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

ANGELO BINNO,

Plaintiff,

-vs-

THE AMERICAN BAR ASSOCIATION,

Defendant.

Honorable Denise Page Hood

Case 2:11-cv-12247

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DEFENDANT'S RESPONSE TO MICHIGAN ATTORNEY GENERAL BILL SCHUETTE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Should the Court allow Michigan Attorney General Bill Schuette to file a brief as amicus curiae in this case?

   The ABA Answers: "It does not object to the Attorney General's request."

2. Should the Court disregard the arguments raised in the Attorney General's proposed amicus curiae brief as irrelevant to its ruling on the ABA's Motion to Dismiss Plaintiff's Amended Complaint under FED. R. CIV. P. 12(b)(1) or (12)(b)(6)?

   The ABA Answers: "YES."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

1. M.C.L. § 14.28
2. FED. R. CIV. P. 12(b)(1)
3. FED. R. CIV. P. 12(b)(6)

I. ARGUMENT

A. The ABA Does Not Object To The Attorney General's Request To File A Brief As Amicus Curiae.

Defendant American Bar Association (the "ABA") does not object to Michigan Attorney General Bill Schuette's (the "Attorney General") request to file a brief as an amicus curiae in this case. The Attorney General has broad statutory authority to appear on behalf of the people of Michigan in any cause or matter in which he determines that the people may have an interest. M.C.L. § 14.28. If the Court is inclined to grant his request for leave to file his proposed amicus brief, the ABA recognizes the Attorney General's participation in this matter as an impartial amicus curiae.

B. The Arguments Raised By The Attorney General In His Proposed Amicus Curiae Brief Are Irrelevant To The Court's Ruling On The ABA's Motion To Dismiss Plaintiff's Amended Complaint.

Despite concurrence that there may be a public interest, the Attorney General's stated interest in this case is attenuated.[1] According to his proposed brief, discovery is needed to determine "whether intervention by the Attorney General is [even] necessary."[2] (Dkt. Entry #25-1 at 3). The Attorney General urges the Court to deny "summary judgment[3] and allow discovery" because "[d]iscovery will assist in assessing the factual support for Mr. Binno's

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[1] Plaintiff's Amended Complaint notably does not allege a violation of any Michigan state statute.

[2] It is unclear why, then, the Attorney General chose to seek leave to file an amicus brief at this stage of the litigation, particularly when admittedly neither he nor anyone in his office interviewed either Plaintiff Angelo Binno ("Plaintiff" or "Binno"), the ABA, the Michigan law schools that allegedly denied Plaintiff admission, or the publisher of the LSAT -- the Law School Admission Council ("LSAC"), and no complaint or charge was filed with any Michigan state court or agency. Perhaps the Attorney General's only sources of information were Plaintiff's Amended Complaint and Plaintiff's attorney.

[3] In his requests for relief, the Attorney General asks the Court to deny the ABA's Motion for Summary Judgment. He never explicitly takes a position on the ABA's pending Motion to Dismiss. And, he makes no mention of the ABA's argument that Plaintiff lacks standing to bring his claims against the ABA.

allegations." (*Id.* at 3, 6, 15). The Attorney General argues that "[w]ithout discovery, ... it is difficult to assess Mr. Binno's allegations," (*id.* at 6), because, "at the pleadings stage, there is insufficient information to draw conclusions," (*id.* at 10-11). This argument fails to recognize the fact that, first and foremost, the ABA filed a Motion to Dismiss Plaintiff's Amended Complaint under FED. R. CIV. P. 12(b)(1) for lack of standing and FED. R. CIV. P. 12(b)(6) for failure to state a claim. When ruling on this Motion, the Court must assess Plaintiff's allegations without discovery, and if his pleadings are insufficient to state claims that are "plausible on [their] face," they must be dismissed. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp, v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff simply may not use the discovery process to search for facts to cure his deficient pleadings. *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). Therefore, the Attorney General's arguments about what facts discovery "could uncover" are irrelevant to the Court's disposition of the ABA's pending Motion to Dismiss.

The Attorney General also contends that whether the ABA "offers" the Law School Admission Test ("LSAT") within the meaning of Section 309 of the Americans with Disabilities Act ("ADA") "is an undeveloped legal issue that will depend on facts uncovered during discovery." (Dkt. Entry #25-1 at 14). But whether Plaintiff has pled sufficient facts that, if presumed true, establish that the ABA "offers" the LSAT is a legal question of statutory interpretation to be decided by the Court based on the pleadings alone. Here, Plaintiff's assertion that the ABA "offers" the LSAT rests solely on the alleged facts that the ABA reviewed and approved the LSAT as valid and reliable in compliance with Standard 503 of its Standards for Approval of Law Schools. (Dkt. Entry #15, ¶¶ 47-49). No discovery is necessary for the Court

to hold as a matter of law that the ABA's mere recognition of the LSAT as a valid and reliable test does not make it an offeror of the LSAT within the meaning of Section 309.

The Attorney General seems to rely heavily on the use of the term "selected" in the applicable federal regulations to argue that Plaintiff's alleged facts may amount to "selecting, and therefore offering, for purposes of the ADA...." (Dkt. Entry #25-1 at 13-14). But the Attorney General fails to recognize that the term "selected" in the regulations neither defines nor modifies what it means to "offer" an examination covered by Section 309. *See* 28 C.F.R. § 36.309(b)(1)(i). The cited regulation provides, in relevant part:

> (1) **Any private entity offering an examination** covered by this section must assure that --
>
> (i) The examination is **selected and administered** so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

28 C.F.R. § 36.309(b)(1)(i) (emphasis added). Thus, the stated obligation to "select" (and "administer") an examination so as to best ensure that it tests the aptitude or achievement level of an individual with a disability rather than reflecting that individual's impairment **only applies to a "private entity offering an examination" in the first place**. *See id.* That is, one must be an "offeror" of the LSAT within the meaning of the statute before one has a duty to select and administer the test in accordance with the regulations. Because the ABA does not "offer" the LSAT within the plain, ordinary meaning of that word,[4] it is irrelevant if the ABA somehow

[4] No statutory definition exists for the term "offer." So the word must be interpreted according to its plain, ordinary meaning, see *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010), which when used in this context is "to make available" or to "afford." (Dkt. Entry #17 at 11).

"selects" the LSAT by recognizing it as a valid and reliable test. Plaintiff's claims must fail as a matter of law because he simply does not (and cannot) allege sufficient facts to establish that the ABA "offers" the LSAT within the meaning of Section 309 of the ADA.

II. CONCLUSION

Thus, although the ABA does not object to the Attorney General's filing of a brief as amicus curiae, it respectfully requests that the Court disregard the arguments raised by the Attorney General in his proposed brief as irrelevant to its ruling on the ABA's Motion to Dismiss Plaintiff's Amended Complaint.

Respectfully Submitted,

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Dated: November 23, 2011

I hereby certify that on November 23, 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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