UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	§	CIVIL ACTION NO. 1:99-cv-705 DCN
Plaintiff	§	Hon. Donald C. Nugent
v.	§	PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER FROM RULE 30(B)(6) DEPOSITION NOTICE
CINEMARK USA, INC.,	§	
Defendant.	§	

I. INTRODUCTION

This stadium-style theater action arising under the Americans with Disabilities Act ("ADA") has recently returned to this Court for remand proceedings following the issuance of the Sixth Circuit's mandate, United States v. Cinemark USA, Inc., 348 F.3d 369 (6th Cir. 2003). On April 1, 2004, defendant Cinemark USA, Inc. ("Cinemark") served a broad 18-paragraph Rule 30(b)(6) deposition notice on the United States.

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the United States seeks an order from this Court quashing Cinemark's Rule 30(b)(6) notice on the grounds that: (i) the topics identified in the notice exceed the scope of the Sixth Circuit's mandate; (ii) the notice seeks testimony from Department of Justice ("Department") officials on highly-sensitive areas that are protected from disclosure by the deliberative process, work product, attorney client, law enforcement/investigative, and settlement negotiation privileges; (iii) the notice impermissibly seeks discovery outside the administrative record underlying the challenged regulation (28 C.F.R. pt. 36, Appendix A, Section 4.33.3); and (iv) the notice prematurely seeks testimony regarding the Department's trial expert(s) several months prior to the court-ordered deadline for expert disclosures.

This Court should, therefore, quash Cinemark's Rule 30(b)(6) deposition notice in its entirety. In the alternative, this Court should nonetheless limit Cinemark to a deposition upon written questions that are narrowly crafted to address relevant, non-privileged areas (if any) encompassed by this notice. See Fed. R. Civ. P. 31.

II. FACTUAL AND PROCEDURAL BACKGROUND

In this action, the United States alleges that Cinemark has engaged in a pattern or practice of violating title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189, and its implementing regulations, by impermissibly relegating patrons who use wheelchairs to the "traditional" sloped-floor section of the vast majority of its stadium-style theaters nationwide with

inferior lines of sight and less desirable seating, while other members of the moviegoing public have access to seats in the stadium section that are more desirable and offer superior lines of sight. See Complaint ¶¶ 1, 11-14 (ECF #123, Attachment # 1). Specifically, the central issue in this action concerns Cinemark's failure to provide patrons who use wheelchairs (and their moviegoing companions) with seats that are "an integral part of any fixed seating plan and . . . [that provide] lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, Appendix A (Department of Justice Standards for Accessible Design), § 4.33.3 [hereinafter "Standard 4.33.3"].

In December 2000, Cinemark moved for summary judgment. See Cinemark I, Docket Nos. 70-71. Based primarily on the Fifth Circuit's then-recent decision in Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000), Cinemark argued that, as a matter of law, the wheelchair seating locations at its stadium-style theaters complied with Standard 4.33.3 because such locations allegedly had unobstructed views of the screen and were located amidst seating for other members of the viewing audience. Id. The United States opposed this motion and filed its own cross-motion for partial summary judgment. See Cinemark I, Docket Nos. 74-83.

In November 2001, this Court granted Cinemark's motion for summary judgment and dismissed this action in its entirety. See Memorandum Opinion and Order, Cinemark I, Docket # 107. Finding the Lara decision "persuasive," this Court concluded that Cinemark's placement of wheelchair seating locations at its stadium-style theaters violated neither Standard 4.33.3's comparability nor integration mandates. Id. The United States filed a timely notice of appeal with respect to the court's line-of-sight determination. See Cinemark I, Docket # 111.

In November 2003, the Sixth Circuit issued a decision reversing this Court's entry of summary judgment in favor of Cinemark and remanding for further proceedings. See United States v. Cinemark USA, Inc., 348 F.3d 569 (6th Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3513 (U.S. Feb. 4, 2004) (No. 03-1131) [hereinafter "Cinemark II"]. With respect to line-of-sight issues, the

