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

UNITED STATES OF AMERICA, Plaintiff, v. AMC ENTERTAINMENT, INC., et al., Defendants.	Case No.: CV-99-01034-FMC (SHx) MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION FOR PROTECTIVE ORDER FROM DEFENDANT AMC ENTERTAINMENT, INC.'S RULE 30(b)(6) DEPOSITION NOTICE, AND MOTION FOR SANCTIONS DATE: April 1, 2002 TIME: 2:00 p.m. JUDGE: Magistrate Judge Stephen J. Hillman Fact Discovery Cut-Off: May 1, 2002 Pre-Trial Conference: Sept. 16, 2002 Trial Date: Oct. 22, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES AND REGULATIONS

INTRODUCTION

In January 2002, Defendant AMC Entertainment, Inc. served a Rule 30(b)(6) Notice of Deposition that sets forth 28 wide-ranging topics for which it seeks testimony from a representative of the United States. This Notice, however, ignores the entire discovery history of the case, in which this Court has issued several written orders rejecting AMC's efforts to obtain information that is privileged or otherwise protected from disclosure. Despite these rulings, AMC attempts through this Notice to re-litigate the privilege and other discovery areas already addressed by at least three decisions issued in 2000 by the Magistrate Judge and the District Court. For the reasons outlined below, including the "law of the case" doctrine, AMC should not be permitted to take this "second bite" from the litigation apple. The United States seeks a protective order to quash the deposition notice in its entirety or, in the alternative, an order limiting AMC to a deposition upon written questions with respect to non-privileged, non-duplicative areas (if any) encompassed by this Notice. In addition, the United States seeks sanctions of AMC's counsel for, once again, failing to participate in the "meet and confer" process as mandated by Local Rule 37-1.[1]

FACTUAL AND PROCEDURAL BACKGROUND

This complex action began in January 1999 when the United States filed a complaint against defendants AMC Entertainment, Inc. and American Multi-Cinema, Inc. [hereinafter collectively referred to as "AMC"][2] alleging that they had engaged in a pattern or practice of violating title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189,

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[1] As permitted under the new Local Rule 37-2.4, the United States files this brief separately, as opposing counsel has "failed to confer in a timely manner in accordance with L.R. 37-1." See Local Rule 37-2.4; see also Declaration of Gretchen E. Jacobs, ¶ 3-6 (dated March 1, 2002) [hereinafter, "Jacobs Decl."]; Declaration of John A. Russ IV, ¶ 2-3 (dated March 1, 2002) [hereinafter, "Russ Decl."].

[2] When necessary in this memorandum to refer to either defendant individually, defendant AMC Entertainment, Inc. shall be referred to as "AMCE" and defendant American Multi-Cinema, Inc. shall be referred to as "AMCI."

and its implementing regulations, in the design, construction, and operation of movie theaters with stadium-style seating in California and the rest of the country. See Appendix to Plaintiff United States' Motion for Protective Order From AMC Entertainment Inc.'s Rule 30(b)(6) Deposition Notice, Volumes One and Two [hereinafter "App. I" or "App. II"], App. I, Ex.1 (Complaint for Declaratory, and Injunctive Relief, and Compensatory Damages, and Civil Penalties).

Although this Complaint alleges numerous ADA violations, one of several central issues in this action is AMC's failure to provide patrons who use wheelchairs (and their companions) with seats that are "an integral part of any fixed seating plan and . . . [provide] lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, Appendix A (Standards for Accessible Design), section 4.33.3 [hereinafter "Standard 4.33.3"]. In short, the United States alleges that, in the vast majority of the stadium-style movie theater auditoriums at issue in this case, AMC impermissibly relegates patrons who use wheelchairs to seats on the traditional sloped section with inferior lines of sight and less desirable seating, while other members of the public have access to seats in the stadium-style section that are more desirable and offer superior lines of sight. See, e.g., App. I, Ex. 1 at ¶ 3.

In July 1999, the seeds of the instant discovery dispute concerning AMC's Rule 30(b)(6) Notice were sown when AMC served the United States with its initial set of written discovery requests. See, e.g., App. I, Exs. 3-5. Over the ensuing months, the United States produced both extensive interrogatory responses and several thousands pages of documents in responses to these discovery requests, including: public documents relating to the Department's interpretation of Standard 4.33.3 or the comparability of lines of sight in movie theaters; pleadings, final settlement agreements, affidavits, exhibits, and press releases in other ADA actions in which the United States participated as a party or as *amicus curiae* and that involved the application of Standard 4.33.3 to movie theaters or other assembly areas; public documents relating to enforcement actions filed by the United States against other movie theater companies; copies of written complaints filed with the Department by individuals with disabilities or their companions claiming that AMC had violated title III of the ADA at one or more of its stadium-style movie

theaters; and prepared speeches, policy letters, letters to members of Congress regarding communications between the Department and movie theater representatives regarding Standard 4.33.3. See App. I, Ex. 6-8; see also Ex. 11B (chart summarizing United States' extensive document production efforts). The United States, however, refused to produce additional interrogatory responses and/or documents on the grounds that such information was privileged or otherwise protected by disclosure. See id.

Despite the volume of information produced, in November 1999, AMC nonetheless moved to compel the United States to further respond to twenty-five specified interrogatory requests and requests for production of documents. See App. I, Exs. 9-10, 12.[3] The United States strongly opposed this motion. See App. I, Ex. 11, 13. After reviewing the parties' respective memoranda, this Court issued an order seeking supplemental briefing on eight enumerated issues. See Minute Order (dated March 3, 2000) (App. I, Ex. 14). The parties thereafter submitted a Supplemental Joint Stipulation addressing the requested issues. See App. I, Ex. 15. Altogether, the parties submitted over 300 pages of briefing – *excluding* exhibits – on AMC's motion to compel. Id. at Exs. 9-13.

In June 5, 2000, this Court issued a detailed minute order denying AMC's motion to compel and affirming the United States' privilege assertions. See App. I Ex. 16 ("June Minute Order"). In summary, this June 2000 Minute Order: (i) affirmed the United States' invocation of various discovery privileges (e.g., deliberative process, work product, settlement negotiation, and law enforcement investigative privileges); (ii) limited the scope of discovery to the application of Standard 4.33.3 to commercial movie theaters; and (iii) precluded the AMC defendants from

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[3] In January 2000, AMC also sought to compel supplemental interrogatory responses for Interrogatory Nos. 6 & 7 seeking information concerning communication or contacts between Department officials and the National Association of Theater Owners ("NATO") — an industry trade organization regarding Standard 4.33.3 or lines of sight. See discussion infra pp. 18-20. Ultimately, this Court held that AMC was not entitled to information regarding DOJ-NATO contacts that would reveal negotiating positions or statements made during settlement negotiations. See App. II, Ex. 20. After AMC moved to reconsider this decision, the District Court affirmed this Court's ruling that DOJ-NATO settlement negotiations should remain confidential and outside the scope of discovery. See App. II, Ex. 23; see generally App. II, Exs. 17-23.

seeking discovery outside the administrative record for Standard 4.33.3 to support their APA-based affirmative defenses. Id. AMC did not appeal this Order to the district court.

On January 18, 2002, AMC served the United States with a Rule 30(b)(6) Notice, outlining 28 topics on which it seeks testimony from a representative of the United States. See First Amended Notice, Defendant AMC Entertainment, Inc Notice of Deposition Pursuant to Fed. R. Civ. P. 30(B)(6) (served Jan. 18, 2002) (App. II, Ex. 29) [hereinafter, "AMC's Rule 30(b)(6) Notice"]. The United States subsequently sent a 13-page letter to counsel for AMC, initiating the meet and confer process, and outlining in great detail the United States' objections to the Notice, on grounds of privilege and the law of the case doctrine. See App. II, Exs. 30-31; Jacobs Decl. ¶¶ 3-4. As of the date of the filing of this motion, AMC's counsel had not responded to the United States' request to meet and confer regarding this motion. See Jacobs Decl. ¶¶ 3-6; Russ Decl. ¶¶ 2-3.

ARGUMENT

The United States Seeks a Protective Order to Quash AMC's Inappropriate Rule 30(b)(6) Notice, on the Grounds that This Court Has Already Ruled that the Information Sought Is Privileged or Otherwise Protected from Disclosure.

As discussed more fully in the paragraphs below, the testimony sought by AMC's Rule 30(b)(6) Notice improperly attempts to revisit issues previously litigated in the case, and under the law of the case doctrine, this Court should grant the United States' motion for a protective order. See, e.g., June 2000 Minute Order (upholding United States' assertion of privileges). In this motion, the United States is asserting the following privileges:

(i). the work product doctrine (as to ¶¶ 1, 2, 3, 4, 5, 7, 8, 11, 12, 13, 15, 17, 20, 21, 22, and 23 of AMC's Rule 30(b)(6) Deposition Notice);

(ii). the attorney-client privilege (as to ¶¶ 1, 2, 3, 4, 5, 7, and 8);

(iii). the law enforcement investigative privilege (as to ¶¶ 1, 3, 4, 5, 18, 19, 22, 23);

(iv). the deliberative process privilege (as to ¶¶ 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 24, 25, 26, 27, and 28); AND

(v). the settlement negotiation privilege (as to ¶¶ 6, 8, 12, 13, 14, 15, 17, 18, and 19).

