JANET RENO
Attorney General

PAUL M. GAGNON
United States Attorney
DAVID BRODERICK
Assistant United States Attorney

BILL LANN LEE
Acting Assistant Attorney General
Civil Rights Division
JOHN L. WODATCH, Chief
L. IRENE BOWEN, Deputy Chief
PHILIP L. BREEN, Special Legal Counsel
EDWARD MILLER, Attorney
KEN NAKATA, Attorney
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
Post Office Box 66738
Washington, D.C. 20035-6738
(202) 514-3422
Attorneys For *Amicus Curiae*
United States of America

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BETTY KITSON,	*	
	*	
Plaintiff,	*	
	*	CHAPTER 13
v.	*	Case No.: 97-12873mwv
	*	
PEOPLES HERITAGE SAVINGS BANK,	*	Adv. Proc. No.: 97-01169mwv
	*	Trial Date: November 12, 1998
Defendant.	*	

MEMORANDUM OF *AMICUS CURIAE* UNITED STATES IN OPPOSITION TO DEFENDANT PEOPLES HERITAGE SAVINGS BANK'S MOTION TO DISMISS PLAINTIFF'S CLAIM FOR VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

Plaintiff, Betty Kitson, who is blind, applied for a home mortgage with the Defendant, Peoples Heritage Savings Bank ("Peoples") in 1994. Plaintiff's Third Amended Complaint, ¶¶ 15-16.[1] According to Ms. Kitson, she requested that her loan documents be provided to her in recorded audio form. Id. ¶ 30. Ms. Kitson alleges that Peoples refused to provide the documents in recorded audio form, and instead read the documents to her at the mortgage closing. Id. ¶ 24, 30-33. According to Ms. Kitson, Peoples agreed to record the loan documents subsequent to the closing; however, to date Peoples has not provided the documents in this format. Id. ¶ 24, 30-33.

In August 1997, Ms. Kitson filed for bankruptcy, and in October 1997, she filed an adversarial proceeding against Peoples as part of the bankruptcy proceedings. The complaint alleged breach of contract, breach of fiduciary duty, breach of good faith and fair dealing, and violations of title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C §§ 12181-12189.

On September 9, 1998, Peoples filed a Motion to Dismiss the ADA claims. Peoples relies principally on two arguments in support of its motion. First, Peoples argues that where state law contains anti-discrimination provisions comparable to the ADA, a private party must notify the relevant state administrative agency of her complaint prior to bringing an action to enforce title III. Peoples argues that, because Ms. Kitson did not so notify the State, she lacks a jurisdictional basis for her ADA counts. Second, Peoples argues that Ms. Kitson lacks standing

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[1/] Because this is a motion to dismiss, this Court must "accept all factual allegations in the complaint as true and give the pleader the benefit of all reasonable inferences that can be fairly drawn therefrom." Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). Such a motion should be granted only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

to assert her ADA claim because she cannot demonstrate that she is likely to seek future services from Peoples and to be denied such services in a discriminatory manner, and therefore she cannot seek injunctive relief.[2] The Defendant's positions rest on an erroneous reading of title III of the ADA, and should be rejected.

INTEREST OF THE UNITED STATES

The United States has substantial responsibility for enforcement of title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181 et seq.. One of the express purposes of the ADA, 42 U.S.C. § 12101(b)(3), is to "ensure that the Federal Government plays a central role in enforcing the standards established in [the Act] on behalf of individuals with disabilities." Pursuant to 42 U.S.C. § 12186(b) and 42 U.S.C. § 12206(c)(3), the Department of Justice has issued regulations and a Technical Assistance Manual interpreting title III. Neither the regulations nor the Technical Assistance Manual make any mention of the pre-suit state administrative notice requirement that the Defendant asserts is applicable. See 28 C.F.R. 36.501(a) (1993); Department of Justice, The Americans with Disabilities Title III Technical Assistance Manual, §§ III-8.1000, 8.2000. The absence of any mention of such a requirement in the contemporaneous administrative interpretation of the statute is cogent evidence of the Attorney General's belief that resort to such procedures was not intended by Congress.

