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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) **PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS DEFENDANT STK'S COUNTERCLAIM** Judge: Florence-Marie Cooper Date: May 22, 2000 Time: 10 a.m.

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MISCELLANEOUS

The United States submits this Memorandum in support of its motion to dismiss the counterclaim filed by the architectural firm Salts, Troutman, and Kaneshiro, Inc. (STK).[1] In its counterclaim, STK alleges that the United States has violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, in attempting to enforce the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and its regulations as applied to Defendants' stadium-style theaters.

PRELIMINARY STATEMENT

On December 17, 1999, the District Court entered a written order dismissing without prejudice Defendant AMC's APA-based counterclaim, by concluding that AMC[2] had failed to identify any final agency action that would provide grounds for jurisdiction to review this claim. Order Granting Plaintiff's Motion to Dismiss Defendants' Counterclaim at 17-18 (December 17, 1999) (hereinafter "December 17th Order"). The Court specifically held that the Department of Justice's threats of litigation and settlement negotiations, as well as its filing of an amicus brief in a Texas case and its filing of the present suit against AMC, were not final agency action.[3] See id. at 11, 12-14. The Department subsequently amended its complaint to name STK as a defendant. STK responded in its answer with an APA counterclaim identical to

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[1] Fed. R. Civ. P. 12(a)(3) provides that the United States has 60 days following the service of a counterclaim to file a responsive pleading. Where a counterclaim was served by mail, as in this case where the counterclaim was served by mail on February 15, 2000, the United States has 63 days to serve a timely motion to dismiss. Fed. R. Civ. P. 6(e). Thus, the United States' motion to dismiss is timely so long as it is served by April 18, 2000.

[2] "AMC" refers collectively to Defendants AMC Entertainment, Inc. and American Multi-Cinema, Inc.

[3] A district court in the Northern District of Ohio recently reached the same conclusion in dismissing an APA counterclaim raised by another movie theater chain. See United States v. Cinemark USA, Inc., 99-CV-705, Memorandum Opinion and Order at 6 (Mar. 22, 2000) ("Because they do not meet the requirements of finality, Plaintiff's filing of complaints in their enforcement actions; correspondence discussing settlement or alleged violations of the ADA; and *amicus* briefs are not 'final' agency actions.") (hereinafter "Ohio Cinemark Order (Mar. 22, 2000)") (see Exh. A).

the one dismissed by the December 17th order. Because this Court has already rejected all of Defendants' possible grounds for identifying final agency action by the government, and because even with further discovery Defendants cannot identify any final agency action "meeting the standards set forth in [the December 17th] order," see id. at 18,[4] under the law of the case the Court should dismiss STK's counterclaim for lack of jurisdiction. See United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

STATUTORY AND FACTUAL BACKGROUND

The U.S. Department of Justice ("Department") has been designated by Congress as the agency assigned to monitor and enforce compliance with most provisions of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq. In 1997, the Department began investigating a relatively new facility design — stadium-style movie theaters. In these theaters, most moviegoers reach their seats by climbing stairs rather than by walking down traditional sloped-floor aisles. Of course, moviegoers who use wheelchairs, who are entitled under the ADA to access to "comparable" seating in movie theaters, are unable to climb the stairs to reach the stadium-style seats.

With few exceptions, AMC and STK[5] have responded to this dilemma not by designing theaters to allow entry into the stadium section by wheelchair users, but by placing wheelchair seating on the floor, to the side of, or in front of, the stadium-style seats. This practice has resulted in numerous complaints by individuals with disabilities who are forced to choose

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[4] See Wells Fargo Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977) (person asserting jurisdiction bears burden of making "initial prima facie showing of jurisdictional facts at the pleading stage"; court need not allow further discovery regarding jurisdictional issue "when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction").

[5] STK had been retained by AMC to perform services related to the design, construction, and alternation of various AMC theaters with stadium-style seating, including the Norwalk Theater and the Promenade 16 Theater here in the Central District. First Am. Compl. at ¶ 14.1.

between sitting in craned-neck discomfort in the front of the theater (the worst seats in the house) or foregoing movies in Defendants' theaters altogether. As common sense would indicate, the ADA does not permit such discrimination.

In June, 1998, the Department advised AMC that its theaters with stadium-style seating violated Title III of the ADA, 42 U.S.C. §§ 12181-12189, and agreed to enter into negotiations with AMC to attempt to resolve the matter without litigation. When seven months of negotiations proved unsuccessful, the Department filed an enforcement action against AMC alleging that its stadium-style theaters violate Title III of the ADA. Earlier this year, this Court permitted the Department to amend its complaint to add architect STK as a defendant. The primary issue in the negotiations and in the enforcement complaint has been the interpretation of a 1991 Department of Justice regulation ("Standard 4.33.3") that requires wheelchair users to be provided with "lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, Appendix A, § 4.33.3.

