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

UNITED STATES OF AMERICA, Plaintiff, v. AMC ENTERTAINMENT, INC., et al., Defendants.	)	Case No.: CV-99-01034-FMC (SHx) **PLAINTIFF UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS DEFENDANT STK'S COUNTERCLAIM** **Judge:** Florence-Marie Cooper **Date:** June 26, 2000 **Time:** 10 a.m.

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PRELIMINARY STATEMENT

STK claims that the United States has created and seeks to enforce "highly technical 'line of sight' requirements for wheelchair seating in 'stadium style' movie theaters." Def.'s Opp'n Br. at 1. This assertion fundamentally mischaracterizes the nature of the United States' lawsuit. The United States has filed this suit to enforce the Americans with Disabilities Act (ADA) and its implementing regulations, including Standard 4.33.3, based upon a plain language interpretation of the law. The District Court in its December 17th written order has held that this interpretation is not final agency action. See Dec. 17th Order at 11 ("The filing of the brief [in Lara] and articulation of an interpretation of Standard 4.33.3, therefore, did not constitute final agency action subject to judicial review.") (emphasis added).

Ignoring the binding legal authority of the December 17th order, Defendant STK attempts to reargue questions of law on the United States' alleged violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, that have already been resolved in favor of the plaintiff in this case. The December 17th Order rejected Defendant AMC's identical arguments that the United States has engaged in final agency action, a prerequisite for bringing a claim under the APA, and Defendant has failed to identify any other action by the Department that constitutes final agency action under Supreme Court and Ninth Circuit precedents. The APA counterclaims of Defendants AMC and STK attempt to revisit issues already decided against them and to distract attention from the central issue in this case: that Defendants have discriminated against persons who use wheelchairs by relegating them to the worst seats in Defendants' stadium-style movie theaters.

Most of Defendant's arguments in its Opposition Brief have already been rejected by Judge Morrow in the December 17th Order. Despite Defendant's assertions to the contrary, that Order's legal conclusions that the United States has not engaged in final agency action represent binding law of the case, and there are no facts or intervening changes in the law that warrant revisiting these conclusions. Because Defendant has failed to identify any action by the United States that qualifies as final agency action under either the standards set forth in the

December 17th Order, see Dec. 17th Order at 18, or in binding court precedent, this Court should follow the law of the case and dismiss STK's APA-based counterclaim with prejudice.

STATUTORY AND FACTUAL BACKGROUND

Defendant STK attempts to rewrite the history of the Department's promulgation and enforcement of Standard 4.33.3 in its opposition to the United States' motion to dismiss. The Department disagrees with this purported history, but it is not necessary to address every inaccuracy. The most important point is that the United States has not attempted to adopt highly technical line of sight requirements under Standard 4.33.3, as Defendant erroneously alleges. See Def.'s Opp'n Br. at 2. Standard 4.33.3 requires that movie theaters provide patrons who use wheelchairs with "lines of sight comparable to those for members of the general public." See 28 C.F.R. pt. 36, Appendix A, § 4.33.3. Relegating wheelchair users to the worst seats of a stadium auditorium clearly violates that standard. The Department can only enforce this plain language interpretation of Standard 4.33.3, however, by filing an enforcement action in U.S. District Court, 42 U.S.C. § 12188(b)(1)(B), and only a court order can force Defendant to comply with that plain-language interpretation. See 42 U.S.C. § 12188(b)(1)(B).

The United States will not repeat the history of this case as laid out in its initial brief, see Br. at 2-4,[1] but will note several of the more glaring errors presented by STK as fact. First, much of Defendant's "history" focuses on the Department's enforcement of Standard 4.33.3 in the context of sports arenas, particularly two cases, Caruso v. Blockbuster-Sony Music, 174 F.3d 166, 177 (3d Cir.), vacated and superseded on reh'g, 193 F.3d 730 (3d Cir. 1999); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 758 (D. Or. 1997).[2]

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[1] Plaintiff United States' Memorandum in Support of Its Motion to Dismiss STK's Counterclaim 2-4 (hereinafter "United States' Initial Brief").

[2] But see Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997), cert. denied sub nom., Pollin v. Paralyzed Veterans of America, 523 U.S. 1003 (1998).

The District Court's December 17th Order has rejected Defendants' attempts to apply those two cases' APA analysis to the present action:

> Neither Caruso nor Independent Living addressed the issue presently before the court, i.e., whether DOJ's interpretation of Standard 4.33.3 was final agency action that could be judicially reviewed under the APA. All parties [in Caruso and Independent Living] apparently agreed that the Department's issuance of the 1994 TAM Supplement constituted final agency action; their disagreement concerned whether requiring a line of sight over standing spectators constituted a substantive or interpretative rule. . . . Unlike the Department's interpretation of the line of sight requirement at issue in Caruso and Independent Living, the interpretation it seeks to enforce in this action has not been subject of any official statement of policy or position equivalent to the TAM Supplement. Rather, AMC contends that DOJ has taken final agency action by filing an amicus brief, sending private communications to theater owners, and threatening to initiate and in fact initiating litigation against some of them. Consequently, the 1994 TAM Supplemental cases do not control decision of the issues raised in DOJ's motion to dismiss.

