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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) REPLY MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LINE OF SIGHT ISSUES DATE: Nov. 18, 2002 TIME: 10:00 a.m. JUDGE: Hon. Florence-Marie Cooper

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INTRODUCTION

As with many of its other briefs in this action, the summary judgment opposition memorandum of defendants AMC Entertainment, Inc. and American Multi-Cinema, Inc. [hereinafter collectively referred to as "AMC"] is littered with factual and legal inaccuracies. See Mem. of Points and Auth. In Opp. to Plntf.'s Motion for Partial Sum. Judgment Re: Lines of Sight Issues Or, In the Alternative A Motion for Continuance of the Sum. Judgment Hearing Pending Completion of the Add'l Discovery (filed Nov. 4, 2002) (Docket # 373) ("AMC SJ Opp. Mem."). In this memorandum, AMC, for example, mischaracterizes the United States' position with respect to the interpretation of Standard 4.33.3, ignores the full history of fact discovery in this action, and makes bald factual assertions supported only by the declaration of AMC's trial counsel. Yet perhaps the most remarkable aspect of AMC's summary judgment papers is that AMC does not dispute - and thus concedes - significant and material aspects of the United States' summary judgment motion concerning the seating layout of its stadium-style theaters, the meaning of the term "lines of sight," and the inferior quality of the lines of sight afforded patrons who use wheelchairs where, in the overwhelming majority of AMC's stadium-style theaters, they are relegated to seats on the traditional, sloped-floor portion of the theater. Taken together, these considerations strongly counsel in favor of this Court granting the United States' motion for partial summary judgment.

ARGUMENT

A. AMC Does Not Dispute Material Facts Underlying the United States' Partial Summary Judgment Motion Concerning Lines of Sight In Its Stadium-Style Movie Theaters

Perhaps the most remarkable aspect of AMC's opposition memorandum (and its accompanying Statement of Genuine Issues) is the fact that AMC does not dispute significant and material aspects of the United States' summary judgment motion. First, and perhaps most importantly, AMC's opposition memorandum does not even discuss – let alone distinguish – its damning admission in a May 1995 memorandum filed in the Fiedler v. AMC litigation that, in the context of Standard 4.33.3, "[l]ines of sight for a patron in an auditorium are measured with reference to the horizontal and vertical angles of view the eye must encompass in seeing the

screen." See, e.g., Mem. In Support of Pl. United States' Motion for Partial Sum. Jdgmnt. Re: Line of Sight Issues 2, 17, 19-20 (filed Oct. 28, 2002) (Docket # 367) ("US SJ Mem."); Mem. of Pl. United States In Opp. to AMC's Motion for [Partial] Summary Judgmnt. 8-9, 18 (filed Nov. 4, 2002) (Docket # 367) ("US SJ Opp. Mem.").[1] Given that AMC has admitted this statement, AMC cannot now credibly challenge the reasonableness of the Department's reading of Standard 4.33.3's comparable-lines-of-sight requirement.

Second, AMC fails to dispute -- and thus concedes -- significant material facts set forth in the United States' Statement of Uncontroverted Facts. See Stmnt. of Uncontroverted Facts and Concl. of Law In Support of Pl. United States' Motion for Partial Sum. Judgment Re: Lines of Sight (lodged Oct. 28, 2002) (Docket # 366). First, AMC's Statement of Genuine Issues admits the majority of the United States' fact paragraphs concerning the configuration of its stadium-style theater complexes. See AMC SJ Opp. Facts ¶¶ 1-3, 5-7, 9, 19-20, 23, 25. Remarkably, moreover, AMC does not dispute ***any*** of the United States' material facts establishing that: (i) the phrase "lines of sight" is a well-established term of art in the context of theater designers that encompasses several factors including viewing angles (see id. at ¶¶ 43-49); (ii) AMC's "outside" architects have admitted that "lines of sight" include viewing angles and that AMC was using viewing angles as early as 1995 to design its stadium-style movie theaters (see id. at ¶¶ 76-77); (iii) seats placed too close to the screen with consequently large horizontal and vertical viewing angles cause viewer discomfort, make it difficult to view the entire screen, and make the images

[1] While its admission in the Fiedler memorandum is ignored by AMC in its opposition memorandum, AMC's Statement of Genuine Issues at least acknowledges this statement by raising a relevancy "objection" to the United States' fact paragraph quoting the Fiedler memorandum. See Dfndnts.' Separate Stmnt. of Genuine Issues of Material Fact In Opp. to Plntf.'s Motion for Partial Sum. Judgment Re: Line of Sight Issues 48 (filed Nov. 4, 2002) (Docket # 374) "(AMC SJ Opp. Facts") (Fact No. 75). AMC's "objection" is frivolous. First, the United States made no such argument in the Fiedler litigation. See US SJ Opp. Mem. at 6-7. Second, irrespective of the legal issues in Fiedler, AMC's statement that Standard 4.33.3 encompasses viewing angles is significant both as evidence demonstrating that the United States has reasonably interpreted Standard 4.33.3 to encompass viewing angles, and that, even before ever opening any of its stadium-style theater complexes, AMC fully understood Standard 4.33.3's comparability mandate.

on the screen appear distorted (see id. at ¶¶ 79-85); (iv) the seats on the traditional, sloped-floor portion of its stadium-style theaters (where 76% of the wheelchair and companion seating are located) provide views of the screen that are less relaxing, more uncomfortable, more distorted, and have overly large projected images (see id. at ¶¶ 86-88); (v) "lines of sight" can be qualitatively compared, and the middle portion of the stadium section of AMC's stadium-style theaters is generally considered to offer the "best" and most preferred seating, while the wheelchair seating located on the traditional, sloped-floor portion of these theaters provide inferior lines of sight that are less popular and less desirable to movie patrons (see id. at ¶¶ 89-94); and, that (vi) since most movie patrons sit in the stadium section of AMC's stadium-style theaters, the placement of wheelchair locations in only the non-stadium-style section of the majority of these theaters results in the segregation and isolation of persons who use wheelchairs (see id. at ¶ 95). Taken together, these admissions provide all the facts necessary to grant the United States' motion for partial summary judgment.[2]

Finally, the remaining portions of AMC's Statement of Genuine Issues do not directly dispute the United States' facts, but, rather, "object" to these facts on the basis of "relevancy." See AMC SJ Opp. Facts ¶¶ 11 - 18, 21-22, 24, 27-42, 75, 78.[3] Such an objection, however, fails

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[2] Indeed, AMC expressly disputes only a ***single*** paragraph in the entirety of the United States' Statement of Uncontroverted Facts -- a paragraph concerning whether AMC had a "pattern and practice" of placing wheelchair seating on the traditional, sloped-floor portion of its stadium-style theaters with seating capacities of 300 or fewer patrons (see id. at ¶ 26). Notably, AMC does not dispute the United States' factual assertion that of the 1,714 auditoria contained in the stadium-style theater complexes currently owned or operated by AMC, 1,306 auditoria (76.2%) had no wheelchair or companion seating location in the stadium-style section. See AMC SJ Opp. Facts ¶¶ 24, 26. AMC thus apparently contests only the United States' statement that such a percentage (76%) amounts to a "pattern and practice" of placing wheelchair locations outside the stadium-style section.

