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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case No.: CV-99-01034-FMC(SHx)
	)	
	)	REPLY MEMORANDUM OF PLAINTIFF
Plaintiff,	)	UNITED STATES IN SUPPORT OF
	)	MOTION FOR PARTIAL SUMMARY
v.	)	JUDGMENT ON DEFENDANTS'
	)	FAILURE TO COMPLY WITH THE
	)	STANDARDS FOR ACCESSIBLE
AMC ENTERTAINMENT, INC.,	)	ELEMENTS NOT RELATED TO LINE OF
et al.,	)	SIGHT
	)	
	)	DATE: Jan. 21, 2003
Defendants.	)	TIME: 10:00 a.m.
	)	JUDGE: Judge Florence-Marie Cooper

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INTRODUCTION

Defendants' reliance on conclusory statements unsupported by factual evidence fails to refute the United States' evidence in its pending motion for partial summary judgment. Defendants' attempts to further delay a ruling by this Court on these issues should not be allowed. This Court should thus proceed to adjudicate the legal issues set forth in the United States' motion for partial summary judgment.

ARGUMENT

A. The United States' Motion for Partial Summary Judgment on Non-Line of Sight Issues Is Ripe for Adjudication

Defendants first attempt to forestall a ruling by this Court on the United States' motion for partial summary judgment by suggesting that this motion is not ripe for consideration because (i) they allegedly now wish -- at the eleventh-hour -- to mediate the accessibility issues presented in this motion, and (ii) they have not had sufficient time to investigate the accessibility violations addressed in this motion. See, e.g., AMC Opp. Mem. at 1, 3-4, 6-8. Defendants' arguments are meritless and should be summarily rejected by this Court.

First, Defendants' belated "request" to mediate the accessibility violations at its stadium-style movie theaters represents nothing more than a thinly-veiled attempt to further delay hearing on the United States' motion. It was the United States that proposed mediation in 2000 and again in 2001, urging AMC to join in mediation to resolve the outstanding disputes, even after the parties engaged in extensive efforts to reach a negotiated agreement resolving both line-of-sight and non-line of sight issues in this action and were very near a final resolution. AMC withdrew from mediation on both occasions.[1] The parties' lengthy past attempts at both private

[1] Indeed, in 2000 and 2001, the parties spent over eighteen months attempting to amicably resolve both line-of-sight and non-line of sight issues through settlement and mediation. See, e.g., Joint Stipulation By Plaintiff United States to Motion to Compel Documents and Supplementary Reports Concerning AMC's Trial Experts (filed Dec. 30, 2002)(Docket #412); Second Joint Stipulation Regarding Plaintiff's Motion to Compel Testimony from Defendants (filed Aug. 8, 2002)(Docket #327); Joint Stipulation Regarding Plaintiff's Motion to Compel Testimony from Defendants (filed July 12, 2002)(Docket #314); Joint Stipulation By Plaintiff to Motion for Protective Order (filed Feb. 28, 2002)(Docket #232); United States' Third Status Report Regarding Court-Ordered Mediation (filed Dec.

settlement and formal mediation, along with the extensive history of discovery disputes in this case, clearly demonstrates that any attempt to resolve accessibility violations without a Court ruling concerning the underlying liability issues would be ineffective and cause extensive further delays. Moreover, while the United States ***did*** offer to mediate regarding the remediation of accessibility violations at AMC's stadium-style theaters after the issuance of the Court's summary judgment ruling, see Plaintiff United States' Request for Status Conference (filed Dec. 18, 2002) (Docket # 407), AMC did not respond to this offer. See US Reply App., Ex. 1, ¶ 9. Indeed, Defendants did not even respond to the United States' earlier invitation to meet-and-confer before the filing of the instant motion for partial summary judgment. See US Reply App., Ex. 2, ¶ 3-4. Given this background, it is plain that AMC's mediation "request" is little more than a delay tactic.[2] This Court should thus proceed to adjudicate the legal issues set forth in the United States' motion for partial summary judgment.

Second, Defendants' claim that it had insufficient time to investigate and respond to the accessibility violations addressed in the United States' motion for partial summary judgment also

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28, 2001) (Docket # 225); Plaintiff's Request for Status Conference, Re: Mediation and Scheduling (filed Aug. 3, 2001) (Docket # 182).

[2] Defendants' rationale for mediating these accessibility issues ***prior*** to a ruling on the pending motion is also seriously flawed. First, Defendants allege that the Department "only recently" disclosed these violations. This is patently false. In response to interrogatories served on the United States in 1999, the United States provided Defendants with a 60-page list of preliminary violations at the AMC Promenade 16, Norwalk 20, Olathe Station 30, and Barry Woods 24 theater complexes. See Joint Stipulation Re: Plaintiff United States' Motion for Protective Order From AMC Entertainment, Inc's Notices of Deposition to Five Department of Justice Employees 28 (filed Mar. 22, 2002) (Docket # 254) (citing Appendix (Volume One) to Plaintiff United States' Motion for Protective Order From AMC Entertainment Inc.'s Five Deposition Notices to Five Department of Justice Employees, Ex. 7, pp. 8-67 (filed Mar. 22, 2002) (Docket # 251)). Further, during the parties' failed settlement discussions in 2001, the United States provided AMC with details on many of the same violations listed in the United States' Statement of Undisputed Facts for nine of the 12 surveyed theater complexes. See US Reply App., Ex. 1, ¶ 4. AMC also improperly alleges that the United States sought, and was granted, an order *preventing* AMC from "improving its facilities." See Order Granting United States' Ex Parte Motion for Temporary Restraining Order to Prevent Further Spoliation of the Evidence by Defendants (filed Oct.10, 2000) (Docket #172). However, the Court's Order only prohibited Defendants from making accessibility changes to the 12 theater complexes covered by the Order *until* the United States had completed its surveys of those theaters. Prior to that time, Defendants could seek Court approval for any changes it sought to make. See id., ¶¶ 3, 10. Yet Defendants have taken no action to correct any of these violations at these theaters. See US Reply App., Ex. 3, 392:9-397:11.

rings hollow. Defendants have already sought and received two extensions of time which collectively afforded them ***eight*** additional weeks to frame their opposition to the United States' summary judgment motion. See Defendants' Ex Parte Application to Continue Hearing on Plaintiff's Motion for Partial Summary Judgment filed Nov. 5, 2002 (Docket #382); Defendants' Ex Parte Application to Temporarily Stay the Action or to Modify the Court's November 6, 2002 Order, filed November 22, 2002 (Docket #402). Moreover, Defendants' continued protestations that they were *never* provided information on these violations until they received the Hecker report[3] flies in the face of reality. As discussed previously, see supra fn. 2, the United States provided Defendants in August 1999 with a 60-page list of accessibility violations at four of AMC's stadium-style theater complexes. During later settlement negotiations, the United States also subsequently provided AMC with extensive lists of accessibility violations at approximately nine of the twelve theater complexes it had surveyed by that time. US Reply App., Ex. 1, ¶ 4. Finally, it also bears noting that Defendants had both theater-level and corporate-level personnel on-site at each of the 12 theater surveys observing the survey process. Its personnel had the opportunity to observe United States' accessibility expert Bill Hecker while he was making each and every measurement, including where and how each measurement was made.[4] There was nothing to prevent Defendants from having its own architects, staff members, or experts follow

