UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No. 96-2028**
	)	
	)	
DAYS INNS OF AMERICA, INC., *et al.*	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS DAYS INNS OF AMERICA, INC. AND HFS INCORPORATED'S MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

ISABELLE KATZ PINZLER
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
RENEE M. WOHLENHAUS,
Acting Deputy Chief
ROBERTA S. KIRKENDALL
JEANINE M. WORDEN
MARGARITA M. PRIETO
THOMAS M. CONTOIS
Attorneys
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
Post Office Box 66738
Washington, D.C. 20035-6738
(202) 307-0986

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I. INTRODUCTION

Despite undisputed evidence that they have participated in and exercised extensive control over the design and construction of several new Days Inn hotels that are inaccessible to individuals with disabilities, Days Inns of America, Inc. ("DIA") and HFS Incorporated ("HFS") contend that they bear no responsibility for those hotels under title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 through 12189 ("ADA"). According to DIA and HFS, Congress' directive to end discrimination against individuals with disabilities does not apply to them: it is only P & P and other small businessmen like them who must comply with the ADA.

DIA's[1] argument rests on a fundamental misreading of the ADA and its legislative history. Despite DIA's protestations to the contrary, the ADA and its legislative history do not limit compliance with new construction requirements to those who own, operate or lease a new facility. Instead, Congress has made it illegal for any individual or entity to design and construct an inaccessible facility, whatever their relationship to the facility after its completion. And, even if DIA's reading of the ADA were correct, the United States has introduced abundant, undisputed evidence showing the ways in which DIA controls and directs the functioning of the hotels in its chain, such that DIA "operates" those hotels within the meaning of title III.

In addition to misreading the ADA, DIA advances a variety of other theories to relieve itself from responsibility for ADA violations at new Days Inn hotels. For instance, DIA maintains that it has no ADA liability because it has assigned responsibility for ADA compliance

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[1]As in the United States' Memorandum in Support of its Motion for Summary Judgment ("U.S. Mem."), defendants DIA and HFS are referred to collectively as DIA, unless the context requires otherwise.

to its licensees, under the terms of its license agreements. Even if DIA's purported assignment of ADA liability were valid, however, it is well established that the duty to comply with a federal civil rights law cannot be delegated. While such an assignment may give DIA an action against its licensees (e.g., for indemnification), it is no defense to an ADA action against DIA and HFS directly for their parts in the design and construction of the Champaign Days Inn.

DIA also seeks to avoid liability by invoking state common law principles of agency. The government, however, has not advanced any claim based on an agency theory, or any other theory of vicarious liability. To the contrary, the United States has consistently maintained that, due to its extensive participation in and control over the design and construction of all new Days Inn hotels, including the Champaign Days Inn, DIA has its own, independent responsibility to comply with the ADA. As the Champaign Days Inn and numerous other new inaccessible Days Inns prove, DIA has consistently failed to meet that responsibility. Thus, DIA is liable for its own violation of the ADA, not for some other person or entity's failure to comply with the statute.

II. ARGUMENT

A. Section 303 of the ADA Broadly Prohibits the Design and Construction of Public Accommodations and Commercial Facilities that Are Not Accessible.

Section 303 of the ADA — the ADA's mandate requiring all newly constructed facilities to be fully accessible — applies to any party that controls or participates in the design and construction of a new public accommodation or commercial facility. *See* U.S. Mem. at 2-3, 6-12. DIA's argument that it is only illegal for some parties to engage in this activity fails to comport with the structure, purpose, language, and legislative history of title III and § 303 in

particular. In an effort to convince this court that its view of the statute is correct, DIA misrepresents the ADA's language and its legislative history, offering conclusory and misleading statements that confuse the actual congressional intent regarding § 303 with DIA's fictional recreations of legislative intent. DIA's statements are not supported by the ADA, supporting legislative history, or court precedent, and therefore should be disregarded.[2]

1. DIA's argument is inconsistent with the language, structure, and purpose of title III of the ADA.

As the United States argued in its memorandum in support of its motion for summary judgment, § 303 of the ADA is not limited to parties who own, lease, or operate public accommodations. *See* U.S. Mem. at 6-19. In suggesting that § 303 is so limited, DIA fails to explain how its reading of the statute can be reconciled with the structure of title III, the language of § 303 itself, with Congress' clearly expressed intent to ensure that all new facilities are designed and constructed to be accessible, or with court decisions that have interpreted § 303 consistent with the United States' reading of the statute.

[2]DIA directs the Court's attention to the ruling in United States v. Days Inns of America, Inc. (D.S.D.), where the U.S. District Court for the District of South Dakota granted DIA's motion for summary judgment, holding that DIA had not done enough in the design and construction of the Wall Days Inn to be held liable under § 303. But the South Dakota court's ruling was a very narrow one based on the facts relating to the Wall Days Inn. That ruling is not relevant to the issues before this Court because the facts that the court relied on in that case are very different from the facts relating to DIA's participation in the design and construction of the Champaign Days Inn. Moreover, the South Dakota court did not address the legal issues relating to the proper interpretation of § 303 that are before this Court other than to acknowledge that it would not revisit the holding of the Ellerbe court, which concluded that persons other than owners, operators, and lessors could be liable under § 303. Thus, the United States submits that the opinion in United States v Days Inns of America, Inc. (D.S.D.) Is not persuasive authority that would merit consideration in this case.

