UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
BALTIMORE DIVISION

THE EQUAL RIGHTS CENTER, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil No. 1:09-cv-03157 JFM**
ABERCROMBIE & FITCH CO., et al.,	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et. seq.*, ("ADA"). The Attorney General has statutory authority to enforce title III and to issue regulations implementing the statute. *See* 42 U.S.C. §§ 12186-88.

This case presents an issue regarding the standing of plaintiffs to bring a private action under title III against a place of public accommodation. Private plaintiffs play an important role in enforcing the ADA, particularly in the area of public accommodations. *See* 42 U.S.C. § 12188(a)(1). The United States cannot investigate every place of public accommodation in the country to determine if it is in compliance with the ADA. Effective enforcement of title III, therefore, depends upon a combination of suits by the United States and litigation by private plaintiffs who are aware of and encounter violations in their local communities. The United States therefore has a strong interest in

ensuring that the standing of private plaintiffs to sue under title III is not unduly restricted.

In the pending motion to dismiss ("Motion"), Defendants claim that Plaintiffs Rosemary Ciotti ("Ciotti") and The Equal Rights Center ("ERC") do not have standing – individually, as an organization in its own right, or on behalf of its members – to sue under the ADA because they have not alleged injury in fact sufficient to establish Article III standing and because ERC lacks prudential standing. Defendants' arguments, however, are contrary to prevailing case law and specifically this Court's numerous holdings on the same issues. Accordingly, for the reasons set forth in greater detail below, the United States respectfully submits that this Court should deny Defendants' Motion to Dismiss For Lack of Standing.

LEGAL STANDARD

Where a party moves to dismiss for lack of subject matter jurisdiction per Federal Rule of Civil Procedure 12(b)(1) on the basis that the complaint "fails to allege facts upon which subject matter jurisdiction can be based,"[1] then all the facts alleged in the complaint are assumed to be true and the plaintiff is essentially given the same procedural protection as he would have under a Rule 12(b)(6) motion for failure to state a claim upon which relief may be granted. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

To survive a motion to dismiss for failure to state a claim, a plaintiff must plead plausible, not merely conceivable, facts in support of his claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The complaint must state "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

[1] Defendants here move to dismiss per Fed. R. Civ. P. 12(b)(1) "on the ground that the factual allegations of plaintiffs' First Amended Complaint show that the Court has no subject matter jurisdiction." (Motion at 2.) They do not dispute that a Rule 12(b)(6) standard applies.

Id. at 555. The Court still, however, must "assume the veracity [of well-pleaded factual allegations] and then determine whether they plausibly give rise to an entitlement of relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

In standing cases, the United States Supreme Court has made clear that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted). Thus, for purposes of Defendants' Motion to Dismiss, the Court must accept the factual allegations set forth in Plaintiffs' complaint.

SUMMARY OF FACTS

Plaintiffs allege that Defendants Hollister's and Abercrombie & Fitch's clothing stores "prevent individuals with disabilities from entering and navigating their stores" because they have "stepped, inaccessible entrances," "inaccessible interior paths of travel," and "inaccessible service counters." (Am. Compl. ¶¶ 7, 50.) Plaintiffs found similar accessibility barriers at each of the seventeen locations of Defendants' stores that they investigated. (*Id*. ¶¶ 49-200.) Plaintiffs allege that this is the result of common design features, policies, and practices. (*Id*. ¶¶ 10, 201-202.)

Plaintiff ERC is a national non-profit organization. (Am. Compl. ¶ 20.) Its members include people with disabilities who reside throughout the country. (*Id*.) ERC alleges that it brings this case "on its own behalf and as a representative of its members, whose right to live in and enjoy a community free from discrimination on the basis of physical disability has been infringed by Defendants." (*Id*.) ERC alleges that, as a result

of Defendants' discriminatory policies and practices, it has suffered and will continue to suffer injury, including the frustration of its mission to achieve equality of access for persons with mobility impairments and eliminate discrimination against persons with disabilities in places of public accommodation; "the diversion of the ERC's resources to identify and counteract Defendants' unlawful discriminatory practices;" and "interference with the interests of the ERC and its members in protecting their rights to live in and enjoy a community that is free from discrimination on the basis of physical disability." (*Id*. ¶ 207.)

