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 PLAINTIFF'S AMENDED COMPLAINT
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") Amended 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, as well as 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 Plaintiff's Amended Complaint Or, Alternatively, Motion for Summary Judgment, and dismiss Plaintiff's Amended Complaint in its entirety with prejudice.

Respectfully Submitted,

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Dated: September 19, 2011

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

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QUESTION PRESENTED

1. Should the Court dismiss Plaintiff Angelo Binno's ("Plaintiff") Amended Complaint where 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 claim for a violation of Title III of the Americans with Disabilities Act ("ADA") where the ABA is not an entity covered by Title III with regard to Plaintiff's claim because the ABA is not a "person" that "offers" the Law School Admission Test ("LSAT")?

   The ABA Answers: "YES"

3. Should the Court dismiss Plaintiff's claim for a violation of Title V of the ADA because the ABA is not a covered entity under the ADA with respect to the LSAT and Plaintiff otherwise fails to allege that the ABA acted with discriminatory animus in allegedly "interfering" with his rights protected by the ADA?

   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)
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4. 42 U.S.C. § 12189
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11. *Youngblood v. Prudential Ins. Co.*, 706 F.Supp. 2d 831 (M.D. Tenn. 2010)
12. *Brown v. City of Tucson*, 336 F.3d 1181, 1191 (9th Cir. 2003)
13. *Mich. Prot. & Advoc'y Serv. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994)

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 allegedly because of his poor performance on the Law School Admission Test ("LSAT"). 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 allegedly often require spatial reasoning and diagramming for successful completion. Rather than suing the developer and administrator of the LSAT -- the Law School Admissions Council ("LSAC") -- 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 Titles III and V of the Americans with Disabilities Act ("ADA"). Plaintiff alleges that the ABA's accreditation standards effectively require that all law school applicants take the LSAT as a prerequisite to admission, which has the effect of denying blind and visually impaired students equal access to educational opportunities at law schools in the United States, thus interfering with their rights under the ADA.

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 claims 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 the 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 statutory provisions under which he asserts his claims -- Title III and Title V of the ADA -- simply do 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 such that it is an entity covered by Title III or Title V. Accordingly, the Court should summarily dismiss Plaintiff's Amended 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 AMENDED COMPLAINT

Plaintiff's Amended Complaint asserts claims against the ABA for violations of Title III and Title V of the ADA. (*See* Dkt. Entry #15, ¶¶ 33-68). In support of those claims, Plaintiff specifically alleges the following in his Amended 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 ¶ 37).

- "The American Bar Association Council of the Section of Legal Education and Admission to the Bar is the entity charged with accrediting law schools in the United States." (*Id*. at ¶ 9).

- "The ABA 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 the Approval of Law Schools." (Dkt. Entry #15, ¶ 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 Reasoning 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).[1]

D. The ABA Allegedly "Offers" The LSAT.

- "By promulgating [Standard 503 of] the ABA Standards for Approval of Law Schools … [the ABA] has "offered" and continues to "offer" a discriminatory examination, within the meaning of Title III of the Americans with Disabilities Act, as they [sic] exercise control in the requirement that the exam be given, and play a central role in reviewing the contents of the examination to deem it valid and reliable." (*Id*. at ¶ 49).

E. Plaintiff Claims That The ABA's Accreditation Standards Both Discriminate Against Him And Other Blind Or Visually Impaired Law School Applicants And Interfere With Their Rights Under The ADA 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

[1] Plaintiff admittedly scored 133 and 136 out of 180 on the LSAT, which would place his performance in the bottom 4th and 7th percentile, respectively, of all applicants who took the LSAT under standard testing conditions from June 2008 to February 2011.

Test which is an examination within the meaning of 28 CFR 36.309." (Dkt. Entry #15, ¶ 44).

- "Standard 503 of the ABA Standards for Approval of Law Schools, and the corresponding sanctions contained in Rule 13 of the Rules of Procedure 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." (*Id*. at ¶ 50).

