UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SUSAN MEINEKER, et al., Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, V. HOYTS CINEMAS CORPORATION, REGAL ENTERTAINMENT GROUP, and REGAL CINEMAS, INC. Defendants.	)	Civil No. 1:98-CV-1526

PLAINTIFF-INTERVENOR UNITED STATES' RESPONSE TO DEFENDANT'S OBJECTIONS TO MAGISTRATE HOMER'S FEBRUARY 25, 2004 ORDER

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INTRODUCTION

On February 25, 2004, Magistrate Judge Homer entered an order (i) granting Hoyts's request to stay these remand proceedings as between the United States and Hoyts due to the pendency of appeals before the First Circuit in another stadium-style theater action (United States v. Hoyts Cinemas Corp.) to which they are both parties; (ii) denying Hoyts's request to stay these remand proceedings as to the private plaintiffs; and (iii) granting the private plaintiffs' motion to compel supplementary interrogatory responses from Hoyts. See Docket No. 112. The United States does not challenge Magistrate Judge's entry of a partial stay as between Hoyts and the United States. Indeed, the United States did not oppose the entry of such a stay given the unique procedural juxtaposition of these remand proceedings and the Hoyts appeal.

The United States nonetheless submits this memorandum in response to Hoyts's objections to Magistrate Judge Homer's February 25th Order to address two important issues raised by these objections. First, Hoyts mistakenly asserts that both the United States and the private plaintiffs are preclusively bound by the Hoyts action. Both due process principles and Title III's statutory enforcement scheme ensure that private plaintiffs (such as Sybil McPherson) have a private right to pursue their own individual Title III-based discrimination claims irrespective of any prior or pending government action (such as Hoyts). Second, Hoyts argues in the alternative that this Court should lift the partial stay – a stay requested by Hoyts – in order to allow Hoyts to conduct additional discovery against the United States. Hoyts's alternative argument should be summarily dismissed as procedurally improper and legally meritless since Hoyts has already had a full and complete opportunity to conduct discovery against the United States in the Hoyts action.

FACTUAL AND PROCEDURAL BACKGROUND

A. Meineker Litigation: Factual and Procedural Summary

In September 1998, plaintiffs Susan Meineker and Sybil McPherson filed this action alleging that Hoyts's Crossgates Stadium 18 complex violated Title III of the ADA (42 U.S.C. §§ 12181-12189) and its implementing regulations – particularly 28 C.F.R. pt. 36, App. A., § 4.33.3 ("Standard 4.33.3") – by failing to locate wheelchair seating areas within the "stadium" sections of the majority of the theaters comprising this complex, by failing to provide appropriate companion seating locations, and by physically segregating wheelchair seating in the rear corners of the larger theaters in "corrals" or "pens." First Amended Complaint ¶¶ 19-22, 33-36, 54-64 (filed Feb. 12, 1999) (Docket # 8).

In March 2001, Hoyts completed renovations to the wheelchair and companion seating areas at the Crossgates Stadium 18 complex. Affidavit of Ray Gaudet ("Gaudet Aff.") ¶¶ 2-12 (dated Nov 15, 2001) (Docket # 52). In the fourteen smaller theaters, these renovations generally consisted of removing wheelchair and companion seating areas from the first row of the traditional section to other rows in this same section located a few feet farther back from the screen (i.e., third through fifth rows), and/or otherwise rearranging wheelchair and companion seating areas within the traditional section. Id. No wheelchair seating areas were added to the stadium sections of these fourteen smaller theaters during these renovations. Id.

In late 2001, after the completion of these renovations, Hoyts moved for summary judgment. See Docket Nos. 50-54. The private plaintiffs responded by filing a cross-motion for summary judgment. See Docket Nos. 58-62. Thereafter, in August 2002, this Court issued a memorandum opinion granting defendant Hoyts's motion for summary judgment. Meineker v. Hoyts Cinemas Corp., 216 F. Supp. 2d 14 (N.D.N.Y. 2002) ("Meineker I"), vacated and remanded, 69 Fed.Appx. 19, 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 Stadium 18 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*. On July 1, 2003, the Second Circuit issued a summary order vacating Meineker I and remanded for further proceedings. Meineker v. Hoyts Cinemas Corp., 69 Fed.Appx. 19, 2003 WL 21510423 (2nd Cir. July 1, 2003) ("Meineker II"). This summary order, stated, in relevant part, that remand was necessary for adjudication of two primary 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).

