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.	)	

UNITED STATES' OPPOSITION TO DEFENDANT HOYTS'S MOTION TO JOIN THE DEPARTMENT OF JUSTICE AS A PARTY-PLAINTIFF

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INTRODUCTION

In late October 2003, Hoyts Cinemas Corporation ("Hoyts") filed a Motion to Join the Department of Justice as a Party Plaintiff in this action. See Docket Nos. 88-90. Shortly thereafter, the United States filed a Motion to Intervene as a party-plaintiff in this action. See Docket. Nos. 92-94.[1] Hoyts's joinder motion and the United States' intervention motion have thus "crossed paths" on the court docket. Review of these dual filings reveals that the parties mutually agree on one central issue -- namely, that the United Status should be granted party status in these remand proceedings. The parties are also in apparent agreement that the rulings and judgment issued by the District of Massachusetts in another stadium-style theater action between the same parties styled United States v. Hoyts Cinemas Corp., et al., C.A. No. 00-12567-WGY (D. Mass.) ("Hoyts") have preclusive effect in this action. However, the parties nonetheless still strongly dispute the nature of, and proper terms for, the United States' entry as a party in this action.

Because of the stark differences in practical and legal effects between the two motions, the United States opposes Hoyts's compulsory joinder motion and, instead, urges the Court to grant its motion to intervene voluntarily as a party-plaintiff in this action. The United States' opposition to Hoyts's joinder motion is, moreover, more than just a "tit for tat" procedural tactic. Fundamental sovereign immunity principles bar compulsory joinder of the Department of Justice in this action. In addition, neither the pendency of the Hoyts action nor the fact that this litigation arises under Title III of the ADA make the Department a "necessary" party within the meaning of Rule 19(a) subject to compulsory joinder. Indeed, a finding that the Department of

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[1] A complete discussion of the procedural history and timing underlying the United States' motion for intervention is set forth in its moving papers and will not be repeated herein. See Memorandum In Support of United States' Motion to Intervene 3-7, 9-12 (filed Nov. 12, 2003) (Docket # 94).

Justice was a "necessary" party subject to compulsory joinder whenever a suit involved the interpretation or application of the ADA or its implementing regulations -- as Hoyts argues -- would severely compromise Departmental resources given the thousands of private ADA actions filed annually in federal courts nationwide. This Court should, therefore, deny Hoyts's motion to join the Department of Justice as an involuntary plaintiff in this action.

ARGUMENT

I. Hoyts's Joinder Motion Is Untimely and Procedurally Flawed

Before addressing the substance of Hoyts's joinder motion, it bears noting that this motion suffers from two significant procedural flaws with respect to its timeliness and propriety under the Northern District of New York's local rules. Whether considered individually or collectively, these procedural problems counsel in favor of denying Hoyts's motion to join the Department of Justice as an involuntary party-plaintiff.

First, Hoyts inexplicably waited several years before filing its joinder motion. Central to Hoyts's motion is its allegation that "[t]he DOJ must be joined as a party-plaintiff to the case because the DOJ is pursuing identical claims against Hoyts in the Massachusetts District Court [Hoyts action]." Memorandum of Law In Support of Defendant's Motion to Join the Department of Justice as a Party-Plaintiff 2 (filed Oct. 27, 2003) (Docket # 90) ("Hoyts Joinder Mem."). The United States, however, initiated the Hoyts enforcement action nearly three years ago in December 2000. See Affirmation of Michael J. Malone In Support of Defendant's Motion to Join the Department of Justice as a Party-Plaintiff, Ex. C (filed Oct. 27, 2003) ("Malone Aff.") (copy of Hoyts complaint). The Hoyts and Meineker actions have thus been proceeding on parallel tracks for several years. Yet nowhere does Hoyts address, let alone attempt to justify, its three-year delay in filing the instant joinder motion. Hoyts's unexplained tardiness in filing the instant joinder motion thus not only calls into question the alleged

"necessity" of the Department's compulsory joinder, but also itself provides sufficient basis for the denial of this motion. See Fed. R. Civ. Proc. 19 advisory Committee's note (1966 Amendments) ("undue delay in making the [joinder] motion can properly be counted against [the moving party] as a reason for denying the motion").

