No. 98-5913

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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TAMMY STEVENS,

Plaintiff-Appellant

v.

PREMIER CRUISES, INC.,

Defendants-Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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Stevens v. Premier Cruises, Inc.

No. 98-5913

C-1

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Stevens, Tammy, Plaintiff

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**RULES AND REGULATIONS:**



**MISCELLANEOUS:**



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* Authorities chiefly relied upon are marked with asterisks.

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## INTEREST OF THE UNITED STATES

The United States submits this brief pursuant to Fed. R. App. P. 29(a). This appeal concerns whether Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181-12189 governs the operations of cruise ships that do business in the United States. The Department of Justice enforces Title III. 42 U.S.C. 12188(b). Pursuant to 42 U.S.C. 12186(b) and 12206(c)(3), the Department has issued regulations and a Technical Assistance Manual interpreting Title III. See 28 C.F.R. Pt. 36; ADA Title III Technical Assistance Manual. The Department of Justice has determined that cruise ships are places of public accommodation covered by the ADA. See 28 C.F.R. Pt. 36, App. B at 585; Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (Add. 5). This Court's decision could, therefore, affect the Department's enforcement of the statute.

## STATEMENT OF THE ISSUES

1. Whether plaintiff has standing to maintain an action for injunctive relief pursuant to Title III of the ADA where she alleges that the defendant's cruise ship was not accessible to her and that she would take a cruise on defendant's cruise line again if the defendant's facilities were modified to comply with the ADA.

2. Whether a cruise ship is a place of public accommodation and/or transportation provided by a private entity that is covered by Title III of the ADA.

3. Whether foreign-flag cruise ships that enter United States ports to pick up passengers are subject to the ADA.

## STATEMENT OF THE CASE

1. Plaintiff Tammy Stevens uses a wheelchair and is a person with a disability within the meaning of the ADA (R. 1 at 2).[1/] Stevens took a four day cruise from Miami to the Bahamas on "The Big Red Boat," also known as the S.S. Oceanic, a cruise ship operated by defendant Premier Cruises (R. 1 at 5). Prior to booking the cruise, Stevens informed Premier's representatives that she was disabled, and they assured her that they would provide her with a wheelchair accessible cabin (R. 1 at 10). Stevens alleges that Premier charged her more than the advertised price, and more than non-disabled persons are required to pay,

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[1/] "R.__" refers to the record on appeal. "Add.__" refers to the Addendum attached to this Brief.

for the purportedly wheelchair accessible cabin (R. 1 at 5, 8, 10).

Premier, a Canadian corporation that is licensed to transact business in Florida, has its principal place of business in Miami, Florida, and advertises its cruises in United States newspapers (R. 1 at 2-3, 5). Premier's cruise ship, The Big Red Boat, contains several amenities, including numerous guest cabins and facilities (R. 1 at 5). Premier alleges that the cruise ship is registered in the Bahamas and sails under that country's flag (R. 5 at 1, 6).

2. On September 10, 1998, Stevens filed suit against Premier in the Southern District of Florida, alleging violations of the ADA (R. 1). In addition to alleging that she was charged a discriminatory fare, Stevens alleges that Premier failed to remove barriers to accessibility as required by the ADA by, inter alia: (1) failing to provide her with an accessible cabin and bathroom; (2) failing to provide accessible routes onto and throughout the public areas of the ship; (3) failing to post appropriate signs at inaccessible routes and locations indicating the accessible route into and through the vessel; (4) failing to modify numerous interior and exterior doors to make them accessible to persons with disabilities; and (5) failing to install and maintain emergency notification devices required by the ADA (R. 1 at 5-8). Stevens' complaint seeks injunctive relief to enjoin Premier from further violations of the ADA and to order Premier to modify the vessel to bring it into compliance

(R. 1 at 9).[2/] Stevens also asserted several state law claims (R. 1 at 10-13).