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[3] Defendants state that they did not receive the United States' expert reports until September 26, 2002, and thus had less than three months to review them prior to filing its opposition memorandum. As with many of Defendants' factual statements, this is not correct. The United States served its expert disclosures on AMC on August 20, 2002, and the hundreds of photographs, field notes, and other materials accompanying Mr. Hecker's report were also made available for inspection at that time. Defendants' claim that the United States refused to provide them with the videotapes made during the theater inspections is also inaccurate. This Court has stated that AMC is *only* entitled to the approximately 159 videotapes utilized by its experts. See Minute Order of November 12, 2002, Denying Defendants' Ex Parte Application to Strike Videotapes Referenced in Deposition Transcript of Edward Gipple (Docket #390). Yet despite its repeated protestations that it needs these videotapes, Defendants have yet to make arrangements to view and/or copy those tapes it *is* entitled to. "*The lady doth protest too much, methinks.*" (William Shakespeare, Hamlet, Act III, Scene II). Further, these videotapes, which only show audience seating preferences, have ***no*** bearing on the instant motion.

[4] Indeed, AMC's claim that it had no knowledge of these violations prior to receiving Mr. Hecker's expert report is further contradicted by the deposition testimony of its Vice-President for Special Projects, Mr. Philip Pennington. Mr. Pennington was at each of the twelve Departmental surveys and became aware of some of the violations, including the lack of raised letter and braille room identification signs, at the time of the surveys. See US Reply App., Ex. 3, 164:15-165:13.

Mr. Hecker during his surveys and duplicate his measurements on the spot. The fact that Defendants elected not to undertake such measures does not now entitle them to delay the proceedings on the United States' motion for partial summary judgment for yet a third time.

B. AMC Does Not Dispute Material Facts Underlying the US Motion for Partial Summary Judgment In Its Stadium-Style Movie Theaters

Defendants do not dispute, by declaration or other written evidence, significant and material aspects of the United States' Motion. See Fed.R.Civ.Pro. 56(e) (motion for summary judgment must be countered with properly-supported factual statements with "specific *facts* showing that there [are] genuine issue[s] for trial")(emphasis added); C.D. Local Rule 56-3 (material facts adequately supported by the moving party are admitted to exist unless "controverted by declaration or other written evidence filed in opposition to the motion"). This obligation is not met by the assertion of conclusory allegations or denials. See, e.g., Taylor v. List, 880 F.2d 1040, 1045-46 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying on conclusory allegations unsupported by factual data."); see also Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) ("The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient" to preclude summary judgment).

Defendants do not dispute the vast majority of the United States' Facts with declarations or other written evidence. Instead, Defendants use a handful of boilerplate and conclusory allegations in an effort to manufacture factual disputes. However, given that these conclusory allegations do not satisfy the burden necessary to counter the United States' summary judgment evidence, the United States' Motion for Partial Summary Judgment should be granted in its entirety.

1. *AMC Fails to Create Disputed Issues of Material Fact Concerning Mr. Hecker's Measurements*

The vast majority of the paragraphs in AMC's Separate Statement of Genuine Issues of Material Fact ("AMC's Disputed Facts")(filed Jan. 7, 2003)(Docket #423) are nothing more than an attempt to attack the way the United States' expert conducted his surveys of AMC's theaters. In order to create a dispute over these facts, the majority of which consist of detailed

measurements and dimensions, Defendants must show an actual dispute in the measurements or dimensions. However, other than the thread-bare statements in the two declarations filed with AMC's Opposition regarding a handful of measurements taken at five of Defendants' theaters allegedly showing different results than those obtained by Mr. Hecker,[5] no other contrary measurements have been presented by Defendants, nor by Defendants' own accessibility expert, Mr. Michael P. Gibbens. See Gibbens Report, Exhibit O to Declaration of Gregory F. Hurley in Support of AMC's Opposition ("Hurley Decl.")(filed Jan. 7, 2003)(Docket #422).[6]

Defendants were served with Mr. Hecker's expert report on August 20, 2002. Defendants' representatives were on-site at each survey and observed Mr. Hecker conducting his surveys. Defendants have deposed Mr. Hecker on, among other topics, his methodology for conducting these surveys, the equipment he utilized, its known accuracy, and how often he calibrated his equipment. Defendants have been provided with Mr. Hecker's field notes from these surveys and the hundreds of photographs he took during those surveys documenting the elements he surveyed and conditions at the theaters. See US Reply App., Ex. 5, Response to Request for Production Nos. 1, 4-5, 10-11; US Reply App., Ex. 4, 20:21-12. Had Defendants requested the production of Mr. Hecker's equipment at his deposition, Mr. Hecker would have complied. However, no such request was ever made. See AMC's Disputed Facts at 5. While Defendants contend that the United States "must establish that the measurements that they took were accurate", id., an issue the United States does not concede, nonetheless, the United States has in fact done so. See U.S. SJ App. Ex. 2, Hecker Decl. ¶ 5-6 (filed Nov. 4, 2002)(Docket # 381). See also Response of Plaintiff United States to AMC Defendants' "Objections" to

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[5] As discussed later in this memorandum, see Section C, pp. 16-22, *infra,* the declarations of AMC Counsel Gregory F. Hurley and AMC Vice-President Philip C. Pennington are legally deficient and fail to create disputed issues of material fact.

[6] Indeed, the Gibbens report is devoid of ***any*** facts, only a few general conclusory statements not connected in any fashion to the actual conditions found at Defendants' stadium-style movie theaters at issue in this litigation. There is no indication that Mr. Gibbens has ever surveyed *any* AMC stadium-style theater or reviewed any plans for any of its theaters. In fact, the Gibbens Report makes clear that even Defendants' expert has *no* idea whether any of the measured violations of the Standards in the Hecker Report are accurate or not. See Gibbens Report at 1, Exhibit O to Hurley Decl. ("While the aforementioned facilities/features ***may or may not in fact ultimately be shown to depart*** from one or more of the requirements of the ADA ...") (emphasis added).

Declaration of William Hecker in Support of Plaintiff's Motion for Summary Judgment (served Jan. 14, 2003) ("Response to Hecker 'Objections'"). The burden is now on Defendants to come forward with contrary measurements for all twelve theaters surveyed by the United States, attested to or otherwise supported by written evidence. Conclusory statements simply do not meet the evidentiary burden necessary to defeat a motion for summary judgment. Taylor, 880 F.2d at 1045-46. Without evidence of contrary measurements, there can be no disputed facts. See also Arpin, 261 F.3d at 919 (mere scintilla of evidence not sufficient to preclude summary judgment).

