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 PROTECTION, MOTION TO QUASH SUBPOENAS SERVED ON THIRD PARTY ARCHITECTS**
CINEMARK USA, INC.,	§	
Defendant.	§	

Defendant attempts to obfuscate the basic, simple issue before this Court - whether the information sought by the United States in the third party subpoenas duces tecum served upon TK Architects and the Beck Group is necessary and relevant to the claims or defenses of the parties in the above-captioned action and therefore is discoverable. See Defendant's Third Motion for Protection, Motion to Quash Subpoenas served upon Third Party Architects, and supporting brief (hereinafter "Cinemark's Motion to Quash")(Docket No. 138).[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. In the subpoenas duces tecum at issue, the United States seeks information from third party architects who worked with Cinemark in the design and construction of its stadium style movie theaters regarding, in pertinent part, the decisions that were made when designing and constructing

[1]While this motion is styled as a Motion for Protection and to Quash, it is primarily a motion to

these theaters, including Texas Accessibility Standards ("TAS") related decisions. Cinemark has filed a broad objection to the production of these documents, raising vague, often half-articulated objections and unsupported claims of privilege and protection in support of its on-going efforts to thwart almost all discovery necessary and relevant to prove the United States' pattern or practice claim against Cinemark.

However, this Court does not have jurisdiction to entertain that portion of Cinemark's Motion to Quash seeking to quash discovery of documents requested of the Beck Group because that subpoena issued from the Northern District of Texas. The United States District Court for the Northern District of Texas is the only court with jurisdiction to review a motion to quash a subpoena duces tecum issued by that court. Also, with regard to the documents sought from both third party architects, no legitimate claims of Cinemark's privilege or confidentiality applies to these documents. In addition, Cinemark does not have standing to complain that the discovery is irrelevant, overbroad or creates an undue burden on the third party architects. It is beyond serious question that the information sought by the United States from Cinemark's architects is relevant to the claims and defenses of the parties in this litigation. Moreover, TK Architects has already agreed to produce almost all of the requested documents. As such, Cinemark's Motion to Quash should be denied.

A. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE MOTION TO QUASH THE SUBPOENA FOR THIRD PARTY ARCHITECT THE BECK GROUP

Pursuant to Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure, a motion to quash or modify a subpoena must issue form the court from which the subpoena was issued. *See also* 9A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 2459 (1995)("The 1991 amendments to Rule 45(c) now make it clear that motions to quash, modify, or condition the

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quash. *See* id.

subpoena are to be made to the district court of the district from which the subpoena issued. It is the issuing court that has the necessary jurisdiction over the party issuing the subpoena and the person served with it to enforce the subpoena."); In re Digital Equipment Corp., 949 F.2d 228, 230-231 (8th Cir. 1991) . As the subpoena seeking production of documents for the Beck Group was issued by the United States District Court for the Northern District of Texas, where the Beck Group is located, that court, and only that court, properly has jurisdiction over a motion to quash the Beck's Group subpoena duces tecum. [2] As such, Cinemark's Motion to Quash with regard to the Beck group's subpoena duces tecum must be dismissed.

B. CINEMARK'S OBJECTIONS TO PRODUCTION OF DOCUMENTS BY THE THIRD PARTY ARCHITECTS ARE WITHOUT MERIT AND SHOULD BE DENIED

In its Motion to Quash, Cinemark has raised several specious objections to the documents requested in the third party subpoenas against TK Architects and the Beck Group.[3] Cinemark erroneously and summarily complains that the United States seeks documents protected by a common interest privilege, work product privilege and attorney client privilege and that certain documents contain certain amorphous confidential business dealings. Finally, Cinemark also claims that the discovery requests are irrelevant, overly broad and objectionable - all arguments it has no standing to raise.

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[2]Cinemark notes that the subpoena duces tecum for TK Architects is procedurally defective as it issued from this Court instead of from the district court in which TK Architects has its principal of business. *See* Motion to Quash, p. 7, n. 9. TK Architects, the only entity with standing to make this argument, has already agreed to produce documents sought by the relevant subpoena. *See* letter of March 12, 2004 from G. William Quatman to Phyllis M. Cohen, attached as Exhibit 1.

