

ORAL ARGUMENT REQUESTED

THE HONORABLE REGINA S. CAHAN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

THE WASHINGTON STATE
COMMUNICATION ACCESS PROJECT, a
Washington Non-Profit Corporation,

Plaintiff,

vs.

REGAL CINEMAS, INC., a subsidiary of
Regal Entertainment Group, a Delaware
Corporation, AMC ENTERTAINMENT, INC.,
a/k/a American Multi-Cinema, Inc., a Delaware
Corporation, CINEMARK HOLDINGS, INC.,
a Delaware Corporation, SILVER CINEMAS
ACQUISITION CO., LLP., d/b/a Landmark
Theaters, a Delaware Limited Partnership,
LINCOLN SQUARE CINEMAS, LLC, a
Delaware limited liability company, and
KIRKLAND PARKPLACE CINEMAS LLC, a
Washington liability company,

Defendants.

No. 09-2-06322-2 SEA

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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1 **I. SUMMARY OF ARGUMENT AND RELIEF REQUESTED**

2 Cobbling together patchwork concepts from state statutes and regulations, Plaintiff asks
3 the Court to promulgate a judicially-created movie captioning rule based on what Plaintiff’s
4 members believe the law should be, notwithstanding what the law actually is, Plaintiff’s refusal
5 to define what Defendants must do to comply with the injunctive relief they seek, or the myriad
6 problems that granting such relief would necessarily create. This is unjust. No movie captioning
7 requirement exists under current law, and the Washington Legislature surely did not intend for a
8 new requirement to be imposed via private litigation, based on the idiosyncratic preferences of a
9 few affected individuals and their attorneys. If a new movie captioning requirement is to be
10 promulgated, and movie theaters are to comply with it under penalty of civil lawsuit, then due
11 process demands that it be established prospectively by legislation or administrative rulemaking,
12 not enacted by summary judgment order.

13 Plaintiff’s motion for partial summary judgment should be denied for multiple reasons.
14 Plaintiff cannot make the *prima facie* showing for a claim for disability discrimination under the
15 WLAD, that is, that Defendants treat Plaintiff’s members differently than the general public.
16 The Washington Supreme Court and Ninth Circuit have rejected similar WLAD requests for
17 “excess goods and services” akin to what Plaintiff seeks. Plaintiff’s claim is wholly dependent
18 upon the premise that the WLAD was intended to regulate the content of the goods and services
19 provided by places of public accommodation, an unreasonable expansion of law that the
20 applicable regulations do not contemplate, no court has recognized, and multiple courts have
21 counseled against. “Interpreting” a mandatory captioning requirement from the WLAD’s
22 general references to “full enjoyment” and “understandable” would also present due process
23 problems and Washington APA conflicts, each of which precludes summary judgment for
24 Plaintiff.

25 Equally troubling are the problems arising from Plaintiff’s piecemeal approach to this
26 lawsuit. On the one hand, Plaintiff asks the Court to recognize a generalized duty for Defendants
27 to provide movie captioning, while on the other hand, Plaintiff refuses to specify basic “what,”

1 “how,” and “when” particulars of the injunctive relief it seeks. If the most Plaintiff is willing to
2 say is “Defendants can do more than they are reasonably doing,” then Plaintiff unquestionably
3 violates Washington Civil Rule 65(d)’s requirement that injunctions shall be “specific in terms”
4 and “describe in reasonable detail the act or acts sought.” An appellate court will not hesitate to
5 overturn a decision where, as here, only vague injunctive relief is sought.

6 There can be little doubt that Plaintiff is employing these tactics in order to defer
7 consideration of the many problems that a judicially-created mandatory movie captioning
8 requirement assuredly will cause. This is inefficient and extremely short sighted. Securing a
9 generalized acknowledgement of an undefined duty to caption movies will not only invite new
10 litigation from additional persons with differing opinions on what must be done to render the
11 movies exhibited by Defendants “understandable” to disabled patrons, but given the verifiable
12 disagreements within the hearing-disabled community as to current captioning technologies, the
13 risk of inconsistent determinations is very real. This should not and need not happen. The
14 myriad legal and practical problems presented by this lawsuit could be avoided if the Court
15 denies Plaintiff’s motion for partial summary judgment and determines that new accessibility
16 standards must be established prospectively by legislation or administrative rulemaking.