[3] In addition to relevancy, AMC also raises particularized objections to two other categories of the United States' fact paragraphs. First, AMC "objects" to the United States' fact paragraphs regarding statements by an industry trade organization (National Association of Theater Owners ("NATO")) concerning "lines of sight" in movie theaters on the dual grounds of relevance and the Department's purported "barring" of discovery concerning DOJ-NATO settlement negotiations. See AMC SJ Opp. Facts ¶¶ 59 - 61, 63 - 74. AMC also "objects" to the United States' fact paragraphs regarding audience seating preferences because the Department allegedly did not produce copies of videotapes from which the United States' expert statistician

to satisfy AMC's obligation under Rule 56(e) of the Federal Rules of Civil Procedure to counter the United States' properly-supported factual statements with "specific facts showing that there [are] genuine issue[s] for trial." This obligation is not met by the assertion of conclusory allegations or denials. See, e.g., Taylor v. List, 880 F.2d 1040, 1045-46 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying on conclusory allegations unsupported by factual data."); Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (facts not contradicted by party opposing summary judgment are admitted); 10B Charles A. Wright et al., Federal Practice and Procedure § 2739 (1998). The facts set forth in the United States' Statement of Uncontroverted Facts to which AMC raises "relevancy" objections should, therefore, be deemed admitted for purposes of the instant motion for partial summary judgment. See id.; see also C.D. Local Rule 56-3 (noting that material facts adequately supported by the moving party are admitted to exist unless "controverted by declaration or other written evidence filed in opposition to the motion").

B. AMC Ignores Well-Established Administrative Law Precedents Counseling That the Department of Justice's Interpretation of Its Own ADA Regulations, As Well As Its Enforcement Decisions, Are Entitled to Substantial Deference

1. The Department of Justice's Reasonable and Consistent Interpretation of Standard 4.33.3 Warrants Substantial Deference By This Court

As discussed in the United States' summary judgment memorandum, the Department's interpretation of Standard 4.33.3's comparability and integration requirements is entitled to substantial deference because its reading of these provisions fully comports with the language of

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(Dr. Linda Fidell) derived her statistical data. See id. at ¶¶ 95-104. Both of AMC's "objections" are meritless. Both Magistrate Judge Hillman and this Court have already held that AMC is not entitled to information regarding DOJ-NATO contacts that would reveal negotiating positions or statements made during settlement negotiations. See Minute Order (dated Feb. 25, 2000) (Docket # 87); Order Denying Defendants' Motion for Review and Reconsideration (dated April 11, 2000) (Docket # 103). Second, with respect to Dr. Fidell's statistical analysis, the United States has already made available for inspection by AMC all the materials she considered or relied on when forming her opinions – including the videotapes from which the digital images she analyzed were extracted. See US Facts ¶¶ 96-98 (describing videotapes and digital image extraction process); see also Pl. United States' Opp. to Defendants' *Ex Parte* App. Striking Videotapes Which Formed the Basis of Plntf.'s Motion for Partial Sum. Judgment Re: Lines of Sight (filed Nov. 8, 2002)

the regulation and best serves the anti-discrimination principles underlying Title III of the ADA and its implementing regulations. See US SJ Mem. at 11-14, 23-25.[4] AMC, in its opposition memorandum, attempts to avoid this well-established principle of administrative law by suggesting that the Access Board -- rather than the Department of Justice -- "drafted" Standard 4.33.3, and by claiming that the Department's interpretation of Standard 4.33.3 is merely a "litigating position" that has changed over time. See AMC SJ Opp. Mem. at 1-3, 9-11, 22-25.[5] Indeed, AMC even goes so far as to argue that the United States' summary judgment memorandum itself contains a "new" interpretation of Standard 4.33.3 by noting (in footnote six) that the Department does not view this regulation as imposing specific viewing angle requirements. See AMC SJ Opp. Mem. at 22-25; see also Decl. of Gregory F. Hurley In Support of Opp. to Plntf.'s Motion for Partial Sum. Judgment Re: Lines of Sight Issues ¶¶ 12-13 (filed Nov. 4, 2002) (Docket # 378) ("Hurley Dec."). AMC's claims are meritless.

a. AMC Mistakenly Assumes that the Access Board "Drafted" Standard 4.33.3

As an initial matter, AMC is mistaken when stating that the Access Board "drafted" Standard 4.33.3. Rather, as discussed at length in the United States' memorandum in opposition to AMC's motion for summary judgment, Standard 4.33.3 traces its regulatory roots back to private assembly area accessibility guidelines published in 1980 by the American National Standards Institute ("ANSI"). See US SJ Opp. Mem. at 2-4. These ANSI assembly area guidelines were then picked up, with some modification, by other federal accessibility regulations and guidelines over the years until finally becoming part of the Access Board's "ADA Accessibility Guidelines for Buildings and Facilities" ("ADAAG"). Id. at 3. ADAAG,

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[4] Of course, the United States also noted in its summary judgment memorandum that the meaning of Standard 4.33.3 is clear and that the Court need not look beyond this plain language to affirm the Department's interpretation of this regulation. See US SJ Mem. at 11-12. In the event that the Court disagrees and views the language of Standard 4.33.3 as ambiguous, it is only then that deference principles come to the legal forefront.

[5] AMC's related argument that the Department's impermissibly seeks to retroactively apply its "litigating postion" has already been addressed in the United States' memorandum in opposition to AMC's motion for summary judgment. See US SJ Opp. Mem. at 22 & n.7.

however, merely establishes minimum guidelines for new construction and alterations of facilities covered by Title III of the ADA. See US SJ Mem. at 5 & n.2; US SJ Opp. Mem. at 3. The Department of Justice alone is congressionally-tasked with promulgating binding regulations under Title III of the ADA, and this regulatory authority includes the discretion to "exceed the [Access] Board's 'minimum guidelines' and establish standards that provide greater accessibility." 56 Fed. Reg. 35,408, 35,411 (1991). Pursuant to Congress' delegated regulatory authority, the Department in 1991 issued final regulations -- after notice-and-comment rulemaking – to govern new construction of, and alterations to, Title III-covered facilities. See US SJ Mem. at 5-6 (discussing DOJ Standards for Accessible Design). Id.