3. On November 30, 1998, the district court granted Premier's motion to dismiss the complaint with prejudice (R. 11). Relying on City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the court ruled that plaintiff lacked standing to seek injunctive relief because she had not specifically alleged that she intended to take another cruise with Premier in the future (R. 11 at 3). The court further held that the ADA did not apply to Premier's cruise ship because the ADA does not apply extraterritorially (R. 11 at 3-4). The court held that because the cruise ship "is owned by a Canadian company and registered in the Bahamas, and, accordingly, sails under a foreign flag," the presumption against extraterritorial application of statutes set forth in EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991), required dismissal of the ADA claim (R. 11 at 3-4). The court declined to exercise supplemental jurisdiction over the pendent state law claims (R. 11 at 4).

4. On December 9, 1998, Stevens filed a motion for reconsideration in which she tendered a proposed amended complaint (R. 13). The amended complaint alleged Stevens "would go on another cruise on [Defendant's vessel], if not for the Defendant's lack of accommodation for her disability." (R. 13, Exh. B at 2). The court denied the motion on December 14, 1998,

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[2/] Only injunctive relief is available in a private action alleging a violation of Title III of the ADA. See 42 U.S.C. 12188(a)(1); 42 U.S.C. 2000a-3(a).

finding that even if Stevens could establish standing, the ADA "does not reach the extraterritorial application sought in this case" (R. 15 at 1-2). Stevens filed a timely notice of appeal (R. 17).

## SUMMARY OF ARGUMENT

The district court erred in dismissing Stevens' complaint for lack of standing. A district court may not dismiss a complaint with prejudice because of a defect in the pleadings without giving the plaintiff an opportunity to amend the complaint. Isbrandtsen Marine Servs., Inc. v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996). The district court found Stevens' complaint defective because she failed to specifically allege that she intended to take another cruise with Premier (R. 11 at 2). Even assuming that this omission would have justified dismissal without prejudice, the district court erred in dismissing her complaint because Stevens promptly submitted an amended complaint that cured the alleged defect (R. 13, Exh. B). Stevens' amended complaint, which alleges that she would take another cruise with Premier but for Premier's failure to comply with the ADA, alleges a concrete and imminent harm sufficient to establish her standing to seek injunctive relief. See, e.g., Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175 (S.D. Fla. 1997).

The ADA clearly applies to cruise ships. Deck v. American Haw. Cruises, Inc., No. 98-00092 (D. Haw. Jan. 15, 1999) (order denying motion for summary judgment) at 5-6 (Add. 10-11). The

statute prohibits discrimination in places of public accommodation and transportation provided by a private entity (except aircraft) that affect commerce. 42 U.S.C. 12182, 12184. The Department of Justice, the agency responsible for interpreting and enforcing Title III of the ADA, has determined that cruise ships are covered as places of public accommodation under 42 U.S.C. 12182. See 28 C.F.R. Pt. 36, App. B at 585. The Department of Transportation, which is responsible for interpreting the transportation provisions of the ADA, has determined that cruise ships are also covered as transportation provided by a private entity under 42 U.S.C. 12184. 56 Fed. Reg. 45,584, 45,600 (1991). These agency determinations are entitled to deference. Defendant has not cited any statutory or regulatory provisions supporting its position that cruise ships do not fall within the scope of the ADA.

The district court erred in holding that the ADA did not apply to foreign flag cruise ships that do business in the United States. Actions that take place on a ship docked in the United States are subject to the laws of the United States, unless Congress creates an exemption or an exemption must be inferred because of applicable principles of international law. The statutory language of the ADA contains no such exemption. Consistent with that language, the Department of Justice and the Department of Transportation have reasonably determined that foreign flag cruise ships are subject to the ADA when they enter

United States ports or other internal waters. See 28 C.F.R. Pt. 36, App. B at 585; 56 Fed. Reg. 45,584, 45,600 (1991).

The district court erred by invoking the presumption against extraterritorial application of United States statutes to dismiss Stevens' complaint. Extraterritorial application of a statute means applying it to conduct that takes place outside the United States. Here, the alleged discrimination took place in the United States, when Stevens paid for her ticket and when she boarded the ship in Miami.

