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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Mark A. Bourdon, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Scott T. Croft, M.D.; Arizona )  
 Bone & Joint Specialists, Ltd.; )  
 and Lisa M. Croft, wife of )  
 Scott T. Croft, M.D., )  
 )  
 Defendants. )  
\_\_\_\_\_ )

No. CV-02-1233-PHX-JFM

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
THE UNITED STATES' MOTION TO  
INTERVENE AS OF RIGHT OR,  
ALTERNATIVELY, TO INTERVENE  
BY PERMISSION**

The United States files this Memorandum of Points and Authorities in support of its Motion to Intervene as of Right or, Alternatively, to Intervene by Permission. The United States applies for intervention in this action because it has claims against the Defendants that arise from the same facts that are at issue in this case, and because

permitting all claims to proceed together in the same forum will conserve judicial resources and ensure the consistent application of federal law.

## **BACKGROUND**

### **A. Statutory and Regulatory Background**

Title III of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181-12189, prohibits places of public accommodation from discriminating against individuals with disabilities. Under the ADA, an individual is disabled if he has a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(A). Under Title III and its implementing regulation, 28 C.F.R. pt. 36, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. *Id.* at § 12182(a); 28 C.F.R. § 36.201(a). Places of public accommodation include, among other things, professional offices of health care providers. *Id.* at § 12181(7)(F); 28 C.F.R. § 36.104.

Places of public accommodation may violate Title III's general prohibition of disability discrimination in various ways including, but not limited to:

- a. denying an individual with a disability the opportunity to participate in or benefit from the goods, services, or facilities of the public accommodation, see 42 U.S.C. § 12182(b)(1)(A)(i); 28 C.F.R. § 36.202(a);
- b. affording an individual with a disability an opportunity to participate in or benefit from goods, services, or facilities that is unequal to that afforded to other individuals, see 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. § 36.202 (b), (c);
- c. using eligibility criteria that screen out or tend to screen out individuals with disabilities from full and equal enjoyment of goods and services, see 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a); and
- d. failing to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford goods, services, or facilities to

individuals with disabilities, see 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a).

The United States Department of Justice (“United States” or “the Department”) is the federal agency charged with administering and enforcing Title III of the ADA. See 42 U.S.C. § 12188(b). The Attorney General is authorized to file suit to enforce the ADA whenever an issue of general public importance has been identified, and may seek both equitable and monetary relief. See id.

Similarly, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits recipients of Federal financial assistance from discriminating against individuals with disabilities. Under section 504, no otherwise qualified individual with a disability shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 29 U.S.C. § 794(a). Recipients of Federal financial assistance may not deny a qualified individual with a disability the opportunity to benefit from provided services, see 45 C.F.R. § 84.4(b)(1)(i); may not provide a qualified individual with a disability with services that are unequal to those provided to others, see id. at § 84.4(b)(1)(ii); may not utilize criteria that have the effect of subjecting qualified individuals with disabilities to discrimination, see id. at § 84.4(b)(4)(i); and may not otherwise limit a qualified individual with a disability in the enjoyment of aids, benefits, or services enjoyed by others, see id. at § 84.4(b)(1)(vii).

## **B. Factual Background**

Mark Bourdon is a 37-year-old male from Phoenix, Arizona, who works as a flight attendant. He was diagnosed with HIV disease and Kaposi’s Sarcoma (KS), an opportunistic infection associated with HIV disease, in 1995. Since his diagnosis, he has been on a pharmaceutical regimen which, as of mid-2000, had restored his immune system functioning to a near-normal level and had lowered the quantum of HIV in his blood to an undetectable amount.

Arizona Bone & Joint Specialists, Ltd. (ABAJS), is a sports medicine practice

with offices in Phoenix and Scottsdale, Arizona. ABAJS is a professional corporation governed by the laws of the state of Arizona, and receives Medicare and Medicaid payments for the cost of medical services provided to some patients. Dr. Scott T. Croft is a licensed orthopedic surgeon who is a vice president and shareholder-employee of ABAJS.

In April 2000 Bourdon began to feel pain in his left shoulder while weightlifting, while performing manual tasks at home and at work, and while sleeping. He was examined by Dr. Croft at the ABAJS Phoenix office on May 19, 2000, where Croft prescribed a six-week course of physical therapy and reduction in physical activity, but indicated that, if Bourdon's pain was not controlled by these measures, "the next step" would be to perform a clavicle resection, a procedure in which that portion of the clavicle which irritates adjacent tissues is removed.

