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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) RESPONSE OF PLAINTIFF UNITED STATES TO AMC DEFENDANTS' "OBJECTIONS" TO DECLARATION OF WILLIAM HECKER IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DATE: Jan. 21, 2003 TIME: 10:00 a.m. JUDGE: Judge Florence-Marie Cooper

INTRODUCTION

Accompanying AMC's Opposition to the United States' Motion for Partial Summary Judgment is a separate pleading which is artfully entitled "Objections to Declaration of William Hecker in Support of Plaintiff's Motion for Partial Summary Judgment" (filed Jan. 7, 2003) (Docket # 420) ("AMC Objections"). In these Objections, AMC claims that the Hecker declaration and report - both of which accompanied the United States' motion for partial summary judgment on non-line of sight issues - should be stricken from the record in this action because they allegedly (i) contain improper legal conclusions, and (ii) rest on unreliable data and invalid methodology. See AMC Objections at 4-8. AMC's "objections" should be rejected because they are both untimely and contrary to law. Not only are AMC's "objections" improperly before this Court, but also the Hecker declaration and his expert report fully comport with both Rule 56(e) and applicable requirements under the Federal Rules of Evidence for expert testimony.

ARGUMENT

A. AMC's "Objections" Are Untimely and Procedurally Improper

Although AMC's Objections are styled as a challenge to only the Hecker declaration, this pleading is actually a motion to strike not only the Hecker declaration, but also the Hecker expert report. See AMC Objections at 8 (stating, in conclusion, that "AMC's objections to both the Hecker Declaration and Report should be sustained and the evidence stricken"). As such, the Central District's local rules mandate that AMC's motion to strike should have been served not less than 21 days (personal service) or 24 days (service by mail) in advance of the hearing date. See C.D. Cal. L.R. 6-1. AMC, however, failed to comply with this requirement. Rather, AMC belatedly served its "Objections"/Motion to Strike on January 7, 2002 – only fourteen days before the hearing scheduled for January 21, 2003. Considering that AMC was served with the United States' Motion and the supporting Hecker declaration on November 4, 2002, more than two and half months before the January 21 hearing date, and the Hecker Report on August 20, 2002, more than five months before the hearing date, its failure to file and serve a timely motion to strike the Hecker declaration and report is inexcusable. Accordingly, this Court should

summarily dismiss AMC's "Objections"/Motion to Strike as untimely and procedurally improper.

B. The Hecker Declaration and Report Fully Comply With Both Rule 56(e) and the Federal Rules of Evidence

Yet even setting aside AMC's belated filing of its "Objections"/Motion to Strike, it is clear that under Ninth Circuit caselaw the Hecker report and declaration satisfy the federal rules of evidence and civil procedure for the presentation of expert opinion in support of a motion for summary judgment.

Citing caselaw from a number of different circuits, AMC asserts that for summary judgment purposes expert testimony must satisfy both the requirements of Federal Rules of Evidence 702 and 703 as well as the requirements of Rule 56(e). See AMC Objections at __. While the United States does not necessarily dispute this statement of the law, contrary to AMC's discourse on how other circuits have interpreted the requirements of Rule 56(e) as applied to expert declarations, the Ninth Circuit does not interpret Rule 56(e) to require that the expert declaration set forth not only the facts upon which it is based, but also the reasoning process underlying the expert's opinion, or the material on which the expert based his opinion. AMC Objections at 3. Instead the Ninth Circuit, in balancing Rule 56(e), which requires the setting forth of admissible facts, with Fed.R.Evid. 705, which allows an expert to testify in terms of opinion without first presenting the underlying facts or data, has held that "Expert opinion is admissible . . . if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1986). The Court went on to state that if further facts are desired, the movant may request, and the district court may require their disclosure. Id.; see also Courtaulds Aerospace, Inc. v. Huffman, No. CV-F-91-518, 1994 WL 508168, at *5 (E.D. Cal. June 9, 1994)(describing the standard as lenient and stating that an expert's affidavit is insufficient only when it contains no factual basis to support a conclusion as to the ultimate issue, and the underlying facts are non existent) (copy attached as Exhibit A).

Here, AMC objects to Mr. Hecker's declaration and report, apparently on the grounds that

they allegedly offer conclusory opinions, and thus fail to satisfy the requirements of Rule 56(e), as well as legal conclusions, which generally extend beyond what is considered permissible expert testimony under the Federal Rules of Evidence. See AMC Objections at 3, 4-6; see also Advisory Committee Note to Fed.R.Evid. 704 (abolishing the so-called "ultimate issue" rule, but not lowering the bar so as to admit all opinions). The Hecker declaration, however, does not state any opinions whatsoever, whether expert, legal, or otherwise. Rather, it is a straightforward recitation of a number of facts that are within Mr. Hecker's personal knowledge, such as, his work experience, the number of surveys he has conducted, the fact that he personally made and recorded the field measurements in his report, the type of tool he used to measure the ramps at AMC's theaters, and the amount of time it took him to survey each theater. See Hecker Decl. Ex. 2, ¶¶ 1-7 (Docket #381). As the declaration does not present any opinions, it cannot be struck for being conclusory or lacking in a factual basis, and as it consists entirely of factual information, nor can it be struck for offering legal conclusions.