The Department of Justice articulated its interpretation of Standard 4.33.3 in an amicus brief filed in a private action against another motion picture theater operator, Lara v. Cinemark USA, No. EP-97-CV-502-H (W.D. Tex.), and it has relied on its interpretation of Standard 4.33.3 in filing its enforcement complaint against Defendants. It is Standard 4.33.3, however, and not the Department of Justice's interpretation, that has legal effect. The Department cannot enforce compliance with Title III of the ADA except by filing an enforcement action in U.S. District Court. 42 U.S.C. § 12188(b)(1)(B). Thus, Defendants are not forced to comply with the Department's interpretation of Standard 4.33.3 unless and until a court orders Defendants to do so. See, e.g., 42 U.S.C. § 12188(b)(1) ("If the Attorney General has reasonable cause to believe that . . . any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter . . . [she] may commence a civil action. . . .); id. § 12188(b)(2) (providing that in a civil action "the court . . . may grant any equitable relief that such court considers to be appropriate . . . [and] may award such other relief as the court considers to be appropriate, including monetary damages. . . .) (emphasis added); United States v. Cinemark USA, Inc., 99-CV-705, Memorandum Opinion and Order, at 8 (Mar. 22, 2000)

("Any order for relief, damages, or levying of a fine can only be made by the district court, and not by the Attorney General. 42 U.S.C. § 12188(b)(2).") (hereinafter "Ohio Cinemark Order (Mar. 22, 2000)") (see Exh. A).[6] As discussed further below, the Department has not engaged in any final agency action in this case that provides the basis for jurisdiction for STK's APA counterclaim.

ARGUMENT

I. Under the Law of the Case Doctrine, the Court Has Already Rejected All Possible Grounds for Demonstrating Final Agency Action

In her December 17th Order, District Court Judge Morrow rejected all of AMC's arguments that the Department had engaged in "final agency action." Specifically, the Court found the following actions do **not** constitute final agency action for purposes of conferring jurisdiction under the APA: filing briefs in litigation (including amicus briefs),[7] the decision to file a complaint,[8] and settlement negotiations and threats of lawsuit.[9] See also December 17th Order at 14 ("Thus, viewed separately or in combination, the matters AMC characterizes as

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[6] Indeed, in the Lara action, where a private plaintiff sued a motion picture theater operator to enforce Standard 4.33.3, the Department filed an amicus brief to convince the court to adopt the Department's interpretation of the regulation. However, the district court found the theaters in violation of the ADA and Standard 4.33.3 based on its own interpretation of the plain language of the regulation — not relying on the Department's interpretation. See Lara v. Cinemark, 1998 WL 1048497 (W.D. Tex. 1998) (see Exh. B). The Fifth Circuit recently reversed the District Court, announcing its own interpretation of Standard 4.33.3 and holding that "section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons." Lara v. Cinemark, 2000 WL 297662 (5th Cir. April 6, 2000) (see Exh. C). Although the Department respectfully disagrees with the Fifth Circuit's conclusion (and will fully brief its arguments distinguishing the Lara opinion at the appropriate time), its decision is further evidence that the Department's interpretation is not final agency action, as it reached the merits of interpreting the plain meaning of Standard 4.33.3.

[7] See December 17th Order at 10.

[8] See id. at 11.

[9] See id. at 12.

final agency action are not the kind of actions that are subject to judicial review under the APA."). The Court further found that, on the issue of whether the Department of Justice had taken an industry-wide position as in National Union Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1970), that "at most, DOJ has communicated with ten members of the theater industry nationwide, and has not sought to press its interpretation of Standard 4.33.3 uniformly even among the largest owners. Consequently, the court concludes the evidence does not establish that DOJ has engaged in final agency action." See December 17th Order at 17. The Court ultimately dismissed AMC's motion without prejudice and permitted AMC to seek leave to reassert its counterclaim "should it develop, through discovery or otherwise, evidence of final agency action that satisfied the legal standards discussed herein." Id. at 17.

The District Court in the Northern District of Ohio recently agreed with this Court's December 17th Order, holding that "[b]ecause they do not meet the requirements of finality, [the Department of Justice's] filing of complaints in their enforcement actions; correspondence discussing settlement or alleged violations of the ADA; and *amicus* briefs are not 'final' agency actions." See Ohio Cinemark Order at 6 (Mar. 22, 2000) (Exh. A).[10] In rejecting the defendant's finality arguments, the Court noted that

> The DOJ has no inherent power under the Act to adjudicate. Unlike many other agencies, it has no power to issue fines or to order a violator to do, or not do, some act. . . . Any order for relief, damages, or levying of a fine can only be made by the district court, and not by the Attorney General. 42 U.S.C. § 12188(b)(2). If the Court were to adopt Defendant's position [on finality], the United States and the Attorney General would be subject to suit any time the Attorney General initiated an investigation or filed a complaint based on the belief that some party was unlawfully discriminating against persons with disabilities. This is an untenable position which this Court declines to

[10] The Court alternatively noted that, even if such actions were final agency actions, Defendant Cinemark had failed to exhaust its administrative remedies under 5 U.S.C. § 553(e). See id. at 6 n.4.

adopt. See [FTC v.] Standard Oil, 449 U.S. [232,] at 239 [(1980)] ("The Commission's issuance of its complaint was not 'final agency action.'").

