IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-K-1364

SCOT HOLLONBECK,
JOSE ANTONIO INIGUEZ,
JACOB WALTER JUNG HO HEILVEIL, and
VIE SPORTS MARKETING, INC., a Georgia corporation,

Plaintiffs,

v.

UNITED STATES OLYMPIC COMMITTEE, a federally-chartered corporation, and
U.S. PARALYMPICS, INC., f/k/a UNITED STATES PARALYMPIC CORPORATION, a Colorado non-profit corporation,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ADA AND REHAB ACT CLAIMS PURSUANT TO FED. R. CIV. P. 12(B)(6)

Plaintiffs, by and through their counsel, hereby submit this Brief in Opposition to Defendants' Motion To Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiffs' Amended Complaint alleges that Defendants discriminate against athletes with disabilities by providing Olympic athletes with services, benefits and supports that they deny Paralympic athletes. Defendants attempt to justify this discrimination based on their assertion that the Olympics and Paralympics are separate programs. This argument is no more valid than a college defending a Title IX claim on the grounds that it has separate men's and women's athletic programs and is therefore permitted to provide benefits to the former that it denies the

latter. Defendants also argue that their discrimination is justified because Paralympic athletes are not "qualified" for the Olympics; this is equivalent to a college arguing that its female athletes are not entitled to equitable athletic opportunities because they are not "qualified" for the men's teams.

Defendants ultimately attempt to immunize themselves completely from the Americans with Disabilities Act, 42 U.S.C. §§ 12101 - 12213 ("ADA"), and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehabilitation Act"), by arguing that the only law that applies to them is the Ted Stevens Olympic and Amateur Sports Act. 36 U.S.C. §§ 220501 - 220529 ("ASA"). Defendants provide no support for the proposition that in attempting to organize amateur sports, Congress placed amateur athletes outside the protection of federal anti-discrimination laws.

The Shepherd Litigation

Plaintiffs agree with Defendants that the legal questions at issue in Defendants' Motion To Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6)[1] ("Defs.' Mot. to Dismiss Athlete Pls.") are the same as those addressed in the cross-motions for summary judgment in Shepherd v. United States Olympic Committee, 99-K-2077, currently pending

[1] At the time Defendants filed this motion, only the Athlete Plaintiffs asserted claims under the ADA and the Rehabilitation Act; as such, Defendants' motion addresses only those claims. Since that time, Plaintiffs have amended their complaint to assert ADA and Rehabilitation Act claims on behalf of Plaintiff Vie Sports Marketing, Inc. (See Am. Compl. (filed Oct. 22, 2003). Defendants' Motion to Dismiss does not address those claims. Because the Athlete Plaintiffs' claims remain the same in the Amended Complaint and because the latter is now the operative complaint, Plaintiffs will refer to the Amended Complaint herein.

before this Court. (See Def.'s Mot. to Dismiss Athlete Pls. at 2.) In light of that, Plaintiffs incorporate by reference the legal arguments in plaintiff Mark Shepherd's briefs in the Shepherd case: Plaintiff's Memorandum in Support of His Motion for Partial Summary Adjudication (filed Sept. 18, 2002); Plaintiff's Memorandum in Opposition to the USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief (Shepherd's Shepherd Opp., filed Oct. 9, 2002); and Plaintiff's Reply Memorandum in Support of His Motion for Partial Summary Adjudication (filed Oct. 16, 2002). This brief, while incorporating some of the language of those briefs, contains new material and argumentation that, for example, addresses the different procedural posture of Defendants' motion here.

FACTS

The Paralympic Games are the equivalent of the Olympic Games for persons with disabilities. (Am. Compl. ¶ 18.) Plaintiffs Scot Hollonbeck, Jose Antonio Iniguez, and Jacob Walter Jung Ho Heilveil (the "Athlete Plaintiffs") all have disabilities that cause them to use wheelchairs for mobility. (Id. ¶¶ 9-11.) All three are elite wheelchair racers who have competed in past Paralympic Games and are training to compete in the 2004 Paralympic Games in Athens. (Id. ¶¶ 34-47.) Defendants the United States Olympic Committee ("USOC") and U.S. Paralympics, Inc. discriminate against the Athlete Plaintiffs by providing services, benefits and supports to Olympic athletes that are either denied to Paralympic athletes or provided in inferior types and amounts. (Id. ¶¶ 48-75, 120-31.)

ARGUMENT

I. Standard of Review.

Defendants have moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dismissal under this rule is appropriate "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." Dubbs v. Head Start, Inc., 336 F.3d 1194, 1201 (10th Cir. 2003) (internal quotes omitted). "An affirmative defense may be raised in a motion to dismiss only if the defense appears plainly on the face of the complaint." Guardian Title Agency, LLC v. Matrix Capital Bank, 141 F. Supp. 2d 1277, 1280 (D. Colo. 2001) (citing Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1311 n.3 (10th Cir. 1999)).

