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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DIMAS O'CAMPO,

NO. CIV. S-10-1105 LKK/CMK

Plaintiff,

v.

O R D E R

CHICO MALL, LP, et al.,

Defendants.

_____ /

Plaintiff brings claims against numerous defendants, including a shopping mall and several stores and restaurants within that mall. Plaintiff, who suffers from severe brain damages and requires the use of a cane, alleges that defendants denied him access by virtue of physical and intangible barriers. Defendant Hot Topic, Inc. ("Hot Topic"), one of the stores within the shopping mall has moved for a stay of proceedings and early evaluation conference under California's Construction-Related Accessibility Standards Compliance Act and to dismiss for lack of jurisdiction and for failure to state a claim. For the reasons described below, Hot Topic's motions are denied.

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2 **I. BACKGROUND**

3 **A. The Complaint¹**

4 Plaintiff Dimas O'Campo ("plaintiff" or "O'Campo") suffers
5 from severe brain damage. Compl. ¶ 16. He needs to use a cane to
6 travel in public because his injury affects his ability to walk,
7 talk, see, and stand. Id. Plaintiff brings claims against
8 numerous alleged public accommodations. See Compl. They include
9 a shopping mall and several stores and food establishments
10 within the mall. Id. Moving defendant Hot Topic, Inc.
11 ("defendant" or "Hot Topic") is a store within the mall.

12 With respect to Hot Topic, plaintiff alleges, inter alia,
13 that he visited the store and encountered physical and
14 intangible barriers that interfered with or denied his ability
15 to use and enjoy the goods, services, privileges, and
16 accommodations offered at Hot Topic. Id. at 26. Plaintiff
17 specifically identified three barriers at Hot Topic: (1) the
18 dressing room bench is not 24 inches wide by 48 inches long; (2)
19 the check out counter is too high with no portion lowered to
20 accommodate a patron in a wheelchair;² and (3) many of the
21 aisles/routes through the store are less than 36 inches wide
22 because of crowded merchandise. Id. at 37. Further, plaintiff
23 alleges that he was deterred from visiting Hot Topic because "he

24 ¹ These assertions are drawn from the complaint and are
25 accepted as true solely by virtue of the motions.

26 ² The court notes that there are no facts that suggest that
plaintiff uses a wheelchair. Rather, plaintiff has alleged that he
uses a cane.

1 knew that . . . Hot Topic[\'s] . . . goods, services, facilities,
2 privileges, advantages, and accommodations were unavailable to
3 physically disabled patrons (such as himself). Id. at 38.
4 Plaintiff represents that he "continues to be deterred from
5 visiting . . . Hot Topic . . . because of the future threats of
6 injury created by these barriers." Id.

7 **B. Facts Related to Motion to Stay and For Early**
8 **Evaluation Conference**

9 Hot Topic\'s counsel filed a declaration. The relevant
10 portion states:

11 On information and belief after all appropriate
12 inquiry, the Hot Topic Store . . . at the Chico Mall
13 was inspected by a duly licensed Certified Access
14 Specialist ("CASp Inspector") on or about 26 May 2010.
15 I personally spoke with the CASp inspector [sic] on
16 the day of the inspection and received pictures he
17 took and a report he prepared at my direction shortly
18 thereafter; it is my understanding that the Hot Topic
19 Store is pending a determination by the CASp that the
20 site meets applicable Construction Related
21 Accessibility Standards. Although I did not personally
22 accompany the CASp Inspector, the information he
23 provided is consistent with information I obtained
24 through other sources so that there is no doubt in my
25 mind that he inspected the subject property . . . on
26 or about 26 May 2010.

Decl. of David W. Peters, ¶ 2.

Plaintiff filed his complaint on May 5, 2010. The complaint
was served upon Hot Topic on June 2, 2010.

II. STANDARDS³

³ The court does not include a standard section for the
application for a stay and conference. The standard applied as to
that application is discussed in the analysis section below.

1 **A. Fed. R. Civ. P. 12(b)(1) Motion to Dismiss**

2 It is well established that the party seeking to invoke the
3 jurisdiction of the federal court has the burden of establishing
4 that jurisdiction exists. KVOS, Inc. v. Associated Press, 299
5 U.S. 269, 278 (1936); Assoc. of Medical Colleges v. United
6 States, 217 F.3d 770, 778-779 (9th Cir. 2000). On a motion to
7 dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the standards that
8 must be applied vary according to the nature of the
9 jurisdictional challenge.