Sixth Circuit concluded that (i) Standard 4.33.3 was primarily intended "to assure disabled patrons seats of 'comparable' quality to those provided for members of the general public," and that (ii) Standard 4.33.3's comparability mandate requires more than simply an unobstructed screen and "doubtless include[s] viewing angles." Id. at 576. The Sixth Circuit charged this Court on remand with the task of "determin[ing] the extent to which lines of sight must be similar for wheelchair patrons in stadium-style theaters." Id. at 579. Additionally, the Sixth Circuit rejected each of the three alternative grounds advanced by Cinemark for affirmance – namely, its arguments that (i) the Department violated the APA by promulgating a "new" interpretation of Standard 4.33.3 without the requisite notice-and-comment procedures, (ii) the Department's certification of the Texas Accessibility Standards ("TAS") acted as a complete estoppel against the instant enforcement action, and that (iii) the United States' participation in the Lara litigation as *amicus curiae* also barred – by virtue of collateral estoppel – the instant action. See id. at 580-84.

After issuance of the Sixth Circuit mandate, this Court conducted a status conference to establish a schedule for these remand proceedings. See Cinemark I, Minutes of Proceedings (ECF # 124). The parties thereafter recommenced their discovery efforts. Cinemark propounded both lengthy written discovery, see Defendant Cinemark's USA, Inc's First Set of Interrogatories (served April 1, 2004); Defendant Cinemark's USA, Inc's Second Request for Production of Documents (served April 1, 2004), as well as the 18-paragraph Rule 30(b)(6) deposition notice that forms the basis for the instant motion for protective order. See Cohen Dec., Ex. 1 (deposition notice). After reviewing the text of this Rule 30(b)(6) notice, the United States sent a detailed "meet and confer" letter to Cinemark setting forth its serious privilege and other objections to this notice. See Cohen Dec., Ex. 2. The United States also proposed several dates for a telephonic discovery conference among the parties. Id. at 7. By letter dated April 23, 2004, Cinemark responded by, inter alia, dismissing the United States' objections and asserting that further discussions would likely be

fruitless since, in Cinemark's view, "the DOJ's extreme positions appear to leave little room for compromise." Cohen Dec., Ex. 3.

III. ARGUMENT

A. The Sixth Circuit's Mandate Precludes Cinemark From Seeking Testimony In Support of Its Twice-Rejected APA-Related Defenses, And, In Any Event, Such Testimony Is Protected From Disclosure By The Deliberative Process Privilege and Other Related Privileges

One-half of the paragraphs comprising Cinemark's Rule 30(b)(6) notice relate to its now twice-rejected APA defenses and its related argument that the Department has improperly interpreted Standard 4.33.3. See, e.g., Rule 30(b)(6) Notice, ¶¶ 1, 3-6, 8-11. For example, this notice seeks testimony concerning, among other things, the development of the Department's interpretation of Standard 4.33.3, the methods used by the Department to calculate viewing angles and other components of lines of sight, and communications amongst Department officials relating to wheelchair seating locations in areas of public assembly, including movie theaters. Id. Such discovery, however, greatly exceeds the scope of the Sixth Circuit's mandate since the Circuit has already conclusively determined – as a matter of law – the proper interpretation of Standard 4.33.3 in the context of stadium-style movie theaters. Moreover, well-established principles of administrative law preclude litigants challenging administrative actions from seeking discovery outside the administrative record. Finally, the highly-sensitive testimony sought by Cinemark in these paragraphs is protected from disclosure by the deliberative process privilege and other related discovery privileges.

As an important corollary to the law of the case doctrine, the so-called "mandate rule" holds that, on remand, a district court must proceed in accordance with the decision of a higher appellate court. See, e.g., Allard Enterprises, Inc. v. Advanced Programming Resources, Inc., 249 F.3d 564, 569-70 (6th Cir. 2001); United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994); accord

Independent Petroleum Ass'n of Am. v. Babbitt, 235 F.3d 588, 596-97 (D.C. Cir. 2001) ("Under the mandate rule, an 'inferior court had no power or authority to deviate from the mandate issued by an appellate court.'") (citation omitted). As this Circuit has emphasized, "the trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." Moored, 38 F.3d at 1421.