In fall 2003, Hoyts and the United States each filed competing motions seeking to have the United States afforded party status in these remand proceedings. First, in late October 2003, Hoyts filed a motion seeking to have the United States compulsorily joined as an involuntary plaintiff pursuant to Fed. R. Civ. P. 19(a). See Docket Nos. 88 - 90. A few weeks later, the United States moved to intervene as a party-plaintiff. See Docket Nos. 92-94. The parties also filed briefs opposing the other parties' respective joinder and intervention motions. See Docket Nos. 97-100, 103 (Hoyts' opposition to United States' intervention motion); Docket Nos. 102, 106 (United States' opposition to Hoyts' joinder motion). After reviewing the parties' respective briefs on these motions, Magistrate Judge Homer granted the United States's motion and

authorized the filing of its complaint-in-intervention. See Order (filed Jan. 23, 2003) (Docket # 108).

In late February 2004, during the course of a discovery dispute between private plaintiffs, Hoyts sought an order from Magistrate Judge Homer staying these remand proceedings pending the resolution of the cross-appeals pending before the United States Court of Appeals for the First Circuit in the Hoyts litigation. See discussion infra pp. 5-10.[1] Due to the overlapping nature of these remand proceedings and the pending Hoyts appeals, the United States did not oppose entry of a stay as between Hoyts and the United States pending issuance of a decision by the First Circuit. See, e.g., Affidavit of Patricia A. Green ("Griffin Aff.") (filed March 15, 2004) (Docket # 114), Ex. G, Attachment A (Correspondence from Gretchen E. Jacobs to Leslie Arnold); see also Griffin Aff., Ex. H, Transcript of Discovery Conference, pp. 5-6, 11-15. However, the United States opposed Hoyts's stay motion with respect to the private plaintiffs on the grounds that (i) plaintiffs have a statutorily-protected private right of action under the Americans With Disabilities Act (42 U.S.C. § 12188(a)) that exists independently of the United States' filing of an enforcement action in Hoyts, and (ii) Hoyts has no preclusive effect on the private plaintiffs since they are not parties to that action. See, e.g., Griffin Aff., Ex. H, Transcript of Discovery Conference, pp. 5-6, 11-15.

On February 24, 2004, during the telephonic discovery conference, Magistrate Judge Homer granted Hoyts' unopposed motion to stay these remand proceedings as between Hoyts and the United States, but denied Hoyts's stay request in all other respects. See, e.g., Griffin Aff., Ex. H, Transcript of Discovery Conference, pp. 15-16. First, Magistrate Judge Homer agreed that the private plaintiffs' Title III-based private right of action was not pre-empted by the United States' prosecution of the Hoyts action. Id. at 16. Second, Magistrate Judge Homer

[1] This was not the first occasion on which Hoyts had requested a stay in this action. At least twice previously, Hoyts has asked for – and been denied – stays of proceedings based on the pendency of the Hoyts litigation. See, e.g., Docket Nos. 20-21 & 87.

noted that the instant litigation has been pending for several years (i.e., since 1998) and that the Second Circuit's remand order limited discovery to a few relatively discrete matters. Id. The following day, on February 25, 2004, the Court issued a brief written order memorializing these findings. See Docket No. 112.

B. Hoyts Litigation: Factual and Procedural Summary

For several years, the instant private litigation has also been proceeding on parallel course with another stadium-style theater case styled United States v. Hoyts Cinemas Corp., et al., C.A. No. 00-12567-WGY (D. Mass.) ("Hoyts"). Commenced in December 2000, the Hoyts action was initially two separate enforcement actions filed by the United States against Hoyts Cinemas Corporation ("Hoyts") and National Amusements, Inc. ("National"). Affidavit of Gretchen E. Jacobs (dated April 2, 2004) ("Jacobs Aff."), Ex. 1 (Hoyts complaint). These two separate enforcement actions were subsequently consolidated into a single action that named both Hoyts and National as co-defendants. Id. at Ex. 2 (Hoyts docket sheet).[2] In the Hoyts complaint, the United States alleged that both Hoyts and National violated the ADA and its implementing regulations by failing to design and construct their respective stadium-style theaters nationwide in a manner that made them readily accessible to, and usable by, persons with disabilities. Jacobs Aff., Ex. 1 at ¶¶ 1-4, 10-15. Specifically, the United States alleged that the theater-defendants violated Standard 4.33.3's comparability and integration mandates by locating wheelchair and companion seating areas -- including the stadium-style theaters at the Crossgates Stadium 18 complex -- outside the stadium sections of the vast majority of their stadium-style theater complexes. Id. at ¶¶ 20-22.

