UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	§	CIVIL ACTION NO. 1:99CV-705
Plaintiff	§	Hon. Donald C. Nugent
v.	§	**PLAINTIFF UNITED STATES' COMBINED (A) OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTION AND MOTION TO QUASH NOTICE OF ENTRY UPON LAND AND (B) PLAINTIFF'S MOTION FOR COURT ORDER SETTING CONDITIONS FOR THE UNITED STATES' INSPECTIONS OF CERTAIN CINEMARK THEATERS**
CINEMARK USA, INC.,	§	
Defendant.	§	

This case involves compliance with federal architectural standards at buildings designed and constructed by Defendant Cinemark USA, Inc.. The necessity for on-site inspections by architectural experts to gather relevant evidence where architectural questions are the primary issue to be decided is obvious. However, rather than seeking to negotiate reasonable conditions for the conduct of these inspections,[1] Defendant instead seeks to completely lock the United States and its expert(s) out of its theaters, and prevent legitimate and necessary discovery. The crux of Defendant's Motion for a Protective Order is that, even though Defendant claims its wheelchair seating locations comply with ADA Standards 4.33.3 and it relied on certification of the Texas Accessibility Standards ("TAS") when designing and constructing its stadium-style movie theaters *nationwide*, the United States and its expert(s) are not entitled to inspect a representative sample of those theaters. Once again, Cinemark seeks to delay relevant discovery with further motions practice, consuming valuable discovery time. This Court should deny Cinemark's motion to limit discovery, grant the United States' motion to permit entry on land, and enter the attached proposed order setting reasonable conditions for these inspections to take place at the earliest possible time.

The Federal Rules of Civil Procedure permit parties, as a general matter, to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). Moreover, Rule 34(a) specifically provides parties the ability to request

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[1] Defendant failed to comply with Fed. R. Civ. P. 26(c) by making a good faith effort to confer with the United States in an effort to resolve this dispute prior to filing its Second Motion for Protective Order. Indeed, Defendant failed to make any effort to contact the United States prior to filing for the instant protective order. Not surprisingly, Defendant's Motion is *not* accompanied by the required

> entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b) [governing relevancy].[2]

What the Federal Rules explicity permit is all that the United States seeks in this case – to obtain entry to defendant's stadium-style theaters for the limited purpose of gathering evidence relevant to the claims and allegations contained in the government's complaint and in the Sixth Circuit's opinion. Cinemark may disagree with those allegations and with the government's legal theories, but a dispute over it should not be allowed to restrict the scope of discovery otherwise permitted by the Federal Rules and within the Sixth Circuit's mandate.[3]

I. CINEMARK HAS NOT MET THE STANDARD FOR SEEKING A PROTECTIVE ORDER UNDER FEDERAL RULE 26(c)

Defendant seeks protection from the United States' Notice of Entry Upon Land because the Notice is "overly broad, unnecessary, unreasonable, harassing, and grossly inefficient." Defendant's Second Motion for Protection, Motion to Quash Plaintiff's Notice of Entry Upon Land

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certification of good faith efforts at resolution.

[2] Rule 34, like the other rules relating to discovery, is to be broadly and liberally construed. Hickman v. Taylor, 329 U.S. 495, 507 (1947); Morales v. Turman, 59 F.R.D. 157 (E.D. Texas 1972) (Rule 34 designed to permit broadest sweep of access); Martin v. Reynolds Metals Corp., 297 F.2d 49, 56-57 (9th Cir. 1961) (holding that "[t]he word 'inspection' has a broader meaning than just looking" and can include such activities as photographing and taking samples). "Rule 34 ... is as broad in scope as any of the discovery devices and is in all respects an essential part of a liberal and integrated scheme for the full disclosure of relevant information between the parties that will facilitate the prompt and just disposition of their litigation. The rule authorizes the broadest sweep of access, inspection, examination, testing, copying, and photographing of documents or objects in the possession or control of another party. ... Any document or thing that is relevant to the subject matter involved in a pending action may be inspected pursuant to Rule 34 unless it is privileged, or it has been prepared in anticipation of litigation or for trial, or it reveals facts known and opinions held by experts, or there are ***special reasons*** why inspection would cause annoyance, embarrassment, oppression, or an undue expense burden." Wright & Miller, 8A Fed. Prac. & Proc. Civ.2d §§ 2206 (2003) (emphasis added).