Second, Hoyts failed – as required by local rule – to file a proposed amended complaint along with its motion for joinder. Local Rule 7.1(a)(4) for the Northern District of New York provides, in pertinent, part: "An unsigned copy of the proposed amended pleading must be attached to a motion brought under Fed. R.. Civ. P. 14, 15, 19-22. Except as provided by leave of court, the proposed amended pleading must be a complete pleading which will supersede the original pleadings in all respects." Hoyts's failure to file this requisite proposed pleading is, moreover, more than just a minor procedural inconvenience. Without a proposed amended complaint, both the United States and this Court are left to assess Hoyts's joinder motion in a contextual vacuum without any understanding of the causes of action, factual allegations, or claims for relief that Hoyts proposes the Department of Justice make as an involuntary plaintiff in this action. Moreover, Hoyts's failure to file a proposed amended complaint takes on heightened significance where, as here, a defendant seeks to involuntarily join a federal agency as a party-plaintiff in contravention of basic sovereign immunity principles. See discussion infra pp. 4-8. Hoyts's joinder motion should, therefore, be denied for failure to file a proposed amended complaint as mandated by Local Rule 7.1(a)(4).

II. Sovereign Immunity Bars Joinder of the Department of Justice as an Involuntary Plaintiff in this ADA Action

In addition to the foregoing procedural infirmities, Hoyts's motion to join the Department of Justice as an involuntary party-plaintiff runs afoul of well-established sovereign immunity principles. Absent an express congressional waiver of sovereign immunity -- which neither the ADA nor any other statute at issue in this litigation provides -- the Department of Justice cannot be involuntarily joined as a party litigant.

When a party seeks to subject the United States or an agency thereof to compulsory joinder under Rule 19, sovereign immunity issues necessarily come into play. As noted by Professors Wright and Miller, "[t]he question of when the United States must be joined [under Rule 19] is closely connected with the doctrine of sovereign immunity . . . . No doubt because of the sovereign immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests." Charles A. Wright, et al., 7 Federal Practice and Procedure § 1617 (3d ed. 2001). Sovereign immunity principles, in turn, dictate that "the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965 (1983); see also Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); Dew v. United States, 192 F.3d 366, 371 (2nd Cir. 1999), cert. denied, 529 U.S. 1053 (2000). Moreover, a waiver of sovereign immunity must be unequivocally expressed by Congress in statutory text and, therefore, cannot be created through implication. See, e.g.,

Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096 (1996); S.E.C. v. Credit Bankcorp, Ltd., 297 F.3d 127, 141 (2nd Cir. 2002); Doe v. Civiletti, 635 F.2d 88, 93 (2nd Cir. 1980).[2]

Applying the foregoing principles, it is plain that Hoyts has not – and cannot – establish the requisite statutory waiver of sovereign immunity in order to make the Department of Justice amenable to compulsory joinder in this action. Title III of the ADA, under which this stadium-style theater action arises, contains no explicit waiver of sovereign immunity and, in any event, it is the inaccessibility of Hoyts's stadium-style theaters at the Crossgates Mall that is at issue here, not Department of Justice facilities. Nor can the necessary waiver be found in the Administrative Procedure Act (5. U.S.C. § 551 *et seq*.) since none of the operative pleadings in this action raise an APA-related claim or defense. See, e.g., Credit Bankcorp, 297 F.3d at 141 (rejecting argument that APA § 702 waived sovereign immunity when parties did not complain of any action or inaction by a federal agency); Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990) (noting that "[t]he Administrative Procedure Act itself is not a grant of jurisdiction for the review of agency action . . . The language of this section and the amendments thereto merely suggest that sovereign immunity will not be a defense in an action in which jurisdiction already exists.") (citations omitted); Doe, 635 F.2d at 94 (same). Finally, general federal jurisdictional statutes -- such as those referenced in plaintiffs' complaint in this action -- provide no waiver of sovereign immunity. See, e.g., Lonsdale, 919 F.2d at 1443-44 ("Sovereign immunity is not waived by general jurisdictional statutes[.]"); Doe, 635 F.2d at 94 (same); see

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[2] Because of these sovereign immunity considerations, neither counsel for the United States nor any other Department of Justice official – even if so inclined – could consent to Hoyts's motion for compulsory joinder. See Mitchell, 463 U.S. at 215-16, 103 S. Ct. at 2967 ("no contracting officer or other [federal] official is empowered to consent to suit against the United States").

also First Amended Complaint ¶ 3 (filed Feb. 12, 1999) (Docket # 8) (invoking federal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343).

