

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

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| ERIC STEWARD, by his next friend and mother, Lillian Minor, <i>et al.</i> , |) | |
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| Plaintiffs, |) | |
| |) | |
| v. |) | CIV. NO. 5:10-CV-1025-OLG |
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| |) | |
| RICK PERRY, Governor, <i>et al.</i> |) | |
| |) | |
| Defendants. |) | |
| |) | |

UNITED STATES’ REPLY IN SUPPORT OF MOTION TO INTERVENE

The United States of America respectfully submits this Reply in support of the United States’ Motion to Intervene. The Defendants incorrectly argue that: 1) the Department of Justice (“DOJ”) failed to satisfy the statutory requirements of filing suit under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et. seq.*; 2) despite Congress’s delegation of authority to the Attorney General to enforce the ADA, the United States lacks a direct and substantial interest in the litigation sufficient to warrant intervention as of right; 3) the United States’ interest can be represented by private Plaintiffs’ counsel; 4) the Defendants will be prejudiced if the United States is granted intervention; and 5) the United States attempts, as a nonparty, to improperly join the State of Texas as a Defendant. The Defendants’ arguments lack merit and should be rejected.

I. The United States Has Satisfied the ADA Title II Statutory Procedural Requirements

Contrary to the Defendants’ assertion, the United States need not satisfy the requirements of 42 U.S.C. § 2000d-1 prior to seeking intervention because Rule 24 of the Federal Rules of

Civil Procedure governs intervention and nothing in the ADA or the Rehabilitation Act restricts the United States' ability to intervene pursuant to Rule 24. (*See* Defendants' Response in Opposition to the United States' Motion to Intervene ("Def. Mem.") 5-9, ECF No. 56 (July 19, 2011).) Nevertheless, the United States has satisfied the requirements of 42 U.S.C. § 2000d-1 by providing the Defendants notice of their violations and determining that the Defendants' compliance cannot be secured by voluntary means.

A. The United States Need Not Satisfy the ADA's Procedural Requirements to Filing Suit When Seeking to Intervene in an Existing Lawsuit

The Defendants' contention that the United States failed to satisfy the statutory prerequisites to suit contained within the ADA is not a basis for this Court to deny the United States' motion to intervene. The statutory prerequisites of providing notice and determining that compliance cannot be secured by voluntary means, *see* 42 U.S.C. § 2000d-1, apply only when the United States seeks to bring its own, independent enforcement actions and do not apply when the United States seeks to intervene in a pending lawsuit.

Rule 24 governs intervention, including intervention by the United States. Indeed, Rule 24 was supplemented in 1946 to explicitly state that a government agency may seek to intervene in cases where a party relies on a statute or executive order the agency administers. *See* Fed. R. Civ. P. 24(b)(2). This provision was added to avoid "exclusionary constructions" of the United States' right to intervene.¹ Fed. R. Civ. P. 24 advisory committee's notes (1946). Thus, if the United States meets the intervention requirements of Rule 24, then it is not constrained in its

¹ The Committee Notes reference *In re Bender Body Co*, 47 F. Supp. 224 (N.D. Ohio 1942) as an example of the "exclusionary construction" that prevented government intervention which the revised Rule 24 sought to remedy. Fed. R. Civ. P. 24, advisory committee's notes (1946). In *In re Bender*, the district court denied intervention to the Administrator of the Office of Price Administration, a then federal agency, because the Administrator's interest was only that of the "public interest", the Administrator had "no interest that may be bound by the judgment in this action . . . he cannot be adversely affected by the court's decision . . . he has no claim or defense which will be affected by any decision of law or fact by the court." *In re Bender*, 47 F. Supp. at 232.

ability to intervene by the ADA's procedural prerequisites required if the United States were to pursue its own, separate action against the Defendants.