Additionally, Defendants challenge the fact that measurements were only taken on one part of each of the many ramps surveyed, AMC's Disputed Facts at 5, and that these measurements were taken with an electronic level, id. at 11. However, Defendants themselves have admitted violations in their theaters where a *portion* of a ramp exceeds 8.3 percent.[7]

Therefore, those facts that Defendants have challenged on the basis that the United States' accessibility expert Mr. Hecker failed to indicate how or where each measurement was taken, that his measurements and equipment are improper, and other attacks on the way the surveys were conducted, without providing contrary measurements or dimensions, must be deemed admitted.[8]

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[7] See US Reply App., Ex. 6 at ¶ 22 ("Certain ***parts*** of vomitory ramps and auditorium cross slopes do not meet the ADA requirement of 1 in 12.")(emphasis added); see also US Reply App., Ex.7, ¶ 1164.

[8] See AMC's Disputed Facts ¶¶ 13-14, 17-19, 21-42, 49-54, 56, 58-63, 75-78, 85-88, 90-93, 95-131, 133, 137-138, 152-155, 160-166, 168-172, 174-175, 186-189, 195-224, 233-247, 249, 252-253, 258-261, 263-264, 267, 269, 271, 275, 277, 289-290, 292, 302-310, 313, 317, 320, 324, 331-332, 334-336, 338-340, 342-343, 345, 350-351, 362, 364-369, 371, 373, 379-380, 382-390, 398-406, 408-410, 413-415, 417-419, 423, 437-455, 458-460, 462-471, 473, 483, 485-486, 492, 494, 496, 498-512, 519-521, 532-537, 542-543, 547-572, 578, 582, 590-594, 609-622, 624, 626-627, 629-631, 633, 637-657, 668-669, 671-680, 692-698, 713-758, 764-765, 767, 770-772, 774-777, 786, 788-789, 791-792, 795, 797, 799-805, 818-833, 838–840, 843, 845-899, 953-954, 956-958, 960-969, 986-987, 990, 994, 996-997, 1001, 1003-1007, 1009-1012, 1019-1028, 1031-1033, 1035-1038, 1047-1050, 1052, 1054, 1058-1060, 1064-1073, 1078-1086, 1088-1092, 1096-1097, 1100-1102, 1106-1112, 1114-1120, 1123-1127, 1131, 1134-1137, 1140-1141, 1143-1149, 1154-1163, 1171, 1173, 1184, 1080-1086, 1088-1092, 1096-1097, 1100-1102, 1106-1112, 1114-1120, 1123-1127, 1131, 1134-1137, 1140-1141, 1143-1149, 1155-1163, 1171, 1173, 1184, 1199, 1201, 1203-1209, 1216, 1222-1226, 1230, 1234-1235, 1241-1250, 1261-1272.

2. *AMC's Repeated Assertions That the United States Did Not Provide the Actual Measurements Taken as Its "Evidence Showing Dispute" Are Patently False.*

AMC states repeatedly that the United States has not provided the actual measurements of the violations found at its theaters. This so-called "evidence showing dispute" is plainly nonexistent. The United States' Facts specifies the exact measurements taken *and* specifies the measurement required by the Standards for easy comparison. Therefore, those paragraphs in AMC's Disputed Facts must be deemed admitted.[9]

3. *AMC Has Not Disputed the Facts That It Has Neither Provided One Fixed Companion Seat for Each Wheelchair Space Or That the Companion Seats are Next to Each Wheelchair Space*

The requirement to provide companion seating ***next to*** wheelchair seats in assembly areas such as movie theaters, Standard 4.33.3, is based on common sense - people with disabilities, including people who use wheelchairs, frequently attend movies with non-disabled companions, such as spouses, friends, attendants who perform various services for the person with a disability. Thus, the physical relationship between a companion seat and its adjacent wheelchair seat should provide the person with a disability and his/her companion with the same experience as any two people without disabilities who attend a movie and expect to be able to sit ***next to*** *their* companion. AMC, however, has chosen a different route; in many of its stadium-style auditoria a companion attending a movie with a person who must use a wheelchair is either forced to sit away from the person using the wheelchair (horizontally separated by distance, rails, etc.), or the companion is forced to sit in a seat that is elevated inches *above* or below the floor level of the person using the wheelchair (vertically separated). See US Reply App., Ex. 6, ¶ 5 ("some

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[9] See AMC's Disputed Facts ¶¶ 13-14, 21-50, 52, 75-78, 81, 90-93, 95, 98, 100, 102-105, 107, 111-112, 114, 152, 155-156, 164, 166, 168-170, 173, 175, 186, 197-198, 200-209, 215-224, 225-232, 248-249, 251, 253-254, 256-258, 261-262, 265-266, 268, 270, 272, 278, 289-292, 294-296, 302-323, 325-331, 337, 341-342, 344-345, 350-351, 362-369, 371-373, 376, 379-406, 408, 410, 414-415, 417-419, 422, 424-425, 437-455, 458-459, 463-485, 487-498, 502, 505, 509-512, 519-521, 532-537, 540, 545, 547-574, 576-592, 609-624, 626-627, 629-630, 633, 658, 668-669, 671-743, 745-756, 762, 764-765, 767, 769, 771-772, 774-776, 783-786, 791-792, 795, 797-798, 800-804, 817-833, 840, 843, 847-943, 954, 956, 958-962, 964-966, 968-969, 971-974, 986, 990, 994, 996-998, 1001, 1003-1004, 1006-1019, 1021, 1023-1028, 1031-1054, 1058-1060, 1064-1065, 1067-1077, 1080-1081, 1083-1086, 1088-1091, 1093-1097, 1100-1101, 1106-1107, 1109-1115, 1117-1121, 1123-1131, 1134-1137, 1141-1155, 1157, 1159-1163, 1170-1173, 1184, 1199, 1201, 1204-1223, 1225-1126, 1230-1232, 1234-1238, 1241-1271, 1273-1282.

companion seats are located too far from the wheelchair space"); see also United States' Motion for Summary Judgment on Line of Sight, Appendix, Vol. 2 ("US SJ App."), filed October 28, 2002 (Docket #369), Ex. 40, Declaration of Herbert Kjos (dated Oct. 19, 2002) ¶ 5 and Ex. 49, Declaration of Mary O'Brien (dated Oct. 21, 2002) ¶¶ 9-11; see also US Reply App., Ex. 8, Declaration of Brian Koukol (dated Nov. 8, 2002) ¶ 4.[10] No other movie-going patrons are forced to deal with this situation, other than people with disabilities and their companions.

AMC maintains that Standard 4.33.3 does not specify a "location or orientation" for companion seats. AMC's Disputed Facts at 14-15. Of course, this is simply not true. Standard 4.33.3 requires that "[a]t least one companion fixed seat shall be provided ***next to*** each wheelchair seating area." 28 C.F.R. Pt. 36, App. A § 4.33.3 (emphasis added). By AMC's definition, a companion seat could be located in a completely different row or a different section of the auditorium from its "companion" wheelchair space.