See id. at 8. The Court subsequently granted the United States' motion to dismiss Cinemark's APA counterclaim in its entirety.[11] See id. at 12. Indeed, the conclusions of this Court and the Northern District of Ohio are well supported by precedent. See National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (decision to file complaint not final agency action); Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 343 (9th Cir. 1990) (agency advocacy in a judicial proceeding not final agency action); Board of Trade of the City of Chicago v. SEC, 883 F.2d 525, 529-30 (7th Cir. 1989) (discretionary decision to prosecute a complaint not reviewable under APA); New Jersey Hospital Ass'n v. United States, 23 F. Supp. 2d 497, 500 (D. N.J. 1998) (settlement letters not final agency action); Duval Ranching Co. v. Glickman, 965 F. Supp. 1427, 1440 (D. Nev. 1997) (threatening to file lawsuit not final agency action).

On February 15, 2000, STK filed an APA counterclaim identical in substance to the one dismissed by this Court's December 17th Order. Compare, e.g., Answer to First Am. Comp., Counterclaim ¶¶ 5, 14-16 with Answer to Compl. ¶¶ 5, 23-25. Defendants have failed to articulate what agency action by the Department constitutes final agency action. Indeed, further discovery will not reveal any APA violation by the Department, as none of the Department's actions meet the Ninth Circuit's definition of "final agency action" needed to provide the basis for jurisdiction of an APA-based challenge in this case. Because this Court has already rejected all possible grounds by which the Defendants might claim final agency action, see United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997),[12] and because Defendants have failed to

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[11] In the case Cinemark v. Department of Justice, No. 99-CV-0183 (N.D. Tex.), a declaratory judgment action filed by a movie theater chain against the Department, the same issue is still pending before the Court. Prior to the Ohio decision, a Magistrate Judge orally recommended the conclusion that the Department's actions are final agency action subject to review, but the Court is considering this issue at a hearing on April 21, 2000.

[12] "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, or a higher court in the identical case." See Alexander, 106 F.3d at 876 (quoting Thomas v. Bible, 983 F.2d 152, 154

identify any other grounds that constitute final agency action, this Court should dismiss STK's counterclaim, with prejudice.

II. There is No Final Department of Justice Action That Can Justify Judicial Review

A. The Administrative Procedure Act Is the Only Possible Source for a Waiver of Sovereign Immunity That Would Give This Court Jurisdiction Over STK's Counterclaim

"It is axiomatic that the United States may not be sued without its consent, and that the existence of consent is prerequisite to jurisdiction." United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961 (1983); see also E.J. Friedman Co., v. United States, 6 F.3d 1355, 1357 (9th Cir. 1993) ("Waivers of sovereign immunity must be strictly construed in favor of the government."); Marshall Leasing, Inc. v. United States, 893 F.2d 1096, 1098 (9th Cir. 1990). The Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, waives sovereign immunity to suit subject to several limitations, including that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review."[13] 5 U.S.C. § 704; see also Gallo Cattle Co. v. United States Dep't of Agriculture, 159 F.3d 1194, 1198 (9th Cir. 1998); Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1196 (9th Cir. 1997). "[A] finding of finality, or an applicable exception, is

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(9th Cir. 1993)). A court may only depart from the law of the case where "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." See id. at 876. As seen below, the law of the Ninth Circuit is quite clear that the actions taken by the Department of Justice in this case do not constitute final agency action, nor have courts intervened to change those standards. See discussion in Section II, supra. Nor have any intervening facts or manifest injustice arisen since December 17, 1999 to justify disturbing the Court's conclusions.

[13] Although the APA can waive sovereign immunity, it does not provide an independent basis for subject matter jurisdiction. See Gallo Cattle Co. v. United States Dep't of Agriculture, 159 F.3d 1194, 1198 (9th Cir. 1998). Jurisdiction is conferred under 28 U.S.C. § 1331, which permits challenge to federal agency action as to claims arising under federal law, unless a statute expressly precludes review. See id. In this case, 5 U.S.C. § 704 permits review of "final" agency actions.

essential when the court's reviewing authority depends on one of the many statutes permitting appeal only of 'final' agency actions, such as § 10 of the APA, 5 U.S.C. § 704." Ukiah Valley Med. Ctr. v. Federal Trade Comm'n, 911 F.2d 261, 264 (9th Cir. 1990).

