UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 06-22835-CIV-GOLD/TURNOFF

DISABILITY ADVOCATES AND COUNSELING GROUP, INC. and STEVEN BROTHER,

Plaintiffs,

v.

PETSMART, INC.,

Defendant.

MOTION TO DISMISS THE AMENDED COMPLAINT,[1] AND, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT, AND INCORPORATED MEMORANDUM OF LAW

[1] Defendant, PETSMART, INC. ("PetSmart), is moving to dismiss the Amended Complaint, which, contrary to the certificate of service was not served on PetSmart, and was only discovered on Monday, March 5, 2007 by virtue of a check of the court docket done as a precaution. It appears that Plaintiffs' counsel assumed, even prior to the undersigned counsel's filing its first motion for an extension of time to respond to the original Complaint, that Plaintiffs could serve Robert S. Fine of the firm of Greenberg Traurig, PA, by stating the Clerk of the Court would "send a notice of electronic filing." However, at the time, Greenberg Traurig, PA, and its attorneys, including Robert S. Fine, had not filed a pleading in this matter. Therefore, electronic service was not yet active; the undersigned lead trial counsel, Joseph Z. Fleming, was never served, nor was Robert S. Fine. The problem apparently involved an incorrect assumption by Plaintiffs' counsel, but is overcome by this Motion's timely filing. Undersigned counsel simply wishes to bring to the Court's attention that this type of difficulty can innocently occur due to the nature of electronic filing and service. Here, as a result PetSmart's having secured an extension of time to respond to the original Complaint, there was no prejudice to the parties as a result of the problem.

PetSmart, pursuant to Rules 12(b)(1), (6), and (7) of the Federal Rules of Civil Procedure, moves this Court for an Order dismissing the Amended Complaint of Plaintiffs, DISABILITY ADVOCATES AND COUNSELING GROUP, INC. ("Plaintiff Disability Advocates"), and STEVEN BROTHER ("Plaintiff Brother") on the grounds that Plaintiffs lack standing to bring claims over which this Court has jurisdiction, and that Plaintiffs failed to join parties indispensable to this action and failed to state a claim upon which relief may be granted. Alternatively, PetSmart moves under Rule 56 of the Federal Rules of Civil Procedure for Summary, or Partial Summary, Judgment, for the reasons set forth herein, including Plaintiffs' claims alleging discrimination on property not controlled by PetSmart, but by landlords at individual PetSmart locations.

INTRODUCTION

Plaintiffs claim that they, and others similarly situated, are subject to discrimination in violation of Title III of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), because they allegedly were "excluded from proper unobstructed access to and use of" PetSmart stores and surrounding common areas, due to "illegal barriers to access." Amended Complaint ("Compl.") at ¶8. Plaintiffs purport to bring claims on behalf of all persons with disabilities, whom they claim are adversely affected by alleged barriers to access at ten (9) specifically-identified Florida PetSmart stores, one (1) California store, *and* at PetSmart stores in every State within the United States, and "the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United Sates Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands." Compl. at ¶9. Plaintiffs seek to initiate a class action stretching across every State within the United States and

Territories of the United States, and representing potentially 43 million Americans. *Id.* at ¶11.[2]

The Amended Complaint should be dismissed in its entirety because: (1) Plaintiff Brother lacks standing to bring the foregoing claims, neither in his individual capacity, nor as an alleged "tester"; (2) Plaintiff Disability Advocates lacks standing to bring claims on behalf of its members; and (3) Plaintiffs failed to join the landlords at the various PetSmart locations, which landlords are indispensable to this action. As will be argued in this Motion, recent Supreme Court precedent also forbids the award of damages associated with parties not properly before the court as an unconstitutional denial of due process.

In the alternative, the Amended Complaint should be dismissed in part because: (1) the Amended Complaint alleges violation of "accessible reach requirements," when there are no such requirements for shelving and display units, and consequently no claim upon which relief may be granted can be advanced based upon reach requirements; and (2) the case law is unanimous that an ADA plaintiff is limited to his or her disabilities in alleging discrimination, and any claims that rely upon disabilities that Plaintiff Brother does not have (Plaintiff Brother is hearing and mobility impaired, but the Amended Complaint's alleges discrimination against sight-impaired individuals, for example) cannot be raised by either Plaintiff Brother or his corporate entity, Plaintiff Disability Advocates, and such claims must be dismissed.

In the alternative, Partial Summary Judgment should be granted in favor of PetSmart because Plaintiffs allege barriers to access with respect to parking and other common areas,

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[2] Because of the many factual and legal inadequacies apparent on the face of the Amended Complaint, PetSmart seeks with this Motion dismissal of the Amended Complaint, dismissal of portions of the Amended Complaint, or the entry of Partial Summary Judgment in favor of PetSmart. PetSmart does not waive, and expressly reserves the right to attack the Amended Complaint's deficiencies with regard to the class action it purports to initiate in the context of any future class certification proceedings.

which are owned and/or controlled by PetSmart's various landlords. Summary Judgment in favor of PetSmart is appropriate for those claims that allege discrimination occurring in areas or upon Property over which PetSmart has no control.