The most serious flaw in DIA's argument is its failure to recognize, much less address, the disparity in the scope of §§ 302 and 303. While § 303 applies to both commercial facilities and public accommodations, § 302 applies only to public accommodations, and to private entities that own, lease, or operate public accommodations. *See* U.S. Mem. at 13-16. Limiting § 303 to the parties identified in § 302 would effectively eliminate ADA coverage of all commercial facilities — except those that happened to be owned, leased, or operated by a public accommodation.

DIA attempts to sidestep this problem by breaking down § 302(a) into five parts — an exercise not based on any reasoned analysis or intent of the drafters — and severing the "owners, operators, lessors, and lesseest" language from the words that follow — the words that limit all of § 302 to places of public accommodation. *See* DIA's Mem. at 7-10.[3] After breaking the language of § 302(a) into parts, DIA then mixes and matches the segments, picking and choosing which parts of the section are included in § 303 by virtue of the phrase "discrimination for purposes of section 302(a) includes. . ." 42 U.S.C. § 12183. While DIA repeatedly claims to be relying on the "plain language" of the statute — *see* DIA's Mem. at 7 — it is intriguing that DIA's chief argument instead relies upon a revision and expansion of the statute's language to something that is simply not there, and was never intended by Congress to be there. DIA argues that, since, § 303 contains a reference to § 302(a), liability under § 303 should be limited to entities that are named in § 302(a) — i.e., persons "who own, lease (or lease to), or operate a place of public accommodation." But, recognizing that a direct incorporation of the limiting

[3]Indeed, when Congress had the opportunity to apply the "owns, leases (or leases to), or operates" language to commercial facilities it chose not to do so. *See infra* 8-10.

language of § 302(a) into § 303 would impermissibly eliminate § 303's coverage of commercial facilities, DIA asks the Court not only to incorporate the limiting language from § 302(a) but also to amend it so that it applies to persons who own, lease (lease to), or operate commercial facilities, in addition to the parties actually named in § 302(a).

In ascertaining the meaning of statutory language, "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., ___ U.S. ____, 117 S. Ct. 843, 846 (1997). The United States' position is that there is only one reading of the statute that is consistent with the language of both § 302 and § 303, and with the structure, purpose, and legislative history of the Act. U.S. Mem. at 8-19. And, even if the Court were to conclude that the statute is ambiguous[4], then the interpretation of the statute by the agency entrusted with its enforcement is entitled to substantial deference. *See, e.g.,* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (where Congress has not directly addressed the precise question at issue, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); Pennington v. Didrickson, 22 F.3d 1376, 1382-83 (7th Cir. 1994); Hanson v. Espy,

[4]The statute includes no provision whatsoever regarding entities that own, lease, or operate commercial facilities. Therefore, it necessarily follows from DIA's argument that the statute is ambiguous. See United States v. Ellerbe Becket, Inc., ___ F. Supp. ___, 1997 WL 610275, *7 n.4 (D. Minn. Oct. 2, 1997) (holding "own, operate and lease" language is not incorporated into § 303 and stating "[t]he Court would reach the same conclusion if it found that the silence of § 303(a) with respect to parties responsible for violations, along with the reference to § 302(a) in § 303(a) constituted an ambiguity in the statute.").

8 F.3d 469, 472-73 (7th Cir. 1993); United States v. Baxter Health Care Corp., 901 F.2d 1401, 1407 (7th Cir. 1990); Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 906-07 (7th Cir.1990).

By contrast, DIA's suggestion that the "owns, leases (or leases to), or operates" language should be detached from "a place of public accommodation" and applied to § 303, to cover both public accommodations and commercial facilities, is inconsistent with the purpose of § 303. As explained in the United States' Memorandum supporting Summary Judgment, the aim of making all new construction accessible as it is being built, rather than doing costly retrofitting, which is required by § 303, is far better accomplished if § 303's prohibition applies to all parties engaged in the design and construction of new facilities. *See* U.S. Mem. at 13-17. DIA does not explain why Congress would go to the trouble to define an illegal activity (the design and construction of inaccessible facilities), and yet allow a multitude of parties to engage in that activity with impunity — parties including not only franchisors that involve themselves in design and construction, but also architects, engineers, and contractors. Congress has not taken such an approach in other civil rights statutes, and DIA offers no evidence proving that Congress intended the ADA to be any different. *See* U.S. Mem. at 16-17.[5]

In fact, § 804(f)(3)(C) of the Fair Housing Act ("FHA"), which was enacted two years before the ADA was enacted and is the provision that § 303 mirrors, uses identical "failure to design and construct" language without listing responsible parties (in particular, there is no FHA

[5]Section 302 of the ADA itself demonstrates that Congress has taken the same approach here. As discussed below, *see* Part II.A.2, as the legislation neared enactment, the scope of § 302's coverage was expanded to include not just those parties who operate public accommodations, but the parties that own and lease them as well. In doing so, Congress brought within the coverage of § 302 every party that might conceivably have responsibility for, or be in a position to ensure compliance with, the various non-discrimination requirements of §302.

limitation to owners, operators, lessors and lessees). 42 U.S.C. § 3604(3)(C). Moreover, a review of the legislative history of that provision confirms that Congress indeed intended entities that participate in design and construction of housing, such as architects, contractors and developers, to be responsible and have liability for compliance with the new construction provisions of the FHA. See H.R. Rep. 100-711, 100th Cong., 2d Sess. 16-18.[6] It is doubtful that the 101st Congress, when enacting identical language as applied to public accommodations and commercial facilities merely two years later, would have intended such a drastically different result.[7]