December 17th Order at 9. As the District Court correctly observed, unlike the sports arena cases, the Department has issued no technical assistance manual supplement or other policy directive that constitutes final agency action in this case. Therefore, Defendant's assertion that "[t]he issue of this case was decided in Caruso and Independent Living Resources," see Def.'s Opp'n Br. at 23, is simply not true.

The sports arena context is also factually distinct from the present action: in sports arenas, unlike movie theaters, spectators tend to stand up during critical moments of sporting events in order to get a better view of the field below. Because they generally cannot stand up, persons seated in wheelchairs spend key moments of sporting events staring at the backsides of persons standing in front of them, unless wheelchair seating in sports arenas provides lines of sight over standing spectators. Furthermore, in a sports arena, a patron typically has a choice of admission prices, the quality of the patron's seat and amenities provided to the patron typically

vary depending on the admission price paid, and the patron typically has multiple points of focus (for example, in a baseball stadium, the patron is likely to focus on the movement and activity of multiple players, the umpire, and the baseball). In movie theaters, however, a patron typically pays one price for admission and focuses on one stationary object — the screen where the movie is projected. These differences are important, since Standard 4.33.3 requires that wheelchair locations provide not only "lines of sight comparable to those for members of the general public" but also "a choice of admission prices." Consequently, factors relevant to determining lines of sight in sports arenas are very different from those relevant in determining lines of sight in movie theaters.

Second, Defendant erroneously asserts that the Department has adopted a complicated new formula for determining whether a movie theater offers wheelchair seating with lines of sight comparable to those for members of the general public.[3] See Def.'s Opp'n Br. at 9. Contrary to Defendant's assertions, the United States has not incorporated the Society of Motion Picture and Television Engineers (SMPTE) Guidelines for the Design of Effective Cine Theaters. The United States has simply taken a plain language approach to interpreting Standard 4.33.3: lines of sight provided to wheelchair users must be comparable to those provided to members of the general public, with comparable given its ordinary meaning of "equivalent" or "similar." See Webster's Ninth New Collegiate Dictionary (1990). The purpose of the Department's reference to SMPTE Guidelines in its amicus brief in the Lara case was to provide documentary evidence of the manner in which the motion picture theater industry measures sightlines in movie theaters and evidence of the extremely poor quality of sightlines provided to wheelchair users in the theaters at issue in that case. The United States has not adopted the SMPTE Guidelines in any way.

Third, contrary to the plain language of Standard 4.33.3, Defendant argues that "[a]t the time [Standard] 4.33.3 was adopted it contained no specific requirements for lines of sight and

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[3] Likewise, the United States has not "promulgat[ed] new line of sight requirements." See Def.'s Opp'n Br. at 18. The Standard being applied in this case is the plain language of Standard 4.33.3.

the term 'comparable' referred only to the distribution of wheelchair seating in assembly areas of more than 300 seats." Def.'s Opp'n Br. at 5. A review of the plain language of Standard 4.33.3 reveals the errors in Defendant's arguments. The regulation on its face contains several requirements for each wheelchair space, including that it provide "lines of sight comparable to those for members of the general public," that wheelchair locations be "an integral part of any fixed seating plan," that they "adjoin an accessible route," and that a companion seat be located next to each wheelchair space. See 28 C.F.R. Part 36, App. A, § 4.33.3. In addition to these requirements, when seating capacity exceeds 300, wheelchair spaces are to be dispersed in more than one location. Id. None of the other requirements is contingent on the seating capacity exceeding 300, nor could they be. See Lara v. Cinemark, 207 F.3d 783, 787-88 (5th Cir. 2000) (holding that comparable lines of seat applies to all theaters, regardless of number of seats). Certainly the drafters of Standard 4.33.3 did not intend wheelchair locations in each theater with 300 seats or less to lack companion seats so that persons who use wheelchairs cannot sit alongside their companions, or lack an accessible route so that persons using wheelchairs could not access the required wheelchair seating locations or evacuate the theater in the event of a fire or other emergency. To read the regulation as applying its requirements only to theaters with more than 300 fixed seats would fail to give effect to the regulation's other requirements, thereby violating one of the primary tenets of statutory construction that statutes and regulations should be read to give effect, if possible, to every clause. See, e.g., Heckler v. Chaney, 470 U.S. 821, 829 (1985); Rainsong Co. v. FERC, 151 F.3d 1231, 1234 (9th Cir. 1998), cert. denied, 120 S. Ct. 43, 145 L. Ed. 2d 39 (1999); Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 239 (9th Cir. 1995).

