UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	§	CIVIL ACTION NO. 1:99CV-705
	§	
Plaintiff	§	Hon. Donald C. Nugent
	§	
v.	§	**PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT**
CINEMARK USA, INC.,	§	
	§	
Defendant.	§	
	§	
	§	

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT

INTRODUCTION

Defendant Cinemark's Motion for Partial Summary Judgment for its stadium-style movie theaters located within the Fifth Circuit is premature and misconstrues both the United States' appellate arguments and the Sixth Circuit's opinion reversing and remanding this Court's grant of summary judgment to Defendant. Partial summary judgment is *not* appropriate prior to this Court's determination of liability in this nationwide pattern or practice lawsuit.

STATEMENT OF UNDISPUTED FACTS

1. The United States' Complaint in this action alleges that Cinemark has 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. Complaint ¶¶ 1-2, 19, 24. ECF docket #123, attachment #1; ADA Accessibility Guidelines for Buildings and Facilities ("ADA Standards") § 4.33.3, 28 C.F.R. Part 36, Appendix A.

2. Cinemark currently owns and operates approximately 76 stadium-style movie theater complexes throughout the United States. Approximately 32 of these theaters are located in Texas, Louisiana, and Mississippi. See Cinemark's website, http://www.cinemark.com/tspage.asp, attached as Exhibit 1A.[1]

3. The United States previously produced some evidence that Cinemark's wheelchair seating locations have obstructed views of the screen: the United States offered copies of Cinemark's own press releases touting the advantages of its *stadium-style seating* as offering "greater visibility and enhanced, ***unobstructed*** sight lines to the screen." United States' Appendix to Cross Motion for

[1] Cinemark's current Motion for Partial Summary Judgment states, "Cinemark owned and operated approximately 70 stadium-style movie theater multiplexes throughout the United States *at the time this lawsuit was filed*." Cinemark's Motion for Partial Summary Judgment for Theaters Within the Fifth Circuit at 2, ¶ 2 and supporting Affidavit of Don Harton. (ECF docket #132, attachment #1.) ***All*** of Cinemark's stadium-style movie theaters are covered by the United States' pattern or practice allegations in the Complaint filed in this action.

Partial Summary Judgment ("US App. Cross Motion"), tab 8 (*Cinemark I*, docket #80).

4. The United States previously submitted other evidence that shows that elevated, or stadium seating, was installed by movie theaters to eliminate obstructions in lines of sight to the screen, yet most of Cinemark's wheelchair seating locations are not provided in the elevated, stadium seating portion of its auditoriums, but instead are located in the traditional, sloped or flat areas closest to the screen. Thus, its wheelchair seating locations do not meet even Lara's minimal requirement of providing an unobstructed view of the screen. *See* Cinemark's (First) Motion for Summary Judgment at ¶ 7 (*Cinemark I*, docket #28); United States' Appendix in Support of Cross Motion (*Cinemark I*, docket #80), tab 3, ¶ 6 (stadium-style seating "eliminates virtually all obstructions to sight lines caused by lack of visual clearance over patrons seated immediately in front of any particular seat"); id., tab 4, ¶¶ 4-5 (same); United States' Memorandum in Support of Cross Motion for Summary Judgment, Facts at 17 (*Cinemark I*, docket #79); United States' Appendix in Support of Cross Motion (*Cinemark I*, docket #80), tab 9, ¶ 12 (affidavit of Steven John Fellman describing the view to the screen from stadium-style seating as "less obstructed, if not completely unobstructed. Theater patrons have less difficulty seeing over the heads of tall persons wearing hats."); and United States' Appendix in Support of Cross Motion (*Cinemark I*, docket #80), tab 10, ¶ 12 (affidavit of William F. Kartozian-"The change from sloped -floor auditoria to stadium-style auditoria has been very popular. The view to the screen is less obstructed. Theater patrons have less difficulty seeing over the heads of tall persons or persons wearing hats.").

