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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 Action No.: 99-1034 FMC (SHx) **PLAINTIFF UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION FOR AN ORDER ENLARGING THE TIME IN WHICH DEFENDANTS MAY REFILE AN APA COUNTERCLAIM** Judge: Florence-Marie Cooper Date: To be determined. Time: To be determined.

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INTRODUCTION

The United States hereby opposes Defendants' premature ex parte application[1] for an extension of time to reassert their Administrative Procedure Act (APA)-based counterclaim in order to allow additional time for discovery.[2] A hearing on Defendants' motion to compel discovery is currently scheduled before Magistrate Judge Hillman on May 4, 2000.[3] The Magistrate Judge may well conclude next week the scope of further discovery, if any, to which Defendant is entitled. Determining now whether an extension of time would be necessary for review of such discovery is premature at this point, as the Magistrate Judge may well deny Defendants' motion to compel.

Magistrate Judge Hillman stated at a January 11th hearing that he tentatively agreed with the Department's arguments that certain documents were privileged or irrelevant and should not be turned over. See Declaration of Stephanie Stoltzfus at ¶ 14 ("Stoltzfus Decl."). The United States has opposed Defendants' motion to compel on the grounds that the Department is only withholding privileged or non-relevant documents and that it has already provided Defendants

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[1] Defendants fail to explain why an ex parte application was necessary to resolve this deadline issue, rather than following the regular motion calendar schedule, given that the deadline is approximately one month away, on May 24, 2000. As the case Mission Power Engineering Co. v. Continental Casualty Co., 883 F. Supp. 488 (C.D. Cal. 1995), makes clear, an ex parte application should explain "why the accompanying proposed motion for the ultimate relief requested cannot be calendered in the usual manner," id. at 492, an explanation Defendants have failed to provide in this case. The mere fact that Defendants have not received certain documents from the government that the Department believes are privileged or irrelevant, an issue currently pending before the Magistrate, "is insufficient to justify ex parte relief." See id. at 493.

Furthermore, the United States informed Defendants that it would stipulate to a one-month extension of AMC and AMCE's deadline to reassert their counterclaim.

[2] Although Defendants request the extension for both STK and AMC, see Defs.' Ex Parte Application at 13, in fact the current May 24th deadline only applies to defendants AMC and AMCE. STK has already filed an APA-counterclaim when its served the United States with its answer in February, 2000. The United States currently has a motion to dismiss STK's counterclaim for lack of jurisdiction calendered for hearing on May 22, 2000.

[3] The Magistrate Judge has also scheduled the United States' motion to compel further discovery on the same day.

with thousands of pages of discovery over the course of the last ten months in response to Defendants' expansive requests for production. See Stoltzfus Decl. at ¶¶ 2-7. This Court has already upheld the Magistrate's conclusion that the United States' settlement negotiations with other theater chains are protected from discovery. See United States v. AMC, CV 99-1034, Order Denying Defendants' Motion for Review and Reconsideration at 5 (Apr. 12, 2000) (hereinafter "April 12th Order").

Furthermore, delaying resolution of the APA question by four months is unwarranted because the District Court has already rejected Defendants' arguments that the United States has engaged in final agency action in this case. See Order Granting Plaintiff's Motion to Dismiss Defendants' Counterclaim at 17-18 (December 17, 1999) (hereinafter "December 17th Order"). Without final agency action, the APA does not waive sovereign immunity for this Court to hear Defendants' counterclaims. Defendants have failed to identify any Department action that could constitute final agency action as defined by the December 17th Order and binding precedent. Even if Defendants obtain further documents at the May 4th hearing, there is no agency action that qualifies as final under these standards. Indisputably, Defendants have simply used the APA question to divert attention away from the central issue in this case—i.e. their discriminatory treatment of persons with disabilities.

If the Court believes it appropriate, however, the United States would agree to a thirty-day extension of AMC and AMCE's deadline to reassert their counterclaim, as the hearing on Defendants' motion to compel discovery was recently postponed from April 14th to May 4th.[4]

[4] The Magistrate moved this hearing date at the request of the government due to an unexpected illness. The Department indicated that it would be available for a hearing during the last week of April if necessary. After consulting both parties' schedules, the Magistrate Judge selected May 4th for the hearing of Defendants' motion to compel. The Magistrate later added the United States' motion to compel to that same date.

