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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AMC ENTERTAINMENT, INC., et al., Defendants.	Case No.: CV-99-01034-FMC(SHx) **PLAINTIFF UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER MAGISTRATE JUDGE HILLMAN'S FEBRUARY 25, 2000 ORDER** **Judge:** Florence M. Cooper **Date:** April 10, 2000 **Time:** 10:00 a.m

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

TREATISES

BACKGROUND

A. The United States' Claims Against AMC.

In this action, the United States alleges that AMC has violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq, by: (1) failing to design and construct movie theaters so they are accessible to persons with disabilities; (2) failing to make alterations to movie theaters so they are accessible to persons with disabilities; and (3) operating movie theaters in a manner that denies persons with disabilities equal access to the goods, services, facilities, privileges, advantages, and accommodations offered by those theaters. Under its first two claims, the United States will show that AMC's theaters do not comply with certain Justice Department regulations known as the Standards for Accessible Design, 28 C.F.R. pt. 36, Appendix A (the "Standards").[1] The Standards set out hundreds of specific architectural requirements applicable to movie theaters and other places of public accommodation. A key issue in the United States' first two claims is AMC's failure to comply with Standard 4.33.3 — a Justice Department regulation that governs the placement of wheelchair seating in movie theaters.

Standard 4.33.3 is a regulation that was promulgated by the Justice Department in 1991 following notice and comment rulemaking. Pursuant to 42 U.S.C. § 12183(a)(1), all theaters designed and constructed for first occupancy after January 26, 1993, are required to comply with the requirements of Standard 4.33.3. Among other things, Standard 4.33.3 requires movie theaters to provide wheelchair seating areas that are "an integral part of any fixed seating plan"

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[1]AMC erroneously refers to the Standards as the "ADAAG." However, the term "ADAAG" properly refers to the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, a regulation promulgated by the Architectural and Transportation Barriers Compliance Board (the "Access Board"). 36 C.F.R. pt. 1191. Under the ADA, the regulations promulgated by the Justice Department must be consistent with, but are not required to be identical to, the regulations promulgated by the Access Board. See 42 U.S.C. § 12186(c). In 1991, the Department adopted the ADAAG as the Department's Standards. The distinction between the ADAAG and the Standards is important because the Justice Department adopted only the plain language of the ADAAG — not the Access Board's Preamble to or interpretations of the ADAAG.

and "provide people with physical disabilities ... lines of sight comparable to those for members of the general public."[2] In addition, in theaters with seating capacities greater than 300, Standard 4.33.3 requires the theaters to provide dispersed wheelchair seating -- i.e., seating in more than one location.

In 1997 and 1998, the Justice Department investigated six of AMC's theaters with stadium-style seating that were designed, constructed, and/or altered after January 26, 1993. The Department's investigations revealed that, in almost all of AMC's theater auditoriums with stadium-style seating, AMC gives persons who use wheelchairs some of the worst seats in the house. Specifically, in the vast majority of its theaters with stadium-style seating, AMC has placed wheelchair seating in very close proximity to a large movie screen on a sloped floor that is located in front of, and on a lower level than, the stadium-style seats that are provided for members of the general public. These wheelchair seating areas require persons who use wheelchairs to view movies in craned-neck discomfort if they are able to use the seats at all. The United States contends that these wheelchair seating areas violate Standard 4.33.3 because they are not "an integral part" of the stadium-style seating plan and they do not "provide people with physical disabilities ... lines of sight comparable to those for members of the general public." That contention is based on a plain language interpretation of Standard 4.33.3.

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[2]Standard 4.33.3 states:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

B. AMC's Dismissed Counterclaim and Affirmative Defense Under the Administrative Procedure Act.

In response to the United States' lawsuit, AMC filed a counterclaim and an affirmative defense under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq., challenging the Attorney General's authority to file an enforcement action against AMC. Although Standard 4.33.3 was promulgated in 1991, AMC's counterclaim and affirmative defense alleged that, by applying the plain language of Standard 4.33.3, the Justice Department has imposed substantive new requirements on AMC without notice and comment rulemaking.

The United States filed a motion to dismiss AMC's counterclaim. After holding two hearings on the matter and after permitting AMC some limited discovery relating to the Justice Department's settlement negotiations with other movie theater owners and operators, Judge Morrow dismissed AMC's counterclaim because the Justice Department had not engaged in final agency action, which is a jurisdictional prerequisite for APA-based challenges to agency action. December 17th Order at 7 (copy appended as Exhibit A); see also 5 U.S.C. § 704, Gallo Cattle Co. v. U.S. Dep't. of Agriculture, 159 F.3d 1194, 1198-99 (9th Cir. 1998). In her Order, Judge Morrow specifically held that: "Neither settlement negotiations nor threats of suit constitute final agency action that may be judicially reviewed." Order at 12. The Judge also rejected AMC's argument that the United States had adopted a secret law that it was imposing theater industry-wide through settlement negotiations:

> Here, rather than a communication intended definitively to articulate an industry-wide policy, DOJ has communicated privately with individual theater owners to negotiate and resolve its differences with them. These communications do not have "the contemplation and likely consequence of 'expected conformity'" among members of the industry. See [National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 698 (D.C. Cir. 1971)] (quoting Abbott Laboratories, supra, 387 U.S. at 150). See also Association of Public Agency Customers v. Bonneville Power Admin., 126

F.3d 1158, 1184 (9th Cir. 1997) ("Negotiations, which are not final actions, therefore are not reviewable, and we decline to consider them").

Order at 13-14.

C. AMC's Motion to Compel Discovery.

On December 7, 1999, AMC filed a motion to compel discovery from plaintiff United States. Through its motion, AMC sought discovery to renew its APA counterclaim. The parties briefed the motion extensively, submitting more than 135 pages of briefing for Magistrate Judge Hillman's review. A hearing of the motion was held on January 11, 2000. At the hearing, which was primarily held off the record, the Magistrate Judge issued tentative rulings on certain issues[3] and advised the parties that AMC's discovery would be limited by Judge Morrow's December 17th Order, which was the law of the case. Following the Magistrate Judge's statement of his tentative rulings, the United States voluntarily agreed to disclose most of the information that would be responsive to Interrogatories # 5 and # 6. However, the United States was unwilling to disclose were communications that occurred in the course of settlement negotiations between the Justice Department and persons and entities other than AMC, and (2) communications that occurred in the course of the United States' investigation of entities other than AMC.[4] Following the hearing, the Magistrate Judge ordered the parties to submit additional briefing on the issue of whether AMC should be permitted to obtain discovery regarding the United States' settlement negotiations with movie theater industry members other than AMC and the applicability of the law enforcement and investigative privilege. The parties submitted another 20 pages of briefing for the Magistrate Judge's review. On February 25, 2000, after reviewing both sets of briefing by the parties, the

[3]Among other things, the Magistrate Judge indicated that his tentative position was that AMC was not entitled to discovery into issues relating to stadiums as opposed to issues relating to stadium-style theaters. Although that ruling has not been finalized and, thus, is not yet ripe for review, AMC attempts to raise it in its motion for reconsideration.

[4]The Department did not agree to reveal attorney's notes or thoughts about such communications, since those notes and thoughts are plainly protected by the work product doctrine.

Magistrate Judge issued a Minute Order in which he required the United States to provide certain additional discovery but denied AMC's requests for discovery into the United States' settlement negotiations with entities other than AMC. AMC now seeks reconsideration of the Magistrate Judge's February 25th Order.[5]

ARGUMENT

A. Standard of Review.

AMC may not obtain reversal or modification of Magistrate Judge Hellman's ruling in this matter unless it was "clearly erroneous or contrary to law." See Fed. R. Civ. P. 72(a); see also 28 U.S.C. § 636(b)(1)(A) (district court may review magistrate judge's order if it is "clearly erroneous or contrary to law."); Local Rules, Chapter V, Rule 3.3.1. "To conclude that a magistrate judge's decision is clearly erroneous, the district court must arrive at a 'definite and firm conviction that a mistake has been committed.'" Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1168 (C.D. Cal. 1998) (quoting Federal Sav. & Loan Ins. Corp. v. Commonwealth Land Title Ins. Co., 130 F.R.D. 507 (D. D.C. 1990)). Insofar as the February 25th Order embodied a relevance determination, AMC must meet a still higher standard, since district courts review such issues only for abuse of discretion. See Folb, 16 F. Supp. 2d at 1168 n.2; see also Geophysical Systems Corp. v. Raytheon Co., 117 F.R.D. 646, 647 (C.D. Cal. 1987).

B. Magistrate Judge Hellman's February 25th Ruling Should Be Affirmed.

AMC contends that Magistrate Judge Hellman's ruling denying discovery of information relating to the United States' settlement negotiations with members of the movie theater industry other than AMC should be reversed. We disagree for two reasons. First, the February 25th Order is consistent with a large body of case law recognizing the need to protect the confidentiality of settlement negotiations. Second, information relating to the United States' settlement negotiations with entities other than AMC is simply not relevant to this action.

[5]A copy of the Order is appended hereto as Exh. D.

1. The Ruling Is Not Clearly Erroneous or Contrary to Law.

AMC contends that the ruling denying discovery into settlement negotiations is clearly erroneous and contrary to law. The United States disagrees. The Supreme Court, the Ninth Circuit, and the Federal Rules of Evidence have long recognized the need to encourage settlement, to promote the resolution of disputes without litigation, and to maintain the confidentiality of settlement negotiations. See St. Louis Mining & Milling v. Montana Mining Co., 171 U.S. 650, 656, 19 S. Ct. 61, 43 L.Ed. 320 (1898); United States v. Contra Costa County Water District, 678 F.2d 90, 91 (9th Cir. 1982); Fed. R. Evid. 408 (evidence of "conduct or statements made in compromise negotiations" are not "admissible to prove liability for or invalidity of the claim or the amount [of a claim]."). The Magistrate Judge's Order is also supported by a wealth of case law.

While some courts have permitted discovery into settlement negotiations, the Ninth Circuit and many other courts have long recognized the need to keep settlement negotiations confidential. In Contra Costa, 678 F.2d at 91 , a municipal defendant sued by the United States sought to introduce evidence of settlement negotiations between the federal government and a non-party to the litigation. The district court ruled that, under Fed. R. Evid. 408, settlement negotiations are "'not admissible to prove liability for or invalidity of the claim or its amount.'" Id. (quoting Fed. R. Evid. 408). The Ninth Circuit affirmed, recognizing that there were two basic principles underlying the evidentiary exclusion embodied in the rule:

> The first is that the evidence is irrelevant as being motivated by a desire for peace rather than from a concession of the merits of the claim. Second, is in promotion of the public policy favoring the compromise and settlement of disputes. By preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged, thereby furthering the policy toward settlement. Here, we give additional importance to the fact that appellant was not a party to the [litigation giving rise to the settlement negotiations].

Contra Costa, 678 F.2d at 92 (citing the Advisory Committee Notes to Fed. R. Evid. 408); Sternberger v. United States, 401 F.2d 1012, 1018 (Ct. Cl. 1968); and Pewrzinski v. Chevron Chemical Co., 503 F.2d 654, 658 (7th Cir. 1974).

In Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D. Cal. 1990), the court applied the ruling in Contra Costa to determine the same question that is before the Court in this case. In Cook, former employees who were suing their employer for sexual harassment sought discovery of documents reflecting statements made during the course of settlement negotiations between the employer and the attorney representing a supervisor who had been terminated in connection with activities relating to the employees' sexual harassment claims. The employees sought to discover correspondence between the employer and the supervisor's attorney that occurred in the course of settlement negotiations. The employees argued that the discovery was relevant because it was likely to contain information regarding the veracity of the employees' claims, to show bias by the supervisor when he testified at trial, and that it was unfair to allow the employer to use the supervisor's termination as evidence that the employer had acted to prevent harassment without allowing the employees to discover the circumstances of the termination. Cook, 132 F.R.D. at 553. The District Court for the Eastern District of California denied the discovery, holding that statements made in settlement negotiations are entitled to protection under a right to privacy. Id. at 553. The court held that settlement negotiations are conducted in privacy with the expectation that they will not be disclosed to persons who are not parties to those negotiations. Id. Rejecting the employees' arguments that the private nature of the discussions would make them more likely to reveal information helpful to the employees' case, the court concluded that "it would be perverse logic to hold that the more private one expects discussions to be, the more releasable is the content of those discussions." Id.

In addition to holding that the settlement negotiations were protected by privacy rights, the Cook court also held that information relating to settlement negotiations was protected by the "well established privilege relating to settlement discussions." Id. The court reasoned:

> Thus, while it is true that Rule 408 is addressed to the inadmissibility of evidence at trial and generally pertinent to the inadmissibility of compromise material to prove damages or liability in the claim of origin, 'the same consideration of policy which actuates the courts to exclude an offer of compromise made by [the defendant to the plaintiff], also apply to settlement [negotiations between the defendant and a third party.] * * * In this regard, the court finds that one consideration in precluding the discovery of documents generated in the course of settlement discussions lies in the fact that such discussions are frequently not the product of truth seeking. Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are 'motivated by a desire for peace rather than from a concession of the merits of the claim.' ... What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sort of 'facts' would be highly misleading if allowed to be used for purposes other than settlement.

Id. at 554 (citing Contra Costa, 678 F.2d at 92, and Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69, 71 (4th Cir. 1987)). See also Bank of America Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assoc., 800 F.3d 339, 345 (3d Cir. 1986) (noting "confidentiality ordinarily accorded to settlement agreements" that do not formally use the judicial process); Butta-Brinkman v. FCA Int'l, Ltd., 164 F.R.D. 475, 477 (N.D. Ill. 1995) (holding that the defendant is not required to turn over information relating to settlement negotiations unless it is relevant and unless the party seeking the information can show that it cannot be obtained by other means); Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D. N.J. 1994) (requiring a more particularized showing that evidence is relevant and calculated to lead to the discovery of admissible evidence in the context of settlements); Serina v. Albertson's, 128 F.R.D. 290, 293 (M.D. Fla. 1989) (courts have long recognized Fed. R. Evid. 408's policy of encouraging

settlement in creating a particular standard to govern discoverability of settlement materials); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D. N.Y. 1982) (privilege for settlement documents is to recognize "the strong public policy in favoring settlements"); Olin Corp. v. Insurance Co. of North Am., 603 F. Supp. 445, 449-50 (S.D. N.Y. 1985) (same); City of Groton v. Connecticut Light and Power, 84 F.R.D. 420, 423 (D. Conn. 1979); UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co., 647 A.2d 142 (N.J. Sup. 1994) (holding that ordering disclosure of settlements would not only jeopardize those settlements but would chill and deter other parties from entering into confidential discussions to settle their disputes without a lengthy trial."). Cf. Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998) (finding that "information exchanged in confidential mediation, like any other information," is subject to discovery rules, "at least where jurisdiction is premised on a federal question and the material sought in discovery is relevant to the federal claims presented" but allowing discovery of settlement negotiations when they are calculated to lead to the discovery of admissible evidence); Oliver v. Committee for the Re-Election of the President, 66 F.R.D. 553, 556 (D. D.C. 1975) (although declining to recognize a settlement privilege, finding that information requested regarding settlement was neither relevant nor reasonably calculated to lead to admissible evidence).

AMC suggests that Fed. R. Evid. 408 and the Ninth Circuit's opinions in Brocklesby v. United States, 767 F.2d 1288, 1292-93 (9th Cir. 1995), cert denied, 474 U.S. 1101 (1986), and Hudspeth v. Commissioner, 914 F.2d 1207, 1214 (9th Cir. 1990), should be read to permit routine discovery into settlement negotiations because they expressly recognize a few limited instances where evidence relating to settlement agreements could be admissible for the limited purpose of proving the bias or prejudice of a witness. AMC Mem. at 7. However, the possible admissibility of settlement agreements in limited circumstances for the purpose of showing bias or prejudice does not equate to invasive discovery into all settlement negotiations. Here, AMC does not contend and, indeed, cannot contend that it seeks discovery into the Government's settlement negotiations for the purpose of obtaining evidence of bias or prejudice or for the purpose of obtaining any other evidence that would be admissible under Fed. R. Evid. 408.

Instead, AMC openly admits that it seeks discovery of information for use in proving the invalidity of the United States' claims -- i.e., evidence to support its APA defense (and to renew its dismissed APA counterclaim) alleging that the United States is allegedly applying a secret policy industry-wide through settlement negotiations and evidence to support its reliance defense in which it claims that, in designing its theaters, AMC allegedly relied on statements allegedly made by the Government during settlement negotiations with entities other than AMC. Both types of information would be inadmissible under Fed. R. Evid. 408, since they would offered to prove the validity or invalidity of a claim. Thus, the evidence that AMC seeks would not be admissible under Fed. R. Evid. 408. Contra Costa, 678 F.2d at 91.

2. The Discovery Sought by AMC Is Not Relevant and Does Not Warrant Intrusion into Confidential Settlement Negotiations.

AMC argues that the Court should ignore all of the cases supporting Magistrate Judge Hellman's ruling and instead follow the dictates of other cases holding that discovery of settlement negotiations should be permitted when it may lead to relevant evidence. But AMC's reliance on these cases is unavailing. AMC ignores the law of the case, which has already established that settlement negotiations and stadium cases are simply not relevant to AMC's APA-based arguments in this action.

In her December 17th Order dismissing AMC's counterclaim, Judge Morrow established the law of the case as to AMC's challenges of Justice Department action under the APA. First, the Judge held that "Neither settlement negotiations nor threats of suit constitute final agency action that may be judicially reviewed." Order at 12. Second, the Judge rejected AMC's APA-based argument that the United States had adopted a secret law that it was imposing on the theater industry through settlement negotiations.[6] Order at 13-14. Under these two rulings,

[6]AMC cites to an oral ruling by Judge Morrow during the August 9, 1999 hearing on the United States' motion to dismiss AMC's counterclaim to suggest that adopting an industry wide position in settlement negotiations could be final agency action. AMC Mem. at 8. However, AMC ignores Judge Morrow's later written order, which reverses her August 9 oral ruling. December 17th Order at 17 ("On August 27, 1999, AMC filed a supplemental declaration proffering the additional evidence it had been able to obtain concerning DOJ's action. . . ."); Id. at 16-17 ("The additional evidence proffered by AMC is not sufficient to demonstrate that DOJ

Judge Morrow made clear that AMC cannot rely on Justice Department statements during settlement negotiations as the basis for an APA challenge to this enforcement action. Accordingly, under the law of the case, the United States' settlement negotiations with other members of the movie theater industry or any other industry are simply not reasonably calculated to lead to the discovery of admissible evidence and, thus, are not permitted areas of discovery under Fed. R. Civ. P. 26(b)(1).[7]

AMC argues that it is entitled to discovery into settlement negotiations because it may have relied on such statements when it designed its theaters. At the January 11, 2000 hearing on AMC's motion to compel, the Magistrate Judge rejected this argument for two reasons. First, AMC did not argue good faith reliance as a basis for discovery into settlement negotiations when it originally briefed its motion to compel. Thus, that argument was waived. Second, the Magistrate Judge agreed with the United States' view that, if AMC had actually relied on statements made by the United States during settlement negotiations, it would necessarily know about such statements and would not need to discover them from the United

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has taken an industry-wide position like that the agency in National Union Automatic Laundry took by sending an opinion letter to an industry trade association. See National Union Automatic Laundry, supra, 443 F.2d at 701-02. To the contrary, the evidence before the court suggests that, at most, DOJ has communicated with ten members of the theater industry nationwide, and has not sought to press its interpretation of Standard 4.33.3 uniformly even among the largest owners. Consequently, the court concludes the evidence does not establish that DOJ has engaged in final agency action.").

[7]Judge Hillman's Minute Order denied AMC discovery relating to the United States' communications (and settlement negotiations) with stadium owners and operators and with architects relating to issues involving lines of sight in stadiums — not lines of sight in movie theaters. Judge Hillman's ruling is consistent with Judge Morrow's December 17th Order, which held that "[u]nlike the Department's interpretation of the line of sight requirement at issue in Caruso and Independent Living [two cases involving stadiums], the interpretation it seeks to enforce in this action has not been the subject of any official statement of policy or position equivalent to the [Technical Assistance Manual] Supplement [struck down in those two cases]. Rather, AMC contends that DOJ has taken final agency action by filing an amicus brief, sending private communications to theater owners, and threatening to initiate and in fact initiating litigation against some of them. Consequently, the 1994 TAM Supplement cases do not control decision of the issues raised in DOJ's motion to dismiss." Dec. 17th Order at 9.

States. Permitting AMC to discover statements that it does not know about simply does not make sense in the context of a reliance claim, since AMC cannot have relied upon statements unless it knew about them. Moreover, the statements that AMC seeks to discover are statements made in 1998 and 1999 — statements made years after AMC decided to build stadium-style theaters. AMC obviously could not have relied on statements made to theater owners during settlement negotiations when those statements were made after many of AMC's stadium-style theaters were already built.

Public policy considerations also support affirmance of the Magistrate Judge's ruling. Whenever possible, the Civil Rights Division attempts to resolve matters through informal settlement negotiations before instituting litigation to compel compliance with ADA requirements. As a result of this policy, most ADA violations uncovered through Justice Department investigations do not require recourse to litigation. Balanced against the public policy favoring the protection of the confidentiality of settlement negotiations and the Civil Rights Division's policy of pursuing alternate dispute resolution before filing suit to enforce its claims is AMC's alleged "need" for the discovery it seeks — a need that AMC has not shown. First, as the Court noted in its December 17th Order, the Department's statements in private communications with other members of the motion picture theater industry are "are not the kind of actions that are subject to judicial review under the APA," December 17, 1999 Order at 14, 9, and 8. Thus, these communications are not discoverable under AMC's APA-based affirmative defense and/or counterclaim. Second, under Fed. R. Evid. 408, communications that occurred during settlement negotiations (such as the Department's offers to compromise its claims by allowing a theater owner to provide certain lines of sight for wheelchair seating locations) "'are 'not admissible to prove liability for or invalidity of the claim.'" Contra Costa, 678 F.2d at 92 (quoting Fed. R. Evid. 408). Thus, even if AMC obtained discovery regarding settlement negotiations, it could not use them to prove or disprove the validity of any claim. Id. Third, the communications at issue occurred long after AMC designed the theaters at issue in this case. Thus, notwithstanding AMC's arguments to the contrary, AMC simply cannot argue that it relied on such communications when it made design decisions about its theaters or that

these communications bear any relevance to AMC's understanding of the requirements of Standard 4.33.3. Fourth, the identity of the persons who participated in settlement negotiations is not relevant either, since naming such persons would simply be a predicate to AMC's efforts to seek information about those settlement negotiations from the persons named — again, evidence that is not relevant. Fifth, the evidence that AMC seeks — evidence about the Department's interpretation of Standard 4.33.3 is available from other sources that have already been disclosed to AMC. The Department has provided AMC with all briefs it has filed discussing the application of Standard 4.33.3 to movie theaters, copies of all technical assistance materials it has prepared on the subject, copies of all settlement agreements it has reached with any movie theater owners and operators, and copies of all correspondence to members of Congress and other members of the public inquiring about the application of Standard 4.33.3 to movie theaters. Thus, AMC has no need to know what negotiating positions the Justice Department has taken in its settlement negotiations with other theater operators. See also Schachter v. United States, 1994 WL 327696 at *1 (N.D. Cal. Apr. 12, 1994) (holding that, in determining whether the interpretation of a statute is correct, "the court need only look to the face of the statute and the regulation").

