

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **JONATHAN ALVAREZ-VEGA ON**
4 **BEHALF OF HIS MINOR, E.A.L.,**

5 **Plaintiff,**

CIVIL NO. 17-1601 (GAG)

6 **v.**

7 **CUSHMAN & WAKEFIELD**
8 **/PROPERTY CONCEPTS**
9 **COMMERCIAL et al.,**

10 **Defendants.**

11 **OPINION AND ORDER**

12 Jonathan Álvarez Vega, on behalf of his minor child, E.A.L., sued Cushman & Wakefield
13 /Property Concepts Commercial (C&CW/PCC), Caribbean Cinemas of Guaynabo Corp., Cinemas
14 Management of Puerto Rico, Inc., and Caribbean Cinema Corporation for violating Title III of the
15 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189 *et seq.* (2015). (Docket No. 1
16 ¶1). Plaintiff seeks injunctive and declaratory relief, and attorneys' fees and costs. *Id.* ¶¶2-3.
17 Presently before the Court is Defendants' motion to dismiss under Federal Rules of Civil Procedure
18 12(b)(1) and 12(b)(6). (Docket No. 16). The Court ordered Plaintiff to amend the complaint to
19 include the dates when the alleged injury occurred. (Docket No. 19). After reviewing the parties'
20 submissions and pertinent law, the Court **DENIES** Defendants' motion to dismiss.

21 **I. Amended Complaint**

22 Before addressing Defendants' motion to dismiss, the Court will address Plaintiff's amended
23 complaint. Rule 12(e) of the Federal Rules of Civil Procedure allows the Court to order Plaintiff to
24 file "a more definite statement." FED. R. CIV. P. 12(e). If Plaintiff disobeys the Court's order, the
Court may strike the pleading or issue any other appropriate order. *Id.* Pursuant to Rule 12(e), the

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1 Court ordered Plaintiff to file an amended complaint specifying the date when the alleged injury
2 occurred. (Docket No. 19). Plaintiff complied with the Court’s order and submitted an amended
3 complaint with the relevant date. (Docket No. 20). However, Plaintiff also added factual allegations
4 regarding additional barriers and Caribbean Cinemas’ website not included in the original complaint.
5 (Docket No. 20 ¶¶ 11-12). These amendments go beyond the scope of the Court’s order. Because
6 Rule 12(e) enables the Court to issue any appropriate order if Plaintiff disobeys, the Court will ignore
7 all the changes except the date of the alleged injury from Plaintiff’s amended complaint.

8 If Plaintiff wishes to amend the complaint and add new allegations, he shall seek the
9 opposing party’s written consent or the Court’s leave per Federal Rule of Civil Procedure 15. FED.
10 R. Civ. P. 15(a)(2).

11 **II. Standard of Review**

12 As courts of limited jurisdiction, federal courts must construe their jurisdictional grants
13 narrowly. Destek Grp. v. State of N.H. Pub. Utils. Comm’n, 318 F.3d 32, 38 (1st Cir. 2003).
14 Consequently, the party asserting jurisdiction carries the burden of showing the existence of federal
15 jurisdiction. Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998). When deciding whether to
16 dismiss a complaint for lack of subject matter jurisdiction, the Court “may consider whatever
17 evidence has been submitted, such as . . . depositions and exhibits.” Aversa v. United States, 99
18 F.3d 1200, 1210 (1st Cir. 1996); Torres v. Bella Vista Hosp., Inc., 523 F. Supp. 2d 123, 132 (D.P.R.
19 2007). Motions brought under Rule 12(b)(1) are subject to the same standard of review as Rule
20 12(b)(6). Negrón-Gaztambide v. Hernández-Torres, 35 F.3d 25, 27 (1st Cir. 1994); Torres, 523 F.
21 Supp. 2d at 132.

22 When considering a motion to dismiss for failure to state a claim upon which relief can be
23 granted, the Court analyzes the complaint in a two-step process under the current context-based

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1 “plausibility” standard established by the Supreme Court. See FED. R. CIV. P. 12(b)(6), Schatz v.
2 Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (citing Ocasio-Hernández v.
3 Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011), which discusses Ashcroft v. Iqbal, 556 U.S. 662
4 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). First, the Court must “isolate and
5 ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash
6 cause-of-action elements.” Id. A complaint does not need detailed factual allegations, but
7 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
8 do not suffice.” Iqbal, 556 U.S. at 678-79. Second, the Court must then “take the complaint’s well-
9 [pleaded] (i.e., non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in
10 the pleader’s favor, and see if they plausibly narrate a claim for relief.” Schatz, 669 F.3d at 55.
11 Plausible means something more than merely possible, and gauging a pleaded situation’s plausibility
12 is a context-specific job that compels the Court to draw on its judicial experience and common sense.
13 Id. (citing Iqbal, 556 U.S. at 678-79). This “simply calls for enough facts to raise a reasonable
14 expectation that discovery will reveal evidence of” the necessary element. Twombly, 550 U.S. at
15 556.

