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

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>AMC ENTERTAINMENT, INC., et al.,<br><br>Defendants. | Case No.: CV-99-01034-FMC (SHx)<br><br>**PLAINTIFF UNITED STATES' SUPPLEMENTAL RESPONSE TO REVISED JOINT STATEMENT REGARDING COMMENTS ON TENTATIVE RULING**<br><br>Date: May 25, 2000<br>Time: 10 a.m.<br>Judge: Stephen J. Hillman |

Pursuant to the Magistrate Judge's May 16, 2000, Order, the Department submits the following supplemental briefing.

Instead of making specific suggestions to improve the language of the Tentative Order, Defendants have again challenged the merits of the Court's proposed rulings. The United States disagrees with Defendants' arguments and addresses them below.

**The United States' Response to AMC's General Comments on Tentative Ruling**

1. Defendants Have Not Been Denied Discovery Necessary to Defend Against Civil Penalties. In an enforcement action by the Attorney General under Title III of the ADA, a court "may, to vindicate the public interest, assess a civil penalty against the entity in an amount (i) not exceeding $50,000 for a first violation, and (ii) not exceeding $100,000 for any subsequent violation."[1] 42 U.S.C. § 12188(b)(2)(A)(iii)(c). "[T]he court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this Act by the entity." 42 U.S.C. § 12188(b)(5); 28 C.F.R. 36.504(d). Thus, in determining what amount of civil penalties to assess, a court is required by statute to consider whether an entity made a good faith effort to comply with the ADA and, if so, whether such good faith effort outweighs the public interest in assessing civil penalties to deter future violations of the law by the entity being sued and other entities that are subject to ADA requirements.

Defendants contend that the Court's Tentative Order would deny them the discovery they need to defend against civil penalties. The Department disagrees. To defend against civil penalties, Defendants may show any alleged "good faith effort or attempt [they actually made] to comply" with the ADA, including any alleged good faith efforts or attempts to comply with Standard 4.33.3. 42 U.S.C. § 12188(b)(5); 28 C.F.R. 36.504(d). The evidence that Defendants need to make such a showing is within their own control or has already been produced to them — i.e., the plain language of the ADA, the regulations implementing the ADA (including

[1] For the purposes of determining the amount of civil penalties that can be awarded, "a determination in a single action ... that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation." 42 U.S.C. § 12188(b)(3); 28 C.F.R. 36.504(a)(3).

Standard 4.33.3, and technical assistance materials issued by the Justice Department interpreting ADA requirements; whether or not Defendants actually believed they were complying with ADA requirements at the time they designed, constructed, and operated their theaters; and, if applicable, the reasons why Defendants held those beliefs regarding ADA requirements. Communications or conduct by the Justice Department or the Access Board are not relevant to Defendants' good faith efforts to comply with ADA requirements unless Defendants could somehow show that (1) they relied on such communications or conduct and (2) their reliance was reasonable under the circumstances.

The Department has already produced to Defendants all technical assistance materials relating to Standard 4.33.3 and other ADA requirements at issue in this action. Under the Court's Tentative Order, the Department would also be required to produce all agency interpretations of Standard 4.33.3 applicable to commercial movie theaters, including interpretations issued since Standard 4.33.3 was promulgated in July 1992. This is all of the discovery that Defendants need from the Department relating to any good faith defense to civil penalties. To the extent that Defendants wish to argue that civil penalties should not be awarded because they relied on statements made by the Justice Department, the knowledge of statements that they actually relied upon is within Defendants' control.

Defendants contend that they need to obtain evidence showing "that their [sic] was no consensus of opinion within or between the Access Board and the Civil Rights Division of the Department of Justice on what ADAAG Section 4.33.3 required." Revised Jt. Stmt. at 2. Through this argument, Defendants erroneously suggest that they are not receiving Justice Department and Access Board interpretations of Standard 4.33.3. To the contrary, Justice Department and Access Board interpretations of Standard 4.33.3 are not being withheld. Defendants have received no documents reflecting a lack of "consensus of opinion" with respect to the interpretation of Standard 4.33.3 in movie theaters for one simple reason: there has been no such lack of consensus in the positions articulated by the agencies.