Plaintiff Rosemary Ciotti is a member of ERC. (Am. Compl. ¶ 21.) She uses a wheelchair for mobility and she shops with her teenage daughter at Hollister clothing stores. (*Id*. ¶¶ 21, 25-26.) Ms. Ciotti has visited two Hollister store locations several times in the past few months in order to shop with and for her daughter. (*Id*. ¶¶ 27-45.) Plaintiffs allege that Ms. Ciotti "will be subjected to continuing discrimination" (because she "will continue to visit Hollister stores as long as her daughter is interested in Hollister brand clothing." (*Id*. ¶¶ 47, 210.)

Chelsea Stanton is also a member of ERC. (Am. Compl. ¶ 67.) Like Ms. Ciotti, she also uses a manual wheelchair for mobility. (*Id*. ¶ 68.) Ms. Stanton likes Hollister brand clothing and shops at Hollister stores frequently. (*Id*. ¶ 69.) At Hollister stores, she has encountered numerous barriers including cramped interior paths of travel, segregated entrances, and inaccessible sales counters. (*Id.* ¶¶ 70-84.) Despite the difficulties of shopping at Hollister stores, Plaintiffs allege that she will continue to shop there because she likes the clothing. (*Id.* ¶ 84.)

ARGUMENT

Article III of the United States Constitution requires that a party have standing in order to invoke the jurisdiction of the federal courts. "Simply stated, the consideration of standing ensures the appropriateness of a particular party to pursue specific litigation." *Finlator v. Powers*, 902 F.2d 1158, 1160 (4th Cir. 1990). In addressing the issue of standing, a court must determine whether a party has a sufficient personal stake in the outcome of an otherwise justiciable controversy to obtain relief through a judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

In order to establish standing that satisfies Article III's "case or controversy" requirement, a plaintiff must prove (1) an injury, that is, the invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not merely conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-561. "In the shorthand analysis of standing, these three basic requirements are referred to as injury-in-fact, causation, and redressability, and they are central to any discussion of standing." *Finlator*, 902 F.2d at 1160.

In addition to Article III's "minimum of standing," the Supreme Court has recognized prudential limitations on the "class of persons who may invoke the courts' decisional and remedial powers." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). For instance, one prudential limitation on standing is that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id*.

Standing questions therefore must be resolved according to a two-part inquiry that considers (1) Article III constitutional limitations, and (2) prudential limitations. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). Thus, a litigant must generally pass both constitutional and prudential muster to have standing to sue. *Warth*, 422 U.S. at 499.

I. Ciotti Has Standing To Sue Under The ADA

Defendants erroneously assert that Plaintiff Ciotti lacks Article III standing on the basis that the Amended Complaint fails to demonstrate that she suffered an injury in fact.[2] (Motion at 10.) Specifically, Defendants contend that Plaintiffs have not alleged "an 'imminent' threat of future injury that is concrete and non-contingent." (*Id*.) Contrary to Defendants' assertion, however, the Amended Complaint makes clear that Ciotti is very likely to face future discrimination at Hollister stores.

A. Ciotti Has Pleaded A Sufficient Likelihood Of Future Harm

An individual with a disability who alleges that a facility covered by title III violates the ADA in a manner that it likely to affect her use of it, and that she is likely to use the facility in the near future, has established an injury sufficient to confer standing because her statutory right not to be "discriminated against on the basis of disability in the full and equal enjoyment" of that place of public accommodation has been violated.

[2] Defendants also allege that Ciotti lacks standing to sue because her personal allegations of discrimination took place after the original complaint was filed and therefore she could not have had standing "at the commencement of the action" as measured by the filing of the original complaint. (Motion at 9.) It is well accepted, however, that an amended pleading takes the place of an original pleading. *See Young v. City of Mt. Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) ("As a general rule, an amended pleading ordinarily supersedes the original and renders it of no legal effect.") (internal quotation marks omitted). Therefore, the Amended Complaint, containing Ciotti's allegations, will be the proper measure for standing purposes. Defendants fail to cite any authority to the contrary.

42 U.S.C. § 12182(a). In order to seek injunctive relief to redress such injury,[3] a plaintiff needs to show that there is a "real or immediate threat" of future harm if injunctive relief is not awarded. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 111 (1983). The most common formulation for analyzing whether a plaintiff faces the necessary harm is to consider the *likelihood* of future harm. *See id*. ("[A party's] standing to seek the injunction requested depended on whether he was likely to suffer future injury"); *O'Shea v. Littleton*, 414 U.S. 488, 496-497 (1974); *Gregory v. Otac, Inc.*, 247 F. Supp. 2d 764, 770 (D. Md. 2003) ("In ADA cases, courts have held that a plaintiff does not have standing…if he cannot demonstrate a likelihood that he will suffer future discrimination at the hands of the defendant."); *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 824-25 (D. Md. 1998) (considering the likelihood of plaintiff returning to defendant hospital in the near future).