Next, DIA attempts to reduce Congress' inclusion of the term "design" in § 303 to nothing more than a mere "triggering event." DIA Mem. at 12-14.[8] There is nothing in the statute's language or legislative history to support this assertion. Congress included the term "design" in § 303 to make it clear that it was concerned with more than just the end result of the

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[6]The Committee Report makes clear that there was no limitation on liability under the new construction provisions of the FHA: "The Committee believes that these provisions carefully facilitate the ability of tenants with handicaps to enjoy full use of their homes without imposing unreasonable requirements on homebuilders, landlords and non-handicapped tenants." Id. See also 134 Cong. Rec. S10532-04 *61(Statement of Sen. Humphrey) ("bill subjects the designer and the builder to severe penalties if either designs or builds housing that fails to conform. . .").

[7]Indeed, early versions of the ADA were introduced in the 100th Congress and considered at the same time as the Fair Housing Amendments Act.

[8]The Supreme Court has made it clear that "legislative enactments should not be construed to render their provisions mere surplusage." Dunn v. Commodity Futures Trading Comm'n, ___ U.S. ___, 117 S. Ct. 913, 917 (1997). If, in fact, Congress had intended only to hold owners, operators, lessors and lessees responsible for violations of § 303, the inclusion of the term "design" would be meaningless.

design and construction process.[9] If, as DIA suggests, the focus were really intended to be only on those parties who are ultimately responsible for the facility, it would have made far more sense for Congress to have omitted the word "design" from the statute altogether, and simply to have made it illegal to "construct" an inaccessible facility. Congress, however, did expressly include the term "design" when describing the prohibited activities — *see* U.S. Mem. at 13 — and DIA's strained rationale for the inclusion of the word design in the statute is simply not supported by the legislative history nor the language of the statute itself. It is more faithful to the language of the statute, and better serves the purposes of the Act, to read § 303's use of the conjunctive "and" to make it unlawful to design an inaccessible facility as well as to construct an inaccessible facility.[10]

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[9] Title III's remedial provisions allow private actions to be brought before a new facility is built inaccessibly. 42 U.S.C. § 12188(a)(1). That Congress authorized actions against buildings before they are completed — based on nothing more than the designs for the facility — further demonstrates the importance Congress attached to ensuring that those who design new facilities do so in compliance with the ADA. As Rep. Schroeder noted, "[t]he ADA recognizes that it is important to stop a violation of the act's access provisions before it occurs. It is a lot cheaper to make a building accessible to people with disabilities in the design stage than once the building is erected." 136 Cong. Rec. H2599-01, *H2634. But if DIA's reading of the statute were correct, many individuals and entities who design new facilities would be excluded from coverage.

[10] DIA even goes so far as to suggest that § 303 should be limited by the "own, operate and lease" language because the heading of title III is "Public Accommodations and Services Operated by Private Entities." DIA's Mem. at 15 n.8. It is well settled that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." Brotherhood of Railroad Trainmen v. Baltimore & Ohio Ry. Co., 331 U.S. 519, 528-29 (1947); United States v. Minker, 350 U.S. 179, 185 (1956) (quoting same). See also Johnson v. Commissioner of Internal Revenue, 114 F.3d 145, 150 (10th Cir. 1997) ("title to a statutory provision is not part of the law itself. . ."); United States v. Jac Natori Co., Ltd., 108 F.3d 295, 299 (Fed. Cir. 1997) ("The titles of statutes are simply reference guides and cannot limit or contravene the statutory text.") Moreover, several provisions of title III are not limited to owners, operators, lessors and lessees. In addition to § 303, liability under § 309 extends to "any person that offers examinations or

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2. DIA's argument is inconsistent with the legislative history of § 302 and § 303.

DIA correctly points out that § 302 and § 303 were at one time part of the same section. DIA fails to recognize, however, that the changes made to those sections after they were separated suggest that § 302 and § 303 were specifically modified in ways that caused them to apply not just to different facilities, but also to different parties.

In early versions of the legislation, the provisions that now constitute § 302 and § 303 of the ADA were included in what was then Title IV, Public Accommodations and Services Operated by Private Entities. *See, e.g.,* S. 933, 101st Cong. Title IV (May 9, 1989); H.R. 2273, 101st Cong. Title IV (May 9, 1989). Provisions governing both existing facilities and new construction were included in § 402, which set forth the "general rule" that "[n]o individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability." S. 933 at § 402(a); H.R. 2273 at § 402(a). In those bills, the term "public accommodation" was defined to include both places used by the general public as customers, clients, or visitors, and potential places of employment. S. 933 at § 401(2)(A); H.R. 2273 at § 401(2)(A). Neither the House nor the Senate bill contained any language regarding the owners, operators, lessors, or lessees of the covered facilities.

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courses. . ." 42 U.S.C. § 12189. See D'Amico v. New York State Bd. of Law Examiners, 813 F. Supp. 217, 221 (W.D.N.Y. 1993)("person" defined to have same meaning as term in § 701 of Civil Rights Act); Ware v. Wyoming Board of Law Examiners, 973 F. Supp. 1339, 1353 (D. Wy. 1997) (same).