Nor is a different construction of the ADA required to avoid a conflict with international law. As a general rule, ships that enter United States ports or other internal waters must comply with United States laws. See, e.g., Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923). Courts sometimes construe statutes to avoid "pervasive regulation of the internal order of a [foreign-flag] ship". See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19 n.9 (1963). That narrow principle, however, is limited to matters that affect "only the vessel or those belonging to her," Mali v. Keeper of the Common Jail, 120 U.S. 1, 12 (1887), such as the relations between a foreign ship and its foreign crew. Here, by contrast, Congress has regulated the accessibility of a ship to United States residents. Such regulation does not implicate the internal order of a ship and is consistent with international law.

# ARGUMENT

## I

## PLAINTIFF HAS STANDING TO SEEK INJUNCTIVE RELIEF

### A. The District Court Abused Its Discretion By Failing To Permit Stevens To Amend Her Complaint

A district court may not dismiss a complaint for failure to state a claim without giving the plaintiff an opportunity to amend the complaint to correct any defects. "Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Isbrandtsen Marine Servs., Inc. v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996) (quoting Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)); see also Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 806 & n.6 (11th Cir. 1993) (plaintiff should normally be permitted to amend complaint after dismissal to support standing), cert. denied, 510 U.S. 1040 (1994). This is so even when the plaintiff moves for reconsideration after a final judgment has been entered. Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991). In Thomas v. Town of Davie, 847 F.2d 771, 773 (11th Cir. 1988), for example, this Court held that the district court abused its discretion in denying a motion for reconsideration where more specific allegations would have remedied the defect in the complaint. We therefore examine whether Stevens' amended complaint alleges facts sufficient to establish her standing.

B. The Allegations In Stevens' Proposed Amended Complaint Are Sufficient To Establish Her Standing To Seek Injunctive Relief

In order to establish standing, the plaintiff must allege (1) an injury, that is, the invasion of a legally protected interest; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Church v. City of Huntsville, 30 F.3d 1332, 1335 (11th Cir. 1994). When a plaintiff seeks to enjoin future conduct based upon an alleged injury in the past, the plaintiff must either allege that defendant's current conduct is continuing to harm the plaintiff, or that there is a "real or immediate threat" that the harm will be repeated if injunctive relief is not awarded. See City of Los Angeles v. Lyons, 461 U.S. 95, 102, 111 (1983); Church, 30 F.3d at 1337. At the complaint stage, general allegations of injury are usually sufficient to withstand a motion to dismiss because the court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." Defenders of Wildlife, 504 U.S. at 560 (quoting Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990)).

Stevens' amended complaint alleges facts sufficient to establish her standing to seek injunctive relief. The amended complaint alleges that Stevens is a person with a disability within the meaning of the ADA, that she took a cruise on Premier's vessel, that areas of the vessel were not accessible to

her, and that she would take a cruise with Premier again but for Premier's failure to make its vessels fully accessible to persons with disabilities (R. 13, Exh. B). Therefore, plaintiff alleges a concrete and imminent harm -- the inability to take an accessible cruise with Premier -- that is caused by Premier's failure to comply with the ADA.

Lower courts have found standing in similar circumstances. Specifically, courts have held that plaintiffs who have previously attended hospitals or sports arenas are entitled to seek injunctive relief with respect to those facilities if they allege that they intend to return, or would do so but for the defendant's alleged violation of the ADA. See, e.g., Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1177 (S.D. Fla. 1997); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 707 n.4 (D. Or. 1997); Naiman v. New York Univ., No. 95-6469, 1997 WL 249970 at *4-*5 (S.D.N.Y. May 13, 1997). Stevens has, therefore, adequately alleged facts necessary to support her standing to seek injunctive relief.

## II

## TITLE III OF THE ADA APPLIES TO CRUISE SHIPS

### A. Cruise Ships Are Places Of Public Accommodation Under 42 U.S.C. 12182(a)

Premier argued below that cruise ships are not covered by the ADA (R. 5 at 12-13). Title III of the ADA prohibits discrimination against persons with disabilities by private entities in their operation of places of public accommodation. 42 U.S.C. 12182(a). A place of public accommodation is defined

as a facility, operated by a private entity, whose operations affect commerce and fall within one or more of the 12 broad categories of facilities listed in the statute. See 42 U.S.C. 12181(7). These categories include, inter alia, places of lodging, establishments serving food or drink, places of "exhibition or entertainment," and places of "exercise or recreation." Ibid.