C. The Magistrate Judge's Order Is Appropriate on Other Grounds As Well.

While the Magistrate Judge denied AMC the discovery it seeks because it involves confidential settlement negotiations that are not admissible under Fed. R. Evid. 408, the discovery could have been denied on other grounds as well.

In addition to asserting the confidentiality of settlement negotiations, the United States was also unwilling to disclose the information sought by AMC because it is protected by the law enforcement and investigative privilege.[8] The law enforcement and investigative privilege

[8]The Department invoked the law enforcement investigative privilege in answers to interrogatories, in answers to requests for production of documents, and by filing the Declaration of Acting Assistant Attorney General Bill Lann Lee. See Declaration of Bill Lann Lee at ¶ 21 (appended hereto as Exh. B); see excerpts from Pl.'s Resps. and Objections to Def.'s First Set of Interrog. at 3 and excerpts from Pl.'s Resps. and Objections to Def.'s First Set of Requests for

protects the government from the disclosure of information that would harm an agency's law enforcement efforts. In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988); Assoc. for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977). The privilege protects not only investigative files themselves but also the testimony about the contents of those files,[9] see In re Sealed Case, 856 F.2d at 271, the identity of law enforcement sources of information, see Tuite v. Henry, 98 F.3d 1411, 1414 (D.C. Cir. 1996), and the identity of individuals under investigation, see Church of Scientology v. United States Internal Revenue Serv., 995 F.2d 916, 920 (9th Cir. 1993) (noting that the courts are to consider invasion of privacy in evaluating claim of investigative privilege).[10]

Produc. of Docs. at 2 (appended as Exh. C). Acting Assistant Attorney General for the Civil Rights Division Bill Lann Lee is the appropriate person to assert this privilege, as he is "the head of the department [here, the Civil Rights Division] having control over the requested information." See Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996). In Tuite, the Court found the law enforcement privilege had been properly invoked by Michael Shaheen, counsel for the Office of Professional Responsibility (OPR), a component of the Department of Justice. See id. at 1413, 1414, 1417. See also United States v. Rozet, 183 F.R.D. 662, 666 (N.D. Cal. 1998) (finding that the acting head of an agency "is precisely the appropriate person to invoke the privilege, and has full authority to do so"). At the January 11th hearing, Magistrate Judge Hellman stated his tentative ruling that the Department had properly invoked the privileges it was asserting.

[9]"It makes little sense to protect the actual files from disclosure while forcing the government to testify about their contents." In re Sealed Case, 856 F.2d at 271.

[10]The law enforcement and investigative privilege applies in civil cases as well as criminal cases. In re Sealed Case, 856 F.2d at 271 (the law enforcement and investigative privilege protects "the public interest in safeguarding the integrity of ongoing civil and criminal investigations"); see also 12 Fed. Proc. § 33.306 (1988) (treatise observing that "[t]he [common-law]privilege is most often invoked as to investigative materials compiled in connection with the civil or criminal law enforcement efforts of the Justice Department and FBI"). In the FOIA context, the Ninth Circuit has held that the investigative files exemption applied to "civil as well as criminal law enforcement activities." Church of Scientology, 995 F.2d at 919 (9th Cir. 1993) (quoting National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974)); see also Stern v. FBI, 737 F.2d 84, 88 (D.C. Cir. 1984) (FOIA's law enforcement exemption applies to "enforcement of both civil and criminal federal law").

Since the Justice Department does not have subpoena power in its investigations under the ADA, it must rely on the cooperation of persons and entities under investigation when it is gathering evidence to determine if they are in compliance with ADA requirements. To encourage such cooperation, it is the Justice Department's policy to maintain the confidentiality of persons and entities under investigation for ADA violations unless it is necessary to file a lawsuit to enforce ADA compliance. Declaration of Acting Assisting Attorney General Bill Lann Lee at ¶ 21 (appended hereto as Exhibit B). The discovery that AMC seeks would require the Justice Department to reveal the identities of movie theater owners and operators that are currently under investigation, exposing these entities to public scrutiny as investigative targets and impairing the Department's ability to obtain cooperation from them. See Church of Scientology, 995 F.2d at 920. Accordingly, under the law enforcement and investigative privilege, the United States should not be compelled to disclose this information.[11]

CONCLUSION

For these reasons, the United States respectfully requests that Magistrate Judge Hellman's discovery order be affirmed and that AMC be denied discovery into the United States' settlement negotiations with other entities.

Respectfully submitted,

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Disability Rights Section
Civil Rights Section

[11]Recommendations and proposals regarding settlement negotiations are protected by the deliberative process privilege. See Norwood v. FAA, 993 F.2d 570, 577 (6th Cir. 1993); Mead Data Cent. v. United States Dep't of Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977).

U.S. Department of Justice
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Counsel for Plaintiff
United States of America

Dated: March 26, 2000

PROOF OF SERVICE

I, Jeanine M. Worden, declare:

I am over the age of 18 and not a party to the within action. I am employed by the U.S. Department of Justice, Civil Rights Division, Disability Rights Section. My business address is P.O. Box 66738, Washington, D.C. 20035-6738.

On March 27, 2000, I served **PLAINTIFF UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER MAGISTRATE JUDGE HELLMAN'S FEBRUARY 25, 2000 ORDER** on each person or entity named below by enclosing a copy in an envelope addressed as shown below and depositing the same with common carrier Federal Express for overnight delivery.

Date and Place of service: March 27, 2000, Washington, D.C.

Person(s) and/or Entity(ies) to Whom mailed:

Robert J. Harrop, Esq.
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Newport Beach, CA 92660

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: March 27, 2000 at Washington, D..C.

_____
Jeanine M. Worden

United States' Opposition
to Defendants' Motion to Reconsider
Exhibit A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. AMC ENTERTAINMENT, INC.; et. al., Defendants.	CASE NO. CV 99-1034 MMM (ShX) ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM

The Department of Justice ("DOJ") filed this action against defendants AMC Entertainment, Inc. and American Multi-Cinema, Ltd. (collectively "AMC") on January 29, 1999, charging that AMC theaters with stadium-style seating violate Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181-12189. DOJ alleges, *inter alia*, that the theaters violate a 1991 Department regulation requiring that public facilities, including movie theaters, offer wheelchair users "lines of sight comparable to those for members of the general public." 28 C.F.R., Pt. 36, Appendix A, § 4.33.3. Specifically, it asserts that in AMC's Norwalk, Promenade 16 and other theaters, there are two types of seating–"traditional-style" and "stadium-style" seats. Traditional-style seats are located in close proximity to the screen and afford viewers

lines of sight less desirable than those found in other parts of the auditorium.[1] Stadium-style seats, by contrast, are located throughout the theater, and provide "comfortable unobstructed lines of sight to the screen."[2] Because stadium-style seats can only be accessed by climbing stairs, DOJ alleges that wheelchair users cannot use them, and thus that they are relegated to traditional-style seats near the screen – the "worst seats in the house."[3] It further asserts that the theaters do not provide companion seating as mandated by Standard 4.33.3.

On April 13, 1999, AMC filed a counterclaim against DOJ. It alleges that, under the guise of interpreting the ADA, DOJ "has impermissibly and without notice" adopted a new rule of law in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 5522, 553. Specifically, AMC contends that "[t]he claims asserted by the DOJ in this lawsuit constitute substantive changes in the regulations promulgated under the ADA and are therefore null and void due to the DOJ's failure to comply with the APA.."[4]

Standard 4.33.3 provides:

> "Wheel chair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location." 28 C.R.F. pt. 36, Appendix A. § 4.33.3.

AMC contends that in the motion picture industry, "line of sight" refers to the vertical clearance

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[1]Complaint, ¶¶ 3, 13, 19.

[2]Id., ¶ 3.

[3]Id., ¶¶ 3, 13.

[4]Counterclaim, ¶ 6.

between rows.[5] It asserts that DOJ initially adopted the industry's understanding of the term when it promulgated Standard 4.33.3,[6] and that AMC constructed its theaters in reliance on this interpretation, clustering wheelchair spaces so they had an unobstructed view of the screen and providing at least one companion seat for each wheelchair area.[7]

Thereafter, in March 1996, AMC alleges that DOJ intervened in litigation between private individuals and United Artists Theater Circuit, Inc. ("UA") in order to become a party to the consent decree settling that action. AMC contends that DOJ used the consent decree to change the requirements of Standard 4.33.3 in two significant respects.[8] First, the settlement decree purportedly increased the number of companion seats mandated by requiring one seat per wheelchair *space*, rather than one for each area.[9] Second, the settlement decree allegedly mandated that future theaters provide wheelchair spaces in two separate locations,[10] with at least two of the five spaces provided located "one-quarter to three-quarters of the way back from the screen,. . . no closer to the screen than the fourth row, and no farther from the screen than four rows from the back of the auditorium.[11]

Although AMC was not a party to the UA suit, it alleges it relied on the decree, and both modified and built theaters to ensure compliance with its terms.[12] In August 1997, DOJ began investigating AMC's Norwalk and Promenade 16 theaters, facilities constructed prior to the UA consent decree. AMC asserts that, after completing its investigation, DOJ declined to provide any

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[5] *Id.*, ¶ *9.*

[6] *Id.*

[7] *Id.*, ¶ 10.

[8] *Id.*, ¶ ¶ 13, 14.

[9] *Id.*, ¶ 14.

[10] *Id.*

[11] *Id.*.

