IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CINEMARK USA, INC.,	)	
Plaintiff,	)	
v.	)	3:99-CV-0183-L
UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Respectfully submitted,

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Dated: April 2, 1999 Counsel for Defendant

PRELIMINARY STATEMENT

The Department of Justice has been designated by Congress as the agency assigned to monitor and enforce compliance with most provisions of the Americans With Disabilities Act ("ADA"). For the past year, the Department of Justice has been investigating a relatively new facility design -- stadium-style movie theaters. In these theaters, most moviegoers reach their seats by climbing stairs, much like in a stadium, rather than by walking down traditional sloped floor aisles. Of course, moviegoers who use wheelchairs, who are entitled under the ADA to access to "comparable" seating in movie theaters, are unable to climb the stairs to reach the stadium-style seats.

Plaintiff Cinemark, USA ("Cinemark") has responded to this dilemma not by designing its theaters to allow entry into the stadium section by wheelchair users, but by placing wheelchair seating on the floor, in front of the stadium-style seats. This has resulted in numerous complaints, and lawsuits, by individuals with disabilities who are forced to choose between sitting in craned-neck discomfort in the front of the theater (the "worst seats in the house") or foregoing movies in Cinemark's theaters altogether. As common sense would indicate, and as one federal court has already found, the ADA does not permit such discrimination.

The Department of Justice opened an investigation of Cinemark's theaters in January 1998, and has engaged in negotiations with Cinemark since then. When those negotiations

proved unsuccessful, the Department of Justice filed an enforcement action against Cinemark alleging that its stadium-style theaters violate the ADA. The primary issue in the negotiations, in the enforcement complaint, and in private litigation against Cinemark, has been the interpretation of a 1991 Department of Justice regulation ("Standard 4.33.3") that requires wheelchair users to be provided with "lines of sight comparable to those for members of the general public."

The Department of Justice articulated its interpretation of Standard 4.33.3 in an amicus brief filed in a private action against Cinemark, Lara v. Cinemark USA, No. EP-97-CV-502-H (W.D. Tex.), and it has relied on that interpretation in filing its enforcement complaint. It is Standard 4.33.3, however, and not the Department of Justice's interpretation, that has legal effect. Cinemark is not forced to comply with the interpretation unless and until a court so orders. Indeed, although the court in Lara found that Cinemark's theaters violate the ADA and Standard 4.33.3, it did not rely on the Department of Justice's interpretation in making that determination.

In this case, Cinemark seeks to turn enforcement of the ADA on its head. Cinemark requests a declaratory judgment that the Department of Justice's interpretation is procedurally improper, substantively incorrect, and unenforceable. Essentially, Cinemark asks the Court to prohibit the Department of Justice from interpreting its own regulation, paralyze the Department of Justice's efforts to enforce the ADA, and reverse the judgment of

another federal court that Cinemark's stadium-style theaters violate the ADA. The Court cannot and should not grant such relief.

Under well-established Supreme Court and appellate precedent, the Department of Justice's actions challenged here — interpreting its regulations in the context of carrying out its enforcement mandate — are not "final agency action" subject to judicial review under the Administrative Procedure Act. Moreover, Cinemark will have a full opportunity to raise its objections to the Department of Justice's actions as defenses in the enforcement suit filed against it. Therefore, the Court does not have jurisdiction to hear this case.

Even if the Court had jurisdiction, it would not properly be exercised here. Courts routinely and repeatedly reject attempts to use the Declaratory Judgment Act to change the forum in which disputes are resolved. The dispute between Cinemark and the United States, for which the Department of Justice's enforcement action establishes the proper forum, is no exception.

Finally, even if the case were to proceed in this Court, Cinemark's request for a declaratory judgment that its current theaters comply with the ADA is nothing more than a collateral attack on the judgment of another federal court. Under basic rules of preclusion, this is a claim upon which Cinemark cannot obtain relief.

STATUTORY AND FACTUAL BACKGROUND

The Americans With Disabilities Act, 42 U.S.C. § 12101, et

seq. ("ADA"), was premised in part on the Congressional finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . effects of architectural . . . barriers." 42 U.S.C. § 12101(a)(5). To combat this discrimination, Congress mandated that all commercial facilities and "public accommodations" designed and constructed for first occupancy after January 26, 1993 be "readily accessible to and usable by individuals with disabilities . . . in accordance with standards set forth or incorporated by reference in regulations" issued pursuant to the Act. 42 U.S.C. § 12183(a)(1). Movie theaters are among the specific types of entities considered to be a "public accommodation" and therefore subject to the requirements of the Act. 42 U.S.C. § 12181(7)(C).

