IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MEMPHIS CENTER FOR INDEPENDENT LIVING,	)	
Plaintiff,	)	
vs.	)	
MAKOWSKY CONSTRUCTION CO., ET AL.,	)	NO. 2:01cv02069 D/P
Defendants,	)	
and	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	
vs.	)	
MAKOWSKY CONSTRUCTION CO., ET AL.	)	

AMENDED ORDER GRANTING DEFENDANTS' MOTIONS FOR PROTECTIVE ORDERS

Before the Court are eight Motions for Protective Orders[1]

[1] See Defendants' Motions for Protective Orders, docket entries 241, 243, 248, 254, 268, 280, 290, 300.

filed on behalf of nineteen defendants.[2] Each motion contains the same prayer: that the Court enter a protective order quashing plaintiff-intervenor United States' requests for admission ("RFAs"), which range from between 625 and 2,742 requests per defendant. These defendants also ask the Court to enter a protective order with respect to the United States' single interrogatory that asks:

> With respect to each request to admit you do not unequivocally admit in its entirety, please provide a detailed explanation for your failure to do so, identifying all facts and circumstances that support your failure to admit.[3]

United States District Court Judge Bernice B. Donald referred the defendants' Motions for Protective Orders to this Court. On May 7, 2003, this Court held a hearing on defendants' motions. Prior to the hearing, seven attorneys filed memoranda of law urging this Court to grant the defendants' Motions for Protective Orders. The United States filed two responses. The Court has carefully considered defendants' motions and all

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[2] The defendants are as follows: W. H. Porter & Co., Makowsky, Stonebridge, Windyke, Penn Investors, JAN Realty, Richard and Milton Grant Co., J. Richard Grant, Milton Grant, Belz/South Bluffs, Jack Belz, Ronald A. Belz, Jerome Hanover, Parker, Estes & Associates, Archeon, John Gillentine, and Reaves, Sweeney, Marcom, Inc, Henry Hart and Henry Hart Engineering, P.C.

[3] See Def. Makowsky's Motion and Memorandum in Support of Protective Order, Exhibit A at 3, D.E. 261.

parties' memoranda of law and is otherwise fully informed of the issues. For the following reasons, defendants' Motions for Protective Orders are GRANTED.

I. Background

Plaintiff-intervenor United States served seventeen defendants with RFAs, allegedly germane to the question of whether or not defendants' design, engineering, and construction of several Memphis-area multi-unit apartment complexes were in compliance with the Fair Housing Amendments Act (42 U.S.C. §§ 3601-3619) and the Americans With Disabilities Act (42 U.S.C. §§ 12101 et seq.). The United States and plaintiff Memphis Center For Independent Living contend, among other things, that defendants' buildings do not contain necessary accessibility features. They also argue that the structures were designed, engineered and erected in contravention of the United States Department of Housing and Urban Development's Fair Housing Accessibility Guidelines. See 56 Fed. Reg. 9472 (Mar. 6, 1991).

Prior to serving the RFAs on the defendants, the United States hired an expert who was permitted to survey and inspect the various properties at issue. Following these inspections, the expert prepared reports which detailed numerous alleged violations. From these reports, the United States distilled their contents into a long list of RFAs which, if admitted by

the defendants, allegedly support the plaintiffs' claims in this lawsuit. These RFAs, which total approximately 31,000,[4] are broken down as follows:

RFAs	**Defendant**
625	W.H. Porter & Co.
684	Windyke
1,158	Parker, Estes & Assoc.
1,202	Stonebridge
1,295	Henry Hart
1,295	Henry Hart Engineering
1,459	Reaves, Sweeney
1,858	Makowsky
1,858	Belz/South Bluffs, Inc.
1,858	Jack A. Belz
1,858	Ronald A. Belz
1,858	Jerome Hanover
1,920	Rich. & Milton Grant Co.
1,920	J. Richard Grant
1,920	Milton Grant
2,741	Archeon, Inc.
2,741	John Gillentine
2,742	Penn Investors
2,742	JAN Realty

Each of the United States' RFAs generally falls into one of two categories. The first category of RFAs relate to measurements taken by the plaintiffs' expert at the various developments and which are contained in the expert's reports. These RFAs contain

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[4]This figure is based on the total number of RFAs served on all of the defendants. Presumably, some of the defendants who are represented by the same attorney and who received the same set of RFAs could respond to the RFAs without having to duplicate efforts. Even taking this into account, however, the total number of RFAs would still be approximately 19,000.

statements that quantify the size, shape, slope, height, width, angle, or other characteristics of the defendants' developments. The statements, which defendants are asked to admit or deny, pertain to ramps, doorways, hallways, restrooms and much more. One such example is as follows:

> Admit that 6105 Braxton Lane was constructed with a route from the parking spaces to the building entrance with a cross slope exceeding 2% at the approach walk.

