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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Fernando Gastelum,

10 Plaintiff,

11 v.

12 Canyon Hospitality LLC,

13 Defendant.

No. CV-17-02792-PHX-GMS

ORDER

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15 Pending before the Court is the Motion to Dismiss of Defendant Canyon
16 Hospitality, LLC for lack of standing. (Doc. 12). Recently, in *Civil Rights Education*
17 *and Enforcement Center v. Hospitality Properties Trust*, 867 F.3d 1093, 1099 (9th Cir.
18 2017) (hereinafter “*CREEC*”), the Ninth Circuit restated and clarified the broad scope of
19 standing in ADA cases involving public accommodations as it relates both to the
20 deterrent effect doctrine and to tester standing. Plaintiff has filed 133 similar cases
21 against hotels in the Phoenix area. Because the issue of standing affects all of Plaintiff’s
22 cases before the Court, the Court ordered a consolidated hearing at which the Court could
23 consider Mr. Gastelum’s standing in all his cases then pending before this Court. In
24 addition to the Canyon Hospitality case, Mr. Gastelum had eleven other ADA complaints
25 against hotels pending in this Court. The hearing held was noticed for ten of them.¹
26 After reviewing the evidence from the hearing, the Court determines that Plaintiff

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28 ¹ The hearing in *Gastelum v. Drury Southwest Inc.*, No. 17-cv-03626-PHX-GMS
(D. Ariz. filed Oct. 10, 2017) was postponed for one week at the request of the Defendant.
(Doc. 39).

1 nevertheless fails to meet the requirements for standing in every case. Thus, the Court
2 grants Defendant's Motion to Dismiss and enters this Order dismissing both the Canyon
3 Hospitality case and all other cases brought by Plaintiff that were the noticed subject of
4 the motion hearing.

5 **BACKGROUND**

6 Plaintiff Fernando Gastelum's left leg is amputated below the knee, requiring him
7 to move around either with a prosthetic leg or the aid of a wheelchair. He spends
8 approximately 85% of his time in a wheelchair. In his Complaint,² as it pertains to his
9 interaction with Defendant Canyon Hospitality's hotel, Plaintiff merely alleges that "on
10 or about August 17, 2017" "Plaintiff reviewed a 3rd party lodging website to book an
11 ambulatory and wheelchair accessible room." (Doc. 1, pp. 15, 26, 30). According to
12 Plaintiff, this website did not contain sufficient information for Plaintiff to determine
13 whether Defendant's hotel complied with the Americans with Disabilities Act (ADA), 42
14 U.S.C. §§ 12181-89. (Doc. 1, p. 5). Next, Plaintiff visited Defendant's first-party
15 website, www.gcuhotel.com, attempting to find the information that was not available on
16 the third-party website. Plaintiff found that the first-party website also lacked enough
17 detail on ADA compliance. *Id.* at p. 8. Because he could not ascertain from the websites
18 whether the hotel complied with the ADA, he thereafter called Defendant's hotel to
19 inquire whether it was ADA compliant and was assured by an employee, Rena, that it
20 was. *Id.* at pp. 33-35. Nevertheless, on August 18, 2017, Plaintiff visited Defendant's
21 hotel to verify in person whether the hotel was ADA compliant and suitable for Plaintiff
22 to stay.

23 In his visit to this Defendant, Plaintiff noted 22 areas where Defendant's external
24 facilities were allegedly out of compliance with the ADA. *Id.* at pp. 10-12. That same
25 day, August 18, 2017, Plaintiff filed the present lawsuit seeking injunctive relief under
26 the ADA. (Doc. 1). Plaintiff does not state in his Complaint how any of the failures of

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28 ² As the motion was filed in the *Canyon Hospitality* case, the Court uses facts from
it as illustrative. Should there be relevant distinctions between the cases, the Court will
provide that information and cite to those cases separately.

1 compliance discriminate against him or his disability, but the Complaint does make the
2 bare allegation that he “intends to book a room at the Defendant’s hotel once Defendant
3 has removed all accessibility barriers.” (Doc. 1, pp. 16, 19, 30). On that same date,
4 Plaintiff also filed a separate complaint concerning a separate hotel with virtually
5 identical allegations. *See Gastelum v. BRE/LQ Properties LLC*, No. 17-cv-02802-PHX-
6 DGC (D. Ariz. filed Aug. 18, 2017).

7 At the time of the filing of Defendant Canyon Hospitality’s Motion to Dismiss,
8 Plaintiff had, in the previous six weeks, filed over thirty-three ADA complaints against
9 hotels in the Phoenix area alleging that he has been personally harmed by the ADA
10 violations of those hotels. By the time the hearing was held on this matter Plaintiff
11 acknowledged that he has filed a total of approximately 125 similar lawsuits in the
12 District of Arizona against various hotels in the Phoenix area. At present, Plaintiff has
13 apparently filed 133 lawsuits. He has continued to file such suits after the hearing.³ The
14 complaints filed in all the cases pending in front of this Court are substantially similar,
15 boilerplate complaints. In all the complaints, Mr. Gastelum alleges the same process of
16 checking a third-party website, then a first-party website, and finally an in-person visit.
17 If the websites make different levels of disclosure of ADA accommodations, the
18 complaints reflect the specific disclosures, seemingly copied and pasted from the website.
19 *See, e.g., Gastelum v. AUM Hospitality Ventures, LLC*, No. 18-cv-0104-PHX-GMS (D.
20 Ariz. filed Jan. 11, 2018) (Doc. 1, pp. 9–10). All of the complaints contain the same
21 language that Mr. Gastelum “intends to book a room at the Defendant’s hotel once
22 Defendant has removed all accessibility barriers.” *See, e.g., id.* at p. 4. No complaint
23 contains further detail on Mr. Gastelum’s return plans. Each complaint contains a
24 different list of ADA barriers found on Plaintiff’s inspection, though many of the same

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26 ³ The cases assigned to this Court and filed after this Court set a hearing are:
27 *Gastelum v. DHILLON Properties & Investments LLC*, No. 18-cv-01283-PHX-GMS (D.
28 Ariz. filed April 24, 2018), *Gastelum v. Concord CS Chandler LLC*, No. 18-cv-01429-
PHX-GMS (D. Ariz. filed May 9, 2018), and *Gastelum v. Chandler HG LLC*, No. 18-cv-
01453-PHX-GMS (D. Ariz. filed May 11, 2018). An additional case was reassigned
from a magistrate judge to this Court after the hearing: *Gastelum v. CP Buttes LLC*, No.
18-cv-00940-PHX-GMS (D. Ariz. filed March 26, 2018).

