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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' OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL NOVEMBER 20, 2002 ORDER DATE: Jan. 21, 2003 TIME: 10:00 a.m. JUDGE: Hon. Florence Marie Cooper

BACKGROUND

In November 2002, this Court issued a detailed, 49-page decision which, among other things, affirmed the propriety of the United States' interpretation of Standard 4.33.3, 28 C.F.R. Pt. 36, App. A § 4.33.3 (1994) and held that defendants AMC Entertainment, Inc. and American Multi-Cinema, Inc. [hereinafter collectively referred to as "AMC"] violated this Standard by placing wheelchair and companion seating outside the stadium section of its stadium-style movie theaters. See Court's Order on Parties' Motions for Summary Judgment (filed November 20, 2002) (Docket # 397) (hereinafter "Court's Order of Nov. 20, 2002"). AMC now asks this Court to certify the entirety of this Order for interlocutory review by the Ninth Circuit Court of Appeals. Motion to Certify for Interlocutory Appeal November 20, 2002 Order Granting Plaintiff's Motion for Partial Summary Judgment (filed Dec. 26, 2002) (Docket # 409) ("AMC Cert. Mot."). AMC's motion is flawed in several respects and should be rejected by this Court. First, this question concerning the proper interpretation of Standard 4.33.3's comparable line-of-sight requirement has already been fully briefed and argued in the Ninth Circuit in Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 142 F. Supp. 2d 1293 (D. Or. 2001) appeal docketed, No. 01-35554 (9th Cir. June 13, 2001; argued Dec. 2, 2002) ("Regal"). As such, the identical question in this case is not – or will not be as soon as the opinion in Regal is issued -- a controlling question of law as to which there is substantial grounds for difference of opinion. In addition, to grant interlocutory review of that question in this case would further delay ultimate termination of this case and waste the time and resources of this Court, the appellate court and the United States.

Also, this Court has not yet determined liability, or lack thereof, for several categories of non line-of-sight violations in AMC's stadium-style theaters. Presently pending before this Court is the United States' Motion for Partial Summary Judgment on Defendants' Failure to Comply with the Standards for Accessible Design of Elements Not Relating to Lines of Sight. (Docket # 379) ("US SJ on Non Line-of-Sight Issues"). This motion establishes many ADA violations just in the twelve AMC stadium-style movie theater complexes surveyed by the United States. These violations include: insufficient maneuvering space at doors; insufficient numbers

of assistive listening devices; improperly placed or total lack of visual fire alarms; protruding objects; excessive cross slopes at designated accessible parking spaces; improper or lack of signs; auditorium violations, including hundreds of interior ramp slopes that are too steep; and toilet room violations. See id. In addition to these outstanding liability issues,[1] this Court has not yet adjudicated the remedial phase of this litigation. Finally, the United States is poised to present its proposal regarding how best to administer the remedial phase of this litigation in order to move expeditiously using the minimum amount of the Court's resources, once all liability issues have been fully briefed and argued before this Court later this month.

Despite these factors, defendant AMC filed a broad, non-specific Motion to Certify for Interlocutory Appeal November 20, 2002 Order Granting Plaintiff's Motion for Partial Summary Judgment ("AMC Cert. Mot.") that does not narrowly focus the question for interlocutory appeal. While AMC has asserted that it is seeking interlocutory review of more than one question of law, including the question of the proper interpretation of Standard 4.33.3, nowhere in AMC's motion to certify does it state with any specificity what issues, other than the proper interpretation of Standard 4.33.3, it seeks to certify. For all of the reasons discussed herein, AMC's Motion to Certify should be denied.