Later in 1989, title IV was renumbered as title III, and the requirements for new construction and existing facilities were separated into two sections: the obligations for existing facilities were left in what had been § 402 of the legislation (now renumbered to be § 302), and the requirements for new construction were moved to new § 303. *See* S. Rep. 116, 101st Cong., 1st Sess. 58-60, 68-69 (1989). At the same time, "potential places of employment" were eliminated from the definition of "public accommodation," so that the term (and new § 302) applied only to twelve categories of "privately operated entities." Id. at 58-59. New § 303 was made applicable to both public accommodations (as redefined) and potential places of employment. Id. at 68-69.

It was not until 1990, shortly before the ADA was finally adopted, that the language in § 302 concerning "privately operated entities" was replaced with the final language regarding entities who "own, lease (or lease to), or operate" public accommodations. *See* H.R. Rep. 485, Part 3, 101st Cong. 2d Sess. 11 (1990). Significantly, this new language was added only to § 302, and not to § 303. Indeed, it is quite clear that that language was not intended in any way to define the scope of § 303; to the contrary, the change in the language of § 302 was specifically intended to clarify the coverage of § 302 itself, to make clear that the parties covered by that section were not only those who operated public accommodations, but also those who owned and leased them. As the House Committee on the Judiciary explained:

> The Committee adopted an amendment which clarifies that the prohibition against discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," applies to "any person who owns, leases (or leases to), or operates a place of public accommodation."
>
> This amendment makes it clear that the owner of the building which houses the public

> accommodation, as well as the owner or operator of the public accommodation itself, has obligations under this Act. For example, if an office building contains a doctor's office, both the owner of the building and the doctor's office are required to make readily achievable alterations. It simply makes no practical sense to require the individual public accommodation, a doctor's office for example, to make readily achievable changes to the public accommodation without requiring the owner to make readily achievable changes to the primary entrance to the building.

Id. at 55-56.

At the same time that the "owns, leases (or leases to), or operates," language was added to § 302, Congress also amended § 303. Its coverage, which previously had included public accommodations and "potential places of employment," was redefined to include public accommodations and "commercial facilities." Unlike § 302, however, no language was added to § 303 to indicate that those who own, operate or lease the facilities in question were the only parties with responsibilities under § 303. Certainly, if Congress had wished to restrict § 303's coverage in that manner, it could have done so at the same time that it "clarified" the coverage of § 302. In sum, there can be little question that Congress deliberately chose to draft § 302 and § 303 differently, and intended them to apply to different kinds of activities, different categories of facilities, and different parties.

B. DIA's Duty to Comply With the ADA's New Construction Requirements is Not Delegable.

DIA contends that ADA compliance at Days Inn hotels is somebody else's problem. According to DIA, its license agreements have assigned the duty of ADA compliance to its licensees and, thus, relieved DIA of all ADA liability. DIA's Mem. at 3-4, 21-24. But it is a well-settled matter of law that the duty to comply with federal civil rights statutes such as the

ADA cannot be delegated.[11] Walker v. Crigler, 976 F.2d 900, 904 (4th Cir. 1992) (adopting "general rule" applied by other federal courts that duty not to discriminate under Fair Housing Act is non-delegable); Coates v. Bechtel, 811 F.2d 1045, 1051 (7th Cir. 1987) (under Fair Housing Act and § 1982, courts have imputed wrongful acts of real estate agent to property owner, even if not authorized or ratified).[12] Moreover, even if there were no general prohibition against delegating duties to comply with federal civil rights statutes, the ADA specifically addresses this issue. Under § 302 of the ADA: "[a]n individual or entity shall not, directly **or through contractual or other arrangements**, utilize standards or criteria or methods of administration (i) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12182(b)(1)(D) (emphasis added). The legislative history makes clear that Congress intended this language to prevent entities from escaping ADA liability through contractual

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[11]The Supreme Court has defined a non-delegable duty as "not merely an obligation to exercise care in [a party's] own activities, but to answer for the well-being of those persons to whom the duty runs. The duty is not discharged by using care in delegating it to an independent contractor." General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 395-96 (1982) (citations omitted).

[12]*See also* Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 141 (6th Cir. 1985) (holding that realtor could not escape liability for acts of real estate agents by proving that the agents "were independent contractors, over whom under common law it has no control" or proving that the realtor instructed its agents in the law and urged them to comply with it); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980) (duty to obey laws relating to racial discrimination is non-delegable); Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974) (holding the owner of an apartment building responsible for the discriminatory conduct of a resident manager "because the duty to obey the law is non-delegable"), *quoting* United States v. Youritan Construction Co., 370 F. Supp. 643, 649 (N.D. Calif. 1973), *aff'd in part and rev'd in part on other grounds*, 509 F.2d 626 (9th Cir. 1975)); Saunders v. General Svcs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1987) (under Fair Housing Act, duty not to discriminate is non-delegable).

arrangements such as the one contained in DIA's license agreements: "an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under the Act[,] . . . [and] **a covered entity may not use a contractual provision to reduce any of its obligations under this Act**." H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. (1990) at 104 (emphasis added).

Thus, while the provisions in DIA's license agreements and other disclaimers of responsibility may give DIA a third-party action against its licensees, those license provisions provide no defense to an action by the United States under title III of the ADA.