16 “[W]here the well-pleaded facts do not permit the court to infer more than the mere
17 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is
18 entitled to relief.’” Iqbal, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)). If, however, the
19 “factual content, so taken, ‘allows the court to draw the reasonable inference that the defendant is
20 liable for the misconduct alleged,’ the claim has facial plausibility.” Ocasio-Hernández, 640 F.3d
21 at 12 (quoting Iqbal, 556 U.S. at 678).

1 **III. Factual and Procedural Background**

2 Plaintiff resides in Bayamón and suffers from muscular dystrophy. (Docket No. 1 ¶¶7-8).
3 As a result, he relies on a wheelchair for mobility in public spaces. Id. ¶7. On October 23, 2016,
4 Plaintiff visited Caribbean Cinemas in Plaza Guaynabo (“Facility”). (Docket No. 20 ¶9).¹ At the
5 Facility, he encountered numerous barriers, such as the lack of van-accessible parking space; the
6 lack of an adequate access aisle adjacent to a van-accessible parking space for the disabled; the lack
7 of an adequate number of wheelchair spaces in the assembly area; and an inadequate seating
8 arrangement in the assembly area. (Docket No. 1 ¶9).

9 Plaintiff also alleges that he is aware of other barriers, despite not encountering them
10 personally. Id. ¶10. These barriers concern the dimensions of sales counters, compliance with
11 parking signage, and location of accessible parking spaces. Id.

12 Due to these barriers, Plaintiff claims that he was, and continues to be, deterred from visiting
13 the Facility. Id. ¶11. He believes he needs the type of goods and services offered at the Facility to
14 enjoy movies at Caribbean Cinemas in Plaza Guaynabo, and will return once these barriers are
15 removed. Id. Moreover, Plaintiff believes that Defendants had knowledge of these barriers and
16 enjoy sufficient control and authority to eliminate them, including the financial resources to do so.
17 Id. ¶12-13. Their failure to remove these barriers, Plaintiff alleges, suffices to establish Defendants’
18 discriminatory intent. Id. ¶14.

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22 _____
23 ¹ The Court notes that Plaintiff listed the date as October 23, 2017 in paragraph 1, and October 23, 2016
24 in the ensuing paragraphs. The Court assumes the correct date is October 23, 2016 because the complaint
was filed on May 8, 2017, and, as far as the undersigned is aware, time travel to the future is not yet
possible.

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1 Rodriguez v. Fernandez Bakery, Inc., 255 F. Supp. 3d 334, 338 (D.P.R. 2017) (citing Disabled Ams.
2 For Equal Access, Inc., 405 F.3d at 64) (“a disabled individual deterred from visiting a public
3 accommodation because of architectural barriers in violation of the ADA has suffered an actual and
4 imminent harm.”).

5 In this case, Plaintiff alleges sufficient facts to confer standing because he is currently
6 deterred from returning to the Facility and is sufficiently likely to face the same barriers in the future.
7 (Docket No. 1 ¶11). In his complaint, Plaintiff states that he went to the Facility on October 23,
8 2016 and encountered at least four barriers related to his mobility and use and enjoyment of the
9 Facility. (Docket Nos. 1 ¶9, 20 ¶9). These facts establish that he is currently deterred from
10 patronizing the Facility because of Defendants’ failure to comply with the ADA. Plaintiff also
11 alleges that he will not be able to return until these barriers are removed, and that to date, Defendants
12 have failed to do so. (Docket No. 1 ¶¶11-12). This fact establishes that he will face a similar injury
13 in the future because of Defendants’ existing noncompliance. Therefore, Plaintiff has standing.

14 B. Sufficiency of Plaintiff’s Claim

15 Congress enacted the ADA in order to prohibit discrimination against people with disabilities
16 and “to assure equality of opportunity, full participation, independent living, and economic self-
17 sufficiency for such individuals.” Dudley, 333 F.3d at 303 (citing 42 U.S.C. § 12101(a)(8)). Title
18 III of the ADA prevents privately operated public accommodations from denying disabled
19 individuals “full and equal enjoyment of the goods, services, facilities, privileges, advantages” these
20 places offer. Id. at 303-04.

21 To establish a *prima facie* case under Title III of the ADA, the plaintiff “must demonstrate
22 that (1) he or she has a qualified disability under the ADA, (2) that the defendant operates a place of
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1 public accommodation, and (3) *that the plaintiff was discriminated against as a result of his or her*
2 *disability.*” Medina-Rodriguez, 255 F. Supp. 3d at 341 (emphasis added).