Bourdon attended six physical therapy sessions and modified his weightlifting routine, but his pain increased. On July 6, 2000, he returned to ABAJS for a second consultation with Dr. Croft. During this visit, Croft told Bourdon that he would not perform the clavicle resection because "[w]hen you're asking me to do surgery, you're asking me to put myself, my pregnant wife, my children, and my staff at risk" of HIV disease.

Bourdon eventually saw another orthopedic surgeon who performed the clavicle resection. On July 2, 2002, he timely filed a complaint in this Court on July 2, 2002, against ABAJS and Dr. Croft, stating claims under section 504 of the Rehabilitation Act, the Arizonans with Disabilities Act, and common law intentional infliction of emotional distress.

## **ARGUMENT**

### **A. The United States is Entitled to Intervene as of Right.**

Federal Rule 24(a)(2) states that, upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the

action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). Four elements must be shown before a court must grant intervention in any particular case: the timeliness of the motion to intervene; the applicant's "significantly protectable" interest in the subject of the action; potential impairment of the applicant's ability to protect that interest if intervention is not granted; and inadequate representation of the movant's interests by the existing parties. United States v. City of Los Angeles, 288 F.3d 391, 397 (9<sup>th</sup> Cir. 2002). Courts "generally 'construe [the Rule] broadly in favor of proposed intervenors.'" Id. (quoting United States ex rel. McGough v. Covington Techs. Co., 967 F.2d 1391, 1394 (9<sup>th</sup> Cir. 1992)).

1. The United States' Motion is Timely.

"Timeliness is 'the threshold requirement for intervention as of right.'" League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9<sup>th</sup> Cir. 1997) (quoting United States v. Oregon, 913 F.2d 576, 588 (9<sup>th</sup> Cir. 1990)). Three factors are relevant to determining whether any Rule 24(a)(2) motion is timely filed: (1) the stage of the proceeding at which the applicant seeks to intervene; (2) possible prejudice to other parties; and (3) the reason for and length of any delay in moving to intervene. Tocher v. City of Santa Ana, 219 F.3d 1040, 1044 (9<sup>th</sup> Cir. 2000).

In this case, Bourdon filed his complaint against ABAJS and Croft on July 2, 2002. The defendants filed their answer on November 6, 2002. Depositions have been scheduled but will not take place until April 6, 2002. Neither Bourdon nor the Defendants would be prejudiced by the United States' participation in this action at this time, nor could they argue that the United States delayed unduly before filing. Cf. Los Angeles, 288 F.3d at 398 (stating that parties did not challenge timeliness of Rule 24(a)(2) motion filed one and a half months after complaint was filed); Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9<sup>th</sup> Cir. 2001) (stating that parties stipulated to timeliness of motion filed five months after complaint was filed); Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1397 (9<sup>th</sup> Cir. 1995) (upholding district

court's timeliness finding, in part because "[t]he intervention motion was filed at a very early stage, before any hearings or rulings on substantive matters"); Sierra Club v. United States EPA, 995 F.2d 1478, 1481 (9<sup>th</sup> Cir. 1993) ("Timeliness is undisputed. The application for intervention was made at the outset of the litigation, before the EPA had even filed its answer.").

2. The United States Has a Significant Protectable Interest in the Existing Action.

"An applicant [for intervention] has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." Los Angeles, 288 F.3d at 393 (quoting Donnelly v. Glickman, 159 F.3d 405, 409 (9<sup>th</sup> Cir. 1998)). "The 'interest' test is not a clear-cut or bright-line rule, [however,] because '[n]o specific legal or equitable interest need be established.'" Id. (quoting Greene v. United States, 996 F.2d 973, 980 (9<sup>th</sup> Cir. 1993)). Instead, the test is "'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" Id. (quoting County of Fresno v. Andrus, 622 F.2d 436, 438 (9<sup>th</sup> Cir. 1980)).