C. DIA's Reliance On Neff v. American Dairy Queen is Misplaced.[13]

DIA relies on Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), cert. denied, ____ U.S. ____, 116 S. Ct. 704 (1996), in an attempt to show that it does not operate the Champaign Days Inn or other Days Inn hotels.[14] That reliance is misplaced. As a district court

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[13]The United States does not believe it is necessary to prove that DIA operates the Champaign Days Inn, since DIA is liable under § 303 solely because it participated in the design and construction of the Champaign Days Inn. However, assuming for the sake of argument that DIA were correct in its reading of §§ 302 and 303, and that the coverage of § 303 were limited to owners, operators, lessors and lessees, DIA is nonetheless still liable for violating § 303 because it operates the Champaign Days Inn (and other Days Inn hotels). *See* U.S. Mem. at 20-23.

[14]DIA argues that the United States does not contend that DIA controls the day-to-day operations of the Champaign Days Inn, or other Days Inn hotels. DIA's Mem. at 20. In making this argument, DIA relies solely on the uncorrected version of Ms. Savage's deposition transcript, and disregards a variety of other statements by the United States that it does contend that DIA controls the daily operations of the hotels in its system, including the Champaign Days Inn. *See* United States' Responses to Days Inns of America, Inc.'s Third Set of Interrogatories and Requests for Production, Ex. 46, at 1-9.

Ms. Savage's testimony was not to the contrary. She testified that DIA exercised control over the operations of Days Inn hotels in a variety of ways, including the reservations system, the operating policies manual, other manuals, training programs, QA inspections, the Sunburst rating

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in the Fifth Circuit previously noted in response to DIA's argument that Neff controlled the decision of DIA's liability in these matters, "[i]f DIA/HFS indeed is relying on such precedent [Neff], this Court finds such reliance *to be of dubious nature given the distinguishable facts and section of the ADA addressed in Neff versus that found in the present suit*." Days Inns of America, Inc. v. Reno, 935 F. Supp. 874, 878 n.21 (W.D. Tx. 1996) (emphasis added).

1. *Neff* is wrongly decided.

In Neff, the plaintiff alleged that a franchisor violated § 302 of the ADA by failing to remove architectural barriers to accessibility at two of its franchisees' restaurants that had been built before passage of the ADA. Id. at 1065. Concluding that the franchisor had minimal control over the removal of architectural barriers at the restaurants, the Fifth Circuit held that the franchisor was not liable under § 302 because it did not "operate" the restaurants within the meaning of the ADA.[15] Id. at 1066, 1068-69. Thus, in deciding what the term "operate" means under title III, the Fifth Circuit focused solely on the question of who has control over the ability

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[14](...continued)
system, DIA's central handling of guest complaints, and others. Savage Dep., Ex. 44, at 283-85. Indeed, in quoting Ms. Savage in its memorandum (and in citing her deposition in support of this paragraph), DIA did not consult the errata sheet compiled by Ms. Savage upon reviewing the deposition transcript (and has not provided that errata sheet as an exhibit). *See* id., errata sheet.

[15]While the Neff court began its analysis with traditional definitions of the term "operates," i.e., '[t]o control or direct the functioning of.' id. at 1065, the court proceeding to an inappropriately narrow test, considering only whether the entity had control over the prohibited activity at issue (the removal of architectural barriers), not whether the entity had general control of the place of public accommodation. Id. at 1066. As a result, the court only considered one provision of the ADQ license agreement, which gave American Dairy Queen the right to disapprove or veto structural changes to the facility. Id. at 1068.

to remove architectural barriers — not the more general question of who has power or control over all of the operations of the facility. In doing so, Neff produces a rule that cannot be reconciled with other provisions of § 302(b) and leads to absurd results.

Neff's narrow inquiry — looking only to see who had authority to make physical changes to the facility — is not consistent with the language of the statute, and makes no sense. Section 302(a) of the ADA prohibits discrimination by any entity that "owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. §§ 12182(a). Section 302(b) then defines several particular types of activity considered to be discrimination. Under the Neff approach, the entities who would be covered under § 302(b) would vary from prohibition to prohibition, because, under the Neff approach, the question would not be whether an entity operates the public accommodation in a general sense (as is implied by § 302(a)), but rather whether the entity has control over the activity in question in the particular sub-paragraph of § 302(b) (things such as imposing eligibility criteria, modifying policies and practices, or providing auxiliary aids and services). *See* 42 U.S.C. §§ 12182(b)(2)(A)(i), (ii), (iii). Neff thus suggests that rather than making a single determination of who is covered under § 302(a), coverage must be determined separately for each of § 302(b)'s particular prohibitions. Nothing in the language of the statute supports such an odd conclusion.[16]

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[16]The Neff court does not explain, for instance, how (by any definition of "operates") a party who has control over the ability to make physical changes to the facility, but who has no other control over the business conducted there, nonetheless "operates" the facility. If such a party does "operate" the facility, the Neff court fails to explain either 1) why it makes sense to hold that party responsible for the other obligations of § 302(b) as well — such as providing auxiliary aids and services, or modifying the business' policies and practices, or 2) if the party is not to be held liable for those obligations, why not (since the party has already been held to be

(continued...)

Other courts confronted with this question have understood that § 302 requires an inquiry not into whether the party in question has authority over the particular activity in question, but rather whether that party can direct or control the operation of the facility itself.[17] Indeed, the cases relied upon by the Fifth Circuit in Neff apply this general test. For instance, in Carparts Distribution Center Inc. v. Automotive Wholesalers Ass'n of New England, 37 F.3d 12 (1st Cir. 1994), the First Circuit considered whether a self-funded medical reimbursement plan was covered as an "employer" under title I of the ADA. The First Circuit did not look just to the plan's control over the alleged discriminatory act, as Neff implies. To the contrary, the First Circuit underscored its obligation to construe the ADA broadly, and offered several possible theories under which the plan — which in no way "employed" the plaintiff in the traditional sense — could be found covered by the Act. Id. at 16-18.[18]

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[16](...continued)
"operating" the facility).