AMC also tries to convince this Court that the Standards allow AMC to provide just one fixed companion seat where it places two wheelchair seating spaces side-by-side. This argument again defies common sense and the rationale for requiring the provision of companion seats. See *supra.*

4. *AMC's Allegations That Certain Areas of Its Theaters Are Not Subject to the Requirements of the Standards Are Incorrect*

AMC misconstrues those requirements of the Standards that apply to areas for "common use" to limit its liability in the pending motion. AMC 's Disputed Facts at 17. Defendants attempt to narrow the term to exclude areas it determines are for its employees only. However, the term "common use" is defined in the Standards itself: "those interior and exterior rooms, spaces, or elements that are made available for the use of a restricted group of people (for

[10]The problems created by these separations are perhaps most clearly laid out in the declaration of Mr. Koukol. US Reply App., Ex. 8, ¶ 4. Because of his disability, Mr. Koukol cannot maintain his seated upright position in his wheelchair by himself. His girlfriend/attendant, or other companion, must constantly reposition Mr. Koukol. When attending those AMC's theaters where the companion seats are horizontally and/or vertically separated from the wheelchair spaces, Mr. Koukol's attendant must get out of his or her seat in order to reposition Mr. Koukol in his wheelchair. In theaters where there is no horizontal or vertical separation between companion and wheelchair seats, this is not necessary.

example, *occupants of a homeless shelter*, the occupants of an office building, or the guests of such occupants)." Standards § 3.5 (emphasis in original). "Common use" areas are different than the "work areas" covered by Standard ¶ 4.1.1(3) and cited by Defendants. Defendants attempt to expand "work areas" to such rooms or spaces as employee break rooms, employee locker rooms, and employee restrooms. AMC's Disputed Facts at 17. Defendants' expansive view of "work areas," however, conflicts with guidance issued by the Department of Justice. "Work areas" are further defined in the Department's 1993 Technical Assistance Manual III ("TAM") as follows: "What is included in the term "work area"? Does it include employee lounges, restrooms, cafeterias, health units, and exercise facilities? No. These common use areas are not considered work areas, and they must be constructed or altered in full compliance with ADAAG." US Reply App., Ex. 9, ¶ 7.3110. The Department's interpretation is entitled to substantial deference. See, e.g., Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994) (holding that courts "must give substantial deference to an agency's interpretation of its own regulations"; an agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation")(quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); accord Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997); Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002); Klem v. County of Santa Clara, 208 F.3d 1085, 1089 (9th Cir. 2000); Dep't of Health & Human Services v. Chater, 163 F.3d 1129, 1133-34 (9th Cir. 1998).

Based on this definition, published by the Department of Justice in 1993, all the areas listed as having noncompliant features in the United States' motion are required to comply with the Standards. Therefore, Defendants' attempts to create disputed material facts about these "common use" areas should be rejected, and the following paragraphs in the United States' Facts must be deemed admitted: ¶¶ 54-63, 132-135, 167, 274, 346-347, 426, 513-517, 778-782, 787, 945-952, 987, 1239-1240. Similarly, paragraph 18 of the Declaration of Philip C. Pennington in Support of AMC's Opposition ("Pennington Decl.")(filed Jan. 7, 2003)(Docket #421) in which Mr. Pennington states that the "only 'common areas' of these theaters are the lobbies, the public restrooms, and the auditoriums" is not true and contains a legal conclusion by Mr. Pennington,

and therefore does not create a dispute of material facts. This portion of the Pennington Declaration should thus be stricken. See also discussion at Section C.2, pp. 21-22, *infra,*.

5. *AMC's Allegations That It Is Not Required to Provide Raised Letter and Braille Room Identification Signs at Auditorium Entrance Doors Is Neither Supported By the Standards Nor By the Deposition Testimony of Its Declarant, Philip C. Pennington.*

Standard 4.1.3(16)(a) requires signs which "designate permanent rooms and spaces" to contain raised letters and brailled characters in compliance with Standard 4.30.4. Defendants allege that their auditorium signs are merely informational signs and thus not required to comply with Standard 4.30.4. The signs at issue are outside each auditorium and designate which numbered auditorium patrons are about to enter. Additionally, Defendants claim these signs qualify for the stated exception to Standard 4.1.3(16): "Building directories, menus, and all other signs which are ***temporary*** are not required to comply." (Emphasis added.) The Department's 1993 Technical Assistance Manual, however, makes clear that "informational signs" are signs such as "cafeteria this way"; or "copy room". US Reply App., Ex. 10, ¶ 7.5165. Similarly, examples of signs designating permanent rooms and spaces in the 1993 TAM include signs such as ***men's and women's rooms***, ***room numbers***, and exit signs. Id. (Emphasis added.) Clearly, signs identifying AMC's auditoria numbers are room numbers in movie theaters. See also US Reply App., Ex. 3, 164:15-165:13 (Pennington became aware of this signage problem during the Department's surveys). Therefore, since Defendants have not raised a *material* dispute on this issue, the following paragraphs of the United States' Facts must be deemed admitted: ¶¶ 15, 20, 83-84, 136, 158, 299-300, 348, 374, 377, 421, 461, 518, 659, 762, 793, 836, 841, 844, 992-993, 999, 1029, 1055, 1061, 1087, 1098, 1103, 1122, 1132, 1138, 1200, 1202, 1229, 1233.

Defendants also allege that other signs in their theaters do not designate permanent rooms or spaces and so do not have to meet the requirements of Standard 4.1.3(16)(a). For instance, Defendants claim that signs for the women's and men's restrooms in its theaters do not designate permanent rooms and so are exempt from Standard 4.1.3(16)(a). The Department's Technical Assistance Manual makes clear that restroom signs are signs designating permanent rooms and spaces and, therefore, must comply with Standard 4.1.3(16)(a). See discussion *supra*. Since

Defendants have failed to raise a material dispute on this issue, the following paragraphs of the United States' Facts also must be deemed admitted: ¶¶ 250, 255, 412, 416, 420, 575, 596-597, 970.

Defendants attempt to create disputed facts relating to other signs in their theaters by claiming that Standard 4.1.3(16)(b) and its exception are the only requirements with which these signs must comply. However, these signs, which include restroom and telephone signs, are cited by the United States not because of the information on the signs, but because the signs themselves protrude too far into the "walks, halls, corridors, passageways, or aisles" of AMC's theaters. Standard 4.4.1. Standard 4.1.3(16)(b) does not address protruding objects, including signs. Therefore, Defendants have failed to raise a material disputed fact regarding these protruding signs and the following paragraphs of the United States' Facts must be deemed admitted: ¶¶ 670, 790, 796, 1000, 1002, 1030, 1056-1057, 1062-1063, 1099, 1104-1105, 1133, 1139, 1166, 1227-1228.

