UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELO BINNO,

Plaintiff,

Hon. Denise Page Hood

-vs-

Case No. 2:11-cv-12247

THE AMERICAN BAR ASSOCIATION,

Defendant.

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DEFENDANT'S MOTION TO DISMISS OR,
ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

Defendant American Bar Association ("Defendant" or the "ABA"), by and through its attorneys Dickinson Wright PLLC, respectfully moves to dismiss the claims in Plaintiff Angelo Binno's ("Plaintiff") Complaint under Rule 12(b)(1) or Rule 12(b)(6) and, alternatively, moves for summary judgment of those claims under Rule 56.

In support of its motion, Defendant relies upon the law and argument set forth in the attached brief in support and exhibits, and the pleadings on file with the Court.

Defendant's counsel sought Plaintiff's concurrence in the relief requested herein, but such concurrence was not forthcoming.

WHEREFORE, Defendant respectfully requests that the Court grant its Motion to Dismiss Or, Alternatively, Motion for Summary Judgment, and dismiss Plaintiff's Complaint in its entirety with prejudice.

Respectfully Submitted,

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Dated: August 15, 2011

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

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QUESTION PRESENTED

1. Should the Court dismiss Plaintiff Angelo Binno's ("Plaintiff") Complaint because Plaintiff lacks standing to bring his claim against Defendant American Bar Association (the "ABA") because his alleged inability to gain admission to a law school is neither fairly traceable to the alleged ABA's law school accreditation requirement that all applicants take a valid and reliable test nor likely to be redressed by a favorable decision in this case?

   The ABA Answers: "YES"

2. Should the Court dismiss Plaintiff's single-count Complaint against the ABA for a violation of Title III of the Americans with Disabilities Act ("ADA") because the ABA is not an entity covered by Title III with regard to Plaintiff's claim as it is not a person that "offers" the Law School Admission Test ("LSAT")?

   The ABA Answers: "YES"

CONTROLLING OR MOST APPROPRIATE AUTHORITY

1. FED. R. CIV. P. 12(b)(1)
2. FED. R. CIV. P. 12(b)(6)
3. FED. R. CIV. P. 56
4. 42 U.S.C. § 12189
5. 28 C.F.R. 36.309
6. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)
7. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976)

I. INTRODUCTION

Plaintiff Angelo Binno ("Plaintiff") is a legally blind person who was denied admission to at least three law schools in the state of Michigan because of his poor performance on the Law School Admission Test ("LSAT") and other factors. Plaintiff alleges that the LSAT significantly disadvantages blind and visually impaired test takers, like himself, because one-fourth of the questions on the exam are logic game questions that often require spatial reasoning and diagramming for successful completion. Rather than suing the publisher or administrators of the LSAT, the Law School Admissions Council, or the law schools that denied him admission, Plaintiff filed the present lawsuit against Defendant American Bar Association (the "ABA"), claiming that its accreditation standards for law schools violate Title III of the Americans with Disabilities Act ("ADA"). Plaintiff alleges that the ABA's accreditation standard effectively requires that all law school applicants take the LSAT as a prerequisite to admission, and therefore has the effect of denying blind and visually impaired students equal access to educational opportunities at law schools in the United States.

Plaintiff has sued the wrong party, and the ADA's testing provisions do not apply to the ABA with respect to the LSAT. Plaintiff lacks standing to bring his claim against the ABA because he cannot establish that his alleged inability to gain admission to law school is "fairly traceable" to the ABA's accreditation standard and not the result of the independent decision-making processes of the law schools to which he applied. Plaintiff also lacks standing because it is merely speculative that a favorable decision in this case would redress his alleged inability to gain admission to law school, absent a showing that law schools would not require applicants to take the LSAT as a prerequisite to admission in the absence of the ABA's accreditation standard.

Moreover, even if Plaintiff could establish standing, the statute under which he asserts his sole claim -- Title III of the ADA -- simply does not apply to the ABA with regard to the LSAT.

The ABA is not a public accommodation or commercial facility, and it does not offer the LSAT to applicants. Accordingly, the Court should summarily dismiss Plaintiff's Complaint under Rule 12(b)(1) or Rule 12(b)(6) or, alternatively, grant Defendant summary judgment under Rule 56.

