UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	§	
	§	CIVIL ACTION NO.1:99CV-705
Plaintiff	§	
	§	Hon. Donald C. Nugent
v.	§	
	§	**REPLY MEMORANDUM OF LAW**
CINEMARK USA, INC.,	§	**IN FURTHER SUPPORT OF**
	§	**PLAINTIFF UNITED STATES'**
Defendant.	§	**CROSS MOTION FOR PARTIAL**
	§	**SUMMARY JUDGMENT**
	§	
	§	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF UNITED STATES' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Table of Contents

Table of Authorities iv

I. INTRODUCTION 1

II. ARGUMENT 2

A. Cinemark Violates the Plain Meaning of Section 302 by Offering an Enhanced and Superior Movie-Going Experience to the General Public, but Failing to Make That Experience Available to Persons Who Use Wheelchairs. 4

B. Cinemark Misconstrues the Plain Meaning of Section 303 and Standard 4.33.3 9

1. The Integration Requirement in Standard 4.33.3 Requires More than Companion Seating 10

2. The Requirement to Provide Persons Who Use Wheelchairs with Comparable Lines of Sight Is an Independent and Separate Requirement from the Dispersal Requirement 13

C. Cinemark Misapplies Relevant Deference Standards 16

1. Deference to a Federal Agency's Interpretation of its Own Regulation Is Generally Encouraged and Is Mandated Where A Regulation Is Ambiguous 16

2. There Is No "Heightened Deference" to the Fifth Circuit 19

3. Deference to the Fifth Circuit's Flawed Analysis in Lara Is Unwarranted 21

D. Cinemark's So-Called "Evidence" of Local Approvals Does Not Preclude United States Enforcement of the ADA 22

E. Neither the Doctrine of Mutual Collateral Estoppel Nor the Doctrine of Non-Mutual Collateral Estoppel Bars the United States' Claims 26

F. Cinemark's APA Defense Fails Because No Final Agency Action Exists 28

G. The Fifth Circuit's Decision in Lara Does Not Deprive This Court of the Authority to Reach an Independent Decision on the Legal Issues Involved in this Case 30

III. CONCLUSION 31

I. INTRODUCTION

Individuals seated in Cinemark's stadium-style seats are provided with an enhanced movie viewing experience that is superior to the experience offered to those seated in its traditional seats. Persons who use wheelchairs are denied access to Cinemark's stadium-style seats. Cinemark does not dispute these facts.

Instead, Cinemark argues that it is free to place wheelchair seating locations anywhere in its auditoriums – even in locations providing the worst sightlines in the house – as long as there is an "unobstructed" view to the screen. In other words, Cinemark asks this Court to permit movie theater owners and operators to relegate persons who use wheelchairs to the worst seats in a theater as long as there is no obstruction. Such an outcome would undercut the basic premise of the ADA: to provide individuals with disabilities fair and equal enjoyment of public facilities.

The United States does not contend and has never contended that the ADA requires Cinemark to provide persons who use wheelchairs with the best seats in the house. Rather, the ADA specifically prohibits Cinemark from (a) denying persons who use wheelchairs access to a new good, service, or accommodation available at Cinemark's theaters, i.e., stadium-style seating; (b) failing to integrate wheelchair seating locations into areas of the theater where a majority of the patrons sit; and (c) providing persons who use wheelchairs with inferior lines of sight to the screen.

Despite Cinemark's efforts to introduce tangential and erroneous arguments as well as irrelevant and unfounded allegations, the underlying question before this Court remains the same: In new movie theaters featuring "stadium-style" seating, can people who use wheelchairs be relegated to the traditional sloped-floor seating sections of the theaters and be denied seating in the stadium-style

sections? The United States brings the instant motion to resolve this question and to remedy a pattern or practice of discrimination against persons with disabilities by Cinemark in its movie theaters with stadium-style seating.[1]

II. ARGUMENT

Although Defendant Cinemark USA, Inc. ("Cinemark") has clouded the record with irrelevant disputed facts, the Court need only consider a limited number of material undisputed facts in order to resolve the United States' motion for partial summary judgment.[2] The undisputed evidence shows that:

- At least forty-nine (49) of Cinemark's stadium-style theater complexes have auditoriums with two types of seating: stadium-style seating, which is elevated on risers, and tradition or non-stadium-style seating, which is located on the sloped floor section of the auditorium and not on risers. Plaintiff United States' Statement of Undisputed

[1] In opposing the United States' cross motion, Cinemark relies on arguments raised in support of its second motion for summary judgment. See Cinemark's Memorandum of Law in Opposition to United States' Cross Motion for Partial Summary Judgment ("Cinemark Opp'n") at 16, 24-26. Specifically, Cinemark incorporates by reference arguments relating to Lara v. Cinemark, 207 F.3d 783 (5th Cir.), cert. denied, 121 S. Ct. 341 (2000), deference, certification, the APA, theaters in the Fifth Circuit, and collateral estoppel, each of which was addressed in Cinemark USA, Inc.'s Reply in Further Support of its Second Motion for Summary Judgment ("Cinemark Reply"). Thus, the United States responds, where appropriate, to these arguments in the instant reply.

[2] Cinemark mistakenly contends that certain facts relied upon in the United States' "Statement of Undisputed Material Facts" are irrelevant, misleading or inadmissible. See Cinemark Opp'n at 4-7. Cinemark misconstrues the United States' intended use of certain undisputed facts. See U.S. Memorandum in Opposition to Defendant's Objection to and/or Motion to Strike Plaintiff's Cross-Motion for Partial Summary Judgment Evidence ("U.S. Opp'n"). The United States relies upon a limited number of facts necessary to the Court's determination of Cinemark's violation of the plain meaning of the ADA and the applicable regulations. See discussion infra at 3. However, in the event that this Court finds that it cannot discern the plain meaning of the statute or regulations, the United States includes additional undisputed facts to: (a) demonstrate the reasonableness and consistency of the Department of Justice's interpretation of applicable regulations; (b) assist the Court in understanding the applicable regulatory terms and how they are applied in practice; and (c) demonstrate that applicable regulatory terms (e.g., "lines of sight comparable") have specific meaning to the regulated industry and its membership organization. In citing to the views of industry officials regarding Standard 4.33.3, the United States did not intend to suggest that the test of whether Cinemark must comply with the regulation is based upon Cinemark's actual knowledge of the regulation or industry's views and opinions on the regulation. Rather, publication of Standard 4.33.3 in the Federal Register gave Cinemark notice of the regulation and Cinemark was required to comply with it. Merrill v. Federal Crop Ins. Corp., 332 U.S. 380, 384-85 (1947).

Material Facts in Support of its Cross Motion for Partial Summary Judgment ("U.S. Facts") at 8.[3]

- Stadium-style seats offer "greater visibility" and "enhanced," "unobstructed sight lines" to the screen and a comfortable viewing experience. U.S. Facts at ¶¶ 11-13. In press releases and advertisements, Cinemark promotes the unique amenities associated with stadium-style seats. Id.

- In the 49 Cinemark theaters subject to this motion, 80.3 % of the seats are located in the stadium-style section of the auditorium. See Supp. U.S. Facts at ¶ 43.

- Seats located in the non-stadium-style section do not offer "greater visibility" or "enhanced" and "unobstructed sight lines." U.S. Facts at ¶¶ 11-13, 16.

- In the 49 Cinemark theaters subject to this motion, Cinemark relegates persons who use wheelchairs to wheelchair seating locations in the traditional sloped-floor sections of its auditoriums, denying them access to the enhanced, unobstructed sight lines that are available to everyone else. Id.; see also Cinemark's Second Motion for Summary Judgment and Brief in Support ("Cinemark Motion"), Section III, ¶¶ 2-3.

