No. 99-56221

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN LONBERG AND RUTHEE GOLDKORN,

Plaintiffs-Appellants

v.

SANBORN THEATERS, INC.;
SALTS, TROUTMAN & KANESHIRO, INC.; and
WEST COAST REALTY INVESTORS, INC.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

BILL LANN LEE
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3876

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IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE SOURCE OF THE AUTHORITY TO FILE

The United States files this brief pursuant to Fed. R. App. P. 29(a). This appeal raises questions about the proper standard for determining whether architects are liable under Title III of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (Title III), when they design facilities that fail to comply with the ADA's accessibility requirements. The Department of Justice enforces Title III. 42 U.S.C. 12188(b). Pursuant to 42 U.S.C. 12186(b) and 12206(c)(3), the Department also has issued regulations and a Technical Assistance Manual interpreting Title III. See 28 C.F.R. Pt. 36; ADA Title III Technical

Assistance Manual (Nov. 1993). The Department has construed the statute as imposing liability on architects who design inaccessible facilities, id. § III-5.1000, and has brought a number of lawsuits against architects under Title III. This Court's decision, therefore, could affect the Department's enforcement of the statute.

STATEMENT OF JURISDICTION

The United States agrees with the jurisdictional statement in Appellants' brief. As Appellants point out, their notice of appeal was timely because it was filed within the 60-day period of Fed. R. App. P. 4(a)(1)(B), which states:

> When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

Appellants had 60 days, rather than 30 days, to file their notice of appeal because the United States was a party to the case. Although the government was not yet a party on November 17, 1998, when the district court granted summary judgment to Salts, Troutman & Kaneshiro, Inc. (STK) (E.R. 113), the United States intervened in the case on March 29, 1999 (R. 148, 156), prior to entry of final judgment for STK on May 11, 1999 (E.R. 174).[1] By intervening, the United States became a party for

[1] "E.R. __" refers to the page number of the Appellants' Excerpts of Record. "R. __" indicates the entry number on the district court docket sheet.

purposes of Rule 4(a). United Steelworkers of America v. Jones & Lamson Machine Co., 854 F.2d 629, 630 (2d Cir. 1988).

STK has filed a motion to dismiss the appeal, however, arguing that the 60-day period of Rule 4(a)(1)(B) is inapplicable because the United States was not a party at the time the district court granted summary judgment to STK and because the United States did not assert a claim against STK after intervening in the case. Those arguments are meritless because they read limitations into the rule that do not appear in its plain language.

"[T]he 60-day deadline is applicable if the United States was a party to the action at any stage of the litigation." Cohen v. Empire Blue Cross & Blue Shield, 176 F.3d 35, 40 (2d Cir. 1999) (emphasis added). Rule 4(a)(1)(B) focuses on the "judgment or order appealed from." Fed. R. App. P. 4(a)(1)(B). Therefore, if the United States became a party at any time prior to the entry of the judgment from which the appeal was taken, the 60-day rule applies. It is irrelevant whether the United States was a party at the time the district court issued an earlier, non-final order in the case.

Moreover, the language of the rule requires only that the United States be a "party," not that it assert claims against any particular party. This Court has clearly established that the 60-day appeal period applies even if the United States, although a party in the district court, was not directly involved in the

particular claim that is the subject of the appeal. In re Paris Air Crash of March 3, 1974, 578 F.2d 264, 265 (9th Cir. 1978).[2] The Court recognized that "when the United States is a named party, participates in the general action and is, or may be, interested in the outcome of an appeal, even though it is not a party to the appeal, then it is a 'party' for purposes of [Rule] 4(a) and the 60-day time limit for appeal applies." Ibid. In the present case, the United States is a named party and has participated in the case in the district court (R. 155, 156).[3] The United States also has an interest in this appeal, as evidenced by the filing of this amicus brief.

