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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) **PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF ITS EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER TO PREVENT FURTHER SPOLIATION OF THE EVIDENCE BY DEFENDANTS** Judge: Judge Florence-Marie Cooper Date: To be determined by Court. **Time:** To be determined by Court.

INTRODUCTION

1. The United States moves for a Temporary Restraining Order ("TRO") to enjoin Defendants from further spoliating evidence at the twelve (12) AMC theaters designated for inspection under Magistrate Judge Hillman's June 16, 2000, Order (hereinafter, "June 16th Order") (See Exhibit A). "Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999); see generally Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). In this case the United States has learned that Defendants are attempting to significantly alter the wheelchair seating areas and other accessibility features at their theaters prior to the completion of the United States' inspections. Defendants have refused to identify what changes they have made or plan to make to the wheelchair seating areas, and to other features affecting accessibility, at these theaters. Furthermore, Defendants have refused to agree to stop any such alterations prior to inspections, causing the United States irreparable injury by preventing it from gathering accurate evidence of AMC's compliance or lack of compliance with the ADA and its regulations.

2. The inspections, approved by the Magistrate Judge and this Court, will include measurements of wheelchair seating locations, measurements of lines of sight from the seats in the auditorium to the screen, and examinations and surveys of other features related to accessibility and compliance with the ADA. Because Defendants have told the United States that they lack "as-built" architectural plans that accurately show the layout of the theaters as they were actually constructed, the United States sought these inspections in part to take measurements of the actual configuration of the theaters. If, however, Defendants change seating layouts and other features affecting accessibility at these twelve theaters, and if Defendants continue their refusal to identify what specific changes have been made, the United States' ability to gather evidence to which it is entitled under the June 16th Order will be irreparably compromised—the United States will be unable to know whether the measurements

it takes have been affected by Defendants' improper attempts to hide or diminish their ADA violations.

3. Defendants have an obligation to preserve evidence at these twelve theaters prior to the completion of inspections by the United States. See West, 167 F.3d at 779. The United States, however, received a document in discovery revealing AMC's plans to alter the wheelchair seating layout at its Promenade 16 theater at Woodland Hills. (See Exhibit B, filed separately under seal).[1] The United States has attempted to verify the accuracy of the information in that document with AMC's counsel, but Defendants have refused to answer whether they have made these or other changes at the twelve theaters identified for inspection.

4. Defendants have also refused to agree to halt all alterations to wheelchair seating areas at these theaters prior to inspection, despite their clear obligation to preserve evidence under their control prior to the United States' opportunity to measure that evidence. See West, 167 F.3d at 779. Indeed, Defendants have asserted that they have the right to make whatever changes at these theaters they want prior to inspections, (see Exhibit C, AMC's Sept. 28 letter), without regard to the impact on the United States' ability to collect evidence pursuant to the Magistrate Judge's June 16th Order.

5. The United States is seeking to enjoin efforts by Defendants to alter evidence relating to seating layout and other features affecting accessibility at the twelve theaters listed for inspection under the June 16th Order.[2] Defendants cannot be permitted to alter the accessibility of these twelve theaters in an attempt to improperly interfere with the Department's ability to gather evidence. The United States is also seeking to require Defendants to identify at which of the twelve theaters they have altered the seating layout or any

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[1] The United States has previously filed this document under seal with the Magistrate Judge and provided a courtesy copy, under seal, to this Court.

[2] The United States is not attempting to prohibit routine maintenance, such as replacing a single seat when it becomes broken. Changing the seating layout to add or subtract wheelchair seating locations, or altering the layout of seats around the wheelchair spaces to affect access to those wheelchair spaces, are clearly not examples of routine maintenance.

other features affecting accessibility, since January 29, 2000, when the United States filed the present litigation.

6. On October 2, 2000, the United States filed an emergency request for a conference call with Magistrate Judge Hillman to discuss Defendants' refusal to halt spoliation of evidence prior to inspections. On October 3, 2000, the Magistrate Judge informed the United States that he lacked injunctive power to prevent any alleged spoliation at Defendants' theaters and that any such relief would have to be sought in the District Court. On the same day, the United States contacted Defendants' counsel and asked if Defendants would agree to stop making alterations to wheelchair seating areas in these theaters prior to inspection. Defendants refused to agree, thus necessitating the present motion. See accompanying Declaration of John Russ (hereinafter, "Russ Decl."), at ¶ 4-5.

FACTUAL BACKGROUND

7. On February 4, 2000, the United States provided Defendants with a list of twelve theaters that it proposed for detailed inspections to measure the theaters' compliance with the ADA. (See Exhibit D, portions of the United States' First Request and the United States' proposed joint stipulation).[3] On February 11, 2000, the United States advised AMC that it considered any attempt to change the configuration of seating at AMC's theaters, or to otherwise affect these theaters' accessibility, prior to completion of inspections, as constituting spoliation of the evidence. The United States specifically excluded routine maintenance. (See Exhibit E).