The Department of Justice has determined that a cruise ship is a place of public accommodation. 28 C.F.R. Pt. 36, App. B at 585; Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (Add. 5). Congress directed the Department of Justice to issue regulations to implement Title III, 42 U.S.C. 12186(b), to render technical assistance to covered entities, 42 U.S.C. 12206(c), and to enforce Title III in Court, 42 U.S.C. 12188(b). As a result, the regulations, interpretive guidance, and technical assistance manuals issued by the Department of Justice with respect to Title III are entitled to deference. See Bragdon v. Abbott, 118 S. Ct. 2196, 2209 (1998); Stinson v. United States, 508 U.S. 36, 45 (1993); Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 584-585 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1184 (1998). This Court must defer to the Department of Justice's interpretation of the ADA as long as it represents a reasonable construction of the statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984); Herman v. NationsBank Trust Co., 126 F.3d 1354, 1363 (11th Cir. 1997). This is so even if this Court might

have reached a different result were it confronted with the question in the first instance. See Jaramillo v. INS, 1 F.3d 1149, 1152-1153 (11th Cir. 1993).

The determination of the Department of Justice that cruise ships are places of public accommodation is reasonable. Cruise ships, which typically contain guest cabins, eating and drinking establishments, places of exhibition and entertainment, and exercise and recreation facilities, function as one or more of the types of places of public accommodations enumerated in 42 U.S.C. 12181(7). As the Department of Transportation has cogently observed, "[c]ruise ships are self-contained floating communities." 56 Fed. Reg. 45,584, 45,600 (1991). "In addition to transporting passengers, cruise ships house, feed, and entertain passengers and thus take on aspects of public accommodations." Ibid. The only court to address the matter thus far has held that cruise ships are places of public accommodations and, therefore, covered by the ADA. Deck v. American Haw. Cruises, Inc., No. 98-00092 (D. Haw. Jan. 15, 1999) (order denying motion for summary judgment) at 5 (Add. 10). Stevens alleges that the cruise ship in question has guest cabins and other facilities (R. 1 at 5). At minimum, the cruise ship is a place of lodging and, therefore, is a public accommodation covered by Title III.[3/]

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[3/] Defendant's argument (R. 5 at 12-13) that cruise ships are not covered because the ADA does not mention them specifically is without merit. Facilities embraced within broad definitions are just as clearly covered by the ADA as those that are mentioned by

(continued...)

As places of public accommodation, cruise ships must comply with all Title III requirements applicable to the provision of goods and services. These include nondiscriminatory eligibility criteria, reasonable modifications in policies, practices, and procedures, provision of auxiliary aids, the removal of architectural barriers in existing facilities, and alternatives to barrier removal that are readily achievable. 42 U.S.C. 12182(b)(2)(A); 28 C.F.R. Pt. 36, App. B at 585; Technical Assistance Manual III-1.2000(D) (1994 Supp.) (Add. 5). Cruise ships are not required to comply with accessibility standards for new construction or alterations, however, because no federal standards for the construction of accessible ships have been developed. 28 C.F.R. Pt. 36, App. B at 585; Technical Assistance Manual III-5.3000 (Add. 2-3). The Access Board is currently developing such guidelines. 63 Fed. Reg. 15,175 (1998).

Stevens' allegations fall well within the scope of the obligations that the Department of Justice has determined are applicable to cruise ships. Stevens' allegation that Premier charged her a higher fare because she needed an accessible cabin fairly alleges a denial of Stevens' right to equal enjoyment of goods, services, and facilities. See 42 U.S.C. 12182(b)(2)(A)(i); 28 C.F.R. 36.301(c) (unlawful to impose

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[3/](...continued)
name. See Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1954-1956 (1998) (ADA covers state prisons even though they are not specifically mentioned in statute).

surcharge for providing accessible facility); 28 C.F.R. Pt. 36, App. B at 585 (cruise line may not adopt discriminatory eligibility criteria). Similarly, Stevens' allegations that Premier failed to remove barriers to accessibility are consistent with the Department's regulations regarding barrier removal. See 28 C.F.R. 36.304 (listing examples of barrier removal).