A party asserting subject matter jurisdiction over an action (in this case, STK) bears the burden of demonstrating that such jurisdiction exists. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). In its counterclaim, STK relies on the waiver of sovereign immunity contained in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq.; see Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole, 948 F.2d 953 (5th Cir. 1991). The APA's waiver of sovereign immunity contains several limitations. Gallo Cattle Co., 159 F.3d at 1198-1199. The APA provides for judicial review by a district court of "agency action" in a case brought by a "person suffering legal wrong because of agency action." 5 U.S.C. § 702. The Act, however, "does not make every agency action subject to judicial review." See Taylor-Callahan-Coleman, 948 F.2d at 956; see also Heckler v. Chaney, 470 U.S. 821, 828, 105 S. Ct. 1649, 1654, 84 L. Ed. 2d 714 (1985). Such review is limited in various respects by other sections of the APA. Most relevant here, agency action can be reviewed only if it is "final," and, if it is final, only if the plaintiff has "no other adequate remedy in a court." 5 U.S.C. § 704; Gallo Cattle Co., 159 F.3d at 1198-1199. Therefore, unless STK can demonstrate that it challenges "final agency action" and that it is without an adequate remedy, there is no waiver of sovereign immunity and this Court does not have jurisdiction. See, e.g., id.; Veldhoen v. United States Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994); Taylor-Callahan-Coleman, 948 F.2d at 956.

B. The Department of Justice's Interpretation of Standard 4.33.3 Is Not "Final Agency Action" Subject to Judicial Review Under the Administrative Procedure Act

1. The Department Is Simply Attempting to Enforce the Plain Language of Standard 4.33.3

In this case, Defendants seek to turn enforcement of the ADA on its head by filing a counterclaim which, in essence, challenges the Attorney General's authority to file an

enforcement action against it. Indeed, "[j]udicial review . . . should not be a means of turning prosecutor into defendant." FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 243, 101 S. Ct. 488, 495, 66 L. Ed. 2d 416 (1980); see also Dow Chemical v. United States EPA, 832 F.2d 319, 324 n.30 (5th Cir. 1987). In its counterclaim, STK requests a declaratory judgment that the Department of Justice's interpretation of Standard 4.33.3 is procedurally improper, substantively incorrect, and unenforceable. Essentially, STK asks the Court to prohibit the Department of Justice from interpreting its own regulation, to paralyze the Department's efforts to enforce the ADA against Defendants, and to allow Defendants to continue discriminating against persons who use wheelchairs by denying them access to the stadium-style seats that are provided to all other members of the general public. The Court cannot and should not grant such relief.

Under well-established Supreme Court and appellate precedent, the Department of Justice's actions challenged here — interpreting its own regulations in the context of carrying out its enforcement mandate — are not "final agency action" subject to judicial review under the Administrative Procedure Act. Therefore, the Court does not have jurisdiction to hear STK's counterclaim.

The ADA was premised in part on the Congressional finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . effects of architectural . . . barriers." 42 U.S.C. § 12101(a)(5). To combat this discrimination, Congress mandated that all commercial facilities and "public accommodations" designed and constructed for first occupancy after January 26, 1993, be "readily accessible to and usable by individuals with disabilities . . . in accordance with standards set forth or incorporated by reference in regulations" issued pursuant to the Act. 42 U.S.C. § 12183(a)(1). Movie theaters are among the specific types of entities considered to be a "public accommodation" and therefore subject to the requirements of the Act.[14] 42 U.S.C. § 12181(7)(C).

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[14] Motion picture theaters are also "commercial facilities" within the meaning of Section 301(2) of the ADA, since they "are intended for nonresidential use" and since their "operations will affect commerce." See 42 U.S.C. § 12181(2); 28 C.F.R. 36.104.

The Department of Justice, through the Attorney General, was specifically designated by Congress as the agency authorized to issue regulations to carry out the requirements of the ADA with respect to new construction of public accommodations and commercial facilities. See 42 U.S.C. § 12186(b). The Department of Justice issued such regulations on July 26, 1991. See 56 Fed. Reg. 35,544 (1991), codified at 28 C.F.R. § 36.101, et seq. The regulations incorporate architectural standards for new construction that are known as the Standards for Accessible Design (the "Standards"). See 28 C.F.R. Part 36 App. A. The Standards address numerous issues, but the primary regulation at issue in this case is Standard 4.33.3, governing the placement of wheelchair locations in assembly areas such as movie theaters. Standard 4.33.3 states in part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

28 C.F.R. Part 36 App. A, § 4.33.3. Before 1998, the Department of Justice had never announced an interpretation of this regulation as applied to stadium-style movie theaters, nor had any court addressed that issue.