In this case, as the federal agency charged with enforcement of Title III of the ADA, the Department has an interest in enforcing the statute and its implementing regulation on behalf of the public interest in ending disability discrimination. Title III itself enables the United States to commence a legal action to advance this interest when discrimination prohibited by the ADA takes place.<sup>1</sup> See 42 U.S.C. § 12188(b)(1)(B). The United States also has an interest in ensuring that recipients of federal financing, such as ABAJS, do not violate section 504's similar prohibition of disability discrimination. The factual circumstances underlying the United States' claims also form the basis of Bourdon's federal and state claims. Because the alternative to the United States' intervention in Bourdon's lawsuit is a separate action including the United States'

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<sup>1</sup>Cf. Diamond v. Charles, 476 U.S. 54, 68-69 (1986) (suggesting that any party that has standing to bring its own suit has a sufficient interest to intervene in a pending suit).

Title III and section 504 claims, the “interest” test’s efficiency goals are best met if intervention is permitted here. See Greene, 996 F.2d at 979-80 (dissenting opinion) (discussing Rule 24(a)(2)’s efficiency rationale).

3. The United States’ Interest Would Be Impaired If It Does Not Intervene.

“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.” Southwest Ctr., 268 F.3d at 822 (quoting Fed R. Civ. P. 24 advisory committee note). Intervention may be required “when considerations of *stare decisis* indicate that an applicant’s interest will be practically impaired.” Greene, 996 F.2d at 977 (citing Oregon, 839 F.2d at 638); see also Yniguez v. Arizona, 939 F.2d 727 (9<sup>th</sup> Cir. 1991) (in reversing district court’s denial of Rule 24(a)(2) motion, stating that “jurisprudential concerns might cause [later courts] to find the reasoning of the district court more persuasive than they might otherwise find a similar argument to be, and . . . they might choose to accept the district court’s reasoning to avoid confusion, lack of finality, and disrespect for law”). Because the *stare decisis* effect of a holding in favor of the Defendants may affect negatively the United States’ efforts to enforce Title III and section 504, both in this case and in other cases involving the discriminatory refusal to provide medical care to persons with infectious diseases, the impairment factor is met here.

4. The Existing Parties Do Not Adequately Represent the United States’ Interest.

In determining whether existing parties adequately represent the interest of an applicant for intervention under Rule 24(a)(2), this Court must consider: “(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.” Los Angeles, 288 F.3d at 398 (quoting Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9<sup>th</sup> Cir. 1996)). “[T]he burden of showing inadequacy is ‘minimal,’ and the applicant need only show that

representation of its interests by existing parties ‘may be’ inadequate.” Southwest Ctr., 268 F.3d at 823 (citing Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)). As a general rule, “no representation constitutes inadequate representation.” Yniguez, 939 F.2d at 737 (emphasis added).

In this case, the United States’ interest in enforcing the ADA, and its interest in ensuring that recipients of federal funding comply with section 504, are clearly unrepresented by the existing parties. Bourdon does not raise a Title III claim, and his interest in enforcing section 504 diverges from that of the United States. As the Ninth Circuit recognized in a recent case allowing private parties to intervene alongside government agency defendants, “[t]he interests of government and the private sector may diverge. On some issues Applicants will have to express their own unique private perspectives and in essence carry forward their own interests.” Southwest Ctr., 268 F.3d at 823-24. The same reasoning applies when, as here, the government seeks intervention into a lawsuit between private parties involving federal civil rights claims.

Furthermore, even if Bourdon could be said to represent the public interest in Title III and section 504 enforcement, he is incapable of making all the arguments that the Department will make if allowed to intervene. Bourdon is being represented by the Arizona Center for Disability Law, a small, non-profit legal services organization with limited resources and limited experience in litigating Title III and section 504 claims involving HIV disease as a disability. The Civil Rights Division, because it has litigated similar cases in the past,<sup>2</sup> has special expertise in developing and presenting evidence in such cases. Such expertise will be necessary in order to advance the United States’ interests.<sup>3</sup>

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<sup>2</sup>See United States v. Neurological Surgery, Inc., 00-CV-0026-E(M) (N.D. Okla. 2000); United States v. Morvant, 898 F. Supp. 1157 (E.D. La. 1995).

<sup>3</sup>Because Bourdon does not represent the Department’s interests in Title III and section 504 enforcement, and could not capably do so were he the Department’s representative, participation by the United States as amicus curiae in this matter would be insufficient to fully represent the United States’ interest. Cf. Los Angeles, 288 F.3d at 400 (holding that “amicus status is insufficient to protect the . . . rights [of the applicant for intervention] because such status does not allow [the applicant] to raise issues or arguments formally and gives it no right of appeal”).