I. The Court Should Not Delay Resolution of the APA Question for an Additional Four Months.

A. Defendants' Request for an Extension Is Premature.

The Department of Justice ("Department") has been designated by Congress as the agency to monitor and enforce compliance with most provisions of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. The United States brought the present action against Defendants when it discovered Defendants were designing stadium-style theaters that failed to provide patrons who use wheelchairs access to seating "comparable" to that offered to other members of the movie-going public, in violation of Title III of the ADA, 42 U.S.C. §§ 12181-12189, and the Department's implementing regulations, in particular Standard 4.33.3. See 28 C.F.R. pt. 36, Appendix A, § 4.33.3 (requiring that wheelchair users be provided "lines of sight comparable to those for members of the general public.").[5]

From the beginning of this litigation, however, Defendants have attempted to turn enforcement of the law on its head, by challenging the ability of the Department to interpret its own regulations and by improperly "turning prosecutor into defendant." See Standard Oil Co. v. FTC, 449 U.S. 232, 242-43, 101 S. Ct. 488, 66 L. Ed. 2d 416 (1980). Through their counterclaim based on the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, Defendants have improperly attempted to prevent the Department from offering a plain language interpretation of what Standard 4.33.3 means, and the District Court has already rejected Defendants' first APA-based counterclaim because it found no final agency action. See December 17th Order at 14. The Court rejected all of Defendants' arguments that the United States had engaged in final agency action, but permitted Defendants to refile their

[5] Despite Defendants' assertions to the contrary, the United States has interpreted Standard 4.33.3 consistently. The Department of Justice articulated its plain-language interpretation of Standard 4.33.3 as applied to stadium-style theaters in an amicus brief filed in 1998 in a private action against another motion picture theater operator, Lara v. Cinemark USA, No. EP-97-CV-502-H (W.D. Tex.). It is Standard 4.33.3, however, and not the Department of Justice's interpretation of that Standard, that has binding legal effect.

counterclaim at a later date. See December 17th Order at 17-18. The date for refiling was originally fixed at January 31, 2000.

Subsequently, this Court issued a scheduling order granting Defendants' an almost four-month extension of time to refile their APA counterclaim, to May 24, 2000. See February 28th, 2000 Order. Defendants now request an additional four-month extension, one that is wholly unwarranted under the circumstances.[6] The hearing on Defendants' motion to compel further discovery is scheduled for May 4, 2000, before Magistrate Judge Hillman. At a hearing on January 11, 2000, the Magistrate Judge offered his tentative views that the United States had properly invoked its privileges, including the deliberative process and work product privileges, and that the District Court's December 17th Order dismissing without prejudice AMC's APA counterclaim was law of the case, including its determination that legal briefs and private negotiations do not constitute final agency action. See Stoltzfus Decl. at ¶ 14; see also December 17th Order at 10, 12; see also Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 343 (9th Cir. 1990); New Jersey Hospital Ass'n v. United States, 23 F. Supp. 2d 497 (D. N.J. 1998); Duval Ranching Co. v. Glickman, 965 F. Supp. 1427, 1440 (D. Nev. 1997). He further offered the tentative conclusion that Defendants' requests for discovery regarding sports arenas were not relevant to the present action. Stoltzfus Decl. at ¶ 14.

The United States anticipates that the Magistrate may resolve the issues raised by Defendants' Motion to Compel at or soon after the May 4, 2000, hearing. At that time, the

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[6] On April 24, 2000, counsel for Defendants informed the United States that Defendants would seek an ex parte order to move the deadline for refiling the APA counterclaim by three months. Counsel for the United States indicated that the government would agree to a thirty-day extension, in light of the fact that the hearing on Defendants' motion to compel discovery had been moved from April 14, 2000, to May 4, 2000. The parties did not address moving the hearing date for the United States' pending motion to dismiss STK's APA-based counterclaim, currently scheduled for hearing on May 22, 2000.

Further discovery will not reveal any agency action that can be properly identified as final for purposes of waiving sovereign immunity under the APA, in light of this Court's December 17th, 2000 Order and binding Supreme Court and Ninth Circuit precedent. See discussion below. However, in light of the recent three-week postponement of the hearing to resolve Defendants' motion to compel, the United States would also agree to a thirty-day extension of the hearing date for its pending motion to dismiss STK's counterclaim.