In December 1997, a group of disabled individuals filed suit against a motion picture theater operator alleging that certain stadium-style theaters, and specifically the placement of wheelchair locations in those theaters, violate the ADA. Lara v. Cinemark USA, Inc., No. 97-CV-502 (W.D. Tex.). On July 21, 1998, the Department of Justice submitted an amicus brief in Lara on behalf of the United States in which it offered to the court its interpretation of Standard 4.33.3 as applied to stadium-style theaters. The Department's amicus brief offered the following plain language approach to Standard 4.33.3:

> Once measured, the lines of sight provided to wheelchair users must be comparable to those provided to members of the general public. "Comparable" is an ordinary word used in everyday parlance. Grider v. Cavazos, 911 F.2d 1158, 1161-62 (5th Cir. 1990) (courts forbidden from tampering with plain meaning of words in ordinary lay and legal parlance); Webster's defines "comparable" as "capable of or suitable for comparison;

equivalent; similar." Webster's Ninth New Collegiate Dictionary (1990) (emphasis added). Consistent with this practical definition, the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates to that of members of the general public.[15] In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in the industry guidelines, "viewing angles" refers to vertical viewing angles, horizontal viewing angles and to other components that affect "lines of sight."

Brief of Amicus Curiae United States on Summary Judgment Issues at 8-9.

The Department's views, even when asserted in an amicus brief, are entitled to respect because the Department is charged by Congress with implementing the ADA. See Olmstead v. Zimring, 119 S. Ct. 2176, 2185-86 & 2185 n.9 (1999) ("Because the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II [of the ADA] . . . its views warrant respect."); see also Bragdon v. Abbott, 524 U.S. 624, 642, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998) ("[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); Auer v. Robbins, 519 U.S. 452, 461-62, 117 S. Ct. 905 (1997) (holding that the Secretary of Labor's interpretation of his Department's regulation should be

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[15] See 28 C.F.R. Part 36, §§ 36.202, 36.203, 36.302 (As a general rule, the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons.). . . .

controlling unless "plainly erroneous or inconsistent with the regulation," even if "the Secretary's interpretation comes to us in the form of a legal brief") (internal quotation marks omitted). However, the Department's interpretation of the plain language does not bind the Defendants absent a court order. See 42 U.S.C. § 12188(b)(2); see also Ukiah Valley, 911 F.2d at 265 (finding no final agency action in filing an administrative complaint, because plaintiffs were "not yet subject to any order requiring them to act"); Ohio Cinemark Order at 6 (Mar. 22, 2000) (Exh. A).

2. Because the Department Has Not Engaged in Final Agency Action in Attempting to Enforce the ADA and Its Regulations, This Court Lacks Jurisdiction to Hear STK's Counterclaim

An agency action is not a "final agency action" unless it is "one by which rights or obligations have been determined, or from which legal consequences will flow." Gallo Cattle Company, 159 F.3d at 1199; Western Radio, 123 F.3d at 1196; see also Bennett v. Spear, 520 U.S. 154, 177-78 (1997); Dow Chemical, 832 F.2d at 323. To be final agency action, "the administrative action challenged should be a definitive statement of an agency's position; the action should have a direct and immediate effect on the day-to-day business of the complaining parties; the action should have the status of law; immediate compliance should be expected; and the question should be a legal one." Mt. Adams Veneer Co., 896 F.2d at 343. As the December 17th order and circuit court precedent make clear, none of the Department's actions in attempting to enforce the requirements of Standard 4.33.3 in the stadium-style theater context violate the APA.

For example, the Department's letters to Defendants during settlements negotiations, and the Department's efforts to settle potential claims against other theater chains, are not final agency actions reviewable under the APA. See Association of Public Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, 1184 (9th Cir. 1997) ("Negotiations, which are not final actions, therefore are not reviewable, and we decline to consider them."). Further, the Department's filing of briefs, including the amicus brief in the Lara case, are not properly subject to challenge under the APA, since "[a]gency advocacy in a judicial proceeding is

obviously not such agency action as would be subject to judicial review" under the APA. Mt. Adams Veneer, 896 F.2d at 343.[16] In filing amicus briefs with the Lara court, the Department was offering its views on the interpretation of Standard 4.33.3 to the court—views that the court is free to reject if it believes that it is plainly erroneous or that it is inconsistent with the regulatory purposes. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 114 S. Ct. 2381, 2386, 129 L. Ed. 2d 405 (1994).