17 **II. STATEMENT OF FACTS AND EVIDENCE RELIED UPON**

18 In opposition to Plaintiff’s motion for partial summary judgment, Defendants rely on the
19 Stipulated Facts as set forth in Plaintiff’s Motion at 4-8 (¶¶ 1-20), the authorities cited herein,
20 and all the pleadings and records on file in this case.

21 **III. OBJECTIONS TO ADDITIONAL FACTS AND PROPOSED ORDER**

22 Defendants object to the “Additional Undisputed Facts” (¶¶ 21-34) in Plaintiff’s Motion
23 on hearsay and authenticity grounds pursuant to Washington State Court Rules of Evidence 802
24 and 901. Plaintiff’s counsel’s statements regarding the contents of various websites are being
25 offered to prove the truth of the matters asserted, but copies of the documents that purportedly
26 were reviewed are not attached to Plaintiff’s filing, and Defendants’ counsel is unable to
27 replicate the cited website information. Defendants thus make these objections in an abundance

1 of caution in order to preserve a proper summary judgment record. For the same reasons,
2 Defendants also object to the proposed order Plaintiff filed with its motion to the extent that it
3 contains proposed findings of fact other than the facts to which the parties have stipulated,
4 including, without limitation, the aforementioned “additional undisputed facts.”

5 IV. STATEMENT OF ISSUES

6 1. Has Plaintiff made the predicate *prima facie* showing required to state a claim for
7 disability discrimination under the WLAD, that Defendants treated Plaintiff’s members
8 differently than the general public?

9 2. Does the regulatory scope of the WLAD extend to goods and services, as opposed
10 to places of public accommodation?

11 3. Would judicial enforcement of an interpretation of the WLAD that mandates
12 captioned movie exhibitions unconstitutionally deprive Defendants of their due process rights?

13 4. Would seeking to impose a mandatory captioning requirement through private
14 litigation conflict with the Washington APA’s rulemaking requirements?

15 5. Is Plaintiff’s generalized request for captioning, without providing injunctive
16 relief specifics, fatal to its motion for partial summary judgment?

17 V. ARGUMENT AND AUTHORITIES

18 A. **Plaintiff Cannot Make A *Prima Facie* Showing Of Disability Discrimination Under 19 The WLAD, And Neither The WLAD Regulations Nor The Cases Interpreting Them Support Plaintiff’s Arguments.**

20 In *Fell v. Spokane Transit Authority*, 128 Wash. 2d 618, 637 (Wash. 1996), the
21 Washington Supreme Court held that to establish a *prima facie* case of discrimination by a public
22 accommodation, a plaintiff must first show, among other things, that he or she was
23 “discriminated against by receiving treatment that was not comparable to the level of designated
24 services provided to individuals without disabilities by or at the place of public accommodation.”
25 As Plaintiff acknowledges, under a plain reading of *Fell*, “if disabled individuals receive the
26 same ‘designated services’ as everyone else, there is no discrimination.” (Plaintiff’s Motion at
27 17.) That is precisely what the undisputed facts establish here. Defendants do not treat hearing-

1 disabled movie patrons differently than the general public when they exhibit non-captioned films
2 that all patrons, disabled or not, can attend on the same terms and conditions as everyone else.
3 No Washington case interpreting the WLAD has held to the contrary.

4 The relief Plaintiff seeks – entitlement to excess goods and services in the form of
5 mandatory movie captioning – is precisely the sort of legal theory that was rejected in *Fell* as
6 insufficient to establish a *prima facie* showing of discrimination. In *Fell*, where plaintiffs sought
7 paratransit services beyond those offered to the general public, the Court found that such a
8 request would require the transportation agency “to offer *greater* service to disabled people than
9 is available to nondisabled people.” 128 Wash. 2d at 640. The Court held that “services to
10 disabled people *in excess* of the services [] provide[d] to the nondisabled,” are not required under
11 the WLAD, noting that the WLAD “was *not* intended to entitle certain protected classes to some
12 unspecified type and unlimited level of services.” *Id.* at 631 (emphasis in original). The Ninth
13 Circuit independently reached the same conclusion in *Weyer v. Twentieth Century Fox Film*
14 *Corp.*, recognizing that “the test is comparable treatment,” and because the WLAD is a
15 “statutory mandate to provide access to places of public accommodation,” but “not a mandate to
16 provide services which are not otherwise available to the general public,” there is no
17 discrimination where a defendant treats everyone the same by offering the same goods and
18 services to all individuals. 198 F.3d 1104, 1119 (9th Cir. 2000) (citations omitted). Pursuant to
19 *Fell* and *Weyer*, the Court should reject Plaintiff’s theory that its members are entitled to special
20 mandatory captioned movie exhibitions in excess of the movie exhibitions provided to the
21 general public, hold that Plaintiff has failed to establish a *prima facie* showing of discrimination,
22 and deny Plaintiff’s motion for partial summary judgment.¹