1 barriers appear on each complaint. Thus, while details gleaned from the inspections are
2 changed, the substance of the rest of the complaints are almost exactly the same.

3 Defendant Canyon Hospitality operates the Grand Canyon University Hotel in
4 Phoenix, and moved the Court to dismiss on the grounds that Plaintiff has failed to plead
5 the necessary requirements to establish Article III standing. (Doc. 12). In light of the
6 questions raised by Defendant in its motion that were similar to virtually all of the cases
7 filed by Mr. Gastelum in this Court, and the Court's obligation to sua sponte determine
8 whether there is standing in its cases, *see Bernhardt v. County of Los Angeles*, 279 F.3d
9 862, 868 (9th Cir. 2001), the Court held evidentiary hearings on May 4, 2018 and May
10 11, 2018 that pertained to all of the cases filed by Mr. Gastelum that were being heard by
11 this Court.

12 Mr. Gastelum was present to testify on both occasions. Mr. Gastelum testified that
13 he lives in Casa Grande, Arizona, approximately fifty-five miles from Phoenix, Arizona.
14 He is 57 years old and has lived in Casa Grande all of his life. Mr. Gastelum testified
15 that since he began to file ADA lawsuits against lodgings in the Phoenix area last year he
16 has stayed overnight at ten hotels. He never stayed in the same hotel twice.
17 Mr. Gastelum sued each of these ten hotels for failure to comply with the ADA.⁴ He
18 testified that he has not returned to any of the hotels with which he has settled his claims,
19 or in which he has stayed, because they have not yet completed their compliance with all
20 ADA standards. In addition to staying at the ten lodgings, he has paid visits within the
21 past year to many other Phoenix area lodgings to assess whether they comply with the
22 ADA. Inspecting hotels for ADA compliance in the company of his attorney is one of
23 the principal reasons that he comes to Phoenix: Mr. Gastelum meets with his attorney,
24 Mr. Peter Strojnik, in Phoenix, twice a week. Mr. Gastelum's son, Eric, who receives

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26 ⁴ To the best of this Court's knowledge, the suits involving only one of these
27 hotels are in front of this Court: *Gastelum v. Hilton Garden Inns Management LLC*, No.
28 18-cv-00820-PHX-GMS (D. Ariz. filed March 13, 2018) (Doc. 28, pp. 7, 15). The
Complaint in this case (Doc. 1) contains no substantial differences in its allegations
compared to the complaints filed in the cases in which Mr. Gastelum has not stayed the
night and paid for a room.

1 compensation for the inspection of the hotels, and Mr. Strojnik himself generally
2 accompany Mr. Gastelum to the hotels. In fact, Mr. Gastelum stated in a deposition that
3 he usually stays in the car while Eric and Mr. Strojnik inspect the hotel.⁵ *Gastelum v.*
4 *Pride Hospitality*, No. 17-cv-03607-PHX-GMS (D. Ariz. filed Oct. 8, 2017) (Doc. 27,
5 Ex. 1, p. 106:10–16). Mr. Gastelum testified that he had been given a three-ring binder
6 prepared by his counsel Mr. Strojnik⁶ which contains materials and instruction by which
7 he can ascertain whether a lodging is in compliance with all ADA regulations. He takes
8 the binder with him when he visits those lodgings. If the lodging is out of compliance
9 with the ADA, Mr. Strojnik files suit on his behalf. Mr. Gastelum estimates that he
10 visits four Phoenix-area hotels a week, usually two per day. But he generally returns to
11 Casa Grande for the evening without staying at any of the Phoenix lodgings that he has
12 visited. In addition to bringing suit against each of the ten lodgings at which he actually
13 stayed during the past year, he has brought suit against more than 120 other facilities that
14 he has visited or otherwise contacted to evaluate for ADA compliance. And as the facts
15 of some of the cases demonstrate, the lawsuit is at least sometimes filed on the same date
16 as Mr. Gastelum’s visit. At the hearing, Mr. Gastelum testified that it was his intent and
17 desire in bringing these suits to represent all persons with disabilities in asserting their
18 rights to ADA compliance, and that he had a general desire to live in communities and
19 stay at lodgings that accommodated persons with disabilities as full members of the

21 ⁵ “Q: Do you stay in the car during the compliance checks?

22 A: Most of the time, I would say, yes.”

23 Q: And Eric gets out and —

24 A: Yes.

25 Q: And Mr. Strojnik is there sometimes as well?

26 A: He is there I would say 95 percent of the time.”

27 ⁶ Mr. Strojnik created this binder and has, in at least two cases, requested
28 attorney’s fees for his time spent preparing the materials. *Gastelum v. Pride Hospitality*,
No. 17-cv-03607-PHX-GMS (D. Ariz. filed Oct. 8, 2017) (Doc. 22, p. 7); *AUM*
Hospitality Ventures, No. 18-cv-0104-PHX-GMS (Doc. 15, p. 7).

1 community.

2 As has been discussed, an examination of the Complaints in these lawsuits reveals
3 that the Complaints are boilerplate complaints that have identical language in many
4 particulars and are minimally tailored to accommodate the facts of the individual lodging
5 defendant. Mr. Gastelum has not personally paid the filing fees for any of the cases
6 brought. His attorney covers the filing fee. The amount of filing fees alone paid to file
7 the suits in the last year exceeds Mr. Gastelum's yearly household income of \$44,000.⁷
8 His wife is employed and works a regular work week from Monday to Friday. In his
9 deposition in the *Pride Hospitality* case, Mr. Gastelum testified that his wife of over
10 twenty years is unaware that he is a plaintiff in ADA cases and that he frequently travels
11 to Phoenix with his son to investigate hotels and meet with his attorney. No. 17-cv-
12 03607-PHX-GMS (Doc. 27, Ex. 1, pp. 26:6–27:4).

