UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SUSAN MEINEKER, et al.,	)	
Plaintiffs,	)	
V.	)	Civil No. 1:98-CV-1526
HOYTS CINEMAS CORPORATION,	)	Return Date: Dec. 18, 2003
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO INTERVENE

In defendant Hoyts Cinemas Corporation's ("Hoyts") memorandum opposing the United States' motion to intervene, Hoyts introduces two new matters that warrant separate reply in this action. See Hoyts Cinemas Corporation's Memorandum of Law In Opposition to United States' Motion to Intervene (served Dec. 3, 2003) ("Hoyts Opp. Mem."). First, Hoyts argues – based on newly-submitted evidence – that neither Regal Entertainment Group nor Regal Cinemas, Inc. [hereinafter collectively referred to as "Regal"] are properly named as party-defendants in the United States' proposed complaint-in-intervention. See Hoyts Opp. Mem. at 14-16. Second, Hoyts also urges this Court to reject that portion of the United States' prayer for relief seeking

civil penalties and compensatory damages because it purportedly would represent an unwarranted "attempt to expand the scope of these proceedings at this late date." Hoyts Opp. Mem. at 13. Neither of Hoyts's arguments, however, provide a legal basis for this Court to strike any portion of the United States' proposed complaint-in-intervention. Indeed, Hoyts's attempts to dictate the terms for the United States' entry as a plaintiff-intervenor in these remand proceedings appears to be little more than an impermissible "pre-emptive strike" on the United States' complaint.

1. ***The Regal entities are properly named as party-defendants in the United States' proposed complaint.*** Hoyts states that it "opposes" the naming of both Regal Entertainment Group and Regal Cinemas, Inc. as co-defendants in the United States' proposed complaint-in-intervention because the Regal entities' acquisition of Hoyts in March 2003 occurred years after the Crossgates Mall stadium-style theater complex opened for business and after the district court litigation had concluded. See Hoyts. Opp. Mem. at 14-16. In addition, Hoyts submits an affidavit from the Vice President-HR Counsel for Regal Entertainment Group asserting that Hoyts still "owns" the Crossgates Mall complex irrespective of the fact that it is now being operated under the Regal brand name. See Affidavit of Raymond L. Smith Jr. (served Dec. 3, 2003) (Docket # 97).

Hoyts's arguments, however, miss the mark. First, as with any putative defendant about to be sued by a plaintiff in a new action, Hoyts has no standing to tailor the terms of the United States' intervention complaint according to its own corporate preferences. Hoyts (or Regal) may, for example, subsequently elect to deny the allegations in the complaint, move to dismiss all or part of the complaint, or file a motion for summary judgment. But what Hoyts cannot do is

preemptively seek to strike portions of the United States' complaint-in-intervention prior to its filing.

Second, there is ample legal and factual basis for naming the Regal entities as party-defendants in this action. As the Smith affidavit acknowledges, both Regal Entertainment Group and Regal Cinemas did, in fact, acquire certain Hoyts assets -- including the Crossgates Mall stadium-style theater complex -- in spring 2003. See Smith Aff. ¶¶ 2; see also Supplementary Affidavit of Gretchen E. Jacobs In Further Support of United States' Motion to Intervene (served Dec. 10, 2003) ("Supp. Jacobs Aff."), Ex. 2, pp. 1-2 (SEC Form 8-K filed by Regal Entertainment Group disclosing acquisition of certain Hoyts theater complexes including the Crossgates Mall complex). Mr. Smith also acknowledges that the Crossgates Mall complex is being operated on the same property under the Regal brand name. Id. at ¶ 3. Furthermore, it would strain credulity to suggest that Regal lacked knowledge of either the instant Meineker litigation (which was filed in 1998) or the Hoyts action in Massachusetts (which was filed in December 2000) prior to acquiring Hoyts in a multi-million dollar transaction in March 2003. Finally, public records suggest that Hoyts has been sufficiently integrated into Regal's operations such that its profits, losses, debts, and capital expenditures are passed through to, and reported by, the Regal Entertainment Group. See, e.g., Supp. Jacobs Aff., Ex. 1, pp. 3-4, 6-7, 9 (transcript of Regal teleconference discussing pending acquisition of Hoyts by Regal and noting that "these superior [Hoyts] assets . . . will be accretive to [Regal's] cash flow and earnings"), Ex. 3, pp. 6, 16 (transcript of conference call regarding Regal's Third-Quarter (2003) earnings), Ex. 4, pp. 5-6, 12 (Regal Entertainment Group's SEC Form 10-Q detailing Hoyts acquisition and noting that "the results of operations of the acquired Hoyts theater locations have been included in the

accompanying [Regal] financial statements for the period subsequent to the acquisition date"), Ex. 5, p. 5 (Regal Entertainment Group's 2002-03 annual report).