[3]As the discussion supra demonstrates, this Court has no jurisdiction to entertain the motion to quash the subpoena for the Beck Group. However, the arguments raised in the remainder of this brief with regard to Cinemark's failure to allege or demonstrate legitimate claims of privilege or confidentiality requiring this Court's protection, and Cinemark's lack of standing to contest the relevancy or scope of the documents sought by the United States from third parties apply to the Beck subpoena as well.

Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure permits a court to quash or modify a subpoena in four limited situations: (i) if the subpoena fails to allow a reasonable time for compliance; (ii) if the subpoena requires a non party to travel more than 100 miles to produce the requested documents; (iii) if the subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies; or (iv) if the subpoena subjects a person to undue burden. A party, in contrast to the entity toward whom the third party subpoena duces tecum is directed, only has standing to object to production of documents containing privileged or other protected matter; it does not have standing to raise objections based upon relevancy, undue burden or the alleged broadness of the document request. 9A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 2459 (1995)("A motion to quash, or for a protective order, should be made by the person from whom the documents or things are requested. Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought").[4] Cinemark expressly acknowledges these limitations upon its ability to object to the third party subpoenas when it cites authority contrary to its own motion that demonstrates that Cinemark only has standing to raise legitimate claims of privilege and/or personal right limited to the Cinemark corporation when objecting to third party subpoenas duces tecum. *See* Motion to Quash at p. 5.

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[4]*See* EEOC v. Danka Industries, Inc., 990 F. Supp. 1138, 1141 (E.D. Mo. 1997); Brown v. Braddick, 595 F. 2d 961, 967 (5th Cir. 1979); QC Holdings, Inc. v. Diedrich, 2002 WL 334281 (D. Kan. 2002).

1. The documents subject to the subpoenas duces tecum do not contain privileged material requiring protection[5]

Cinemark raises summary objections to the subpoenas duces tecum based, in pertinent part, on specious, summary claims of common interest privilege, attorney client privilege, and work product privilege regarding both TK Architects and the Beck Group's identical Request No. 11.[6] Request No. 11 seeks "All documents relating, referring to, or discussing the Department of Justice's ("DOJ") ongoing investigation and litigation related to Cinemark stadium-style movie theater projects or other companies' stadium-style movie theaters." See Motion to Quash, (Docket No. 138, attachments 2 and 3). Cinemark does not articulate any reasons or rationales as to why such communications are privileged, nor does it attempt to identify any specific documents subject to such privileges, including, inexplicably, how documents in the architectural firms' possession regarding "other companies' stadium-style movie theaters" could raise any possible claim of privilege flowing to Cinemark. Rather, Cinemark simply raises a blanket claim of attorney-client privilege and work product privilege - and in a footnote asserts, without further elucidation, a claim

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[5]While Cinemark asserts that it seeks "protection . . . with respect to requests for production concerning compliance with ADAAG or TAS provisions other than Section 4.33.3," *see* Motion to Quash, p.8, its objections are based upon relevancy grounds (it claims the requests are overly broad and improper), not on grounds that some privilege is implicated. As the discussion *infra* demonstrates, Cinemark does not have standing to raise such objections. Also, Cinemark's objections notwithstanding, such information is relevant. Cinemark implies that this Court, in its Order of October 23, 2000, expressly prohibited production of information other than that regarding compliance or interpretation of Section 4.33.3. Id. at p. 10. That is not accurate. Both that Order and this Court's previous Order of March 22, 2000 (Docket No. 46) expressly ordered Cinemark to produce documents in relation to ADA compliance generally. Moreover, that Order was limited, in part, because of offers by the United States to limit production at that time to documents regarding the appropriate interpretation of, and compliance with, Section 4.33.3. However, this Court also said that the original request, which covered documents related to compliance with the ADA, was "in large part" appropriate to the case. Now, the decision by the Sixth Circuit in this case has put into question the reliance by Cinemark on the TAS inspector's certification making discovery on those issues relevant and necessary. United States v. Cinemark, 348 F.3d 569, 581-83 (6th Cir. 2003).

[6]Cinemark failed to make any effort to contact the United States to discuss the issues raised herein prior to filing for the instant protective order nor is its Motion to Quash accompanied by the required certification of any good faith efforts to resolve these issues. Hence, its motion for protective order is defective and should be dismissed.

of common interest privilege. These claims of privilege are especially perplexing and erroneous because there is no legitimate common interest privilege, attorney-client privilege, or work product privilege Cinemark can claim to documents either it did not create, or did create but shared with third parties who do not have identical interests with Cinemark, and who are not parties to this litigation. *See also* United States' Second Motion to Compel (Docket No. 60). Cinemark's spurious claims of privilege and the summary manner in which such claims are made demonstrate its fundamental misunderstanding of both the showing necessary to support claims of privilege and protection and the proper scope and breadth of these privileges.