See Def. Makowsky's Motion and Memorandum in Support of Protective Order, Exhibit A, RFA #175, D.E. 261.

The second category of RFAs concerns construction documents. These RFAs ask the defendants to admit that their own construction documents lack specifications that would obligate the builders, architects, and engineers of the projects at issue to design or install particular accessibility features. One example of a RFA in this category is the following:

> Admit that construction documents for Windyke do not specify that the unisex restroom adjacent to the laundry room be constructed with side or rear grab bars at the toilet.

See Def. Makowsky's Motion and Memorandum in Support of Protective Order, Exhibit A, RFA #1037, D.E. 261. The United States argues that the RFAs, although admittedly lengthy, are justifiable, and that this Court should require the defendants to respond to them. The United States' position is that the RFAs will narrow the

issues in this case, saving time at trial and obviating the need for extensive expert testimony. The United States also states that it is important at this stage in the litigation for there to be an undisputed record of measurements from which the parties can work. The defendants argue that requiring them to respond to these RFAs would be an undue burden.

II. Applicable Law

"Admissions sought under Rule 36 are time-saving devices, designed to narrow the particular issues for trial." Honeycutt v. First Federal Bank, No. 02-2710, 2003 WL 1054235, at *1 (W.D. Tenn. 2003) (only Westlaw citation currently available) (citing Fed. R. Civ. P. 36, Adv. Comm. Notes). "A request for admissions 'should be confined to facts that are not in material dispute.'" Honeycutt, 2003 WL 1054235, at *1 (quoting United States v. Watchmakers of Switzerland Info. Cent., Inc., 25 F.R.D. 197, 201 (S.D.N.Y. 1959)).

"Generally, the statements posed by the party seeking their admission should be 'capable of an answer by a yes or no.'" Honeycutt, 2003 WL 1054235, at *1 (quoting Johnstone v. Cronlund, 25 F.R.D. 42, 45 (D. Pa. 1960)). "Statements that are vague, or statements susceptible of more than one interpretation, defeat the goals of Rule 36 and are properly objectionable." Id. at *1.

Any party objecting to requests for admission may file a

motion for a protective order. See Rule 26(c), Fed. R. Civ. P. The rule states that:

> Upon motion by a party or by the person from whom discovery is sought . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or *undue burden or expense* . . . .

Fed. R. Civ. P. 26(c) (emphasis added). In the case of RFAs, such a motion may be proper when requests to admit are:

> *so voluminous and so framed* that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome.

Fed. R. Civ. P. 36, Adv. Comm. Notes (emphasis added). Rule 36 does not require the answering party to track down every fact and detail under the sun. Rather, the party is required to make a "reasonable inquiry":

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made *reasonable inquiry* and that the information known or *readily obtainable by the party* is insufficient to enable the party to admit or deny.

Fed. R. Civ. P. 36(a) (emphasis added). When a litigant objects to requests for admission or interrogatories propounded upon him by opposing counsel and files a motion for a protective order, the court has discretion to either deny or grant the motion. See Misco v. U.S. Steel Corp., 784 F.2d 198, 206 (6th Cir. 1986) ("a district court has broad discretion in regulating discovery"); United States v. 266 Tonawanda Trail, 95 F.3d 422, 426 (6th Cir

1996).

III. Discussion

A. The Law of The Case Doctrine

As a threshold matter, the United States argues that U.S. Magistrate Judge James H. Allen's Order of August 8, 2002,[5] which previously required defendant Makowsky to answer 882 RFAs[6] is now the "law of the case." The law of the case doctrine provides that "issues decided at an early stage of litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case." See Coal Resources, Inc. v. Gulf & Western, 865 F.2d 761, 766 (6th Cir. 1989). The United States contends that Judge Allen's Order, which denied defendant Makowsky's previous Motion for a Protective Order, is now the law of the case. This

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[5] See D.E. 98, Order of Judge James H. Allen, August 8, 2002, which states:

> While it is true that 882 request for admissions sound excessive, if in fact there are that many specific violations, proof thereof would take an inordinate amount of trial time, and would inconvenience many witnesses to establish these facts (if true). A more efficient use of resources would be to require Makowsky to investigate these matters, and admit (or deny) these requests, thus slimming down the litigation process. Therefore, Makowsky must respond to these requests, within 30 days of the docketing of this order.

precedent, the United States asserts, necessitates an outcome today that is congruous with Judge Allen's prior order.

