IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-0244-CIV-KING/O'SULLIVAN

UNITED STATES OF AMERICA,

Plaintiff

v.

NORWEGIAN CRUISE LINES, INC.,

and

NORWEGIAN CRUISE LINE LIMITED,

Defendants.
_____/

PLAINTIFF UNITED STATES' MEMORANDUM RESPONDING TO THE COURT'S REQUEST TO BRIEF THE APPLICABILITY OF PRIOR AUTHORITY

On August 8, 2001, this Court issued an Order directing the parties to file briefs regarding whether the holding in Resnick v. Norwegian Cruise Line, Inc., No. 99-1615-CIV-SEITZ (S.D. Fla. Nov. 10, 1999), is applicable and dispositive of the present case. The court in Resnick held that application of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181 et seq., to a foreign-flag cruise ship violated the legal presumption against extraterritorial application of United States law. Because the holding on this threshold coverage issue was effectively overruled by the Eleventh Circuit in Stevens v. Premier Cruises, Inc., 215 F.3d 1237 (11th Cir. 2000), the United States respectfully submits that the holding in Resnick is neither dispositive of nor applicable to this case.

I. Background

On January 19, 2001, the United States filed a Complaint in the United States District Court for

the Southern District of Florida against Norwegian Cruise Lines, Inc., and Norwegian Cruise Line Limited ("Defendants"). The Complaint alleged that Defendants violated Title III of the ADA[1] by imposing unfair terms and conditions of travel on passengers and potential passengers with vision impairments. The Complaint alleges that Defendants' policies violate various provisions of the ADA and includes, *inter alia*, claims that Defendants deny persons with disabilities the full and equal enjoyment of their facilities; that Defendants impose eligibility criteria that screen out or tend to screen out persons with disabilities; and that Defendants fail to make reasonable modifications in policies, practices, or procedures where such modifications are necessary to make its cruise ships available to persons with disabilities.[2]

On November 10, 2000, Judge Seitz of the Southern District of Florida issued an Order granting the Defendants' Motion to Dismiss in Resnick v. Norwegian Cruise Lines, Inc., No. 99-1615-CIV-SEITZ (S.D. Fla. Nov. 10, 1999). In Resnick, the plaintiff, who uses a wheelchair, argued that Defendants violated the ADA because one of their ships was inaccessible to persons using wheelchairs.

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[1] Title III prohibits discrimination on the basis of disability by, *inter alia*, owners and operators of public accommodations and providers of specified public transportation. 42 U.S.C. §§ 12182, 12184.

[2] The Complaint contains four separate counts. The first count alleges discrimination by Defendants against Stephen Gomes, a prospective passenger on one of Defendants' ships who was denied boarding in Houston, Texas, on August 22, 1999. Counts Two and Three allege that Defendants discriminated against Joy Stigile, neé Cardinet, and Robert Stigile, who had reserved and paid deposits for a June 19, 2000 honeymoon cruise aboard one of Defendants' ships. Count Four alleges that Defendants' policies and practices (including written requests to persons with vision impairments that they travel with a sighted chaperone, provide "fit for travel" notes from physicians, sign waivers acknowledging and assuming all risks associated with travel onboard the ship, and purchase travel insurance) constitute a pattern or practice of discrimination against all passengers or prospective passengers with vision impairments.

Judge Seitz dismissed the plaintiff's complaint, concluding that plaintiffs were seeking "extraterritorial application of the ADA to a ship which flies under a foreign flag." See Order Granting Defendants' Motion to Dismiss, Resnick v. Norwegian Cruise Lines, Inc., No. 99-1615-CIV-SEITZ (S.D. Fla. Nov. 10, 1999) [hereinafter Resnick Order], attached as Exhibit A, at 2-3. The court relied in large part on Stevens v. Premier Cruises, Inc., 98-2140-CIV-MORENO (S.D. Fla. Nov. 30, 1998), which dismissed an ADA complaint against a foreign-flag cruise ship on the same grounds.