[2] Due to the voluminous nature of the Hoyts pleadings generated during the district court and appellate proceedings, this memorandum merely summarizes pleadings listed on the Hoyts PACER docket sheets. Upon the Court's request, the United States will file complete copies of any referenced pleading.

Following several years of extensive discovery and related procedural battles, see, e.g., Jacobs Aff., Ex. 2, Docket Nos. 32-42, 51-55, 58-62, 68-72, 73-76, 80, 83-94, 95-98, Hoyts and National each filed motions for summary judgment in June 2002. Id., Docket Nos. 103-117, 146-49. Citing Lara v. Cinemark U.S.A., Inc., 207 F.3d 783 (5th Cir. 2000) and its then-existing district court progeny, the theater-defendants argued that their respective stadium-style theaters fully complied with Standard 4.33.3 as a matter of law because the wheelchair and companion seating areas were located among the seats offered to the general public and provided unobstructed views of the movie screen. Id.; see also United States v. Hoyts Cinemas Corp., 256 F.Supp.2d 73, 82-83, 91 (1st Cir. 2003) (summarizing theater-defendants' summary judgment arguments).[3] Both Hoyts and National also claimed that applying the Department's interpretation of Standard 4.33.3 to their existing stadium-style theaters would violate due process principles. Id. The United States filed a combined opposition to the theater-defendants' summary judgment motions, but did not separately cross-move for summary judgment. Id., Docket Nos. 127- 140. The Court held oral argument in September 2002 and, at the Court's request, all parties subsequently submitted lengthy supplemental post-argument briefs and exhibits. Id., Docket No. 157.

Thereafter, in March 2003, Chief Judge Young issued a twenty-page decision denying the theater-defendants' motions for summary judgment and *sua sponte* granting summary judgment in favor of the United States. See United States v. Hoyts, 256 F.Supp.2d 73 (D. Mass.

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[3] The legal landscape surrounding Standard 4.33.3 has changed considerably since June 2002 when Hoyts and National filed their summary judgment papers. Since that time, every district court decision that followed the Lara decision in whole or in part has been overturned on appeal. See Meineker v. Hoyts Cinemas Corp., 216 F.Supp.2d 14 (N.D.N.Y. 2002), vacated and remanded, 69 Fed.Apx. 19, 2003 WL 21510423 (2nd Cir. July 1, 2003); United States v. Cinemark USA, Inc., No. 1:99 CV-705 (N.D. Ohio Nov. 19, 2001), rev'd, 348 F.3d 569 (6th Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3513 (U.S. Feb. 4, 2004) (No. 03-1131); Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 142 F.Supp.2d 1293 (2001), rev'd and remanded, 339 F.3d 1126 (9th Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-641).

2003), appeals docketed, Nos. 03-1646, 03-1787 (1st Cir. June 5, 2003). Judge Young commenced his opinion with a comprehensive review of Hoyts's and National's stadium-style theaters in terms of their respective floor plans, wheelchair seating areas, amenities, and overall design. See 256 F.Supp.2d at 77-80. The Court noted that both theater-defendants' tiered stadium-style designs elevated each successive row in the stadium section (typically, 15-18 inches) such that "[e]ach row is, in a sense, an island unto itself" free from visual obstructions from patrons seated in the preceding rows. Id. at 78. The Court also concluded that stadium sections provided a "more expansive view of the screen" because patrons are permitted to view the screen at a flatter (and more comfortable) angle as compared to seating in the traditional portions of theaters. Id. The theater-defendants' stadium-style theaters also tended to have larger screens as compared to traditional theaters which, as a consequence, meant that viewers seated closer to the front of the screen have greater difficulty viewing the entire screen. Id. at 78-79.

Based on these and other considerations, Judge Young firmly concluded -- as a factual matter-- that the stadium sections of Hoyts's and National's stadium-style theaters offered superior viewing experiences that were generally inaccessible to patrons who use wheelchairs:

> First, despite many variations, most of the wheelchair accessible seating is located in the traditional section. Second, given the inherent superiority of the view afforded by the seats in the stadium-style section as opposed to that provided in the more traditional seating sections, their physical locations, and other characteristics, the best seats in all of the theaters reside in the stadium section. The stadium section contains the most desirable seats, and wheelchair-accessible seating, on the whole, is generally not part of this section.

256 F.Supp.2d at 81; see also id. at 78 (characterizing stadium-seating as providing patrons with "a markedly superior view and experience to traditional seating"). In addition, the Court went on to take judicial notice of the "obvious and incontestable fact" that movie patrons overwhelmingly prefer stadium seating: "Naturally, because of their basic location and

superiority, patrons entering a stadium-style theater will choose seats in the stadium section and only go to the traditional seats in the front of the theater when . . . the stadium is full." Id.