- "Standard 503 of the ABA [S]tandards for Approval of Law Schools thus 'interferes' with Plaintiff's rights under the Americans with Disabilities Act, including but not limited to, his right to pursue a legal education without being forced to take a discriminatory examination prior to his admission to law school." (*Id*. at 68).

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).[2] 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.

[2] 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 Amended Complaint and form the basis of Plaintiff's claims. See *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999).

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*.).

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 claims 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 Amended 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 the plaintiff has failed to offer factual allegations sufficient to render the asserted claim "plausible on its face" by "rais[ing] a right to relief above the speculative level on

the assumption that all the allegations in the complaint are true." See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp, v. Twombly*, 550 U.S. 544, 570 (2007)). This presumption of truth does not apply to "conclusory allegations or legal conclusions masquerading as factual allegations." *Id.* Nor will the Court accept unwarranted factual inferences. *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). The Court must view the evidence in the light most favorable to Plaintiff and draw all reasonable inferences in his favor. See *Cox v. Ky. Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995). However, Plaintiff cannot rest upon his pleadings alone; he must present significant probative evidence on which the jury could reasonably find for him. See *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995).

B. Plaintiff Lacks Standing To Bring His Claims 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 #15, ¶¶ 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, 50-51). 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 "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 #15, ¶¶ 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 any law school made such a request and was 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, rather than 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). In his Amended Complaint, Plaintiff still fails to 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 be 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's Title III Discrimination Claim Fails As A Matter Of Law.

1. Plaintiff fails to state a claim under Title III because he does not allege facts sufficient to establish that the ABA "offers" the LSAT.

Plaintiff's claim for a violation of Title III of the ADA must be dismissed for the additional reason that Plaintiff fails to allege facts sufficient to establish 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;[3]
>
> (2) Commercial facility;[4] or
>
> (3) **Private entity <u>that offers</u> examinations** or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.

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

Plaintiff does not allege that the ABA is either a "public accommodation" or a "commercial facility." Plaintiff also failed to allege in his initial Complaint that the ABA is a "person that offers examinations or courses" such that it would be covered by Section 309 of the ADA. (*See* Dkt. Entry #1); 42 U.S.C. §12189. After the ABA highlighted this deficiency in its

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[3] "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.

[4] "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.

motion to dismiss that Complaint, Plaintiff amended his Complaint to allege that, by promulgating Standard 503 of the ABA Standards for Approval of Law Schools, the ABA "offers" the LSAT within the meaning of Title III of the ADA because it "exercise[s] control in the requirement that the exam be given, and play[s] a central role in reviewing the contents of the examination to deem it valid and reliable" under Standard 503. (*See* Dkt. Entry #15, ¶¶ 47-49).

But Plaintiff's amendments do not save his claim because he still does not plead facts sufficient to establish that the ABA is actually covered by Section 309 with regard to the LSAT. Section 309 of the ADA applies only to private entities that "offer" covered examinations and obligates such entities to "offer" them in a place and manner accessible to persons with disabilities:

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

Plaintiff does not allege -- because he cannot -- that the ABA "make[s] [the LSAT] available" to applicants. Rather, he alleges that the ABA "exercise[s] control in the requirement that the [LSAT] be given, and play[s] a central role in reviewing the contents of the examination to deem it valid and reliable" under Standard 503. But, even assuming that this were true, it does not show that the ABA "offers" the LSAT within the meaning of Title III of the ADA. Plaintiff does not allege that the ABA has ***any*** control over the content or format of the test itself or the place or manner in which it is offered. The ABA simply cannot be said to "offer" the LSAT or