In addition, AMC should be precluded from seeking testimony from ¶¶ 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, and 28, on the grounds that judicial review

under the APA is limited to a review of the administrative record in all but a few cases, and AMC has not met the threshold requirement for discovery to supplement the administrative record. See June 2000 Minute Order ¶ 6; see also Friends of the Earth v. Hintz, 800 F.2d 822, 828 (9th Cir. 1986). AMC is also prematurely seeking evidence relating to expert opinions prior to the filing of expert reports (in ¶¶ 2, 3, 4, 5, 22, and 23), see Fed. R. Civ. P. 26(a)(2)(C), as well as evidence that is beyond the relevant scope of discovery (the application of § 4.33.3 to commercial movie theaters) as outlined in this Court's June 2000 Minute Order.

I. PARAGRAPH 1

> **Text of Paragraph 1:** *Any and all bases for each and every allegation of fact contained in the First Amended Complaint for Declaratory and Injunctive Relief, Compensatory Damages, and Civil Penalties ("Complaint") filed by Plaintiff in this action.*

Largely seeking to rewrite litigation history, paragraph one of AMC's Rule 30(b)(6) Notice reads as if the United States had not already provided extensive responses to AMC's voluminous written discovery propounded to date, or that the Court had never issued any prior discovery rulings regarding privilege or other discovery matters in this action. AMC's overbroad and irresponsible approach, however, cannot ignore the fact this Court previously upheld the United States' invocation of the work product and law enforcement investigative privileges in this action. These privilege rulings are now law of the case. In addition, because the testimony sought in this paragraph is largely (if not completely) duplicative of the AMC defendants' prior discovery requests, it would be unduly burdensome for the United States to prepare a high-ranking government official and provide deposition testimony that repeats written discovery and calls for privileged testimony. These factors thus strongly counsel in favor of the Court issuing a protective order quashing paragraph one in its entirety.

A. This Court's Prior Discovery Rulings Are Now Law of the Case and Preclude AMC From Re-Litigating These Matters in the Context of the Rule 30(b)(6) Notice

Designed to promote judicial efficiency and finality, the law of the case doctrine stands for the common-sense principle that the *same* issues presented a second time in the *same* case in

the *same* court should lead to the *same* result. See, e.g, United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) ("Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court . . . in the identical case."); see also United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000); Mendenhall v. National Transp. Safety Bd., 213 F.3d 464, 469 (9th Cir. 2000); Goodyear Tire & Rubber v. McDonnell Douglas Corp., 820 F. Supp. 503, 509 (C.D. Cal. 1992). A court may only depart from the law of the case under certain limited circumstances, such as an intervening change in the law or a finding that the first decision was clearly erroneous. See, e.g., Lummi Indian Tribe, 235 F.3d at 452-53; Alexander, 106 F.3d at 876.[4] Failure to apply law of the case principles—absent one of these requisite circumstances—amounts to an abuse of discretion. Alexander, 106 F.3d at 876.

Applying these principles to paragraph one of the Rule 30(b)(6) Notice, it is clear that most (if not all) of the testimony sought in this paragraph runs afoul of these principles. The Court's June 2000 Minute Order expressly upheld the United States' invocation of the work product and law enforcement/investigative privileges against discovery of sensitive pre-Complaint investigatory files and work product. See App. I, Ex. 16 at ¶¶ 4, 8. Thus, any effort by AMC to "go behind" the facts in the Complaint into areas protected from disclosure by these privileges — including such matters as the substance or nature of the United States' pre-suit investigation, how or when facts listed in the Complaint were discovered, or how it was determined which facts would be used in the Complaint — are precluded by the law of the case. See, e.g., Alexander, 106 F.3d at 876-77 (holding prior evidentiary ruling in same action to be law of the case); United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1244, 1246-47 (E.D. Cal. 1997) (prior summary judgment ruling dismissing affirmative defense prevented re-litigation

[4] Specifically, a court may have discretion to depart from the law of the case when: (i) the first decision was clearly erroneous; (ii) an intervening change in the law has occurred; (iii) the evidence on remand is substantially different; (iv) other changed circumstances exist; or (v) a manifest injustice would otherwise result. See, e.g., Mendenhall, 213 F.3d at 469; Alexander, 106 F.3d at 876. No factual or legal circumstances exist to support AMC's assertion of any of these exceptions.

of same affirmative defense later in same action); Goodyear Tire, 820 F. Supp. at 508-09 (denying motion for summary judgment on law of the case grounds when such motion was "virtually identical" to summary judgment motion denied earlier in same case).

Yet, even assuming that law of the case principles do not bar AMC from re-litigating privilege issues that have already been extensively briefed and conclusively adjudicated by this Court, paragraph one of AMC's Rule 30(b)(6) Notice still impermissibly seeks testimony covered by the law enforcement/investigative, work product, attorney client privileges. First, as discussed at length in the United States' previous briefs, see App. I, Ex. 11 at pp. 41-43, Ex. 15 at pp. 35-37, 46-49, the law enforcement investigative privilege presumptively protects the information contained in files related to both civil and criminal law enforcement investigations. See, e.g., Black v. Sheraton Corp., 564 F.2d 531, 542 (D.C. Cir. 1977); Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984).[5] This privilege protects against the release of governmental information — whether through documents or deposition testimony — that would harm an agency's enforcement or investigative efforts. See In re Sealed Case, 856 F.2d 268, 272, 317 (D.C. Cir. 1988) (public interest in safeguarding integrity of civil and criminal investigations supports application of law enforcement/investigative privilege to both investigatory files and deposition testimony that would disclose the contents or information in those files).

Here, the declaration of former Acting Assistant Attorney General Bill Lann Lee — originally submitted to the Court in conjunction with the United States' portion of the Joint Stipulation regarding AMC's motion to compel filed in December 1999 — amply demonstrates that disclosure of the sources, methods, and analyses underlying the Department's investigation of AMC prior to filing the instant Complaint in January 1999 would cause great harm to the Department's ADA enforcement efforts in this and other actions. See App. I, Ex. 11A at ¶ 21

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[5] Though the privilege is not absolute, the party seeking discovery cannot obtain information protected by the law enforcement/investigative privilege absent proof of a particularized need that outweighs the public's interest in maintaining the confidentiality of investigative materials. See In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988); Friedman, 738 F.2d at 1341.

(Lee Declaration). AMC, on the other hand, cannot demonstrate an overriding need for such sensitive investigatory information because: (i) the text of the Complaint itself provides AMC with a detailed description of the factual bases for the Complaint; and (ii) interrogatory responses and voluminous documents subsequently produced by the United States during discovery in this action have provided additional, non-privileged factual information with respect to the United States' ADA claims against AMC. For example, the United States' response to AMC Interrogatory No. 5 served in August 1999 provides an exhaustive 60-page preliminary list of ADA violations at the AMC Promenade 16, Norwalk 20, Olathe Station 30, and Barry Woods 24 theater complexes. See App. I, Ex. 7 at pp. 8-67.[6] The AMC defendants, therefore, need not need raid the Department's confidential investigative files to adequately defend themselves in this action. See United States v. Illinois Fair Plan Ass'n, 67 F.R.D. 659, 662 (N.D.. Ill. 1975) (granting United States' requested protective order when there was alternative means of securing information sought in United States Postal Service's investigative files).

Furthermore, deposition inquiry into "any and all bases for . . . every factual allegation" in the Complaint—as sought in paragraph one—would also implicate the work product and attorney client privileges.[7] As outlined in the seminal Supreme Court case of Hickman v. Taylor, 329 U.S. 495 (1946), the work product privilege provides nearly absolute protection for the thought processes, mental impressions, and legal strategy decisions of counsel (or his or her

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[6] It is anticipated that, when expert reports are due, the United States will be providing AMC with additional information regarding ADA violations at these and other AMC theater complexes at issue in this litigation. See discussion infra pp. 14-16.

[7] With respect to the attorney client privilege, the privilege — as applied here — protects confidential communications between Department personnel and Department attorneys (acting in their capacity as attorneys) in the course of seeking legal advice. See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding that attorney client privilege applies to communications between government agencies and their counsel); Arizona Rehabilitation Hospital v. Shalala, 185 F.R.D. 263, 269 (D. Ariz. 1998) (recognizing attorney client privilege in the context of intra-agency communications pre-decisional to the promulgation or repealing of regulations). Since the United States' portion of the Joint Stipulation regarding AMC's motion to compel in November 1999 contained a detailed discussion of the attorney client privilege, see App. I, Ex. 11 at pp. 39-40, that discussion will not be repeated in this memoranda.

representatives) in preparation of a case. See also, e.g., United States v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000); In re Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994); Holmgren v. State Farm Mutual Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992); Terrebonne, Ltd. of California v. Murray, 1 F. Supp. 2d 1050, 1060 (E.D. Cal. 1998). As the Supreme Court noted in Hickman: "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." 329 U.S. at 510.

