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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Advocates for Individuals with Disabilities
10 Foundation Incorporated,

11 Plaintiff,

12 v.

13 Golden Rule Properties LLC,

14 Defendant.

No. CV-16-02413-PHX-GMS

ORDER

15 On August 25, 2016, this Court issued an Order for the Plaintiffs to Show Cause
16 as to why this case should not be dismissed for lack of standing. (Doc. 22.) For the
17 following reasons, the Court remands the case to state court, awards fees to the Defendant
18 pursuant to 18 U.S.C. § 1447, and issues sanctions against the Plaintiff's counsel
19 pursuant to 28 U.S.C. § 1927.

20 **BACKGROUND**

21 Plaintiff Advocates for Individuals with Disabilities ("AID") is a non-profit
22 charitable organization that advocates for disabled individuals. It is represented by
23 attorneys Peter Strojnik and Fabian Zazueta, who also make the decisions on behalf of
24 the client. Part of AID's strategy involves filing law suits against local businesses that
25 violate the Americans with Disabilities Act ("ADA") and similar state statutes. To date,
26 162 of these claims have been filed in or removed to this Court, and approximately one
27 thousand of such claims have been filed in state court. Each claim's complaint contains
28 the same general language alleging that the local business violated the ADA by having

1 inadequate signage or parking spaces for disabled individuals.

2 AID filed a complaint against Defendant Golden Rule Properties LLC (“Golden
3 Rule”) on June 9, 2016 in Maricopa County Superior Court. (Doc.1.) The complaint
4 stated that Defendant Golden Rule’s parking lot failed to comply with the ADA and the
5 Arizona Disability Act because it failed to “identify car parking spaces by the designation
6 ‘van accessible’ and or fails to maintain the minimum height of 60 inches” above the
7 floor. (Doc. 1, Ex. 1 at 5.)

8 The complaint does not allege that any disabled individual encountered the
9 Defendant’s defective signage. Rather, it asserts that “Plaintiff, who is known to have a
10 relationship or association with individuals with disabilities,” (Doc. 1, Ex. 1 at 5),
11 investigated the Defendant’s business and found that it “was not accessible to persons
12 with disabilities.” (*Id.*) Because these general allegations do not illustrate that AID has a
13 “concrete and particularized” injury that affects it “in a personal and individual way,” the
14 Court ordered AID to show cause why this case should not be dismissed for lack of
15 standing.

16 Furthermore, AID’s pre- and post- removal conduct demonstrates an attempt to
17 increase the costs of litigation to maximize Defendants desire to settle the suit due to the
18 cost of defense. Because Golden Rule’s counsel had represented other defendants in
19 cases brought by the Plaintiff and had defendants dismiss the federal claim immediately
20 upon removal to federal court to require remand of the remaining state law disability
21 claim to state court, Golden Rule reached out to AID and its counsel to determine their
22 intent to proceed with the federal claim prior to initiating the removal process. (Doc. 22
23 at 13.) Defense counsel suggested a willingness to stipulate to a dismissal of the federal
24 court claim to avoid the incurred expense and time of removal, dismissal and remand.
25 AID assured Golden Rule and its counsel that it intended to proceed with the federal
26 claim. (*Id.*) Yet immediately following removal, AID moved to dismiss the federal claim.
27 (*Id.*) In light of these events, the Court also ordered AID to show cause why AID should
28 not bear the costs of removal and why its counsel should not be sanctioned for their

1 actions pursuant to 28 U.S.C. § 1927.

2 DISCUSSION

3 **I. Plaintiff Lacks Article III Standing, and Thus This Case is Remanded to** 4 **State Court.**

5 “To invoke the jurisdiction of the federal courts, a disabled individual claiming
6 discrimination must satisfy the case or controversy requirement of Article III by
7 demonstrating his standing to sue at each stage of litigation.” *Chapman v. Pier 1 Imports*
8 *(U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (en banc). After reviewing Plaintiff’s
9 response to the Order to Show Cause, hearing oral arguments, and reviewing the
10 supplemental briefings, the Court finds that AID does not have standing to pursue this
11 suit.