Defendant adopts the incorrect conclusion of the Independent Living Resources case to mistakenly assert that, at the time of its adoption, Standard "4.33.3 did not contain any requirements regarding lines of sight," other than a dispersal requirement for theaters with more than 300 seats. Def.'s Opp'n Br. at 5, 6 (citing Independent Living Resources, 982 F. Supp. at 743). As noted above, Defendant's reading of the regulation renders the term "lines of sight comparable" meaningless, in violation of principles of statutory construction. See Heckler, 470

U.S. at 829; Rainsong, 151 F.3d at 1234. Defendant also suggests that the lines of sight provision lacked any meaning because of the purported lack of any commentary or technical assistance provided by either the Access Board or the Department of Justice. See Def.'s Opp'n Br. at 5. As a legal matter, the lack of technical assistance with respect to an issue is not a proper defense to liability. See 28 C.F.R. § 36.507 ("A public accommodation or other private entity shall not be excused from compliance with the requirements of this part [of the regulations] because of any failure to receive technical assistance. . . .").[4]

ARGUMENT

I. STANDARD OF REVIEW

Under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (quoting Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993)). The Ninth Circuit has flatly rejected Defendant's argument, see Def.'s Opp'n Br. at 2-3, that a district court is "free to disregard the preceding orders" of another district court judge assigned to the same case. Ridgeway v. Montana High School Ass'n, 858 F.2d 579, 587 (9th Cir. 1988). Courts "should be reluctant to change decisions already made, because encouragement of change would create intolerable instability for the parties." Id. at 587.

The Ninth Circuit has identified only five narrow circumstances under which a court might depart from the law of the case: where "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially

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[4] Despite Defendant's assertions to the contrary, the United States has interpreted Standard 4.33.3 consistently. The Department articulated its plain-language interpretation of Standard 4.33.3 as applied to stadium-style movie theaters in an amicus brief filed in 1998 in a private action against another motion picture theater operator, Lara v. Cinemark USA, No. EP-97-CV-502-H (W.D. Tex.), and in a brief in 1999 in Lonberg v. Sanborn Theatres, Inc., No. CV-97-6598 AHM (BQRx) (C.D. Cal) (The United States intervened in Sanborn, a case brought by a private plaintiff.). It is Standard 4.33.3, however, and not the Department of Justice's interpretation of that Standard, that has binding legal effect.

different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." Id. The failure to apply this doctrine "absent one of the requisite conditions constitutes an abuse of discretion." Id. Defendant has failed to identify any legitimate rationale for revisiting the Judge Morrow's conclusion that the Department's activities identified by Defendants do not constitute final agency action. See discussion below, Sections II & III. Furthermore, the Northern District of Ohio has reached the same conclusion as Judge Morrow did in this Court's December 17th Order, holding that the United States' actions in attempting to enforce Standard 4.33.3 to stadium-style movie theaters do not constitute final agency action.[5] See United States v. Cinemark USA, Inc., 99-CV-705, Memorandum Opinion and Order at 12 (Mar. 22, 2000) (hereinafter "Ohio Cinemark Order (Mar. 22, 2000)") (see United States' Initial Brief, Exhibit A).

Despite the clear law of this Circuit, Defendant baldly asserts that "[t]his Court is free to decide the Dismissal Motion independent of any previous order." Def.'s Opp'n Br. at 3. Defendant cites to United States v. Byrne, 192 F.3d 888, 891 (9th Cir. 1999), an opinion that was withdrawn on January 31, 2000, and superseded on rehearing by United States v. Byrne, 203 F.3d 671 (9th Cir. 2000). Byrne analyzed whether the Double Jeopardy Clause was violated when a judge reconsidered an oral ruling granting a motion for acquittal; the case does not address the "law of the case" doctrine. See 203 F.3d at 673. Likewise, Defendant's citation to Tang v. State of Rhode Island, 163 F.3d 7, 11 (1st Cir. 1998) is inapposite. In that case, the First Circuit found that an oral comment made by one district court judge on the admissibility of certain evidence did not bind a subsequent district court judge under the law of the case doctrine. Id. at 10-11. This result turned in part on the First Circuit's practice of not applying the law of the case doctrine to interlocutory orders, id. at 11, a policy that the Ninth Circuit has rejected. See Ridgeway, 858 F.2d at 587 (holding that law of the case doctrine "applies to

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[5] A District Court in Texas is currently reviewing the oral recommendation of a magistrate judge that the Department's actions were final agency action subject to review. Cinemark v. Department of Justice, No. 99-CV-0183 (N.D. Tex.). The hearing on this issue before the District Court was held April 21, 2000.

interlocutory decisions of the same or higher tribunals"). The December 17th Order is binding law of the case.