[17] *See*, *e.g.*, Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1335 (N.D. Cal. 1994) ("[t]he use of language relating to ownership or operation implies a requirement of control over the place providing services.") (emphasis added)).

[18]Similarly, in Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994), the court noted the broad language and remedial purposes of the ADA, and extended coverage under title III to an on-call admitting physician, finding him individually liable for his discriminatory actions. Id. at 78. In determining whether the physician was an "operator of the hospital" within the meaning of the ADA, the court considered not only whether the physician had the power and discretion to perform the allegedly discriminatory act, but whether he was in a position of authority at the hospital generally. Id Although it came to a contrary conclusion, the Aikins court applied a similar analysis in finding that a physician did not operate a hospital within the meaning of the ADA. The court found that because he not only had no control over the specific prohibited activity — the requirement to provide auxiliary aids and services to individuals who are deaf — but also because he was "not on the hospital's board of directors, and [had] no authority to enact or amend hospital policy," he did not "operate" the hospital within the meaning of title III. 843 F. Supp. at 1335.

2. This case is distinguishable from *Neff*.

In any event, this case is readily distinguishable from Neff. First and foremost, Neff was decided under § 302; this case has been filed under § 303. Days Inns of America, Inc., 935 F. Supp. at 878 n.21. Second, the Neff court based its holding entirely on the language of the franchise agreement in that case; the court did not consider any other evidence of ADQ's control over the restaurants. Neff, 58 F.3d at 1065, 1067. And because the plaintiff conceded that the franchise agreement was unambiguous, the court held that the only question presented — the construction of an unambiguous contract — was one of law. Neff, 58 F.2d at 1065. In general, however, courts have held that the nature and extent of control exercised by a franchisor over a franchisee is a question of fact.[19]

In this case, the degree of control that DIA exercises over its licensees, including P & P, is evidenced not just by the license agreement, but by a variety of other documentary evidence, and the testimony of several witnesses. As discussed above and in the United State's Statement of Undisputed Facts, the undisputed evidence shows that DIA exercises considerable control over virtually all aspects of the operation or management of the Champaign Days Inn, including marketing, setting room rates, front desk operations, employee training, employee relations, employee uniforms and job duties, dealing with walk-up business, providing wake up calls and continental breakfasts, fees charged for local telephone calls, fax services, and use of baby cribs, purchasing supplies and equipment, maintenance, assuring the cleanliness of rooms, maintaining

[19]Oberlin v. Marlin American Corp., 596 F.2d 1322, 1326 (7th Cir. 1979) (legal status of relationship between franchisor and franchisee depends of facts of relationship); Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 785-86 (3rd Cir. 1978) (treating question, arising under state law of agency, of whether franchisor operated retail store as one of fact).

books and records, and others. *See* U.S. Mem. at 20-23; Facts ¶¶ 75-91; United States' Response to Days Inns of America, Inc. and HFS Incorporated's Statement of Undisputed Material Facts ¶¶ 19-28. In addition, the undisputed facts further show that DIA exercises control over a variety of other hotel functions or operations, including the hotel's reservations system (Facts ¶¶ 114-117), provision of no-smoking rooms and making courtesy calls to guests (Facts ¶¶ 118-120), training for hotel managers (Facts ¶¶ 121-127), and handling guest complaints (Facts ¶¶ 137-143). By means of its Operating Policies Manual, its Franchise Services Department, its Quality Assurance program, and the Sunburst rating system, DIA controls hundreds of aspects of the daily operation of hotels in its chain. *See* Facts ¶¶ 92-113, 128-136. In sum, the evidence that DIA operates the Champaign Days Inn and other Days Inn hotels is overwhelmingly great compared to the meager evidence considered by the Fifth Circuit in Neff.

3. Even if *Neff* were correctly decided, and applicable here, DIA would be responsible under the *Neff* "test" for the failure of the Champaign Days Inn to be readily accessible to and usable by individuals with disabilities.

Even under the test adopted by the Fifth Circuit in Neff, DIA operates the Champaign Days Inn and other Days Inns. Neff, 58 F.3d at 1066-67 ("the relevant inquiry in a case such as this one is whether [the franchisor] specifically controls the modification of the franchises to improve their accessibility to the disabled").[20] Thus, in a case alleging violation of § 303, the

[20]DIA contends that there must also be some showing that the franchisor "caused" the facility not to comply with the ADA. DIA's Mem. at 16-18. Neff contains no such requirement. But even if DIA's interpretation were correct, the United States has made that showing. The undisputed facts show that DIA caused the Champaign Days Inn to be inaccessible: the PDSM which DIA provided to P & P was not consistent with the ADA, Facts ¶¶ 37-38; when DIA reviewed specifications and plans for the Champaign hotel, it did not review them for compliance with the ADA, or for compliance with DIA's own barrier-free requirements, Facts ¶¶ (continued...)

relevant inquiry under Neff would be whether DIA specifically controlled the design and construction of the buildings at issue. And, the undisputed facts make clear that DIA had such control and exercised it.[21]