23
24 ¹ Contrary to Plaintiff’s “regulatory path” arguments, there is no regulatory loophole that permits Plaintiff to jump
25 over the *prima facie* discrimination showing required by *Fell* in order to litigate the specifics of reasonable
26 accommodation remedies. Moreover, there is no “same service” barrier that prevents access by Plaintiff’s members
27 to the goods and services regularly provided by Defendants, such as a lack of box office signage about costs, movie
options, and show times that might hinder hearing-disabled patrons from purchasing show tickets and create a
problem comparable to the WLAD’s example that “same service” stairwells bar access by wheelchair-using patrons
to regularly provided upper-floor store merchandise. *See* WAC 162-26-060(2).

1 **B. Plaintiff’s Attempt To Regulate The Content Of The Goods And Services**
2 **Defendants Regularly Provide Is An Unprecedented Expansion Of Accessibility**
3 **Law.**

4 The WLAD regulates places of public accommodation by providing access to them and
5 the goods and services they regularly make available to the general public, but not goods and
6 services themselves. *See, e.g.*, WAC 162-26-060(2) (discussing “reasonable accommodation” in
7 terms of requiring access to regularly provided goods and services located on the second floor of
8 a store with stairways, not requiring goods and services in excess of those provided to the
9 general public).² Interpreting the WLAD to impose a mandatory movie captioning requirement
10 would require an unprecedented expansion of the WLAD to regulate the accessibility of the
11 goods and services. No court has ever done so. Federal courts have expressly disallowed
12 attempts to argue for similar expansions of federal accessibility law. *See Doe v. Mut. of Omaha*
13 *Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999) (stating that “[t]he common sense of [ADA Title III]
14 is that the content of the goods or services offered by a place of public accommodation is not
15 regulated,” noting “[h]ad Congress purposed to impose so enormous a burden on the retail sector
16 of the economy and so vast a supervisory responsibility on the federal courts, we think it would
17 have made its intention clearer and would at least have imposed some standards”).

18 As discussed in Defendants’ prior summary judgment briefing, federal courts have
19 consistently held that federal accessibility laws require access to places of public accommodation
20 and the right to use and enjoy goods and services as they are regularly provided to the general
21 public, but do not regulate the content of those goods and services, and do not require the
22 provision of special goods that are specifically designed for persons with disabilities. *See*
23 *McNeil v. Time Ins. Co.*, 205 F.3d 179, 186-87 (5th Cir. 2000); *Weyer*, 198 F.3d at 1115; *Mut. of*
24 *Omaha Ins. Co.*, 179 F.3d at 559-60; *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457
(6th Cir. 1998). And applying these principles to the captioning issue presented here, the District

25 _____
26 ² Federal accessibility regulations recognize similar limitations. *See, e.g.*, 28 C.F.R. § 36.307(a), (c) (a place of
27 public accommodation is not required to provide “accessible or special goods that are designed for, or facilitate use
by, individuals with disabilities” such as “Brailled versions of books,” “closed-captioned video tapes,” and “special
foods to meet particular dietary needs”).

1 of Arizona, the Southern District of Texas, and the District of Oregon have each held that movie
2 theaters are not required to provide captioning for the movies they regularly exhibit. *See Arizona*
3 *v. Harkins Amusement Enterprises, Inc.*, 548 F. Supp. 2d 723, 731 (D. Ariz. 2008); *Todd v.*
4 *American Multi-Cinema, Inc.*, No. Civ. A. H-02-1944, 2004 WL 1764686, at *4 (S.D. Tex.
5 August 5, 2004); *Cornilles v. Regal Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885, at
6 *7 (D. Or. Jan. 3, 2002), *findings adopted in part and recommendation adopted*, 2002 WL
7 31469787, at *1 (D. Or. Mar. 19, 2002).