B. Cruise Ships Are Specified Transportation Services Under 42 U.S.C. 12184

Cruise ships are also covered by Section 12184 of the ADA. See Deck v. American Haw. Cruises, Inc., No. 98-00092 (D. Haw. Jan. 15, 1999) (order denying motion for summary judgment) at 6 (Add. 11). Section 12184 prohibits discrimination on the basis of disability in "specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. 12184(a). Specified public transportation is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service * * * on a regular and continuing basis." 42 U.S.C. 12181(10) (emphasis added). The ADA directs the Department of Transportation to issue regulations to implement 42 U.S.C. 12184. 42 U.S.C. 12186(a)(1). The Department of Transportation has determined that cruise ships are covered by Section 12184 of the ADA. 56 Fed. Reg. 45,584, 45,600 (1991) (noting that "[c]ruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce."). Like the

Department of Justice, the Department of Transportation has not yet established any specific design or construction requirements for cruise ships. Ibid.

III

THE ADA APPLIES TO FOREIGN-FLAG CRUISE SHIPS WHEN THOSE SHIPS ARE IN THE PORTS OR OTHER INTERNAL WATERS OF THE UNITED STATES

A. Foreign Flag Cruise Ships Are Generally Subject To United States Laws When They Enter United States Ports Or Other Internal Waters

Virtually all cruise ships serving United States ports are foreign-flag vessels. 56 Fed. Reg. 45,584, 45,600 (1991). Nothing in the plain language of the ADA excludes from coverage foreign flag cruise ships that do business in the United States. The ADA does not exempt from coverage public accommodations or transportation operated by foreign corporations. 42 U.S.C. 12182, 12184. Absent a statutory exemption, corporations doing business in the United States must comply with all generally applicable laws, including laws that prohibit discrimination. See, e.g., Goyette v. DCA Adver., Inc., 830 F. Supp. 737, 745 (S.D.N.Y. 1993); Ward v. W & H Voortman, Ltd., 685 F. Supp. 231, 232 (M.D. Ala. 1988).

The fact that a cruise ship sails under a foreign flag or is registered in a foreign country does not exempt it from generally applicable laws of the countries in which it does business. "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country." Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957); accord Cunard S.S. Co.

v. Mellon, 262 U.S. 100, 124 (1923); Mali v. Keeper of the Common Jail, 120 U.S. 1, 12 (1887); Armement Deppe, S.A. v. United States, 399 F.2d 794 (5th Cir. 1968), cert. denied, 393 U.S. 1094 (1969). In Cunard, the Supreme Court held:

> The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

Cunard, 262 U.S. at 124.[4/]

B. The Department Of Justice And The Department Of Transportation Have Determined That Foreign-Flag Cruise Ships Are Subject To The ADA When They Are In The Ports Or Other Internal Waters Of The United States

The Department of Justice has determined that cruise ships must comply with the ADA "to the extent that its operations are subject to the laws of the United States." 28 C.F.R. Pt. 36, App. B at 585. Because foreign-flag vessels are "subject to the laws of the United States" when they are in United States ports or other internal waters, supra 15-16, the Department of Justice has implicitly determined that foreign-flag cruise ships are

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[4/] The United States contends that the ADA applies to cruise ships that enter United States ports or other internal waters. The United States' position is consistent with customary international law of the sea, which limits the authority of coastal states to regulate ships in innocent passage through their territorial waters, but permits regulation of ships that enter ports or other internal waters. See United Nations Convention on the Law of the Sea, done at Montego Bay, Dec. 10, 1982, 21 I.L.M. 1261 (1982).

subject to the requirements of the ADA when they are in the ports or internal waters of the United States. The Department of Justice Technical Assistance Manual provides that foreign flag ships "that operate in United States ports may be subject to domestic law, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement."[5/] Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (Add. 5). The Department of Transportation has similarly determined that the United States "appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports" except to the extent that enforcing ADA requirements would conflict with a treaty. 56 Fed. Reg. 45,584, 45,600 (1991). Because the plain language of the ADA does not exempt foreign-flag ships from coverage, Premier can avoid coverage only by establishing that some canon of statutory construction requires this Court to exempt from the ADA foreign-flag cruise ships that do business in the United States.