AMC also argues, inexplicably, that Mr. Hecker's declaration necessarily incorporates his expert report, and thus, the report should be struck as well for offering legal conclusions regarding the meaning of Title III of the ADA, and perhaps, although AMC's arguments are unclear, because it, too, is conclusory. AMC Objections at 1, 4-6. In the first two pages of its opposition, AMC lists thirteen quotes that it attributes to Mr. Hecker's report as evidence of improper legal conclusions made by Mr. Hecker. Although the citation for each quote is to Mr. Hecker's Report, the quotes are actually taken not from Mr. Hecker's report, but directly from the United States' Memorandum in Support of its Motion for Partial Summary.[1] As these statements, even if considered legal conclusions, were not made by Mr. Hecker, but instead by counsel for the United States, they do not constitute grounds for striking Mr. Hecker's report. Moreover, the only information from Mr. Hecker's report that is relied on by the United States in

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[1] The quote under Subheading 1.A (interior ramps) can be found on page 13 of the United States' memorandum; Subheadings 1.B, 1.C (width of wheelchair spaces, aisle seating) quotes are located on page 15 of the United States' memorandum; Subheading 1.D (toilet stalls & grab bars) quotes are located on pages 16-17; Subheading 1.E (auditorium doors) quotes are located on page 17 of the United States' memorandum; Subheadings 1.F, 1.G, and 1.H (assistive listening devices, visual fire alarms, and protruding objects) quotes are located on page 18 of the United States' memorandum.

support of its motion is entirely factual in nature. The United States' Facts cites uniformly to data from the twelve appendices to the Hecker Report that catalogue the precise measurements recorded during each of the twelve theater complex surveys. These notes and measurements from each of the twelve surveyed theater complexes consist solely of data and factual information about the theaters, and are devoid of any legal conclusions or interpretations of the law. Any such legal interpretations are presented by the United States in its memorandum of law. Further, Mr. Hecker's report thoroughly satisfies, if applicable, the requirements of Rule 56(e). Mr. Hecker's opinions are supported by twelve appendices ranging from four to eleven pages each of detailed factual evidence on each of the theaters surveyed. The report also includes 14 pages of reasoning upon which Mr. Hecker's opinions are based. Accordingly, AMC's motion to strike Mr. Hecker's report and declaration on these bases should be denied.

While AMC does not clearly articulate a basis to support its argument to exclude the Hecker Report and Declaration for failure to provide the proper foundation, AMC appears to complain that Mr. Hecker's Report and Declaration are not "reliable" and that his "underlying methodology is invalid." See AMC Objections at 6-8. AMC raises three specious allegations to support this complaint: that Mr. Hecker's use of a two foot "Smart Level" to measure portions of AMC's interior ramps was supposedly in direct contravention of the Standards; that Mr. Hecker's Report and Declaration allegedly did not indicate if, when taking measurements, he took into account "construction tolerances" and any variances that could be due to "temporary interruptions" or "maintenance"; and, that Mr. Hecker's descriptions of how and where he took measurements were too "generic" for AMC to "verify or disprove the findings." Id. at 7. However, AMC's allegations are, once again, without merit.

First, AMC challenges Mr. Hecker's measurements of AMC's interior ramps using a two-foot long digital "Smart Level" claiming, without citation, that "[t]he Standards require that these ramps must be measured across their entire length, and not in two foot increments as done by Mr. Hecker" and that Mr. Hecker allegedly "moved that level until he found a portion of the ramp that exceeded" the requirement for ramp slope set forth in the Standards. Id. The Standards, however, do not set forth requirements regarding how interior ramps are to be measured. Moreover, Mr. Hecker's use of a Smart Level and any measurements taken from the steepest part

of the slope are perfectly acceptable. See http://www.usdoj.gov/crt/ada/ckstools.htm#anchor45374 wherein the Department of Justice issued guidance, in the context of new lodging facilities, listing a digital "slope meter,"such as a digital "Smart Level," as one way to determine a given slope and advising that the measurement should be placed on the "steepest part" of the slope.