The Department of Justice, through the Attorney General, was specifically designated by Congress as the agency authorized to issue regulations to carry out the requirements of the ADA with respect to new construction of public accommodations. See 42 U.S.C. § 12186(b). The Department of Justice issued such regulations on July 26, 1991. See 56 Fed. Reg. 35,544 (1991), codified at 28 C.F.R. § 36.101, et seq. The regulations incorporate architectural standards for new construction that are alternatively known as ADA Accessibility Guidelines ("ADAAG") or Standards for Accessible Design ("Standards"). See 28 C.F.R. Part 36 App. A.

The Standards address numerous issues, but most relevant to this case is Standard 4.33.3, governing placement of wheelchair

locations in assembly areas such as movie theaters, which states in part:

> 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.

28 C.F.R. Part 36 App. A, § 4.33.3. Before 1998, the Department of Justice had never announced an interpretation of this regulation as applied to stadium-style movie theaters, nor had any court addressed that issue. See Decl. of Edward Miller ("Miller Decl.") at ¶ 5.

In December 1997, a group of disabled individuals filed suit against Cinemark alleging that Cinemark's El Paso stadium-style theaters, and specifically the placement of wheelchair locations in those theaters, violate the ADA. Lara v. Cinemark USA, Inc., No. 97-CV-502 (W.D. Tex.). On July 21, 1998, the Department of Justice submitted an amicus brief in Lara on behalf of the United States in which it offered to the court its interpretation of Standard 4.33.3 as applied to stadium-style theaters. See Exh. 1 at 8-9. The court in Lara found that Cinemark's theaters do violate the ADA and Standard 4.33.3, see Lara, slip op. at 3-4 (W.D. Tex. Oct. 21, 1998) (amended order on motions for summary judgment) (copy attached as Exh. 2), but expressly did not rely on the Department of Justice's interpretation of that regulation. See Lara, slip op. at 1 (W.D. Tex. Aug. 26, 1998) (order on

motion for delay pending discovery) (copy attached as Exh. 3).[1/]

Meanwhile, on January 28, 1998, the Department of Justice opened an investigation of whether Cinemark's stadium-style theaters comply with the ADA. See Exh. 4; see also Miller Decl. ¶ 4. During and after the Lara litigation, the Department of Justice engaged in negotiations with Cinemark in an attempt to resolve issues arising out of the Department of Justice's investigation. Miller Decl. ¶ 7. On December 2, 1998, the Department of Justice notified Cinemark that it had obtained authorization to sue Cinemark should the negotiations not succeed. Id. On January 26, 1999, the Department of Justice sent Cinemark a letter confirming in writing its settlement position with respect to the ongoing investigation. Id. ¶ 8. This lawsuit was filed two days later. On March 24, 1999, the Department of Justice filed an enforcement action against Cinemark in the United States District Court for the Northern District of Ohio. See United States v. Cinemark USA, No. 1:99-CV-705 (N.D. Ohio) (complaint attached as Exh. 5).

[1/] The Court in Lara originally decided cross-motions for summary judgment on August 21, 1998. It amended its order on October 21, 1998, to permit Cinemark to petition for permission to take an interlocutory appeal (which was later denied by the Fifth Circuit). On the substantive issues, the two orders are identical, and only the amended order is attached.

ARGUMENT

I. There is No Final Department of Justice Action That Can Justify Judicial Review

A. The Administrative Procedure Act Is the Only Possible Source For A Waiver of Sovereign Immunity That Would Give This Court Jurisdiction of This Case

Absent a waiver of sovereign immunity, a court lacks jurisdiction over claims against the United States. See, e.g., United States v. Mitchell, 463 U.S. 206, 212 (1983). Cinemark attempts to invoke this Court's jurisdiction under various statutes, most of which have no relevance to this case and do not in any event provide the requisite waiver of sovereign immunity. Pl.'s First Am. Compl. ¶ 3.[2/] For example, 28 U.S.C. § 1346 (which includes the Tucker Act and the Federal Tort Claims Act) waives sovereign immunity for tort claims and claims for money damages, but neither form of relief is relevant here. See Mitchell, 463 U.S. at 216-18; Richards v. United States, 369 U.S. 1, 6 (1962). Likewise, 28 U.S.C. § 1343 does not waive sovereign immunity. See Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972). Indeed, the only possible source of a waiver in the statutes cited by Cinemark is the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq.