II. ALLEGATIONS OF PLAINTIFF'S COMPLAINT

Plaintiff's Complaint asserts a single claim against the ABA for a violation of Title III of the ADA. (*See* Dkt. Entry #1, ¶¶ 32-49). In support of that claim, Plaintiff specifically alleges the following in his Complaint:

A. The ABA Promulgates Standards and Rules of Procedure for Approval of Law Schools.

- "The American Bar Association is a 'private entity' as defined by the ADA." (*Id.* at ¶ 36).
- "The American Bar Association Section of Legal Education and Admission to the Bar is the sole entity charged with accrediting law schools in the United States." (*Id.* at ¶ 9).
- "The Council of the Section promulgates the Standards and Rules of Procedure for Approval of Law Schools with which law schools must comply in order to be ABA-approved." (*Id.* at ¶ 11).
- "Standard 503 of the ABA Standards for Approval of Law Schools states in pertinent part that[,] 'A law school shall require each applicant for admission as a first year J.D. student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's educational program." (*Id.* at ¶ 13).
- Interpretation 503-1 of the ABA Standards for Approval of Law Schools provides that, "A law school that uses an admission test other than the Law School Admission Test sponsored by the Law School Admission Council shall establish that such other test is a valid and reliable test to assist the school is assessing an applicant's capability to satisfactorily complete the school's educational program." (*Id.* at ¶ 14).
- "A law school that chooses to grant a waiver or exemption from the examination requirement faces sanctions, up to and including, loss of accreditation under Rule 13 of the ABA [Rules of Procedure] for Approval of Law Schools." (Dkt. Entry #1, ¶ 15).

B. The LSAT Allegedly Disadvantages Blind Or Visually Impaired Test Takers Like Plaintiff.

- "The LSAT is a standardized test consisting of approximately 100 multiple choice questions." (*Id.* at ¶ 18).

- "Approximately one-fourth of the questions on the exam are what is known as "Analytical Re[as]oning Questions" or logic game questions[,] which require spatial reasoning and diagramming of visual concepts for successful completion by most applicants." (*Id.* at ¶ 19).

- "A blind or visually impaired applicant[, like Plaintiff,] is unable to conceive of spatial relationships or diagram answers in the same manner as their sighted peers." (*Id.* at ¶ 20).

C. Plaintiff Was Denied Admission To At Least Three Law Schools In The State Of Michigan Because Of His Poor Performance On The LSAT.

- "Despite repeated attempts, Plaintiff has been unable to attain admission to law school as a result of his poor performance on the LSAT. Plaintiff has been denied admission to three law schools in the Eastern District of Michigan...." (*Id.* at ¶ 24).

D. Plaintiff Claims That The ABA Standards Discriminate Against Him And Other Blind Or Visually Impaired Law School Applicants By Allegedly Requiring That All Applicants Take The LSAT.

- "By promulgating [Standard 503 of] the ABA Standards for Approval of Law Schools, ... [the ABA] has required all law school applicants to take the Law School Admission Test which is an examination within the meaning of 28 CFR 36.309." (*Id.* at ¶ 43).

- "Standard 503 of the ABA Standards for Approval of Law Schools, and the corresponding sanctions contained in Rule 13 of the Standards for Approval of Law Schools, directly discriminate against Plaintiff, and other qualified individuals with disabilities, by mandating that the Plaintiff takes an inherently discriminatory examination and disallowing any law school from waiving the examination as a reasonable accommodation." (Dkt. Entry #1, ¶ 44).

Notably, Plaintiff's Complaint does **not** allege that the ABA is either a "public accommodation" or a "commercial facility" under Title III of the ADA. Nor does it allege that the ABA is a "person that offers examinations or courses" covered by Section 309 of the ADA. (*See* Dkt. Entry #1).

III. STATEMENT OF ADDITIONAL FACTS

A. The ABA Standards Do Not Require Law Schools To Assign A Certain Weight To An Applicant's LSAT Or Other Test Score When Making An Admission Decision.