5. Evidence relied upon by Cinemark in its Second Motion for Summary Judgment (*Cinemark I*, docket #70) does not prove that *all* wheelchair seating locations in Cinemark's stadium-style movie theaters within the Fifth Circuit have unobstructed views of the screens. Cinemark's Appendix in Support of Second Motion for Summary Judgment, tab A (Harton Affidavit) ¶¶ 7, 10 (*Cinemark I*,

docket #71) ("A ***summary*** review of "as-built" designs produced to the DOJ shows this to be true, and I also know this to be true due to my position with Cinemark and personal visits to ***many*** of these movie theaters.") (Emphasis added.)

6. Cinemark admits that the "elevated seating configuration" of stadium-style seating "eliminates the 'obstructed view' problems ..." Cinemark's Second Motion for Summary Judgment, Facts ¶ 2 (*Cinemark I*, docket #70).

7. Cinemark admits that wheelchair seating locations in its stadium-style movie theaters are not on elevated seating. Id., ¶ 3.

8. Inspectors who reviewed Cinemark's Texas theaters for compliance with the Texas Accessibility Standards ("TAS") did not make a determination of whether wheelchair seating locations had unobstructed views. Depositions of James Sheffield, pp. 38/l.19-41/l.9; 45/l.9-45/l.6; 56/l.23-57/l.9; 65/l.1-66/l.12 (July 3, 1998) and Terry Lee Williams, pp. 52/l.9-53/l.15 (July 2, 1998) (both depositions called by defendant Cinemark), Lara v. Cinemark USA,, No. EP-97-CA-502-H, 1998 WL 1048497 (W.D. Texas Aug. 21, 1998) (attached as Exhibit 1B).

9. The Sixth Circuit, in its opinion reversing and remanding this case, stated that the principles of comity should *only* be considered by this Court when determining the scope of relief to be ordered. United States v. Cinemark USA, Inc., 348 F.3d 569, 584 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3513 (U.S. Feb. 4, 2004) (No. 03-1131).

10. Cinemark has filed a petition for *certiorari* before the United States Supreme Court in this case. The primary issue in that petition is whether ADA Standard 4.33.3's "comparable lines of sight" provision requires more than an unobstructed view. United States v. Cinemark USA, 348 F.3d 569 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3513 (U.S. Feb. 4, 2004)(No. 03-

1131), Question 1 (attached as Exhibit 1C). [2]

11. Regal Cinemas, through its counsel Laura M. Franze, has filed a petition for *certiorari* before the United States Supreme Court in a similar case. The primary issue in that petition is whether seating that merely provides an "unobstructed view" of the screen in stadium style movie theaters satisfies ADA Standard 4.33.3's requirement that wheelchair seating "provides lines of sight comparable to those for members of the general public." Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003), *petition for cert. filed*, 72 USLW 3310 (Oct 27, 2003)(No. 03-641*)*, Question 1 (attached as Exhibit 1D).

12. Cinemark has previously admitted that the Sixth Circuit is not bound by the decisions of sister circuits. *See* Cinemark's Opp. to US Cross Motion for SJ at 14 (*Cinemark I*, docket #91).

ARGUMENT

A. PARTIAL SUMMARY JUDGMENT UNDER LARA IS NOT APPROPRIATE AT THIS STAGE OF A PATTERN OR PRACTICE CASE

In order to establish that a "pattern or practice" of discrimination in violation of Title III of the ADA exists, the United States must show that "the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature ... a company repeatedly and regularly engaged in acts prohibited by the statute." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, n.16 (1977) (citing 110 Cong. Rec. 14270 (1964). Cinemark's many theaters located within the Fifth Circuit constitute part of this "pattern or practice." Discovery about those theaters is necessary to establish that such a pattern or practice of discrimination did in fact occur. The earlier summary judgment decision in this case effectively pre-empted discovery about Cinemark's liability nationwide for ADA Title III violations in failing

[2] A decision on the two *petitions for certiorari* is likely before the end of the current Supreme Court term.

