

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.09-cv-02757-WYD-KMT

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit corporation,
ANITA HANSEN,
ROBERT SIROWITZ,
JOSHUA STAPEN,
ROBIN STEPHENS, and
BENJAMIN HERNANDEZ,

Plaintiffs,

v.

ABERCROMBIE & FITCH CO.,
ABERCROMBIE & FITCH STORES, INC, and
J.M. HOLLISTER LLC,

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF
STANDING**

Plaintiffs, by and through undersigned counsel, hereby submit their Response to
Defendants' Motion for Lack of Standing.

INTRODUCTION

Defendants operate the Hollister chain of clothing stores -- generally located in shopping malls -- that contain common barriers to customers with disabilities, including faux porch entrances to which several steps have been added and service counters that are too high to use for customers in wheelchairs. All of these Hollister stores were constructed long after federal Americans with Disabilities Act, 42 U.S.C. §12181 *et seq.*, (“ADA” or “Title III”) took effect.

These steps and other barriers discriminate against the individual plaintiffs and other Hollister customers who use wheelchairs. Because the individual plaintiffs have all alleged that they were injured by these barriers, intend to return to Hollister stores when the barriers are removed, and are thereby deterred by the barriers, they have standing under Article III.

FACTUAL BACKGROUND

Plaintiffs allege that Defendants as a matter of policy designed, constructed and continue to maintain Hollister stores with common architectural barriers that discriminate against wheelchair users, citing Abercrombie’s March 2009 SEC form 10-K statement’s description of common store design, furniture, fixtures and merchandise placement “to ensure a consistent store experience, regardless of location.” [Doc. 34 Second Amended Complaint (“Complaint”) ¶ 4.]¹

The common architectural barriers, as noted above, include entrances with stairs; separate segregated and inaccessible entrances for wheelchair users; service counters that are too high for wheelchair users; and merchandise displays, furniture and plants that limit access. *Id.* ¶ 8.

Plaintiffs, who visited Hollister stores in their wheelchairs, alleged that “each of the individual Plaintiffs has experienced some or all of the accessibility barriers” described in the complaint.

Id. ¶ 41 .

All five individual plaintiffs (“Individual Plaintiffs”), disabled members of the Colorado Cross-Disability Coalition (“CCDC”) who use wheelchairs, allege they have “experienced the

¹ Defendants employ a “Company-wide merchandising strategy” to ensure that “every brand displays merchandise uniformly to ensure the consistent store experience, regardless of location.” Complaint ¶ 4 (emphasis added). In addition, Defendants created and designed all Hollister stores as part of the Company-wide merchandising strategy after the passage of the effective date of the ADA. *Id.* ¶ 6.

accessibility barriers identified” in the complaint. Complaint ¶¶ 61-65. In particular, the Individual Plaintiffs allege that when they visited Hollister stores, they encountered barriers that prevented them from entering the store and shopping. *Id.* ¶¶ 8, 9, 25-39, 41, 61-65. The Individual Plaintiffs all visited Hollister stores with entrance stairs and did not have equal access to the main store entrance because it is not physically accessible to them. *Id.* ¶¶ 31-35. When they looked for an accessible entrance, they discovered that Hollister stores did not have signs directing them to the separate entrance. *Id.* ¶ 37. Once they were able to find an entrance that did not have stairs, they discovered that the door was locked or that the button that activated the assisted door hardware was out of order. *Id.* ¶ 8.b. Once inside the store, the Individual Plaintiffs found there was no accessible route through the store because merchandise displays, furniture, and other fixtures were spaced too close together or arranged in such a way that they did not have enough space to maneuver in their wheelchairs without running into the obstacles. *Id.* ¶¶ 8.d, 38-39. The Individual Plaintiffs also discovered that even if they managed to maneuver their wheelchairs to the service counter, the counter was too high for them to reach. *Id.* ¶¶ 8.c, 25-28. Despite the accessibility problems the Individual Plaintiffs encountered, each Plaintiff “would like to access Defendants’ stores in the future if Defendants remedy the ADA violations identified in this complaint.” *Id.* ¶¶ 61-65.

These allegations are sufficient to demonstrate that the Individual Plaintiffs have standing under Title III to seek injunctive relief requiring Defendants to remedy the barriers to accessibility in their stores. Also, CCDC has associational standing to represent its members. Finally, the state law claims are identical to the federal claims. Therefore, this Court has subject matter jurisdiction over this case, and Defendants’ motion to dismiss should be denied in its

entirety.

STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(1), “the Court must construe the complaint broadly and liberally.” *Axtell v. U.S.*, 860 F. Supp. 795, 797 (D. Wyo. 1994) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROCEDURE: Civil 2d §1350, at 218 (2d ed. 1990)). At the pleading stage, courts assume that specific standing allegations are subsumed under broad standing allegations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (on a motion to dismiss, it is presumed that general allegations embrace those specific facts that are necessary to support the claim). Despite this, Defendants cite case law that involved motions for summary judgment.² Summary judgment cases are inapplicable to a motion to dismiss, as more evidence is needed. *See Lujan*, 504 U.S. at 561 (comparing sufficiency of plaintiff’s allegations at the pleading stage to facts developed in discovery determined on a summary judgment motion). Reliance on such cases is inappropriate here.

² Defendants rely heavily on *Tandy v. City of Wichita*, 380 F.3d 1277 (10th Cir. 2004), which involved a ruling on a defense motion for summary judgment for lack of standing. Motion at 6-9. In addition, Defendants cite *Calderon v. Kansas Dept. of Soc. and Rehabilitation Services*, 181 F.3d 1180, 1183 (10th Cir. 1999) for the proposition that a Rule 12(b)(1) motion to dismiss for lack of standing should be reviewed under the same standard that governs 12(b)(6) motions to dismiss for failure to state a claim. Motion at 2. *Calderon* does not, however, discuss Rule 12(b)(1). Rule 12(b)(1) motions are subject to a far different standard of review. *See, e.g., Gray v. Darby*, 2009 WL 805435, at *3 (E.D. Pa. 2009) (“Because a court need not find a claim wholly frivolous or insubstantial in order to dismiss it under Rule 12(b)(6), the threshold to withstand a rule 12(b)(1) motion to dismiss is *significantly* lower than that under Rule 12(b)(6).” (emphasis added)).

ARGUMENT

I. Plaintiffs' Allegations Establish Standing Under Title III.

To establish Article III standing, a plaintiff must show (1) that he suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *See Lujan* at 560-61.³ “When . . . a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief . . . by lack of standing.” *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002). In addition, in the case of a statutory right, the Court also must consider the effect of the nature of the statutory right on prudential standing requirements. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). “[T]he actual or threatened injury required by Article III may exist ‘solely by virtue of statutes creating legal rights, the invasion of which creates standing.’” *Id.* (internal citation omitted). Here, the source of Plaintiffs’ standing is Title III of the ADA, which provides that “[n]o individual shall be discriminated against on the basis of disability . . . [in] any place of public accommodation.” 42 U.S.C. § 12182(a). Title III expressly authorizes a civil action remedy “to any person who is being subjected to discrimination on the basis of disability” *or* who “has reasonable grounds for believing that such persons is about to be subjected to discrimination.” 42 U.S.C. § 12188(a)(1). The statute therefore provides an “express right of action to persons who otherwise would be barred by prudential standing rules.” *Warth*, 422 U.S. at 501.

³ Defendants’ standing challenge focuses on whether Plaintiffs have sustained an injury-in-fact that is likely to occur again. As such, this response does not address the traceability and redressability components of the standing test.

Defendants argue that Plaintiffs do not meet their burden of establishing standing because Plaintiffs have not alleged an intent to return to specific Hollister stores. Defendants are wrong. Plaintiffs have alleged facts necessary to support the elements of standing under Title III -- whether purely because of an intent to return, as deterred customers, or as testers.

A. Plaintiffs Have Properly Alleged an Intent to Return.

As set forth in the Complaint and outlined above, each of the Individual Plaintiffs went to Defendants' Hollister stores, attempted to shop, and experienced the barriers identified. Not only do the Individual Plaintiffs allege common architectural barriers arising from a policy of Defendants, but they also alleged they "would like to access defendants stores in the future *if* defendants remedy the ADA violations identified in [the] complaint." Complaint ¶¶ 61-65 (emphasis added).⁴ Taken together, these statements clearly constitute allegations that Plaintiffs intend to return to the Hollister stores if they are made accessible.⁵ *See, e.g., Clark v. McDonald's Corp.*, 213 F.R.D. 198, 228-29 (D.N.J. 2003) (holding that wheelchair user who alleged an intent to return to defendant's restaurants after they were made accessible had standing to sue under Title III of the ADA).

B. Plaintiffs Have Properly Alleged Standing Based on Deterrence.

Additionally, under 42 U.S.C. § 12188(a)(1), deterrence is sufficient to establish an injury and confer standing under Title III. "[S]o long as the discriminatory conditions continue,

⁴ As discussed further below, these allegations are sufficient on a motion to dismiss. Although plaintiff's allegations that he "desires to use" defendant's facilities were found insufficient in *Tandy*, 380 F.3d at 1288 (concluding that one plaintiff, Garnett, failed to allege facts sufficient to establish standing), *Tandy* is distinguishable from the instant case because *Tandy* involved a motion for summary judgment.