The APA provides for judicial review by a district court of

[2/] Cinemark invokes 28 U.S.C. § 1331, the general federal question statute, but that statute does not waive the sovereign immunity of the United States. See Voluntary Purchasing Groups v. Reilly, 889 F.2d 1380, 1385 (5th Cir. 1989). Other cited sections have no relevance. For example, 28 U.S.C. § 451 is a definitional section, and 28 U.S.C. §§ 1343 and 1346 deal with claims for damages, not injunctive or declaratory relief.

"agency action" in a case brought by a "person suffering legal wrong because of agency action." 5 U.S.C. § 702. Such review, however, is limited in various respects by other sections of the APA. Most relevant here, agency action can be reviewed only if it is "final," and only if the plaintiff has "no other adequate remedy in a court." 5 U.S.C. § 704. Therefore, unless Cinemark can demonstrate that it challenges "final agency action" and it is without an adequate remedy, there is no waiver of sovereign immunity and this Court does not have jurisdiction. See, e.g., Veldhoen v. United States Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994); Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole, 948 F.2d 953, 956 (5th Cir. 1991).

B. The Department of Justice's Interpretation of Standard 4.33.3 is Not "Final Agency Action" Subject to Judicial Review Under the Administrative Procedure Act

"A final agency action is one that imposes an obligation, denies a right, or fixes a legal relationship." Veldhoen, 35 F.3d at 225; Dow Chemical v. United States EPA, 832 F.2d 319, 323 (5th Cir. 1987); see also Bennett v. Spear, 520 U.S. 154, 177-78 (1997). The "action" that Cinemark challenges in this litigation is the Department of Justice's interpretation of its own regulation. See Pl.'s First Am. Compl. ¶ 3. That interpretation was developed and put forward as part of the Department's responsibility to enforce the ADA, but it has not been codified, nor has it resulted in any legal consequences for anyone, let alone Cinemark. As a result, the Administrative Procedure Act

does not provide a means to challenge it.[3/]

An extended analysis of Dow is worthwhile because that case involved facts strikingly similar to those here -- a procedural and substantive challenge to an agency's efforts to enforce a statute and regulations entrusted to it. Specifically, Dow challenged the EPA's interpretation of its own regulation regarding the meaning of "discharges," an interpretation which had been disclosed and applied to Dow in the context of an investigation of Dow's alleged discharges of vinyl chloride gas. Subsequent to Dow's filing its lawsuit, the EPA filed a complaint in a pending enforcement action against Dow in which, relying on its interpretation of its regulation, it asked a court to order Dow to comply with its regulation as interpreted, and order civil penalties.

The Court dismissed Dow's claim, finding that EPA had not taken any steps that could be characterized as final agency action. The Court first held that EPA's interpretation of its

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[3/] The Fifth Circuit has, on occasion, employed a four part test to determine whether agency action is "final." See, e.g., Resident Council v. United States Dep't of Housing and Urban Development, 980 F.2d 1043, 1055 (5th Cir. 1993). Three of the questions a court asks under this test are whether the agency's action has the status of law with penalties for noncompliance, whether its impact is direct and immediate, and whether immediate compliance is expected. Id. That test is therefore merely an extension of the inquiry posed in Dow, Veldhoen, and similar cases -- whether the agency action imposes obligations, denies rights, or fixes a legal relationship -- with the additional requirement that the agency's action must be a definitive statement of position. See also Bennett, 520 U.S. at 177-78. Analysis of the Department of Justice's interpretation under either approach leads to the same result.

discharge regulation, just like the Department of Justice's interpretation of Standard 4.33.3,

> is "final" only in the sense that no one at the agency currently plans to revise it. The same could be said for countless other instances of legal "interpretation" that inevitably occur. . . . When these interpretations do not establish new rights or duties — when they do not fix a legal relationship — they do not constitute "final action" by the agency and they are not reviewable. . . .

Dow, 832 F.2d at 323-24. The Court reached this holding despite recognizing that Dow might eventually be penalized for failing to abide by the discharge regulation as interpreted by EPA. "But the legal source for these [penalties] — if indeed the district court concludes they are warranted — will be [the regulation], and not any later EPA interpretation of that regulation." Id. at 323; see also Orengo Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993) (interpretive statement in context of adjudication not intended to create new rights or duties).

