IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. 96-5012
v.	)	
	)	
DAYS INNS OF AMERICA, INC., HFS INCORPORATED, RICHARD HAUK, KARLA HAUK, DAVID BAUMANN d/b/a CAD DRAFTING PLUS, and DOUBLE H ENTERPRISES, INC.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

I. INTRODUCTION

The United States filed this suit against Days Inns of America, Inc. ("DIA"), and its parent company, HFS Incorporated ("HFS"), and the owners, architect, and builder of a newly constructed Days Inn hotel in Wall, South Dakota, alleging that those entities violated title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 through 12189 ("ADA" or the "Act"). The United States alleged that those parties violated title III of the ADA by designing and constructing the Wall Days Inn to be inaccessible to individuals with disabilities, in violation of section 303(a) of the ADA, 42 U.S.C. § 12183(a).[1] The United States further alleges that the actions or omissions of DIA and HFS with respect to the Wall Days Inn are typical of its standard practices or procedures, that numerous other new Days Inn hotels are inaccessible to individuals with disabilities, and that DIA and HFS have engaged in a pattern or practice of illegal conduct in violation of title III of the ADA.

DIA and HFS do not deny that the Wall Days Inn is inaccessible to individuals with disabilities. DIA and HFS do not deny that at least 13 other new Days Inn hotels — two others in South Dakota, and 11 others in ten other states — have also been designed and constructed to be inaccessible to individuals with disabilities. Further, there is no dispute over what actions DIA or HFS did or did not take with respect to the design and construction of the Wall Days Inn or other new Days Inn hotels. Thus, the only questions that remain in dispute are questions of law: whether, given the undisputed facts, DIA and HFS are liable under title III of the ADA for the design and construction of the Wall Days Inn and other inaccessible Days Inn hotels. Accordingly, the United States moves for summary judgment pursuant to Federal Rule of Civil

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[1]The United States entered into a consent decree with the owners, architect, and builder of the Wall Days Inn, and those defendants are no longer parties to this action. The Court approved the consent decree on June 5, 1997.

Procedure 56,[2] seeking both injunctive relief and the award of civil penalties against both DIA and HFS.

II. STATEMENT OF THE CASE

As set forth more fully in the United States' Statement of Material Facts, the following facts are not disputed.

A. The Wall Days Inn is not accessible to or usable by individuals with disabilities.

As detailed in the report of the United States' expert, Mr. William Hecker, the Wall Days Inn is not readily accessible to or usable by individuals with disabilities. *See* U.S. Facts ¶¶ 77-79.[3] The hotel was designed and constructed[4] with numerous violations of the ADA's Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"), occurring in every area of the facility, from the parking lot, walkways, and entrances, to the lobby and other public and employee areas, to the guest rooms and guest bathrooms. Id. In general, the violations fall into three categories: (1) conditions that result in unequal treatment for individuals with disabilities; (2) conditions that make it difficult or impossible for individuals with disabilities to gain access

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[2]A court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). *See also* Madel v. FCI Marketing, Inc., 116 F.3d 1247, 1251 (8th Cir. 1997) ("Summary judgment is proper only if the evidence taken in the light most favorable to the nonmoving party fails to create a genuine issue of material fact and one party is entitled to judgment as a matter of law."); Reliance Ins. Co. v. Shenandoah South, Inc., 81 F.3d 789, 791 (8th Cir. 1996)(same).

[3]Citations to "U.S. Facts" refer to the United States' Statement of Material Facts filed with this memorandum. All references to Exhibits (in the form "Ex. __") are references to exhibits provided with the United States' Statement of Material Facts.

[4]There is no dispute that the hotel qualifies as new construction under title III of the ADA, or that it is subject to the requirements of section 303. The Wall Days Inn is a place of lodging with five or more rooms; the last application for a building permit for the facility occurred after January 26, 1993, and the facility was first occupied after January 26, 1993. U.S. Facts ¶¶ 7-9. *See* 28 C.F.R. § 36.401.

to or use some area or feature of the hotel; and (3) conditions that present potential safety hazards for individuals with disabilities.

Perhaps the best example of a condition that results in unequal treatment for individuals with disabilities is the failure to provide accessible features in the hotel's various types of guest rooms. As designed and constructed, the Wall Days Inn has two rooms designated for use by individuals with disabilities, each of which has only one bed. U.S. Facts ¶ 78.l. The hotel has several rooms with two beds, but none of the rooms with two beds have any accessibility features, and are not usable by individuals with disabilities who need an accessible room. Id.[5]

There are a multitude of conditions at the Wall Days Inn that make it difficult or impossible to gain access to or make use of some area or feature of the hotel. The most significant of these is undoubtedly the hotel's failure to provide an elevator. The hotel has guest rooms on each of the first and second floors, and a basement level with a spa and sauna area, two restrooms, a laundry facility, and various electrical, mechanical, and storage spaces. U.S. Facts ¶ 77.a. The only means of access to either the upper floor of the hotel, or to any of the facilities in the basement, however, is by means of stairs; the hotel has no elevator. U.S. Facts ¶ 77.b. The Standards require multi-story facilities to provide at least one passenger elevator. Standards § 4.1.3(5).[6]

In addition to failing to provide an elevator, there are a number of other conditions at the Wall Days Inn that make it difficult or impossible to gain access to or make use of some area or

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[5]The ADA's Standards for Accessible Design require that, "in order to provide persons with disabilities a range of options equivalent to those available to other persons served by the facility, [a hotel's accessible] sleeping rooms and suites . . . shall be dispersed among the various classes of sleeping accommodations available" at the hotel. Standards § 9.1.4. The Days Inn Planning and Design Standards Manual (PDSM) calls for all accessible rooms to have only one bed. PDSM, Ex. 4, § 10.04.B, at 107-08.

[6]With certain exceptions, two-story facilities are exempted from this requirement. Standards § 4.1.3(5). Thus, the Wall Days Inn is required to have an elevator because it has three stories. *See* U.S. Facts ¶ 77.a.

feature of the hotel. For instance, the hotel fails to provide accessible parking spaces, and the ramp leading to the hotel's front entrance does not have a level landing at the top, so that wheelchair users will tend to roll backwards, away from the door, when they release their wheels to grasp the door handle. U.S. Facts ¶¶ 77.a, c. Once inside, the hotel's registration desk is too high to be used by someone who uses a wheelchair, U.S. Facts ¶ 78.f,[7] and the signs identifying rooms and spaces within the hotel do not have Braille or raised letters, so that individuals who are blind or who have low vision will not be able to determine where they are. U.S. Facts ¶¶ 78.g, j. In the hotel's guest rooms, the controls for the heating and air conditioning units require a degree of manual dexterity that many individuals with disabilities do not have, and the clothes rods and shelves are mounted too high to be reached by someone using a wheelchair,. U.S. Facts ¶¶ 78.n, o. As a result, many individuals with disabilities at the Wall Days Inn will be unable to turn on or off, or adjust, the heat or air conditioning, or to hang their clothes. Further, in the hotel's guest rooms that are not the guest rooms specifically designed for individuals with disabilities, the doors to the bathrooms are too narrow to allow the passage of an individual using a wheelchair. U.S. Facts ¶ 78.k. Wheelchair users will thus not be able to gain access to the bathrooms in those rooms, which they might need to do if the accessible rooms are not available, or if they are visiting someone who is staying in one of the hotel's non-accessible rooms.[8]

Finally, there are many conditions at the Wall Days Inn that present safety hazards for individuals with disabilities. For instance, because there are no curb ramps providing access to

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[7]The registration desk at the Wall Days Inn is 43 1/4 inches high. U.S. Facts ¶ 78.f. A drawing of the registration desk in the PDSM shows the desk with a height of 46 inches. PDSM, Ex. 4, Appendix B, Section A, at 147. The Standards require that at least a portion of the registration desk be no more than 36 inches high. Standards § 7.2(2).