Although this Court recognized in Paris Air Crash that the United States will be considered a "party" under Rule 4(a) where it "may be" interested in the outcome of an appeal, 578 F.2d at 265, the Court did not hold that such a potential interest is necessary to trigger the 60-day appeal period; the Court held

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[2] To be sure, this Court stated in In re Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977), that "in bankruptcy proceedings, the United States should not be deemed a 'party,' for purposes of Fed. R. App. P. 4(a), unless it is a participant in the particular controversy which led to the appeal." 557 F.2d at 203. In reaching this result, the Court emphasized the unique features of bankruptcy proceedings. See ibid. In light of the Court's subsequent decision in Paris Air Crash, the Combined Metals opinion should be read as limited to bankruptcy cases.

[3] The government's participation as an amicus in this Court is not inconsistent with our status as a party in the district court. Although we were a party below, we are proceeding as an amicus in this appeal because we did not file a notice of appeal and are not defending the district court's judgment.

only that such an interest is sufficient. We submit that the proper interpretation of Rule 4(a)(1)(B) is a literal one, which gives the appellant 60 days to file the notice of appeal whenever the United States is a party in the district court, without regard to whether the United States ever participated in the particular claims at issue in the appeal or has any potential interest in the resolution of those claims. See Cohen, 176 F.3d at 40 (60-day period applies even if United States has no interest in the appeal); In re Burlington Northern, Inc. Employment Practices Litigation, 810 F.2d 601, 606 (7th Cir. 1986) ("the fact that the United States was not directly concerned with the particular decision appealed * * * is irrelevant"), cert. denied, 484 U.S. 821 (1987); Montelongo v. Meese, 777 F.2d 1097, 1098 (5th Cir. 1985) (same), cert. denied, 481 U.S. 1048 (1987); see also 16A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3950.2, at 132 (3d ed. 1999) ("Most cases, correctly it is thought, have allowed the 60-day period whenever the government, or its officer or agency, is a named party to the case, even though the government has no interest in the particular issue that is being appealed.") (footnote omitted).

This Court has properly recognized the need for a literal interpretation of Rule 4(a)(1)(B):

> What matters a great deal is that the unsuccessful party in district court be able to figure out which time period applies, easily, without extensive research, and without

> uncertainty. A literal interpretation of the rule achieves this important purpose.

United States ex rel. Haycock v. Hughes Aircraft Co., 98 F.3d 1100, 1102 (9th Cir. 1996), cert. denied, 520 U.S. 1211 (1997); accord Wallace v. Chappell, 637 F.2d 1345, 1347 (9th Cir. 1981) (en banc). Inquiring into whether the United States has a potential interest in the outcome of an appeal inevitably injects ambiguity into what should be a clear-cut rule.

STATEMENT OF THE ISSUES

1. Whether an architect who designs a facility that does not comply with the accessibility requirements of the Americans With Disabilities Act (ADA) can be liable under § 303 of the ADA, 42 U.S.C. 12183, if the architect does not participate in or have authority over the construction of the facility.

2. Whether a genuine issue of material fact exists with regard to whether the defendant architect had significant authority over the facility's construction.

STATEMENT OF THE CASE

Two individuals who use wheelchairs filed suit under Title III of the ADA, alleging that the Market Place Cinema in Riverside, California, failed to comply with the ADA's accessibility requirements for new facilities (E.R. 8, 14-17). Plaintiffs sued the operator of the cinema (Sanborn Theatres, Inc.), the owner of the building (West Coast Realty Investors,

Inc.), and the architectural firm (Salts, Troutman, and Kaneshiro, Inc. (STK)) that designed the facility (E.R. 9-10).

On November 17, 1998, the district court granted summary judgment in favor of STK (E.R. 113). At the outset, the court rejected STK's argument that § 303 of the ADA limits liability only to owners, operators, lessors or lessees of inaccessible facilities (E.R. 118-120). But the court agreed with STK's alternative argument that § 303 covers only parties that both design and construct an inaccessible facility (E.R. 120). The court further held that although STK designed the theater, it did not have sufficient control over the construction to be liable under § 303. The court concluded that STK had no "power to control the construction process, except insofar as to ensure that the construction was adhering to the design plans" (E.R. 122). The summary judgment ruling did not terminate the case because the plaintiffs' ADA claims against the other two defendants were pending.