8 The sole case cited by Plaintiff to support its discrimination argument, *Negron v.*
9 *Snoqualmie Valley Hosp.*, 86 Wash. App. 579 (1997) does not compel a different result. In that
10 case, a deaf plaintiff alleged that a defendant hospital discriminated against her by not providing
11 a sign language interpreter when plaintiff went to the hospital for treatment. *Id.* at 584. That
12 case turned on “[l]ack of communication access” to the defendant’s regularly provided medical
13 goods and services, which included “not only medical intervention, but also the opportunity to
14 explain symptoms, ask questions, and understand the treatment being performed including
15 options if any.” *Id.* at 584, 586. The case did not extend the WLAD’s reach to the content of the
16 regular goods and services offered. Thus, the inquiry was framed as whether the plaintiff was
17 given a “comparable opportunity” to receive access to the regular medical services offered by the
18 hospital, not whether the hospital was required to provide excess medical services to the hearing-
19 disabled plaintiff. *See id.* at 586. Accordingly, the *Negron* decision does not support any
20 expansion of the WLAD to require excess goods or services beyond those which are regularly
21 provided. Nor does it relieve Plaintiff of its obligation to establish a *prima facie* case under *Fell*
22 and *Weyer*, which Plaintiff has failed to do.

23 **C. Plaintiff Should Not Be Permitted To Judicially “Interpret” A New Movie**
24 **Captioning Requirement From General Statutory References To “Understandable”**
25 **And “Full Enjoyment.”**

26 Notwithstanding the multiple threshold hurdles presented by Plaintiff’s failure to
27 establish a *prima facie* case and Plaintiff’s attempt to secure an unprecedented expansion of the

1 WLAD, discussed previously, the fact that Plaintiff’s summary judgment argument turns on
2 whether the words “understandable” and “full enjoyment” can be interpreted to require
3 Defendants to exhibit movies with captions presents grave due process problems. The reasons
4 are obvious. No movie captioning requirement is defined by the current WLAD regulations, and
5 no implied captioning requirement has been inferred by the Human Rights Commission or the
6 courts. Compounding the problems, on a broader level, the Washington Supreme Court
7 describes the WLAD’s standards as “vague” (*see Fell*, 128 Wash. 2d at 628), and even Plaintiff
8 concedes that the WLAD’s regulatory path is “a bit roundabout.” (*See Plaintiff’s Motion* at 15.)
9 And there is no statute, regulation, or case law discussing what it means to make a good or
10 service “understandable” to a disabled person, which, in and of itself, presents a Pandora’s Box
11 of interpretive problems.

12 As Plaintiff acknowledges, “[f]leshing out what exactly constitutes actionable
13 discrimination [is] left to the Human Rights Commission, which was empowered to promulgate
14 ‘suitable rules and regulations to carry out the provisions of this chapter.’” (*Plaintiff’s Motion* at
15 14 (citing RCW 49.60.120(3)).) But when the statute, rules, and regulations are silent as a
16 captioning requirement specifically, or what “understandable” means generally, as here, Plaintiff
17 should not be permitted to sue Defendants, “interpret” from generalized WLAD references to
18 “understandable” and “full enjoyment” a new movie captioning requirement, and then seek
19 injunctive relief and attorney’s fees for failing to comply. Doing so violates Defendants’ due
20 process rights. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498
21 (1982); *Giaccio v. Penn.*, 382 U.S. 399, 402 (1966); *State v. White*, 97 Wash. 2d 92, 98-99
22 (1982), *overruled on other grounds by State v. Corrillo*, 89 Wash. App. 1014 (1998); *see also*
23 *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (it is not
24 lawful for an agency to “promulgate mush” that is only given concrete form through subsequent
25 “interpretations”).³

26
27 ³ Moreover, as Defendants noted in prior summary judgment filings, the fact that Plaintiff is now suing every major movie exhibitor in King County, Washington to enforce its “interpretation” that the WLAD requires mandatory