- Stadium-style theaters can be designed so that the stadium-style section of the theater is accessed by persons who use wheelchairs through the use of cross aisles and ramps. See Supp. U.S. Facts at ¶ 44.

The plain meaning of the ADA and applicable regulations does not permit Cinemark to discriminate against persons who use wheelchairs by denying them access to the stadium-style section of its theaters. Accordingly, as a matter of law, Cinemark is liable under sections 302 and 303 of the ADA. Therefore, this Court should grant partial summary judgment in favor of the United States.

[3] See Plaintiff United States' Supplemental Statement of Undisputed Material Facts in Further Support of its Cross Motion for Partial Summary Judgment ("Supp. U.S. Facts") at ¶ 42 (listing the 49 Cinemark theaters at issue in this motion). The instant motion addresses only 49 theaters with both stadium-style seating and traditional sloped-floor seating in one auditorium, and where all wheelchair seating is in the traditional sloped-floor seating. See Supp. U.S. Facts at ¶ 43.

A. Cinemark Violates the Plain Meaning of Section 302 by Offering an Enhanced and Superior Movie-Going Experience to the General Public, but Failing to Make That Experience Available to Persons Who Use Wheelchairs

To prohibit discrimination faced day-to-day by individuals with disabilities, Congress enacted the ADA. This Court must decide whether Cinemark violates section 302 of the ADA when it develops and markets a new and enhanced good, service, or accommodation (i.e., an enhanced and superior movie-going experience through the use of stadium-style seating) yet fails to make that good, service, or accommodation available to persons who use wheelchairs. Despite Cinemark's attempt to complicate and confuse this issue by raising extraneous contentions and immaterial facts, there is no genuine dispute that the stadium-style seating Cinemark offers to the general public has excellent viewing locations, enhanced and unobstructed sight lines to the screen, and a comfortable viewing experience. U.S. Facts at ¶¶ 8, 11. There is further no dispute that seating provided in the traditional sloped-floor seating area of Cinemark's theaters does not offer these features. U.S. Facts at ¶¶ 11-13, 16.

Cinemark insists that it is exempt from section 302's comprehensive mandate against discrimination because stadium-style seating entails an architectural design and construction component. See Cinemark Opp'n at 12-15. According to Cinemark, if a movie theater meets the architectural design and building requirements of section 303 and Standard 4.33.3, it has satisfied all the obligations of section 302. See id. at 12-13. Cinemark relies upon inapposite case law and advances its subjective view of "common sense" in arguing that only the detailed building guidelines in Standard 4.33.3 determine whether Cinemark's exclusion of individuals from stadium-style seating violates the ADA. See id. at 13-15. Cinemark's position misstates the law.

The mandate of section 302 – to provide persons who use wheelchairs with the full and equal enjoyment of a good, service, or accommodation – cannot be ignored merely because one of the distinguishing characteristics of a good, service, or accommodation entails an architectural component. Although Cinemark allows individuals with disabilities to enter its theaters, it denies these individuals the opportunity to participate in, and benefit from, the enhanced movie-going experience offered by the stadium-style seating. The plain reading of section 302 and the broad remedial goals of the ADA prohibit Cinemark from denying individuals with disabilities access to, or enjoyment of, the enhanced movie-going experience that it normally offers to the public.

Moreover, Cinemark ignores the fact that sections 302 and 303 of the ADA are independent and distinct provisions, with independent obligations and liabilities. A cardinal principle of statutory construction gives effect "if possible, to every clause and word of a statute." United States v. Menasche, 348 U.S. 528, 538-539 (1955); see also Moskal v. United States, 498 U.S. 103, 109-110 (1990). A statute should not be read to render a portion of the statute meaningless. See Colautti v. Franklin, 439 U.S. 379, 392 (1979); Cafarelli v. Yancy, 226 F.3d 492, 499 (6th Cir. 2000). Section 302(a) bars a public accommodation from discriminating on the basis of disability in the "full and equal enjoyment" of goods, services and accommodations that it provides to the general public. See 42 U.S.C. § 12182(a). Section 302(b) defines a variety of acts and omissions that constitute discrimination for purposes of section 302(a), including the imposition of discriminatory eligibility criteria, the prohibition of offering separate or different goods and services, the failure to modify policies and practices, the failure to provide auxiliary aids and services, the failure to remove

architectural barriers, the failure to provide public accommodation in the most integrated setting, and others. See 42 U.S.C. § 12182(b)(1)(2).

Section 303 addresses only one category of prohibited activity: the design and construction of inaccessible facilities. Thus, the purpose of the ADA is not only to change the way in which new facilities are designed and constructed, but also to discard the practices of operating these new facilities in ways that relegate individuals with disabilities to diminished enjoyment of those facilities and lessen their participation in the day-to-day life of our society. Where new designs and methods of construction heighten and dramatically improve a good, service, or accommodation, a public accommodation must comply with Congress' comprehensive ban against discrimination by offering this improved good, service, or accommodation to persons with disabilities. Excusing a public accommodation from some of its obligations under section 302 merely because the good or service derives its enhanced features from an innovative architectural design reads some key provisions of section 302 out of the law. Further, Cinemark's restrictive reading of section 302 would lead to absurd results. For example, a facility could be designed and constructed in full compliance with all relevant technical guidelines under the ADA, but an owner or operator could simply deny persons who use wheelchairs access to the facility. Under Cinemark's interpretation of section 302, there would no violation of the ADA.

The case cited by Cinemark does not support its claim that compliance with section 303 is sufficient to comply with all of Title III, and is readily distinguishable here. In Caruso v. Blockbuster-Sony Music Entertainment Centre, 968 F. Supp. 210, 211-12 (D.N.J. 1997), aff'd in part, rev'd in part,174 F.3d 166 (3d Cir.), opinion vacated and superceded on panel reh'g, 193 F.3d 730

(3d Cir. 1999), plaintiffs alleged violations of the ADA for failure to provide persons who use wheelchairs with unobstructed lines of sight over standing spectators in a large music and entertainment facility. Caruso is inapposite – the court's decision centered on its holding that it should not defer to the Department's Technical Assistance Manual on the question of sight lines over standing spectators when it found (incorrectly, in our view) that there was a specific contrary regulatory history of interpretation. See Caruso, 968 F. Supp. at 215-16. Such is not the case here. The Caruso opinion does not stand for the sweeping proposition that section 302 is inapplicable in determining ADA violations where an accommodation has an architectural and design component. The court only briefly discusses the "full and equal enjoyment" language of the statute, and did not address the more specific provisions in section 302(b), such as integrated setting and equal access to accommodations and services. See id. at 216.

Cinemark next argues that Section 302 does not require that individuals with disabilities be provided an identical experience as members of the general public, nor does it require entities to change the goods or services it normally offers the general public. Cinemark Opp'n at 14-15 (relying on McNeil v. Time Ins. Co., 205 F.3d 179 (5th Cir. 2000), cert. denied, 2001 WL 178218 (Feb. 26, 2001) and Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999), cert. denied, 528 U.S. 1106 (2000)). However, the United States does not contend that Cinemark must do either of these things. Cinemark's reliance on McNeil and Doe demonstrates its misunderstanding of the United States' position as well as the goals, purpose, and scope of section 302.