Because paragraph one of the Notice is framed so broadly, there is a great likelihood that AMC will attempt to "go behind" the facts listed in the Complaint and seek the mental impressions and strategy decisions of Department counsel regarding the formulation of the Complaint. That is, since this paragraph contains no limitations on the "bases" for facts in the Complaint, this paragraph could be used as a vehicle to impermissibly elicit testimony regarding such highly privileged areas as: the thought processes underlying counsel's decisions regarding which facts to emphasize in the Complaint, how those facts were selected or structured, or how the United States intends to use these (or other facts) to prove its case. The work product privilege does not permit such searching inquiries into the thought processes of counsel. See, e.g., Baker v. General Motors Corp., 209 F.3d 1051, 1054-55 (8th Cir. 2000) (holding that attorney notes, memoranda, and witness interviews were opinion work product entitled to "almost absolute immunity"); Chaudhry v. Gallerizzo, 174 F.3d 394, 402-03 (4th Cir. 1999) (work product privilege prohibited disclosure of unredacted legal bills and research memorandum that would reveal statutes researched and confidential sources); see also In re Allen, 106 F.3d 582, 608-09 (4th Cir. 1997) (holding that counsel's selection, ordering, and compilation of documents constituted opinion work product immune from disclosure).

B. Paragraph One of AMC's Rule 30(b)(6) Notice Seeks Testimony Regarding Areas That Have Already Been Exhaustively Covered By Defendants' Previous Discovery Requests

As discussed previously, see discussion supra pp. 2-3, AMC has already propounded voluminous and overlapping discovery requests probing virtually every aspect of the United States' factual and legal contentions in this case. Of particular relevance here, AMC has

extensively canvassed the United States' bases for the factual allegations in the Complaint through both interrogatory and document requests. See, e.g., AMCI Interrogatory Nos. 2-3, 5-16 (App. I, Ex. 4); AMCE Document Request Nos. 15-33 (App. I, Ex. 5). The United States collectively produced thousands of pages of documents and over one-hundred pages of textual interrogatory responses on these and other related topics. See discussion supra pp. 2-3. Indeed, the United States' responses to Interrogatory Nos. 2-3 and 5-16 alone were over 65 pages, including an exhaustive 59-page preliminary list of ADA violations at the AMC Promenade 16, Norwalk 20, Olathe Station 30, and Barry Woods 24 theater complexes. See US AMCI Interrogatory Responses, App. I, Ex. 7.

Given the volume of information produced to AMC to date, there can be no question that AMC already has in its corporate possession sufficient information with which to discern the relatively limited non-privileged bases for the United States' factual allegations in the Complaint. Deposition testimony on this area from a Rule 30(b)(6) deponent designated by the United States thus would be, at best, duplicative, and, at worst, a time-consuming and burdensome exercise meant to draw off time and resources from trial preparation. Rule 26(c) is expressly intended to protect parties from just this type of "annoyance . . . oppression, or undue burden and expense" through repetitious discovery. See, e.g., Van Arsdale v. Clemo, 825 F.2d 794, 798 (4th Cir. 1987) (affirming district court's entry of protective order preventing depositions when appellant failed to demonstrate that additional evidence would be developed through testimony); St. Matthew Publishing, Inc. v. United States, 41 Fed. Cl. 142, 146-47 (1998) (granting United States' motion for protective order for deposition of IRS official, requiring plaintiff-taxpayer to re-issue modified notice, and mandating that re-issued notice delete requests for privileged and duplicative information); United States v. Upton, Civ. No. 3:92-CV-00524, 1995 WL 264247 (D. Conn. Jan. 26 1995) (granting United States' motion for protective order from depositions of Internal Revenue Service agents when defendant-taxpayer had already received responses to 30 interrogatories, all documents concerning his tax assessment, and there was no showing that defendant would obtain additional, non-repetitive information through oral testimony) (App. II, Ex. 33); see generally Herbert v. Lando, 441 U.S. 153, 177 (1979) ("[D]istrict courts should not

neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" (quoting Rule 26(c)).[8]

For the foregoing reasons, the Court should enter a protective order pursuant to Fed. R. Civ. P. 26(c) quashing paragraph one of AMC's Rule 30(b)(6) Notice in its entirety because this paragraph: (i) impermissibly seeks to re-litigate privilege and other discovery areas already addressed by the Court in previous discovery rulings that are now law of the case; (ii) improperly seeks testimony that implicates the work product, attorney-client, and/or law enforcement/investigative privilege; and (iii) would subject one or more government officials to a duplicative, burdensome, and time-consuming deposition that would provide no additional facts or information that has not already been provided to the AMC defendants through written discovery.

In the alternative, should the Court grant discovery, the United seeks an order limiting AMC to a deposition upon written questions with respect to non-privileged, non-duplicative areas, if any, encompassed by paragraph one. See Fed. R. Civ. P. 31; see also, e.g., Boutte v. Blood Systems, Inc., 127 F.R.D. 122, 124-25 (W.D. La. 1989) (issuing protective order limiting disputed deposition of third-party blood donor to deposition upon written questions pursuant to Rule 31); Moretti v. Herman's Sporting Goods, Inc., 1988 WL 122299 (E.D. Pa. Nov. 10, 1988) (ordering plaintiff to proceed pursuant to Fed. R. Civ. P. 31 in response to defendant's motion for protective order to quash notice of oral deposition) (App. II, Ex. 34). Absent a protective order denying the overbroad request for obviously privileged information, such written questions

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[8] This is particularly true where, as here, the governmental deponent would be a high-ranking official in the Department's Civil Rights Division. See, e.g., Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774, 779-80 (9th Cir. 1994)("[A] court may use Rule 26(b) to limit discovery of agency documents or testimony of agency officials if the desired discovery is relatively unimportant when compared to the government interests in conserving scarce government resources."); Church of Scientology v. I.R.S., 138 F.R.D. 9, 12-13 (D. Mass. 1990) (granting motion to quash deposition of Internal Revenue Service employee when deposition would be unduly burdensome on government operations and noticing party failed to carry burden that information could not be gathered from other sources).

would have the salutary effect of permitting the parties to evaluate and resolve any issues relating to privilege, relevancy, or burdensomeness.

II. PARAGRAPH 2

Text of Paragraph 2: *The precise nature and scope of the relief sought by Plaintiff in this action including, but not limited to, each and every improvement Plaintiff contends AMC would have to make to any of its existing facilities in order for those facilities to comply with the regulations set forth in 28 C.F.R. Part 36, Appendix A.*

Introduction

The United States previously set forth in its interrogatory responses the "nature and scope" of the relief sought in this action. See U.S.' AMC Interrogatory Response, Nos. 17-20 (App. I, Ex. 7). This Court has already rejected AMC's previous efforts to compel additional responses to Interrogatory Nos. 19 and 20. See generally June 2000 Minute Order (regarding the 25 issues set forth in Defendants' Motion to Compel Discovery) (App. I, Ex. 16); see also Joint Stipulation Pursuant to Local Rule 7.15.2 Regarding Defendants' Motion to Compel Discovery (Issue Nos. 24-25) (App. I, Ex. 10). Any attempt to elicit testimony beyond these responses would run afoul of several privileges, including the work product, attorney-client, and deliberative process privileges. See discussion below.

In addition, pursuant to Fed. R. Civ. P. 26(a)(2)(C), the United States' designation of expert witnesses to be called at trial is not due for months. Until such time, it would be premature for AMC to attempt to elicit testimony that is otherwise protected from disclosure by the work product privilege.

A. Paragraph Two Improperly Seeks Testimony Protected by the Work Product Doctrine and Attorney Client Privilege

The testimony AMC seeks through paragraph two regarding internal discussions about the nature of the relief the Department has considered in this or other litigation necessarily includes information protected by the work product doctrine and the attorney client privilege, and the Department incorporates by reference its earlier arguments. See discussion supra pp. 5-9.

B. The Deliberative Process Privilege Also Protects Information Sought Through Paragraph Two

This Court has previously upheld the United States' assertion of the deliberative process privilege as to "documents which are pre-decisional and deliberative" and recognized that the privilege protected not only pre-decisional information relating to the promulgation of the regulation § 4.33.3, but also "subsequent decisions as to the enforcement of the standard in Technical Assistance publications, and with regard to decisions to commence investigations and lawsuits."[9] See June 2000 Minute Order ¶ 2 (App. I, Ex. 16). The Court found that it "need not identify the actual decisions reached with respect to documents withheld." See id. (citing Maricopa Audubon Society v. U.S.F.S., 108 F.3d 1089, 1094 (9th Cir. 1997)). Pursuant to the "law of the case" doctrine, the Court should not disturb its prior ruling that the deliberative process privilege applies to the multiple decisions made by the Department (i.e., to file a lawsuit, to launch an investigation), in addition to the decision to adopt Standard 4.33.3. See Alexander, 106 F.3d at 876.

Paragraph two not only seeks information protected by the work product and attorney-client privileges, but it also implicates deliberative process. The purpose of the deliberative process privilege "is to allow [government] agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." Assembly of the State of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992); see also United States v. Fernandez, 231 F.3d 1240, 1246 (9th Cir. 2000) ("[T]he deliberative process privilege encourages forthright and candid discussions of ideas and, therefore, improves the decisionmaking process."). The fact that AMC's Rule 30(b)(6) Notice seeks testimony rather than documents does not alter the application of the deliberative process privilege. See, e.g., Lang v. Kohl's Food Stores, Inc., 185 F.R.D. 542, 550-51 (W.D. WI 1998) (granting EEOC's motion to quash deposition subpoenas on the grounds that, inter alia, the information sought was

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[9] The United States has also extensively briefed this issue in response to AMC's prior motion to compel discovery. See, e.g., App. I, Ex. 11, pp. 17-25 ; App. I, Ex. 15, pp. 11-16, 25-28. The United States incorporates those arguments by reference here.

both burdensome and protected by the deliberative process privilege), motion to vacate denied, 185 F.R.D. 542 (W.D. Wis. 1998). See generally Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The [deliberative process] privilege serves to protect the deliberative process itself, not merely documents containing deliberative material.").

