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

JOHN R. LONBERG, ET AL.,	CASE NO.: CV-97-6598AHM(JGx)
Plaintiff,	**MEMORANDUM OF PLAINTIFF-INTERVENOR UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT**
v.	
SANBORN THEATERS, INC. ET AL.,	
Defendants.	Date: April 26, 1999 Time: 10:00 a.m. Courtroom: 14 Judge: A. Howard Matz

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Pursuant to the Court's Order of April 13, 1999, the United States submits this Memorandum as amicus curiae.

I. INTRODUCTION

Defendants have moved this Court for partial summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, claiming that certain of Plaintiffs' allegations that the Marketplace Cinema was built and operated in violation of state law and Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189 ("ADA"), and its implementing regulations, are without merit. In each instance Defendants argue that Plaintiffs' allegations either misstate the facts or misconstrue the applicable law. We disagree.

A. The United States as Plaintiff-Intervenor/Amicus Curiae.

Plaintiff-Intervenor United States comes before the Court in an unusual posture, able and permitted by the Court only to reply to Defendants' partial summary judgment motion as amicus curiae and without the benefit of discovery. We do so in order to set forth the Department of Justice's views on the interpretation and application of various provisions of the ADA and to counter the untenable legal positions and interpretations set out in Defendants' brief. In so doing, the United States respectfully sets forth, to the extent possible at this time, arguments in opposition to the legal issues raised in Defendants' motion, accompanying memorandum, and supporting papers. As the Supreme Court recently noted, the Department of Justice ("the Department") occupies a unique position when it expresses its views on the ADA. "As the agency directed by Congress to issue

implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 2208; see also Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 911-12, 65 U.S.L.W. 4136 (1997) (agency position entitled to deference even if offered in an amicus brief). In order to preserve its rights as Plaintiff-Intervenor, the United States reserves any and all legal arguments, including but not limited to those made herein, for argument in our case at the close of discovery or at any other time appropriate in the course of the above-captioned litigation. In those instances where we do not address the assertions of Defendants, we do not waive our right to do so in our own case or indicate acquiescence to their position.

B. The Americans With Disabilities Act of 1990.

Congress, in enacting the ADA, found that architectural barriers constituted one of the types of discrimination "continually encounter[ed]" by individuals with disabilities. 42 U.S.C. § 12101(a)(5). To address this form of discrimination, Congress mandated that all commercial facilities and places of accommodation designed and constructed after January 26, 1993, be "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a). Congress intended strict adherence to the new construction requirements so that, "over time, access will be the rule rather than the exception." H. R. REP. NO. 485, at 63 (1990). "The ADA is geared to the future . . . . Thus, the bill only requires modest expenditures

to provide access in existing facilities, while requiring all new construction to be accessible." Id. (emphasis added).

Section 303 of the ADA requires that newly constructed facilities be "readily accessible to and usable by individuals with disabilities . . . in accordance with standards set forth . . . in regulations issued under this subchapter." 42 U.S.C. § 12183(a). These architectural standards were initially issued as the Americans with Disabilities Act Accessibility Guidelines (“ADAAG”) by the Architectural and Transportation Barriers and Compliance Board (the “Access Board”), an independent government agency charged with developing accessibility standards. When the Department promulgated its regulation implementing Title III, the Department independently adopted these Guidelines as part of its regulation, 28 C.F.R. pt.36 at Appendix A, as the Standards for Accessible Design ("the Standards"). Because the Marketplace Cinema falls within the “new construction” definition, it must comply fully with the new construction provisions of the Standards.