McNeil and Doe involve insurance companies that refused to provide individuals with HIV additional insurance coverage not typically provided to other members. McNeil, 205 F.3d at 187;

Doe, 179 F.3d 558. The issue in the instant case is not whether section 302 requires Cinemark to provide an individual with a disability access to a good or service not generally provided to members of the general public. Rather, the issue is whether section 302 requires Cinemark to provide an individual with a disability a good or service that is normally offered to the general public, i.e., stadium-style seating.[4]

The United States does not contend that Cinemark must provide patrons who use wheelchairs with the best seat in the house. Nor does the United States contend that Cinemark must make every seat in the house accessible to these patrons, or fulfill every subjective preference of each of these patrons. Moreover, the United States has not challenged the basic concept of stadium-style theaters, nor has the United States suggested that Cinemark needs to tear down its stadium-style theaters.[5] Rather, Cinemark's practice and policy of promoting and offering the enhanced movie-going experience afforded by stadium-style seating to the general public while, at the same time, failing to provide individuals who use wheelchair access to, and enjoyment of, the stadium-style seating violates the ADA.[6]

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[4] Indeed, McNeil and Doe both recognize that the full and equal enjoyment provision of section 302 requires owners and operators of public facilities to provide individuals with disabilities access to those goods generally provided to members of the general public. McNeil, 205 F.3d at 186; Doe, 179 F.3d at 558.

[5] Should the Court grant the instant motion, the United States intends to introduce evidence, during the remedy phase of this litigation, that will establish the feasibility of appropriate modifications or changes to Cinemark's existing stadium-style theaters.

[6] Cinemark mischaracterizes the United States' discussion of Cinemark's aggressive advertising campaign as nothing more than a false advertising claim. Cinemark Opp'n at 13, n 8. Cinemark's promotion of its stadium-style theaters directly relates to the goods and services that Cinemark normally offers to the general public and underscores the two different experiences that Cinemark offers. In addition, Cinemark's advertising relates to Cinemark's operational policies and practices. Pursuant to section 302, Cinemark's policies, practices and procedures that deny goods and services to individuals with disabilities are discriminatory. 42 U.S.C. § 12182(b)(2)(A)(ii).

The fact that members of the general public also sit in the traditional sloped-floor seating section does not bring wheelchair seating located in this section into compliance with the "equal enjoyment" mandate of section 302. The test is whether individuals who use wheelchairs are deprived of the superior experience that Cinemark normally offers to the general public. The majority of seats (80.7%) in Cinemark's theaters are in the stadium-style section elevated on risers. See Supp. U.S. Facts at ¶ 43. Therefore, by depriving individuals with disabilities of access to, and enjoyment of, the enhanced moving-going experience normally offered to the general public, Cinemark fails to comply with the "full and equal enjoyment" requirement of section 302.

B. Cinemark Misconstrues the Plain Meaning of Section 303 and Standard 4.33.3

The undisputed facts demonstrate that Cinemark has violated Section 303 and Standard 4.33.3 in two ways: (1) by failing to provide wheelchair seating locations that are an integral part of the fixed seating plan within the stadium-style seating area; and (2) by failing to provide comparable lines of sight to persons who use wheelchairs.[7] See Memorandum of Law in Support of Plaintiff United States' Cross Motion for Partial Summary Judgment ("U.S. Cross Motion") at 23-34.

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[7] Cinemark's allegation that the United States "stood silent" on its interpretation of Standard 4.33.3 while Cinemark built the theaters subject to the instant motion is both irrelevant and unfounded. See Cinemark Opp'n at 1, 3. The absence or presence of technical assistance is not relevant to the issue of whether Cinemark complied with sections 302 and 303 of the ADA, and the underlying regulations. See 42 U.S.C. § 12206(e) ("[An entity] covered under [the ADA] shall not be excused from compliance with the requirements of [the ADA] because of any failure to receive technical assistance . . ."). At all times relevant to these proceedings, Cinemark had ready access to Standard 4.33.3 and was on notice of its requirements. In any event, and for the purpose of clarifying the record, the first time the industry asked for guidance on the requirements of Standard 4.33.3 in stadium-style theaters was in April, 1998, and the Department immediately and unequivocally informed the industry that wheelchair seating locations must be provided, at a minimum, in the stadium-style seating section of auditoriums. See Appendix of Documents Supporting the United States' Motion for Summary Judgment ("App.") at 11, pp. 5-6. Finally, at least 13 of the 49 theaters that are subject to this motion were designed and/or built after April 1998, when the industry first asked for technical assistance on Standard 4.33.3 and the Department made clear that wheelchair areas must be provided, at a minimum, in the stadium-style section. See Supplemental Declaration of Diane Perry ¶ 45, Supp. U.S. Facts at Tab A.

1. The Integration Requirement in Standard 4.33.3 Requires More than Companion Seating

Cinemark contends that the requirement in Standard 4.33.3 that "[w]heelchair areas shall be an integral part of any fixed seating plan" merely requires it to provide companion seating next to wheelchair seating locations in order to satisfy this requirement. See Cinemark Opp'n at 23-24. Cinemark misconstrues the Preamble to the Department's final Title III regulations and relies on inapplicable case law in an attempt to support its restrictive reading of Standard 4.33.3. Cinemark's interpretation of this integration requirement is far too narrow, and must be rejected for numerous reasons.

Cinemark's reading of this provision of Standard 4.33.3 renders the Standard's separate and express requirement to provide companion seating redundant and superfluous. Because the plain meaning of Standard 4.33.3 already requires that "[a]t least one companion fixed seat shall be provided next to each wheelchair seating area," the language addressing the integration requirement (i.e., that wheelchair seating be an integral part of the fixed seating plan) must mean something different.[8] "Regulations, like statutes, are interpreted according to canons of construction. Chief among these canons is the mandate that constructions which render regulatory provisions superfluous are to be avoided." Black & Decker Corp. v. Commissioner of Internal Revenue, 986 F.2d 60, 65 (3d Cir. 1993) (internal quotation marks omitted); see also Jewett v. Commissioner of Internal Revenue, 455 U.S. 305, 315 (1982) (rejecting interpretation of regulation that rendered half of it superfluous).

[8] See 28 C.F.R. pt. 36, App. A, § 4.33.3 ("Wheelchair areas shall be an integral part of any fixed seating plan. . .").

Cinemark's reading is also clearly inconsistent with the intent of both Congress and the Department that integration means much more than merely providing a companion seat.[9] Congress passed the ADA in part because "historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination . . . continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Among the forms of discrimination encountered by persons with disabilities, Congress found, are "segregation[] and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." Id. § 12101(a)(5). Similarly, the Preamble to the regulation, in addition to recognizing that persons who use wheelchairs have been forced to sit apart from family and friends, also recognizes that persons who use wheelchairs historically have been provided "inferior seating" and "segregated accommodations" compared to non-disabled individuals, thus relegating persons who use wheelchairs "to the status of second-class citizens." See 28 C.F.R. pt. 36, App. B, at 631-633, 651 (2000) (discussion of §§ 36.308, 36.203).[10]

To effectuate the integration requirement in Standard 4.33.3, wheelchair seating locations must not only be located in the auditorium and next to a companion seat, they must be part of the auditorium seating section where most members of the general public routinely sit. See U.S. Cross Motion at 23-25. Any other interpretation of Standard 4.33.3 would result in the very inferior seating and

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[9] Cinemark contends that on page 22 of the United States' memorandum in support of its cross motion, the United States took remarks by Representative Shroeder out of context to support its integration argument. See Cinemark Opp'n at 23, n. 22. Cinemark's allegation is somewhat baffling, because the United States did not rely on remarks by any member of Congress, anywhere in its memorandum, to support its integration argument.