12 An association may sue on behalf of one of its injured members if “(a) its
13 members would otherwise have standing to sue in their own right; (b) the interests it
14 seeks to protect are germane to the organization's purpose; and (c) neither the claim
15 asserted nor the relief requested requires the participation of individual members in the
16 lawsuit.” *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). This
17 analysis also applies to situations where the organization does not have traditional
18 “members,” provided that the purported constituency “possess[es] all of the indicia of
19 membership” in an organization. *Id.* at 344.

20 **A. Plaintiff does not Allege Sufficient Facts to Assert that Either Ms.** 21 **Puckett or Mr. Ritzenthaler is a Member of AID.**

22 Nonprofit corporations may file lawsuits on behalf of their members even if it
23 does not have members in the traditional sense. *See Sierra Ass'n for Env't v. F.E.R.C.*,
24 744 F.2d 661, 662 (9th Cir. 1984) (allowing a California corporation to file suit as an
25 unincorporated association due to the presence of federal question jurisdiction). However,
26 in these situations, a nonprofit must still allege sufficient facts to show that a purported
27 member “possess[es] many indicia of membership—enough to satisfy the purposes that
28 undergird the concept of associational standing: that the organization is sufficiently

1 identified with and subject to the influence of those it seeks to represent as to have a
2 personal stake in the outcome of the controversy.” *Oregon Advocacy Ctr. v. Mink*, 322
3 F.3d 1101, 1111 (9th Cir. 2003) (internal quotations and citations omitted).

4 The Supreme Court provided examples of relevant “indicia of membership” in
5 *Hunt*. 432 U.S. at 344–45. Key factors include whether the proposed constituency
6 maintained control over who was elected to leadership of the association, if the proposed
7 constituency was the only group that could service on the leadership board, and whether
8 the proposed constituency financed the association’s activities (including litigation). *Id.*
9 The analysis turns on whether the association “provides the means by which they express
10 their collective views and protect their collective interests.” *Id.*

11 The Plaintiff’s complaint does not mention a single individual member of AID by
12 name. (Doc. 1, Ex. 1.) Rather, the complaint attempts to allege that the Plaintiff has a
13 “close relationship” with all “former, current and future disabled individuals” due to its
14 “charitable acts.” (Doc. 1, Ex. 1 at 3.) There is a total absence of specific facts to support
15 these conclusory assertions. (*Id.*) Nothing in the complaint alleges that any of the indicia
16 listed by the *Hunt* Court are present in this case. (*Id.*)

17 In its Response to the Order to Show Cause, the Plaintiff mentions two purported
18 members, Ms. Shannon Puckett and Mr. David Ritzenthaler. However, the Plaintiff failed
19 to assert a basis of membership for either individual. Instead, AID argued that any
20 individual that tests a location for ADA compliance in connection with its serial lawsuits
21 exerts influence over the litigation, and is thus a member. (Doc. 22 at 5.) Even if the
22 Court could agree that participation as a tester amounts to exerting influence over
23 litigation, this alone cannot be said to grant the tester “many indicia” of membership.
24 *Oregon Advocacy Ctr.*, 322 F.3d at 1111. The Plaintiff again dodged the question in its
25 Reply to the Order to Show Cause, stating that the question of membership “is not
26 germane to the proceedings.” (Doc. 24 at 5.)

27 In the absence of demonstrating that either Ms. Puckett or Mr. Ritzenthaler have
28 any indicia of membership, there is no basis on which AID may assert standing based on

1 their alleged injury. Further, as discussed below, even if Ms. Puckett and Mr. Ritzenthaler
2 were members, AID may not rely on them to provide associational standing in this
3 lawsuit.