[12] *Id..*, ¶ 15.

indication of its findings[13]. In January 1998, DOJ inspected three AMC theaters in Kansas City that had been constructed after the UA consent decree, and featured wheelchair spaces no closer than the fourth row in all auditoria. Again, AMC alleges, DOJ declined to state its findings.[14]

In June 1998, DOJ advised AMC that its theaters were in violation of the ADA and threatened a lawsuit if it did not agree to design criteria for future facilities.[15] Between June 1998 and January 1999, the parties met and exchanged correspondence in an attempt to resolve the matter. AMC asserts that DOJ continually declined to articulate its view of what Standard 4.33.3 mandated in theaters with stadium-style seats. Rather, the Department purportedly continued to redefine and expand the requirements of the section.[16] Consequently, AMC alleges that DOJ's current interpretation of Standard 4.33.3 constitutes a new rule that agency can adopt and enforce only after it has complied with the notice and comment provisions of the APA.[17] AMC seeks, *inter alia*, a declaration that DOJ's interpretation of the phrase "comparable lines of sight" in theaters containing 300 seats or less, and its requirements for auditoria having sight lines that require slopes of greater than 5%, constitute substantive rulemaking, and are null and void because of the Department's failure to comply with the procedural requirements of the APA[18].

DOJ has moved to dismiss AMC's counterclaim, asserting that the interpretation of Standard 4.33.3 it seeks to enforce in this action does not constitute "final agency action" subject to judicial review under the APA. See 5 U.S.C. § 702. It also asserts that review is improper because AMC cannot show that it has "no other adequate remedy in a court." See 5 U.S.C. § 704.

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[13] *Id.*, ¶ 16.

[14] *Id.*, ¶ 17.

[15] *Id.*, ¶ 18.

[16] *Id.*, ¶ 19.

[17] *Id.*, ¶ 21.

[18] *Id.*, ¶ 24, Prayer, ¶¶ 1, 2.

DOJ asserts there is no final agency action because it has not issued any orders embodying its present interpretation of Standard 4.33.3., and has not imposed penalties on any party for failure to comply with the interpretation. DOJ acknowledges that it took a position regarding the application of Standard 4.33.3 to movie theaters in an amicus brief filed in *Lara v. Cinemark USA, Inc.*, United States District Court for the Western District of Texas, Case No. EP-97-CA-502H. It contends, however, that neither that brief, its pre-litigation communications with AMC, nor its filing of the present enforcement action constitute final agency action for purposes of APA review.

AMC counters that DOJ has taken final agency action respecting its interpretation of Standard 4.33.3 by filing the *Lara* brief, sending correspondence to theater owners in which it seeks compliance with the standard set forth in the brief, and initiating litigation against theaters when they fail to comply. It contends that, assessed pragmatically and flexibly, this activity constitutes the adoption of a new substantive rule in violation of the procedural protections of the APA.

I. DISCUSSION

A. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(1)

A plaintiff bears the burden of demonstrating that the court has subject matter justification over an action. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225, (9th Cir. 1989). The party mounting a Rule 12(b)(1) challenge to the court's jurisdiction may do so either on the fact of the pleadings or by presenting extrinsic evidence for the court's consideration. See *Thornhill Publishing co v. General Tel. & Electronics*, 594 F.2d 730, 733 (9th Cir. 1979) (facial attack); *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (challenge based on extrinsic evidence). There is an important difference between Rule 12(b)(1) motions attacking a complaint or counterclaim on its face and those replying on extrinsic evidence. In ruling on the former, courts must accept the allegations of the claim as true. See *Valdez, United States*, 837 F. Supp. 1065, 1067 (E.D.Cal. 1993), aff'd., 56 F.3d 1177 (9th Cir. 1995). In deciding the latter, courts may

weigh the evidence presented, and determine the facts in order to evaluate whether they have the power to hear the case. See *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

The APA does not provide an independent basis for federal subject matter jurisdiction. Rather, a federal court has jurisdiction over challenges to federal agency action because they are claims arising under federal law. See 28 U.S.C. § 1331. While the APA does not confer subject matter jurisdiction on the district court, "it does provide a waiver of sovereign immunity in suits seeking judicial review of a federal agency action under § 1331. *Gallo Cattle Co. v. U.S. Dep't. of Agriculture,* 159 F3.d 1194, 1198 (9th Cir. 1998). This waiver is subject to certain "limitations." however. *Id.* The agency action must be "final.'" and the complainant must have no other adequate remedy in a court. 5 U.S.C. §§ 702, 704.[19] To the extent these conditions are not satisfied, the court lacks jurisdiction to hear the claim. See *Powelson v. United States,* 150 F.3d 1103, 1104 (9th Cir. 1998) ("[s]overeign immunity is not merely a defense to an action against the United States, but a jurisdictional bar," quoting 16 J. Moor et al., MOORE'S FEDERAL PRACTICE ¶ 105.21 (3rd ed. 1998)); *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1098 (9th Cir. 1990) ("The United States is immune from suit unless it has consented to be sued, and the terms of its consent to be sued in any court define the jurisdiction of that court to entertain the suit"); *Dow Chemical v. United States E.P.A.,* 832 F.2d 319, 323 (5th Cir. 1987) ("we must now decide whether Dow has identified 'final' EPA action over which we have jurisdiction"). In determining whether it has jurisdiction over AMC's counterclaim, the court has considered the declarations and other evidence filed by the parties.

B. The Administrative Procedures Act

Under the APA, agencies must give notice and seek comment before formulating substantive regulations. See 5 U.S.C. §§ 553(b), (c) ("General notice of proposed rule making shall be published in the Federal Register. . . . After notice required by this section, the agency

[19]Section 704 provides for review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . ." See 5 U.S.C., §704. Here, neither party contends that a specific statute authorizes review of DOJ's interpretative and enforcement activities.

shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation"). See also *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C.Cir. 1997). These notice and comment requirements apply only to "legislative" or "substantive" rules; they do not apply to "interpretative rules, general statement of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b). See *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (1988); *Community Nutrition Institute v, Young*, 818 F.2d 943, 945-46 (1987) (per curium).

What constitutes a "substantive rule" is not defined in the APA. The Supreme Court has noted, however, that one characteristic inherent in the concept is that the regulation must "affect[] individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). "This characteristic is an important touchstone for distinguishing those rules that may be 'binding ' or have the 'force of law.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979) (quoting *Morton, supra*, 415 U.S. at 235). Substantive rules "effect a change in existing law or policy." Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983). Interpretive rules, by contract, "merely clarify or explain existing law or regulations." *Id.* AMC's counterclaim charges that DOJ's new interpretation of Standard 4.33.3 constitutes substantive rulemaking. Because DOJ did not give notice or seek comment prior to adopting the alleged new rule, AMC asserts the APA has been violated.

C. Final Agency Action

Whether AMC's claim in this regard can be heard depends in the first instance on whether DOJ's interpretation constitutes "final agency action." See 5 U.S.C. § 704; *Gallo, supra,* 159 F.3d at 1198-99. The Ninth Circuit has directed that this finality requirement be interpreted in a "pragmatic" and "flexible" way. *Dietary Supplemental Coalition, Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992). See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996). Generally, administrative orders are not final and reviewable "unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." *Ukiah Valley Medical Center v.*

FTC, 911 F.2d 261, 264 (9th Cir. 1990) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)); *Air California v. United States Dep't of Transportation*, 654 F.2d 616, 621 (9th Cir. 1981) (same). Thus, when an action is not a "definitive" statement of the agency's position and does not have a "direct and immediate . . . effect on the day-to-day business" of a party, it is not "final." *Air California, supra*. See also *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) ("the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. . .").

Other relevant factors in assessing finality include whether the action has the status of law or comparable legal force, and whether immediate compliance with its terms is expected. See *FTC v. Standard Oil Co*, 449 U.S. 232, 239-40 (1980); *Assiniboine v. Board of Oil and Gas Conservation*, 792 F.2d 782, 788 (9th Cir. 1986) (applying the *Abbott Laboratories* factors). DOJ's amicus brief in *Lara*, its private correspondence with theater owners around the country, and its initiation of litigation against certain of them do not have these indicia of finality.

1. The 1994 TAM Supplement Cases

In arguing that DOJ's interpretation of Standard 4.33.3 constitutes final agency action subject to review, AMC relies heavily on two cases that examined the Department's interpretation of the line of sight requirement in connection with seating arenas and stadia. In each case, a private stadium owner challenger the agency's attempt to enforce a requirement that wheelchair locations be sufficiently elevated that their occupants could see over spectators standing in front of them. This requirement was set forth in the 1994 Supplement to the DOJ's Technical Assistance Manual ("1994 TAM Supplement"). Because the interpretation constituted a fundamental change in the agency's prior interpretation of Standard 4.33.3, and because DOJ had adopted the 1994 TAM Supplement without notice and comment, both decisions cited by AMC held it was invalid. See *Caruso v. Blockbuster-Sony Music*, 174 F.3d 166, 177 (3rd Cir. 1998); *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 758 (D.Or. 1997). But see *Paralyzed Veterans, supra*, 117 F.3d at 587 (holding that DOJ had not previously adopted an authoritative positive on the issue, and thus that the 1994 TAM Supplement was an interpretative

rule that could be adopted without notice and comment).

Neither *Caruso* nor *Independent Living* addressed the issue presently before the court, i.e., whether DOJ's interpretation of Standard 4.33.3 was final agency action that could be judicially reviewed under the APA. All parties apparently agreed that the Department's issuance of the 1994 TAM Supplement constituted final agency action; their disagreement concerned whether requiring a line of sight over standing spectators constituted a substantive or interpretative rule. See *Caruso, supra*, 174 F.3d at 174 (finding that DOJ violated the APA because the "agency [knew] it [was] promulgating a rule [Standard 4.33.3] that [was] ambiguous on a substantive issue of concern to commentators [whether lines of sight over standing spectators were required], and later trie[d] to resolve the issue through an interpretive rule [the 1994 TAM Supplement]"); *Independent Living, supra*, 982 F.Supp. at 737 (holding that "the interpretation of Standard 4.33.3 expressed in the 1994 TAM Supplement is an attempt to impose a new substantive obligation, which may not be accomplished under the rubric of an 'interpretive regulation'"). Unlike the Department's interpretation of the line of sight requirement at issue in *Caruso* and *Independent Living*, the interpretation it seeks to enforce in this action has not been the subject of any official statement of policy or position equivalent to the TAM Supplement. Rather, AMC contends that DOJ has taken final agency action by filing an amicus brief, sending private communications to theater owners, and threatening to initiate and in fact initiating litigation against some of them. Consequently, the 1994 TAM Supplement cases do not control decision of the issues raised in DOJ's motion to dismiss.

2. The *Lara* Amicus Brief

In its brief in *Lara*, the Department noted that it was "participating as *Amicus curiae* . . . to provide the Court with the United States' interpretation of the American with Disabilities Act . . . and its implementing regulations."[20] After asserting that its views were entitled to

[20]Declaration of Gregory F. Hurley in Opposition to Motion to Dismiss Counterclaim ("Hurley Decl."), Ex. E at 2.

deference,[21] DOJ argued:

> "Once measured, the lines of sight provided to wheelchair users must be comparable to those provided to members of the general public. "Comparable" is an ordinary word used in everyday parlance. . . . Consistent with this practical definition, the Department of Justice interprets the language in the Standards requiring 'lines of sight comparable to those for members of the general public' to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. . . . In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in industry guidelines, 'viewing angles' refers to vertical viewing angles, horizontal viewing angles and to other components that affect 'lines of sight.'"[22]

Advocacy in the context of a judicial proceeding does not constitute final agency action. See *Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990) ("Agency advocacy in a judicial proceeding is obviously not such agency action as would be subject to judicial review under the Administrative Procedure Act. . . . . Judicial review of administrative action under the Administrative Procedure Act is limited to orders of definitive character dealing with the merits of proceedings before an administrative agency"). See also *National Labor*

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[21] *Id.*

[22] *Id. at 8-9.* Earlier in the brief, DOJ discussed a publication of the Society of Motion Picture and Television Engineers ("SMPTE") titled Engineering Guideline Design of Effective Cine Theaters, EG 18-1994 ("the SMPTE Guideline"). (*Id*. at 3-3.) It is this industry standard to which the last quoted sentence apparently makes reference. DOJ asserts that it did not adopt the SMPTE Guideline in the *Lara* brief, and that it has not adopted it as the Department's interpretation of Standard 4.33.3.

Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (noting that an agency's decision to file a complaint does not constitute a final agency decision since it does not effect a final disposition, but merely permits litigation); *Board of Trade of the City of Chicago v.* SEC, *883 F.2d 525, 529-30 (7th Cir. 1989) (*agency's discretionary decision to prosecute a complaint is not reviewable under the APA). This is because an agency's statement of position in litigation with a private party imposes no legal obligation, denies no existing rights and fixes no legal relationships. See *Ukiah Valley Medical Center, supra,* 911 F.2d at 264.

In an analogous context, the Supreme Court held in *FTC v. Standard Oil Co. of California,* 449 U.S.232, 241 (1980), that the Federal Trade Commission's issuance of an administrative complaint did not constitute a reviewable final action. The Court explained that "the Commission's averment of 'reason to believe' that [defendant] was violating the act [was] not a definitive statement of position." *Id.* at 241. See also *USAA Fed. Sav. Bank v. McLaughlin*, 849 F2.d 1505, 1508 (D.C.Cir. 1988) ("the mere issuance of an administrative complaint does not constitute final agency action"); *Dow Chemical, supra,* 832 F.2d at 323-24 (the interpretation of an agency regulation, coupled with a request for data and amendment of a complaint in an enforcement action, was not final action subject to judicial review).

In *Lara*, DOJ articulated its view or belief concerning the meaning of Standard 4.33.3. Like the filing of the administrative complaint in Standard Oil, the amicus brief in *Lara* "ha[d] no legal force comparable to that of the [published] regulation at issue in *Abbott Laboratories* [requiring that manufacturers print certain information on drug labels and advertisements], nor any comparable effect upon [defendant's] daily business." *Standard Oil, supra,* 449 U.S. at 242. See also *Ukiah Valley Medical Center, supra,* 911 F.2d at 264 (the burden of having to defend administrative suits has "consistently been held not to constitute a 'direct and immediate . . . effect on the day-to-day business' of charged parties"). This is particularly true since the *Lara* court declined to adopt the interpretation of Standard 4.33.3 espouse in DOJ's amicus brief. The filing of the brief and articulation of an interpretation of Standard 4.33.3, therefore, did not constitute final agency action subject to judicial review.

3. Settlement Communications And Threats of Litigation

As further evidence of final agency action, AMC points to DOJ's correspondence with theater owners since *Lara*. It asserts that in these private communications DOJ has advanced the interpretation of Standard 4.33.3 it articulated in *Lara*, and has threatened to sue theater owners who decline to abide by it. Neither settlement negotiations nor threats of suit constitute final agency action that may be judicially reviewed. See *New Jersey Hospital Ass'n. v. United States*, 23 F.Supp.2d 497 (D.N.J. 1998) ("The question then becomes whether the actions of the DOJ in providing settlement letters to plaintiff's member hospitals constitute final agency action, for which there is no other adequate remedy in a court. . . . .This Court finds that the DOJ's actions are not final, [and] that plaintiff has available to it other adequate remedies in a court. . .") *Duval Ranching Co. v. Glickman*, 965 F.Supp. 1427, 1440 (D.Nev. 1997) ("Finally, there is no evidence that Defendants have ever attempted to enforce any regulations against any of the named Plaintiffs. . . . Mere threats are not final action. In *Ukiah Valley Medical Center* the Ninth Circuit held that the filing of a complaint by an administrative agency is not 'final' for purposes of judicial review. . . . A fortiori, threatening to file a complaint, threatening to initiate criminal proceedings, or threatening to sue, are also not final").

AMC asserts that "agency 'interpretations' and other informal announcements [may] constitute[] final agency action subject to review [under] the APA."[23] The cases it cites for this proposition, however, are inapposite. In *Independent Broker-Dealers' Trade Association v. Securities & Exchange Comm'n*, 442 F.2d 132, 139-40 (D.C.Cir. 1970), for example, the court found that the SEC's statement of policy respecting customer-direct give-ups of brokerage fees had led the stock exchange to abolish the give-ups. The court noted that the

> "elimination of [the] give-ups . . .confront[ing] appellants with pecuniary harm was accomplished, not merely threatened. There was no means within the administrative framework by which appellants could force the Commission to hold further hearings on give-ups. As to them the Commission's action was effective

[23]Memorandum of Points and Authorities in Opposition to Motion to Dismiss at 26:13-16

and final." *Id.*

The court contrasted this situation with one in which the stock exchange had "refused to follow the Commission's polities." Had the exchange elected to follow such a course, it stated, the brokers "action would likely have been premature." *Id*. at 141. Here, unlike the plaintiffs in *Independent Broker-Dealers*, AMC is "merely threatened" with harm. While AMC faces the burden and cost of litigation, DOJ cannot force compliance with its interpretation of Standard 4.33.3 unless and until the court endorses that interpretation by issuing a final judgment in DOJ's favor.

In another case cited by AMC, *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d. 689, 692 (D.C.Cir. 1971), the federal Wage-Hour Administrator issued an opnion letter to an association of laundry and cleaning businesses stating that coin-operated launderettes and dry-cleaning services were "engaged in laundering or cleaning clothing or fabrics within the meaning of the act." The District of Columbia Circuit held that this was final agency action subject to judicial review. *Id* at 702. The court found that the opnion letter constituted final agency action because it had been issued in response to a specific inquiry, and the administrator intended it to be a "deliberative determination of the agency's position at the highest available level on a question of importance. . ." that affected the entire industry. *Id*. at 701-02.

Here, rather than a communication intended definitively to articulate an industry-wide policy, DOJ has communicated privately with individual theater owners to negotiate and resolve its differences with them.[24] These communications do no have "the contemplation and likely consequence of 'expected conformity'" among members of the industry. See *id*. at 698 (quoting *Abbott Laboratories, supra*, 387 U.S. at 150). See also *Association of Public Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997) ("Negotiations, which are not

[24]See Hurley Decl., Exs. G, H. Exhibit G, a letter directed to AMS, invites it to submit new drawings and indicates that DOJ's counsel is willing to schedule a meeting to discuss the matter further. The letter concludes "If you do no contact me immediately to schedule a meeting time and to commit to submitting such drawings by a date certain next week, the Department will assume that you are unwilling to resolve the investigation through settlement at this time." (Id., Ex. G.)

final actions, therefore are not reviewable, and we decline to consider them.")[25]

Thus, viewed separately or in combination, the matters AMC characterizes as final agency action are not the kind of actions that are subject to judicial review under the APA.

D. No Other Adequate Remedy In A Court

Even if it is assumed that DOJ's amicus brief, correspondence with theater owners, and threats of enforcement action are final agency action, AMC has an adequate remedy in that it may assert violation of the APA as a defense to DOJ's enforcement action against it. See *Jerry T. O'Brien, Inc. v. Sec*, 704 F.2d 1065, 1066 (9th Cir. 1983), rev'd on other grounds, 467 U.S. 735 (1984) (dismissing suit seeking to enjoin an administrative investigation by the SEC on the grounds that it was being conducted improperly, since plaintiffs' ability to assert their defenses in a future action by the agency to enforce the subpoena was "an adequate legal remedy"). See also *Christensen, supra* 549 F.2d at 1323 ("Litigation expenses, however substantial and nonrecoverable, which are normal incidents of participation in the agency process do not

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[25]The remaining cases cited by AMC are similarly distinguishable. See National Union Resources Defense Council, Inc. v. Environmental Protection Agency, 22 F.3d 1125, 1133 *(D.C.Cir. 1994)* (the fact that a memorandum to regional EPA directors, a letter to the National Resources Defense Council and a "Nitrogen Oxides Supplement to the General Preamble" published in the Federal Register "constitute[d] final agency action [was] clear from the EPA's subsequent conditional approval of non-I/M committal SIPs . . . *under authority of those documents*" (emphasis added)); *Southern California Aerial Advertisers' Ass'n v. Federal Aviation Administration, 881, F.2d 672, 676 (9th Cir. 1989) (*a letter issued by an FAA official was "a definitive statement of the FAA's position that had a direct and immediate effect on petitioner's members and that carried an expectation of immediate compliance with its terms. . . . Given that petitioner's members were expected to obey the rule set fort in the . . . letter as if it were law, the informality of the letter does not undermine[it]. .."): *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165, 1170 (6th Cir. 1983), cert. denied, 465 U.S. 110 (1984) (court held that the FTC's announcement of the results of a year-long study of tar and nicotine levels in Barclay cigarettes constituted final agency action, since "the FTC also halted the testing of Barclay cigarettes, stated that it would refuse to publish any 'tar' or nicotine content figures for Barclay, and amended the 1981 Report which lists Barclay as a 1 mg. 'tar' cigarette. As a result, it would now appear to be inappropriate for Brown & Williamson to continue to cite the figures in the 1981 Report in its Barclay advertisements. Although the FTC did not order Brown & Williamson to desist from making the 'ultra-tow tar' claim in its advertisements for Barclay, that is the effect of the action taken...").

constitute irreparable injury" and therefore do not "permit judicial intervention in the agency process").

AMC argues that such a view "ignores the practical consequences" of DOJ's conduct. It asserts that DOJ's press releases regarding this litigation threaten to harm its business reputation irreparably and leaves the entire theater industry in a state of uncertainty as to the applicable law. AMC has proffered no evidence that it has suffered actual harm to its business reputation as a result of publicity surrounding the filing of this action. Compare *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997) ("The Hospital also introduced evidence that its reputation and, consequently, its fund-raising ability had been impaired since the Union began displaying the fraudulent banner")[26] Nor has it demonstrated in any other fashion that litigating the matter of APA compliance as an affirmative defense to DOJ's enforcement action will not suffice to protect its interests.

E. AMC's Request for Discovery

In its opposition to DOJ's motion, AMC argues that if the court determines there is a "legitimate issue" regarding final action, the motion to dismiss should be denied, and AMC should be given time to conduct discovery. AMC contends discovery is warranted "[b}ecause the resolution of factual issues is inappropriate on a motion to dismiss." This overlooks the fact that in deciding Rule 12(b)(1) motions asserting lack of subject matter jurisdiction, the court may consider extrinsic evidence and resolve factual issues. See *Roberts, supra*, 812 F.2d at 1177. Thus, the present motion to dismiss is a proper vehicle for determining whether final agency action exists. See, *e.g., Air California, supra*, 654 F.2d at 622 ("the district court entered judgment dismissing this action for lack of jurisdiction on the grounds that the issues were not ripe for review and that no case or controversy had been presented").