On March 29, 1999, the district court granted the United States' motion to intervene in the case (R. 154). The United States filed a complaint alleging that Sanborn Theaters, Inc. (Sanborn) violated § 303 of the ADA, 42 U.S.C. 12183, by failing to design and construct certain theaters, including the Market Place Cinema, to be readily accessible to and usable by individuals with disabilities (R. 156 at 2 ¶ 3). The complaint alleged, among other § 303 violations, that the theater failed to

provide wheelchair users with lines of sight that were comparable to those offered to the general public and failed to offer a sufficient number of wheelchair seating areas (R. 156 at 4 ¶ 12). In addition, the complaint alleged that Sanborn violated § 302 of the ADA, 42 U.S.C. 12182, by operating the theaters in a way that denied persons with disabilities equal access, benefits and services. The United States' complaint did not assert any claims against STK.

On May 11, 1999, the court entered final judgment for STK under Fed. R. Civ. P. 54(b). Private plaintiffs filed a notice of appeal on June 30, 1999, within the 60-day deadline of Fed. R. App. P. 4(a)(1)(B).

The United States' claims against Sanborn and the private plaintiffs' claims against Sanborn and West Coast Realty Investors, Inc. are pending in the district court.

ARGUMENT

I

AN ARCHITECT WHO DESIGNS AN INACCESSIBLE FACILITY BUT DOES NOT PARTICIPATE IN ITS CONSTRUCTION CAN BE LIABLE UNDER § 303 OF THE ADA

The district court erred in holding that a party cannot be liable under § 303 of the ADA unless it both designs and constructs an inaccessible facility. That interpretation conflicts with congressional intent, the broad remedial goals of the statute, and the Department of Justice's consistent interpretation of Title III of the ADA.

Section 303 provides, in relevant part, that

> discrimination * * * includes * * * a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter * * *.

42 U.S.C. 12183(a)(1).

The most plausible interpretation of this language is that the term "discrimination" covers two distinct kinds of conduct: (1) a failure to design facilities to be accessible and (2) a failure to construct facilities to be accessible. In other words, both failures are types of prohibited discrimination and thus either is sufficient to trigger liability under § 303.

Congress's use of the word "and" in the phrase "failure to design and construct" does not undermine this reading of the statute. It is true that Congress could have achieved the same result by using the phrase "failure to design or construct." But legislatures often use the words "and" and "or" interchangeably in statutes, and thus "courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or,'" where necessary to effectuate legislative intent. United States v. Fisk, 70 U.S. 445, 447 (1865). See also Alaska v. Lyng, 797 F.2d 1479, 1482-1483 & n.4 (9th Cir. 1986) (explaining that the statutory phrase "suitable for prospective community centers and recreational areas" makes sense "only if 'and' is read

disjunctively"), cert. denied, 480 U.S. 945 (1987); Wirtz v. Western Compress Co., 330 F.2d 19, 21 (9th Cir. 1964) (statutory exemption for employers engaged "in the ginning and compressing of cotton" can cover an employer that compresses, but does not also gin, cotton); 1A Sutherland Statutory Construction § 21.14, at 129 (5th ed. 1993); Black's Law Dictionary 86 (6th ed. 1990) ("and" is "[s]ometimes construed as 'or'").[4]

Our interpretation of § 303's language is necessary to effectuate congressional intent. A huge loophole would exist in the statute if § 303 were interpreted to impose liability only where a defendant both fails to design and fails to construct a facility to be accessible. Under such a reading of the statute, an owner that fully complied with the ADA standards during the design phase of the project could freely depart from those designs and eliminate accessible features during construction without running afoul of § 303. Although such an owner would have failed to construct an accessible facility, she would not also have failed to design the facility to be accessible. Congress could not have intended an interpretation that would

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[4] See also United States v. Blackwell, 946 F.2d 1049, 1052-1053 (4th Cir. 1991) (interpreting "and" in criminal statute to mean "or" to give effect to congressional intent); Person v. Miller, 854 F.2d 656, 660-661 (4th Cir. 1988) (interpreting prohibition against violating statutes A, B "and" C as prohibiting the violation of any of the three statutes), cert. denied, 489 U.S. 1011 (1989); Bruce v. First Fed. Sav. & Loan Ass'n, 837 F.2d 712, 713-717 (5th Cir. 1988) ("We hold that the word 'and' * * * should be given a disjunctive rather than a conjunctive meaning").

allow owners of new facilities to so easily evade responsibility under the ADA.