Had Congress wanted to limit the authority of the Attorney General to intervene in matters involving the ADA, then Congress would have placed an explicit limitation on this authority as it did in other instances.² Indeed, in an analogous context, courts have permitted the Equal Opportunity Employment Commission ("EEOC") to intervene in pending private Title VII actions even if the EEOC did not engage in the statutory prerequisites required before initiating an action of its own. *See, e.g., Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 847 & n.13 (8th Cir. 1977) (permitting EEOC intervention in private Title VII actions even if it had not performed the conciliation required to initiate an action of its own); *Sobel v. Yeshiva Univ.*, 438 F. Supp. 625, 627-28 (S.D.N.Y. 1977) (permitting EEOC intervention "to protect public interests, without those prerequisite proceedings that would justify the initiation of its own action"); *Stewart v. Hewlett Packard*, 66 F.R.D. 73, 76 (E.D. Mich. 1975) (permitting EEOC intervention based, in part, on a clear reading of Rule 24(b)(1) that "Congress has obviated the need for the Commission to establish an independent jurisdictional basis by satisfying any of the jurisdictional prerequisites which might be required if the EEOC were seeking to initiate an action, instead of to merely intervene."); *see also Association for Community Living in Colorado v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) (Individuals with Disabilities Education Act's administrative requirements need not be exhausted when they would be useless); *Snell v. Suffolk County*, 782 F.2d 1094, 1101 (2d Cir. 1986) (holding that only one plaintiff needed to comply

² *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a) (Attorney General may intervene in private suits regarding public accommodations upon certification that the case is of general importance); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (Attorney General may intervene in private suits regarding employment discrimination by public employers upon certification that the case is of general public importance); Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2 (Attorney General may intervene in private suits alleging denial of equal protection on account of race, color, national origin, or sex upon certification that the case is of general public importance); Fair Housing Act, 42 U.S.C. § 3613(e) (Attorney General may intervene in private suits regarding discriminatory housing practices upon certification that the case is one of general public importance).

with the administrative exhaustion requirements of Title VII when the claims arise out of the same discriminatory conduct because the “employer received adequate notice and an opportunity for conciliation” by virtue of the first filing) (citations omitted).

B. DOJ Gave Notice to the Defendants and Determined that Compliance Cannot Be Secured Voluntarily

Although it is not required, the United States satisfied the procedural requirements of 42 U.S.C. § 2000d-1 before seeking intervention. The United States has “advised the appropriate person or persons of the failure to comply . . . and has determined that compliance cannot be secured by voluntary means.” 42 U.S.C. § 2000d-1. The United States’ compliance with these requirements is evident from the face of its proposed complaint.³ (*See* Proposed Complaint in Intervention “Proposed Compl.”, Ex. 1, ¶¶ 61-63, ECF No. 53-1 (June 22, 2011).) The June 1, 2011, and June 15, 2011, letters from DOJ to the Defendants provide unequivocal notice to the Defendants of their violations under the ADA, including the State’s unnecessary institutionalization of individuals with developmental disabilities in nursing facilities; its failure to provide services in the most integrated setting; its failure to offer community-based services to the individually named Plaintiffs even though these services already exist within the State’s service system and that the individually named Plaintiffs exemplify the consequences of a systemic and widespread problem; and its failure to properly screen and evaluate individuals with developmental disabilities seeking admission to nursing facilities to offer them alternatives

³ Whether the United States has complied with statutory prerequisites is an inquiry into the sufficiency of the allegations in the complaint, and thus not proper for consideration of whether the United States meets the requirements of intervention under Rule 24. *See United States v. Arkansas*, No. 10-327, 2011 WL 251107, at *8 (E.D. Ark. Jan. 24, 2011). Further, the Defendants’ inclusion of documents that were not attached to the proposed complaint and not publically available adds another layer of procedural irregularity. However, under the particular circumstances in this case and in the interest of judicial efficiency, the United States does not object to the Court’s full consideration of the Defendants’ arguments and exhibits so that these matters are fully settled going forward in the litigation.

to institutional placement. (Exhibits to Defendants' Response in Opposition to the United States' Motion to Intervene ("Def. Exs.") 1.1 and 1.3, ECF No. 56-2 (July 18, 2011).)