Thus, whatever Standard 4.33.3's regulatory and linguistic roots, the interpretation and enforcement of this regulation is now the sole responsibility of the Department of Justice. The Department's interpretation of Standard 4.33.3 is, therefore, entitled to substantial deference. See, e.g., Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997) (deferring to the Department of Justice's interpretation of Standard 4.33.3 and ruling that "[o]nce the [Access] Board's language was put out by the Department as its own regulation, it became, as the [ADA] contemplates, the Justice Department's and only the Justice Department's responsibility"), cert. denied, 523 U.S. 1003 (1998); Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 36 & n.4 (D.D.C. 1994) (deferring to the Department's interpretation of Standard 4.33.3); but see Lara v. Cinemark, U.S.A., 207 F.3d 783 (5th Cir.) ("Lara II"), cert. denied, 531 U.S. 944 (2000).[6]

In any event, identifying the "drafter" of Standard 4.33.3 proves beside the point since deference principles do not rest – as AMC asserts without citation – on the notion that "who better than the drafters of the regulation know what it means." AMC SJ Opp. Mem. at 2; see also id. at 9. AMC's bald assertion notwithstanding, the Supreme Court describes the doctrine of deference as stemming from several considerations having nothing to do with regulatory

[6] A detailed discussion of the flaws underlying the Fifth Circuit's analysis of deference and other matters is set forth in the United States' memorandum in opposition to AMC's motion for partial summary judgment. See US SJ Opp. Mem. at 12-17; see also US SJ Mem. at 21-22.

authorship, including the agency's familiarity and experience with the regulated program, and Congress' express delegation of rulemaking and policymaking authority to the agency. See, e.g., Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 2387 (1994); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696, 111 S. Ct. 2524, 2534 (1991) (holding that Secretary of Labor's "entitlement to deference" derived from congressionally-delegated authority to adopt regulations). Indeed, the Supreme Court's comments regarding the rational for affording deference in Martin v. Occupational Safety and Health Rev. Comm'n, 499 U.S. 144, 111 S. Ct. 1171 (1991) applies with equal vigor to this action:

> Because applying an agency's regulations to complex or ***changing circumstances*** calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's lawmaking powers.

499 U.S. at 151, 111 S. Ct. at 1176 (emphasis added).[7] Since the Department (rather than the Access Board) has been exclusively tasked by Congress with rulemaking and enforcement authority for Title III of the ADA, these Supreme Court precedents make plain that: (i) Standard 4.33.3 is the Department's own regulation for deference purposes irrespective of authorship; and that (ii) this Court should afford deference to the Department's interpretation of this regulation.

b. The Department Has Consistently Interpreted Standard 4.33.3

Setting aside issues regarding the "authorship" of Standard 4.33.3, AMC also suggests that the Department's interpretation of this regulation is not entitled to deference both because it is allegedly only a "litigating position" that was "first published in an amicus brief" and because the Department's reading of this regulation has purportedly changed over time. See AMC SJ

[7] That authorship is not an essential predicate to deference has been made plain by several Supreme Court decisions wherein the Court afforded substantial deference to an agency's interpretation of regulations issued by another state or federal agency. See Arkansas v. Oklahoma, 503 U.S. 91, 109-114, 112 S. Ct. 1046, 1059-61 (1992) (reversing Court of Appeals decision for failing to grant substantial deference to EPA's interpretation of state water quality standards); Pauley, 501 U.S. at 696-99 (deferring to Secretary of Labor's interpretation of regulations implementing the Black Lung Benefits Act that were initially promulgated by the former Department of Health, Education and Welfare).

Opp. Mem. at 9-11, 22-25. Neither of these claims undercut the broad deference due the Department's interpretation of Standard 4.33.3.

The Department's interpretation of Standard 4.33.3's comparability requirement is not, as AMC suggests, merely a "litigating position" devised in the heat of a lawsuit in which the United States or the Department was a party.[8] Rather, the Department first stated its position with respect to the application of stadium-style theaters in an *amicus* brief in the Lara action in light of the fact that: (i) the Department reasonably understood that -- when promulgating Standard 4.3.33 in 1991 -- the phrase "lines of sight" was a well-recognized term of art in the context of theater design and architects and designers would thus naturally understand the term as encompassing viewing angles; (ii) inferior viewing angles for wheelchair users in movie theaters did not become a prominent problem until after the first stadium-style theater complex (AMC's Grand 24 in Dallas, Texas) opened for business in May 1995 since traditional-style movie theaters in existence prior to that time lacked the elevated (tiered) seating of the stadium-style theaters which frequently caused dramatic disparities in viewing angles; and (iii) the defendant theater operator in Lara (Cinemark, U.S.A., Inc.) was advocating a novel interpretation of Standard 4.33.3's comparable-lines-of-sight requirement whereby, in Cinemark's view, the phrase "lines of sight" had nothing to do with viewing angles and only referred to visual obstructions. See US SJ Mem. at 14-20; US SJ Opp. Mem. at 14.[9]

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[8] A discussion of the Department's interpretation of Standard 4.33.3's integration requirement follows separately in section E of this reply memorandum. See infra pp. 23-25.

[9] The fact that *viewing angles* did not become a prominent problem for movie patrons who use wheelchairs until after 1995 does not mean, as AMC contends, that issues surrounding the placement and dispersal of wheelchair seating were foreign to traditional, sloped-floor theaters. See AMC SJ Opp. Mem. at 18 (wherein AMC claims that "[m]ost assuredly, questions concerning which portion of an auditorium should contain wheelchair spaces did not arise when all the seats were located on the sloped floor"). AMC's bald and disingenuous assertion is countered by at least two federal cases - one of which AMC was the named defendant - involving litigation over the application of Standard 4.33.3 to, and the placement of wheelchair locations within, traditional, sloped-floor theaters. See Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994); Arnold v. United Artists Theater Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994).

That the Department's views with respect to the application of Standard 4.33.3's comparability requirement to stadium-style movie theaters were initially stated in an *amicus* brief, moreover, does not diminish the deference due the Department's interpretation of its own regulations implementing the ADA. See, e.g., Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997) (expressly rejecting petitioner's claim that, because Secretary of Labor's interpretation was set forth in an *amicus* brief, it was "unworthy of deference"); Klem v. County of Santa Clara, 208 F.3d 1085, 1089 (9th Cir. 2000) ("The Secretary's interpretation is entitled to deference even when, as here, that interpretation comes to the court in the form of a legal brief."); Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1082 (9th Cir. 1999) (deferring to agency interpretation expressed in *amicus* brief). Moreover, because neither the United States nor the Department were parties to the Lara litigation, the interpretation put forth by the Department in its *amicus* brief in that action were "'in no sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past action against attack," but rather "reflect[ed] the [Department's] considered judgment on the matter in question." Auer, 519 U.S. at 462, 117 S. Ct. at 912 (internal citation omitted).[10] In accordance with well-established administrative law principles, this Court should, therefore, afford substantial deference to the Department's interpretation of Standard 4.33.3.

Furthermore, since the filing of its Lara *amicus* brief, the Department has uniformly interpreted Standard 4.33.3's comparable-lines-of-sight requirement in the context of stadium-style movie theaters in a manner that is fully consistent with its views expressed in that action. As discussed previously, see US SJ Mem. at 16-17, the Department reasonably stated in Lara that: (i) Standard 4.33.3 encompassed horizontal and vertical viewing angles; (ii) lines of sight provided to wheelchair users must be comparable to those provided to members of the general

[10] AMC's citation to Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 109 S. Ct. 468 (1988) is thus inapposite since, unlike the United States' *amicus* position in Lara, the agency seeking deference to its interpretation was a party-defendant in the underlying litigation. Indeed, the agency's status as a party-defendant was the central reason that Bowen declined to give the agency's "convenient litigating position" any deference. See 488 U.S. at 212, 109 S. Ct. at 473-74.