The Court then turned to a legal analysis of Standard 4.33.3. Finding the Lara line of cases unpersuasive, the Court characterized the theater-defendants' "obstruction only" line-of-sight argument as "indefensible" and inconsistent with the principles underlying the ADA. 256 F.Supp.2d at 90. Instead, the Court agreed with the United States' "eminently reasonable" view that Section's 4.33.3's comparability mandate represents "a 'qualitative requirement' and [that] viewing angles are truly the only operative way of measuring whether the line of sight offered by a [wheelchair] seat is 'comparable' to those offered the general public." 256 F.Supp.2d at 87; see also id. at 88 ("the comparable 'lines of sight' requirement . . . means that viewing angles *must* be taken into account") (emphasis in original). Applying this standard to Hoyts and National, the Court held their respective stadium-style theaters in violation of Standard 4.33.3's comparability requirement:

> [S]tadium-style theaters cannot possibly offer 'lines of sight comparable to those for members of the general public' when wheelchair-accessible seats are placed only in the traditional-seating section, whether on risers or otherwise . . . . [¶] As a matter of simply geometry, the seats on the access-aisle and in the traditional seating section *always* offer an inferior viewing angle to the stadium-seats. Given the fact that the majority of seats in all of the auditoriums at issue are stadium seats, it is impossible for the [Hoyts and National] stadium-style theaters to comport with the comparable 'lines of sight' requirement of Section 4.33.3 as a *matter of law*, absent wheelchair accessible seating in the stadium section.

256 F.Supp.2d at 88 (emphasis in original).[4]

Having found the theater-defendants in violation of Standard 4.33.3, Judge Young then turned to the issue of remedial relief. After reviewing the regulatory history underlying Standard

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[4] For similar reasons, the Judge Young also concluded that Hoyts's and National's stadium-style theaters violated Standard 4.33.3's integration mandate. See 256 F. Supp.2d at 88-89 ("Seats in a separate front section where no-one would sit willingly, given the superiority of the stadium section are neither 'necessary' nor 'part of' the whole. The 'fixed seating plan,' in the case of stadium theaters, is the seating plan for the stadium section, the heart of the whole enterprise[.]")

4.33.3, as well as prior judicial interpretations by federal courts, the Court held that both Hoyts and National would be required to locate (or relocate) wheelchair seating areas within the stadium sections of their stadium-style theaters, but only in such theaters constructed or refurbished after the commencement of the Hoyts action in December 2000. See 256 F.Supp.2d at 91-93. The Court premised this holding on due process grounds, concluding that the theater-defendants did not have "fair warning" – at least until December 2000 – of what Standard 4.33.3 required. Id. The Court thus entered the following order of judgment:

> With respect to all stadium-style theaters owned or leased by [Hoyts or National] wherein construction or refurbishment (that is, any change that requires a building permit under local law) occurs on or after the date upon which this lawsuit commenced, Section 4.33.3 requires that wheelchair accessible seating must be located within the stadium section. To be clear, to comply with Section 4.33.3, wheelchair seating cannot be located solely in the traditional section, nor solely in the access-aisle, nor solely in both the traditional section and access-aisle.

256 F.Supp.2d at 93.

Both Hoyts and National immediately noticed their respective appeals of Judge Young's opinion and judgment. See Jacobs Aff., Ex. 2, Docket Nos. 172 & 179; see also id., Ex. 179 (Hoyts's notice of appeal). In these appeals, the theater-defendants primarily contest Judge Young's interpretation of Standard 4.33.3 and finding of ADA liability. See Jacobs Aff., Ex. 3, Brief of Defendant-Appellant/Cross-Appellee Hoyts Cinemas Corporation (docketed Aug. 20, 2003) (PACER appellate docket). Hoyts also challenges Judge Young's discovery orders precluding the company from seeking production of internal information from the United States protected by the deliberative process privilege and other related privileges. Id. The United States subsequently filed a cross-appeal with respect to that portion of Judge Young's order limiting the theater-defendants' remedial obligations to prospective relief dating from the commencement of the Hoyts action in December 2000. Jacobs Aff., Ex. 1, Docket No. 181, Ex. 4. Briefing has been completed on the parties' respective Hoyts appeals and oral argument was conducted before a panel of the First Circuit in early February 2004. Jacobs Aff., Ex. 3 (PACER appellate docket).