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[26]*Abbott Laboratories* is similarly distinguishable. There, the FDA published regulations that required the plaintiff manufacturer to "change all [of its] labels, advertisements and promotional materials" immediately. *Abbott Laboratories, supra*, 387 U.S. at 1517. Here, by contract, DOJ's position respecting Standard 4.33.3 has no legal effect unless and until the court enters a judgment enforcing it.

Perhaps for this reason, courts resolving Rule 12(b)(1) jurisdictional challenges have frequently handled requests for discovery in a manner similar to that prescribed in Rule 56(f): they have required that the party asserting jurisdiction be permitted to conduct discovery to obtain facts supporting its position, at least where such facts are peculiarly within the knowledge of the opposing party. See, e.g., *Investment Properties International, Ltd. v. IOS, Ltd*, 459 F.2d 705, 707-08 (2d Cir. 1972); *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.), cert. denied, 454 U.S. 897, (1981); *Timberlane Lumber Co. v. Bank of America*, 574 F.Supp. 1453, 1461 (N.D.Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984). At the August 9, 1999, hearing on this motion, the court determined that AMC should have an opportunity to conduct further discovery on the issue of final agency action[27] Accordingly, it continued the hearing to September 8, 1999.

On August 27, 1999, AMC filed a supplemental declaration proffering the additional evidence it had been able to obtain concerning DOJ's action. AMC asserted that DOJ had refused to produce the majority of the documents it had requested, had raised a work product privilege in response to numerous requests, and had objected on the basis that discovery was stayed.[28] DOJ countered that it had certified to AMC that it had had communications with less than ten of the

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[27]Because one aspect of the parties' dispute centered on the number of theaters to whom DOJ had communicated a demand that it comply with the interpretation of Standard 4.33.3 set forth in the *Lara* brief, the court suggested that DOJ identify the theaters that were currently under investigation or that had been sent such a communication. Counsel for DOJ responded that she would do provide this information if AMC specifically requested it and if the disclosure would not waive the Department's investigative process privilege. (See August 9, 1999 Hearing Transcript of Plaintiff's Motion to Dismiss Defendant's Counterclaim, 34:21-35:1.) The court then stated:

> "At a *minimum*, . . . the Department could certify under oath in some fashion, whether in response to an interrogatory or otherwise, that it had communicated with [some number of] theater owners across the country with respect to the issues that are involved in this litigation." (*Id.* at 35:5-9 (emphasis added).)

This latter approach was apparently that the department ultimately adopted.

[28]Supplemental Declaration of Gregory F. Hurley Regarding United States' Responses To Discovery, 6-8.

fifty largest theater owners in North America.[29] DOJ also certified that none of the ten was the largest theater owner.[30] With three exceptions, the information provided by DOJ did not specify which theater owners had been contracted. The three owners identified include AMC and Cinemark USA, who are among the ten largest theater owners in the nation, and SoCal Cinemas, which ranks 38 of 50.[31]

The additional evidence proffered by AMC is not sufficient to demonstrate that DOJ has taken an industry-wide position like that the agency in *National Union Automatic Laundry* took by sending an opinion letter to an industry trade association. See *National Union Automatic Laundry, supra*, 443 F.2d at 701-02. To the contrary, the evidence before the court suggests that, at most, DOJ has communicated with ten members of the theater industry nationwide, and has not sought to press its interpretation of Standard 4.33.3 uniformly even among the largest owners. Consequently, the court concludes the evidence does not establish that DOJ has engaged in final agency action.

It is clear, however, that the parties dispute the proper scope of discovery on this issue and that multiple discovery matters remain to be resolved. As a result, while DOJ's motion to dismiss AMC's counterclaim must be granted, the order of dismissal is without prejudice to AMC's right to seek leave to reassert the counterclaim at a later time should it develop, through discovery or otherwise, evidence of final agency action that satisfies the legal standards discussed herein.

II. CONCLUSION

AMC's counterclaim is dismissed on the basis that the court lacks subject matter jurisdiction over it. This dismissal is without prejudice to AMC's right to seek leave to reassert

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[29]Supplemental Declaration in Support of the United States' Motion to Dismiss Defendants' Counterclaim, ¶ 6.

[30]*Id.*

[31]*Id.*

the counterclaim should it develop evidence of final agency action meeting the standards set forth in this order.

DATED: September 8, 1999

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

United States' Opposition
to Defendants' Motion to Reconsider
Exhibit B

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff v. AMC ENTERTAINMENT, INC., et al. Defendants.	Civil Case No: 99-01034 MMM (SHx) **DECLARATION AND FORMAL ASSERTION OF PRIVILEGES IN OPPOSITION TO DEFENDANT AMC'S MOTION TO COMPEL DISCOVERY**

I, Bill Lann Lee, hereby state and declare, as follows:

1. I am the Acting Assistant Attorney General of the Civil Rights Division of the United States Department of Justice (the "Department"). I was appointed to that position on December 15, 1997.

2. The Attorney General of the United States is responsible for enforcement of the nation's civil rights laws, and has primary responsibility for enforcement of the Americans With

Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 through 12213. I have been delegated the authority of the Attorney General to enforce the ADA under 28 C.F.R. § 0.50(1). Pursuant to my authority, the Disability Rights Section of the Civil Rights Division is charged with enforcing Title I, II, and III of the ADA as it relates to both public and private entities.

3. The Attorney General has the authority and the duty to investigate alleged violations of Title III of the ADA and to conduct compliance reviews of covered entities. 42 U.S.C. § 12188(b)(1)(A)(i). The Attorney General also has the authority to promulgate regulations under Title III of the ADA. 42 U.S.C. § 12186. In addition, the Attorney General has the authority to file a civil action in United States District Court if she believes that an entity has violated Title III of the ADA by engaging in a pattern or practice of discrimination or to vindicate the public interest. 42 U.S.C. § 12188(b)(1)(B)

4. I am generally familiar with the history and nature of the above-captioned action before the United States District Court for the Central District of California. Members of my staff have reviewed a representative sampling of the hundreds of pages of privileged documents already identified, and I have reviewed a representative sample of the privileged documents.

5. On January 31, 1999, the Attorney General filed a lawsuit in the Central District of California alleging, among other things, that American Multi-Cinema, Inc. ("AMC"), and its parent company AMC Entertainment ("AMCE"), violated Title III of the ADA by failing to design, construct, and operate certain motion picture theaters in the Los Angeles area and elsewhere in accordance with the ADA Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A (the "Standards"), including but not limited to § 4.33.3 ("Standard 4.33.3"). The Attorney General considers this failure to comply with the Standards to constitute a pattern or practice of discrimination and to constitute unlawful discrimination raising an issue of general public importance. See Complaint at ¶ 3.

6. On September 8, 1999, the District Court in this case dismissed, without prejudice, AMC's counterclaim alleging that the Department violated the Administrative Procedure Act (APA), 5 U.S.C. § 551, et seq., in its interpretation of Standard 4.33.3

7. The United States has provided hundreds of documents and over one hundred pages of answers to interrogatories, request for production, and requests for admission in response to AMC's discovery requests. Among the documents and information that the United States has produced to AMC are preliminary list of the ADA Violations at the Norwalk Theater, the Promenade 16 Theater, the Olathe Theater, the Bari Woods Theater, and the Leawood Theater; all Department of Justice technical assistance documents relating to the ADA; all Department press releases relating to the ADA,; all Department policy letters relating to Standard 4.33.3 and/or movie theaters; all pleadings, exhibits, and affidavits filed by the Department in lawsuits involving movie theaters; all settlement agreements involving movie theaters entered into by the Department; and all Departmental records of public statements by the Department about movie theaters and/or the application of Standard 4.33.3 to movie theaters.

8. During the course of discovery, the United States advised AMC that several of its requests for production and interrogatories sought documents and information protected by the governmental deliberative process privilege, the work product doctrine, the attorney-client privilege, and the law enforcement and investigative privilege. The United States also advised AMC that many of its request sought documents and information that are not reasonably calculated to lead to the discovery of admissible evidence and that AMC's discovery requests were imposing an extreme burden on the Justice Department. The Department asked AMC to limit its discovery requests so that they did not seek clearly privileged materials, so that they sought materials that were relevant to movie theaters, and so that they did not pose an undue burden of Departmental resources. AMC refused these requests and insisted that Department attorneys prepare a privilege log itemizing each of the hundreds of documents for which the United States is claiming privilege.

9. AMC's discovery requests have imposed a major burden on the Justice Department. To date, although the Department has limited its search for documents to those directly relevant to movie theaters, Jeanine Worden, the lead attorney on this case, advises me that Department attorneys have spent over 800 hours responding to AMC's discovery requests --

i.e, reviewing files to locate documents and information responsive to AMC's requests; preparing answers to AMC's two sets of interrogatories, request for production of documents, and request for admission; and reviewing documents for privilege and preparing a privilege log. Because the review required by AMC's request is so extensive, covering the time period from 1991 to the present, and because AMC's discovery request require the review of tens of thousands of Departmental documents, it is difficult to determine how much additional time will be required to complete the Department's response to AMC's discovery requests. The Department's search for responsive documents and information is not yet complete. Ms. Worden advises me that she believes Department attorneys will spend at least another 500 hours completing the review for nonprivileged documents relating to movie theaters that are responsive to AMC's request. If the Court were to order the Department to produce all nonprivileged documents and information sought by AMC, Ms. Worden advises me that the process of reviewing files to locate such documents and information is likely to take at least an additional 2,000 hours of attorney time, including not only attorney time in the Civil Rights Division's Disability Rights Section, but also attorney time in United States Attorney's offices nationwide. Requiring the Justice Department to devote such large amounts of attorney time to responding to AMC's discovery requests would impose a tremendous burden on the Department and would severely limit the Department's ability to continue ADA enforcement efforts in other matters.

10. To date, the Department has completed a partial privilege log listing approximately 500 documents for which privilege is being asserted in this action. (A copy of the partial privilege log has been submitted together with the Joint Stipulation regarding this discovery dispute. Department attorneys have asked AMC to relieve them of the burden of listing each and every document for which any privilege was claimed, but AMC refused this request. Ms. Worden advises me that compilation of a privilege log that listed each document for which the Department is asserting privilege (i.e., the attorney-client privilege, work product doctrine, the law enforcement and investigative privilege or the deliberative process privilege) would require hundreds of additional hours of attorney and paralegal time, particularly if the

Department were required to log each page of attorney notes and other attorney work product, each document contained in active and closed investigative files, and each document for which the Department is asserting the deliberative process privilege. For this reason, I am asking the Court to relieve the Department of the burden of preparing a privilege log listing each document for which the Department is asserting privilege — for example, relieving the Department of the obligation to list each work product document and/or allowing the Department to log categories of documents, instead of individual documents.

11. In its portion of the joint stipulation regarding discovery disputes, AMC has moved to compel the United States to produce documents and information that are not relevant to a defense arising under the Administrative Procedure Act or any other claim or defense in this action and documents and information for which the Department is asserting privilege.

12. As part of my official duties, I am familiar with the government's deliberative process privilege, the attorney-client privilege, the work product doctrine, and the law enforcement and investigative privilege.

