UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

United States of America,	)	
	)	
Plaintiff,	)	**Case No. 96-26**
	)	
v.	)	
	)	
Days Inns of America, Inc.,	)	
Hospitality Franchise Systems, Inc.,	)	
Hazard Management Group, Inc.,	)	
J. Douglas Kidd, and	)	
Napier-Sebastian Corporation.	)	
	)	
Defendants.	)	

PLAINTIFF UNITED STATES' MEMORANDUM
IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants Days Inns of America, Inc. and HFS Incorporated (collectively, "DIA")[1] operate a nationwide system of hotels called "Days Inns." Although Section 303 ("§ 303") of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12183, requires that all newly constructed hotels be readily accessible to, and usable by, individuals with disabilities, and although DIA plainly knew of this requirement, it is undisputed that many newly constructed Days Inns, including the Days Inn in Hazard, Kentucky, fail to comply with this law. DIA participated in the design and construction of these nonaccessible hotels and has profited from them, but argues that it should have no responsibility whatsoever under the ADA for its role in their design and construction. DIA asserts, instead, that only the local owner should be held liable:[2] that the national franchisor that established the design and construction requirements for these nonaccessible hotels, reviewed and approved the architectural plans for these nonaccessible hotels, and monitored and inspected the construction of these nonaccessible hotels should not. DIA asks the Court to exempt it from liability because: (1) franchisors are allegedly not covered by the new construction provisions of § 303, (2) imposing ADA liability on franchisors would allegedly be inconsistent with the legislative history of the ADA and allegedly makes no sense, (3) DIA allegedly does not control the operations of the Hazard Days Inn, or any other newly constructed Days Inn, and (4) DIA has allegedly

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[1]Because they are so closely related, DIA and HFS will be referred to collectively as "DIA," unless the context requires otherwise. In addition to being a wholly owned subsidiary of HFS, DIA and HFS have the same address, share office space, and file consolidated annual reports, financial statements, and tax returns. Deposition of William Keeble ("Keeble Dep."), Exh. 11, at 77-78; Consolidated Annual Report, Exh. 37; DIA's Financial Statements, Exhs. 38, 39. Moreover, DIA has no employees; all DIA functions are carried out by HFS employees. Keeble Dep., Exh. 11, at 30-35.

[2]In addition to filing suit against DIA, the United States also filed suit against the owner, Hazard Management Group, Inc.; the architect, J. Douglas Kidd, AIA; and the contractor, Napier-Sebastian Corporation. But the claims against the owner, architect, and contractor have been settled pursuant to a Consent Decree. Thus, the United States' only remaining claims are against DIA.

delegated the duty to comply with the ADA to its franchisees through the terms of its license agreements.

As the United States shows in this Memorandum and will show further in its motion for summary judgment,[3] the language of § 303 is broad, and Congress plainly did not intend liability under it to be limited to persons who own, lease, or operate a facility, as DIA contends. And, contrary to DIA's assertions, interpreting the ADA to cover franchisors makes more sense and is far more consistent with the ADA's legislative history and with Congress' stated goal of making all new construction accessible to persons with disabilities than DIA's narrow interpretation, which would exclude from coverage not only franchisors but also those who are most able to ensure ADA compliance -- e.g., architects and building contractors. In addition, notwithstanding DIA's protestations to the contrary, the undisputed facts show that DIA controls the operations of the Hazard Days Inn. Thus, even if DIA's limiting interpretation of § 303 were correct, DIA is nonetheless liable for ADA violations at the Hazard Days Inn and other newly constructed Days Inns because it controls the operations of those nonaccessible hotels. And, finally, DIA cannot escape liability under a federal civil rights law such as the ADA by delegating the duty to comply with the law to someone else. Thus, whether or not DIA looks to its franchisees to ensure that its newly constructed hotels comply with the requirements of § 303, DIA is nonetheless still liable for violations of § 303 that have occurred at newly constructed Days Inns.

[3]The United States intends to file a motion for summary judgment in this case within the next two weeks. Because of the unavailability of witnesses, conflicting schedules of counsel, and DIA's continued failure to identify witness locations, discovery in this action has not yet been completed, and the United States does not yet have all of the deposition transcripts on which it will rely.

COUNTERSTATEMENT OF THE CASE

A. The ADA Requires That All Newly Constructed Hotels Be Accessible to Persons with Disabilities.

The ADA was enacted in 1990 to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It is broad civil rights legislation: it makes discrimination against persons with disabilities illegal in employment, programs and services provided by state and local governments, transportation, telecommunications, and public accommodations and commercial facilities. In enacting the ADA, Congress specifically found that individuals with disabilities "continually encounter" discrimination in the form of architectural barriers to access. 42 U.S.C. § 12101(a)(5). To redress this type of discrimination, Congress required some barrier removal in existing places of public accommodation.[4] But for new buildings, Congress set more stringent requirements, mandating that all commercial facilities and public accommodations completed after January 26, 1993, be "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a). Congress intended strict compliance with these new construction requirements. As the legislative history makes clear,

> [t]he ADA is geared to the future -- the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63 (1990) (emphasis added). To achieve this goal, Congress required that all newly constructed facilities be designed and constructed according to architectural standards set by the Attorney General. 42 U.S.C. §§ 12183(a), 12186(b). These

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[4]Section 302(b)(2)(A)(iv) of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), only requires removal of architectural barriers to access in facilities built before the passage of the ADA only to the extent that removing such barriers is "readily achievable." "Readily achievable" is defined to mean "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). The statute also identifies factors to consider in determining whether barrier removal is readily achievable in a particular case. Id.

Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A (the "ADA Standards"), are incorporated into the Department of Justice's regulations implementing Title III of the ADA. They set many requirements for newly constructed hotels, including requirements applying to all areas of the hotel, from parking lots and exterior walkways to entrances, lobbies, interior stairs, corridors, and guest rooms.

B. The Hazard Days Inn and Other Newly Constructed Days Inns Are Not Accessible to Individuals with Disabilities.

It is uncontested that the Hazard Days Inn and thirteen other newly constructed Days Inns across the country fail to comply with the ADA Standards. See Report by Bill Hecker, AIA ("Hecker Report"),[5] Exh. 7; Deposition of Harold Kiewel, Exh. 15, at 9-11, 61. These hotels were designed and constructed with violations of the ADA Standards occurring in every area of the facility, from the parking lots, walkways, and entrances, to lobbies, other public and employee areas, guest rooms, and guest bathrooms. See Hecker Report, Exh. 7.

C. DIA and HFS Had Extensive Control Over, and Involvement in, the Design and Construction of these Nonaccessible Hotels.

As will be shown more fully in the United States' motion for summary judgment, DIA had extensive control over, and involvement in, the design and construction of the Hazard Days Inn and other newly constructed Days Inns that violate the ADA Standards. The license agreement (the "L.A.") covering the Hazard Days Inn gave DIA extensive control over the design and construction of that hotel. For instance, the L.A. set several design features of the hotel (e.g., number of rooms and parking spaces), set the dates by which hotel construction had to begin and end, and required

[5]Mr. Hecker is the United States expert on architectural matters. His report lists all of the ways in which the Hazard Days Inn and thirteen other Days Inn hotels fail to comply with the ADA Standards. Harold Kiewel, AIA, Defendants' expert on architectural matters, did not contest Mr. Hecker's findings relating to the nonaccessibility of the Hazard Days Inn or any of the other thirteen Days Inns that Mr. Hecker surveyed. Deposition of Harold Kiewel, AIA, Exh. 15, at 9-11, 61.

Hazard Management Group, Inc.[6] ("HMGI") to obtain DIA's approval of any delay in the construction schedule. L.A., Exh. 3, at ¶ 3, HAZ 1216-18, Schedule B at HAZ 1246, and Amendment to L.A. at HAZ 1252. The L.A. further required HMGI to prepare architectural plans for the hotel that conformed to Days Inn Design Standards -- hundreds of detailed design and construction requirements which are set forth in comprehensive detail in DIA's Planning and Design Standards Manual ("PDSM")[7] -- and required HMGI to submit its plans to DIA for DIA's review and approval before beginning construction. L.A., Exh. 3, at ¶ 3, at HAZ 1216-1217; PDSM, Exh. 4, at §§ 3.01 through 10.07. It also required HMGI to construct the hotel in accord with the plans approved by DIA, and to obtain DIA's written approval of any changes to those plans. L.A., Exh. 3, at HAZ 1216-1217. The L.A. further provided that DIA had the right to inspect the construction during the course of the project and after its completion for compliance with the approved construction plans and DIA Design Standards. Id. Under the L.A., DIA also reserved the right to require HMGI to make modifications specified by DIA prior to opening. Id. at HAZ 1217-18. Finally, the L.A. proscribed HMGI from opening and operating the hotel until after DIA certified that the hotel was acceptable to DIA. Id. DIA's control over the design and construction of the Hazard Days Inn, as reflected in the L.A., is typical of its control over the design and construction of other newly constructed Days Inns. See DIA's standard form of license agreement, Exh. 2, at ¶ 3, at DIA 246-47, 274.

