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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 MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' AFFIRMATIVE DEFENSES JUDGE: Hon. Florence Marie Cooper DATE: October 21, 2002 TIME: 10:00 a.m.

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I. PRELIMINARY STATEMENT

The United States moves pursuant to Rule 56(c) of the Federal Rules of Civil Procedure for partial summary judgment on defendants', AMC Entertainment, Inc. and American Multi-Cinema, Inc. (hereinafter collectively referred to as "AMC"), Affirmative Defense Nos. 2-13, and 17-25 on the grounds that these defenses are not supported by the law or facts of this case and, therefore, are now appropriate for summary judgment. In response to the United States' Complaint against AMC for violations of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, in the design, construction, and operation of its stadium-style theaters, AMC filed an Answer in which it asserted twenty-six affirmative defenses, twenty-one of which are at issue in this motion. (See Answer, Affirmative Defenses & Countercl. (Jury Trial Demanded)(filed April 13, 1999)(Docket # 5)(respectively "Answer" or "Counterclaim").) These twenty-one affirmative defenses are littered with boilerplate defenses, legally deficient defenses, and defenses wholly lacking in factual support. Specifically, AMC's APA-based affirmative defenses (Affirmative Defense Nos. 2, 18-22) should be dismissed because they are barred by law of the case principles and the doctrine of collateral estoppel. Moreover, AMC's equitable estoppel, judicial estoppel, waiver, laches, jurisdiction, mitigation and unclean hands defenses (Affirmative Defense Nos. 3-7,10, 13, 17, 23-25) lack any factual support. Finally, AMC's statute of limitations, collateral estoppel, res judicata, third party negligence, and privilege defenses (Affirmative Defense Nos. 8-9, 11-12) fail, as a matter of law, to state legally viable defenses. Accordingly, the United States' motion for partial summary judgment regarding AMC's affirmative defenses should be granted.

II. FACTUAL AND STATUTORY BACKGROUND

A. Americans With Disabilities Act

Congress enacted the ADA in 1990 to remedy pervasive and continuous discrimination against persons with disabilities. See 42 U.S.C. § 12101(a)-(b); see generally PGA Tour, Inc. v. Martin, 532 U.S. 661, 674-77, 121 S. Ct. 1879, 1889-1890 (2001). Of particular relevance to this action, Title III of the ADA expressly prohibits disability-based discrimination by public accommodations and commercial facilities. See 42 U.S.C. §§ 12181-12189. More specifically,

Title III requires so-called "newly constructed" public accommodations (i.e. - covered facilities designed or constructed for first occupancy after January 26, 1993) to be "readily accessible to and usable by" persons with disabilities. See 42 U.S.C. § 12183(a)(1); see also id at § 12182(a) (forbidding disability-based discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation"). Movie theaters -- such as the theaters owned or operated by the AMC defendants -- are expressly encompassed within Title III's non-discrimination mandate. Id. at § 12181(7)(C) (defining the term "public accommodation" to include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment").

Congress granted primary enforcement authority of Title III of the ADA to the United States Department of Justice [hereinafter "Department" or "DOJ"), including the responsibility for promulgating regulations, issuing technical assistance materials, and filing lawsuits in federal court to enforce compliance with the statute and accompanying regulations. 42 U.S.C. §§ 12186(b), 12206, 12188(b). In 1991, pursuant to this regulatory authority, the Department issued final regulations to govern new construction of, and alterations to, Title III-covered facilities. See 28 C.F.R. §§ 36.101 - 36.608 & App. A; see also 56 Fed. Reg. 35,546 (July 26, 1991). One of these regulations is Standard 4.33.3, which governs the placement and location of wheelchair and companion seats in public assembly areas such as movie theaters. Standard 4.33.3 provides, in pertinent part, that

> [w]heelchair 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 case of 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.

28 C.F.R. Pt. 36, App. A § 4.33.3 (1994) [hereinafter "Standard 4.33.3"].

B. AMC Litigation: Factual and Procedural Summary

In 1995, AMC opened a new 24-screen theater complex in Dallas, Texas called the Grand 24. See United States' Statement of Uncontroverted Facts and Conclusions of Law ¶ 3 (filed Sept. 30, 2002) [hereinafter "U.S. Facts"]. The Grand 24 employed a new type of theater design

whereby, rather than placing rows of seats on a gradually sloping floor, all but a few rows of seats at the front of each theater nearest the screen were placed on a series of seating platforms or risers (up to 18 inches in height) to elevate the seats off of the floor. (U.S. Facts ¶¶ 4-6.) Access to these seats on risers was accomplished by climbing stairs, rather than walking up or down sloped aisles. (Id. ¶ 7.) This risered-seating design is generally referred to in the theater industry as "stadium-style seating" or "stadium seating." (Id. ¶ 9.) At the Grand 24, all but the four largest theaters locate wheelchair and companion seating in the rows on the sloped floor portion of the theater nearest the screen, rather than in the far more desirable and heavily-promoted stadium-style seating section. (Id. ¶ 8.)

AMC's opening of the Grand 24 was followed immediately by the opening of several other AMC stadium-style theater complexes, including the Promenade 16 in Woodland Hills, California and the Norwalk 20 in Norwalk, California. (Id. ¶ 10.) The majority of theaters at the Promenade 16 and the Norwalk 20 theater complexes employed the same type of stadium-style theater design whereby wheelchair and companion seating was located in the first few rows of the theater nearest the screen, rather than in the stadium-style seating section. (Id. ¶ 11.) Indeed, the Grand's stadium-style seating concept proved so popular with theater patrons -- and so profitable for AMC -- all but one of the 83 theater complexes constructed or altered by AMC since May 1995 has incorporated stadium-style seating. (Id. ¶¶ 12-14.)

In 1997, the Department of Justice began investigating complaints by patrons with disabilities and their companions that AMC was violating the ADA by, inter alia, placing wheelchair seats on the sloped floor portion of the theater in close proximity to the screen, with non-comparable and less desirable lines of sight than those found in the non-accessible stadium-style seating section. (Id. ¶ 15.) Approximately one year later, in 1998, the Department of Justice advised AMC that its theaters with stadium-style seating violated Title III of the ADA, and cautioned that, if the parties were not able to reach a negotiated agreement, the Civil Rights Division had been authorized to commence an enforcement action. (Id. ¶ 16.) Between June 1998 and January 1999, the parties met and exchanged correspondence in an unsuccessful attempt to resolve the matter. (Id. ¶ 17.)

In January 1999, the United States commenced this action against AMC alleging that it had engaged in a pattern or practice of violating Title III of the ADA, 42 U.S.C. §§ 12181-12189, in the design, construction, and operation of movie theaters with stadium-style seating across the country. (See Compl. for Declaratory & Inj. Relief, Compensatory Damages, & Civil Penalties (filed Jan. 29, 1999)(Docket # 1)("Complaint").) Although this Complaint alleges numerous ADA violations, one of several important issues concerns the United States' allegation that AMC has failed to provide patrons who use wheelchairs (and their companions) with seats that are "an integral part of any fixed seating plan and . . . [that provide] lines of sight comparable to those for members of the general public." Standard 4.33.3. In short, the United States alleges that, in the vast majority of the stadium-style movie theaters at issue in this case, AMC impermissibly relegates patrons who use wheelchairs (and their moviegoing companions) to seats in the less desirable traditional sloped-floor section with its inferior lines of sight, while other members of the public have access to seats in the more desirable stadium-style section that offer far superior lines of sight. (See, e.g., Complaint ¶ 3.)

In April 1999, AMC filed its answer to the United States' initial complaint and an accompanying one-count counterclaim seeking declaratory relief. (See Answer & Counterclaim.) In this Counterclaim, AMC alleged that the Department had adopted a "new" substantive interpretation of Standard 4.33.3 in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 552, 53. (Counterclaim ¶ 6.) More specifically, AMC asserted that, when Standard 4.33.3 was initially promulgated, the Department allegedly accepted the industry's view that the regulation's comparability mandate was properly interpreted as requiring "only an unobstructed view of the screen." (Id. at ¶ 9, see also id. ¶¶ 8 & 12.) AMC claimed that it constructed the Grand and other theater complexes "in accordance with and in reliance on" the Department's purported initial interpretation of Standard 4.33.3. (Id. ¶ 12.)