In essence, the "action" that STK challenges in this litigation is the Department of Justice's interpretation of its own regulation. See STK's Counterclaim, ¶ 6. That interpretation was developed and put forward as part of the Department's responsibility to enforce the ADA, but it has not been codified, nor has it resulted in any legal consequences for anyone, let alone Defendants. As a result, the APA does not provide a means to challenge it. The decision to file an enforcement action does not constitute final agency action. See Standard Oil Co., 449 U.S. at 238 (issuing a complaint is not "final agency action"); Sears, Roebuck & Co., 421 U.S. at 160 (memorandum recommending filing of complaint not final agency action); Ukiah Valley, 911 F.2d at 263-64 (issuing an administrative complaint not final agency action). The filing of a complaint against STK "has no legal force" on STK and imposes no "burden" other than responding to the Department's allegations, which cannot serve as the basis of a finding of final agency action. See Standard Oil Co., 449 U.S. at 242; see also Ohio Cinemark Order at 8 (Mar. 22, 2000) (Exh. A). Indeed, "the expense and annoyance of litigation is part of the social burden of living under government" and not the type of burden that fixes rights or obligations. See Standard Oil, 449 U.S. at 244 (quoting Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 222, 58 S. Ct. 834, 841, 82 L. Ed. 1294 (1938)) (internal quotation marks omitted). To allow defendants to challenge the decision to file a complaint as final

[16] Cf. Heckler, 470 U.S. at 821 n.5 ("[W]e find it difficult to believe that statements of agency counsel in litigation against private individuals can be taken to establish 'rules' that bind an entire agency prospectively. Such would turn orderly process on its head.").

agency action turns enforcement of the law on its head, "turning prosecutor into defendant" in potentially every case in which an enforcement action is brought.[17] See id. at 242-43.

An extended analysis of the Fifth Circuit's decision in Dow is worthwhile because that case involved facts strikingly similar to those here — a procedural and substantive challenge to an agency's efforts to enforce a statute and regulations entrusted to it. Specifically, Dow challenged the EPA's interpretation of its own regulation regarding the meaning of "discharges," an interpretation that had been disclosed and applied to Dow in the context of an investigation of Dow's alleged discharges of vinyl chloride gas. Subsequent to Dow's filing its lawsuit, the EPA filed a complaint in a pending enforcement action against Dow in which, relying on its interpretation of its regulation, it asked a court to order Dow to comply with its regulation as interpreted, and order civil penalties.

The Court dismissed Dow's claim, finding that EPA had not taken any steps that could be characterized as final agency action. The Court first held that EPA's interpretation of its discharge regulation, just like the Department of Justice's interpretation of Standard 4.33.3,

> is "final" only in the sense that no one at the agency currently plans to revise it. The same could be said for countless other instances of legal "interpretation" that inevitably occur. . . . When these interpretations do not establish new rights or duties — when they do not fix a legal relationship — they do not constitute "final action" by the agency and they are not reviewable. . . .

Dow, 832 F.2d at 323-24. The Court reached this holding despite recognizing that Dow might eventually be penalized for failing to abide by the discharge regulation as interpreted by EPA.

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[17] Furthermore, apart from the requirement that an agency action be final, courts cannot review agency action that is committed to its discretion by law. See New Jersey Hospital Ass'n, 23 F. Supp. 2d at 500; see also 5 U.S.C. § 701(a)(2). In this case, the Attorney General may commence a civil action if she "has reasonable cause to believe that . . . any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter." See 42 U.S.C. § 12188(b)(1)(B). Such language provides the Attorney General with discretion to "assess the results of [an] investigation, as well as the application of agency policy and available resources, to the factual circumstances before them." See New Jersey Hospital Ass'n, 23 F. Supp. 2d at 501-02; see also E.J. Friedman Co., 6 F.3d at 1359 (finding that decision by the IRS "to discharge a lien" was an agency action committed to agency discretion, as there was no meaningful standard against which to judge the agency's exercise of that discretion).

"But the legal source for these [penalties] — if indeed the district court concludes they are warranted — will be [the regulation], and not any later EPA interpretation of that regulation." Id. at 323; see also Orengo Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993) (interpretive statement in context of adjudication not intended to create new rights or duties).

The same result is mandated in this case. As the Department of Justice has interpreted Standard 4.33.3 — specifically the phrase "lines of sight comparable to those for members of the general public" in that regulation — Defendants' practice of placing wheelchair seating in the front of its stadium-style theaters, outside the stadium portion, does not comply with the regulation. But it is the regulation itself, and not the Department of Justice's interpretation of it, that imposes the duty to provide wheelchair users with "comparable" seating. Indeed, the Department of Justice has issued no order requiring Defendants to comply with its interpretation (nor does the ADA authorize the Department to compel action), and can impose no penalty on Defendants for failing to comply with its interpretation absent a court order. The interpretation therefore does not have "the status of law with penalties for noncompliance" and is not final agency action. Taylor-Callahan-Coleman, 948 F.2d at 959; see also Resident Council of Allen Parkway Village v. United States Dep't of Housing & Urban Development, 980 F.2d 1043, 1056 (5th Cir. 1993) (HUD interpretation of statute not final because it does not have status of law).[18]

