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

ANGELO BINNO, Plaintiff, v. THE AMERICAN BAR ASSOCIATION, Defendant.	)	Honorable Denise Page Hood Case No.: 2:11-cv-12247

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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

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QUESTIONS PRESENTED

1. Should the Court dismiss the Plaintiff's Amended Complaint for lack of standing despite his properly alleging the three necessary elements to form a constitutional basis for standing: (1) That he has suffered an actual injury in being forced to take a discriminatory exam prior to applying to law school, (2) That his being forced to take the exam is "fairly traceable" to the actions of the Defendant, and (3) That a favorable ruling from this Court would redress his inability to apply to law school without taking a discriminatory exam?

   Plaintiff Angelo Binno Answers: "NO"

2. Should the Court dismiss the Plaintiff's Amended Complaint, or in the alternative grant summary judgment to the Defendant on Count I, violations of Title III of the Americans with Disabilities Act when Plaintiff has sufficiently pled facts to establish that the Defendant is a covered entity and is "offering" a discriminatory examination within the meaning of the Act, and Plaintiff has yet to have the opportunity to conduct discovery in this matter?

   Plaintiff Angelo Binno Answers: "NO"

3. Should the Court dismiss the Plaintiff's Amended Complaint on Count II, violations of Title V of the Americans with Disabilities Act when Plaintiff has sufficiently pled facts to establish that Defendant has "interfered" with rights afforded to him under the Act?

   Plaintiff Angelo Binno Answers: "NO"

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12. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978)
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14. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)
15. *Tcherepnin v. Knight*, 389 U.S. 332 (1967)
16. *Turner v. Fouche,* 396 U.S. 346 (1970)
17. *Warth v. Seldin*, 422 U.S. 490 (1975)
18. 42 U.S.C. § 12203(b)
19. 42 U.S.C. § 12189
20. 42 U.S.C. § 12101
21. Fed. R. Civ. Pro. 12(b)(6)
22. Fed. R. Civ. Pro. 56

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I. INTRODUCTION

Plaintiff Angelo Binno ("Plaintiff") is a 29-year-old blind man who has had his dreams of attending law school and pursing a legal career eviscerated by the illegal and patently discriminatory actions of the Defendant the American Bar Association ("Defendant"). Defendant has promulgated rules and procedures for the approval of law schools which discriminate against Plaintiff, and other visually impaired and blind law school applicants, by forcing them to take an illegally discriminatory entrance exam, the Law School Admission Test ("LSAT"), which they have deemed to be "valid and reliable," as a condition of applying to law school. Furthermore, the Defendant illegally threatens to punish any school which waives this discriminatory exam for the blind or visually impaired by enforcing sanctions, up to and including, loss of the school's accreditation. The LSAT contains a substantial number of visually biased questions, which require diagramming and an understanding of spatial relationships, skills which blind people are inherently disadvantaged at demonstrating. Rather than testing Plaintiff's aptitude for the study of law, the exam instead cruelly and needlessly tests a blind man's ability to draw pictures, which is absurd, unwarranted, and at variance with long-standing law. Having already denied Plaintiff the opportunity to pursue a legal education, Defendant now seeks to also deny Plaintiff his day in court. Defendant has raised a series of meritless and baseless arguments in its Motion to Dismiss, or alternatively Motion for Summary Judgment in an attempt to escape liability for their outrageous and illegal behavior. Plaintiff has adequately pled his standing to bring this action and has properly pled claims against the Defendant under Titles III and V of the Americans with Disabilities Act of 1990, and therefore the Defendant's Motion should be denied.

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II. FACTUAL ALLEGATIONS

Plaintiff, a 28-year-old blind man has overcome many challenges in life despite his disability. (See Dkt. Entry #15, ¶ 6). His academic accolades would be deemed impressive if achieved by any sighted individual. Plaintiff is a trilingual, who finished high school an entire year early, and worked for the United States Department of Homeland Security, where he was awarded a high-level security clearance. (*Id.* ¶ 26). Yet despite Plaintiff's academic prowess and preparedness for a career in law, Plaintiff cannot gain acceptance into a single law school. (*Id.* ¶ 24). Not because Plaintiff lacks the qualifications for law school acceptance, but because the Plaintiff, a blind man, cannot draw pictures. (*Id.* ¶ 22).