In June 1999, the United States moved to dismiss AMC's Counterclaim on several grounds. (See Pl. United States' Mem. In Supp. of Its Mot. to Dismiss Defs.' Countercl. (filed June 15, 1999) (Docket # 22) ("U.S. Dismiss Mem.").) First, the United States argued that the Department's interpretations of Standard 4.33.3, whether made in the course of this or any other

enforcement action, do not constitute "final agency action" subject to APA review. (See U.S. Dismiss Mem. at 8-12.) Second, the United States asserted that, in any event, this Court lacked jurisdiction because AMC had an "adequate remedy" within the meaning of APA § 704 to challenge the Department's interpretation of Standard 4.33.3 in the underlying action. (See id at 12-13.)

In December 1999, this Court granted the United States' Motion to Dismiss AMC's Counterclaim. (See Order Granting Pl.'s Mot. to Dismiss Defs.' Countercl. (filed Dec. 16, 1999) (Docket # 51) ("Dismissal Order").) Rejecting AMC's finality claims, the Court held that none of the Department's actions following the promulgation of Standard 4.33.3 – including the filing of *amicus* briefs in private theater litigation, corresponding with theaters owners, or filing of enforcement actions against theater owners (such as AMC) – constituted "final agency action" subject to judicial review under the APA. (Dismissal Order at 9-14.) The Court also concluded that, in any event, AMC had an adequate remedy at law "in that it may assert violation of the APA as a defense to DOJ's enforcement action against it." (Id. at 14.) Thus, because AMC had failed to establish the jurisdictional prerequisites for APA review, the Court dismissed AMC's counterclaim for lack of subject matter jurisdiction. (Id. at 17.)

C. AMC's Texas Action: Redux of APA Claims

At the same time the parties were litigating AMC's counterclaim in this action, AMC became a party to another APA-based challenge to the Department's interpretation of Standard 4.33.3 in a separate action in Texas, Cinemark USA, Inc. v. United States Dep't of Justice, C.A. No. 3:99-CV-0183-L (January 28, 1999). In March 1999, only two months after the commencement of the Cinemark action, AMC moved to intervene as a party-plaintiff. (AMC Mot. to Intervene, Decl. & Exs. in Supp. of Pl. U.S.' Mot. for Partial S.J. on Defs.' Affirmative Defenses, Ex.16.)[1] As in the AMC litigation, AMC's Cinemark complaint alleged that the defendant Department of Justice had violated the APA (and the United States Constitution) by

[1] All exhibits referenced in this memorandum have been attached to the United States' Declaration and Exhibits in Support of Plaintiff United States' Motion for Partial Summary Judgment on Defendants' Affirmative Defenses.

purportedly promulgating "new" substantive interpretations of Standard 4.33.3 without following notice and comment requirements:

> This suit challenges the United States Department of Justice's adoption and attempted enforcement of various "interpretations" with respect to [Standard 4.33.3]. These "interpretations" set forth new, stricter requirements for compliance with the Americans With Disabilities Act Accessibility Guidelines (ADAAG) and conflict with prior "interpretations" espoused by the Department with respect to the application and meaning of the ADAAG. Each new "interpretation" constituted a substantive change in the regulations adopted and are therefore null and void due to the Department's failure to comply with the Administrative Procedures Act (APA). . . . [The Department has] acted in a manner that is beyond their legal and statutory authority and in violation of the United States Constitution. The promulgation without notice and retroactive application of these positions constitutes a denial of AMC's due process rights and unlawful taking of its property in violation of the United States Constitution.

(AMC Cinemark Complaint ¶ 1, Ex. 17.) In July 1999, the Court granted AMC's intervention motion, and its complaint was accepted for filing. (Order Granting Intervention, Ex. 18.)

The parties to the Cinemark action – i.e., the Department of Justice, Cinemark, and AMC – thereafter engaged in several rounds of briefing on various discovery disputes and dispositive motions, including the Department's Motion to Dismiss both AMC and Cinemark's Complaints. (See Def.'s Mem. In Supp. of Mot. to Dismiss, Ex. 19.) In July 2000, the Cinemark court granted the Department's dismissal motion against both Cinemark and AMC. (Mem. Op. & Order Granting Mot. to Dismiss, Ex. 20 ("Cinemark Dismissal Order").) Relying in part on this Court's December 1999 dismissal order in the AMC action, the Cinemark court held that none of the Department's interpretations with respect to, or enforcement actions under, Standard 4.33.3 formed the requisite "final agency action" necessary for APA review. (Id. at 7-11.) Both the Cinemark and AMC complaints were, therefore, dismissed for lack of subject matter jurisdiction. (Id. at 5,12.)

III. ARGUMENT

AMC'S VARIOUS AFFIRMATIVE DEFENSES FAIL LEGAL REQUIREMENTS ON VARIOUS GROUNDS AND SHOULD BE DISMISSED

A. Summary Judgment Standard

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmovant. Anderson, 477 U.S. at 248. A fact is "material" if it is "relevant to an element of a claim or defense" and its "existence might affect the outcome of the suit" under governing substantive law. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)(citing Anderson, 477 U.S. at 248). Disputes over irrelevant or unnecessary facts the resolution of which would not affect the outcome of the suit are irrelevant to the Court's consideration, and will not preclude the granting of summary judgment. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001)(citing Anderson, 477 U.S. at 248); T.W. Elec. Serv., Inc., 809 F.2d at 630. The moving party bears the burden of showing the absence of any issues of material fact, and the Court views the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. See Celotex, 477 U.S. at 323; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356 (1986). The moving party's burden may be met by "showing . . . that there is an absence of evidence to support the nonmoving party's case." Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000)(quoting Celotex, 477 U.S. at 325). Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party, who may not simply rely on mere allegations in the pleadings, but must instead set forth by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. Id.; T.W. Elec. Serv., Inc., 809 F.2d at 630. "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient" to preclude summary judgment. Arpin, 261 F.3d at 919.

B. Preclusion and Law of the Case Principles Bar AMC From Asserting Its APA-Based Defenses In this Action (Affirmative Defense Nos. 2, 18-22)

AMC has already twice litigated (and lost) the APA-based claims raised in its affirmative defenses. Both this Court and the Cinemark court have conclusively determined that

the Department's interpretation of Standard 4.33.3 does not constitute "final agency action" subject to judicial review under the APA. Preclusion and law of the case principles now prevent AMC from seeking yet a third bite at the litigation apple. Summary judgment should thus be entered in favor of the United States on AMC's APA-based affirmative defenses.

Designed to promote judicial efficiency and finality, the law of the case doctrine stands for the common-sense principle that the *same* issues presented a second time in the *same* case in the *same* court should lead to the *same* result. See, e.g, United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) ("Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court . . . in the identical case."); see also United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000); Mendenhall v. Nat'l Transp. Safety Bd., 213 F.3d 464, 469 (9th Cir. 2000); Goodyear Tire & Rubber v. McDonnell Douglas Corp., 820 F. Supp. 503, 509 (C.D. Cal. 1992). A court may only depart from the law of the case under certain limited circumstances, such as an intervening change in the law or a finding that the first decision was clearly erroneous. See, e.g., Lummi Indian Tribe, 235 F.3d at 452-53; Alexander, 106 F.3d at 876. Failure to apply law of the case principles—absent one of these requisite circumstances—amounts to an abuse of discretion. Alexander, 106 F.3d at 876.

Applying these principles to AMC's APA-based affirmative defenses, it is beyond peradventure that these no longer present viable legal defenses. This Court's December 1999 order dismissing AMC's counterclaim expressly held that none of the Department's action following the promulgation of Standard 4.33.3 – including the filing of *amicus* briefs in private theater litigation, corresponding with theater owners, or the filing (or threats of filing) enforcement actions against theater owners – constituted "final agency action" subject to judicial review under the APA. (See Dismissal Order at 17; see also discussion, supra, at 4-5.) This Dismissal Order is now law of the case and bars AMC from continuing to litigate its APA claims

by way of its affirmative defenses.[2] See, e.g., United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1244, 1246-47 (E.D. Cal. 1997) (prior summary judgment ruling dismissing affirmative defense prevented re-litigation of same affirmative defense later in same action); Goodyear Tire & Rubber v. McDonnell Douglas Corp., 820 F. Supp. 503, 508-509 (C.D. Cal. 1992); (denying motion for summary judgment on law of the case grounds when such motion was "virtually identical" to summary judgment motion denied earlier in same case).