[8]The PDSM calls for the doors to standard guest room bathrooms to be 28 inches wide (2 feet, 4 inches). PDSM, Ex. 4, § 5.02.E.1 at 39. The Standards require that doors into and within all guest rooms provide a clear opening

the walkway along the front of the hotel (and because that walkway can be blocked by parked cars overhanging the walkway), the only route for a wheelchair user to the hotel entrance from the parking spaces designated for use by individuals with disabilities is to enter the public street in front of the hotel, and travel along that street to the end of the parking area, and then turn in toward the entrance. U.S. Facts ¶ 78.b. The rear wall of the hotel presents a safety hazard to individuals who are blind, or who have low vision: heating and air conditioning units for the first floor guest rooms project out into the walkway that runs along the rear wall of the hotel, about head high. There are no barriers or warnings, however, to prevent individuals with vision impairments from walking into these units. U.S. Facts ¶ 78.e.

There are hazards inside the hotel as well. For instance, while the spa and sauna area and the restrooms in the hotel basement have emergency alarms, those alarms have only audible warnings; they have no visual signals, and will not alert a person who is deaf to an emergency. U.S. Facts ¶ 78.i. If that person is by himself or herself (for instance, alone in the sauna or restroom), that person may not be alerted by hotel staff or other guests. Finally, the hot water and drain pipes under the lavatories in the public restrooms are not insulated, or otherwise configured to prevent contact with the legs of wheelchair user. U.S. Facts ¶ 78.h. Given that many wheelchair users have no feeling in their legs, they would not know that they were being burned by those pipes.

B. In addition to the Wall Days Inn, several other newly constructed Days Inn hotels are inaccessible to individuals with disabilities.

In addition to the Wall Days Inn, several other newly constructed Days Inn hotels have been designed and constructed to be inaccessible to or unusable by individuals with disabilities.

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width of at least 32 inches. Standards § 9.4. It is physically impossible, of course, for a 28 inch door to provide a 32 inch opening. *See* Deposition of Harold Dean Kiewel (Kiewel Dep.), Ex. 20, at 81-83.

The United States' expert, Mr. Hecker, has surveyed 13 other new Days Inns, and has found numerous violations of the Standards at each. U.S. Facts ¶¶ 80-84. As with the Wall Days Inn, the violations occur in all parts of the facility, and can be grouped into the same three categories. For instance, new Days Inn hotels in Willows, California, Hazard, Kentucky, and Champaign, Illinois, all have rooms with two beds, or larger rooms with additional amenities, but at each of these hotels, the accessible guest rooms have only one bed and none of the other amenities. U.S. Facts ¶¶ 81.o, 82.i, 83.e.

Similarly, both the Willows and Hazard Days Inns have too few accessible parking spaces, or parking spaces designated for use by individuals that do not comply with the requirements of the Standards. U.S. Facts ¶¶ 81.a, b, 82.a. The Willows Days Inn has a swimming pool which cannot be reached by someone who uses a wheelchair, due to a lack of curb ramps. U.S. Facts ¶ 81.d. Each of the three hotels has a registration counter that is too high. U.S. Facts ¶¶ 81.g, 82.e, 83.a. Each has controls for lamps and heating and air conditioning units in their guest rooms that require a high level of manual dexterity, so that many guests with disabilities will not be able to turn on or off the lights, or turn on or off the heating or air conditioning. U.S. Facts ¶¶ 81.n, 82.k, 83.h. Finally, the bathroom doors to the non-accessible guest rooms at all three hotels fail to provide adequate clear width. U.S. Facts ¶¶ 81.k, 82.j, 83.g.

With respect to safety hazards, the Willows Days Inn has only one curb ramp providing access from the walkway surrounding the hotel to the parking lot. U.S. Facts ¶ 81.c. That ramp is in front of the hotel lobby; if there is a fire in or near the lobby, wheelchair users may not be able to use that ramp, and may not be able to leave the building safely. Id. In addition, both the Hazard and Willows hotels fail to provide barriers or other warnings to prevent people who are blind or have low vision from walking into the undersides of exterior stairs, or into objects

protruding into the hotel's walkways. U.S. Facts ¶¶ 81.f, 82.c, d. All three hotels have emergency alarm systems that fail to provide visual alarms in the hotel lobbies, lobby restrooms, or guest rooms, U.S. Facts ¶¶ 81.e, h, l, 82.g, 83.c, f, and all three hotels have lavatories with hot water and drain pipes that are not insulated or otherwise configured to protect against contact. U.S. Facts ¶¶ 81.i, 82.f, 83.b.

Further evidence of the typicality of the ADA violations at the Wall Days Inn comes from the United States' inspections of ten other newly constructed Days Inn hotels, including Days Inn hotels in Sturgis and Watertown, South Dakota. At each of those hotels, the United States' expert found violations of the Standards throughout the facility, of the same types as the violations found at the Willows, Wall, Hazard, and Champaign hotels. U.S. Facts ¶ 84. The findings of the United States' expert with respect to ADA violations at the Wall Days Inn and the other newly constructed Days Inn hotels are undisputed. U.S. Facts ¶ 79.

C. DIA and HFS were extensively involved in, and had extensive control over, the design and construction of the Wall Days Inn.

As the undisputed facts show, DIA and HFS had both a high degree of control or authority over the design and construction of the Wall Days Inn, and extensive involvement in the project itself.[9] The license agreement covering the Wall Days Inn contains several terms governing the design and construction of the hotel, and reserves to DIA considerable control over the project. For instance, the license agreement sets dates by which construction must begin and be completed, and requires the licensees, Richard and Karla Hauk, to prepare architectural plans for the hotel that conform to the Days Inn design standards. U.S. Facts ¶¶ 29.a, b. The

agreement requires the Hauks to submit their plans to DIA for DIA's review and approval before beginning construction. U.S. Facts ¶ 29.c. The agreement requires the Hauks to construct the hotel in accord with the plans approved by DIA, and to secure DIA's written approval of any changes to those plans. U.S. Facts ¶ 29.d. The agreement further provides that, upon DIA's request, the Hauks must provide copies of their building permits to DIA and reports on the progress of construction, and that DIA has the right to inspect the construction during the course of the project. U.S. Facts ¶ 29.f. Once construction is completed, the agreement forbids the Hauks to open and operate the hotel until after DIA certifies in writing that the hotel complies with DIA's design standards, and is acceptable to DIA. U.S. Facts ¶ 29.g.

In addition to the control over the project that DIA reserved to itself in the Wall license agreement, the undisputed facts show that DIA involved itself in the project in a variety of other ways as well. In late 1992, Andy Anderson, a DIA franchise sales representative, approached Mr. Hauk in Wall. U.S. Facts ¶¶ 44, 45. The Hauks had acquired a vacant piece of property in Wall, and were trying to decide what to do with it. U.S. Facts ¶ 45. Before talking with Anderson, the Hauks had not seriously considered building a new hotel. Id. The Hauks met with Anderson in Aberdeen, South Dakota, where Anderson introduced them to David Baumann, an architect who had prepared plans for two other Days Inn hotels, one in West Fargo, North Dakota, and one in Oacoma, South Dakota. U.S. Facts ¶¶ 46, 47. Before meeting with the Hauks in Aberdeen, Baumann, who knew Anderson from his involvement in the West Fargo Days Inn project, discussed the possibility of becoming involved in the Wall project with Anderson. U.S. Facts ¶¶ 47-48. Based on Anderson's recommendation of Baumann, and Baumann's previous

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[9]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 and share office space, and file consolidated annual reports and financial statements. U.S. Facts ¶¶ 117-18.

experience designing Days Inn hotels, the Hauks hired Baumann to prepare plans for the Wall Days Inn. U.S. Facts ¶¶ 50-53.