[3] "When important civil rights are in issue in complex litigation of widespread concern, a court must make every effort to enhance the fact-finding process available to counsel for both sides." Morales, 59 F.R.D. at 159.

("Def.'s Second Motion for Protection") at 1. Defendant further alleges that the Notice is "deficient ... AND concerns matters that are irrelevant to this case, ... and is principally targeted to multiplexes within the Fifth Circuit ..." Def.'s Second Motion for Protection at 1-2.[4] None of these reasons is legally sufficient to deny the United States and its expert(s) access to a representative sample of Cinemark's theaters to develop evidence in support of its pattern or practice claims. See United States' Opposition to Defendant's Motion for Partial Summary Judgment for All Stadium-Style Movie Theaters Within the Fifth Circuit at 4-9 (ECF docket # 139).

A. EVEN UNDER THE 4TH CIRCUIT BELCHER TEST PROPOSED BY CINEMARK, THE UNITED STATES' INSPECTIONS SHOULD BE GRANTED

Sixth Circuit precedent carefully circumscribes the Court's discretion to tailor protective orders "when justice requires to protect a party and for good cause shown." Lewis v. St. Luke's Hospital Ass'n, 132 F.3d 33 (6th Cir. 1997), 1997 WL 778410, *2. The Court's discretion is "limited by the careful dictates of Fed.R.Civ.P. 26." Id., citing Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996). Defendant contends that the Fourth Circuit's "balancing test" for inspections of properties warrants its request for a protective order. Belcher v. Bassett Furniture Industries, Inc., 588 F.2d 904, 908 (4th Cir. 1978), found that entry upon premises entails greater burdens and risks than the production of documents under Fed. R. Civ. P. 34, and therefore requires a greater inquiry into its necessity than just the relevancy test of Rule 26(c). The Fourth Circuit test requires a balancing of the degree to which the inspections will aid in the search for truth against the burdens and dangers created by the inspection. Belcher

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[4] The burden is on Defendant to show that these inspections are oppressive or an undue burden. Snowden By and Through Victor v. Connaught Laboratories, Inc., 137 F.R.D. 325, 332 (D. Kansas 1991). Defendant can not meet its burden by mere conclusory statements. Koch v. Koch Industries, Inc., 1992

was a sex and racial discrimination case brought by former and current employees of the defendant in which plaintiffs sought access to five plants operated by the defendant, including authorization for its expert to "roam through the plants, to stop when he chooses, and to make such inquiries as the expert deemed appropriate" of any of the plant employees. Id. at 906. See also Johnson v. Mundy Industrial Contractors, Inc., 2002 WL 31464984 (E.D.N.C.) (March 15, 2002) (relied upon by Defendant for the same proposition). No such breadth of inspections nor potential risk to Cinemark or third party employees exists in this case, and the threshold for granting the protective order even under Belcher is easily satisfied here.

Unlike the facts in Belcher and Johnson, there can be no question that the physical aspects of Defendant's theaters are germane to the United States' noticed inspections, they contain evidence to prove specific allegations of ADA "new construction" violations alleged in the Complaint, and evidence in the theaters is contemplated to meet the issues clarified in the Sixth Circuit's opinion. Even under the Belcher test, balancing the degree to which the noticed inspections will aid in the search for truth with the burdens and dangers created by the inspections, Defendant has failed to show harms that satisfy the Belcher standard nor anything more than the ordinary burdens of litigation. There is no danger to Defendant's business or personnel, and the discovery is appropriately limited especially when viewed under the reasonable conditions set forth in the attached United States' Proposed Order.

B. DEFENDANT HAS FAILED TO MAKE *ANY* SHOWING OF ALLEGED UNDUE BURDEN

Defendant makes no allegations, nor could it, that the noticed inspections will cause it annoyance, embarrassment, or oppression. A motion under Rule 26 to limit discovery requires

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WL 223816, *9 (D. Kansas 1992).

the Court to balance the interests at issue; the Court must "compare the hardship on both parties if the motion is either granted or denied." York v. American Medical Systems, 166 F.3d 1216 (6th Cir. 1998), 1998 WL 863790, *4. Cinemark's sole claim that could conceivably fall within the requirements of Rule 26(c) for this Court to grant its requested protective order is the alleged expense to it involved in the noticed inspections.[5] However, Cinemark makes no showing that its alleged expenses for the inspections are "undue," as required for this Court to grant Cinemark's request for a protective order. Lewis v. St. Luke's Hospital Ass'n, 132 F.3d 33 (6th Cir. 1997), 1997 WL 778410, *4 ("Broad allegations of harm unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test."); Continental Illinois Nat. Bank & Trust v. Caton, 136 F.R.D. 682, 685 (D. Kan. 1991) (party opposing discovery cannot rely on bare assertions of burdensomeness, oppressiveness, or irrelevance).[6]