In addition to the control over the design and construction of the Hazard Days Inn that DIA reserved to itself in the L.A., DIA involved itself in the project in a variety of other ways as well.

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[6]HMGI is the licensee, and owner, of the Hazard Days Inn.

[7]The PDSM contains Design Standards that comprehensively address the design and construction of all areas of the hotel, including Design Standards for barrier free rooms for persons with disabilities that are inconsistent with the ADA Standards. See Keiwel, Exh. 15, at 163; Zelazny, Exh. 16 , at 194.

Among other things, Mike Burgess, a DIA Franchise Sales Manager, selected the site on which the Hazard Days Inn was constructed.[8] Mr. Burgess then introduced the owner of the site to Wilgus Napier, a principal of a general contracting firm, who had constructed other Days Inn hotels and who operated a Days Inn in Berea, Kentucky. Deposition of Wilgus Napier, Exh. 8, at 70; Burgess Dep., Exh. 44, at ___. The plans that Mr. Napier used to construct the Hazard Days Inn had previously been used to construct the Berea Days Inn and were purchased from a DIA broker. Napier Dep., Exh. 8, at 30-31, 37-39, 48; Deposition of J. Douglas Kidd, AIA, Exh.9, at 42-43. Before construction of the Hazard Days Inn began, DIA reviewed and approved the architectural plans for the hotel, annotating the plans with recommended changes relating to compliance with DIA's Design Standards, compliance with a safety requirement of a model building code, compliance with industry standards for lamps, and an accessibility requirement for a public toilet room[9]. The contractor incorporated DIA's revisions to the architectural plans into the construction of the hotel. Napier Dep., Exh. 8, at 55-56. Once construction was completed but before the hotel opened, a DIA representative toured the property, inspecting the exterior and interior of the hotel. Deposition of James Stansburry, Exh. 13, at 71-72, 107-111; Recap of Property Training at Hazard Days Inn, Exh. 23. Since then, DIA has inspected the property at least three times a year as part of its Quality Assurance ("QA") program. Keeble Dep., Exh. 11, at 297; QA Forms for the Hazard Days Inn, Exh. 40. Among other things, the QA inspections check for compliance with the Days

[8]Mr. Burgess testified to this fact at his deposition, but the United States could not obtain the transcript prior to filing this brief. Thus, the United States will supplement this brief with the appropriate references to, and excerpts from, the transcript promptly after it is received. In the interim, citations to Mr. Burgess' testimony will be in the form Burgess Dep., Exh. 44, at ___.

[9]Napier Dep., Exh. 8, at 48-56; Deposition of Richard Tischler, Exh. 17, at 122-129; Architectural Plans of Hazard Days Inn with Changes Annotated by DIA, Exh. 43.

Inn Design Standards, including some accessibility requirements.[10] DIA's involvement in the design and construction of the Hazard Days Inn is typical of its involvement in the design and construction of other Days Inns.[11]

D. DIA Controls the Operations of the Hazard Days Inn and Other Newly Constructed Hotels in the Days Inn System.

As will be shown more fully in the United States' motion for summary judgment, DIA also controls the operations of the Hazard Days Inn and other newly constructed hotels in the Days Inn system. The L.A. provides that the Hazard Days Inn must be operated in accordance with DIA's System Standards. L.A., Exh. 3, at ¶ 5, at 1280, ¶16(c), at 1228; Keeble Dep., Exh. 11, at 126-129. And, DIA sets thousands of detailed System Standards governing the operation of the Hazard Days Inn in its System Standards Manuals and other manuals.[12] The System Standards apply to all aspects of hotel operations, such as the times that the front desk must remain open, the forms of payment that the hotel must accept, the number of matches that a Days Inn franchisee must place in the ashtray of a guest room; the weight, fiber content, dimension, and permissible shrinkage for towels; and the number and types of hangers kept in the closet of each guest room.. OPM, Exh. 5, Appendix B, at 14, 16, 51-52. To ensure compliance with System Standards, DIA provided training on them to the general manager and certain staff of the Hazard Days Inn and reserved the right in the L.A. to enforce its System Standards by conducting QA inspections of the Hazard Days Inn -- a

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[10]Stansburry Dep., Exh. 13, at 50-52, 71-72, 107-111; Courchene Dep., Exh. 14, at 67.

[11]The architectural plans that were adapted for the Hazard Days Inn were purchased from a DIA broker, but DIA also issues prototype plans that its franchisees can give to their architects to short-cut the design process and make it less expensive. Burgess Dep., Exh. 44, at ___; Tischler Dep., Exh. 17, at 505.

[12]Keeble Dep., Exh. 11, at 73-75; Napier Dep., Exh. 8, at 87-98; PDSM, Exh. 4, §1.02.A, at 7; Operating Policies Manual ("OPM"), Exh. 5, at 3-4, 103; Standards of Operation and Design Manual, Exh. 6, at §100.00; Day to Day with QA, Exh. 25, at 36,47-65, 67-92.

right that DIA exercises at least three times each year.[13] If HMGI does not comply with DIA's System Standards, including QA system requirements, DIA has the right under the L.A. to remove the Hazard Days Inn from DIA's central reservations system or to terminate the L.A. and force HMGI to close the Hazard Days Inn. L.A., Exh. 3, at ¶ 10, at HAZ 1222, at ¶ 19, at HAZ 1231; Keeble Dep., Exh.11, at 292-294; Napier Dep., Exh.8, at 96-98. See also 1993 Uniform Franchise Offering Circular ("UFOC"), Exh. 1, at 46 (identifying number of hotels terminated from DIA system for failure to comply with QA standards). If a QA inspection reveals that alterations are needed to the hotel's design and construction, DIA has the right under the L.A. to require HMGI to make those modifications. L.A., Exh. 3, at ¶ 16(d), at HAZ 1229. Thus, DIA exercises control over the operations of the Hazard Days Inn, through the L.A., through its System Standards, and through its training and QA programs.

DIA controls the operations of the Hazard Days Inn in other ways as well: it operates a national reservations system that accounts for 25-30% of the bookings at the hotel; it operates a centralized system for responding to guest complaints; it approves the suppliers that HMGI can use to purchase certain products; and it implements national marketing programs in which the Hazard Days Inn must participate. Keeble Dep., Exh. 11, at 179-180; L.A., Exh. 3, at ¶ 10, at HAZ 1222, ¶ 11, at 1223-1224, at ¶ 15, at 1227-1228; OPM, Exh. 5, at 14-15, 25, 103; Napier Dep., Exh. 8, at 149-152. This control that DIA exercises over the operations of the Hazard Days Inn is typical of the control that DIA exercises over the operations of other newly constructed Days Inns.[14]

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[13]L.A., Exh. 3, at ;¶ 5(b), at HAZ 1220, ¶ 12, at 24-25; OPM, Exh. 5, at 45; Napier Dep., Exh. 8, at 96-98; Keeble Dep., Exh. 11, at 297; Courchene Dep., Exh. 14, at 30, 54; Deposition of Mark Merriman, Exh. 20, at 27-28.

[14]See Standard License Agreement, Exh. 2, at ¶ 10, at 7-8, at ¶ 11, at 8-9, at ¶ 15, at 12-13; OPM, Exh. 5, at 14-15, 25, 103; Keeble Dep., Exh. 11, at 179-180.

ARGUMENT

A. Section 303 of the ADA Is a Broad Prohibition of the Design and Construction of Public Accommodations and Commercial Facilities That Are Not Accessible to Individuals with Disabilities.

Section 303 prohibits discrimination against individuals with disabilities in the design and construction of public accommodations and commercial facilities. It provides:

> § 303. New Construction and Alterations in Public Accommodations and Commercial Facilities.
>
> (a) Application of Term. Except as provided in subsection (b),[15] as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) of this title includes (1) a failure to design and construct facilities for first occupancy later than [January 26, 1993], that are readily accessible to and usable by individuals with disabilities....

42 U.S.C. § 12183(a). Section 303 defines a discriminatory activity -- the design and construction of inaccessible facilities -- and makes it illegal to engage in that activity. It does not contain any limitation on the parties who may be held liable under its terms. Thus, any party who engages, or is involved, in the design and construction of an inaccessible public accommodation or commercial facility has performed an illegal activity, and violates § 303 of the ADA.

Liability under § 303 is broad but not unlimited. It depends on the facts of each case. In particular, liability under § 303 depends on three factual inquiries: (1) whether the facility in question is readily accessible to and usable by individuals with disabilities; (2) whether the party in question participated in the design and construction of that facility; and (3) whether the party's participation included participation in the design and construction of some portion of the facility that

[15] Subsection (b) contains certain limitations on requirements for elevators.

fails to comply with the ADA Standards. Put differently, the scope of a party's responsibility under § 303 is commensurate with the scope of that party's involvement in the design and construction of the facility.[16] Thus, a plumbing subcontractor whose work was limited to a facility's toilet room would be liable only for violations of ADA Standards occurring within the scope of its involvement (i.e., in the toilet room) -- not for violations in the hotel's parking lot. By contrast, a contractor who paved a hotel parking lot might be liable for violations of the ADA Standards in the parking lot, but not those in the hotel toilet room.