On June 22, 2000, the United States Court of Appeals for the Eleventh Circuit ruled on an appeal in the Stevens case. Stevens v. Premier Cruises, Inc., 215 F.3d 1237 (11th Cir. 2000), attached as Exhibit B.[3] In a unanimous decision, the court held that Title III of the ADA applied to foreign-flag cruise ships operating in United States waters. In reversing the district court, the Court held that

> [t]he district court's conclusion . . . was grounded in an inaccurate legal assumption: that foreign-flag ships in United States waters are "extraterritorial." "By definition, an extraterritorial application of a statute involves the regulation of conduct beyond *U.S. borders*." ***Accordingly, a foreign-flag cruise ship sailing in United States waters is not extraterritorial.*** The presumption against extraterritoriality, therefore, is inapposite to this case.

Stevens, 215 F.3d at 1242 (quoting Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531

[3] The plaintiff in Stevens, a wheelchair user, had reserved an accessible cabin onboard a Premier cruise ship that was registered in the Bahamas. Once onboard, however, the plaintiff discovered that some aspects of her cabin were inaccessible to persons using wheelchairs, and that many public areas of the cruise ship were similarly inaccessible. The plaintiff then filed suit against Premier, alleging that Premier had violated Title III of the ADA, by charging her a higher fare for an accessible cabin and by failing to remove architectural barriers aboard its ship. The district court dismissed the complaint for failure to state a claim, holding that Stevens failed to establish standing and that, as a matter of law, the ADA did not apply to foreign-flag cruise ships.

(D.C. Cir. 1993) (second emphasis added).[4]

II. The Holding in Resnick Is Not Applicable and Dispositive of This Case Because It Is Contrary to the Controlling Law in the Eleventh Circuit, Stevens v. Premier Cruises, Inc.

In construing federal common law, this Court is "undoubtedly bound by the current law in the Eleventh Circuit." U.S. Philips Corp. v. Windmere Corp., No. 84-2508-CIV-MARCUS, 1991 WL 338258, *6 (S.D. Fla. Sept. 3, 1991) ("[T]here can be no question that an appellate court's decision is the law of the case at the district court level."); accord Dean Witter Reynolds, Inc. v. Daily, 12 F. Supp.2d 1319, 1322 (S.D. Fla. 1998) ("Upon determining that federal law applies, the Court is bound by the law as dictated by the Supreme Court and the Eleventh Circuit."). Stevens is the current law in the Eleventh Circuit regarding whether application of the ADA to foreign-flag cruise ships operating in United States waters constitutes an extraterritorial application of federal law. In holding that the presumption against extraterritoriality was inapposite to deciding the applicability of the ADA in such situations, the Eleventh Circuit not only reversed the district court in Stevens; it effectively reversed the holding in the Resnick Order, which was largely premised upon the Stevens district court holding regarding extraterritoriality. In reversing the district court in Stevens, the Eleventh Circuit explained that applying the ADA to a foreign-flag cruise ship sailing in United States waters was not an extraterritorial application of the law. See Stevens, 215 F.3d at 1242 & n.7. The Eleventh Circuit

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[4] On July 12, 2000, Premier filed a petition for rehearing or rehearing en banc raising several grounds for rehearing. On June 14, 2001, the same three-judge panel that decided Stevens issued an order requesting supplemental briefs on an issue that does not disturb the application of the ADA to Defendants in this case. See Order, Stevens v. Premier Cruises, Inc., No. 98-5913 (June 14, 2000), attached as Exhibit C. As of the date of this filing, however, the court has not granted Premier's motion for rehearing. See infra Part II.

specifically found that the district court's erroneous conclusion about non-coverage of foreign-flag cruise ships was "grounded in an inaccurate legal assumption: that foreign-flag ships in United States waters are 'extraterritorial'"; and that the presumption against extraterritorial application of a statute was "inapposite to this case." Id. at 1242. The district court had relied upon EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) ("Aramco"), in which the Supreme Court announced that this presumption against extraterritorial application of a statute was to be invoked in the absence of a clearly expressed intention to the contrary. In Stevens, the Court of Appeals found the district court's reliance on Aramco to be misplaced and reasoned that it was unnecessary to decide the reach of a federal civil rights law beyond United States territory because "a foreign-flag ship sailing in United States waters is not extraterritorial." Id.