For instance, DIA provided its PDSM to the licensee, required P & P to prepare plans that conformed to the Days Inn design standards (which include accessibility requirements) contained in the PDSM, reviewed those plans for compliance with DIA's design standards and other standards and noted changes on them (including changes to improve the accessibility of the hotel), monitored the progress of construction, inspected the hotel upon its completion, before admitting it to the Days Inn system, and repeatedly inspected the hotel after it became a part of the Days Inn system. *See* Facts ¶¶ 48-66. Under the terms of both the license agreement and the PDSM, DIA required P & P to design and construct the hotel in compliance with the ADA, and

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[20](...continued)
146-148; and when DIA inspected and admitted the Champaign hotel into the Days Inn system, it ignored or failed to note blatant violations of the ADA, and failed to require P & P to bring the facility into compliance with the ADA, as required by the license agreement and the PDSM. Facts ¶ 147.

[21]DIA suggests, without any reasoning or analysis, that a Seventh Circuit decision interpreting totally unrelated statutory language in a federal environmental statute, CERCLA, should determine this Court's interpretation of whether DIA "operates" the Champaign Days Inn under § 302 of the ADA. DIA Memorandum at 18. It is absurd to suggest that the CERCLA definition has any meaning in the context of the ADA, a civil rights statute. Even assuming, arguendo, there were any basis to compare the two provisions, DIA would be held to be an "operator" under either statutory definition. Courts have repeatedly held entities liable pursuant to CERCLA if they had the authority to "control," even if they did not exercise that authority. HRW Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318 (D. Md. 1993); Ganton Technologies, Inc. v. Quadion Corp., 834 F. Supp. 1018 (N.D. Ill. 1993); Pierson Sand & Gravel, Inc. v. Pierson Township, 851 F. Supp. 850 (W.D. Mich. 1994). DIA clearly has the authority to control the operations at its franchised locations, and operates Days Inn hotels, as demonstrated by the facts in this case.

the license agreement gives DIA the affirmative authority to require P & P to modify the hotel (both to gain intial admittance to the Days Inn system, and to renovate the hotel later in the life of the agreement). *See* Facts ¶¶ 31, 90-91. Moreover, if P & P refuses to comply with its obligations under the license agreement (including the requirement to comply with the ADA), DIA can suspend P & P from the Days Inn reservation system, or terminate the agreement (and require P & P to forfeit its investment in the franchise). Thus, even if the Neff test were relevant here, the United States has proved that DIA has more than sufficient control over the design and construction of the Champaign Days Inn and other Days Inns to meet that test.

D. DIA Exercises Considerably More Control Over its Licensees than is Required by the Lanham Act.

DIA argues that the controls that it exercises over the operations of Days Inn hotels are no more than is required to preserve the validity of its trade and service marks under the Lanham Act, 15 U.S.C. §§ 1051, 1061, and 1127 *et seq*. DIA's Mem. at 21. But DIA can point to no provision of the Lanham Act that shields the owner of a trade or service mark from liability under federal civil rights laws — because there is none. Most importantly, DIA exercises far more control over its licensees' operations than the Lanham Act requires.

Under the Lanham Act, a franchisor need only exercise minimal controls over its licensees to ensure that they are not deceiving the unsuspecting public by selling goods bearing the mark that are of inferior quality. Oberlin v. Marlin American Corp., 596 F.2d at 1327 (holding licensor must control certain "operations of its licensees to ensure that the trademark is not used to deceive the public"); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 387 (5th Cir. 1977) (same). As the Seventh Circuit explained, "the scope of the

duty of supervision associated with a registered trademark is commensurate with [the] narrow purpose" of the Lanham Act to avoid deception. Oberlin, 596 F.2d at 1327. A licensor is not required to control the day-to-day operations of a licensee "beyond that necessary to ensure uniform quality of the product or service." Id. Similarly, the Fifth Circuit explained that "[r]etention of a trademark requires only minimal quality control," and the party seeking to establish that the control has been inadequate must "carry [a] heavy burden." 549 F.2d at 387.[22]

The System Standards imposed by DIA in its OPM and its PDSM — and as enforced by its Quality Assurance program and Sunburst rating system — far exceed the quality control requirements of the Lanham Act. The OPM, for instance, sets remarkably detailed requirements for all aspects of the daily operations of Days Inn hotels, including specifying all furnishing, fixtures, and supplies for guest rooms (*e.g.*, the number of Montrose style number 17BTN skirt hangers with an O ring or equivalent), the size, weight, color, and fiber content of all towels and linens (maximum shrinkage allowed is ten percent), the size of the ice bucket, and the size of the soaps). Facts ¶¶ 94.c, d. It sets requirements for guest services, including wake-up service, a fax machine, complimentary coffee, free local phone calls, free ice, free use of baby cribs, and a complimentary continental breakfast consisting of fruit juices, freshly brewed coffee, decaffeinated coffee, hot water, tea bags, breakfast pastries, muffins, croissants, or local specialities. Facts ¶¶ 94.i, o. It also sets detailed housekeeping and maintenance requirements (*e.g.*, establishing a schedule for cleaning the lint traps in dryers). And, the QA inspections evaluate dozens of items for cleanliness and proper working condition. Facts ¶¶ 94.k, 99, 104.

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[22]*See also* Dawn Donut Co., Inc. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959) (licensor must take "some reasonable steps to prevent misuses of his trademark").