13. I have executed this Declaration for the purpose of making formal claims of privilege as to documents and information sought by AMC in its Joint Stipulation. The statements and conclusions stated in this Declaration are based upon information made available to me in my official capacity. After consulting with the Disability Rights Section attorneys involved in the instant case and members of my staff who have reviewed a representative sampling of the documents and provided me with a representative sampling of the documents that I have reviewed, I have determined that the documents and information sought by AMC are protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, and the law enforcement ad investigative privilege.

14. Specifically, I am making a formal claim of the deliberative process privilege with respect to the following documents and with respect to all oral and written communications relating to deliberations reflected in, or otherwise relating to these documents: the memorandum written by Jeanine M. Worden, Trial Attorney, to John L. Wodatch, Chief, Disability Rights Section, recommending this litigation against AMC, including all attachments to the

memorandum and the executive summary for the memorandum; all drafts of that memorandum and the executive summary and notes and comments about them; all drafts of the complaint and other documents filed in this action; the memorandum from Daniel Werfel, Trail Attorney, to John L. Wodatch, Chief, Disability Rights Section, recommending amendment of the complaint in this action, drafts of that memorandum, and notes and comments relating to those drafts; the memorandum from John L. Wodatch to me recommending amendment of the complaint in this action, all drafts thereof, and notes reflecting comments on the drafts thereof, all memoranda, drafts of memoranda, notes, written communications, and meeting notes regarding the memoranda recommending amicus participation in Lara v Cinemark USA, Inc (W.D. Tex), including all attachments to such memoranda; all memoranda, drafts of memoranda, and notes, comments and communications about the memoranda recommending the potential filing of a lawsuit or recommending participating in the Lonberg v Sanborn Theaters Action, the Olympic Stadium Action, The Oregon Arena Action, the Ellerbe-Becket Action, Arnold v United Artists, Fiedler v America Multi-Cinema, the Paralyzed Veterans Action, the Caruso Action, and all other actual or potential litigation or actual or potential amicus participation in lawsuits at the trial or appellate level: all memoranda and drafts of memoranda recommending investigation and/or lawsuit against Cinemark USA, Inc., including all attachments to the memorandum; all emails, handwritten and typewritten notes, records of meetings, and memoranda discussing any of the foregoing memoranda, all memoranda recommending the promulgation or revision of regulations under the ADA; all nonpublic drafts of notices of proposed rulemaking and all nonpublic drafts of proposed regulations under the ADA, all internal Departmental and internal Architectural and Transportation Barriers Compliance Board ("Access Board")[1] memoranda, notes, and other written and oral communications regarding drafts of notices of proposed rulemaking and/or nonpublic drafts of proposed regulations; all internal Departmental and Access Board communications relating to proposed revisions to regulations under the ADA; all

[1] The Department is in possession of these documents because it is a member of the Access Board.

memoranda prepared by Department attorneys or staff working at the direction of Department attorneys proposing litigation strategy or litigation positions in this case, Lonberg v Sanborn Theaters, Inc., Lara V Cinemark USA, Inc., United States v. Cinemark USA, Inc., Cinemark USA, Inc. v. United States, the Olympic Stadium Action, the Oregon Arena Action, the Ellerbe-Becket Action, Arnold v. United Artists, Fiedler v American Multi-Cinema, the Paralyzed Veterans Action, the Caruso Action, and any other actual or proposed litigation that falls within the scope of AMC's discovery requests; all nonpublic documents, consultant's reports, and communications relating to internal Departmental deliberations regarding potential settlement terms, and potential settlement agreements, or potential consent decrees in this case, Lonberg v Sanborn Theaters, Inc., Lara V Cinemark USA, Inc., United States v Cinemark USA, Inc., Cinemark USA, Inc. v United States, the Olympic Stadium Action, the Oregon Arena Action, the Ellerbe-Becket Action, Arnold v United Artists, Fiedler v American Multi-Cinema Inc., the Paralyzed Veterans Action, the Caruso Action, and any other actual or proposed litigation that falls within the scope of AMC's discovery requests. Since the review of files for all potentially responsive documents and information relating to AMC's discovery requests is not yet complete, this list is not exclusive. As review for additional documents and information responsive to AMC's requests continues, I reserve the right to claim the deliberative process privilege for additional privileged documents that are not identified in the Declaration. In addition, I am also claiming the deliberative process privilege with respect to the identities of the persons who have participated in the deliberations described above.

15. In making this formal claim of the deliberative process privilege on behalf of the Department of Justice, I make the following statements that provide the legal foundation for invoking the privilege. I have control over the requested information and documents for which privilege is being asserted. My assertion of the privilege is based on actual personal review and consideration of a representative sample of the type of documents for which the privilege is being asserted. The representative sample of documents provided to me for my review was selected by my personal staff -- not the attorneys responsible for litigating this case. All of the documents, communications, and information for which I am claiming the deliberative process

privilege are pre-decisional and deliberative. I am asserting the privilege to prevent disclosure of the deliberations of Justice Department personnel regarding the following: decisions whether to file lawsuits or whether to engage in amicus participating in lawsuits; decisions regarding which legal strategies to pursue and which legal positions to assert in lawsuits filed by the Department and during the Department's appearances as amicus curiae in lawsuits; decisions regarding the potential promulgation of regulations under the ADA; decisions regarding the potential revision of regulations under the ADA; decisions regarding what technical assistance materials to issue and regarding potential revisions to technical assistance materials; decisions regarding what negotiating positions to take during settlement negotiations and decisions regarding what terms the Department's might accept during settlement negotiations; and decisions regarding what terms to include in proposed settlement agreements and proposed consent decrees.

16. Disclosure of the documents and information for which I am claiming the deliberative process privilege would chill the discussion within the Department and, specifically, within the Civil Rights Division and Disability Rights Section with respect to decisions whether to conduct investigations, decisions whether to file lawsuits, decisions whether to participate as amicus curiae in lawsuits, decisions whether to adopt litigation strategies or legal positions during litigation or amicus participation in litigation, decisions whether to issue or revise technical assistance materials, decisions regarding what positions to take in settlement negotiations and regarding what terms the Department will accept in settlement negotiations and consent decrees, decisions whether to promulgate or revise regulations, decisions whether to propose amendments to the ADA, and a variety of other decisions that are crucial to ADA enforcement efforts. The Attorney General, Civil Rights Division managers, and I maintain an atmosphere within the Department that permits free and open discussion in order to ensure that we hear all factors relevant to decisionmaking. If the Court ordered the Department to turn over the documents and information for which I am claiming the deliberative process privilege, attorneys and other staff members would be reluctant to advise me and other Department officials candidly of the reasons why actions should or should not be taken, why lawsuits or amicus participation should or should not go forward, why a legal position may or may not be

appropriate, why a regulation should or should not be promulgated or revised, and the potential downsides of other decision for fear that their frank discussion of these issues would later be used to the Department's disadvantage in lawsuits and in other public forums. Without hearing the positives and negatives on issues about which I and other Justice Department mangers must make decisions, we cannot make reliable, well-informed decisions, and decisionmaking regarding the Department's ADA enforcement efforts would be seriously impaired.

17. In addition to asserting the deliberative process privilege with respect to the litigation-related documents described above, I am also claiming protection of many of the same documents and much of the same information under the work product doctrine. Specifically, all of the memoranda and other documents and oral communications relating to the potential filing of lawsuits, decisions regarding the pursuit of litigation strategies, decisions regarding the assertion of specific legal positions in lawsuits filed by the Department or amicus participating by the Department in lawsuits, decisions regarding positions to take in settlement negotiations and decisions regarding the terms the Department would accept in settlement agreements or consent decrees, draft pleadings and comments regarding such drafts, documents and notes relating to attorney thought processes relating to actual or potential litigation, nonpublic reports prepared by consultants to the Department in anticipating of litigation, and internal Departmental documents and communications that were prepared during the course of investigations where the Department anticipated that the investigation might result in litigation, including documents and consultant's reports prepared during the investigation of AMC's theaters, Cinemark's theaters, United Artists' theaters and other theaters, sports arenas, and assembly areas that are currently under investigations and for which the Department anticipates engaging in litigation to redress ADA violations.

18. The documents for which I am claiming work product protection contain the mental impressions, conclusions, opinions, and/or legal theories of Department attorneys with respect to ongoing litigation or anticipated litigation. Their disclosure would reveal the Department's litigation strategy to AMC and give an unfair litigation advantage to AMC. These documents contain the essence of the Department's work product and should not be disclosed.

19. As review for additional documents and information responsive to AMC's requests continues, I reserve the right to claim the protection of the work product doctrine for additional privileged documents that are not identified in this Declaration.

20. I am hereby claiming the attorney-client privilege with respect to one category of documents, oral communications, and information: confidential written and oral communications between Department attorneys and high level Department officials in which legal advise is sought or provided and communications in which facts are conveyed for the purpose of obtaining legal advice. These communications involving instances where Department officials are seeking legal information from Department attorneys in their capacity as attorneys (not in their capacity as administrators) and in instances where attorneys are providing legal advice in their capacity as attorneys (not in the capacity of administrators). It is the policy of the Department to maintain the strict confidentiality of such documents, communications, and information, and the Department has not waived its right to assert this privilege. As review for additional documents and information responsive to AMC's requests continues, I reserve the right to claim the attorney-client privilege for additional privileged documents that are not identified in this Declaration.

21. I am also hereby asserting a claim of the law enforcement and investigative privilege with respect to documents that have been prepared, collected, and complied in the course of investigations undertaken for the purpose of ADA enforcement relating to movie theaters, sports arenas, an other assembly areas and in the course of settlement negotiations that occurred during the course of those investigations. It is the Department's policy to keep the names of persons or entities being investigated and materials gathered during the course of investigations confidential unless and until a lawsuit is filed. It is also the Department's policy to maintain the confidentiality of the documents and information contained in the Department's files of open investigations. The Department does not disclose this information to the public because it is often of a private or proprietary nature. In particular, in the investigations of movie theaters that the Department has undertaken, a number of AMC's competitors have provided the Department with materials, including materials of a proprietary nature, responsive to

investigators' requests on the condition that the Department maintain the confidentiality of these materials and not disclose them to the public. Requiring the Department to disclose this information to AMC would violate assurances of confidentiality that the Department provided to the entities under investigation. In addition, disclosure of any of the Department's investigative files would reveal the Department's investigative methods and procedures, impairing ADA enforcement efforts. The Department of Justice does not have subpoena power in its ADA enforcement efforts and must rely on the cooperation of persons and entities charged with discrimination in order to obtain the information needed to make a determination as to whether ADA violations have occurred. If all information voluntarily provided to the Department in the course of investigations were subject to disclosure to an entity's business competitors and the public during litigation, the Department would face a severed reduction in the amount of cooperation its receives during its ADA-related investigations and the effectiveness of ADA investigations would be severely impaired. As review for additional documents and information responsive to AMC's requests continues, I reserve the right to claim the law enforcement and investigative privilege for additional privileged documents that are not identified in this Declaration.

22. For the foregoing reasons, I hereby assert a formal claim of the deliberative process privilege (as to Defendants' Issues Nos. 1, 2, 8, 11, 12, 14, 19, and 22), the attorney-client privilege (Issues No. 14, 19, 20, 21, and 22), the work product doctrine (Issues Nos. 1, 2,, 4, 5, 6, 7, 8, 11, 12, 14, 19, 20, and 22), and the law enforcement and investigative privilege (Issues Nos. 1, 2, 8, 13 and 15).