II. No Changed Circumstances Exist to Warrant Abandoning the Law of the Case.

Defendant raises several "subsequent events" that allegedly provide grounds for ignoring the District Court's December 17th Order dismissing AMC's APA-based counterclaim. Def.'s Opp'n Br. at 10-11, 12. For example, Defendant asserts that the Fifth Circuit's decision in Lara v. Cinemark somehow justifies disregarding the December 17th Order. Id. at 11. In fact, Lara supports the conclusion that the United States has not engaged in final agency action. In Lara, a private lawsuit against a movie theater, the United States filed an amicus brief to convince the Court to adopt the Department's interpretation of Standard 4.33.3. The District Court found that the stadium-style theaters violated the ADA and Standard 4.33.3, based on its own interpretation of the plain language of the regulation. See Lara v. Cinemark, 1998 WL 1048497 (W.D. Tex. 1998) (see U.S. Initial Brief, Ex. B). The Fifth Circuit reversed the District Court, announcing its own, different interpretation of Standard 4.33.3 by holding that the regulation "does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons." See Lara, 207 F.3d 783, 789 (5th Cir. 2000). Although the Department strongly disagrees with the Fifth Circuit's conclusions as to the proper interpretation of the Department's regulation, the decision is further evidence that the Department's interpretation is not final agency action. The Fifth Circuit referred to the Department's interpretation as a "litigating position" that did not provide "specific regulatory guidance" about the meaning of Standard 4.33.3. See id. at 789. Whether or not the Fifth Circuit gave the Department's interpretation the proper level of consideration, it is plain that the Court did not believe that the interpretation fixes rights or imposes legal obligations. Absent those facts, the Department's interpretation cannot be final agency action. See Gallo Cattle Co. v. United States Dep't of Agriculture, 159 F.3d 1194, 1199 (9th Cir. 1998); Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1196 (9th Cir. 1997).

Second, Defendant's citation to recent statements made by the United States Architectural and Transportation Barriers Compliance Board ("the Access Board") are also inapposite. See Def.'s Opp'n Br. at 3, 10-11 (citing 64 Fed. Reg. 62,248, 62,278 (Nov. 16, 1999)). The Board's statement that the Department is attempting to settle particular cases where patrons who use wheelchairs are not provided comparable lines of sight is consistent with the December 17th Order's conclusion that there is no final agency action in this case. The Department's interpretation of the regulation in litigation does not determine rights or fix obligations, nor do any binding legal consequences flow from it. See Gallo Cattle Co., 159 F.3d at 1199; Ukiah Valley Medical Ctr. v. FTC, 911 F.2d 261, 264 (9th Cir. 1990). Although the Department attempts to settle or resolve violations of law without resorting to litigation, the Department cannot enforce the regulation upon an unwilling party except by filing an enforcement action in a U.S. District Court and obtaining a court order. See 42 U.S.C. § 12188(b)(1)(B); id. § 12888(b)(2); Ukiah Valley, 911 F.2d at 265 (no final agency action where party is "not yet subject to any order requiring them to act"); see also Ohio Cinemark Order at 8 (Mar. 22, 2000). This language by the Access Board mentioning recent litigation by the Department has no bearing on whether there was final agency action in this case.

Third, Defendant cites a Texas magistrate judge's oral recommendation in Cinemark v. Department of Justice, No. 99-CV-0183 (N.D. Tex.) that the United States had engaged in final agency action. See Def.'s Opp'n Br. at 12. Review of that recommendation is currently pending before a District Court in Texas, and the United States argued against its adoption at a hearing on April 21, 2000. A recommendation by the Texas Magistrate Judge—made orally on September 17, 1999—does not constitute an intervening change in law, both because it occurred prior to this Court's December 17th written order and because it currently does not have the status of law. See 28 U.S.C. § 636(b)(1) (providing that magistrate judges may be designated to conduct hearings on a motion to dismiss and to submit "proposed findings and recommendations," which the district court is to review de novo if there are objections) (emphasis added). Furthermore, at least one other district court has adopted the reasoning of this Court's Order and dismissed with prejudice all APA-based claims brought by another

movie theater chain against the Department, holding that the Department's actions did not constitute final agency action. See Ohio Cinemark Order at 6 (N.D. Ohio Mar. 22, 2000). As the Court correctly found, the Department of Justice

> has no inherent power under the Act to adjudicate. . . . If the Court were to adopt Defendant's position [on finality], the United States and the Attorney General would be subject to suit any time the Attorney General initiated an investigation or filed a complaint based on the belief that some party was unlawfully discriminating against persons with disabilities. This is an untenable position which this Court declines to adopt.[6]

See id. at 8 (citing FTC v. Standard Oil Co., 449 U.S. 232, 239 (1980)). Likewise in this case, Defendant STK's contention that the United States has violated the APA merely by offering a plain language interpretation of the statute, see Def.'s Opp'n Br. at 22-23, would turn every enforcement action into an APA challenge, because enforcing the law necessarily requires an interpretation of what the law means. As the Supreme Court has warned, "[j]udicial review . . . should not be a means of turning prosecutor into defendant." FTC v. Standard Oil Co., 449 U.S. 232, 243, 101 S. Ct. 488, 495, 66 L. Ed. 2d 416 (1980); see also Dow Chemical v. United States EPA, 832 F.2d 319, 324 n. 30 (5th Cir. 1987). In short, there has been no factual or legal development that would warrant departing from the law of the case on the APA question.