Anderson also referred the Hauks to a builder for the project, Double H Enterprises, Inc. U.S. Facts ¶ 54. At the time, Double H was in the process of building the Oacoma Days Inn, one of four other Days Inn hotels, including West Fargo, that Double H had constructed. U.S. Facts ¶¶ 54-55. Anderson had an established relationship with Charles Hayes, the principal of Double H. They had had several prior business dealings (including joint ownership of a hotel in Nebraska), and Anderson had introduced Hayes to the owners of the Oacoma project. U.S. Facts ¶ 56-57. According to Hayes, the two were "fairly good friends." U.S. Facts ¶ 57. Before talking to the Hauks about the Wall Days Inn, Hayes spoke with Anderson two or three times about the possibility of becoming involved in the project. U.S. Facts ¶ 58. Shortly after the Hauks met with Anderson and Baumann in Aberdeen, they went to Oacoma, and met Hayes at the Days Inn construction site. U.S. Facts ¶ 59. The Hauks subsequently accepted a proposal from Hayes for work on the wall Days Inn. U.S. Facts ¶ 60.

In addition to providing an architect and contractor for the project, DIA involved itself in the Wall project in other ways. Very early on, in October 1992, the DIA Design and Construction Department prepared and sent to Mr. Hauk a conceptual site plan for his lot in Wall, showing how the hotel might fit on the site, and how many rooms it might contain. U.S. Facts ¶ 61. Although the site plan was not actually used in the final design of the project, Mr. Hauk did rely on it to decide that a hotel with enough rooms to be financially feasible could fit on the site. U.S. Facts ¶ 61.a. DIA also prepared a projection of revenues and expenses for the new hotel, which projection the Hauks' lender relied upon in seeking a guaranty of the construction financing from the Small Business Administration. U.S. Facts ¶ 62.

Moreover, DIA has no employees; all DIA functions are carried out by HFS employees. U.S. Facts ¶ 119.

In the course of preparing plans for the Wall Days Inn, Baumann frequently referred to the Days Inn Planning and Design Standards Manual. He had gotten a copy from Anderson, had been through it in detail, and highlighted various requirements. U.S. Facts ¶ 49, 63. Baumann referred to the PDSM for "all kinds of standards," including guest room sizes and layouts, bathroom sizes and layouts, door sizes, corridors, exit doors, and other items. U.S. Facts ¶ 64. In addition, in preparing the Wall plans, Baumann used several detail drawings that he had previously used in the West Fargo and Oacoma Days Inns; and while he did not know whether those drawings had been reviewed by DIA, he did know that those hotels had been completed and opened for business as Days Inn hotels. U.S. Facts ¶¶ 65-66. Baumann hired an engineering firm in Fargo to prepare mechanical and electrical drawings for the hotel, and provided them with the sections of the PDSM relating to electrical and mechanical requirements. U.S. Facts ¶¶ 67-68. The engineering firm also incorporated Days Inn requirements into the plans it prepared. U.S. Facts ¶ 69. Hayes also had a copy of the PDSM, which he used to determine what furniture, fixtures, and equipment were required. U.S. Facts ¶ 70-71.

Baumann sent a set of preliminary plans for the Wall Days Inn — four sheets of architectural drawings — to Mark Zelazny, an architect in the DIA Design and Construction Department, for DIA's review and approval. U.S. Facts ¶ 72. Zelazny reviewed and commented upon the plans, and returned a marked up set of plans to Baumann. U.S. Facts ¶ 73. Zelazny noted several items on the plans, some of which were required by the Days Inn design standards, and some of which were not. U.S. Facts ¶ 74. Among those items not covered by the PDSM were items reflecting current industry standards, safety items, and various items relating to accessibility for individuals with disabilities, including showing the location of a curb ramp near

the hotel's front entrance, and showing the necessity for providing adequate turning space in the bathrooms in the accessible guest rooms. U.S. Facts ¶ 74.b, c, d.

Once construction began, Anderson visited the site twice. The first visit was quite brief, but the second visit lasted longer, and included a conversation with Richard Hauk. U.S. Facts ¶ 75. DIA's Property Openings department monitored the progress of the construction, making multiple phone calls to the Hauks. U.S. Facts ¶ 76. As the hotel neared completion, DIA's contact became more frequent. Id. Since the completion of the hotel, DIA has inspected the facility several times. The first visit was made by the DIA representative who came to the property to install the hotel's computer reservations terminal, and provide training to the hotel's management and staff. That visit occurred in late June, 1993, just as construction was being completed, and included a tour of the property. U.S. Facts ¶ 111.c.i. Since that time, DIA has inspected the property at least three times a year as part of its Quality Assurance program. U.S. Facts ¶¶ 93, 100. Among other things, the Quality Assurance (QA) inspections check for compliance with the Days Inn design standards. U.S. Facts ¶ 92.

D. DIA's involvement in and control over the design and construction of the Wall Days Inn is typical of its involvement in and control over the design and construction of all new Days Inn hotels.

DIA's involvement in, and control over, the design and construction of the Wall Days Inn are by no means unique to the Wall hotel. To the contrary, the undisputed facts show that DIA has the same level of control over the design and construction of all new Days Inn hotels, and the same kind of control over and involvement in the design and construction of other new hotels.

Initially, the Wall license agreement is typical of all license agreements. U.S. Facts ¶ 28. Indeed, DIA uses a standard form of agreement for all of its licensees. U.S. Facts ¶¶ 20, 21. And while DIA will alter some specific provisions of the standard agreement in some cases, many are

not negotiable. U.S. Facts ¶ 22. These include the provisions that require the licensee to prepare plans and specifications for the hotel that comply with DIA's design standards. U.S. Facts ¶ 22, 27. In addition, in order to protect its own interests, DIA includes in all of its agreements the provisions which fix the number of guest rooms for the hotel, and which set dates by which the construction of the unit must begin and be completed. U.S. Facts ¶¶ 27.e, f.

The Days Inn Planning and Design Standards Manual is one of the Days Inn System Standards manuals, which licensees must comply with both when preparing the plans for their hotels, and continuously thereafter. U.S. Facts ¶¶ 18, 19, 23, 24, 30. The PDSM was originally developed by DIA's predecessor in interest, Days Inns of America Franchising, Inc. (DIAF), as part of DIAF's own construction projects, and then passed on to DIAF's franchisees. U.S. Facts ¶ 31. When HFS acquired the Days Inn chain from DIAF, and created its wholly-owned subsidiary DIA, the DIAF PDSM was re-issued with DIA's name and address. U.S. Facts ¶ 31.a.

The PDSM sets detailed requirements for new hotels. DIA's expert, Mr. Kiewel, described it as "comprehensive," and Mr. Baumann, the architect who prepared plans for the Wall Days Inn described it as "a very complete manual." U.S. Facts ¶¶ 32.a, c. Mr. Zelazny, the DIA architect who reviewed the plans for the Wall Days Inn confirmed that the PDSM imposed hundreds of requirements, covering all aspects of the hotel's design and construction. U.S. Facts ¶¶ 32.b, 33. In addition, the PDSM includes dozens of drawings and sketches, showing guest room and guest room bathroom layouts, and drawings of previously constructed Days Inn hotels. U.S. Facts ¶ 34. While licensees are not required to use the drawings of prior Days Inn hotels, the PDSM "encourages" licensees to use these "examples of recent Licensee and DIA designed and built models." U.S.v Facts ¶ 34.b.