The parties do not dispute that Defendant's stores are covered by title III and that Plaintiff Ciotti alleges those stores violate the ADA. Therefore, so long as Ciotti alleges that she is likely to use the stores in the future, the Article III injury requirement is met. The Amended Complaint satisfies this threshold by alleging that "Ms. Ciotti will continue to visit Hollister stores as long as her daughter is interested in Hollister brand clothing." (Am. Compl. ¶ 47.) Unlike the allegations by unsuccessful plaintiffs in the cases Defendants cite, Ciotti's alleged future injury is neither hypothetical nor speculative. *See Proctor*, 32 F. Supp. 2d at 825 (plaintiff encountered discrimination at defendant hospital after an accident but could not allege an intention to return to the hospital as he had been discharged from the hospital and had no appointment or other

[3] Plaintiffs suing under title III of the ADA are limited to injunctive relief. *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 830, 832 (D. Md. 1998). As such, Plaintiffs here seek only injunctive relief under their ADA claims.

reason to return); *Gregory*, 247 F. Supp. 2d. at 771 (plaintiff could not demonstrate likelihood of future discrimination because he was not a regular customer of defendant restaurant and apparently did not allege an intention to visit restaurant in the future). Ciotti alleges that she will continue to shop at Defendants' stores regularly, as she has in the past, for the foreseeable future. Accordingly, Ciotti has standing to sue under the ADA.

II. ERC Has Both Organizational and Representative Standing To Sue Under the ADA

An organization may allege two different types of standing. *Warth*, 422 U.S. at 511. It may allege that it has standing in its own right based on the injuries suffered directly by the organization. *Id*. ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982). This type is called organizational standing. Additionally, or alternatively, an organization may allege standing based solely as a representative of its members. *Warth*, 422 U.S. at 511; *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). This type is called representative standing.

Defendants assert incorrectly that the Amended Complaint fails to allege facts sufficient to establish that ERC has either organizational or representative standing. (Motion at 12.) As discussed below, the Amended Complaint does indeed establish both the organizational and representative standing of ERC.

A. ERC Has Organizational Standing

An organization must meet the same three requirements (injury in fact, causation, and redressability) for Article III standing as an individual. *Warth*, 422 U.S. at 511; *Equal Rights Ctr. v. AvalonBay Cmtys., Inc*., No. AW-05-2626, 2009 WL 1153397, at *4 (D. Md. Mar. 23, 2009). Similar to their challenge of Ciotti's standing, Defendants argue ERC does not have organizational standing because Plaintiffs fail to meet the injury in fact element of the standing analysis. (Motion at 13.) As with their challenge of Ciotti's standing, Defendants' challenge to ERC's organizational standing also fails.

Allegations of frustration of an organization's mission and diversion of its resources as a result of and in order to combat a defendant's alleged discrimination are exactly the type of specific organizational injuries that have been held sufficient for pleading injury in fact by this Court and others. *See Havens Realty Corp.*, 455 U.S. at 379 (finding injury in fact where plaintiff organization alleged it "had to devote significant resources to identify and counteract the defendant's *[sic]* racially discriminatory steering practices"); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350-51 (11th Cir. 2009); *AvalonBay*, 2009 WL 1153397, at *5-6 (holding ERC had established organizational standing and noting that this Court had found ERC had standing based on similar allegations of frustration of mission and diversion of resources in three similar cases). Regarding this same issue and ERC in another title III case, this Court wrote:

> ERC has alleged that, because of Defendants [sic] wrongful conduct, the ERC "has been damaged by the frustration of its mission, and by having to divert significant resources that the ERC would have used to provide counseling, education and referral services." The ERC's allegations are comparable to, and difficult to distinguish from, those made in *Havens*. Assuming the ERC's allegations to be true and drawing all inferences in its

> favor, the Court finds that the ERC has sufficiently plead [sic] injury in fact under *Havens*.

AvalonBay, 2009 WL 1153397, at *6. Plaintiffs now allege the very same frustration of mission and diversion of resources in this matter. The Amended Complaint alleges that as a result of Defendants' continuing discrimination, ERC has suffered "the frustration of the mission of the ERC to achieve equality of access for persons with mobility impairment" and "the diversion of the ERC's resources necessary to identify and counteract Defendants' unlawful discriminatory practices." (Am. Compl. ¶¶ 20, 207.) In further detail, the Amended Complaint defines ERC's mission and describes how Defendants' discrimination has required it to "divert resources…that it would have used to provide counseling, outreach and education, and referral services. Instead, the ERC has devoted resources to identifying and investigation Defendants' discriminatory policies and practices." (*Id*. at ¶ 20.)