8. AMC has fought the United States at every step of the process to keep the United States from commencing inspections to measure lines of sight and other evidence related to accessibility at AMC's theaters. When AMC refused to permit the inspections sought by the United States, the United States moved to establish conditions for inspections in a

[3] The United States filed an amended request to permit entry on February 15, 2000, listing the same theaters for inspection. The new version listed the order in which the United States sought to conduct inspections.

motion before the Magistrate Judge. On May 25, 2000, the Magistrate Judge made an oral ruling that he intended to permit inspections at the twelve theaters identified by the United States. On June 16, 2000, the Magistrate Judge entered a written order permitting inspections at these theaters and establishing conditions for the inspections.[4] Defendants sought review of the Order before this Court, which affirmed the Order in its entirety on July 14, 2000. Defendants subsequently filed a writ of mandamus with the Ninth Circuit, seeking to block the inspections from going forward. On September 19, 2000, the Ninth Circuit dismissed Defendants' writ without seeking further briefing. (See Exhibit F, Sept. 19th Order).

9. On June 6, 2000, Defendants offered to permit the United States to inspect its theaters, as long as the United States would agree not to assess audience seating preferences or measure lines of sight, (see Exhibit G**,** AMC's June 6th letter), even though one of the central issues in the case is whether the seats offered to patrons who use wheelchairs provide "lines of sight comparable to those for members of the general public." See 28 C.F.R. pt. 36, App. A, § 4.33.3. See also First Am. Compl. at ¶ 19.

10. The United States informed Defendants on June 15, 2000, that the extensive restrictions on inspections that Defendants proposed in their June 6th letter would require multiple trips to AMC's theaters, thus unnecessarily increasing the expense of the inspections and depriving the United States of evidence, such as line of sight measurements and audience seating preferences, that are central to its case. (See Exhibit H, United States' June 15th letter). The United States repeated these concerns when Defendants again raised the issue of multiple trips before this Court during the July 6, 2000, status conference. Both the Magistrate Judge's June 16th Order and this Court's July 14th Order have approved the United States' taking measurements of lines of sight and audience seating preferences at AMC's theaters.

11. During the week of September 18th, the United States discovered a May 30, 2000 document in AMC's production of documents pursuant to Magistrate Judge Hillman's

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[4] See Order Granting in Part and Denying in Part the United States' Motion for Order Establishing Conditions for the United States' Inspection of AMC Theaters (entered June 16, 2000).

May 15, 2000, Protective Order. This document, which includes architectural plans and drawings, proposed adding and removing wheelchair seating, altering companion seating, and/or changing the seating layout in eleven of the auditoriums at the Promenade 16 theater in Woodland Hills—the first theater listed for inspection under the Magistrate Judge's June 16th Order. (See Exhibit B, filed separately under seal). The pages of the documents with layouts of auditoriums at the theater contain the caption, "Woodland Hills ADA Retro." (See id.).

12. Upon discovering this document, the United States became concerned that Defendants might be attempting to affect the United States' measurements during its inspections, by altering the accessibility features at the theaters listed for inspection without prior notice to the United States. On September 21, 2000, the United States sent a letter to Defendants, requesting that they inform the United States of any changes, beyond routine maintenance, that they intended to make or had already made to the seating layout or other accessibility features at the twelve theaters listed for inspection. The United States also insisted that, if AMC had already altered any of these twelve theaters, that it provide the United States with documents discussing the specific changes that had occurred and the exact conditions of the theater prior to the alteration. (See Exhibit I, United States' Sept. 21st letter).

13. On September 28, 2000, Defendants informed the United States that "AMC never promised . . . that it would cease improving its facilities" and that it believes it is free to make "any access improvements to our facilities." Defendants declined to provide any details as to what changes, if any, they had already made or were planning to make at these theaters. (See Exhibit C, AMC's Sept. 28th letter). On October 3, the United States asked Defendants' counsel by telephone if Defendants would refrain from altering the wheelchair spaces and seating layout at the twelve theaters prior to inspections. Defendants' counsel refused. The United States informed Defendants' counsel that it would take this issue before the District Court for resolution. (See Russ Decl., at ¶ 4-5).