The ADA unambiguously evidences Congress’ intent that persons with disabilities who utilize public accommodations be provided with an experience that is equivalent to that of the general public. Section 302 of the ADA evidences Congress’ intent that persons with disabilities be given equal access to goods and services so that they share with the general public the right to fully participate in those goods and services. The ADA makes it illegal to “subject an individual or class of individuals on the basis of a disability ... to a denial of the opportunity ... to participate in or benefit from the goods,

services, facilities, privileges, advantages or accommodations" of the entity. 42 U.S.C. §§ 12182(a) and 12182(b)(1)(A)(i). It is similarly illegal to provide a good or service that "is not equal to that afforded to other individuals." 42 U.S.C. §§ 12182(a) and 12182(b)(1)(A)(ii). Finally, and perhaps most telling, Congress made it illegal to provide individuals with disabilities who use wheelchairs with a good, service or facility that is different and/or separate from that provided to other individuals. 42 U.S.C. §§ 12182(a) and 12182(b)(1)(A)(iii) (emphasis added).

II. ARGUMENT

THE OWNERS AND OPERATORS OF THE MARKETPLACE CINEMA FAILED TO DESIGN AND CONSTRUCT THE FACILITY IN COMPLIANCE WITH THE NEW CONSTRUCTION PROVISIONS OF THE ADA.

A. Wheelchair Seating Locations.

1. New Construction Provisions of Title III Governing Accessible Seating in Assembly Areas.

In newly constructed facilities, the provision of wheelchair seating locations in assembly areas is governed by §§ 4.1.3(19)(a) and 4.33 of the Standards. 28 C.F.R. pt. 36, App. A, §§ 4.1.3(19)(a), 4.33. Section 4.1.3(19)(a) mandates the number of wheelchair seating locations that must be provided in assembly areas based on their seating capacity, while § 4.33 lays out the requirements for how these seats are to be configured and where they are to be placed. Id. Section 4.1.3(19)(a) sets out the requirements for the number of wheelchair seating locations in the following manner:

Capacity of Seating in Assembly Areas	Number of Required Wheelchair Seating Locations
4 to 25	1
26 to 50	2
51 to 300	4
301 to 500	6
Over 500	6, plus 1 additional space for Each total seating capacity Increase of 100

Id. at § 4.1.3(19)(a). Section 4.33 in turn sets forth requirements for the size, placement, and configuration of the wheelchair locations. Id. at § 4.33.3. Of significant importance to this case are the provisions contained in § 4.33.3.

> Placement of Wheelchair Seating Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in an emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

Id.

2. Defendants Fail to Prove as a Matter of Law That They Have Met the ADA's Requirement That Wheelchair Seating Locations in Movie Theaters Afford Lines of Sight to Persons Who Use Wheelchairs Comparable to Those Afforded Members of the General Public.

As stated earlier, the regulation requires that wheelchair seating locations be provided so that they are "an integral part of any fixed seating plan and . . . provide people with physical disabilities a choice of admission prices and lines of sight

comparable to those for members of the general public." Id. The movie theater industry recognizes the importance of sight lines. The Society of Motion Picture and Television Engineers ("SMPTE") has issued engineering guidelines for theater design, "SMPTE Engineering Guideline, Design of Effective Cine Theaters, EG 18-1994", pp. 1-5, ("SMPTE Guideline") (attached hereto as Exhibit 1).

Among other things, the SMPTE Guideline describes various components of a viewer's "line of sight" – i.e., the viewing angles as they relate to the viewer's horizontal and vertical field of vision, the screen, and viewing comfort; the angles which allow viewers to see movies without distortion; distance from the screen; and the extent to which the view of the screen is obstructed. In so doing, it defines the "vertical viewing angle to the top of the screen" as the angle formed by the intersection of a line horizontal with eye level (a straight-ahead view) and a line from eye level to the top of the viewing screen.

The full "vertical viewing angle" on the other hand is described as the subtended arc of an angle formed by two intersecting lines - one drawn from a viewer's eye level to the top of the screen, and the other extending, from the viewer's eye level to the bottom of the screen. Similarly, the "horizontal viewing angle" describes the subtended arc of an angle formed by two lines - one extending from the viewer's eyes to the left side of the screen, and the other drawn from the viewer's eyes to the right side of the screen. These factors and others listed in the SMPTE Guidelines are used by the industry to determine whether a

viewer has an effective view of the image on the screen. Id. They are also used to determine whether the viewer has a line of sight that results in physical discomfort. Id. Therefore, the industry's own guideline acknowledges the importance of comparing the quality of the viewing experience by evaluating the lines of sight provided to patrons. Id.