4 **B. Neither Ms. Puckett nor Mr. Ritzenthaler Suffered an Injury-in-**
5 **Fact, Thus Neither Can Provide AID with Associational Standing.**

6 An association may only assert standing on behalf of a member if the member has
7 standing. *Hunt*, 432 U.S. at 343. For an individual member to have standing under Article
8 III, he must satisfy three elements: 1) an injury-in-fact, 2) causation between the injury
9 and the allegedly wrongful conduct, and 3) the injury is likely redressable by the court.
10 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The burden is on the plaintiff to
11 establish that standing exists. *See id.* (“The party invoking federal jurisdiction bears the
12 burden of establishing these elements.”).

13 An injury-in-fact must be “(a) concrete and particularized and (b) ‘actual or
14 imminent, not ‘conjectural’ or ‘hypothetical.’ ” *Lujan*, 504 U.S at 560 (internal quotations
15 and citations omitted). This requires that “the party seeking review must allege facts
16 showing that he is himself adversely affected.” *Sierra Club v. Morton*, 405 U.S. 727, 740
17 (1972). In ADA cases, a plaintiff experiences an injury-in-fact when “a disabled person
18 encounters an accessibility barrier violating its provisions.” *Chapman v. Pier 1 Imports*
19 *(U.S.) Inc.*, 631 F.3d 939, 947 (9th Cir. 2011) (emphasis added). The barrier does not
20 need to completely hinder the plaintiff’s ability to enter or use the facility, but it must
21 “interfere with the plaintiff’s ‘full and equal enjoyment’ of the facility.” *Id.* (quoting 42
22 U.S.C. § 12182(a)).

23 AID cannot assert standing on behalf of Ms. Puckett or Mr. Ritzenthaler because
24 neither suffered an injury-in-fact. Nothing in AID’s complaint alleges that Ms. Puckett,
25 Mr. Ritzenthaler, or any other member ever personally encountered the barrier in
26 question. (Doc. 1, Ex. 1.) In fact, the complaint does not mention Ms. Puckett or Mr.
27 Ritzenthaler at all. (*Id.*) The complaint merely alleges that “Plaintiff has actual
28 knowledge of at least one barrier related to third party disabled individuals” on the

1 Defendant's property. (*Id.* at 6.) Likewise, a declaration filed by the Plaintiff establishes
2 that Ms. Puckett was "informed" of the defective signage, but does not state that she ever
3 actually encountered the defective signage. (Doc. 21-1 at 18.)

4 Contrary to Plaintiff's assertions, mere knowledge of the Defendant's lack of
5 signage is insufficient to show injury-in-fact. In *Pickern v. Holiday Quality Foods Inc.*,
6 the Ninth Circuit found that a plaintiff who had visited the defendant's grocery store in
7 the past had standing to bring an ADA claim based on the barriers he personally
8 encountered as well as the barriers that he did not have the chance to encounter during his
9 visit. 293 F.3d 1133, 1138 (9th Cir. 2002). That case did not involve a situation where, as
10 here, the plaintiff never frequented the defendant's establishment prior to filing suit. *Id.*
11 In fact, none of the cases cited by the Plaintiff hold that an injury-in-fact occurs by virtue
12 of the plaintiff's knowledge of a potential barrier. *See Pickern*, 293 F.3d at 1135 (plaintiff
13 visited the store in question multiple times); *Chapman*, 631 F.3d at 943 (plaintiff
14 frequented the defendant's store and personally encountered barriers that deprived him of
15 "full and equal enjoyment of the facility."); *Houston v. Marod Supermarkets, Inc.*, 733
16 F.3d 1323, 1326 (11th Cir. 2013) (plaintiff visited and encountered barriers to entry at a
17 grocery store). Therefore, AID's vague assertions that it had "knowledge of at least one
18 barrier" at the Defendant's parking lot is insufficient to establish that its members
19 suffered an injury-in-fact, and thus AID does not have standing to pursue this case.

