

I. INTRODUCTION

Cinemark USA, Inc. constructed and operates the Tinseltown USA theater, a 20 auditorium, "stadium-style" seating motion picture theater in El Paso, Texas, and currently plans to construct and operate a second theater in El Paso with the same seating plan. Stadium-style seating, as the name suggests, has the look and feel of a sports stadium. Seating is placed on level tiers with each row/tier elevated approximately 16 inches above the row/tier immediately ahead. While traditional-style seating is situated on a sloped floor, stadium-style tiers are accessed by stepped, rather than sloped, aisles. The result for the viewer in the stadium seating is sight lines that are far superior to those found in traditional movie theater seating. As Cinemark itself heralded in a recent press release, stadium style seating:

offer[s] a sixteen-inch height difference between each row, allowing greater visibility and enhanced, unobstructed sight lines to the screen. ... [A stadium style theater] boasts ... wall-to-wall screens, high-back lounge rocking chair seats with extra padding and cupholder armrests, as well as a forty-five inch clearance between rows for extra leg room, offering significantly more comfort for the patron.¹

In total, the stadium style seating gives patrons a better, more comfortable viewing experience.

In 18 of the 20 auditoriums in the Tinseltown USA theater, wheelchair users are denied access to the stadium-style seating. Rather than enjoying improved, unobstructed sight lines, wheelchair users are relegated to the very front of the theater, in traditional seating that is much closer to the screen and not raised off the floor at all. The result: wheelchair users are denied the experience and improved sightlines of the stadium seating.

Faced with these facts, eight individuals with disabilities and two disability advocacy

¹"Tinseltown Opens in West Monroe, Louisiana," Press Release, dated June 23, 1998 (attached hereto as Exhibit 4) at 1.

groups, VOLAR Center for Independent Living and ADAPT, brought a private suit against Cinemark. The complaint alleges that Cinemark's Tinseltown USA theater in El Paso fails to provide "appropriately" integrated seating for people with disabilities in 18 of its 20 auditoriums, relegating wheelchair seats to the front of the auditoriums. Plaintiffs further allege that the wheelchair seats in the front of the auditoriums are inferior to other seats in the auditoriums that are available to persons who are not disabled. Additionally, Plaintiffs allege a lack of appropriate signage at the theater. Plaintiffs also seek injunctive relief to prevent Cinemark from building a second planned stadium-style theater complex in West El Paso with the same or similar design flaws. Plaintiffs seek declaratory and injunctive relief, monetary damages under state law, and attorneys' fees.

The United States is participating as amicus curiae in this case of first impression to provide the Court with the United States' interpretation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189, and its implementing regulations in an effort to assist the Court in evaluating whether wheelchair seating in Defendant's stadium-style seating movie theaters complies with the ADA. Because the Department of Justice enforces Title III of the ADA, provides ADA technical assistance, and issued the regulations at issue in this case, the United States is in a unique position to assist this Court in applying the law to the facts presented here. As the Supreme Court has stated recently: "As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference." Bragdon v. Abbott, 66 U.S.L.W. 4601, 1998 WL 332958 at *14 (U.S. 1998); see also Auer v. Robbins, 117 S.Ct. 905, 911-12 (1997) (agency position entitled to deference even if offered in an amicus brief).

II. STATEMENT OF FACTS

1. Defendant Cinemark USA, Inc. is a public corporation headquartered in Dallas, Texas, which owns and operates motion picture theaters throughout the United States. Defendant owns, operates and has designed and constructed the Tinseltown USA movie theater, a 20 auditorium motion picture theater at 11855 Gateway Boulevard West in El Paso, Texas. The El Paso Tinseltown USA movie theater opened for business in September, 1997. Defendant Cinemark USA, Inc.'s First Amended Answer (filed with the Court and attached hereto as Exhibit 1), ¶¶ 1, 21, 24; April 21, 1998 Affidavit of Don Harton (attached hereto as Exhibit 2), ¶¶ 2, 3; see also Defendant's Statement of Material, Undisputed Facts, ¶ 6.