[2/] Peoples also argues that Ms. Kitson's ADA claims should be dismissed because she seeks monetary damages under title III. It is correct that private plaintiffs cannot seek damages under title III. 42 U.S.C. § 12188. However, while Plaintiff's title III damages request should be denied, this cannot serve as a basis to dismiss her ADA claim in its entirety, since Ms. Kitson is nonetheless entitled to injunctive and declaratory relief. See infra at 11-17.

Section 308(b) of title III of the ADA, 42 U.S.C. § 12188(b), provides authority for the Attorney General to enforce the nondiscrimination requirements where there is a pattern or practice of discrimination or where discrimination raises an issue of general public importance. In addition to this public enforcement, section 308(a) also provides a private remedy to enable individuals to correct particular instances of disability-based discrimination. Given the limited resources of the Department of Justice, together with the volume of allegations of discrimination, this private remedy is an important method of ADA enforcement. The limitation sought by the Defendant in this case on the right of an individual to bring a suit in federal court is unwarranted by the plain language of section 308(b) of the ADA and would result in significantly delaying the vindication of federal rights.

ARGUMENT

I. Individuals Alleging Discrimination Based Upon Disability by Public Accommodations Need Not Invoke State Administrative Remedies Prior to Bringing Suit in Federal Court Under Title III of The Americans With Disabilities Act

Title III of the ADA, 42 U.S.C. § 12181 through 12189, prohibits discrimination on the basis of disability. Among other things, it requires private entities that own, operate, or lease public accommodations to provide auxiliary aids and services to persons with disabilities to ensure that such persons are not excluded, denied services, segregated or otherwise treated differently than other individuals on the basis of disability. 42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(iii).

Congress intended the nondiscrimination provisions of title III to be enforced both by persons who are themselves subjected to discrimination on the basis of disability, 42 U.S.C. §

12188(a), and by the Attorney General, 42 U.S.C. § 12188(b). Thus, section 308(a)(1), 42 U.S.C. § 12188(a)(1), provides, in relevant part (emphasis added):

> The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183.

Section 2000a-3(a) of title 42 is the codified version of section 204(a) of the Civil Rights Act of 1964. It provides that:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court, may in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

42 U.S.C. § 2000a-3(a).

Thus, the "procedures" for implementing the remedies afforded by the Civil Rights Act are intervention by the Attorney General in a case certified by the Attorney General to be of "general public importance," and, "[u]pon application by the complainant and in such circumstances as the court may deem just," appointment of an attorney for the complainant and the commencement of suit without the payment of fees, costs, or security. Neither the "remedies" nor the "procedures" include any requirement of notice to any state or local authority.

The notice requirement that Peoples seeks to impose comes from a different provision of the Civil Rights Act: Section 204(c) (codified as 42 U.S.C. § 2000a-3(c)). That provision does

require that in states or other political subdivisions with statutes that offer civil rights protections, a plaintiff must notify the relevant state or local agency at least thirty days before bringing an action on a claim arising under the Civil Rights Act. 42 U.S.C § 2000a-3(c).[3] However, the ADA makes clear that title III of the ADA specifically incorporates only section 204(a) of the Civil Rights Act, and there is no indication in the language of the statute or its legislative history that section 204(c) of the Civil Rights Act pertains to ADA actions.

Title III of the ADA is not simply a carbon copy of title II of the 1964 Act, although both prohibit discrimination in places of public accommodation. Congress recognized that discrimination based upon disability is manifested in ways that are distinct from discrimination on the basis of race, color, religion or national origin, and must be addressed in a different way. Thus, rather than simply amending title II of the 1964 Act to add disability as a prohibited basis for discrimination, Congress enacted a comprehensive statute addressing issues such as architectural and communication barriers, 42 U.S.C. § 12182(b)(2)(A)(iv), and provision of auxiliary aids and services, 42 U.S.C. § 12182(b)(2)(A)(iii), that were not relevant to the kinds of discrimination prohibited by the 1964 Act. The ADA concept of public accommodations is also

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[3/] Section 204(c) of the Civil Rights Act provides that:

> In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

42 U.S.C. § 2000a-3(c).

much broader than that of title II of the 1964 Act. Compare 42 U.S.C.§ 2000a(b) with 42 U.S.C. § 12181(7), 42 U.S.C. § 12183 (commercial facilities), 42 U.S.C. § 12184 (public transportation services provided by private entities).