The Court does not agree. Defendants' Motions for Protective Orders presently before this Court do not pertain to the same RFAs propounded upon defendant Makowsky last year and addressed in Judge Allen's Order. The current set contains different requests. Today's RFAs are directed to sixteen different parties, including some who were not even parties to this lawsuit when Judge Allen issued his order. The instant discovery dispute falls far later in litigation. Judge Allen's Order, which sought to address RFAs served on defendant Makowsky, is not binding through the law of the case doctrine.

B. The United States' Requests for Admission

The Court finds that requiring each of the defendants to respond to the United States' RFAs would impose undue burden and expense on the defendants. As discussed above, the United States' measurement-category RFAs seek to elicit admissions from the defendants relating to the size, shape, slope, height, width, angle, etc. of ramps, doorways, hallways, restrooms and numerous other features and locations in the various apartment complexes. Although one might think that questions about measurements and numbers can be an exact science, this is not always the case. Measurements, like the ones the United States asks the defendants to admit or deny, might depend on factors such as the exact

locations where the measurements were taken, what instruments were used, the weather conditions under which the measurements were taken, and other such variables.

Defendants have demonstrated to this Court that achieving this objective would be burdensome and expensive for the defendants, especially given the large number of RFAs at issue. Even if each of the defendants could somehow figure out the exact locations where the United States' expert took his readings and measurements, the Court is still concerned about other variables. Soils shift, structures settle into the earth, and materials expand and contract. These factors, among others, inject an element of ambiguity into the equation and rob of certainty and objectivity the statements the United States has asked the defendants to admit or deny. Even if there were certain RFAs that the defendants could respond to after replicating the exact conditions of the United States' measurements, the Court is still not confident that the exercise would bear fruit. In a lawsuit, unlike a laboratory, there are adverse interests at play, which can work to defeat the scientific method.

Moreover, the Court finds that many of the United States' RFAs were propounded upon parties who may not be in a position to respond accordingly. The United States has served the RFAs upon seventeen defendants. These include development companies and their individual owners, the architectural firms who planned the

projects, engineering groups that contributed to the design of the buildings and planned various systems, and investors who bankrolled these endeavors.

The United States' RFAs seem to make no distinction – or at least make an inadequate distinction – among these parties. The United States has asked the engineers questions that appear to be directed at the architects. The architects have been served with RFAs that appear to be directed at the builder. Investors have been asked to confirm or deny facts that might not fall within their purview. In other words, the United States' RFAs are not carefully tailored.

The number of RFAs also exceeds the bounds of reasonableness. This is so not only because of the sheer volume, but because the costs of compliance would likely be quite high. If required to respond to the RFAs, the defendants have demonstrated that they would need to hire experts and/or engineers to assist in taking the measurements and analyzing the construction documents. Counsel may also need to participate in that endeavor, in addition to having to draft responses to each RFA. With the number of RFAs running into the thousands - and each one raising the specter of liability - the costs could be enormous. The Court is not persuaded by the United States' argument that compliance with the RFAs could be easily achieved and that the defendants are overstating the alleged burden of responding. The expense to the

defendants – coupled with the large volume of RFAs and the fact that there is no guarantee of harmonious results – outweighs the potential benefit of judicial economy.

The number of RFAs is also excessive. Twelve of the seventeen defendants objecting were served with approximately 2,000 discrete RFAs. Four were asked to respond to over 2,700. Only two defendants had a burden of less than 1,000 RFAs. Such voluminous requests, under these circumstances, are not reasonable. See Misco v. U.S. Steel Corp., 784 F.2d 198, 206 (6th Cir. 1986); Wigler v. Electronic Data Sys. Corp., 108 F.R.D. 204, 205 (D. Md. 1985); Minnesota Mining & Manuf. V. Norton Co., 36 F.R.D. 1 (N.D. Ohio 1964).

Despite a ruling on this issue adverse to the United States, there does not appear to be a risk of prejudice to the plaintiff-intervenor or the plaintiff. They have had access to the subject apartment complexes, and their expert has had multiple opportunities to inspect and survey the properties. Although the Court would perhaps benefit from the parties agreeing to an undisputed set of measurements and set of construction documents, the Court finds that the RFAs at issue are not the appropriate discovery device in this case. Instead, the Court encourages the parties to attempt to agree – through stipulation or otherwise –

to as many common facts as possible prior to trial.[7]

Finally, since the defendants' Motions for Protective Orders are granted, the defendants are likewise not required to respond to the United States' single interrogatory.

IV. Conclusion

Accordingly, for the above reasons, the defendants' Motions for Protective Orders are GRANTED.

IT IS SO ORDERED this ____ day of May, 2003.

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TU M. PHAM
United States Magistrate Judge

[7] At oral argument, a suggestion was made that the parties could stipulate to the construction documents prior to trial. The attorney for the United States agreed that such an approach would obviate the need for the defendants to respond to those RFAs which relate to the construction documents.