III. Defendant Has Identified No Action by the Department of Justice that Constitutes Final Agency Action.

The APA can provide a waiver of sovereign immunity in suits seeking judicial review of a final agency action, where some other statute provides subject matter jurisdiction over the United States.[7] See Gallo Cattle Co., 159 F.3d at 1198. The APA, however, does not make

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[6] Cinemark's motion to reconsider the Court's March 22nd Order is pending, and the United States has opposed the motion.

[7] Jurisdiction can be conferred under 28 U.S.C. § 1331, which permits challenge to federal agency action for claims arising under federal law, unless a statute expressly precludes review. See Gallo Cattle Co., 159 F.3d at 1198. In this case, 5 U.S.C. § 704 permits

every agency action subject to judicial review. See Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole, 948 F.2d 953, 956 (5th Cir. 1991); see also Heckler, 470 U.S. at 828. For Defendant STK to have a claim under the APA, it must identify "final agency action." 5 U.S.C. § 704; see also Ukiah Valley Med. Ctr., 911 F.2d at 264. As fully briefed previously, there has been no final agency action here. See United States' Initial Br. at 12-17.

Citing Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41, 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967),[8] STK argues that the Court should permit its APA-based counterclaim because "[t]he Supreme Court has directed the federal courts to accord a 'generous' and 'hospitable' interpretation to the review provisions of the APA." Def.'s Opp'n Br. at 13. Abbott Laboratories does not eliminate the requirement that an APA claim can only challenge final agency action. As the Ninth Circuit has explained, "a finding of finality, or an applicable exception, is essential when the court's reviewing authority depends on one of the many statutes permitting appeal only of 'final' agency actions, such as § 10 of the APA, 5 U.S.C. § 704."[9] Ukiah Valley Medical Ctr., 911 F.2d at 264. Administrative actions are only final and thereby reviewable under the APA when the agency action imposes an obligation, denies a right, or fixes a legal relationship that creates a consummation of the administrative process. Id.

None of the Department's actions in this case constitute final agency action, and Defendant has failed to identify any new specific action that might qualify as final agency

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review of "final" agency actions.

[8] In 1977, the Supreme Court in Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977) overruled the suggestion in Abbott Laboratories that the APA provided an independent grant of subject matter jurisdiction.

[9] The Ukiah Court noted that "[f]inality in administrative law is sometimes treated as an aspect of the doctrine of ripeness, and sometimes as an independent jurisdictional requirement." Id. at 264 n.1. The Court added, however, that "while exhaustion and ripeness are judge-made prudential doctrines, finality is, where applicable, a jurisdictional requirement." Id. (citations omitted).

action that has not already been rejected by the December 17th Order or by binding Supreme Court and Ninth Circuit precedent. See December 17th Order at 14 ("Thus, viewed separately or in combination, the matters [Defendant] AMC characterizes as final agency action are not the kind of actions that are subject to judicial review under the APA."). See also United States' Initial Br. at 12-17.

In its opposition brief, Defendant asserts that it is not challenging the United States' filing of this lawsuit but rather the United States' "adoption of new line of sight requirements." Def.'s Opp'n Br. at 22. As noted previously, see page 4 supra, the United States has not adopted SMPTE or any other highly technical line of sight requirements. Instead, the United States' is alleging that the Defendants have violated the plain language of Standard 4.33.3, which requires that movie theaters provide to patrons who use wheelchairs lines of sight "comparable" to those offered to the general public. Defendant fails to identify any specific action that the United States has taken other than its nebulous assertion that the United States has purportedly "adopt[ed]" new line of sight requirements. To assert an APA claim, Defendant has an obligation to identify a specific final agency action that provides the basis for its claim. See ONRC Action v. Bureau of Land Management, 150 F.3d 1132, 1137 (9th Cir. 1998) (rejecting APA claim on the ground that party "cannot point to a deliberate decision by [the agency] to act or not to take action"); see also Lujan v. National Wildlife Federation, 497 U.S. 871, 891, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) ("Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm."); Ecology Center, Inc. v. United States Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999) (requiring plaintiff to identify "concrete action").

The December 17th Order rejected AMC's attempts to label the United States' actions as "final agency action," including the United States' filing of amicus briefs articulating its interpretation of Standard 4.33.3, its attempts to settle cases with theater owners, and the initiation of litigation such as the present action. See December 17th Order at 8, 11. STK fails to identify any new or different specific action taken by the Department that qualifies as final agency action. The Ninth Circuit requires that a party bringing an APA claim must point to an

"identifiable agency order, regulation, policy or plan that may be subject to challenge as final agency action." See ONRC Action, 150 F.3d at 1136. Defendant simply challenges the Department's plain language interpretation. See Def.'s Opp'n Br. at 22-23. Defendant's argument, however, has already been rejected by the Court. See Dec. 17th Order at 11 ("The filing of the brief [in Lara] and articulation of an interpretation of Standard 4.33.3, therefore, did not constitute final agency action subject to judicial review.") (emphasis added). As noted previously, the Department's interpretation fixes no rights and imposes no legal obligations; only a court order can require STK to follow the law. See 42 U.S.C. §§ 12188(b)(2); Ohio Cinemark Order (Mar. 22, 2000) ("Any order for relief, damages, or levying of a fine can only be made by the district court, not by the Attorney General."). Therefore, the Department's interpretation is not final agency action. See Gallo Cattle Co., 159 F.3d at 1199; Bennett v. Spear, 520 U.S. 154-, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