public; (iii) wheelchair locations should not be relegated to the worst sight lines in the theater, but neither do they categorically have to be the best; and that, (iv) consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates with that of most members of the general public. The Department has taken the same position in subsequent litigation involving the application of Standard 4.33.3 to stadium-style movie theaters. See, e.g, Mem. of Plaintiff-Intervenor United States As Amicus Curiae In Opp. to Defendants' Partial Motion for Sum. Judgment 7-8 (filed April 20, 1999), Lonberg v. Sanborn Theaters, Inc., C.A. No. CV-97-6598 AHM (Jgx) (C.D. Cal.) (Docket # 170); Mem. of Law In Support of Pl. United States' Cross Motion for Partial Sum. Judgment 12-13, 19-28 (filed Jan. 18, 2001), United States v. Cinemark USA, Inc., C.A. No. 1:99CV-705 (N.D. Ohio) (copy attached as Exhibit 1 to Appendix to Reply Memorandum In Support of Plaintiff United States' Motion for Partial Summary Judgment Re: Line of Sight Issues "("US SJ Reply App.")); Consol. Opp. of United States to Defendants' Motions for Sum. Judgment 3-8 (filed July 15, 2002), United States v. Hoyts Cinemas Corp., et al., C.A. No. 00-12567-WGY (D. Mass.) (US SJ Reply App., Ex. 2).

Dissemination of the Department's interpretation of Standard 4.33.3's comparability requirement, moreover, has not been restricted (as AMC contends without support) to legal briefs. See AMC SJ Opp. Mem. at 1, 10. Rather, the Department has broadly disseminated its views regarding Standard 4.33.3 through: public speeches given by Department officials to several national disability and trade organizations, including NATO; meetings between Department officials and the NATO codes committee; publication of the Department's ADA quarterly status reports which is circulated to a mailing list of about 5,000 organizations; and, posting of relevant materials on the Department's ADA website (www.ada.gov). See, e.g., Pl. United States' Response to Defendant AMC Entertainment, Inc.'s Third Set of Interrogatories 3-6 (served July 31, 2002) (US SJ Reply App., Ex. 3); Pl. United States' Amended and Supplemental Objections to Def. AMC Entertainment, Inc.'s Interrogatories 6 and 7, Response to Interrogatory No. 6 (served Feb. 11, 2000) (US SJ Reply App., Ex. 4); NATO, "Wodatch Talks

to NATO Members Assembled in DC - Stadium-Style Seating: The Government's View," NATO News, at 10 (July 1998) (US SJ Reply App., Ex. 5).

Against this backdrop, it cannot be said that the Department has issued inconsistent interpretations of Standard 4.33.3's comparable-lines-of-sight requirement. Indeed, in June 2000, the Court reached the opposite conclusion. From December 1999 through May 2000, the parties were engaged in a lengthy discovery skirmish regarding AMC's motion to compel additional interrogatory responses and documents. See discussion infra pp. 15-20. AMC moved to compel additional discovery outside the administrative record underlying Standard 4.33.3 based, in part, on its assertion that the Department had offered inconsistent interpretations of Standard 4.33.3 over the years. Id. After reviewing hundreds of pages of briefing and exhibits, Magistrate Judge Hillman flatly rejected AMC's "inconsistency" argument and precluded AMC from seeking discovery outside the administrative record, stating:

> Judicial review under the APA is limited to the administrative record in all but a few cases. Defendant has not met the threshold requirement for discovery to supplement the administrative record. ***Defendant has not shown inconsistent interpretations by plaintiff of § 4.33.3 with regard to commercial stadium style movie theaters.***

Minute Order at 3 (June 5, 2000) (emphasis added) (Docket #134) (US SJ Reply App., Ex. 6). This June 2000 Order sounds the death knell for AMC's argument that the Department has interpreted Standard 4.33.3 in an inconsistent fashion.

c. The United States' Summary Judgment Memorandum Does Not, as AMC Asserts, Present a "New" Interpretation of Standard 4.33.3

Perhaps the most frivolous aspect of AMC's opposition memorandum is its insistence that footnote six of the United States' instant motion for partial summary judgment represents "the first time the Department has asserted that Standard 4.33.3 does not impose [specific] viewing angle [requirements]." See AMC SJ Opp. Mem. at 10-11, 22-25. Remarkably, AMC makes this claim based ***solely*** on the unsupported declaration of its trial counsel (Mr. Gregory Hurley). See Reply Mem. In Support of United States' Motion to Strike Declaration of Attorney Gregory F. Hurley and Supp. Mem. In Support of Motion to Strike Second Declaration By

Attorney Gregory F. Hurley (filed Nov. 12, 2002) ("US Strike Reply Mem."). AMC's claim is baseless and should be summarily rejected by this Court.

That the Department does not interpret, and has not interpreted, Standard 4.33.3's comparable-lines-of-sight requirement as imposing specific viewing angle requirements is a matter of public record. What makes AMC's contention even more egregious is that AMC's counsel (Mr. Hurley) has been informed of this position on no less than four occasions. See, e.g., Mem. of Law In Support of Pl. US' Cross Motion for Partial Summary Judgment [US v. Cinemark] at 26 ("[A]lthough various industry design standards provide that no seat should have a viewing angle to the top of the screen exceeding 30-35 degrees because of discomfort, . . . the Department does not adopt theat 30-35 degree measurement as a maximum for wheelchair spaces.") (emphasis in original) (US SJ Reply App., Ex. 1)[11]; Pl. United States' Reply Mem. In Support of Its Motion to Dismiss Def. STK's Counterclaim 4, 12 (filed June 6, 2000) (noting, in response to STK's claim that the Department had "promulgat[ed] new line of sight requirements, that the Department had not adopted the SMPTE Guidelines regarding viewing angles) (Docket # 133); Correspondence from Jeanine Worden to Gregory F. Hurley 1-2 (dated March 26, 1999) ("[W]e have repeatedly advised you that the Department does not use a formula when evaluating compliance with the comparable sightlines requirement of Section 4.33.3[.]") (US SJ Reply App., Ex. 7); United States Portion of Joint Stip. Re: Discovery 7, 10 (filed Dec. 15, 1999) (Docket # 55) ("Contrary to AMC's assertions, the United States has not incorporated the [SMPTE Guidelines] into Standard 4.33.3, nor has it formally or informally set any other specific viewing angle requirements for wheelchair seating in movie theaters.").[12] AMC's

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[11] In response to AMC's interrogatory requests, the United States identified Cinemark as being one of the enforcement actions filed by the United States that described or discussed the United States' position with respect to the application of Standard 4.33.3 to stadium-style movie theaters. See, e.g., US SJ Reply App., Ex. 3 at 3-4 (United States' Response to Interrogatory No. 25). The Cinemark pleadings were also produced to AMC during the course of discovery in this action.

[12] Indeed, not even AMC or its "outside" architects understood Standard 4.33.3 as imposing specific viewing angle requirements. See, e.g., Pl. United States' Statement of Genuine Issues In Opp. to Defendant AMC's Motion for [Partial] Summary Judgment 11-12 (filed Nov. 4, 2002) (Docket # 375); Correspondence from Gould Evans Associates (William E.

frivolous claim that the United States' summary judgment memorandum amounts to a "new" interpretation of Standard 4.33.3 should, therefore, be summarily dismissed.