Even something more than *minimal* burden, expense, and hardship *still* does not require denial of the United States' noticed inspections. Snowden By and Through Victor v. Connaught Lab., 137 F.R.D. 325, 332-33 (D. Kan. 1991) ("The mere fact that compliance with an inspection order will cause great labor and expense or even considerable hardship and possibility of injury

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[5]Cinemark also claims the inspections are "unnecessary, unreasonable, and harassing" but offers no support for such allegations, either factual or legal. Cf. Lewis v. St. Luke's Hospital Ass'n, 132 F.3d 33 (6th Cir. 1997), 1997 WL 778410, *4 ("Broad allegations of harm unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test."); Koch v. Koch Industries, Inc., 1992 WL 223816, *9 (D. Kansas 1992); Continental Illinois Nat. Bank & Trust v. Caton, 136 F.R.D. 682, 685 (D. Kan. 1991) (party opposing discovery cannot rely on bare assertions of burdensomeness, oppressiveness, or irrelevance).

[6] Cinemark cannot make the requisite showing of undue financial burden, given its most recent public statements of its financial condition. Cinemark Fourth Quarter and Year End Results, attached as Exhibit 1. See Koch, 1992 WL 223816, *10 ("[t]here is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of busisness-related information than might be expected of one whose business is small and simple.") (*quoting* Sanders v. Levy, 558 F.2d 636, 650 (2nd Cir. 1976), *judgment rev'd*, 437 U.S. 340

to the business of the party from whom discovery is sought does not of itself require denial of the motion. Rule 26(c) speaks of 'undue burden or expense' and discovery should be allowed unless the hardship is unreasonable in the light of the benefits to be secured from the discovery.") (citation omitted).[7] The United States has extensive experience in conducting similar inspections at other theaters pursuant to express approval by United States District Courts in California and Massachusetts. These courts granted inspections of more theaters than the United States seeks here and for more detailed surveys than are required in this case. The attached United States' Proposed Order Setting Conditions for the United States' Inspections of Certain Cinemark Theaters proposes reasonable limitations on both parties for the smooth and efficient conduct of these inspections. This Court should allow this relevant discovery to proceed immediately, and deny Defendant's procedurally defective Motion for Protective Order.[8]

II. THE UNITED STATES' INSPECTION NOTICE PROVIDES SUFFICIENT DETAIL TO GIVE DEFENDANT SPECIFIC NOTICE

Cinemark claims the United States' Notice for Entry Upon Land, served on Defendant on March 16, 2004, is deficient and lacks "meaningful formulation, precision, and direction." Def.'s Second Motion for Protection at 5. This argument is without basis in fact. The United States' inspection notice clearly specifies the ten theaters that the United States intends to inspect

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(1978)).

[7] *Any* facility inspection "will potentiate to disruption, but the parties are capable of minimizing any distraction through advance preparation, and any remaining prospect for disruption is outweighed by the efficiencies and effectiveness of a[n] ... inspection ..." Minnesota Mining & Manufacturing Co., Inc. v. Nippon Carbide Industries Co., Inc., 171 F.R.D. 246, 250 (D. Minn. 1997).

[8] In addition to its failure to comply with the "meet and confer" requirement of Rule 26(c), Defendant's Declaration of Don Harton, Exhibit A to its Second Motion for Protection, Motion to Quash, ECF #137, attachment #1, is undated and should be stricken from the record.

on which dates.[9] Defendant has received notice of the areas within each theater that the United States seeks discovery of in the following previous pleadings: United States Complaint, ECF docket #123, attachment #1; United States' Reply Brief in Support of its Renewed Motion to Compel Discovery and Reschedule *In Camera* Review, ECF docket #131; United States' Brief in Support of its Renewed Motion to Compel Discovery and Reschedule *In Camera* Review, ECF docket #125.[10]

Moreover, the United States is not required at this time to specify by name the people who will be conducting and attending these inspections. It is sufficient that Cinemark know that each

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[9] Cinemark deliberately misconstrues the United States' Notice. The United States has no intention of conducting inspections at more than one location at the same time. Def.'s Second Motion for Protection at 10, n.7. The United States attempted to group its theater inspections in any given week based on geographic proximity to minimize travel costs and time. Each group of theaters is scheduled to be inspected during the scheduled week seriatum, not simultaneously, an issue Defendant could have clarified with a simple telephone call. The United States is unable at this time to give definitive dates for the start of each survey within each week's grouping due to the unpredictability of how long each survey will take.