2. The El Paso Tinseltown USA movie theater features stadium-style seating in all auditoriums, where seating is placed on level tiers with each row/tier elevated approximately 16 inches above the row/tier immediately ahead of it. Exhibit 1, ¶ 21; see also Defendant's Statement of Material, Undisputed Facts, ¶ 6. In addition, in the very front of each auditorium there are three or four rows of traditional-style seating, situated on a sloped floor directly in front of the screen, followed by at least ten rows of stadium-style seating. Exhibit 1, ¶ 24; see also Defendant's Statement of Material, Undisputed Facts, ¶ 7, 8.

3. In eighteen of the twenty auditoriums, there are no wheelchair locations within the stadium-style seating. Exhibit 1, ¶ 24; see also Defendant's Statement of Material, Undisputed Facts, ¶ 7, 8.

4. The Society of Motion Picture and Television Engineers ("SMPTE") has issued engineering guidelines for theater design, "SMPTE Engineering Guideline Design of Effective Cine Theaters, EG 18-1994" ("SMPTE Guideline") (attached hereto as Exhibit 3). Among other things, the SMPTE Guideline describes "line of sight" as the measurements, expressed in degrees

of angles, of the viewer's horizontal and vertical field of vision to the viewing screen. The vertical viewing angle is the angle formed by the intersection of a line horizontal with eye level (a straight-ahead view) and a line from eye level to the top of the viewing screen. As an example, a straight-ahead view would be zero degrees; an object located ten degrees above this straight-ahead view would require the viewer to look up and would be at a positive angle, (e.g., +10 degrees); an object located ten degrees below this straight ahead view would require the viewer to look down and would be at a negative angle (e.g., -10 degrees). The horizontal line of sight is the angle measured between a line perpendicular to the seat (again, a straight-ahead view) and the centerline of the screen. Exhibit 3 at 1-5.

5. The SMPTE guideline, based on anthropometric data and numerous studies, establishes that physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds +35 degrees, while the vertical range of "easy head movement" is +30 degrees. Exhibit 3 at 1-5. Physical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction. Exhibit 3 at 5.

6. The SMPTE Guideline also recognizes that "the normal line of sight is 12 to 15 degrees *below* the horizontal" (or -12 to -15 degrees) (emphasis added). Exhibit 3 at 5. Because of this, the "optimum viewing zone" is from horizontal at eye level (0 degrees) to -30 degrees. Exhibit 3 at 2, fig. 1. The SMPTE Guideline therefore recommends that, to avoid excessive vertical viewing angles and to bring the vertical viewing angle closer to zero degrees, seat backs should be tilted the same amount, 12 to 15 degrees. Exhibit 3 at 5.

7. Cinemark improves the line of sight in its non-wheelchair seating by providing fixed and rocker seats that tilt back.

III. ARGUMENT

A. The ADA Requires That in Newly Constructed Theaters, Wheelchair Seating Locations Be an Integral Part of the Fixed Seating Plan and Provide Lines of Sight Comparable to Those Offered to the General Public

Congress, in enacting the ADA, found that architectural barriers constituted one of the types of discrimination "continually encounter[ed]" by individuals with disabilities. 42 U.S.C. § 12101(a)(5). To address this form of discrimination, Congress mandated that all commercial facilities and public accommodations designed and constructed after January 26, 1993, be "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a). Congress intended strict adherence to the new construction requirements so that, "over time, access will be the rule rather than the exception." H.R. Rep. 485, Part 3, 101st Cong., 2d Sess. 63 (1990). "The ADA is geared to the future Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible." *Id.* (emphasis added).

Section 303 of the ADA requires that newly constructed facilities be "readily accessible to and usable by individuals with disabilities . . . in accordance with standards set forth . . . in regulations issued under this subchapter." 42 U.S.C. § 12183(a). The architectural standards called for by the statute are included in the Department of Justice's regulation implementing Title III of the ADA, 28 C.F.R. Part 36 at Appendix A, and are known as the Standards for Accessible Design ("the Standards"). Because the El Paso Tinseltown USA movie theater falls within the "new construction" definition (Facts ¶ 1), it must comply fully with the new construction provisions of the Standards.