ARGUMENT

A. Magistrate Judge Homer Properly Held That the Pendency of the Hoyts Action in Massachusetts Does Not Divest Private Plaintiffs of Their Own Private Right of Action Under the ADA

Hoyts's objections primarily focus on its contention that Magistrate Judge Homer erred when concluding that the Hoyts action did not extinguish the private plaintiffs' right to pursue their individual discrimination claims in these remand proceedings. See Hoyts Mem. at 6-10. Specifically, Hoyts asserts that Magistrate Judge Homer should have granted their stay request with respect to the entire action – rather than entering a partial stay vis à vis Hoyts and the United States – on the theory that the United States has already litigated the Hoyts action " in its representative capacity on behalf of all plaintiffs." Id. at 7. Hoyts's objections, however, are fatally flawed because they (i) misconstrue the ADA's enforcement scheme for Title III-based actions, (ii) blur the important distinction between actions representing "public" and "private" interests, and, most fundamentally, (iii) ignore constitutionally-recognized due process principles.

Based on the "deep-rooted historic tradition that everyone should have his [or her] own day in court," Martin v. Wilks, 490 U.S. 764, 762, 109 S. Ct. 2180, 2184 (1989) (internal quotation omitted), well-established Supreme Court precedents have long held that litigants generally may not be precluded – consistent with federal due process principles – by a judgment in a prior action to which they were not a party. See, e.g., Richards v. Jefferson County, Alabama, 517 U.S. 793, 798, 116 S. Ct. 1761, 1765-66 (1996); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329, 91 S. Ct. 1434, 1443 (1971); Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 117 (1940). These due process considerations apply irrespective of whether, for example, the first and second actions involve "identical issues," see Blonder-Tongue, 402 U.S. at 329, 91 S. Ct. at 1443 ("Due process prohibits estopping [litigants who never appeared in an earlier action] despite one or more existing

adjudications of the identical issue which stand squarely against their position."); Green v. City of Tucson, 255 F.3d 1086, 1100-01 (9th Cir. 2001) (*en banc*) (mere identity of interests insufficient basis for preclusion), or share common counsel, see South Central Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-68, 119 S. Ct. 1180, 1185 (1999) (rejecting argument that corporation in federal action challenging validity of state tax law was precluded by adverse judgment against corporate-plaintiffs in prior state tax action despite fact that both suits involved similar issues and both sets of corporate-plaintiffs were represented by same counsel).

Against this legal backdrop, it is plain that Hoyts's claim that this action should be stayed in its entirety as a result of the allegedly preclusive effect of the Hoyts action on the private plaintiffs in these remand proceedings lacks merit. It is undisputed that the private plaintiffs in this case were never parties to, nor ever appeared in, the Hoyts action. Nor did the private plaintiffs direct or control the United States' participation in the Hoyts action. Additionally, Hoyts's repeated claim that this action and Hoyts litigation "involve the identical issues concerning the Crossgates theaters" carries no constitutional significance since, even assuming this characterization to be valid (which the United States does not believe is the case), the foregoing Supreme Court caselaw makes plain that it is the identity of *parties* – rather than issues – that controls the due process calculus on matters of preclusion. See, e.g., Hoyts Mem. at 1, 5, 10, 13.[5] Private plaintiffs thus have a constitutionally-protected right to "their day in court" in this action in order to conduct their own discovery, marshal their own evidence, present their

[5] While similar, the claims presented by the private defendants in this action cannot be considered "identical" to the claims presented by the United States in either the Hoyts complaint or its Meineker complaint-in-intervention. For example, the private plaintiffs' complaint alleges ADA violations not only with respect to the lack of wheelchair seating locations within the stadium sections of the theaters at the Crossgates Stadium 18 complex, but also the lack of appropriate companion seating locations and Hoyts's use of segregated "corrals" or "pens" in the four largest theaters at this complex. See discussion supra p. 2. The United States' complaints, by contrast, do not specifically raise these latter allegations. See United States' Complaint In Intervention (filed Jan 30, 2004) (Docket # 109) (Meineker complaint-in-intervention); Jacobs Aff., Ex. 1 (Hoyts complaint).

own theories of liability and remedial relief, and otherwise prosecute their ADA claims in the manner of their own choosing.