Congress borrowed from the 1964 Act the remedial structure contained in Section 204(a), but it did not thereby incorporate any of the other provisions of Section 204. Congress could simply have repeated the language of section 204(a) in title III of the ADA to indicate the remedies and procedures it intended to provide to aggrieved persons. If it had done so, there would be no argument that Congress intended to require such persons to exhaust State or local administrative remedies. The fact that Congress used Subsection 204(a) of the 1964 Act as a shorthand method to refer to the remedies and procedures it intended to provide should not change that result.

In any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." Staples v. United States, 511 U.S. 600, 605 (1994). The Supreme Court has instructed "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992).

Indeed, it is well-settled that when one statute is modeled on another, but omits a specific provision contained in the original, "a strong presumption exists that the legislature intended to omit that provision." Kirchner v. Chattanooga Choo Choo, 10 F.3d 737, 738-739 (10th Cir. 1993) citing Bank of America v. Webster, 439, 691, 692 (9th Cir. 1971); Crane Co. v. Richardson Constr. Co., 312 F.2d 269, 270 (5th Cir. 1973). See also Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947) (in construing a

statute, "[o]ne must also listen attentively to what it does not say").

The weight of legal authority addressing this issue has rejected Defendant's interpretation of the statute. The sole circuit court to decide the issue has affirmed a trial court finding that no pre-suit administrative notice exists. Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547 (7th Cir. 1996), cert. denied, 117 S.Ct. 771 (1997). The District Court had expressly rejected the argument offered by Peoples, finding that "[b]y the express terms of § 12188, the only provision adopted for subchapter III of the ADA is § 2000a-3(a). Although subsection (c) limits when subsection (a) may be invoked, Congress only cited the latter. Therefore, there is no requirement that parties provide notice to a state or local authority." Soignier v. American Bd. of Plastic Surgery, NO. 95 C 2736, 1996 WL 6553, at *1 (N.D.Ill., Jan. 8, 1996). In affirming that decision, the Seventh Circuit recognized that "there is no first obligation to pursue administrative remedies" prior to bringing a title III claim. 92 F.3d at 553 (citation omitted, emphasis added).

Other courts to evaluate this issue have also found that the administrative notice requirements of subsection (c) do not apply to the ADA. Botosan v. Fitzhugh, 1998 WL 458195 (S.D. Cal. Aug. 3, 1998); Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, slip op. at 5-11 (D. Colo. Civil No. 96-WY-2492-AJ, Mar. 3, 1997); Bercovitch v. Baldwin School, 964 F. Supp. 597, 605 (D. P.R. 1997), rev'd on other grounds, 133 F.3d 141 (1st Cir. 1998); Coalition of Montanans Concerned with Disabilities Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1169 (D. Mont. 1997); Grubbs v. Medical Facilities of America, Inc., NO. CIV. A. 94-0029-D, 1994 WL 791708, *2-3 (W.D. Va. Sept. 23, 1994).[4] Copies of these

[4/]The legislative history of the ADA also makes clear that there are no prerequisites to filing a federal action under title III. A colloquy between Senator Harkin, one of the primary sponsors of

opinions, as well as the Soignier opinions, are attached as Exhibit 1.

The principal case relied upon by the Defendant, Daigle v. Friendly Ice Cream, 957 F. Supp. 8 (D.N.H. 1997), is of questionable precedential value. While it is true that Judge Devine, in Daigle, held that plaintiffs must provide written notice to the appropriate state authority as a prerequisite to a title III action, Defendant here has failed to address or inform the Court that in a later case Judge Devine actually rejected his earlier holding. In Doukas v. Metropolitan Life Insurance Co., No. CIV. 4-478-SD, 1997 WL 833134 (D. N.H. Oct. 21, 1997) (attached hereto as Exhibit 2), which was decided eight months after Daigle, Judge Devine was presented with the identical issue presented both here and in Daigle. Judge Devine specifically held that "written

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the ADA and the floor manager of the bill, and Senator Bumpers, a co-sponsor, indicates that pursuit of administrative remedies is not required in suits under title III.