Thus, since sovereign immunity has not been waived by the ADA or any other federal statute relevant to this action, the Department of Justice cannot be compelled to join as a party in these remand proceedings. See, e.g., State of New Jersey Dep't of Envtl. Protection v. Gloucester Environmental Management Services, Inc., 668 F. Supp. 404, 407 (D.N.J. 1987) (denying motion to join United States Environmental Protection Agency as party pursuant Rule 19(a) since neither federal environmental statutes nor APA § 701 waived sovereign immunity); K N Energy, Inc. v. Marathon Oil Co., 1983 WL 1430, slip op. at * 2-7 (D. Neb. 1983) (holding that United States could not be joined as necessary party pursuant to Rule 19(a) when operative statutes contained no express waiver of sovereign immunity) (copy attached as Exhibit 1); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 903-04 (D. Mass. 1977) (United States could not be compelled to join action brought by Indian tribe seeking declaration of right to possession of disputed lands under Rule 19 because no waiver of sovereign immunity); Sturdevant v. Deer, 70 F.R.D. 539, 543 (E.D. Wisc. 1976) (sovereign immunity barred compulsory joinder of United States in action arising under Indian Civil Rights Act).

Nor can Hoyts avoid sovereign immunity issues by noting that its compulsory joinder motion seeks to join the Department of Justice as a party-plaintiff in this action, as opposed to a party-defendant.[3] A discussion of State of New Jersey Dep't of Envtl. Protection v. Gloucester

[3] In addition to sovereign immunity considerations, Hoyts's compulsory joinder motion also runs counter to well-established caselaw holding that joining a party as an involuntary plaintiff is a "disfavored" procedural device that, in any event, requires the showing of a trust or other special relationship between the existing plaintiff and the putative involuntary plaintiff. See, e.g., Hicks v. Intercontinental Acceptance Corp., 154 F.R.D. 134, 135-36 (E.D.N.C. 1994)

Environmental Management Services, Inc., 668 F. Supp.404 (D.N.J. 1987) [hereinafter "Gloucester Landfill") illustrates this point. In Gloucester Landfill, the State of New Jersey's Department of Environmental Protection filed suit to apportion financial responsibility among several defendants for the toxic cleanup of the Gloucester landfill. Id. at 406. Defendant waste management companies thereafter sought to join the United States Environmental Protection Agency as an involuntary plaintiff pursuant to Rule 19(a) on the premise that the EPA's presence as a party was required to prevent double liability as between state and federal regulators. Id. at 406-07. After reviewing the relevant federal environmental and administrative statutes, the district court found no waiver of sovereign immunity. Id. Accordingly, the district court held that sovereign immunity barred compulsory joinder of the EPA in that action. Id. The court was unpersuaded, moreover, by defendants' argument that the sovereign immunity calculus was somehow altered because they sought to align the EPA as a party-plaintiff. The court flatly rejected this argument and stated:

> [T]he court finds that joinder is still inappropriate. The EPA's prosecutorial discretion in taking enforcement actions is presumptively immune from judicial review [citing Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649 (1985)] . . . The EPA's decision as to the timing of an enforcement action is one within its discretion.

(denying motion to join Federal Trade Commission as involuntary plaintiff pursuant to Rule 19(a) on ground that, inter alia, compelling joinder as a party-plaintiff was "disfavored" and moving party failed to establish requisite special relationship between FTC and private plaintiff); Caprio v. Wilson, 513 F.2d 837, 838-40 (9th Cir. 1975) (affirming district court's refusal to join United States Post Office as an involuntary plaintiff since no trust relationship existed between appellants and the Post Office); see also 7 Federal Practice and Procedure § 1606 (describing joinder as an involuntary plaintiff pursuant to Rule 19(a) as procedural device historically limited to patent or copyright actions).

Id. at 407 (internal citation omitted). The court went on to note that it nonetheless encouraged EPA's continuing ***voluntary*** participation in the proceedings (including settlement discussions) in an effort to promote the efficient use of federal and state resources. Id.

The conclusions reached by Gloucester Landfill apply with equal force to this case. Congress granted primary enforcement authority for Title III of the ADA to the Department of Justice, 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. See 42 U.S.C. §§ 12186(b), 12206, 12188(b). Neither Hoyts nor this Court can dictate the terms or timing by which the Department exercises its investigative and enforcement authority. Yet that is precisely the effect of Hoyts's joinder motion which seeks to compel the Department to join these remand proceedings as an involuntary plaintiff. This Court should thus deny Hoyts's compulsory joinder motion as barred by sovereign immunity. As with Gloucester Landfill, however, it would nonetheless be appropriate for this Court to permit the United States to participate voluntarily in this action -- as the United States is herein seeking to do through its pending intervention motion -- since doing so would not only help to ensure consistency between this action and the Hoyts litigation, but would also avoid otherwise intractable sovereign immunity issues.