The Defendants incorrectly argue that by providing more detailed findings letters in some other investigations, DOJ has established a minimum standard for notice pursuant to 42 U.S.C. § 2000d-1. (*See* Def. Mem. 5-9.) DOJ, as the agency charged with enforcing Title II of the ADA, retains the discretion to determine the form of the notice it provides in a particular circumstance. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72995 (Nov. 4, 1980) (delegating authority to the Attorney General, *inter alia*, to "develop standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews" with regard to Title VI of the Civil Rights Act of 1964); *see also* *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 398-402 (2008) (accorded deference to the EEOC's interpretation of procedural requirements of Title VII and noting that it is appropriate to give deference to an agency regarding details on the administration of a statute for which it is charged with enforcing.)

The United States has also "determined that compliance cannot be secured by voluntary means". 42 U.S.C. § 2000d-1; (Proposed Compl. ¶ 63). The Defendants did not accept the United States' offer to enter into settlement discussions. (*See* Def. Exs. 1.1-1.7.) The United States provided, per the Defendants' request, additional details regarding the violations so that the Defendants could determine whether to engage in settlement discussions. (*Id.* at 1.3.) Nevertheless, the Defendants still did not accept the United States' offer to enter into settlement discussions. (*See id.* at 1.4-1.7.) Further, the Defendants had already been sued for the same violations that the United States seeks to resolve. Indeed, the existing parties have been engaged in adversarial litigation for seven months, yet the ADA violations are ongoing and the

individually named Plaintiffs remain unnecessarily institutionalized in nursing facilities.⁴ As a result of the Defendants' actions, the United States made a determination that compliance could not be secured by voluntary means. In nearly identical circumstances, the court in *Smith v. City of Philadelphia*, 345 F. Supp. 2d 482 (E.D. Pa. 2004), found DOJ in compliance with the statutory prerequisites of Title II of the ADA. *Id.* at 490. In *Smith*, DOJ sent a letter to the defendants indicating the United States' intention to intervene and offered to discuss resolution. *Id.* After the defendant failed to respond in three weeks, the United States intervened.

The Defendants' reliance on *United States v. Arkansas*, No. 10-327, 2011 WL 251107 (E.D. Ark. Jan. 24, 2011), is misplaced. In that case, DOJ brought its own suit against Arkansas; it did not seek to intervene in an existing lawsuit. *Id.* at *1. Further, the court in *United States v. Arkansas* found that DOJ's pre-filing written notice to the defendant merely stated that DOJ had commenced an investigation and that DOJ had *not* reached a conclusion that the defendant was in violation of the ADA. *Id.* at *6. In contrast, here DOJ provided clear notice of the State's ADA violations, described the violations and the scope of the violations, and informed the State that the United States would seek to intervene absent the State's agreement to remedy the violations through a consent decree. (Def Exs. 1.1 and 1.3.) The Defendants rejected the United States' offer to enter into settlement discussions. (*Id.*) The United States has thus complied with the statutory prerequisites contained within 42 U.S.C. § 2000d-1.

II. The United States Has Satisfied the Requirements for Intervention Under Fed. R. Civ. P. 24

The Defendants incorrectly argue that the United States does not have a sufficient interest in the pending litigation to warrant intervention as of right, that the United States' interest can be

⁴ Plaintiff Benny Holmes was moved to the community soon after the Plaintiffs' Complaint was filed, because of circumstances unrelated to the State's willingness to remedy the ADA violations voluntarily. (Plaintiffs' Opposition to Defendants' Opposed Motion to Abate Motion for Class Certification 4, n.4, ECF No. 21 (Feb. 4, 2011).)

served by participation as *amicus*, that the United States' interest can be represented by Plaintiffs' counsel, and with regard to permissive intervention, that the United States' intervention would be prejudicial to the Defendants. (*See* Def. Mem. 10-19.)