[10] Cinemark contends that the inspections are an "absurdly overly broad and unreasonable exercise," and that the United States' lawsuit concerns only ADA Standard 4.33.3. Def.'s Second Motion for Protection at 6 and n.2. Cinemark also relies on Macort v. Goodwill Industries-Manasota, Inc., 220 F.R.D. 377 (M.D. Fla. 2003) for the proposition that inspections cannot exceed the parameters of a complaint. It should be noted, however, that the United States' complaint in this case alleges that Cinemark designs and constructs its stadium-style movie theaters in violation of "the Department of Justice's Regulation implementing Title III of the ADA, 28 C.F.R. Part 36 (the "Regulations"), *including but not limited to* Section 4.33.3 of the Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"). The United States previously submitted some evidence of Cinemark's violations of the ADA Standards, in addition to Standard 4.33.3. Plaintiff's Appendix to its Opposition to Cinemark's Motion to Dismiss, Transfer, or Stay (*Cinemark I,* docket #9, exhibit 11); Plaintiff's Counter-Statement of Material Facts in Dispute at 1-2 (*Cinemark I,* docket #82). This evidence was presented to Cinemark pre-suit in the United States' demand letter, and correction of other violations of the ADA Standards was one of the criteria for resolving the United States' investigation without litigation. See Letter to Laura M. Franze, March 17, 1999, attached as Exhibit 2. Further, the United States has repeatedly stated its intention, in accordance with the Sixth Circuit's opinion, to gather and present evidence to rebut the presumption that compliance with a state certified code evidences compliance with the ADA to defeat Cinemark's alleged reliance on the Texas Accessibility Standards reviews of its theaters in Texas and nationwide. See Cinemark, 348 F.3d at 582 (6th Cir. 2003) (certification could not be completely relied upon, so district court not barred from ordering remedial measures if facts warrant).

person will either be an employee of the United States or under contract to perform work for the United States.[11] Cinemark complains in its motion that the United States has not identified or designated any experts or consultants yet in this case. This argument ignores the fact that the United States is not required to identify its experts until August 26, 2004, the date set by this Court for the United States to designate and file its expert(s) report(s). See Minutes of Status Conference of January 26, 2004, ECF docket #124. To require the United States to make such an identification of experts now would render the Court's expert discovery schedule moot.

Further, the Sixth Circuit's opinion reversing and remanding this Court's previous granting of summary judgment gave Cinemark notice of the areas that remain to be determined. United States v. Cinemark USA, Inc., 358 F.3d 569 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3513 (U.S. Feb. 4, 2004)(No. 03-1131). These include, but are not limited to, determining the comparability of the lines of sight at the wheelchair seating locations to those of the other seats in Cinemark's auditoria, and determining compliance with the ADA Standards to rebut the presumption that compliance with a state certified code evidences compliance with the ADA Standards. While Cinemark, having lost its "obstruction only" argument, now seeks to limit "lines of sight" to obstruction and viewing angles, a definition contrary to the extensive architectural literature cited by the United States in its Appendix in Support of Cross Motion for Partial Summary Judgment (*Cinemark I*, docket #80, tabs 18-21), this Court has not yet had an opportunity to determine the appropriate comparison for lines of sight consistent with the Sixth Circuit ruling. Cinemark, 358 F.3d at 579. Architectural drawings will be useful for one part of

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[11] Any potential concerns about possible confidential business information or details about Cinemark operations could be addressed in a mutually agreed upon confidentiality agreement prior to the start of the inspections. Such an agreement was reached before inspections by the United States of AMC theaters.

this determination, but the United States and its expert(s) are entitled to conduct a limited number of inspections of the very theaters at issue to present evidence to this Court on that question.