to provide “comparable lines of sight” for wheelchair seating in Cinemark theaters, leaving the current fact record upon remand almost completely undeveloped. Moreover, nothing in the Sixth Circuit’s decision, the briefs filed by the United States in this case, representations at oral argument by counsel for the United States, published opinion, or caselaw, supports Cinemark's specious claim that its stadium-style movie theaters within the Fifth Circuit should be excluded from any liability finding in this case, and, as such, these theaters are appropriately included in the United States’ case-in-chief on liability and should be subject to adequate and reasonable discovery by the United States.

In the Sixth Circuit, the United States argued that Cinemark's assertion was premature that summary judgment for its theaters located within the Fifth Circuit was appropriate. See United States' Reply Brief in the Sixth Circuit at 18-19 (citing Peveler v. United States, 269 F.3d 693, 699 (6th Cir. 2001) (attached as Exhibit 1E). "[T]he law in the Fifth Circuit will become relevant at the ***remedial stage*** if the district court finds Cinemark liable on remand. If *Lara* is still the law of the Fifth Circuit at that time, the district court should not order relief regarding the theaters within that Circuit ... **But, at the present time, one cannot be sure that *Lara* will still be the law of the Fifth Circuit on the 'lines of sight' issue by the time the district court is ready to enter judgment on remand**." Id. (Emphasis added; citations omitted.)

The Sixth Circuit denied Cinemark’s request to affirm the this Court's grant of summary judgment for all of its theaters located within the Fifth Circuit and agreed with the United States that the Lara holding is only relevant at the remedial stage of this litigation, when considering the "scope of relief" for Cinemark's theaters within the Fifth Circuit. Cinemark asked the Sixth Circuit to affirm this court's grant of summary judgment for all of its stadium-style theaters within the Fifth Circuit. Cinemark, 348 F.3d at 584. The Sixth Circuit, making short shrift of Cinemark’s

argument, stated "[t]his pertains to the ***scope of relief***, and therefore is a matter for the district court to decide consistent with the principles of comity." Id. (emphasis added); US Opposition, Facts ¶ 9. This Court should likewise decline Cinemark's invitation to limit review of this case by granting partial summary judgment prematurely.

The Sixth Circuit's opinion and the mandate rule[3] now require that consideration of the effect of the Fifth Circuit's decision in Lara v. Cinemark on the instant action be reserved until after a liability ruling on the United States' pattern or practice claims. United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994) (trial court precluded from reconsidering issue expressly or impliedly decided by appellate court). Summary judgment is not only premature at this time, but would violate the mandate rule.

B. CINEMARK'S THEATERS LOCATED WITHIN THE FIFTH CIRCUIT MUST BE INCLUDED IN THE AMBIT OF DISCOVERY IN THIS CASE TO FAIRLY DEMONSTRATE CINEMARK'S PATTERN OR PRACTICE OF FAILING TO DESIGN, CONSTRUCT, AND OPERATE ITS THEATERS IN COMPLIANCE WITH THE ADA

1. Establishing Liability in This Pattern or Practice Case Requires Discovery About Defendant's Stadium-Style Movie Theaters Located Within the Fifth Circuit

The Supreme Court established the proper structure for a pattern or practice case stating that in such cases it is appropriate to divide these cases into two stages – the intial liability stage, and a subsequent damages phase, if the government seeks individual relief for the victims of the discriminatory practice. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Importantly, at least four district courts and the10th Circuit have held that the *Teamsters*

[3]Under the mandate rule, after an appellate court has remanded a case to a lower court, the lower court must follow the decision that the appellate court has made in the case, unless new evidence or an intervening change in the law dictates a different result. Black's Law Dictionary (7th ed. 1999).

framework is appropriate for a government ADA pattern or practice claim.[4]

In the Title VII context, during the liability stage, the government's initial burden is to demonstrate that unlawful discrimination has been the employer's regular procedure or policy.[5] The employer may then defeat the prima facie case by demonstrating that the government's proof is either inaccurate or insignificant. Id. at 360. "If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief." Id. at 361.