II. The Elements of a Prima Facie Case under Title III and the Rehabilitation Act.

The Athlete Plaintiffs bring suit under Title III of the ADA, 42 U.S.C. § 12181 - 12189, and section 504 of the Rehabilitation Act. 29 U.S.C. § 794. Title III of the ADA prohibits disability discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).[2] Under the Rehabilitation Act, a qualified individual with a disability may not -- solely by reason of his or her disability -- be "excluded from the participation in, be denied the

[2] See also 28 C.F.R. pt. 36 (Department of Justice ("DOJ") Title III regulations).

benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).[3] Discrimination under the ADA and Rehabilitation Act may take the form of, among others, denial of participation, 42 U.S.C. § 12182(b)(1)(A)(i), 28 C.F.R. § 41.51(b)(1)(i), unequal benefits, 42 U.S.C. § 12182(b)(1)(A)(ii), 28 C.F.R. § 41.51(b)(1)(ii), or imposition of eligibility criteria that screen out or tend to screen out people with disabilities. 42 U.S.C. § 12182(b)(2)(A)(i).

The Athlete Plaintiffs state a prima facie case under Title III of the ADA if they can show that (1) they have a disability; (2) Defendants own, operate, lease or lease to a place of public accommodation; and (3) they were denied full and equal treatment because of their disability. See Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001). Under the Rehabilitation Act, the Athlete Plaintiffs are required to show that (1) they have a disability; (2) they are otherwise qualified to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminated against them. See Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999).

III. The Athlete Plaintiffs have Stated Claims under The ADA and the Rehabilitation Act.

Defendants do not dispute that the Athlete Plaintiffs have properly alleged that they have disabilities, that Defendants receive federal funding, and that Defendants are places of public accommodation. (See Am. Compl. at ¶¶ 24-33, 149-50; Mot. to Dismiss Athlete Pls. at 10 n.3,

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[3] See also 28 C.F.R. pt. 41 (DOJ Rehabilitation Act Coordination Regulations).

11 n.4 & 12.) Defendants argue that the Athlete Plaintiffs have not properly alleged the second and fourth of the elements set forth in Powers: that they are otherwise qualified; and that Defendants discriminated against them on the basis of disability. Plaintiffs will address these questions in reverse order, and will then address two defenses raised by Defendants: that their eligibility criteria are necessary; and that they do not have to change their mix of services. These defenses are inappropriate on a motion to dismiss and are, in any event, wrong. Finally, Defendants raise the question of reasonable accommodation; this argument is irrelevant because the Athlete Plaintiffs do not seek an accommodation.

A. Defendants Discriminate Against the Athlete Plaintiffs on the Basis of Disability.

1. The Athlete Plaintiffs have Properly Alleged Disability Discrimination.

The Athlete Plaintiffs allege that Defendants discriminate against athletes with disabilities by providing services, benefits and supports to Olympic athletes that they deny to Paralympic athletes. (See Am. Compl. ¶¶ 48-75, 120-31.) These policies facially discriminate against athletes with disabilities. Plaintiffs "make[ ] out a prima facie case of intentional discrimination . . . merely by showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment." Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995). The Athlete Plaintiffs allege that Defendants provide benefits to Olympic athletes but deny those benefits to Paralympic athletes; this subjects athletes with disabilities to "explicitly differential -- i.e. discriminatory -- treatment." Plaintiffs have thus stated a prima facie case of intentional disability discrimination.

The fact that Defendants' discrimination is against Paralympic athletes rather than against disabled athletes per se is not to the contrary. Using such a "proxy" for a protected class constitutes intentional discrimination. See, e.g. McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992) (holding that a defendant "cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the 'fit' between age and gray hair is sufficiently close that they would form the same basis for invidious classification."); Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057, 1070 (N.D. Ill. 1996) (holding that fire code provision that applied to "facilities that house four or more unrelated persons 'for the purpose of providing personal care services'" was a proxy for intentional disability discrimination); Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 694 (E.D. Pa. 1992) (holding that an ordinance requiring 1000 feet between facilities in which "permanent care or professional supervision is present" was facially discriminatory), aff'd, 995 F.2d 217 (3rd Cir. 1993)).