STK repeats an argument made previously by AMC that the Court should allow its APA claim because the Department will argue that its interpretation of Standard 4.33.3 is entitled to deference. See Def.'s Opp'n Br. at 18. The fact that the views of the Department of Justice on the meaning of the ADA and its implementing regulations are entitled to deference[10] does not change the analysis of whether final agency action exists and therefore whether sovereign immunity has been waived. The deference accorded to the Department as a matter of law does not mean that every time the Department expresses its views it subjects itself to an APA lawsuit. Rather, the appropriate step for a litigant like STK that disagrees with the Department's views is to convince the Court of the accuracy of its own contrary interpretation.

Defendant cites for support National Automatic Laundry & Cleaning Council, 443 F.2d 689 (D.C. Cir. 1971), for the proposition that the United States has engaged in final agency action. The December 17th Order has already rejected this contention, holding that communicating with ten members of the theater industry nationwide does not establish a

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[10] See, e.g.,Olmstead v. Zimring, 527 U.S. 581, ___, 119 S. Ct. 2176, 2185-86 & 2185 n.9 (1999); see also Bragdon v. Abbott, 524 U.S. 624, 642, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998); Auer v. Robbins, 519 U.S. 452, 461-62, 117 S. Ct. 095 (1997).

situation similar to that in the National Automatic Laundry case. See December 17th Order at 17. Furthermore, the facts of this case differ from National Automatic Laundry. In that case, an official at the Department of Labor issued a ruling in 1963 that coin-operated laundrettes were not covered under one exemption of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. for laundry establishments, but that they might qualify for another exemption for conventional retail or service establishments. See 443 F.2d at 691-92. Following amendments to the Fair Labor Standards Act specifying that laundry establishments could not qualify for the retail exemption, an industry group wrote to the head of an agency at the Labor Department asking if the prior 1963 ruling still applied. Id. at 691-92, 700. The official responded with a new ruling finding that the amendments covered coin-operated laundrettes and therefore the old ruling no longer was good law. Id. at 692. The Court found the second ruling final agency action, noting that "[w]hen a published interpretation represents the initial views of an agency, approved by the Commission or person who heads the agency, when it is the product of the process provided by the agency for taking into account the position of agency staff as well as the outside presentation, when the interpretation is not labeled as tentative or otherwise qualified by arrangement for reconsideration," the agency action is final. Id. at 702. But see Zaharakis v. Heckler, 744 F.2d 711, 712 (9th Cir. 1984) (holding that interpretive rules do not "grant rights [or] impose obligations"); Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (same).

The narrow factual situation presented by National Automatic Laundry does not apply to this case: the only final agency action here was the promulgation of Standard 4.33.3 in 1991, which Defendant does not challenge. The Department's decision to enforce the plain language of the law simply does not fall within the facts provided by National Automatic Laundry as an example of an agency issuing a published ruling to an industry. The Department has issued no ruling signed by the head of the agency that announces a new standard in conflict with a prior published ruling. See id. at 702.

Indeed, the Fifth Circuit distinguished National Automatic Laundry in the case Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole, 948 F.2d 953 (5th Cir. 1991).

In Taylor-Callahan-Coleman, a county investigated by the Department of Labor for violations of the Fair Labor Standards Act sought declaratory judgment against the agency by claiming that the Department had issued inconsistent opinion letters without following the notice and comments procedures required by the APA. See id. at 954-55, 957. The Court found that such advisory opinions were "neither final nor binding on employers or employees" and were limited to the factual situation presented by the requesting party. Id. at 957. The Court observed that such "opinions are intended to guide DOL officials in similar situations, [and therefore] they surely are carefully reasoned. Nevertheless it is the regulations, not the opinion letters, which fix rights. . . ." Id. at 958. It distinguished National Automatic Laundry, without reaching the question of whether it conflicted with Fifth Circuit precedent, id. at 958, by observing that the opinion letters in Taylor-Callahan-Coleman were not directed at a trade association and addressed inquiries specific to individual entities. See id. at 958-59.

Similarly in this case, the Department's attempts to negotiate settlements with individual theaters owners whom it believes to be in violation of the plain language of the law do not constitute final agency action that binds the industry.[11] These efforts "do not have the status of law with penalties for noncompliance." See id. at 959. Indeed, this Court has already determined that investigating and litigating against approximately ten members of the theater industry nationwide "does not establish that DOJ has engaged in final agency action." See December 17th Order at 17. This ruling is consistent with the Ninth Circuit's determination that negotiations "are not final action, [and] therefore are not reviewable." See Association of Public Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, 1184 (9th Cir. 1997).

The case of Independent Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132 (D.C. Cir. 1970) cited by STK is also distinguishable. See Def.'s Opp'n Br. at 20. In that case, the chairman of the SEC made a written request pursuant to the Securities Exchange Act that the New York Stock Exchange change the manner in which minimum commission rates were set.