CONCISE STATEMENT OF FACTS[3]

Plaintiff Brother. According to the Amended Complaint, Plaintiff Brother is partially paralyzed in his lower body and is deaf. Compl. at ¶3. There is no allegation that Plaintiff Brother is sight-impaired. *Id.* The Amended Complaint explains that Plaintiff Brother makes it his practice to travel to places of public accommodation to act as an alleged "tester" to check for ADA compliance, and if he finds such compliance lacking, "he proceeds with legal action to enjoin such discrimination." Compl. at ¶¶5-6.

Plaintiff Brother is the President of Plaintiff Disability Advocates. Compl. at ¶3. As found by Judge King in *Disability Advocates and Counseling Group v. Betancourt*, 379 F. Supp. 2d 1343 (S.D. Fla. 2005), Plaintiffs have filed at least 106 cases in this District.[4] Many of the District Court Judges in this District entered *sua sponte* dismissals against the cases brought by Plaintiffs due to their lack of standing. *Id.*[5] As a way to get around the many *sua sponte*

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[3] This brief factual recitation is submitted as a "Statement of Undisputed Facts" in support of this Motion's requests for dismissal on the pleadings, and as a "Concise Statement of Facts" in support of this Motion's alternative request for Partial Summary Judgment. Any factual material relied upon outside the pleadings in support of the alternative request for Partial Summary Judgment is supported by legal citations and affidavits, in full compliance with Rule 56(e) of the Federal Rules of Civil Procedure.

[4] This Court may take judicial notice of prior orders of the Court in separate proceedings, "at least for the limited purpose of recognizing the judicial action taken or the subject matter of the litigation." *See Olmstead v. Humana, Inc.*, 154 Fed. Appx. 800, 803, fn. 3 (11th Cir. 2005).

[5] In many, if not all, of Plaintiffs' cases that were dismissed for lack of standing, no appeal was taken. *See Betancourt*, 397 F. Supp. 1361-1363. A final judgment on the merits of an action precludes a party from relitigating issues, particularly where it is apparent that a litigant "made a

(continued . . .)

dismissals, counsel for Plaintiffs engaged in "judge shopping" by re-filing the cases anew, and checking the civil coversheets attached to the complaints as "original proceedings." *Id.* In *Betancourt*, Judge King dismissed Plaintiff Brother's and Disability's case with prejudice as a sanction for violation of Court Rules, Rules of Procedure and case law. *Id.* at 1366.

Plaintiff Disability Advocates. The following information about the membership of Plaintiff Disability Advocates is alleged in the Amended Complaint: (1) Plaintiff Brother is a member and the President of Plaintiff Disability Advocates; (2) Plaintiff Disability Advocates' members are "individuals with disabilities"; and (3) the organization's membership "represents a cross-section of all of the disabilities to be protected by the ADA and includes individual[s] with mobility impairments, visual impairments, and other physical and mental disabilities." Compl. at ¶¶2, 15. No information is provided about: (1) any actual individual member other than Plaintiff Brother (if there are any); (2) the specific disabilities of any other member(s); or (3) whether any member other than Plaintiff Brother has ever visited a PetSmart location.

PetSmart. PetSmart is a retail store with a national presence including several South Florida locations, and which sells pet-related products to the public. The Amended Complaint alleges a class action, alleging illegal discrimination at PetSmart locations in all each of the United States and its Territories. Out of this enormous geographic area, the Amended Complaint enumerates only ten (10) actual PetSmart locations,[6] however, and the leases from at least four

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(. . . continued)
calculated choice to forgo their appeals." *Federated Department Stores v. Moitie*, 452 U.S. 394, 400-401 (1981).

[6] In fact, the original Complaint referred to only six (6) locations, five (5) in Miami-Dade and Broward Counties, and one (1) in Palm Beach County. The Amended Complaint identifies four (4) additional stores, three (3) located in Florida's Palm Beach, Martin, and Brevard Counties, respectively, and one (1) in California.

(4) of those locations—all located in Miami-Dade and Broward Counties—show that the landlord at each individual location reserves to itself control and responsibility for common areas such as parking lots.[7]

ARGUMENT

I. The Amended Complaint Should Be Dismissed Because the Plaintiffs Lack Standing to Invoke the Court's Jurisdiction, and Failed to Join Indispensable Parties.

As a matter of law, the Court should dismiss the Amended Complaint for lack of jurisdiction because Plaintiffs lack standing to bring this action and failed to join the individual landlords who are indispensable to this action.[8]

A. The Amended Complaint Should Be Dismissed For Lack of Jurisdiction Because the Plaintiffs Lack Standing To Bring This Action.

(1) The Amended Complaint Should Be Dismissed Because Plaintiff Brother Lacks Standing to Bring this Lawsuit for Lack of Injury.