Moreover, the district court's interpretation interferes with Congress's intent to require both architects and contractors to comply with § 303's accessibility requirements. Such intent is evident from the legislative history of the ADA. During the floor debate, a member of Congress explained that the ADA would, and should, allow a plaintiff to "bring suit against * * * contractors" who were about to build an inaccessible facility. 136 Cong. Rec. 10,457 (1990) (Rep. Delay). Also significant are two provisions that Congress added to the legislation at the urging of architects. Congress inserted a provision that would allow the Attorney General to certify that a state law or local building code meets the ADA accessibility requirements. 42 U.S.C. 12188(b)(1)(A)(ii). Congress also added a provision specifying that if final administrative regulations were not yet promulgated when a building permit was issued, compliance with interim standards would "suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183." 42 U.S.C. 12186(d)(1). These provisions were designed to give architects and contractors greater predictability about their § 303 obligations. H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 125-126 (1990); 136 Cong. Rec. 11,475 (1990) (Rep. Hoyer); id. at 11,461-11,462 (Rep. Schroeder). Architects urged adoption of

these two provisions because they recognized that they were subject to liability if they failed to comply with the ADA's accessibility requirements. See Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary, 101st Cong., 1st Sess. 308-309, 314-315, 444-446 (1989); Americans With Disabilities Act: Hearings on H.R. 2273 & S. 933 Before the Subcomm. on Transp. & Hazardous Materials of the House Comm. on Energy & Commerce, 101st Cong., 1st Sess. 160-164 (1989).

Yet the district court's interpretation would have the practical effect of excluding many architects and contractors from coverage. Although some architects — apparently including STK (see pp. 18-21, infra)— have significant input into the construction of the buildings they design, many do not. Conversely, many contractors have no responsibility for the design of the facilities they build. The district court's holding thus interferes with Congress's goal of requiring architects and contractors to adhere to ADA accessibility standards in the work they perform on new facilities, and, in some cases, could lead to an untenable situation where no party is liable for an inaccessible facility.

The district court's holding also violates well-established canons of statutory construction, which require that remedial legislation be interpreted expansively to effectuate its underlying purposes. Jefferson County Pharm. Ass'n v. Abbott

Labs., 460 U.S. 150, 159 (1983); Gomez v. Toledo, 446 U.S. 635, 639 (1980). This rule of construction has special force here in light of the ADA's "broad goal of 'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 731 (9th Cir. 1999), quoting 42 U.S.C. 12101(b)(1).

In addition, the district court's decision impedes Title III's broad remedial goals. One form of discrimination that Congress intended to attack was the inaccessibility of theaters and similar facilities to individuals who use wheelchairs. See, e.g., H.R. Rep. No. 485, Pt. 2, supra, at 34, 102-104, 111; H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 56-57 (1990).[5] Congress also intended § 303 to prevent accessibility problems in new facilities before they were constructed. Congress recognized that incorporating accessible features into a building from the beginning is far easier and less expensive than retrofitting the facility after construction is complete. See H.R. Rep. 485, Pt. 3, supra, at 60, 63 & n.67; S. Rep. No. 116, 101st Cong., 1st Sess. 71-72 (1989). In order to effectuate these goals, Congress sought to cover a wide range of parties who are in a position to prevent or correct accessibility problems before a new facility is constructed. Holding architects liable for failing to comply

[5] See also 136 Cong. Rec. 17,365 (1990) (Sen. Hatch); 136 Cong. Rec. 11,461-11,462 (1990) (Rep. Schroeder).

with accessibility requirements will give them an incentive to ensure that ADA violations are avoided or corrected at the early stages of a project, long before a new facility is completed. As a practical matter, architects often are in the best position to prevent accessibility problems in new facilities. They have special training in design that often gives them an understanding of ADA accessibility requirements that is more sophisticated than that possessed by contractors or by the owners or operators of facilities.