Similarly, the PDSM contains hundreds of detailed specifications for the design and construction of the hotel, many of which are not essential to ensuring the quality of services provided to guests. In addition to detailed requirements for guest rooms, the hotel lobby, and other public areas, the PDSM includes site requirements (*e.g.*, for paving materials, loading docks, dumpster pads, and swimming pool filtering systems); structural requirements (*e.g.*, for soil borings, the hotel's structural frame, roofing materials, and insulation in the exterior walls); requirements for employee areas (*i.e.*, for the hotel laundry, linen storage area, the capacity of washers and dryers, the maintenance area, and the storage of equipment and materials in various storage areas); and requirements for the hotel's electrical system (*e.g.*, for circuit breakers, wiring conduits, transformer locations, and lightning protection). Facts ¶ 35. DIA's expert witness admitted that the PDSM contained requirements for areas of the hotel that guests would never see, and that the PDSM contained numerous requirements that had nothing to do with defining Days Inn's market position. Kiewel Dep., Ex. 19, 168-69, 176-79.[23] In sum, there can be little question that the requirements DIA imposes on its licensees far exceed what is required by the Lanham Act.

E. DIA's Reliance on Agency Law is Misplaced.

To divert the Court from the real issues in this case, DIA devotes considerable effort to arguing that it does not meet the requirements for liability under principles of the law of agency,

[23]It is not surprising that the PDSM exceeds what is required by the Lanham Act, given that the PDSM was originally developed not for the purposes of quality control for franchisees, but in connection with actual construction projects undertaken by DIA's predecessor in interest. *See* Facts ¶ 33. The manual was later distributed to franchisees, a practice which DIA continued when it took control of the company. Id.

a theory of liability on which the United States does not rely. DIA's Mem. at 21-24. Citing numerous irrelevant cases, DIA insists, at length, that control of the type exercised by DIA has been held insufficient to make franchisors vicariously liable, under state law, for personal injuries suffered on the premises of individual franchise locations. *See* DIA's Mem. at 21-24 . But rulings by state courts on agency law in personal injury cases are not relevant to DIA's liability under the terms of a federal statute. The United States does not contend that DIA should be held vicariously liable — under agency law or any other law — for the actions of its franchisees. DIA's liability in this case arises from its own actions and inactions. Thus, unlike Hayman v. Ramada Inn, Inc., 357 S.E.2d 394, 397 (N.C. App. 1987), and the other cases cited by DIA, liability here does not depend upon the existence of an agency relationship. *See* DIA's Mem. at 21-23.

DIA also relies upon state law agency cases to define the term "operate," in the event that its reading of Neff is not adopted. DIA's Mem. at 20-23. But the cases cited by DIA make clear that they rest on policy choices that are embodied in state law[24] — not on the very different policies embodied in federal civil rights law. And, DIA has shown no basis whatsoever for concluding that Congress wished to afford some special protection to franchisors. To the

[24]That is, they recognize that there is a legitimate interest to be served by allowing franchisors to exercise some control over their franchisees, without making the franchisees, which are otherwise independent contractors, into the agents of the franchisors. *See, e.g.*, Cislaw v. Southland Corp., 4 Cal. App. 4th 1284, 6 Cal. Rptr. 2d 386, 391 (Cal. Ct. App. 1992) ("The cases, taken as a whole, implicitly recognize that the franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent."). What DIA does not explain, however, is why this policy judgment, embedded in state law, should be imported into the ADA.

contrary, Congress made clear that the purpose of the ADA 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), and to that end, Congress acted to "invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). There is simply no suggestion anywhere in the Act or its legislative history that Congress intended to carve out a special protection for franchisors, exempting them from the requirements placed on all other American businesses.[25] Moreover, it is well settled that, unless otherwise defined, words appearing in a statute are to be interpreted as having their ordinary, natural, or common meaning. *See*, *e.g.*, Smith v. United States, 508 U.S. 223, 228 (1993); Perrin v. United States, 444 U.S. 37, 42 (1979). Accordingly, the term "operate" must be given its ordinary meaning, not some meaning developed in a specialized line of cases dealing with another area of the law. And, under the ordinary, natural or

[25]Indeed, it is well established that federal, not state, law must define the contours of federal civil rights protections. As the Sixth Circuit observed, when confronted with an issue of whether state law of agency would govern a claim under the Fair Housing Act, "prior decisions in other areas of civil rights direct us to use federal — not state — law." Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974) (discussing prior cases). That Court went on to explain that

> [a]n examination of the [Fair Housing] Act reveals a broad legislative plan to eliminate all traces of discrimination within the housing field. To allow such a purpose to be controlled by state law might well defeat this objective. We believe that in such a situation this Court is not restricted by the law of the various states, and that it should apply federal law.

Id. (citation omitted).

common meaning of operates, the facts show beyond dispute that DIA operates the Champaign Days Inn.

III. CONCLUSION

For the reasons stated, the United States respectfully requests that this Court deny DIA's motion for summary judgment.

Respectfully submitted,

ISABELLE KATZ PINZLER
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
RENEE M. WOHLENHAUS, Acting Deputy Chief
Disability Rights Section
Civil Rights Division

_____
ROBERTA STINAR KIRKENDALL
JEANINE M. WORDEN
THOMAS M. CONTOIS
MARGARITA M. PRIETO
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
Post Office Box 66738
Washington, D.C. 20035-6738
(202) 307-0986

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