In the present case, "Paralympian" is a proxy for "elite disabled athlete." It is irrelevant that the occasional Olympic athlete with a disability may be entitled to the benefits at issue here. "That a law may not burden all members of the protected class does not remove its facially discriminatory character." Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1496 n.8 (W.D. Wash. 1997) (citing Asbury v. Brougham, 866 F.2d 1276, 1281-82 (10th Cir. 1989)); see also Hargrave v. Vermont, 340 F.3d 27, 31, 36-37 (2d Cir. 2003) (holding that statute affecting individuals with mental illness who were civilly committed or in prison violated Title II of the

ADA despite the fact that it only affected a subset of individuals with mental illness); Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002) (holding that the fact that some individuals with disabilities were eligible for certain government benefits did not excuse the exclusion of the plaintiffs on a discriminatory basis), cert. denied, 537 U.S. 1105 (2003). The "fit" is sufficiently close between Paralympic athletes and athletes with disabilities to make facial discrimination against the former a proxy for facial discrimination against the latter.

Defendants also impose an eligibility criterion for many of their benefits -- the requirement that an athlete be an Olympic athlete to qualify -- that screens out or tends to screen out elite athletes with disabilities, in violation of 42 U.S.C. § 12182(b)(2)(A)(i). This provision "makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation." H. R. Rep. No. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388. Given that Paralympic athletes are not eligible for many of the services, benefits, and supports at issue in this litigation, the chances of most elite disabled athletes qualifying for these benefits are next to zero. For this reason, and as a matter of common sense, excluding Paralympic athletes will tend to screen out "a class of individuals with disabilities," that is, elite disabled athletes.[4]

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[4] In its opposition to Mr. Shepherd's motion for summary judgment, the USOC argued that its eligibility criterion was not in fact discriminatory because it "exclude[d] most of the human population, irrespective of disability." Shepherd, The USOC's Resp. in Opp. to Pl.'s Mot. for Partial Summ. Adjudication Pursuant to Fed. R. Civ. P. 56(d) (filed on Oct. 9, 2002) at 12. Such an argument would vitiate all discrimination claims: the USOC could refuse to provide benefits to African American athletes on the grounds that most of the white population of the world would not qualify either. Indeed, an employer could refuse to hire an applicant explicitly (continued...)

In sum, Plaintiffs have properly alleged that Defendants discriminated against them based on their disability in violation of the ADA and the Rehabilitation Act.

2. Disparate Funding and Unequal Benefits That Result from the Explicit Exclusion of Paralympic Athletes Violate the ADA and the Rehabilitation Act.

Defendants argue that Plaintiffs have not property alleged discrimination because providing disparate funding or unequal benefits to different programs does not constitute actionable discrimination under the ADA or the Rehabilitation Act. (See Defs.' Motion to Dismiss Athlete Pls. at 19). That is, because they assert that the Olympics and the Paralympics are separate programs, Defendants believe they are free to support one and not the other. If this argument were permissible, three decades of colleges and universities could simply have argued that their men's and women's athletic programs were separate, and that this freed them from any obligation -- under Title IX of the Education Amendments of 1972, 29 U.S.C. § 1681 -- to provide equal athletic opportunities for female athletes. The cases are to the contrary. Although no school has had the audacity to make the argument made here by Defendants, courts commonly interpret Title IX to require equitable treatment of male and female athletes participating in separate teams and programs. See, e.g., Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 829-32 (10th Cir. 1993) (holding that university violated Title IX when it cut its

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[4](...continued)
because he was African-American, and then argue that it was not discriminatory because he did not offer the job to the rest of the white population. The relevant universe here is those elite athletes for whom Congress has given the USOC responsibility. Within that universe, the USOC's eligibility criterion includes those without disabilities, and screens out those with disabilities.

women's softball team); Cohen v. Brown Univ., 991 F.2d 888, 903-04 (1st Cir. 1993) (holding that demoting two women's varsity teams to club status violated Title IX); Comtys. for Equity v. Mich. High School Athletic Ass'n, 178 F. Supp. 2d 805, 855-57 (W.D. Mich 2001) (holding that scheduling boys teams to play in traditional seasons and girls teams in non-traditional seasons violated Title IX).[5] A college could not deny benefits to its female athletes that it provides to its male athletes simply on the grounds that it has chosen to administer those teams or programs separately. Likewise, Defendants may not deny benefits to Paralympic athletes that it provides to Olympic athletes simply because it asserts that they are separate programs.

The Court need not even reach that analysis, however, because there is nothing on the face of the Amended Complaint to indicate that this case involves separate programs. To the contrary, the Amended Complaint alleges that Congress gave the USOC responsibility for both Olympic and Paralympic athletes, and that Defendants provide benefits to the former that they do not provide to the latter. (See Am. Compl. at ¶¶ 21, 48-75, 120-31.) There is no basis for the premise of Defendants' argument: that the benefits they provide Olympic athletes are somehow part of a different "program" from the benefits they provide Paralympic athletes. This makes the holding in John Does 1-5 v. Chandler, 83 F.3d 1150, 1155 (9th Cir. 1996) -- on which

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[5] Title IX is especially relevant to this Court's analysis of the Athlete Plaintiffs' claims, as Congress has made clear that the Rehabilitation Act is to be read and interpreted together with Title IX. See S. Rep. No. 100-64, 100th Cong., 1st Sess. at 3, reprinted in 1988 U.S.C.C.A.N. 3, 5 ("the same standards are used to interpret and enforce [those] laws"); see also Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1379 (10th Cir. 1981) (holding that the Rehabilitation Act and Title IX were both patterned after Title VI of the Civil Rights Act, 42 U.S.C. § 2000d).