"make [it] available" because, without such alleged control, it cannot fulfill Section 309's requirement to offer the test "in a place and manner accessible to persons with disabilities." This is why the only entities who have been sued under Section 309 are those with control over the format or place or manner of a covered exam, such as the Law School Admissions Council (develops and administers the LSAT);[5] the National Conference of Bar Examiners, Inc. (develops the Multistate Bar Exam ("MBE") and the Multistate Professional Responsibility Exam ("MPRE"));[6] the state entities responsible for licensing attorneys (administer state bar examinations, which often include the MBE);[7] the Association of American Medical Colleges (develops and administers the Medical College Admission Test ("MCAT"));[8] the National Board of Medical Examiners (develops and administers the United States Medical Licensing Examination ("USMLE"));[9] and the American Board of Psychiatry & Neurology (develops and administers board certification exam for specialty).[10]

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[5] See, e.g., *Love v. Law Sch. Admission Council, Inc*., 513 F.Supp. 2d 206 (E.D. Pa. 2007); *Agranoff v. Law Sch. Admission Council, Inc*., 97 F.Supp. 2d 86 (D. Mass. 1999); *Rothberg v. Law Sch. Admission Council*, 102 Fed. App'x 122 (10th Cir. June 16, 2004) (unpublished).

[6] See, e.g., *Enyart v. Nat'l Conf. of Bar Examiners, Inc*., 630 F.3d 1153 (9th Cir. 2011); *Barr v. Nat'l Conf. of Bar Examiners, Inc*., No. 98-6216, 1999 U.S. App. LEXIS 9741 (10th Cir. May 20, 1999) (unpublished); *Jones v. Nat'l Conf. of Bar Examiners*, No. 5:11-cv-174, 2011 U.S. Dist. LEXIS 85137 (D. Vt. Aug. 2, 2011) (unpublished); *Bonnette v. D.C. Court of Appeals, et al*., No. 11-1053, 2011 U.S. Dist. LEXIS 75076 (D. D.C. July 13, 2011) (unpublished); *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) (unpublished).

[7] See, e.g., *Bartlett v. N.Y. State Bd. of Law Examiners*, 226 F.3d 69 (2d Cir. 2000); *Ware v. Wyoming Bd. of Law Examiners*, 973 F. Supp. 1339 (D. Wyo. 1997); *Pazer v. N.Y. State Bd. of Law Examiners*, 849 F. Supp. 284 (S.D. N.Y. 1994); *D'Amico v. N.Y. State Bd. of Law Examiners*, 813 F. Supp. 217 (W.D. N.Y. 1993); *Bonnette*, 2011 U.S. Dist. LEXIS 75076, *supra*; *Elder*, 2011 U.S. Dist. LEXIS 15787, *supra*.

[8] See, e.g., *Rumbin v. Ass'n of Am. Med. Colleges*, No. 3:08-cv-983, 2011 U.S. Dist. LEXIS 28580 (D. Conn. March 21, 2011) (unpublished).

[9] See, e.g., *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620 (6th Cir. 2000); *Doe v. Nat'l Bd. of Med. Examiners*, 199 F.3d 146 (3d Cir. 1999); *Scheibe v. Nat'l Bd. of Med. Examiners*, 424 F.Supp. 2d 1140 (W.D. Wis. 2006); *Baer v. Nat'l Bd. of Med. Examiners*, 392 F.Supp. 2d 42 (D. Mass. 2005); *Rush v. Nat'l Bd. of Med. Examiners*, 268 F.Supp. 2d 673 (N.D.

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Plaintiff does not allege that the ABA develops or administers the LSAT. And Plaintiff's allegations that the ABA requires that the LSAT be taken and that the ABA has reviewed the exam and deemed it valid and reliable under Standard 503 simply fail to "plausibly" show that the ABA "offers" the LSAT within the plain meaning of that word. Accordingly, Plaintiff's Amended 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).

2. Alternatively, the ABA is entitled to summary judgment of Plaintiff's Title III claim because the ABA does not "offer" the LSAT such that it is a covered entity.

