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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SCOTT JOHNSON,  
  
Plaintiff,  
  
v.  
  
CARAMIA PALLOTTA; HENRY  
PALLOTTA; and DOES 1-10,  
  
Defendants.

No. 2:14-cv-00940 JAM-AC

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

Caramia and Henry Pallotta are licensed physical therapists who own and operate Manteca Physical Therapy. Pallotta Decl. ¶ 2. This family business provides therapy to treat orthopedic injuries. Pallotta Decl. ¶ 3. They have recently found themselves defendants in this Americans with Disabilities Act (ADA) lawsuit brought by Plaintiff Scott Johnson, who is not, has never been, and never could be a patient of their clinic.

Plaintiff Scott Johnson claims that he has been to the Manteca area "on scores of occasions" despite the fact that he lives about an hour away. Compl. ¶ 12; id. Civil Cover Sheet (reporting Plaintiff's County of Residence as "Sacramento");

1 Google Maps, <http://goo.gl/maps/sKu7a> (last visited Nov. 21,  
2 2014). He went to Manteca Physical Therapy in January 2014 and  
3 allegedly "obtained some items." Compl. ¶ 12. While there, he  
4 claims he encountered multiple ADA violations. Compl. ¶¶ 12-13.  
5 Because of this experience, Plaintiff states, he has not been  
6 back to the clinic since. Compl. ¶ 12. But he "continue[s] to  
7 desire to patronize" the business. Compl. ¶ 21.

8 It is not clear what services Plaintiff desires there, or  
9 why he chose to patronize a business located approximately an  
10 hour away that "does not, and has never, provided . . .  
11 rehabilitation" for spinal cord injuries (such as the one  
12 rendering Plaintiff disabled). Pallotta Decl. ¶ 3. In light of  
13 these allegations, Defendants move to dismiss Plaintiff's  
14 Complaint on numerous grounds, including standing.

## 15 I. OPINION

### 16 A. Legal Standard

17 "Standing is a jurisdictional requirement, and a party  
18 invoking federal jurisdiction has the burden of establishing  
19 it." Harris v. Stonecrest Care Auto Center, LLC, 472 F. Supp.  
20 2d 1208, 1214 (S.D. Cal. 2007) (citing Lujan v. Defenders of  
21 Wildlife, 504 U.S. 555, 561 (1992)). At the pleading stage, a  
22 defendant may move for dismissal based on lack of Article III  
23 standing under Federal Rule of Civil Procedure 12(b)(1). Maya  
24 v. Centex Corp, 658 F.3d 1060, 1067 (9th Cir. 2011). In  
25 assessing such a motion, the court "is not restricted to the  
26 face of the pleadings, but may review any evidence, such as  
27 affidavits and testimony, to resolve factual disputes concerning  
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1 the existence of jurisdiction." McCarthy v. United States, 850  
2 F.2d 558, 560 (9th Cir. 1988). "[I]t is within the trial  
3 court's power to . . . require the plaintiff to supply, by  
4 amendment to the complaint or by affidavits, further  
5 particularized allegations of fact deemed supportive of  
6 plaintiff's standing." Maya, 658 F.3d at 1067 (quoting Warth v.  
7 Seldin, 422 U.S. 490, 501 (1975)) (quotation marks omitted).

8 B. Analysis

9 Defendants argue that Plaintiff lacks Article III standing  
10 because he has not shown that he is "likely to return to the  
11 business for any legitimate purpose, or that he was deterred from  
12 doing so[.]" Mot. at 9; Reply at 4-5. Plaintiff's opposition  
13 does not respond to this argument.<sup>1</sup>

14 An ADA plaintiff has Article III standing if he shows either  
15 that (1) he intends to return to the defendant's establishment or  
16 (2) he is deterred from returning because of the barriers he  
17 encountered. Chapman v. Pier 1 Imports Inc., 631 F.3d 939, 944  
18 (9th Cir. 2011) (en banc). Because the ADA provides only  
19 injunctive relief, a plaintiff must demonstrate that his intent  
20 to return or his deterrence from returning is "real and  
21 immediate[.]" Id. at 948 (citing City of Los Angeles v. Lyons,  
22 461 U.S. 95, 111 (1983)); see, e.g. Fortyune v. American Multi-  
23 Cinema, Inc., 364 F.3d 1075, 1079 (9th Cir. 2004) (holding that  
24 plaintiff established standing where he attested that he  
25 continued to attend three to four movies at defendant's movie  
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27 <sup>1</sup> Plaintiff's opposition brief also erroneously states in the  
28 caption that the defendants in this action are "Ethan Conrad" and  
"America's Party Rental, Inc."

1 theater per week "with regularity"); Doran v. 7-Eleven, Inc., 524  
2 F.3d 1034, 1040 (9th Cir. 2008) (holding that plaintiff had  
3 standing where he "alleged that he had visited [defendant's] 7-  
4 Eleven store on ten to twenty prior occasions, that he is  
5 currently deterred from visiting [it] because of its  
6 accessibility barriers, that the store is conveniently located  
7 near his favorite fast food restaurant in Anaheim, and that he  
8 plan[ned] to visit Anaheim at least once a year on his annual  
9 trips to Disneyland" but would only return to the store "once  
10 it's fixed").