2. The Department of Justice Has Substantial Discretion To Determine How Best to Regulate and Enforce Standard 4.33.3

Though the relevance to the instant motion for partial summary judgment is unclear, AMC also cavalierly asserts in its opposition memorandum that the United States should have promulgated amended regulations specifically relating to stadium-style movie theaters, rather than pursuing the instant enforcement action. See AMC SJ Opp. Mem at 18-20. In AMC's view, "[a]s originally drafted, § 4.33.3 did not anticipate the issues raised by stadium seating" and, therefore, "new issues call for new rules." Id. at 18. AMC is both factually and legally mistaken. Not only is the language of Standard 4.33.3 sufficiently broad to cover stadium-style movie theaters (or any other type of assembly area), but also longstanding administrative law principles afford regulatory agencies the broad discretion to address emergent regulatory issues either by general rulemaking or by individual enforcement actions.

As discussed previously, in light of the myriad types of assembly areas to which Standard 4.33.3 applies, the Department of Justice reasonably and necessarily opted for a flexible regulatory standard in Standard 4.33.3 that does not dictate the configuration of each assembly area so long as disabled patrons are provided comparable views of the screen, stage, or other spectacle being viewed. See US SJ Mem. at 11-13 & n.6; US SJ Opp. Mem. at 17-22. When the Department promulgated Standard 4.33.3 in 1991, it could not possibly anticipate every design innovation that might occur in the future that could effect lines of sight in movie theaters or other assembly areas. But that inability to predict the future does not limit the authority of the Department to apply the broad language of its regulation to new factual situations as they develop, even if they were unanticipated at the time Standard 4.33.3 was promulgated. Cf. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212, 118 S. Ct. 1952, 1956 (1998)

Pyle, Jr.) to American Multi-Cinema, Inc. (Sam Giordano) 1 (dated April 27, 1999) ("We understand that . . . the ADA does not specify a degree angle for line of sight . . . ") (US SJ Reply App., Ex. 8).

(broad language of ADA can be applied to prisons even if Congress did not expressly anticipate coverage of prisons when drafting the statute). Indeed, one reason that the judiciary defers to administrative agency interpretations is to allow a "measure of flexibility to [the] agency as it encounters new and unforeseen problems over time." International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20, 99 S. Ct. 790, 800 (1979); see also Martin, 499 U.S. at 151 (agency has inherent authority to interpret its own regulations because "applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives"). The mere fact that AMC's first stadium-style theater (AMC Grand 24) was constructed several years after the promulgation of Standard 4.33.3 does not, therefore, render this regulation inapplicable to AMC's stadium-style theater complexes. Indeed, were it otherwise, administrative agencies - such as the Department of Justice - would be engaged in ceaseless rulemaking to account for every new issue or situation that arose on the regulatory horizon.

Administrative law principles, moreover, make plain that the determination of whether to address emerging regulatory issues through general rule or case-by-case methods (such as adjudication or individual enforcement actions) rests with the sound discretion of the agency. See, e.g, N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 293, 94 S. Ct. 1757, 1771 (1974) (choice between announcing policy through rulemaking or adjudication is within agency discretion); S.E.C. v. Chenery Corp., 332 U.S. 194, 203, 67 S. Ct. 1575, 1580 (1947) ("[T]he choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.") ("Chenery II"); accord Bullwinkel v. Federal Aviation Admin., 23 F.3d 167, 171-72 (7th Cir. 1994); Ford Motor Co. v. Federal Trade Comm'n, 673 F.2d 1008, 1009 (9th Cir. 1982), cert. denied, 459 U.S. 999 (1982); Patel v. I.N.S., 638 F.2d 1199, 1203 (9th Cir. 1980). The Department of Justice – rather than AMC – was thus vested with the discretion to determine whether the advent of stadium-style movie theaters raised new "lines of sight" issues that called for regulatory amendments to Standard 4.33.3 or, rather, whether such issues were best addressed on a case-by-case basis in the context of civil

enforcement actions.[13] Since there is no evidence that the Department abused its discretion by choosing to file the instant enforcement action, this decision must be affirmed by this Court.

C. AMC Already Has Been Afforded Ample Discovery In This Action and This Court's Prior Discovery Rulings Are Now Law of the Case, Thus Precluding AMC from Re-Litigating Such Matters In the Context of These Summary Judgment Proceedings

Largely seeking to rewrite litigation history, AMC's opposition memorandum reads as if the United States had not already provided extensive responses to AMC's voluminous written discovery, or that this Court had never issued any prior discovery rulings regarding privilege or other discovery matters in this action. For instance, AMC repeatedly claims that the United States "prevented" AMC from seeking "necessary" discovery by, for example, "preclud[ing] any inquiry into the genesis of its position [concerning Standard 4.33.3] and "barr[ing] AMC from taking a single deposition from DOJ regarding its interpretation of [Standard] 4.33.3." See AMC SJ Opp. Mem. at 3, 23. Based on such alleged discovery improprieties, AMC asserts that this Court should deny the United States' motion for partial summary judgment on the ground that AMC cannot respond to this motion absent additional discovery concerning the Department's allegedly "new" interpretation of Standard 4.33.3. See id. at 24-25; see also Fed. R. Civ. P. 56(f). AMC's ostrich-like approach to the history of this case, however, cannot ignore the fact that this Court has already upheld the United States' invocation of various discovery privileges in this action (e.g. work product, deliberative process, settlement negotiation, and law enforcement investigative privileges), precluded AMC from seeking discovery outside the administrative record for Standard 4.33.3, and limited AMC to discovery concerning regulation of new construction of commercial movie theaters. These rulings are now law of the case. AMC should,

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[13] Significantly, AMC was a party to NATO's Petition for Rulemaking Regarding Stadium-Style Motion Picture Theaters submitted to the Department of Justice in August 1999. See US SJ Reply App., Ex. 9, Appendix A. The Department denied this petition in November 1999, stating that the Department was planning to "review and amend" its ADA regulations after the Access Board's completion of its comprehensive review of ADAAG. See id. at Ex. 10. Apparently satisfied with this response, neither NATO nor any of its member theater operators (such as AMC) sought judicial review of the denial this petition. See 5 U.S.C. §§ 702, 706. AMC is thus procedurally barred in this action from challenging the Department's decision not to amend Standard 4.33.3. See Auer, 519 U.S. at 459, 117 S. Ct. at 910.

therefore, be precluded from using Rule 56(f) as a shield to prevent this Court from adjudicating the United States' properly-filed motion for partial summary judgment.