10 Here, the challenge to jurisdiction is a facial attack.
11 That is, the federal defendant contends that the allegations of
12 jurisdiction contained in the complaint are insufficient on
13 their face to demonstrate the existence of jurisdiction. Safe
14 Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).
15 In a Rule 12(b)(1) motion of this type, the plaintiff is
16 entitled to safeguards similar to those applicable when a Rule
17 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d
18 345, 347 (11th Cir. 1994), Osborn v. United States, 918 F.2d
19 724, 729 n.6 (8th Cir. 1990); see also 2-12 Moore's Federal
20 Practice - Civil § 12.30 (2009). The factual allegations of the
21 complaint are presumed to be true, and the motion is granted
22 only if the plaintiff fails to allege an element necessary for
23 subject matter jurisdiction. Savage v. Glendale Union High Sch.
24 Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003), Miranda
25 v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001).

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1 **B. Fed. R. Civ. P. 12(b) (6) Motion to Dismiss**

2 A Fed. R. Civ. P. 12(b) (6) motion challenges a complaint's
3 compliance with the pleading requirements provided by the
4 Federal Rules. In general, these requirements are established by
5 Fed. R. Civ. P. 8, although claims that "sound[] in" fraud or
6 mistake must meet the requirements provided by Fed. R. Civ. P.
7 9(b). Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir.
8 2003).

9 Under Federal Rule of Civil Procedure 8(a) (2), a pleading
10 must contain a "short and plain statement of the claim showing
11 that the pleader is entitled to relief." The complaint must give
12 defendant "fair notice of what the claim is and the grounds upon
13 which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
14 555 (2007) (internal quotation and modification omitted).

15 To meet this requirement, the complaint must be supported
16 by factual allegations. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950
17 (2009). "While legal conclusions can provide the framework of a
18 complaint," neither legal conclusions nor conclusory statements
19 are themselves sufficient, and such statements are not entitled
20 to a presumption of truth. Id. at 1949-50. Iqbal and Twombly
21 therefore prescribe a two step process for evaluation of motions
22 to dismiss. The court first identifies the non-conclusory
23 factual allegations, and the court then determines whether these
24 allegations, taken as true and construed in the light most
25 favorable to the plaintiff, "plausibly give rise to an
26 entitlement to relief." Id.; Erickson v. Pardus, 551 U.S. 89

1 (2007).⁴

2 "Plausibility," as it is used in Twombly and Iqbal, does
3 not refer to the likelihood that a pleader will succeed in
4 proving the allegations. Instead, it refers to whether the non-
5 conclusory factual allegations, when assumed to be true,
6 "allow[] the court to draw the reasonable inference that the
7 defendant is liable for the misconduct alleged." Iqbal, 129
8 S.Ct. at 1949. "The plausibility standard is not akin to a
9 'probability requirement,' but it asks for more than a sheer
10 possibility that a defendant has acted unlawfully." Id. (quoting
11 Twombly, 550 U.S. at 557). A complaint may fail to show a right
12 to relief either by lacking a cognizable legal theory or by
13 lacking sufficient facts alleged under a cognizable legal
14 theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
15 (9th Cir. 1990).

16 The line between non-conclusory and conclusory allegations
17 is not always clear. Rule 8 "does not require 'detailed factual
18 allegations,' but it demands more than an unadorned, the-
19 defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at
20 1949 (quoting Twombly, 550 U.S. at 555). While Twombly was not
21 the first case that directed the district courts to disregard
22

23 ⁴ As discussed below, the court may consider certain limited
24 evidence on a motion to dismiss. As an exception to the general
25 rule that non-conclusory factual allegations must be accepted as
26 true on a motion to dismiss, the court need not accept allegations
as true when they are contradicted by this evidence. See Mullis v.
United States Bankr. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987),
Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

1 "conclusory" allegations, the court turns to Iqbal and Twombly
2 for indications of the Supreme Court's current understanding of
3 the term. In Twombly, the Court found the naked allegation that
4 "defendants 'ha[d] entered into a contract, combination or
5 conspiracy to prevent competitive entry . . . and ha[d] agreed
6 not to compete with one another,'" absent any supporting
7 allegation of underlying details, to be a conclusory statement
8 of the elements of an anti-trust claim. Id. at 1950 (quoting
9 Twombly, 550 U.S. at 551). In contrast, the Twombly plaintiffs'
10 allegations of "parallel conduct" were not conclusory, because
11 plaintiffs had alleged specific acts argued to constitute
12 parallel conduct. Twombly, 550 U.S. at 550-51, 556.