The fact that the Department of Justice has filed an enforcement action based on an application of Standard 4.33.3 to Defendants' stadium-style theaters does not change the finality analysis. This exact situation arose in Dow, and the Fifth Circuit expressly held that the filing of an enforcement suit by an administrative agency responsible for enforcement of a statute is not final agency action. Dow, 832 F.2d at 325. While Defendants now have the "obligation" to

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[18] Cf. Western Illinois Home Health Care v. Herman, 150 F.3d 659, 663-64 (7th Cir. 1998) (party not entitled to seek judicial review when no legal consequences for disregarding agency's position); Allsteel, Inc. v. United States EPA, 25 F.3d 312, 315 (6th Cir. 1994) ("Where violation of an order would not expose the party to penalties or obligations not already imposed by the statute, the impact of the order may not be sufficiently practical or immediate to make the action 'final.'").

defend themselves in litigation, that "obligation" is "different in kind and legal effect" from the burdens imposed by final agency action. Id. (quoting Standard Oil, 449 U.S. at 242).

The Dow court's decision is consistent with the pragmatic approach the Supreme Court and the Ninth Circuit employ to assess finality. Standard Oil, 449 U.S. at 239; Gallo Cattle Co., 159 F.3d at 1199; Western Radio Servs. Co., 123 F.3d at 1196. Administrative agencies continually engage in enforcement efforts, often relying on their own interpretations of statutes and regulations entrusted to their administration. See, e.g., American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1111-12 (D.C. Cir. 1993). To allow a defendant to preempt an enforcement action through a procedural challenge would significantly hinder agency enforcement efforts. As the Supreme Court put it, it is not the purpose of judicial review provisions to turn prosecutor into defendant. Standard Oil, 449 U.S. at 243; see also Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise, § 15.15 at 391 (3d ed. 1994) ("[c]ourts cannot possibly get into the business of reviewing . . . announcements of major investigations or enforcement actions").

The Department of Justice's complaint against STK is a statement that there is "reasonable cause to believe" that discrimination under the ADA has occurred, see 42 U.S.C. § 12188(b)(1)(B), and such a statement, even in the form of a formal complaint, is not final agency action. Standard Oil, 449 U.S. at 241. In essence, the Department of Justice has "recommended" that a court make certain findings, and that does not "fix legal rights or impose obligations, even if further proceedings prompted by the [agency's] decision may." Veldhoen, 35 F.3d at 226. See also Solar Turbines Inc. v. Seif, 879 F.2d 1073, 1082 (3d Cir. 1989) (issuance of administrative order not final agency action where no compulsion to obey order). Any penalty imposed on STK would result from a court's determination that it failed to comply with the ADA and its regulations, rather than any action by the Department of Justice. See Gallo Cattle Co., 159 F.3d at 1199.

Finally, as noted earlier, this Court has already rejected the argument that the Department of Justice has taken an industry-wide position as the agency did in National Automatic Laundry & Cleaning Council, 443 F.2d 689 (D.C. Cir. 1971). See December 17th

Order at 17. The Court in National Automatic found final agency action when the head of an agency issued a ruling to an industry group on the meaning of the Fair Labor Standards Act. 443 F.2d at 702. But see Zaharakis v. Heckler, 744 F.2d 711, 712 (9th Cir. 1984) (holding that interpretive rules do not "grant rights [or] impose obligations" on private interests but rather "merely express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities") (internal quotation marks omitted). The narrow factual case presented by National Automatic Laundry does not apply to this case, as the Department's attempts to negotiate settlements with individual theaters owners who it believes have violated the plain language of the law do not constitute final agency action that binds the industry. These efforts "do not have the status of law with penalties for noncompliance." See Taylor-Callahan-Coleman, 948 F.2d at 959.

Furthermore, this Court has already determined that investigating and litigating against approximately ten members of the theater industry nationwide "does not establish that DOJ has engaged in final agency action" even under the National Automatic Laundry framework. See December 17th Order at 17. This ruling is consistent with the Ninth Circuit's determination that negotiations "are not final action, [and] therefore are not reviewable." See Bonneville Power Admin., 126 F.3d at 1184.