1 This point has been recognized numerous times under federal law. Federal courts
2 analyzing accessibility claims under the “full and equal enjoyment” provision of the ADA have
3 determined that Congress did not intend for the ADA’s general nondiscrimination mandate to
4 give rise to an independent cause of action. *See, e.g., Caruso v. Blockbuster-Sony Music Entm’t*
5 *Ctr.*, 968 F. Supp. 210, 216 (D. N.J. 1997) (“Congress has elected to pass a very general statute
6 and leave it to the regulatory process to fill in the necessary details Congress did not intend
7 for defendants to be responsible, in the absence of applicable regulations, for determining
8 whether a design provides ‘full and equal enjoyment’ for the disabled”), *aff’d in part, rev’d in*
9 *part on other grounds*, 193 F.3d 730 (3d Cir. 1999); *see also Lara v. Cinemark USA, Inc.*, 207
10 F.3d 783, 789 (5th Cir. 2000) (declining to impose an accessibility requirement not expressly
11 defined in the federal accessibility guidelines because doing so “would require district courts to
12 interpret the ADA based on the subjective and undoubtedly diverse preferences of disabled
13 moviegoers”); *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997)
14 (“courts are ill equipped to evaluate [accessibility] claims and to make what amount to
15 engineering, architectural, and policy determinations as to whether a particular design feature is
16 feasible and desirable”). The same reasoning defeats Plaintiff’s arguments here.

17 Moreover, seeking a judicially-created mandatory captioning requirement where one does
18 not presently exist unlawfully circumvents the rulemaking process set forth in the Washington
19 APA. *See* Defendants’ Motion at 11-13. Plaintiff’s motion for partial summary judgment is not
20 a substitute for proper legislative rulemaking, especially where the Court’s decision would
21 undoubtedly affect the interests of others who are not participating in this case and would have
22 implications beyond the geographic boundaries of King County.

23 **D. Plaintiff Should Not Be Permitted To Seek An Abstract Summary Judgment Ruling**
24 **That A Duty To Provide Captioning Exists When It Refuses To Specify The**
25 **Injunctive Particulars Required To Comply With That Duty.**

26 No doubt attempting to defer consideration of the many problems that a judicially-created
27 captioning to make movies “understandable” to deaf patrons strongly suggests a serious problem with the underlying
law, or, alternatively, with Plaintiff’s interpretation of it.

1 mandatory movie captioning requirement will cause, and the resulting undue burden arguments
2 from Defendants, Plaintiff asserts that it is not seeking a ruling that “Defendants must equip
3 every theater to show captioned movies, nor that they must show only movies for which captions
4 are available, nor even that they must use the captioned version for every showing[; n]or . . . how
5 captioning must be done.” (Plaintiff’s Motion at 3-4, 16.) Rather, what Plaintiff purports to seek
6 is an abstract ruling on the existence of a general duty without having to specify the “what,”
7 “how,” “when” associated with that duty. Plaintiff’s unwillingness (or inability) to articulate
8 what is required to satisfy the purported duty to provide captioning warrants denying its motion.

9 Washington Civil Rule 65(d) provides that “[e]very order granting an injunction and
10 every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall
11 describe in reasonable detail, and not by reference to the complaint or other document, the act or
12 acts sought to be restrained.” While Defendants are not aware of any Washington state court
13 decision addressing lack of specificity in the context of Rule 65(d), this issue has been analyzed
14 multiple times under the identical federal rule. *See All Star Gas, Inc. v. Bechart*, 100 Wash. App.
15 732, 736-37 (2000) (“Federal Rule of Civil Procedure 65(d) is identical to CR 65(d) so cases
16 interpreting the federal rule can be used for guidance.”). The United States Supreme Court and
17 other appellate courts have overturned lower courts’ injunctive relief decisions where the
18 injunction ordered fails to provide specific guidelines for how defendants are to accomplish the
19 duty set forth in the injunctive order. *See, e.g., Schmidt v. Lessard*, 414 U.S. 473, 476-77 (1974)
20 (reversing and vacating injunction); *Union Pacific R. Co. v. Mower*, 219 F.3d 1069, 1072-73,
21 1077 (2000) (same); *Atiyeh v. Capps*, 449 U.S. 1312, 1317 (1981) (injunctive order falls short of
22 specificity requirement). For example, in *Atiyeh*, the district court found the State of Oregon’s
23 prisons overpopulated and ordered the state to reduce the prison population by a certain time
24 frame. *Id.* The Supreme Court found that the district court’s order did not comply with Fed. R.
25 Civ. P. 65(d), reiterating decisions from prior cases holding that “the specificity provisions of
26 Rule 65(d) are no mere technical requirements” and “[t]he Rule was designed to prevent
27 uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the