Hoyts attempts to escape this constitutional conundrum by claiming that the Hoyts action nonetheless has preclusive effect on the private plaintiffs in these remand proceedings because the United States necessarily prosecuted Hoyts "in the public interest" and "in its representative capacity on behalf of all plaintiffs." See Hoyts Mem. at 7-10. This argument, however, lacks merit for two significant reasons. First, Hoyts's argument exhibits a fundamental misunderstanding of Title III's enforcement scheme. Title III of the ADA grants private plaintiffs a statutorily-protected private right of action to seek redress for individual acts of discrimination. See 42 U.S.C. § 12188(a). Congress also entrusted the Attorney General with responsibility for investigating, settling, or, if necessary, prosecuting alleged Title III violations in cases of general public importance or involving a widespread pattern or practice of disability-based discrimination. See 42 U.S.C. § 12188(b)(1). Because of the widely divergent purposes underlying these two types of enforcement actions, the Department of Justice's enforcement responsibilities are intended to parallel – not preempt – an individual's private right of action. As the Supreme Court noted when rejecting a similar argument that a nationwide pattern-or-practice action prosecuted by the EEOC precluded private litigants from subsequently filing their own discrimination complaints:

> These private-action rights [under Title VII] suggest that the EEOC is not merely a proxy for the victims of discrimination . . . . Although the EEOC can secure specific relief, such as hiring or reinstatement . . . on behalf of discrimination victims, the agency is guided by the 'overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.' When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.

General Telephone Co. of the Northwest, Inc., v. E.E.O.C., 446 U.S. 318, 326, 100 S. Ct. 1698, 1704 (1980) (internal citation omitted); see also id. at 326 n.8 ("[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties.").

Hoyts's contention that the United States's Title III-based enforcement actions (such as Hoyts) merely serve as a "proxy" for victims of discrimination (such as Sybil McPherson) is thus baseless. The Department of Justice, as the agency with primary enforcement authority under Title III of the ADA, investigates and prosecutes discrimination complaints in terms of the broader national interests in eradicating disability-based discrimination. Individual litigants pursuing private actions, on the other hand, must litigate with an eye towards vindicating their own personal rights and remedies. While these national and individual interests may at times overlap, it cannot be assumed that they are so necessarily and precisely aligned as to preclude private actions whenever the United States files its own Title III-based enforcement action. Cf. Heaton v. Monogram Bank of Georgia, 297 F.3d 416, 424 (5th Cir. 2002) (distinguishing between public and private interests when assessing government's intervention motion under Rule 24(a)(2)); Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of Interior, 100 F.3d 837, 845 (10th Cir. 1996) (same); Ceres Gulf v. Cooper, 957 F.2d 1199, 1203 (5th Cir. 1992) (same). In addition, nowhere does the ADA or its legislative history suggest that Congress intended the Attorney General's enforcement authority under Title III to pre-empt or otherwise limit private rights of action.[6] Indeed, given that one of the ADA's central purposes is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), interpreting Title III's enforcement provision as providing for complementary – rather than mutually exclusive – modes of enforcement best serves the ADA's goals.

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[6] By contrast, Congress has expressly provided in other federal statutes that the filing of an enforcement action by a public entity precludes independent actions by private citizens. See, e.g., Clean Water Act, 33 U.S.C. § 1319(g)(6)(A)(ii) (private actions for civil penalties precluded if state or federal government "has commenced and is diligently processing" a similar action); Fair Labor Standards Act, 29 U.S.C. § 216(b) (private enforcement rights expire upon suit by the Secretary of Labor); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(1)(B) (preclusion or private actions under same circumstances as Clean Water Act).

Taken together, these considerations strongly counsel in favor of affirming Magistrate Judge Homer's holding that the Hoyts action does not preclude the private plaintiffs in this action from pursuing their own individual Title III-based discrimination complaint. See, e.g., General Telephone, 446 U.S. at 333, 100 S. Ct. at 1707-08 ("In light of the 'general intent to accord parallel of overlapping remedies against discrimination,' we are unconvinced that it would be consistent with the remedial purposes of the [Title VII] statutes to bind all [employees] with discrimination grievances against the employer by the relief obtained under an EEOC judgment or settlement against the employer.") (internal citation omitted); Charles A. Wright, et. al, 18A Federal Practice and Procedure, § 4458.1 (2nd ed. 2002) ("In most circumstances . . . it should be presumed that public enforcement actions are not intended to foreclose traditional common-law claims or private remedies created by statute."); James Wm. Moore, 18 Moore's Federal Practice § 131.40[3][e] (3rd ed. 2003) ("[I]ndividuals asserting violations of their civil rights frequently are permitted to bring private actions despite past or pending litigation by the government addressing the same acts or practices by the defendants.").