While law of the case principles standing alone provide ample legal basis for entry of summary judgment against AMC on its APA-based affirmative defenses, application of collateral estoppel based on the Cinemark dismissal order sounds the procedural death knell for these defenses. As a general matter, the doctrine of collateral estoppel (i.e. - issue preclusion) prevents re-litigation of all issues of fact that were actually litigated and necessarily decided by a valid and final judgment in a prior proceeding. See, e.g., Arizona v. California, 530 U.S. 392, 414, 120 S. Ct. 2304, 2319 (2000); Robi v. Five Platters, Inc., 838 F.2d 318, 321-22 (9th Cir. 1988); Restatement (Second) of Judgments § 27 (1982) [hereinafter "Restatement"]. Furthermore, once the requirements for preclusion have been satisfied, the determination in the first action is conclusive in any subsequent action between the parties or their privies irrespective of whether the second action involves the same or different claims. See Restatement § 27; see also 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 4416 - 4417 (1981).

Here, the Cinemark dismissal order plainly satisfies all of the conditions for application of collateral estoppel. Both AMC and the Department of Justice were parties to the Cinemark litigation. (See discussion, supra, at 5-6.) Moreover, there can be no question that the Cinemark court "actually and necessarily" determined by a valid final judgment that it lacked subject matter jurisdiction under the APA to adjudicate AMC's claims. (See Cinemark Dismissal Order,

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[2] Indeed, this Court has already deemed its December 1999 Dismissal Order to be law of the case barring re-litigation of the question of whether the court had subject matter jurisdiction over AMC's APA claims. In June 2000, this Court dismissed then-defendant STK Architecture, Inc.'s APA-based counterclaim -- a counterclaim that raised identical APA claims as AMC's then-dismissed counterclaim -- on the ground that its December 1999 Dismissal Order precluded re-litigation of the jurisdictional issues. (See Order Granting Pl.'s Mot. to Dismiss STK's Countercl. (entered June 26, 2000) (Docket # 144).)

Ex. 20 at 7-12.) Since AMC is presently asserting the identical APA claims and jurisdictional bases in this action as in the Cinemark litigation, (see discussion, supra, at 5-6), its APA-based affirmative defenses are now jurisdictionally barred. See, e.g., Okoro v. Bohman, 164 F.3d 1059, 1063 (7th Cir. 1999) (finding that jurisdictional dismissal in first action collaterally estops re-litigation of jurisdiction in second suit); Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1411 (8th Cir. 1984) ("Dismissal of a suit for lack of subject matter jurisdiction precludes re-litigation of the same issue of subject matter jurisdiction in a second federal suit on the same claim."); Hoffman v. United States, 53 F. Supp.2d 483, 492-93 (D.D.C. 1999) (granting summary judgment based on *res judicata* in favor of United States in action arising under the Federal Tort Claims Act when, in an earlier FTCA-based action between the same parties, the Fifth Circuit had already determined that federal courts lacked jurisdiction over plaintiffs' claims); Federal Practice & Procedure § 4402, 4435-36; see generally Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706, 102 S. Ct. 1357, 1367 (1982) (affirming "long recognized" principle that "*res judicata* appl[ies] to questions of jurisdiction as well as to other issues").

Taken together, application of the law of the case doctrine (based on this Court's December 1999 Dismissal Order), and collateral estoppel principles (based on the dismissal of AMC's identical APA claims in the Cinemark action), form an impenetrable legal barrier against AMC's APA-based affirmative defenses in this action. The only remaining issue concerns the scope of these preclusive precedents. Unquestionably, AMC's second affirmative defense – which expressly alleges that the United States' complaint is defective because the Department "failed to comply with the [APA] in promulgating the interpretation of the regulations [it] now asserts in this action" – is precluded by these prior judicial decisions. (Answer ¶ 38.) Moreover, AMC's Affirmative Defense Nos. 18 through 22 must also be deemed to fall within the preclusive ambit of these decisions, since the primary focus of these constitutional defenses, as with Affirmative Defense No. 2, is alleged defects attending the Department's purportedly "new"

interpretation of Standard 4.33.3 at issue in this litigation.[3] For example, Affirmative Defense No. 22 alleges that "enforcement of [the United States'] interpretation of the regulations it purports to enforce would amount to a retroactive application of the law in violation of the United States Constitution." (Answer ¶ 58.) This retroactivity claim necessarily rests on the assumption that the Department's "interpretation" of Standard 4.33.3 that it seeks to "enforce" in this action constituted final agency action with all of the attendant procedural requirements set forth in the APA. Yet with two courts having already fully and finally determined that none of the Department's actions or interpretations following the promulgation of Standard 4.33.3 in 1991 amounted to "final agency action" subject to judicial review, the United States cannot now be held to have impermissibly and retroactively enforced an "interpretation" of that Standard that is not final agency action. This Court should, therefore, enter summary judgment in favor of the United States with respect to all of AMC's APA-based affirmative defenses (Affirmative Defense Nos. 2 & 18-22).

C. AMC Fails to Carry Its Heavy Burden of Demonstrating That the Requisite Exceptional Circumstances Exist to Support an Equitable Estoppel Claim Against the Federal Government (Affirmative Defense Nos. 3, 5, 24)

AMC's affirmative defenses raising equitable estoppel claims prove equally meritless. In these defenses, AMC alleges it "justifiably and in good faith" relied on unspecified "representations" and "directives" by the Department such that the United States is now "estopped from enforcing conflicting interpretations of the regulations . . . in this action." (See Answer ¶¶ 39, 41.) AMC's equitable estoppel claims are meritless, however, because AMC has not satisfied (and cannot satisfy) the virtually insurmountable evidentiary showing necessary to make this affirmative defense in this action.

As an initial matter, equitable estoppel rarely lies against the federal government. Indeed, the Supreme Court as recently as 1990 noted that "we have reversed every finding of estoppel we

[3] Specifically, the constitutional issues raised by AMC's affirmative defenses include allegations of Fifth Amendment violations (Affirmative Defense No. 18), equal protection violations (Affirmative Defense No. 19), vagueness (Affirmative Defense No. 20), overbreadth (Affirmative Defense No. 21), and impermissible retroactivity (Affirmative Defense No. 22). (See Answer ¶¶ 54-57.)

have reviewed." Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 422, 110 S. Ct. 2465, 2470 (1990); see also Rojas-Reyes v. I.N.S., 235 F.3d 115, 126 (2nd Cir. 2000) (noting that doctrine of equitable estoppel "is not available against the government except in the most serious circumstances . . . and is applied with utmost caution and restraint") (internal citations omitted); Harrod v. Glickman, 206 F.3d 783, 793 (8th Cir. 2000) (characterizing Supreme Court jurisprudence as holding that estoppel will "rarely work against the government")(internal citations omitted); Costa v. I.N.S., 233 F.3d 31, 38 (1st Cir. 2000) (noting that estoppel against the government "if it exists at all is hen's-teeth rare"). Thus, not surprisingly, the Ninth Circuit – in accordance with other federal circuits – has held that private litigants asserting estoppel claims against the government shoulder the heavy burden of demonstrating, not only the traditional elements of estoppel, but also that: (i) the government's act or actions constituted "affirmative misconduct;" (ii) such misconduct "threatened to work a serious injustice;" and (iii) the "imposition of estoppel [would] not unduly harm the public interest." See, e.g., Purcell v. United States, 1 F.3d 932, 939 (9th Cir. 1993) (internal citations omitted); accord Rojas-Reyes, 235 F.3d at 125; Costa, 233 F.3d at 38; LaBonte v. United States, 233 F.3d 1049, 1053 (7th Cir. 2000).

Applying the foregoing legal considerations, AMC cannot, as a matter of law, erect a viable equitable estoppel defense. First, and most importantly, AMC's estoppel argument is legally insufficient because it fails to even allege "affirmative misconduct" on the part of Department officials. At most, all that AMC has claimed in various pleadings is that the Department – whether through *amicus* briefs filed in private litigation, settlement agreements with other movie theater companies (such as the United Artist settlement), Technical Assistance manuals, oral statements by Department employees, or other public statements – has put forth allegedly inconsistent interpretations of Standard 4.33.3, and that AMC relied on these allegedly inconsistent interpretations to its detriment. Affirmative misconduct requires much more -- even assuming, as AMC alleges, these statements were indeed misleading or inconsistent. See, e.g., Heckler v. Cmty. Health Servs., 467 U.S. 51, 64-66, 104 S. Ct. 2218, 2223-27 (1984) (holding that United States was not estopped from recouping Medicare overpayment even when plaintiff-

respondent relied to its detriment on erroneous advice by an employee of the federal government's fiscal intermediary); United States v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995)(affirmative misconduct standard requires proof of "affirmative conduct going beyond mere negligence")(internal quotation omitted).[4]

Nowhere does AMC demonstrate that: (i) the United Artists agreement was anything other than a typical settlement agreement between the Department and private litigants; (ii) this Agreement contained "erroneous" advice by the Department regarding Standard 4.33.3; or (iii) AMC's purported reliance on a settlement agreement in a lawsuit to which it was not a party should be considered "reasonable" when designing and constructing multi-million dollar movie theater complexes.[5]

Thus, because AMC has failed to carry its heavy burden of establishing the legal and factual elements necessary to support an estoppel claim against the government, this Court should grant the United States' motion for summary judgment on AMC's Affirmative Defense Nos. 3, 5, and 24.