DIA contends that the test for liability under § 303 is "so amorphous as to be no test at all."[17] But the test is not amorphous -- it is a very concrete test that is based on an entity's actual involvement in the design and construction of a facility. When the facts of a particular case are considered, the test for liability under § 303 is definite and easy to apply.

B. Liability Under Section 303 Is Not Limited to Owners, Lessors, Lessees, and Operators of Public Accommodations and Commercial Facilities.

In addition to § 303's new construction requirements, title III of the ADA also contains a general rule prohibiting discrimination by public accommodations, which is contained in § 302 of the ADA. It provides:

> § 302. Prohibition of Discrimination by Public Accommodations.
>
> (a) General Rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

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[16] As the Department of Justice explained in the deposition taken by DIA under Fed. R. Civ. P. 30(b)(6), "[y]our liability is coextensive with the scope of your involvement and participation." Deposition of Elizabeth Savage, Exh. 21, at 81. See also id. at 103 ("The test [under section 303] is that you are involved in the design and construction and that your liability is coextensive with the extent of your involvement.")

[17] See Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 20.

42 U.S.C. § 12182. Thus, liability for violation of Section 302 is limited to "any person who owns, leases (or leases to), or operates a place of public accommodation." Id.

Unlike § 302, § 303 does not contain any language limiting liability to persons who own, lease (lease to), or operate a place of public accommodation. But § 303 does contain a reference to § 302(a), and DIA contends that this reference is intended to identify who is liable under § 303 much in the same way as Congress identified who is liable under § 302 -- i.e., by restricting liability to "any person who owns, leases (or leases to), or operates a place of public accommodation" or commercial facility. But a limitation of that kind would be inconsistent with the language and structure of the statute and with Congress' stated intent in enacting § 303.

1. The Scope of § 303 is Broader, and Was Intended to Be Broader, Than the Scope of § 302.

Unlike § 302, which applies only to public accommodations, § 303 applies to two types of facilities: "public accommodations" and "commercial facilities." 42 U.S.C. § 12183(a). The ADA defines "public accommodations" as entities (1) whose operations affect commerce, and (2) that fall into one or more of twelve categories of public accommodations set out in the Act. 42 U.S.C. § 12181(7). This is a broad definition that includes hotels, bars, restaurants, stadiums, theaters, shopping malls, doctors' and lawyers' offices, museums, zoos, and many other facilities that provide goods or services to the public.

Although "public accommodations" has been defined broadly in the ADA, the term "commercial facilities has been given a still broader definition. "Commercial facilities" are all facilities intended for non-residential use whose operations affect commerce. 42 U.S.C.

§ 12181(2).[18] While "commercial facilities" obviously include many facilities that are "public accommodations,"[19] they also include many facilities that are not "public accommodations," such as factories, warehouses, many office buildings, and other buildings in which employment may occur. Congress chose this expansive coverage of commercial facilities deliberately. Lawmakers recognized that even though employees at commercial facilities would be protected by title I of the ADA, 42 U.S.C. §§ 12111-12117 (which requires private employers to make reasonable accommodations for employees with disabilities), it nonetheless made sense to impose a blanket requirement for architectural accessibility on facilities that were potential places of employment, but were not places of public accommodation. As the House Committee on Education and Labor stated,

> [t]o the extent that new facilities are built in a manner that make(s)them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodation to particular employees.

H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. 117 (1990).

Because § 303 expressly applies to commercial facilities in addition to places of public accommodation, it would plainly be inconsistent with the language of § 303 to incorporate language from § 302 that limits liability to "any person who owns, leases (or leases to), or operates a place of public accommodation." Under such a reading, the only people who could be held liable for design and construction violations of commercial facilities would be those who own, lease, or operate public accommodations. Thus, for all commercial facilities that are not places of public

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[18]Excepted from the definition of commercial facilities are aircraft, certain railroad facilities and equipment, and certain facilities covered or exempted from coverage under the Fair Housing Act. 42 U.S.C. § 12181(2).

[19]The Hazard Days Inn, for instance, is a non-residential facility whose operations affect commerce, and thus is a "commercial facility." In addition, the hotel is a "public accommodation," as it falls within one of the statute's categories of public accommodation: it is "an inn, hotel, motel, or other place of lodging," within the meaning of section 301(7)(A). See 42 U.S.C. §§ 12181(7)(A).

accommodation -- e.g., factories, warehouses, and many office buildings -- no one would meet this definition and, consequently, no one could be held accountable for ADA violations at those facilities. Such a result contradicts the language of § 303 that explicitly includes "commercial facilities" within the scope of the new construction requirements as well as Congress' stated intention of ensuring that all new commercial facilities be covered by the ADA's requirements for new construction. As the report of the House Committee on Education and Labor explains:

> In many situations, the new construction will be covered as a "public accommodation," because in many situations it will already be known for what business the facility will be used. The Act also includes, however, the phrase "commercial facilities," to ensure that all newly constructed commercial facilities will be constructed in an accessible manner. That is, the use of the term "commercial facilities" is designed to cover those structures that are not included within the specific definition of "public accommodation."

H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. 116 (1990) (emphasis in original).

A House Judiciary Committee amendment moving the requirement for accessible alterations from § 302 to § 303 provides further evidence that Congress intended §303 to have a broader scope of coverage than § 302. As the Committee Report explains:

> [t]he Committee adopted an amendment to move the section governing alterations for existing facilities from Section 302(b)(2)(vi), which only covered public accommodations, to Section 303 which covers both public accommodations and commercial facilities..... If a business is going to build a new building or engage in alterations, the access requirements apply.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63 (emphasis added).[20] The Committee clearly understood that § 303 covered a wider universe than § 302 and wanted to ensure that the requirements for alterations, like those for new construction, applied to the many office buildings,

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[20]The section in question became § 303(a)(2), which defines illegal discrimination to include a failure, when altering a facility or portion of a facility, to make those alterations in a manner that the altered portions of the facility are readily accessible to and usable by individuals with disabilities. 42 U.S.C. § 12183(a)(2).

factories, warehouses, and other potential places of employment that are not covered by § 302. As the Committee noted,

> if alterations were not included in Section 303, governing commercial facilities, the anomalous situation could arise of a new accessible building being renovated to include barriers to access.

Id.

Thus, contrary to DIA's assertions, 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.[21] Accordingly, the reading of § 303's reference to § 302(a) that is most consistent with the language of the statute and congressional intent is that § 303 refers to § 302(a) for the sole purpose of indicating that the failure to design and construct accessible facilities constitutes another type of "discrimination on the basis of disability," and not to identify the parties that may be held liable under § 303. Unlike DIA's proposed interpretation of § 303, this interpretation gives full effect to all of the terms of the provision.[22] See Moskal v. United States, 498 U.S. 103, 109-10 (1990) (courts should interpret statutes in a manner

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[21]By including the term "design" in § 303, Congress made clear that § 303 would cover persons who design the facility -- not just those who own, operate, or lease it. If owners, operators, lessors, and lessees were the only parties to be covered, Congress could have omitted the word "design" from § 303 and addressed only the end result by making it illegal to simply "construct" inaccessible facilities. Indeed, Congress took that approach in § 226 of the ADA, 42 U.S.C. § 12146, which provides that "it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services, unless that facility is readily accessible to and usable by individuals with disabilities...." By including the design function in the prohibited conduct, Congress deliberately extended § 303's coverage to extend not only to those parties who are ultimately responsible for the construction of new facilities, but also to those who design them -- architects, engineers, interior designers, and all other parties who design facilities. Thus, limiting § 303 to those persons who own, lease (lease to), or operate a facility, as DIA suggests, would nullify coverage expressly marked out by Congress.

[22]DIA does not explain why incorporating the language of § 302 which applies only to places of public accommodation would also limit liability to those who own, lease, or operate commercial facilities. No doubt the answer lies in the fact that the Hazard Days Inn is a commercial facility as well as a place of public accommodation. Thus, if the limiting language that DIA seeks to import into § 303 did not limit liability to those who own, lease, or operate commercial facilities as well as public accommodations, DIA would still be liable.

that gives effect to every clause and word of the statute) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955) (same)).[23]

2. Limiting § 303's Coverage to Persons Who Own, Lease, or Operate a Facility Would Frustrate Congress' Purpose in Enacting the ADA.

Under well-established canons of statutory construction, in addition to examining the text of the statute, the Court must also look to the statute's remedial purposes and construe the text in a way that will allow it to achieve those purposes.[24] Limiting the coverage of § 303 as DIA suggests would greatly diminish § 303's effectiveness in achieving Congress' stated purpose of ensuring that all new facilities are designed and constructed to be accessible, and result instead in a great many more inaccessible buildings.