Defendants rely -- inapposite. The Ninth Circuit's holding in that case -- that a state could place a durational limit on a benefits program for individuals with disabilities that did it did not place on a program for "families with dependent children" -- was based in part on its determination that the programs at issue were separate and should be analyzed separately, rather than as part of a unitary general assistance program. Id.

Assuming for the moment that it were appropriate to analyze the benefits that Defendants provide to Olympic athletes as a separate program, the present case differs from Does 1-5 in one very central respect: the favored program in Does 1-5 -- the one for needy families with dependant children -- was in fact open to all. That is, the category "families with dependent children" is in no way a proxy for "non-disabled families," and the criterion of having dependent children does not screen out or tend to screen out individuals with disabilities. The plaintiffs in Does 1-5 made no such argument and it is simply common sense that many families with dependent children will have one or more members who have disabilities. This was essential to the court's approval of the differing durational limitations. Id. at 1155 (holding that "a program would not violate the ADA as long as disabled people with children were not excluded from full participation in the program.") In contrast, the two programs Defendants ask this Court to analyze separately -- and to permit Defendants to treat differently -- are almost perfectly aligned with the classification protected by the ADA. It would be as if the state in Does 1-5 offered one benefit program for "families all of whose members can walk" (which had no durational limit) and a separate benefit for "families one or more of whose members have a mobility impairment" (which was limited to one year). Where two programs are defined to track the distinction

between a protected and unprotected class -- male/female; African-American/Caucasian; disabled/non-disabled -- a defendant cannot excuse discrimination against the protected-class program by asserting that the programs are separate.

3. Defendants Do Not Provide Meaningful Access to their Benefits for Elite Athletes with Disabilities.

Defendants also attempt to refute the Athlete Plaintiffs' discrimination claim by arguing that they are only required to provide "meaningful access" to their benefits and that they have done so. (See Defs.' Mot. to Dismiss Athlete Pls. at 18.) It is not clear what Defendants mean by this. If they are referring to the benefits they provide Olympic athletes, the Athlete Plaintiffs allege that Defendants provide Paralympic athletes no access whatsoever -- meaningful or otherwise -- to a number of those benefits.[6] If, instead, Defendants are suggesting that, by providing support to those extraordinarily rare disabled athletes who qualify for the Olympics, they have provided meaningful access to elite disabled athletes in general, this argument has repeatedly been rejected. See, e.g., Lovell, 303 F.3d at 1054 (holding that "appropriate treatment of some disabled persons does not permit [the defendant] to discriminate against other disabled people under any definition of 'meaningful access.'"); see also supra at 7-8 (citing cases). There is, in any event, nothing on the face of the Amended Complaint that indicates that athletes with disabilities have meaningful access to Defendants' benefits and services. As such, dismissal at this stage would be inappropriate.

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[6] See Am. Compl. ¶¶ 48-75, 120-31.

B. The Athlete Plaintiffs Are Otherwise Qualified for Defendant's Benefits.

The Athlete Plaintiffs have properly alleged that they are qualified for the Paralympics and that "[t]he Paralympic Games . . . are the equivalent of the Olympic Games for persons with disabilities." (See Am. Compl. at ¶¶ 18, 34-47.) The Athlete Plaintiffs are thus elite athletes, qualified for the benefits at issue but for the discriminatory condition Defendants' have placed on those benefits.

Defendants do not dispute that the Athlete Plaintiffs are qualified for the Paralympics. Rather, Defendants argue that the Athlete Plaintiffs are not qualified because, "[s]ince none of the Athlete Plaintiffs are qualified to compete in an 'official' event on the program of the Olympic Games, none are eligible for the USOC's Olympic benefits." This is circular: Defendants have simply defined the benefits in terms of the discriminatory condition. See Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 441 (E.D. Va. 1995) (noting, in addressing mental health question on bar application, that "[w]hile Defendant argues that [the plaintiff] is not an 'otherwise qualified individual' because she failed to answer [the mental health question], this argument begs the question of whether [the question] must be answered at all.").

Before the Supreme Court decided Brown v. Board of Education, 347 U.S. 483 (1954), African-American students were not "qualified" to enter Topeka schools; before United States v. Virginia, 518 U.S. 515 (1996), women were not "qualified" to enter the Virginia Military Institute. Ultimately, Defendants' argument is tantamount to a Title IX defendant asserting that, since members of the women's team are not qualified for the men's team, they cannot challenge inequitable provision of benefits to the two teams.