Thus, in order to establish liability in this pattern or practice discrimination suit against Cinemark, the United States must offer evidence sufficient to establish a prima facie case that Cinemark followed a pattern, or had a practice, of designing and constructing its stadium-style movie theaters in violation of ADA Standards 4.33.3. To do this, the United States must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that ... discrimination [is] the company's standard operating procedure ... rather than the unusual practice." Teamsters, 431 U.S. at 336. The burden would then shift to Cinemark to attempt to demonstrate that the United States' proof is either

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[4] Davoll v. Webb, 194 F.3d 1116, 1148 (10th Cir. 1999); United States v. AMC Entertainment, Inc., 245 F.Supp.2d 1094, 1100 (C.D. Cal. 2003); EEOC v. Murray, Inc., 175 F. Supp. 2nd 1053, 1060 (M.D. Tenn. 2001); United States v. City and County of Denver, 943 F. Supp. 1304, 1309 (D. Colo. 1996); U.S. v. Morvant, 843 F. Supp. 1092, 1096 (E.D. La. 1994).

[5] In a Tenth Circuit Age Discrimination in Employment Act (ADEA) case, the court wrote,"proper consideration of defendant['s] motion for summary judgment must take into account the fact that [plaintiffs] were asserting a pattern-or-practice claim ... During the first stage of a pattern-or-practice case, for example, a summary judgment motion (whether filed by plaintiffs or defendants) must focus solely on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination ..." Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1108-1109 (10th Cir. 2001). See also Teamsters, 431 U.S. at 357-61.

inaccurate or insignificant. Id. at 360. Based upon the Teamsters framework, the United States' proof of Cinemark's discriminatory pattern or practice is sufficient to support a finding that any stadium-style movie theater designed or constructed during the period of the discriminatory practices was itself designed or constructed following such pattern or practice. Id. at 362.

A large percentage, approximately forty (40) percent, of Cinemark's stadium-style movie theaters are located within the Fifth Circuit and these theaters appear to encompass most, if not all, design generations of Cinemark's stadium style theaters. Discovery related to *all* of Cinemark's stadium-style movie theaters is therefore necessary and relevant to establish that Cinemark engaged in a *nationwide* pattern or practice of failing to design, construct, and operate its stadium-style movie theaters in violation of the ADA. United States v. International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local No. 1, 438 F.2d 679, 683 (7th Cir. 1971)(pretrial discovery in civil rights action should not be limited; past conduct, *even if lawful*, relevant to establish a pattern or practice of discrimination). Thus, even *if* Cinemark's stadium-style movie theaters located within the Fifth Circuit provide unobstructed views for its wheelchair seating locations, a fact disputed by the United States (US Opposition, Facts ¶¶ 3-7), the United States should be allowed discovery of those theaters and those theaters should be included in order to prove its claim that Cinemark has engaged in an unlawful pattern or practice.

More importantly, the Sixth Circuit has already made very clear that the Fifth Circuit decision in Lara is only to be considered in any remedial phase of these proceedings. Therefore, this Court is not bound by the Lara decision in considering and determining liability of the Defendant. Cinemark, 348 F.3d at 584; US Opposition, Facts ¶¶ 9, 12; Peveler, 269 F.3d at 699; Nixon v. Kent County, 76 F.3d 1381, 1388 (6th Cir. 1996) (circuit courts not required to follow views of other circuit courts, especially if the other circuits' opinions are "based upon an incomplete

or incorrect analysis."). In addition, the Sixth Circuit has also already determined that its decision in the instant case, although in conflict with the Lara decision, does not place Cinemark in an "impossible position" due to "inconsistent legal obligations." Cinemark, 348 F.3d at 579.[6] There is, therefore, no legal impediment to a finding that Cinemark's stadium-style movie theaters nationwide, including its theaters within the Fifth Circuit, fail to comply with ADA Standard 4.33.3 and discovery about theaters in the Fifth Circuit should be granted.