> MR. BUMPERS. * * * if somebody who is disabled goes into a place of business, and we will just use this hypothetical example, and they say, "You do not have a ramp out here and I am in a wheelchair and I just went to the restroom here and it is not suitable for wheelchair occupants," are they permitted at that point to bring an action administratively against the owner of that business, or do they have to give the owner some notice prior to pursuing a legal remedy?
>
> MR. HARKIN. First of all, Senator, there would be no administrative remedy in that kind of a situation. The administrative remedies only apply in the employment situation. In the situation you are talking about --
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> MR. BUMPERS. That is true. So one does not have to pursue or exhaust his administrative remedies in title III if it is title III that is the public accommodations.

135 Cong. Rec. 19859 (1989). See also Botosan v. Fitzhugh, No. CIV. 98-0387-R (RBB), 1998 WL 458195, at *2 (S.D. Cal. Aug. 3, 1998) (finding that "the legislative history of the ADA does not indicate that Congress intended to adopt subsection(c)."); Grubbs v. Medical Facilities of America, Inc., Civ. A. No. 94-0009-D, 1994 WL 791708, at *2 (W.D. Va. Sep. 23, 1994) (noting that the legislative history of the ADA "indicates that Congress did not intend to require exhaustion of administrative remedies for persons with disabilities").

notice to state authorities is not a requirement under title III of the ADA," id. at *2, and expressly overruled his opinion in Daigle, stating that "upon further consideration, the court finds that limiting the scope of reference to 2000a-3 to paragraph (a) is a better interpretation of the statute." Id. at *2 n.2. The remaining cases relied upon by Defendant, while making incorrect statutory interpretations, nonetheless limited their rulings to permit the plaintiffs to proceed following notice. See Mayes v. Allison, 983 F. Supp. 923 (D. Nev. 1997) (staying action pending notice to state administrative agency); Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148, 1149 (D. Colo. 1996) (dismissing ADA claim, but granting leave to amend complaint to reassert ADA claim following notice to state).[5] Further, both Mayes and Howard were decided before the Seventh Circuit implicitly rejected the legal analysis of the opinions. Soignier, 92 F.3d at 553. The United States maintains that Mayes and Howard were wrongly decided, and urges the Court to reject their approach and instead follow the weight of legal authority which, consistent with the plain language of the statute at issue, has rejected Peoples' arguments.

The Third Circuit faced an analogous situation in Sperling v. Hoffman-La Roche, Inc., 24 F.3d 463 (3rd Cir. 1994). There the issue was whether the filing of a representative complaint under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), tolled the statute of limitations for unnamed employees to become members of the opt-in class. At the time the action was filed, the ADEA expressly incorporated the statute of limitations contained in Section 6 of the Portal-to-Portal Act, 29 U.S.C. § 255. 29 U.S.C. § 626(e)(1) (1991). The employer

[5/]This is the approach established by the Section 204(c) of the Civil Rights Act. See supra at 5, n.3.

argued that the tolling question should be governed by Section 7 of the Portal-to-Portal Act, 29 U.S.C. § 256, which was not incorporated specifically into the ADEA. Section 7 would have required employees who wished to opt-in to do so within the Section 6 statute of limitations.

The Third Circuit noted that "incorporation of selected provisions into section 7(b) of [the] ADEA indicates that Congress deliberately left out those provisions not incorporated." 24 F.3d at 470. The Court stated that its decision was "a fairly routine application of the traditional rule of statutory construction pithily captured in the Latin maxim expressio unius est exclusio alterius." Ibid. That principle applies equally here.

The underlying rationale of Defendant's argument is that all of Section 204 is incorporated into the ADA. However, such a finding would lead to incongruous results. For example, title III of the ADA does not refer specifically to Section 204(d) of the 1964 Act, which applies under title II of the 1964 Act where the alleged discrimination takes place in a state where there is no state law prohibiting such discrimination. Under those circumstances, Subsection 204(d) allows a court in which a civil action is commenced pursuant to Section 204(a) to refer the matter to the Community Relations Service (CRS) for a limited time, if it believes there is a "reasonable possibility of obtaining voluntary compliance." Although the Defendant's rationale would suggest that Subsection 204(d) may be followed by a court in which an ADA title III action is filed, Congress could not have intended such a result. Since the ADA did not expand the jurisdiction of the CRS to allow it to mediate issues of discrimination based on disability, Congress could not have intended Subsection 204(d) to be incorporated by implication into title III.