1 possible founding of a contempt citation on a decree too vague to be understood.” *Id.* (quoting
2 *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)).⁴

3 “Since an injunctive order prohibits conduct under threat of judicial punishment, basic
4 fairness requires that those enjoined receive explicit notice of precisely what conduct is
5 outlawed.” *Schmidt*, 414 U.S. at 476. Similarly, the injunctive order must provide “guidance” to
6 a defendant regarding how it should comply with a prohibition set forth in the order. *Union*
7 *Pacific R. Co.*, 219 F.3d at 1077 (rejecting broad injunctive relief order that failed to provide
8 guidance, detailed inquiry or explanation, and assessment where complete exclusion might not
9 be warranted). Here, if the most Plaintiff is willing to say is “Defendants can do more,” then a
10 Washington appellate court will not hesitate to overturn the decision.

11 Moreover, Plaintiff’s contention that granting the broad “duty to provide captioning”
12 ruling it seeks will decrease the litigation in this area should be viewed with considerable
13 skepticism. It is much more likely that the result will be increased litigation. Securing a
14 generalized acknowledgement of an undefined duty to caption movies will not only invite new
15 litigation from additional persons with differing opinions on these new entitlements – and the
16 Court already has received extensive evidence of verifiable disagreements on captioning within
17 the hearing-disabled community – but that new litigation also presents real risks of inconsistent
18 determinations as to what must be done to render the movies exhibited by Defendants
19 “understandable” to disabled patrons.⁵ Defendants would be forced to litigate against moving
20 targets and would have no assurances that any captioning they provide would be a sufficient

21
22 ⁴ The Court also noted that the dual requirement for specificity is that an appellate court “can hardly begin to assess
23 the correctness of the judgment entered by the District Court here without knowing its precise bounds. In the
24 absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made
25 impossible.” *Atiyeh*, 449 U.S. at 1317.

26 ⁵ Plaintiff’s own arguments underscore the manageability problems that would arise if an order recognizing a
27 general duty to caption movies were issued. Although Plaintiff is unwilling to articulate what captioning it would
consider to be sufficient, it is evident from Plaintiff’s motion that it has some expectation of what would be
necessary to satisfy this purported duty. For example, Plaintiff argues that captioning voluntarily provided by
Defendants is provided at what it views to be “less than desirable times” – highlighting as examples show times like
6:50 p.m., 7:45 p.m., 9:35 p.m., and weekend showings (Plaintiff’s Motion at 8-10.) And, Plaintiff argues that it
considers the form of captioning selected by Cinemark to voluntarily provide captioning, by relying on a third party
vendors for its captioning, to be insufficient. (*Id.* at 20.)

1 “safe harbor” to protect them from future lawsuits. Such litigation would not be limited to movie
2 theater captioning, either – the expansion of law required to recognize the broad duty Plaintiff
3 seeks would mean that any goods and services in any place of public accommodation would be
4 fair game for new lawsuits.⁶ This is yet another reason why a public forum allowing for proper
5 notice and comment, and a fleshing out of these issues, from all whose interests may be affected,
6 is necessary before there can be any legislation on mandatory captioning, and why attempting to
7 establish new accessibility standards through litigation is inappropriate.⁷

8 **E. Plaintiff’s Refusal To Specify The Amount And Type Of Captioning Required**
9 **Underscores The Multiple Practical Difficulties That Weigh Against Any Judicially-**
10 **Created Movie Captioning Requirement.**

11 Plaintiff’s tactical decision to refrain from specifying the amount of and form of
12 captioning desired does little to negate the undue burden associated with an order to provide
13 captioning, and in fact, supports one of Defendants’ key contentions, that there are simply too
14 many practical difficulties in judicially mandating movie theater companies to provide an
15 unknown amount of captioning using unspecified captioning technology. *See* Defendants’
16 Motion for Summary Judgment at 13-18. These burdens, unique to the issue of mandatory
17 captioning, transcend mere cost considerations like those addressed in the case cited by Plaintiff,
18 *Am. Council for the Blind v. Paulson*, 525 F.3d 1256, 1266-67 (D.C. Cir. 2008), and further
19 demonstrate that a judicially-created mandate, insulated from the benefit of notice and public
20 comment on what these difficulties are and how they can be addressed, is not the proper vehicle