C. Defendants' Defenses Are Meritless.

Defendants also offer the defenses to Plaintiffs' prima facie case that their eligibility criterion is necessary and that they should not be required to alter the mix of their services. Both are wrong, and the latter is irrelevant.

1. The Eligibility Criterion of Being an Olympic Athlete Is Not Necessary for the Provision of the Services Being Offered.

By alleging that "[t]he Paralympic Games . . . are the equivalent of the Olympic Games for persons with disabilities" and that Defendants provide certain benefits only to Olympic, and not Paralympic, athletes, (see Am. Compl. at ¶¶ 18, 48-75, 120-31), the Athlete Plaintiffs have stated a claim for violation of the provision prohibiting the imposition of "eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities." 42 U.S.C. § 12182(b)(2)(A)(i). That provision contains a defense: such criteria are acceptable if they "can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered." Id. The question whether the criterion of being an Olympic athlete is "necessary" is an affirmative defense on which Defendants have the burden of proof. See Colo. Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1003 (10th Cir. 2001) (noting that "[s]everal district courts have placed the burden of showing that the eligibility criteria are necessary on the proponent of such criteria" and citing cases). Because there is nothing on the face of the Amended Complaint to suggest that this criterion is necessary, it would be inappropriate to resolve this question on a motion to dismiss. See Guardian Title, 141 F. Supp. 2d at 1280.

In any event, Defendants simply perpetuate the circularity of their qualification argument by defining the goal of the program in discriminatory terms. The racial and gender restrictions at issue in Brown v. Board of Education and United States v. Virginia might have been necessary if the purpose of the defendant schools were defined to be, respectively, the education of white or male students. Here, because the USOC is responsible for obtaining and training both Olympic and Paralympic athletes, see 36 U.S.C. § 220503(3)(A), (4) & (13), and because supporting Paralympic athletes serves the goal of supporting athletes with "agility, strength, speed, balance, and other talents," (see Defs.' Mot. to Dismiss Athlete Pls. at 15), Defendants' limitation of its benefits to Olympic athletes is not "necessary for the provision of the [benefits] being offered." See 42 U.S.C. § 12182(b)(2)(A)(i). As such, it violates the ADA.

2. The Athlete Plaintiffs Are Not Asking Defendants to Alter Their Mix of Services.

The Athlete Plaintiffs brought this suit to compel Defendants to provide Paralympic athletes with the same services, supports and benefits they provide Olympic athletes. Defendants point to a regulation stating that the ADA does not require public accommodations to carry "accessible or special goods," 28 C.F.R. § 36.307(a), and argue that providing the same benefits to Olympic and Paralympic athletes somehow involves providing the latter "accessible or special" goods. (See Defs.' Mot. to Dismiss Athlete Pls. at 17.) Because the Athlete Plaintiffs do not request anything other than what is provided Olympic athletes, this argument is completely irrelevant.

The cases cited by Defendants underscore this irrelevance. Defendants rely on five cases in which the plaintiffs were requesting insurance products with more advantageous coverage than the ones offered by the defendants to their other employees. Although the court in each case held that the ADA did not require the provider to change the content of its insurance policies to provide superior coverage for people with disabilities, in each case the court made clear that the defendant had offered the same insurance product to all employees.[7] Indeed, at least one of Defendants' cases made clear that it would have been a violation of the ADA to do otherwise. Doe, 179 F.3d at 561 ("[R]efusing . . . to provide the same coverage for a broken leg, or other afflictions not peculiar to people with AIDS . . . would be a good example of discrimination by reason of disability.") The Athlete Plaintiffs are asking that Defendants here do the equivalent of what the defendants in each of its insurance cases had already done: make the same benefits available to all of the elite amateur athletes for which Congress has given them responsibility.

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[7] See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1116 (9th Cir. 2000) (the defendant "gave [the plaintiff] the same opportunity that it gave all the rest of its employees"); McNeil v. Time Ins. Co., 205 F.3d 179, 188 (5th Cir. 2000) (defendant "offered the policy to [the plaintiff] on the same terms as it offered the policy to other members of the association."), cert. denied 531 U.S. 1191 (2001); Kimber v. Thiokol Corp., 196 F.3d 1092,1101 (10th Cir. 1999) ("Every [Thiokol] employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every [Thiokol] employee received equal treatment."); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("Mutual of Omaha does not refuse to sell insurance policies to . . . persons [with the plaintiff's disability]."), cert. denied 528 U.S. 1106 (2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998) ("Every Schering employee had the opportunity to join the same plan with the same schedule of coverage"), cert. denied 525 U.S. 1093 (1999), cited in Defs.' Mot. to Dismiss Athlete Pls. at 17-19.