As for discussions of Standard 4.33.3 that occurred between staff of the Justice Department and staff of the Access Board in the context of proposing new regulations or

alternate regulations, such discussions represent the views of individual staff members — not the views of the respective agencies — and are expressly protected by the deliberative process privilege. See Pies v. United States Internal Revenue Service, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (holding that a draft of a proposed regulation and transmittal memoranda are protected under the deliberative process privilege). Moreover, confidential internal deliberations by Justice Department staff members or Access Board staff members can have no bearing on a good faith defense to civil penalties, since Defendants could not have relied on such deliberations in designing, constructing, or operating their movie theaters because they did not know about them. Accordingly, such discovery is properly denied for two reasons: because the information sought is privileged and because it is not "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(c); Oakes v. Halvorsen Marine, Ltd., 179 F.R.D. 281, 283 (C.D. Cal. 1998).

Defendants suggest that the Justice Department will offer witnesses at trial regarding the meaning of Standard 4.33.3 and that they need access to deliberative documents in order to cross-examine such witnesses. Defendants are wrong. The meaning of a regulation calls for an interpretation of the law to be handled in legal briefing to the Court — not through government officials' testimony before a jury.

2. The Court Correctly Denied Discovery of Non-Movie-Theater Assembly Areas. Defendants contend that they need discovery relating to the application of Standard 4.33.3 to sports arenas because the Department did not issue any guidance relating to movie theaters before 1996. First, as a legal matter, the lack of technical assistance with respect to an issue is not a proper defense to liability or civil penalties. See 28 C.F.R. 36.507 ("A public accommodation or other private entity shall not be excused from compliance with the requirements of this part [of the regulations] because of any failure to receive technical assistance. . . .").

Second, as a factual matter, Defendants' statement is simply incorrect. In 1994, the Department of Justice filed an *amicus* brief in which it discussed the application of Standard 4.33.3 to movie theaters. Defendants cannot deny knowledge of this case, since American

Multi-Cinema, Inc. ("AMC") was the defendant in that action. See Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994), in which the United States District Court for the District of Columbia rejected AMC's interpretation of Standard 4.33.3 relating to dispersed seating and instead adopted the Justice Department's view.

Third, the issues involved in enforcing Standard 4.33.3 in the context of sports arenas are so different from the issues involved in enforcing that Standard in the context of stadium-style movie theaters that they are not relevant. See James Pascuiti, et al. v. The New York Yankees and the City of New York, 98 Civ. 8186 SAS (S.D.N.Y. Oct. 4, 1999) (hearing transcript attached to the United States' initial briefing at Exhibit E, pp. 21-22, 30). In movie theaters, a patron typically pays one price for admission and focuses on one stationary object — the screen where the movie is projected. In a sports arena, a patron typically has a choice of admission prices, the quality of the patron's seat and amenities provided to the patron typically vary depending on the admission price paid, and the patron typically has multiple points of focus (for example, in a baseball stadium, the patron is likely to focus on the movement and activity of multiple players, the umpire, and the baseball). These differences are important, since Standard 4.33.3 requires that wheelchair locations provide not only "lines of sight comparable to those for members of the general public" but also "a choice of admission prices." In addition, Section 302 of the ADA requires that persons with disabilities be provided with the same amenities as persons without disabilities. Consequently, investigative findings relating to a sports arena often turn on factors that are not relevant to movie theaters or lines of sight, such as the availability of different categories of admission prices and different categories of amenities.

Moreover, the lines of sight at issue in sports arenas (e.g., where spectators generally look down and focus on multiple things and where wheelchair users must be offered seating at hundreds of locations at different ticket prices) are fundamentally different than the lines of sight at movie theaters (e.g., where patrons are looking up or across and are focusing on one focal point, the screen, and where ticket prices are uniform and there are generally only 2 - 6 wheelchair seating locations in any auditorium). Thus, investigations relating to wheelchair

seating requirements in sports arenas is simply not relevant to determining what is "comparable" wheelchair seating in a movie theater with stadium-style seating, since what the audience at sporting events and movie theaters view is very different.