The statute unambiguously evidences Congress' intent that persons with disabilities who utilize public accommodations be provided with an experience that is equivalent to that of the

general public. Section 302 of the ADA evidences Congress' intent that persons with disabilities be given equal access to goods and services so that they share with the general public the right to fully participate in those goods and services. The ADA makes it illegal to "subject an individual or class of individuals on the basis of a disability ... to a denial of the opportunity ... to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations" of the entity. 42 U.S.C. §§ 12182(a) and 12182(b)(1)(A)(i). It is similarly illegal to provide a good or service that "is not equal to that afforded to other individuals." 42 U.S.C. §§ 12182(a) and 12182(b)(1)(A)(ii). Finally, and perhaps most telling, Congress made it illegal to provide individuals with disabilities who use wheelchairs with a good, service or facility that is different and/or separate from that provided to other individuals. 42 U.S.C. §§ 12182(a) and 12182(b)(1)(A)(iii) (Emphasis added).

Among other things, the Standards set requirements for the number, size, location, and other attributes of wheelchair seating locations for newly constructed movie theaters. The Standards specifically address the placement of wheelchair seating locations in newly constructed assembly areas, including movie theaters, using straightforward language:

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

28 C.F.R Part 36, Appendix A, § 4.33.3 (emphasis added). Thus, the regulation unambiguously instructs that wheelchair locations must be an integral part of the fixed seating plan and also must provide lines of sight that are comparable to those provided to the general public.

B. In 18 of Cinemark's 20 Auditoriums, Wheelchair Seating Locations Are Not an "Integral Part of the Fixed Seating Plan"

Cinemark emphasizes in the marketing of its Tinseltown theaters that the product it is

providing or selling to the public is stadium-style seating. As Cinemark stated in a recent press release issued regarding the opening of a Tinseltown theater in West Monroe, Louisiana:

The new complex will feature stadium-style seating in every auditorium, offering a sixteen-inch height difference between each row, allowing greater visibility and enhanced, unobstructed sight lines to the screen [as compared to traditional style movie theaters]. Stadium seating is a relatively new phenomenon in movie theatres. Over the last two years, it has become the standard in new theatre construction. Cinemark has been on the leading edge of this trend and currently operates 42 locations with stadium seating worldwide, including Tinseltown in Baton Rouge. Cinemark will also be opening an all stadium seating theatre in Shreveport before the end of this year.

Tinseltown West Monroe boasts seventeen wall-to-wall screens, high-back lounge rocking chair seats with extra padding and cupholder armrests, as well as a forty-five inch clearance between rows for extra leg room, offering significantly more comfort for the patron.²

While stadium-style seating is the product that Cinemark offers, it denies access to the stadium to persons with disabilities who use wheelchairs in 18 of its 20 auditoriums. It is undisputed that there are no wheelchair locations in any of the stadium-style portion in these 18 auditoriums; instead, wheelchair seating is relegated to the front rows on the sloped floor immediately in front of the screen. Facts, ¶¶ 2-3. Consequently, it is beyond dispute that wheelchair locations are not "an integral part" of the stadium's "fixed seating plan" and Cinemark has therefore violated the ADA. 28 C.F.R Part 36, Appendix A, § 4.33.3.

C. Cinemark Must Provide Wheelchair Locations with Lines of Sight That Are Comparable to Those Offered to Members of the General Public.

As noted, the regulations implementing the ADA state plainly that wheelchair areas in buildings such as movie theaters must provide people with physical disabilities "lines of sight comparable to those for members of the general public...." 28 C.F.R Part 36, Appendix A, § 4.33.3. "Lines of sight" are described by the movie industry itself, and this concept provides a

²Exhibit 4 at 1.

way of measuring the quality of the movie viewing experience. Facts ¶ 4-6. The vertical field of vision (to the top and bottom of the screen), horizontal field of vision, and other similar factors are measured to ensure that the viewer has a line of sight that approaches an optimal viewing zone. Id. These same factors are used to determine whether the viewer has a line of sight that results in physical discomfort. Id. Therefore, the industry's own guideline acknowledges the importance of comparing the quality of the viewing experience by evaluating the lines of sight provided to patrons. Id.; see Exhibit 3.