To the extent paragraph two seeks testimony about proposed remedies internally discussed within the Department prior to filing the lawsuit, such information represents the type of "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975) (internal quotation marks omitted); see also Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Likewise, any internal discussions relating to proposed fixes to AMC's theaters that occurred in the context of developing settlement positions are also protected by the deliberative process privilege. See, e.g., Norwood v. FAA, 993 F.2d 570, 576-77 (6th Cir. 1993); Finkel v. HUD, 1995 WL 151790 at *3 (E.D.N.Y. Mar. 28, 1995) (App. II, Ex. 35). Furthermore, any factual information considered as part of these recommendations would necessarily be "so interwoven with the deliberative material that it is not severable." Fernandez, 231 F.3d at 1247; see also Mapother, 3 F.3d at1537-38 (privilege covered report summarizing facts for use of the Attorney General in decision making); Montrose Chemical Corp. v. Train, 491 F.2d 63, 67-68 (D.C. Cir. 1974) (written summaries of factual evidence provided to decisionmaker protected from discovery because they were prepared for the purpose of assisting decisionmaker in making decision).

C. AMC Prematurely Seeks Information Relating to Expert Witnesses

To the extent AMC, in its request for "[t]he precise nature and scope of the relief," is seeking testimony on possible remedies recommended by the Department's experts, AMC is improperly and prematurely seeking evidence prior to the deadline for the filing of expert reports. Federal Rules of Civil Procedure 26 sets forth the general rule regarding the timing and scope of expert disclosures. Specifically, Rule 26 (a)(2)(C) provides that

> [t]hese disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. . . .

Fed. R. Civ. P. 26 (a)(2)(C). This rule represents the balance needed to provide parties the time required to adequately prepare for cross examination of the expert witness, while simultaneously preventing parties from unduly benefitting from the other party's preparation by simply building their case through the use of the opponent's experts. See In re Shell Oil Refinery, 132 F.R.D. 437, 440 (E.D. La. 1990). Thus, the timing and sequence of disclosures are generally ordered by the court to allow both parties the time necessary to prepare and utilize the experts for trial.

Previously, Local Rule 16.2-6 provided that "plaintiff . . . shall designate experts to be called by plaintiff and provide the reports required by F.R.Civ.P. 26(a)(2)(B), not later than eight weeks prior to the discovery cutoff date." The District Court has set May 31, 2001 as the close of expert discovery, see Order Re: Modifying the Discovery Schedule (entered Nov. 1, 2001) (App. II, Ex. 27), and therefore under the old Local Rules, the Department's designation of experts was due approximately April 5, 2002—eight weeks prior to the May 31st deadline.

The new Local Rules, however, no longer contain a specific date for the designation of expert reports, see Local Rule 16-2.5, and therefore the default 90-day rule of Rule 26 (a)(2)(C) should apply.[10] As the Court has designated October 22, 2002 as the trial date, see Minute Order (entered Jan. 8, 2002) (App. II, Ex. 28), the experts reports may instead be due approximately mid-July, 2002.[11] Under either the old local rules, or Rule 26(a)(2)(C), the government is under no obligation now to either identify or designate the individuals that it plans to utilize for trial,

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[10] The new Local Rules took effect on October 1, 2001.

[11] In light of the modification of the local rules to eliminate a reference to expert report due dates, see Local Rule 16-2.5, it is unclear the relation between the expert discovery cut-off date of May 31st and the specific due date for expert reports, or how that May 31st deadline interacts with the default rule of 90 days before trial. See Rule 26(a)(2)(C). The parties may need to seek clarification from Judge Cooper on the exact date by which expert reports are now due, under the new Local Rules.

nor should AMC be entitled to a sneak preview of such information through this deposition notice.

For the foregoing reasons, the Court should enter a protective order pursuant to Fed. R. Civ. P. 26(c), quashing paragraph two of AMC's Rule 30(b)(6) Notice in its entirety, as the paragraph seeks information protected by the attorney-client privilege, the work product doctrine, and the deliberative process privilege. In the alternative, the Court should enter an order limiting AMC to a deposition upon written questions with respect to non-privileged, non-duplicative areas, if any, encompassed by paragraph two.

III. PARAGRAPH 3

Text of Paragraph 3: *Any and all bases for the contention in the Complaint at ¶ 3 that "traditional-style seats... are located very close to the screen and offer far less desirable lines of sight."*

The United States has already set forth in interrogatory responses all non-privileged facts supporting its contention in paragraph 3 of the First Amended Complaint. See U.S.' AMCI Interrogatory Responses, No. 2 (App. I, Ex. 7). The information sought in paragraph three is protected from disclosure by the attorney-client privilege, the work product doctrine, and the law enforcement privilege. See discussion supra pp. 5-9; see also Alexander, 106 F.3d at 876 (law of the case doctrine). In addition, to the extent AMC is seeking information that will be disclosed later in the United States' expert reports, the United States adopts its previous arguments regarding Rule 26(a)(2)(C) and the timing of expert discovery. See pp. 14-16.

IV. PARAGRAPH 4

Text of Paragraph 4: *Any and all bases for the contention in the Complaint at ¶ 11 that "traditional-style seats do not provide lines of sight to the screen that are comparable to those provided [sic] the stadium-style seats."*

The United States has already set forth in interrogatory responses all non-privileged facts supporting its contention in paragraph 11 of the First Amended Complaint. See U.S.' AMCI Interrogatory Responses, No. 3 (App. I, Ex. 7). The information sought in paragraph four is protected from disclosure under the attorney-client privilege, the work product doctrine, and the

law enforcement privilege. See discussion supra pp. 5-9; see also Alexander, 106 F.3d at 876 (law of the case doctrine). In addition, to the extent AMC is seeking information that will be disclosed later in the United States' expert reports, the United States adopts its previous arguments regarding Rule 26(a)(2)(C) and the timing of expert discovery. See pp. 14-16.

V. PARAGRAPH 5

Text of Paragraph 5: *Any and all bases for the contention in ¶ 19 of the Complaint that "AMCE and AMC fail to comply with the Department of Justice's regulation implementing Title III of the ADA, 28 C.F.R. Part 36 (the "Regulations"), including, but not limited to Section 4.33.3 of the Standards for Accessibility Design, 28 C.F.R. Part 37, Appendix A (the "Standards")."*

The United States has already set forth in interrogatory responses all non-privileged facts supporting its contention in paragraph 19 of the First Amended Complaint. See U.S.' AMCI Interrogatory Responses, No. 5 (App. I, Ex. 7). This topic calls for testimony about any discussions or considerations of legal principles, law to facts, and legal conclusions that are protected from disclosure by the attorney-client privilege and the work product doctrine. See discussion supra pp. 5-9. This paragraph also seeks testimony protected under the law enforcement privilege. See id.; see also Alexander, 106 F.3d at 876 (law of the case doctrine).. In addition, to the extent AMC is seeking information that will be disclosed later in the United States' expert reports, the United States adopts its previous arguments regarding Rule 26(a)(2)(C) and the timing of expert discovery. See pp. 14-16.

VI. PARAGRAPH 6

Text of Paragraph 6: *The circumstances surrounding the attendance by Plaintiff's representatives(s) at any meetings with representatives or members of the National Association of Theater Owners (NATO), from 1990 to the present including the nature of the statements made by Plaintiff's representative(s) at such meetings.*

Introduction

The United States has previously set forth in interrogatory responses all non-privileged information with respect to the Department's attendance or participation at NATO meetings. See, e.g., U.S.' AMCE Interrogatory Responses, Nos. 6-7 (App. I, Ex. 6); U.S.' Supp. AMCE

Interrogatory Responses to Nos. 6-7 (App. II, Ex. 19). AMC's efforts to compel additional responses to Interrogatories Nos. 6 and 7 were rejected by both Magistrate Judge Hillman and Judge Cooper in three separate orders, see discussion below, and therefore paragraph six simply represents an "end-run" around the law of the case. As the Court has previously held, many of these discussions are protected under the settlement negotiation privilege. To the extent discussions did not occur in the context of settlement, AMC is limited to the administrative record, as provided under Judge Hillman's June 2000 Minute Order.

A. Under the Law of the Case, AMC May Not Seek Testimony Relating to Settlement Discussions Held Between the Department of Justice and NATO

AMC previously moved on two occasions to compel the production of the information sought in paragraph six, and in both cases, this Court and the District Court rejected AMC's efforts. Specifically, AMC moved to compel additional answers to its Interrogatories 6 and 7, which covered any meetings held with theater companies and industries representatives regarding the meaning of Standard 4.33.3.[12] On February 25, 2000, this Court held that "Defendants are not entitled to information regarding communications between Plaintiff and movie theater representatives which would reveal Plaintiff's negotiating positions and statements made during settlement negotiations." Minute Order at 1 (entered Feb. 25, 2000) (App. II, Ex. 20) [hereinafter, "February 2000 Minute Order"]. AMC moved for reconsideration of that Order with the District Court, which subsequently denied its motion and held that "evidence pertaining to meetings, discussions, and negotiations between plaintiff and other theater owners concerning enforcement of the ADA's line-of-sight requirements is privileged and not subject to discovery."