The same result is mandated in this case. As the Department of Justice has interpreted Standard 4.33.3 -- specifically the phrase "lines of sight comparable to those for members of the general public" in that regulation -- Cinemark's practice of placing wheelchair seating in the front of its stadium-style theaters, outside the stadium portion, does not comply with the regulation. But it is the regulation itself, and not the Department of Justice's interpretation of it, that imposes the duty to provide wheelchair users with "comparable" seating. Indeed, the Department of Justice has issued no order requiring

Cinemark to comply with its interpretation (nor does the ADA authorize the Department to compel action), and can impose no penalty on Cinemark for failing to comply with its interpretation absent a court order. The interpretation therefore does not have "the status of law with penalties for noncompliance," and is not final agency action. Taylor-Callahan-Coleman, 948 F.2d at 959; see also Resident Council, 980 F.2d at 1056 (HUD interpretation of statute not final because does not have status of law).[4/]

The fact that the Department of Justice has now filed an enforcement action based on an application of Standard 4.33.3 to Cinemark's stadium-style theaters does not change the finality analysis. This exact situation arose in Dow, and the Fifth Circuit expressly held that the filing of an enforcement suit by an administrative agency responsible for enforcement of a statute is not final agency action. Dow, 832 F.2d at 325. While Cinemark will now have the "obligation" to defend itself in litigation, that "obligation" is "different in kind and legal effect" from the burdens imposed by final agency action. Id. (quoting FTC v. Standard Oil, 449 U.S. 232, 242 (1980)).

The Fifth Circuit's decision in Dow is consistent with the pragmatic approach courts employ to assess finality. FTC v.

[4/] Cf. Western Illinois Home Health Care v. Herman, 150 F.3d 659, 663-64 (7th Cir. 1998) (party not entitled to seek judicial review when no legal consequences for disregarding agency's position); Allsteel, Inc. v. United States EPA, 25 F.3d 312, 315 (6th Cir. 1994) ("Where violation of an order would not expose the party to penalties or obligations not already imposed by the statute, the impact of the order may not be sufficiently practical or immediate to make the action 'final.'").

Standard Oil, 449 U.S. 232, 239 (1980); Taylor-Callahan-Coleman, 948 F.2d at 957. Administrative agencies continually engage in enforcement efforts, often relying on their own interpretations of statutes and regulations entrusted to their administration. See, e.g., American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1111-12 (D.C. Cir. 1993). To allow a defendant to preempt an enforcement action through a procedural challenge would significantly hinder agency enforcement efforts. As the Supreme Court put it, it is not the purpose of judicial review provisions to turn prosecutor into defendant. Standard Oil, 449 U.S. at 243; see also Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise, § 15.15 at 391 (3d ed. 1994) ("[c]ourts cannot possibly get into the business of reviewing . . . announcements of major investigations or enforcement actions").

Indeed, even if in different circumstances agency enforcement actions could constitute final agency action -- for example, if the filing of the action itself had legal consequences for the defendant -- the Department of Justice's filing legal papers adverse to Cinemark's position falls well short of this threshold. The Department of Justice's complaint against Cinemark is a statement that there is "reasonable cause to believe" that discrimination under the ADA has occurred, see 42 U.S.C. § 12188(b)(1)(B), and such a statement, even in the form of a formal complaint, is not final agency action. Standard Oil, 449 U.S. at 241. In essence, the Department of Justice has

"recommended" that a court make certain findings, and that does not "fix legal rights or impose obligations, even if further proceedings prompted by the [agency's] decision may." Veldhoen, 35 F.3d at 226. See also Solar Turbines Inc. v. Seif, 879 F.2d 1073, 1082 (3d Cir. 1989) (issuance of administrative order not final agency action where no compulsion to obey order).

C. Cinemark Has An "Adequate Remedy In A Court" Because It May Challenge the Department of Justice's Interpretation of Standard 4.33.3 in The Pending Enforcement Action

Even if the Department of Justice interpretation of Standard 4.33.3 were final agency action, this Court would not have jurisdiction of Cinemark's complaint under the APA because Cinemark has an "adequate remedy in a court." 5 U.S.C. § 704. Cinemark is free (and likely) to raise its contrary interpretation of Standard 4.33.3, as well as its other defenses against application of Standard 4.33.3 to Cinemark, see Pl.'s First Am. Compl. at 10, as a defense in the pending enforcement suit. Thus, dismissing this case will not prevent Cinemark from challenging the Department of Justice's interpretation. See Dow, 832 F.2d at 325.