20 **II. Leave to Amend or Supplement the Pleadings**

21 The Plaintiff's Response to the Order to Show Cause states that the "Plaintiff
22 wishes to file for leave to amend the Complaint or file a Rule 15(d) supplemental
23 pleading." As of this moment, the Plaintiff has not yet filed any such motion for leave. If
24 the Plaintiff did, this request would be denied.

25 District courts are permitted to deny leave when it finds "undue delay, bad faith or
26 dilatory motive on the part of the movant, repeated failure to cure deficiencies by
27 amendments previously allowed, undue prejudice to the opposing party by virtue of
28 allowance of the amendment, futility of the amendment, etc." *Foman v. Davis*, 371 U.S.

1 178, 182 (1962).

2 AID’s counsel has more than 160 ADA cases currently pending in this Court. The
3 complaints are largely identical. None of the complaints contain any specific factual
4 allegations. (Doc. 1, Ex. 1.) Instead, they each contain the same boilerplate language and
5 assert vague, conclusory allegations. (*Id.*) Counsel relies on the use of clauses such as
6 “and/or” to ensure that the form complaint may be used in multiple situations. (Doc. 1,
7 Ex. 1 at 6.) The complaint filed in this case even refers to the Defendant as a hotel,
8 which it is not. (*Id.*) Given these facts alone, the Court would not grant leave to file an
9 amendment.

10 However, permitting leave to file an amendment would also be futile in this case.
11 As noted in the Defendant’s Response to Show Cause, the Defendant remedied the
12 alleged ADA violations and is now ADA compliant. (Doc. 22 at 12.) Apparently, neither
13 Ms. Puckett nor Mr. Ritzenthaler visited the Defendant’s property during the time that it
14 was noncompliant. (Doc. 21-1 at 18.) Thus, they never encountered any barrier.
15 Permitting an amendment to the complaint at this point would be futile. Neither purported
16 member was injured by the noncompliance when it existed, and now that the
17 noncompliance is remedied, no injury can occur. Therefore, the Plaintiff will not be
18 granted leave to supplement or amend their complaint.

19 **III. Remand to State Court is Proper in This Case**

20 The removal statute instructs that “[i]f at any time before final judgment it appears
21 that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28
22 U.S.C. § 1447(c). The Ninth Circuit has implied that where a plaintiff would lack
23 standing in state court as well, a district court may dismiss the entire suit without remand.
24 *See Bell v. City of Kellogg*, 922 F.2d 1418, 1424–25 (9th Cir. 1991) (“Where the remand
25 to state court would be futile, however, the desire to have state courts resolve state law
26 issues is lacking. We do not believe Congress intended to ignore the interest of efficient
27 use of judicial resources.”) However, this should be applied only “where there is absolute
28 certainty that remand would prove futile.” *Id.* at 1425 (internal citations and quotations

1 omitted).

2 Arizona law does not impose the same standing requirements on parties that the
3 federal Constitution does. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in*
4 *Arizona*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985).

5 Due to Arizona's flexible standing requirements, the Court cannot say that there is
6 "absolute certainty" that AID's claims would be dismissed if they were remanded to state
7 court. *Bell*, 922 F.2d at 1425. Therefore, remand to the state court is the appropriate
8 action in this case. Furthermore, the Court will not dismiss the federal claims on remand
9 because the state courts have concurrent jurisdiction to hear the claims. *See Yellow*
10 *Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990) ("[W]e conclude that Congress
11 did not divest the state courts of their concurrent authority to adjudicate federal claims.").

12 **IV. Defendant is Awarded Fees Incurred Between Removal and Remand**

13 If an attorney "multiplies the proceedings in any case unreasonably and
14 vexatiously," he "may be required by the court to satisfy personally the excess costs,
15 expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. §
16 1927. Attorneys may only be held personally liable for fees under Section 1927 if the
17 attorney acted in bad faith. *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th
18 Cir. 1996). "Bad faith is present when an attorney knowingly or recklessly raises a
19 frivolous argument, or argues a meritorious claim for the purpose of harassing an
20 opponent." *Estate of Blas Through Chargualaf v. Winkler*, 792 F.2d 858, 860 (9th Cir.
21 1986) (internal citations omitted).