13 Mr. Gastelum's counsel has already settled 6 of the suits that were filed in this
14 Court for undisclosed sums. Mr. Gastelum is paid \$350 for every case that is
15 successfully terminated by his counsel. *Pride Hospitality*, No. 17-cv-03607-PHX-GMS
16 (Doc. 27, Ex. 1, pp. 173:24–174:10). In two of the cases that are currently before this
17 Court the parties have resolved the underlying matters but have asked the Court to award
18 attorneys' fees to Mr. Gastelum's counsel as representing the prevailing party. In both
19 cases, Mr. Gastelum's counsel has quickly settled the case against the Defendants and
20 then sought attorney's fees and costs awards of \$21,291 and \$12,643, respectively,
21 without doing any substantial discovery in the case. *Pride Hospitality*, No. 17-cv-03607-
22 PHX-GMS (Doc. 22); *AUM Hospitality Ventures LLC*, No. 18-cv-00104-PHX-GMS
23 (Doc. 15).

24 Mr. Gastelum stated that he likes to come to Phoenix to attend baseball games, and
25 to go to karaoke bars and shopping with his wife, and meet with his attorney.
26 Mr. Gastelum filed an evidentiary memorandum with the court, prior to the first hearing.

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28 ⁷ The Court's filing fee is \$400.00. With 133 cases filed in under a year, the total
filing cost for Mr. Gastelum equates to \$53,200.

1 In the evidentiary memorandum he provided receipts from all of the hotels at which he
2 has stayed and all of the sporting events he attended in Phoenix in the last year. The
3 sporting events are for Diamondback games together with two football related events.
4 (Doc. 28). To the extent that Mr. Gastelum attempts to suggest that he stays overnight in
5 Phoenix when he attends Diamondbacks games, the receipts and dates of the tickets
6 demonstrates that he does not. The dates he has stayed in lodgings in the Phoenix in the
7 last year do not coincide with dates on which he was attending Diamondbacks games,
8 and he provides no corroboration that he stayed with his wife on such occasions when
9 shopping or going to karaoke with her.

10 Prior to the time he began initiating these lawsuits, Mr. Gastelum generally
11 returned to Casa Grande for the night when he had business in Phoenix, or he stayed with
12 his friend who lived in Phoenix or with his sister who lives in Mesa. He believed he had
13 stayed at hotels in the Phoenix area approximately ten other times in his life during all of
14 which he has resided in Casa Grande. On his family's household income—\$44,000 per
15 annum—Mr. Gastelum estimated that he would be able to stay in hotels in the Phoenix
16 area a maximum of twelve to fifteen times per year. Mr. Gastelum stated that it would be
17 impossible to stay at all of the approximately 125 (now 133) hotels he has sued, but he
18 would like to stay at some.⁸ He testified that he would return to and stay at any of the
19 hotels he has sued if the alleged ADA violations were fixed.

20 Mr. Gastelum has never before visited Defendant Canyon Hospitality, nor has he
21 since visited. Nor at the hearing was he able to set forth any persuasive reasons why he is
22 likely to visit the Defendant Canyon Hospitality in the future. The Court finds that
23 although Mr. Gastelum did visit the Defendant's facility as a tester, he did so only with
24 the purpose of filing a lawsuit to obtain injunctive relief as a part of pattern of litigation
25 against many Phoenix area hotels. He has offered no sufficiently persuasive reason to

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27 ⁸ “Q: So in the past 279 days you filed about 125 lawsuits. Were you planning on
28 actually staying at all the hotels you were visiting, at all 125 hotels?”

A: That would be impossible if I'm looking at two per day. I would like to stay at
one of those.” (Doc. 41, p. 29:14–18).

1 believe that he would revisit the facility, or any other facility in the cases for which the
2 hearing was noted, except to the extent that such a revisitation or an avowal of
3 willingness to revisit would be necessary to maintain standing to obtain injunctive relief.

4 Mr. Gastelum did identify a few generalized reasons why he might want to return
5 to other hotels he has sued, including, for example, their proximity to water parks or
6 malls. But he offered no reasonable plans to believe that he had any specific intent or
7 likelihood of doing so. Further, Mr. Gastelum has sued 133 hotels in the Phoenix area
8 and avowed in doing so that he intended to book a room at each one of them once the
9 defendant resolved its ADA issues. However, Mr. Gastelum testified that he has never
10 stayed at a hotel more than once.

11 In his verified complaints Mr. Gastelum does not avow that he would actually
12 return to any of the facilities against which he is bringing suit, only that he would “book a
13 room” in such facilities. In none of the complaints does Mr. Gastelum allege a specific
14 persuasive reason why he would return to the lodging he sues. Because of the volume of
15 cases he has brought, his limited reasons for staying in Phoenix, the proximity to Casa
16 Grande to which he easily can, and frequently does, return for his overnight stays, the
17 evident enterprise in conjunction with his attorney to sue many hotels in the Phoenix area
18 for ADA compliance, his personal finances, his past travel habits, and his testimony that
19 he could not return to all hotels he has sued, the Court finds that he has failed to establish
20 a sufficient likelihood that he would return to any of the hotels that are the defendants in
21 the cases in which this hearing is noticed.

22 Based upon the above facts the Court concludes that Mr. Gastelum and his counsel
23 Mr. Strojnik are engaged in a joint enterprise in which they are filing multiple suits
24 against any Phoenix area lodgings that they believe to be out of compliance with the
25 ADA in some respect or respects. They are filing such suits without reference to whether
26 Mr. Gastelum actually had any intent to make future visits to those facilities for reasons
27 not related to his pursuit of ADA claims against them. Given the facts of this case Mr.
28 Gastelum has failed to establish that he would have any likelihood of revisiting these

1 facilities except to the extent it would be deemed necessary for him to do so to bring suit
2 against each of the Defendants.