Plaintiff took the LSAT twice, each time facing the same futile result, both during the test and after, when the Plaintiff was denied admission to three law schools in Plaintiff's home state. (*Id.* ¶ 24). One quarter of the LSAT requires Plaintiff to draw pictures. (*Id.* ¶ 19). The logic games section of the LSAT forces an examinee to diagram information in the forms of lists, charts, and other visual aids in order to succeed. (*Id.*). Prior to 1997, law schools exercised discretion to waive the LSAT for blind applicants. (*Id.* ¶ 12). Now Standard 503 prevents schools from exercising that discretion. (*Id.*). Since 1997, drawing pictures in the form of logic game diagrams is required for blind law school applicants. (*Id.*).

Plaintiff alleges that the Defendant has enacted accreditation standards for law schools which discriminate against the blind. (*Id.* ¶ 1). Defendant's standards require law schools to administer a discriminatory entrance exam. (*Id.* ¶ 2). Under Standard 503 the LSAT is the only test deemed "valid and reliable." (*Id.*). A school which endeavors to waive the discriminatory LSAT exam faces sanctions up to loss of accreditation by Defendant. (*Id.*). Defendant has full authority over the LSAT, by requiring it, approving its content, and thereby "offering" it to

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potential law school applicants, as a condition precedent to gaining law school acceptance. (*Id.* ¶ 49). Plaintiff wishes to apply to law school free from the stigma of a low score on an exam which discriminates against him. (*Id.* ¶ 7).

III. RESPONSE TO DEFENDANT'S ADDITIONAL FACTS

In a thinly veiled attempt to disguise their role in requiring blind applicants to take an exam which requires them to draw pictures as a condition of applying to law school, Defendant attempts to allege additional facts in their Motion to Dismiss (Dkt. Entry #17 at 4). While Defendant calls these additional statements "facts," they are most obviously not facts but rather are conclusions and arguments which go well beyond the pleadings in the case at bar. Such additional arguments disguised as "facts" should not be considered by the Court in deciding a Rule 12(b)(6) motion. *Bomarko, Inc. v. Hemodynamics, Inc.*, 1991 U.S. Dist. LEXIS 7459 (W.D. Mich. June 4, 1991) ("The Sixth Circuit Court of Appeals recognizes that outside materials should not be considered by this Court on a motion to dismiss," citing *Sims v. Mercy Hospital of Monroe*, 451 F.2d 171 (6th Cir. Mich. 1971)).

Furthermore, the additional facts rely in large part on the Declaration of Hulett H. Askew ("Askew Declaration") (Dkt. Entry #17, **Exhibit B**) the content of which is the subject of Plaintiff's Motion to Strike (Dkt. Entry #19) as it contains evidence without a source in violation of Fed. R. Civ. Pro. 56(c)(I)(A). Additionally, the Askew Declaration contains many conclusions unsupported by facts to show that the declarant is testifying from personal knowledge, and the remaining testimony is largely inadmissible hearsay in violation of Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802. In light of Plaintiff's evidentiary objections to the Askew Affidavit, the Court should not consider the additional facts put forth by the Defendant in deciding their Motion.

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IV. ARGUMENT

A. STANDARD 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. Pro. 12(b)(1). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). A motion to dismiss for failure to state a claim tests the legal sufficiency of the allegations stated in the Complaint. Fed. R. Civ. Pro. 12(b)(6). "Factual allegations must be enough to raise a right to relief above the speculative level". *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).

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. Pro. 12(d). A motion for summary judgment can only 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. Pro. 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). "Rule 56(c) [of the Federal Rules of Civil Procedure] mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an

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element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

B. Plaintiff has Standing to Bring His Claims Against the ABA

"[A] party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," [which] mean[s] an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical, (2) a causal relationship between the injury and the challenged conduct, [which] mean[s] that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," and (3) a likelihood that the injury will be redressed by a favorable decision, [which] mean[s] that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative." *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 663-64 (1993). "The question of standing . . . concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Plaintiff's complaint alleges the facts necessary to establish an injury in fact, fairly traceable to the illegal acts of Defendant, which will likely be redressed by a favorable decision in this case. He has met the constitutional requirement to invoke the jurisdiction of this Honorable Court.