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[5/] Premier does not allege that applying the ADA to ships that enter United States ports or other internal waters conflicts with any applicable treaty. Courts ordinarily construe statutes and treaties to avoid a conflict between them and to give effect to both laws. See, e.g., Posadas v. National City Bank, 296 U.S. 497, 503 (1936). If plaintiff prevails, therefore, we believe that the court should not order any relief that conflicts with any treaty obligations of the United States, such as the International Convention for the Safety of Life at Sea (SOLAS). See SOLAS (Consolidated Ed. 1997); 56 Fed. Reg. 45,584, 45,600 (1991).

C. The Presumption Against Extraterritoriality Is Not Applicable Because The Relevant Conduct Took Place Within The United States

It is a longstanding principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (ARAMCO) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)). In ARAMCO, the Court applied this presumption in ruling that Title VII did not prohibit discrimination against United States citizens employed by American employers in foreign countries, and cited the ADA as a statute that had "[never] been held to apply overseas."[6/] ARAMCO, 499 U.S. at 244, 251. Under the ARAMCO standard, Title III of the ADA does not apply extraterritorially.[7/]

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[6/] Following the decision in ARAMCO, Title I of the ADA was amended to cover employees employed by covered entities in foreign countries. See 42 U.S.C. 12111(4); 42 U.S.C. 12112(c).

[7/] Courts have held the presumption against extraterritoriality is not applicable when, inter alia (1) failure to apply the statute in a foreign setting will result in adverse effects within the United States; or (2) the regulated conduct is intended to cause, and results in, substantial effects within the United States. In re Simon, 153 F.3d 991, 995 (9th Cir. 1998), cert. denied, 119 S. Ct. 1032 (1999); Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952)); Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984). Courts have also held that the presumption is not implicated by a course of conduct, part of which takes place in the United States. See, e.g., United States v. Inco Bank & Trust Corp., 845 F.2d 919, 920 n.4 (11th Cir. 1988). Because in this case Premier's conduct is not extraterritorial, see infra 18-19, it is not necessary to determine whether any of these exceptions to the presumption against extraterritoriality are applicable.

While the district court's general discussion of the principles of extraterritoriality may have been correct, the court erred in ruling that those principles were implicated because the ship "is owned by a Canadian company and * * * sails under a foreign flag" (R. 11 at 3-4). Application of the presumption against extraterritoriality is triggered by where the conduct takes place, not the nationality of the actor. Stevens is not seeking an extraterritorial application of the statute. Stevens alleges that she was subjected to discrimination in the United States in two ways: first, when she booked the cruise in Miami and was required to pay more for the cruise than a non-disabled passenger; and second, when she boarded the ship in Miami and discovered that Premier had not removed architectural barriers to make the ship accessible, as required by 42 U.S.C. 12182(b)(2)(A)(iv). Because both discriminatory acts are alleged to have occurred in the United States, applying the ADA in this instance does not represent an extraterritorial application. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia J., dissenting) (presumption against extraterritoriality does not apply to tort occurring on board ship in American waters); Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (presumption against extra-territoriality does not apply to conduct that occurs within the United States).

The Supreme Court's decision in Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923), makes clear that activity that occurs on a

ship within United States waters or ports is not extra-territorial. Cunard, 262 U.S. at 123-124. In Cunard, the Court held that the Volstead Act, which outlawed the importation and transportation of alcoholic beverages within the United States, prohibited foreign-flag vessels from bringing alcohol into American ports. The Court concluded that the statute was not intended to apply extraterritorially. Cunard, 262 U.S. at 123 (statute "confined to the physical territory of the United States"). The Court held, therefore, that the Act did not govern the activities of foreign-flag ships while they were outside the territorial waters of the United States. Cunard, 262 U.S. at 123-124. The Court held, however, that the Act did apply to such vessels while they were docked in an American port or otherwise in American waters. Cunard, 262 U.S. at 124. The Court found it irrelevant to its analysis that the alcoholic beverages were kept sealed in storage to be used only when the ship was outside United States waters. Id. at 130. Because the beverages were brought into United States ports and harbors, the statute applied. Ibid. See also Grogan v. Hiram Walker & Sons, 259 U.S. 80, 89-90 (1922) (Volstead Act prohibited transfer of alcoholic beverages from one British vessel to another in New York harbor) (Holmes, J.).