Plaintiff Brother has no individual standing to pursue this action, since he has not alleged any ongoing injury due to the alleged barriers to access. *See O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by continuing, present adverse, affects."). Pursuant to 42 U.S.C. § 12188(a)(1), 28 C.F.R. § 36.501, injunctive relief is the only

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[7] See Exhibits A-D to Affidavit of Jaye D. Perricone attached hereto as Exhibit 1.

[8] Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a motion to dismiss is appropriate when it is demonstrated "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also M/V Sea Lion v. Reyes*, 23 F.3d 345, 347 (11th Cir. 1994); *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355 (S.D. Fla. 2000); *Medalie v. FSC Sec. Corp.*, 87 F. Supp. 2d 1295 (S.D. Fla. 2000). Rule 12(b)(6) is an appropriate vehicle to challenge a Title III claim on issues such as those present here. *See Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir.), cert. denied, 516 U.S. 1028 (1995) (Title III claim dismissed on 12(b)(6) motion); *Brown v. 1995 Tenet ParaAmerica Bicycle Challenge*, 959 F. Supp. 496 (N.D. Ill. 1997) (same).

remedy for a plaintiff bringing a lawsuit pursuant to Title III of the ADA. In order to establish the injury in fact necessary to maintain a claim for injunctive relief, Plaintiffs must demonstrate that PetSmart's conduct is causing irreparable harm and that there is a "real or immediate threat that [they] will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (quoting *O'Shea*, 414 U.S. at 502).[9]

With respect to ADA cases specifically, a plaintiff lacks standing to obtain injunctive relief if, as here, he cannot demonstrate a real likelihood of suffering future discrimination by the defendant. *Shotz v. Cates*, 256 F.3d 1077, 1081-82 (11th Cir. 2001).[10] In *Shotz,* the court found that, despite the fact that disabled plaintiffs may have established past discrimination with regard to access to a courthouse, they had not alleged a present intention to return to the courthouse. Absent a showing of a "*real and immediate* threat of future discrimination," the plaintiffs had no standing to seek injunctive relief under the ADA. *Id.* at 1082 (emphasis supplied).

In the present case, Plaintiffs attempt to meet this pleading threshold with the vague and conclusory allegation that Plaintiff Brother and other unnamed members of Plaintiff Disability Advocates "specifically intend to gain access into and use the stores owned, leased and/or

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[9] *See also Steger v. Franco, Inc.*, 228 F.3d 889, 892-93 (8th Cir. 2000) ("Intent to return to the place of injury some day is insufficient.") (internal citations omitted).

[10] *See also Freydel v. N.Y. Hosp.*, 242 F.3d 365 (2d Cir. 2000) (unpublished opinion) (no standing for deaf plaintiff where other hospitals were closer to her home and she had no ties to defendant); *Constance v. S.U.N.Y. Health Science Ctr. at Syracuse*, 166 F. Supp. 2d 663, 667 (N.D.N.Y. 2001) (no standing where conclusory allegation of likely return to hospital showed no more than a possibility of return); *Tyler v. Kansas Lottery,* 14 F. Supp. 2d 1220, 1224-25 (D. Kan. 1998) (no ADA standing where plaintiff fails to allege specifics of future plans to use defendant's services); *Delil v. El Torito Restaurants, Inc.*, 1997 WL 714866 (N.D. Cal.) (no ADA standing where plaintiff failed to allege intention to return to restaurant, even though she had returned once); *O'Brien v. Werner Bus Lines*, 1996 WL 82484 (E.D. Pa.) (no standing where blind plaintiffs failed to show likelihood of using defendant's services in near future); *Schroedel v. N.Y.U. Med. Ctr.*, 885 F.Supp. 594 (S.D.N.Y. 1995) (no standing where hospital was not nearest to deaf plaintiff's residence and plaintiff did not regularly use hospital's services).

operated by the Defendant in the future. . . ." Compl. at ¶8. This inadequate statement cannot constitute the "real and immediate threat" required under the law, and this Court "may not speculate concerning the existence of standing or piece together support for the plaintiff." *Shotz* at 1081.[11] As explained in *Deck v. American Hawaii Cruises, Inc.*, 121 F. Supp. 2d 1292, 1297 (D. Haw. 2000), "there must be sufficient immediacy, reality and causality between defendant's conduct and plaintiffs' allegations of future injury to warrant injunctive relief."

In this case, Plaintiffs' unsupported allegation of generalized future intentions of Plaintiff Brother do not rise to the level of a "real and immediate threat" that they will again be subject to barriers to access at Defendants' stores. *Shotz*, 256 F.3d at 1082. Accordingly, Plaintiff Brother lacks individual standing, and his claims must be dismissed.

(2) The Amended Complaint Should Be Dismissed Because Plaintiff Brother Lacks Standing to Bring this Lawsuit as a "Tester" Since There is No Standing for "Testers" Under Title III of the ADA.