14. Defendants have erroneously mischaracterized the United States' request as an attempt to prevent improvements at AMC's theaters. (See Exhibit C, AMC's Sept. 28 letter). The issue in this motion is Defendants' obligation to preserve evidence under its control prior

to the completion of inspections by the United States at each of the twelve theaters, mandated by this Court, since at least the time the United States filed its complaint (January 29, 1999), if not earlier.[5] See West, 167 F.3d at 779 (requiring preservation of evidence "in pending or reasonably foreseeable litigation"). Once the United States has completed its inspections of AMC's theaters, AMC is free to make alterations to each particular theater, with the exception of the Promenade 16 and the Norwalk 20 in the Central District of California. During a February 24, 2000, conference call, this Court said that it would resolve at a later date the question of whether a jury will be permitted to visit one of these theaters, and Defendants have an obligation not to spoliate or tamper with any evidence that may be presented to the jury.

15. Defendants' claims in their September 28, 2000, letter that they are simply trying to improve their theaters' accessibility is further undercut by their failure to inform the United States that they intended to alter their theaters prior to inspections. (See Exhibit C). The United States only learned of plans to alter the Promenade 16 when it uncovered the May 30th document among others documents turned over by AMC; Defendants have since refused to disclose whether those changes have actually been made, or whether they have altered any of the other theaters listed for inspection.[6]

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[5] The United States conducted very short inspections of Norwalk and Woodland Hills on August 6-7, 1997. At that point, AMC was arguably on notice that litigation over its compliance with the ADA was "reasonably foreseeable." See West, 167 F.3d at 779.

[6] Under Section 303 of the ADA, Defendants have an obligation to design and construct all of their new stadium-style theaters to be "readily accessible to and usable by individuals with disabilities" from their opening. See 42 U.S.C. § 12183; see also 28 C.F.R. pat 36, App. A, § 4.1 ("All areas of newly designed or constructed buildings and facilities . . . shall comply with these guidelines"); see also 28 C.F.R. § 36.401 (defining new construction as "facilities for first occupancy after January 26, 1993"). To the extent Defendants' September 28, 2000, letter (Exhibit C) admits that AMC's stadium-style theaters need "improving" to better comply with the ADA, Defendants are effectively admitting that these theaters—all of which are new construction as defined by 28 C.F.R. § 36.401— were not in compliance with the ADA and its regulations at the time the United States filed its complaint.

ARGUMENT

17. The standard for determining whether a TRO should be granted is similar to the standard for a preliminary injunction. See Uarco Inc. v. Lam, 18 F. Supp. 2d 1116, 1120 (D. Hawaii 1998). To obtain a preliminary injunction, the moving party must demonstrate "either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." Chalk v. United States District Court, 840 F.2d 701, 704 (9th Cir. 1988). The grant or denial of a motion for preliminary injunction "lies within the discretion of the district court, and its order will be reversed only if the court relied on an erroneous legal premise or otherwise abused its discretion." Id. The United States is likely to succeed on the merits of this motion, in that altering wheelchair seating areas and other accessibility features at theaters prior to completion of inspections clearly constitutes spoliation of the evidence, and the United States will be irreparably harmed if the evidence is not preserved, because it will not be able to present the evidence of violations of the ADA as they existed when the complaint was filed. Id.

Defendants' Actions Clearly Constitute Spoliation of the Evidence.

18. Defendants have an on-going obligation to preserve its property for use as evidence "in pending or reasonably foreseeable litigation." See West, 167 F.3d at 779. At a minimum, this means Defendants had an obligation to preserve evidence relating to accessibility at its theaters at least from January 29, 1999, when the United States filed this lawsuit. Courts seek to deter parties from spoliating evidence, in part based on the notion that a party who seeks to destroy evidence is more likely to be threatened by that evidence than a party who does not destroy it. See Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991); see also West, 167 F.3d at 779 ("It has long been the rule that spoliators should not benefit from their wrongdoing. . . .").

19. Likewise in this case, Defendants have been on notice that the United States intended to inspect AMC's theaters for purposes of gathering evidence relating to AMC's compliance with the ADA. Any effort to alter that evidence at these theaters—particularly in light of Defendants' assertion that it lacks as-built drawings that accurately reflect the theaters'

layout—suggests that AMC feared that the evidence at its theaters was unfavorable to its defense against the United States' lawsuit.[7]

20. The proposed changes in the May 30th document clearly indicate that AMC is attempting to alter evidence that it unfavorable to its defense of this lawsuit. For example, in Auditorium ten, the plan calls for adding two new wheelchair seats in an auditorium that currently has 193 seats and only two wheelchair spaces. (See Exhibit B, the eighth unmarked page). Under Standard 4.1.3., auditoriums with between 51 to 300 seats must have four wheelchair locations. 28 C.F.R. pt. 36, App. A, § 4.1.3(19). As new construction, auditorium ten should have had the four locations from the time of its opening. AMC is clearly trying to improperly affect the outcome of the United States' inspections, by attempting to bring the number of wheelchair locations in auditorium ten into compliance with Standard 4.1.3.

