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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' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER FROM DEFENDANT'S NOTICES OF DEPOSITION OF FIVE DEPARTMENT OF JUSTICE EMPLOYEES DATE: April 15, 2002 TIME: 2:00 p.m. JUDGE: Magistrate Judge Stephen J. Hillman DISCOVERY CUTOFF: May 1, 2002 PRE-TRIAL CONFERENCE: Sept. 16, 2002 TRIAL DATE: Oct. 22, 2002

On March 21, 2002, the United States filed a motion for a protective order from AMC Entertainment, Inc.'s ("AMC") deposition notices issued to five current and former Department of Justice [hereinafter "DOJ" or "Department"] employees. In its portion of the joint stipulation, AMC (i) attempts to avoid application of law of the case principles; (ii) claims that AMC does not bear the burden to justify deposing DOJ opposing counsel; and (iii) asserts that collateral estoppel precludes the United States from seeking the instant protective order based on non-final and unpublished discovery orders from another ADA action to which AMC is not a party. In addition, in its portion of the Joint Stipulation, AMC requests sanctions against the United States on the ground that DOJ acted in "bad faith" when filing its motion for protective order. AMC's arguments are meritless.[1]

1. <u>AMC's Attempt to Avoid Application of Law of the Case Principles Are Meritless.</u> Without addressing – or even distinguishing – the "law of the case" principles cited by DOJ, AMC simply claims that law of the case does not apply here because: (i) the United States' current counsel was allegedly "not even associated with this action" at the time this Court's discovery rulings were issued in 2000; and (ii) these prior rulings do not expressly preclude AMC from deposing DOJ employees. Joint Stip. at 5, 46-47. This Court's prior discovery rulings upholding the United States' privilege claims and otherwise limiting the scope of discovery in this action, however, are not so easily dispatched. First, nowhere does AMC cite any caselaw for its novel proposition that a party's counsel must be the same at all times during the litigation for law of the case principles to apply. Simply put, this argument is frivolous since the law of the case doctrine depends on the identity of issues, not counsel. Joint Stip. at 14-15.[2]

AMC's second argument against applying law of the case principles is equally deficient. As an initial matter, it is not surprising that the Court in 2000 did not *expressly* preclude AMC from deposing

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[1] In addition, many of the "facts" as laid out in the sworn declaration of AMC's counsel, Gregory Hurley, either (i) constitute thinly veiled legal arguments, (ii) lack any support in the evidence or the events of this litigation, or (iii) are simply misleading and not true. <u>See</u> Declaration of Gretchen Jacobs In Support of Supplemental Memorandum ("Jacobs Dec.") (dated April 3, 2002).

[2] In any event, AMC's contention that DOJ's current counsel were "not associated with" this action in 2000 is false. One of the current DOJ trial counsel was present at several of these discovery hearings. <u>See</u> Declaration of John A. Russ IV In Support of Supplemental Memorandum ("Russ Dec.") ¶ 3 (dated April 3, 2002). Another DOJ counsel, while not present at these hearings, has nonetheless read the certified transcripts for each of these discovery hearings. Jacobs Dec. ¶ 6.

DOJ employees since, at that time, AMC had not even issued any Rule 30(b)(1) deposition notices of DOJ employees. Jacobs Dec. ¶ 10. Rather, the parties' discovery battles in 2000 focused on the propriety of the DOJ's interrogatory responses and document requests. Joint Stip. at 7-10. The fact that the Court's rulings in 2000 arose out of discovery disputes concerning written discovery, however, in no way undermines the applicability of law of the case principles. The law of the case doctrine stands for the common-sense principle that the same *issue* presented a second time in the same case in the same court should lead to the same result. Joint Stip. at 15. Here, AMC's five disputed deposition notices raise the same *issues* addressed by this Court's prior discovery rulings – namely, the discoverability of information held by the United States (or its employees) that is protected by the work product, deliberative process, settlement negotiation, and law enforcement investigative privileges, or that is otherwise protected from disclosure. App. I, Ex. 16 (June 200 Minute Order). Law of the case principles foreclose AMC from seeking through oral deposition information that the Court has already ruled to be privileged, or otherwise protected from disclosure, when the information was in written form. See United States v. Alexander, 106 F.3d 874, 876-77 (9th Cir. 1997) (holding prior evidentiary ruling in same action to be law of the case).