III. Neither the Pendency of the Hoyts Action Nor the Fact That This Action Arises Under the ADA Supports a Finding That the Department of Justice Is A "Necessary" Party Within the Meaning of Rule 19(a) Subject to Compulsory Joinder

Hoyts's motion for compulsory joinder is also fatally flawed because Hoyts fails to establish that the Department of Justice is a "necessary" party within the meaning of Rule 19(a). Hoyts claims that the Department of Justice should be compelled to join this action as a party-

plaintiff because: (i) the Department "has a long proclaimed statutorily mandated interest in defending and promoting its interpretation of Section 4.33.3" (Hoyts Joinder Mem. at 9); and (ii) the pendency of the Hoyts litigation subjects the corporation "to a substantial risk of double, multiple or otherwise inconsistent obligations imposed by the decisions in this action and those in United States v Hoyts" (Hoyts Joinder Mem. at 2, 10-12). Neither of these arguments provides any basis for the Department's compulsory joinder in this action.

First, Hoyts's sweeping proclamation that the Department of Justice must be involuntarily joined as a plaintiff because the Department's regulations are at issue in this litigation is meritless. Every year, thousands of private ADA actions are filed in federal courts nationwide.[4] Thus, a finding that the Department of Justice was a "necessary" party subject to compulsory joinder whenever, as here, a suit involves the interpretation or application of the ADA or its implementing regulations would severely compromise Departmental resources. Interpreting Rule 19(a) as mandating the compulsory joinder of the Department of Justice in any ADA-related action would, moreover, squarely conflict with other sections of the federal rules authorizing the *permissive* intervention of a federal agency in actions involving statutes or regulations over which that agency has regulatory authority. See Fed. R. Civ. P. 24(b) ("When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation . . . the officer or agency upon timely application may be permitted to intervene in this action."). Accordingly, the mere fact that this action involves interpretation of the ADA and its

[4] For example, according to LEXIS's Courtlink database, over 3,000 private ADA actions were filed in federal courts in 2002.

implementing regulations does not make the Department a "necessary" party within the meaning of Rule 19(a).[5]

Second, the mere pendency of the Hoyts action cannot be said to make the Department a "necessary" party subject to compulsory joinder in this litigation. As noted previously, see supra pp. 2-3, Hoyts's claim of urgent necessity in joining the Department as an involuntary plaintiff are directly undermined by the fact that Hoyts waited nearly three years before filing its joinder motion. If Hoyts believed that parallel litigation as between this action and Hoyts posed an undue risk of multiple or inconsistent obligations, it could and should have attempted to join the Department of Justice in December 2000 when the Hoyts action commenced. Hoyts's belated filing of the instant joinder motion at this late juncture in the proceedings thus calls into question the true "necessity" of the Department's presence as an involuntary plaintiff in this action.

In any event, Hoyts misconstrues the meaning of Rule 19(a)(2)(ii)'s "multiple liability" clause when arguing that the pendency of Hoyts might unfairly subject the corporation to multiple or inconsistent judgments.[6] This provision compels joinder of an absent party to avoid

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[5] While Hoyts's memorandum cites several cases in support of its argument that the Department should be compelled to join this action as an involuntary plaintiff under Rule 19(a) because its ADA regulations are here at issue, see Hoyts Joinder Mem. at 9-10, these cases are inapposite. First, none of these cases even addressed sovereign immunity principles, let alone held that sovereign immunity presented no barrier to the compulsory joinder of a federal agency under Rule 19. Second, none of these cited cases addressed the issue of compulsory joinder of a federal agency as an involuntary plaintiff which, as discussed previously, presents substantially different considerations than joinder as a party-defendant. See supra pp. 6-7.