21. The relief sought by the United States is appropriate under the circumstances. The District Court has "broad discretion in crafting a proper sanction for spoliation," although the sanction "should be molded to serve the prophylactic, punitive and remedial rationales underlying the spoliation doctrine." West, 167 F.3d at 779; see also Glover, 6 F.3d at 1329("A federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence."); Donato v. Fitzgibbons, 172 F.R.D. 75, 81 (S.D.N.Y. 1997) ("It is well settled that the Court has the inherent power to sanction a party that destroys relevant and discoverable evidence."). The injunction sought by the United States would prevent further destruction and alteration of evidence at the theaters listed for inspection. Furthermore, ordering Defendants to identify
what changes they have made since at least January 29, 1999, and the exact condition of the theaters prior to those alterations, would restore "the prejudiced party [here, the United States] to the same position he would have been in absent the wrongful destruction of evidence by the

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[7] AMC could have avoided this motion by simply providing final "as built" blueprints for the theaters in question, along with detailed plans describing the changes to the accessible features of these theaters. AMC has maintained, however, that it does not have any "as built" blueprints for its theaters.

opposing party."[8] West, 167 F.3d at 779 (quoting Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)); see also Donato, 172 F.R.D. at 81-82.

The United States Will Suffer Irreparable Injury If the Spoliation Is Not Stopped.

22. Because Defendants have told the United States that they lack accurate as-built plans of their theaters, the United States has no way of knowing whether the plans that AMC has turned over to the United States actually reflect how each theater was constructed. The United States sought inspections in part to accurately record the design and layout of AMC's theaters, and to measure AMC's compliance with the ADA and its implementing regulations. The United States' ability to collect evidence is undermined if Defendants are free to attempt to alter those theaters prior to the completion of inspections. Without as-built drawings to compare the original state of the theaters, the United States will have no way of distinguishing whether the measurements it is taking reflect the actual state of theaters at the time it filed its complaint or whether the measurements have been affected due to post-litigation attempts by Defendants to lessen the extent of their ADA violations at their theaters. The United States, and the public interest in assuring that newly constructed theaters are accessible, will be irreparably harmed if Defendants do not identify the changes they have made and are not enjoined from further spoliation.

The Balance of Hardships Tips Strongly in the United States' Favor.

23. As noted above, the United States will be irreparably harmed by Defendants' failure to cease spoliating the evidence. Defendants, in contrast, are simply being asked to hold off altering accessibility features at these theaters until the inspections for those theaters are

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[8] At the appropriate time, the United States will also seek an instruction allowing the jury to draw an adverse inference against the Defendants for attempting to change their theaters prior to inspections. "Generally, a trier of fact may draw an adverse inference from the destruction of evidence relevant to a case." Akiona, 938 F.2d at 161. In this case, the jury can properly infer that Defendants would not be attempting to alter their theaters' wheelchair spaces, prior to inspections, unless they feared that they were not in compliance with the law. Under Ninth Circuit precedent, a finding of bad faith is not a prerequisite for drawing such an adverse inference; "simple notice" to Defendants of the evidence's potential relevance to the litigation will suffice. Glover, 6 F.3d at 1329.

completed (with the exceptions of Norwalk and Promenade, where Defendants are being asked to hold off until such time as either a jury has the chance to visit those theaters, or this Court determines that such a visit will not occur). Given that these theaters, as new construction, should have been in compliance from their very opening (see discussion above), asking Defendants to temporarily delay making alterations at these theaters until the United States can accurately record evidence does not present any burden or hardship on Defendants. (See Exhibit J, United States' Oct. 2, 2000 letter).

CONCLUSION

For the foregoing reasons, the United States asks the Court to issue a temporary restraining order, preventing Defendants from further spoliating evidence of seating layout and accessibility at the twelve theaters listed for inspection in Magistrate Judge Hillman's June 16th Order. The United States also asks the Court to enjoin Defendants to identify what changes they have made since January 29, 1999, to the theaters listed for inspections and the exact condition of those theaters prior to the alterations. The United States also requests this Court to issue an order for Defendants to show cause as to why the TRO should not become a preliminary injunction, until the United States' inspections at AMC's theaters are completed.

Respectfully submitted,

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Dated: October 4, 2000

PROOF OF SERVICE

I, John A. 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 October 4, 2000, I served

PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF ITS EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER TO PREVENT SPOLIATION OF THE EVIDENCE BY DEFENDANTS

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 depositing the same with common carrier Federal Express for overnight delivery.

Date and Place of service: October 4, 2000, Washington, D.C.

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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: October 4, 2000, at Washington, D..C.

_____
John A. Russ IV