Plaintiff Brother also attempts to establish standing by claiming that he is a "tester." Compl., ¶¶ 5-8. The Supreme Court has held that "testers" do not *per se* lack standing to bring civil rights claims, "provided the harm they suffer is the type the statute was intended to guard against." *Harris v. Stonecrest Care Auto Center, LLC*, 2007 WL 412467 (S.D. Cal. Feb. 5, 2007) (citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373 (1982)) (testers who had no intention of renting or purchasing a residence nevertheless had Article III standing to sue if they were denied the truthful information they sought). Nonetheless, even while the Tenth Circuit, has allowed a plaintiff to proceed on the basis of tester standing under Title II of the ADA, *see Tandy*

[11] For purposes of a motion to dismiss, the complaint is taken in a light most favorable to the plaintiff and all of the facts alleged by the plaintiff are taken as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *World Access USA Corp. v. AT&T Corp.*, 2000 WL 297845 (S.D. Fla.). Even though the burden on a motion to dismiss is high, a court may dismiss a complaint on a dispositive issue of law. *Marshall County Bd. of Educ.*, 992 F.2d 1171, 1174 (11th Cir. 1994).

v. City of Wichita, 380 F.3d 1277 (10th Cir. 2004), no circuit has extended this holding to apply to Title III claims. Indeed, the *Stonecrest* court recently addressed this very issue. In denying the plaintiff's alleged tester standing, the court there distinguished the *Tandy* analysis' applicability to Title III, finding no Congressional intent, nor:

> *any* authority showing that Title III of the ADA was intended to create such broad rights against individual local businesses by private parties who are not bona fide patrons, and are not likely to be bona fide patrons in the future. Where a plaintiff's sole purpose in visiting a local business is to litigate, he may visit the establishment before or during the litigation, but his reason for returning vanishes as soon as litigation is concluded.

Stonecrest at *11 (emphasis supplied). The court went on to hold that a Title III plaintiff's role as a "tester" was "insufficient to confer Article III standing to seek injunctive relief." As at least two other courts have found in ADA actions brought by Plaintiff Brother himself,[12] he also has failed here to allege a "credible threat of future injury."

(3) The Amended Complaint Should Be Dismissed Because Plaintiff Disability Advocates Lacks Standing to Bring this Lawsuit Since It Does Not Possess Organizational Standing.

Plaintiff Disability Advocates likewise lacks standing to prosecute this claim. While there are situations in which an organization may assert standing on behalf of its members, this is not such a case, because the Amended Complaint alleges no ADA violations against the organization itself. The United States Supreme Court laid out the test for organizational standing in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). When an association seeks standing on behalf of its members the following three elements must be met:

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[12] *See Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1374, 1375 (M.D. Fla. 2004) ("Mr. Brother lacks a "continuing connection" to the Defendant's establishment. His explanation for his first visit . . . is incredulous, as is his desire to return to that facility. . . ."); *Brother v. CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004) ("[T]he Court does not credit Mr. Brother's allegation that he intended to patronize the hotel.").

(1) its members must otherwise have standing to sue in their own right; (2) the interests sought to be protected must be connected to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See id.* at 343. Here, Plaintiff Disability Advocates has satisfied neither the first nor third prongs.[13]

Under Title III of the ADA, a plaintiff cannot establish a case or controversy without individualized proof of injury. The ADA requires proof as to each individual claimant's disability in order to properly limit the scope of the injunctive relief sought. Consequently, showing a violation of the ADA requires proof of standing with regard to each individual claimant. *See Association for Disabled Americans, Inc., v. Concorde Gaming*, 158 F. Sup. 2d 1353, 1363-64 (S.D. Fla. 2001).[14] Therefore, under the first prong of *Hunt*, Plaintiff Disability Advocates' members must—at a minimum—allege their particular disabilities to confer standing. The Amended Complaint does not provide any particularized description or enumeration of Plaintiff Disability Advocates' members, other than the vague allegation that they "include Plaintiff Steven Brother, [and] are individuals with disabilities as defined by and

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[13] The three-prong Hunt factors for associational standing in the context of an ADA case — particularly the first and third factors requiring individual member standing and participation — effectuate Article III's very purpose: to make sure that the federal Courts reach and adjudicate only those claims and parties properly before them. The Supreme Court has recently held that the adjudication of rights and the award of relief associated with parties not properly before a court constitutes an unconstitutional extension of judicial power and a "taking" in violation of due process. *See Phillip Morris USA v. Williams*, 127 U.S. 1057 (2007). The Court concluded that an award of punitive damages designed to punish the defendant for harm caused to persons not before the court amounts to "a taking of 'property' from the defendant without due process." Id. at 1060. A similarly unlawful "taking" would occur if this case culminated in the granting of the relief sought in the Amended Complaint, when in fact Plaintiffs never possessed Art. III standing to appear before the Court.