Defendants' argument is not only irrelevant, it's dangerous. If a proprietor were permitted to refuse to sell goods to people with disabilities on the grounds that the simple act of providing its goods to such people would convert them to "accessible or special" goods, this single exception would swallow Title III whole. Yet this is what Defendants argue: that by making benefits available to Paralympic athletes, those same benefits become "accessible or special." Under this reasoning, a restaurant could refuse to serve people who use wheelchairs and then argue that any attempt to alter that discriminatory rule would be forcing it to sell "accessible or special goods."

D. The Athlete Plaintiffs Do Not Seek a Reasonable Accommodation; They Seek an End to Facial Discrimination.

Defendants argue that "[t]he ADA and the [Rehabilitation] Act, at their broadest interpretation, perhaps require the USOC to make reasonable accommodations to permit a qualified entrant to participate," and then discuss PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001), for a page and a half. (Defs.' Mot. to Dismiss Athlete Pls. at 12-13.) The plaintiff in Martin was an elite disabled golfer who sought to modify the rules of the PGA Tour to permit him to compete against non-disabled golfers. Id. at 669. The entire discussion is irrelevant: the Athlete Plaintiffs do not seek to compete in Olympic track events against non-disabled athletes, nor do they seek a reasonable modification of a neutral rule under 42 U.S.C. § 12182(b)(2)(A)(ii), as Mr. Martin did. Rather, the Athlete Plaintiffs here seek the removal of a facially discriminatory provision that denies elite disabled athletes services, benefits and supports that Defendants provide elite nondisabled athletes. Where a provision is facially discriminatory, a reasonable

accommodation analysis is not appropriate; rather, the facially discriminatory provision constitutes a per se violation of the ADA. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 734-35 (9th Cir. 1999).

IV. The ASA Provides No Reason to Dismiss the Athlete Plaintiffs' Claims.

As demonstrated above, the Athlete Plaintiffs have stated claims under Title III and the Rehabilitation Act. Defendants seek to avoid these claims by attempting to convert them -- largely through wishful thinking -- into claims under the ASA, which claims, they then argue, are improper. Defendants provide no legally-cognizable grounds for this Court to treat the Athlete Plaintiffs' ADA and Rehabilitation Act claims as ASA claims or otherwise to use the ASA to dismiss this case.

A. The ASA's Substantive Requirements are Irrelevant.

Defendants assert that the ASA has no private right of action and that it does not mandate parity between athletes. (See Def.'s Mot. to Dismiss Athlete Pls. at 5, 7-10.) The former is true, and the latter may be arguable, but both are completely irrelevant, as the Athlete Plaintiffs have not asserted claims under the ASA. All of the cases on which Defendants rely involved plaintiffs

who asserted claims directly under the ASA;[8] their holding that the ASA does not create a private right of action is not applicable to the present case.

B. The USOC Has Disavowed Any Argument That the ASA Preempts the ADA or Rehabilitation Act.

Defendants assert, in their Motion to Dismiss Athlete Plaintiffs, that "[t]he only obligation the USOC has at all with respect to Olympic, Paralympic or Pan American athletes is enumerated in the ASA." (Id. at 6.) Furthermore, two of the cases on which Defendants rely hold that state tort claims are pre-empted by the ASA.[9] While it might appear that Defendants are making a preemption argument, the USOC, in its reply brief in the Shepherd case, explicitly disavowed the argument that the ASA preempts the ADA or Rehabilitation Act. (See Shepherd, The USOC's Reply in Supp. of Mot. for Summ. J. ("USOC Shepherd Reply," filed Oct. 16, 2002)) at 2 ("The USOC's basis for summary judgment, however, does not stand on the argument that the ASA preempts either the ADA or [the Rehabilitation Act]."")) In any event, an

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[8] Martinez v. United States Olympic Comm., 802 F.2d 1275, 1280-81 (10th Cir. 1986) (addressing ASA claim of deceased boxer); Michels v. United States Olympic Comm., 741 F.2d 155, 156 (7th Cir. 1984) (addressing ASA claims of athlete challenging disqualification following drug test); Oldfield v. Athletic Cong., 779 F.2d 505, 506 (9th Cir. 1985) (addressing ASA claims of athlete challenging suspension of amateur status and resulting disqualification from competition); DeFrantz v. United States Olympic Comm., 492 F. Supp. 1181, 1186 (D.D.C.) (addressing ASA claims of athletes challenging the USOC's decision not to send a team to the Moscow Olympics), aff'd 701 F.2d 221 (D.C. Cir. 1980); Walton-Floyd v. United States Olympic Comm., 965 S.W.2d 35, 35-37, 40 (Tex. App. 1998) (addressing ASA and state tort claims of athlete challenging disqualification following drug test); Dolan v. United States Equestrian Team, Inc., 608 A.2d 434, 435 (N.J. Super. Ct. App. Div. 1992) (addressing ASA and state tort claims of athlete challenging selection of different athlete for world championship team), cited in Def.'s Mot. to Dismiss Athlete Pls. at 5.