Once measured, Title III requires the lines of sight provided to wheelchair users to be comparable to those provided to members of the general public. "Comparable" is an ordinary word used in everyday parlance. Grider v. Cavazos, 911 F.2d 1158, 1161-62 (5th Cir. 1990) (courts forbidden from tampering with plain meaning of words in ordinary lay and legal parlance). Webster's defines "comparable" as "capable of or suitable for comparison; equivalent; similar." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1990). Consistent with this practical definition, the Department interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles offered to most of the general public in the stadium style seats, adjusted for seat tilt. 28 C.F.R. pt. 36, App. A, § 4.33.3. Similarly, wheelchair locations in traditional style movie theaters must have sight lines within the range of viewing angles offered to most of the people in the rest of the theater, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the auditorium, but neither do they categorically have to be the best. Instead, consistent

with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience is equivalent to that of members of the general public.[1] In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium portion of stadium style theaters. Similarly, for traditional theaters they should not be located in a manner that provides them with the extreme range of sight lines offered in traditional theaters but with those available in most of the seats in the theater.

In the only case decided thus far on this issue, Lara, et al. v. Cinemark, USA, Inc., No. EP-97-CA-502-H, Slip Op. (W.D. Tex. Aug. 21, 1998)(attached hereto as Exhibit 2) this interpretation of the comparable lines of sight provision was adopted. The court found that § 4.33.3 required lines of sight provided to patrons in wheelchairs to be similar to those provided to an "average patron of the theater rather than being relegated to the worst seats in the house." Id. at 4. Finding the viewing angles for wheelchair users to be inferior because they were more severe than those enjoyed by average patrons, the Court found that plaintiffs had been "denied the full and equal enjoyment of the movie going experience." Id.

In their motion for summary judgment, Defendants assert that

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[1]See 28 C.F.R. Part 36, §§ 36.202, 36.203, 36.302 (As a general rule, the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons); see also discussion of § 302 supra, at 6-7.

they have not violated the ADA's requirement that comparable sight lines be provided. First, they argue that they are not required to provide comparable lines of sight in accordance with § 4.33.3 because the Marketplace Cinema charges only one price for tickets and therefore provides comparable ticket pricing. Defendants Memorandum at 19. Second, they assert that if wheelchair seating must provide comparable lines of sight, they comply because each seat has a unique line of sight and there are fixed seats for non-disabled patrons which are inherently comparable (i.e., equally bad), in the vicinity of the wheelchair seating locations. Defendants' Memorandum at 20. Third, they argue that any requirement that movie theaters provide wheelchair seating locations with particular lines of sight to the screen is "inherently unworkable" and "virtually impossible because of the numerous factors at issue," and the difficulty in determining how to measure the line of sight. Defendants' Memorandum at 20-21.

Defendants' first argument is irrelevant. Section 4.33.3 does not condition the provision of comparable lines of sight on the availability of a range of ticket prices, and nothing in the regulation or the Department's guidance on this issue indicates otherwise. Section 4.33.3 requires that people who use wheelchair seating locations have "a choice of admission prices and lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, at § 4.33.3.. This provision encompasses two completely independent requirements. First, that people who use wheelchair seating have the opportunity to purchase tickets at prices that reflect those available to members of the general public; and second, that the wheelchair

seating locations provided afford wheelchair users comparable lines of sight. Defendants' responsibility for complying with the sight line requirement is not dependent on the availability of comparable ticket prices. It is certainly not dependent on whether more than one ticket price is charged. In fact, even if tickets were free, Defendants would still need to provide wheelchair seating locations with comparable lines of sight. Thus, the fact that defendants charge a uniform price for tickets is irrelevant.