The cases cited by Defendants do not require a different outcome. One case, *Shield Our Constitutional Rights and Justice v. Hicks*, No. DKC 09-0940, 2009 WL 3747199 (D. Md. Nov. 4, 2009), actually bolsters Plaintiffs' position. In that case, this Court found that a plaintiff's "bald allegation" of diversion of funds would not substantiate organizational standing. *Id* at *5. However, in explaining the type of allegations that would substantiate organizational standing, this Court quoted at length a case in which ERC was found to have organizational standing based on detailed allegations of the nature of its programs and how defendant's discrimination had frustrated its mission and caused it to have to divert funds from its programs in order to battle that discrimination – just like ERC has pleaded in this matter. *See id*. (quoting *Equal Rights Ctr. v. Equity Residential*, 483 F. Supp. 2d 482 (D. Md. 2007)). Another

case, *Buchanan v. Consol. Stores Corp*., 125 F. Supp. 2d 730 (D. Md. 2001), did not involve claims under the ADA or the analogous Fair Housing Act ("FHA") and therefore is not applicable to the present matter.

Furthermore, neither *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) nor *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) change the basic standing analysis. Rather, they require a plaintiff to plead "plausible" and "not merely conceivable" facts in support of his claim. *See Twombly*, 550 U.S. at 556. A court must still assume the truth of well pleaded plausible facts. *See Iqbal*, 129 S. Ct. at 1950. Plaintiffs' allegations are detailed and plausible and therefore must be assumed to be true for purposes of considering Defendants' Motion to Dismiss. Additionally, neither *Doe v. Sebelius*, 676 F. Supp. 2d 423 (D. Md. 2009) nor *Doe v. Obama*, 670 F. Supp. 2d 435 (D. Md. 2009) turned on the holdings in *Twombly* or *Iqbal*, as suggested by Defendants. (Motion at 16.) Rather, both denied organizational standing based on plaintiffs' tenuous injury in fact allegations per *Buchanan*, a case which this Court considered and rejected as controlling in *AvalonBay* on similar facts. *See Sebelius* at 429 ("[plaintiff] has not alleged a sufficient injury to establish standing, merely because its mission conflicts with the Defendants' conduct;" alleged injury was also not traceable to defendant); *Obama* at 441; *AvalonBay*, 2009 WL 1153397, at *5 n.5 ("Given the decisions in three recent and nearly identical cases to the present cases, the Court does not find the decision in *Buchanan*, which dealt with a factually different situation that did not include FHA or ADA claims, to be controlling in this case."). Regardless, Plaintiffs have alleged much more than just a conflict between ERC's mission and Defendants' actions as discussed above and detailed at length in the Amended Complaint.

For all these reasons, ERC has organizational standing to sue on its own behalf under the ADA.

B. ERC Has Representative Standing

Generally, an injured party must assert her own legal rights and interests and cannot rest her claim to relief on the legal rights or interests of third parties. *Warth*, 422 U.S. at 499. However, in certain circumstances, an association may have standing solely as the representative of the people whom it serves. *Id.* at 511; *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 262 (4th Cir. 2001). The landmark case for associational, or representative, standing is *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977). An association satisfies the *Hunt* test for representative standing if:

> (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, 432 U.S. at 343. The *Hunt* test was reaffirmed in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986), where the Court specifically noted that very often an organization will present an especially efficient vehicle for litigation from the perspective of both the litigants and the judicial system. *Brock*, 477 U.S. at 289 ("[A]n association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. …These resources can assist both courts and plaintiffs.").

Defendants contend that ERC does not have representative standing to bring claims on behalf of its members because it does not meet the first and third prongs of the

Hunt test. (Motion at 17.) Defendants are mistaken. ERC meets the requirements for representative standing as explained below.