23. In addition to making the formal claims of privilege asserted herein, I am also making the following statements to support the Department's request for a protective order and to address certain "Issues" identified in AMC's portion of the Joint Stipulation.

24. The Department has not produced documents wholly unrelated to movie theaters for several reasons. First, this case is about movie theaters — not sports arenas or other assembly areas. Second, review of Justice Department records for all documents unrelated to movie theaters that are sought by AMC would take hundreds of additional hours of attorney

time, would have a severe adverse impact on ADA enforcement efforts, and would severely disrupt operations in the Disability Rights Section of the Civil Rights Division. Third, many of the documents and much of the information that AMC seeks relate to confidential investigations and confidential settlement negotiations that can have no possible bearing on the outcome of this case and that would unfairly disclose proprietary information about AMC's competitors to AMC.

25. Request for Production #20 (Issue No. 11) seeks any and all documents supporting ¶ 19 of the Complaint, that AMC has failed to comply with Standard 4.33.3. This request is objectionable only to the extent that it seeks documents and information covered by the deliberative process privilege and work product doctrines. As stated above, exposing the mental process of Departmental decision makers and the work product and mental impressions of the Department attorneys litigating this case to public scrutiny would have a chilling effect on the decisionmaking process in the Civil Rights Division and would give AMC unfair advantages in this litigation. AMC is not disclosing its attorneys' work product to Department attorneys; Department attorneys should not be required to disclose their work product to AMC.

26. AMC Interrogatory #5 (Issue No. 14] asks the Department to "[d]escribe in detail all efforts made to communicate the current interpretation of the Phase to the public or motion picture exhibitors." This request is extremely burdensome. The Justice Department operates an ADA Information Line that answers questions from the public has about the ADA. The Department keeps no records of these calls. It would be impossible for the Department to respond to AMC's interrogatory by describing all communications that Department personnel have had with members of the public or the movie theater industry regarding Standard 4.33.3 without expending hundreds or thousands of hours of attorney time. The Department has produced all documents located to date that relate to efforts made by the Department to convey to movie theater industry members the requirements of Standard 4.33.3. Department attorneys and staff will continue their efforts to locate any such additional documents. We believe this is a reasonable response to AMC's interrogatory.

27. AMC Interrogatory #10 (Issue No. 19) seeks the identity of "all persons or organization whom you have consulted with, interviewed or deposed relating to lines of sight in movie theaters after the adoption of the ADAAG." First, the Department has not deposed anyone relating to lines of sight in movie theaters. Second, the only person that the United States has consulted with or interviewed regarding lines of sight in movie theaters are experts who will testify in this litigation. Information about these experts will be disclosed as part of expert discovery in this action, which Judge Morrow has scheduled to occur following fact discovery in this case. Thus, the Department is not required to disclose this information at this time. Accordingly, it is the Department's position that its response to this interrogatory is sufficient for this stage of discovery.

28. In Interrogatory #11, AMC requested that the Department describe the criteria it uses to determine whether sight lines are comparable. The Department responded that it did not use criteria but rather used the approach described in its amicus briefs in Lara v Cinemark U.S.A., Inc, No. 97-CV-502(W.D. Tex.) and Lonberg v Sanborn Theaters Inc. No. CV97-6598AHM (BQRx). Despite this response, AMC now seeks to compel the Department to answer Interrogatories #12 and 13 (Issues No. 20 and 21), which seeks the dates on which these criteria from Interrogatory #11 were adopted and the efforts made to communicate these criteria to the public or motion picture exhibitors. Obviously, the Department cannot disclose the dates on which "criteria" were adopted when "criteria" were not, in fact, adopted and cannot describe efforts to communicate "criteria" when such criteria do not exist.

29. For the reasons stated herein and in the Department's portion of the Joint Stipulation, I respectfully request that the Court uphold my formal claims of privilege, deny AMC's request for an order compelling discovery, and grant the protective order request in the Department's portion of the Joint Stipulation

30. In Request # 36 of AMC's First Set of Requests for Production of Documents, AMC requests that the United States "[p]roduce any and all documents relating to the ADAAG." This request would entail the production of tens of thousands of page of materials, most of which bear no arguable relevance to this action. Many of the documents sought by this

request are, in fact, documents that are subject to the Access Board's responsibility. For any documents that are in the Department's possession as a result of the Department's service as a voting member of the Access Board, I hereby exercise the relevant privileges. In addition, the requests seeks production of many of the privileged materials described above. Justice Department attorneys have asked AMC to limit this request, and AMC has refused to place any reasonable limits on it. The Department, therefore, asks the Court to issue a protective order excusing the Department from providing any further response to this request.

31. Except as stated herein, this Declaration is based upon personal knowledge.

32. I am over eighteen years of age and competent to make this Declaration.

33. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on December 2, 1999.

_____

Bill Lann Lee
Acting Assistant Attorney General
General for Civil Rights

United States' Opposition

to Defendant's Motion to Reconsider

Exhibit C

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff **v.** AMC ENTERTAINMENT, INC., Defendants	Case No: 99-01034 - MMM (SHx) **PLAINTIFF UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANT AMC ENTERTAINMENT, INC. 'S FIRST SET OF INTERROGATORIES**

Plaintiff United States of America ("United States") objects and responds to defendant American Multi-Cinema, Inc. 's ("AMC") interrogatories, as follows:

General Objections

The following General Objections are hereby incorporated into the United States' response to each of the following interrogatories.

The United States objects to these contention interrogatories on the grounds that they are premature, that they require the United States to state opinions with respect to facts and/or to respond regarding the application of law to facts, and that the United States cannot respond to them fully and fairly at this time given the early stage of discovery in this case and the extensive factual and expert discovery that remains to be completed in this case. As the United States has advised the Court and as the Court has acknowledged, the United States will not be in a position to respond fully and fairly to defendants' contention interrogatories until such time as it has conducted reviews of AMC's architectural plans, conducted on-site inspections of certain of AMC's theaters, and completed certain expert discovery. At the Court's direction, AMC first made certain of its architectural plans available to the United States for preliminary review and copying on August 10 and 11, 1999, and AMC advises the United States that the remaining architectural plans and construction drawings will not be available until early September, 1999. Moreover, AMC has advised the United States that the architectural plans it is making available are not "as built" plans and that they may not reflect the building as it was actually constructed or as it exists today. Because defendants are not providing the United States with access to "as built" plans, the United States will be unable to confirm actual conditions at the theaters without on-site inspections of the theaters. To date, the United States and AMC have not scheduled on-site inspections of any theaters, since the United

States' selection of the theaters it will inspect cannot be made until it has had a reasonable opportunity to review in detail the architectural plans for AMC's theaters. Thus, the United States can only provide preliminary responses to AMC's contention interrogatories at this time, which responses are subject to later supplementation and/or revision based on discovery yet to be completed in this case.

This United States objects to these interrogatories to the extent that they seek to impose meanings to words or terms that are other than the ordinary meanings. The United States also objects to these interrogatories to the extent that they seek to incorporate instructions that expand the obligation for responding to the interrogatories beyond the obligations set forth in Rules 26 and 33 of the Federal Rules of Civil Procedure.

The United States further objects to these interrogatories to the extent that they seek information that is not calculated to lead to the discovery of admissible evidence and to the extent that they seek discovery that has been stayed by the Court pending a ruling on the United States' motion to dismiss defendants' counterclaim.

In addition, the United states object to these interrogatories to the extent that they seek discovery of information and/or documents protected from disclosure pursuant to the attorney-client privilege, the work product doctrine, the deliberative process privilege, the law enforcement and investigative privilege, and any other applicable privilege and/or doctrine.

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Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AMC ENTERTAINMENT, INC. et al., Defendants.	)	Case No: 99-01034 MMM (SHx) PLAINTIFF UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANT AMC ENTERTAINMENT, INC. 'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

The United States hereby responds and objects to Defendant AMC Entertainment, Inc.'S First Set of Requests for Production of Documents. In accordance with the responses to individual request set out below, the United States agrees to make documents available

for inspection and copying on a date that is mutually agreeable to the parties.

General Objections

The following General Objections are hereby incorporated into the United States' response to each of the following requests for production.

The United States objects to these requests to the extent that they seek to impose meanings to words or terms that are other than the ordinary meanings. The United States also object to these requests to the extent that they seek to incorporate instructions that expand the obligation for responding to the requests beyond the obligations set forth in Rules 26 and 34 of the Federal Rules of Civil Procedure.

The United States further objects to these requests to the extent that they seek documents and information that are not calculated to lead to the discovery of admissible evidence and to the extent that they seek discovery that has been stayed by the Court pending a ruling on the United States' motion to dismiss defendants' counterclaim. The United States additionally objects to these requests to the extent that they seek discovery related to their counterclaim or defense under the Administrative Procedure Act ("APA"), since discovery of the sort sought is not legally permissible on APA-related issues. The United States also objects to the requests to the extent that they seek documents or information that is protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, the investigative privilege, and any other applicable privilege and/or doctrine.

United States' Opposition

to Defendant's Motion to Reconsider

Exhibit D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

CIVIL MINUTES--GENERAL

Case No. CV 99-01034-FMC (SHx) Date: February 25, 2000

Title U.S.A. v. AMC Entertainment, Inc.

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DOCKET ENTRY

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PRESENT:

Hon. STEPHEN J HELLMAN, MAGISTRATE JUDGE

SANDRA BUTLER N/A
Deputy Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

N/A N/A

PROCEEDINGS: (IN CHAMBERS)

Pursuant to FRCP 37(a), Defendants move to compel answers to AMC's Interrogatories Nos. 6 and 7. See FRCP 37(a). Interrogatories 6 and 7 request information regarding meetings and discussions between representatives of Plaintiff and representatives of movie theater owners and operators relating to ADAAG section 4.33.3.

Defendants are entitled to discovery pursuant to Interrogatories 6 and 7, subject to Plaintiff's Settlement Negotiation Privilege. See Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D. Cal. 1990) (finding Fed. R Evid. 408 applicable to discovery).

Defendants are not entitled to information regarding communications between Plaintiff and movie theater representatives which would reveal Plaintiff's negotiating positions and statements made during settlement negotiations.

To the extent that there may be documents which are not protected by the Settlement Negotiation Privilege, but that arguably may fall under the Law Enforcement.

Investigative Privilege, Plaintiff has not persuaded the court that such privilege should be invoked to deny Defendants' Motion to Compel. If Plaintiff seeks protection from discovery pursuant to the Law Enforcement Investigative Privilege, supplemental briefing is required sufficient to warrant the applicability of the doctrine to the Department of Justice in this civil matter.

Plaintiff is not excused from production of information pursuant to interrogatories 6 and 7 insofar as they relate to the A.D.A. "Information Line." Defendants are entitled to discovery of the content and identities of persons participating in all discussions "with any movie theater company or operator, or industry representative, or any agents of the foregoing, in which ADAAG section 4.33.3 and/or lines of sight were discussed".

However, plaintiff need not interview Information Line personnel in order to comply with this Order. Any extant documents shall be produced.

Defendants' motion to compel is granted subject to Plaintiff's Settlement Negotiation Privilege.

cc: Judge Hellman
Parties of Record