Magistrate Judge may well conclude that the Defendants are not entitled to any of the privileged or irrelevant discovery they are seeking with their motion to compel; delaying the deadline to reassert the APA counterclaim by four months therefore would not serve the interests of a speedy resolution of the APA question. Extending the current deadline of May 24th by one month would provide sufficient time for Defendants to prepare their motion to reassert their counterclaim, while at the same time avoiding any unnecessary delay if the Magistrate Judge upholds the Department of Justice's assertion of privileges.

B. The United States Has Cooperated with Defendants by Providing Non-Privileged, Relevant Discovery.

The United States disagrees with Defendants' misrepresentation of the events in this case as described in Defendants' ex parte application. Rather than respond to every inaccurate statement, however, the United States will address a few issues of relevance here. Most importantly, despite Defendants' assertions, the United States has provided over seven thousand pages of relevant, non-privileged discovery in response to Defendants' broad requests for production and interrogatories.[7] See Stoltzfus Decl. at ¶ 2. In addition, other documents responsive to Defendants' discovery requests are available on the Department of Justice's website, on the Freedom of Information Act and ADA pages, which can be searched for key words.[8]

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[7] This discovery includes the pleadings and correspondence files for several lawsuits, including Lara v. Cinemark, Fiedler v. AMC, Arnold v. United Artists, and Lonberg v. Sanborn. The Department has also provided, for example, amicus briefs, summary judgment filings, copies of the Arnold settlement agreement, technical assistance documents, public studies on sight lines in movie theaters, letters to Congress, newspaper and magazine articles discussing accessibility issues at stadium-style theaters, agenda and minutes from public hearings in Florida, sight line drawings of stadium auditoriums, and talking points for speeches by Department of Justice officials. See Stoltzfus Decl. at ¶ 8.

[8] Although Defendants assert that "new defendant STK" should be entitled to develop discovery of its potential APA claim, see Defs.' Ex Parte Application at 3, Defense counsel, who represents both STK and AMC, told Magistrate Judge Hillman during a February 14, 2000 conference call that STK wanted the same discovery that AMC was seeking in its motion to compel discovery. See Stoltzfus Decl. at ¶ 9.

In opposing Defendants' overly broad motion to compel, the United States has asserted privileges protecting certain documents from discovery, including the deliberative process privilege, the attorney-client privilege, attorney work product, and the law enforcement investigative privilege.[9] The United States has also argued that certain documents sought by Defendants, such as those pertaining to sports arenas, are not relevant to the Department's enforcement of the law in the stadium-style theater context. The United States has a right and obligation to assert privileges for documents to which Defendants are not entitled. See, e.g., Assembly of the State of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992) (holding that the main purpose of the deliberative process privilege is to protect the free and frank exchange of ideas and opinions in the agency decision-making process); Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 573 (D.C. Cir. 1990) (warning that "the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl").

This Court has already upheld the United States' objection to turning over documents included in its settlement negotiations. See April 12th Order at 5 (holding that "evidence pertaining to meetings, discussions, and negotiations, between plaintiff and other theater owners concerning enforcement of the ADA's line-of-sight requirements is privileged and not subject to discovery"). To characterize the government's refusal to turn over privileged or irrelevant discovery as "stonewall[ing]" is therefore inaccurate and inappropriate. See Defs.' Ex Parte Motion at 3, 12.

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[9] Pursuant to the Magistrate Judge's instruction, the United States has described to Defendants the nature of each document listed on its privilege log, as well as the privileges applicable for each document. Of these 316 documents, AMC has decided to challenge the privileges asserted for 75. See Stoltzfus Decl. at ¶ 10-11. The hearing on these documents will be held on May 4, 2000.

II. Further Discovery Will Not Yield Any Evidence of Final Agency Action that Has Not Already Been Rejected by this Court's December 17th Order or Binding Court Precedent.

Even if Defendants' motion to compel discovery were granted in full, Defendants' APA-based counterclaim should be dismissed because Defendants cannot identify any agency action that qualifies as "final" for purposes of waiving sovereign immunity under the APA, as defined by this Court's December 17th Order and by binding precedent. See 5 U.S.C. § 704 (government must have engaged in "final agency action for which there is no adequate remedy in a court"); see also Gallo Cattle Co. v. United States Dep't of Agriculture, 159 F.3d 1194, 1198 (9th Cir. 1998).