Defendants' second argument, that they are in compliance with the ADA because all seats have unique sight lines and the wheelchair seating locations are near other seats that have similar (i.e., equally bad) sightlines is a misguided attempt to remove the qualitative comparison required by the regulation. It is axiomatic that regulations should not be read so as to render terms meaningless. Bartlett v. New York State Board of Law Examiners, 2 F.Supp. 2d 388,391 (2nd Cir. 1997), citing Silverman v. Estrich Multiple Investor Fund, 51 F.3d 28,31 (3rd Cir. 1995)(explaining that there "is a basic tenet of statutory construction, equally applicable to regulatory construction, that a 'statute should be construed so that the effect is given to all of its provisions, so that part no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error'."). Defendants' definition of comparable completely removes the qualitative aspect of the term comparable and the object of comparison - the sightlines afforded the general public. It is not enough that sight lines afforded

wheelchair seating locations can be compared to those near them; they need to be qualitatively comparable to those provided to the general public, i.e., more than a handful of other patrons.

To bolster their argument that the theater complies with all ADA requirements, Defendants submit the Declaration of Kevin Troutman, a principal of Salts, Troutman & Kaneshiro ("STK"), the architectural firm that designed the Marketplace Cinema as well as several theaters for American Multi-Cinema, Inc. ("AMC"). The Troutman Declaration is deficient in several ways -- both for what it says and what it does not say.[2]

To support defendants' arguments that sightlines for wheelchair seating areas are comparable to those for members of the general public, the Troutman Declaration contains a few isolated measurements relating to two factors that the industry considers relevant in evaluating sightlines in movie theaters. See Exhibit 1 (setting out several factors relating to sightlines that the industry considers in designing motion picture theaters). Mr. Troutman's measurements were not disclosed in his expert report, as required by FED. R. CIV. P. 26(a), since Mr. Troutman's expert report contained no measurements relating to

[2]For example, in Paragraph 4 of his Declaration, Mr. Troutman states that neither he nor STK "have ever been named in any lawsuit regarding accessibility or handicapped regulations." Although this statement may be literally true, it is misleading. Two theaters designed by STK were named in the ADA enforcement action filed by the Justice Department against AMC in January 1999. Thus, the Justice Department has plainly called STK's ability to design an ADA-compliant movie theater into question before Department counsel had any knowledge of this case.

sightlines.[3] Indeed, instead of evaluating the sightlines provided for wheelchair seating and for members of the general public, as § 4.33.3 of the ADA Standards dictates, Mr. Troutman's expert report asserts in a conclusory manner that "[w]hat constitutes a good line of sight is a highly individual determination." Troutman Expert Report at 6. Thus, Defendants should not be permitted to buttress their summary judgment motion with Mr. Troutman's heretofore undisclosed measurements.[4]

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[3]Mr. Troutman also did not disclose these measurements during his deposition. When asked the distance from the screen to the first row of seats in a stadium theater, Mr. Troutman testified that he had not measured that distance. Troutman Dep., Exh. 2, at 39.

[4]Fed. R. Civ. P. 26(a)(2)(B) requires a party to disclose a written expert's report that contains "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions ...." Mr. Troutman's expert report failed to comply with these requirements and, thus, should not be considered as evidentiary support for Defendants' motion for summary judgment. See Ingram v. Acands, Inc., 977 F.2d 1332, 1341 (9th Cir. 1992) (upholding district court's exclusion of expert testimony on the ground that the party proffering the evidence failed to comply with disclosure requirements); Salgado v. General Motors Corp., 150 F.3d 735, 741-42 (7th Cir. 1998) (upholding district court's exclusion of expert testimony in opposition to summary judgment for failure to comply with disclosure requirement and holding that expert report must be "detailed and complete;" "must include the substance of the testimony which an expert is expected to give on direct examination together with the reasons therefor;" "must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial;" "must not be sketchy, vague or preliminary in nature;" and "must include 'how' and 'why' the expert reached a particular result, not merely the expert's conclusory opinions." Mr. Troutman's Declaration also contains numerous conclusory statements that have no evidentiary value for summary judgement purposes. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990) (holding that the object of Rule 56 is not to replace conclusory averments in a pleading