A. The United States Meets the Requirements for Intervention as of Right

The Defendants incorrectly argue that the United States' interest in this litigation – the consistent enforcement of the ADA and remedying systemic and widespread violations of the ADA – is not sufficiently direct to warrant intervention as of right. (*See* Def. Mem. 10-16.)

The United States' interest is rooted in DOJ's unique role as the federal agency with primary regulatory and enforcement authority of Title II of the ADA. *See* 42 U.S.C. §§ 12133-12134. The Defendants misread controlling precedent regarding the requisite "direct" interest required for a public entity to intervene in a case involving a statute that it enforces. For example, in *Heaton v. Monogram Credit Card Bank*, 297 F.3d 416 (5th Cir. 2002), the Fifth Circuit Court of Appeals reversed the district court's denial of intervention by the Federal Deposit Insurance Corporation, according significant weight to the agency's "broader interest in protecting the proper and consistent application of the Congressionally designed framework to ensure the safety and integrity of the federal deposit insurance system." *Id.* at 424. Similarly, with respect to *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992), Defendants ignore the Fifth Circuit's warning to avoid "defin[ing] Rule 24(a)(2) 'property or transaction' so narrowly" and noted that the government intervener's interest "springs from [its] role in administering the [statute]." *Id.* at 1203. In *Ceres Gulf*, the Fifth Circuit reversed the district court's denial of intervention by the Director of the Office of Workers' Compensation Programs, noting that the Director was "vested with an important 'watchdog' role" that included an overarching interest in ensuring "consistent application of . . . a statutory scheme he is charged with administering."

Id. The Attorney General, like the Director at issue in *Ceres Gulf*, is charged with enforcement of a federal law (Title II of the ADA) and seeks intervention to ensure the consistent application of that federal law and that the present violations are remedied. The Defendants also fail to point to a single case where the United States has been denied intervention due to lack of sufficient interest. Quite the contrary, the United States is routinely granted intervention in civil rights cases involving the civil rights statutes the DOJ is charged with enforcing.⁵

The Defendants' argument that the United States' interests can be represented by the existing parties or through participation by *amicus* is equally unpersuasive. The Defendants ignore the reality that *amicus* participation does not protect the United States' concerns regarding the *stare decisis* effect of an unfavorable decision. *See Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (Former 5th Cir. 1967) (recognizing that potential for a negative *stare decisis* effect may "supply that practical disadvantage which warrants intervention as of right"); *see also United States v. City of Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002) (holding that *amicus curiae* status may be insufficient to protect the rights of an applicant for intervention "because such status does not allow [the applicant] to raise issues or arguments formally and gives it no right of appeal"). That the Plaintiffs are represented by a national organization and the designated protection and advocacy organization does nothing to change the fact that the Attorney General – not Plaintiffs' counsel – is tasked with primary regulatory and enforcement

⁵ *See generally Bazemore v. Friday*, 478 U.S. 385 (1986) (United States granted intervention regarding Titles VI and VII of the Civil Rights Act of 1964); *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (United States granted intervention regarding Title VI of the Civil Rights Act of 1964); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3d Cir. 1979) (United States granted intervention involving, *inter alia*, the Rehabilitation Act); *Dilworth v. City of Detroit*, No. 4-cv-73152, 2010 U.S. Dist. LEXIS 23199 (E.D. Mich. Mar. 12, 2010) (United States granted intervention regarding Title II of the ADA); *Meineker v. Hoyts Cinemas Corp.*, 325 F. Supp. 2d 157 (N.D.N.Y. 2004) (United States granted intervention regarding Title III of the ADA); *Reg'l Econ. Cmty. Action Program Inc. v. City of Middletown*, No. 97-cv-8808, 2000 U.S. Dist. LEXIS 22194 (S.D.N.Y. Sept. 25, 2000) (United States granted intervention regarding Title II ADA and Rehabilitation Act claims); *Knight v. Ala.*, No. 83-M-1676-S, 1990 U.S. Dist. LEXIS 19604 (N.D. Ala. Mar. 8, 1990) (United States granted intervention involving Title VI of the Civil Rights Act of 1964).

authority of Title II of the ADA, and is directly responsible for carrying out Congress’s intent to provide “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(2). The United States’ interest in this litigation is not adequately represented by private counsel who owe a specific duty to their clients.