[10] Cinemark erroneously contends that all of the United States' citations to its Preamble are from sections dealing specifically with companion seating. See Cinemark Opp'n at 23, n. 24. In fact, § 36.203 of the Preamble is entitled "Integrated Settings" and does not discuss companion seating. Section 36.308 is entitled "Seating in Assembly Areas" and discusses the removal of barriers to assembly areas, including, but not limited to, the provision of appropriate companion seating.

segregation that Standard 4.33.3 was intended to prevent. Stadium-style seating makes up 80.7% of the seating in Cinemark's stadium-style auditoriums, meaning that, in those auditoriums, the general public sits primarily in stadium-style seats. See Supp. U.S. Facts at ¶ 43. Further, Cinemark emphasizes the greater comfort and "greater visibility and enhanced unobstructed sight lines to the screen" afforded by its stadium-style seating, not by its traditional seating. See U.S. Facts at ¶¶ 11-13. Therefore, to be "an integral part of the fixed seating plan" in Cinemark's stadium-style theaters, wheelchair seating locations must be located in the stadium-style section.[11]

Contrary to Cinemark's contention, the decisions in Caruso v. Blockbuster-Sony Entertainment Centre, 193 F.3d 730 (3d Cir. 1999) and Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994) do not support its narrow interpretation of Standard 4.33.3's integration requirement because they do not even address that requirement. See Cinemark Opp'n at 22-24. The integration provision of Standard 4.33.3 was not at issue in Caruso. Rather, Caruso discusses whether the "lines of sight comparable" language in Standard 4.33.3 requires persons who use wheelchairs to be provided lines of sight over standing spectators. See 193 F.3d at 731-37. The decision in Arnold is limited to the resolution of several procedural issues (e.g., class certification, bifurcation of trial, reconsideration and interlocutory appeal).

In sum, it is undisputed that Cinemark does not provide wheelchair seating locations in the stadium-style section of its auditoriums. See, e.g., Cinemark Motion at Section III, ¶ 3 ("Wheelchair-accessible seating at Cinemark's stadium-style movie theaters . . . is located on a flat portion of each

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[11] Cinemark contends that this interpretation of Standard 4.33.3 contradicts the law because Standard 4.33.3 allows clustering of seats in certain circumstances. As we discuss later, the clustering "exception" does not apply to stadium-style theaters. See pp. 15-16, infra.

auditorium, near the entranceway and exits, in front of the tiered seats."). Rather, Cinemark locates its wheelchair seating in the front of its auditoriums, see id., in traditional sloped-floor seating that comprises less than 20% of the total seating in its stadium-style theaters, see Supp. U.S. Facts at ¶ 43. Based on these undisputed facts, this Court should conclude that Cinemark's seating is not "an integral part of the fixed seating plan," in violation of Standard 4.33.3.[12]

2. The Requirement to Provide Persons Who Use Wheelchairs with Comparable Lines of Sight Is an Independent and Separate Requirement from the Dispersal Requirement

In opposing the United States' motion, Cinemark alternatively argues that the comparable lines of sight requirement does not apply to its theaters because they fit within an exception to the rule and that, in any event, it has complied with the requirement for comparable lines of sight. See Cinemark Opp'n at 17-19. Cinemark's arguments lack merit.

Cinemark first argues that Standard 4.33.3's line of sight requirement does not apply to theaters with a seating capacity of 300 or less. See Cinemark Opp'n at 17-18. Cinemark improperly collapses the comparable line of sight requirement with the separate "dispersal" requirement. However, in addition to requiring integration, comparable lines of sight, and choice of admission prices (when relevant), Standard 4.33.3 also requires wheelchair seating locations to be dispersed throughout a facility. See Standard 4.33.3. According to Cinemark, because the dispersal requirement applies only to a facility with a seating capacity exceeding 300, a smaller facility (i.e., one with a seating capacity

[12] The Court should give no weight to Cinemark's proffered testimony of the appropriate meaning of Standard 4.33.3's integration requirement. See Cinemark Opp'n at 21 (relying on supplemental affidavits of its architects). The proper interpretation of Standard 4.33.3's integration requirement is a legal question for this Court to decide. See Plaintiff United States' Reply in Further Support of its Motion to Strike Portions of Evidence Used in Support of Cinemark's Second Motion for Summary Judgment ("U.S. Strike Reply") at 4-6.

of 300 or less) may avoid both the dispersal and the line of sight requirements. See Cinemark Opp'n at 17-18. Cinemark misconstrues the regulation.

A plain reading of Standard 4.33.3 establishes that, in addition to the requirement that wheelchair seating locations be an integral part of the fixed seating plan, the regulation contains two independent requirements that are applicable here: (1) that wheelchair seating locations have lines of sight comparable to those for members of the general public, and (2) that, in assembly areas with seating capacities exceeding 300, wheelchair seating locations be dispersed in two or more different locations. See Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 588 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1184 (1998). Cinemark's interpretation of Standard 4.33.3 reads the requirement of comparable lines of sight out of the regulation. Nothing in Standard 4.33.3 permits a facility with a seating capacity of 300 or less to provide wheelchair seating locations only in locations that offer distinctly inferior lines of sight that are not comparable to those provided most other patrons.

Cinemark next argues that it has complied with the comparable lines of sight requirement because, in Cinemark's view, Standard 4.33.3 only requires that the sight lines for wheelchair spaces be "capable of being compared" to other public seating, and imposes no particular quality of sight lines. Cinemark Opp'n at 18. As explained in the United States' cross motion, the term "comparable" should be given its common meaning of "equivalent or similar." U.S. Cross Motion at 25-34. Thus, it is not enough that sight lines afforded wheelchair seating locations can be compared to those near them; they need to be qualitatively comparable to those normally provided to the general public. Because the regulation's standard is "comparability," the determination of what is "comparable" is necessarily decided on a case-by-case basis. For example, if most members of the general public have viewing

angles exceeding 30-35 degrees, then persons in wheelchairs may also be provided viewing angles exceeding 30-35 degrees, so long as the viewing angles are otherwise "comparable" for both types of seats.

Cinemark's third argument asserts that Standard 4.33.3's exception providing that "[a]ccessible viewing positions may be clustered for bleachers, balconies, and other areas having lines of sight that require slopes of greater than 5 percent" (emphasis added) permits its placement of wheelchair seating on the unelevated sloped floor in the front of its theaters. See Cinemark Opp'n at 19. Cinemark tries to exempt an entire auditorium through an exception that was intended for particular limited "areas," i.e., bleachers and balconies. Cinemark claims the exception applies to its theaters because "[t]he floor rises at an angle plainly not accessible to wheelchairs." Id.

This exception to Standard 4.33.3, however, does not apply here; and even if it were to apply, it does not negate the comparable lines of sight requirement. The exception merely permits noncompliance with the dispersal requirements of Standard 4.33.3, and only in limited circumstances. Even where the exception applies, the exception still requires "[e]quivalent accessible viewing positions" on levels having accessible egress. In other words, "equivalent accessible viewing positions" with comparable lines of sight must still be provided.[13]

[13] Relying on Fiedler v. Am. Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994), Cinemark argues that – in the past – the Department considered it reasonable to place wheelchair seating at the top or bottom of a theater if the seating arrangement mimicked bleacher-style seating at sports events. See Cinemark Opp'n at 17, n. 13. However, the Department's position in Fiedler, which the court described and to which the court deferred, was based on the assumption that balconies, bleachers and areas having characteristics similar to them are situated high above the spectacle to be observed, and thus are not typically accessible by ramps. Fiedler, 871 F. Supp. at 38-39. In the instant case, the Department's position in Fiedler is inapplicable because stadium-style theaters can be designed so that the stadium-style seating is accessed by persons using wheelchairs through the use of cross-aisles and ramps. See Supp. U.S. Facts at ¶ 44.

Moreover, Cinemark wrongly concludes that the stadium-style sections of the theater are "plainly not accessible to wheelchairs." Cinemark Opp'n at 19. More accurately, it is feasible for persons who use wheelchairs to access stadium-style seating through cross-aisles and ramps, see Supp. U.S. Facts at ¶ 44; however, Cinemark has simply chosen to design its theaters without providing access to the stadium-style seating section for persons who use wheelchairs. That choice violates the ADA.

The limited exception to Standard 4.33.3 does not exempt whole auditoriums. See Fiedler, 871 F. Supp. at 38. Those areas that are within the exception must still comply with all the provisions of Standard 4.33.3 except for dispersal. The exception does not affect Cinemark's obligation to design and construct new theaters to provide patrons who use wheelchairs with the opportunity to enjoy the enhanced and superior lines of sight heralded by Cinemark as the central attraction of its stadium-style theaters.