In addition to the control over the design and construction of new Days Inn hotels evidenced by the license agreement and PDSM, DIA is involved in the design and construction of new Days Inn hotels in a variety of other ways. For instance, DIA visits the sites of proposed new hotels, and evaluates those sites according to several factors. U.S. Facts ¶ 42.a. As it did in Wall, DIA frequently assists licensees in the early stages of design by providing conceptual site plans or architectural renderings, drawings which can be used for a variety of purposes, such as determining the feasibility of a particular project on a particular site, or obtaining zoning permits or waivers from local building officials. U.S. Facts ¶¶ 42.b, c, d. As Mr. Keeble put it, conceptual site plans can help licensees "get an idea of what they want to build." U.S. Facts ¶ 42.c.i.[10] Those drawings can also be used to show to a prospective lender, in support of an application for construction financing. U.S. Facts ¶ 42.c. DIA also refers licensees to lenders or architects who have expressed an interest in new Days Inn hotel projects. U.S. Facts ¶ 42.e.

As it did for the Wall Days Inn, the DIA Design and Construction Department reviews plans for new Days Inn hotels. While these reviews are intended primarily to check for compliance with Days Inn system standards, they frequently include issues of building code compliance, recent trends in the industry, and accessibility for people with disabilities. U.S. Facts ¶ 41. DIA also monitors the progress of construction for new Days Inn hotels; in lieu of sending inspectors to construction sites, DIA would send cameras to licensees, for them to take pictures of their projects to send to DIA. U.S. Facts ¶ 43. Finally, just as it did in Wall, a DIA representative visits every new hotel at or near the completion of construction, to install reservations equipment, train hotel staff, and tour or inspect the property. U.S. Facts ¶¶ 111.c.

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[10]DIA and HFS designated Mr. William Keeble, Senior Vice President of Operations for the Hospitality Division of HFS, to testify on their behalf, pursuant to Fed. R. Civ. P. 30(b)(6). Keeble Dep., Ex. 19, at 10-12.

In addition to this initial visit, the DIA Quality Assurance department inspects every Days Inn property at least three times per year, inspections that include compliance with Days Inn's design standards. U.S. Facts ¶¶ 92, 93.

III. THE ADA'S REQUIREMENTS FOR NEW CONSTRUCTION

The Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, is Congress' most comprehensive civil rights legislation since the Civil Rights Act of 1964. Its chief purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). To that end, Congress acted to "invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The ADA's coverage is accordingly broad: it prohibits discrimination on the basis of disability in employment, State and local government programs and services, transportation systems, telecommunications, and the provision of goods and services offered to the public by private businesses.

Nowhere is the breadth of the ADA more evident than in section 303 of the statute. Congress specifically found that architectural barriers constituted one of the types of discrimination "continually encounter[ed]" by individuals with disabilities. 42 U.S.C. § 12101(a)(5). To redress this form of discrimination, Congress mandated 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 adherence to the 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,[11] while requiring all new construction to be accessible.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63 (1990) (emphasis added).

To realize its goal of a fully accessible future, Congress required that all newly constructed facilities be designed and constructed according to architectural standards to be set by the Attorney General. 42 U.S.C. §§ 12183(a), 12186(b). Those standards are incorporated into the Department of Justice's regulation implementing title III of the ADA, 28 C.F.R. Part 36, and are known as the Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"). The Standards set a variety of requirements for newly constructed hotels, requirements which apply to all areas of the facility, from parking and exterior walkways to entrances to lobbies to interior stairs and corridors, and all guest rooms.

IV. ARGUMENT

A. By participating in the design and construction of hotels that are inaccessible to or unusable by individuals with disabilities, DIA has violated section 303 of the ADA.

As detailed above, DIA does not dispute that the Wall Days Inn and numerous other new Days Inn hotels are not readily accessible to and usable by individuals with disabilities. The undisputed facts further show that DIA was extensively involved in the design and construction of those hotels. Accordingly, DIA is liable under section 303 of the ADA.

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[11] See section 302(b)(2)(A)(iv) of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), requiring 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) (and setting forth factors to consider in determining whether it is readily achievable to remove barriers in a particular case).

Section 303 provides that

> 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)(1). Section 303 defines a discriminatory activity — the design and construction of inaccessible facilities — and makes it illegal to engage in that activity. It is thus one part of Congress' "clear and comprehensive national mandate" for the elimination of discrimination against individuals with disabilities: any party who engages in, or is involved in, the design and construction of an inaccessible facility engages in or is involved in an illegal activity, and violates section 303 of the ADA.

Liability under section 303 depends on the facts of each case. In particular, liability under section 303 depends upon three factual inquiries: 1) whether the party in question participated in the design and construction of the facility in question; 2) whether the facility is readily accessible to and usable by individuals with disabilities; and 3) whether the party's participation in the design and construction of the facility included participation in the design and construction of some portion of the facility that fails to comply with the ADA's Standards for Accessible Design. Put differently, the scope of a party's responsibility under section 303 is commensurate with the scope of that party's involvement in the design and construction of the facility. Thus, the architect for a facility would be responsible for any violations of the Standards occurring within the scope of his or her work, while a plumbing subcontractor would be responsible for violations occurring within the scope of its involvement in the project (for instance, violations in the facility's toilet rooms). By the same token, however, the plumbing subcontractor would not be responsible for violations of the Standards occurring in the facility's parking lot (but the

paving subcontractor might be), and a roofing subcontractor would rarely if ever have any ADA liability, because the Standards impose no accessibility requirements for a facility's roof.

As outlined above, the undisputed facts of this case show that there are numerous violations of the Standards both at the Wall Days Inn and several other new Days Inns, and that DIA has participated extensively in the design and construction of those hotels. As it does with other hotels in its chain, DIA's involvement with the design and construction of the Wall Days Inn began early, and extended to every aspect of the project. The DIA Design and Construction Department provided a conceptual site plan for the project, which Mr. Hauk used to decide that the project was feasible. DIA assisted with the construction financing, and the DIA franchise salesman recommended an architect and builder for the hotel, both of whom had been involved in previous Days Inn projects. The architect, engineer and builder all had and referred to the PDSM. Through the license agreement with the Hauks DIA set dates for the beginning and completion of construction, required the Hauks to prepare plans for the hotel that conformed to the Days Inn Planning and Design Standards Manual, and required the Hauks to obtain DIA's approval of their plans for the hotel, which they did. DIA monitored the progress of the construction (especially as it neared completion), and inspected the hotel upon its completion.[12]

The PDSM itself represents significant involvement by DIA in the design of the Wall and other new Days Inn hotels: as DIA's expert architect put it, the PDSM is "comprehensive." U.S. Facts ¶ 32.a. It sets forth hundreds of design requirements for all areas of new Days Inn hotels, and includes sketches showing the design or layout of guest rooms and guest bathrooms. U.S. Facts ¶¶ 32.b, 33, 34. The PDSM addresses or sets requirements for all of the areas of the Wall

[12]As the discussion in Part II.D., above, indicates, these kinds of involvement in the design and construction of new Days Inn hotels were not unique to the Wall Days Inn, but rather were typical of DIA's involvement in the design and construction of all new Days Inn hotels.

Days Inn in which violations of the Standards occurred. Similarly, the license agreement with the Hauks (which is typical of agreements with other Days Inn licensees) requires them to submit architectural drawings and specifications for the hotel. Because the scope of DIA's control over and involvement in the design and construction of the Wall Days Inn extended to every aspect of the hotel, the scope of its liability for ADA violations at the Wall Days Inn is quite broad: along with the owner, architect, and builder (each of whom were also involved in the design and construction of all aspects of the facility), DIA is responsible for all of the violations of the Standards at the Wall Days Inn.

B. The parties responsible for complying with section 303 of the ADA are not limited to the parties covered by section 302 of the ADA.

Title III of the ADA does not only set architectural requirements for the design and construction of new facilities. It also prohibits a variety of forms of discrimination in the day-to-day operation of certain businesses. That is, in addition to the requirements for new construction set out in section 303, section 302 of the Act includes a general prohibition of discrimination against individuals with disabilities, and imposes on public accommodations, but not on commercial facilities, various other non-discrimination obligations with respect to their day-to-day operations. *See* 42 U.S.C. § 12182(a) and (b).[13]

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[13]Title III's general mandate prohibiting discrimination against individuals with disabilities in public accommodations is set out in section 302(a) of the Act, which provides that

> [n]o 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.