To be fully effective, the ADA's new construction obligation must apply not only to the parties who own, lease, or operate the facility in question, but also to all of the parties involved in its design and construction. If all parties who engage in the illegal activity -- the design and construction of inaccessible buildings -- are held liable for doing so, the level of compliance with the statute will be considerably higher than it would be if only some of those parties are held

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[23]Moreover, limiting § 303 coverage to those parties identified in § 302 makes no sense from a practical perspective. Parties who own, operate, or lease public accommodations are the obvious choice for the obligations related to the day to day operation of existing businesses imposed by § 302. But parties who lease or operate a facility frequently will have nothing whatsoever to do with the initial design and construction of the facility. Indeed, it is not at all clear how one would identify who it is that "operates"a facility that has not yet been built.

[24]See Peyton v. Rowe, 391 U.S. 54, 65 (1968) (civil rights legislation should be liberally construed in order to effectuate its remedial purpose); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"). "[R]emedial statutes are to be liberally construed to effectuate their purposes." Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 n.54 (D.C. Cir. 1984). *See also* Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 18 (1st Cir. 1994) (broadly construing the ADA); Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (same), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994) (same).

accountable.[25] And Congress certainly did not wish to create a scheme under which compliance will be achieved only as a result of costly litigation. Such a scheme would burden not just individuals with disabilities and the courts, but the rest of society as well, when construction is halted, or a facility is shut down, for the purpose of retrofitting it to comply with ADA Standards.

The intent of the statute cannot be fully realized unless it is read the way Congress drafted it: § 303 simply identifies a prohibited activity without limiting those parties who may be held liable for engaging in it. Thus, there are incentives for all people who are involved in the design and construction of a new building -- e.g., owners, architects, engineers, interior designers, builders, and franchisors -- to ensure that it complies with ADA Standards.

Indeed, Congress has used the same approach to redress discrimination in other civil rights statutes. Congress has not placed responsibility on only some of the parties engaged in the activity in question; instead, it has crafted statutes more broadly to prohibit discriminatory conduct by all parties involved. Put differently, it is a basic tenet of our civil rights law that one party is not free to discriminate just because another party somewhere down the line may be held liable for that

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[25]For instance, if liability under § 303 is limited to those who own, operate, or lease facilities, an owner could decide to erect a building that is not accessible to persons with disabilities and likely find an architect and contractor who were willing to do so. Neither the architect nor the contractor would have a strong incentive to refuse, since they would have no liability under the ADA and no liability to the owner because they were following the owner's instructions. Thus, a limiting reading of § 303 would permit more inaccessible buildings to be built, and accessibility of those buildings could only be achieved through lawsuits to compel compliance. Such a result is clearly not what Congress intended. Congress recognized that it is far easier and less expensive to incorporate accessible features into a building from the beginning than to go back later and retrofit the facility after construction is complete:

> Because retrofitting existing structures to make them fully accessible is costly, a far lower standard of accessibility has been adopted for existing structures -- a standard of "readily achievable." Because it costs far less to incorporate accessible design into the planning and constructing of new buildings and of alterations, a higher standard of "readily accessible to and usable by" person with disabilities has been adopted in the ADA for new construction and alterations.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 60 (1990).

discrimination. For example, the Fair Housing Act makes a variety of activities illegal without limiting the parties who may be held responsible for engaging in them.[26] Indeed, § 303 of the ADA mirrors a provision in § 804 of the Fair Housing Act, a provision which identifies an illegal activity -- the design and construction of inaccessible housing facilities -- but does not specify or limit the parties that may be held liable for it.[27] In modeling § 303 of the ADA on § 804(f)(3)(C) of the Fair Housing Act, Congress clearly chose to approach the design and construction of inaccessible public accommodations and commercial facilities in the same way that it had approached the design and construction of inaccessible housing facilities: it has simply specified an illegal activity -- the design and construction of inaccessible facilities -- but has not limited that prohibition to allow some parties, but not others, to discriminate in that way. Since Congress specifically "invoked the sweep of its authority" to establish a "clear and comprehensive national mandate" to eliminate discrimination against individuals with disabilities when it enacted the ADA, it is not surprising that Congress chose to draft § 303 so broadly.

3. DIA's Account of the Legislative History of § 302 and § 303 Is Misleading.

DIA suggests that § 303 should be read to incorporate limiting language from § 302 because, at an early stage of the drafting process, the nondiscrimination requirements of § 302 and § 303

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[26] See Robert G. Schwemm, Housing Discrimination Law and Litigation § 12.3(1) at 12-22 (1990 and Supp. 1995) (Fair Housing Act provisions "simply declare certain housing practices to be unlawful without specifying who may be held responsible for these practices. Thus, anyone who commits one of the acts proscribed by the statute's substantive provisions is liable to suit," unless specifically exempted).

[27] Section 804(f)(3)(C) of the Fair Housing Act provides that

> For purposes of this subsection, discrimination includes -- in connection with the design and construction of covered multifamily dwellings for first occupancy after [March 13, 1991], a failure to design and construct those dwellings in such a manner that -- the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons . . . .

42 U.S.C. § 3604(f)(3)(C).

were both contained in one section. But DIA's tortured tracing of the legislative history fails to highlight for the Court that Congress intentionally separated § 302 and § 303 to retain broad coverage in § 303 while limiting the coverage of § 302.

In early versions of the ADA, the accessibility requirements for existing facilities that are now in § 302 and the accessibility requirements for new construction that are now in § 303 were included in what was then § 402. Section 402 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." But, 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). Although DIA fails to highlight it for the Court, at the time that the precursors to §§ 302 and 303 were together in § 402, neither bill contained any language specifying that only the owners, operators, lessors, or lessees of the covered facilities could be held liable for violations.

When the legislation was amended later that year, the obligations for existing facilities were left in § 302 of the bill,[28] but the requirements for new construction were moved to a new section -- i.e., § 303. See S. Rep. 116, 101st Cong., 1st Sess. 58-60, 68-69 (1989). At the same time, Congress limited the coverage of § 302 by removing "potential places of employment" from the definition of "places of public accommodation." Id. at 58-59. By contrast, new § 303 was made applicable to both places of public accommodation (as redefined) and potential places of

[28]Section 402 was renumbered to § 302.

employment. Id. at 68-69. However, there was still no language in § 302 or § 303 specifying the parties who would be liable for violations.

It was not until the next year, 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. The change in the language of § 302 was specifically intended to clarify that the parties covered by § 302 were not only those who operated public accommodations, but also those who owned and leased them. As the House Committee on the Judiciary explained:

> 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, operates, or leases language was added to limit coverage of § 302 to places of public accommodation, § 303 was also amended. Its coverage, which previously had included public accommodations and "potential places of employment," was redefined to include public accommodations and "commercial facilities,"[29] expressly rejecting the limitations imposed on § 302. Moreover, unlike §302, no language was added to § 303 to indicate that those

[29]The legislative history is clear that the change from "potential places of employment" to "commercial facilities" was made solely for the purpose of avoiding any confusion with the provisions of title I of the ADA, which prohibits discrimination in employment. The two terms were intended to have the same meaning. See H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 53 (1990).

who own, operate or lease the facilities in question were the only parties who were accountable under § 303. Certainly, if Congress had wished to specify the parties covered by § 303 in the same manner that it specified the parties covered by § 302, it could have done so at the same time that it "clarified" and limited the coverage of § 302. Indeed, Congress made another amendment showing that it intended coverage under § 302 and § 303 to differ. As the House Judiciary Committee report explains,

> [t]he Committee adopted an amendment to move the section governing alterations for existing facilities from Section 302(b)(2)(vi), which only covered public accommodations, to Section 303 which covers both public accommodations and commercial facilities.

Id. at 63.[30] In sum, contrary to DIA's assertions, there can be little question that Congress deliberately chose to draft § 302 and § 303 differently. Thus, the Court should not adopt DIA's revisionist view of legislative history and impose limitations on § 303 that Congress chose not to include.

4. Two Other Courts Have Addressed the Scope of § 303 and Reached Opposite Conclusions.

Two federal district courts have considered the proper scope of § 303's coverage and come to different conclusions. The first case addressing the issue was Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1 (D.D.C. 1996). In PVA, the court dismissed § 303 claims against the architectural firm that designed an arena on the grounds that § 303's reference to § 302 limits the parties responsible for complying with § 303 to those who own, lease, or operate the facility. But the PVA opinion is not persuasive. Its central flaw is that it does not explain why § 303, which plainly applies to public accommodations and commercial facilities,

[30]The section in question became section 303(a)(2), which defines illegal discrimination to include a failure, when altering a facility or portion of a facility, to make those alterations in a manner that the altered portions of the facility are readily accessible to and usable by individuals with disabilities. 42 U.S.C. § 12183(a)(2).

should be limited to parties who own, lease, or operate public accommodations. Rather, the court simply states that "the limitation in § 302 to owners, operators, and lessors also applies to § 303 and thereby excludes architects . . . ." Id. at 2. But since § 302 applies only to owners, operators, and lessors of public accommodations and not to commercial facilities at all, this analysis leads to the patently incorrect result of virtually eliminating coverage of strictly commercial facilities from the ADA's new construction requirements.