ARGUMENT

The general rule is that an appellate court should not review a district court ruling until after entry of a final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474, 98 S. Ct. 2454, 2461, 57 L. Ed. 2d 351 (1978); In re Cement Antitrust Litig., 673 F. 2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom.* Arizona v. Ash Grove Cement Co., 459 U.S. 1190, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983); see 28 U.S.C. § 1291; Yakima Products, Inc. v. Industri Ab Thule et al., 1998 WL 173205, *1 (N.D. Ca. 1998) (copy attached as Exhibit A). An exception to this general rule is set out in 28 U.S.C. § 1292(b). Section 1292(b) provides, in pertinent part, that

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate

[1] Also, the Court's Order of November 20, 2002 on line-of-sight violations does not address theater auditoria with over 300 seats nor does it address auditoria in which all seats are on risers, so liability is unresolved on those issues as well.

> appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order . . . *Provided, however,* That application for an appeal hereunder shall not stay the proceedings in the district court unless the district judge of the Court of Appeals or a judge thereof shall so order.

28 U.S.C. 1292(b).

It has been generally held that § 1292(b) appeal is to be "used sparingly and only in exceptional cases" in furtherance of the long-standing federal policy against piecemeal appeals. U.S. v. Woodbury, 263 F.2d 784, 788 n. 11 (9th Cir. 1959); Vaughn v. Regents of the Univ. of Cal, 504 F. Supp. 1349, 1355 (E.D. Cal. 1981). Certification is only proper "under the most unusual circumstances where the immediate appeal might avoid protracted and costly litigation."[2] U.S. Rubber Co. v. Wright, 359 F. 2d 784, 785 (9th Cir. 1966); In re Cement Antitrust Litig., 673 F. 2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom.* Arizona v. Ash Grove Cement Co., 459 U.S. 1190, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983); Vaughn, 504 F. Supp. at 1354.

The party seeking certification of an interlocutory appeal has the burden to show the presence of those exceptional circumstances. Coopers & Lybrand, 437 U.S. at 474-75; In re Cement Antitrust Litig., 673 F. 2d at 1026; see also Fukuda v. County of Los Angeles, 630 F. Supp. 228, 229 (C.D. Cal. 1986). AMC has not and cannot meet this critical standard.

A. AMC's Motion to Certify is Too Vague Regarding the Precise Questions of Law For Which It Seeks Review

AMC alleges that the challenged Order involves several "controlling questions of law" for which it seeks interlocutory review. AMC Cert. Mot. at 1. Nowhere in AMC's moving papers does it state with sufficient specificity the alleged questions for which it now seeks certification. Rather, AMC simply states that it seeks certification of this Court's "Order of November 20, 2002" and the "propriety of the [United States] Department [of Justice's] interpretation of Standard 4.33.3." Id. But the extensive Order from which AMC seeks interlocutory appeal resolved several motions and issues including: the parties' cross-motions for

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[2] Indeed, according to statistics from the Court of Appeals for the Ninth Circuit, only 2 applications for § 1292(b) appeal were filed per judgeship in 2002 (the most recent year for which statistics were available). See Appellate Judicial Statistics Caseload Report, available at http://www.uscourts.gov/cgi-bin/csma2001.p1.

Partial Summary Judgment on the line-of-sight issues; the United States' Motion to Strike the September 26, 2002 Declaration of Gregory Hurley; the United States' Motion for Summary Judgment regarding Defendants' Affirmative Defenses; and AMC's evidentiary objections concerning materials prepared by the United States in support of its motion for summary judgment. See Court's Order of Nov.20, 2002 at 2, 4 n.3, 8 n.6, 15 n.8, 21 n. 11. Some of the issues resolved in this Order involve questions of fact and some involve mixed questions of law and fact, and so are inappropriate for interlocutory appeal. See 28 U.S.C. § 1292(b); 16 Wright, Miller & Cooper, Federal Practice and Procedure, § 3930 (1996); see also Clark-Dietz and Associates-Engineers, Inc. v. Basic Constr. Co., 702 F. 2d 67, 68 (5th Cir. 1983); Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364, 366 (S.D.N.Y. 1982). Accordingly, it is difficult, if not impossible, to discern which issues AMC seeks to appeal at this time to the Ninth Circuit. While the United States can surmise, albeit without complete assurance, that AMC is seeking interlocutory review of the proper interpretation of the language in Standard 4.33.3 regarding "lines of sight comparable," it cannot and should not be expected to hypothesize what other issues AMC seeks review. Moreover, it would be inappropriate for either the United States or this Court to attempt to divine what those questions of law are - that responsibility lies with AMC and it has failed to meet that burden. See McCann v. Communications Design Corp., 775 F. Supp. 1506, 1534 (D. Conn. 1991) (denied plaintiff's request for certification finding conclusory assertions that the court's order met the requirement of 28 U.S.C. § 1292(b) insufficient); see also Clark-Dietz, 702 F. 2d at 68 (Court of appeals must rely on would-be appellant to supply in the petition or supporting memorandum an adequate presentation of facts and statement of precise nature of controlling question of law involved). As such, AMC's Motion to Certify should be denied.