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[12] **Interrogatory # 6:** *Identify all meetings, discussions, conversations, and conferences that you held with any movie theater company or operator, or industry representative, or any agents of the foregoing, in which ADAAG § 4.33.3 and/or lines of sight were discussed.*

Interrogatory # 7: *Identify all persons participating in the meetings, discussions, conversations, and conferences identified in your response to Interrogatory No. 6.*

See AMCE First Set of Interrogatories, at 5 (App. I, Ex. 3).

Order Denying Defendants' Motion for Review and Reconsideration at 5 (entered Apr. 12, 2000) [hereinafter, "April 2000 Reconsideration Order"] (App. II, Ex. 23). The Court went on to note that the United States had already turned over any settlement agreements reached with theater owners, and that the privilege covered "evidence of negotiations where no agreement was reached." Id.

Later, this Court addressed AMC's entire motion to compel, which again included Interrogatories 6 and 7. Echoing the prior two rulings, this Court held that

> Plaintiff is entitled to the settlement negotiation privilege protection. See Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D. Cal. 1990) (finding Fed.R.Evid. 408 applicable to discovery). Defendants are not entitled to information regarding communications between plaintiff and movie theater owner representatives which would reveal plaintiff's negotiating positions and statements made during settlement negotiations.

June 2000 Minute Order at ¶ 5 (App. I, Ex. 16)."[13]

Despite these clear rulings, AMC seeks yet another bite at the apple, in its attempts to gather information protected by the settlement negotiation privilege. Under the law of the case doctrine, AMC's improper attempts to revisit these issue should be rejected, as the Court has already upheld the Department's assertion of the settlement negotiation privilege to settlement meetings between the Department and other theater owner representatives. See Alexander, 106 F.3d at 876.

The United States has previously discussed the scope of the settlement negotiation privilege in the extensive briefing surrounding AMC's motion to compel, and the United States incorporates those arguments by reference here.[14] To summarize, district courts in this circuit have recognized that evidence from settlement negotiations is protected by privilege. See, e.g., April 2000 Reconsideration Order at 5 (App. II, Ex. 23); Cook v. Yellow Freight System, Inc., 132 F.R.D. 548, 554 (E.D. Cal. 1990). For example, the Court in Cook held that the public

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[13] As this issue has also been extensively briefed, the United States incorporates by reference herein its prior arguments. See, e.g., App. I, Ex. 11, at pp. 40-41; App. II, Ex. 22 (United States' opposition brief to AMC's motion for reconsideration of Feb. Minute Order).

[14] See, e.g., Joint Stipulation Pursuant to Local Rule 7.15.2 Regarding Defendants' Motion to Compel Discovery: AMC Interrogatories Nos. 6 and 7, at 10-16 (App. II, Ex. 18).

policy of encouraging settlement negotiation specifically prohibits the introduction of such negotiations. Id.

In United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982), the Ninth Circuit discussed the two basic principles underlying the evidentiary exclusion embodied in Fed. R. Evid. 408, that settlement negotiations are not admissible to prove liability:

> The first is that the evidence is irrelevant as being motivated by a desire for peace rather than from a concession of the merits of the claim. Second, is in promotion of the public policy favoring the compromise and settlement of disputes. By preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged, thereby furthering the policy toward settlement. Here, we give additional importance to the fact that appellant was not a party to the [litigation giving rise to the settlement negotiations].

See id. at 92 (citing the Advisory Committee Notes to Fed. R. Evid. 408). Those principles also warrant the conclusion reached by the District Court and the Cook Court that discovery relating to settlement negotiations should be privileged.

Paragraph two of AMC's 30(b)(6) motion conflicts with at least three prior rulings in this case—specifically, the February 2000 Minute Order, the April 2000 Reconsideration Order, and the June 2000 Minute Order—that have upheld the application of the settlement negotiation privilege to discussions the Department has had with theater owners and industry representatives. In particular, the settlement negotiation privilege prevents AMC from deposing the Department on discussions held between the United States and NATO involving settlement of active or potential litigation. It would undermine the purposes of the rule—the judicial policy of encouraging compromise and the settlement of disputes—if AMC could obtain through deposition what it could not obtain through its prior motion to compel: i.e., information surrounding the Department's settlement negotiations with NATO or any other theater group.[15]

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[15] In addition to the law of the case doctrine, it is inappropriate for AMC to seek information relating to more recent settlement negotiations with NATO because AMC has signed a confidentiality agreement as to those meetings, and should be bound by the terms of that agreement. In the summer of 2000, the Department of Justice, NATO, AMC, and two other chains signed a confidentiality agreement, in which the parties agreed that "[i]n the event that the negotiations do not result in settlement or other agreement, the parties agree that nothing said during the course of the discussions and no positions set forth during said discussions shall be binding on any of the parties." See NATO-DOJ Confidentiality Agreement, ¶ 2 (App. II, Ex. 26). The parties also agreed that they would not "disclose the substance of said discussions to

B. AMC Is Limited to the Administrative Record Under This Court's June 2000 Minute Order.

To the extent AMC seeks information relating to Department meetings with NATO that either are not settlement discussions, or that are not covered by the 2000 confidentiality agreement, this Court has previously ruled that evidence available to AMC should be limited to the administrative record, and that ruling should govern here, as well.

AMC has previously contended that the Department violated the Administrative Procedure Act (APA) by alleging promulgating a new "rule" on stadium-style theaters without following the requirements of the APA. See [Defendants'] Answer, Affirmative Defenses and Counterclaim, ¶ 38 ("Plaintiff's claims are barred because Plaintiff failed to comply with the Administrative Procedure Act, 5 U.S.C. § 552, *et seq.* ("APA") in promulgating the interpretation of the regulations Plaintiff now asserts in this action") (App. I, Ex. 2). To the extent AMC is seeking information in paragraph six to support—either implicitly or explicitly—its defense based on the APA, this Court has already held that

> judicial review under the APA is limited to a review of the administrative record in all but a few cases. Defendant has not met the threshold requirement for discovery to supplement the administrative record. Defendant has not shown inconsistent interpretations by plaintiff of § 4.33.3 with regard to commercial stadium style movie theaters.

See June 2000 Minute Order at ¶ 6 (App. I, Ex. 16). In addition, the District Court has twice rejected Defendants' APA-based arguments, in dismissing both AMC and then-defendant STK's APA counterclaims. See Order Granting Plaintiff's Motion to Dismiss STK's Cross-Complaint at 3-4 (entered June 26, 2000) (finding no jurisdiction for APA counterclaim because Defendant

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any persons or entities" outside their respective companies. Id. at ¶ 1. Both of AMC's counsel signed this agreement: specifically, Mr. Robert Harrop signed as counsel for AMC, and Mr. Greg Hurley signed as counsel for Sanborn Theaters. See id. It is inappropriate for AMC to sign a confidentiality agreement regarding settlement negotiations between the United States and NATO, and then seek to require the Department to divulge such information for AMC's presumed benefit during the course of litigation. Even if the Court were inclined to disregard the prior rulings in this case, AMC should be bound by the terms of the confidentiality agreement it signed.

had failed to identify any action by Department that constituted final agency action) (App. II, Ex. 25); Order Granting Plaintiff's Motion to Dismiss Defendants' Counterclaim at 17 (entered Dec. 17, 1999) ("AMC's [APA] counterclaim is dismissed on the basis that the court lacks subject matter jurisdiction over it.") (App. II, Ex. 24).

As with most of the issues raised again by AMC's notice of deposition, the parties have tread down this path before, and the United States has briefed the limits on discovery available under the APA. See App. I, Ex. 11, at pp. 10-17; App. I., Ex. 15, at pp. 70-73. The Department incorporates those arguments by reference here.

To summarize, the Ninth Circuit has held that with few exceptions judicial review for the APA is limited to the administrative record. See Friends of the Earth v. Hintz, 800 F.2d 822, 828 (9th Cir. 1986); Black Construction Corp. v. INS, 746 F.2d 503, 505 (9th Cir. 1984); Arizona Past & Future Foundation, Inc. v. Lewis, 722 F.2d 1423, 1425-26 & 1426 n.5 (9th Cir. 1983). As the Supreme Court has made clear, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L. Ed.2d 106 (1973). Accord Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988), as amended, 867 F.2d 1244 (9th Cir. 1989); Friends of the Earth, 800 F.2d at 828. In light of both this Court's prior rulings and these precedents, AMC is not entitled to pursue deposition testimony to create a new "record" in contravention of this principle.

This Court's ruling in its June 2000 Minute Order limiting AMC's APA-related discovery to the administrative record represents law of the case, and the Court should reject any effort by AMC to go beyond the administrative record through this deposition. To the extent AMC is seeking testimony regarding meetings with NATO held prior to the promulgation of Standard 4.33.3 in January 1993, AMC is clearly limited to the documents that are part of the administrative record of Standard 4.33.3, rather than any testimony generated as a result of this litigation. See Camp, 411 U.S. at 142. As for meetings held after January 1993 that do not involve settlement negotiations, AMC is still limited to the administrative record, as the only possible reason AMC seeks such testimony is to bolster its failed APA claims. If AMC is

seeking this testimony to show alleged inconsistencies in the Department's interpretation of Standard 4.33.3, AMC is simply revisiting its failed APA argument. See, e.g., App. I, Ex. 10 at p. 3 (AMC's argument that "Plaintiff's new and highly technical 'interpretation' of Section 4.33.3 finds no support in the language of the regulation, is inconsistent with Plaintiff's prior interpretation of and public pronouncements regarding Section 4.33 [*sic*], and constitutes legislative rule-making in violation of the Administrative Procedure Act ("APA").). This Court has already ruled, however, that "Defendant has not shown inconsistent interpretations by plaintiff of § 4.33.3 with regard to commercial stadium style movie theaters." See June 2000 Minute Order at ¶ 5 (App. I, Ex. 16). The Court should reject AMC's efforts seeking evidence beyond the administrative record, as it represents an end-run around this Court's prior rulings.