Similarly, in EEOC v. Kloster Cruise Ltd., 939 F.2d 920 (11th Cir. 1991) this Court held that an employer operating a foreign-flag cruise ship had to comply with an agency subpoena issued in connection with the investigation of complaints filed

by two cruise ship employees who alleged that they had been terminated in violation of Title VII. Id. at 924. Rejecting the argument that the EEOC clearly lacked jurisdiction to investigate the complaint, this Court held that the EEOC was entitled to discover information that would be relevant to its jurisdiction, such as "the nature and extent of [the employer's] business operations in Miami, the extent to which the employment activities occurred in Miami, and whether the acts of alleged discrimination occurred in Miami." Id. at 923. See also EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109, 1111 (M.D. Fla. 1990) (presumption against extraterritoriality did not require dismissal of Title VII claim alleging that plaintiff had been denied employment on foreign-flag ship, where plaintiff alleged that her application had been submitted to the employer's Miami office and had been rejected in the United States). The district court's decision is in conflict with Cunard and Kloster. Because the alleged discriminatory conduct in this case took place within the United States, the court erred in determining that the presumption against extraterritoriality required dismissal.

D. The Presumption That Statutes Should Not Be Construed To Violate International Law Is Not Applicable

In the district court, Premier also argued that dismissal was required by the Supreme Court's decisions in Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) and McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (R. 5 at 14-15). In those cases, the Court construed the National Labor Relations Act (NLRA) not to regulate the labor

relations of a foreign-flag ship with its foreign crew, even when the ship was in an American port. Those decisions were not based on the presumption against extraterritoriality, however, but on the "wholly independent" canon of construction that a statute be construed not to apply to situations where enforcing the statute would violate international law. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815-816 (1993) (Scalia J., dissenting); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."). The relevant question is, therefore, whether applying the ADA to foreign-flag cruise ships that enter United States ports or other internal waters would conflict with international law.

1. Customary international law recognizes that "the law of the flag state ordinarily governs the internal affairs of a ship," and nations, therefore, generally refrain from regulating such matters even when the ship enters their ports. See McCulloch, 372 U.S. at 21; accord Mali v. Keeper of the Common Jail, 120 U.S. 1, 12 (1887). The Supreme Court has applied these principles in a series of cases interpreting the scope of the NLRA, 29 U.S.C. 151 et seq., which regulates a wide variety of activities that affect "commerce." See McCulloch, 372 U.S. at 15. Although the Act is broad enough to reach foreign-flag ships, the Court has construed it not to regulate the labor relations between a foreign ship and its foreign crew, even when

the ship is temporarily docked in a United States port. See, e.g., Benz, 353 U.S. 138; McCulloch, 372 U.S. 10; Windward Shipping Ltd. v. American Radio Ass'n, 415 U.S. 104 (1974). In McCulloch, the Court explained that applying the Act in such circumstances would contravene "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." 372 U.S. at 21. The Court also noted that the legislative history of the Act indicated that Congress was primarily concerned with regulating American workers and employers, not foreign nationals. McCulloch, 372 U.S. at 20. The Court, therefore, held that it would be inappropriate to construe the Act to regulate the labor relations between a foreign ship and its foreign crew, unless Congress had clearly expressed such an intention. Ibid.

The narrow presumption established in Benz and McCulloch, however, is not applicable in contexts that do not involve "the pervasive regulation of the internal order of a ship". See McCulloch, 372 U.S. at 19 n.9. In subsequent cases, for example, the Supreme Court has held that the NLRA governs the interaction of foreign-flag ships with American citizens and businesses, even though the Act does not specifically state that it applies to foreign-flag vessels. See International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970) (NLRA protected union picketing protesting substandard wages paid by foreign-flag vessel to American longshoremen working in American ports); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456

U.S. 212, 218 (1982) (NLRA prohibited secondary boycott by unions refusing to unload shipments from Soviet ships destined for American importers).