3 Disability discrimination exists when an entity fails “to remove architectural barriers, and
4 communication barriers that are structural in nature, in existing facilities . . . where such removal is
5 readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv). Thus, here Plaintiff must show (1) the
6 existence of barriers, (2) Defendants’ failure to remove them, and (3) that removal is readily
7 achievable. “The term ‘readily achievable’ means easily accomplishable and able to be carried out
8 *without much difficulty or expense.*” Id. § 12181 (9). Factors to consider include:

9 (A) the nature and cost of the action needed under this chapter;

10 (B) the overall financial resources of the facility or facilities involved in the action; the
11 number of persons employed at such facility; the effect on expenses and resources, or
the impact otherwise of such action upon the operation of the facility;

12 (C) the overall financial resources of the covered entity; the overall size of the business
of a covered entity with respect to the number of its employees; the number, type, and
13 location of its facilities

14 Id. If removal is not readily achievable, discrimination nonetheless occurs if the entity fails “to make
such goods, services, facilities, privileges, advantages, or accommodations available through
15 alternative methods if such methods are readily achievable.” Id. § 12182(b)(2)(A)(v).

16 Defendants argue that Plaintiff fails to allege sufficient facts to state a plausible claim for
17 relief under Title III. The Court disagrees. Plaintiff has proffered sufficient facts regarding the
18 existence of architectural barriers, Defendants’ failure to remove them, and that removing them or
19 providing accommodations through alternative methods is “readily achievable.”

20 Plaintiff lists a handful of barriers he encountered at the Facility, as well as other barriers he
21 knows of. (Docket No. 1 ¶¶9-10). He also alleges that Defendants refuse remove these barriers. Id.
22 ¶12. Moreover, Plaintiff alleges “Defendants have the financial resources to remove these barriers
23 from the Facility (without much difficulty or expense).” Id. ¶12. In the alternative, if removal is not

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1 readily achievable, Plaintiff alleges “Defendants violated the ADA by failing to make the required
2 services available through alternative methods, which are readily achievable.” Id. ¶12.

3 Viewed in isolation, these last two allegations weigh against Plaintiff because they are
4 conclusory. The 12(b)(6) standard obliges the Court to “isolate and ignore statements in the
5 complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements.”
6 Twombly, 550 U.S. 544 (2007). Although the Court does not demand detailed factual allegations,
7 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
8 do not suffice.” Iqbal, 556 U.S. at 678-79. In his complaint, Plaintiff has restated the definition of
9 “readily achievable” and one of the factors the Court considers in a conclusory fashion. Namely,
10 that Defendants can remove these barriers without difficulty or expense because they have the
11 financial resources to do so. Furthermore, Plaintiff has not offered any facts that show Defendants’
12 have the overall financial resources to remove these barriers, or of the difficulty or expense of doing
13 so. He has also failed to proffer any facts to support that, if removal is not readily achievable, then
14 alternative methods are.

15 Nevertheless, the Court must take the complaint’s well-pleaded facts as true and draw all
16 reasonable inferences in Plaintiff’s favor. See Schatz, 669 F.3d at 55. This is a “context-specific
17 job that compels the Court to draw on its judicial experience and common sense,” including “‘facts’
18 susceptible to ‘judicial notice.’” Id. (citing Iqbal, 556 U.S. at 678-79). “Nothing about the
19 plausibility standard requires a court to blind itself to what is obvious.” Grajales v. Puerto Rico
20 Ports Authority, 682 F.3d 40, 48 (1st Cir. 2012). Here, Plaintiff’s well-pleaded facts allege that
21 Caribbean Cinemas, one of the defendants, caused Plaintiff’s injuries. It is generally known in
22 Puerto Rico that Caribbean Cinemas is a chain that operates multiple establishments in the region.
23 This fact susceptible to judicial notice suggests it is plausible that Defendants have the financial

1 resources to remove the barriers. Thus, the well-plead allegations in the complaint as a whole “raise
2 a reasonable expectation that discovery will reveal evidence” of Defendants’ financial resources and
3 whether removing the barriers is readily achievable. Twombly, 550 U.S. at 556. This expectation,
4 in turn, makes Plaintiff’s claim for relief plausible.

5 This holding is consistent with the Court’s precedent. In Medina-Rodriguez, the plaintiff
6 suffered from a walking disability, and sued a bakery under the ADA. 255 F. Supp. 3d at 337. He
7 alleged that removing barriers (similar to the ones in this case) was readily achievable, but the
8 defendants moved to dismiss because he failed to specify why. Id. The Court agreed that “Medina
9 fails to specify exactly how each of the barriers would be easily removed.” Id. at 343. Nevertheless,
10 the Court looked at the alleged barriers and drew on “its judicial experience and common sense”.
11 Id. (quoting Torres v. Junta De Gobierno de Servicio de Emergencia, 91 F. Supp. 3d 243, 249 (D.P.R.
12 2015)). It was plausible, the Court held, “that removing the alleged barriers is readily achievable,
13 including modifying parking lot spaces, adding seating in the food court accessible to persons with
14 disabilities, and adding grab bars and accessible restroom signs.” Id. The same is true here.

15 **V. Conclusion**

16 For the reasons above, Defendants’ motion to dismiss at Docket No. 16 is **DENIED**.

17 **SO ORDERED.**

18 In San Juan, Puerto Rico, on this 14th day of November, 2017.

19 *s/ Gustavo A. Gelpí*
20 GUSTAVO A. GELPI
21 United States District Judge
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