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[4] Of course, the United States does not concede AMC's claim that the Department has issued conflicting interpretations of Standard 4.33.3. Indeed, Magistrate Judge Hillman already reached quite the opposite conclusion when limiting AMC's APA-related discovery in this action to the administrative record underlying the regulation: "Defendant has not shown inconsistent interpretations by plaintiff of § 4.33.3 with regard to commercial stadium style movie theaters." (Minute Order Denying Defs.' Mot. to Compel, at 3 (June 5, 2000)(Docket #134).)

[5] AMC also asserts in Affirmative Defense No. 24 that the United States' claims are barred because AMC relied in "good faith on the law as it existed at the time of construction" of its facilities. (Answer ¶ 60.) To the extent AMC is claiming that the United States' interpretation of Standard 4.33.3 constitutes law upon which it has relied, the Court, as previously discussed, has held that none of the Department's actions in relation to Standard 4.33.3, including the filing of *amicus* briefs, corresponding with theater owners, or the filing of enforcement actions constitute final agency action, and therefore any analysis contained in those documents is not the law, but only the Department's interpretation of the law. (See Dismissal Order at 17.) Moreover, the United States' interpretation of Standard 4.33.3 as applied to stadium-style theaters has remained consistent over time. Accordingly, summary judgment should be granted in favor of the United States as to Affirmative Defense No. 24 as well. (See Minute Order Denying Defs.' Mot. to Compel Discovery, at 3 (June 5, 2000)(Docket #134)).

D. United States Has Not Expressly or Impliedly Waived Its Claims Against AMC (Affirmative Defenses Nos. 4, 13)

AMC asserts in Affirmative Defense Nos. 4 and 13 that the United States' claims are barred in whole or part by the equitable doctrine of waiver. Despite the dearth of evidence even tending to show that the United States has waived its right to bring this action against AMC, defendants contend that the United States expressly and/or impliedly waived all of its claims against AMC under Title III of the ADA. (Answer ¶¶ 40, 49.) No facts have been produced showing waiver on the part of the United States, and thus AMC does not satisfy the stringent requirements for establishing these affirmative defenses. Accordingly, summary judgment should be granted in favor of the United States as to AMC's Affirmative Defense Nos. 4 and 13.

To establish the defense of waiver against the United States, defendants bear the heavy burden of showing "an intentional relinquishment or abandonment of a known right or privilege." Groves v. Prickett, 420 F.2d 1119, 1125 (9th Cir. 1970). A waiver must be unconditional, and, in contrast to the doctrine of equitable estoppel, the waiver doctrine focuses on the actions and intent of the party alleged to have waived their rights. See Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1559 (9th Cir. 1991); Monterey Bay Unified Air Pollution Control Dist. v. Unites States Dep't of the Army, 176 F. Supp.2d 979, 989 (N.D. Cal. 2001). Courts emphasize that a party cannot establish the waiver of a right absent "a clear showing of an intent to relinquish such right," and that cases where that intention is in doubt are to be decided against a finding of waiver. Wong v. Cal. Franchise Tax Bd., No. C 97-2748, 2000 WL 630878, at *4 (N.D. Cal., May 2, 2000)(finding no waiver of the statute of limitations defense by defendants where parties orally agreed that plaintiff could re-file her dismissed claims, but failed to agree to the terms of a stipulation to that effect), Ex. 26; see also In re United Marine Shipbuilding, Inc., 158 F.3d 997, 1001 (9th Cir. 1998)(holding that inadvertent disbursement by IRS of a tax refund to debtor did not constitute a voluntary and intentional relinquishment by government of its right of setoff with regard to tax refund). AMC has failed to allege any facts or point to any evidence, such as written statements, pleadings, or letters by the Department expressly stating that the United States intends to relinquish its rights to enforce this

action. Nor is AMC able to present such evidence, because throughout the course of its investigation of AMC and the litigation of this case, the United States has consistently and diligently pursued the enforcement of its ADA claims against AMC. (See discussion supra, at 3-4.) Thus, in the absence of any evidence of the United States' intent to knowingly waive its rights, defendants' Affirmative Defense No. 4 fails as a matter of law.

Similarly, AMC has been unable to garner any factual support for its unsubstantiated claim that the United States has impliedly waived its right to bring this action through its "words, representations, actions, inactions or conduct." (Answer ¶ 49.) In order to establish this defense, AMC, at a minimum, must present evidence of conduct that is "clear, decisive and unequivocal of a purpose to waive the legal rights involved." Groves, 420 F.2d at 1126; see also United States v. Amwest Sur. Insur. Co., 54 F.3d 601, 603 (9th Cir. 1995). AMC must also be able to point to facts revealing a clear, unequivocal, and decisive act on the part of the United States that shows a purpose to abandon or waive its legal right to enforce this action. See United States v. Chichester, 312 F.2d 275, 282 (9th Cir. 1963). Such acts must be so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1559 (9th Cir. 1991); see also Central Bank Nat'l Ass'n v. Superior Court, 81 Cal. App.3d 592, 600-01 (Cal. Ct. App. 1978)(conduct "should be so manifestly inconsistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of [the] conduct is possible"). AMC has failed to allege any conduct that clearly, unequivocally, and decisively shows an intentional purpose on the part of the United States to waive its right to enforce Title III of the ADA against AMC, nor is there any evidence of conduct manifesting such an intent on the part of the United States. The United States has consistently sought to enforce its claims against AMC for violations of Title III in the construction and operation of AMC's stadium-style theaters, and has never deviated from the enforcement of that right. Accordingly, Affirmative Defense Nos. 4 and 13 are insufficient as a matter of law, and summary judgment should be granted in favor of the United States.

E. United States' Position In This Case Is Entirely Consistent With Positions It Has Taken In All Other Stadium-Style Theater Cases (Affirmative Defense No. 6)

Although AMC asserts in Affirmative Defense No. 6 that the United States' claims are barred by the doctrine of judicial estoppel, (Answer ¶ 42.), it has once again failed to allege any facts in support of this defense. Because AMC has not met the rigorous requirements for establishing the defense of judicial estoppel against the United States, summary judgment should be granted as to this affirmative defense as well.

Judicial estoppel is an equitable doctrine that is invoked by the Court when "a party's position is 'tantamount to a knowing misrepresentation to or even fraud on the court.'" Johnson v. State of Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998)(quoting Ryan Operations G.P. v. Satiam-Midwest Lumber Co., 81 F.3d 355, 362-63 (3d Cir. 1996)). Aimed at protecting the integrity of the judicial process, judicial estoppel prevents a party from gaining advantage through the manipulative assertion of incompatible positions over the course of judicial proceedings when such positions have an adverse impact on the judicial process. See Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 601 (9th Cir. 1996); Comm. of the Russian Fed'n on Precious Metals & Gems v. United States, 987 F. Supp. 1181, 1183-84 (N.D. Cal. 1997). Judicial estoppel prevents a litigant from playing "fast and loose" with the courts, and is invoked at the court's discretion. Russel v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990); see also American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc., 135 F. Supp.2d 1031, 1046 (N.D. Cal. 2001).