3 DISCUSSION

4 I. Legal Standard

5 Standing under Article III of the Constitution is a constitutional limitation on a
6 court's subject matter jurisdiction and cannot be granted by statute. *See Cetacean Cmty.*
7 *v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Lujan v. Defenders of Wildlife*, 504
8 U.S. 555, 576–77 (1992)). Because standing is a jurisdictional question, it is properly
9 addressed in a Rule 12(b)(1) motion instead of a Rule 12(b)(6) motion. *Cetacean Cmty.*,
10 386 F.3d at 1174. “A district court may hear evidence and make findings of fact
11 necessary to rule on the subject matter jurisdiction question prior to trial, if the
12 jurisdictional facts are not intertwined with the merits.” *Rosales v. United States*, 824
13 F.2d 799, 803 (9th Cir. 1987).

14 II. Analysis

15 The Constitution requires that litigants “who seek to invoke the jurisdiction of the
16 federal courts must satisfy the threshold requirements imposed by Article III . . . by
17 alleging an actual case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101
18 (1983). This Constitutional prerequisite of standing is so fundamental that federal courts
19 are required to consider these issues sua sponte. *See Bernhardt*, 279 F.3d at 868. Three
20 elements must be present for a Plaintiff to have standing: (1) the Plaintiff must have
21 “suffered an injury in fact—an invasion of a legally protected interest which is (a)
22 concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;”
23 (2) there must be a “causal connection between the injury and the conduct complained
24 of;” and (3) it must be “likely, as opposed to merely speculative, that the injury will be
25 redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61. When a plaintiff seeks
26 injunctive relief, there is an additional requirement of showing “a sufficient likelihood
27 that [the plaintiff] will again be wronged in a similar way . . . [t]hat is, . . . a real and
28 immediate threat of repeated injury.” *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d

1 1075, 1081 (9th Cir. 2004) (quoting *Lyons*, 461 U.S. at 111, and *O’Shea v. Littleton*, 414
2 U.S. 488, 496 (1974)) (internal quotations omitted). In the context of civil rights
3 statutes, such as the ADA, courts are instructed to take a “broad view” of constitutional
4 standing. *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039–40 (9th Cir. 2008) (citing
5 *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

6 But, Congress “cannot erase Article III’s standing requirements by statutorily
7 granting the right to sue to a plaintiff who would not otherwise have standing.” *Raines v.*
8 *Byrd*, 521 U.S.811, 820 n. 3 (1997). As such, “Congress’ role in identifying and
9 elevating intangible harms does not mean that a plaintiff automatically satisfies the
10 injury-in-fact requirement whenever a statute grants a person a statutory right and
11 purports to authorize that person to sue to vindicate that right.” *Spokeo, Inc. v. Robbins*,
12 136 S.Ct. 1540, 1549 (2016). Plaintiffs cannot “allege a bare procedural violation,
13 divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article
14 III.” *Id.*

15 **A. Injury-in-Fact**

16 Although Defendant Canyon Hospitality challenges all three elements of standing,
17 the crux of the argument is that Mr. Gastelum has not suffered an injury in fact, and thus,
18 all other deficiencies flow from that.⁹ An injury-in-fact is (a) concrete and particularized,
19 and (b) actual or imminent, not conjectural or hypothetical. Under the ADA, “[n]o
20 individual shall be discriminated against on the basis of disability in the full and equal
21 enjoyment of the goods, services, [or] facilities . . . of any place of public
22 accommodation.” 42 U.S.C. § 12182(a). Hotels are places of public accommodation. *Id.*
23 at § 12181(7)(A).

24 **1. Actual or Imminent Injury**

25 In the context of ADA discrimination claims, the Ninth Circuit recognizes a

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27 ⁹ Defendant argues that because there is no injury, there can be no causation.
28 Similarly, Defendant argues that without an injury, there is nothing to redress. (Doc. 12,
pp. 8–9). These claims are derivative of the general claim that Plaintiff has not suffered
an injury-in-fact. As such, the Court will only address the question of whether the
Plaintiff has suffered an injury-in-fact.

1 deterrent effect doctrine. For the requirement that the injury be actual or imminent, “a
2 disabled individual who is currently deterred from patronizing a public accommodation
3 due to a defendant’s failure to comply with the ADA has suffered ‘actual injury.’” *Doran*,
4 524 F.3d at 1040 (quoting *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138
5 (9th Cir. 2002)). The Ninth Circuit recently clarified that a plaintiff need not personally
6 encounter a barrier in order to be injured. Instead, “[i]t is the plaintiff’s ‘actual
7 knowledge’ of a barrier, rather than the source of that knowledge, that is determinative.”
8 *CREEC*, 867 F.3d at 1099. Injury is imminent when a plaintiff “is threatened with harm
9 in the future because of existing or immediately threatened non-compliance with the
10 ADA.” The ADA provides that plaintiffs need not “engage in a futile gesture if such
11 person has actual notice that a person or organization . . . does not intend to comply with
12 the ADA.” 42 U.S.C. § 12188(a)(1). Where an individual knows of ADA violations at a
13 public accommodation, he is not required to keep returning in order to show imminent
14 injury. Instead, the ongoing deterrence is sufficient to satisfy the requirement of an actual
15 and imminent injury. *Doran*, 524 F.3d at 1040 (quoting *Pickern*, 293 F.3d at 1138).

16 Similarly, in *CREEC*, the Court noted that the plaintiff’s motivation in visiting the
17 public accommodation is irrelevant. This so-called “tester standing” rule means that a
18 plaintiff can visit or otherwise obtain information about a public accommodation solely
19 for the purpose of ensuring ADA compliance and with the intent to bring a lawsuit if
20 deficiencies are found. An ADA plaintiff has suffered an “actual” injury, even if the
21 plaintiff had no intention or plan to visit the hotel at the time of the acquisition of
22 knowledge of ADA noncompliance. *CREEC*, 867 F.3d at 1101–02.