Neither does the ADA refer to Subsection (b) of Section 204 of the 1964 Act, which

allows a court to award attorney's fees to a prevailing party other than the United States in an action brought pursuant to Subsection 204(a). Congress certainly did not intend to incorporate Subsection 204(b) because the ADA contains a separate attorney's fees provision, 42 U.S.C. § 12205, that is applicable to all civil actions and administrative proceedings brought pursuant to the ADA. Therefore, Defendant's reading of the statute would render the attorney's fee provisions of the ADA superfluous, violating a fundamental tenet that statutes should be not be read so as to render terms meaningless. United States v. Campos-Serrano 404 U.S. 293, 301 n.14 (1971) ("(A) statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

As courts have recognized, a statute "is as significant for what it omits as for what it says." In re TMI, 67 F.3d 1119, 1123 (3d Cir. 1995), cert. denied, 517 U.S. 1163 (1996), quoting Williams v. Wohlgemuth, 540 F.2d 163, 169 n.30 (3d Cir. 1976). The inherent differences between title II of the 1964 Act and title III of the ADA demonstrate the error in the Defendant's attempt to pick and choose, on its own, portions of the 1964 Act to incorporate into the ADA. Rather, the plain language of Section 308 of the ADA applies. The notice provisions of the 1964 Act simply do not apply to the ADA. Therefore, the United States respectfully requests that this Court deny Peoples' Motion to Dismiss.

II. Plaintiff Betty Kitson Has Standing to Assert Claims for Injunctive and Declaratory Relief Under Title III of The Americans With Disabilities Act

Defendant's second argument in support of its Motion to Dismiss is that Plaintiff lacks standing because she is both unlikely to seek services from Peoples in the future and unlikely to

be denied those services. Because this argument conflicts with the purpose and language of the ADA, it should properly be rejected.

The Americans with Disabilities Act of 1990 is a sweeping civil rights law designed to "provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities." 42 U.S.C. § 12101 (b)(1). In passing the ADA, Congress expressly found that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101 (a)(4) (emphasis added). Thus, Congress stated that a primary purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Section 12101 (b)(2).

A key enforcement mechanism is the statute's private right of action allowing individuals to sue for injunctive and declaratory relief. See text of 42 U.S.C. § 2000a-3(a), supra at 5, n.3. Under Defendant's view of standing, however, this private right of action would be rendered a nullity.

Because damages are not available in private suits under title III of the ADA, a finding that Ms. Kitson lacks standing to seek injunctive and declaratory relief would deprive Ms. Kitson of a forum in which to vindicate her civil rights. To deny plaintiff such a forum would afford Ms. Kitson "no legal recourse to redress" discrimination, and would render the promises of the ADA meaningless. 42 U.S.C. § 12101(a)(4) ("findings" section of the ADA). Moreover, the failure to hear plaintiff's claim would effectively immunize the sort of discrimination allegedly perpetrated by the Defendant. Clearly this was not Congress' intent in passing such a broad civil

rights law; instead, courts should construe civil rights legislation, including the ADA, broadly to effectuate the purposes of the statute. Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); see also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

Under the ADA, as under both the Fair Housing Act and the Civil Rights Act of 1964, suits by "private attorneys general" are critical to successful enforcement of the law where federal enforcement resources are limited. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) ("[S]ince the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which. . . the complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'"); Newman v. Piggy Park Enters., Inc., 390 U.S. 400, 401 (1968) (private attorneys general critical for enforcement of title II of the Civil Rights Act of 1964).

The ADA plainly covers discrimination like that alleged by Ms. Kitson. 42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(iii). The statute provides relief to:

> Any person who is being subjected to discrimination on the basis of disability in violation of this title . . . Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

42 U.S.C. § 12188(a). As with other civil rights statutes, standing under the ADA should be interpreted as broadly as permissible under the Constitution. Havens Realty Corp., 455 U.S. at 372; Trafficante, 409 U.S. at 205; see also Gladstone Realtors, 441 U.S. at 91.