Where a party has the ability to assert its claims as a defense in another proceeding, that is an adequate remedy at law. See Georgia v. City of Chatanooga, Tennessee, 264 U.S. 472, 483 (1924); see also United States v. Rural Elec. Convenience Coop. Co., 922 F.2d 429, 433 (7th Cir. 1991); Travis v. Pennyrile Rural Elec. Coop., 399 F.2d 726, 729 (6th Cir. 1968). Under the APA, then, this Court does not have jurisdiction to hear Cinemark's

claims. See New Jersey Hosp. Ass'n v. United States, 23 F. Supp. 2d 497, 501 (D.N.J. 1998); NAACP v. Meese, 615 F. Supp. 200, 203 (D.D.C. 1985). Although Cinemark might rather not litigate in the context of an enforcement action, in which injunctive relief and civil penalties are a possible outcome, that does not mean that Cinemark does not have an "adequate" opportunity, within the meaning of 5 U.S.C. § 704, to defend itself in court. See, e.g., First Nat'l Bank v. Steinbrink, 812 F. Supp. 849, 853-54 (N.D. Ill. 1993) (expense or inconvenience of defending self does not limit adequacy of remedy in court).

II. Cinemark Should Not Be Permitted to Pursue A Declaratory Judgment Action Filed in Anticipation of Other Litigation

Cinemark's complaint should be dismissed for the separate and independent reason that it was demonstrably filed in anticipation of an action to be brought amgainst it by the United States. As Cinemark acknowledges, the United States began an investigation of Cinemark's theaters over a year ago. See Pl.'s First Am. Compl. ¶ 10. In the course of that investigation, Cinemark and the United States engaged in negotiations to settle any possible claims the United States would have against Cinemark under the ADA and Standard 4.33.3. Id. ¶¶ 10, 15; see also Miller Decl. ¶¶ 4, 7. The United States notified Cinemark, however, that the United States had obtained authority to sue Cinemark under the ADA if the negotiations were not successful. Miller Decl. ¶ 7. The negotiations continued until Cinemark notified the United States that it had filed this lawsuit rather than responding to the most recent offer by the United States.

Id. ¶¶ 8-9. Indeed, this case was filed only two days after the United States sent a settlement letter to Cinemark. See Pl.'s First Am. Compl. ¶ 16 (noting United States letter dated January 26, 1999). The United States, having received no substantive response to its proposals, subsequently filed its enforcement action against Cinemark. See Exh. 5; see also Miller Decl. ¶ 10.

The Declaratory Judgment Act does not require a district court to hear a case brought by a plaintiff seeking declaratory relief. See Rowan Cos., Inc. v. Griffin, 876 F.2d 26, 28 (5th Cir. 1989); see also 28 U.S.C. § 2201(a) (court "may" declare rights); Wilton v. Seven Falls Co., 515 U.S. 277, 286-88 (1995). Rather, as the Fifth Circuit has repeatedly reiterated, that statute "gives the court a choice, not a command." Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d 599, 601 (5th Cir. 1983) (quoting Dresser Indus. Inc. v. Insurance Co., 358 F. Supp. 327, 330 (N.D. Tex.), aff'd, 475 F.2d 1402 (5th Cir. 1973)). One of the primary reasons for a court to exercise its choice not to hear a declaratory judgment action is when that action is filed in anticipation of another suit. Id. at 602; see also Rowan at 29.

"Anticipatory suits are disfavored because they are an aspect of forum-shopping." Mission, 706 F.2d at 602 n.3. "The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum." Id. (quoting American Auto. Ins. Co. v. Freundt, 103 F.2d 613, 617 (7th Cir. 1939)). Therefore the Fifth

Circuit has repeatedly upheld dismissal or stays of declaratory judgment actions filed in anticipation of other litigation. Id. at 602-03; Odeco Oil & Gas Co. v. Bonnette, 4 F.3d 401, 404 (5th Cir. 1993); Granite State Ins. Co. v. Tandy Corp., 986 F.2d 94, 96 (5th Cir. 1992), cert. dismissed, 507 U.S. 1026 (1993); Pacific Employers Ins. Co. v. M/V Capt. W.D. Cargill, 751 F.2d 801, 804 (5th Cir. 1985); Amerada Petroleum Corp. v. Marshall, 381 F.2d 661, 663 (5th Cir. 1967); see also Rowan, 876 F.2d at 29 n.3 (existence of other suit is important factor district court should take into account on remand in determining whether to dismiss declaratory judgment action).