42 U.S.C. § 12182(a). Section 302(b) then construes section 302(a), defining discrimination on the basis of disability to include various acts or omissions. For instance, 302(b) generally makes it unlawful for public accommodations to deny individuals with disabilities opportunities to participate in and benefit from their services on a basis equal to that offered to other individuals. *See* 42 U.S.C. § 12182(b)(1)(A)(ii). Section 302(b) also prohibits several specific forms of discrimination, including, for instance, failing to provide auxiliary aids or

1. The scope of section 303 is broader than the scope of section 302, in that section 303 applies to facilities not covered by section 302.

Unlike section 302, which applies only to public accommodations, section 303 applies to two categories of facilities: "public accommodations" and "commercial facilities." 42 U.S.C. § 12183(a). The statute 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. *See* 42 U.S.C. § 12181(7). This is a broad definition that includes, for example, hotels, bars, restaurants, stadiums, theaters, shopping malls, doctors' and lawyers' offices, museums, zoos, and many other facilities that provide goods or services.

As broadly defined as it is, the category of "public accommodations" is not as broad as the category of "commercial facilities." That term is defined as all facilities intended for non-residential use whose operations affect commerce. *See* 42 U.S.C. § 12181(2).[14] While this definition includes many facilities that are also public accommodations,[15] it includes a broad range of 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. The lawmakers recognized that while employees at commercial facilities would have the protections of the provisions of title I of the ADA, 42 U.S.C. §§ 12111 through 12117 (governing private employers, and requiring them to make reasonable accommodations for employees with disabilities), it nonetheless made sense to

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services — such as assistive listening devices, sign language interpreters, documents in Braille, and so on — and failing to remove architectural barriers to access, when doing either is necessary to ensure that individuals with disabilities are not excluded from or denied services by a public accommodation. *See* 42 U.S.C. § 12182(b)(2)(A).

[14]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).

[15]The Wall 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

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 pointed out,

> [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 the scope of section 303's coverage is broader than the scope of coverage of section 302, it would do violence to the statutory scheme to read the reference to section 302(a) in section 303 to mean that only those who have obligations under 302 — the owners, lessors, lessees and operators of public accommodations — can be held liable for new construction violations under section 303. 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. For strictly commercial facilities — many office buildings, for instance, do not contain places of public accommodation — there is no party who would meet this definition and, therefore, no party to be held accountable for ADA violations. Such a result cannot be harmonized with the language in section 303 that explicitly includes "commercial facilities" within the scope of the new construction requirements, or with Congress' desire to insure that all new commercial facilities would be covered. 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."

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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).

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 section 302 to section 303 provides further evidence that Congress intended section 303 to have a scope of coverage beyond that of section 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.

H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63.[16] The Committee clearly understood that section 303 covered a wider universe than section 302 and wanted to ensure that the requirements for alterations, like those for new construction, applied to the many office buildings, factories, warehouses, and other potential places of employment that are not public accommodations. 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.

In sum, there can be little question that Congress deliberately chose to draft sections 302 and 303 differently, and intended them to apply to different kinds of activities, different categories of facilities, and different parties. Thus, the most sensible reading of section 303's reference to section 302(a) is that section 303 refers to section 302(a) only to indicate that the failure to design and construct accessible facilities constitutes another type of "discrimination on

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[16]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).

the basis of disability," and not to identify the parties that may be held liable under section 303. This interpretation gives full effect to all of the terms of the provision. *See* Moskal v. United States, 498 U.S. 103, 109-10 (1990) (courts should interpret statutes in a manner that gives effect to every clause and word of the statute) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955) (same)).[17]

2. The use of the term "design" in section 303 makes clear that section 303 is intended to apply to parties not covered by section 302.

By including the term "design" in section 303, Congress made clear that section 303 is not to be limited only to parties who own, operate, or lease the facility in question. If only those parties were to be covered, then entities that design new facilities, but typically do not own, operate, or lease them — including architects, engineers, and other design professionals — would be excluded from the scope of section 303's coverage. A general exclusion of design professionals, however, cannot be squared with the inclusion of the term "design" in the text of the statute. Congress could have written this paragraph without using the word "design," addressing itself only to the end result by making it illegal only to "construct" inaccessible facilities. By including the design function in the description of the prohibited conduct, however, Congress deliberately brought within the Act's coverage not just those parties who are ultimately responsible for the construction of a new facility, but also those entities who design new facilities — architects, engineers, interior designers, and all other parties who design facilities. Limiting section 303 to those parties covered by section 302 would thus nullify a large portion of the

[17]Moreover, limiting section 303 coverage to those parties identified in section 302 makes no sense from a practical perspective. While parties who own, operate, or lease public accommodations are the obvious choice for the obligations related to the day to day operation of the businesses imposed by section 302, *see* n.13, *supra*, parties who lease or operate a facility frequently will have nothing whatever to do with the initial design and construction of the facility. Indeed, it is not at all clear how one would even identify who it is that "operates" a facility that has not yet been built.

coverage marked out by Congress. As we argue in the next section, so circumscribing the coverage of section 303 would significantly limit the ability of section 303 to achieve its purpose.

3. Limiting the coverage of section 303 to the parties identified in section 302 would result in the design and construction of numerous inaccessible new facilities, frustrating Congress' purpose in adopting the ADA.

Under well-established canons of statutory construction, in addition to examining the text of the statute the Court must also look to its remedial purposes, and construe the statute in a way that will allow it to achieve those purposes.[18] Limiting the coverage of section 303 to the parties identified in section 302 would greatly limit the ability of section 303 to achieve 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, operate, or lease the facility in question, but to all of the parties involved in the design and construction of the facility. 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 responsible. For instance, if only those who own, operate, or lease facilities have any responsibility under section 303, an owner who decides to erect a building that is not accessible to individuals with disabilities, and asks an architect to design it without regard to the ADA's architectural requirements, and a contractor to build it that way, is quite likely to find an architect

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[18]*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

and contractor who will do as he asks. Neither the architect nor the contractor would have any reason to refuse: they would have no liability under the ADA to any person with a disability, and no liability to the owner, because they were following the owner's express instructions. As a result, it is much more likely that the facility will be designed and built inaccessibly — and will only be made accessible if a lawsuit is filed to compel compliance. Such a result is clearly not what Congress intended: the legislative history makes clear that 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.[19] 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 our society as well, when construction of a facility is halted, or a completed facility is shut down, for the purpose of undertaking remedial work to bring it up to ADA standards.

The intent of the statute cannot be fully realized unless it is read the way Congress drafted it: section 303 simply identifies a prohibited activity, and does not specify, either to include or exclude, what parties may be liable for engaging in that activity. Thus, if an owner wishes to

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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).

[19]Congress recognized that modifying or retrofitting a facility after it is built can be very costly (which is why Congress imposed only a limited obligation to remove architectural barriers to access in facilities in existence prior to the ADA's effective date — *see* 42 U.S.C. § 12182(b)(2)(A)(iv)), and therefore sought to have new facilities designed and constructed to be accessible from the beginning.

> 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).

build a facility that is inaccessible, any architect will (or should) refuse, because that architect can be held liable for violating section 303. And even if the owner can find an architect who will design it, any contractor will (or should) refuse to build it, because the contractor can be held liable under section 303. It thus becomes significantly more difficult to have a building designed and constructed to be inaccessible to individuals with disabilities, and the statute is far more likely to achieve the goals set by Congress.