Standard 503 of the ABA Standards for the Approval of Law Schools "does not prescribe the particular weight that a law school should give an applicant's admission test score in deciding whether to admit or deny admission to the applicant." (**Exhibit A**, ABA Standards, Interpretation 503-2, p. 36).[1] It only instructs law schools to "use the test results in a manner that is consistent with the current guidelines regarding the proper use of the test results provided by the agency that developed the test." (*Id.*, Standard 503, p. 36). "The 'Cautionary Policies Concerning LSAT Scores and Related Services' published by the Law School Admission Council is an example of the testing agency guidelines referred to in Standard 503." (*Id.*, Interpretation 503-4, p. 36; Appendix 2, p. 163-64).

B. The ABA Standards Allow Law Schools To Seek A Variance From The Alleged Requirement That All Applicants Take The LSAT As a Prerequisite to Admission.

A law school may seek a variance from Standard 503's admission test requirement under Standard 802. (*Id.*, Standard 802, p. 47). Standard 802 provides: "If the Council finds that [a law school's] propos[ed] [admission program is inconsistent with Standard 503, but] is nevertheless consistent with the general purposes of the Standards, the Council may grant the variance, may impose conditions, and shall impose time limits it considers appropriate." (*Id.*).

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[1] In ruling on the ABA's motion, the Court may consider the ABA Standards for the Approval of Law Schools to be a part of the pleadings because they are specifically referred to in Plaintiff's Complaint and form the basis of Plaintiff's claim. See *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999).

C. The ABA Does Not Develop Or Administer The LSAT.

The ABA does not develop or publish the LSAT. (**Exhibit B**, Declaration of Hulett H. Askew, ¶ 9-10). The ABA is not involved in any way in processing applications to take the LSAT or in administering the test. (*Id.* at ¶ 11). It does not select the place or manner in which the LSAT is administered. (*Id.* at ¶ 12). The ABA has no authority to decide whether any given test taker will receive a requested accommodation to the place or manner of the LSAT. (*Id.* at ¶ 13). Nor does it evaluate any requests for accommodation. (*Id.*).

IV. ARGUMENT

A. Standards Of Review

A motion to dismiss for lack of standing challenges the Court's subject matter jurisdiction to hear the claim alleged. FED. R. CIV. P. 12(b)(1). In ruling on such a motion at the pleading stage, the Court must accept as true all material allegations of Plaintiff's Complaint. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Plaintiff, however, still bears the burden of alleging facts sufficient to persuade the Court that it, indeed, has subject matter jurisdiction. See *White v. United States, et al.*, 601 F.3d 545, 551-52 (6th Cir. 2010).

A motion to dismiss for failure to state a claim tests the legal sufficiency of the allegations stated in the Complaint. FED. R. CIV. P. 12(b)(6). The Court must dismiss a Complaint where, even under the facts alleged, the plaintiff is not entitled to the remedy sought. *See id.* If the Court considers matters outside of the pleadings in ruling on a Rule 12(b)(6) motion to dismiss, the motion is converted to one for summary judgment under Rule 56. FED. R. CIV. P. 12(d). However, "[d]ocuments attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999) (citing *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997)). A motion for summary judgment must be granted if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

B. Plaintiff Lacks Standing To Bring His Claim Against The ABA.

"[T]he irreducible constitutional minimum of standing" has three elements: (i) injury in fact, (ii) causation, and (iii) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where, as here, the plaintiff is not himself the object of the defendant's challenged action -- that is, his asserted injury arises indirectly from a restriction allegedly imposed by the

defendant upon a third party -- standing is "'substantially more difficult' to establish." *Id.* at 562 (citing *Allen v. Wright*, 468 U.S. 737, 758 (1984); *Warth*, 422 U.S. at 505). This is because, in those circumstances, both causation and redressability "depend[ ] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of KENNEDY, J.)). Absent facts "showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury," standing cannot be established. *Id.* Plaintiff lacks standing here because his Complaint fails to allege such facts necessary to prove either causation or redressability.

1. Plaintiff's alleged inability to gain admission to a law school is not "fairly traceable" to the ABA's alleged requirement that all applicants take a valid and reliable test.