The U. S. District Court in the Southern District of New York dealt with a comparable discovery dispute in James Pascuiti, et al. v. The New York Yankees and the City of New York, 98 Civ. 8186 SAS (S.D.N.Y. Oct. 4, 1999), a case alleging ADA violations at Yankee Stadium. In that case, the defendant sought discovery of all documents where the Justice Department had made statements relating to the term "readily achievable barrier removal" in the context of any investigation involving sports arena. The court concluded that it would be unworkable to introduce the facts of 11 other investigations of sports arenas into a case involving Yankee Stadium, since defendants would be placing the Court in the untenable position of having to evaluate and compare what the government had demanded as "readily achievable barrier removal" in each case in order to determine whether there were inconsistencies. The court determined that such a process was unworkable and unduly burdensome on the Justice Department and on the Court. Id. at pp. 21-22, 30. The discovery that Defendants seek in this case is far more burdensome than the discovery denied in the Yankee Stadium case. Here, Defendants seek not only all documents and information relating to 11 sports arena investigations, but also all documents and information relating to investigations of a similar number of movie theaters, and investigations of all other types of assembly areas as well. Granting Defendants this discovery would invite Defendants to introduce evidence at trial relating not only to movie theaters but also to numerous types of sports arenas. As Acting Assistant Attorney General Bill Lann Lee stated in his Declaration, requiring the Justice Department to locate, review, and produce this discovery would be extremely burdensome. Lee Declaration at ¶ 9 (attached as Exhibit A to the Department's initial briefing). More important, however, introducing all of these documents and all of this information as evidence in this case would be unduly burdensome to the Court, transforming a large, complex, and difficult case into an unmanageable one.

3. The Court's Order Sufficiently Addressed Defendants' Discovery Requests. Defendants complain that the Court's Tentative Order must individually address each specific discovery request in order to determine which issues they will appeal. The United States disagrees. The Court gave Defendants this opportunity to raise any issue that they believe the Court's Tentative Order did not adequately address. Defendants failed to raise specific issues with respect to any of their discovery requests. Accordingly, it is plain that the Court's Tentative Order, together with the Court's prior Order relating to specific interrogatories, adequately addresses all issues raised by Defendants' Motion to Compel.

4. The Court's Order Explained the Rationale for Withholding the Contested Documents. Defendants contend that the Tentative Order does not provide adequate information about the documents reviewed by the Court and the decisions that form the basis for the government's exercise of the deliberative process privilege. Defendants' claim of inadequate information is unjustified for several reasons. First, Defendants have extensive knowledge about the documents being withheld, since counsel for the United States spent more than 10 hours describing those documents to Defendants. Second, the Court stated its willingness to review each document *in camera* and Defendants only requested review of 14 documents. This review occurred in open court on the record. Defendants can obtain a copy of the transcript which will show why the documents were withheld and the basis for the Court's decision relating to those documents. Third, Defendants' repeated insistance that the Court must identify the actual decision for each document withheld pursuant to the deliberative process privilege is contrary to Ninth Circuit precedent. Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1094 (9th Cir. 1997) (quoting Assembly of the State of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992)) (recognizing that the deliberative process privilege is applicable even in cases where a court is unable to "identify the actual decision that was made").

The deliberative process privilege in this case applies to multiple decisions, such as the decisions to begin investigations of individual theaters, the decisions to enter settlement negotiations, and the decisions to initiate litigation. See, e.g., Norwood v. FAA, 993 F.2d 570,

577 (6th Cir. 1993); Coastal States, 617 F.2d at 868; see also Maricopa Audubon Soc'y, 108 F.3d at 1094. Moreover, given the volume of documents at issue in this case, the United States does not believe it is necessary for the Court to prepare an order that itemizes each document reviewed and identifies the basis for upholding the assertion of privilege for each such document. In a case such as this one, where large volumes of documents are at issue, Fed. R. Civ. P. 26(b)(5) recognizes that a party need not list each and every document on a privilege log and can, instead, simply identify categories of documents for which privilege is being asserted.[2] See Imperial Corporation of America v. Shields, 174 F.R.D. 475, 477 (S.D. Cal. 1997) ("no where in Fed. R. Civ. Pro. 26(b)(5) is it mandated that a document-by-document privilege log is required"). If the Federal Rules of Civil Procedure do not even require a party to prepare a document-by-document privilege log, a court would plainly not be required to itemize the basis for its decision in writing when it has already discussed each withheld document that Defendants requested to be reviewed on the record in an open hearing.