In her December 17th Order, District Court Judge Morrow rejected AMC's arguments that the Department had engaged in final agency action. Specifically, the Court held that the filing of briefs in litigation (including amicus briefs), the decision to file a complaint, and settlement negotiations and threats of lawsuits with theater chains do not constitute final agency action. See December 17th Order at 10, 11, 12; see also id. at 14 ("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."). The Court further found that, to the extent it would be relevant if the Department of Justice had taken an industry-wide position as in National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1970), that "at most, DOJ has communicated with ten members of the theater industry nationwide, and has not sought to press its interpretations 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." See December 17th Order at 17. The Court's conclusions in its December 17th Order represent the law of the case. United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

Although Defendants cite, out of context, oral statements about discovery made by Judge Morrow at the September 8, 1999 hearing, the Judge explicitly stated that she was not issuing any ruling on the scope of discovery. See Sept. 8, 1999, Tr. at 8:20-24. (Exhibit A) ("With respect to the issue of the proper scope of discovery, the Court would make the

following comments: It is not issuing any ruling with respect to that matter today. That matter being, in the first instance, one to be presented to Judge Hillman."). Furthermore, Defendants ignore the Court's subsequent final written order, entered on December 17, 1999, in which the Court addressed the issue of whether the Department had taken an industry-wide position similar to National Automatic Laundry. The Department had filed a supplemental declaration that it had had communications with less than ten of the fifty largest theater owners in North America. See December 17th Order at 16-17 & 17 n.29. In light of this statement, the Court concluded that

> 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.

December 17th Order at 17.

This conclusion is supported elsewhere in the December 17th Order. For example, the Court explicitly held that the Department had not attempted to articulate an industry-wide policy as in National Automatic Laundry but rather had "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.'" Id. at 13 (quoting National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 698 (D.C. Cir. 1971)). Furthermore, the Court also found that "[n]either settlement negotiations nor threats of suit constitute final agency action that may be judicially reviewed." Id. at 12. As for further discovery, the Court concluded in its written order that "the parties dispute the proper scope of discovery on this issue and that multiple discovery matters remained to be resolved." See Dec. 17th Order at 17. The Court did not attempt to resolve those disputes itself.

In that light, Defendants' request for a four-month extension in refiling their APA counterclaim represents an unnecessary delay in resolving this question. This Court has already rejected Defendants' previous attempts to characterize the government's actions as "final agency action," and Defendants have failed to identify any other action that might qualify as "final agency action." Defendants' memorandum in support of its ex parte application simply seeks to revisit issues already decided by this Court or that are currently pending before the Magistrate. See Alexander, 106 F.3d at 877. None of the grounds asserted by Defendants justify a four-month delay.

Defendants cite an oral recommendation by a Texas Magistrate Judge that the Department had engaged in final agency action—again, ignoring this Court's December 17th Order as binding law of the case. See Alexander, 106 F.3d at 876. Defendants' argument invoking the Texas Magistrate's statement merely attempts to revisit legal conclusions already resolved by this Court's order, particularly this Court's conclusion that the filing of an amicus brief does not constitute final agency action. See Dec. 17th Order at 10. The United States' offering of a plain language interpretation of its regulations in a court proceeding simply does not qualify as final agency action that potentially invokes this court's jurisdiction. See Mt. Adams, 896 F.2d at 343. Furthermore, a District Court in the Northern District of Ohio has rejected the Texas Magistrate's reasoning and has reached the same conclusion as this Court, dismissing a movie theater chain's APA counterclaim for lack of final agency action. See United States v. Cinemark USA, Inc., 99-CV-705, Memorandum and Opinion and Order at 6 (Mar. 22, 2000) (hereinafter "Ohio Cinemark Order") ("Because they do not meet the requirements of finality, Plaintiff's filing of complaints in their enforcement actions; correspondence discussing settlement or alleged violations of the ADA; and *amicus* briefs are not 'final' agency actions.") (see Exhibit B). The Texas Magistrate's recommendations themselves are currently under review by the District Court in the Northern District of Texas, which held oral argument on the appeal of the Magistrate's ruling on April 21, 2000.