[11] On April 12, 2000, this Court held in a written order that settlement negotiations between the United States and other theaters are privileged and not subject to discovery.

Id. at 136. The Exchange responded with a counterproposal that included abolishing "customer-directed give-ups of brokerage fees," in which a securities broker surrendered part of his or her commission to another broker. Id. at 136, 134-35. This practice developed in part to avoid the Exchange's rigid minimum rate schedule. Id. at 135. The Commission accepted the counterproposals, and the Exchange voted to abolish these "give-ups." An association of securities broker sued the SEC, but not the Exchange, for ending "give-ups." A majority of the panel held that although the court had jurisdiction under the APA to review the association's APA claim, the merits of the association's arguments were "insubstantial;" the court therefore dismissed the association's complaint with prejudice. Id. at 387.

On the jurisdiction issue, the majority held that the SEC "had injected itself, without legal justification, into an area of business relationships and ha[d] asked one of the parties to the relationship to terminate or modify it." Id. at 145. In this case, however, the Department is simply trying to enforce the plain language of the regulation, and to allow an APA claim every time the Department attempted to enforce the law would eviscerate the protections afforded to individuals with disabilities under the ADA. This case is further distinguished from Independent Broker-Dealers because Defendant STK has a "remedy" in this case—it can offer its own interpretation of what it believes Standard 4.33.3 requires. In contrast, in Independent Broker-Dealers, the Court found that the association had no available alternative remedy. Id. at 140. Finally, to the extent the majority opinion holds that recommendations by an agency constitute final agency action, the Ninth Circuit has rejected that contention. See Ecology Center, Inc., 192 F.3d at 925 ("agency recommendations are not reviewable as final agency actions").

Although Defendant claims that the Ninth Circuit has recognized that informal agency action can constitute final agency action, Def.'s Opp'n Br. at 21, the Ninth Circuit has not abandoned the requirement that agency action is only reviewable if it has the indicia of finality: i.e., that it is an agency action "by which rights or obligations have been determined, or from which legal consequences will flow." Gallo Cattle Co., 159 F.3d at 1199; see also Ecology Center, Inc., 192 F.3d at 922. Therefore, Defendant's attempts to characterize the Department's

interpretation as "informal agency action," see Def.'s Opp'n Br. at 21, does not change the fact that the United States' interpretation does not bind Defendant's activities. For example, Southern California Aerial Advertisers' Ass'n v. FAA, 881 F.2d 672, 675 (9th Cir. 1989), involved a letter by the FAA banning a route frequently used by fixed-wing aircraft. The Court found this letter to be a final agency action for purposes of conferring jurisdiction. Id. at 676. In contrast, in this case it is Standard 4.33.3, and not the Department's plain language interpretation, that binds Defendant's conduct, and Defendant has not challenged the promulgation of Standard 4.33.3.

Finally, STK errs when its suggests that the Department "provided theatre owners with its interpretation of Section 4.33.3 line of sight requirements" in the settlement agreement with United Artist, somehow implicating the APA analysis in this case. See Def.'s Opp'n Br. at 8. The Department's settlement agreement with United Artists is nothing more than a contract embodying a compromise on terms mutually agreed upon by the parties to that agreement. It is not, and does not purport to be, a definitive statement of the Department's position on the interpretation of Standard 4.33.3 having the status of law, nor can it have the effect of amending the plain language of the regulation. Since STK was not a party to the settlement agreement and since the settlement agreement can be in no way binding on, or enforceable against, STK, the Department's entry into the settlement agreement is simply not an action "by which [STK's] rights or obligations have been determined, or from which legal consequences [for STK] will flow." Gallo Cattle Co., 159 F.3d at 1199.

IV. Further Discovery Will Not Reveal Any Final Agency Action

Rather than identifying a specific action that it believes constitutes final agency action, STK claims that further discovery is needed because the United States, and presumably STK, "cannot possibly know what discovery will reveal." Def.'s Opp'n Br. at 14. STK has not alleged a single new fact that the Department took "final agency action" after the December 17th Order when the Court held that there was no final agency action in this case. Defendant is not entitled to a discovery fishing expedition in an attempt to create a cause of action where none

exists, especially because STK "points to nothing tangible that it could explore" through additional discovery.[12] See Grolier Inc. v. FTC, 699 F.2d 983, 987 (9th Cir. 1983).

Defendant cannot even identify a specific, concrete action taken by the Department that constitutes final agency action, as required by Supreme Court and Ninth Circuit precedent. See National Wildlife Federation, 497 U.S. at 891; Ecology Center, Inc., 192 F.3d at 926; ONRC Action, 150 F.3d at 1137. Supported by binding precedents, this Court has already found that the only specific action alleged to have been taken by the Department in enforcing Standard 4.33.3 in movie theaters—i.e. filing briefs, initiating lawsuits, or entering settlement negotiations—do not constitute final agency action.[13] The Court should therefore dismiss STK's counterclaim with prejudice.