B. The Appropriate Interpretation of Standard 4.33.3 is Not a Controlling Question of Law About Which There is Substantial Ground for Difference of Opinion

In order for this Court to find that interlocutory appeal is appropriate, it needs to determine that the issue (or issues) to be certified involves a controlling issue of law about which substantial ground exists for difference of opinion. 28 U.S.C. §1292(b); Yakima, 1998 WL

173205, at * 2. While an issue need not be dispositive in order to be "controlling," U. S. v. Woodbury, 263 F. 2d at 787, if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court" it is deemed "controlling." In re Cement, 673 F. 2d at 1026; U.S. Rubber Co. v. Wright, 359 F. 2d 784, 785 (9th Cir. 1966); Yakima, 1998 WL 173205, at * 2. The Ninth Circuit has made clear, however, that simply because an issue could be overturned on appeal and so save some time, effort and expense at the district court level does not mean that it is "controlling." In re Cement, 673 F. 2d at 1027.

> "The precedent in this circuit has recognized the congressional directive that section 1292(b) is to be applied sparingly and only in exceptional cases, and that the 'controlling question of law' requirement be interpreted in such a way to implement this policy [internal citations omitted]. Such precedent prohibits us from disregarding the 'controlling question of law' requirement in the statute despite the fact that judicial resources might be saved by so doing."

Id.

Already pending before the Ninth Circuit is an appeal in Regal, which concerns the very same line-of-sight issue addressed in this Court's Order of Nov. 20, 2002. Because this appeal will inevitably be decided by the Ninth Circuit before interlocutory appeal in this case could be decided, a later ruling on AMC's motion for certification of an interlocutory appeal will not advance the ultimate termination of this case. See General Orders of United States Court of Appeals for the Ninth Circuit, 4.1 (providing that the panel which first takes the issue has priority and all other panels before which the issue is pending shall enter an order vacating or deferring submission pending a decision by the first panel).

Like this case, Regal involves a challenge pursuant to Standard 4.33.3 to the wheelchair seating locations in six complexes of Regal's stadium-style theater complexes. See Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 142 F. Supp.2d 1293, 1294 (D. Or. 2001). The district court in Regal found that the wheelchair seating in the six theater complexes at issue is located in the first five rows of seats of the traditional-sloped floor portion of the theater in front of the stadium style seating section. Id. The Regal plaintiffs argued that these wheelchair locations violate Standard 4.33.3, because, as the United States maintains in this case,

Standard 4.33.3 requires the provision of comparable lines of sight, which is not limited to a merely unobstructed view, but rather, includes comparable viewing angles. Regal, like AMC here, argued that Standard 4.33.3 does not impose a viewing angle standard and simply requires that a patron who uses a wheelchair must be provided an unobstructed view of the movie screen. Id. at 1295. The defendant in that case, Regal Cinemas, Inc., relied heavily on the Fifth Circuit decision in Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir. 2000) in support of its argument. In granting Regal's motion for summary judgment, the district court, erroneously relying on Lara, held that Standard 4.33.3's "lines of sight comparable" requirement does not require anything more than that theaters provide patrons who use wheelchairs with unobstructed views of the screen. Id. at 1297. Plaintiffs appealed the district court's ruling, and at this time the appeal has been fully briefed by both parties, and includes the filing of *amicus* briefs by the United States and the National Association of Theater Owners, Inc. The appeal was argued before a Ninth Circuit panel on December 2, 2002.