The district court's holding is also contrary to the Department of Justice's consistent interpretation of Title III of the ADA. In 1991, the Department published the Standards for Accessible Design (Standards), setting forth detailed design requirements for new facilities. See 28 C.F.R. Pt. 36, App. A, incorporated by reference into 28 C.F.R. 36.406. Those Standards expressly state that they apply to "[a]ll areas of newly designed or newly constructed buildings and facilities." 28 C.F.R. Pt. 36, App. A, § 4.1.1 (emphasis added). The Standards thus indicate that an ADA violation can occur at the design stage, even before construction begins on the facility. This necessarily means that an architect can violate the ADA without participating in the facility's construction.

As the Supreme Court has emphasized, the Department of Justice's interpretations of Title III are "entitled to deference," because the Department is "the agency directed by

Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b)." Bragdon v. Abbott, 524 U.S. 624, 646 (1998). Such deference is required even if the Department's reading of the statute is not the one the Court would adopt if writing on a clean slate. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 & n.11 (1984).

In support of its holding that § 303 covers only parties that both design and construct inaccessible facilities, the district court relies (E.R. 120) on United States v. Days Inns of Am., Inc., 151 F.3d 822 (8th Cir. 1998), cert. denied, 119 S. Ct. 1249 (1999), which involved a § 303 claim against a franchisor that failed to prevent and correct accessibility problems in a hotel owned by its franchisee. The Eighth Circuit stated in Days Inns that, "[i]n the context of [that] case," the court would "apply conjunctively the 'design and construct' language of section 303" and would impose liability on the franchisor only if it was "responsible for the design and construction" of the inaccessible facility. Id. at 825 n.2. That statement is dictum. The court did not need to decide the issue because the franchisor had authority over both the design and construction of the facility. See id. at 826. Because it was irrelevant to the outcome of the case, the parties did not brief the issue in the

Eighth Circuit appeal. Consequently, the court's off-hand comment about "design and construct" carries little weight.

At any rate, the district court in this case failed to recognize that the Eighth Circuit's statement arose in a factual context that is quite different from the one presented here. Days Inns involved a franchisor that had not actively participated in either the design or the construction of the inaccessible facility. Id. at 826-827. Despite the lack of active participation, the Eighth Circuit held that the franchisor could be liable under § 303 because it had significant control over the design and construction of the facility and could have exercised that authority to prevent or correct the accessibility problems caused by others. Id. at 826-827 & n.4. The Eighth Circuit thus confronted a situation in which the defendant had not directly caused the inaccessibility of the facility. Therefore, the comment in Days Inns about the need for control over both design and construction should be understood as the Eighth Circuit's attempt to limit liability for parties who play, at most, a passive role in a project. No such limitation is appropriate in the present case, in which (according to plaintiffs' allegations) STK directly caused the accessibility problems by producing the non-compliant architectural plans that the contractor used to build the facility. We reiterate our disagreement with the Eighth Circuit's comment about the need for control over both design and construction. But even if that were

the appropriate standard in a suit against a franchisor that plays only a passive role in a project, that standard should not govern a case against an architect who actively participates in the design of a facility and creates drawings that cause the accessibility problems in the new building.

Although architects can be liable under § 303 without participating in or having any control over the construction of a facility, the ADA includes other limitations on liability that provide important protections for architects. For example, an architect who designs a facility in compliance with the ADA but plays no role in its construction will not be liable if the contractor or owner departs from the designs in a way that leads to accessibility problems in the facility. Under those circumstances, the architect has designed the facility to be accessible and thus has fulfilled his or her obligation under § 303. Moreover, an architect who creates design drawings without the intention or expectation that those drawings will actually be used to construct a facility will not be liable even if the drawings conflict with the ADA accessibility standards. The architect in that scenario has not designed a facility "for * * * occupancy," 42 U.S.C. 12183(a), and thus has not violated § 303.