Defendants' citation to recent statements made by the United States Architectural and Transportation Barriers Compliance Board ("the Access Board") are also inapposite.[10] See Defs.' Ex Parte Application at 11 (citing 64 Fed. Reg. 62248, 62278 (Nov. 16, 1999)). The Board's statement that the Department is attempting to settle particular cases where wheelchair patrons are not provided comparable lines of sight is consistent with the December 17th Order's conclusion that there is no final agency action in this case. The Department's interpretation of the regulation does not determine rights or fix obligations, nor do any binding legal consequences flow from it. See Gallo Cattle Co., 159 F.3d at 1199; Ukiah Valley Medical Ctr. v. FTC, 911 F.2d 261, 264 (9th Cir. 1990). Although the Department attempts to resolve violations of the law without resorting to litigation through settlement negotiations, the Department cannot enforce the regulation upon an unwilling party except by filing an enforcement action in a U.S. District Court and obtaining a court order. See 42 U.S.C. § 12188(b)(1)(B); id. § 12888(b)(2); see Ukiah Valley, 911 F.2d at 265 (no final agency action where party is "not yet subject to any order requiring them to act"); see also Ohio Cinemark Order at 8 (Mar. 22, 2000) ("Any order for relief, damages, or levying of a fine can only be made by the district court, and not by the Attorney General.") (see Exhibit B). Defendants' position that the Department's attempts to settle disputes somehow constitutes final agency action is not only contrary to law, see December 17th Order at 12 (citing cases), but also would have the perverse effect of discouraging settlement in lieu of litigation.

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[10] On page 6 of its ex parte application, Defendants erroneously refers to the Standard 4.33.3 as "ADAAG § 4.33.3" However, the term "ADAAG" properly refers to the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, a regulation promulgated by the Access Board. See 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 text of the ADAAG — not the Access Board's Preamble to or interpretations of the ADAAG.

Lara v. Cinemark USA, Inc., 2000 WL 297662 (5th Cir. Apr. 6, 2000), to which Defendants cite, actually favors the Department's position that no final agency action is at issue. In Lara, the Fifth Circuit referred to the Department's interpretation as a "litigating position" that did not provide "specific regulatory guidance" about the meaning of Standard 4.33.3. See id. at *5. Whether or not the Fifth Circuit gave the Department's interpretation the proper level of consideration, it is plain that the Court did not consider it to be final agency action. Most importantly, the Fifth Circuit did not believe that the interpretation fixes rights or imposes any legal obligations. Absent that, the interpretation cannot be final agency action. See Gallo Cattle Co., 159 F.3d at 1199.

CONCLUSION

Another four-month delay to resolve this issue is unjustified under the circumstances, as none of the information Defendants seek will reveal final agency action to invoke this Court's jurisdiction. Furthermore, the Magistrate currently has a hearing scheduled for May 4, 2000, to resolve Defendants' motion to compel discovery; if the Magistrate Judge finds that the discovery Defendants seek is privileged or not relevant, there is no further need to delay final resolution of the APA question.

However, if the Court believes it appropriate, the United States would agree to a thirty-day extension of AMC and AMCE's deadline to reassert their counterclaim, as the hearing on Defendants' motion to compel discovery was postponed from its original date of April 14th to May 4th. Likewise, the United States would consent to a thirty-day extension of the May 22nd hearing on the United States' motion to dismiss STK's counterclaim.

The Department also requests that if the Court elects to hold a hearing on this ex parte application, that the hearing be held telephonically, as the Department's attorneys are located in Washington, D.C.

Respectfully submitted,

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Dated: April 28, 2000

PROOF OF SERVICE

I, John Albert Russ IV, 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 April 28, 2000, I served the following documents,

PLAINTIFF UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION FOR AN ORDER ENLARGING THE TIME IN WHICH DEFENDANTS MAY REFILE AN APA COUNTERCLAIM, and

DECLARATION OF STEPHANIE L. STOLTZFUS SUPPORTING THE UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION FOR AN ORDER ENLARGING THE TIME IN WHICH DEFENDANTS MAY REFILE AN APA COUNTERCLAIM

on each person or entity named below by sending a facsimile copy to their office, and by enclosing a copy in an envelope addressed as shown below and by sending it via overnight mail to the following addresses:

Date and Place of mailing: April 28, 2000, Washington, D.C.

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

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

Executed on: April 28, 2000, at Washington, D..C.

_____

John Albert Russ IV