Indeed, this is precisely the way Congress has approached other problems of discrimination in other civil rights statutes. While the language varies from statute to statute, the basic approach has been the same. Congress has not placed responsibility only on some of the parties engaged in the activity in question; rather, Congress has consistently cast the net more broadly, to prohibit discriminatory conduct by all parties involved. Put differently, it is axiomatic in our civil rights law that it is not permissible for one party to act in a discriminatory fashion because another party somewhere down the line may be held liable for that discrimination. The most analogous example of this approach is that set forth in the Fair Housing Act, which simply makes illegal various discriminatory activities, without limiting the parties who may be held responsible for engaging in that activity. *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).

Significantly, section 303 of the ADA mirrors a provision contained in section 804 of the Fair Housing Act, a provision which also simply identifies an illegal activity — the design and construction of inaccessible housing facilities — and does not specify or limit the parties that may

be held liable under that section.[20] In modeling section 303 of the ADA on section 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 — and has not qualified that prohibition to allow some parties, but not others, to engage in that activity. Indeed, given that Congress specifically "invoked the sweep of its authority" when it enacted the ADA, to establish a "clear and comprehensive national mandate" for the elimination of discrimination against individuals with disabilities, it would only be surprising if Congress had chosen not to draft section 303 so broadly, but only to require some limited class of parties to fulfill its goal of a fully accessible future.

4. Although two other federal district courts have addressed the scope of section 303's coverage, they have come to conflicting conclusions.

Two federal district courts have considered the question of the scope of section 303's coverage, and have come to conflicting conclusions. The first case to address this issue was Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1 (D.D.C. 1996), in which the Court dismissed claims against the architectural firm that designed an arena alleged to be inaccessible, on the grounds that section 303's reference to section 302 limits the parties responsible for complying with section 303 to those who own, lease, or operate

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[20]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).

the facility. The PVA opinion, however, is not persuasive. Its central flaw is that it does not explain why section 303, which plainly applies to public accommodations and commercial facilities, should be limited to parties who own, lease, or operate public accommodations. The opinion does not even acknowledge this discrepancy, much less try to account for it. Rather, the court states only that "the limitation in § 302 to owners, operators, and lessors also applies to § 303 and thereby excludes architects . . . ." Id. at 2. But because section 302 applies only to owners, operators, and lessors of public accommodations and not to commercial facilities at all, this analysis, as discussed above, leads to the patently incorrect result of eliminating from section 303 any meaningful coverage of commercial facilities.

In addition, the PVA court erred when it assumed, without explanation, that the aims of the statute could effectively be achieved even if only the owners of new facilities were responsible for ADA compliance. Id. As discussed above, however, limiting the scope of section 303 to owner, operators, lessors and lessees would mean that the aims of section 303 would only be achieved as a result of a multitude of legal actions to compel retrofitting of facilities designed and constructed to be inaccessible, a prospect Congress specifically wished to avoid.

More persuasive is the ruling of the court in Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175 (S.D. Fla. 1997), another title III action alleging that a new arena was being designed to be inaccessible to individuals with disabilities. Again, the architects were named as defendants, and moved to dismiss the claims against them on grounds that they did not own, operate, or lease the facility. The Johanson court recognized that if the reading advanced by the architects in that case were correct, coverage of commercial facilities would effectively be eliminated from section 303. Under such a reading, the court noted, “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.

C. Even if section 303 were limited to parties who own, operate, or lease the facilities in question, the United States is still entitled to judgment as a matter of law, because DIA operates the Wall Days Inn.

Even assuming for the sake of argument that section 303 is limited to the parties identified in section 302, the United States is still entitled to judgment as a matter of law. Given the degree of control it exercises over all aspects of the operation of the hotels in the Days Inn System, including the Wall Days Inn, DIA "operates" the Wall Days Inn, and other Days Inns, within the meaning of section 302.[21]

1. The Days Inn "hotel operating system" and the "System Standards."

When a licensee buys a franchise from DIA, part of what he or she buys is a "hotel operating system." U.S. Facts ¶ 85. 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, moreover, the agreements that licensees enter into give DIA several additional means of control over the operation of Days Inn hotels. The license agreement between DIA and the Hauks typifies the ways in which DIA can and does control the day to day operations of the hotels in its system.

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[21]The term "operates" is not defined in the statute. 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 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).

As part of its System Standards, DIA establishes operating policies for all Days Inn hotels — operating policies which "must be strictly observed by each property in the Days Inn System." U.S. Facts ¶ 89. DIA has the right to change the System Standards at any time, in any fashion it deems necessary. U.S. Facts ¶¶ 25, 88.a. 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. U.S. Facts ¶ 89. James Stansburry, a former HFS employee who conducted training sessions for hotel managers and employees at Days Inn hotels 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.

Deposition of James Stansburry, Ex. 17, at 114. His description is an apt one. As more fully detailed in the United States' Statement of Material Facts, the OPM sets dozens of requirements for the daily operation of all Days Inn hotels, including the Wall Days Inn. U.S. Facts ¶¶ 90, 91. Among other things, the OPM sets requirements for grooming and attire for 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). U.S. Facts ¶¶ 91.f, h, i, j, l, m. 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) and tea, and pastries, muffins, croissant, or "local specialties"). U.S. Facts ¶ 91.o.

The OPM also includes dozens of specifications for the supplies and furnishings that must be provided in every guest room. These include requirements for the provision of, and often the number and location of, pictures, desks, tables, chairs, televisions, mirrors, towel racks, clothes hangers, ashtrays, wastebaskets, rolls of toilet tissue, note pads, and sheets of hotel stationery and envelopes. U.S. Facts ¶¶ 91.b, c. 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. U.S. Facts ¶ 91.d. The maximum shrinkage allowed is ten percent. Id.

In addition, the OPM sets forth the responsibilities of the hotel's general manager, requirements for employee relations at the hotel, and requirements for employee job performance. U.S. Facts ¶¶ 91.a, e, g. The OPM also sets requirements for housekeeping and maintenance at the hotel. U.S. Facts ¶ 91.k.

2. Enforcement of the System Standards: the Quality Assurance program.

DIA actively enforces its System Standards, including the requirements of the OPM. Under the terms of the license agreements, DIA is entitled to conduct, and does conduct, unannounced inspections of every Days Inn hotel, including the Wall Days Inn, at least three times per year. U.S. Facts ¶¶ 88.a, 92, 93. These mandatory inspections are known as "Quality Assurance" evaluations; at the end of each inspection, the hotel is scored on its compliance with the System Standards. U.S. Facts ¶ 97, 99. 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 being terminated from the system. U.S. Facts ¶ 98. 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. U.S. Facts ¶ 103. The Sunburst ratings for all Days Inn hotels are published in the Days Inn directory, which is distributed free of charge at every Days Inn hotel, and are available to guests who call the Days Inn reservation center, and through the Days Inn World Wide Web site. Id. The QA system is thus a powerful tool for controlling the way licensees operate their hotels. As Mr. Keeble explained,

> [t]he big importance [of the Sunburst rating system] is franchisees have bought into it, and the big impact that we've seen is franchisees have bought into the concept, bought into the idea, and they — they work to get that Sunburst rating up. They want it to be higher because it's a source of personal pride and it could very well be a good marketing tool for them as well. And yes, it will attract more guests and it might attract higher-paying guests, as well.

U.S. Facts ¶ 104.a. Mr. Hauk added that in his view, the importance of the Sunburst rating lies in the fact that "[c]ustomers look at it and I believe determine where they want to stay because of the sunburst rating." U.S. Facts ¶ 104.b. Accordingly, in conducting the business of the Wall Days Inn, the Hauks make an effort to get a high QA score, "[b]ecause we get a higher sunburst rating, and that reflects on how our property looks to the customer."