The foregoing discussion makes clear that AMC is not entitled to further discovery as to the NATO meetings, as the information sought includes settlement discussions protected by the settlement negotiation privilege, as recognized by this Court and the District Court, and because AMC's efforts to gather this evidence run afoul of the limitation that discovery on APA claims is limited to the administrative record.

Prior to the Court's ruling on these privilege issues, the United States provided AMC with supplemental objections and responses to Interrogatories 6 and 7, regarding its meetings with industry representatives. See U.S.' Supp. AMCE Interrogatories Response to Nos. 6 & 7 (App. II, Ex. 19). Subsequently, both the Magistrate and the District Court rejected AMC's efforts to compel further discovery as to the United States' meetings with theater industry representatives. See February 2000 Minute Order at 1; April 2000 Reconsideration Order at 5; June 2000 Minute Order at ¶ 5. In light of these three rulings rejecting AMC's efforts to compel further discovery, the Court should enter a protective order pursuant to Fed. R. Civ. P. 26(c), quashing paragraph six of AMC's Rule 30(b)(6) Notice in its entirety. In the alternative, if the Court departs from its prior rulings, the Court should enter an order limiting AMC to a deposition upon written questions with respect to non-privileged, non-duplicative areas, if any, encompassed by paragraph six.

If the Court departs from its prior rulings, however, or declines to require any remaining non-privileged topics for deposition questions to be completed in writing, the United States requests that the Court admit a 30(b)(6) deposition of a United States representative conducted in a related case, United States v. Hoyts, Civ. No. 00-12567-WGY (D. Mass.); that transcript is a sufficient response to AMC's inquiries, without requiring a second deposition of a high-ranking Department official on the same topics. See App. II, Ex. 32 (deposition transcript of Andrew E. Lelling).[16] In other words, as an alternative, the United States would agree to stipulate to the introduction of the Lelling deposition, subject, of course, to the United States' privilege and other objections. This alternative is only useful, however, if the Court departs from earlier rulings—i.e., the February 2000 Minute Order, the April 2000 Reconsideration Order, and the June 2000 Minute Order. The United States believes the more appropriate course of action would be to quash the Rule 30(b)(6) Notice in its entirety.

VII: PARAGRAPH 7

> **Text of Paragraph 7**: *The procedures followed by DOJ in developing any interpretations of any language in the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") or the Justice Department Standards of Accessible Design ("JDSAD").*

This paragraph is overbroad to the extent it seeks testimony unrelated to the "procedures" used in developing "interpretations" of language in the Access Board Guidelines or the Standards to commercial movie theaters. See June 2000 Minute Order, ¶ 1 (limiting the scope of discovery to commercial movie theaters). Moreover, this paragraph impermissibly seeks testimony protected by several discovery privileges, including the deliberative process privilege, since the discussion of the "process" for "interpretations" would itself chill frank discussion among

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[16] Unlike the Hoyts case, this Court has issued written orders upholding the United States' assertion of the settlement negotiation, deliberative process, law enforcement investigative, and work product privileges, and has limited AMC's APA-related discovery to the administrative record. In Hoyts, the United States was ordered to present a witness for a 30(b)(6) deposition, subject to the privileges to be asserted by the United States during the course of the deposition. The witness was instructed to limit his answers to only publicly available information. See App. II, Ex. 32.

Department representatives, reveal the thought processes of Department attorneys, and/or reveal the nature of interactions between Department attorneys and their agency clients. The United States asserts the deliberative process privilege, see discussion supra pp. 13-14, as well as the attorney-client privilege and work product doctrine, see pp. 5-9. Finally, the testimony sought in this paragraph runs counter to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

VIII. PARAGRAPH 8

> **Text of Paragraph 8**: *The DOJ's interpretation and/or application of §4.33.3 of the ADAAG or JDSAD with respect to movie auditoriums at any time since it became effective in 1991.*

The United States has already produced to AMC the non-privileged public documents relating to its interpretation of Standard 4.33.3 as applied to movie theaters (e.g., non-internal memoranda, correspondence, pleadings, technical assistance documents, policy letters, public statements, speech texts, settlement agreements, and press releases). To the extent this paragraph seeks to elicit testimony beyond the information provided in these non-privileged sources, or other discovery responses produced by the United States to AMC in this litigation to date, such areas are protected from disclosure by the attorney-client privilege and work product doctrine, see discussion supra pp. 5-9, as well as the deliberative process privilege, see pp. 13-14, and the settlement negotiation privilege, see pp. 18-20. Finally, the testimony sought in this paragraph runs counter to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See pp. 21-23. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

IX. PARAGRAPH 9

> **Text of Paragraph 9**: *The identity of the individuals involved in developing the interpretations of the language "lines of sight comparable to those for members of the general public."*

The United States has already produced to AMC a copy of the certified administrative record for Standard 4.33.3. Testimony sought in this paragraph regarding the identities of individuals involved in the development of the language in this section runs contrary to the June 2000 Minute Order ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, the identities of such individuals are also protected by the deliberative process privilege, since the revelation of such identities would have a chilling effect on internal, pre-decisional debate among government officials. See pp. 13-14. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

X. PARAGRAPH 10

Text of Paragraph 10: *The identify of the individuals involved in developing the requirements set forth in the amicus curiae brief filed by the DOJ in Lara v. Cinemark USA, Inc., EP-97-CA-502-H (W.D. Tex, 1997) ("Lara Brief").*

The United States has already produced to AMC a copy of the Lara brief. Testimony sought in this paragraph regarding the identities of individuals involved in drafting of this brief runs contrary to the June 2000 Minute Order ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, the identities of such individuals are protected by the deliberative process privilege, since the revelation of such identities would have a chilling effect on internal, pre-decisional debate among government officials. See pp. 13-14. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XI. PARAGRAPH 11

Text of Paragraph 11: *The development of the requirement for wheelchair space locations set forth in the Lara Brief.*

The United States has already produced to AMC a copy of the Lara brief. Testimony sought in this paragraph regarding the "development" of the "requirements" in this brief with respect to wheelchair locations runs contrary to the June 2000 Minute Order ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See

discussion supra pp. 21-23. In addition, revealing the internal development of the statements in the Lara brief is protected by the deliberative process privilege, since the revelation of that process would have a chilling effect on internal, pre-decisional debate among government officials. See pp. 13-14. Finally, testimony regarding the drafting or development of the Lara brief is immune from disclosure under the work product doctrine, as AMC cannot use the discovery process as a tool to explore the mental processes or legal analysis of the Department. See pp. 5-9. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XII. PARAGRAPH 12

Text of Paragraph 12: *The development of Plaintiff's current requirements for wheelchair space locations in movie theater auditoriums which include so-called "stadium-style" seating.*

The United States has already produced to AMC a copy of the certified administrative record for Standard 4.33.3, as well as the public documents relating to the Department of Justice's interpretation and application of this section to stadium-style movie theaters. Testimony sought in this paragraph regarding "development" of "requirements" with respect to wheelchair locations in stadium-style movie theaters runs contrary to the June 2000 Minute Order ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, the testimony sought is protected by the deliberative process privilege, as revelation of such discussions would have a chilling effect on internal, pre-decisional debate among government officials. See pp. 13-14. Finally, the testimony sought also is protected under the work product doctrine, see pp. 5-9, and the settlement negotiation privilege, see pp. 18-20. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XIII. PARAGRAPH 13

Text of Paragraph 13: *The development of the requirements governing the location of wheelchair spaces in movie theater auditoriums which do not include so-called "stadium-style" seating.*

As with paragraph 12, the testimony sought by paragraph 13 runs counter to the June 2000 Minute Order ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, the testimony sought is subject to several privileges, including the work product doctrine, see pp. 5-9; the deliberative process privilege, see pp. 13-14; and the settlement negotiation privilege, see pp. 18-20. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XIV. PARAGRAPH 14

> **Text of Paragraph 14**: *The identity of the individuals involved in developing the requirement that movie theaters with so-called "stadium-style" seating must provide wheelchair seating locations with vertical viewing angles to the screen that are at the median or better counting all seats in the auditorium.*

The United States has informed AMC on several occasions that the Department does not interpret Standard 4.33.3 as imposing a specific "vertical viewing angle requirement" on wheelchair seating locations. See, e.g., U.S.' AMCE Interrogatory Responses, No. 3 (App. I, Ex. 6). In addition, the United States has already produced to AMC a copy of the certified administrative record for Standard 4.33.3, as well as the public documents relating to the interpretation and application of this section as it relates to wheelchair locations in stadium-style movie theaters.