Moreover, the measurements that Mr. Troutman provides in his Declaration are, at best, woefully incomplete. Mr. Troutman has provided isolated measurements for only a handful of the worst seats — in the stadium theaters, isolated measurements for wheelchair seating locations, seats in the same row as wheelchair seating locations, and seats in rows ahead of wheelchair seating locations. In reaching his conclusions about comparability, Mr. Troutman ignores the majority of seats in the stadium theaters -- i.e., all of the better seats, which are located in rows behind the wheelchair seating locations and, thus, all seats having smaller, more comfortable vertical viewing angles than wheelchair seats. Accordingly, Mr. Troutman concludes that sightlines for the wheelchair seats are "comparable" because he only compares them to seats that have sightlines that are equal or worse in quality, totally ignoring all seats having better sightlines.

In addition, the Troutman Declaration provides a few isolated measurements for only two of the factors that are recognized by the industry as relevant to motion picture theater sightlines: (1) the distance from some seats to the screen, and (2) the vertical viewing angle from eye level at some seats to the top of the screen. As the SMPTE Guideline and Mr. Troutman's own deposition testimony make clear, sightlines involve other

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with conclusory allegations in an affidavit); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)(holding that summary judgment cannot be defeated by affidavit containing conclusory statements); United States v. Hemmons, 774 F. Supp. 346, 352 (E.D. Pa. 1991), aff'd 972 F.2d 1333 (3rd Cir. 1992)(holding that "[conclusory affidavits are not helpful, and are therefore not considered when deciding a motion for summary judgment."); Evans v. Technologies Applications & Service Company, 80 F.3d 954, 959 (4th Cir. 1996) (holding that conclusory allegations in affidavits are insufficient to defeat summary judgment).

crucial components, such as the full vertical angle for viewing the entire screen from top to bottom, the full horizontal angle for viewing the entire screen from side to side, and the extent to which a person's view of the screen is obstructed.[5] Mr. Troutman has offered no measurements whatsoever relating to these crucial sightline components. Thus, Defendants have failed to carry their burden of showing that sightlines are comparable, since they have failed to introduce into evidence the data necessary to make a comparison.

Defendants' third argument, that it would be too difficult to provide comparable sight lines in wheelchair seating areas is completely unsupported. Defendants' state no reason and cite no authority for their contention that it would be too difficult to ascertain the correct lines of sight in various assembly areas, including movie theaters. As the SMPTE Guidelines demonstrate, the movie theater industry clearly understands how to measure sight lines and has standards for doing so. See Exhibit 1 at 1-5. Defendants also assert, in a conclusory way, that maintaining compliance with "fire, safety, seismic and other applicable building codes" would create further complications. As stated earlier, the new construction provisions of Title III require strict adherence to the requirements of the Standards. Supra at 5-6. Only in rare circumstances where entities can demonstrate

[5]As Mr. Troutman testified, "[t]here's many components of a sight line. Direct angle to your focal point. The left to right head motion. The up to down head motion; the clearance in front of the patron in front of you; those are all components of the sightline." Troutman Deposition at 39-40 (excerpts attached hereto as Exhibit 3.

that it is structurally impracticable to meet the requirements can they fail to comply with provisions of the Standards. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.401(c). The regulation states clearly that structural impracticability does not equate with difficult or complex but will be found "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. § 36.401(c). Defendants' vague allegations that providing comparable lines of sight would be impossible because they must take into account and comply with various health, safety, fire, and seismic codes are made without factual foundation or any evidence to substantiate them. They clearly do not set forth the requisite facts nor indicate the narrow circumstances where this exception to the new construction requirements is valid.