In addition, the PVA court erred when it assumed, without explanation, that the aims of the statute could effectively be achieved even if owners of new facilities were the only ones responsible for ADA compliance. Id. As discussed above, however, limiting the scope of § 303 to owners, operators, lessors and lessees of public accommodations would mean that the aims of § 303 would only be achieved as a result of a multitude of legal actions to compel retrofitting of facilities designed and constructed to be accessible -- which, as previously noted, was a prospect Congress intended to avoid.

Much more persuasive is the ruling of the court in Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175 (S.D. Fla. 1997), another action alleging that architects were violating § 303 by designing a new arena to be inaccessible to individuals with disabilities. Again, the architects moved to dismiss the § 303 claims on grounds that they did not own, operate, or lease the facility. The Johanson court recognized that if the reading advanced by the architects were correct, coverage of commercial facilities would effectively be eliminated from § 303. The court noted that, under a reading that limited liability to persons who own, lease, or operate a facility, "it is conceivable that

no entity would be liable for construction of a new commercial facility which violates the ADA." Id. at 1178. Accordingly, the Johanson court denied the architects' motion to dismiss.[31]

Thus, the Court should reject the approach taken by the PVA court, which is advanced by DIA, and follow the lead of the Johanson court instead, since it is more consistent with the language of the statute, the legislative history of the statute, and Congress' express intent of ensuring that all new buildings are accessible.

5. The Department of Justice's Interpretation of Section 303 Is Entitled To Deference.

At the same time as it suggests that its reading of § 303 is compelled by the "plain language" of the statute,[32] DIA also attempts to avoid the "plain language" of the statute. DIA passes over the fact that the language it would like to incorporate into § 303 (i.e., person who owns, leases (or leases to), or operates a place of public accommodation or commercial facility) is not the actual language of § 302 (i.e., "person who owns, leases (or leases to), or operates a place of public accommodation"). Simply stated, the language that DIA wishes to import into § 303 from § 302 contains no references to commercial facilities or to the persons who own, operate, or lease them. DIA suggests that the language of § 302(a) should not be read as written, but that it should be modified so as "to apply Section 303 only to parties who own, operate, or lease a covered facility." Id. at 15. Later, DIA suggests that what § 302(a) really means is that the parties who are covered are the "owners, lessors, and lessees of the physical location, in addition to operators." Id. at 18. DIA thus attempts to convince the Court to adopt its interpretation of § 303 by twisting the "plain language" of § 302 to include additional parties.

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[31]The Johanson case is still pending in the United States District Court for the Southern District of Florida.

[32]DIA's Memorandum at 9-10, 14.

DIA's approach to statutory interpretation implicitly suggests that the language of § 303 is ambiguous.[33] Indeed, since § 303 itself does not identify who the responsible parties are, and since the limitation on responsible parties contained in § 302 is incompatible with the express language of § 303, one might argue that the language of the statute itself does not clearly answer the question of who is responsible for compliance with § 303. In such a case, of course, the interpretation of the statute by the agency entrusted with enforcement of the statute is entitled to substantial deference. 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"); Teichman v. Espy, ___ F.3d ___, No. 95-2168, 1997 WL 458680 (6th Cir. Aug. 13, 1997) (holding that where a statute is silent or ambiguous on a given issue, "'[a]n agency's interpretation of a statutory scheme that it is entrusted to administer is entitled to a degree of deference,' ... and we will uphold that construction if it is reasonable.")(quoting Gallagher v. Croghan Colonial Bank, 89 F.3d 275, 277 (6th Cir. 1996, and citing to Chevron, supra).

As the agency charged with enforcing title III of the ADA, the Department of Justice has taken the position that all parties involved in the design and construction of new facilities must conform their involvement, whatever its scope, to the requirements of § 303, and that the parties who can be held accountable for violations of § 303 are not limited to owners, lessors, lessees, or operators of the facility. See, e.g., U.S. Department of Justice, Civil Rights Division, Public Access Section, The Americans with Disabilities Act Title III Technical Assistance Manual, Covering

[33]Indeed, the Supreme Court has noted that when two courts construe a statute differently -- such as PVA and Johanson -- it is difficult to say that a statute is not ambiguous. Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1732-33 (1996).

Public Accommodations and Commercial Facilities, November 1993, § III-5.1000 at 46.[34] Thus, the Department's interpretation of § 303 is entitled to substantial deference in this Court.

Accordingly, the Court should resist DIA's urgings to the contrary and rule that liability under § 303 is not limited to those who own, lease (or lease to), or operate facilities. It should hold, instead, that all parties that are involved in the design and construction of a place of public accommodation or commercial facility are responsible for complying with § 303 and, thus, are liable for violating § 303 if they fail to do so. Finally, the Court should deny DIA's motion for summary judgment, since the undisputed facts show that DIA was involved in the design and construction of the Hazard Days Inn and other Days Inns that are not accessible to individuals with disabilities.

C. Even if § 303 Were Limited as DIA Suggests, DIA Is Still Liable Because It Operates the Hazard Days Inn and Other Newly Constructed Days Inns.

Even if liability under § 303 were limited to the parties identified in § 302, which it is not, DIA is still liable for violating § 303 of the ADA. Given the degree of control that it exercises over all aspects of the operation of the hotels in the Days Inn System, including the Hazard Days Inn, DIA plainly "operates" those hotels within the meaning of § 302.

1. Contrary to DIA's Assertions, Neff v. American Dairy Queen Does Not Require a Showing of Causation.

Despite overwhelming evidence that DIA operates the Hazard Days Inn and other hotels in the Days Inn system, DIA mistakenly relies on Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), cert. denied, 116 S. Ct. 704 (1996), to support its argument that this Court should nonetheless hold that DIA does not operate those hotels. DIA contends that, under Neff, a party

[34]In addition to including this interpretation of § 303 in its Technical Assistance Manual, the Department has also consistently taken this legal position in briefs filed in other lawsuits, e.g., PVA, Huizenga, supra.

cannot be liable under § 302 as an operator of a facility unless that party caused the ADA violations that are at issue.[35] But DIA has mischaracterized the Neff holding.

In Neff, the plaintiff alleged that two Dairy Queen restaurants constructed before passage of the ADA had violated § 302(b) of the ADA by failing to remove architectural barriers to access in an existing facility where barrier removal was readily achievable. Id. at 1064. The plaintiff argued that the franchisor, American Dairy Queen ("ADQ"), "operated" the restaurants, and should therefore be held liable for the restaurants' failures to remove the barriers. Id. at 1065. Concluding from the facts of that case that ADQ had minimal control over the removal of structural barriers, the Fifth Circuit held that ADQ did not operate a place of public accommodation within the meaning of § 302 because it did not have control over barrier removal. Id. at 1066-69 (holding that "the relevant question" in determining whether ADQ operates at the Dairy Queen restaurants is whether ADQ "controls modification of the [restaurants]"). Although the Fifth Circuit noted that ADQ had not caused the ADA violations at issue by refusing to permit its franchisees to remove barriers to accessibility, id. at 1069 n.13, it did not hold that the plaintiff was required to establish causation in order to establish that the franchisor was an operator under § 302. Neff simply required a showing that the franchisor controlled modifications to the facility -- i.e., that the franchisee had control over the discriminatory conduct at issue in the case.[36] Thus, under the Neff test, DIA operates the Hazard

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[35]See Defendants' Supplemental Memorandum of Law in Support of Motion for Summary Judgment ("Def. Supp. Mem.") at 5-9.

[36]Even if DIA's interpretation of Neff were correct, and a showing of causation were required to establish that DIA operates the Hazard Days Inn, the United States has made that showing. The undisputed facts show that DIA caused the Hazard Days Inn to be inaccessible: its broker sold plans for an inaccessible hotel to Mr. Napier; it failed to correct violations of the ADA Standards when it reviewed and approved the plans for the Hazard Days Inn; it failed to require HMGI to correct violations of the ADA Standards prior to allowing the Hazard Days Inn to open for business; and it permitted the Hazard Days Inn to continue operations without making modifications to eliminate violations of the ADA Standards even though it had the authority under the L.A. to require HMGI to make the modifications required to make the Hazard Days Inn accessible.

Days Inn for the purposes of § 303 if DIA had control over the discriminatory activity at issue under § 303 -- i.e., the design and construction of the Hazard Days Inn and other newly constructed Days Inns that do not comply with the ADA Standards. DIA meets that test.