**B. Alternatively, the United States Should Be Granted Permissive Intervention.**

Rule 24(b), governing permissive intervention, states that

[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. 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, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed R. Civ. P. 24(b). Rule 24(b) thus expressly provides for permissive intervention by the Department when a federal statute confers upon it a conditional right of intervention. In this case, Title III of the ADA incorporates by reference the remedies of Title II of the Civil Rights Act of 1964, which confers such a conditional right of intervention in matters of general public importance. See 42 U.S.C. § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3(a)). Although section 504 of the Rehabilitation Act does not contain an express right of intervention, advancing the public interest in ending disability discrimination, and ensuring that recipients of federal funding do their part in this effort, are matters of general public importance. Permissive intervention by the United States into Bourdon's section 504 action to enforce Title III and section 504 is appropriate.<sup>4</sup> Cf. SEC v. United States Realty & Imp. Co., 310 U.S. 434, 459, 460 (1940) (rejecting court of appeals holding that "a governmental agency . . . may not be permitted to intervene without statutory authority" and holding that, even though there was no statutory right of intervention, "we think it plain that the Commission has a sufficient interest in the

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<sup>4</sup> Although section 504, which incorporates the "remedies, procedures and rights" of Title VI of the Civil Rights Act of 1964, does not include an express right of intervention by the United States into private actions, since the enactment of Title VI and section 504 there is no reported case in which the United States has been denied intervention, and at least one prominent case in which the Department has participated as intervenor. See United States v. Fordice, 505 U.S. 717, 724 (1992) (discussing Division intervention into private Title VI action); see also Consent Decree, Richardson v. City of Steamboat Springs, No. 99-Z-1247 (D. Colo. 2000) (discussing Division intervention into private action alleging claims under Title II of ADA and section 504).

maintenance of its statutory authority and the performance of its public duties to entitle it [to] intervention”).

The United States’ application also meets all common law prerequisites for permissive intervention: there are independent grounds for this Court’s jurisdiction; the application is timely; and the United States’ claims and the main action have questions of law and fact in common. San Jose Mercury News, Inc. v. U.S. District Court–Northern District (San Jose), 187 F.3d 1096, 1100 (9<sup>th</sup> Cir. 1999) (quoting United Latin Am. Citizens, 131 F.3d at 1308). This Court will have federal question jurisdiction over any action the Department might bring including claims under Title III and section 504. And, because the same timeliness factors apply to determine whether either permissive intervention or intervention as of right is appropriate, see Mercury News, 187 F.3d at 1100-01, as shown above, this motion is timely. Finally, the Department’s and Bourdon’s claims have both legal questions and factual questions in common.<sup>5</sup> Because the Department’s intervention at this time satisfies the threshold requirements for permissive intervention, and would not delay the main action nor unfairly prejudice the existing parties, the court should grant permissive intervention here.

### CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant it leave to intervene in this case, either by right or by permission.

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<sup>5</sup>This is so even though the Department would introduce a Title III claim into the action; both Title III and section 504, and their implementing regulation, require similar showings as to whether discrimination has taken place and whether the person alleging discrimination is disabled. See, e.g., Pascutti v. New York Yankees, No. 98 CIV. 8186(SAS), 1999 WL 1102748 (S.D.N.Y. Dec. 6, 1999) (deciding burden of proof question in case where United States was allowed to intervene into Title III action to introduce supplemental claim under Title II of the ADA, and also to introduce defendants New York City and New York City Department of Parks and Recreation). Ninth Circuit precedent allows intervention by federal agencies where specific federal statutory interests are at stake, regardless of whether the existing parties raised such a statutory claim. See Beck v. Atlantic Richfield Co., 62 F.3d 1240, 1242 n.3 (9<sup>th</sup> Cir. 1995) (discussing district court’s grant of federal Environmental Protection Agency’s (EPA) application for intervention into state law water rights action “because [plaintiffs’] request to enjoin the [EPA-ordered] diversions implicated federal interests under CERCLA”)

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_ day of \_\_\_\_\_, 2003, true and correct copies of the United States' Motion To Intervene As of Right Or Alternatively, To Intervene By Permission, Memorandum of Points and Authorities, to Intervene by Permission, and a lodged copy of the Complaint in Intervention were served by U.S. Mail, postage pre-paid, on the following parties:

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