QA inspections are exacting. They include hundreds of items, both inside and outside the facility. U.S. Facts ¶ 94. QA inspectors arrive at the property unannounced, posing as guests. Id. Among other things, QA inspectors check dozens of items in the hotel's guest rooms, including the condition and proper operation of room number signs, door locks, drapery controls, heating and air conditioning units, telephones, chairs, tables, beds, televisions, light fixtures, plumbing fixtures, towel racks, linens of all sorts, and the presence of all required room supplies. U.S. Facts ¶ 95. In addition to the inspections in the guest rooms, QA evaluations cover a variety of other areas, including: compliance with DIA's operating standards; hotel employees' grooming, appearance, uniforms, professionalism, and knowledgeability; compliance with all of

DIA's required marketing programs and required training programs; the number of guest complaints received by the hotel; safety issues including the presence and proper functioning of smoke detectors, fire extinguishers, first aid kits, lighting in the parking lots, guest room security locks, depth markings on swimming pools, and storage of flammable materials; presence of non-discrimination posters required by federal law; and, in some cases, accessibility issues for individuals with disabilities, including the location of peepholes in the doors to accessible guest rooms, and bathroom door width. U.S. Facts ¶ 96.

At the Wall Days Inn, QA inspectors issued numerous warnings or deductions, including required items missing from guest rooms (skirt hangers, stationery, Days Inn cups, and Do Not Disturb signs), missing eye wash from the first aid kit, faded striping in the parking lot, failing to cover wastebaskets in the hotel's restrooms, dirty filters in the heating and air conditioning units, inadequate front desk hours, failing properly to maintain the courtesy call log, housekeepers not wearing proper uniforms, front desk staff wearing jeans and no name tag, and insufficient plants and flowers around the exterior of the hotel. U.S. Facts ¶ 100.

At the conclusion of the inspection, which typically takes two hours or more, the inspector fills out a QA evaluation form, giving the property a score for the inspection. U.S. Facts ¶ 97. The inspector discusses the results of the inspection with the hotel manager, and seeks a commitment from the manager to correct items for which deductions were taken. Id. Those commitments often include commitments to take certain actions on a daily basis, and the Hauks have routinely agreed to take a variety of actions to clean or maintain items in guest rooms or other features of the hotel on a daily or regular basis. U.S. Facts ¶ 97, 102. Moreover, the Hauks have repeatedly modified various aspects of their operation of the Wall Days Inn, to comply with Days Inn requirements and avoid QA deductions. Among other things, they

changed the hours of operation of their front desk, have arranged to install electronic door locks for all of their guest rooms, give discounts on room rates they would not otherwise give, and respond to guest complaints they believe to be meritless. U.S. Facts ¶ 101.

3. Other means by which DIA controls or directs the functioning of the hotels in its system.

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 operations of individual Days Inn hotels, including the Wall Days Inn.

a. Control over renovations or other physical changes to the hotel.

As described in Part II.D., above, DIA has considerable control over the initial design and construction of new Days Inn hotels. The license agreements give DIA a similar level of control over any renovations or other changes to the hotel. First, the agreements contain provisions prohibiting the licensee from materially modifying, diminishing, or expanding the hotel, or changing its interior design or layout, without DIA's prior written consent. U.S. Facts ¶ 88.m. DIA also has the authority affirmatively to require its licensees to undertake renovations to their hotels. Under the terms of the standard license agreement, DIA can require licensees to undertake renovations costing (by DIA's estimate) up to an aggregate of $3,000 times the number of guest rooms. U.S. Facts ¶ 88.l.i. The Wall license agreement contains two renovations provisions: one for "minor" renovations, which is capped at $1,000 times the number of guest rooms, and the other for "major" renovations, which is capped at $10,000 times the number of rooms (for the Wall hotel, $32,000 and $320,000, respectively), adjusted for inflation. U.S. Facts ¶ 88.l.ii.

b. The Days Inn reservation system and policies.

DIA operates a national reservations system, which produces approximately 25-30% of the room reservations for Days Inn hotels system-wide. U.S. Facts ¶¶ 105, 106. All Days Inn hotels, including the Wall Days Inn, are required to participate in the system, and to honor reservations accepted by the system. U.S. Facts ¶¶ 105, 107. System hotels are also required to comply with other reservations policies set by DIA, including their "walk" policy, which requires hotels to find other lodging for guests with confirmed reservations whose rooms are not available, and, if the substitute lodging costs more, to pay the difference. U.S. Facts ¶ 108.

c. DIA's mandatory marketing programs.

Under the terms of the license agreements, licensees are required to participate in a variety of marketing and promotional programs conducted by DIA. Under some of these programs — for example, the September Days Club for senior citizens, and the Inn-Credible Club Card, for business travelers — individual Days Inn hotels are required to provide discounted room rates and other benefits to members. U.S. Facts ¶¶ 110.a, b. Under at least one marketing program, the Simple Super Saver program, DIA both sets a minimum discount that must be offered, and imposes an upper limit on the rate that licensees may charge. U.S. Facts ¶ 110.c. DIA also conducts promotional programs from time to time, including programs connected to popular motion pictures; for programs like these, DIA requires licensees, including the Hauks, to purchase promotional materials to be displayed in the hotel lobby or to be given away to guests. U.S. Facts ¶ 110.f.

Other DIA marketing programs impose service requirements on Days Inn licensees. For instance, DIA requires licensees to provide non-smoking guest rooms, U.S. Facts ¶ 110.e, and to engage in a "Courtesy Call Program," in which the hotel's front desk staff is required to contact

each guest shortly after check-in, to ensure that the guest has no complaints. U.S. Facts ¶ 110.d. The front desk staff are required to keep a log of all "courtesy calls," and log is included in the Days Inn QA inspections. Id.

d. DIA's mandatory training programs for managers and employees of all Days Inn hotels.

DIA conducts several training programs for the general managers of Days Inn hotels and hotel employees, many of which are mandatory. The first is what DIA calls the "Property Training Program," which is the training session that occurs at the hotel, at or near the completion of construction of a new Days Inn hotel. U.S. Facts ¶ 111.c. The hotel's management, front desk staff, and housekeepers are all required to attend various sessions of the training, which three to four days. Id. The training sessions cover a wide variety of topics, including marketing, guest relations, the reservations system, Quality Assurance standards (including mock inspections of hotel guest rooms, and showing housekeepers how to be more efficient in the cleaning rooms and setting up their carts), and guest safety and security. Id. The initial property training for the Wall Days Inn took place from June 29 to July 2, 1993. U.S. Facts ¶ 111.c.i.

General managers of all Days Inn hotels are also required to attend DIA's Hospitality Management Training program. U.S. Facts ¶ 111.a. This week-long training session occurs at the Days Learning Center in Knoxville, Tennessee, and covers a wide range of topics relating to the operation of a Days Inn hotel. Id. In particular, HMT covers the Days Inn System standards, setting room rates, managing room inventory, controlling labor costs, scheduling, motivating and managing hotel personnel, sales and marketing, labor laws, loss prevention and risk management, innkeepers' law, safety and security, occupational health and safety standards, stress management, leadership skills, and unit operation and maintenance, and recruiting, interviewing,

and selecting hotel personnel. Id. Both Richard and Karla Hauk attended HMT; Mr. Hauk testified that some sessions were very helpful to him, including sessions on personnel matters — interviewing job applicants, and hiring, firing, and motivating employees. U.S. Facts ¶ 111.a.i.

In addition to initial property training and HMT, DIA engages in a variety of other training efforts, including training for hotel employees provided at the hotel site by QA inspectors, and training programs provided by regional alliances of Days Inn hotels. U.S. Facts ¶ 111.d. DIA also requires licensees to attend annual conferences, because those conferences are primarily training events. U.S. Facts ¶ 111.b. As Mr. Keeble put it, the conferences are designed for hotel managers to "get a little bit more education in operation of their hotel." Id.