[14] *See* also *National Alliance for Mentally Ill, St. Johns Inc. v. Board of Cty. Com'rs of St. Johns Cty.*, 376 F.3d 1292, 1296 (11th Cir. 2004) (no standing for association where it did not offer proof of members with individual standing).

pursuant to the ADA." Compl. ¶2. The Amended Complaint contains no allegations concerning any of Plaintiff Disability Advocates' members being denied access to PetSmart beyond those specifically asserted by Plaintiff Brother. Therefore, because there has been no showing that members of Plaintiff Disability Advocates have standing to sue as individuals, Plaintiff Disability Advocates lacks associational standing to bring this action. *Hunt*, 432 U.S. at 343.

Moreover, Plaintiff Disability Advocates lacks standing because it fails to satisfy the third prong of *Hunt*, as it cannot assert a claim without the participation of individual members. Although the requirement of non-necessity of individual participation has been held to be a prudential—rather than constitutional—requirement, *see, e.g., Doe v. Stincer*, 175 F. 3d 879 (11th Cir. 1999), it is still mandated under the ADA in order for an association to have standing. *Access for the Disabled, Inc. v. Rosof*, 2005 WL 3556046, *1 (M.D. Fla. 2005) ("[C]laims brought under Title III of the ADA require the participation of individual members in the lawsuit.") (citing *Hunt*). An associational plaintiff therefore lacks standing under the ADA without individual proof as to each claimant. "Plaintiff[s] cannot shoehorn an unknown number of supposed, but unknown, victims into their cause of action by the mechanism of associational standing." *Concorde Gaming*, 158 F. Supp. 2d at 1363-64. It is only when "the nature of the claim and the relief sought do not make the individual participation of each injured party indispensable," that individual proof is not required for associational standing. *Doe v. Stincer*, 175 F. 2d at 882. Under the ADA, Title III, the nature of the claim and the precise relief sought, require the individual participation of each injured party. *Access Now, Inc. v. South Florida Stadium*, 161 F. Supp. 2d 1357, 1368 (S.D. Fla. 2001).

PetSmart is entitled to point out to the Court the Plaintiffs' lack of standing with the foregoing arguments at this early stage of the case. Standing is a threshold jurisdictional issue

which must be addressed prior to and independent of the merits of a party's claims, *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 974 (11th Cir. 2005), and must exist at the time a complaint is filed, and cannot be bolstered by subsequent actions. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.,* 528 U.S. 167, 189 (2000); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003); *Resnick v Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298, 1302 (M.D. Fla 2001) ("Moreover, because standing is determined as of the date of the commencement of the lawsuit, any attempts to achieve standing after the suit was filed are ineffective."). A court must zealously assure that jurisdiction exists over a case, and should itself raise the question of subject matter jurisdiction at any point in the litigation where a doubt about jurisdiction arises. *Smith v. GTE Corp.,* 236 F.3d 1292, 1299 (11th Cir. 2001).

The "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559 (1992). *See also Lyons,* 461 U.S. at 101 ("those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy"). To establish Article III standing, a plaintiff must show that: (1) he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *See Lujan,* 504 U.S. at 560-61.

All of the foregoing arguments on standing place the Plaintiffs' Amended Complaint squarely outside the boundaries of this Court's jurisdiction, and illustrate why the Court should dismiss the Amended Complaint filed by Plaintiffs for lack of jurisdiction.

B. The Amended Complaint Should Be Dismissed Because Plaintiffs Failed to Join Individual Landlords Indispensable to this Action.

The Amended Complaint alleges that PetSmart is the "owner, lessee, lessor, and/or operator of the real property an improvements" at nine (9) Florida locations, one (1) California location, and unspecified locations in all 50 States of he United States and United States Territories. Compl. at ¶9. But Plaintiffs neglected to attach any documentation of PetSmart's supposed status as "owner, lessee, lessor, and/or operator," or even provide any additional explanation in support of this broad allegation.

Contrary to the Amended Complaint's sweeping allegations, PetSmart does not own all, but rather leases some, of the property at issue, on which its stores are located. In fact, in stark contrast to the incorrect allegations set forth by Plaintiffs, the lease agreements demonstrate that individual landlords not joined as parties maintain control of parking and common areas. *See* Exhibits A through D to Affidavit of Jaye D. Perricone (Exhibit 1 hereto), comprised of copies of the lease agreements for four (4) (out of the ten (10)) of the specific locations named in the Amended Complaint. Plaintiffs allege they have suffered discrimination at the PetSmart stores located, among others, at the following locations, where the operative lease agreements specify that the landlords, not PetSmart, own and operate the parking and common areas:

> 21095 Biscayne Blvd., Aventura, Florida: "Landlord shall maintain, operate and repair ... the Common Area ... in full compliance with all applicable laws, codes, ordinances [and] regulations. ..." § 11.1. Common Area is defined to include "parking areas, roads, streets, drives, truck and delivery passages, customer loading zones, landscaped and planted areas, parking lot lighting, exterior ramps, entrances to and exits from the Shopping Center [and] sidewalks." § 2.2.
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> 4101 Oakwood Blvd., Hollywood, Florida: "Landlord agrees to operate and maintain, or cause the operation and maintenance of the Common Area. ..." § 34.3. Common Area is defined to include "parking areas, private streets and alleys, landscaping and landscaped areas, curbs, loading area, sidewalks..." § 34.1
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> 13621 South Dixie Highway, Miami, Florida: "Landlord agrees to operate and

> maintain all of the common areas at the Shopping Center. ..." Art. VI § 1. Common areas are defined to include "parking areas, driveways, entrances and exits thereto...." *Id.*
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> 8241 West Flagler Street, Miami, Florida: Common Area is defined to include "parking areas, roads, streets, drives, truck and delivery passages, customer loading zones, landscaped and planted areas, parking lot lighting, exterior ramps, entrances to and exits from the Shopping Center [and] sidewalks." § 1.2

Exhibits A, B, C and D to Affidavit of Jaye D. Perricone. Because Plaintiffs have alleged discrimination at PetSmart stores with respect to parking spaces and routes between the parking lot and stores themselves in all fifty (50) United States and in Territories of the United States, PetSmart's various landlords are indispensable parties to this action. Compl., ¶¶ 24i and 24ii.

Rule 19, Fed. R. Civ. P provides in pertinent part that "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties." "A party is considered 'necessary' to the action if the court determines either that complete relief cannot be granted with the present parties or the absent party has an interest in the disposition of the current proceedings...." *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 847 (11th Cir. 1999). Both such conditions are present in this case, where (a) Plaintiffs cannot be afforded complete relief as requested in the Amended Complaint (*i.e.*, an injunction over property controlled by non-parties), and (b) non-parties have an interest in the disposition of the proceedings (*i.e.*, non-party landlords have a vested interest in the allegations of accessibility barriers on property within their exclusive control). Even if Plaintiffs choose to dismiss their class allegations, at a minimum, four (4) individual landlords associated with the leased properties identified in the Amended Complaint are indispensable to this action. Assuming that the allegations within the Amended Complaint are taken as true, joinder of unidentified landlords is required by Rule 19. And since joinder of

these unknown people and/or unidentified entities is impossible because of the class action allegations in the Amended Complaint, dismissal is required.

II. If the Court Does Not Dismiss the Entire Amended Complaint For the Foregoing Reasons, the Court Alternatively Should Dismiss Certain Claims Therein.

A. The Court Should Dismiss All Claims in the Amended Complaint that Are Based Upon Allegations for which Plaintiffs Lack Standing.

The Amended Complaint purports to seek relief on behalf of visually impaired individuals. *See* Compl., ¶ 24vi. The law is well-settled that standing in the context of ADA cases extends only as far as a plaintiff's particular personal disabilities. *See, e.g., Brother et al v. CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1368 (S.D. Fla. 2004) (no standing to sue for ADA violations "not related to [plaintiffs'] respective disabilities"); *Concorde Gaming,* 158 F. Supp. 2d at 1363-64 (disabilities other than those of individual plaintiffs were not "properly before the Court"); *Steger v. Franco,* 228 F.3d 889, 893 (8th Cir. 2000) (same) (citing *Lewis v. Casey,* 518 U.S. 343, 358 & n. 6 (1996).

The Amended Complaint alleges that Plaintiff Brother is deaf and is uses a wheelchair. Compl. at ¶3. The Amended Complaint goes on to allege in Paragraph 24vi, however, a need to "modify the self-service pet tag machines to have Braille instruction and Braille on operating controls…." Even if these machines were accessible to Plaintiff Brother, he lacks standing to challenge such a "barrier" because he has no impairment that limits his ability to see the instructions and controls. Plaintiff Brother "lacks standing to complain about violations on behalf of all disabled individuals, as this would expand the standing doctrine beyond the limits of Article III." *Access Now, Inc. v. South Florida Stadium Corp.,* 161 F. Supp. 2d 1357, 1364 (S.D. Fla. 2001). Accordingly, Plaintiff Brother has failed to state a claim for any barriers to access that do not correspond to his own disabilities.

The limitation of claims to particular disabilities applies with equal force to organizations

such as Plaintiff Disability Advocates. *See Concorde Gaming*, 158 F. Supp. 2d at 1364, fn 8 (no organizational standing for plaintiff association, and "the Court will not consider [defendant's] compliance with Title III in regards to other disabilities [beyond those of individual plaintiff], as no such claims are properly before the Court."). Because the Amended Complaint neglects to enumerate any facts about the identity and disability of any member of Plaintiff Disability Advocates other than Plaintiff Brother, the Court should likewise dismiss all claims which pertain to accessibility issues other than those that pertain to Plaintiff Brother's disabilities, to wit: hearing impaired and mobility impaired.