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1. Plaintiff has Suffered Actual Injury as a Result of Defendant's Requirement that He Take a Discriminatory Exam Before Applying to Law School

"[F]ederal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). Defendant cites *Warth* to establish that standing is "substantially more difficult to establish" where the plaintiff is not himself the object of the defendant's challenged action. *Warth v. Seldin*, 422 U.S. 490, 505 (1975). However, the facts in *Warth* are wholly distinguishable from the facts of this case. As the Court observed in *Warth*:

> The complaint refers to no specific project of any of [the association's] members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by [the association's] members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, [the association] has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

Id., at 516. The petitioners in *Warth* did not allege to have ever applied for any permit or variance, let alone be denied one. Here at least one law school that Plaintiff applied to has considered a policy to waive the LSAT for Plaintiff, and other blind and visually impaired individuals, but was thwarted in their attempts to do so by the Defendant. (**Exhibit A.** Declaration of David R. Moss, ¶ 6)[1]. The accredited law school that denied this waiver did so because it could not waive the LSAT requirement without violating Defendant's Standard 503. *Id.* More analogous to this case is *Ne. Florida Chapter of Associated Gen. Contractors of Am.*, where the Supreme Court found that Plaintiffs had the standing necessary to invoke federal

[1] Defendant's Motion (Dkt. Entry 17) is styled as both a Motion to Dismiss under Fed. R. Civ. Pro. 12(b)(6), as well as a Motion for Summary Judgment under Fed. R. Civ. Pro. 56. In opposing a motion for summary judgment, Plaintiff is permitted to go outside the pleadings and submit declarations based on the "personal knowledge" of the declarant. (Fed. R. Civ. Pro. 56(c)(4)).

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jurisdiction because the discriminatory actions of the Defendant "erected a barrier," making it more difficult for the Plaintiffs to compete with others for government contracts on an equal footing. *Ne. Florida Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 666. In reconciling its decision with *Warth*, the court explained: "*Warth* did not involve an allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit." Here, Plaintiff clearly alleges that a discriminatory admission test, required by Defendant, has prevented him from competing on an equal footing with other applicants for admission to an accredited law school. *Id.* at 667. The facts here are more closely analogous with those of *Ne. Florida*, and should be governed by that standard. While the defendant ABA is not a government entity, the reasoning of the Supreme Court in *Ne. Florida* is applicable to the case at bar:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Id. at 666. By requiring the LSAT to be taken by all law school applicants, and considered for admissions purposes by all accredited law schools, the ABA has unequivocally "erected a barrier" for blind and visually impaired applicants, such as Plaintiff, to gain admission to an accredited law school and pursue a fulfilling legal career. (Dkt. Entry #17-2 at 14). Congress enacted the Americans With Disabilities Act of 1990 ("ADA") to eliminate this very evil:

> It is the purpose of this chapter-- **(1)** to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; **(2)** to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; **(3)** to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and **(4)** to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

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42 U.S.C. § 12101. In *Turner v. Fouche,* 396 U.S. 346 (1970), a Georgia law limited school board membership to individuals who owned property. Plaintiffs, individuals who did not own property, were found to have standing to bring their claim even though they could not make an affirmative showing that but for Georgia's law, they would gain membership to the school board. *Id.* at 362. Justice Thomas later explained, "although we did not say so explicitly, our holding [in *Turner*] did not depend upon an allegation that [Plaintiff] would have been appointed to the board but for the property requirement. All that was necessary was that the plaintiff wished to be considered for the position." *Ne. Florida Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 664. Defendant claims that Plaintiff's inability to gain admission to an accredited law school is not a concrete injury because Plaintiff cannot affirmatively prove he would gain admission but for Defendant's conduct. This expectation has been denied by the Supreme Court as it is flatly impossible to meet.

2. Plaintiff's Injury is Fairly Traceable to the Challenged Actions of the Defendant

Defendant cites the language of *Lujan*, in that 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 v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In *Lujan*, petitioners challenged Defendant's new interpretation of a rule and sought to restore the previous interpretation, which would regulate the treatment of endangered species worldwide, as opposed to only in the US and on the high seas. *Id.* at 558-59. Justice Scalia, delivering the opinion of the court, found the petitioners to lack standing. *Id.* at 578. In *Lujan*, petitioners' alleged injury was that they would not be able to travel the world (specifically Egypt) to see the endangered "nile crocodile" if it was not protected worldwide. The Court acknowledged that "the desire to use or observe an animal species, even for purely

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esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Id.* at 562-63. The Court held that this injury did not meet the standing threshold because the court did not view it as an "imminent" injury, due to petitioners' failure to allege definite plans to visit Egypt in the future to see this animal:

> [A]ffiants' profession of an "inten[t]" to return to the places they had visited before-where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species-is simply not enough. Such "some day" intentions-without any description of concrete plans, or indeed even any specification of *when* the some day will be-do not support a finding of the "actual or imminent" injury that our cases require.