The Supreme Court has applied similar principles in construing the Jones Act, 46 U.S.C. 688, a statute that previously authorized suits by "any seaman" who was injured in the course of his employment.[8/] The Court has established an eight-factor test to determine whether to apply United States law to such maritime actions.[9/] See Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Lauritzen v. Larsen, 345 U.S. 571 (1953). In applying this test, the Court has held that international law principles do not prohibit a court from applying American law to a maritime action by a foreign crew member against a foreign-flag ship when the injury occurs in American waters and the ship has a substantial base of operations in the United States. Hellenic Lines Ltd., 398 U.S. at 308-309; accord Szumlicz v. Norwegian Am. Line, Inc., 698 F.2d 1192, 1194 (11th Cir. 1983).

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[8/] The Jones Act has subsequently been amended to restrict such actions. See 46 U.S.C. 688 (1994 App.).

[9/] The factors that are considered include: (1) the place of the wrongful act; (2) the law of the flag; (3) the nationality of the injured party; (4) the nationality of the shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the ship owner's base of operations and the extent of his or her contracts with the forum state. See Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 308-309 (1970); Lauritzen v. Larsen, 345 U.S. 571, 583-591 (1953).

2. The above international law principles do not require courts to construe the ADA to exclude from coverage foreign-flag ships that enter United States ports. Accessibility of a ship to United States passengers is not internal to a ship's operations; it does not affect "only the vessel or those belonging to her." See Mali, 120 U.S. at 12. Rather, accessibility concerns the relations of the cruise line with United States residents who use its services. Because application of the ADA directly protects the interests of United States residents, the principles cautioning restraint when regulating the relations between foreign ships and their foreign crew are not applicable. Moreover, unlike the situation in McCulloch and Benz, applying the ADA to foreign flag cruise ships that enter United States ports furthers the explicit purpose of the Act, to protect the rights of Americans with disabilities. See 42 U.S.C. 12101.

Applicable case law makes clear that United States citizens and residents may bring Title VII actions against foreign-flag cruise lines without conflict with international law. In EEOC v. Kloster Cruise Ltd., 939 F.2d 920 (11th Cir. 1991), this Court held that the EEOC did not clearly lack jurisdiction to investigate a Title VII complaint alleging that a foreign-flag cruise line with business operations in the United States had fired two American citizens in violation of federal law. In rejecting the argument that McCulloch and its progeny required that the subpoena be quashed, this Court held that the application of Title VII to the employment of United States

citizens was "sufficiently dissimilar" to the "pervasive regulation of the internal order of a ship" at issue in McCulloch, 372 U.S. at 19 n.9. Kloster Cruise Ltd., 939 F.2d at 923-924. This Court noted that the multi-factored analysis set forth in Hellenic Lines Ltd., 398 U.S. 306, and Lauritzen, 345 U.S. 571, appeared to be more applicable than the analysis in McCulloch. Kloster Cruise Ltd., 939 F.2d at 924. See also EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109, 1111 (M.D. Fla. 1990) (rejecting argument that the employment of United States citizens on cruise ship was an internal matter that should be governed by law of the flag).

The Supreme Court's decision in Cunard S.S. Co. v. Mellon, 262 U.S. 100, 124 (1923), also strongly supports the legitimacy of applying ADA requirements to foreign-flag cruise vessels. In Cunard, the Court affirmed the application of the Volstead Act to foreign-flag passenger vessels that carried sealed alcoholic beverages as "sea stores" into an American port, but only opened the beverages for the crew and passengers when the ship was outside the territorial waters of the United States. Although the carrying of such beverages was permitted and in some cases even required by the other foreign ports to which the ship sailed, the Court held that the United States had a legitimate interest in prohibiting the beverages from being in the United States at any time, to avoid the possibility that they might be smuggled ashore. Id. at 119, 131. The Court implicitly rejected the argument, advanced in the dissent, that applying the

Volstead Act conflicted with international law principles and improperly regulated the internal affairs of foreign-flag ships. See id. at 132 (Sutherland J., dissenting).

## CONCLUSION

The district court's order of dismissal should be reversed and the case remanded with instructions to grant Stevens leave to file an amended complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 1999, two copies of the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE were served by first-class mail, postage prepaid, on the following counsel of record:

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