23 Mr. Gastelum has actual knowledge of the alleged barriers, and may have even
24 encountered some of them. And the fact that he has visited the lodgings as a tester does
25 not negate his knowledge of or encounters with the alleged barriers. The recognition of
26 the deterrent effect and tester standing doctrines, however, does not do away with the
27 standing requirements necessary to obtain injunctive relief nor does it free the Plaintiff
28 from the obligation to show injury-in-fact with respect to the discrimination alleged in the

1 complaint.

2 **2. Injunctive Relief**

3 A plaintiff seeking injunctive relief, as Mr. Gastelum does in each of his
4 complaints here, must also show that there is a “real and immediate threat of repeated
5 injury.” *Lyons*, 461 U.S. at 111. An ADA plaintiff may show a real and immediate
6 threat of injury in two ways. First, the plaintiff can show that “he intends to return to a
7 noncompliant accommodation and is therefore likely to reencounter a discriminatory
8 architectural barrier.” *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 950 (9th Cir.
9 2011). Or second, the plaintiff can show that the “discriminatory architectural barriers
10 deter him from returning to a noncompliant accommodation” which he would otherwise
11 visit in the course of his regular activities. *Id.* Even in holding that the ADA permits
12 tester standing in *CREEC*, and the further holding that a personal encounter with an
13 alleged barrier was not a prerequisite for standing purposes, the Ninth Circuit did not
14 relax the requirement that the Plaintiff demonstrate real and immediate threat of repeated
15 injury by showing a legitimate intent to visit again the public accommodation in question.
16 In *CREEC*, the Ninth Circuit stated that “past exposure to illegal conduct does not in
17 itself show a present case or controversy . . . the plaintiff must allege continuing, present
18 adverse effects stemming from the defendant’s actions.” 867 F.3d at 1098 (quoting
19 *Lyons*, 461 U.S. at 102) (quotation marks omitted). An ADA Plaintiff may show
20 continuing adverse effects by showing a “defendant’s failure to comply with the ADA
21 deters her from making use of the defendant’s facility.” *CREEC*, 867 F.3d at 1098. But,
22 to be deterred from making use of the defendant’s facility, one must have a true desire to
23 return to the facility but for the barriers. *See Chapman*, 631 F.3d at 949 (“Article III,
24 however, requires a sufficient showing of likely injury in the future related to the
25 plaintiff’s disability to ensure that injunctive relief will vindicate the rights of the
26 particular plaintiff rather than the rights of third parties.”). *CREEC* shows no desire to
27 change the clear holding in *Chapman* that a plaintiff must make a sufficient showing of
28 likely injury in the future. *See also Pickern*, 293 F.3d at 1138 (noting, in the context of

1 discussing the actual and imminent injury requirement, that plaintiff has “visited
2 Holiday’s Paradise store in the past[.]. . . that he prefers to shop at Holiday markets and
3 that he would shop at the Paradise [location] if it were accessible); *Doran*, 524 F.3d at
4 1040 (“As to whether Doran’s injury is actual or imminent, Doran alleged that he had
5 visited the 7-Eleven store on ten to twenty prior occasions, . . . that the store is
6 conveniently located near his favorite fast food restaurant in Anaheim, and that he plans
7 to visit Anaheim at least once a year on his annual trips to Disneyland.”); *D’Lil v. Best*
8 *Western Encina Lodge & Suites*, 538 F.3d 1031, 1037–38 (9th Cir. 2008) (“In order to
9 show the actual and imminent nature of her injury, then, D’Lil must demonstrate her
10 intent to return to the Santa Barbara area and, upon her return, her desire to stay at the
11 Best Western Encina if it is made accessible. . . . [S]he explained that her preference for
12 staying at the Best Western Encina during future trips to Santa Barbara was based on the
13 hotel’s proximity to downtown, its accessibility from the freeway, and its amenities,
14 including lush gardening and fresh country linen quilts.”).

15 Both the Tenth and the Eleventh Circuit opinions cited in *CREEC* continue to hold
16 that a tester plaintiff seeking injunctive relief must demonstrate a real and immediate
17 threat of repeated injury. *Colorado Cross Disability Coalition v. Abercrombie & Fitch*
18 *Co.*, 765 F.3d 1205, 1211–12 (10th Cir. 2014) (noting that “the fact that ‘tester standing’
19 exists under [the ADA] does not displace the general requirements of standing” and
20 finding that a plaintiff who testified that she intends to return to a store in the mall at least
21 six times in the next year has demonstrated a real and immediate threat of injury);
22 *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336 (11th Cir. 2013) (finding that
23 a tester plaintiff who had visited the defendant’s store twice in the past and lived 30 miles
24 from the store has sufficiently demonstrated a likelihood of future injury).

25 In determining whether a plaintiff has a future intent to visit the public
26 accommodation at issue, factors such as “(1) the proximity of the place of public
27 accommodation to plaintiff’s residence, (2) plaintiff’s past patronage of defendant’s
28 business, (3) the definitiveness of plaintiff’s plans to return, and (4) the plaintiff’s

1 frequency of travel near defendant” are relevant. *Harris v. Del Taco, Inc.*, 396 F.Supp.2d
2 1107, 1113 (C.D. Cal. 2005). But even these factors are not definitive. The *CREEC*
3 Court emphasized that a past visit to a hotel is not necessarily sufficient to establish the
4 likelihood of a future visit. It noted that while “[r]equiring a plaintiff to ‘personally’
5 encounter a barrier in order to obtain an injunction under Title III might screen out
6 plaintiffs who do not in fact intend to use the facility—that is, plaintiffs for whom an
7 injury is not actually imminent”—a requirement of past visits was both under- and over-
8 inclusive. *CREEC*, 867 F.3d at 1099. It could be under-inclusive because “evidence of
9 concrete travel plans would be sufficient to show that a disabled plaintiff intends to visit a
10 facility, even if she has not travelled there in the past.” *Id.* at 1100. Such a rule could also
11 be over-inclusive because “in the absence of travel plans, a past visit might not be
12 sufficient evidence of imminent future harm.” *Id.* The *CREEC* court thus expressed
13 confidence that making “case-by-case determinations about whether a particular
14 plaintiff’s injury is imminent is well within the competency of the district courts.” 867
15 F.3d at 1100 (citing *Houston*, 733 F.3d at 1335–37) (using similar factors as in *Harris* to
16 evaluate the imminence of a plaintiff’s injury).