Finally, Defendants claim that Standard 4.1.3(16)(b) and its exception specify the only requirements for signs at elevators. However, elevator signs at hoistway entrances are specially required to have raised and brailled letters by Standard 4.10.5 for which there is no exception. Therefore, paragraph 301 of the United States' Facts must also be deemed admitted.

6. *AMC Has Not Produced Evidence to Dispute the Majority of the United States' Evidence Regarding Excessive Slopes and Cross Slopes at Ramps, Curb Ramps, Parking Spaces, or Access Aisles*

With regard to slope measurements, Defendants allege that "[m]any of Hecker's measurement's (sic) are within 0.1% of the standard. This is equivalent to an imperceptible difference of .012 of an inch measured over a foot."[11] Defendants are once again incorrect and making misleading statements. In fact, just five individual auditorium ramps are listed in the United States' Facts as being just 0.1% above the specified standard. See US Facts ¶¶ 387 (one

[11] See AMC's Disputed Facts ¶¶ 23-42, 95, 98, 100, 102-105, 107, 111-112, 152, 164, 186, 215-216, 219-224, 289, 312-323, 366-367, 382-390, 448-450, 473-485, 487-491, 493-495, 534, 536, 548-570, 609, 616-617, 619, 630, 714-716, 718-722, 819, 821, 823, 870-886, 888, 891-898, 1009-1012, 1035-1038, 1060, 1069-1070, 1072-1073, 1109-1112, 1124, 1143-1145, 1147-1149, 1184, 1216, 1261-1264; see also id. at 4-5.

of three ramps in this paragraph), 474, 491, 493, 552, and 876. The United States agrees with Defendants that these five ramps can be excluded from the Court's consideration. **No other** ramps, curb ramps, parking spaces, or access aisles, slopes or cross slopes, are within 0.1% of the applicable standards. Defendants' attempt to trivialize the United States' measurements does not cause these many other slope measurements to become any less difficult or impossible for people who use wheelchairs, walkers, crutches, or canes to navigate. With the exception of a few ramps in three auditoriums, see section C.2, pp. 20, *infra*, Defendants have not refuted the United States' Facts evidencing excessive slopes.

7. *Defendants Do Not Provide Sufficient Evidence to Create Disputed Facts on other Accessibility Violations*

Defendants' Opposition asserts that their retractable tape barricades used at their theaters to cordon off queuing areas in the lobby and in the concessions areas, which are not detectable to cane users, are furniture and not subject to the Standards. Defendants' Opposition at 17. However, the Department's 1994 Supplement to its Technical Assistance Manual specifies that public accommodations may be obligated to purchase accessible free-standing equipment in order to provide equal opportunity to people with disabilities in its theaters, including people with visual impairments. See US Reply App., Exs. 10, ¶ II-5.3000, 11. Defendants allege that some of its restrooms do not have the required ambulatory accessible toilet stalls (a 36 inch wide stall with parallel grab bars designed to provide support for people who use walkers, canes, etc., and required when there are six or more stalls) because of "normal wear". See AMC's Disputed Facts ¶¶ 256, 272, 1268. This statement is ridiculous; Defendants do not allege that these theaters were *designed* with this required feature. There is no reasonable explanation for these statements by AMC. Similarly, Defendants argue that the fact that the stall door in a designated wheelchair accessible stall is not positioned diagonally opposite the toilet , as required, is also allegedly due to "normal wear." Defendants' Disputed Facts ¶ 270. Defendants also claim

"normal wear" explains why a number of structures attached to its walls are protruding objects, including signs, fire alarm boxes, wall mounted lights, water fountains, rails, etc.[12]

Defendants also seem to use a novel definition of a "circulation path" to avoid liability for protruding objects. See Defendants' Disputed Facts ¶ 19 (protruding plumbing valve in hallway outside auditorium entrance not in a circulation path). However, the term is clearly defined in the Standards: "[a]n exterior or interior way of passage from one place to another for pedestrians, including, but not limited to, walks, hallways, courtyards, stairways, and stair landings." Standard § 3.5.

8. *AMC's Reliance Upon the Gibbens Report Is Misplaced*

Defendants purport to find support for its opposition to many of the United States' Conclusions of Law in its expert report by Mr. Michael Gibbens. See AMC's Disputed Facts (Conclusions of Law) ¶¶ 2-13. Aside from the fact that Defendants cite to no specific portion of Mr. Gibbens' report, the report itself contains (1) no contrary measurements, (2) no evidence to support AMC's contention that any elements in AMC's theaters comply with any industry standards of dimensional tolerances, (3) no evidence to support AMC's contention that any elements in AMC's theaters provide equivalent facilitation, and (4) no evidence that Mr. Gibbens has conducted any accessibility surveys of any of Defendants' stadium-style theaters or reviewed any of the architectural drawings.

The remaining portions of AMC's Disputed Facts also do not refute the United States' Facts, but, rather, contain similar conclusory statements which do not satisfy AMC's burden in order to oppose the United States' Motion for Partial Summary Judgment. See Rule 56(e); Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (facts not contradicted by party opposing summary judgment are admitted); 10B Charles A. Wright et al., Federal Practice and Procedure § 2739 (1998). See also C.D. Local Rule 56-3.

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[12] Defendants Disputed Facts ¶¶ 590-592, 611, 629, 633, 668-669, 724, 764-765, 791-792, 797, 840, 899, 990, 1058, 1064-1065, 1089, 1100-1101, 1106-1107, 1123, 1134-1135, 1165, 1235.

C. The Declarations of AMC Counsel Gregory F. Hurley and AMC Vice-President Philip C. Pennington Are Deficient, Misleading, and Not Credible

AMC presents two declarations that are at the foundation of its opposition "evidence." For the reasons specified below, neither declaration is sufficient for refuting the United States' summary judgment motion.

1. *The Declaration of AMC Counsel Gregory F. Hurley*

Paragraph four of the Declaration of Gregory F. Hurley in Support of AMC's Opposition ("Hurley Decl." or "Hurley Declaration") is a conclusory statement by Attorney Hurley that the "majority of the 'variances'" in the United States' Facts are "less than 1 inch." Attorney Hurley then lists measurements of some elements of AMC's theaters that led him to that conclusion. Presumably these measurements are from the United States' Facts, although which specific factual statements by the United States are not specified by Mr. Hurley. The implication from this paragraph of the declaration seems to be that these differences in measurements from the Standards are too trivial to rise to the level of violations. A review of the United States' Facts, however, reveals approximately 37 paragraphs out of the total 1290 fact paragraphs (three percent) listed by the United States that might meet Mr. Hurley's statement in his declaration.[13] However, a number of these "variances" Mr. Hurley complains about are variances from ***minimum*** requirements. AMC could have designed and built these features to meet the ADA Standards or provide greater access than these bare minimums, but it chose not to. This Court