A District Court in the Western District of Texas recently dismissed a declaratory judgment action filed in a nearly identical situation. Days Inns v. Reno, 935 F. Supp. 874 (W.D. Tex. 1996). That case, too, arose out of an investigation by the Department of Justice of a company's alleged failure to comply with the ADA. Id. at 875. The Department of Justice engaged in settlement negotiations with the company, but also informed the company that it would file enforcement actions against the company if the negotiations were not successful. Id. at 876. While an offer was still on the table, the company filed a declaratory judgment action against the United States. Id. Subsequently, the Department of Justice filed the promised enforcement action. Id.

Based on this similar situation, the court dismissed the declaratory judgment action. Id. at 877. The evidence of

negotiations between the parties and the threat of enforcement action by the Department of Justice was sufficient to support the conclusion that the declaratory judgment action was an anticipatory lawsuit and therefore merited dismissal. See also Granite State, 986 F.2d at 96 (recounting similar facts); Mission, 706 F.2d at 602 (same). As the court noted, "[t]he federal declaratory judgment is not a prize to the winner of a race to the courthouses." Days Inns, 935 F. Supp. at 878 (quoting Perez v. Ledesma, 401 U.S. 82, 119 n.12 (1971) (Brennan, J., dissenting)). The same conclusion applies here: Although Cinemark "race[d] to the courthouses," its anticipatory suit does not take priority over the enforcement action filed by the Department of Justice.[5/]

A review of the complaint in the enforcement action filed in the Northern District of Ohio reveals that the entire dispute between the parties to this action can be resolved in that case. See Exh. 5; cf. Rowan, 876 F.2d at 29 (existence of other suit where controversy can be resolved is basis to dismiss declaratory judgment action); Days Inns, 935 F. Supp. at 877, 878 (same). Where that is true, and where the evidence supports the conclusion that the declaratory judgment action was an anticipatory suit, the declaratory judgment action should be

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[5/] This conclusion applies with even more force to the prospective intervenors, American Multi-Cinema, Inc. and AMC Entertainment, Inc. ("AMC"), against whom an enforcement action by the United States was pending prior to their effort to join this litigation. See AMC Brief at 4.

dismissed. See General Motors Corp. v. Volpe, 321 F. Supp. 1112, 1125-26 (D. Del. 1970), aff'd as modified, 457 F.2d 922 (3d Cir. 1972); see also Torch, Inc. v. LeBlanc, 947 F.2d 193, 196 (5th Cir. 1991) (function of declaratory judgment act is not to allow defendant to obtain pre-emptive declaration of non-liability).

III. Cinemark's Claim Regarding Its Operational Theaters Is Barred by Collateral Estoppel

Even if this Court had jurisdiction, and were to exercise that jurisdiction, over Cinemark's claims generally, at least one of Cinemark's claims would still have to be dismissed at the outset. Cinemark seeks a declaratory judgment that its operational theaters comply with Standard 4.33.3 and the ADA. See Pl.'s First Am. Compl. at 10 (¶ d); see also id. at ¶ 6 (describing Cinemark's seating plan). Another federal court, however, has already determined that not to be the case.

In Lara, Judge Hudspeth concluded that Cinemark's El Paso stadium-style theaters, and particularly the placement of wheelchair seating on the floor in front of the stadium-style section of the theater, violate the ADA and the plain language of Standard 4.33.3.[6/] As the Court in Lara found, Cinemark's theaters deny wheelchair users "full and equal enjoyment of the movie going experience" by denying those patrons "comparable" lines of sight as the ADA and Standard 4.33.3 require. See Exh.

[6/] See generally Lara, slip op. (W.D. Tex. Feb. 4, 1999) (judgment) (attached as Exh. 6); id., slip op. (order awarding damages and injunctive relief) (attached as Exh. 7); see also Exh. 2 (order on motions for summary judgment).