A. INSPECTIONS OF CINEMARK'S THEATERS ARE APPROPRIATE TO DEVELOP EVIDENCE TO REBUT THE PRESUMPTION IN THE ADA THAT COMPLIANCE WITH A STATE CERTIFIED CODE EVIDENCES COMPLIANCE WITH THE ADA STANDARDS

The Sixth Circuit, in its opinion reversing and remanding this Court's grant of summary judgment to Defendant, recognized that the Department of Justice's certification of a state code is (1) rebuttable evidence of compliance with the ADA Standards, (2) "not something upon which the builder could completely rely," and (3) that some remedial measures for Cinemark's existing theaters may be appropriate "if the facts warrant." United States v. Cinemark USA, Inc., 348 F.3d 569, 582 (6th Cir. 2003). The only way for the United States to develop evidence to show that Cinemark knew, or should have known, that it should not rely upon the TAS process as evidence of compliance with the ADA is to conduct inspections of a representative sample of Cinemark's theaters and compare the results of those inspections with the TAS documentation of its reviews of the same theaters.[12]

Cinemark cites Macort v. Goodwill Industries-Manasota, Inc. for the proposition that a Rule 34 inspection may not exceed the specifics of the complaint in an action. 220 F.R.D. 337,

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[12] Defendant argues that it relied on the Department of Justice's certification of the code of Texas for compliance with the ADA Standards not only for its theaters in Texas, but nationwide. This argument is baseless and attempts to stretch the certification program beyond any statutory or regulatory authority or intent. See United States' Reply Brief in Support of its Renewed Motion to Compel. Discovery and to Reschedule *In Camera* Review at 8, n.10 (ECF docket #131).

2003 WL 23323629, *2 (M.D. Fla. Dec. 19, 2003).[13] The inspections sought are consistent with the allegations in the Complaint that Cinemark violated Title III "new construction" requirements to provide "comparable lines of sight" to wheelchair locations. Cinemark's defense, that it relied upon TAS to avoid meeting the ADA Standards, flows directly flow the allegations of the complaint. Discovery of the extent of violations of the ADA Standards in this case must include discovery based upon Cinemark's affirmative defense. Discovery must also proceed in accordance with the decision of the appellate court which specifically included review of compliance with TAS on remand. 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). Therefore, the United States' inspections may include inquiry into Cinemark's compliance with the TAS to demonstrate that Cinemark knew, or should have known, that the TAS inspections should not be relied upon for compliance with *any* provisions in the ADA Standards, including Standard 4.33.3. Cinemark, 348 F.3d at 582. This Court should, therefore, deny Defendant's Motion for a Protective Order and enter the attached Proposed Order Setting Conditions for the United States' Inspections of Certain Cinemark Theaters.

B. INSPECTIONS OF DEFENDANT'S THEATERS WITHIN THE FIFTH CIRCUIT ARE APPROPRIATE

As discussed more fully in the United States' Opposition to Defendant's Motion for Partial Summary Judgment for All Stadium-Style Movie Theaters Within the Fifth Circuit (ECF docket #139), in order to establish that a "pattern or practice" of discrimination in violation of Title III of the ADA exists, the United States must show that "the denial of rights consists of

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[13] The Macort court allowed the inspection to take place, limited to the nineteen specific barriers to access noted in plaintiffs' complaint.

something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature ... a company repeatedly and regularly engaged in acts prohibited by the statute." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, n.16 (1977) (citing 110 Cong. Rec. 14270 (1964). Cinemark's many theaters located within the Fifth Circuit constitute part of this "pattern or practice." Discovery about those theaters is necessary to establish that such a pattern or practice of discrimination did in fact occur. Moreover, nothing in the Sixth Circuit's decision, the briefs filed by the United States in this case, representations at oral argument by counsel for the United States, published opinion, or caselaw, supports Cinemark's claim that its stadium-style movie theaters within the Fifth Circuit should be excluded from any liability finding in this case, and, as such, these theaters are appropriately included in the United States' case-in-chief on liability and should be subject to adequate and reasonable discovery by the United States. See Cinemark, 348 F.3d at 584 (denying Cinemark's request to affirm this Court's grant of summary judgment for its theaters within the Fifth Circuit).

III. THE NOTICED INSPECTIONS CAN BE CONDUCTED WITHOUT DISRUPTION TO DEFENDANT'S BUSINESS AND THERE IS NO BASIS FOR REQUIRING THE UNITED STATES TO PAY FOR CINEMARK'S TRUMPED UP EXPENSES

The United States has conducted hundreds, if not thousands, of architectural inspections during businesses hours of such large facilities as hospitals, restaurants, and hotels. Further, the United States has conducted architectural inspections of dozens of stadium-style movie theater auditoria in the course of its ongoing litigation in this area. Specifically, similar inspections have been conducted in United States v. AMC Entertainment Inc., C.A. No. CV-99-01034 (C.D. Cal.) (Order Granting in Part and Denying in Part the United States' Motion for Order Establishing Conditions for the United States' Inspection of AMC Theaters, attached as Exhibit 3), and United