[9] Dolan, 608 A.2d at 437-38; Walton-Floyd, 965 S.W.2d at 40.

argument that the ASA preempted the ADA would not succeed. See Devlin ex rel. Devlin v. Ariz. Youth Soccer Ass'n, No. CIV 95-745 TUC ACM, 1996 WL 118445, at *2 (D. Ariz. Feb. 8, 1996) (Ex. 1 hereto) (holding that "the ADA . . . preempt[s] federal and state laws that provide less protection than the ADA and by precluding a judicial remedy, the Amateur Sports Act provides less protection for the rights of individuals with disabilities than does the ADA.").

C. Entities Governed by the ASA Are Also Required to Comply with Other Federal Laws.

Because the Athlete Plaintiffs did not actually make a claim under the ASA and because Defendants disavow any argument that the ASA preempts the ADA or the Rehabilitation Act, in order for Defendants' ASA argument to succeed, they must find some legally cognizable way to convert the Athlete Plaintiffs' claims into ASA claims. The bald assertion -- quoted above -- that "[t]he only obligation the USOC has at all with respect to Olympic, Paralympic or Pan American athletes is enumerated in the ASA," (Def.'s Mot. to Dismiss Athlete Pls. at 6), does not do the trick. Defendants provide no support for this proposition. Furthermore, having admitted for the purposes of the present motion that they are both recipients of federal funding and places of public accommodation,[10] Defendants provide no legal or logical reason why they alone among such recipients and places should not be covered by the Rehabilitation Act and Title III, respectively.

While Defendants provide no support for the proposition that their only obligation to athletes is under the ASA, several cases have held to the contrary. In Devlin, 1996 WL 118445,

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[10] Def.'s Mot. to Dismiss Athlete Pls. at 10 n.3 & 11 n.4

at *2-4, for example, the court upheld an ADA claim against an athletic organization that alleged it was covered by the ASA. In two other cases, courts considered on their merits federal civil rights claims against national governing bodies of sport ("NGBs"), which are also governed by the ASA. 36 U.S.C. §§ 220504(b)(1) (defining "member" to include NGBs). See Akiyama v. United States Judo, Inc., 181 F. Supp. 2d 1179, 1182-83 (W.D. Wash. 2002) (considering on its merits a claim against the NGB of judo under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a)); Sternberg v. U.S.A. National Karate-do Fed'n, Inc., 123 F. Supp. 2d 659, 661-62 (E.D.N.Y. 2000) (holding that female athlete stated cause of action against the NGB of karate for gender discrimination under Title IX based on the NGB's decision to withdraw a women's team from world championship competition while permitting the equivalent men's team to participate); see also Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580 (7th Cir.) (considering on its merits a claim against the USOC under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.), cert. denied, 534 U.S. 828 (2001).[11] These cases contradict any assertion that the USOC's only duties to athletes arise under the ASA.

Mark Shepherd cited to these same cases in his opposition to the USOC's motion for summary judgment. (Shepherd's Shepherd Opp. at 5-7.) In its reply brief, the USOC attempted to distinguish these cases, but used an argument that had nothing whatsoever to do with the ASA. That is, the USOC did not explain how the argument that its only duty to athletes arises under the

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[11] Two other cases have permitted athletes to proceed with state contract claims against the USOC. See Foschi ex. rel Foschi v. United States Swimming, Inc., 916 F. Supp. 232, 241 (E.D.N.Y. 1996); Harding v. United States Figure Skating Ass'n, 851 F. Supp. 1476, 1480 (D. Or. 1994).

ASA is consistent with cases recognizing claims against the USOC, NGBs and other covered sports organizations under the ADA, Title IX, Title II of the Civil Rights Act of 1964, and RICO. Rather, it simply repeated its argument that Mr. Shepherd is not qualified, a subset of its argument that discrimination against Paralympic athletes is not disability discrimination. (See USOC Shepherd Reply at 4-5 (distinguishing Akiyama and Sternberg on the grounds that the athlete-plaintiffs in those cases were "qualified," whereas, in the USOC's view, Mr. Shepherd is not qualified for the benefits he seeks).) Similarly, when explaining to the Court in Shepherd that it was not making a preemption argument, the USOC asserted that its ASA argument was in fact this: that "[n]either the ADA nor [the Rehabilitation Act] are meant to provide a remedy to a class of athletes who are displeased by the USOC's financial allocations." Id. at 2. Thus explained, Defendants' ASA argument simply collapses into its argument -- refuted above -- that Mr. Shepherd and the Athlete Plaintiffs have not stated an actionable discrimination claim.