2. Discovery Related to Cinemark's Stadium-Style Movie Theaters Located Within the Fifth Circuit is Relevant to the United States' Claims and to Cinemark's Defenses and is Reasonably Calculated to Lead to the Discovery of Admissible Evidence under F.R.Civ.Pro. 26(b)(1)

The Federal Rules of Civil Procedure authorizing discovery are to be broadly and liberally construed. Hickman v. Taylor, 329 U.S. 495, 507 (1947); Burns v. Thiokol Chemical Corp., 483 F.2d 300, 307 (5th Cir. 1973) ("open disclosure of all potentially relevant information is the keynote of the Federal Discovery Rules"). "[Liberal construction of discovery rules] is particularly true in complex civil rights cases. Certainly the relevancy requirement has been liberally construed." Laufman v. Oakley Bldg and Loan Co., 72 F.R.D. 116, 120 (S.D. Ohio 1976) (internal citation omitted); Williams v. United Parcel Service, No. C 79-401, 1982 WL 419 (N.D. Ohio Sept. 28, 1982) (scope of discovery in Title VII case generally broad). Given the appropriately broad authority for discovery, and the mandate of the Federal Rules of Civil Procedure, Cinemark cannot be heard to argue that evidence of a pattern or practice of ADA violations in forty percent of its theaters would not be relevant to a finding of liability.

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[6] "[T]he 'inconsistent legal obligations' that Cinemark will suffer from in this case do not appear to be insurmountable: any chain of stores that extends across state lines is subject to the different building codes of the various states in which it chooses to build a store (and probably to a variety of different local ordinances at each location as well). This is not such an 'impossible position' as defendant would lead us to believe." Id., n.7.

C. THE UNITED STATES HAS NOT WAIVED LIABILITY CLAIMS AGAINST CINEMARK'S STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT SIMPLY BECAUSE IT WILL NOT *CURRENTLY* SEEK REMEDIAL CHANGES IN THOSE THEATERS

Cinemark repeatedly and purposefully misstates the United States' position in order to make its implausible argument that partial summary judgment must be granted because there is no present live controversy regarding its theaters within the Fifth Circuit. Nothing could be farther from the truth. In fact, every Departmental statement, written or oral, that Cinemark relies on for this argument makes clear that, until Lara is no longer the law within the Fifth Circuit, the United States will not ask this Court to order any *remedial* measures for those theaters. However, the United States has never withdrawn, nor does it now withdraw, its claims that even those theaters within the Fifth Circuit violate ADA Standard 4.33.3, and are part of Defendant's pattern or practice of failing to comply with ADA Standard 4.33.3. US Opposition, Facts ¶ 1. Nor does the fact that the United States will not seek any remedial measures while Lara is the law in the Fifth Circuit convert this case into one seeking an advisory opinion from the Court or diminish the ongoing "live controversy" over Cinemark's liability for ADA violations. Instead, the United States seeks a clear and unequivocal finding that Cinemark's wheelchair seating locations *nationwide* violate ADA Standard 4.33.3, and that Cinemark has engaged in a pattern or practice of designing, constructing, and operating its stadium-style movie theaters in violation of the ADA. Both Hall v. Beals, 396 U.S. 45 (1969) and Flast v. Cohen, 392 U.S. 83 (1968), cited by Defendant, are therefore inapposite because the issues presented by the United States are capable of resolution by this Court.