In any event, the ABA is entitled to summary judgment under Rule 56 because the undisputable facts show that 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. 42 U.S.C. § 12189 (emphasis added). 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, and it undertakes no review of, nor establishes any protocol in, the administration or scoring of the LSAT. (*Id.* at ¶¶ 11-12). 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). And it has no involvement in reviewing or granting requested accommodations (so as to be able

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Tex. 2003); *Biank v. Nat'l Bd. of Med. Examiners*, 130 F.Supp. 2d 986 (N.D. Ill. 2000); *Price v. Nat'l Bd. of Med. Examiners*, 966 F. Supp. 419 (S.D. W.V. 1997).

[10] See, e.g., *Shaywitz v. Am. Bd. of Psychiatry & Neurology*, 675 F.Supp. 2d 376 (S.D. N.Y. 2009).

to fulfill Section 309's requirement to "offer alternative accessible arrangements for such individuals"). (*Id*. at ¶ 13). The ABA simply does not "offer" the LSAT within the plain meaning 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 Title III claim under Rule 56 because the ABA is not a covered entity under Title III of the ADA.

3. Plaintiff may not take discovery to search for facts to cure his deficient pleadings.

Plaintiff likely 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) (unpublished)[11] (**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. But *Elder* is neither controlling nor persuasive to the Court's resolution of this case on its pleadings.

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 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

[11] All other unpublished cases have been submitted separately to the Court in an Appendix, which has been served upon Plaintiff's counsel.

requests, the State Bar -- rather than the NCBE -- "offers" the MBE within the meaning of the ADA. *Id*. at *9-10. The court denied the motion to dismiss because it could not say as a matter of law that the NCBE did not "offer" the MBE in light of the plaintiff's specific factual allegations that the NCBE is the entity that develops the MBE and controls the format in which it is offered and administered by the State Bar. *Id*. at *10-11. The court also denied the motion for summary judgment as premature, finding that questions existed as to whether the NCBE actually controls the accommodations to the format of the MBE that state bars may offer to disabled test takers, whether the NCBE requires state bars to follow specific protocols in administering the MBE in order to protect the integrity of its test, and whether the NCBE had allowed disabled test takers to take the MBE in an electronic format in the past. *Id*. at *12-13. The court allowed the plaintiff to take discovery on these issues, finding that, if true, they would tend to show that, "by exercising total control over the format and conditions by which the MBE will be offered to disabled as well as non-disabled test takers, as well as control over its scoring, it is [the] NCBE which 'offers' the MBE under the meaning of Section [309]." *Id*. at *13.

Unlike in *Elder* with respect to the NCBE and the MBE, Plaintiff's Amended Complaint contains no allegation that the ABA develops the LSAT or exercises any control whatsoever over the format in which it is administered. Without such alleged facts to support the conclusory legal allegation that the ABA "offers" the LSAT, Plaintiff fails to state a "plausible" claim for a violation of Title III of the ADA. According to a recent Sixth Circuit holding, Plaintiff may not use the discovery process to search for facts to cure his deficient pleadings after filing suit. *New Albany Tractor v. Louisville Tractor, et al*., __ F.3d __, 2011 U.S. App. LEXIS 12457, at *10 (6th Cir. June 21, 2011) (citing *Iqbal*, 129 S. Ct. at 1954). In any event, ordering discovery here would be futile because, 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 (*Id.* at ¶ 12). Nor does the ABA otherwise administer the LSAT. (*Id.*). Unlike in *Elder*, there is no question here that the ABA does not "offer" the LSAT and, thus, is not a covered entity under Title III of the ADA.

D. Plaintiff's Title V Interference Claim Fails As A Matter Of Law.

1. Plaintiff does not allege facts sufficient to establish that the ABA is a covered entity under the ADA with respect to the LSAT.

Plaintiff's "interference" claim under Title V of the ADA also fails as a matter of law. Plaintiff alleges that Standard 503 of the ABA Standards for Approval of Law Schools "interferes" with his rights under the ADA, including the "right to pursue a legal education without being forced to take a discriminatory examination prior to his admission to law school." (Dkt. Entry #15, ¶ 68). But Plaintiff's claim fails because he does not allege sufficient facts to establish that the ABA is an entity even subject to Title V's interference provision. A plaintiff cannot maintain a Title V interference claim against an entity that is not otherwise subject to Titles I, II, or III of the ADA. Because Plaintiff cannot establish that the ABA "offers" the LSAT or is otherwise subject to Title III with respect to the LSAT, he cannot prove that the ABA is subject to Title V, and his interference claim fails as a matter of law.