C. Cinemark Misapplies Relevant Deference Standards

1. Deference to a Federal Agency's Interpretation of its Own Regulation Is Generally Encouraged and Is Mandated Where a Regulation Is Ambiguous

In the recent case of Christensen v. Harris County, 529 U.S. 576 (2000), the Supreme Court articulated and clarified the appropriate level of deference that courts should give a Federal agency's interpretation of its own regulation. According to the Supreme Court, agency interpretations of its own regulations are "entitled to respect" to the extent the agency's position is persuasive. Id. at 587. The Supreme Court further instructs that, if a court finds the language of a regulation to be ambiguous, then the court must defer to an agency's interpretation of its own regulation pursuant to the Supreme

Court's earlier holding in Auer v. Robbins, 519 U.S. 452, 461 (1997) (an agency's interpretations of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation). See Christensen, 529 U.S. at 588. Moreover, despite Cinemark's creative interpretation of Christensen to the contrary, it is irrelevant whether the agency's interpretation of its own regulation is articulated in a legal brief, a policy document, or a notice and comment procedure.[14] See id.

Thus, applying Christensen to the claims surrounding Standard 4.33.3 in the instant case, if the Court finds the requirements of Standard 4.33.3 to be clear on their face, then the Court should independently interpret the plain meaning, but is encouraged to look to the Department of Justice's interpretation for guidance. See Christensen, 529 U.S. at 587. Should the Court find the requirements of Standard 4.33.3 to be ambiguous, then the Court must defer to the Department of Justice's interpretation of Standard 4.33.3 unless that interpretation is plainly erroneous or inconsistent with the regulation.[15]

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[14] Cinemark relies on Christensen to argue that the United States' interpretation of Standard 4.33.3 is not entitled to Chevron deference because it comes by way of a "legal brief." See Cinemark Opp'n at 16, n. 12 (incorporating by reference Cinemark Reply at 5). This line of reasoning is misleading on two fronts. First, the United States does not seek Chevron deference to its interpretation of Standard 4.33.3. The Supreme Court case in Chevron is relevant where there is a challenge to the way an agency construes a statute. Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 843-844 (1984) (emphasis added); see also Christensen, 529 U.S. at 587-88. Conversely, deference under the Supreme Court case in Auer is relevant where there is a challenge to the way an agency construes a regulation. Auer, 519 U.S. at 461 (emphasis added); see also Christensen, 529 U.S. at 587-88. Thus, to the extent the United States seeks deference to its interpretation of Standard 4.33.3 (i.e., a regulation), it does so pursuant to Auer, not Chevron. Second, although the Christensen Court held agency interpretations found in subregulatory documents (i.e., opinion letters) do not warrant Chevron deference, it further held that agency interpretations found in subregulatory documents (i.e., opinion letters) can be given Auer deference if the underlying regulation is ambiguous. See Christensen, 529 U.S. at 587-88.

[15] This analysis also applies to the claims in the instant case surrounding section 302 of the ADA, 42 U.S.C. § 12182, and its implementing regulations, 28 C.F.R. §§ 36.201, 36.202, and 36.203. The United States interprets these regulatory provisions to prohibit a public accommodation from making a good, service, or accommodation (such as stadium-style seating) available to the general public, but failing to make that same good, service, or accommodation available to individuals with disabilities. The United States' interpretation is controlling if the Court finds the regulatory requirements to be ambiguous.

The United States submits that the requirements of Standard 4.33.3 are clear on their face and can be applied to the theaters subject to the instant motion as follows: (1) the requirement for wheelchair seating locations to be "an integral part of any fixed seating plan" is violated where two types of seating plans, stadium-style seats (with enhanced sight lines) and traditional sloped-floor seating (with unenhanced sight lines) are provided in a single auditorium and no wheelchair locations are provided in the stadium-style section; and (2) the requirement that wheelchair locations provide "lines of sight comparable to those for members of the general public" is violated where two types of seats, "stadium-style" and "traditional sloped-floor," are provided in a single auditorium and no wheelchair areas are provided in the stadium-style section. This interpretation is entitled to respect if this Court finds these regulatory requirements to be clear on the face of the rule, and is controlling if the Court finds the regulatory requirements ambiguous.

Finally, Cinemark alleges that deference is not due because the United States' interpretation of Standard 4.33.3 has been "a moving target." See Cinemark Opp'n at 1, 3, 16, n. 12 (incorporating by reference Cinemark Reply at 6, n. 6). However, the United States' interpretation of Standard 4.33.3 has not changed through time. The United States has always maintained that: (a) at a minimum, persons who use wheelchairs must have access to the stadium-style section of auditoriums; (b) because the relevant standard is "comparability," there is no minimum or maximum viewing angle required (i.e., if most members of the general public have viewing angles to the top of the screen exceeding 35 degrees, then persons who use wheelchairs may also be provided viewing angles exceeding 35 degrees); and (c) owners and operators of movie theaters must provide lines of sight for persons who use wheelchairs within the range of viewing angles offered to most members of the general public with respect to

viewing angles, distance to the screen, obstruction of view, and distortion of images.[16] The United States' position is consistent with Standard 4.33.3, is not clearly erroneous, and has not changed. Thus, the Court should grant respect to the United States' position, and must defer to the United States' position if it finds the requirements of the applicable regulations ambiguous. See Christensen, 529 U.S. at 587.

2. There Is No "Heightened Deference" to the Fifth Circuit

Cinemark concedes that the Sixth Circuit is not bound by the decisions of its sister circuits. See Cinemark Opp'n at 14, n. 17. However, Cinemark asks this Court to give "heightened" deference to the Fifth Circuit in order to shield Cinemark from potential "inconsistent" legal obligations. See Cinemark Opp'n at 16, n. 12 (incorporating by reference Cinemark Reply at 8-9). Cinemark's claim of "heightened" deference is inappropriate and should be rejected.

First, Cinemark's claim that it faces potential "inconsistent" legal obligations is unfounded. The Fifth Circuit held that Cinemark must provide persons who use wheelchairs with unobstructed views to the screen. See Lara v. Cinemark, 207 F.3d 783, 789 (5th Cir. 2000), cert. denied, 121 S. Ct. 341 (2000). Should this Court grant the instant motion, Cinemark would have to provide persons who use wheelchairs with both unobstructed views of the screen and seating locations in the stadium-style

[16] Cinemark's claim that the United States, in its Lara amicus brief, sets a maximum viewing angle of 35 degrees is pure fabrication, for which Cinemark provides neither a quote from the amicus brief nor a cite to support its claim, nor can it. See Cinemark Opp'n at 16, n. 12 (incorporating by reference Cinemark Reply at 6, n. 6). Furthermore, Cinemark's claim that Access Board statements regarding "50 per-cent" of the viewing angles indicate a change in the Department's interpretation is erroneous. See id. The Access Board's statement merely tries to restate the Department's position with respect to the provision of lines of sight for persons who use wheelchairs within the range of viewing angles offered to most members of the general public. Moreover, Cinemark erroneously concludes that the Access Board's consideration of clarifying the requirements of Standard 4.33.3 in future regulations necessarily indicates that the requirements in question do not currently exist. See Cinemark's Opp'n at 20-21. The laudable desire of an agency to clarify the requirements of a regulation does not nullify the existing requirements. Smiley v. Citibank, 517 U.S. 735, 743 (1996).

section of its auditoriums. Cinemark's compliance with the latter ruling would in no way affect its compliance with the former ruling. Indeed, the single case on which Cinemark relies for its "heightened" deference standard, Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987), describes "inconsistent legal obligations" as putting a party in an "impossible position." Id. at 1124; see also Cinemark Opp'n at 16, n. 12 (incorporating by reference Cinemark Reply at 12). Although this Court's rejection of Lara would result in additional, but not inconsistent, obligations for Cinemark, it would not put Cinemark in an "impossible situation," i.e., where compliance with one court's order would mean non-compliance with a separate court's order.