Because the Resnick decision is based on the same conclusion and underlying assumption found to be in error by the Eleventh Circuit, see Resnick Order at 3 (citing Aramco, 499 U.S. at 250-51), it is not valid law and cannot be dispositive of this case. In fact, the district court in Resnick relied solely on Aramco and the lower court's decision in Stevens, and noted that the factual allegations in Stevens were "nearly identical" to those presented in Resnick. See Resnick Order at 3.

It is, then, the Eleventh Circuit's decision in Stevens that is controlling and dispositive of the threshold title III coverage issue in this case. As is the case in Stevens, the United States in the instant case does not allege that Defendants discriminated against individuals with disabilities outside United States territorial waters. The United States has alleged that Defendants' policies and practices, set forth and carried out by its Miami, Florida, main office and directed at passengers and prospective passengers residing within the United States, violate the ADA. This court therefore need not decide whether the

presumption against extraterritoriality prevents the ADA's application outside the United States; instead, the jury may be allowed to decide whether Defendants' conduct against passengers and prospective passengers with vision impairments within the United States violates the ADA.

The fact that some, but not all, of Defendants' conduct alleged by the United States to violate the ADA occurred after the Resnick decision and before the Stevens decision does not make Resnick dispositive.[5] Even if all of Defendants' allegedly discriminatory conduct had occurred before the Eleventh Circuit's opinion was issued, that opinion must be given full retroactive effect.[6] Cf. Harper v. Virginia Dep of Taxation, 509 U.S. 86, 96 (1993) ("[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law. . . . in all cases still open on direct review."); see also Herman v. Hector I. Nieves Transp., Inc., 244 F.3d 32, 37-38 (1st Cir. 2001); Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.,

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[5] Defendants' Motion to Stay and Incorporated Memorandum of Law states that, "[s]ignificantly, the Stevens opinion took place after the cause of action accrued for both Gomes and the Stigiles." This statement is factually inaccurate. The Eleventh Circuit's decision in Stevens was issued on June 22, 2000. On June 30, 2000, Defendants advised counsel for Robert and Joy Cardinet Stigile, named complainants in this case, that Defendants would not refund the $500 deposit paid by the Stigiles when they booked a cruise on the Norwegian Wind in March 2000. The United States' Complaint alleges that Defendants' conduct on this date, as well as conduct occurring before June 22, 2000, injured the Stigiles. See Complaint, ¶¶ 35, 37, 51, 53. Furthermore, the United States alleges that, as long as they remain in effect, Defendants' discriminatory policies continue to injure passengers and prospective passengers onboard Defendants' ships. See Complaint, ¶¶ 57-62.

[6] Whether Defendants believed the ADA applied to them is no more a defense than their ignorance of the existence of the law itself would be. See Torres v. INS, 144 F.3d 472, 474 (7th Cir. 1998) (Posner, J.) (Ignorance of a statute is . . . never a defense in a civil case, no matter how recent, obscure, or opaque the statute."). Moreover, both the Department of Justice and the Department of Transportation had indicated, well before the Eleventh Circuit's decision in Stevens, that the ADA applied to foreign-flag cruise ships in United States internal waters. See 28 C.F.R. Pt. 36, App. B at 585 (Department of Justice); 56 Fed. Reg. 45,584, 45, 600 (1991) (Department of Transportation); Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.).

26 F.3d 375, 386 n.8 (3d Cir.1994); Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1128 (7th Cir.1993).

Furthermore, the fact that the three-judge panel that decided Stevens has asked for supplemental briefing from the parties does not disturb the Stevens binding precedent. Examination of the panel's request reveals that it is highly unlikely that any possible revision of the Stevens decision would affect this case, because the panel's request focuses on a narrow issue relevant only to physical changes to a cruise ship, which are not at issue here.