Here, Cinemark's Rule 30(b)(6) notice violates this mandate rule by seeking testimony from Department officials on matters relating to its now-failed APA affirmative defenses. To the limited extent Cinemark's APA-based affirmative defenses survived this Court's dismissal of its counterclaim, see Memorandum Opinion and Order, Cinemark I, Docket # 47 (order dismissing Cinemark's APA-based counterclaim), the Sixth Circuit has now conclusively rejected these affirmative defenses in their entirety. See discussion supra p. 3. Moreover, the Sixth Circuit's rejection of these APA-based affirmative defenses was unequivocal and left no residual issues for factual development or adjudication during these remand proceedings. Cinemark's attempt to seek discovery bolstering its APA-based affirmative defenses is, therefore, improper and should be rejected by this Court.[1]

Moreover, Cinemark's attempt to seek deposition testimony concerning the Department's interpretation of Standard 4.33.3 also runs afoul of the mandate rule. In Cinemark II, the Sixth Circuit expressly determined – as a matter of law – that (i) Standard 4.33.3 ensures movie patrons who use wheelchairs lines of sight of similar quality as compared to those offered other members of the movie audience, and that (ii) this comparability analysis requires more points of similarity than merely an unobstructed view of the screen and "doubtless" includes viewing angles. See discussion

[1] For similar reasons, this Court should also reject Cinemark's attempt to seek discovery relating to its collateral estoppel defense – Paragraph 16 of Cinemark's Rule 30(b)(6) notice – since the Sixth Circuit firmly concluded that the Department's participation in the Lara litigation as *amicus curiae* did not estop the government from pursuing this enforcement action. See discussion supra p. 3.

supra p. 3; see also Cinemark II, 348 F.3d at 575-79. Because the Sixth Circuit has thus already laid out the legal parameters concerning the proper interpretation of Standard 4.33.3, Cinemark cannot on remand properly seek discovery concerning the origin, development, or propriety of the Department's interpretation of Standard 4.33.3 with respect to movie theaters or any other types of public assembly areas.[2] Yet, this is precisely the type of testimony sought by Cinemark in at least half of the topics listed in its deposition notice. See, e.g., Cinemark Rule 30(b)(6) Notice, Paragraph Nos. 1, 3-6, and 8-11. Inquiry into these areas exceeds the scope of the Sixth Circuit's remand order and is simply not relevant to these remand proceedings.[3] This Court should, therefore, enter a protective order quashing these paragraphs in their entirety.

Yet even assuming that Cinemark II could be generously read as theoretically permitting discovery concerning the Department's interpretation of Standard 4.33.3 (and Cinemark's related APA-based affirmative defenses), well-established administrative law principles nonetheless preclude Cinemark from seeking to augment the administrative record underlying Standard 4.33.3 with extra-record deposition testimony from Departmental officials. Federal courts nationwide – including the Sixth Circuit – have consistently held that, with few exceptions, judicial review under the APA is limited to the administrative record. See, e.g., Sierra Club v. Slater, 120 F.3d 623, 638

[2] Cinemark's Rule 30(b)(6) deposition notice suffers from overbreadth to the extent it seeks testimony relating to public assembly areas other than movie theaters. Line-of-sight issues presented by movie theaters are fundamentally different from those presented by other types of assembly areas such as sports arenas or baseball stadiums. See Cohen Dec., Ex. 5 at ¶ 1 (discovery order entered in AMC action, inter alia, noting divergent line-of-sight issues among different types of assembly areas and limiting theater-defendants to discovery concerning movie theaters only).

[3] To be sure, the Sixth Circuit's decision does indeed contemplate additional remand proceedings on line-of-sight issues to the extent the Circuit noted that "[w]e leave it to the district court on remand to determine the extent to which lines of sight must be similar for wheelchair patrons in stadium-style theaters." Cinemark II, 348 F.3d at 579. However, this limited remand is a far cry from a more generalized remand order calling for this Court to consider anew the proper interpretation of Standard 4.33.3. On remand, Cinemark requires no discovery relating to the propriety or bases for the Department's interpretation of Standard 4.33.3 since it is the Sixth Circuit's legal interpretation of Standard 4.33.3 – as applied by this Court – that controls the line-of-sight calculus on remand.

(6th Cir. 1997); Federal Trade Comm'n v. Owens-Corning Fiberglass Corp., 853 F.2d 458, 461 n.5 (6th Cir. 1988); accord Friends of the Earth v. Hintz, 800 F.2d 822, 828 (9th Cir. 1986). As the Supreme Court has made clear, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244 (1973).