AMC's arguments ignore and/or mischaracterize the substance of many of the Court's prior discovery rulings in this case. For example, AMC claims that DOJ has issued conflicting interpretations of Standard 4.33.3, and that, as a consequence, AMC should be permitted to depose DOJ witnesses relating to other assembly areas such as sports arenas. See Joint Stip. at 48. However, in its June 2000 Minute Order, this Court expressly rejected both of these arguments. App. I, Ex. 16, ¶ 6; see also United States v. Farley, 11 F.3d 1385, 1391 (7th Cir. 1993).[3] Likewise, AMC's argument that the deliberative

[3] In addition, equitable estoppel rarely lies against the federal government. Joint Stip. at 33-35. This Court should reject AMC's attempt to create a post-hoc reliance argument through depositions of DOJ counsel, as AMC should already know the past DOJ conduct upon which it supposedly relied. Moreover, AMC's "examples" of allegedly inconsistent materials are fundamentally flawed. AMC cites comments made by DOJ attorney Joseph Russo at a Florida workshop in 1997, id. at 55-56, but ignores his statements that "I'm not taking any positions at all for the Department today" and that "[n]obody runs into the movie theater to see Terminator 200 and runs to the front seat so that they can get neck strain[.]" App. III, Ex. 56 at AMCP0338. AMC also cites to a document that it claims to be DOJ guidelines on wheelchair seating. See Joint Stip. at 55; App. III, Ex. 55 (AMCP0630). In fact, the document—which does not identify its author—is a proposal made by a private advocacy group and was given to the Department; it does not reflect DOJ's position. See Jacobs Dec. ¶ 16.

process privilege cannot apply to decisions made after the promulgation of Standard 4.33.3 in 1991, Joint Stip. at 53, ignores this Court's ruling upholding this privilege as applied to the United States' "additional, subsequent decisions as to the enforcement of the standard in Technical Assistance publications, and with regard to decisions to commence investigations and lawsuits." App. I, Ex. 16 at ¶ 8. AMC even claims that DOJ failed to make a formal claim of privilege by the head of the Department, Joint Stip. at 54, n.20, despite the fact that DOJ previously filed the declaration of the Assistant Attorney General asserting the deliberative process and other privileges during the parties' discovery disputes in 2000. App. I, Ex. 11A. Finally, AMC selectively quotes from the February 2000 Order to justify obtaining information on communications with theater owners, Joint Stip. at 47, yet it ignores the fact that (i) DOJ did turn over public information on its communications with theater owners, App. I, Ex. 19, and (ii) two subsequent orders in this case rejected AMC's efforts to compel further responses on such communications. App. I, Ex. 16, at 15; App. II, Ex. 23, ¶ 5. In light of these considerations, the Court should preclude AMC from re-litigating the privilege and other discovery issues that are now law of the case.[4]

2. AMC Fails to Carry Its Heavy Burden of Justifying the Depositions of DOJ's Counsel.

Courts strongly disfavor allowing depositions of opposing counsel, and the party that seeks to depose an opposing counsel bears a heavy burden to justify the deposition. Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) (requiring party seeking deposition to meet three-factor test). Undoubtedly, AMC's "task in preparing for trial would be much easier if [it] could . . . simply depose opposing counsel in an attempt to identify the information that opposing counsel has decided is relevant and important to his legal theories and strategy," yet AMC cannot meet any of the Shelton factors for

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Finally, on the issue of sports arenas, AMC claims that DOJ advised AMC that it would use the DOJ's technical assistance materials relating to sports arenas in the prosecution of its case against AMC. Joint Stip. at 40; Hurley Dec. ¶ 19. AMC fails to cite to any specific letter or conversation to support this assertion; in fact, counsel for DOJ did not make this or any similar statements. See Jacobs Dec. ¶ 12; Russ Dec. ¶ 4; Declaration of Jeanine Worden ¶¶ 2-3 (dated April 1, 2002).

[4] In addition, AMC's document requests attached to four of the five notices improperly attempt to re-litigate the Court's June 2000 Order. Joint Stip. at 61-63. Although AMC claims it is not seeking duplicative documents, id. at 64, the United States has turned over the non-privileged documents responsive to their prior requests. Id. at 8. The only remaining documents are those already found to be privileged by the Court. Compare App. II, Ex. 33 (document request in notice for Philip Breen seeking communications with movie theater groups) with June 2000 Order at 1 and ¶ 5 (denying Defendants' motion to compel further discovery, including communications with movie theater groups).

allowing depositions of opposing counsel, including that the material be non-privileged.[5] Id. at 1327. While AMC claims it does not seek work product, AMC argues it should have Section Chief John Wodatch's testimony on his legal theory of Standard 4.33.3, by describing him as the "author" of an *amicus* brief filed in a private lawsuit in Texas, see Joint Stip. at 5, 38, notwithstanding the fact that a group of attorneys participated in the drafting of that brief. Nothing could be more protected by the work product doctrine than the mental impressions and legal theories of attorneys preparing a brief in litigation.[6] Hickman v. Taylor, 329 U.S. 495, 510 (1947).