The foregoing considerations thus provide a sound legal and factual basis for naming the Regal entities as co-defendants in the United States' ADA-based discrimination complaint. See, e.g., McKee v. American Transfer and Storage, 946 F. Supp. 485, 487-88 (N.D. Tex. 1996) (recognizing liability of successor corporations in ADA actions when, inter alia, successor corporation had notice of pending litigation, the predecessor corporation may no longer be able to provide complete relief, and the successor corporation continues to operate the business); see also Golden State Bottling Co., Inc., v. National Labor Relations Board, 414 U.S. 168, 180-86, 94 S. Ct. 414, 423-26 (1973) (affirming Board's finding of successor liability in employment discrimination action); Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1235-27 (7th Cir. 1986) (noting "liberalization" of common law successor liability principles in context of federal discrimination actions); E.E.O.C. v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1089-92 (6th Cir. 1974) (recognizing applicability of successor liability in Title VII-based actions); E.E.O.C. v. SWP, Inc., 153 F. Supp. 2d 911, 917-18 (N.D. Ind. 2001) (finding successor liability in employment actions "broader" than either common law succession doctrine or related exceptions); E.E.O.C. v. Sage Realty Corp., 507 F. Supp. 599, 611-13 (S.D.N.Y. 1981) (holding successor cleaning contractor jointly and severally liable for discriminatory acts of predecessor cleaning contractor); Fed. R. Civ. P. 25(c) (authorizing addition of parties "in any case of transfer of interest" during pendency of litigation).

2. ***The United States' prayer for relief properly includes requests for civil penalties and compensatory damages*****.** Hoyts's opposition memorandum characterizes the United States'

prayer for relief as improperly expanding this litigation beyond the scope of the private plaintiffs' original complaint. See Hoyts Opp. Mem. at 12-13. Again, Hoyts's claim is meritless. Since only the United States is empowered to file Title III-based enforcement actions seeking civil penalties or damages, compare, e.g., 42 U.S.C. § 12188(a) (remedies and procedures governing private Title III actions) with id. at § 12188(b) (setting forth the Attorney General's enforcement authority), it is axiomatic that entry of the United States into a private action will necessarily "expand" the scope of the litigation in terms of the remedial options available to the court. But any such "expansion" of remedies is plainly warranted by Congress' express authorization for the Attorney General to seek such remedies in enforcement actions. In addition, the prayer for relief in the United States' proposed complaint-in-intervention in this action merely mirrors the relief sought by the United States in the Hoyts litigation pending in the District of Massachusetts. Compare, e.g., Affidavit of Michael J. Malone (filed Oct. 27, 2003), Ex. C, pp. 8-9 (Hoyts complaint) with Affidavit of Gretchen E. Jacobs In Support of United States' Motion to Intervene (filed Nov. 12, 2003), Ex. 1, pp. 8-9 (proposed complaint-in-intervention). Finally, it bears noting that the United States has only sought to intervene in one other private stadium-style theater action, Lonberg v. Sanborn Theaters, Inc., C.A. No. CV-97-6598-AHM (BQRx) (C.D. Cal.). In Lonberg, the district court not only granted the United States' intervention request, but also permitted filing of the United States' proposed complaint-in-intervention which – as here – sought civil penalties and compensatory damages against the private theater defendants. See Supp. Jacobs Aff., Exs. 6 - 7 (copies of Lonberg intervention complaint and PACER docket sheet).

CONCLUSION

For the foregoing reasons, the Court should (i) grant the United States' intervention motion and (ii) authorize the filing of the United States' proposed complaint-in-intervention in its entirety.

Dated: December 10, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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