17 In *CREEC*, the three Plaintiffs each identified a separate hotel under common
18 ownership at which they would stay in the future if that hotel would cease to discriminate
19 against their disability by providing equivalent transportation to wheelchair bound
20 patrons. By contrast, although he lives close by, Mr. Gastelum has sued over 130
21 lodgings in the Phoenix metropolitan area for their failure to comply with ADA
22 requirements without specifying how it relates to his disability and without setting forth
23 any reason why he would plan to visit that hotel again. In each of the complaints at issue
24 here, Mr. Gastelum identically alleges that “Plaintiff intends to book a room at the
25 Defendant’s hotel once Defendant has removed all accessibility barriers, including the
26 ones not specifically referenced herein, and has fully complied with the ADA.” (Doc. 1,
27 p. 4). But, Plaintiff cannot substitute a “formulaic recitation of the elements of a cause of
28 action” in the place of factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

1 555 (2007). Plaintiff must provide facts that establish an intent to visit Defendant’s hotel
2 in order to have standing; Plaintiff cannot simply state the rule. While the need to look at
3 the specificity with which the Plaintiff has pleaded the likelihood of future visits might be
4 less stringent had he only sued one hotel in the Phoenix area, as had the Plaintiffs in
5 *CREEC*, the inquiry must be more exacting where he has expressed only a rote intent to
6 “book rooms” in 133 other lodgings in the same geographic area. Further,
7 Mr. Gastelum’s standard avowal in his verified complaints that he intends to “book a
8 room” at each lodging is not sufficient to establish concrete injury, absent a showing that
9 he would likely visit that hotel again (as opposed to merely booking a room) for some
10 purpose other than maintaining his litigation against that hotel. Avowing to a desire to
11 “book a room,” is different than avowing an intent to actually visit a hotel.

12 Mr. Gastelum has only visited Defendant Canyon Hospitality’s hotel on the visit
13 that gave rise to this lawsuit, and he did not stay there then. He has not pled any facts
14 about a specific plan to return or about why he is likely to want to stay or visit at
15 Defendant’s hotel in the future. *Cf. D’Lil*, 538 F.3d at 1037–38. At the evidentiary
16 hearing, Mr. Gastelum could not remember why he had been interested in staying at the
17 GCU Hotel. Mr. Gastelum and his counsel Mr. Strojnik are engaged in a joint enterprise
18 in which they are filing multiple suits against any Phoenix area lodgings that they believe
19 to be out of compliance with the ADA in some respect or respects. They are filing such
20 suits without reference to whether Mr. Gastelum actually intends to actually revisit those
21 facilities except to the extent he would be required to do so to maintain the right to pursue
22 litigation against them. This is insufficient to grant him standing against any of these
23 Defendants.

24 Moreover, even though Mr. Gastelum likes to travel to Phoenix to attend sporting
25 events, karaoke bars, and go shopping, there is insufficient support that Mr. Gastelum
26 actually stays in hotels after he comes to the Phoenix area for those purposes, or that he
27 would stay at a particular hotel or hotels again for those purposes. Mr. Gastelum did
28 stay at the Hilton Garden Inn, and that case is pending before this Court. But as the

1 CREEC court noted, a past stay is not indicative of an intent to return. 867 F.3d at 1100.
2 To accord standing allowing Plaintiff to sue Defendants when he can establish no
3 likelihood of again visiting their facilities in the course of his normal activities other than
4 maintaining litigation against a defendant would violate the standing principles set forth
5 in *Raines, Spokeo, and Lyons*. A plaintiff must show a likelihood of future injury, *Lyons*,
6 461 U.S. at 111, and that alleged statutory violations exist does not give rise, on its own,
7 to an injury. *Spokeo*, 136 S.Ct. at 1549. Nor does “booking a room” establish sufficient
8 future concrete injury absent some likelihood that the Plaintiff would actually visit the
9 hotel again for some non-litigation purpose. Without a showing of future injury and true
10 deterrence from returning, the alleged ADA violations at the lodgings are mere statutory
11 violations that do not give rise to standing in Mr. Gastelum to bring suit.

12 In addition, at hearing and in his motion papers Mr. Gastelum seemed to suggest
13 that he has standing due to a broader right under the statute to stay at a hotel that does not
14 discriminate against any person based on disability. But his desire to lodge in a hotel that
15 provides equal access to persons of all disabilities is insufficient to provide him with
16 standing to represent such persons’ claims especially if he cannot establish a real non-
17 litigation related reason why he is likely to stay at that particular hotel in the future.
18 Further, as will be explained below, his Complaint does not adequately allege how he is
19 deprived access due to the failure of the hotel to comply with ADA regulations, let alone
20 how others with separate disabilities are denied access. It is true that in the Fair Housing
21 context, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) held that those who lived
22 close to the apartment complex at issue would also have standing to sue for steering
23 practices that deprived the neighbors of the right to the benefits of interracial associations
24 that arise from living in integrated communities. *Id.* at 376. But *Havens Realty* further
25 specified that such “neighborhood” standing would not extend to everyone in the city or
26 the county. *Id.* at 377 (“It is indeed implausible to argue that petitioners’ alleged acts of
27 discrimination could have palpable effects throughout the *entire* Richmond metropolitan
28 area. At the time relevant to this action the city of Richmond contained a population of

1 nearly 220,000 persons, dispersed over 37 square miles. . . . Our cases have upheld
2 standing based on the effects of discrimination only within a ‘relatively compact
3 neighborhood[.]’ . . . We have not suggested that discrimination within a single housing
4 complex might give rise to ‘distinct and palpable injury,’ . . . throughout a metropolitan
5 area.”).