D. THE COURT SHOULD REJECT CINEMARK'S ARGUMENTS BASED UPON "LAW OF THE CASE" DOCTRINE

Notwithstanding Cinemark's protestations, "law of the case" does not require this Court to carve out all Fifth Circuit theaters before the liability stage of this pattern or practice case is completed. "Unlike the more precise requirement of *res judicata*, law of the case is an amorphous concept." Arizona v. California, 460 U.S. 605, 619 (1983). The Sixth Circuit has held that "law of the case doctrine is 'directed to the court's common sense and is not an 'inexorable command," and has articulated three circumstances where previous findings can, and should, be reconsidered: (1) where the prior decision is clearly erroneous and would work a manifest injustice; (2) where substantially different evidence is raised in a subsequent trial; or (3) when controlling authority has since made a contrary decision of law applicable to the issues. Hanover Ins. Co. v. American Eng'g Co., 105 F.3d 306, 312 (6th Cir. 1997), citing Petition of U.S. Steel Corp., 479 F.2d 489, 494 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973). Coal Resources Inc. v. Gulf & Western Industries, Inc., 865 F.2d 761, 766 (6th Cir. 1989). The United States submits that following remand from the Sixth Circuit, the issues and law have changed thus satisfying the Sixth Circuit standard for rejecting Cinemark's claim that "law of the case" justifies summary judgment at this early stage.

In Hanover, the Sixth Circuit held that "law of the case" did not apply because the motion for summary judgment decided earlier in the case was not based upon a complete record and did not present identical issues to those that were before the court in the second review. 105 F.3d at 312. Likewise in this case, in its first ruling this Court essentially adopted the analysis in Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir. 2000), finding that "no obstruction" in sight lines was the single element necessary to show compliance with the ADA Standards. The Court granted Cinemark's motion for summary judgement based upon the "no obstruction" holding in Lara before

facts could be adequately developed in discovery to satisfy the "comparable lines of sight" requirement urged by the United States in both cases and now adopted by the Sixth Circuit. Given the lack of an adequate record, the Court should now allow the parties necessary discovery in order to determine whether Cinemark satisfies the standard for ADA compliance, as interpreted by the Sixth Circuit, that stadium-style theaters must provide wheelchair locations with "comparable lines of sight," including viewing angles and other relevant considerations. That is a different legal issue than this Court decided initially and the "law of the case" doctrine should not be applied to deny discovery necessary to evaluate whether Cinemark meets the standards now set by the Sixth Circuit. Contrary to Cinemark's baseless claims, "law of the case" does not limit the Court's authority to permit full development of the facts and presentation of all the issues in this second proceeding on remand. Furthermore, nothing in the "law of the case" doctrine precludes this Court from reconsidering its own previous decisions. United States v. Todd, 920 F.2d 399, 403 (6th Cir. 1990) (court has power to revisit prior decisions of its own), *citing* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988).

Another reason for revisiting the Court's earlier summary judgment ruling is that the earlier judgment was granted in the face of controverted facts. In response to Cinemark's Second Motion for Summary Judgment, the United States presented evidence that wheelchair seating locations in Cinemark's stadium-style movie theaters have obstructed views of the screen. See US Opposition, Facts ¶¶ 3-7. From those cited public statements and affidavits, this Court can reasonably infer the following: the elevated tiers of stadium-style movie theaters eliminate all or most obstructions; most wheelchair seating locations are not on elevated tiers but are in the front flat or sloped non-elevated seating areas; therefore, the wheelchair seating locations have obstructed views. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (court must afford reasonable inferences and construe

evidence in light most favorable to nonmoving party); Petrey v. City of Toledo, 246 F.3d 548, 553 (6th Cir. 2001) (summary judgment evidence must be construed in the light most favorable to nonmoving party); Cox v. Kentucky Dept. of Transportation, 53 F.3d 146, 151 (6th Cir. 1995) (nonmoving party may rely on circumstantial and inferential evidence to defeat motion for summary judgment). Since there is a factual dispute on the issue of obstruction, Cinemark's Motion for Partial Summary Judgment should be denied. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (summary judgment appropriate 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."); Anderson v. Liberty Lobby, Inc., 477 U.S. at 247-48 (same); Fed. R. Civ. P. 56(c).