Id. at 564. Plaintiff here has done more than show "definite plans" to apply to law school, he *has applied.*

The actions of the law schools not before this court are far from *independent*. The ABA, via Standard 503, requires accredited law schools to use applicants' LSAT scores to assist them in admissions decisions. (Dkt. Entry #17-2 at 15). While Standard 503 may not prescribe a particular weight to the LSAT, the plain language of this standard requires law schools to apply at least *some* weight to LSAT scores, thus discriminating to at least *some* degree against blind and visually impaired applicants. *Id.* Defendant argues that it should be immune from liability for "offering" a discriminatory test because it does not "prescribe the weight" to which law schools rely on the score. This theory requires the Court to condone discrimination so long as it is purportedly done in small doses – such regressive thinking undermines the spirit and stated intent of the ADA and runs contrary to the very notions of justice and fundamental fairness that should define the profession that Plaintiff seeks to enter. When an accredited law school to which Plaintiff applied was unable to grant him, or others similarly situated, a waiver, the law school was acting in accordance with Defendant's unlawful Standard 503 in order to avoid sanctions. (**Exhibit A**. Declaration of David R. Moss, ¶ 6).

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Defendant cites as an analogous case, *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), in which the complaint "alleged only that petitioners, by the adoption of Revenue Ruling 69-545, had "encouraged" hospitals to deny services to indigents." *Id.* at 42. The Court found that it would be "purely speculative" to assume that the respondents' injury would be redressed by a favorable decision. *Id.* at 42-43. Plaintiff's complaint here does not allege that Defendant merely "encourages" law school applicants to take the LSAT. Nor does Plaintiff's complaint allege that Defendant "encourages" accredited law schools to use LSAT scores to assist in admissions decisions. This is because the ABA does not merely "encourage" law school applicants to take the LSAT, nor does it merely "encourage" law schools to use LSAT scores to assist them in admissions decisions, the ABA *requires* it. (Dkt. Entry #17-2 at 14). Defendant's requirement imposes a direct burden on Plaintiff's ability to compete on an equal footing with others by requiring him and others similarly situated to take a test that discriminates against the blind and visually impaired.

3. Plaintiff's Inability to Apply for Admission to an Accredited Law School Without Taking a Discriminatory Exam will be Redressed by a Favorable Ruling from this Court

In order to have standing, Plaintiff must show that it is likely his injury will be redressed by a favorable decision. *Simon*, 426 U.S. at 38. He need not show that he will certainly gain admission to an accredited law school in the absence of the ABA's LSAT requirement. In *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), the Supreme Court acknowledge that when a Defendant's actions inhibit a Plaintiff from competing on an equal basis for school admissions, Plaintiff need not show that he would have certainly gained admission to a school but for Defendant's discrimination:

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The

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> constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim . . . The question of Bakke's admission *vel non* is merely one of relief.

Id. at 280-81. Plaintiff possesses many positive attributes that would be looked favorably upon during the law school admissions process, including his ability to graduate from college despite the challenges presented by his blindness, his ability to speak three languages, and his work experience at the United States Department of Homeland Security. (**Exhibit A**. Declaration of David R. Moss, ¶ 7). It is likely that but for Defendant's LSAT requirement, Plaintiff would be able to gain admission to an accredited law school. Plaintiff has alleged an injury, actual or imminent, fairly traceable to the conduct of Defendant, which will likely be redressed by a favorable decision from this Honorable Court. Therefore, Plaintiff has met the necessary constitutional requirements of standing to invoke this Court's jurisdiction.

C. Defendant is a Private Entity "Offering" a Discriminatory Examination in Violation of Title III of the Americans with Disabilities Act

The purpose of the ADA is not "to allow individuals to advance to professional positions through a back door. Rather, it is aimed at rebuilding the threshold of a profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering the front door." *Gonzalez v. Nat'l Bd. of Med. Examiners*, 60 F. Supp. 2d 703, 705-06 (E.D. Mich. 1999). Title III of the ADA states, in relevant part that:

> 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. "[Section] 12189, despite being housed in Title III, applies broadly to all "persons" and not just public accommodations." *Bonnette v. Dist. of Columbia Court of Appeals*, CIV.A. 11-1053 CKK, 2011 WL 2714896 (D.D.C. July 13, 2011).