II

SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS WITH REGARD TO WHETHER STK HAD SIGNIFICANT AUTHORITY TO CONTROL THE FACILITY'S CONSTRUCTION

Even if liability under § 303 were limited to parties who played a role in the construction of the facility, the district court nonetheless erred in granting summary judgment to STK. The district court acknowledged that the record contains evidence that STK had the power "to ensure that the construction was adhering to the design plans" (E.R. 122). Such evidence, by itself, is enough to preclude summary judgment. The power to require a contractor to comply with design plans represents "significant authority to control the * * * construction process." Days Inns, 151 F.3d at 826-827. An architect with such authority would be liable under § 303 where, as is alleged here, the architect's design plans violated the ADA accessibility standards and the contractor relied on those plans to build an inaccessible facility.

The evidence in the record creates a genuine issue of material fact concerning the extent of STK's authority over the facility's construction. Plaintiffs produced evidence that STK had significant control over the construction. They pointed to an interrogatory response from Sanborn, the cinema's operator, indicating that STK supervised or participated in the facility's construction (E.R. 81, response 10). Plaintiffs also submitted a copy of a standard form contract which purported to define STK's

role in the construction of the Market Place Cinema (E.R. 65). According to Article 2 of the form contract, the architect had the authority to:

(1) prepare construction documents "setting forth in detail the requirements for the construction of the Project" (E.R. 66, § 2.4.1);

(2) assist the owner "in awarding and preparing contracts for construction" (E.R. 66, § 2.5.1);

(3) administer the construction contract on behalf of the owner (E.R. 66, § 2.6.2);

(4) visit the construction site to gauge the progress and quality of the work (E.R. 67, §§ 2.6.5, 2.6.7);

(5) review the contractor's work to check compliance with construction documents (E.R. 67, §§ 2.6.9, 2.6.10, 2.6.12, 2.6.14);

(6) reject work that does not conform to the construction documents (E.R. 67, § 2.6.11);

(7) authorize minor changes in the construction work (E.R. 67, § 2.6.13); and

(8) make final decisions regarding aesthetic issues (E.R. 68, § 2.6.17).

Although STK asserted that this form contract was never executed, STK nonetheless acknowledged that it worked under an oral agreement with Sanborn that was "generally consistent with" the terms and conditions of Article 2 of the form contract (E.R.

96 ¶ 3; E.R. 115). Because the court was required to view the evidence in the light most favorable to the plaintiffs, United States ex rel. Oliver v. Parsons Co., 184 F.3d 1101, 1106 (9th Cir. 1999), it should have inferred that STK had essentially the authority specified in Article 2, including the power to establish construction specifications, to monitor the contractors' compliance with those requirements, to reject work by the contractor, and to authorize changes in the construction. Such power constitutes significant authority over the facility's construction.

We acknowledge that STK produced a declaration from Kevin Troutman, one of STK's principals, asserting that STK did not have "the authority to order construction stopped or to direct or control in any manner the contractor, its agents or any other person in the construction" of the theater (E.R. 96-97 ¶ 5). Troutman appears (see ibid.) to base that assertion on § 2.6.6 of the form contract, which states that the architect (1) "shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures * * * since these are solely the Contractor's responsibility," and (2) "shall not have control over or charge of acts or omissions of the Contractor" (E.R. 67).

But Troutman's assertions conflict with other provisions of Article 2 of the form contract which, as we have explained, support a finding that STK had significant control over the

theater's construction. This factual dispute precludes summary judgment.

CONCLUSION

This Court should reverse the grant of summary judgment.

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3876

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)
AND CIRCUIT RULE 32.1 FOR CASE NO. 99-56221

I certify that:

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is monospaced, has 10.5 or fewer characters per inch and contains not more than either 7,000 words or 650 lines of text.

_____
GREGORY B. FRIEL
Attorney

October 25, 1999

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 1999, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL were served by first-class mail, postage prepaid, on each of the following attorneys:

Terence J. Kilpatrick
1720 Bancroft Street
San Diego, California 92102
(Attorney for Appellants)

Gregory F. Hurley
Kutak Rock
620 Newport Center Drive
Suite 450
Newport Beach, California 92660
(Attorney for Appellees)

I further certify that copies of the same brief were filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) by sending them to the Clerk of the United States Court of Appeals for the Ninth Circuit by first-class mail, postage prepaid, on October 25, 1999.

_____
GREGORY B. FRIEL
Attorney