To prove causation, Plaintiff must establish that his alleged injury is "fairly ... traceable to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61. Here, Plaintiff's alleged injury is his inability to gain admission to an ABA-accredited law school. (Dkt. Entry #1, ¶ ¶ 7(b), 24). Plaintiff alleges that he is unable to do so because of the ABA's accreditation standards for law schools that allegedly require that all law school applicants take the LSAT -- a test that he believes discriminates against blind and visually impaired test takers like himself. (*Id.* at ¶ 7(b), 24, 45-46). But Plaintiff's alleged inability to gain admission to a law school is not "fairly traceable" to the challenged action of the ABA because the adverse admissions decisions were made by third parties who are not before this Court: the law schools to which Plaintiff applied for admission.

Plaintiff does not allege -- because he cannot -- that the ABA's accreditation standards require law schools to assign a certain weight to an applicant's LSAT or other valid and reliable test score when making an admission decision. (*See* **Exhibit A**, ABA Standards, Interpretation 503-2, p. 36). The ABA's accreditation standard is only that a law school require each applicant to "take" a valid and reliable admission test; the law schools to which Plaintiff applied were free to weigh (or discount) Plaintiff's LSAT score as they saw fit. (*Id.*; Dkt. Entry #1, ¶ ¶ 7(b), 13). Moreover, the law schools could have sought a variance from the ABA's admission test requirement under Standard 802 for purposes of accreditation. (**Exhibit A**, ABA Standards, Standard 802, p. 47). There is no allegation that they did make such a request and were denied by the ABA. Thus, the Court cannot reasonably infer from Plaintiff's allegations that his inability to gain admission to law school is "fairly traceable" to the challenged action of the ABA and not the result of the independent action of the law schools to which he applied.

In this respect, Plaintiff's deficient allegations are similar to those of *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976) -- a case in which the United States Supreme Court reversed a district court's denial of a motion to dismiss based on lack of standing. *Id.* at 37 & n. 15. In *Simon*, the indigent patient-plaintiffs sued the Secretary of the Treasury and the Commissioner of the Internal Revenue, claiming that the Internal Revenue Service's ("IRS") policy of extending favorable tax treatment to non-profit hospitals that offered only emergency-room services to indigents violated the Code by "encouraging" the hospitals to deny medical services to the plaintiffs. *Id.* at 33-34. The Supreme Court held that the plaintiffs lacked standing to bring their claim against the IRS defendants because "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS'] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax

implications." *Id.* at 42-43. Similarly, Plaintiff lacks standing here because "[s]peculative inferences are necessary to connect [his] injury to the challenged actions" of the ABA. *Id.* at 45.

2. It is merely speculative that Plaintiff's alleged inability to gain admission to a law school will be redressed by a favorable decision in this case.

Plaintiff also lacks standing because it is merely "speculative" as opposed to "likely" that Plaintiff's alleged injury -- his inability to gain admission to law school because of his low LSAT score -- would be "redressed by a favorable decision" in this case. See *Lujan*, 504 U.S. at 561. Since the law schools to which Plaintiff has applied or intends to apply are not parties, the Court can only afford Plaintiff relief against the ABA by enjoining the application of its accreditation standard which Plaintiff alleges requires all applicants to take the LSAT. But this alone would not remedy Plaintiff's alleged injury because the law schools would still be free to require that their applicants take the LSAT as a prerequisite to admission. *See, e.g.*, *Lujan*, 504 U.S. at 568-71 (holding plaintiffs failed to establish redressability because, even if the court ordered the Secretary to revise his regulation, this would not remedy the plaintiffs' alleged injury unless the non-party funding agencies were bound by the Secretary's regulation); *Simon*, 426 U.S. at 42-43 (1976) (holding the relief sought by plaintiffs (withdrawal of a hospital's tax exemption by the IRS) would not likely redress the alleged injury (denial of hospital care to indigent patients), since hospitals might restrict such care even if the exemption were removed). Plaintiff did not allege that, in the absence of the ABA's accreditation standard, law schools would not require applicants to take the LSAT as a prerequisite to admission. He did not do so because any such allegation would have been speculative. Without such factual allegations, Plaintiff cannot demonstrate that the relief he seeks against the ABA is likely to redress his inability to gain admission to law school because of his low LSAT score. Therefore, Plaintiff's claim against the ABA should be dismissed for lack of standing.

