of right); see generally Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636 n.10 (1972) (characterizing putative intervenor's burden of establishing inadequacy of representation of interests by current parties as "minimal").

For all of the foregoing reasons, the United States' should be permitted to intervene as of right in these remand proceedings. See, e.g., Heaton, 297 F.3d at 422-25 (holding FDIC should have been permitted to intervene under Rule 24(a)(2) in order to both defend challenged regulatory action and protect public interest); United States ex rel. McGough v. Covington Technologies, Inc., 967 F.2d 1391, 1394-96 (9th Cir. 1992) (reversing district court's denial of motion for intervention as of right given United States' substantial interests in *qui tam* action); Ceres Gulf, 957 F.2d at 1203-04 (district court erred in denying intervention pursuant to Rule 24(a)(2) when Director of federal workers' compensation program had direct interest in action challenging his administrative authority over such program); Roeder v. Islamic Republic of Iran, 195 F. Supp.2d 140, 154-55 (D.D.C. 2002) (permitting United States to intervene as of right in class action by former hostages against Republic of Iran in light of United States' substantial sovereign interest in protecting treaty commitments), aff'd, 333 F.3d 228 (D.C. Cir. 2003).

II. This Court Should Alternatively Grant the United States Request for Permissive Intervention Pursuant to Rule 24(b)(2)

Rule 24(b) of the Federal Rules of Civil Procedure provides an alternative basis for the

United States' permissive intervention in this action. Rule 24(b) provides that permissive intervention may be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). Rule 24(b), moreover, also makes special provision for intervention by a federal agency in lawsuits concerning federal statutes or regulations within its administrative purview. This Rule provides that, where as here, a party rests a claim or defense on a federal statute or regulation, the federal officer or agency "upon timely application may be permitted to intervene in the action." Id. When assessing a motion for permissive intervention, the primary consideration is "whether the intervention will unduly delay or prejudice the existing parties." Commack Self-Service Kosher Meats, 170 F.R.D. at 106.

The United States' motion for intervention easily satisfies these requirements for permissive intervention. First, the United States' central claims in this action -- namely, that the Department has reasonably interpreted Standard 4.33.3 in the context of stadium-style movie theaters, that the court should defer to this interpretation, that Hoyts (and the rest of the movie theater industry) well understood that they were affording patrons who use wheelchairs with inferior lines of sight when locating wheelchair seating areas outside the stadium section of stadium-style theaters, and that Hoyts violated Title III of the ADA by placing wheelchair seating areas in the "traditional" seating section -- share common legal and factual issues with the private plaintiffs' claims in this action. Second, as discussed above, the United States' intervention motion can hardly be characterized as unduly delaying the proceedings on remand since this motion was filed shortly after the issuance of the Second Circuit's Meineker II mandate. See discussion supra pp. 9-12. Third, given the United States' expertise in ADA

issues, its intervention in this matter would have the salutary effect of enhancing the Court's understanding of the underlying legal and factual issues and, thereby, assisting in the efficient resolution of this action. Fourth, the private plaintiffs' claims (as well as the theater-defendants' defenses) plainly implicate the ADA and its implementing regulations, thereby providing a separate basis for the United States' permissive intervention.

Taken together, these considerations plainly demonstrate the propriety of the United States' permissive intervention. Indeed, in light of the Second Circuit's remand order, the United States' intervention in these remand proceedings presents a paradigmatic situation for application of Rule 24(b)'s special provision for federal agencies. Here, the Second Circuit expressly directed this Court on remand to determine the deference due the United States' interpretation of Standard 4.33.3 with respect to stadium-style movie theaters. Meineker II, slip op. at *3-4. The United States, as the agency charged with administering Title III of the ADA, has a vested interest in not only ensuring that this Court affords the appropriate level of deference to its interpretation of Standard 4.33.3, but also demonstrating the propriety of this interpretation and its application to the theater-defendants. This is precisely the scenario for permissive intervention by a federal agency contemplated by Rule 24(b). This Court should, therefore, grant the United States' alternative request for permissive intervention. See, e.g., Metro Transp. Co. v. Balboa Ins. Co., 118 F.R.D. 423, 424 (E.D. Pa. 1987) (granting Public Utilities Commissioner's motion for permissive intervention in litigation concerning interpretation of PUC regulation and commenting: "The rule [24(b)] requires that intervention be granted liberally to governmental agencies because they purport to speak for the public interest."); Meyer v. Macmillan Pub. Co, Inc., 85 F.R.D. 149, 149-50 (S.D.N.Y. 1980) (granting

EEOC motion for permissive intervention in light of Rule 24(b)'s "'hospitable attitude'" towards intervention by federal agencies) (internal citation omitted); Sobel v. Yeshiva Univ., 438 F. Supp. 625, 626-27 (S.D.N.Y. 1977) (same).

CONCLUSION

For the foregoing reasons, the Court should grant the United States' intervention motion and order its intervention in this action (i) as a matter or right pursuant to Fed. R. Civ. P. 24(a)(2) or, in the alternative, (ii) permissively pursuant to Fed. R. Civ. P. 24(b). A proposed order and intervention complaint accompany this memorandum.

Dated: November 10, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of November, 2003, true and correct copies of Memorandum In Support of the United States' Motion to Intervene were served by Federal Express, postage pre-paid, on the following parties:

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