21 ⁶ Borrowing from the cases addressing conceptually similar disability issues, additional types of lawsuits that current
22 laws do not recognize but that the expanded accessibility laws Plaintiff seeks would empower include lawsuits to
23 require bookstores to stock Brailled books and sell them to blind patrons (per *Weyer, McNeil, and Doe*), restaurants
24 to provide special menu options for diabetic patrons (per *McNeil*), camera shops to provide cameras specifically
25 designed for disabled patrons (per *Doe*), video stores to stock closed-captioned videotapes and sell them to deaf
26 patrons (per *Parker and Lenox*), and even movie theaters to provide a running translation into sign language of the
27 movie’s soundtrack for deaf patrons (per *Doe*). Of course, there are multiple other potential lawsuits as well.

⁷ Despite Plaintiff’s assertion that it does not seek a ruling on the amount and type of captioning required, the
proposed order Plaintiff filed with its motion requests an order holding, *inter alia*, that “[e]vidence of the extent to
which movie theaters in some areas display captioned movies creates a rebuttable presumption that captioning to
that extent is reasonably possible, and that each Defendant will bear the burden of proving that it is not possible to
utilize captioning to such an extent in their theater multiplexes in King County.” (Plaintiff’s Proposed Order on
Motion for Partial Summary Judgment at 3.) The requested holding is contrary to the position taken by Plaintiff in
its motion, contrary to the applicable law as presented by Defendants, and should be rejected by the Court.

1 to resolve Plaintiff's generalized captioning request.⁸

2 VI. CONCLUSION

3 Plaintiff's members attend the same movies Defendants offer to all patrons. Plaintiff
4 does not complain that its members are denied access to movie theaters, but rather that the
5 content of the regular goods and services Defendants provide is less valuable to hearing-disabled
6 patrons than to the general public. Plaintiff seeks to remedy this complaint by having the Court,
7 as a matter of law, "interpret" from general WLAD references to "understandable" and "full
8 enjoyment" a new mandatory captioning requirement, recognize a first impression legal duty to
9 comply with it, and penalize Defendants with injunctive relief and attorney's fees for failing to
10 already conform to it. Doing so would be fundamentally inconsistent with decisions from the
11 Washington Supreme Court and the Ninth Circuit, would require an unprecedented expansion of
12 the WLAD that would burden the state's retailers and courts in ways never intended by the
13 Washington Legislature, and would blatantly violate Defendants' due process rights.

14 The Washington Supreme Court recognized in *Fell* that "the proposition that [a
15 defendant] violates [the WLAD] if it fails to provide services to disabled people *in excess* of the
16 services it provides to the nondisabled . . . is more appropriately left to the legislative and
17 executive branches." *Fell*, 128 Wash. 2d at 631. The same reasoning applies here. The Court
18 should deny Plaintiff's motion for partial summary judgment and require that new accessibility
19 standards be established prospectively by legislation or administrative rulemaking.

20 For all of the foregoing reasons, Plaintiff's motion for partial summary judgment should
21 be denied in its entirety.

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25 ⁸ The proposed order Plaintiff filed with its motion also seeks a ruling that Plaintiff is the prevailing party and
26 therefore entitled to recovery of all costs of litigation, including reasonable attorneys' fees. (Plaintiff's Proposed
27 Order on Motion for Partial Summary Judgment at 4.) Setting aside the fact that Plaintiff presents an interlocutory
motion for partial summary judgment, and granting it would not accord Plaintiff prevailing party status, the finding
sought in the proposed order further highlights the concerns Defendants have with the lack of specificity in the relief
Plaintiff seeks in this litigation.

1 DATED this 12th day of March, 2010.

2 Respectfully submitted,

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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies under penalty of perjury under the laws of the State of
3 Washington that, on March 12, 2010, they caused to be served on the person(s) listed below in
4 the manner shown:

5
6 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

7 **VIA E-MAIL**

8 Mr. John F. Waldo
9 Law Office of John F. Waldo
10 151 Finch P. SW, #C
11 Bainbridge Island, WA 98110
12 Email: john@wash-cap.com
13 *Attorney for Plaintiff*

14
15 DATED: March 12, 2010

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