In order to establish the defense of judicial estoppel, AMC must demonstrate "a knowing antecedent misrepresentation" by the United States in a judicial proceeding, which directly contradicts an assertion that has been tendered to this Court. Wyler Summit P'ship v. Turner Broad. Sys., Inc., 235 F.3d 1184, 1190 (9th Cir. 2000). The United States' current position must be so "manifestly inconsistent with a prior position," as to constitute "an affront to the court." Id.(internal citations omitted). Absent chicanery or the intent to gain advantage by misleading the court, judicial estoppel does not apply. Johnson, 141 F.3d at 1369. Thus, alternative positions taken during the course of litigation or incompatible positions taken inadvertently or by

mistake are not subject to judicial estoppel. Id.; see also Comm. of the Russian Fed'n, 987 F. Supp. at 1184. Moreover, under Ninth Circuit case law, the earlier court must have actually relied on the party's previously inconsistent statement in making its ruling. Masayesva v. Hale, 118 F.3d 1371, 1382 (9th Cir. 1997).

Here, AMC has plainly failed to show that the United States' position in this case with respect to the application of Standard 4.33.3 to AMC's stadium-style movie theaters is so manifestly inconsistent with positions the United States has taken in other stadium-style theater litigation as to amount to legal chicanery. First, Magistrate Judge Hillman has already expressly held, during the course of discovery proceedings in this action, that "Defendant [AMC] has not shown inconsistent interpretations by [the United States] of § 4.33.3 with regard to commercial stadium style movie theaters." (Min. Order Denying Defs.' Mot. to Compel, at 3 (June 5, 2000)(Docket #134); see discussion supra, at 13 & n. 5.) This ruling by Magistrate Judge Hillman is now law of the case.

Second, even setting aside Magistrate Judge Hillman's prior ruling holding that there was no evidence establishing that the United States had taken inconsistent positions with respect to the application of Standard 4.33.3 to stadium-style movie theaters, AMC still fails to state a legally viable judicial estoppel defense. The Department of Justice issued Standard 4.33.3 in 1991, and articulated its interpretation of this regulation as it applied to stadium-style theaters in an *amicus* brief filed in a private ADA action styled Lara v. Cinemark, USA, Inc., No. 97-CV-502 (W.D. Tex 1998)(See Lara *Amicus* Brief, Ex. 21). The Lara *amicus* brief was filed with the permission of the district court and announced a plain language interpretation of Standard 4.33.3. Specifically, the Lara brief set forth the Department's position that Standard 4.33.3 required wheelchair seating areas be an "integral part" of the fixed seating, and to provide people with physical disabilities "lines of sight that are comparable to those provided to the general public." (Id. at 4.) In interpreting the term "comparable," the United States used the everyday understanding of the word, which is "capable of or suitable for comparison; equivalent; similar." Webster's Ninth Collegiate Dictionary (1990). Thus, the language in the Standard requiring "lines of sight comparable to those of the general public" was interpreted by the Department 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 as those offered to most of the general public in the stadium style seats, adjusted for seat tilt." (Id. at 5.) Thus, as stated in the Lara brief, wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be in the best. (Id.)

Since then, the Department in this case and all other cases involving stadium-style theaters has consistently adhered to its plain language interpretation of Standard 4.33.3. (See Lara v. Cinemark, 207 F.3d 783 (5th Cir. 2000)(United States participated as *amicus curiae*); Oregon Paralyzed Veterans v. Regal Cinema Theaters, Inc., No. 01-35554 (9th Cir. Oct. 19, 2001)(United States participated as *amicus curiae*); Lonberg v. Sanborn Theaters, Inc., No. 97-6598 (C.D. Cal. 1999)(United States participated as intervenor); United States v. Cinemark, USA, Inc., No. 99 CV 705 (N.D. Ohio 2001); United States v. Hoyts Cinemas Corp., No. 00-CV-12567 (D. Mass. 2000); United States v. National Amusements, Inc., No. 00-CV-12568 (D. Mass. 2000). Because Defendants have not and cannot allege any facts showing that the United States has taken a position in this case with regard to Standard 4.33.3 that is so manifestly inconsistent with a position taken in another judicial proceeding as to constitute an affront to the Court, AMC's judicial estoppel defense fails. Accordingly, as AMC has failed to meet the factual and legal requirements for defending this action on the grounds of judicial estoppel, the United States' motion for summary judgment as to AMC's Affirmative Defense No. 6 should be granted.

F. Statutes of Limitations and/or Laches Do Not Run Against the United States When Enforcing the Public Interest (Affirmative Defense Nos. 7 & 8)

AMC also asserts that the United States' claims are barred by the applicable statute of limitations and the doctrine of laches. Black letter law, however, precludes AMC from raising either of these equitable defenses in this action. Accordingly, this Court should grant summary judgment with respect to AMC's Affirmative Defense Nos. 7 and 8.

Neither federal nor state statutes of limitation bar the United States' claims in this action.

First, whatever may be said for the application of state statutes of limitation in private litigation, it is well-settled that state statutes of limitation do not run against the federal government where, as here, it is enforcing a public right or protecting a private interest. United States v. Summerlin, 310 U.S. 414, 416, 60 S. Ct.1019,1020 (1940)("the United States is not bound by state statute of limitation or subject to the defense of laches in enforcing its rights."); see also Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125, 39 S. Ct. 407, 408 (1919). The United States is ***only*** subject to a limitations period when Congress has expressly created one by federal statute. United States v. Thornburg, 82 F.3d 886, 893 (9th Cir. 1996). Yet neither the ADA nor any other federal statute expressly impose any limitations period for enforcement actions initiated by the Department (on behalf of the United States) under the ADA. Accordingly, the United States is not barred from bringing this action against AMC by either a federal or state statute of limitation.

Even if a statute of limitations did apply to the United States' enforcement of the ADA in this case, AMC would nonetheless be precluded from asserting this defense based on its continuing violation of the relevant provisions of the ADA. Although most often applied in Title VII employment actions, courts have repeatedly found that continuing violations or patterns of discrimination toll relevant statutes of limitation. See e.g., Nat'l R.R. Passenger, Corp. v. Morgan, 122 S. Ct. 2061, 2073-76 (2002); Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1190 (9th Cir. 1984); Green v. Los Angeles Superintendent of Sch., 883 F.2d 1472, 1480 (9th Cir. 1989). To determine a continuing violation, a plaintiff must demonstrate either a series of related discriminatory acts, where one or more acts fall within the limitations period, or the maintenance of a discriminatory system both before and during the limitations period. Green, 883 F.2d at 1480 (9th Cir. 1989)(quoting Valentino v. United States Postal Serv., 674 F.2d 56, 65 (D.C.Cir. 1982). Here, AMC has engaged, to date, in a pattern or practice of discriminating against patrons who use wheelchairs, and their companions by failing to provide seats with comparable lines of sight in their stadium-style theaters. (See Complaint ¶¶ 3, 14, 19, 25, 32.) Thus, even if AMC could point to an applicable limitation of time for bringing this action, it is abundantly clear that

their history of designing, constructing, and operating non-compliant theaters from the 1995 construction of the Grand to the present would be deemed a continuing violation, tolling any relevant statute of limitation. (U.S. Facts ¶¶ 3-8, 14.)

The doctrine of laches also proves unavailing to AMC as a defense to this matter. Laches is an equitable time limitation on a party's right to bring suit. Kling v. Hallmark Cards, Inc., 225 F.3d 1030, 1036 (9th Cir. 2000). To obtain a judgment on this affirmative defense, a defendant must prove both an unreasonable delay by the plaintiff in initiating the action and prejudice. Id. However, as with the statute of limitations, laches generally does not serve as a defense against the federal government. See e.g., Chesapeake & Delaware Canal Co., v. United States, 250 U.S. 123, 125 (1919)("It is settled beyond controversy that the United States when asserting 'sovereign' or governmental rights is not subject . . . to laches."); see also Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1919)("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest."); Summerlin, 310 U.S. at 416; Chevron, U.S.A., Inc. v. United States, 705 F.2d 1487, 1491 (9th Cir. 1983)("The government is not bound by state statutes of limitations or laches in enforcing its rights."). AMC's laches defense fails to state a legally viable defense and, therefore, should be dismissed from this action on summary judgment.[6]

[6] Even if laches were an appropriate defense against the United States, AMC has failed to identify any facts showing that the United States unreasonable delayed in the initiation of this action or in any way caused AMC to be prejudiced in its defense of this case. In 1998, the Department advised AMC that its theaters with stadium-style seating violated Title III of the ADA, and that the Civil Rights Division had been authorized to commence an enforcement action if voluntary conciliation efforts failed. (U.S. Facts ¶ 16.) Less than a year later, the United States commenced this action against AMC, and only then after efforts to resolve the matter proved unsuccessful. (U.S. Facts ¶ 18.) Thus, AMC has not and cannot establish that the United States unreasonably delayed commencement of this action or that AMC has been prejudiced by the timing of the Complaint.