3. DOJ Is Not Bound by Non-Final and Unpublished Discovery Orders Issued in the Hoyts Litigation. Without citing to legal authority, AMC baldly contends that DOJ should be collaterally estopped from "re-litigating" issues that have allegedly "been litigated and rejected in identical motions" in Hoyts. Joint Stip. at 3-4, 45-46. AMC's estoppel claim against the United States is meritless. First, since AMC is not a party to the Hoyts action, collateral estoppel is inapplicable; the federal government can only be estopped when there is mutuality of the parties – i.e., the litigants in the first and second actions are the same. See, e.g., United States v. Mendoza, 464 U.S. 154, 159-163, 104 S. Ct. 568, 572-574 (1984) (discussing prudential considerations and holding that nonmutual offensive collateral estoppel does not apply against the federal government); American Fed'n of Gov't Employees v. FLRA, 835 F.2d 1458, 1462 (D.C. Cir. 1987) ("Collateral estoppel will apply against the government only if mutuality of parties exists."); Hercules Carriers, Inc. v. Claimant State of Florida, 768 F.2d 1558, 1578-79 (11th Cir. 1985) (applying Mendoza and holding that nonmutual defensive collateral estoppel cannot be applied to the federal government); Reich v. D.C. Wiring, Inc., 940 F. Supp. 105, 106-07 (D. N.J. 1996) (same).[7]

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[5] The Johnston case, cited by AMC, acknowledges that courts must be cautious in permitting depositions of opposing counsel "where the subject matter of the deposition would be likely to be heavily intertwined with privileged or confidential information." Johnston Develop. Group, Inc. v. Carpenters Local Union No. 1578, 130 F.R.D. 348, 352 (D. N.J. 1990). Unlike Johnston, where the attorney-client privilege had been waived for one of the potential deponents, id. at 354, the United States has not waived any of its privileges. June 2000 Order ¶ 8.

[6] Moreover, the decision-making process behind drafting a brief and deciding to file a brief are protected by the deliberative process privilege. See, e.g., June 2000 Order at ¶ 2.

[7] Mendoza identifies two types of collateral estoppel – offensive and defensive. Offensive collateral estoppel occurs when a plaintiff seeks to preclude a defendant from relitigating an issue that the defendant has unsuccessfully litigated in another action, while defensive collateral estoppel involves

Second, even assuming AMC could overcome this hurdle, collateral estoppel is still improper, because it cannot exist unless "'an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.'" Arizona v. California, 530 U.S. 392, 414 (2000); see also 18 Charles A. Wright et al., Federal Practice and Procedure § 4416 (1988). Here, the "rulings" cited by AMC plainly fall outside these requirements, as (i) the Hoyts court issued no written rulings to accompany the cited discovery orders, thereby making it impossible to discern what issues were actually and necessarily determined by the court; (ii) the matters at issue in Hoyts were not, in any event, identical to the issues raised by DOJ's instant motion for protective order since none of the five DOJ employees that AMC seeks to depose here were the subject of the motions for protective order in Hoyts; and (iii) non-final and unpublished discovery orders, such as those in Hoyts, lack the finality necessary for application of collateral estoppel.[8] See App. III, Ex. 51; Jacobs Dec. ¶ 3; Kay-R Electric Corp. v. Stone & Webster Constr. Co., Inc., 23 F.3d 55, 59 (2nd Cir. 1994) (holding that unpublished ruling denying motion for summary judgment lacked finality necessary for the application of collateral estoppel).

4. AMC's "Motion" for Sanctions Against the United States is Procedurally Improper and Meritless. AMC's assertions notwithstanding, DOJ filed the instant motion for protective order as soon as it became apparent that the parties' meet-and-confer efforts were not going to resolve their discovery dispute over the five deposition notices. See Jacobs Dec. ¶¶ 8-9. AMC's unsupported claim that DOJ was dilatory in filing this motion is frivolous and should be summarily rejected.[9]

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the reverse – a defendant seeking to bar a plaintiff from relitigating issues. See 464 U.S. at 158 & n.3. AMC here seeks to use nonmutual defensive collateral estoppel to bar DOJ's motion for protective order based on discovery orders in the Hoyts case. In Mendoza, the Supreme Court rejected the application of nonmutual *offensive* collateral estoppel against the government since such a finding "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." Id. at 160. As noted above, federal appellate and district courts have applied Mendoza to foreclose nonmutual *defensive* collateral estoppel for the same prudential and policy reasons.

[8] In addition, the discovery orders in Hoyts were, of course, issued without benefit of the law of the case considerations that apply here in light of this Court's prior discovery rulings. See supra pp. 1-3.

[9] AMC's "motion" for sanctions is also procedurally improper because, rather than filing a separate notice of motion as required by Local Rule 37-2, AMC instead attempts to "piggy-back" its sanctions request on the United States' motion for protective order.

DATED: April 3, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2002, true and correct copies of **Plaintiff United States' Supplemental Memorandum in Support of Its Motion for Protective Order From Defendant's Notices of Deposition of Five Department of Justice Employees** were served by Federal Express, postage pre-paid, on the following parties:

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