22 In a similar fashion, Section 1447(c) permits district courts to assign "payment of
23 just costs and any actual expenses, including attorney fees, incurred as a result of the
24 removal" against a party if "at any time before final judgment it appears that the district
25 court lacks subject matter jurisdiction." 28 U.S.C. § 1447. Assigning fees to a party is not
26 the norm, but it is an available option in instances where "such an award is just." *Martin*
27 *v. Franklin Capital Corp.*, 546 U.S. 132, 138 (2005).

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1 The standard for awarding fees against a party under Section 1447(c) does not
2 require a finding of bad faith. Rather, the analysis in Section 1447(c) generally turns on
3 the “reasonableness of the removal.” *Id.* at 141. The Supreme Court noted in *Martin* that
4 district courts “retain discretion to consider whether unusual circumstances warrant a
5 departure from the rule in a given case.”¹ *Id.* However, “discretion is not whim, and
6 limiting discretion according to legal standards helps promote the basic principle of
7 justice that like cases should be decided alike.” *Martin*, 546 U.S. at 139. The test for
8 “awarding fees under § 1447(c) should recognize the desire to deter removals sought for
9 the purpose of prolonging litigation and imposing costs on the opposing party” while also
10 recognizing that parties make strategic decisions in litigation. *Id.* at 140.

11 In *Baddie v. Berkeley Farms, Inc.* the Ninth Circuit held that the plaintiffs should
12 not have been sanctioned under the removal statute for dismissing their federal claims to
13 ensure remand to the state court. 64 F.3d 487, 491 (9th Cir. 1995). There was no bad faith
14 present in that case, as “there was nothing manipulative about that straight-forward
15 tactical decision.” *Id.* *Baddie* stands for the proposition that a plaintiff is entitled to
16 strategically “choose between federal claims and a state forum” without fear of being
17 sanctioned. *Id.*

18 AID and its counsel cannot seek refuge under *Baddie*. Unlike the plaintiffs in
19 *Baddie*, AID and its counsel affirmatively told opposing counsel that they had no
20 intention of dismissing the federal claims if the Defendant removed the case.
21 Furthermore, unlike the plaintiffs in *Baddie*, AID and its counsel have an established
22 practice of misleading opposing counsel.

23 AID and its counsel have filed more than 1,000 lawsuits in the past year asserting
24 identical state and federal claims in state court. (Doc. 22 at 11.) As expected from this
25 high level of activity, this is not the first encounter Defendant’s counsel has had with

26
27 ¹ Notably, nothing in the *Martin* case stands for the proposition that a district court
28 must leave the decision to sanction counsel for the state court to consider on remand.
Thus, Plaintiff’s argument that a situation-specific footnote in *Baddie* appoints state court
as the only appropriate forum for this determination is rejected. (Doc. 21 at 8.)

1 AID, Mr. Strojnik, and Mr. Zazueta. In both this case as well as *Advocates for Individuals*
2 *with Disabilities Foundation, Incorporated v. Sun West Dental Properties, LLC*, Mr.
3 Anderson sent a letter to AID’s counsel inquiring whether they intended to pursue their
4 federal claims. *Compare* (Doc. 10 at 10) *with Advocates for Individuals with Disabilities*
5 *Foundation, Incorporated v. Sun West Dental Properties, LLC*, 16-cv-02416-JJT, Doc. 8
6 at 10. If not, Mr. Anderson inquired as to whether AID would be interested in stipulating
7 to the dismissal of the federal claims to save both parties the costs of removal. *Id.* In both
8 instances, AID’s counsel assured Mr. Anderson that they had no intention of dismissing
9 their federal claims. (Doc. 10 at 13–16); *Advocates for Individuals with Disabilities*
10 *Foundation, Incorporated v. Sun West Dental Properties, LLC*, 16-cv-02416-JJT, Doc. 8
11 at 13–16. And in both instances, AID’s counsel promptly moved for dismissal of its
12 federal claims upon notice of removal. AID had costs imposed against it for its behavior
13 in *Sun West Dental Properties* two weeks prior to the hearing for the same behavior in
14 this case. *Advocates for Individuals with Disabilities Foundation, Incorporated v. Sun*
15 *West Dental Properties, LLC*, 16-cv-02416-JJT, Doc. 26.