In light of these precedents, fundamental administrative law principles thus strongly counsel against Cinemark's pursuit of deposition testimony in order to create a new "record" during the course of these remand proceedings. Indeed, in the AMC litigation, the district court expressly precluded the theater-defendants from seeking discovery outside the administrative record to support their APA-based defenses. See United States v. AMC Entertainment, Inc., C.A. No. 99-01034 (C.D. Cal. June 5, 2000) ("AMC"), Civil Minutes Re: Defendants' Motion to Compel ¶ 6 (copy attached as exhibit 5 to the Cohen Declaration).

In any event, deposition testimony from Department officials on these topics (i.e., Paragraph Nos. 1, 3-6, 8-11) would inevitably run afoul of the deliberative process privilege, as well as other related discovery privileges. The purpose of the deliberative process privilege "is to allow [government] agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." Assembly of the State of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992); see also United States v. Fernandez, 231 F.3d 1240, 1246 (9th Cir. 2000) ("[T]he deliberative process privilege encourages forthright and candid discussions of ideas and, therefore, improves the decisionmaking process."); Schell v. United States Dep't of Health & Human Services, 843 F.2d 933, 939 (6th Cir. 1988) ("The primary purpose served

by the deliberative process privilege is to encourage candid communications between subordinates and superiors.").[4]

Applying these principles to Cinemark's Rule 30(b)(6) deposition notice – which seeks, without limitation, testimony on such broad topics as "the DOJ's interpretation of Section 4.33.3" (¶ 3) and "[c]ommunications within the DOJ on matters concerning wheelchair seating locations in areas of public assembly" (¶ 10) – it is plain that the requested topics would necessarily sweep within their wide ambit highly-sensitive internal deliberations protected from disclosure by the deliberative process privilege.[5] The United States has already produced (or will be producing in response to Cinemark's pending document request and/or through supplementary productions) not only the certified administrative record underlying Standard 4.33.3, but also public documents relating to the Department's interpretation of Standard 4.33.3 as it relates to movie theaters -- including technical assistance manuals, publicly-available pleadings and settlement agreements from enforcement actions filed by the United States against other movie theater companies, and policy letters and speeches by Department officials. See Cohen Dec. ¶¶ 2-3. Any attempt by Cinemark to go beyond these public pronouncements would impermissibly reveal highly-sensitive internal deliberations regarding the Department's interpretation of Standard 4.33.3 in such varied contexts as: (i) decisions

[4] The deliberative process privilege, moreover, protects both testimony and written materials. See, e.g., Lang v. Kohl's Food Stores, Inc., 185 F.R.D. 542, 550-51 (W.D. Wis. 1998) (granting EEOC's motion to quash deposition subpoenas on the grounds that, inter alia, the information sought was both burdensome and protected by the deliberative process privilege); see generally Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The [deliberative process] privilege serves to protect the deliberative process itself, not merely documents containing deliberative material.").

[5] The expansive nature of Paragraph Nos. 1, 3-6, and 8-11of Cinemark's Rule 30(b)(6) deposition notice also implicates several other privileges, including the attorney client, work product, law enforcement/investigative, and settlement negotiation privileges. In the AMC action, for example, the district court expressly upheld the United States' assertion of the settlement negotiation privileges in the context of adjudicating a discovery dispute in another pending stadium-style theater enforcement action, United States v. AMC Entertainment, Inc, C.A. No. CV-99-01034 (C.D.. Cal.). See also Cohen Dec., Exs. 4 - 5. (AMC discovery orders). See also discussion infra pp. 12-15 (discussing work product, attorney client, and law enforcement/investigative privileges).

whether and how to investigate Cinemark or other movie theater companies; (ii) decisions whether to file enforcement actions against Cinemark or other movie theater companies; and (iii) whether, and on what terms, to settle investigations or enforcement actions against movie theater companies.

The deliberative process privilege simply does not permit Cinemark to use a Rule 30(b)(6) deposition as a back-door method for probing the internal deliberative processes and discussions of federal employees regarding the Department's interpretation of Standard 4.33.3. Such internal discussions represent the type of "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975) (internal quotation omitted); see also Schell, 843 F.2d at 939-42 (holding internal memorandum from ALJs to supervisors protected by deliberative process privilege since disclosure would "stifle open and frank communication"); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Furthermore, any factual information considered as part of these recommendations would necessarily be "so interwoven with the deliberative material that it is not severable." Fernandez, 231 F.3d at 1247; see also Mapother, 3 F.3d at1537-38 (privilege covered report summarizing facts for use of the Attorney General in decision making); Montrose Chemical Corp. v. Train, 491 F.2d 63, 67-68 (D.C. Cir. 1974) (written summaries of factual evidence provided to decisionmaker protected from discovery because they were prepared for the purpose of assisting decisionmaker in making decision).