To understand the hollowness of AMC's claim, it is necessary to briefly review the history of discovery -- and discovery disputes -- in this action. In July 1999, AMC served the United States with its initial set of wide-ranging written discovery requests. See, e.g., United States' Portion of Joint Stip. Re: Discovery 2-5, 7-11 (filed Dec. 15, 1999) (Docket # 55); Mem. of Points and Auth. In Support of Pl. United States' Motion for Protective Order From Def. AMC Entertainment, Inc.'s Rule 30(b)(6) Deposition Notice 2-4 (filed March 5, 2002) (Docket # 237) (summarizing discovery history) [hereinafter "US 30(b)(6) Mem."]. Over the ensuing months, the United States produced both extensive interrogatory responses and several thousand pages of documents in response to these discovery requests, including: public documents relating to the Department's interpretation of Standard 4.33.3 or the comparability of lines of sight in movie theaters; pleadings, final settlement agreements, affidavits, exhibits, and press releases in other ADA actions in which the United States participated as a party or as *amicus curiae* and that involved the application of Standard 4.33.3 to movie theaters or other assembly areas; public documents relating to enforcement actions filed by the United States against other movie theater companies; copies of written complaints filed with the Department by individuals with disabilities or their companions claiming that AMC had violated Title III of the ADA at one or more of its stadium-style movie theaters; as well as prepared speeches, policy letters, and letters to members of Congress by or from the Department concerning Standard 4.33.3. Id.; see also US Portion of Joint Stip. Re: Discovery, Ex. 11B (chart summarizing United States' extensive document production efforts).[14]

[14] Beginning in late 2001 and into 2002, the United States also supplemented its initial document productions with additional non-privileged, responsive documents, including complaint-related documents and the certified administrative record for Standard 4.33.3. See, e.g., Appendix (Volume Two) to Pl. United States' Motion for Protective Order From Def. AMC Entertainment, Inc.'s Notices of Deposition to Five DOJ Employees, Exs. 29 - 30 (filed March 22, 2002) (Docket # 252) (cover letters to United States' supplementary document productions).

Yet while the United States' production effort was voluminous, it was not absolute. Consistent with well-established federal caselaw, the United States objected to the production of additional interrogatory responses and/or documents that were privileged or otherwise protected from disclosure.[15] In December 1999, AMC nonetheless moved to compel the United States to further respond to twenty-five specific interrogatory requests and requests for production of documents. See [AMC's] Joint Stip. Pursuant to Local Rule 7.15.2 Re: Defendants' Motion to Compel Discovery (filed Dec. 7, 1999) (Docket # 46). The United States opposed this motion. See United States' Portion of Joint Stip. Re: Discovery (filed Dec. 15, 1999) (Docket # 55); Plaintiff's Supp. Mem. In Opp. to Def. AMC's Motion to Compel Discovery (filed Jan. 4, 2000) (Docket # 70); see also Supp. Joint Stip. on Defendants' Motion to Compel Further Discovery (filed March 23, 2000) (Docket # 93). Altogether, the parties submitted over 300 pages of briefing – *excluding* exhibits – on AMC's motion to compel.

In June 2000, Magistrate Judge Hillman issued a detailed order denying AMC's motion to compel and affirming the United States' privilege assertions. See Minute Order (dated June 5, 2000) (Docket # 134). In summary, this June 2000 Minute Order: (i) affirmed the United States' invocation of various discovery privileges (e.g., deliberative process, work product, settlement negotiation, and law enforcement investigative privileges); (ii) limited the scope of discovery to the application of Standard 4.33.3 to commercial movie theaters; and (iii) precluded AMC from

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[15] For example, the United States objected to the disclosure of documents and information regarding: internal, non-public discussions within the Department regarding Standard 4.33.3 on the ground that such information contained pre-decisional agency deliberations, the disclosure of which would chill free and open debate, and compromise privileged communications (deliberative process and attorney client privileges); meetings and negotiations between the Department and movie theater operators and/or NATO on the ground that the disclosure of these discussions would compromise confidential settlement negotiations (settlement negotiation privilege); Departmental investigations of other Title III-covered facilities and entities on the ground that disclosure of this information would adversely effect the United States' investigative efforts (law enforcement privilege); and, materials outside the administrative record underlying Standard 4.33.3 on the ground that judicial review under the Administrative Procedures Act (5 U.S.C. § 551 et seq.) ("APA") is limited to the administrative record of the challenged regulation. See US Portion of Joint Stip. Re: Discovery at 5-32.

seeking discovery outside the administrative record for Standard 4.33.3 to support its APA-based affirmative defenses. Id. AMC did not move for reconsideration or review of this order.

From late 2000 until December 2001, the discovery front was largely silent due to the parties' ultimately unsuccessful settlement and mediation discussions. After these negotiations stalled, AMC recommenced its relentless quest for discovery of privileged and otherwise protected information and materials. For example, in January 2001, AMC sought deposition testimony and documents from the United States concerning the Department's court-ordered inspections of twelve of AMC's stadium-style theater complexes. See Joint Stip. Re: United States' Motion for Protective Order from Def. AMC Entertainment, Inc.'s Rule 30(b)(6) Deposition Notice Re: Inspection of AMC's Theaters (filed Feb. 28, 2002) (Docket # 232). Magistrate Judge Hillman subsequently granted the United States' motion for protective order, holding that the inspection-related testimony and documents sought by AMC were highly privileged work product and, therefore, protected from disclosure. See Minute Order (dated April 1, 2002) (Docket # 262). AMC did not move for reconsideration or review of this order.

Undaunted, in February 2002, AMC served the United States with notices of deposition seeking testimony from five current or former attorneys who work (or worked) in the Department's Disability Rights Section -- the same office that initiated the investigation of AMC's stadium-style theaters and that is now representing the United States in this action. See United States' Joint Stip. Re: Pl. United States' Motion for Protective Order From AMC Entertainment, Inc.'s Notices of Deposition to Five DOJ Employees 9, 13-14 (filed March 22, 2002) (Docket # 254).[16] The United States filed a motion for protective order from these deposition notices served on Department attorneys on the grounds that the federal rules do not permit such an unwarranted intrusion into the thought processes and legal strategies of the United States' counsel, and that, in any event, law of the case principles precluded AMC from re-

[16] With one exception, each of these deposition notices was also accompanied by a document request seeking a wide range of documents, including documents related to the Department's interpretation of Standard 4.33.3, and communications between the Department and the Access Board or NATO regarding the Department's interpretation of Standard 4.33.3. Id. at 9.

litigating the discovery ground already trod by the Court's discovery orders issued in 2000. Id. at 10-31. After hearing oral argument and entertaining supplemental briefing, Magistrate Judge Hillman quashed both the deposition notices and their accompanying document requests in their entirety without prejudice to AMC serving "narrowly-crafted" fact-based written discovery on two of the attorneys that avoided trenching on privileged matters. See, e.g., Minute Order (dated April 18, 2002) (Docket # 271); Minute Order (dated May 14, 2002) (Docket # 279). AMC's motion for review and reconsideration was subsequently denied by this Court. See Order Denying Defendants' Motion for Review and Reconsideration of the Magistrate's Order 3-4 (filed June 11, 2002) (Docket # 304).