**The United States' Response to AMC's Specific Comments on Tentative Ruling**

1. Defendants contend that discovery should not be limited to "commercial movie theaters." As fully discussed earlier above, the Court has correctly limited discovery, however, because other types of assembly areas are not relevant in applying Standard 4.33.3 to stadium-style movie theaters. See FED. R. CIV. P. 26(b)(1) (discovery is not relevant unless it is "reasonably calculated to lead to the discovery of admissible evidence."). Audience members view one focal point, the motion picture screen. In contrast, spectators at other public assembly areas, such as sports arenas, view an entire playing field, swimming pool, track, or other similar

[2] Indeed, to date, Defendants have done nothing more than baldly assert that they are only withholding documents on the basis of attorney-client privilege and work product. And, the Court has ruled that they need not prepare a document-by-document privilege log for AMC's attorney-client communications.

venue.[3] What constitutes "comparable" lines of sight at a sports arena are not relevant to the very different viewing environment in a movie theater.

Furthermore, the United States has provided, through documents and through its website, all public documents interpreting Standard 4.33.3. To the extent Defendants assert that they relied on such documents in a good faith attempt to comply with the law, Defendants already have in their possession of those documents and cannot attempt to obtain internal documents that they have never seen to create a claim of reliance.

2. Defendants assert that the Court must identify for each document a specific agency decision before applying the deliberative process privilege. Such a requirement is not necessary under Ninth Circuit precedent and in light of the voluminous nature of Defendants' discovery requests. The Ninth Circuit has held that the deliberative process privilege can apply to documents that were "prepared in order to assist an agency decisionmaker in arriving at his decision," even if the court is unable to "identify the actual decision that was made." See Maricopa Audubon Soc'y, 108 F.3d at 1094 (internal quotation marks omitted). Furthermore, the government's privilege log identifies to which documents it has invoked the deliberative process privilege, and Department counsel spent more than 10 hours describing each document to Defendants. Accordingly, Defendants' claim that they will not know to what documents the privilege applies is baseless.

Furthermore, it is overly burdensome and unreasonable to require the Court or the United States to provide a document-by-document listing as demanded by Defendants. See In re Imperial Corp., 174 F.R.D. at 477; Advisory Committee Notes to Fed. R. Civ. P. 26(b)(5) (providing details "may be unduly burdensome when voluminous documents are claimed to be privileged or protected"). In In re Imperial Corp. of America, the Court recognized that, in certain circumstances, particularly those involving a voluminous number of documents, identifying documents by category was sufficient for an assertion of privilege. See 174 F.R.D.

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[3] Although Defendants attempt to create ambiguity where none exists, by questioning the meaning of the term "commercial movie theaters," sports arenas and similar facilities clearly do not fall within that definition.

at 477, 479. This Court is not obligated to provide a document-by-document summary as requested by Defendants.

3. In paragraph five, Defendants object to the Court's holding that plaintiff is entitled to assert the settlement negotiation privilege. The District Court has previously upheld the Department's invocation of this privilege. See Order Denying Defendants' Motion for Review and Reconsideration, CV 99-1034 (C.D. Cal. April 12, 2000) (upholding Magistrate Judge's order and concluding that "evidence pertaining to meetings, discussions, and negotiations between plaintiff and other theater owners concerning enforcement of the ADA's line-of-sight requirements is privileged and not subject to discovery."). This finding by the District Court represents binding law of the case. See 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, or a higher court in the identical case.") (internal quotation marks omitted).

4. In paragraph seven, Defendants again insist that the Court provide detailed reasons as to the invocation of privilege as to each and every document at issue in Defendants' motion. As noted previously, Rule 26(b)(5) does not require a document-by-document privilege log, see In re Imperial Corp. of America, 174 F.R.D. at 477, and the Court is free to make decisions based on categories given the vast number of documents at issue in Defendants' motion to compel.

5. Throughout, Defendants offer boilerplate objections to the Court's findings in its tentative order, without providing any substantive commentary on those provisions. Since the Court has asked the parties not to burden it with additional briefing, the government relies on its prior briefs as to these objections.

## CONCLUSION

The United States asks that the Court reject Defendants' proposed changes to the Court's May 4th Tentative Order.

Respectfully submitted,

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Dated: May 23, 2000

**PROOF OF SERVICE**

I, John Albert Russ IV, declare:

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

On May ___, 2000, I served the following document,

**PLAINTIFF UNITED STATES' SUPPLEMENTAL RESPONSE TO REVISED JOINT STATEMENT REGARDING COMMENTS ON TENTATIVE RULING**

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

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

Executed on May ____, 2000, at Washington, D.C.

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John Albert Russ IV