B. The Court Should Dismiss All Claims Advanced in the Amended Complaint Under the ADA's Requirement for "Accessible Reach Parameters."

The Amended Complaint alleges that PetSmart failed to "place and maintain all items in the stores to be reachable within the accessible reach parameters." Compl. at ¶ 24iii. Simply put, "[r]equirements for accessible reach range do not apply" for "self-service by customers in mercantile occupancies." ADAAG, § 4.1.3(12)(b) (Accessible Buildings: New Construction: Storage, Shelving and Display Units). Title III of the ADA provides, in pertinent part, that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). This broad prohibition contains three essential elements that require further definition to understand the reach of Title III, namely (1) "discrimination" on the basis of (2) "disability" in (3) a "place of public accommodation." *Concorde Gaming*, 158 F. Supp. 2d at 1359-60.

Therefore, to state a claim under Title III a plaintiff must allege three basic elements: (1) the plaintiff is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases (or leases to), or operates a place of public accommodation; and (3) the plaintiff was

denied access to the public accommodation because of his or her disability. *See Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001); *Dunlap v. Association of Bay Area Governments*, 996 F. Supp. 962, 965 (N.D. Cal. 1998); *see also Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1282-83 (11th. Cir. 2002).

Upon passage of the ADA, Congress charged the Department of Justice ("DOJ") with developing the applicable regulations for compliance with the ADA's requirements, see 42 U.S.C. § 12186(b), and the Architectural and Transportation Barriers Compliance Board (the "Access Board") with establishing rules to implement the standards required by Title III, see 29 U.S.C. § 792(b). The regulations are codified in 28 C.F.R. Part 36; the DOJ adopted the Access Board's ADA Accessibility Guidelines ("ADAAG") as Appendix A thereto.

Plaintiffs here seek to impose requirements on PetSmart beyond the express requirements of ADAAG. Such disregard for the federal regulations is inappropriate, and has been specifically repudiated in this District. *See, e.g., Concorde Gaming*, 158 F. Supp. 2d at 1362, fn 4 ("[W]hen a facility is constructed in accordance with the applicable architectural guidelines, no other design requirements may be imposed under Title III. . . . In other words, compliance with the Department of Justice guidelines provides a type of safe harbor for the architectural design of newly constructed facilities.") (citing *Independent Living Resources. v. Oregon Arena Corp.*, 982 F.Supp. 698, 746 (D. Or. 1997) ("*Oregon Arena I*").

Moreover, even if Plaintiffs were to argue that the general non-discriminatory provisions of ADA supersede the specific guidelines promulgated under the ADAAG, *see, e.g., Independent. Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1159, 1169 ("*Oregon Arena II*") (D. Or. 1998) ("Title III of the ADA outlaws not just intentional discrimination but also certain practices that have a disparate impact upon persons with disabilities even in the

absence of any conscious intent to discriminate."), this argument fails as a matter of law. As explained in *Oregon Arena I*, "the Title III Standards promulgated by DOJ are exclusive as to all architectural design issues, and this court may not enforce [an excessive] requirement . . . on the basis of the general non-discrimination provisions in Title III itself." *Oregon Arena I* at 746. Congress' intentions were clear, providing explicit guidance "that compliance with [ADAAG] would be deemed to satisfy the Title III obligations with respect to the design of a structure." *Id.* This guidance included:

> 42 U.S.C. § 12186(d): "[Compliance with ADAAG] "shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title.");
>
> 42 U.S.C. § 12183(a)(1)'s definition of discrimination ("a failure to design and construct facilities ... that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter"); and
>
> 42 U.S.C. § 12188(b)(5)'s tacit distinction between design requirements and the need to anticipate necessary auxiliary aids (the former being spelled out in ADAAG, the latter subject to more general anti-discrimination rules).

Oregon Arena I at 746. Finally, the court found that, according to ADAAG's definition of "accessible," "compliance with the guidelines constitutes compliance with the ADA requirements for new construction." *Id.* at 746 (emphasis supplied); *accord Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000).

Accordingly, because ADAAG expressly precludes "reach range" requirements for self-service merchandise on shelving and display units in the mercantile context (*see* ADAAG § 4.1.3(12)(b)), and because Plaintiffs improperly seek to impose additional obligations on PetSmart, the claims alleged in Paragraph 24iii of the Amended Complaint must be dismissed.

III. If the Court Does Not Dismiss the Amended Complaint in Its Entirety, Alternatively It Should Grant Summary Judgment in Favor of PetSmart on All Claims Pertaining to the Parking and Common Areas Not Owned or Controlled by PetSmart.