The testimony sought here runs counter to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, testimony regarding the identifies of persons involved in the "development" of these purported "requirements" is protected by the deliberative process privilege since the revelation of such discussions would have a chilling effect on internal, pre-decisional debate among government officials. See pp. 13-14. Finally, to the extent this paragraph seeks testimony relating to settlement negotiations between the United States and theater owners, such testimony is protected under the settlement negotiation privilege. See pp. 18-20. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XV. PARAGRAPH 15

Text of Paragraph 15: *The development of the requirement that movie theaters with so-called "stadium-style seating" must provide wheelchair seating locations with vertical viewing angles to the screen that are at the median or better counting all seats in the auditorium.*

The United States has informed AMC on several occasions that the Department does not interpret Standard 4.33.3 as imposing a specific "vertical viewing angle requirement" on wheelchair seating locations. See, e.g., U.S.' AMCE Interrogatory Responses, Interrogatory 3 (App. I, No. 6). As with paragraph 14, the United States has already produced to AMC a copy of the certified administrative record for Standard 4.33.3, as well as the public documents relating to the interpretation and application of this section as it relates to wheelchair locations in stadium-style movie theaters. The testimony sought here runs counter to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, to the extent AMC seeks to go beyond the documents in the public record, testimony regarding the drafting or development of purported vertical viewing angle "requirements" is immune from disclosure under the deliberative process and work product privileges. See pp. 5-9 (work product), pp. 13-14 (deliberative process). Finally, to the extent this paragraph seeks testimony relating to settlement negotiations between the United States and theater owners, such testimony is protected under the settlement negotiation privilege. See pp. 18-20. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XVI. PARAGRAPH 16

Text of Paragraph 16: *The identity of the individuals involved in developing the requirement that movie theaters with so-called "stadium-style" seating must locate wheelchair spaces far enough back in the auditorium to have viewing angles at the 50th percentile (comparing viewing angles for all seats) or further back from the screen.*

The United States has informed AMC on several occasions that the Department does not interpret Standard 4.33.3 as imposing a specific "vertical viewing angle requirement" on wheelchair seating locations. See, e.g., U.S.' AMCE Interrogatory Responses, No. 3 (App. I, Ex. 6). As with paragraph 14 and 15, the United States has already produced to AMC a copy of the

certified administrative record for Standard 4.33.3, as well as the public documents relating to the interpretation and application of this section as it relates to wheelchair locations in stadium-style movie theaters. The testimony sought here runs counter to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, testimony regarding the identifies of persons involved in the "development" of these purported "requirements" is protected by the deliberative process privilege, since the revelation of such discussions would have a chilling effect on internal, pre-decisional debate among government officials. See pp. 13-14 . See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XVII. PARAGRAPH 17

> **Text of Paragraph 17**: *The development of the requirement that movie theaters with so-called "stadium-style" seating must locate wheelchair spaces far enough back in the auditorium to have viewing angles at the 50th percentile (comparing viewing angles for all seats) or farther back from the screen.*

The United States has informed AMC on several occasions that the Department does not interpret Standard 4.33.3 as imposing a specific " viewing angle requirement" on wheelchair seating locations. See, e.g., U.S.' AMCE Interrogatory Responses, No. 3 (App. I, Ex. 6). As with paragraphs 14-16, the United States has already produced to AMC a copy of the certified administrative record for Standard 4.33.3, as well as the public documents relating to the interpretation and application of this section as it relates to wheelchair locations in stadium-style movie theaters. The testimony sought here runs counter to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, to the extent AMC seeks to go beyond the documents in the public record, testimony regarding the drafting or development of purported vertical viewing angle "requirements" is immune from disclosure under the deliberative process, work product, and settlement negotiation privileges. See pp. 5-9 (work product), pp. 13-14 (deliberative process), and pp. 18-20 (settlement negotiation privilege). See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XVIII. PARAGRAPH 18

Text of Paragraph 18: *Plaintiff's contacts in the period 1990 to the present with movie exhibitors with respect to the location of wheelchair spaces in movie auditoriums.*

The United States has already produced to AMC copies of all public settlement agreements reached by and between the Department and other movie exhibitors. In addition, the United States has already set forth in interrogatory responses all non-privileged information with respect to Department representatives' attendance or participation at NATO meetings. See, e.g., U.S.' Supp. AMCE Interrogatory Responses to Nos. 6-7 (App. II, Ex. 19). AMC's efforts to compel additional responses to AMCE Interrogatories Nos. 6 and 7 were rejected by both Magistrate Judge Hillman and Judge Cooper. See February 2000 Minute Order (App. II, Ex. 20); April 2000 Reconsideration Order (App. II, Ex. 23); June 2000 Minute Order (App. I, Ex. 16). Any attempt by AMC to elicit testimony outside these previously-produced documents would implicate the settlement negotiation and law enforcement/investigative privileges, as well as the law of the case principle. See discussion supra pp. 18-20 (settlement negotiations and law of the case); pp. 5-9 (law enforcement). Finally, testimony sought in this paragraph runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See pp. 21-23. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XIX. PARAGRAPH 19

Text of Paragraph 19: *Plaintiff's contacts in the period 1990 to the present with movie exhibitors with respect to the requirements for the location of wheelchair spaces in movie auditoriums.*

For the reasons listed in paragraph 18, any attempt by AMC to elicit testimony through paragraph 19 outside the previously-produced documents would implicate the settlement negotiation and law enforcement/investigative privileges, as well as the law of the case principle. See discussion supra pp. 18-20 (settlement negotiations and law of the case); pp. 5-9 (law enforcement); see also Alexander, 106 F.3d at 876 (law of the case doctrine). Testimony sought

in this paragraph also runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See pp. 21-23.

XX. PARAGRAPH 20

Text of Paragraph 20: *Plaintiff's interpretation of the Society of Motion Picture Television Engineers ("SMPTE") Guideline EG18-1994.*

The United States has informed AMC on several occasions that the Department does not interpret Standard 4.33.3 as imposing specific vertical viewing angle requirements, such as those discussed under SMPTE, on wheelchair seating locations. See, e.g., U.S.' AMCE Interrogatory Responses, Nos. 3 (App. I, Ex. 6). In addition, the United States has already produced to AMC a copy of the certified administrative record for Standard 4.33.3, as well as the public documents relating to this interpretation and application of this section as it relates to wheelchair locations in stadium-style movie theaters, including the Lara brief. Thus, to the extent AMC seeks to elicit testimony that goes beyond these documents, such discovery is precluded by the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, such testimony would be immune from disclosure under the work product doctrine. See pp. 5-9. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XXI. PARAGRAPH 21

Text of Paragraph 21: *Any and all studies and analyses conducted by or on behalf of Plaintiff that were used or relied upon in developing the requirements set forth in the Lara Brief.*

As with paragraph 11, the United States has already produced to AMC a copy of the Lara brief. Testimony sought in this paragraph regarding the "development" of the "requirements" in this brief with respect to wheelchair locations runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See discussion supra pp. 21-23. In addition, analysis and development of litigation material in the process of deciding to file a lawsuit is protected by the deliberative process

privilege. See pp. 13-14. Finally, testimony regarding the drafting or development of this brief is immune from disclosure under the work product privilege, as AMC cannot use the discovery process as a tool to explore the mental processes or legal analysis of the Department. See pp. 5-9; see also Alexander, 106 F.3d at 876 (law of the case doctrine). To the extent AMC is seeking information that will be disclosed later in the United States' expert reports, the United States adopts its previous arguments regarding Rule 26(a)(2)(C) and the timing of expert discovery. See pp. 14-16.

XXII. PARAGRAPH 22

> **Text of Paragraph 22**: *Any and all studies conducted with respect to lines of sight from stadium-style seats and conventional seating (seats on a sloped floor) in movie theaters.*

The United States has already produced to AMC the non-privileged public documents relating to its interpretation of Standard 4.33.3 as applied to movie theaters or the comparability of lines of sight therein. In addition, the United States has provided AMC with interrogatory responses that discuss the Department's interpretation of Standard 4.33.3's comparability language. See, e.g., U.S.' AMCE Interrogatory Responses, Nos. 3, 14 (App. I, Ex. 6); U.S.' AMCI Interrogatory Responses, Nos. 2, 3 (App. I, Ex. 7). To the extent this paragraph seeks to elicit testimony beyond the information provided in these non-privileged sources, such areas are protected from disclosure by the law enforcement/investigative privilege, see discussion supra pp.5-9, and the work product doctrine, see id. Second, the testimony sought in this paragraph runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence in support of its APA-based claims. See pp. 21-23. Finally, until the date for the designation of trial experts has passed, it is premature for AMC to attempt to elicit testimony that is otherwise protected from disclosure by the work product privilege. See pp. 14-16. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XXIII. PARAGRAPH 23

Text of Paragraph 23: *Any and all studies conducted with respect to differences between stadium and conventional seating in movie theaters.*

The same arguments apply to paragraph 23 as apply to paragraph 22: namely, (i) the information sought is protected by the law enforcement/investigative privilege and work product doctrine, see discussion supra pp. 5-9; (ii) the testimony sought runs counter to the June 2000 Minute Order's ruling that AMC may not seek extra-record evidence in support of its APA claims, see pp. 21-23, see also Alexander, 106 F.3d at 876 (law of the case doctrine); and (iii) until the date for the designation of trial experts has passed, it is premature for AMC to attempt to elicit testimony that is otherwise protected from disclosure by the work product privilege, see pp. 14-16.