This Court should thus preclude Cinemark from using its Rule 30(b)(6) deposition notice as a vehicle for making impermissible inquiries into matters protected from disclosure by the deliberative process privilege. Indeed, in ***none*** of the stadium-style theater cases pending nationwide – including the AMC (California) and Hoyts (Massachusetts) actions – has a federal court permitted a theater-defendant to seek discovery of the type of highly-sensitive deliberative information now sought by

Cinemark in its Rule 30(b)(6) deposition notice. See, e.g., Cohen Dec., Ex. 5, ¶¶ 2-3 (AMC discovery order) & Exs. 7, 10-12 (Hoyts affidavit, PACER docket, and discovery order).[6]

* * *

While ample grounds thus support the quashing of Paragraph Nos. 1, 3-6, and 8-11 of Cinemark's Rule 30(b)(6) notice in their entirety, the United States would also nonetheless agree to stipulate to the entry of the Lelling transcript from the Hoyts litigation in this action – subject, of course, to the deliberative process and other privilege objections asserted by Department counsel during the course of the deposition. Stipulated entry of the Lelling transcript would be appropriate in this action since: (i) the Rule 30(b)(6) notice in response to which Mr. Lelling testified in the Hoyts litigation bears a remarkable similarity to the Rule 30(b)(6) notice served by Cinemark in this action, including ***eight paragraphs copied verbatim (or nearly so)*** from the Hoyts notice (compare, e.g., Cohen Dec. Ex. 1 ¶¶ 1, 2, 7-11 & 17 (Cinemark Rule 30(b)(6) notice) with Ex. 8 ¶¶ 1-6 & 11 (Hoyts Rule 30(b)(6) notice)); (ii) Cinemark and the theater-defendants in the Hoyts action – Hoyts Cinemas Corp. and National Amusements, Inc. – claim a joint defense privilege through their common membership in the National Association of Theater Owners ("NATO") (see, e.g., Defendant's Sur-Reply to Plaintiff's

[6] In United States v. Hoyts Cinemas Corp., et al., C.A. No. 1:00-cv-12567 (D. Mass.), the theater-defendants – like Cinemark – served the United States with a broad Rule 30(b)(6) deposition notice implicating the deliberative process privilege and other discovery privileges. The United States moved for a protective order. See Cohen Dec., Ex. 7, Docket Entry Nos. 55-56. The district court denied the motion in favor of a more fully developed factual basis on which to adjudicate the privilege claims. Id., Unnumbered Docket Entry (dated Jan. 7, 2002) . The United States ultimately produced a Department official (Mr. Andrew Lelling) who was deposed for over 8.5 hours. See Cohen Dec., Ex. 9, Parts 1-3 (Lelling transcript). During this deposition, Mr. Lelling was permitted to answer questions concerning any statement the Department had made publicly interpreting Standard 4.33.3, but was instructed not to answer questions seeking privileged information, such as inquiries concerning internal Departmental communications relating to Standard 4.33.3 or the Department's litigation and settlement strategies. Id. The theater-defendants subsequently filed a motion to compel seeking disclosure of the privileged testimony. See Cohen Dec., Ex. 7, Docket Entry Nos. 71 - 75. The United States opposed the motion and filed a formal privilege declaration from a high-ranking Department official. See Cohen Dec., Exs. 10 - 11. The district court denied the theater-defendants' motion to compel, as well as their subsequent motion for reconsideration. See Cohen Dec., Exs. 7 & 12 (Unnumbered Docket Entries - dated April 3, 2002 & April 19, 2002).

Reply In Support of Its Motion to Compel 5, Cinemark I, Docket # 66); and (iii) the Hoyts court ultimately upheld the United States' privilege claims and rejected the theater-defendants' motion to compel further testimony (see supra p. 10 n. 6).