In its motion for certification, AMC maintains that the "resolution on appeal of the propriety of the Department's interpretation of Standard 4.33.3 materially affects the outcome of the litigation in district court because the issue goes directly to the heart of this action . . . ." AMC Cert. Mot. at 4. This sweeping assertion by AMC, however, completely ignores the pendency and the import of the Regal appeal. At issue in the Regal appeal is exactly the question AMC apparently seeks to appeal here (or at least the one posed in this portion of its motion) to the Ninth Circuit: whether comparable lines of sight means more than just an unobstructed view to the screen. The same issue will likely be decided by the Regal appellate panel, and because the Regal appeal has already been briefed and heard by the Ninth Circuit, it will be decided by the Regal panel long before AMC's § 1292(b) appeal, if granted by this Court and the Ninth Circuit, would be decided. See General Orders of United States Court of Appeals for the Ninth Circuit, 4.1.[3]

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[3]AMC cites Kuehner v. Dickinson & Co, 84 F. 3d 316 (9th Cir. 1996) for support of its proposition that a question may be deemed controlling even if reversal of the district court's order would not terminate the case. However, in Kuehner, a suit alleging violations of Fair Labor Standards Act and wrongful discharge under California tort law, the plaintiff sought interlocutory appeal of an order staying the proceedings pending arbitration of her claims. The

C. Interlocutory Appeal of the Line-of-Sight Issue Would Not Materially Advance Ultimate Termination of the Litigation

Separate but closely tied to the mandate that a question of law must be "controlling" in order for interlocutory appeal to be granted, is the statutory requirement that the district court determine that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); see also Yakima, 1998 WL 173205, at * 2; 16 Wright, Miller & Cooper, Federal Practice and Procedure, § 3930 (1996). This factor is linked to whether an issue of law is "controlling" in that the Court should consider the effect of a reversal by the court of appeals on the management of the case. Mateo, 805 F. Supp. at 800; Yakima, 1998 WL 173205, at *2; Napa Community Redevelopment Agency v. Continental Insurance Co., 1995 WL 714363, *3 (N.D. Cal. 1995) (copy attached as Exhibit B). In the present case, this Court should also deny certification of AMC's interlocutory appeal because it cannot demonstrate that an immediate appeal would materially advance ultimate termination of the litigation. On the contrary, such certification would only cause further delay. As the Regal case is already on appeal and, in accordance with the General Orders of that court, see discussion supra, the Ninth Circuit's usual procedure would be to first rule in Regal before it can decide the § 1292(b) appeal, the AMC § 1292(b) appeal would not be determined by the Ninth Circuit for many months, even assuming the Ninth Circuit certified the issue, which is extremely unlikely. Even if the §1292(b) appeal were decided by the Ninth Circuit, the case would then be remanded back to this Court for final disposition when either party may seek Ninth Circuit appeal.

Also, AMC erroneously argues that if the Ninth Circuit adopted AMC's interpretation of the line-of-sight issue, it would obviate the need for determining whether each of AMC's theaters

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Ninth Circuit, in accepting the appeal, held that an order may involve a controlling question of law if it could cause needless expense and delay of litigating the entire case in a forum that had no power to decide the matter. Kuehner, 84 F. 2d at 319. In the instant action, however, AMC raises no such fundamental jurisdictional claims sufficient to elevate the questions for interlocutory appeal, whatever they may be, to the status of a controlling question of law.

AMC also cites Steering Committee v. U.S., 6 F.3d. 572 (9th Cir. 1993), to support its claim that certification is warranted. However, in Steering Committee, the Ninth Circuit, in accepting the case for interlocutory appeal, found persuasive the fact that in a bifurcated case, all liability issues had been resolved by the lower court prior to the United States request for interlocutory appeal. Steering Committee, 6 F.3d at 574-75. In the present case, critical claims in the United States' Complaint regarding many non-line of sight violations remain, so interlocutory appeal clearly is inappropriate.

violates the ADA and how to bring each the theater into compliance.[4] AMC Cert. Mot. 10. AMC conveniently ignores the fact that if the United States prevails, in whole or in part, in its separate summary judgment motion on non line-of-sight violations at AMC theaters, bringing each theater complex into compliance with the ADA must still be decided.