E. ALTERNATIVELY, THE UNITED STATES SEEKS DISCOVERY PURSUANT TO RULE 56(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Cinemark alleges that it is entitled to partial summary judgment based upon the Fifth Circuit's Lara decision that obstruction is the only requirement pursuant to ADA title III Standard 4.33.3. The Sixth Circuit has now ruled to the contrary and discovery should be permitted to adequately address the Sixth Circuit's interpretation of the law; however, even if the Sixth Circuit had limited the review to whether there is an obstruction in the line of sight of wheelchair locations in Cinemark theaters, the United States is entitled to discovery about the obstruction in lines of sight in all of the Cinemark's theaters, including those in the Fifth Circuit before responding to a motion for summary judgment. Before Cinemark's Motion for Partial Summary Judgment was filed,

already pending were several discovery requests by the United States remain pending.[7] Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, the United States is entitled to responses to that discovery before a decision on the partial summary judgment motion.[8]

F. ACTION ON THE PENDING *PETITIONS FOR CERTIORARI* MAY LEAD TO REVERSAL OF THE FIFTH CIRCUIT'S LARA DECISION, THUS CINEMARK'S MOTION FOR PARTIAL SUMMARY JUDGMENT IS PREMATURE

At the present time, two petitions for certiorari are pending before the United States Supreme Court relating to ADA Standard § 4.33.3 and the meaning of "comparable lines of sight" in stadium-style movie theaters. Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3310 (Oct. 27, 2003)(No. 03-641), and United States v. Cinemark USA, 348 F.3d 569 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3513 (Feb. 4, 2004)(No. 03-1131) (ECF docket #126). US Opposition, Facts ¶¶ 10-11. It is quite likely that either the Supreme Court will have decided about accepting one or both of these petitions, or even have issued an opinion on the meaning of ADA Standard 4.33.3 by the time this Court makes any findings on liability in this case. See Minutes of Status Conference of January 26, 2004, ECF docket #124.

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[7] On March 16, 2004, the United States served Cinemark with a Notice of Entry Upon Land pursuant to Rule 34 to inspect certain of its theaters, before Cinemark filed its Motion for Partial Summary Judgment. The United States selected ten of Defendant's stadium-style movie theaters for inspection - three (3) in Ohio and seven (7) in the state of Texas. The seven located in Texas represent theaters that opened in various years. One of the purposes for these inspections is to analyze the lines of sight, including, but not limited to, viewing angles and obstructions, within the auditoriums at the wheelchair seating locations and fixed seats and verify actual dimensions with architectural plans produced by Cinemark. At a minimum, the United States expects this evidence will refute Cinemark's assertion that its theaters provide wheelchair users with unobstructed lines of sight, and that they meet the so-called "Lara test." Because this evidence will contradict Cinemark's vague assertions of compliance with the Lara test and render its request for partial summary judgment for its theaters within the Fifth Circuit improper, this Court should, at minimum, postpone ruling on the motion for partial summary judgment until after the United States conducts its already noticed inspections. Celotex, 477 U.S. at 326 (1986).

[8] Rule 56 of the Federal Rules of Civil Procedure states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

If the Supreme Court grants either or both petitions, its decision could have a significant impact on these proceedings. Therefore, a stay of the case at this stage of the remand proceedings would conserve scarce judicial resources, and save both parties considerable time and expense. Cf. Cinemark's Motion for Partial Summary Judgment at 2 (expressing concern for time, money, and judicial resources in this case). Staying proceedings would avoid later scheduling conflicts and potential waste of resources depending upon the outcome in the Supreme Court.

CONCLUSION

The United States respectfully requests that this Court deny Cinemark's Motion for Partial Summary Judgment for all Stadium-Style Movie Theaters Within the Fifth Circuit. Alternatively, the United States respectfully requests that this Court order a continuance of the motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure to allow the United States to conduct discovery previously served on Defendant prior to Defendant's filing of its Motion for Partial Summary Judgment that will enable the United States to better respond to Defendant's motion.

Respectfully submitted,

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