In the alternative, should this Court permit Cinemark to proceed with its discovery request, the United States seeks an order limiting Cinemark to a deposition upon written questions with respect to relevant, non-privileged areas (if any) encompassed by Paragraph Nos. 1, 3-6, 8-11 of Cinemark's Rule 30(b)(6) notice. See Fed. R. Civ. P. 31; see also, e.g., Boutte v. Blood Systems, Inc., 127 F.R.D. 122, 124-25 (W.D. La. 1989) (issuing protective order limiting disputed deposition of third-party blood donor to deposition upon written questions pursuant to Rule 31); Moretti v. Herman's Sporting Goods, Inc., 1988 WL 122299 (E.D. Pa. Nov. 10, 1988) (ordering plaintiff to proceed pursuant to Fed. R. Civ. P. 31 in response to defendant's motion for protective order to quash notice of oral deposition) (exhibit 13 to Cohen Declaration). Absent a protective order denying Cinemark's quest for obviously privileged testimony, such written questions would have the salutary effect of permitting the parties to evaluate and resolve any issues relating to privilege and relevancy.

B. Cinemark Is Not Entitled to Seek Discovery Concerning the Department's Privileged Investigation and Analysis of Cinemark's Stadium-Style Theaters

Paragraphs 2, 7, 17, and 18 of Cinemark's 30(b)(6) notice seeking – without limitation – testimony concerning the Department's investigation and analysis of, and remedial plans for, Cinemark's stadium-style theaters, also suffer from fatal privilege flaws. Cinemark's attempt to depose one or more Department officials on these topics not only strikes at the heart of the law/enforcement investigative, work product, and attorney client privileges, but also prematurely seeks information relating to the Department's expert witnesses several months prior to the court-ordered deadline for the filing of the United States' expert report(s).

Even assuming that Cinemark's attempt to probe the Department's internal investigation and analysis of Cinemark's stadium-style theaters falls within the scope of the Sixth Circuit's limited mandate (which the United States does not believe to be true), see discussion supra pp. 4-5, these topics still improperly seek testimony protected by the law enforcement/investigative privilege. The law enforcement/investigative privilege presumptively protects the information contained in files related to both civil and criminal law enforcement investigations. See, e.g., Black v. Sheraton Corp., 564 F.2d 531, 542 (D.C. Cir. 1977); Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984). This privilege protects against the release of governmental information — whether through documents or deposition testimony — that would harm an agency's enforcement or investigative efforts. See In re Sealed Case, 856 F.2d 268, 272, 317 (D.C. Cir. 1988) (public interest in safeguarding integrity of civil and criminal investigations supports application of law enforcement/investigative privilege to both investigatory files and deposition testimony that would disclose the contents or information in those files).

Here, any attempt by Cinemark to "go behind" the facts in the Complaint and make inquiries into such sensitive matters as the substance or nature of the United States' pre-suit investigation, how or when facts listed in the Complaint were discovered, and/or the United States' remedial theories, would necessarily implicate the law enforcement/investigative privilege and cause great harm to the agency's enforcement and investigative efforts. See, e.g., Cohen Dec., Ex. 11, (attaching copy of Boyd declaration from Hoyts litigation formally asserting the law enforcement/investigative privilege and other related privileges). Cinemark, on the other hand, cannot demonstrate an overriding need for such sensitive investigatory information because: (i) the text of the Complaint itself provides Cinemark with a detailed description of the factual bases for the United States' allegations; and (ii) written responses and documents produced by the United States during discovery in this action have provided additional, non-privileged factual information with respect to the United States' Title III-based claims against

Cinemark. Cinemark, therefore, need not raid the Department's confidential investigative files to adequately defend itself in this action. See United States v. Illinois Fair Plan Ass'n, 67 F.R.D. 659, 662 (N.D.. Ill. 1975) (granting United States' request for protective order when alternative means existed for securing information in agency's investigative files); see also Cohen Dec., Ex. 5 at ¶ 8 (AMC discovery order affirming, inter alia, United States' assertion of law enforcement investigative privilege in stadium-style theater action).

Furthermore, testimony concerning the United States' investigation and analysis of Cinemark's stadium-style theaters would also necessarily implicate the work product and attorney client privileges.[7] As outlined in the seminal Supreme Court case of Hickman v. Taylor, 329 U.S. 495 (1947), the work product privilege provides nearly absolute protection for the thought processes, mental impressions, and legal strategy decisions of counsel (or his or her representatives) in preparation of a case. Accord In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980) (*per curiam*). As the Supreme Court noted in Hickman: "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." 329 U.S. at 510.