Title V of the ADA sets forth various "Miscellaneous Provisions," including a prohibition against retaliation and coercion or interference with rights protected by the ADA. *See* 42 U.S.C. § 12203. Section 503, which prohibits interference, provides, in relevant part:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(b). Section 503 has no remedies of its own, but rather refers a plaintiff alleging unlawful interference to the remedial provisions of the Title that corresponds to the conduct at issue:

> The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter[12] I, subchapter II and subchapter III, respectively.

42 U.S.C. § 12203(c). The language of Section 503 thus indicates that "[w]hich remedies a plaintiff is afforded, [if any], depends on whether the alleged retaliation [or interference] occurred with respect to employment, public services, or public accommodations." *Stern v. Cal. State Archives*, 982 F. Supp. 690, 693 (E.D. Cal. 1997). For this reason, a plaintiff cannot maintain an ADA retaliation or interference claim under Section 503 against entities that are not otherwise subject to Titles I, II, or III of the ADA -- notwithstanding Section 503's use of the term "person" to identify the entity regulated. *Id.*; see also *Van Hulle v. Pac. Telesis Corp., et al.*, 124 F.Supp. 2d 642, 644-47 (N.D. Cal. 2000); *Andonian v. Auto Alliance Int'l, Inc.*, No. 01-cv-73918, 2003 U.S. Dist. LEXIS 26159 (E.D. Mich. Feb. 25, 2003) (unpublished).[13]

In *Van Hulle*, the plaintiff sued Cigna, an entity that had contracted with his employer to administer its employee health insurance benefits, alleging claims of discrimination under Title

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[12] The ADA was initially enacted as Public Law 101-336 and organized into Titles I through V. When the ADA was codified as 42 U.S.C. § 12101, *et seq.*, the "Titles" were renamed "Subchapters." Titles I, II, and III became Subchapters I, II, and III, respectively, and Title V became Subchapter IV.

[13] Virtually all of the courts, including the Sixth Circuit, who have addressed this issue in the context of whether the term "person" in Section 503's retaliation provision creates individual liability in the employment context have held that a plaintiff cannot maintain an ADA retaliation claim against individual defendants who do not otherwise satisfy the definition of "employer" under Title I. See *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999) (addressing question with respect to the anti-retaliation provision of the Rehabilitation Act, which incorporates by reference Section 503(a) of the ADA); *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Stern*, 982 F. Supp. 690; *Cable v. Dep't of Developmental Servs.*, 973 F. Supp. 937 (C.D. Cal. 1997).

III and retaliation under Title V of the ADA. 124 F.Supp. 2d at 642. The court dismissed both claims on the pleadings because its finding that Cigna was neither an "employer" nor "public accommodation" covered by Titles I or III precluded the plaintiff from asserting a retaliation claim against Cigna under Title V. *Id*. at 646-47. In so holding, the court rejected the plaintiff's argument that the plain language of Section 503 expressly extends liability for retaliation to any "person," including individuals or entities not otherwise subject to the ADA. *Id*. at 645-46. The court reasoned that the most reasonable inference to be drawn from the absence of a remedial provision in Section 503 for situations in which the alleged retaliation did not occur with respect to employment, public services, or public accommodations (as set forth in Titles I, II, and III, respectively) is that Congress did not intend to create a cause of action in such cases. *Id*. at 646. The court, therefore, concluded that "a plaintiff cannot maintain an ADA retaliation claim against entities which are not otherwise subject to Subchapters I, II, and III of the ADA." *Id*.