2. Under the Neff Test, DIA Operates the Hazard Days Inn.

As is shown in Section A of the Argument, and as the United States will show in more detail in its motion for summary judgment, the undisputed facts show that DIA exercised extensive control over the design and construction of the Hazard Days Inn and the other hotels in its system. DIA selected the site for the Hazard Days Inn, and referred the owner of the site to a contractor who was experienced in constructing and operating other Days Inns. A DIA broker sold the contractor the architectural plans that were adapted to construct the Hazard Days Inn. DIA reviewed the plans before construction of the Hazard Days Inn began and made changes to them, including changes to an accessibility feature of the hotel. The changes that DIA made were incorporated into the design and construction of the Hazard Days Inn. DIA inspected the Hazard Days Inn before it opened for business and had the authority to prevent the Hazard Days Inn from opening for business for failure to comply with DIA's Design Standards or failure to comply with federal laws. And, DIA has the authority under the L.A. to require HMGI to make modifications to the Hazard Days Inn and can remove the Hazard Days Inn from the reservations system, terminate the L.A., and compel the Hazard Days Inn to cease doing business under the Days Inn name if HMGI does not make those modifications. Thus, under the Neff test, DIA plainly operates the Hazard Days Inn for the purposes of § 303 because DIA exercised extensive control over the design, construction, and modification of the Hazard Days Inn, as it does for every newly constructed Days Inn.

3. Neff Was Wrongly Decided.

Even though the United States has shown that DIA operates the Hazard Days Inn for purposes of § 303 under the test established by the Fifth Circuit in Neff, there is a major flaw in the reasoning of the Neff opinion. In deciding what the term "operate" means, the Fifth Circuit focused solely on the question of who has the power or control over the ability to remove architectural barriers, rather than the more general question of who has significant power or control over the operations of the facility. In doing so, the Neff Court produced a rule that cannot be reconciled with the language of the statute.

Section 302(a) of the ADA contains a broad prohibition of discrimination by any entity that "owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). But the ADA contains no definition of the term "operates." Under well-established canons of statutory construction, the common meaning of the term must be used to determine who operates a facility. Smith v. United States, 508 U.S. 223 (1993); Perrin v. United States, 444 U.S. 37, 42 (1979).

One common dictionary defines the term to mean "to control or direct the functioning of," "to conduct the affairs of," or "to bring about or effect." Webster's II New Riverside University Dictionary at 823 (1988). Similarly, Black's Law Dictionary defines "operate" as "to perform a function, or operation, or produce an effect." Black's Law Dictionary 984 (5th ed. 1979). While the Neff court purports to use the common meaning of the term "operates," it plainly does not do so -- instead using a contrived definition of the term that varies with the form of discrimination alleged. Other courts confronted with this question have recognized that § 302 does not require an inquiry into the party's authority over the discriminatory activity in question, but rather whether that party

can direct or control the operation of the facility itself. 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). Indeed, the cases cited by the Neff court do not support it's conclusion. Instead of focusing on whether the facility has control over the discriminatory activity, they focus instead on a more general inquiry -- whether the entity operates the facility in general.[37]

Thus, the Fifth Circuit's reasoning in Neff is inconsistent with the language of the statute and contrary to the majority of case law on the issue. This Court should follow the lead of the majority of courts that have considered the issue, apply a general definition to the term operates, and reject the holding of the Neff court and its contrived definition of the term operates. While the choice of definition makes no difference to the outcome of this case, since DIA operates the Hazard Days Inn under any reasonable definition of the term, the Court should construe the statute as written -- not as DIA wishes the statute were written.

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[37]See Carparts Distribution Center Inc. v. Automotive Wholesalers Ass'n of New England, 37 F.3d 12 (1st Cir. 1994), where the First Circuit considered whether a self-funded medical reimbursement plan was covered as an "employer" under title I of the ADA. The court did not look just to the plan's control over the alleged discriminatory act, as Neff implies. Id. 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.

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. And, although it came to a contrary conclusion, the court in Aikins applied a similar analysis in finding that a physician did not operate a hospital within the meaning of the ADA because he had no control over the specific prohibited activity -- the requirement to provide auxiliary aids and services to individuals who are deaf -- and 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. Aikens, 843 F. Supp. at 1335.

4. The Undisputed Evidence Shows That DIA Operates the Hazard Days Inn and Other Newly Constructed Days Inns.

Thus, to determine if DIA operates the Hazard Days Inn and other newly constructed Days Inns, the proper inquiry is whether DIA directs or controls the operations of the facilities. The undisputed evidence shows that it does.

a. DIA Operates the Hazard Days Inn and Other Newly Constructed Days Inns Through Its "Hotel Operating System" and "System Standards."

When a licensee buys a franchise from DIA, part of what he or she buys is a "hotel operating system." UFOC, Exh. 1, at 2. The Days Inn hotel operating system (commonly referred to as the "Days Inn System") is both comprehensive and mandatory. It addresses all aspects of the operation of a Days Inn hotel, and, under the terms of the license agreement, the licensee is required to operate the hotel in compliance with all System Standards at all times. In addition to requiring compliance with the Days Inn System, the license agreements give DIA several additional means of control over the operation of Days Inn hotels. For example, the L.A. (between DIA and HMGI pertaining to the Hazard Days Inn) typifies the ways in which DIA can and does control the day-to-day operations of the hotels in its system.[38]

As part of its System Standards, DIA establishes operating policies for all Days Inn hotels -- operating policies that "must be strictly observed by each property in the Days Inn System." OPM, Exh. 5, at 3. DIA has the right to change the System Standards at any time, in any fashion it deems

[38]DIA cites testimony by Elizabeth Savage, Counsel to the Acting Assistant Attorney General for Civil Rights, to argue that the United States does not contend that DIA controls the day-to-day operations of the Hazard Days Inn or other hotels in the Days Inn System. But the testimony that DIA relies on, which is taken out of context, does not represent the United States consistent position in this case. Ms. Savage's testimony merely reflects the fact that the United States does not contend that DIA controls every single aspect of a hotel's day-to-day operation – meaning DIA is not present at the site managing every aspect of the day-to-day operations of the facility at all times. Savage Dep., Exh. 21. See also United States Responses to DIA's Third Set of Interrogatories.

necessary. UFOC, Exh. 1, at 28-29; Standard license agreement, Exh. 2, ¶ 5, at 4; Keeble Dep., Exh. 11, at 146-147; Hoagland Dep., Exh. 10, at 158-159. The operating policies that Days Inn hotels must follow are set forth in the Days Inn Operating Policies Manual, one of the Days Inn "System Standards" Manuals. OPM, Exh. 5, at 3. James Stansburry, a former HFS employee who conducted training sessions for hotel managers and employees at Days Inns around the country, explained that the OPM

> was set up to tell the franchisee exactly what their responsibilities were as far as in operations, different requirements that the company required of them . . . . [I]t was their Bible to live by when they're at the hotel as far as operating the hotel under Days Inns' standards.

Stansburry Dep, Exh. 13, at 114. His description is apt. As the United States will explain more fully in its motion for summary judgment, the OPM sets hundreds of requirements for the daily operation of all Days Inn hotels, including the Hazard Days Inn. OPM, Exh. 5, at 13-16, 10-22, 33-34, 103, Appendix B, at 51-52. Among other things, the OPM sets requirements for grooming and attire of hotel employees, employee uniforms, hours of operation of the front desk, services that must be provided to guests (such as wake-up calls, fax machines, free local calls, free ice, complimentary coffee, baby cribs, and the like), the forms of payment the hotel must accept, guest safety and security, and swimming pools (including pool equipment, furniture, and chlorine and pH levels). Id. at 13-16, 20-22, 33-34. For hotels with restaurants, the OPM sets a variety of operating requirements for the restaurant; if there is no restaurant at or adjacent to the hotel, the hotel must provide a free continental breakfast, and the OPM specifies the hours and the menu (fruit juice, coffee (including decaf), tea, and pastries, muffins, croissant, or "local specialties"). Id. at 33-34.

The OPM also includes dozens of specifications for the supplies and furnishings that must be provided in every guest room, such as requirements for the provision of, and often the number

and location of, headboards, pictures, desks, tables, chairs, televisions, mirrors, towel racks, clothes hangers, smoke detectors, ashtrays, wastebaskets, rolls of toilet tissue, note pads, and sheets of hotel stationery and envelopes. Id. at App. B, at 51-52. Similarly, the OPM specifies the number of towels that must be provided in each guest rooms (three bath towels, three hand towels, three wash cloths, and one bath mat), and the size, weight, fiber content, and color of the towels, sheets, pillowcases, and blankets. Id. The maximum shrinkage allowed is ten percent. Id.

In addition, the OPM sets forth the responsibilities of the hotel's general manager and requirements for employee relations, employee job performance, and housekeeping and maintenance. Id. at 13-16.

b. DIA Uses its QA Program to Enforce Compliance with System Standards.