Moreover, setting aside the specific statutory context of Title III's enforcement scheme, Hoyts's preclusion argument also ignores the critical distinction between actions seeking to vindicate public versus private interests. While true that private litigation may sometimes be precluded by prior or pending actions prosecuted by public entities, this is only the case where private parties are themselves pursuing matters of general public interest or seeking to enforce common public rights – such as the allocation of natural resources, the validity of a bond issue, or the location of a telephone transmission tower. In such cases, the public entities are deemed to be acting as representatives of its citizens who are thereby bound by the resulting judgment.[7]

[7] As an exception to the general rule that non-parties cannot be bound by prior judgments in actions to which they are strangers, more expansive notions of privity – often referred to as "virtual representation" – hold that non-parties may nonetheless still be bound by such judgments under appropriate circumstances such as when the two actions involve identical issues and there exists a special legal relationship between the non-party and a party to the first

It is these types of "public rights" cases that are cited by Hoyts in support of its argument that the Hoyts action precludes the private plaintiffs from continuing to conduct discovery or otherwise litigate their claims during these remand proceedings. See, e.g., Hoyts Mem. at 6-7.

Here, however, the private plaintiffs are not seeking to protect "public rights," but, rather, to vindicate their own private right to view movies at the Crossgates Stadium 18 complex in an integrated setting with lines of sight comparable to those offered other members of the general public. See discussion supra p. 2. Hoyts's citation to "public rights" cases is, therefore, inapposite. Rather, because the private plaintiffs herein seek to protect their own personal interests in accessible moviegoing at the Crossgates Stadium 18 complex, both Supreme Court and federal caselaw provide ample support for maintenance of their own private right of action notwithstanding any prior government litigation concerning Hoyts's stadium-style theaters nationally. See, e.g., Richards, 317 U.S. at 1766-69 (holding that plaintiff-taxpayers in second tax action denied due process when precluded from pursuing constitutional challenge to personal tax levy since first tax action litigated by county government concerned more general public tax interests); Town of Lockport v. Citizens for Comm. Action, 430 U.S. 259, 263 n.7, 97 S. Ct. 1047, 1051 n.7 (1977) (district court properly rejected argument that first suit by county government challenging constitutionality of city charter law barred second action by private plaintiffs relating to same law); Sam Fox Pub. Co. v. United States, 366 U.S. 683, 689, 81 S. Ct. 1309, 1313 (1961) ("[A] person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation."); Mason Tenders, 958 F. Supp. at 885-86 (holding that United States' prior ERISA action did not preclude private plaintiffs from subsequently pursuing their own private ERISA claims).

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action demonstrating that their respective interests are so closely aligned that it can be assumed that the party was in fact representing the legal interests of the non-party in the first action. See, e.g., Doctor's Associates, Inc. v. Reinert & Duree, P.C., 191 F.3d 297, 304-05 (1999) (discussing virtual representation doctrine); Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 885-86 (S.D.N.Y. 1997) (same).

B. Hoyts's Alternative Argument That This Court Should Lift the Partial Stay And Permit Discovery from the United States Is Both Procedurally Improper And Legally Meritless Since Hoyts Was Afforded Full and Complete Discovery in the Massachusetts Action

As an alternative argument, Hoyts urges this Court to lift the partial stay entered by Magistrate Judge Homer – *a stay requested by Hoyts* – so that the company may conduct additional discovery against the United States. See Hoyts Mem. at 14-15. Specifically, Hoyts argues that this partial stay improperly precludes it from taking discovery on the two issues (i.e., deference and notice) identified by the Second Circuit in its remand order and, thereby, prejudices its ability to defend itself in these remand proceedings. Id. Hoyts's alternative argument is meritless and should be summarily dismissed.

As an initial matter, Hoyts's attempt to lift the partial stay should be rejected as procedurally improper. As discussed previously, see supra p. 4, Hoyts itself raised the issue of a stay in the midst of a discovery dispute with the private plaintiffs. After being apprised of Hoyts's intent to seek a stay at the then-upcoming discovery conference, the United States informed defense counsel that it did not oppose Hoyts's request for a stay as between the United States and Hoyts due to the overlapping nature of these remand proceedings and the Hoyts appeal currently pending before the First Circuit. Id. at pp. 4-5. Magistrate Judge Homer thereafter granted Hoyts's unopposed request to stay proceedings between Hoyts and the United States. Id. at p. 5; see also Griffin Aff., Ex. H, Transcript of Discovery Conference, pp. 15-16. Hoyts's attempt herein to challenge the stay that it previously championed before the Magistrate Judge smacks of "bait and switch" litigation tactics and should, therefore, be denied as procedurally improper.