In addition, even if the Ninth Circuit's decision in Regal was not hovering on the horizon, certification of issues for appeal at this point in the litigation would unduly delay termination of this case. This case, which has been pending for four years, is entering the home stretch. Extensive discovery has been conducted and completed, expert reports have been submitted, most expert depositions have been conducted. [5] The issues to be litigated in this case have matured and evolved and once this Court rules on the United States' Partial Motion for Summary Judgment on Non-line of Sight Issues to determine liability on non line-of-sight issues, the remedies phase may begin. Interlocutory appeal of some or all of the issues addressed in the Court's Order of November 20, 2002 would needlessly and unnecessarily delay the ultimate termination of this case. Once all issues have been resolved in this Court, an appeal of final judgment is likely.

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[4] *Assuming arguendo* that the only question for which AMC was seeking interlocutory review was the proper interpretation of Standard 4.33.3, that that issue were not presently before the Ninth Circuit awaiting decision, and that the Order from which certification is being sought were not one for *partial* summary judgment, it is not enough to simply argue that if this Court's order regarding the appropriate interpretation of 4.33.3 were reversed, that could conclude the case. Under such a theory, all denials of summary judgment and other potentially dispositive interlocutory orders would be automatically appealable. While this argument may provide additional support for certification in some cases, it is insufficient to carry the entire weight of the certification requirement. Chiron Corp. v. Abbott Laboratories, 1996 WL 15758, *3 (N.D. Cal. 1996) (copy attached as Exhibit C).

[5] While all of the experts for the United States have been deposed by AMC, AMC has not yet permitted the United States to depose AMC's experts. See Joint Stip. Re: Pl. U.S.' Motion to Compel Docs. and Supp. Reports Concerning AMC Defendants' Trial Experts; Motion for Sanctions p. 16, lines 25-28, n. 7 (filed Dec. 30, 2002) (Docket # 412); Supp. Memo in Support of Pl. U.S.' Motion to Compel Documents and Supplemental Reports, p.3, lines 24-28, n.1 (filed Jan. 6, 2002).

Also, the concomitant delay[6] engendered by piecemeal appeals would not be fair to those individuals with disabilities upon whose behalf the United States has brought this suit as it would ultimately postpone or hamper meaningful efforts both to develop and to implement remedial relief in AMC's stadium-style theaters across the country and to award damages to those individual complainants for whom damages are sought in the Complaint. See In re Related Asbestos Cases, 23 B.R. 523, 532 (N.D. Cal. 1982) (Court refused to certify an order interpreting the meaning of a federal statute, finding that "an immediate appeal of the [11 U.S.C.] Section 362 issue will not materially advance the ultimate termination of the litigation, but instead will merely delay the litigation and potential settlements and, more importantly, will further jeopardize the interests of the injured plaintiffs").

CONCLUSION

For the foregoing reasons, AMC has failed to demonstrate that the line-of-sight issue for which it seeks interlocutory appeal constitutes the kind of exceptional and unusual situation § 1292(b) was designed to address. As such, AMC's motion for certification should be denied.

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[6] According to statistics maintained by the Administrative Office of the U.S. Courts, the median time frame from filing of notice of appeal to disposition in the Ninth Circuit is 15.8 months. See Appellate Judicial Statistics Caseload Report, available at http://www.uscourts.gov/cgi-bin/csma2001.p1.

DATED: January 7, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2003, true and correct copies of **Plaintiff United States' Opposition to Defendants' Motion to Certify for Interlocutory Appeal November 20, 2002 Order** were delivered by Federal Express, postage pre-paid, on the following parties:

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