13 Twombly also illustrated the second, "plausibility" step of
14 the analysis by providing an example of a complaint that failed
15 and a complaint that satisfied this step. The complaint at issue
16 in Twombly failed. While the Twombly plaintiffs' allegations
17 regarding parallel conduct were non-conclusory, they failed to
18 support a plausible claim. Id. at 566. Because parallel conduct
19 was said to be ordinarily expected to arise without a prohibited
20 agreement, an allegation of parallel conduct was insufficient to
21 support the inference that a prohibited agreement existed. Id.
22 Absent such an agreement, plaintiffs were not entitled to
23 relief. Id.⁵

24
25 ⁵ This judge must confess that it does not appear self-evident
26 that parallel conduct is to be expected in all circumstances and
thus would seem to require evidence. Of course, the Supreme Court
has spoken and thus this court's own uncertainty needs only be

1 In contrast, Twombly held that the model pleading for
2 negligence demonstrated the type of pleading that satisfies Rule
3 8. Id. at 565 n.10. This form provides "On June 1, 1936, in a
4 public highway called Boylston Street in Boston, Massachusetts,
5 defendant negligently drove a motor vehicle against plaintiff
6 who was then crossing said highway." Form 9, Complaint for
7 Negligence, Forms App., Fed. Rules Civ. Proc., 28 U.S.C. App., p
8 829. These allegations adequately "'state[] . . . circumstances,
9 occurrences, and events in support of the claim presented.'" Twombly,
10 550 U.S. at 556 n.3 (quoting 5 C. Wright & A. Miller,
11 Federal Practice and Procedure § 1216, at 94, 95 (3d ed. 2004)).
12 The factual allegations that defendant drove at a certain time
13 and hit plaintiff render plausible the conclusion that defendant
14 drove negligently.

15 III. ANALYSIS

16 A. Hot Topic's Motion to Dismiss

17 1. Standing

18 a. Hot Topic's Argument

19 Hot Topic argues that plaintiff lacks standing to bring his
20 claim under the Americans with Disabilities Act ("ADA"),
21 plaintiff's only federal claim. Because he lacks standing to
22 bring his only federal claim, it argues, the court should
23 dismiss the case for lack of subject matter jurisdiction.

24 Defendant cites to Singletary v. Brick Oven, 406 F. Supp.

25 _____
26 noted, but cannot form the basis of a ruling.

1 2d 1120 (S.D. Cal. 2002) in support of its argument that
2 plaintiff here lacks standing to sue under the ADA. There, the
3 district court held that, "In the context of the ADA's standing
4 requirement for injunctive relief, a plaintiff must allege that
5 a public accommodation has discriminated against him and that
6 there is a "'real or immediate threat that the [public
7 accommodation] will again subject [him] to discrimination.'" Id.
8 at 1126 (quoting Bird v. Lewis & Clark College, 303 F.3d 1015,
9 1019 (9th Cir. 2002))⁶. The Singletary court continued that a
10 plaintiff can meet this standard by "showing that he has
11 encountered (or has knowledge of) barriers at a place of public
12 accommodation and he intends to return to the public
13 accommodation in the future." Id. (citing Pickern v. Holiday
14 Quality Foods, Inc., 293 F.3d 1133, 1137-1138 (9th Cir. 2002)).
15 The Ninth Circuit has subsequently affirmed this reasoning. See
16 Chapman v. Pier 1 Imports (U.S.) Inc., 571 F.3d 853 (9th Cir.
17 2009); Doran v. 7-Eleven, Inc., 524 F.3d 1034 (9th Cir. 2008).
18 Thus, in order to demonstrate standing, plaintiff merely needs
19 to allege that he has encountered or has knowledge of barriers
20 at a place of public accommodation and that he intends to return
21 to the public accommodation in the future.