For this very reason, Plaintiff's ADA interference claim likewise fails. As discussed above, Plaintiff's Amended Complaint fails to allege sufficient facts to establish that the ABA is a private entity that "offers" the LSAT under Section 309 of the ADA. Plaintiff has not pled any other basis for finding that the ABA is otherwise subject to Title III -- or any other Title, for that matter -- with respect to the LSAT. As in *Van Hulle*, Plaintiff's failure to sufficiently plead that the ABA is a covered entity under Title III of the ADA precludes his interference claim under Title V as a matter of law.

2. Plaintiff does not allege that the ABA acted with discriminatory animus.

Moreover, Plaintiff's Title V interference claim fails for the additional reason that his Amended Complaint does not allege that the ABA's alleged interference was motivated by discriminatory animus. See *Youngblood v. Prudential Ins. Co*., 706 F.Supp. 2d 831, 839-40

(M.D. Tenn. 2010) (holding that discriminatory animus is an essential element of an interference claim under Section 503(b) of the ADA). Although the Sixth Circuit has never analyzed the sufficiency of an interference claim under Section 503(b) of the ADA, the courts that have done so have used the same analysis applicable to interference claims under the Fair Housing Act ("FHA"). See *Brown v. City of Tucson*, 336 F.3d 1181, 1191 (9th Cir. 2003); *Youngblood*, 706 F.Supp. 2d at 839-40. Both the *Brown* and *Youngblood* courts applied this analysis because the anti-interference provision of the FHA "was itself referenced in a Committee Report preceding the passage of the ADA," and the anti-interference provisions of the ADA and the FHA are not merely similar, but identical, and "similarities between statutory provisions are an indication that Congress intended the provision to be interpreted the same way." *See id.* (citing H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 138 (1990); *Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973)); *compare* 42 U.S.C. § 12203(b) *with* 42 U.S.C. § 3617. As noted by the *Youngblood* court in analyzing the sufficiency of an ADA interference claim, under well-established Sixth Circuit case law, interference with FHA-protected rights is actionable ***only*** if the acts of interference were motivated by discriminatory animus. 706 F.Supp. 2d at 840 (citing *Mich. Prot. & Advoc'y Serv. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994)).[14]

Applying that FHA analysis to the identical anti-interference provision of the ADA allegedly violated here, for the actions of the ABA in promulgating Standard 503 to rise to the level of actionable interference, Plaintiff must allege that they were taken ***because of*** his alleged disability. *See id.* (denying leave to amend to add a claim for interference under Section 503(b) of the ADA as futile because the proposed amended complaint failed to allege discriminatory

[14] See also *Campbell v. Robb*, 162 Fed. App'x 460, 473-74 (6th Cir. Jan. 9, 2006) (unpublished) (rejecting challenge to animus requirement based on plain language of § 3617 -- which, like § 12203(b) only requires that the interference be "on account of" the exercise or enjoyment of protected rights -- as contrary to the law of the circuit established in *Babin*).

animus). Plaintiff's Amended Complaint contains no such allegation. Plaintiff's allegation that the ABA "has been, and continues to be aware of, the discriminatory effects of their accreditation requirements and yet has taken no action to mitigate the effects of its policy," (Dkt. Entry #15, ¶ 65), falls short of alleging that the ABA promulgated (and continues to enforce) Standard 503's "valid and reliable" test requirement with the ***intent*** or ***motivation*** to discriminate against Plaintiff and other visually impaired applicants based on their alleged disabilities. Plaintiff notably does not allege that the ABA requires that the LSAT -- or any other "valid and reliable" test -- include those logic game questions that he contends are discriminatory. Because Plaintiff does not claim that the ABA's alleged interference was motivated by discriminatory animus, his Amended Complaint fails to state a claim against the ABA for a violation of Title V of the ADA, and the Court must dismiss it under Rule 12(b)(6).

V. CONCLUSION

For all of 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 Amended Complaint in its entirety with prejudice.

Respectfully Submitted,

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Dated: September 19, 2011

I hereby certify that on September 19, 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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