⁵ Although Plaintiffs believe these allegations to be sufficient, as discussed below, they are submitting to the Court further evidence of their intent to return.

and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues.” *Pickern*, 293 F.3d at 1137; *see also Davoll v. Webb*, 194 F.3d 1116, 1132-33 (10th Cir. 1999);⁶ *Disabled Americans for Equal Access Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60, 64-65 & n.7 (1st Cir. 2005). An individual with a disability therefore does not have to engage in the “futile gesture” of returning to or going to another inaccessible store. 42 U.S.C. § 12188(a)(1); *Pickern*, 293 F.3d at 1135 (“[W]hen a [disabled] plaintiff . . . has actual knowledge of illegal barriers at a public accommodation to which he or she desires access, that plaintiff need not engage in the ‘futile gesture’ of attempting to gain access in order to show actual injury” under Title III of the ADA.). “[O]nce a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury” under Title III. *Pickern*, 293 F.3d at 1136-37. Thus, based on the facts alleged in the Complaint -- uniform barriers, knowledge of those barriers and a willingness to return “if Defendants remedy the ADA violations identified in this Complaint,” Complaint ¶¶ 61-65 -- Plaintiffs have alleged facts sufficient to establish standing under the ADA. Plaintiffs will go to Hollister stores but have been deterred from doing so because of Defendants’ discrimination.

This continued deterrence constitutes imminent injury. “[A] plaintiff who is threatened with harm in the future because of existing or imminently threatened non-compliance with the ADA suffers ‘imminent injury.’” *Pickern*, 293 F.3d at 1138; *see also Celano v. Marriott Int’l Inc.*, No. C 05-4004 PJH, 2008 WL 239306 at *7 (N.D. Cal. Jan. 28, 2008) (summary judgment ruling that where defendant has admitted barriers exist at all 26 golf courses nationwide, “[i]t is

⁶ Although *Davoll* involved an employment discrimination claim, it analyzed the application of the “futile gesture” doctrine in the ADA context.

unnecessary that plaintiffs actually visit each of the golf courses to have been deterred from playing there”); *Bacon v. City of Richmond*, 386 F. Supp. 2d. 700, 705 (E.D. Va. 2005) (“The court is not persuaded that the law requires a handicapped plaintiff . . . to suffer the public humiliation of unsuccessfully attempting to enter a public school facility in order to have standing” where there was evidence that all schools did not comply with ADA rather than just the four schools in which named plaintiffs themselves encountered barriers).

Because Plaintiffs have alleged that the Hollister stores were built pursuant to common architectural guidelines and share common inaccessibility, Plaintiffs’ intent to return to any Hollister stores in the future subjects them to the threat of future injury.⁷

C. Plaintiffs Have Properly Alleged Tester Standing.

The individual plaintiffs are all members of CCDC, a disability rights organization that works to end discrimination against persons with disabilities. Complaint ¶¶ 9, 14-19, 66-81. The individual plaintiffs also have standing as “testers” in light of the general allegations that they wish to visit Hollister stores if barriers are removed. *Id.* ¶¶ 61-65.

“Testers” are individuals whose purpose is “to determine whether defendants engaged in unlawful practices,” and, under the ADA, have standing if they intend to return to Defendants’ Hollister stores to test whether they are accessible. *Tandy*, 380 F.3d at 1285-87 . The intent allegations in the Complaint embrace “specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561 (1992). The specific, presumed facts in this instance are that the

⁷ Again, although Plaintiffs believe these allegations to be sufficient, as discussed below they are submitting to the Court further evidence of their deterrence.

individual plaintiffs will visit Hollister stores to test whether the barriers remain.⁸

The Individual Plaintiffs have standing as testers as well.

II. CCDC Has Associational Standing.

Defendants fail to acknowledge that Plaintiff CCDC alleges independent associational standing. *See* Complaint ¶¶ 66-82. An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

As explained above, the Individual Plaintiffs have standing. Defendants' discriminatory conduct directly and significantly undermines the core purpose of CCDC -- to achieve full inclusion for persons with disabilities into all aspects of community life by identifying and counteracting sources of disability discrimination. Complaint ¶¶ 75-81; *see Hunt*, 432 U.S. at 343-44 (finding that the advertising statute's restrictions on marketing impaired the association's purpose of protecting and enhancing the market for apples). The relief sought here does not make the participation of each CCDC member necessary. Complaint ¶ 82; *Hunt*, 432 U.S. at 343.