In connection with its initial property training and other training programs, DIA produces and issues to licensees a wide range of training manuals. These include manuals on housekeeping, hotel maintenance, guest services, telephone etiquette, and many other topics. U.S. Facts ¶ 112. These training manuals provide detailed instruction on how to accomplish various tasks arising in the course of the day to day operation of a Days Inn hotel. For instance, general managers are provided with a manual on how to train their housekeepers, which manual covers employees' personal appearance (including brushing teeth, trimming fingernails, and moderate use of cosmetics), standards for cleaning guest rooms (including how to arrange items on the housekeepers' cart, how to prepare a room for cleaning, how to clean the bathroom and make the beds, and how to vacuum the carpet). U.S. Facts ¶ 112.a. Other manuals are provided directly to hotel employees who participate in training sessions conducted by DIA. For instance, DIA provides a "Housekeeping Participants Manual," which also shows how to arrange the housekeeper's cart, and addresses personal grooming, a "Telephone Etiquette Participants' Manual," which addresses how to answer the phone at a Days Inn hotel, and a "Guest Services

Participants' Manual," which addresses the courtesy call program and dealing with guest complaints, and provides a series of form letters that can be used to respond to complaint. U.S. Facts ¶¶ 112.b, c, d. DIA also provides a Maintenance Operating Manual covering a variety of topics related to maintaining and repairing various aspects of and equipment at a Days Inn hotel. U.S. Facts ¶ 112.e.

e. The Days Inn Guest Services department.

DIA also controls the way its licensees deal with guest complaints. DIA has a "Guest Services" department which oversees the handling of all guest complaints regarding Days Inn hotels. U.S. Facts ¶ 113. DIA requires its licensees to respond to all guest complaints, even if meritless, and to report to DIA on how it has resolved them. U.S. Facts ¶ 114. If a licensee does not respond to a complaint, the DIA Guest Services department will resolve the matter with the guest, and, if a refund is given, charge the hotel in question for the amount of the refund. U.S. Facts ¶ 113.

f. Other controls on the operations of Days Inn hotels granted to DIA by the license agreements.

Finally, there are several other provisions in the Days Inn license agreements that give DIA control over various other aspects of the operation of Days Inn system hotels. For instance, provisions in both the standard license agreement and the Wall license agreement require the licensees to keep books and records specified by DIA, in a form specified by DIA, require the licensees to provide financial statements to DIA, and allow DIA to audit their books at any time. U.S. Facts ¶ 88.d. The agreements also contain provisions limiting the ability of the licensees to operate any food or beverage service at the hotel, and requiring the licensees to get DIA's approval for any outside management company to run the hotel. U.S. Facts ¶¶ 88.i, j.

D. The Court should assess civil penalties against DIA and HFS.

In addition to authorizing injunctive relief, the ADA also authorizes the Court, in a case brought by the Attorney General, to assess a civil penalty against an entity that has violated title III, to vindicate the public interest. 42 U.S.C. § 12188(b)(2)(C). Such a penalty may be in any amount up to $50,000.00 for a first violation, and up to $100,000.00 for a subsequent violation.[22]

Civil penalties serve two purposes: 1) to punish wrongful conduct, Tull v. United States, 481 U.S. 412, 422 n.7 (1987); United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992), and 2) to deter other potential violators. United States v. ITT Continental Baking Co., 420 U.S. 223, 231, 232-33 (1975); United States v. Reader's Digest Ass'n, Inc., 662 F.2d 955, 966-67 (3d Cir. 1981). Thus, a civil penalty must not be so small as to be an acceptable cost of doing business, as that would nullify its effectiveness in punishing wrongdoing and deterring illegal conduct. ITT Continental Baking, 420 U.S. at 231-32; Reader's Digest Ass'n, 662 F.2d at 966-67, 967 n.16. Thus, when civil penalties are sought, a defendant's financial condition is a relevant factor to consider. Federal Election Comm'n v. Furgatch, 869 F.2d 1256, 1258 (9th Cir. 1989) (in determining size of civil penalty, one relevant factor is defendant's ability to pay). *See also* Reader's Digest Ass'n, 662 F.2d at 967 (same); United States v. Danube Carpet Mills, Inc., 737 F.2d 988, 993 (11th Cir. 1984) (same). In addition, under the terms of the ADA, in determining the amount of a penalty the court must give consideration to whether the entity made any good faith effort to comply with the statute. 42 U.S.C. § 12188(b)(5).

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[22]Similar cases brought by the United States, each alleging violations of section 303 of the ADA, are pending against DIA and HFS in four other United States District Courts. U.S. Facts ¶ 4. Accordingly, this case may or may not be the first in which DIA and HFS are held to have violated title III of the ADA.

Here, there is no evidence that DIA or HFS made any good faith effort to comply with the requirements of section 303, or to ensure that new hotels joining its chain were readily accessible to and usable by individuals with disabilities. When HFS took control of the Days Inn chain in January 1992, just as title III of the ADA was going into effect, it re-issued the DIAF Planning and Design Standards Manual under DIA's name. U.S. Facts ¶ 31.a. There were few substantive changes to the manual, but HFS did specifically include mention of the ADA as one of the "jurisdictional codes" that licensees were required to comply with, and reorganized the manual to put all of the "barrier-free" provisions in a single section. U.S. Facts ¶ 121. Thus, there can be no question that HFS was fully aware of the ADA when it re-issued the manual, but it made no effort to check the PDSM's "barrier-free" requirements to see whether they were consistent with the ADA's architectural requirements for new hotels. Id. Further, although it reviews plans for new hotels, DIA does not check those plans for compliance with the ADA, and does not even make careful checks to see if the plans complied with the "barrier-free" provisions of its own PDSM. U.S. Facts ¶¶ 122-24. If the HFS Design and Construction department had made such checks, there might have been fewer violations of the ADA Standards at the Wall and other new Days Inn hotels. U.S. Facts ¶ 125.

Moreover, despite provisions requiring their licensees to comply with all federal laws and regulations, specifically including the ADA, DIA and HFS have routinely admitted hotels into the Days Inn system that they knew or should have known were not accessible to people with disabilities including the Wall hotel. The ADA violations at these hotels were not minor, or isolated, or hidden; rather, as detailed above, there were numerous violations of the Standards at the Wall hotel, in every part of the facility, and the same is true of all of the other hotels examined by the United States. U.S. Facts ¶ 127. DIA representatives tour the hotels upon their

completion, and QA inspectors inspect the hotels regularly. DIA and HFS have nonetheless accepted the Wall and other new hotels into its system, and collected royalties from them. Indeed, DIA and HFS exhibit no concern at all over the fact that the Days Inn hotel chain includes numerous new hotels that are inaccessible to individuals with disabilities. According to Mr. Keeble, no one at HFS or DIA makes any effort to check to see whether Days Inn hotels comply with the requirements of the ADA, despite the provision in the license agreement requiring the hotel to comply with federal law. U.S. Facts ¶ 126. As far as DIA and HFS are concerned, ADA compliance is someone else's problem.

Finally, given the size and resources of these defendants, a significant civil penalty is warranted. HFS is the world's largest franchisor of hotels, and DIA is the world's largest franchisor of economy or "mid-market" hotels. U.S. Facts ¶ 116. Not surprisingly, HFS has substantial annual revenues — over $400 million in 1995 — and profits: in 1995, HFS had retained earnings of $83.6 million. U.S. Facts ¶ 130. With respect to the Wall Days Inn in particular, DIA and HFS collected approximately $90,000 in royalties and advertising fees from the Wall hotel during the first three years of its existence. U.S. Facts ¶¶ 128-29. Given that the hotel has now been open for an additional year, the total is likely to be closer to $120,000. The United States urges the Court to impose civil penalties on DIA and HFS of sufficient magnitude to render their conduct with respect to the Wall Days Inn unprofitable, and to deter others from engaging in a pattern or practice of discrimination like that engaged in by DIA and HFS.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court enter judgment in its favor, and grant the relief requested in its Complaint.

Respectfully submitted,

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