In considering a motion to dismiss, a court is “obliged to take all facts as alleged in

plaintiff's complaint as true and must construe those allegations in a light most favorable to the plaintiff." In re Sansoucy, 136 B.R. 20, 22 (Bankr. D.N.H. 1992). Ms. Kitson has alleged that she was subjected to discrimination on the basis of disability by Peoples at the time of the closing of the loan. Plaintiff's Third Amended Complaint, ¶ 33. She also alleges that, despite several requests for audio tapes of the loan documents since that time, the bank has never provided the documents on audio tape or in any form that she can readily access and understand. Plaintiff's Third Amended Complaint, ¶¶ 30-33, 100-102. Her allegations of the bank's original and continuing refusal to provide the loan documents and related documents in an accessible format constitute allegations of past and continuing violations of the ADA. They also amount to actual notice that Peoples did not intend to and will not in the future comply with the ADA. As provided in the statute, the plaintiff is not obligated to engage in the "futile gesture" of returning to Peoples and subjecting herself to ongoing discrimination in order to preserve a claim against the Bank. 42 U.S.C. § 12188(a).

In other cases involving disability discrimination with facts similar to those at bar courts have found standing. Duffy v. Riveland, 98 F.3d 447, 452 (9th Cir. 1996) (once deaf inmate suffered discrimination on the basis of disability, he had standing to seek injunctive relief against the state). The same is true for cases alleging disability discrimination under the Rehabilitation Act of 1973. For example, in DeLong v. Brumbaugh, 703 F. Supp. 399 (W.D.Pa. 1989), the court found, despite the unavailability of damages, that there was sufficient reality and immediacy to warrant the issuance of relief declaring a violation of section 504 of the Rehabilitation Act where a deaf individual was excluded from a jury. The fact that plaintiff might be called to jury service at any time was deemed sufficient. The court found that

declaratory relief would serve the public interest and act as a vindication of the plaintiff's rights and of the extent of the rights of handicapped persons under section 504. See Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002, 1008 n.7 (3rd Cir. 1995) (Rehabilitation Act case, finding standing for declaratory relief even when standing for injunctive relief was moot); Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1113 (9th Cir. 1987) (rejecting district court's finding that request for declaratory relief was moot due to absence of current federal funding in Rehabilitation Act case, where "[s]uch relief might be appropriate as a vindication of plaintiff's position and as a public statement of the extent of handicapped persons' rights under section 504").

The cases cited by the Defendant do not support Defendant's position that Ms. Kitson lacks standing to seek injunctive relief, since the allegations made by Kitson are sufficient to withstand a motion to dismiss. For example, in Aikins v. St. Helena Hosp., 843 F. Supp. 1329 (N.D. Cal. 1994), the court's key concern was geographic proximity. The court dismissed for lack of standing the complaint of a deaf woman who brought her dying husband to a hospital emergency room when the couple was away from their primary residence on vacation. The woman alleged that the hospital violated the ADA because it failed to provide her with an interpreter. The court found the allegations in plaintiff's complaint (stating that she owned a mobile home seven miles from the hospital, and that she stays at the home only for several days each year), insufficient to show a real and immediate threat of future injury at the hands of defendants. However, the court distinguished the case before it from Greater Los Angeles Council on Deafness v. Baldridge, 827 F.2d 1353 (9th Cir. 1989), in which the court found standing to sue based on defendant's failure to act on an administrative complaint. Furthermore,

in a subsequent ruling in the Aikins, the Court found that Aikins did have standing and granted her leave to amend her complaint because she considered it reasonably possible that she might seek services at the hospital. Aikins v. St. Helena Hosp., No. C 93-3933 FMS, 1994 WL 796604 (N.D. Cal. April 4, 1994) (copy attached as Exhibit 3). Here, the geographic concerns relating to imminence are not present, Ms. Kitson alleges a continuing relationship with the bank, and she has alleged that the Bank has denied and continues to deny her relevant documents in an accessible format. Plaintiff's Third Amended Complaint, ¶¶ 24, 30-33, 99-102. As in Council on Deafness, the claimed violation (original refusal to provide audio documents) constitutes an injury; and the injury, as well as plaintiff's relationship with the defendant, is ongoing. See Aikins, 843 F. Supp. at 1334. Therefore, Ms. Kitson has satisfied the standing requirements.