Once measured, the lines of sight provided to wheelchair users must be comparable to those provided to members of the general public. "Comparable" is an ordinary word used in everyday parlance. Grider v. Cavazos, 911 F.2d 1158, 1161-62 (5th Cir. 1990) (courts forbidden from tampering with plain meaning of words in ordinary lay and legal parlance). Webster's defines "comparable" as "capable of or suitable for comparison; equivalent; similar." Webster's Ninth New Collegiate Dictionary (1990) (emphasis added). Consistent with this practical definition, the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public.³ In other words, to ensure that

³See 28 C.F.R. Part 36, §§ 36.202, 36.203, 36.302 (As a general rule, the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons); see also discussion of § 302 supra, at 6.

wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in the industry guidelines, "viewing angles" refers to vertical viewing angles, horizontal viewing angles and to other components that affect "lines of sight." See Exhibit 3 at 1-5.

As noted earlier, because Cinemark has not provided wheelchair locations within the stadium style seating, they have failed as a matter of law to provide wheelchair seating that is an integral part of the fixed seating plan. Moreover, if the sight lines of the wheelchair locations (which are outside the stadium, in traditional seating on the floor and close to the screen) are inferior to those provided to the majority of the general public in the stadium, they are not comparable. Therefore, during the liability stage of the proceedings, the analysis of sight lines described above may not be necessary. However, the United States urges that in fashioning a remedy for any violation, a sight line analysis of the type described above is necessary to determine whether wheelchair locations in the stadium are comparable.

Again, this is a case of first impression. The few courts that have analyzed the issue of "comparable lines of sight" under Section 4.33.3 have all correctly assumed, without stating explicitly, that comparable means similar or equal. The specific question each court grappled with arose in the context of sports arenas where it was expected that spectators would stand during all or part of an event. The question presented was whether that similarity continued when spectators in front of the wheelchair locations stood, blocking the sightlines of people in wheelchairs. E.g., Paralyzed Veterans of America v. Ellerbe Becket Architects and Engineers, P.C., 950 F. Supp. 393, 400, n.16 (D.D.C. 1996) (finding that "comparable" included lines of sight over standing spectators), aff'd, 117 F.3d 579, 580-81 (D.C. Cir. 1997) (same), cert. denied,

118 S. Ct. 1184 (1998); United States v. Ellerbe Becket, Inc., 976 F. Supp. 1262 (D. Minn. 1997) (same); Caruso v. Blockbuster-Sony Music Entertainment Centre, 968 F. Supp. 210 (D. N.J. 1997) (finding that comparable did not mandate lines of sight over standing spectators); Independent Living Resources v. Oregon Arena Corporation, 982 F. Supp. 698 (D. Or. 1997) (same). In each of these decisions, there was no question that sight lines for those in wheelchairs and those not in wheelchairs had to be similar in quality; instead, the issue presented was whether wheelchair sight lines were required to be similar to seated spectators whose sightlines were blocked by a standing spectator in the row ahead, or to standing spectators who could see over another standing spectator ahead. In the present case, there is only one group to compare to: members of the public sitting in non-wheelchair locations. Thus, these cases, by implicitly adopting the notion of similarity, support the reasonable interpretation of the Department.

The reasonableness of the Department's reading of the "comparable" lines of sight language of the Standards is underscored by the language and purpose of the statute itself. See discussion of § 302 supra, at 6. Each of these statutory provisions is consistent with the common-sense meaning of comparable: wheelchair locations must be provided with sight lines that are within the range of viewing angles provided in the stadium style seating, adjusted for seat tilt.

V. CONCLUSION

For the reasons set forth above this Court should grant summary judgment on the issue of liability to the Plaintiffs, finding that Defendant has violated the ADA in its construction and operation of the El Paso Tinseltown motion picture theater, because its wheelchair locations do not comply with the ADA or its implementing regulation.

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