3. Defendants Fail to Prove as a Matter of Law That The Marketplace Cinema Contains the Correct Number of Companion Seats Located "Next To" the Wheelchair Seating Locations

The number and location of companion seats required in newly constructed assembly areas like the Marketplace Cinema is governed by § 4.33.3 of the Standards. Section 4.33.3 mandates that "At least one companion fixed seat shall be provided next to each wheelchair seating area." 28 C.F.R. § 4.33.3. Defendant contends, without justification, that use of the term "area" indicates that defendants are not required to provide a companion seat next to each wheelchair seating location when wheelchair seating locations are clustered in one location. Defendants also contend that the term "next to" is ambiguous, and does not necessarily mean that companion seats must be located immediately

to the right or left of the wheelchair seating locations which they accompany. These arguments ignore the plain meaning of the regulation and its underlying purpose as well as the longstanding Department of Justice interpretation of its regulation.

Companion seating is exactly that - seating for companions of people who use wheelchairs that allows them, like members of the general public who do not use wheelchairs, the opportunity to attend movies, sports contests, concerts and any other events that take place in assembly areas in the company of friends, family, colleagues, and clients and not be segregated to sitting alone or in the company of strangers. Thus, the regulation requires that each wheelchair seating location be accompanied by at least one fixed companion seat. Id. Although Defendants' argument is not entirely clear, it seems to center on the term "area" and implies that in those instances where wheelchair seating locations are clustered together, only one companion seat need be provided. The regulation does not, however, define wheelchair seating area and it is not a term of art indicating an area where multiple wheelchair users congregate in theaters or other assembly areas. Instead, the regulations use the term "wheelchair seating area" interchangeably with "wheelchair location", "wheelchair space", and "wheelchair area." 28 C.F.R. pt. 36, App. A, § 4.33.

The Department's official interpretation of this provision is set forth in our Technical Assistance Manual which states that companion seating must be provided next to "each wheelchair seating location." U.S. Department of Justice Title III Technical Assistance Manual, 64 (excerpts attached hereto as

Exhibit 4). In so doing, the Department adopts the same interpretation of § 4.33.3 as the Access Board. In their preamble to the ADAAG, the Board provided its interpretation of 4.33.3, stating that it required that "at least one companion fixed seat be provided next to each wheelchair seating space." 56 Fed. Reg.35,440 (1991)(emphasis added).

As discussed earlier, the new construction provisions of Title III give effect to the ADA's statutory mandate which prohibits affording people with disabilities with a benefit or service unequal to that afforded the general public. The ability to attend movies and other events that take place in assembly areas with others is clearly part of the benefit afforded, and for non-disabled patrons the opportunity to do this is universal. The regulation cannot be expected to require that only a lucky few wheelchair users benefit similarly while the rest sit alone.

In another attempt to justify their failure to provide sufficient companion seating, defendants argue that § 4.33.3's requirement that companion seating be located "next to" wheelchair seating locations means only adjacent to, and can mean "in front of" or "behind" the wheelchair seating locations they are meant to accompany. Defendants' position is meritless and they provide no justification for this absurd interpretation. In fact, they lay blame on the regulation, stating that it should have specifically stated that it meant "to the right or left of" and further explained its position in a diagram. The term "next to", however, is so widely understood that no such definition (or

diagram for that matter) is necessary.[6] Moreover, the purpose of the companion seating requirement - allowing people who use wheelchairs to sit with non-disabled companions in the same manner that non-disabled patrons do - makes clear where this seating should be located. People do not typically sit in front of or behind a person with whom they attend a movie, performance or sports event, but to the immediate side or "next to" them so they can communicate, share food and drinks and, in the case of some people with disabilities, receive needed assistance without disrupting the event. The plain meaning of "next to" and the common accepted practice of sitting beside those with whom you attend events in assembly areas makes it abundantly clear that "next to" means to the immediate right or left.