[6] Rule 19(a)(2)(ii) provides, in pertinent part, that a person

> shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . (ii) leave any of the of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

inconsistent *obligations*, rather than merely inconsistent results or adjudications. See, e.g., Field v. Volkswagenwerk AG, 626 F.2d 293, 301-02 (3d Cir. 1980); RPR & Assocs. v. O'Brien/Atkins Assocs., P.A., 921 F. Supp. 1457, 1463 (M.D.N.C. 1995), aff'd, 103 F.3d 120 (4th Cir. 1996); Bedel v. Thompson, 103 F.R.D. 78, 81 (S.D. Ohio 1984); James Wm. Moore, 4 Moore's Federal Practice § 19.03[4][d] (3d ed. 2003). In other words, the "multiple liability" clause is not generally intended to protect parties from differing outcomes in serial litigation for damages or other remedial relief. As colorfully stated by Professor Moore: "Simply put, having to write a check to one claimant and not to another is not the sort of inconsistent obligation the clause [in Rule 19(a)(2)(ii)] addresses." Moore's Federal Practice at § 19.03[4][d], p. 19-60. Rather, the "multiple liability" clause is intended to protect parties from situations in which compliance with one court order might compel them to breach the terms of a second inconsistent order. See, e.g., Micheel v. Haralson, 586 F. Supp. 169, 171 (E.D. Pa. 1983) (distinguishing between inconsistent adjudications and obligations and noting that "under . . . Rule [19(a)(2)(ii)] a person is protected against situations in which there would be two court orders and compliance with one might breach the other.").

Here, defendant Hoyts faces no such possibility of inconsistent court orders such that compliance with the order issued in Hoyts might breach a second order subsequently issued by this Court. In the Hoyts litigation, the district court entered the following remedial order:

> Judgment shall enter declaring that, with respect to all stadium-style theaters owned or leased by [Hoyts or its co-defendant National Amusements, Inc.] wherein construction or refurbishment . . . occurs on or after the date upon which this lawsuit commenced [in December 2000], Section 4.33.3 requires that wheelchair-accessible seating must be located within the stadium section.

United States v. Hoyts Cinemas Corp., 256 F.Supp.2d 73, 93 (D. Mass. 2003). Hoyts contends that, under the terms of this order, it has no remedial obligation with respect to the stadium-style

theaters at the Crossgates Mall complex. See Hoyts Joinder Mem. at 2, 10. Even assuming Hoyts's interpretation of the Hoyts order is correct – a point which the United States strongly disputes, there remains no possibility that a subsequent order issued by this Court would cause Hoyts to incur inconsistent obligations within the meaning of Rule 19(a)(2)(ii). That is, even if this Court were to hold Hoyts in violation of the ADA and its implementing regulations and thereby order Hoyts to relocate wheelchair seating areas to the stadium sections of its stadium-style theaters at the Crossgates Mall complex, compliance with such an order could hardly be said to breach the Hoyts order. At most, Hoyts would be subject to merely inconsistent results for which Rule 19(a)(2)(ii)'s "multiple liability" has no application. The Department of Justice, therefore, cannot be considered a "necessary" party to this action subject to compulsory joinder under Rule 19 simply by virtue of the possibility that this Court and the Hoyts court might ultimately reach different conclusions – though the United states believes that this will not come to pass – regarding Hoyts's ultimate liability and remedial obligations concerning the Crossgates Mall stadium-style theater complex.

CONCLUSION

For the foregoing reasons, the Court should deny Hoyts's motion to join the United States Department of Justice as an involuntary plaintiff in this action.

Dated: December 3, 2003

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General
Civil Rights Division
GLENN T. SUDDABY
United States Attorney

JOHN L. WODATCH, Chief
PHILIP L. BREEN, Special Legal Counsel
RENEE M. WOHLENHAUS, Deputy Chief
Disability Rights Section

_____
GRETCHEN E. JACOBS
PHYLLIS M. COHEN
Trial Attorney

Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
1425 N.Y. Avenue Building
Washington, D.C. 20530
Telephone: (202) 514-9584
Facsimile: (202) 616-6862
gretchen.jacobs@usdoj.gov

Counsel for Plaintiff-Intervenor
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this __ day of December, 2003, true and correct copies of the United States' Opposition to Defendant Hoyts's Motion to Join the Department of Justice as a Party-Plaintiff were served by Federal Express, postage pre-paid, on the following parties:

Timothy A. Clune
Disability Advocates, Inc.
5 Clinton Square - 3rd Floor
Albany, NY 12207-2201

Michael J. Malone
Patricia A. Griffin
King & Spaulding
1185 Avenue of the Americas
New York, NY 10036-4003

_____
Gretchen E. Jacobs