2 at 3-4. The Court's determination in Lara was not based on the Department of Justice's interpretation of Standard 4.33.3, but merely on the plain meaning of the regulation itself, as well as on the plain meaning of the ADA. See id. at 3; see also Lara, slip op. (W.D. Tex. Mar. 22, 1999) (order regarding Pls.' Request for Attorneys' Fees) (attached as Exh. 8), at 3 ("Court's construction of . . . the ADA did not create a 'new standard.' Rather, the Court's construction of [the ADA] is a statement of what the statute meant both before as well as after the Court's decision.").

The doctrine of collateral estoppel, or issue preclusion, prevents a party from relitigating an issue that it has already litigated and lost, and protects defendants against having to litigate an issue that has already been decided against the plaintiff. See, e.g., 18 James Wm. Moore, Moore's Federal Practice, § 132.01 at 132-11 (3d ed.); see also Montana v. United States, 440 U.S. 147, 153-54 (1979) (doctrine protects parties from expense of multiple lawsuits and conserves judicial resources). Collateral estoppel is appropriate where:

> (1) the issue at stake is identical to the one involved in the prior action, (2) the issue was actually litigated, and (3) the issue was necessary to support judgment in the prior action.

Swate v. Hartwell, 99 F.3d 1282, 1289 (5th Cir. 1996).

All of these factors are present here. A review of the complaint in this case and the pleadings and judgment in Lara reveal that the issue raised by Cinemark of whether its current

theaters comply with the ADA and Standard 4.33.3 is exactly the issue involved in, and litigated in, Lara. See Exh. 2 at 2-5; Exh. 6 at 1; Exh. 7 at 2. Cinemark defended itself in that Court by arguing vigorously, as it does here, that its theaters comply with the ADA and Standard 4.33.3.[7/] Cf. Montana, 440 U.S. at 156-57 (court determines identity of issues by review of complaint and decision from prior case). Indeed, in granting summary judgment against Cinemark in that case, the court framed the issue as whether Cinemark's theaters "violate the statute and the regulation [Standard 4.33.3] in that the wheelchair seating that has been provided does not afford [] lines of sight comparable to those provided to able-bodied theater patrons." See Exh. 2 at 3. The court went on to specifically decide that issue against Cinemark. Id. at 4-5.

The resolution of that issue was not only necessary to support the judgment in Lara, but also perhaps the only issue resolved to support that judgment. Without a determination that Cinemark's theaters violate Standard 4.33.3 and therefore violate the ADA, the Court could not have proceeded, as it did, to order Cinemark to modify those theaters "to bring them into compliance

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[7/] For example, Cinemark's summary judgment brief in Lara opened with several pages of argument on exactly this issue — whether its theaters comply with Standard 4.33.3. See, e.g., Def.'s Mot. for Summ. J. and Br. in Supp. Thereof, July 16, 1998, filed in Lara v. Cinemark USA, No. EP-97-CA-502-H (W.D. Tex.), at 2 (argument heading: theaters comply with ADA because they comply with Standard 4.33.3), 3-4 (arguing that theaters as constructed provide comparable lines of sight), 6 ("because Cinemark's theaters comply with Section 4.33.3, Cinemark is entitled to summary judgment"). (copy attached as Exh. 9).

with the requirements" of the ADA. See Exh. 6 at 1.[8/] One federal court having already determined that Cinemark's theaters violate the ADA, Cinemark cannot undermine that determination through collateral attack in this Court.[9/]

CONCLUSION

For these reasons, Plaintiff's First Amended Complaint should be dismissed.

Dated: April 2, 1999 Respectfully submitted,

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[8/] Cinemark may respond that it has appealed the final judgment in Lara. That fact is irrelevant for the purposes of collateral estoppel. See, e.g., Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941); Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co., 510 F.2d 272, 273 (5th Cir. 1975); see also Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155, 158-60 (7th Cir. 1995) (final judgment has claim preclusion and issue preclusion effect although appeal pending); Tripati v. Henman, 857 F.2d 1366, 1367 (9th Cir. 1988) ("to deny preclusion in these circumstances would lead to an absurd result: Litigants would be able to refile identical cases while appeals are pending, enmeshing their opponents and the court system in tangles of duplicative litigation.").

[9/] It is of no importance that the United States was not a party to the Lara case. See Allen v. McCurry, 449 U.S. 90, 94-95 (1980); Terrell v. DeConna, 877 F.2d 1267, 1270 (5th Cir. 1989).

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