C. Plaintiff Fails To State A Claim Because He Does Not Allege That The ABA Is A Covered Entity Under Title III Of The ADA.

Plaintiff's single-count Complaint claiming a violation of Title III of the ADA must be dismissed for the additional reason that Plaintiff failed to allege an essential element of his claim: that the ABA is a covered entity under Title III of the ADA. Unlike Title I (which applies to employers) and Title II (which applies to state and local governments), Title III of the ADA applies ***only*** to any --

> (1) Public accommodation;[2]
>
> (2) Commercial facility;[3] or
>
> (3) **Private entity that offers examinations** or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.

42 U.S.C. §§ 12181-12189 *see also* 28 C.F.R. 36.102(a) (emphasis added). Title III of the ADA and its accompanying regulations was designed to prohibit discrimination on the basis of disability by public accommodations and commercial facilities by removing barriers to the accessibility of such places, including examinations and courses related to admission to a professional school. *Id.*

Plaintiff does not allege that the ABA is either a "public accommodation" or a "commercial facility." Nor does he allege that the ABA is a "person that offers examinations or courses" that would be covered by Section 309 of the ADA. (*See* Dkt. Entry #1). Plaintiff only

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[2] "Public accommodations" are a private entities whose operations fall within one of the twelve categories listed in Section 301 of the ADA, such as hotels, restaurants, theaters or stores. *See* 42 U.S.C. § 12181(7); 28 C.F.R. 36.104.

[3] "Commercial facilities" are facilities that are intended for non-residential use by a private entity whose operations will affect commerce, but not aircraft, railroad cars, or facilities covered or expressly exempted from coverage by the Fair Housing Act. *See* 42 U.S.C. § 12181(2); 28 C.F.R. 36.104.

alleges in his Complaint that the ABA is a "private entity," (*id.* at ¶ 36), which is insufficient to establish that Title III even applies.

Section 309 of the ADA addresses examinations and courses. 42 U.S.C. §12189. Although Plaintiff quotes the regulations interpreting Section 309 of the ADA in his Complaint, (*id.* at ¶¶ 41-42), he tellingly does not allege facts sufficient to establish that the ABA is actually covered by Section 309 with regard to the LSAT. The plain language of Section 309 provides that it applies only to private entities "**that offer**[] **examinations** ... related to applications ... for ... post-secondary education," and obligates such entities to "**offer** such examinations ... in a place and manner accessible to persons with disabilities...." 42 U.S.C. § 12189 (emphasis added). Plaintiff does not allege -- because he simply cannot -- that the ABA "offers" the LSAT within the meaning of Section 309. Because he does not make such allegation, Plaintiff's Complaint fails to allege sufficient facts to state a claim against the ABA for a violation of Title III of the ADA, and the Court must dismiss it under Rule 12(b)(6).

D. Alternatively, The ABA Is Entitled To Summary Judgment Because The ABA Does Not "Offer" The LSAT Such That It Is A Covered Entity Under Title III Of The ADA.

Even if Plaintiff were to attempt to amend his Complaint, the ABA is still entitled to summary judgment under Rule 56 because the ABA does not "offer" the LSAT such that it is a covered entity under Title III of the ADA as a matter of law. As stated above, section 309 of the ADA applies only to private entities that "offer" covered examinations:

> **Any person that offers examinations** or courses **related to applications**, licensing, certification, or credentialing **for** secondary or **post-secondary education**, professional, or trade purposes **shall offer such examinations** or courses in a place and manner accessible to persons with disabilities or **offer** alternative accessible arrangements for such individuals.

42 U.S.C. § 12189 (emphasis added). The plain meaning of the word "offer," when used in this context, is "to make available" or to "afford." *See* MERRIAM-WEBSTER DICTIONARY (2011), available at: http://www.merriam-webster.com/dictionary/offer.