16 AID and its counsel’s decisions to dismiss its federal claims under these
17 circumstances are not “straight-forward tactical decision[s].” Rather, these decisions
18 reflect expensive bait-and-switch maneuvers aimed at “prolonging litigation and
19 imposing costs on the opposing party.” *Martin*, 546 U.S. at 140. Per Mr. Zazueta’s
20 testimony at oral argument, these decisions are ultimately made by Mr. Zazueta and Mr.
21 Strojnik. In this case the Court finds that the refusal to seek dismissal until after counsel
22 had filed their motions for remand evinces a bad faith desire to “argue a meritorious
23 claim for the purpose of harassing an opponent.” *Estate of Blas Through Chargualaf*, 792
24 F.2d at 860. Therefore, the Court finds that counsel’s behavior justifies imposing “the
25 excess costs, expenses, and attorneys’ fees reasonably incurred” due to counsel’s bad
26 faith conduct. 28 U.S.C. § 1927.

27 Likewise, the Court finds that costs should be imposed against AID pursuant to
28 Section 1447(c). AID is a serial litigant in these cases. It had to know that removal to

1 federal court would risk the dismissal of its claims unless it found a way to remand this
2 case back to state court. The only certain route to state court involved a motion to dismiss
3 AID's federal claims. Thus, AID knew when defense counsel approached that it would
4 file a motion to dismiss the federal claims immediately after removal to federal court.
5 AID knew, and yet its counsel intentionally told the Defendant that AID would not file
6 such a motion if the case was removed. Defense counsel relied on that statement and
7 incurred expenses to remove this case to federal court. AID's behavior was aimed at
8 "imposing costs on the opposing party," and it is the exact sort of behavior that the
9 *Martin* Court sought to deter. *Martin*, 546 U.S. at 140. Therefore, AID, Mr. Strojnik, and
10 Mr. Zazueta are ordered jointly and severally to reimburse the Defendant for attorney's
11 fees incurred between the removal and remand of this case. The Court will determine the
12 amount of such reasonable fees upon submission by the attorney of an affidavit outlining
13 his expenses for this period.

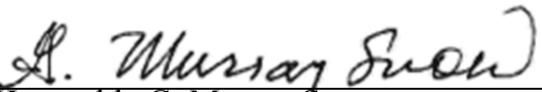
14 CONCLUSION

15 The Plaintiff cannot assert that any individual suffered an injury-in-fact, and thus
16 AID lacks the requisite standing to pursue this claim in federal court. Because there is a
17 chance that these claims will be heard in state court, remand is the appropriate remedy.
18 Furthermore, AID, Mr. Strojnik, and Mr. Zazueta will reimburse the Defendant's fees
19 due to their bad faith behavior.

20 **IT IS THEREFORE ORDERED** directing the Clerk of Court to remand this
21 action back to Maricopa County Superior Court.

22 **IT IS FURTHER ORDERED** that AID, Mr. Strojnik, and Mr. Zazueta shall
23 reimburse the Defendant for attorney's fees acquired between the removal and remand of
24 this case.

25 Dated this 13th day of October, 2016.

26 
27 Honorable G. Murray Snow
28 United States District Judge