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"[T]o succeed on a claim under the ADA, plaintiff must show (1) that she is disabled, (2) that her requests for accommodations are reasonable, and (3) that those requests have been denied." *D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993). "This test is applied in a case by case, fact specific fashion, with the focal point usually being whether the denied request for accommodation was reasonable in light of the ADA's purpose to place disabled individuals on an equal footing without giving them an unfair advantage." *Id.* at 222. It is undisputed that Plaintiff, a legally blind individual, is disabled. Plaintiff has simply requested a waiver from a discriminatory examination, incapable of "validly and reliably" assessing his capability to satisfactorily complete law school. Defendant, via Standard 503, has denied this reasonable request. (Dkt. Entry #15-5 at 2). Courts reach their decisions in these cases based on the circumstances presented and the objectives of the ADA. *Agranoff v. Law Sch. Admission Council, Inc.*, 97 F. Supp. 2d 86, 87 (D. Mass. 1999).

1. Plaintiff has Alleged Facts Sufficient to Establish that the ABA "Offers" the LSAT

"[T]he question of whether [Defendant] offers the [examination] is a factual one not appropriate for resolution through Rule 12(b)(6)." *Bonnette*, 2011 WL 2714896 (D.D.C. July 13, 2011). This was especially true in *Bonnette* where, as the court noted, Plaintiff has requested the opportunity to engage in discovery on the issue. *Id.* Through its amended complaint however, Plaintiff has alleged the facts necessary to establish that Defendant is indeed a private entity that "offers" the LSAT, and is therefore subject to Title III of the ADA.

Defendant cites the dictionary definition of the word "offer" – "to make available" – conveniently ignoring case law that has interpreted the word "offer" for purposes of Title III of the ADA. (Dkt. Entry #17 at 21). Defendant's position is especially troubling considering the ADA is a remedial statute, and should be broadly construed to effectuate its purpose. *Steger v.*

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Franco, Inc., 228 F.3d 889, 894 (8th Cir. 2000). Were this Court to adopt such a narrow approach as "offered" by Defendant, the broad, remedial nature of the ADA would stand for nothing. In stating its purpose behind the promulgation of the ADA, Congress made clear its intention that the provisions of the ADA be given a broad, sweeping interpretation: "[T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). It is of course, a well-known canon of statutory construction that "remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Defendant does not have to literally "make available," or "administer" an examination to be subject to Title III, rather, "to the extent that [Defendant] exercises control over the manner in which the examination is given, it is subject to § 12189." *Bonnette*, 2011 WL 2714896 (D.D.C. July 13, 2011). Defendant has shown an obvious exercise of control over the LSAT, and over accredited law schools forced to use applicants' LSAT scores for admissions purposes. Law schools cannot exempt an individual from taking the LSAT without threat of sanctions by Defendant. (**Exhibit A**. Declaration of David R. Moss, ¶ 6). While Defendant denies publishing or administering the LSAT, it admits that it has reviewed and approved the LSAT as a "valid and reliable test to assist the school in assessing the applicant's capability to satisfactorily complete the school's educational program." (Dkt. Entry #17-2 at 14). Surely, if the LSAT must be approved by the ABA to be used for admissions purposes, the ABA exercises control in how the LSAT is formatted and administered. Further, interpretation 503-1 goes on to say that a law school which ventures to use an admission test besides the LSAT bears the burden of proving the test's validity and reliability to the ABA. *Id.* Defendant's "final say" in whether the LSAT is a "valid and reliable" admission test can be

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described as nothing short of ultimate control over the LSAT, its contents, format, administration, and use by accredited law schools bound by Defendant's Standard 503.

The tactics deployed by Defendant to escape Title III liability in the case at bar have been attempted before, and proved futile. Defendant attempts to escape Title III liability due to a technicality: it does not "make the examination available" to test-takers. (Dkt. Entry #17 at 21). Defendant has created a new *out of thin air* test to determine whether or not a private entity "offers" an examination for purposes of Title III. This is especially troubling considering Defendant's authoritative source for this test: the Merriam-Webster online dictionary. *Id.*

Another Defendant previously attempted to escape Title III liability in strikingly similar fashion, because it was not the entity that technically "administered" (or *made available*) the examination at issue. See *Elder v. Nat'l Conference of Bar Examiners*, C-11-00199-SI, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011). The court did not allow this technicality to preclude a finding that Defendant "offered" the examination for the purposes of Title III:

> Viewing the allegations in the light most favorable to plaintiff, the Court cannot say that [Defendant] does not "offer" the [examination] within the meaning of the ADA as a matter of law. The fact that the State Bar technically administers the California bar exam does not preclude a finding that [Defendant] is the entity which offers the [examination] or co-offers the [examination] with the State Bar.