Ignoring the memorable words of American philosopher George Santayana,[17] AMC is again claiming – for at least the third time during the course of this litigation – that it needs additional discovery regarding the Department's purportedly "new" interpretation of Standard 4.33.3 in order to adequately respond to the United States' summary judgment motion. See AMC Mem. at 3, 22-25. AMC's argument is meritless for three significant reasons. First, as discussed previously, the Untied States has consistently and reasonably interpreted Standard 4.33.3 and, therefore, there is no "new" interpretation warranting discovery. See discussion supra pp. 7-13. Second, AMC already has in its corporate possession all the information it needs to defend itself in this action given the United States' voluminous prior productions of public, non-privileged statements, memoranda, technical assistance materials, or other documents by or from the Department concerning the Department's interpretation of Standard 4.33.3. See discussion supra pp. 15-16. Lastly, Magistrate Judge Hillman has already issued several discovery orders in 2000 and 2002 (which were affirmed by this Court) holding, inter alia, that the deliberative process privilege and other privileges prohibited AMC from seeking discovery of the Department's internal, non-public discussions concerning Standard 4.33.3, and that AMC was prohibited from seeking discovery outside the administrative record underlying Standard 4.33.3. See discussion

[17] George Santayana is credited with the aphorism that "those who cannot remember the past are condemned to repeat it[.]" 1 George Santayana, The Life of Reason 284 (1905).

supra pp. 17-19. Law of the case principles thus plainly foreclose AMC from seeking -- whether through Rule 56(f) or otherwise -- privileged or extra-record APA discovery from the Department regarding its interpretation of Standard 4.33.3. See, e.g, United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) ("Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court . . . in the identical case."); see also United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000); Mendenhall v. National Transp. Safety Bd., 213 F.3d 464, 469 (9th Cir. 2000).

D. AMC Misapprehends Both the Role and Purpose of the United States' Trial Experts

AMC also seeks to divert attention from the material issues presented by the United States' motion for partial summary judgment by making the dual argument that "[t]he Department repeatedly advised AMC that its position on § 4.33.3 would be revealed through the deposition of its experts" and that the United States' architectural expert (Mr. Peter Frink) has designed assembly areas that are "inconsistent" with the Department's reading of this regulation. See AMC SJ Opp. Mem. at 5-8. AMC's claims are not only factually incorrect, but evidence a fundamental misunderstanding of the role of the United States' trial experts in this litigation.

First, neither Mr. Frink nor any of the United States' trial experts "speak" for the Department of Justice with respect to the proper interpretation of Standard 4.33.3. As the agency exclusively tasked by Congress to regulate and enforce Title III of the ADA, only the Department of Justice can issue authoritative interpretations of Standard 4.33.3. See 42 U.S.C. §§ 12186(b), 12206, 12188(b). As with any litigant, however, the United States may offer expert testimony to assist the trier of fact or to determine a fact in issue. See Fed. R. Civ. P. 702. Here, the United States retained Mr. Frink "to analyze certain film facilities characterized as 'stadium' theaters owned and operated by AMC . . . in order to determine the comparability between wheelchair seating and fixed seating as it relates to lines of sight for seeing the screen[.]" See Expert Report of Peter H. Frink 1 (dated Aug. 22, 2002) (US SJ App., Vol. 3, Ex. 112). Nowhere in this report did Mr. Frink opine regarding the "proper" legal interpretation of Standard 4.33.3, nor could he. Thus, while the comparability analyses set forth in Mr. Frink's

report are highly relevant to the issue of whether AMC has engaged in a pattern or practice of violating Standard 4.33.3 with respect to the design, construction and/or operation of its stadium-style theaters, that is not an issue for resolution in these summary judgment proceedings. Rather, the United States seeks herein, inter alia, a partial summary order affirming the reasonableness of the Department's interpretation of Standard 4.33.3's comparability and integration requirements. On these legal issues, Mr. Frink does not, and cannot, provide any "expert" opinions.

Second, AMC fundamentally mischaracterizes the Department's position with respect to the role of its trial experts in this enforcement action. The Department has not, as AMC suggests, "repeatedly advised AMC that its position on § 4.33.3 would be revealed through the depositions of its experts." AMC SJ Mem. at 5. Indeed, quite the opposite. That United the States has already produced thousands of pages of public, non-privileged documents concerning the Department's interpretation of Standard 4.33.3 stands in powerful contrast to AMC's assertion. See discussion supra p. 15-17. Moreover, as with so many other portions of AMC's opposition memorandum, the factual "sound bites" cited by AMC as "support" for this claim simply cannot withstand scrutiny. For example:

- AMC quotes from the United States' responses to Interrogatory Nos. 21 & 22 of Defendant AMC Entertainment, Inc.'s Second Set of Interrogatories, but these interrogatories had nothing to do with the Department's views regarding the role or function of its trial experts. Rather, these interrogatories sought the production of highly-privileged information concerning the United States' court-ordered inspections of twelve of AMC's stadium-style theater complexes -- including the identities of all persons who attended these inspections on the Department's behalf (Interrogatory No. 21), and the identification of all documents related to or resulting from these inspections (Interrogatory No. 22). The United States objected to the production of the Department's work product, and this privilege objection was subsequently upheld by Magistrate Judge Hillman (compare Hurley Dec., Ex. C at 9-10 with AMC SJ Opp. Mem. at 6 and with Minute Order (dated April 1, 2002);

- Without attaching a transcript or even giving a page citation therein, counsel for AMC baldly alleges that, during a discovery hearing in April 2002, the United States represented to the Court "that it would not disclose to AMC where it contends AMC's wheelchair spaces must be located until the Department served its expert reports." Review of this transcript makes plain that counsel for the United States made no such statement. Rather, the only discussion of experts that arose in this hearing concerned expert opinions being offered by the United States on non-compliant "features" of AMC's theater complexes (i.e., non-line of sight accessibility issues involving such architectural features as ramps, concession counters, parking lots, and bathrooms). The United States subsequently produced the expert report of Mr. Bill Hecker who provided a

> detailed accounting of the non-compliant features at the twelve AMC stadium-style theater complexes inspected by the United States (compare Hurley Dec. ¶ 6 with US SJ Reply App., Ex. 11 at 35-39).

Simply put, AMC's claim that the United States represented to AMC that its interpretation of Standard 4.33.3 would come only through trial experts is refuted by the record in this action.

Finally, AMC is factually mistaken in its assertion that there are "inconsistencies" between assembly areas designed by Mr. Frink and the Department's reading of Standard 4.33.3. While a detailed refutation of the these purported "inconsistencies" is beyond the scope of this reply memorandum, a few illustrative examples serve to underscore the folly of AMC's contentions. First, AMC incorrectly states that the wheelchair seating in facilities designed by Mr. Frink are located outside the "stadium portion" of the auditoria. See AMC SJ Opp. Mem. at 7. Instead, most of the post-ADA assembly areas designed by Mr. Frink have one or more wheelchair spaces located in a tiered portion of the auditorium, near the middle of the seating area; indeed, many of Mr. Frink's facilities were designed from the outset with the express intention of providing persons who use wheelchairs with "the best location[s] in the house." See Frink Dep. 45:9-14, 50:3-6; 67:7-14, 110:3-111:8, 115:20-117:2, 119:17-19, 125:24-126:1, 135:16 - 136:2 (US SJ Reply App., Ex. 12); see also Hurley Dec., Ex. E (collection of architectural drawings for some of Frink's facilities). Second, Mr. Frink testified that the assembly areas he designed after the ADA offered comparable lines of sight to persons who use wheelchairs when such multi-purpose assembly areas were being used for their predominant purpose (e.g., dance recitals, lectures, concerts, live theater productions, musical performances). See id. at 46:13-48:1, 58:10-59:9, 69:25-70:6, 74:7-10, 85:18-87:12, 103:18-104:25. Mr. Frink testified, moreover, that all but one of the assembly areas he designed provide comparable lines of sight for persons who use wheelchairs when used for their secondary purpose of viewing projected images, and the only potential sight line problem with the one facility was that the wheelchair locations might be too *far* from the screen depending on where the screen was affixed to the stage. Id.; see also 54:10-55:2, 85:23-87:12 (describing application of criteria), 147:1-148:24 (same).