G. United States Is Not Precluded From Bringing This Action By Either The Doctrine of Collateral Estoppel or Res Judicata (Affirmative Defense No. 9)

Equally without merit is AMC's Affirmative Defense No. 9, which asserts that the United States' claims are barred by the doctrine of res judicata or collateral estoppel. (Answer ¶ 45.) Neither of these doctrines bars the United States' claims in this action since the United States and AMC have only been involved in the same ADA-related litigation on two occasions, and neither of these prior actions satisfy the stringent procedural requirements for application of these doctrines. This Court should, therefore, grant summary judgment in favor of the United States on AMC's Affirmative Defense No. 9.

1. Collateral Estoppel

As discussed previously, the doctrine of collateral estoppel prevents a party from re-litigating issues of fact or law that were actually litigated, and necessarily decided by a valid and final judgment in a prior proceeding, when the determination in the prior proceeding was essential to the judgment. (See discussion supra., at 9-10 (collecting cases)); see also Amadeo v. Principal Mut. Life Insur. Co., 290 F.3d 1152, 1159 (9th Cir. 2002); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). The federal government, moreover, 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 Fla., 768 F.2d 1558, 1578-79 (11th Cir. 1985) (applying Mendoza and holding that nonmutual defensive collateral estoppel cannot be applied to the state government); Reich v. D.C. Wiring, Inc., 940 F. Supp. 105, 106-07 (D. N.J. 1996) (same as to the federal government).

Applying these procedural considerations, it is plain that AMC cannot raise an actionable collateral estoppel defense against the United States. The United States and AMC have only

both been involved in ADA-related litigation in two prior cases – (i) an ADA action filed in 1992 by a private plaintiff against AMC (Fiedler v. American Multi-Cinema, Inc.) concerning the placement of wheelchair locations at a sloped-floor theater in which the United States participated as *amicus curiae,* and (ii) Cinemark's previously-discussed APA-based action against the United States in which AMC intervened as a party-plaintiff. (See discussion supra, at 5-6, 9-10); see also Fiedler v. American Multi-Cinema, Inc., C.A. No. 92-CV-484 (D.D.C. filed Feb. 26, 1992) (copy of PACER docket sheet, Ex. 22). Neither of these cases satisfies the requirements for application of collateral estoppel. First, with respect to Fiedler, the United States only participated as *amicus curiae* in this action.[7] It is well-established, however, that mere appearance as *amicus curiae* falls far short of establishing the requisite amount of control necessary to bind a non-party to a case by the doctrine of collateral estoppel. See, e.g., Munoz v. County of Imperial, 667 F.2d 811, 816-17 (9th Cir. 1982)(participation as *amicus* falls far short of control necessary to actuate collateral estoppel); Nat'l Fuel Gas Distrib. Corp. v. TGX Corp., 950 F.2d 829, 839 (2nd Cir. 1991)(appearance as *amicus* generally insufficient to bind a party to judgment); Restatement § 39 cmt. c. In Fiedler, moreover, no issues of fact or law were actually litigated and determined by a valid and final judgment -- as required by the collateral estoppel

[7] At issue in Fiedler was AMC's placement of wheelchair seating at the back of each theater at the Avenue Grand Theater, a theater complex leased by AMC at Union Station in Washington, D.C.. See Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994). Defendant AMC filed a motion for summary judgment contending that the ADA was inapplicable to its leased theaters at Union Station, that, even if the ADA did apply, that it did not require "dispersed" wheelchair seating at the Avenue Grand Theater, and that the ADA did not require equivalent treatment of disabled patrons when doing so would present a "direct threat" to the health or safety of other patrons. See id. at 36-37. With the permission of the court, the United States filed an *amicus* brief opposing AMC's motion for summary judgment. Id. In this *amicus* brief, the United States contended that AMC's Avenue Grand Theater was indeed subject to the ADA; that AMC was required to provide more than one wheelchair seating location in theaters with more than 300 seats; and that AMC had failed to demonstrate that seating patrons who use wheelchairs towards the front of the theater would constitute a "direct threat." Id. at 37-40. The district court denied AMC's motion for summary judgment, see Fiedler, 871 F. Supp. at 40, and the parties subsequently settled the action. See Ex. 22.

doctrine -- since the case was eventually dismissed pursuant to a settlement agreement to which the United States, as *amicus curiae*, was not a signatory. See, e.g., Arizona v. California, 530 U.S. 392, 414 (2000) ("settlements ordinarily occasion no issue preclusion"); Adams v. Bell, 711 F.2d 161, 195 n.123 (D.C. Cir. 1983) (holding that application of collateral estoppel to consent judgments was not appropriate because court had not resolved substance of the issues contained in the consent decree) (en banc).

AMC's reliance on the Cinemark action for collateral estoppel purposes is equally misplaced. As discussed previously, the only issue actually litigated and necessarily decided by a final judgment in this action was that the court lacked subject matter jurisdiction to adjudicate the APA claims of both Cinemark and AMC. (See discussion supra, at 5-6, 9-10.) Thus, the question decided in the Cinemark case concerned the United States' compliance with the APA, and this issue was decided ***in the United States' favor***. Therefore, the only party in this proceeding that can be collaterally estopped by the Cinemark decision is AMC, not the United States (See discussion, supra, at 9-10.) Accordingly, summary judgment should be granted in favor of the United States on AMC's collateral estoppel defense.

2. Res Judicata

For the same reasons that the United States' claims are not collaterally estopped, neither are they precluded by the doctrine of res judicata. Res judicata prevents the litigation of "all grounds for, or defenses to, recovery that were previously available to the parties," irrespective of whether they were asserted or decided in the prior proceeding. Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988)(quoting Brown v. Felsen, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979)). A later action can be barred under the doctrine of res judicata only when "(1) the prior litigation involved the same parties or their privies, (2) the prior litigation was terminated by a final judgment on the merits, and (3) the prior litigation involved the same 'claim' or 'cause of action' as the later suit." Hydranautics v. Filmtec Corp., 204 F.3d 880, 888 (9th Cir. 2000); see also Nordhorn v. Ladish Co., 9 F.3d 1402, 1404 (9th Cir. 1993). As discussed above, Fiedler

satisfies none of these requirements since the United States was not a party to this action, there was no final judgment on the merits because of the parties' voluntary settlement of the litigation, and, in any event, the case was litigated several years before AMC had even constructed its first stadium-style theater, the Grand 24. (See discussion supra, at 22-23, n.7.) Turning to Cinemark, this litigation also fails to satisfy the requirements for application of the res judicata doctrine. As discussed above, the only party to this action that is barred by the Cinemark judgment from litigating its claims is AMC. The court in Cinemark dismissed AMC's complaint in its entirety and entered judgment in favor of the Department, in part because this Court had also dismissed the identical APA-based claims. (Cinemark Dismissal Order, Ex. 20.) Nonetheless, AMC refuses to admit defeat, and instead has re-pled these exact same APA and constitutional claims as affirmative defenses to this action. (See discussion, *supra*, at 5-6.) Mere repetition, however, cannot strengthen AMC's legally defective claims. This Court should, therefore, grant summary judgment in favor of the United States' on AMC's res judicata defense (Affirmative Defense No. 9).

H. Damages and Civil Penalties Sought In This Action Are Not Subject To Mitigation (Affirmative Defense No. 10)

AMC asserts in Affirmative Defense No. 10 that the United States' claims are barred, in whole or in part, because the United States has failed to mitigate damages. (Answer ¶ 46.) This defense, too, is without merit. As applied to the United States' request for compensatory damages for complainants who have been injured by AMC's violations of Title III, the defense of mitigation is meritless. As applied to the United States' request for statutorily-based civil penalties, this defense is nonsensical. This Court should, therefore, grant the United States' motion for summary judgment on AMC's Affirmative Defense No. 10.