A. The Summary Judgment Standard.

Pursuant to Fed. R.Civ.P. 56(c), summary judgment must be granted if the pleadings, depositions, answers to interrogatories and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). The non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, and a mere "scintilla" of evidence is insufficient. *Anderson v. Liberty Lobby,* 477 U.S. 242, 257 (1986). To carry this burden, the non-moving party must go beyond the pleadings and "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Chanel, Inc. v. Italian Activewear of Fla., Inc.,* 931 F.2d 1472, 1477 (11th Cir. 1991). Summary judgment is properly regarded not as a disfavored procedural shortcut, but, as an integral part of the Federal Rules as a whole, which are designed to secure a just, speedy, and inexpensive determination of every action. *Celotex,* 477 U.S. at 327; Fed. R. Civ. P. 56 (c); *see also Anderson,* 477 U.S. at 250.

B. The Court Should Grant Summary Judgment in Favor of PetSmart on Any Claim Alleging ADA Violations in a Common or Parking Area Not Owned or Controlled by PetSmart.

The ADA prohibits discrimination against persons with disabilities by "any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The leading case on a landlord's liability for violations of the ADA is *Botosan v Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000), confirmed that "a landlord is a 'public accommodation,' which triggers coverage under Title III [of the ADA]," *id.* at 833 (citing 42 U.S.C. § 12182(a)), and held that, vis-à-vis a third-party plaintiff, a landlord cannot contract away its liability under the ADA to its tenant. In doing so, *Botosan* established that, even where parties contractually

shift the burden of ADA compliance to a tenant, where landlord and tenant jointly maintain common areas "both the landlord and tenant are liable under the Act." *Id.; see also Laker Airways,* 182 F.3d at 848 ("joint tortfeasor will be considered a necessary party when the absent party emerges as an active participant in the allegations made in the complaint that are critical to the disposition of the important issues in the litigation") (internal citations omitted). *Botosan*, however, did not address the situation where, as here, a landlord retains exclusive operating control of the premises.

The Affidavit of Jaye D. Perricone, establishes that the landlord—not PetSmart—controls the parking and common areas at four (4) PetSmart locations. In the context of the landlord-tenant relationship, a tenant is not responsible for barriers to access on land that it does not own, lease or control. *Pickern v. Pier 1*, 457 F.3d 963 (9th Cir. 2006), is particularly instructive. There, a person with disabilities sought to require a retailer and its landlord to build an access ramp over a strip of grass between a sidewalk and the store's parking lot. The sidewalk and grassy strip were municipal property. The court focused on the express language of the statute, and affirmed dismissal of the claims because the defendants did not own, lease, operate, control or manage the property. Applying the same test here, it is clear from the lease agreements that PetSmart does not own, lease, operate, control or manage the parking and common areas of at least four (4) of the ten (10) locations complained of in the Amended Complaint.

Accordingly, just as the *Pickern* defendants could not be held liable for barriers to accessibility on city-owned property that the they did not control, PetSmart cannot be held liable for alleged barriers on property under the exclusive dominion of its landlords. PetSmart's lease agreements with its respective landlords clearly set out the terms of the landlord-tenant relationship, and, because the express terms of the ADA hold an entity liable for barriers to

accessibility on premises that it owns, operates or leases, because the landlords exercise exclusive control over and operation of the parking and common areas, Plaintiffs have no claim against PetSmart for the alleged violations in the parking lot and common areas.

Utilizing the *Pickern* court's analysis, it is a landlord — as opposed to a tenant — who fits the Eleventh Circuit's description of the "active participant in the allegations made in the complaint" vis-à-vis parking and other common areas. To wit, as owner/operators of the premises at issue, the landlords bear primary — if not sole — responsibility for maintaining and operating the majority of the parking and common areas alleged to be noncompliant with the ADA. As such, the landlords are "critical to the disposition" of the claims alleged in Paragraphs i and ii of the Amended Complaint. Accordingly, PetSmart should be granted Partial Summary Judgment as to these alleged violations, because there is no genuine issue of fact regarding PetSmart's non-liability for property under the exclusive control and operation of its landlords. Alternatively, these alleged violations should be dismissed for failure to join the landlords in this action.

CONCLUSION

For the foregoing reasons, PetSmart respectfully requests that the Court: dismiss the Amended Complaint in its entirety and with prejudice for lack of jurisdiction; or, in the alternative, dismiss for failure to state a claim those claims that seek to impose obligations beyond applicable law, and/or dismiss for lack of jurisdiction those claims alleging discrimination that goes beyond Plaintiffs' particular disabilities, and/or grant Partial Summary Judgment in favor of PetSmart on those claims alleging ADA violations in the parking or common areas; and grant, PetSmart such other relief in its favor as the Court deems appropriate and proper.

Dated: March 6, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on this 6th day of March, 2007, I electronically filed the foregoing document with the Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record identified on the attached Service List in the manner specified, via transmission of Notices of Electronic Filing generated by CM/ECF and by facsimile, electronic mail and U.S. Mail.

D. PORPOISE EVANS

SERVICE LIST

DISABILITY ADVOCATES AND COUNSELING GROUP, INC, et al. v. PETSMART, INC.
Case No. 06-22835-CIV-GOLD/Turnoff
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