XXIV. PARAGRAPH 24

Text of Paragraph 24: *Any and all contacts from 1992 to the present between Plaintiff and the Architectural and Transportation Barriers Compliance Board ("Access Board") concerning the application of §4.33.3 of the ADAAG or JDSAD to movie auditoriums.*

The contacts between Department officials and the Access Board regarding the application of Standard 4.33.3 to stadium-style movie theaters are protected by the deliberative process privilege, as the disclosure of any such contacts would have a chilling effect on internal, pre-decisional debate among governmental officials. See discussion supra pp. 13-14. In addition, the testimony sought in this paragraph runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record in support of its APA-based claims. See pp. 21-23. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XXV. PARAGRAPH 25

Text of Paragraph 25: *Any and all contacts from 1992 to the present between Plaintiff and the Access Board concerning the application of §4.33.3 of ADAAG or JDSAD to stadiums.*

Paragraph 25 is vague and ambiguous with respect to the term "stadium." To the extent AMC is referring to sports arenas and other, non-movie-theater stadiums, Judge Hillman has

already precluded AMC from such discovery. See June 2000 Minute Order ¶ 1 (App. I, Ex. 16). Specifically, the Court found that

> The relevant scope of discovery is limited to the application of § 4.33.3 to commercial movie theaters and Technical Assistance publications relating thereto. Fed. R. Civ. P. 26(b). Discovery of interpretations of standard 4.33.3 specifically relating to other types of public assembly areas (such as sports arenas) is denied, due to the fundamental differences between stadium style movie theaters and sports arenas. What constitute "comparable" lines of sight in a movie theater does not correlate to "comparability" in a sports arena or other type of assembly area. Defendants are permitted discovery of all relevant documents, not otherwise privileged, which relate to the agency's enforcement of § 4.33.3, as limited above.

See id. This ruling represents the law of the case, see Alexander, 106 F.3d at 876, and AMC is precluded from seeking the testimony outlined in paragraph 25.

To the extent AMC is seeking testimony only as to movie theaters, the arguments discussed in paragraph 24 apply: namely, the contacts between the Department of Justice and Access Board officials are protected by the deliberative process privilege, see discussion supra pp. 13-14, and the testimony sought in this paragraph runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record in support of its APA-based claims. See pp. 21-23.

XXVI. PARAGRAPH 26

> **Text of Paragraph 26**: *Any and all contacts from 1992 to the present between Plaintiff and the Access Board with respect to proposed revisions to the ADAAG.*

To the extent AMC is seeking information beyond proposed regulations affecting movie theaters, such discovery is precluded by The June 2000 Minute Order's June Minute Order. See June 2000 Minute Order ¶ 1 (App. I, Ex. 16) (denying AMC's motion to compel discovery as to sports arenas). As with paragraph 24, the contacts between Department officials and the Access Board regarding the proposed revisions to regulations during the period set forth in this paragraph are protected by the deliberative process privilege, as the disclosure of any such contacts would have a chilling effect on internal, pre-decisional debate among governmental officials. See discussion supra pp. 13-14. In addition, the testimony sought in this paragraph runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-

record in support of its APA-based claims. See pp. 21-23. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XXVII. PARAGRAPH 27

> **Text of Paragraph 27**: *Any and all efforts by Plaintiff to obtain comment with respect to changing, interpreting or defining the requirements of §4.33.3 of the JDSAD or ADAAG.*

Paragraph 27 is ambiguous as to the meaning of the phrase "obtain comment with respect to changing, interpreting, or defining the requirements of section 4.33.3." The Department's participation in the development of ADAAG is exclusively in a regulatory capacity—specifically as a member of the Access Board. Furthermore, any non-privileged responsive documents about the rulemaking process for Standard 4.33.3 have been produced already.

To the extent this paragraph refers to contacts between Department officials and the Access Board regarding proposed revisions to regulations, or within the Department itself, the United States objects for the reasons articulated in paragraph 26, in that the testimony sought in this paragraph necessarily includes evidence protected by the deliberative process privilege. See discussion supra pp. 13-14. Furthermore, the testimony sought in this paragraph runs contrary to the June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record in support of its APA-based claims. See pp. 21-23. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XXVIII. PARAGRAPH 28

> **Text of Paragraph 28**: *The identity of the individuals involved in developing the requirements set forth in the amicus curiae brief filed by the DOJ in Oregon Paralyzed Veterans of America vs. Regal Cinemas, Inc. U.S. Court of Appeals Docket Number 01-35554, United States Court of Appeals For the Ninth Circuit.*

Similar arguments apply here as with paragraph 10: The United States has already produced to AMC a copy of the Oregon Paralyzed Veterans brief. Testimony sought in this paragraph regarding the identities of individuals involved in drafting of this brief runs contrary to The June 2000 Minute Order's ruling that AMC may not seek discovery of extra-record evidence

in support of its APA-based claims. See discussion supra pp. 21-23. In addition, the identities of such individuals are protected by the deliberative process privilege, since the revelation of such identities would have a chilling effect on internal, pre-decisional debate among government officials. See pp. 13-14. See also Alexander, 106 F.3d at 876 (law of the case doctrine).

XXIX. The Court Should Award Costs as a Sanction Against Counsel for AMC's Failure to Participate In the Meet-And-Confer Process

In addition to granting the United States' motion for protective order, this Court should also award the United States its fees and expenses in bringing the instant motion as a sanction against counsel for AMC's continued failure to participate in the meet-and-confer process as mandated by Local Rule 37-1. Shortly after service of AMC's Rule 30(b)(6) Notice, counsel for the United States (Ms. Jacobs) sent a letter to counsel for AMC (Mr. Hurley) informing him that, pursuant to Local Rule 37-1, the United States was initiating the meet-and-confer process. See App. II, Ex. 30; Jacobs Decl. ¶ 3. This letter also contained a summary of the United States' objections regarding this notice. Id.

A little over a week later, on February 4, 2002, counsel for the United States sent another letter to counsel for AMC setting forth a very detailed, 13-page description of the United States' position, citing legal authorities, and proposing any one of six dates for a telephonic meet-and-confer conference. See App. II, Ex. 31; Jacobs Decl. ¶ 4; see also Local Rule 37-1 (setting forth requirement that moving party's letter initiating the meet-and-confer process identify each disputed discovery issue or request, summarize that party's position on these issues or requests, and provide any dispositive legal authority). Finally, this letter reminded counsel for AMC of the obligation to meet-and-confer in this discovery dispute within the following ten days. See App. II, Ex. 31 at p. 13.

Counsel for AMC, however, never responded—either by telephone or in writing—to the United States' repeated requests for a discovery conference about this motion. Jacobs Decl. ¶¶ 5-6; Russ Decl. at ¶¶ 2-3. Indeed, at no time since serving AMC's Rule 30(b)(6) Notice on January 18th did counsel for AMC communicate in any fashion with either Ms. Jacobs or any other DOJ

counsel regarding this notice, or the United States' objections thereto. Id. This Court should not countenance the utter disregard of AMC's counsel for his meet-and-confer obligations under the local rules.

This is not, moreover, the first time that counsel for AMC (Mr. Hurley) has run afoul of the Central District's mandated meet-and-confer process. Currently pending before the court is the United States' motion for protective order from AMC's Rule 30(b)(6) deposition notice seeking testimony and documents related to the United States' court-ordered inspections of twelve of AMC's theater complexes with stadium-style seating. See Plaintiff United States' Motion for Protective Order From Defendant AMC Entertainment, Inc.'s Deposition Notice Re: Inspection of AMC's Theaters and for Sanctions (filed Feb. 28, 2002). As explained in that motion and accompanying Joint Stipulation, counsel for AMC (Mr. Hurley) there — as here — ignored his meet and confer obligations and refused the United States' repeated requests for a telephonic discovery conference as required by Local Rule 37-1.

Thus, because counsel for AMC completely disregarded his meet-and-confer obligations in the instant discovery dispute, and because such disregard for the meet-and-confer process was not an isolated incident, this Court should sanction AMC and its counsel pursuant to Local Rule 37-4 by: (i) granting the United States' motion for protective order in its entirety; and (ii) imposing a monetary sanction of **$ 4,157** which is equal to the United States' costs and expenses in litigating the instant motion. See Local Rule 37.4 ("The failure of any counsel to comply or cooperate in the [meet-and-confer process set forth in Local Rule 37-1] may result in the imposition of sanctions."); see also Jacobs Decl. ¶¶ 7-10 (detailing costs and expenses associated with the filing of the instant motion for protective order); Russ Decl. ¶¶ 4-5 (same).

CONCLUSION

For the foregoing reasons, the Court should enter a protective order pursuant to Fed. R. Civ. P. 26(c) quashing AMC's Rule 30(b)(6) Notice in its entirety. In the alternative, the Court should enter an order limiting AMC to a deposition upon written questions with respect to non-privileged, non-duplicative areas (if any) encompassed by the Notice. To the extent the Court

declines to either quash the Notice or limit AMC to written questions, the United States argues in the alternative that the admission of the Rule 30(b)(6) deposition in the Hoyts case would satisfy the United States' obligation to respond here, subject to the United States' privilege and other objections raised.

DATED: March 1, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2002, true and correct copies of

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION FOR PROTECTIVE ORDER FROM AMC ENTERTAINMENT INC.'S RULE 30(b)(6) NOTICE, AND MOTION FOR SANCTIONS

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