Moreover, in making its claim for heightened deference, Cinemark ignores relevant Sixth Circuit authority instructing district courts to evaluate the decisions of sister circuits on the merits of the underlying legal issues. See Nixon v. Kent County, 76 F.3d 1381, 1388 (6th Cir. 1996) (en banc) (courts within the Sixth Circuit are not constrained to follow decisions of sister circuits if, in the district courts' opinion, they are based upon an incomplete or incorrect analysis); Berryhill v. United States, 199 F.2d 217, 219 (6th Cir. 1952) (stating that a district judge faced with no controlling authority in his circuit should "rule[] in accordance with his own view of the applicable law"). Because the outcome in the instant case will have far reaching consequences for both individuals with disabilities and private entities in the Sixth Circuit and beyond, it is imperative that the Court give the greatest weight to the underlying substantive legal claims of both parties, and give little, if any, weight to Cinemark's claim that it could have a more favorable ruling in a different circuit.

3. Deference to the Fifth Circuit's Flawed Analysis in Lara Is Unwarranted

Should this Court find the analysis in Lara "incomplete" or "incorrect," it must not defer to the Fifth Circuit. Nixon, 76 F.3d at 1388. The United States has previously discussed the underlying flaws in the Fifth Circuit's Lara decision and incorporates those discussions herein by reference. See U.S. Cross Motion at 28-33. Nevertheless, several of Cinemark's mischaracterizations warrant brief correction and clarification.

First, the United States' discussion of hypothetical seating, such as wheelchairs facing sideways, was meant only to demonstrate the absurdity of assessing comparable lines of sight by measuring obstruction only, as the Lara decision would do. See Cinemark Opp'n at 16, n. 12 (incorporating by reference Cinemark Reply at 3); see also U.S. Cross Motion at 29. The Lara decision has the practical effect of permitting movie theater owners and operators to continually provide persons who use wheelchairs with the worst seats in the house as long as those seats provide "unobstructed" views.

Second, Cinemark asserts that the United States does not dispute the Fifth Circuit's conclusion that "questions regarding 'viewing angle' did not arise until well after DOJ promulgated Section 4.33.3." See Cinemark Opp'n at 16, n. 12 (incorporating by reference Cinemark Reply at 3 (quoting Lara, 207 F.3d at 788)). The United States does in fact dispute this conclusion. See U.S. Cross Motion at 30-31. Prior to the promulgation of Standard 4.33.3, the Access Board considered several factors related to viewing angles, such as "slope of the floor; the height of the screen; the distance between rows; and the staggering of seats." 56 Fed. Reg. 35408, 35440 (1991), App. at 28. Although Cinemark argues that the word "viewing angles" is not explicitly used, see Cinemark Opp'n at 16, n. 12 (incorporating by reference Cinemark Reply at 4, n. 3), the factors listed by the Access Board are

inextricably related to viewing angles. At a minimum, the Fifth Circuit was clearly wrong in its related conclusion that the Access Board only considered the factor of "viewer obstruction" prior to the promulgation of Standard 4.33.3. See Lara, 207 F.3d at 788.

Third, the Fifth Circuit specifically found the language in Standard 4.33.3 to be ambiguous; and thus the Fifth Circuit should have deferred to the United States' interpretation as Christensen has since made clear. Christensen, 529 U.S. at 588. Cinemark's claim that the Lara Court did not find Standard 4.33.3 to be "ambiguous" because the word "ambiguous" does not appear in the decision is disingenuous. The Fifth Circuit specifically states: "The text of section 4.33.3 provides little guidance as to whether theaters must provide wheelchair-bound moviegoers with comparable viewing angles or simply unobstructed lines of sight." Lara, 207 F.3d at 788. After the Lara case, the Supreme Court held that, where a court finds a regulation ambiguous, it must defer to an agency's interpretation of its own regulation if that interpretation is not clearly erroneous or inconsistent with the regulation. Christensen, 529 U.S. at 588. Thus, Christensen instructs that the Fifth Circuit should have deferred to the United States' interpretation of Standard 4.33.3, unless the Fifth Circuit found the United States' interpretations to be clearly erroneous or inconsistent with Standard 4.33.3. Id.

D. Cinemark's So-Called "Evidence" of Local Approvals Does Not Preclude the United States' Enforcement of the ADA

Through its discussion of state code certification, Cinemark attempts to misdirect the Court's attention from the central issue of this case and advances several misleading arguments and erroneous facts. See Cinemark Opp'n at 24 (incorporating by reference Cinemark Reply at 9-12).

First, Cinemark contends that the resolution of the disputed facts surrounding local approval of certain Cinemark theaters in Texas is critical to this case. It is not. A Federal court's interpretation and

application of the ADA – a Federal statute – is not dependent upon whether Cinemark received an approval of the theaters from local officials applying the certified state codes. The certification of state codes merely creates a rebuttable presumption that a certified code meets or exceeds Title III's new construction requirements. See 42 U.S.C. § 12188(b)(1)(A)(ii). However, the Department's certification of state codes does not speak to the way in which a local official applies the certified code. See 28 C.F.R. Pt. 36, App. B at 677-78 (2000). Thus, a local approval is not conclusive evidence of compliance with the ADA; even when a building was approved by a local official, a court can find that a building was not built in compliance with the certified code and/or does not comply with Title III standards.

In the instant case, because the Department has shown a violation of Standard 4.33.3, it has established a violation of the ADA. It is possible that Cinemark would be able to establish that local officials granted approvals of particular facilities as built. However, misapplication of the certified state code by local officials in this case would not excuse Cinemark's failure to comply with Federal law.

In order to demonstrate to the Court the way in which local officials can, and in fact did in this case, misapply a state code, the United States presented two very clear and simple examples of problems at one Cinemark theater in Texas.[17] See Plaintiff United States' Counter Statement of Facts

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[17] Cinemark states that the "conclusory" allegations relating to the two specific instances at one theater cannot defeat a motion for summary judgment. See Cinemark Reply at 10-11. But, as noted in the text, these are – and were offered as – illustrative and easy-to-understand examples of ADA violations that do not disappear simply because they are accepted by local officials (i.e., doors that have less than the required 32" clear width, Standard 4.13.5). Notably, the United States had specific information related to non-sightline related issues at the Tinseltown Theater in El Paso because attorneys for the United States had been involved in a previous inspection of that theater during its investigation of Cinemark's compliance with Title III of the ADA, and thus had specific knowledge about the facility that could be compared to the "approval" documentation provided by Cinemark. Indeed, if Cinemark had provided its documentation related to all its local approvals pursuant to the United States' relevant discovery requests and in a timely manner, the United States would have had notice that Cinemark intended to raise this as a defense and had sufficient time to further investigate these purported additional local approvals. See U.S. Strike Reply at 2-4; see also discussion infra at 24-25 (questioning, upon closer examination, the sufficiency of the documentation of

in Dispute of its Memorandum of Law in Opposition to Cinemark's Second Motion for Summary Judgment at 1-2. Moreover, as demonstrated supra at 2-3, the United States is relying upon undisputed facts that show Cinemark violated the ADA with respect to the placement of wheelchair seating areas. Thus, as a matter of law, if this Court concludes that Cinemark violated the ADA, then the local officials misapplied the certified state code for ADA purposes.

Second, the United States has never indicated, publicly or otherwise, that an entity receiving a local approval pursuant to a certified state code is immune from suit. In fact, the ADA specifically contemplates post-certification enforcement proceedings in which evidence of certification would be considered rebuttable evidence that the code meets the requirements of the ADA. See 42 U.S.C. § 12188(b)(1)(A)(ii) ("At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this [Act.]").