As a general matter, parties injured by a legal wrong -- whether in the form of a tort, breach of contract, or act of employment discrimination -- are expected to mitigate their damages to the extent possible. See, e.g., Ford Motor Co. v. EEOC, 458 U.S. 219, 231 n. 15, 102 S. Ct. 3057, n.15 (1982) (citing C. McCormick, Law of Damages 127-158 (1935)); Sangster v. United

Airlines, Inc., 633 F.2d 864, 867 (9th Cir. 1980); Commodity Credit Corp. v. Rosenberg Bros. & Co., 243 F.2d 504, 511 (9th Cir. 1957). Thus, to demonstrate that a plaintiff has failed to satisfy this duty, a defendant must establish "(1) that the damage suffered by plaintiff could have been avoided . . . and (2) that plaintiff failed to use reasonable care and diligence" when seeking to minimize losses. Sias v. City Demonstration Agency, 588 F.2d 692, 696-97 (9th Cir. 1978). AMC, as the proponent of a mitigation defense, bears the burden of proof regarding the adequacy of mitigation efforts by the United States and/or individual theater patrons injured by AMC's ADA violations. See Sangster v. United Airlines, Inc., 633 F.2d 864, 868 (9th Cir. 1980) (holding that defendant-employer in Title VII action bore burden or proof regarding mitigation defense to backpay award), cert denied, 451 U.S. 971 (1981); see also Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1497 (9th Cir. 1995) (same).

Application of the foregoing legal principles reveals that AMC has not – and cannot - demonstrate that disabled movie patrons and their companions failed in any respect to mitigate their respective damages. Under the ADA and its implementing regulations, such persons were statutorily entitled not only to theater seating providing comparable lines of sight as compared to other members of the general public (as required by Standard 4.33.3), but also to accessible restrooms, concession counters, ticket booths, parking lots and other features of AMC's stadium-style theater complexes. See, e.g., 28 C.F.R. pt. 36, Appendix A (setting forth accessibility guidelines for Title III-covered public accommodations and commercial facilities). Having purchased theater tickets and subsequently suffered various types of disability-based discrimination at one or more of AMC's stadium-style movie theater complexes, there is nothing these patrons could – or should – have done to "avoid" this discrimination or otherwise lessen their respective damages. In fact, in perhaps a tacit admission of the inapplicability of mitigation principles to individual complaints in this action, AMC has never proffered any evidence suggesting the means by which these individuals could have mitigated their damages. Thus, the

mitigation defense as it relates to the individual complainants in this action fails as a matter of law.

If AMC's mitigation defense is misplaced as it relates to individual complainants, it is downright nonsensical with respect to the United States' claims for civil penalties – the only other relief sought by the United States in this action that comes close to "damages." Section 12188(b)(2)(c) of the ADA confers on a court the authority to "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" in order to vindicate the public interest. There is nothing in the text of this statutory provision that obligates the United States to mitigate the penalties assessed by the Court against AMC. In fact, the only Title III provision addressing mitigation of civil penalties applies exclusively to ***defendant's*** conduct, by allowing for judicial consideration of a discriminating party's good faith efforts to comply with the ADA when assessing civil penalties. 42 U.S.C. § 12188(b)(5). This omission of mitigation language from the text of the ADA's civil penalties provision must be presumed to be intentional. See, e.g., Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."); Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (9th Cir. 2000). Accordingly, summary judgment should be also be granted in favor of the United States on AMC's tenth affirmative defense relating to the United States' demand for civil penalties.

I. AMC Is Independently Liable For Its Failure To Comply With The ADA Regardless of Any Negligence of Third-Party Architects or Contractors (Affirmative Defense No. 11)

In Affirmative Defense No. 11, AMC claims that the "incident(s) alleged by Plaintiff were caused by the negligence and/or fault of other persons, corporations and entities and non-parties to this action," thereby reducing AMC's liability. (Answer ¶ 47.) This argument is without merit. Regardless of whether AMC has a meritorious contract or tort claim against its

architects or contractors for their part in designing or constructing non-compliant stadium-style theater complexes, AMC – as the owner, lessor, or operator of these facilities – remains independently liable for its failure to comply with the ADA.

There can be no question that AMC's stadium-style theater complexes at issue in this litigation are covered by Title III's non-discrimination mandate. (See discussion supra, at 2); see also 42 U.S.C. 12181(7)(C) (defining the term "public accommodation" to include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment"). Thus, the only question raised by AMC's Affirmative Defense No. 11 is whether AMC can somehow escape or otherwise mitigate its liability under the ADA by "pointing the finger" at third-parties (such as AMC's "outside" architecture firms or contractors) for designing and/or constructing non-compliant movie theaters. Both the ADA, its implementing regulations, and other Department-issued guidance suggests that the answer to this question is a resounding "no."

First, the text of the ADA makes plain that AMC cannot "contract away" its statutory obligations or liability. Under the ADA, a public accommodation is prohibited from subjecting "an individual or class of individuals on the basis of a disability. . . *directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity* . . . to participate in or benefit from the goods, services, . . . or accommodations of an entity." 42 U.S.C. § 12182(b)(1)(A)(i) (emphasis added). The legislative history for this provision explains that the reference in the statute to "contractual arrangements" was included to ensure that an entity not be able to "do indirectly through contractual arrangements what it is prohibited from doing directly" under the ADA. H.R. Rep. No. 101-485 (II), at 104 (1990), *reprinted in* 1990 U.S.C.C.A.N. 387. In other words, "a covered entity may not use a contractual provision to reduce any of its obligations under [the ADA]." Id.

Second, AMC's independent obligation to comply with the ADA is further supported by the regulations implementing the ADA and other DOJ regulatory guidance. Section 36.201(b) of the Department's regulations implementing the ADA provides that both the landlord of a

building that houses a public accommodation and the tenant who owns or operates the public accommodation are subject to Title III of the ADA, but that "as between" the parties the allocation of responsibility for complying with the obligations of the ADA may be determined by lease or contract. 28 C.F.R. § 36.201(b). Significantly, this section provides that the allocation of responsibility is only effective *as between* the parties, and thus any contractual allocation of responsibility has no effect on the rights of third parties. See Botosan, 216 F.3d at 833-34 (holding that allocations in lease agreement between property owner and lessee did not transfer to lessee all liability for ADA compliance); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 767 (D. Or. 1997) (contractual allocation of responsibility for ADA compliance has no effect on the rights of third parties). Moreover, the Department of Justice's interpretation of this section emphasizes that any allocation of responsibility made in a contract is only effective as between the parties, and that "both landlord and tenant remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation." Department of Justice, Title III Technical Assistance Manual § III-1.2000.[8] Otherwise, owners of public accommodations would be able to contract away their liability, thereby severely impeding the enforcement of the statute and the ability of third parties to obtain relief. See Botosan, 216 F.3d at 834; Independent Living Resources, 982 F. Supp. at 768.[9]

[8] The Ninth Circuit has held that the Department of Justice's interpretation of its own regulations, such as the Technical Assistance Manual, must "be given substantial deference and will be disregarded only 'if plainly erroneous or inconsistent with the regulation.'" Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 732 (9th Cir. 1999).

[9] Holding an owner or operator of public accommodations such as AMC independently liable for compliance with the ADA, irrespective of contractual agreements, does not impair that owner or operator's rights because, as noted by the Ninth Circuit, that party is always free to either proceed with the action and later seek indemnification or implead or move to join other potentially responsible third parties. Botosan, 216 F.3d at 834; Independent Living Resources, 982 F. Supp. at 768.

Accordingly, because AMC is, as a matter of law, independently liable for the ADA violations alleged in the United States' Complaint, summary judgment should be granted in favor of the United States as to Affirmative Defense No. 11.

J. AMC's Alleged Compliance with State or Local Building Codes Is Irrelevant to Its Compliance with the ADA (Affirmative Defense No. 12)

In Affirmative Defense No. 12, AMC asserts that its conduct is "privileged in that it was undertaken pursuant to the terms of the applicable laws, regulations, orders and approvals relating to building construction and/or public health and safety." (Answer, ¶ 48.) Even assuming that the AMC stadium-style theaters at issue in this litigation were indeed designed and constructed in compliance with state or local building codes, such compliance does not, as a matter of law, immunize AMC from liability under the ADA.

Defendants' reliance on compliance with state and local laws as an affirmative defense to this action ignores the principle of federal preemption. The Supremacy Clause of the Constitution, Art. VI, cl.2, provides that "'the Laws of the United States which shall be made in Pursuance' of the Constitution 'shall be the supreme law of the land.' The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." City of New York v. Federal Communications Comm'n, 486 U.S. 57, 63, 108 S. Ct. 1637, 1642 (1988). Under the Supremacy Clause, "[s]tate law is preempted when it conflicts with federal law, would frustrate a federal scheme, or where Congress clearly intended to occupy the field." Saridakis v. United Airlines, 166 F.3d 1272, 1276 (9th Cir. 1999). Preemption may be express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383 (1992); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 3022 (1982).