6 Even assuming that the same logic would apply to the neighborhoods in which
7 hotels as opposed to apartment buildings are located, Mr. Gastelum lives in Casa Grande.
8 That is not sufficiently close to any of the Defendants’ hotels to suggest that
9 Mr. Gastelum suffers a personal loss because of the proximity of his residence to the
10 hotel that he alleges is discriminating against persons who have disabilities that he does
11 not.¹⁰ Thus he is unable to assert a theory of “neighborhood standing” on behalf of others
12 with disabilities he does not have when he is not a member of a “relatively compact
13 neighborhood” near any of these hotels and he cannot establish through facts a real
14 likelihood to visit these hotels in the future that arises other than from his desire to bring
15 suit against them. While this Court does not doubt the good-faith desire of Mr. Gastelum
16 to be an advocate for the disabled, he has no standing to assert claims for disabilities that
17 he himself does not possess, or for a failure to follow regulations that do not affect his
18 personal ability to access the facility.

19 **3. Concrete and Particularized Injury**

20 In addition to his failure to sufficiently demonstrate a likelihood of revisiting any
21 of the facilities that are the subject of this order, Mr. Gastelum has failed to indicate in
22 any of the complaints how the facility constructs a barrier to his particular disability. A
23 barrier in a public accommodation must “interfere with the plaintiff’s ‘full and equal
24 enjoyment’ of the facility.” *Chapman*, 631 F.3d at 947 (quoting 42 U.S.C. § 12182(a)).
25 But, “a ‘barrier’ will only amount to such interference if it affects the plaintiff’s full and
26

27 ¹⁰ Even a hotel in Chandler, Arizona, a city in the southeastern part of the Phoenix
28 metropolitan area, would be approximately thirty miles from Casa Grande. A hotel in
Peoria, Arizona, a city in the northwestern part of the Phoenix metropolitan area, would
be approximately sixty miles from Casa Grande.

1 equal enjoyment of the facility *on account of his particular disability.*” *Chapman*, 631
2 F.3d at 947 (emphasis added). A plaintiff may show a concrete and particularized injury
3 by “stating that he is currently deterred from attempting to gain access” to the public
4 accommodation due to that barrier. *Doran*, 524 F.3d at 1040. Plaintiff only has standing
5 to assert discrimination that results from the disabilities that he has. The statutory
6 language in the ADA contains broad language that does not limit rights based on the
7 motivation of the plaintiff. The ADA states that “[n]o individual shall be discriminated
8 against on the basis of disability” and that “any person who is being subjected to
9 discrimination on the basis of disability” may bring a lawsuit. 42 U.S.C. §§ 12182(a),
10 12188(a)(1) (emphasis added). But, even when the statute is read at its most permissive,
11 it still only provides standing to anyone who is discriminated against *on the basis of*
12 *disability*. See, e.g., *Havens Realty*, 455 U.S. at 375 (holding that, in a case involving
13 black and white testers for violations of the Fair Housing Act, the white testers who were
14 not lied to regarding housing availability did not have standing to assert FHA claims). In
15 *Chapman*, the Ninth Circuit held that the plaintiff’s complaint alleging “that he is
16 ‘physically disabled,’ and that he ‘visited the Store’ and ‘encountered architectural
17 barriers that denied him fully and equal access’” was insufficient. *Id.* at 954.
18 Mr. Chapman attached an Accessibility Survey to his complaint which “simply identifies
19 alleged ADA . . . violations without connecting the alleged violations to Chapman’s
20 disability, or indicating whether or not he encountered any one of them in such a way as
21 to impair his full and equal enjoyment of the Store.” *Id.* Plaintiffs “cannot satisfy the
22 demands of Article III by alleging a bare procedural violation.” *Spokeo*, 136 S.Ct. at
23 1550.

24 As in *Chapman*, Mr. Gastelum’s formulized Complaint filed in each action fails to
25 detail how his injury is particularized to his specific disability. Mr. Gastelum’s complaint
26 “does nothing more than perform a wholesale audit of the defendant’s premises.” *Id.* at
27 955 (internal quotations omitted). The Complaint lists over twenty alleged violations of
28 the ADA. (Doc. 1, pp. 10–11). However, this “cannot substitute for the factual

1 allegations required in [a] complaint to satisfy Article III’s requirement of an injury-in-
2 fact.” *Chapman*, 631 F.3d at 955. Like the *Chapman* complaint, Mr. Gastelum “does not
3 even attempt to relate the alleged violations to his disability.” *Id.* Instead, this Court is
4 left “to guess which, if any, of the alleged violations deprived him of the same full and
5 equal access that a person who is not wheelchair bound [or who does not use prosthetics]
6 would enjoy.” *Id.* Mr. Gastelum states that these violations deterred him from booking a
7 room at the hotel, but he does not discuss “how any of [the alleged violations] deter him
8 from visiting the [hotel] due to his disability.” *Id.* Although the specific alleged
9 violations vary from complaint to complaint, depending on the results of the inspection
10 by Mr. Gastelum, his son, and Mr. Strojnik, the “wholesale audit” nature of the complaint
11 does not change. Each complaint details dozens of alleged violations without relating the
12 violations to Mr. Gastelum’s disability.