11 Here, the complaint contains two paragraphs relating to  
12 Plaintiff's potential return to the business. First:

13 The plaintiff frequents the Manteca area and has  
14 visited and shopped there on scores of occasions in  
15 the last year. He went to Manteca Physical Therapy in  
16 January of 2014 and obtained some items. He  
17 encountered barriers at that time. He has been  
deterred from attempting patronage on several other  
occasions because of his knowledge and experience with  
the barriers.

18 Compl. ¶ 12. Later in the complaint, Plaintiff states, "Given  
19 its location and options, Manteca Physical Therapy is a business  
20 center that plaintiff will continue to patronize and will  
21 continue to desire to patronize . . . ." Compl. ¶ 21. Plaintiff  
22 offers no further evidence about his reasons for visiting  
23 Defendants' physical therapy clinic.

24 Plaintiff has not done enough to establish standing.  
25 Plaintiff's allegations do not explain why he went to Defendants'  
26 establishment in January, what "items" he "obtained," or whether  
27 and for what purpose he will need any more "items" in the future.  
28 Nor does he explain why the Manteca location is favorable or what

1 "options" the clinic has as a "business center." See Arnold v.  
2 Kraf, Inc., 2012 WL 2131894, at \*2 (D. Ariz. June 12, 2012)  
3 (holding that plaintiff's standing allegations "f[ell] short of  
4 the federal pleading standard" where the complaint stated that  
5 she "plans to return to the Property to enjoy the goods,  
6 services, privileges, advantages or accommodations being offered  
7 . . . but is deterred from returning because of discriminatory  
8 conditions").

9 Defendants' evidence further deepens the Court's concern  
10 about Plaintiff's standing, because this evidence suggests that  
11 there are no goods or services at Defendants' establishment that  
12 Plaintiff would plausibly be seeking. Defendants attest that  
13 their clinic "does not, and has never, provided . . .  
14 rehabilitation" for spinal cord injuries, such as the one  
15 Plaintiff suffers from. Pallotta Decl. ¶ 3. The clinic only  
16 treats "orthopedic injuries and ailments[.]" Id. Defendants'  
17 clinic therefore "would not and could not accept Plaintiff . . .  
18 as a patient[.]" Id.

19 Defendants also submit evidence of an email exchange in  
20 which Defendants' counsel advised Plaintiff's counsel that the  
21 clinic "do[es] not treat, and ha[s] never treated, spinal  
22 injuries[,]" and offered that "if [Plaintiff] is in genuine need  
23 of physical therapy in the Manteca area, [Defendants] would be  
24 happy to refer him to another practice[.]" Wu Decl. Exh. D at 1.  
25 In response, Plaintiff's counsel wrote, "I'm certain [Plaintiff]  
26 will appreciate the information, if he hasn't found another  
27 therapist." Id.

28 Defendants' evidence is not conclusive evidence that

1 Plaintiff does not actually intend to return. But it suggests  
2 that there are no goods or services for Plaintiff to patronize,  
3 such that there is no reason for him to return - or attempt to  
4 return - in the future. Plaintiff has not submitted evidence or  
5 argument to the contrary.

6 To proceed in this action, Plaintiff must establish "a  
7 sufficient likelihood" that he intends to return or suffers  
8 deterrence. Chapman, 631 F. 3d at 948 (quoting Lyons, 461 U.S.  
9 at 111). He has not done so here. The Court will therefore  
10 require Plaintiff to supply further particularized allegations of  
11 fact in support of his standing in this action. See Maya, 658  
12 F.3d at 1067.

13 For these reasons, the Court GRANTS Defendants' motion to  
14 dismiss, but allows Plaintiff leave to amend in order to  
15 demonstrate Article III standing to bring his ADA claim. See  
16 Maya, 658 F.3d at 1069 (affirming dismissal on 12(b)(1) motion  
17 for lack of standing, but permitting leave to amend on remand  
18 "because plaintiffs may be able to establish by amendment that  
19 they have standing to pursue their claims"). Because standing is  
20 a "threshold requirement" for any federal claim, Lyons, 461 U.S.  
21 at 101, the Court declines to reach the parties' further  
22 arguments as to whether Defendants' repairs are sufficient under  
23 the ADA and whether the violations are likely to recur.


## 24 25 II. ORDER

26 For the reasons set forth above, the Court GRANTS WITH LEAVE  
27 TO AMEND Defendants' motion to dismiss for lack of subject matter  
28 jurisdiction. Plaintiff must file his amended complaint within

1 twenty (20) days from the date of this order. Defendant's  
2 responsive pleading is due within twenty (20) days thereafter.

3 IT IS SO ORDERED.

4 Dated: November 21, 2014

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6 JOHN A. MENDEZ,  
7 UNITED STATES DISTRICT JUDGE  
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