D. The Athlete Plaintiffs Are Not Trying to Enforce Duties Created by the ASA.

Defendants argue that the fact that the Athlete Plaintiffs' claims involve athlete benefits "transforms the Athlete Plaintiffs' claim from one based on disability discrimination to one in which this Court is forced to interpret and then enforce alleged duties or obligations owed to Paralympic athletes under the ASA." (Def.'s Mot. to Dismiss Athlete Pls. at 5-6.) This is simply wrong: The Athlete Plaintiffs do not "rely on alleged duties created by the ASA;" they rely on the duty -- created by the Americans with Disabilities Act and the Rehabilitation Act -- not to discriminate against individuals with disabilities. The ASA does not mandate the benefits at issue here and if the USOC had elected -- as would have been its right under the ASA -- not to

provide certain benefits at all, the Athlete Plaintiffs would not have filed suit to force the USOC to provide them. Once Defendants have chosen to provide a given benefit, however, the ADA and the Rehabilitation Act mandate that they do so in a nondiscriminatory fashion.

The fact that the Amended Complaint refers to the ASA does not convert the Athlete Plaintiffs' claims into ones enforcing that statute. The USOC was created and is defined by the ASA and it would be virtually impossible to understand how the organization functions without reference to that statute. The fact that a court -- in evaluating the presence or absence of discrimination -- refers to foundational documents, internal policies, or other guidelines does not transform a case into one enforcing those documents, policies or guidelines. The Supreme Court in PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001), for example, made extensive reference to the rules of golf and the policies of the PGA Tour in order to examine whether that entity was discriminating under Title III of the ADA. Nothing in this analysis converted Mr. Martin's claim to one attempting to enforce the Rules of Golf, the Conditions of Competition and Local Rules, or the Notices to Competitors. See id. at 666-67. See also, e.g., Woodman v. Runyon, 132 F.3d 1330, 1334 (10th Cir. 1997) (interpreting personnel manual in evaluating whether reassignment was required under the Rehabilitation Act); Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 785 (10th Cir. 1995) (interpreting employee policy manual in evaluating a sexual harassment claim under Title VII).

In the present case, the Court will have to understand what the USOC does to evaluate whether it is doing what it does in a manner that violates the ADA and the Rehabilitation Act. The fact that this understanding will require reference to the ASA -- and to the USOC's

Constitution, its annual reports, it website and numerous other documents -- does not convert the Athlete Plaintiffs' discrimination claims into ASA claims, or claims to enforce annual reports or web pages.

E. Defendants Are Not above the Law.

Defendants conclude their ASA argument by asserting that mandating equivalent programming "would be an intrusion into the USOC's prerogatives, and would endanger the flexibility necessary for any private organization to function efficiently and responsibly." (Defs.' Mot. to Dismiss Athlete Pls. at 9.) Many private organizations function efficiently and responsibly without discriminating -- and, of course, whatever the USOC's prerogatives, they must be exercised in compliance with federal law. See, e.g., Bay Area, 179 F.3d at 735 (holding, in zoning context, "localities remain free to distinguish between land uses to effectuate the public interest -- they just must refrain from making distinctions based on what Congress has determined to be inappropriate considerations."); South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1041 (D.S.D. 2002) (holding that while a state may control land use, it must do so in compliance with the ADA), aff'd in part, rev'd in part on other grounds, 340 F.3d 583 (8th Cir. 2003); Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1492 (S.D. Fla. 1994) ("[T]he Board [of Bar Examiners] is authorized by state law to investigate an applicant's character and fitness. However, the Board is not permitted to conduct such investigation in violation of federal law."); Clark, 880 F. Supp. at 443 ("While the Board's broad authority to set licensing qualifications is well established, such authority is subject to the requirements of the ADA.").

Defendants provide no basis for elevating their prerogatives above those of states, cities and state bar associations. Indeed, the Supreme Court has made clear that -- although sovereign immunity protects states from paying money damages under the ADA -- they are subject to suit for injunctive relief to bring them into compliance with that law. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (holding that the ADA "prescribes standards applicable to the States. Those standards can be enforced . . . by private individuals in actions for injunctive relief under Ex parte Young, [209 U.S. 123 (1908)]."). It is hard to believe that Congress, through the ASA, imbued the USOC with sovereignty greater than that of the States of our Union.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Motion To Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6).

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Dated: November 14, 2003

Certificate of Service

I hereby certify that on November 14, 2003, a copy of **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ADA AND REHAB ACT CLAIMS PURSUANT TO FED. R. CIV. P. 12(B)(6)**, was served by first-class mail, postage prepaid, on:

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