ERC satisfies the first prong of the *Hunt* test, which requires that those whom ERC represents have standing to sue in their own right, because one of ERC's members, Rosemary Ciotti, has standing to sue in her individual capacity as discussed in Section I above. It is enough for Plaintiffs to allege that just one of its members has standing to sue in her own right. *See Warth*, 422 U.S. at 511; *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 186 (4th Cir. 2007); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 155 (4th Cir. 2000). At this the pleading stage, Plaintiffs are not required to allege the standing of any additional ERC members in order to establish its representative standing because they have already pleaded that ERC serves people with disabilities whose right to live free from discrimination has been violated by Defendants, which is sufficient to show Plaintiffs' "plausible" entitlement to relief. (Am. Compl. ¶20.) *See Iqbal*, 129 S. Ct. at 1950 ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief"); *Lujan*, 504 U.S. at 561 ("[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim'). Even so, Plaintiffs do allege sufficient facts to establish the standing of another of its members, Chelsea Stanton. (Am. Compl. ¶¶ 67-84.)

Because Plaintiffs here have sufficiently pleaded individual standing for one or more of ERC's members, Defendants' reliance on cases where plaintiffs attempted to establish representative standing without the prerequisite member with individual

standing is misplaced. *See Sebelius*, 676 F. Supp. 2d at 429 ("NOEL and potential adopters of embryos cannot assert third party standing to sue on behalf of the embryos because the embryos do not possess standing in their own right"); *Maryland Minority Contractor Association v. Maryland Stadium Authority*, 70 F. Supp. 2d 580, 589 (D. Md. 1998) ("Regarding standing…for MMCA in its representative capacity, no named plaintiff or member of MMCA is alleged to have [suffered an injury in fact]….Clearly then, the injury-in-fact prong of the standing inquiry has not been met.").

ERC also satisfies the third prong of the *Hunt* test which asks whether the claim asserted or the relief requested requires the participation in the lawsuit of individuals whom the group serves. Although seeming to prohibit participation by any individual member, this prong has been clarified by many courts to prohibit representative standing where participation by *each* individual member of an association would be required. *See Warth*, 422 U.S. at 511 ("[S]o long as the nature of the claim and of the relief sought does not make the individual participation of *each* injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.") (emphasis added); *International Woodworkers of America, etc. v. Chesapeake Bay Plywood Corp*., 659 F.2d 1259, 1267 (4th Cir. 1981) ("The relevant inquiry…is whether the claims asserted or the relief requested requires *each* member to participate individually in the lawsuit.") (emphasis added); *see also Retail Indus. Leaders Ass'n*, 475 F.3d at 187 (finding representative standing where the relief requested did not depend "upon proofs particular to individual members. Unlike a suit for money damages, which would require examination of *each* member's unique injury, this action seeks a declaratory judgment and injunctive relief,

the type of relief for which associational standing was originally recognized.") (emphasis added); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993) (discussing the history and proper application of *Hunt's* third prong). The present suit does not require the participation of *each* ERC member, and participation by members such as Rosemary Ciotti and Chelsea Stanton will likely be limited in nature to evidentiary submissions, such as the type necessary to allege in the Amended Complaint that a violation occurred. Accordingly, ERC has representative standing to sue on behalf of its members under the ADA.

C. There Are No Prudential Standing Limitations On Title III ADA Claims

Although a party must generally satisfy prudential standing limitations in addition to the Article III limitations, prudential limitations do not apply when Congress has expanded standing to the full extent permitted by Article III. *Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); *Gladstone, Realtors*, 441 U.S. at 100 ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules."); *Motor Coach Ind., Inc. v. Dole*, 725 F.2d 958, 963 (4th Cir. 1984) (citing *Gladstone, Realtors*, 441 U.S. at 100).

Here, Congress did not explicitly exempt title III claims from prudential limitations but, as this Court has discussed, "Congress intended that, under title III, persons with disabilities have remedies and procedures parallel to those available under comparable civil rights laws," such as being free of prudential limitations. *See AvalonBay*, 2009 WL 1153397, at *7 (internal quotation marks omitted). Because

Congress was not explicit when it drafted title III, application of prudential standing limits to such claims has persisted. Recognizing that "several Courts of Appeals have found that prudential standing limitations do not apply to claims under Titles I and II of the ADA," this Court held that claims under title III should also be free of prudential standing limitations in order to effect the broad purpose of the ADA. *Id*. at *7. For these reasons, prudential standing limitations should not be applied to any title III claimant and ERC need not satisfy them in this matter.

III. Plaintiffs Having Standing To Sue For Violations Of The ADA Regarding All Defendants' Store Locations

Defendants suggest that if ERC has representative standing, it is limited to claims against just the two Hollister stores visited by Ms. Stanton. (Motion at 19.) However, imposing such a limitation would inappropriately restrict the scope of representative standing. The Supreme Court held:

> [T]o justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. But, apart from this, whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. *If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.*

Warth, 422 U.S. at 515 (U.S. 1975) (emphasis added).