[13] By category as described in Mr. Hurley's declaration, they are: ramp handrails one-eighth of an inch too large (¶¶ 22, 471, 547); auditorium ramps with running slopes barely exceeding 8.3% (slopes of 8.4% - ¶¶ 387, 474, 491, 493, 552, 876); restroom soap dispensers one inch too high (¶ 53); pull side/latch side maneuvering space at doors ¾" less than the minimum (¶¶ 54, 86, 88, 839, 1005); slopes of access aisles "barely" exceeding two percent maximum (slopes of 2.1 percent - none); wheelchair seating areas one inch less than the minimum width (¶ 92); parallel grab bars mounted one inch too low (¶¶ 748, 753); walkways with running slopes "barely" greater than 5 percent (5.1 percent - none); spout height of accessible drinking fountain one inch higher than maximum 36 inches (¶ 161); mirror mounted one inch too high (¶¶ 170, 1096); ambulatory accessible stall one inch too narrow (¶ 171); handrail extensions reducing width of accessible route by one inch (¶ 211); wheelchair accessible toilets off-center by one inch (¶¶ 263, 502, 510, 743); clear width between handrails of ramps ¾" too narrow (¶ 399); lavatory apron knee height ¾" less than the minimum 29" (¶ 418); wall-mounted posters projecting ¼" into circulation route (¶ 463); operating hardware of automatic ticket vending machine one inch too high (¶¶ 189, 632, 833, 986); clear width between doors one inch less than minimum 48 inches (¶¶ 652, 657); and urinal lips one inch too high (¶ 966).

should not reward AMC for its failure to do so, and its further failure to meet the minimum requirements. See Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001) (no substantial compliance or undue burden exception for new construction); Independent Living Resources v. Oregon Arena Corp., 1 F. Supp. 2d 1124, 1135 (D. Ore. 1998) (court reluctant to accept dimensional tolerances where regulation specifies a *minimum* clearance necessary for an element to be usable by persons with disabilities). Of those elements listed in paragraph 4 of the Hurley Declaration, the following are "variances" from Standards which specify ***minimum*** requirements: pull side/latch side maneuvering space at doors (Standard § 4.13.6); width of wheelchair seating areas (Standard § 4.33.2); handrail extensions reducing width of accessible route (Standard § 4.3.3); clear width between handrails of ramps (§ 4.8.3); lavatory apron knee height (Standard § 4.19.2, Fig. 31); and clear width between doors (Standard § 4.13.7). Of the remaining "variances" of one inch or less, since AMC has utterly failed to counter the United States' evidence with measurements of its own or evidence of accepted industry tolerances, this Court should deem the remaining paragraphs admitted. See fn. 13, *supra.*

Other paragraphs in the Hurley Declaration are equally incorrect, inaccurate, and misleading. In paragraphs 6, 9, and 15, Mr. Hurley ignores the history of discovery in this case and claims that until the filing of the pending summary judgment motion, the United States has not been willing to specify which features at each theater were out of compliance. This is simply untrue. See Section A, pp. 4-5, *supra*. Paragraph 8 also complains that neither the United States nor its accessibilty expert Mr. Hecker produced the tools Mr. Hecker used during his surveys of AMC's theaters, ignoring the fact that Defendants never requested that those tools be produced. See section A.1 *supra*. It is noteworthy that Mr. Hurley's declaration does not *claim* that these tools were, in fact, ever requested. Paragraphs 10 and 14 state that the United States has failed to produce videotapes and photographs taken at AMC's theaters. Mr. Hurley's blatant disregard of this Court's Minute Order of November 12, 2002, Denying Defendants' Ex Parte Application to Strike Videotapes Referenced in Deposition Transcript of Edward Gipple (Docket #390), coupled with AMC's failure to review and/or copy the 159 videotapes that *were* made available, along with the Mr. Hurley's disregard of the thousands of photographs taken during the surveys that he personally reviewed in October 2002 and again at the deposition of Mr. Hecker (see e.g.,

US Reply App., Ex. 4, 21:8-12, 22:13-16), is incredible and even borders on sanctionable behavior.

In Paragraph 13 of his declaration, Mr. Hurley states that the Department of Justice had an obligation to discuss these accessibility issues and "engage in a dialogue with AMC regarding these features." However, the Department did, indeed, engage in such a dialogue during the failed settlement and mediation efforts for over one and one-half years. See discussion Section A, pp. 2-4, *supra*; US Reply App., Ex. 1 ¶ 2. Paragraph 16, without any further explanation, simply states that AMC has not "been afforded" the time needed to reply to the allegations in the pending motion. AMC first told the Court, in its Ex Parte Application to Continue Hearing on Plaintiff's Motion for Partial Summary Judgment, filed Nov. 5, 2002 (Docket #382) that an extension of time was needed to allow Defendants the opportunity to depose the United States' expert, Mr. Hecker (Defendants had unilaterally chosen to postpone Mr. Hecker's deposition from its originally scheduled date in October 2002).[14] Defendants' second *ex parte* request to stay the action or to postpone the hearing on the pending motion, filed November 22, 2002 (Docket #402), was allegedly to allow Defendants time to prepare its Motion to Certify for Interlocutory Appeal the Court's November 20, 2002 Order. However, given that Defendants were provided with lists of many of these violations in August 1999, given further lists during settlement negotiations, had personnel observing Mr. Hecker during each of his surveys, and have had Mr. Hecker's very detailed expert report since August 20, 2002, Mr. Hurley's assertion that AMC needs *further* time to respond is specious. See also Section A, pp. 4-5, *supra.*

Paragraph 22 of the Hurley Declaration states that one percent of the fixed seats at AMC's Woodland Hills and Norwalk theaters are aisle side seats with removable armrests. The United States does not claim in its Statement of Undisputed Facts that those two theaters fail to meet that particular requirement. Finally, and perhaps most troubling, are paragraphs 20-24 of Mr. Hurley's Declaration. In these paragraphs, Mr. Hurley describes surveys he made of AMC's Norwalk and Promenade theaters. These paragraphs are devoid of specific measurements, and

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[14] Mr. Hecker was deposed by Mr. Hurley on December 4, 2002. US Reply App., Ex. 1 ¶ 6.

largely state Mr. Hurley's legal conclusion that these two theaters comply with the Standards. Aside from the lack of specificity in these paragraphs sufficient to refute a motion for summary judgment, see Taylor, 880 F. 2d at 1045-46, copies of Mr. Hurley's surveys have never been provided to the United States in response to the numerous discovery requests. See e.g., Plaintiff United States' First Set of Interrogatories and First Set of Requests for Production of Documents and Things to AMC Entertainment, Inc., Interrogatory Nos. 1-3, 9, Document Request Nos. 1-5 (served Oct. 13, 1999). Therefore, these paragraphs of the Hurley Declaration should be stricken.