13 Mr. Gastelum alleges, for example, that the Defendant is noncompliant with the
14 ADA because “[s]ome parts of the accessible routes have a cross slope greater than
15 1:48.” (Doc. 1, p. 11). As the Supreme Court held in *Spokeo*, however, Mr. Gastelum
16 cannot “allege a bare procedural violation, divorced from any concrete harm” and
17 maintain standing to bring the lawsuit. 136 S.Ct. at 1549. Mr. Gastelum has not alleged
18 that a cross slope that varies from the statutory requirements concretely impacts his
19 ability to enjoy the public accommodation. Additionally, for example, the Complaint
20 alleges that the “[o]utside smoking area is inaccessible,” the “[p]et waste station by the
21 pool is inaccessible,” and the “[w]ashing machines have improper reach ranges.” (Doc. 1,
22 p. 11). At the evidentiary hearing, Mr. Gastelum testified that he does not smoke, he
23 does not have a pet, and he has never done laundry at a hotel. The Complaint in
24 *Gastelum v. CPX Phoenix Airport Gateway Opag, LLC*, No. 18-cv-00068-PHX-GMS (D.
25 Ariz. filed Jan. 8, 2018) alleges that “[t]here is no van accessible parking space” and
26 “[t]he shuttle is not ADA accessible.” (Doc. 1, pp. 13–14). At the evidentiary hearing,
27 Mr. Gastelum testified that he does not drive a van and has never used a shuttle from a
28 Phoenix hotel. The same allegation about a lack of van accessible parking is contained in

1 the Complaint in *AUM Hospitality Ventures, LLC*, No. 8-cv-00104-PHX-GMS (Doc. 1,
2 p. 14). Similarly, the Complaint in *Gastelum v. Kuber-Rambdas Investments, LLC*, No.
3 18-cv-00470-PHX-GMS (D. Ariz. filed Feb. 12, 2018) alleges that “[t]he van accessible
4 parking space has a width less than the required minimum of 132 inches. Mr. Gastelum
5 alleges in the *Hilton Garden Inns Management* Complaint that “[t]he area with the
6 microwave and the mini fridge has an insufficient clear floor space for a parallel
7 approach,” “[t]he iron in the accessible guest room is located at an improper reach range
8 over 48 inches high,” “[t]he fitness center door requires a twisting of the wrist motion to
9 open,” and “[t]he guest laundry room requires a twisting of the wrist motion to open.”
10 Mr. Gastelum testified that he has only ever brought snacks to a hotel, he has never used
11 an iron in a hotel, he has never done laundry in a hotel, and he has never used a hotel’s
12 fitness center. No. 18-cv-00820-PHX-GMS (Doc. 1, p. 15). Even assuming that the
13 Defendant’s hotel is in violation of the ADA in those regards, Mr. Gastelum cannot show
14 that he suffers an injury due to these violations. Finally, Mr. Gastelum’s prayer for relief
15 seeks an “[i]njunctive relief order to alter Defendant’s place of public accommodation to
16 make it readily accessible to and usable by *ALL individuals with disabilities.*” (Doc. 1 at
17 p. 12) (emphasis added). It might be easier for both Mr. Gastelum and the hotel to allow
18 a disabled person like Mr. Gastelum to assert all ADA deficiencies for all disabled
19 persons so that such matters could theoretically be resolved in the course of one lawsuit.
20 But, Mr. Gastelum simply does not have standing to assert discrimination for disabilities
21 that he does not have, nor can he assert a failure to comply with regulations that do not
22 discriminate against him. Nothing in *CREEC* implies that tester standing lessens the
23 factual pleading requirements.

24 **B. Other Causes of Action**

25 The Complaints in all of these actions also bring state law claims of negligence,
26 negligent misrepresentation, failure to disclose, and consumer fraud. Because the Court
27 has concluded that it does not have jurisdiction over Mr. Gastelum’s ADA claim, the
28 Court no longer has supplemental jurisdiction over the remaining state law claims.

1 28 U.S.C. § 1367.

2 **CONCLUSION**

3 Mr. Gastelum has failed to show injury-in-fact or a likelihood of future injury, as
4 required for injunctive relief. Mr. Gastelum's Complaint contains no detail on how the
5 Defendant's alleged ADA violations act as a barrier and interfere with Mr. Gastelum's
6 equal enjoyment of the accommodation. Because Mr. Gastelum has failed to show
7 injury-in-fact, he lacks standing to pursue his claims in federal court.

8 **IT IS THEREFORE ORDERED** that the Motion to Dismiss of Defendant
9 Canyon Hospitality, LLC (Doc. 12) is **GRANTED**. The Clerk of Court is directed to
10 terminate and enter judgment accordingly.

11 **IT IS FURTHER ORDERED** directing the Clerk of Court to file this Order in
12 each of the following cases and dismiss each of them for Mr. Gastelum's lack of Article
13 III standing and enter judgment accordingly:

- 14 1. *Gastelum v. Brixton Metro Plaza LLC*, No. 17-cv-02903-PHX-GMS
- 15 2. *Gastelum v. 11111 North 7th Street Property De LLC*, No. 17-cv-03017-
16 PHX-GMS
- 17 3. *Gastelum v. Drury Southwest Inc.*, No. 17-cv-03626-PHX-GMS
- 18 4. *Gastelum v. Marriott Int'l Inc.*, No. 17-cv-04667-PHX-GMS
- 19 5. *Gastelum v. CPX Phoenix Airport Gateway Opag LLC*, No. 18-cv-0068-
20 PHX-GMS
- 21 6. *Gastelum v. CGD Tempe L P*, No. 18-cv-00512-PHX-GMS
- 22 7. *Gastelum v. Hilton Garden Inns Management LLC*, No. 18-cv-00820-PHX-
23 GMS
- 24 8. *Gastelum v. Debaca Land & Cattle LLC*, No. 18-cv-01112-PHX-GMS

25 **IT IS FURTHER ORDERED** that in addition to directing the Clerk of Court to
26 file this Order, the Motions for Attorney's Fees are moot and the following cases shall
27 remain closed.

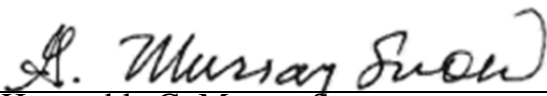
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1. *Gastelum v. Pride Hospitality Inc.*, No. 17-cv-03607-PHX-GMS (Doc. 22).
2. *Gastelum v. AUM Hospitality Ventures LLC*, No. 18-cv-00104-PHX-GMS

(Doc. 15).

Dated this 25th day of May, 2018.



Honorable G. Murray Snow
United States District Judge