The ABA does not "offer" the LSAT because it in no way can be said "to make [the LSAT] available" to applicants. The ABA does not publish or create the LSAT. (**Exhibit B**, Declaration of Hulett H. Askew, ¶ 9). It is not involved in any way in processing applications to take the LSAT. (*Id.* at ¶ 11). The ABA has no authority to either select the "place" or "manner" in which the LSAT is offered (so as to be able to fulfill Section 309's requirement to offer the test "in a place and manner accessible to persons with disabilities"). (*Id.* at ¶ 12). It undertakes no review of, nor establishes any protocol in, the administration or scoring of the LSAT. (*Id.*). The ABA has no involvement in reviewing or granting requested accommodations (so as to be able to fulfill Section 309's requirement to "offer alternative accessible arrangements for such individuals"). (*Id.* at ¶ 13).

The ABA anticipates that Plaintiff will cite to *Elder v. Nat'l Conf. of Bar Examiners, et al.*, No. C 11-00199 SI, 2011 U.S. Dist. LEXIS 15787 (N. D. Cal. Feb. 16, 2011)(**Exhibit C**), for support that he should be allowed to take discovery on the issue of whether the ABA "offers" the LSAT to law school applicants within the meaning of Section 309 of the ADA. However, *Elder* is not controlling, nor does it provide instruction, to the Court's decision in this case.

In *Elder*, the plaintiff -- who was legally blind -- sued the National Conference of Bar Examiners ("NCBE") and the State Bar of California ("State Bar") for a violation of the ADA for failure to provide him with an accommodation in taking the California State bar exam. *Id.* at *2. The plaintiff alleged that although the State Bar had agreed to allow him to take two of the three parts of the California bar exam using a computer equipped with JAWS screen access

software, it had denied his request with respect to the Multistate Bar Exam ("MBE") part of the exam only because the NCBE would not provide the electronic version of the MBE. *Id.* at *2. The NCBE moved to dismiss or, in the alternative, for summary judgment, arguing that, because the State Bar administers the MBE as part of the California bar exam and evaluates any accommodation requests, the State Bar -- rather than the NCBE -- "offers" the MBE within the meaning of the ADA. *Id.* at *9-10. The court denied that motion on the grounds that a question existed as to whether the NCBE was in reality the entity that determined the format of accommodations to be offered by state bars to disabled MBE test takers, and whether the NCBE had allowed disabled persons to take the MBE in electronic formats in the past. There was also a question as to whether the NCBE required state bars to follow specific protocols in administering the MBE in order to protect the integrity of the test. *Id.* at *12-13. In short, there were several potential facts which tended to show that by exercising total control over the format and conditions by which the MBE was offered to all test takers, and control over its scoring, that the NCBE was the party who offered the MBE. Therefore, the court could not say as a matter of law that the NCBE did not "offer" the MBE in light of the plaintiff's allegations that the NCBE develops the MBE and controls the format in which it is offered and administered by the State Bar. *Id.* at *10-11.

That, however, is not the case with respect to the ABA and the LSAT. Unlike the NCBE with regard to the MBE, the ABA has absolutely no authority or control over the content or format of the LSAT. (**Exhibit B**, Declaration of Hulett H. Askew, ¶ 9-10). It does not establish any protocols for its administration or scoring (¶ 12). Nor does the ABA otherwise administer the LSAT. The ABA does not "offer" the LSAT within the meaning of the plain language of Section 309 of the ADA and therefore is unable to make it available in a place or manner

accessible to persons with disabilities. The ABA is thus entitled to summary judgment of Plaintiff's claim under Rule 56 because the ABA is not a covered entity under Title III of the ADA.

V. CONCLUSION

For all these reasons, the ABA respectfully requests that the Court grant its Motion to Dismiss Under Rule 12(b)(1) or 12(b)(6) or, alternatively, grant it summary judgment under Rule 56, and dismiss Plaintiff's Complaint in its entirety with prejudice.

Respectfully Submitted,

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Dated: August 15, 2011

I hereby certify that on August 15, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notice of such filing to all counsel of record.

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