Cinemark claims that it "relied" on the United States' press statements regarding the certification process, such that the United States should now be "estopped" from litigating against Cinemark. See Cinemark Opp'n at 24 (incorporating by reference Cinemark Reply at 9). Apparently, Cinemark interprets statements regarding "additional" legal protection to mean "complete" legal protection. Reliance cannot be manufactured through an arbitrary or mistaken interpretation of a statement. See Goldstick v. ICM Realty, 788 F.2d 456, 465 (7th Cir. 1986) (reliance is inappropriate where the promise has been fabricated or misunderstood without fault on the promisor); see also Office of Personnel Management v. Richmond, 496 U.S. 414, 420-433 (1990) (a court should only entertain

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Cinemark's alleged local approvals.)

equitable estoppel claims against the government in extremely rare circumstances.) Moreover, regardless of any statements by the United States, the plain and unambiguous language of the ADA describing post-certification enforcement actions, see 42 U.S.C. § 12188(b)(1)(A)(ii), put Cinemark on notice that local approvals do not provide immunity from Federal enforcement. Therefore, any alleged reliance by Cinemark was misguided, and its estoppel argument should be rejected.

Finally, there are significant evidentiary problems with Cinemark's current "record" of approvals. Although Cinemark claims that its Appendix of Documentary Evidence in Support of Motion for Summary Judgment provides proof of fourteen separate TAS approvals, see Cinemark Motion at 7, ¶ 10, a close review of Cinemark's appendix reveals approval documentation for only three facilities.[18] The rest of the documentation represents either preliminary approvals of proposed plans, or disapprovals of plans rather than of the theaters "as-built."[19] Thus, the Court should not give any legal effect to what Cinemark has proffered as "evidence" of approval, absent Cinemark's provision of a clear and unambiguous record of approvals of as-built facilities, and sufficient opportunity for the United States to research and investigate their authenticity and validity.

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[18] See "Collected State and Local Approvals," Harton Aff. (App. Ex. A) at ¶ 9 and Tab 4 (substantial compliance certificates for only "The Woodlands"(Woodlands, Tx), "Movies 20" (El Paso, Tx), and "Katy 19" (Katy, Tx)). Given Cinemark's delay in providing this approval documentation, the United States has not had sufficient time to research, investigate, and respond to the meaning and validity of these "Substantial Compliance Certificates" within the context of the Texas certification program. See U.S. Strike Reply at 2-4. Thus, nothing in this response, or any United States' brief on this issue, should be construed as a waiver of the United States' right to further assess, and if necessary challenge, the validity of these local approvals.

[19] See "Collected State and Local Approvals," Harton Aff. (App. Ex. A) at ¶ 9 and Tab 4 (preliminary plan approvals for "Cinemark 20-Plex" (Plano, Tx), "Cinemark 16-Plex" (Houston, Tx), "Cinemark 24-Plex" (Houston, Tx) "Tinseltown 15" (Beaumont, Tx), "Tinseltown 17" (Woodlands, Tx), "Cinemark 17" (Lubbock, Tx), "Harlingen 16" (Harlingen, Tx), "Tinseltown 20" (El Paso, Tx); disapprovals for "Cinemark Theatre" (3600 West Beltway, Houston), "Cinemark 16-Plex" (12920 Highway, Houston, Tx), "Tinseltown 20" (El Paso, Tx); "Tinseltown 17" (Dallas, Tx), "Tinseltown Movies" (Webb Chapel Road, Dallas), "Tinseltown 20-Plex" (Pflugerville, Tx), "Tinseltown 14" (San Angelo, Tx), "Legacy 24" (Plano, Tx), "Corpus Christi 16" (Corpus Christi, Tx)).

E. Neither the Doctrine of Mutual Collateral Estoppel Nor the Doctrine of Non-Mutual Collateral Estoppel Bars the United States' Claims

Cinemark acknowledges that the United States was not a party to the Lara litigation. Therefore, it is axiomatic that the United States cannot be bound by the decision reached in that action. See, e.g., Martin v. Wilks, 490 U.S. 755, 761 (1989).[20] Nor has Cinemark shown, nor can it, that the United States "assume[d] control over the [Lara] litigation" in the manner described in Montana v. United States, 440 U.S. 147, 154 (1979). As demonstrated in our earlier brief, the United States' involvement in Lara was limited to that of amicus curiae on limited points of law with no other involvement in the development or proceedings of the case, and thus the United States should not be bound by the results of the Lara litigation. See U.S. Opp'n at 12-16. Cinemark misrepresents the nature of the United States' participation in the Lara litigation, contending – without factual basis – that the United States discussed litigation and mediation strategy with the Lara plaintiffs' attorneys. See Cinemark Opp'n at 24-25 (incorporating by reference Cinemark Reply at 13). In fact, the United States never discussed litigation strategy with the Lara plaintiffs' attorneys. See Declaration of Phyllis H. Cohen ¶¶ 3-10, U.S. App., Tab A (describing limited extent of United States' participation in Lara action).

Further, the fact that the United States was not a party to the Lara litigation precludes application of both the doctrine of mutual collateral estoppel and the doctrine of non-mutual collateral estoppel to its claims. Under both doctrines, the party against whom collateral estoppel is asserted

[20] "[I]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Martin, 490 U.S. at 761 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

must have had a full and fair opportunity to litigate its claims in a prior action.[21] The United States, acting solely as amicus curiae in the Lara action, never had a full and fair opportunity to litigate its claims against Cinemark.[22] Therefore, no theory of collateral estoppel can bar its claims. Further, because only a non-party to a prior action may assert non-mutual collateral estoppel against the party that appeared in both actions,[23] Cinemark's attempt to assert the doctrine of non-mutual collateral estoppel against the United States is improper.

Finally, contrary to Cinemark's contention (see Cinemark Opp'n at 24-25 (incorporating by reference Cinemark Reply at 14-15)), the United States in no way concedes that the Supreme Court's decision in United States v. Mendoza, 464 U.S. 154 (1984), allows Cinemark to assert the doctrine of non-mutual collateral estoppel against the United States. More accurately, Mendoza addresses whether the government may be collaterally estopped from relitigating an issue that it previously

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[21] See United States v. Stauffer Chem. Co., 464 U.S. 165, 169 (1984) (holding that "the doctrine of mutual defensive collateral estoppel is applicable against the government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts"); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979) (applying doctrine of non-mutual collateral estoppel against petitioners who "received a 'full and fair' opportunity to litigate their claims" in the prior action); Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971) (discarding mutuality requirement but noting that due process prohibits estopping litigants who "have never had a chance to present their evidence and arguments on the claim") (emphasis added).

[22] Cinemark erroneously contends that the United States "does not dispute that it had a full and fair opportunity to litigate against Cinemark in Lara." See Cinemark Opp'n at 24-25 (incorporating by reference Cinemark Reply at 15). On the contrary, the United States spent over four pages of its Memorandum of Law in Opposition to Cinemark's Second Motion for Summary Judgment disputing that contention. See Plaintiff United States' Memorandum of Law in Opposition to Cinemark's Second Motion for Summary Judgment at 12-16. Moreover, in this action, the United States has asserted a claim under section 302 of the ADA that was not included by the private plaintiffs in the Lara complaint or in the Department's amicus briefs. In addition, as part of its claim under section 303, the United States has included an integration argument that the Lara plaintiffs did not make and the district judge did not consider. See id. at 14, n. 12.