DIA actively enforces its System Standards, including the requirements of the OPM by conducting unannounced inspections of every Days Inn hotel, including the Hazard Days Inn, at least three times per year. L.A., Exh. 3, at ¶ 5(b), at HAZ 1220; Keeble Dep., Exh. 11, at 297. At the end of each inspection, the hotel is scored on its compliance with the System Standards. Keeble Dep., Exh. 11, at 277-78, 300-01; QA Evaluation Forms, Exh. 40; Burns Dep., Exh.19, at 42.[39] If the hotel receives a failing score, it is reinspected, and given thirty days to cure the conditions that caused it to fail; if it still fails, the hotel is subject to removal from the system. OPM, Exh. 5, at 6; Keeble Dep., Exh. 11, at 292-94. Even for hotels with better scores, "QA" deductions can be costly. The QA scores are translated into a "Sunburst" rating system in which each property receives from zero to five "Sunbursts," with higher scores getting more Sunbursts. DIA Worldwide Directory,

[39]The inspections are mandatory; if a hotel refuses an inspection, it receives a score of zero. Keeble Dep., Exh. 11, at 998.

Exh. 33; Courchene Dep., Exh. 14, at 31; Keeble Dep., Exh. 11, at 12-14, 278-80, 283; HFS Incorporated's World Wide Web Material, Exh. 34, at DIA 1406-1407. The Sunburst ratings for all Days Inn hotels are published in the Days Inn directory, which is published twice a year, and distributed free of charge at every Days Inn hotel. Id. A hotel's performance on its unannounced QA inspections thus has a significant impact on whether guests will choose to stay at the hotel and what rates they can charge for its rooms. Courchene Dep., Exh. 14, at 30-31; Keeble Dep., Exh. 11, at 179-80, 915-16; HFS Incorporated's World Wide Web Materials, Exh. 34, at DIA 1406-1408.

QA inspections are exacting, including hundreds of items, both inside and outside the facility. Courchene Dep., Exh. 14, at 54; Burns Dep., Exh. 19, at 26-32; HFS Incorporated's World Wide Web Materials, Exh. 34, at DIA 1406; Day to Day with QA, Exh. 25. Among other things, QA inspectors check for compliance with Days Inn's operating standards, marketing programs, and reservations policies. Courchene Dep., Exh. 14, at 54, 77-87; Merriman Dep., Exh. 20, at 49-50, 69; Burns Dep., Exh. 19, at 26-32, 28, 38, 42; Stansburry Dep., Exh. 13, at 89-92; HFS Incorporated's World Wide Web Materials, Exh. 34, at DIA 1406; Day to Day with QA, Exh. 25. At the conclusion of the inspection, the inspector fills out a QA evaluation form, giving the property a score for the inspection, discusses the results of the inspection with the hotel manager, and seeks a commitment from the manager to correct items for which deductions were made. Keeble Dep. Exh. 11, at 277-78, 300-01, 319; Burns Dep., Exh.19, at 27-28; QA Evaluation Forms, Exh. 40. Those commitments often include agreements to take certain actions on a daily basis. Courchene Dep., Exh. 14, at 69-70.

c. DIA Controls or Directs the Functioning of the Hazard Days Inn and Other New Days Inns in Other Ways.

In addition to the System Standards -- as set out in the OPM and enforced by the QA program -- the license agreements give DIA a variety of other forms of control over or involvement in the day-to-day operations of individual Days Inn hotels, including the Hazard Days Inn. DIA controls renovations or other changes to the hotel (including the authority to require renovations), the national reservations system, national marketing and promotional programs, mandatory training programs for the general managers of Days Inn hotels and hotel employees, the handling of guest complaints, the manner in which licensees keep books and records, and the vendors that licensees use to purchase certain supplies and equipment.

D. DIA'S Reliance on the Lanham Act and State Court Decisions Interpreting Agency Law is Misplaced.

In an attempt to divert the Court from the true issue in this case -- DIA's liability under the ADA for its own actions in controlling the design, construction, and operations of the Hazard Days Inn and other newly constructed Days Inns that are inaccessible to persons with disabilities -- DIA argues that it should not be held liable under the ADA because (1) its control over the design, construction, and operations of these hotels was allegedly required under the Lanham Act, 15 U.S.C. §§ 1051, 1061, and 1127, et seq., to protect its trademarks, and (2) control of the type that it exercised has allegedly been held insufficient to make franchisors liable for personal injuries suffered at individual franchise locations under state law theories of agency. But DIA's reliance on the Lanham Act and state law theories of agency is unavailing. First, DIA exercises far more control over the Hazard Days Inn and other newly constructed Days Inns than is required to protect its trademark under the Lanham Act. Moreover, the reason why DIA exercises control over design,

construction, and operations is immaterial: if it exercises control over these functions, it is liable under the ADA notwithstanding any reason it may have for doing so. Second, the State law cases on agency that DIA cites are immaterial because the United States does not seek to hold DIA vicariously liable for the acts of its agents: DIA's liability is based on its own acts or omissions.

1. DIA Exercises Far More Control Over the Hazard Days Inn and Other Newly Constructed Days Inns Than the Lanham Act Requires.

DIA argues that the controls that it exercises over the Hazard Days Inn and other hotels in the Days Inn System are simply quality controls designed to protect its rights in its trademarks and service marks under the Lanham Act and, thus, should not impose liability under the ADA. Def. Supp. Mem. at 12. But DIA plainly goes far beyond the modest requirements of the Lanham Act in the controls that it exercises over the Hazard Days Inn and other hotels in the Days Inn System.

Under the Lanham Act, a trademark owner may grant a license and remain protected so long as it maintains quality control of the goods and services sold under the trademark by the licensee. Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113 (5th Cir. 1991), cert. granted in part, 502 U.S. 1071 (1992); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962); Sheila's Shine Products, Inc. v. Sheila Shine, Inc., 486 F.2d 114 (5th Cir. 1973). The rationale for the quality control requirement is that marks are treated by purchasers as an indication that the trademark owner is associated with the product. Thus, if quality control is not maintained, the public will be misled and the trademark will cease to have utility as an informational device. Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 387 (5th Cir. 1977). If the trademark owner does not exercise adequate quality control, a court may find that the trademark owner has abandoned the trademark. Kentucky Fried Chicken, 549 F.2d at 387; Sheila's Shine, 486 F.2d at 114. But a finding of insufficient control essentially signals involuntary

trademark abandonment, which is very difficult to prove. Kentucky Fried Chicken, 549 F.2d at 387. Thus, "[r]etention of a trademark requires only minimal quality control...." Id. And the question a court asks for Lanham Act purposes is "whether [the trademark owner] has abandoned quality control." Id. See Sheila's Shine, 486 F.2d at 124 (failure to supervise a licensee for over ten years was not construed as an abandonment of the trademark).

Here, DIA far exceeds the quality control requirements of the Lanham Act for protection of its trade and service marks. DIA's PDSM contains hundreds of detailed specifications for the design and construction of the hotel that are not essential to ensuring the quality of services provided by its franchisees -- e.g., specifications for lightning protection, PDSM, Exh. 4, at § 8.01, at 67, and specifications for insulation for walls, roofs, doors, windows, and floors, PDSM, Exh. 4, at § 4.03, at 26. The OPM and DIA's other manuals also include hundreds of detailed specifications relating to the operation of individual Days Inns which far exceed the quality control requirements of the Lanham Act -- e.g., a requirement for a periodic schedule for cleaning lint traps of dryers, OPM, Exh. 5, at § V.D.7., at 16, a requirement that each guest room must have three suit hangers, Montrose style number 17BTN with an O ring or the equivalent, and three skirt hangers, Montrose style number 17BTN with an O ring or the equivalent, OPM, Exh. 5, at 51; a required check for energy conservation at the hotel, Day to Day with QA, Exh. 25, at WIL 4317; requirements for the manner in which sheets, pillow cases, bath towels, hand towels, and wash cloths are folded, Day to Day with QA, Exh. 25, at WIL 4303 - 4308; and requirements for the set up of housekeepers' carts, Day to Day with QA, Exh. 25, at WIL 4309 - 4310

. **2. The Lanham Act Does Not Exempt DIA From Compliance with the ADA.**

Even if DIA could prove that the control that it exercises over the Hazard Days Inn and other hotels in the Days Inn System is only the amount of control required under the Lanham Act to protect its trade and service marks, the Lanham Act still would not afford DIA any exemption from compliance with the ADA. DIA can point to no provision of the Lanham Act or any other law governing trademark owners or franchisors that exempts them from the requirements of the ADA or any other federal civil rights law. Moreover, the ADA does not contain any provision permitting trademark owners or franchisors to discriminate against persons with disabilities without incurring ADA liability for their actions.

2. DIA's Reliance on State Court Cases Applying Doctrines of Agency Is Unavailing Because DIA's Liability Results from Its Own Acts.

In its supplemental memorandum in support of summary judgment, DIA argues that it should not be held liable as an operator of the Hazard Days Inn or other newly constructed Days Inns because franchisors have not been held liable by state courts in personal injury actions based on agency theories. But rulings by State courts on agency law in personal injury cases are not relevant to DIA's liability under federal law because the United States is not seeking to impose ADA liability based on an agency theory: DIA's liability arises from its own actions and inactions that resulted in a failure to design and construct the Hazard Days Inn and thirteen other Days Inns to be accessible to persons with disabilities.