Furthermore, at least one court has explained:

> *ADA standing is not necessarily site specific*. The conclusion does not abrogate the need to establish individual standing; rather, it simply recognizes that the specific injury under the ADA is not a specific barrier at a specific site but instead the discriminatory policy or design or decision. If an offending policy or design gave rise to more than one violation, then reversing the policy should eliminate more than one barrier.

Castaneda v. Burger King Corp., 597 F. Supp. 2d 1035, 1043 (N.D. Cal. 2009) (holding plaintiff had standing to bring ADA claims against an entire restaurant chain on behalf of a class where he alleged he encountered common barriers to accessibility at the locations he visited and that all locations were designed similarly) (emphasis added).

Similarly, "each separate architectural barrier inhibiting…access [by a person with a disability] to a public accommodation [is not] a separate injury that must satisfy the requirements of Article III." *See Doran v. 7-Eleven, Inc*., 524 F.3d 1034, 1042 (9th Cir. 2008). Thus, a plaintiff who suffered discrimination and "a legally cognizable injury for the purposes of Article III standing" when he encountered barriers to access may "conduct discovery to determine what, if any, other barriers affecting his or her disability existed at the time he or she brought the claim. This list of barriers would then in total constitute the factual underpinnings of a single legal injury." *Id*. at 1043-44. Just as it is not essential for a plaintiff to demonstrate that he will necessarily use all aspects or features of a public accommodation in order to seek injunctive relief concerning other barriers in the facility that are likely to affect his use of the facility in the future, so too is it not necessary for Plaintiffs to visit all Hollister stores in order to establish standing when ERC's investigation has shown, and subsequent discovery will prove, that the stores are all equally inaccessible. *See, e.g., id.* at 1047 ("It makes no sense to require a disabled plaintiff to challenge, in separate cases, multiple barriers in the same facility, controlled by the same entity, all related to the plaintiff's specific disability."). This is especially true where, as here, it is alleged that an entire defendant chain adheres to a common corporate architectural design. *Cf. Equal Rights Center v. Hilton Hotels Corp*., No. 07-1528, 2009 WL 6067336, at *7 (D. D.C. 2009) (declining representative standing

to challenge barriers to accessibility across entire hotel chain, in part because ERC did not allege architectural similarity amongst all the locations); Am. Compl. ¶¶ 9-10, 201-202.

The ADA guarantees "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations," 42 U.S.C. 12182(a), which requires that an individual with a disability have the same access to all aspects of the public accommodation as do those without disabilities – even though, just like an individual without a disability, he may choose not to use all of them. *See Disabled Americans for Equal Access, Inc. v. Ferries del Caribe, Inc*., 405 F.3d 60, 64-65 (1st Cir. 2005) (plaintiff need not have traveled aboard Ferries' vessel in order to challenge barriers to his accessibility); *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 922-23 (9th Cir. 2001) (requiring hotel to make each of over 800 hotel bathrooms ADA compliant even though plaintiff had neither visited each room nor was likely ever to do so); *Independent Living Res. v. Oregon Arena Corp.*, 982 F. Supp 698, 762 (D. Or. 1997) (permitting plaintiff to seek relief for unencountered barriers in one action even though it "is unlikely that any individual plaintiff will ever sit in each of the seats in the arena, or use each of the restrooms, or attempt to reach each of the ketchup dispensers in the arena"); *Parr v. L & L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1081 (D. Haw. 2000) ("Plaintiff should not be required to encounter every barrier seriatim…to obtain effective relief."). Accordingly, ERC has standing to bring ADA claims against all Defendants' store locations.

CONCLUSION

The Court should deny Defendants' Motion To Dismiss For Lack of Standing in its entirety. Plaintiffs have demonstrated that the Amended Complaint satisfies all the requirements for standing for Plaintiff Ciotti individually and Plaintiff ERC in both its organizational and representative capacities.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
RENEE M. WOHLENHAUS, Deputy Chief
PHILIP L. BREEN, Special Legal Counsel

/s/ Nabina J. Sinha
NABINA J. SINHA, Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - NYA
Washington, D.C. 20530
Telephone: (202) 616-2730
Facsimile: (202) 305-9775
nabina.sinha@usdoj.gov

Dated: July 6, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, a copy of foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Nabina J. Sinha_____
NABINA J. SINHA
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - NYA
Washington, D.C. 20530
Telephone: (202) 616-2730
Facsimile: (202) 305-9775
nabina.sinha@usdoj.gov

Counsel for United States