The text of the ADA makes clear that Congress intended to preempt state or local laws that limit or reduce the obligations of public accommodations under Title III of the ADA.

Section 501(b) of the ADA provides that "[n]othing in [the ADA] shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by [the ADA]." 42 U.S.C. § 12201(b).[10] By providing an express exemption for those state laws that provide an equal or greater level of protection than the ADA, Congress clearly expressed its intent to preempt all laws that conflict with the ADA by providing lesser levels of protection. See Wood v. County of Alameda, 875 F. Supp. 659, 663 (N.D. Cal. 1995) (noting that ADA was enacted to guarantee individuals with disabilities a baseline level of protection). Thus, even if AMC could produce evidence that local or state law or building codes "required" it to take actions in violation of the ADA, federal law would still preempt any "conflicting" state law or building codes. See Delil v. El Torito Restaurants, No. C 94-3900, 1996 WL 807395, at *9 (N.D. Cal. Dec. 2, 1996)(stating in dicta that defendant may comply with state and local building codes and still violate the ADA), Ex. 29.

K. United States Is Authorized Under the Americans With Disabilities Act to Bring This Lawsuit Against AMC, and Has Satisfied All Jurisdictional Requirements (Affirmative Defense Nos. 17 & 25)

In Affirmative Defense Nos. 17 & 25, AMC alleges that the United States both failed to comply with the jurisdictional prerequisites and is acting outside the scope of its authority when filing this action. (Answer ¶¶ 53 & 61.) In essence, these affirmative defenses challenge the United States' authority to bring this lawsuit. AMC's challenge to the United States' authority to commence this action borders on the frivolous. As a matter of law, the Department of Justice is charged with the authority to investigate alleged violations of Title III and, as necessary, commence enforcement actions against owners or operators of public accommodations -- such as AMC -- for damages and/or civil penalties. Accordingly, the Court

[10] Similarly, the Title III regulations provide that the "use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." 28 C.F.R. Pt. 36, App. A § 2.2.

should enter summary judgment in favor of the United States with respect to AMC's Affirmative Defense Nos. 17 & 25.

That the Department of Justice (on behalf of the United States) was empowered by the ADA to commence this enforcement action against AMC is beyond peradventure. The Department of Justice, through the Attorney General, is authorized to commence a civil action in any appropriate United States District Court against persons or entities violating Title III of the ADA. 42 U.S.C. § 12188(b)(1)(B). Such civil actions may be initiated whenever the Attorney General has reasonable cause to believe that (i) any person or entity is engaged in a "pattern or practice" of discrimination, and/or that (ii) such person or entity has committed acts of discrimination that "raises an issue or general importance." Id. at § 12188(b)(1)(B)(i) - (ii). Indeed, the Department of Justice is the only federal agency with authority to enforce Title III of the ADA, which includes the new construction requirements at issue here. See 42 U.S.C. 12188(b)(1)(B).

Since the enactment of the ADA, the Department's enforcement authority has been one of its key tools for enforcing both the statutory and regulatory requirements of this Act. Here, the Attorney General had more than "reasonable cause" to believe that AMC has engaged in a pattern or practice of discrimination against individuals with disabilities through the construction and operation of stadium-style theaters that, inter alia, deny individuals who use wheelchairs and their companions access to wheelchair and companion seating locations that provide lines of sight comparable to those offered to members of the general public, and that otherwise satisfy the accessibility requirements of Title III and its implementing regulations. (See, e.g., Compl. ¶¶ 3, 19-20.) Because these actions involve a pattern or practice of discrimination by AMC against persons with disabilities, and because AMC's discriminatory conduct raises issues of general public importance, the United States was authorized pursuant to § 12188(b)(1)(B) to commence this action against AMC. As a matter of law, the United States has thus complied with all statutory and jurisdictional requirements to bring this action.

L. The United States Is Not Barred From Litigating This Case Under the Doctrine of Unclean Hands (Affirmative Defense No. 23)

Finally, AMC alleges that the United States' claims should be barred, in whole or in part, by the doctrine of unclean hands. The defense of unclean hands can only be asserted against the federal government when the government's conduct is so egregious that it rises to the level of a constitutional injury. See S.E.C. v. Sands, 902 F. Supp. 1149 (C.D. Cal. 1995). Since AMC has proffered no evidence of governmental wrongdoing in bringing this action – let alone conduct tantamount to a constitutional violation – summary judgment should be granted in favor of the United States on Affirmative Defense No. 23.

As a general proposition, the affirmative defense of unclean hands precludes a plaintiff in a typical private action bars equitable relief only if that plaintiff has engaged in bad faith or unconscionable behavior that relates to the subject matter of the litigation and is directed at the defendant. See, e.g., Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 244-45, 54 S. Ct. 146, 147 (1933); Highmark, Inc. v. UMPC Health Plan, Inc., 276 F.3d 160, 174 (3rd Cir. 2001); Adler v. Nigeria, 219 F.3d 869, 877 (9th Cir. 2000). However, the federal government is not a typical litigant. Unlike private parties, the United States brings enforcement actions to serve the public interest. Thus, in the Ninth Circuit, parties attempting to assert an unclean hands defense must make the additional evidentiary showing that the government's conduct was so outrageous or egregious as to cause constitutional injury. See, e.g., S.E.C. v. Sands, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995) (holding that, in order to raise viable affirmative defense of unclean hands, defendant was required to show such egregiousness by plaintiff Securities and Exchange Commission that "the resulting prejudice to defendant [rose] to a constitutional level") (quoting SEC v. Musella, 38 Fed.R.Serv.2d 426, 428 (S.D.N.Y. 1983)), aff'd, 142 F.3d 1186 (9th Cir. 1998), cert. denied, 525 U.S. 1121 (1999).[11] As the proponent of this affirmative defense, AMC

[11] Indeed, some courts have concluded that the doctrine of unclean hands cannot be invoked at all against a governmental agency where, as here, that agency is acting in the public interest. See United States v. Second Nat'l Bank of North Miami, 502 F.2d 535, 548 (5th Cir. 1974), cert. denied, 421 U.S. 912 (1975); SEC v. Rivlin, 1999 WL 1455758, at *5 (D.D.C. Dec.

bears the heavy burden of establishing the elements of this defense. See Fed. R. Civ. P. 8(c); see also Pierce v. Apple Valley, Inc., 597 F. Supp. 1480, 1485 (S. D. Ohio 1984).

Plainly, AMC has not carried this heavy evidentiary burden. Several years of fact discovery have been completed in this action. Yet AMC still has not produced any evidence establishing that the Department's conduct in bringing this action was so egregious as to cause constitutional harm. Indeed, quite the contrary. For example, as discussed previously, this Court has already (i) dismissed AMC's APA-based counterclaim alleging that the Department failed to adhere to requisite notice-and-comment procedures when promulgating Standard 4.33.3 (see supra, 4-5), and (ii) conclusively determined that the United States has not issued inconsistent interpretations of Standard 4.33.3 (see supra, at 17). Furthermore, AMC has failed to make out the elements for its constitutionally-based affirmative defenses. (See discussion supra, at 10-11 & n. 3.)

In light of the foregoing, this Court should dismiss AMC's affirmative defense of unclean hands, since AMC has failed, as a matter of law, to meet its burden of demonstrating that the United States' conduct in bringing this lawsuit has prejudiced AMC to the level of constitutional injury. See Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000)(moving party's summary judgment burden met by showing an absence of evidence to support non-movant's case)(citing Celotex Corp. v. Catrett, 477 U.S. at 325).

20, 1999) (striking unclean hands defense on the ground that "the doctrine of unclean hands may not be invoked against the SEC"), Ex. 27; SEC v. Condron, 1985 WL 2054, at *1 (D. Conn. June 11, 1985) ("[C]ourts have consistently held that the affirmative defense of unclean hands cannot be invoked against a government agency which is attempting to enforce the public interest."), Ex. 28.

IV. CONCLUSION

For the foregoing reasons, the United States' motion for partial summary judgment as to AMC's Affirmative Defense Nos. 2-13, and 17-25 should be granted and these defenses should be dismissed from this action with prejudice.

DATED: September __, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of September, 2002, true and correct copies of **Plaintiff United States' Memorandum in Support of Motion for Partial Summary Judgment On AMC Defendants' Affirmative Defenses** were served by Federal Express, postage pre-paid, on the following parties:

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