The facts previously set forth in this Memorandum, which will be set forth in more detail in the United States' motion for summary judgment, amply demonstrate that DIA controlled the design, construction, and operations of the Hazard Days Inn and the other newly constructed Days

Inns that are inaccessible to persons with disabilities. Thus, vicarious liability on the basis of agency theory is simply not an issue in this case.

E. DIA Cannot Delegate Its Duty to Comply with the ADA to Its Licensees.

DIA's primary defense to the United States' claim is that ADA compliance at Days Inn hotels is somebody else's problem. According to DIA, its license agreements have assigned the responsibility for ADA compliance to its licensees, and thus relieve DIA of any responsibility for compliance. See Def. Mem. at 5-6. But DIA cannot escape liability under the ADA by contracting it away. DIA has participated in the design and construction of numerous new hotels, all of which are inaccessible to individuals with disabilities. It is well established in federal civil rights law that a party involved in discriminatory conduct cannot disclaim away its responsibility for compliance with a federal statute. Indeed, in enacting the ADA, Congress made clear that "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."[40] H. Rep. No. 101-485 at 104.

Once DIA undertook to participate in, and exercise control over, the design and construction of new Days Inn hotels, it also undertook the responsibility to ensure that the new hotels in its chain comply with the ADA.[41] Having involved itself extensively in the design and construction of these

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[40]Indeed, § 302(b)(1)(D) of the ADA, 42 U.S.C. § 12182(b)(1)(D), specifically provides: "An 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."

[41]DIA's participation in the design and construction of new Days Inn hotels is extensive. As discussed above, they have created prototype plans for new hotels, authored a Planning and Design Standards Manual with hundreds of design specifications and architectural details (including accessibility requirements), drafted and entered into license agreements which reserve to DIA control over every aspect of the design and construction of every new Days Inn hotel, reviewed and approved plans for new hotels, monitored construction, and inspected every new hotel before admitting it to the Days Inn system.

hotels, DIA, like any other private party, cannot escape a responsibility imposed by a federal statute by contracting it away. As the cases discussed below make clear, the duties imposed under federal non-discrimination statutes -- including the Fair Housing Act, from which the language of section 303 is taken -- are not delegable. If DIA has attempted to rely on its licensees to ensure that Days Inn hotels comply with the ADA, they have done so at their own peril. If licensees have failed to ensure compliance, both they and DIA are responsible.

Several federal courts have held that federal civil rights statutes, and particularly the Fair Housing Act, impose nondelegable duties.[42] Indeed, the Sixth Circuit was the first Court of Appeals to recognize that the duty imposed by the Fair Housing Act is not delegable. In 1974, the Sixth Circuit held the owner of a real estate agency responsible for the discriminatory acts of his salesmen, quoting with approval from a district court opinion holding the owner of an apartment building responsible for the discriminatory conduct of a resident manager "both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable." Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974) (quoting United States v. Youritan Const. Co., 370 F. Supp. 643, 649 (N.D. Cal. 1973), aff'd in part and remanded in part by, 509 F.2d 626 (9th Cir. 1975)). See also

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[42]The Supreme Court has defined a non-delegable duty as follows:

> The concept of a nondelegable duty imposes upon the principal not merely an obligation to exercise care in his 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. Consequently, the doctrine creates an exception to the common-law rule that a principal normally will not be held liable for the tortious conduct of an independent contractor. So understood, a nondelegable duty is an affirmative obligation to ensure the protection of the person to whom the duty runs.

General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 395-96 (1982) (citations omitted). The General Bldg. Contractors Ass'n case addressed the question of whether 42 U.S.C. § 1981 imposed a nondelegable duty on an employer. After defining the term, the Court went on to hold that because § 1981 does not speak in terms of duties, but only declares specific rights held by all persons in the United States, it imposed no such duty. 458 U.S. at 396. Nothing in the Court's opinion, however, is contrary to the holdings of several Courts of Appeals and District Courts, discussed subsequently, that other federal civil rights statutes, including the Fair Housing Act, do impose nondelegable duties not to discriminate.

Sanders v. Dorris, 873 F.2d 938, 943 (6th Cir. 1988) (holding that real estate agency was liable for the acts of its real estate agents even though agents were instructed to comply with the law); 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.).[43]

Thus, while the provisions in DIA's license agreements and other disclaimers of responsibility may give DIA a third-party action against the owners of the hotels or others, if those third parties fail to discharge the duties they and DIA have allocated among themselves, those provisions allocating responsibility among DIA and other parties are no defense to an action under title III of the ADA.[44]

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[43] Accord 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, (citing Marr v. Rife)); Coates v. Bechtel, 811 F.2d 1045, 1051 (7th Cir. 1987) (in cases under Fair Housing Act and § 1982, courts have imputed wrongful acts of real estate agent to property owner, even if not authorized or ratified); 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); 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); Harrison v. Otto G. Heinzeroth Mortgage Co., 430 F. Supp. 893, 896-97 (N.D. Ohio 1977) (same); United States v. L&H Land Corp., 407 F. Supp. 576, 580 (S.D. Fla. 1976) (same); Zuch v. Hussey, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975) (same); United States v. Real Estate Devel. Corp., 347 F. Supp. 776, 785 (N.D. Miss. 1972) (same).

[44] Indeed, DIA and HFS have filed just such a claim in this case, asserting a cross-claim against the owner of the Hazard Days Inn, under an indemnification provision in the license agreement for the Hazard Days Inn. The United States expresses no opinion on the merits of DIA's or HFS' indemnification claim.

CONCLUSION

For the reasons stated above, the United States respectfully requests that Defendants' Motion for Summary Judgment be denied.

Respectfully submitted,

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Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
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Dated: August 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1997, a true copy of the foregoing United States Memorandum in Opposition to Defendants' Motion for Summary Judgment and the United States' Exhibits Filed in Support of its Motion for Summary Judgment and in Opposition to Defendants Motion for Summary Judgment were served by common carrier Federal Express for overnight delivery on William L Killion, Esq., Gregory R. Merz, Esq., Gray, Plant, Mooty, Mooty & Bennett, P.A., 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesoto 55402, attorneys for defendants Days Inns of America, Inc., and HFS Incoorporated. I further certify that on this 28th day of August, 1997, I caused a copy of the United States' Memorandum in Opposition to Defendants' Motion for Summary Judgment to be served by U.S. Mail, first class, postage prepaid, on Mr. Wilgus Napier, Napier-Sebastian Construction, 951 Amlin Avenue, Xenia, Ohio 45385, the representative of cross-claim defendant Hazard Management Group, Inc. Mr. Napier requested that he not be served with a copy of the United Sttes' Exhibits Filed in Support of its Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment because theyare quite voluminous.

_____

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DJ# 202-30-6

September 4, 1997

By Federal Express,
Overnight Delivery

Clerk
United States District Court
for the Eastern District of Kentucky
Pikeville Division
102 Main Street
Pikeville, Kentucky 41502

Re: United States v. Days Inns of America, Inc., et al., (E.D. Ky. Civil Action No. 96-26)

Dear Clerk:

Enclosed for filing in the above-captioned action is the original and one copy of the Stipulation for Extension of Time to File Reply Brief.

Thank you in advance for your assistance in filing these papers. Should you have any questions, please contact me at (202) 307-6556

Sincerely,

Jeanine M. Worden
Trial Attorney
Disability Rights Section

Enclosures

cc: Gregory Merz, Esq.

U.S. Department of Justice

Civil Rights Division

Disability Rights Section
PO. Box 66738
Washington, DC 20035-6738

DJ# 202-11E-17

September 4, 1997

VIA FEDERAL EXPRESS

The Honorable Gregory Hollows
United States District Court for
the Eastern District of California
650 Capitol Mall, Room 2546
Sacramento, California 95814

Re: United States v. Days Inns of America, Inc. et al.
(E.D. Cal. No. CIV-S-96-260 WBS GGH)

Dear Judge Hollows:

This letter will confirm my conversation of this date with Chambers staff. Gregory Merz, counsel for Days Inns of America, Inc. and HFS Incorporated (collectively, "DIA"), and I have agreed to the re-scheduling of the hearing of DIA's motion to compel. The motion was previously scheduled to be heard by conference call on September 11, 1997 at 9:00 a.m. Pursuant to my discussion with Chambers staff, the motion has been re-scheduled for hearing by telephone conference call on September 18, 1997 at 9:00 a.m. The conference call will be initiated by the parties. The parties will file their Joint Statement Re Discovery Dispute on September 11, 1997.

Thank you for re-scheduling this hearing.

Sincerely,

Jeaine M. Worden
Trial Attorney
Disability Rights Section
(202) 307-6556

cc: Gregory Merz, Esq.