Similarly, in both O'Brien v. Werner Bus Lines, Civ. A. No. 94-6862, 1996 WL 82484 (E.D. Pa. Feb. 27, 1996) (blind guide dog user denied access to tour bus on one occasion) and Atakpa v. Perimeter Ob-Gyn Assocs., 912 F. Supp. 1566, 1573-74 (N.D. Ga. 1994) (deaf person denied interpreter in connection with her childbirth) the plaintiffs had no contact with the defendants or their services following the alleged discrimination. Here, it is undisputed that Peoples and Ms. Kitson have had a business relationship since the formation of the loan agreement. Kitson alleges that the Bank has, since the formation of the contract, continually denied to provide the loan documents and related documents in an accessible format (even up to the present). Plaintiff's Third Amended Complaint, ¶¶ 24, 30--33, 99-102.[6]

[6/]Once again, the court should grant a motion to dismiss only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). It is certainly possible that plaintiff can prove facts to show

Ms. Kitson alleges that Peoples violated the ADA by refusing, since October 1994 to the present, to provide her with loan documents in an accessible format. The nature of injunctive relief requested by Ms. Kitson is specifically contemplated by the statute:

> Where appropriate, injunctive relief shall ... include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

42 U.S.C. § 12188(a)(2). Ms. Kitson has standing to seek injunctive relief to both remedy that harm and to ensure that such discrimination does not occur in the future. Ms. Kitson also has standing to seek declaratory relief under the ADA. Ms. Kitson alleges that she was discriminated against in violation of the ADA, and her prayer for relief includes a request for a declaratory judgment. Defendant has not challenged this request and has offered no support for an argument that Ms. Kitson lacks standing for such relief.[7] Declaratory relief is especially appropriate in this case because of the relative youth of the ADA and concomitant uncertainty of the legal obligations, the unavailability of monetary relief, and the public interest in vindicating the rights of individuals with disabilities under this important civil rights law. See Bituminous Coal

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a continuing relationship with Peoples on the matter of the mortgage as well as other matters and possible discrimination in the future.

[7/] If the Court concludes that Ms. Kitson has not demonstrated "imminent" harm because it is not sufficiently likely that she will seek out Peoples' services in the immediate future, it should nevertheless find standing, as plaintiff's injury is one "capable of repetition but evading review." Honig v. Doe, 484 U.S. 305, 318-9 (1987), quoting Murphy v. Hunt, 455 U.S. 478, 482 (1981); Roe v. Wade, 410 U.S. 113, 125 (1973). The Supreme Court has recognized a plaintiff's standing to bring such a claim, where the action complained of (1) "was in its duration too short to be fully litigated prior to its cessation or expiration," and there is (2) "a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975)(per curiam); Murphy v. Hunt, 455 U.S. at 482 (1981). See Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia, 972 F.2d 365, 370 (D.C. Cir. 1992).

Operators Ass'n., Inc. v. International Union, United Mine Workers of Am., 585 F.2d 586, 596-97 (3d Cir. 1978). See also DeLong v. Brumbaugh, 703 F. Supp. 399, 405 (W.D. Pa. 1989)(public importance of vindicating plaintiff's rights under the Rehabilitation Act). Ms. Kitson should have the opportunity to prove facts adequate to establish her standing to seek the requested relief, and Defendant's motion to dismiss should be denied.

Conclusion

For the reasons stated above, the United States respectfully requests that Defendant's Motion to Dismiss be denied.

Respectfully submitted,

PAUL M. GAGNON
United States Attorney

DAVID BRODERICK
Assistant United States Attorney

JANET RENO
Attorney General
BILL LANN LEE
Acting Assistant Attorney General
For Civil Rights
JOHN L. WODATCH, Chief
L. IRENE BOWEN, Deputy Chief
PHILIP L. BREEN, Special Legal Counsel

By: _____
EDWARD MILLER
KEN NAKATA
Attorneys
Disability Rights Section
Civil Rights Section
U.S. Department of Justice
1425 New York Avenue, N.W.
Suite 4040 Post Office Box 66738
Washington, D.C. 20035-6738
(202) 514-3422

Counsel for Amicus Curiae
United States of America