4. Defendants Fail to Prove as a Matter of Law that Each Theater in The Marketplace Cinema Contains the Requisite Number of Wheelchair Seating Locations and That They Do Not Need to Provide Wheelchair Seating in More Than One Location

As stated earlier, § 4.1.3(19)(a) mandates the number of wheelchair seating locations that must be provided in assembly areas. 28 C.F.R. pt. 36, App. A, § 4.1.3(19)(a). Plaintiffs allege that, at the time their expert witness examined the Marketplace Cinema the theaters contained an insufficient number of wheelchair seating locations. They also allege that in the two stadium style theaters, which are the largest in the complex, Defendants have failed to provide wheelchair seating in more than

[6]In fact, Defendants use the term "next to" to mean to the right or left when describing the position of wheelchair seating in their brief. They state, "There are fixed seats next to, in front of, and behind wheelchair areas." Defendant's Brief at 20 (emphasis added).

one location as is required when seating capacity exceeds 300. Defendants counter, stating that they have the correct number of wheelchair seating locations and that none of the theaters have a seating capacity in excess of 300.

A review of the expert reports and declarations filed by Plaintiffs and Defendants makes clear that the experts from each side disagree as to how many seats are provided in each theater overall and as to how many wheelchair seating locations are provided.[7] Since the United States has not yet had the opportunity to conduct discovery and count the seats, we cannot authoritatively comment on the factual inconsistency between them. However, two significant legal issues are raised. The first is whether the wheelchair seating locations provided in the Marketplace Cinema comply with all wheelchair seating requirements of the Standards and, thus, can be counted as ADA compliant wheelchair seating locations; and second, whether the wheelchair seating locations themselves should be counted when determining if sufficient seating capacity exists to require dispersed wheelchair seating (wheelchair seating locations

[7]For example, in his report Plaintiffs' expert Logan Hopper stated that, based on a review of the theaters, each of the two stadium style theaters contained 297 seats in addition to the wheelchair seating locations. Plaintiff's Second Supplemental Expert Witness Disclosure of Logan Hopper, at 6. In his expert's report, Defendants' expert contends merely that the theaters have the required number of wheelchair seating locations but fails to state how many seats there are or how he arrived at the conclusion that a satisfactory number of wheelchair seating locations were provided. Troutman Expert Report at 4. Only in his declaration, attached to the Motion for Summary Judgment does Defendants' expert set forth the number of non-wheelchair seats he believes exist in each of the stadium-style theaters, 295. Troutman Declaration at 2.

provided in more than one place in the theater).

While § 4.1.3(19)(a) of the Standards governs the calculation of the number of wheelchair seating locations that need to be provided it also mandates that accessible wheelchair locations comply with §§ 4.33.2, 4.33.3, and 4.33.4. Id. at § 4.1.3(19)(a). If, as we expect to prove through discovery, some or all of these "wheelchair seating locations" do not meet the new construction requirements set forth in the relevant provisions of the Standards, the non-compliant wheelchair seating locations should not be counted to determine whether Defendants have provided a sufficient number of ADA compliant wheelchair seats. Defendants may, therefore, fall short of the minimum number of wheelchair seating locations required by § 4.1.3(19)(a). Because we cannot yet determine which wheelchair seating locations comply with the Standards, it is premature for the Court to rule on this issue.

Defendants' argument that in determining whether wheelchair seating locations must be provided in more than one position in each theater, only fixed seats for non-disabled patrons need be counted is without merit. Section 4.33.3 explicitly rejects this limitation, requiring dispersed wheelchair seating, "[w]hen the seating capacity exceeds 300." Id. at § 4.33.3 (emphasis added). In calculating the seating capacity, § 4.33.3 does not limit the seats counted to those fixed seats provided to non-disabled patrons but explicitly includes the entire seating capacity, including wheelchairs. Id. Contrary to the argument put forth by Defendants, wheelchair seating locations are fixed, and directly impact the seating capacity of assembly areas. They are

required by the regulation to be an integral part of the fixed seating plan and can be used by non-disabled patrons when they are not needed by people with disabilities. Id.[8] Thus, in any theater where the seating capacity (defined to include wheelchair seating locations) exceeds 300, wheelchair seating locations must be provided in more than one location.