In sum, AMC's claim of "inconsistency" between Mr. Frink's facilities and the Department's interpretation of Standard 4.33.3 is nothing more than a ploy to divert the Court's attention from

the material legal issues underlying the United States' motion for partial summary judgment. This Court should reject AMC's blatant attempt to turn these summary judgment proceedings into a referendum on the assembly areas designed by Mr. Frink which, in any event, provide comparable lines of sight to persons who use wheelchairs.

E. AMC Fundamentally Misconstrues the Department's Interpretation of Standard 4.33.3's Integration Requirement as Mandating Wheelchair Access to "Every Square Inch of AMC's Theaters"

Turning to Standard 4.33.3's integration provision, AMC argues that the Department impermissibly reads this integration requirement as mandating that wheelchair seating be located within particular sections of the theater such that "every square inch of AMC's theaters be handicap accessible." See AMC SJ Opp. at 3-5, 15-18. AMC then proffers its own view that Standard 4.33.3's integration requirement is satisfied so long as wheelchair seating is placed "within the general footprint of the fixed seating plan." Id. at 17. AMC is wrong on both accounts. Not only does AMC fundamentally misconstrue the Department's reading of the integration requirement, but also adoption of AMC's proffered interpretation would seriously undermine one of the primary purposes of Title III and its implementing regulations – to promote integration and equality in assembly area seating. See SJ Mem. at 4-6..

Setting AMC's rhetorical flourishes aside, the United States neither reads Standard 4.33.3's integration requirement as mandating that wheelchair seating be placed in any particular section, nor interprets this regulation as requiring "every square inch" of a stadium-style movie theater be accessible to patrons who use wheelchairs. Rather, the Department reasonably reads this integration requirement as requiring that stadium-style movie theaters (and other assembly areas) provide seating for physically disabled patrons that is among the seats where members of the general public routinely sit. See SJ Mem. at 23-25. The Department does not view Standard 4.33.3 as mandating that wheelchair seating be located in any particular section or portion of a theater so long as such seating meets this requirement.

Reading Standard 4.33.3's integration requirement as merely requiring that wheelchair seating be located "among" other "fixed" seats (as AMC contends should be done), on the other hand, would do violence to both the language and purpose of the regulation. First, such a reading

ignores the plain language of Standard 4.33.3, which mandates that wheelchair seating not just be part of any fixed seating plan, but that it be an ***integral*** part of such fixed seating plan. AMC's proffered interpretation reads the word "integral" right out of the integration requirement. Fundamental principles of statutory (and regulatory) construction, however, require all words to be given their full meaning and effect. See, e.g., Rainsong Co. v. F.E.R.C., 151 F.3d 1231, 1234 (9th Cir. 1998) ("Of course, in the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided."); see also US SJ Opp. Mem. at 16-17.[18]

Second, by ignoring the full text of Standard 4.33.3's integration requirement, AMC's proffered interpretation would permit the very inequality and segregation of persons who use wheelchairs that Title III of the ADA and its implementing were designed to remedy. Movie theater operators, such as AMC, should not be permitted to dump several rows of "booker" seats on the sloped-floor at the front of a stadium-style theater – seats that they acknowledge virtually no one sits in – and then say, in effect "See, we've complied with the law because the wheelchair seats are located 'among' other fixed seats." Yet this is precisely what AMC (and other stadium-

[18] Nor do the sources cited by AMC as support for its proffered interpretation undermine the reasonableness of the Department's interpretation of Standard 4.33.3's integration requirement. First, the quoted portion of the 1994 Supplement to the Department's ADA Technical Assistance Manual is plainly addressed to the issue of lines-of-sight over standing spectators, rather than integration issues. See AMC SJ Mem. at 4-5. Second, AMC's citation to the Access Board's 1998 ADAAG Technical Assistance Manual is flawed in two respects. The Access Board is not statutorily-tasked (as is the Department) to interpret or enforce Standard 4.33.3. Moreover, the portion of the ADAAG Manual quoted by AMC is not inconsistent with the Department's reading of the integration requirement since nowhere does it purport to be providing a exclusive list of factors relevant to the integration calculus. Finally, AMC's citation to the discussion of the integration requirement by the district court in Meineker v. Hoyts Cinemas Corp., 216 F. Supp.2d 14 (N.D.N.Y. 2002) proves of no assistance since the Meineker court assumed – perhaps because the record was silent on this point – that the rows of seats on the sloped-floor had comparable lines of sight and provided equally desirable seating locations. Here, however, there is powerful evidence of quite the opposite. See discussion supra pp. 2-3; SJ Mem. at 23-25; see also US SJ App., Vol. 3, Ex. 110 (six sample printouts of digital audience seating preference images).

style movie theater operators) have done. Indeed, AMC admits that: (i) the vast majority (76%) of its stadium-style theaters have wheelchair seating located outside the stadium section; (ii) wheelchair seating located on the traditional, sloped-floor portion of these theaters provides inferior lines of sight that are less popular and less desirable to movie patrons; and (iii) since most movie patrons sit in the stadium section of AMC's stadium-style theaters, "the placement of wheelchair locations in only the non-stadium-style section of the majority of [these] theaters results in the segregation and isolation of persons who use wheelchairs." See supra pp. 2-3.

Consideration of the foregoing facts highlights the human dimension of this case – the more than 2 million Americans who use wheelchairs, many of them moviegoers, on whose behalf this enforcement action was filed. This is a group of people for whom going to the movies can and ought to be one of the most accessible and inexpensive forms of entertainment, and yet it is not. See, e.g., US SJ Facts ¶¶ 30, 32-34, 106. Whether it is a cabinet maker with paraplegia out for the evening with a friend (see Roberts Dec. ¶¶ 1-11), or a parent with a mobility impairment trying to take his family to a Sunday matinee (see Wagner Dep. 21:24-22:1, 40:13-41:7, 49:14-19, 57:8-25) (US SJ App., Vol. 1, Ex. 20), patrons who use wheelchairs enter one of AMC's heavily-promoted stadium-style theaters and are confronted immediately with the fact that they cannot do what most other movie patrons can do – climb the riser steps to find a seat with enhanced sightlines and a comfortable, undistorted view of the screen where they are "immersed" in the viewing experience. See US SJ Facts ¶¶ 11-12. Neither the ADA nor this Court should permit AMC to discriminate against patrons who use wheelchairs in this fashion.

CONCLUSION

For the foregoing reasons, this Court should grant the United States' motion for partial summary judgment.

DATED: Nov. 11, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of November, 2002, true and correct copies of **Reply Memorandum of Plaintiff United States In Support of Motion for Partial Summary Judgment Re: Line of Sight Issues** were served by Federal Express, postage pre-paid, on the following parties:

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