[23] See, e.g., Parklane Hosiery Co., 439 U.S. at 332-33 (allowing stockholders, who were not a party in the prior action, to assert non-mutual collateral estoppel against petitioners, who were a party); Blonder-Tongue Labs., 402 U.S. at 329 (holding that patentee may be estopped from asserting the validity of a patent that was declared invalid in a prior suit against a different party).

litigated against another party. Mendoza has no application where, as here, the government was not a party to the prior litigation. Therefore, Mendoza provides no authority for Cinemark to assert the doctrine of nonmutual collateral estoppel against the United States.

F. Cinemark's APA Defense Fails Because No Final Agency Action Exists

This Court's March 22, 2000 Order unambiguously addresses and rejects each and every APA-related argument raised by Cinemark to date.[24] However, in its latest round of briefs on this issue, Cinemark raises an erroneous and misleading argument that demands clarification and response.

Faced with the reality that no final agency action exists in the instant case, Cinemark has fabricated a wholly unsupported reading of the APA: "Cinemark need not show that the DOJ engaged in 'final agency action'" because "[t]he jurisdictional bar found in the APA [ ] applies only to 'claims,' not defenses." See Cinemark Opp'n at 25 (incorporating by reference Cinemark Reply at 16). This reading of the APA directly contradicts this Court's March 22, 2000, Order, as well as the plain language of the APA and relevant Sixth Circuit precedent.

In its March 22, 2000, Order, this Court made clear that the presence of final agency action is a necessary element to Cinemark's APA-based defense:

> . . . Defendant's APA counterclaim must be dismissed because there is an adequate remedy in Court: Defendant may assert a violation of the APA as a defense to the DOJ's enforcement action against it [ ]. Where an alternate adequate remedy is available to review a final agency action the APA does not express the U.S. government's consent to suit.

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[24] On March 22, 2000, this Court dismissed Cinemark's counterclaim that the United States violated the Administrative Procedure Act (APA) finding that judicial review was inappropriate because no final agency action existed and because Cinemark had an alternate adequate remedy. See Memorandum Opinion and Order at 6, 11 (Mar. 22, 2000) [docket # 47] (hereinafter "March 22, 2000 Order "). Since that time, Cinemark has failed to identify or provide any new evidence of an alleged final agency action not already considered by this Court.

March 22, 2000, Order at 11 (quoting, in part, Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997)) (citations omitted) (emphasis added). Whether an APA allegation takes the form of a claim or some alternate remedy, such as a defense, both this Court and the Sixth Circuit recognize that final agency action is a prerequisite to judicial review of any APA allegation. See id.; see also Beamon, 125 F.3d at 967 ("the APA does not express the U.S. government's consent to suit if an alternate adequate remedy is available to review a final agency action") (emphasis added).

The Court's March 22, 2000 ruling is consistent with the plain language of the APA, which makes no distinction between "claims" and "defenses." 5 U.S.C. § 704 ("Agency 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."). More accurately, the plain language of the APA indicates that the finality requirement is applicable whenever courts are contemplating alleged APA violations. See id.; see also United States v. Bailey, 228 F.3d 637, 638 (6th Cir. 2000) ("Interpretation of a statute begins with the statute's plain language, and if such language is clear and unambiguous, the Court will usually proceed no further.").

Notably, Cinemark fails to identify a single case that supports its unique reading of the APA. Instead, Cinemark pieces together a series of inapplicable cases, none of which limits the APA's requirement for final agency action.[25] See Cinemark Opp'n at 24 (incorporating by reference

[25] Cinemark's remaining arguments in support of its reading of the APA are repetitive of earlier arguments that have been previously addressed and rejected by this Court. First, in response to Cinemark's attempt to link "finality" with "ripeness" in order to argue that the finality requirement is inapplicable where an enforcement action has already commenced, see Cinemark Opp'n at 25 (incorporating by reference Cinemark Reply at 18-19), this Court distinguished "ripeness" from "finality" and found that whether an agency action is ripe for review or not, if "an agency action lacks finality . . . then a court lacks subject matter jurisdiction." See March 22 Order at 5-6. Second, in addressing Cinemark's argument that the United States' position has the effect of immunizing federal agencies from judicial review when "vague regulations" are promulgated and then enforced through litigation, see Cinemark Opp'n at 25 (incorporating by reference

Cinemark Reply at 17) (citing Hoctor v. United States Dep't of Agriculture, 82 F.3d 165, 168 (7th Cir. 1996) (addressing the unrelated question of whether an agency known to have conducted a final agency action ("a promulgated rule") violated the notice and comment provisions of § 553 of the APA); American Frozen Food Inst., Inc. v. United States, 855 F. Supp. 388, 390-391 (Ct. Int'l Trade 1994) (same); Caruso v. Blockbuster Sony Music Entm't Ctr., 968 F. Supp. 210, 216-217 (D. N.J. 1997) (addressing an alleged APA violation only after finding that a final agency action existed), aff'd in part, rev'd in part, 193 F.3d 730 (3rd Cir. 1999); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 743 (D. Or. 1997) (same). Because no Court has adopted Cinemark's unique reading of the APA eliminating the finality requirement, and because Cinemark's reading of the APA is inconsistent with the plain language of the APA and this Court's March 22, 2000, Order, it should be rejected here.[26]

G. The Fifth Circuit's Decision in *Lara* Does Not Deprive This Court of the Authority to Reach an Independent Decision on the Legal Issues Involved in this Case

Contrary to Cinemark's representation (see Cinemark Opp'n at 25-26 (incorporating by reference Cinemark Reply at 19)), the United States has not asked this Court to "overrule" the Fifth Circuit's decision in Lara. The United States understands that only the Fifth Circuit sitting en banc or the United States Supreme Court may overrule the Lara decision. The United States does ask this

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Cinemark Reply at 19), this Court instructed that the proper procedure for pursuit of a grievance over an agency rule is to petition the agency for issuance, amendment, or repeal of a rule, denial of which can be appealed to the courts. See March 22 Order at 6, n. 4.

[26] To the extent that Cinemark challenges the United States' interpretation of the ADA and its underlying regulations, such a challenge would be a valid question of law for this Court to decide. However, the APA does not prohibit the United States from advancing its interpretation, regardless of the appellation (as a "defense" or "claim") Cinemark puts on its APA argument.

Court, however, to reach a decision different from that reached by the Fifth Circuit, which this Court certainly has the power to do.[27] Although Cinemark may, at the appropriate time, ask this Court to decline to order a remedy applicable to theaters located in the Fifth Circuit, this Court has the authority, and indeed is obligated, to reach an independent decision on the legal issues presented in this case. See id. at 6. Moreover, because the United States has asserted claims in this action that were not presented to the Fifth Circuit in Lara, see discussion at 27, n. 22, supra, Cinemark is not entitled to summary judgment in the Fifth Circuit or elsewhere as to all of the United States' claims.

III. CONCLUSION

For the foregoing reasons, this Court should grant the United States' Cross-Motion for Partial Summary Judgment and deny Cinemark's Second Motion for Summary Judgment.

[27] Cinemark continues to misunderstand the holdings of Reich v. Contractors Welding of Western N.Y., Inc., 996 F.2d 1409 (2d Cir. 1993) and NLRB v. Gibson Products Co., 494 F.2d 762 (5th Cir. 1974). See Cinemark Opp'n at 25-26 (incorporating by reference Cinemark Reply at 19 n. 15). These cases stand for the proposition that a government agency appearing as a party before a court of appeals must comply with the decisions of that particular court of appeals. See Reich, 996 F.2d at 1413 (Second Circuit required Occupational Safety and Health Review Commission to comply with mandate issued by the Second Circuit); Gibson Prods. Co., 494 F.2d at 766 (Fifth Circuit required NLRB to adhere to Fifth Circuit law). The United States and Cinemark are currently appearing before U.S. District Court for the Northern District of Ohio, not the Fifth Circuit. Therefore, only decisions of this Court and the Sixth Circuit Court of Appeals (as well as the U.S. Supreme Court) are binding on the United States and Cinemark in this action.

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