5. Defendants Fail to Prove as a Matter of Law That the Size and Configuration of the Wheelchair Seating Locations Comply With the Standards

Section 4.33.3 of the Standards requires all wheelchair seating locations to be configured in accordance with § 4.33.2 and to adjoin an accessible route. Id. Section 4.33.2 refers to Figure 46 which sets forth the configuration of wheelchair seating locations when they are configured to provide two such spaces in series. Id. at § 4.33.2, Fig. 46. Figure 46 shows that the two wheelchair seating locations side by side should total 66 inches in width. Id. If they afford wheelchair users an approach from the side they should be 60 inches deep while those affording access from the front or rear must be 48 inches deep. Id. The minimum width of an accessible route is 36 inches. Id. at § 4.3.3. Plaintiffs' expert Logan Hopper states in his Second Supplemental Expert Witness Disclosure that some of

[8]Thus, Defendants' reliance on the Department's Technical Assistance Manual is misplaced because he assumes wheelchair seating locations are not fixed seating. It is also misplaced because Defendant mistakenly sites a portion of the Technical Assistance Manual dealing with readily achievable barrier removal, which incorporated a different standard for wheelchair seating than new construction. The appropriate section of the Technical Assistance Manual is III-7.5180, which states in relevant part that "Dispersal of wheelchair seating is required in assembly areas where there are more than 300 seats."

the wheelchair seating locations in the Marketplace Cinema that are configured to be two wheelchair seating locations in series are not at least 66 inches wide as required by the regulations and that those accessed from a rear approach do not adjoin an access aisle at least 36 inches in width. Sec. Supp. Expert Witness Disclosure at 6. Defendants assert that all of the relevant wheelchair seating locations are 66 inches in width. Defendant's Brief at 15, Troutman Dec. at 4. They also assert that each of the wheelchair spaces is sufficiently deep as required by § 4.33.2 (48 inches for rear approach, 60 inches for side approach). While a factual issue seems to exist regarding the width of the wheelchair seating locations Defendants fail to set forth any evidence to contradict the allegation that the wheelchair seating locations accessed from a front or rear approach do not adjoin an accessible route with a minimum clear width of 36 inches. Sections 4.33.3, 4.3.3. Because they fail to adequately assert that they have complied with the regulation, defendants' motion for summary judgment must fail on this issue.

B. Defendants Fail as a Matter of Law to Prove That They Are Not Required to Maintain Accessible Features in the Theater

The Title III regulation specifically states, "A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities." 28 C.F.R. § 36.211(a). In their brief Defendants state that they are not required to have a policy to maintain accessible features. This is true. We point out only that if a policy is necessary to achieve the maintenance required by the regulation,

they are required to have one. Similarly, Defendants are correct in asserting that "isolated or temporary disruptions in service or access due to maintenance or repairs," are permitted. Id. at § 36.211(b). These disruptions, however, should not amount to a pattern signifying their failure to properly maintain their accessible features.

III. CONCLUSION

For the foregoing reasons Defendants' Partial Motion for Summary Judgment should be denied.

Respectfully submitted,
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Dated: April 20, 1999

PROOF OF SERVICE

I, Joseph Russo, declare:

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

On April 20, 1999, I served

MEMORANDUM OF PLAINTIFF-INTERVENOR UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT,

on each person or entity named below by common carrier Federal Express for next day delivery.

Date delivered to common carrier: March 22, 1999

Place delivered to common carrier: Washington, D.C.

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

See attached List

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 20, 1999, at Washington, D.C.

_____

Joseph Russo

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