When the Eleventh Circuit reversed the district court in Stevens, it held, *inter alia*, that "Title III was not inapplicable, as a matter of law, to foreign-flag cruise ships in United States waters." Stevens, 215 F.3d at 1243. The court noted that it specifically did not address "whether the treaty obligations of the United States might, in some cases, preclude or limit application of Title III." Id. at 1243 n.8. In response to Premier's petition for rehearing, the panel has requested supplemental briefing on the narrow issue of "[w]hether customary international law establishes that the flag state of a vessel has the responsibility for regulating and implementing any changes to the physical aspects of a vessel and whether application of the Americans with Disabilities Act to foreign flagged cruise ships would conflict with that law." See Order, Stevens v. Premier Cruises, Inc., No. 98-5913 (June 14, 2000). The question appears carefully crafted to settle precisely an issue relevant to the case before that court -- but not this one -- relating to the ADA's regulation of the "physical aspects of a vessel."[7]

[7] The briefing schedule is at this date uncertain. In addition to the parties' supplemental briefs, the International Council of Cruise Lines has requested permission to file a brief addressing the issue. The United States has also participated as amicus in the case. See Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal, Stevens v. Premier Cruises, Inc., No. 98-5913

Unlike this case, Stevens involves claims that Premier violated the "barrier removal" provisions of Title III of the ADA.[8] These provisions require covered entities to "remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). Barrier removal is considered "readily achievable" if it is "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9).

The Stevens panel's request for supplemental briefing as to whether application of the ADA's "barrier removal" requirements conflict with customary international law does not cast doubt on the viability of a case alleging that a foreign-flag cruise ship violates the ADA by employing discriminatory *policies and procedures* against passengers and prospective passengers within the United States.[9] Nor can it affect the panel's holding regarding the inapplicability of the presumption against extraterritoriality. The United States' Complaint alleges that Defendants discriminate by completely denying their facilities to persons with vision impairments; by imposing eligibility criteria that screen out

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(March 24, 1999), attached as Exhibit D.

[8] See 42 U.S.C. §§ 12182(b)(2)(A)(iv) (public accommodations), 12184(b)(2)(C) (entities primarily engaged in transportation); 28 C.F.R. § 36.304; 49 C.F.R. § 37.5(f); Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (stating that barrier removal provisions apply to cruise ships).

[9] See, e.g., Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957) ("It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country."); accord Cunard S.S. Co. v. Mellon, 262 U.S. 100, 124 (1923); Mali v. Keeper of the Common Jail, 120 U.S. 1, 12 (1887); Armement Deppe, S.A. v. United States, 399 F.2d 794 (5th Cir. 1968), cert. denied, 393 U.S. 1094 (1969).

or tend to screen out such persons; and by failing to make reasonable modifications in existing policies necessary in order for persons with vision impairments to enjoy their cruise ships – conduct that, in this case, takes place entirely within United States borders and is remedied by changes in policies and procedures, *not* changes to the physical structure of a ship.[10]

CONCLUSION

As the Eleventh Circuit in Stevens explicitly rejected the rationale in the Stevens district court decision that was the basis for the court's decision in Resnick, both orders have been effectively overruled and cannot control, or even affect, the outcome of the proceedings here.

[10] These issues of policy have no bearing on the physical aspects of a ship. Thus even if the Eleventh Circuit were to reverse its holding in Stevens on the supplemental question on which it has asked for briefing, and to hold that customary international law dictates that the physical aspects of a cruise ship are governed by the ship's flag state, this result would not dictate a finding that the ADA does not apply to policy issues such as these.

This Court must follow Stevens on this issue, and ultimately find that Title III of the ADA applies to foreign-flag cruise ships operating in United States waters.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff United States' Brief Regarding Applicability of Resnick was served by facsimile and regular mail on August 13, 2001 on the following counsel:

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