Second, AMC erroneously argues that since neither Mr. Hecker's Report nor Declaration indicate if the measurements taken were within "construction tolerances" or due to "temporary interruptions or attributable to maintenance," his Report and Declaration should be stricken. See AMC Objections at 7-8. Again, AMC is wrong. While Standard 3.2 provides that dimensions set forth in the Standards are subject to conventional building industry tolerances for field conditions (construction tolerances), the burden to demonstrate that the evidence presented is within "construction tolerances" and so not a violation of the Standards is an affirmative defense upon which AMC bears the burden of proof, not Mr. Hecker. See Independent Living Resources v. Oregon Arena Corp., 1 F. Supp.2d 1124, 1135 (D. Or. 1998); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 782 (D. Or. 1997); see also Memorandum In Support of United States' Motion for Partial Summary Judgment on Defendants' Failure to Comply With the Standards for Accessible Design of Elements Not Related to Line of Sight Issues 19, n.9 (filed Nov. 4, 2002) (Docket # 380); Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001) (no substantial compliance exception for new construction); Pasciutti v. New York Yankees, No. 98 CIV. 8186(SAS), 1999 WL 1102748, * 3 (S.D.N.Y. Dec. 6, 1999) (discussing burdens of proof on affirmative defenses in actions arising under the Americans With Disabilities Act) (copy attached as Exhibit B). In addition, while 28 C.F.R. § 36.211(b) provides a temporary exception to the requirement that a public accommodation maintain accessible facilities for "isolated or temporary interruptions in service or access due to maintenance or repairs," once again, the burden of proof for such isolated or temporary interruptions necessarily lies with AMC as it has the repair and/or maintenance records to demonstrate that such features were not accessible because of such repairs or maintenance. AMC has not met either burden.

Third, AMC complains that neither Mr. Hecker's Report nor his Declaration specifies how or where measurements were taken, including such information as the type of tool used, the

accuracy of the tool and the starting and stopping points of the measurements, and so Mr. Hecker's descriptions lack sufficient specificity for AMC to locate the violations and to either verify them or disprove their findings. See AMC Objections at 7. This complaint is patently false. AMC conveniently ignores the fact that Mr. Hecker's Report lists in exhaustive detail the measurements he took, and that he also produced, during both the document production in October 2002 in Washington, D.C. by the United States and during Mr. Hecker's deposition, his field notes and photographs documenting his measurements. See Hecker Report at 6 and Appendices I - XII; US Reply App., Ex. 4, 19:22-20:18, 109:10-18, 273:18- 274:1. Also, during Mr. Hecker's deposition, he testified in detail regarding how he took certain measurements and of the accuracy of the tools used to make such measurements.[2] In addition, Mr. Hecker's Report (and his deposition) provides sufficient details to enable AMC either to verify or refute the findings contained therein. For example, regarding the Grand theater in Dallas Texas, Mr. Hecker noted that in Auditorium #2, the front ramp screen right was 10.9%, and so steeper than the 8.3% provided in Standard 4.8.2. See Hecker Report, Appendix IV at 2. In addition, in his Declaration and his Deposition, Mr. Hecker states that he measured this slope using a two-foot long digital "Smart Level." See Hecker Decl. at ¶ 6, see also US Reply App., Ex. 4, 16:14-19, 89:16- 93:4. According to AMC, such detail is not sufficiently specific because, in effect, Mr. Hecker did not inform AMC of the type of tool he used (which he clearly did), the accuracy of the tool and the starting and stopping points of the measurement, so that AMC could locate the feature and either verify or disprove the finding. See AMC Objections at 7-8. Such objection is patently ridiculous. Moreover, none of the cases cited by AMC support AMC's novel arguments. As such, AMC's objections to Mr. Hecker's Report and Declaration should be rejected.

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[2] See US Reply App., Ex. 4, 9:20-10:14, 15:21- 20:18, 22:17-23:12, 30:11-21, 34:5-18, 36:9-21, 38:10-39:1, 50:19-51:23, 54:2-9, 56:5-10, 58:22-59:6, 59:19-61:6, 63:13-67:20, 89:16- 93:4, 96:4-9, 181:19-182:21, 183:23-186:2, 187:7-199:1, 202:2-7, 212:10-20, 214:9-17, 264:4-265:4, 267:6-268:3, 269:6-271:3.

CONCLUSION

For the foregoing reasons, the Court should reject AMC's "objections" to the both the declaration and expert report of William Hecker.

DATED: January __, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of January, 2003, true and correct copies of **Response of Plaintiff Untied States to AMC Defendants' "Objections" to Declaration of William Hecker in Support of the Plaintiff's Motion for Partial Summary Judgment on Defendants' Failure to Comply with the Standards for Accessible Design of Elements Not Related to Line of Sight Issues** was delivered by Federal Express, postage pre-paid, on the following parties:

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