States v. Hoyts Cinemas Corp. and National Amusements, Inc., C.A. No. 1:00-cv-12567 (D. Mass.) (Docket entry #63, oral order authorizing United States' inspections of theaters after-hours; Pacer docket sheet attached as Exhibit 7 to the Declaration of Phyllis Cohen in Support of United States' Motion for Protective Order From Rule 30(b)(6) Deposition Notice, ECF #140). Many of the same arguments raised by Cinemark to the United States' noticed inspections were also raised, and rejected, in these cases.[14] Conditions for the conduct of these inspections, such as those in the attached Proposed Order, can minimize any alleged disruption to Defendant's business, but inconvenience alone is not a sufficient reason to prohibit these inspections. Minnesota Mining & Mfg Co., Inc. v. Nippon Carbide Industries, 171 F.R.D. 246, 251 (D. Minn. 1997) (court held "any plant inspection will potentiate to disruption, but the parties are capable of minimizing any distraction through advance preparation ..."); Snowden By and Through Victor v. Connaught Lab., 137 F.R.D. 325, 332-33 (D. Kan. 1991) (mere fact that inspection will cause labor, expense, hardship, and possible injury to business does not require denial of inspection).

Cinemark seeks alternatively to require these inspections to take place after operational hours, thus allegedly incurring additional expenses for employee overtime wages, "consultant

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[14] Cinemark alleges that the architectural drawings it provided to the United States several years ago is the only discovery the United States needs to determine the viewing angles Cinemark provides wheelchair seating locations in its stadium-style movie theaters and the other seats. First, Cinemark attempts to improperly limit the comparability of lines of sight provision of ADA Standard 4.33.3 to only obstruction and viewing angles. However, neither the United States nor the Sixth Circuit has put such a limit on this case. Cinemark, 348 F.3d at 579. Further, architectural drawings are no substitute for inspections. Cox v. E.I. DuPont de Nemours & Co., 38 F.R.D. 396 (D.S.C. 1965) (plaintiff allowed inspection of defendant's plant even though defendant had produced plans, specifications and photographs of plant and equipment).

and attorney monitoring", additional security personnel, and additional utility fees.[15] Cinemark then believes the United States should absorb whatever additional costs Cinemark alleges it incurs for these inspections to take place during nonoperational hours. Cinemark has made no attempt to make the required showing that these generalized, and unnecessary, expenses, which would only be incurred by acceding to Cinemark's insistence on conducting the inspections after-hours, would impose an undue burden or expense on Cinemark. Cinemark's misplaced attempt to shift its unspecified costs from these inspections to the United States is without merit, and any additional costs incurred by either side by Cinemark's insistence that these inspections take place after business hours, a condition the United States has included in its attached Proposed Order, should not be paid by the United States. Defendant relies upon In re Puerto Rico Electric Power Authority, 687 F.2d 501 (1st Cir. 1982) for its creative cost shifting. In reality, this case stands for the well-accepted proposition that costs and expenses *may* be recovered by the prevailing party at the end of a case. Id. at 507; Fed.R.Civ.P. 54(d). Only if the requested discovery imposes an "undue burden or expense" on the producing party may a district court order the requesting party to pay the expenses of the requested discovery after final judgment and proper allocation of costs and fees, id., but Cinemark has failed to make the necessary showing that it is entitled to such extraordinary relief. Indeed, Cinemark's latest public financial statements, and its active participation in, and six-year defense of this and related litigation in the face of repeated attempts to settle, belie the necessity for any cost-shifting at this stage of the litigation. See Cinemark's 4th Quarter and Year Ending December 31, 2003 financial statement, Exhibit 1.

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[15]Defendant may choose, for its own reasons, to have additional personnel on hand in order to "monitor" each of the members of the inspection team, but that is defendant's choice, not the government's request.

Both parties should, and are able to, bear its own costs in complying with discovery requests in these proceedings on remand from the Sixth Circuit.

CONCLUSION

The United States respectfully requests that this Court deny Cinemark's Second Motion for Protection, Motion to Quash Plaintiff's Notice of Entry Upon Land. Further, the United States respectfully requests that this Court enter the attached [Proposed] Order Setting Conditions for the United States' Inspections of Certain Cinemark Theaters.

Respectfully submitted,

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