C. Further Discovery in This Case Will Not Reveal Any Final Agency Action

As a general matter, judicial review under the APA is limited to a review of 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 (9th Cir. 1983). "[T]he 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). Even assuming that Defendants can demonstrate they are entitled to discovery relating to their APA-based challenge (a question currently pending before

Magistrate Judge Hillman),[19] Defendants cannot identify any possible final agency action by the Department in this case that has not already been rejected by this and other Courts. In investigating and pursuing enforcement actions against STK, AMC, and several other owners of stadium-style theaters, the Department has not engaged in any final agency action from "which rights or obligations have been determined, or from which legal consequences will flow." Gallo Cattle Co., 159 F.3d at 1199. None of the Department's actions qualify as final agency action, including the decision to file complaints against theaters and the actual filing of complaints, Standard Oil, 449 U.S. at 238; Sears, Roebuck, 421 U.S. at 160; any briefs or other advocacy taken in judicial proceedings, see Mt. Adams Veneer Co., 896 F.2d at 343; Board of Trade of the City of Chicago, 883 F.2d at 529-30; any settlement letters with theaters or STK, New Jersey Hospital Ass'n, 23 F. Supp. 2d at 500; or any settlement negotiations, Bonneville Power Admin., 126 F.3d at 1184. The fact that the Department's investigations have led it to believe that several other theaters owners, not just AMC and STK, have violated the ADA and its regulations in designing, constructing, and/or operating stadium-style theaters does not suddenly convert its efforts to enforce the law into final agency action. See Taylor-Callahan-Coleman, 948 F.2d at 958-59. Defendants have not identified any action by the Department that qualifies as final agency action in this case, other than the initial promulgation of Standard 4.33.3 in 1991, which Defendants have not challenged. STK has failed to meet its burden of making an "initial prima facie showing of jurisdictional facts at the pleading stage," and the Court need not wait for further discovery on this jurisdictional question "when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." See Wells Fargo Co., 556 F.2d at 430 n.24 (9th Cir.). See also St. Clair v. City of Chico, 880

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[19] On April 12, 2000, this Court upheld Magistrate Judge Hillman's February 25, 2000, minute order denying Defendants' discovery of the United States' settlement negotiations with other theaters. The Court held that it "agrees with the Magistrate 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." United States v. AMC, CV 99-1034, Order Denying Defendants' Motion for Review and Reconsideration at 5 (Apr. 12, 2000).

F.2d 199, 201 (9th Cir. 1989) (holding that district court did not err in denying party asserting jurisdiction additional discovery when it was clear party could not demonstrate the requisite jurisdictional facts); F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1318 (9th Cir. 1989) (holding that, even assuming the truth of plaintiff's allegations, if defendants are immune from suit [here, through qualified immunity], "permitting discovery would be futile").

D. The Court Need Not Reach the Issue of Whether STK Has an Adequate Remedy in a Court Because STK Cannot Point to Any Action by the Department in this Case that Constitutes Final Agency Action.

Because the Department has not engaged in final agency action, the court need not reach the question of whether an adequate remedy in court exists because the Court lacks jurisdiction to hear STK's APA-based counterclaim. See 5 U.S.C. § 704 (providing review for "final agency action for which there is no other adequate remedy in a court"); see also Gallo Cattle Co., 159 F.3d at 1198; New Jersey Hospital Ass'n, 23 F. Supp. 2d at 500, 501. Even if the Department's interpretation of Standard 4.33.3 were final agency action, however, the Court still lacks jurisdiction because STK has an "adequate remedy" in a court. 5 U.S.C. § 704; see also Marshall Leasing, 893 F.2d at 1110. In defending this action, STK is free to argue that the Department's interpretation of Standard 4.33.3 is incorrect, and therefore should not be applied to STK. See, e.g., New Jersey Hospital Ass'n, 23 F. Supp. 2d at 51 (defendant had adequate remedy because it could argue that the Department of Justice could not establish the necessary scienter to bring a viable claim under the FCA). Where a party has the ability to assert its claims as a defense, that is an adequate remedy at law. See Georgia v. City of Chattanooga, Tennessee, 264 U.S. 472, 483 (1924); see also United States v. Rural Elec. Convenience Coop. Co., 922 F.2d 429, 433 (7th Cir. 1991); Travis v. Pennyrile Rural Elec. Coop., 399 F.2d 726, 729 (6th Cir. 1968). Under the APA, then, this Court does not have jurisdiction to hear STK's claims. See New Jersey Hosp. Ass'n, 23 F. Supp. 2d at 501; NAACP v. Meese, 615 F. Supp. 200, 203 (D.D.C. 1985). Although STK might prefer to litigate its interpretation of Standard 4.33.3 preemptively as part of an affirmative claim instead of simply defending an enforcement action by arguing that it disagrees with the enforcing agency's interpretation of the agency's own

regulations, that does not mean that STK lacks an "adequate" opportunity, within the meaning of 5 U.S.C. § 704, to challenge the agency's interpretation of its regulation. See, e.g., First Nat'l Bank v. Steinbrink, 812 F. Supp. 849, 853-54 (N.D. Ill. 1993) (expense or inconvenience of defending self does not limit adequacy of remedy in court).

CONCLUSION

Because this Court has already ruled in its December 17th Order that there was no final agency action, and because there is no basis upon which this Court may exercise its jurisdiction pursuant to the APA, STK's counterclaim must be dismissed, with prejudice.

Respectfully submitted,

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