The party seeking to claim privilege holds the burden of proof. Matter of Bevill, Bressler & Schulman Asset Management Corp., 805 F.2d 120, 123 (3rd Cir. 1986). *See also* United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999) (the party asserting the discovery privilege has the burden of establishing its existence). Moreover, summary unsupported claims of privilege, as Cinemark has raised here, without detailed descriptions of the documents sought and explanations of how such documents are privileged, are insufficient to prove privilege and on this basis alone Cinemark's motion should be denied. The entity seeking protection from production based upon "a claim that it is privileged or subject to protection as trial preparation materials . . . shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Fed. R. Civ. P. 45(d)(2).[7] Moreover, as the Advisory Committee Note to Rule 45(d), explains "[Rule 45(d)(2)'s] purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it

[7] *See* Schorr v. Briarwood Estates Ltd. Partnership, 178 F.R.D. 488, 491 (N.D. Ohio 1998)(party seeking protection has the burden of making a specific and documented fatual showing with regard to which claims of protection apply.)

seems unjustified. The person claiming a privilege or protection cannot decide the limits of [the United States'] own entitlement.[8]

Even if Cinemark had provided information sufficient to assert its claim of privilege, such privileges do not apply to the documents requested in the contested subpoenas. Neither TK Architects nor the Beck Group are litigants or potential litigants in this action, nor are its interests identical to Cinemark's regarding the United States' investigation and litigation of Cinemark's stadium style theaters or other companies' stadium style theaters. As such, these documents are not, and could not be, protected by any common interest privilege.

The joint-defense/common interest privilege is an extension of the attorney client privilege that enables counsel for clients facing a common litigation opponent to exchange privileged communications in order to adequately prepare a defense without waiving either privilege. Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3rd Cir. 1992); International Surplus Lines Insurance Co. v. Willis Corroon Corp., 1992 WL 345051, *7 (N.D. Ill. Nov. 12, 1992); Western Fuels Ass'n, Inc. v. Burlington N. R.R., 102 F.R.D. 201, 203 (D.Wyo.1984). In order for a litigant to claim the privilege for documents transmitted to and from a third party, the litigant must prove that there is anticipated litigation[9] against the third party. See In re Dayco Corporation Derivative Securities Litigation, 99 F.R.D. 616, 622 (S.D. Ohio 1983) (the joint defense privilege is limited to

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[8]A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why that person should not be held in contempt under subdivision (e). Motions for orders and responses to them are subject to the sanctions provisions of Rules 7 and 11. Id.

[9]While some Courts have extended the joint defense doctrine to situations where the third party merely anticipates litigation, most of the case law discussing and interpreting the joint defense doctrine discusses the doctrine's applicability to co-parties to a current litigation sharing confidential communications as part of a joint effort to establish a common defense. See e.g., USA v. McPartlin, 595 F.2d 1321 (7th Cir. 1979); Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989); Ohio-Sealy Mattress Mfg. v. Kaplan, 90 F.R.D. 21 (N.D.Ill. 1980); In re Grand Jury Subpoena, 406 F.Supp. 381 (S.D.N.Y. 1975).

"disclosure of privileged information by an attorney to actual or potential codefendants"). See also Allendale Mutual Insurance Co. v. Bull Data Systems, Inc., 152 F.R.D. 132, 140-141 (N.D. Ill. 1993) ("[A] necessary precondition for the common interest doctrine to apply is that the common interest arise as a result of impending or anticipated litigation"). In addition, the joint defense doctrine only applies where the legal interests of the parties are identical. See Allendale Mutual Insurance Co., 152 F.R.D. at 140 (for the joint defense doctrine to apply, the legal interest must be identical, not similar); DuPlan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1172 (D.S.C. 1974) (same). See also U.S. v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (common interest necessitates anticipating litigation against a common adversary on the same issue or issues).[10]

In the present action, there is no pending litigation by the United States against either architectural firm subject to the third party subpoenas and the time for adding additional defendants is long past. Also, the instant case is about the failure of an owner and operator of stadium-style movie theaters to design, construct, and operate its theaters such that individuals