22 With respect to Hot Topic, plaintiff has alleged that he
23

24 ⁶ In Bird, the Circuit held that a plaintiff lacked standing
25 for injunctive relief against the college from which she had
26 graduated because she "cannot demonstrate a real or immediate
threat that the [c]ollege will again subject her to
discrimination."

1 encountered barriers at Hot Topic and that he was deterred from
2 visiting Hot Topic because of these barriers. Compl. ¶¶ 37-38.
3 Plaintiff has made similar allegations against the other
4 defendants. See id. ¶¶ 26-45. Accordingly, plaintiff has
5 demonstrated that he has standing to sue under the ADA. Thus,
6 Hot Topic's motion to dismiss for lack of subject matter
7 jurisdiction is denied.

8 **b. The Court's Concerns**

9 Plaintiff alleges that he has severe brain damages that
10 affects his ability to walk, talk, see, and stand and that he
11 requires the use of a cane. Compl. ¶ 16. Plaintiff does not
12 allege that he uses a wheelchair. However, many of the barriers
13 plaintiff alleges appear to solely concern accessibility for
14 individuals using wheelchairs. These barriers include:

15 (1) As to the Chico Mall Common Area Facility:

- 16 (a) "There is insufficient strike side clearance when
17 entering the men's restroom." Id. at ¶ 27.
- 18 (b) "There is no handle mounted below the water
19 closet stall door lock. Id.
- 20 (c) "The clothing hook on the interior of the water
21 closet stall door is mounted too high." Id.
- 22 (d) "The flush valve is not mounted on the wide side
23 of the water closet." Id.
- 24 (e) "The toilet tissue dispenser is mounted too
25 high." Id.
- 26 (f) "The toilet tissue dispenser protrudes into the

- 1 clear floor and/or maneuvering space required to
2 access the water closet." Id.
- 3 (g) "There is insufficient strike side clearance when
4 exiting the men's restroom." Id.
- 5 (2) As to the PacSun Facility
- 6 (a) "The check out counters are too high with no
7 portion lowered to accommodate a patron in a
8 wheelchair." Id. at ¶ 29.
- 9 (3) As to the Buckle Facility
- 10 (a) "The check out counters are too high with no
11 portion lowered to accommodate a patron in a
12 wheelchair." Id. at ¶ 31.
- 13 (b) "The pay point machine is too high." Id.
- 14 (4) As to the Orange Julius Facility
- 15 (a) "The check out counters are too high with no
16 portion lowered to accommodate a patron in a
17 wheelchair." Id. at ¶ 33.
- 18 (b) "The pay point machine is too high." Id.
- 19 (5) As to the Gap Facility
- 20 (a) "The check out counters are too high with no
21 portion lowered to accommodate a person in a
22 wheelchair." Id. at ¶ 35.
- 23 (6) As to the Hot Topic Facility
- 24 (a) "The check out counters are too high with no
25 portion lowered to accommodate a patron in a
26 wheelchair." Id. at ¶ 37.

1 (b) "Many of the aisles/routes through the store are
2 less than 36 inches wide due to the crowded
3 merchandise." Id.

4 (7) As to the Cookie Facility

5 (a) "The check out counters are too high with no
6 portion lowered to accommodate a patron in a
7 wheelchair." Id. at ¶ 39.

8 (b) "The pay point machine is too high." Id.

9 (8) As to the JCPenny Facility

10 (a) "The clothing hook on the interior of the
11 dressing room door is mounted too high." Id. at
12 41.

13 (b) "The clothing hook on the interior of the water
14 closet stall door is mounted too high." Id.

15 (c) "The toilet tissue dispenser protrudes into the
16 clear floor and/or maneuvering space required to
17 access the water closet." Id.

18 (d) "The toilet tissue dispenser is mounted too
19 high." Id.

20 (e) "The soap dispensers are mounted too high." Id.

21 (f) "The soap dispensers are outside of the required
22 reach range limits." Id.

23 The court has an independent duty to confirm subject matter
24 jurisdiction. Here, it appears that plaintiff may lack standing
25 to challenge many of the barriers alleged in his complaint. For
26 this reason, the court orders plaintiff to show cause as to

1 whether he has standing to challenge these barriers within
2 fourteen (14) days of the issuance of this order. Plaintiff is
3 instructed to demonstrate whether he has suffered, as alleged,
4 an injury in fact.