B. The United States Also Meets the Requirements for Permissive Intervention

The Defendants do not dispute that the Attorney General administers the statutes at issue in the litigation and thus meets the requirements of Rule 24(b)(2). (Def. Mem. 17-19.) Instead, the Defendants incorrectly argue that the United States’ intervention will cause them prejudice, primarily from DOJ’s alleged failure to comport with the previously discussed statutory prerequisites and from an alleged desire to expand the litigation.⁶ The Defendants’ argument that they will be prejudiced by the United States’ intervention due to expansion of the litigation is contradicted by their own assertion that “the United States and the *Steward* party plaintiffs assert parallel claims” (Def. Mem. 14.) In fact, had the United States instead brought a separate enforcement action rather than intervene in the present litigation, Defendants’ burden in defending two separate lawsuits would be much greater. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 536 (1972) (noting that “[i]ntervention . . . in a pending enforcement suit, unlike initiation of a separate suit . . . subjects the [defendant] to relatively little additional burden”); *see also Smith v. Pangilinan*, 651 F.2d 1320, 1324-25 (9th Cir. 1981) (reversing denial of the United States’ intervention noting that denying intervention would cause the matter to be litigated twice). The United States meets the requirements for permissive intervention.

⁶ Specifically, the Defendants allege that the United States could “unleash a wide-ranging government enforcement action of whatever scope it deems necessary . . .” apparently motivated in part, due to the United States’ “thirst for launching a frontal attack on Texas’ Medicaid waiver programs”. (Def. Mem. 18.) The United States is bound by the same rules governing scope of discovery as all parties in federal litigation.

III. IF UNITED STATES IS GRANTED INTERVENTION, JOINDER IS PROPER

The Defendants' arguments that the United States, *as a nonparty*, cannot join the State of Texas is fundamentally flawed because the United States seeks to join the State of Texas as a Defendant only if the United States is permitted intervention. Upon intervention, the United States would be a party to the litigation and would be entitled to join the State of Texas as a defendant pursuant to Fed. R. Civ. P. 20(a)(2). Joinder of the State of Texas is proper under Rule 20(a)(2) because there are questions of law or fact common to all Defendants. (*Compare* Compl. ¶¶ 31-137, ECF No. 1 (Dec. 20, 2010) *with* Proposed Compl. ¶¶ 8-28 and ¶¶ 50-63.) Following intervention and after the United States' complaint is formally filed, the United States would then serve the State of Texas with process.

Finally, contrary to the Defendants' apparent assertion, the Eleventh Amendment does not bar the United States from bringing suit against the State of Texas to remedy violations of the ADA.⁷ *See EEOC v. Bd. of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 272 (5th Cir. 2009) (“[I]t is well-established that sovereign immunity under the Eleventh Amendment operates only to protect States from private lawsuits—not from lawsuits by the federal government.”); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987) (“States have no sovereign immunity as against the Federal Government”).

CONCLUSION

For the foregoing reasons, the Court should grant the United States' Motion to Intervene and order its intervention in this action (i) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (ii) permissively pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

⁷ The Defendants also make reference to the Eleventh Amendment bar to asserting claims against a public entity pursuant to 42 U.S.C. § 1983. (Def. Mem. 19.) Since the United States is not asserting any claims pursuant to 42 U.S.C. § 1983, the proper defendant under a Section 1983 claim is irrelevant.

Dated: August 4, 2011

Respectfully submitted,

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