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[10]Nor can Cinemark legitimately claim attorney-client privilege or work product privilege over these documents. The Sixth Circuit has held that a communication is protected by the attorney-client privilege: "(1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived." Reed v. Baxter, 134 F.3d 351,355-56 (6th Cir. 1998). With respect to the documents sought by the United States, the only attorney-client privilege that could possibly exist would be communications between TK Architects and its own counsel, not Cinemark's, regarding legal advice or communications or between the Beck Group and its own counsel regarding legal advice – and which also satisfied the other criteria established by the Sixth Circuit. No such privilege has been raised at this point. See Royal Surplus Line Insurance Co. v. Sofamor Danek Group Inc., 190 F.R.D. 505, 513 (W.D. Tenn. 1999) (there is no attorney-client privilege where there is no attorney involved); Allendale, 152 F.R.D. at 137 (same).

Moreover, Cinemark's claim of work product privilege is also erroneous. "The work product privilege protects the work of the attorney done in preparation for litigation." In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir. 1994). Once a document is shared with the third party architects (and the joint defense privilege is found inapplicable, as it is here), any claims for work product are waived. See In re Lindsey, 158 F.3d at 1282; McPartlin, 595 F.2d at 1336-37.

who use wheelchairs have the opportunity to view movies with comparable lines of sight to those patrons who do not use wheelchairs. The third party architectural firms are not owners or operators of stadium-style movie theaters; they simply design such theaters. As such, the two architectural firms' legal interests are not identical to those of Cinemark.[11]

Moreover, third party disclosures automatically waive any claims to attorney-client privilege or work product privilege, unless a joint defense can be established. See In re Lindsey, 158 F.3d 1263, 1282, (D.C. Cir. 1998) (disclosure of attorney-client or work product confidences to third parties waives the protection unless common interest privilege applies); United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979), cert. denied, 444 U.S. 833 (1980) (once third party disclosure occurs, then privileges are waived, unless a common interest argument can successfully be made). See also In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983) (the general rule is that material which is otherwise privileged is discoverable if it has been disclosed to a third party); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (same); In re Horowitz, 482 F.2d 72, 81 (2nd Cir. 1973) (same), cert. denied, 414 U.S. 867 (1973). As previously demonstrated, because the architectural firms are not and will not be parties to this litigation, do not share identical interests with Cinemark, and do not face the same legal obligations as an owner and operator of a public facility, any communications between Cinemark and the architectural firms, much less between the architectural firms and other stadium style theater companies, are not protected by a joint defense privilege. Thus, Cinemark cannot freely

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[11] Cinemark, who has the burden to prove that these privileges apply, *see* discussion *supra*, has offered no evidence that demonstrates that the third parties in this instance, TK Architects and the Beck Group, face identical legal issues in this case and absent such showing, Cinemark can not simply conceal documents behind spurious claims of privilege. Matter of Grand Jury Subpoena, 406 F.Supp. at 389 (burden is on the party asserting the applicability of the joint defense privilege to demonstrate that the clients reasonably believed that their statements were being made within the context and in furtherance of their joint defense).

exchange documents with these third parties and then validly claim privilege for those documents.[12]

In addition, the documents sought, regarding the Department of Justice's ongoing investigations and litigation related to Cinemark's stadium style movie theaters and other companies' stadium style movie theaters, are necessary to demonstrate: what knowledge Cinemark had, and when, regarding the requirements of Section 4.33.3 of the Standards for Accessible Design; whether Cinemark knew or should have known that comparable lines of sight included factors other than obstruction and when it knew that; whether Cinemark knew or should have known that its stadium style theaters did not provide lines of sight to individuals in wheelchairs and their companions comparable to those provided its other patrons; and whether it knew or should have known that certain of its stadium style theaters erected in Texas did not, in fact, comply with the TAS and so do not evidence compliance with the ADA, rebutting the presumption of compliance with the ADA for those Texas theaters.

2. The documents sought pursuant to the subpoenas duces tecum do not contain confidential information

Nor can Cinemark prevail in its novel claim that protection should be granted regarding the requests for production of documents containing supposed "confidential business dealings." *See* Motion to Quash, p. 10. Cinemark claims that the United States' request to the third party architects to produce certain documents - concerning professional fees, including invoices, contracts or billings by project, contracts and their riders and addendums, subcontracts, and the identity and professional position of TK Architects who worked on design issues for Cinemark's stadium style movie theaters - contain confidential business dealings and so should be protected.