5 **2. Failure to State a Claim**

6 Defendant also moves for dismissal of plaintiff's claims
7 against it on the grounds that he has failed to state a claim
8 because he did not plead the date on which he visited Hot Topic.
9 Specifically, Hot Topic contends that plaintiff must allege that
10 he visited the it within the statute of limitations. As this
11 court has previously held, and as courts have recently held in
12 accessibility cases, plaintiff is not required to plead facts in
13 anticipation of an affirmative defense. Saylor v. Zeenat, Inc.,
14 No. Civ.S02-863WBS/DAD, 2002 WL 33928621, at *2 (E.D. Cal. Aug.
15 13, 2002) (citing Ortiz v. Bank of America, No. S-81-298, 1982
16 WL 502, at *4 (E.D. Cal. Sept. 9, 1982)). Applying this
17 reasoning, the court in Salyor, under facts similar to the case
18 at bar, specifically held that, "Saylor is not required to
19 allege the date that her cause of action accrued for statute of
20 limitations purposes." Id. Thus, plaintiff need not plead the
21 date of his visit, and defendant's motion to dismiss for failure
22 to state a claim is denied.

23 **B. Hot Topic's Motion to Stay and Hold Early Evaluation**
24 **Conference.**

25 **1. Construction-Related Accessibility Standards**
26 **Compliance Act**

1 California has recently enacted the Construction-Related
2 Accessibility Standards Compliance Act ("Act"). Cal. Civ. Code
3 §§ 55.51-55.54. This statute entitles some defendants in
4 construction-related accessibility suits to a stay and an early
5 evaluation conference for the lawsuit. Id. at § 55.54(b)(1).
6 Specifically, "upon being served with a summons and complaint
7 asserting a construction-related accessibility claim . . . a
8 qualified defendant may file a request for a court stay and an
9 early evaluation conference in the proceedings of that claim
10 prior to or simultaneous with the qualified defendant's
11 responsive pleading or other initial appearance in the action
12 that includes the claim." Id.

13 The statute defines a "qualified defendant" as a "place of
14 public accommodation[, as defined in the ADA] that met the
15 requirements of 'CASp [(certified access specialist)] -
16 inspected' or 'CASp determination pending' prior to the date the
17 defendant was served with the summons and complaint" Id.
18 at § 55.52(8). A CASp is defined as any person who has been
19 certified pursuant to Cal. Gov. Code § 4459.5, a program
20 implemented by the State Architect. Id. at § 55.52(3). "'CASp-
21 inspected' means the site was inspected by a CASp and determined
22 to meet all applicable construction-related accessibility
23 standards" under the Act. Id. at § 55.52(4). A "CASp
24 determination pending" defendant is one in which the public
25 accommodation was inspected, but for which the CASp has not yet
26 issued a determination of compliance with the Act.

1 The Act defines a “construction-related accessibility
2 claim” as “any civil claim in a civil action with respect to a
3 place of public accommodation . . . based wholly or in part on
4 an alleged violation of any construction-related accessibility
5 standard.” Id. at 55.52(1). A construction-related accessibility
6 standard, in turn, “means a provision, standard, or regulation
7 under state or federal law requiring compliance with standards
8 for making new construction and existing facilities accessible
9 to persons with disabilities” including the statutes under which
10 plaintiff here brings his claims: the ADA, the California
11 Disabled Persons Act, and the California Unruh Act.

12 Section 55.53 of the Act sets forth the obligations of the
13 CASp. In particular, it provides that, “if the CASp determines
14 the site meets all applicable construction-related accessibility
15 standards, the CASp shall provide a written inspection report to
16 the requested party” that describes the property and includes a
17 statement of compliance. Id. at § 55.53(a)(1). Further, “[I]f
18 the CASp determines that corrections are needed to the site in
19 order for the site to meet all applicable construction-related
20 accessibility standards [(i.e. a CASp determination pending
21 site)], the CASp shall provide a signed and dated written
22 inspection report to the requesting party” that describes the
23 corrections needed to meet the standards and a reasonable
24 schedule for completion of the corrections. Id. at §
25 55.53(a)(2).