Moreover, even setting aside these procedural irregularities, Hoyts's alternative attempt to lift the partial stay is still fatally flawed because Hoyts has already been provided with full and complete discovery against the United States in the Hoyts action. Hoyts and the United States engaged in nearly three years of discovery during the district court proceedings in Hoyts –

including the United States' production of thousands of pages of documents and presentation of four Department of Justice and other federal witnesses for deposition by the theater-defendants. During the course of discovery, the theater-defendants repeatedly challenged the United States' assertion of deliberative process and other discovery privileges concerning internal government information and materials. See, e.g., Jacobs Aff., Ex. 1, Docket Nos. 73-76, 80, 93-94, 95-98. In each case, Judge Young rebuffed the theater-defendants' motions to compel and affirmed the United States' privilege claims. See id., Endorsed Order (filed March 6, 2002), Endorsed Order (filed April 3, 2002), Endorsed Order (filed April 19, 2002). With the issuance of Judge Young's summary judgment decision in March 2003, these interlocutory discovery rulings were "merged" into the final judgment and became *res judicata* as between the United States and Hoyts. See, e.g., Allen v. McCurry, 449 U.S. 90, 94-95, 101 S. Ct. 411, 414-15 (1980); Monahan v. New York City Dept. of Corrections, 214 F.3d 275, 284-87 (2nd Cir.), cert. denied, 531 U.S. 1035 (2000).[8] Thus, as a matter of law, Hoyts has already been afforded all the discovery from the United States to which it is legally entitled concerning the stadium-style theater issues relevant to these remand proceedings.[9]

Lastly, Hoyts's attempt to lift the partial stay founders on the shoals of well-established

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[8] Nor can Hoyts be heard to argue that the pendency of the Hoyts appeals lessens the preclusive effect of Judge Young's discovery rulings. See, e.g., Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189, 61 S. Ct. 513, 515 (1941) ("[I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not - until and unless reversed - detract from its decisiveness and finality."); Macfarlane v. Village of Scotia, New York, 86 F. Supp.2d 60, 65 (N.D.N.Y. 2000) ("Generally, the possibility of an appeal does not prevent application of the doctrine of collateral estoppel."); Charles A. Wright, et al., 18A Federal Practice and Procedure § 4433 (2d ed. 2002).

[9] The need to tread gingerly with respect to Hoyts's discovery requests is further underscored by the fact that Hoyts apparently intends to seek discovery of only privileged materials from the United States during these remand proceedings. For example, in late 2003 – before the United States was granted party status in this action -- Hoyts served *subpoenas duces tecum* on both the Attorney General and the United States Attorney for the Northern District of New York that sought production of only documents listed on the United States' privilege logs generated during the Hoyts litigation. See, e.g., Jacobs Aff., Ex. 6

preclusion principles. Both Hoyts and the United States undisputedly agree that the Hoyts judgment has preclusive effect as between themselves in the instant remand proceedings since each was a party to the Massachusetts litigation. See, e.g., Hoyts Mem. at 2, 6-10. Given this understanding, there is no need for Hoyts to conduct additional discovery in this case. That is, the Hoyts judgment directly resolved the two primary issues on which the Second Circuit based its remand order – namely, (i) whether the United States' interpretation of Standard 4.33.3 should be afforded deference, and (ii) whether Hoyts had reasonable notice of the United States' interpretation at the time of construction or renovation of the Crossgates Stadium 18 complex. See Meineker II, 2003 WL at *6; see also discussion supra p. 3. On the deference issue, Judge Young expressly concluded that the United States's interpretation of Standard 4.33.3 was entitled to substantial deference because the United States had consistently interpreted this section since the Lara litigation and had not proffered this interpretation as a "convenient litigating position." See 256 F. Supp.2d at 89-90. The Court therefore concluded that the United States' interpretation was entitled to substantial deference. Id. Second, on the notice issue, the Hoyts judgment makes plain that Hoyts had constitutionally-sufficient notice of the United States' interpretation of Standard 4.33.3 by December 2000 when the United States commenced the Hoyts action. Id. at 90-93. Application of the Hoyts judgment to the Crossgates complex thus fully resolves all of the substantive issues as between the United States and Hoyts which where designated by the Second Circuit for resolution in these remand proceedings. Indeed, should the First Circuit affirm Judge Young's summary judgment ruling, the United States is prepared to move for summary judgment on the ground that, applying the terms of this judgment to the Crossgates Stadium 18 complex, Hoyts must relocate the wheelchair and companion seating locations to the stadium sections of the fourteen smaller theaters by virtue of Hoyts's renovations of these theaters after December 2000.

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