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[12]Furthermore, even if Cinemark intended to maintain a privilege when it shared documents with the architectural firms, the disclosure itself is sufficient to waive the privilege. United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997) (while a client's intent to maintain a privilege is ordinarily

Id. Once again, Cinemark makes no effort to explain how such documents contain "confidential business dealings" requiring this Court's protection nor does it cite to any case law or precedent in support.[13] As stated previously, such blanket assertions, without more, do not suffice to satisfy Cinemark's burden to prove that such information should be protected.[14] Furthermore, such information is necessary and relevant to the United States' claims inasmuch as the requested information could show which entity made certain decisions and the basis upon which such decisions were made, and how much business Cinemark channeled to the architecture firms, which would be necessary to show any bias. The names and titles of architects who worked on Cinemark's projects also is necessary to assist the United States in identifying potential deponents.

3. Cinemark has no standing to object, as it does here, that the production of documents by TK Architects is irrelevant, overly broad and imposes an undue burden

Cinemark seeks to quash the subpoenas on the basis that such document requests are irrelevant, overly broad and create an undue burden on these third party architects.[15] However, as the discussion *supra* demonstrates, except in limited instances wherein legitimate claims of

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necessary to continued protection, it is not sufficient).

[13]Moreover, even if Cinemark had properly pled that such documents were protected, such protection is not absolute. Rather, Rule 45(c)(3)(B)(i) of the Federal Rules of Civil Procedure provides that, with respect to disclosure of a trade secret or other confidential research, development, or commercial information, a court may protect that person with a motion to quash, modify or protect by ordering production only upon specified conditions. It is well-settled that "there is no absolute privilege for trade secrets and similar confidential information." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2043 (1994). However, in the instant case, Cinemark does not even allege that these documents contain trade secrets or other confidential research, development, or commercial information.

[14]*See* Schorr, 178 F.R.D. at 488.

[15]Cinemark also complains that these requests for production are duplicative of prior document requests to Cinemark, *see* Motion to Quash, pp. 2-3, 7-8, conveniently ignoring that Cinemark has failed to produce much of the discovery propounded by the United States. The only discovery Cinemark has produced to date are some as-built architectural plans, some TAS documents, documents created by the United States and NATO documents. *See* Plaintiff United States' Reply Brief in Support of Its Renewed Motion to Compel Discovery and to Reschedule In Camera Review, pp. 3, n4, 5, n.6 (Docket No.131); Plaintiff United States' Supplemental Brief in Support of Its Renewed Motion to Compel Discovery and to Reschedule In Camera Review, p.4.(Docket No. 125).

privilege or protection are raised, a motion to quash, or for protective order, can only be made by the person from whom the documents are requested. As such, Cinemark has no standing to object on the basis of relevancy, scope or undue burden to the information requested in the third party subpoenas. Moreover, the only subpoena which issued from this Court and for which this Court has jurisdiction, *see* discussion *supra*, was to TK Architects, and it has already agreed to produce most all of the requested information.

In addition, assuming *arguendo* that Cinemark had standing to seek to quash TK Architect's (or the Beck Group's) subpoena duces tecum on grounds of relevancy, which it does not, the information sought by the subpoenas is clearly relevant. *See infra* at p.10. Major issues still must be resolved in this pattern or practice case alleging violations of Title III of the ADA.[16] As such, discovery of the requested material is necessary and relevant to prove the United States' claim that Cinemark engaged in a pattern or practice of ADA violations.[17]

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[16]Examples of outstanding issues include, in pertinent part: whether Cinemark provided its wheelchair patrons and their companion with lines of sight comparable to that offered to its other patrons; whether Cinemark knew or should have known that its stadium style theaters nationwide did not comply with the ADA; whether Cinemark's theaters within the jurisdiction of the Fifth Circuit did provide its wheelchair patrons and their companions with unobstructed views to the screen; whether its theaters in Texas were actually constructed in compliance with TAS; whether Cinemark knew or should have known, either from its third party architects or other entities, that its stadium style theaters in Texas did not actually comply with TAS. Such information with regard to stadium style theaters located within the jurisdiction of the Fifth Circuit is relevant both to liability and remedy issues. *See* United States Opposition to Defendant's Motion for Partial Summary Judgment for all Stadium Style Movie Theaters within the Fifth Circuit (Docket No. 139).