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

Because the Department has not engaged in final agency action, the court need not reach the question of whether an adequate remedy in court exists because the Court lacks jurisdiction to hear STK's APA-based counterclaim. See 5 U.S.C. § 704; see also Gallo Cattle Co., 159

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[12] It is axiomatic that in cases alleging APA violations, review is typically limited to the administrative record, rather than creating a new record through discovery. See Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973); Friends of the Earth v. Hintz, 800 F.2d 822, 828 (9th Cir. 1986). Nonetheless, the Department has provided Defendants with thousands of pages of discovery in response to Defendants' expansive discovery requests relating to their APA counterclaim, see Declaration of Stephanie L. Stoltzfus, ¶¶ 2-5 (Exhibit A) (previously filed as with the United States' April 28th Opposition Brief to Defendant's Ex Parte Application).

Furthermore, in May the Magistrate Judge tentatively denied much of Defendants' motion to compel further discovery, finding that many of the documents Defendants sought are privileged or not relevant. The Magistrate invited the parties to comment on his proposed written order; the parties have submitted their comments, and the Department anticipates a final order soon. Regardless of the ultimate outcome of this pending discovery dispute, however, Defendants have not identified any agency action that qualifies as final for purposes of their APA counterclaims.

[13] For further analysis of this issue, see the Department's initial brief at 17-19, and this Court's December 17th Order at 7-14.

F.3d at 1198; New Jersey Hosp. Ass'n v. United States, 23 F. Supp. 2d 497, 500, 501 (D. N.J. 1998). Even if the Department's interpretation of Standard 4.33.3 were final agency action, however, the Court still lacks jurisdiction because STK has an "adequate remedy" in a court. 5 U.S.C. § 704; see also Marshall Leasing, Inc. v. United States, 893 F.2d 1096, 1110 (9th Cir. 1990). In defending this action, STK is free to argue that the Department's interpretation of Standard 4.33.3 is incorrect, and therefore should not be applied to STK. See, e.g., New Jersey Hospital Ass'n, 23 F. Supp. 2d at 51.

Defendant asserts that the mere fact that the Department has filed a lawsuit against it causes it harm to its reputation that proves it has no adequate remedy at law. See Def.'s Opp'n Br. at 23-24. This standard would turn every lawsuit by the Department of Justice to enforce its federal civil rights laws into an APA-claim, if the harm to reputation of being accused of discriminating were sufficient grounds to invoke this Court's jurisdiction under the APA. This argument has been soundly rejected by the courts. See Ukiah Valley Medical Ctr., 911 F.2d at 264 (holding that conclusory statements of party that litigation creates a cloud of uncertainty that hurts company is not sufficient effect to show final agency action); California ex rel. Christensen v. FTC, 549 F.2d 1321, 1323 (9th Cir. 1977) (holding that litigation expenses are the normal incident of agency process, do not constitute irreparable harm, and are insufficient to provide basis for judicial intervention pursuant to APA); California Dep't of Educ. v. Bennett, 833 F.2d 827, 834 (9th Cir. 1987) (possible financial loss is not sufficient to provide jurisdiction of APA claim); First Nat'l Bank v. Steinbrink, 812 F. Supp. 849, 853-54 (N.D. Ill. 1993) (expense or inconvenience of defending oneself does not make defense an inadequate remedy).

San Antonio Community Hospital v. Southern California Dist. Council of Carpenters, 125 F.3d 1230 (9th Cir. 1997) is not to the contrary. In that case, the Court held that a union's fraudulent statements suggesting that a hospital was infested with rodents warranted a preliminary injunction against the union. Id. at 1235-36. As a prerequisite to allowing an injunction, the Court required a showing of irreparable injury and no adequate legal remedy. Id. at 1237. The Court noted that the hospital had experienced a 200 patient per month drop in

maternity preadmissions since the Union began carrying a banner near the hospital alleging that the hospital was "full of rats." Id. at 1238, 1236. This case does not stand for the proposition that every potential harm to reputation is irreparable or that there will be a lack of an adequate remedy at law. Nor does the case provide any guidance in determining whether an agency action is final for purposes of conferring jurisdiction under the APA.

CONCLUSION

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

Respectfully submitted,

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Dated: June __, 2000

PROOF OF SERVICE

I, John Albert Russ IV, declare:

I am over the age of 18 and not a party to the within action. I am employed by the U.S. Department of Justice, Civil Rights Division, Disability Rights Section. My business address is P.O. Box 66738, Washington, D.C. 20035-6738.

On June ___, 2000, I served

PLAINTIFF UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS DEFENDANT STK'S COUNTERCLAIM

on each person or entity named below by sending a facsimile copy to their office, and by enclosing a copy in an envelope addressed as shown below and by sending it via overnight mail to the following addresses:

Date and Place of mailing: June ___, 2000, Washington, D.C.

Person(s) and/or Entity(ies) to Whom mailed:

Gregory F. Hurley, Esq.
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: June ___, 2000, at Washington, D.C.

_____
John Albert Russ IV