26 Under Section 55.54(b) of the Act, a qualified defendant

1 has thirty days to file an application for a stay and early
2 evaluation conference. This application must include a signed
3 declaration that declares that the site "has been CASp-inspected
4 or is CASp determination pending and, if the site is CASp-
5 inspected, [that] there have been no modifications completed or
6 commenced since the date of inspection that may impact
7 compliance with construction-related accessibility standards to
8 the best of the defendant's knowledge" and that an inspection
9 report has been issued by a CASp."⁷ Id. at § 55.54(c)(1). Under
10 the Act, immediately after receipt of the application for stay
11 and early evaluation, the court must grant a ninety day stay of
12 the proceedings with respect to the construction-related
13 accessibility claim and schedule a mandatory early evaluation
14 conference. Id. at § 55.54(d). "Early evaluation conferences
15 shall be conducted by a superior court judge or commissioner, or
16 a court early evaluation conference officer." Id. at § 55.54(f).

17 **2. Application to Plaintiff's Federal Claim**

18 The Act is preempted to the extent that it imposes any
19 additional procedural hurdles to a plaintiff bringing a claim
20 under the ADA. The Ninth Circuit has held that, "[F]or federal
21 law to preempt state law, it is not necessary that a federal
22 statute expressly state that it preempts state law. Federal law
23 preempts state law if the state law "actually conflicts" with
24 federal law." Hubbard v. SoBreck, LLC, 554 F.3d 742 (9th Cir.

25
26 ⁷ The court does not decide whether defendant's counsel's
declaration is sufficient under the Act.

1 2009) (citing Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S.
2 272, 280-81 (1987)). Here, the ADA has no provision for
3 mandatory stays and early settlement conferences where a public
4 accommodation has been inspected by a state official and found
5 to be in compliance with federal as well as state law. Any state
6 law requirement that a claim brought under the ADA be subjected
7 to such a procedure, then, clearly conflicts with federal law.
8 Thus, the Act is preempted to the extent it applies to
9 plaintiff's ADA claim.

10 Defendant requests that this court decline supplemental
11 jurisdiction if it finds that application of the Act to the ADA
12 is preempted. In this case, the federal and state claims turn on
13 virtually identical facts and similar theories of liability. It
14 appears to the court to be an inappropriate use of judicial
15 resources to have the federal courts and the state courts
16 simultaneously resolve cases with virtually identical facts.
17 Consequently, the court shall exercise supplemental jurisdiction
18 over the state law claims.

19 **3. Stay and Early Evaluation Conference**

20 The remaining question is whether this court should apply
21 the Act to plaintiff's state law claims.⁸ When federal courts
22 consider claims under state law, they are to apply federal

23
24 ⁸ Defendant's request for a ninety-day stay appears pointless
25 in this case. The parties shall be engaged in discovery over the
26 next ninety days with respect to plaintiff's ADA claim. As far as
this court can tell, the parties will seek discovery on the same
grounds for plaintiff's federal and state law claims. Thus, a stay
appears inappropriate.

1 procedural law and state substantive law. Erie R. Co. v.
2 Tompkins, 304 U.S. 64 (1938). Here, there is no federal rule of
3 procedure that addresses mandatory evaluation conferences in the
4 circumstances and stays covered by the Act. See Hanna v. Plumer,
5 380 U.S. 460 (1965). As such, the court must determine whether
6 application of the state law is likely to be determinative of
7 the outcome of the lawsuit. See Guaranty Trust Co. v. York, 326
8 U.S. 99 (1945). While of course a settlement conference could
9 potentially dispose of a case if a settlement is reached, it
10 does not seem to be outcome determinative as that term is
11 understood under the Erie doctrine. Likewise, a mandatory stay
12 of proceedings does not appear to be outcome determinative.
13 Applying the rule does not effect any parties' legal rights or
14 entitlement to relief. Accordingly, this federal court cannot
15 order a plaintiff to engage in an early evaluation conference.
16 Thus, defendant's motion for a stay and an early evaluation
17 conference under the Act is denied.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the court ORDERS that defendant
20 Hot Topic's application for a stay and an early evaluation
21 conference, ECF No. 15, and motion to dismiss, ECF No. 19, are
22 DENIED.

23 The court FURTHER ORDERS plaintiff to SHOW CAUSE as to
24 whether he has standing to challenge the legality of the

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1 barriers identified in his complaint.

2 IT IS SO ORDERED.

3 DATED: August 12, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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