III. The Court Has Discretion to Consider Additional Evidence.

Rule 12(b)(1) motions take two forms: a facial attack or a factual attack. *See Paper, Allied-Industrial, Chem. & Energy Workers Intern. Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005) ("*Cont'l Carbon*") (citing *Holt v. United States*, 46 F.3d 1000, 1002-03

⁸ Again, although Plaintiffs believe these allegations to be sufficient, as discussed below they are submitting to the Court further evidence of their intent to return to test the stores.

(10th Cir. 1995)). A facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint and the Court must accept the allegations in the complaint as true. *See Cont'l Carbon*, 428 F.3d at 1292 (internal citations omitted). If Defendants' challenge is construed as a *factual* attack under Rule 12(b)(1), however, the Court "must look beyond the complaint and has wide discretion to allow documentary and even testimonial evidence." *Id.* (citing *Holt*, 46 F.3d at 1002-03; *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987)).

For the reasons set forth above, Plaintiffs' Complaint is sufficient to establish they have standing. Alternatively, under *Cont'l Carbon*, this Court should look to any and all evidence beyond the Complaint necessary to resolve the jurisdictional issue.⁹

The Declarations of Anita Hansen, Robert Sirowitz, Joshua Stapen, Robin Stephens and Benjamin Hernandez, attached as Exhibits 1-5 hereto, make clear that each individual Plaintiff (a) experienced discriminatory barriers when the Plaintiff visited Defendants' Hollister stores, Hansen Decl. ¶¶ 5- 51; Sirowitz Decl. ¶¶ 5-20; Stapen Decl. ¶¶ 5-11; Stephens Decl. ¶¶ 4-10; Hernandez Decl. ¶¶ 4-23; (b) intend to shop at Defendants' Hollister stores, but that have been deterred by the lack of accessibility, Hansen Decl. ¶¶ 51-55; Sirowitz Decl. ¶¶ 23-24; Stapen Decl. ¶ 14; Stephens Decl. ¶¶ 12, 14; Hernandez Decl. ¶¶ 23-24, 26; and (c) specifically allege that individual Plaintiffs intend to test whether Hollister stores come into compliance with the ADA in the future, Hansen Decl. ¶¶ 54-55; Sirowitz Decl. ¶ 25; Stapen Decl. ¶13; Stephens Decl. ¶ 13; Hernandez Decl. ¶ 25.

⁹ This Court may consider such evidence without converting Defendants' 12(b)(1) motion to a Rule 56 motion. *See Cont'l Carbon*, 428 F.3d at 1292.

IV. Supplemental Jurisdiction Is Appropriate on Plaintiffs' Second Claim for Relief Because the Federal Claims Are Adequately Pleaded.

Defendants also argue the Court should decline supplemental jurisdiction over Plaintiffs' state law claims in the absence of any viable federal claim. Because this Court has jurisdiction over Plaintiffs' federal law claims, it should not dismiss Plaintiffs' state law claims. Moreover, this Court should exercise jurisdiction over Plaintiffs' state law claims because Plaintiffs' state law claims are virtually identical to their federal claims. *Compare* 42 U.S.C. § 12182(a) (making it unlawful for a place of public accommodation to deny the "full and equal enjoyment" of its goods, services, privileges and accommodations to an individual with a disability), *with* Colo. Rev. Stat. § 24-34-601(2) (same). The two statutes are to be construed identically. *See* 3 Colo. Code Reg. 708-1:60.1(C).

Under 28 U.S.C. § 1367(a), this Court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." None of the reasons for denying supplemental jurisdiction under 28 U.S.C. § 1367(b) & (c) apply in this case.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request Defendants' Motion to Dismiss for Lack of Standing be denied.

Date: June 28, 2010

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

/s/ Kevin W. Williams

Kevin W. Williams
Carrie Ann Lucas
655 Broadway, Suite 775
Denver, CO 80203
Voice: (303) 839-1775
Facsimile: (303) 839-1782
E-mail: kwilliams@ccdconline.org

LEWIS, FEINBERG, LEE, RENAKER &
JACKSON, P.C.

Bill Lann Lee
1330 Broadway, Suite 1800
Oakland, CA 94612
Voice: (510) 839-6824
Fax: (510) 839-7839
Email: blee@lewisfeinberg.com

FOX & ROBERTSON, P.C.

Amy F. Robertson
104 Broadway, Suite 400
Denver, CO 80203
Voice: (303) 595-9700
TTY: (877) 595-9706
Facsimile: (303) 595-9705
E-mail: arob@foxrob.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

Gregory A. Eurich
geurich@hollandhart.com

Mark A. Knueve
maknueve@vorys.com

/s/ Kevin W. Williams
Legal Program Director
Colorado Cross-Disability Coalition