[17]Review of architectural plans and design decisions contemplated, rejected or made, and information regarding possible retrofitting, would shed light on when and why such decisions were made. Also, documents regarding compliance with the ADA or TAS, including information or advice, checklists and waivers, could demonstrate that: Cinemark did not even consider or did not provide wheelchair patrons with comparable lines of sight and/or unobstructed views compared with that which was offered to its other patrons; that the TAS inspectors were not properly or appropriately enforcing TAS; and whether Cinemark was aware that the TAS inspectors were not properly or appropriately enforcing TAS, either in regard to the location and placement of wheelchair seats or with regard to other accessibility issues. In addition, documents regarding complaints or compliance reviews could demonstrate that Cinemark was well aware that its stadium style theaters did not comply with the ADA or TAS.

Cinemark, however, tries to artificially restrict the United States to discovery limited to two discrete issues: the extent to which lines of sight must be similar for wheelchair patrons in stadium style theaters; and whether Cinemark relied on any previous advice and representations by the government in order to decide whether or not any relief to be accorded will apply on a prospective basis only. *See* Motion to Quash, pp. 6-7. It then claims that "No other discovery concerning Cinemark, including discovery on TK Architects or The Beck Group, is required pursuant to the Sixth Circuit's decision. Cinemark inexplicably and intentionally ignores the broad scope of the pending allegations against Cinemark[18] and the fact that these claims are still very much alive in this litigation.[19]

Furthermore, the amount of discovery a plaintiff may properly obtain is not limited by Defendant's biased views regarding the merits, or the extent, of plaintiff's case.[20] A far more generous standard applies. Rule 26(b)(1) of the Federal Rules of Civil Procedure, as amended on December 1, 2000, provides, in pertinent part, that "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to

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[18]*See* United States' Opposition to Cinemark's Motion for Partial Summary Judgment (Docket No. 139)

[19]A detailed discussion of the facts of this case is found in Plaintiff United States' Opposition to Defendant's Motion for Partial Summary Judgment for all Stadium-Style Movie Theaters Within the Fifth Circuit, pp. 1-4, "Statement of Undisputed Facts" (Docket No.139) and will not be reiterated here. The United States does note, however, that Cinemark, in its "Undisputed Facts" section of its Motion to Quash misquotes the Department of Justice's representations to the Sixth Circuit in this case, *see* Motion to Quash at p. 7, claiming that the Department stated that "because *Lara* was still controlling authority in the Fifth Circuit, 'the district court should not order relief regarding the theaters within [the Fifth Circuit]." However, a simple review of the actual document, which Cinemark thoughtfully attached to its Motion to Quash, clearly demonstrates that the United States instead asserted that "If *Lara* is still the law of the Fifth Circuit at that time [the remedial phase of this litigation], the district court should not order relief."

[20]*See* Donovan v. Central Baptist Church, Victoria, 96 F.R.D. 4, 5 (S.D. Tex. 1982); *see also* EEOC v. Electro-Term, Inc., 167 F.R.D. 344, 347 (D. Mass. 1996)(Defendant's objections are "based on certain assumptions which have not as yet been proven" and address "the ultimate merits of the case rather than the pending question of discovery.")

lead to the discovery of admissible evidence." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2008 (2002) (the present standard, "relevant to the claim or defense of any party is still a very broad one); Leon v. County of San Diego, 202 F.R.D. 631, 634 (S.D.Cal. 2001). While this amendment narrows somewhat the scope of the previous Rule 26(b), which permitted discovery relevant to the subject matter involved in the pending action, the Advisory Committee Notes to the 2000 Amendments recognize that the "dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. . . . " Fed. R. Civ. Pro. at pp.158-59. In fact, the amendment to Rule 26(b)(1) still leaves intact the broad scope of discovery available to parties. See Anderson v. Hale, No. 00 C 2021, 2001 WL 503045, at *3 (N.D. Il., May 10, 2001)("The minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome even considering the recent amendment to Rule 26(b)(1)"); Jones v. Rent-A-Center, 2002 WL 924833, *1-2 (D. Kan. May 2, 2002) (finding that, even under the 2000 Amendments to Rule 26(b), the relevancy of a discovery request is to be broadly construed and that "a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party").

CONCLUSION

For the forgoing reasons, Cinemark's Motion to Quash should be denied.

Respectfully submitted,

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Dated: April 27, 2004

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