2. *The Declaration of AMC Vice-President Philip C. Pennington*

Paragraphs 4 and 5 of Mr. Pennington's declaration simply state that each of the twelve theaters fully surveyed by the United States was checked and approved by local officials at the plan check stage and again during and after construction. However, state or local building officials do not enforce the ADA. See US Reply App., Ex. 10, III- 7.1000, or http://www.usdoj.gov/crt/ada/taman3up.html. Paragraph 6 of the Pennington Declaration similarly states that AMC's theaters in the states of Texas and Florida were approved by local officials in those states as being in compliance with those state codes that have been certified by the Department of Justice as being substantially equivalent to the ADA. However, such approval is only rebuttable evidence of compliance with the ADA, and as discussed in Section D, pp. 22-23, *infra*, the United States has produced more than sufficient evidence to rebut any such presumption.

Paragraph 7 of Mr. Pennington's declaration states that the plans for the twelve theaters show that "all ramps were designed to have a slope of 1:12 or less." Nowhere does Mr. Pennington attest that *all* ramps in the twelve theaters were, in fact, built with slopes of 1:12 or less. Other parts of Mr. Pennington's declaration (¶¶ 8-10) confirm, in fact, that ramps were *built* that do not comply with the Standards. Therefore, this statement in paragraph 7 does not fully refute the United States' evidence of noncompliant ramp slopes and should be stricken.

Paragraphs 8-10 of the Pennington Declaration provide Mr. Pennington's measurements of the slopes of some auditoria ramps at three of AMC's stadium-style theaters in the Kansas

City area. Paragraph 8, ramps at the Barry Woods theater, confirms Mr. Hecker's slope measurement for Auditorium #8 (8.6 percent). Consequently, paragraph 98 and of the United States' Facts must be deemed admitted. Mr. Pennington's measurements of ramps in Auditoriums #1, 9, 13, 16, and 20 have no bearing on the United States' Motion since the ramps in these auditoria are not included in the United States' Facts. Mr. Pennington's measurement of one ramp within Auditorium 10 is of a different ramp than that included in the United States' Facts. These measurements by Mr. Pennington do not controvert statements by the United States and thus should be stricken. Conversely, Mr. Pennington has *not* provided ramp slope measurements for Auditoriums #12, 14, 15, 17, 22, and 24; thus, paragraphs 103-104, 107, 111-112 of the United States' Facts must been deemed admitted. Similarly for the Olathe Station theater (paragraph 9), Mr. Pennington confirms Mr. Hecker's measurements of one ramp in Auditorium #29, and provides measurements for other ramps that confirm violations of the maximum allowable slope: Auditoriums #19 and #29 (8.7 percent). Paragraphs 485 and 494 of the United States' Facts are thus admitted. Mr. Pennington has not provided measurements for one of the ramps in Auditorium #17, so the portion of paragraph 483 dealing with the front ramp at screen left also is admitted. For the AMC theater in Leawood (paragraph 10), Mr. Pennington also (1) provides measurements for ramps that confirm violations of the maximum allowable slope in Auditoriums #3 and #8 (8.6 percent); (2) does not provide measurements for Auditorium #12 (US Facts ¶ 478 is thus admitted); and (3) does provide measurements for ramps in Auditoria #4 and #9 that are not included in the United States' Facts and should be stricken.

Elsewhere in his declaration, Mr. Pennington states that he took measurements of the toilet center lines at Barry Woods and obtained "measurement[s] less than shown in Mr. Hecker's report." Pennington Decl. ¶ 12. However, conspicuously absent from this paragraph are both the actual measurements Mr. Pennington obtained and/or any declaration that the measurements he obtained showed compliance with the applicable Standards. Paragraphs 117, 121, 130 of the United States' Facts should therefore be deemed admitted. Paragraph 11 of his declaration admits that the wheelchair spaces at Barry Woods are not the minimum 66 inches wide required for two wheelchairs (although the actual measurements Mr. Pennington obtained

are not provided), and that the wheelchair spaces are encroached upon by an adjacent companion seat.[15]

Mr. Pennington claims that Defendants do not own the pay phones it has in its theaters, does not have the right to alter them, and further, the phones are accessible. Pennington Decl. ¶¶ 14-16. Aside from the issue of what, if any, responsibility Defendants have (1) by allowing pay phones to be placed in its property; and (2) to provide accessible pay phones when it provides pay phones to its non-disabled customers, Defendants have previously assumed the responsibility for obtaining compliant pay phones. See US Reply App., Ex. 14; see also US Reply App., Ex. 7, Response to Request for Admission No. 1143. Mr. Pennington does not provide any of his measurements of the telephones at Barry Woods that would confirm his statement that they are accessible and comply with the Standards; these statements should therefore be stricken. As with the pay phones, Mr. Pennington claims, without evidence, in paragraph 17 of his declaration that AMC does not own, operate, lease, or control the parking and exterior walkways of its Barrett Commons, Barry Woods, Celebration, Norwalk, Olathe, Pleasure Island, and Woodland Hills theaters. Mr. Pennington does not make the same claim for the parking and exterior walkways of the Grand, Leawood, Palm Promenade, and Sterling Heights theaters, and presumably, therefore, AMC accepts responsibility for the exterior violations at these theaters. See US Facts ¶¶ 186-188, 289-292, 532-537, 816-832.

Paragraph 18 of the Pennington Declaration asserts AMC's unsupportable definition of "common areas". See discussion at Section B.4., pp. 10-12, *supra*. Paragraph 19 merely states AMC's policy to repair its facilities, but Mr. Pennington makes no assertion that repairs to any specific features identified in the United States' Facts have been made. See e.g., Defendants' Disputed Facts ¶¶ 538 (broken infrared transmitter for assistive listening devices at Palm Promenade); 661 (same at Pleasure Island, plus broken receivers for assistive listening devices). Lastly, paragraph 20 of Mr. Pennington's declaration concerns the insufficient numbers of assistive listening devices ("ALDs") and the lack of compliant signage indicating their

[15] See also US Reply App., Ex. 6 at ¶ 5 ("handrail infringes on the 66" required width").

availability. Mr. Pennington states that additional ALDs are maintained in other parts of AMC's theaters other than the guest service counters. However, Mr. Pennington does ***not*** assert that these theaters do in fact have the correct number of ALDs.[16] Neither does he assert that AMC's signs indicating the availability of ALDs are compliant with the Standards (i.e., contain the international symbol of access for hearing loss).[17]

Except for the contradictory measurements regarding a few auditoria ramps at three theaters, the Pennington Declaration does not provide the necessary proof to refute the United States' Facts and defeat the United States' Motion for Partial Summary Judgment.