Because Paragraph Nos. 2, 7, 17 and 18 of Cinemark's Rule 30(b)(6) notice are framed so broadly, there is a significant likelihood that Cinemark will attempt to "go behind" the facts listed in the Complaint and seek the mental impressions of Department counsel regarding the formulation of the Complaint and/or counsel's strategy in litigating this action. The work product privilege does not permit such searching inquiries into the thought processes of counsel. See, e.g., Baker v. General

[7] With respect to the attorney client privilege, the privilege – as applied here – protects confidential communications between Department personnel and Department attorneys (acting in their capacity as attorneys) in the course of seeking legal advice. See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding that attorney client privilege applies to communications between government agencies and their counsel); Arizona Rehabilitation Hospital v. Shalala, 185 F.R.D. 263, 269 (D. Ariz. 1998) (recognizing attorney client privilege in the context of intra-agency communications pre-decisional to the promulgation or repealing of regulations).

Motors Corp., 209 F.3d 1051, 1054-55 (8th Cir. 2000) (holding that attorney notes, memoranda, and witness interviews were opinion work product entitled to "almost absolute immunity"); Chaudhry v. Gallerizzo, 174 F.3d 394, 402-03 (4th Cir.) (work product privilege prohibited disclosure of unredacted legal bills and research memorandum that would reveal statutes researched and confidential sources), cert. denied, 528 U.S. 891 (1999); In re Grand Jury Subpoena, 622 F.2d at 935-36 (work product privilege precluded prosecution from "embark[ing] on a generalized fishing expedition" into defense counsel's investigatory and litigation files).

Lastly, in addition to the foregoing privilege issues, these paragraphs also prematurely seek testimony relating to the United States' trial experts. The current scheduling order obligates the United States to disclose its expert(s) and their respective opinions in late August 2004. See Minutes of Proceedings, Cinemark I, Docket # 124. Thus, pursuant to Fed. R. Civ. P. 26(a)(2)(C), the United States is under no obligation at this juncture to either identify its experts or prematurely reveal the substance of their opinions. Indeed, under similar circumstances, the AMC court entered a protective order prohibiting the theater-defendants from seeking production of the United States' expert-related investigative materials and analyses prior to the court-ordered disclosure deadline. See Cohen Dec., Ex. 6 (AMC order).

For the foregoing reasons, this Court should quash Paragraph Nos. 2, 7, 17, and 18 of Cinemark's Rule 30(b)(6) notice in their entirety, or, in the alternative, limit Cinemark to a deposition upon written questions that are crafted to avoid privileged areas. See supra pp. 10-11.

C. Cinemark Impermissibly Seeks Privileged and Otherwise Protected Information Concerning the Department's Certification Program for State and Local Building Codes

Paragraphs 12 through 15 of Cinemark's Rule 30(b)(6) notice seek testimony concerning the Department's certification program for state and local building codes generally, as well as the specific circumstances underlying the Department's TAS certification. Cinemark's certification-related

discovery, however, both exceeds the scope of the Sixth Circuit's remand order and implicates the deliberative process and other related discovery privileges. First, since the Sixth Circuit expressly held that the burden fell on the ***government*** on remand – not Cinemark – to overcome the "rebuttable evidence" that Cinemark's construction of stadium-style theaters in conformance with TAS also evidenced ADA compliance, Cinemark's attempt to seek discovery concerning the Department's certification program necessarily violates the mandate rule. See Cinemark II, 348 F.3d at 581-83. Second, even assuming that Cinemark's certification-related discovery could be construed as falling within the scope of the mandate, it nonetheless runs afoul of the same APA and privilege issues as the other paragraphs in this notice. See, e.g., discussion supra pp. 6-7 (APA issues), 7-9 (deliberative process privilege), and 13-14 (work product and attorney client privileges).

This Court should, therefore, quash Paragraph Nos. 12 through 15 of Cinemark's Rule 30(b)(6) notice in their entirety, or, in the alternative, limit Cinemark to a deposition upon written questions that are narrowly crafted to avoid privileged areas. See supra pp. 10-11.

Dated: April 27, 2004

Respectfully submitted,

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