D. AMC's Claims of State Code Compliance is Another Smoke Screen Designed to Cloud the Issue of Its Non-Compliance with the Standards

AMC claims that its stadium-style movie theaters in the states of Washington (1 theater), Texas (13 theaters), and Florida (15 theaters) must be presumed to comply with the ADA because they were designed and constructed in compliance with those states' building codes. AMC's Disputed Facts at 8-10. AMC correctly states that certification by the United States of these states' building codes is *rebuttable* evidence that these State codes meet or exceed the ADA's minimum requirements for accessibility. 42 U.S.C. § 12188(b)(1)(A)(ii). However, the preamble to the Department of Justice's regulation describes the effect of code certification as follows:

> Certification will *not* be effective in those situations where a State or local building code official *allows a facility to be constructed or altered in a manner that does not follow the technical or scoping provisions of the certified code.* Thus, if an official either waives an accessible element or feature or allows a

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[16] The Court Order governing the inspections of AMC's theaters put restrictions on communications between the Department's survey team and AMC personnel and patrons. At each survey, AMC had a theater representative and a corporate representative. See Declaration of Gretchen E. Jacobs in Support of United States' Motion for Protective Order Regarding AMC's Notice of Deposition Pursuant to Fed.R.Civ.P. 30(b)(6) Re: Inspection of AMC Theaters ¶ 8, filed Feb. 28, 2002 (Docket #233). It was the theater representative who was typically responsible for providing the ALDs that were on-site to Mr. Hecker for counting and testing. US Reply App., Ex. 1, ¶ 8.

[17] Indeed, AMC asserts that these signs are lacking the required accessibility symbol due to "normal wear." See AMC's Disputed Facts ¶¶ 156, 190, 296, 540.

> change that does not provide equivalent facilitation, *the fact that the Department has certified the code itself will not stand as evidence that the facility has been constructed or altered in accordance with the minimum accessibility requirements of the ADA*. The Department's certification of a code is effective only with respect to the standards in the code; *it is not to be interpreted to apply to a State or local government's application of the code.*

28 C.F.R. pt. 36, App. B at 668 (1997) (emphasis added). AMC fails to acknowledge the overwhelming evidence in the United States' Motion that, in fact, AMC's stadium-style theaters in Dallas, Texas ("The Grand") and in Florida ("Pleasure Island") contain several hundred violations of the Standards for Accessible Design. See US Facts ¶¶ 186-277, 609-805. There is thus abundant evidence of violations, allegedly all approved by any state or local inspectors, sufficient to rebut the presumption of compliance. Further, AMC has failed to refute the United States' evidence with proper declarations or other written evidence. See discussion at Section B, p. 6, *supra.*

E. AMC Has Not Met Its Burden to Demonstrate That Any of Its Hundreds of Noncompliant Elements Are Within Industry Standards for Dimensional Tolerances

As discussed in its Memorandum in Support of United States' Motion for Partial Summary Judgment (Docket #380), the burden is on Defendants to provide specific evidence of accepted dimensional tolerances for any instances of construction it alleges are "close enough". Long, 267 F.3d at 923 (no substantial compliance exception for new construction); Independent Living Resources, 1 F. Supp. 2d at 1135 (D. Ore. 1998); U.S. Memo at 19. Defendants have failed to meet, or even address, this burden. Further, many of the Standards set *minimum* specifications that Defendants failed to meet. Independent Living Resources, 1 F. Supp. 2d at 1135 (court reluctant to accept dimensional tolerances where regulation specifies a *minimum* clearance necessary for an element to be usable by persons with disabilities). Defendants could have designed and constructed these features to exceed these minimum requirements. Nowhere in Defendants' Opposition papers do Defendants allege that a single specific feature is within a specific industry standard for tolerances. Nowhere in Defendants' expert Mr. Gibbens' report does *he* allege that any specific feature or element within *any* of Defendants' stadium-style movie

theaters is within any industry standard. Mere conclusory statements such as those in Defendants' Opposition not sufficient to create a genuine dispute. Taylor, 880 F.2d at 1045-46.

F. AMC Has Not Met Its Burden to Demonstrate That Any of Its Hundreds of Noncompliant Elements Provide Equivalent Facilitation

As with the issue of dimensional tolerances, the burden is on Defendants to demonstrate that any "variance" of any particular feature or element of its stadium-style movie theaters nonetheless provides equal or greater access to persons with disabilities. US Reply App., Ex. 10, ¶ III-7.2100 ("Proposed alternative designs, when supported by available data, are not prohibited; but in any title III investigation or lawsuit, the covered entity would bear the burden of proving that any alternative design provides equal or greater access."). Once again, Defendants' Opposition is devoid of facts and full of conclusory statements. See Defendants' Disputed Facts at 7-8. Taylor, 880 F.2d at 1045-46. Nothing alleged in AMC's opposition to summary judgment demonstrates that any of the elements built by AMC provide equivalent facilitation, and such claims must therefore fail.

G. Defendants' Continued Attacks on the Designs of United States' Expert Peter Frink Are Contrary to this Court's Order of Nov. 20, 2002

Defendants try to turn a decision on the pending motion into a referendum once again on the designs of another United States expert, Mr. Peter Frink. See Defendants' Disputed Facts at 13-14. This Court has already discounted AMC's previous attempts, see Court's November 20, 2002 Order on Parties' Motions for Summary Judgment at 8-9, fn. 6 (Docket #397), and AMC has once again not produced any evidence that it relied on, or was even aware of, the designs of Mr. Frink when AMC designed its own theaters. Thus, the designs and opinions of Mr. Frink relating to companion seating have no bearing on the pending motion and cannot be used as evidence to create disputed facts.

H. The Standards for a Pattern or Practice Claim Have Been Ignored by Defendants

Defendants have not addressed the United States' discussion of the standards for determining a pattern or practice of discrimination. Therefore, if the Court finds all or most of

the United States' Facts unrefuted by Defendants, there is sufficient evidence for this Court to find that AMC has engaged in a pattern or practice of failing to design and construct its stadium-style movie theaters in compliance with the Standards for Accessible Design.

CONCLUSION

Except for a few paragraphs of the United States' Statement of Undisputed Material Facts put into dispute by the Pennington Declaration with specific, contrary measurements (US Facts ¶¶ 95, 98, 102, 312, 314-316, 318-319, 321-323, 473-482, 483 (one ramp only), 484, 487-491, 493, 495), the few additional paragraphs that the United States agrees should be excluded from the Court's consideration (US Facts ¶¶ 387 (one ramp only), 552, and 874), and perhaps the paragraphs relating to the exterior parking and walkways of seven theaters (US Facts ¶¶ 13-14, 74-79, 149-154, 362-373, 437-455, 609-621, 1184-1193), the vast majority of the United States' facts remain uncontradicted by evidence sufficient to refute a motion for summary judgment. Arpin, 261 F.3d at 919 (9th Cir. 2001) (mere scintilla of evidence in support of non-moving party insufficient to preclude summary judgment). Similarly, Defendants have provided no factual or legal arguments for why, if the majority of the United States' facts are deemed admitted, this Court should not find that Defendants AMC have engaged in a pattern or practice of failing to comply with the Standards for Accessible Design in its stadium-style theaters.

For the foregoing reasons, this Court should grant the United States' Motion for Partial Summary Judgment and enter its proposed Order (Docket #379).

DATED: January 14, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of January, 2003, true and correct copies of **Reply Memorandum of Plaintiff United States In Support of 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** were served by Federal Express, postage pre-paid, on the following parties:

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