Elder, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011).

2. Summary Judgment is Not Proper as Questions of Material Fact Exist and Plaintiff is Entitled to Discovery to Further Establish that Defendant "Offers" the LSAT

"Rule 56(c) [of the Federal Rules of Civil Procedure] mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322. (emphasis added). Plaintiff has properly pled that Defendant indeed "offers" the LSAT for

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purposes of Title III of the ADA. "[T]he question of whether [Defendant] offers the [examination] is a factual one . . ." *Bonnette*, 2011 WL 2714896 (D.D.C. July 13, 2011). Defendant bases its argument that it does not "offer" the LSAT on a dictionary definition of the word "offer," a definition contrary to the interpretation courts have given "offer" insofar as it is related to Title III of the ADA. Plaintiff has met his burden in demonstrating that Defendant does "offer" this examination.

Defendant acknowledges that in *Elder*, the court allowed discovery where "it could not say as a matter of law that the [defendant] did not "offer" the [examination] in light of the plaintiff's specific factual allegations that the [defendant] is the entity that develops the [examination] and controls the format in which it is offered and administered by the State Bar. (Dkt. Entry #17 at 25) (citing *Elder*, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011). Plaintiff has alleged that Defendant exercises complete control over not only the contents of the LSAT through Standard 503, but also requires that LSAT scores must be used by accredited law schools:

- The American Bar Association requires that the Law School Admission Test be offered, has reviewed and approved of the contents of the exam under Standard 503, and imposes harsh sanctions for schools that do not require their applicants to take the examination. (Dkt. Entry #15, ¶ 48).
- By promulgating the ABA standards for Approval of Law Schools, and specifically Standard 503 thereunder, Defendant has "offered" and continues to "offer" a discriminatory examination, within the meaning of Title III of the Americans with Disabilities Act, as they 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).

In *Elder*, the court needed only a "cursory review" of evidence proffered by plaintiff to establish that he was within his right to take discovery and "develop a full factual record on the issue of whether [Defendant] "offers" the [examination] within the meaning of the ADA. *Elder*, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011). Plaintiff has demonstrated that Defendant "offers" the LSAT for the purposes of Title III, or alternatively that at the very least a question of fact exists

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as to whether Defendant "offers" the LSAT for purposes of Title III. Plaintiff has had no opportunity to conduct discovery on the issue of whether Defendant "offers" the LSAT for purposes of Title III, and must be allowed discovery to further establish this allegation.

D. Defendant has Unlawfully Interfered with Plaintiff's Exercise and Enjoyment of Rights Granted and Protected by the ADA

By promulgating Standard 503, effectively coercing accredited law schools into considering the unreliable LSAT scores of the blind and visually impaired, Defendant has interfered with Plaintiff's statutory rights under the ADA. (Dkt. Entry #17-2 at 14). Title V of the ADA states 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). Among other rights afforded to Plaintiff by the ADA, Plaintiff has an explicit right to a non-discriminatory admission examination. § 12189. By "offering" this examination for purposes of Title III of the ADA, Defendant has unlawfully interfered with this right. While Defendant is a private entity subject to Title III of the ADA, Title V, through its plain language, applies to any "person" whether or not they are subject to any other provision of the ADA. § 12203(a).

1. While Defendant is a Private Entity Subject to Title III of the ADA, Plaintiff Need Not Establish this Fact to Allege a Cognizable Title V Interference Claim

Defendant cites *Stern v. Cal. State Archives*, 982 F. Supp. 690 (E.D. Cal. 1997), to establish that Plaintiff cannot maintain an ADA retaliation or interference claim under Title V 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. (Dkt. Entry #17 at 27).

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In *Stern*, the court was handling a 12203(a) retaliation claim in the employee-employer context. *Stern*, 982 F. Supp. at 692-95. The court observed:

> Here the plaintiff complains about retaliation in employment. The ADA refers such claims to Section 12117, which, in turn, refers such claims to the remedial provisions of Title VII. The enforcement provision of Title VII permits actions against an "employer, employment agency, labor organization, or joint labor–management committee. . . . Thus, an individual cannot be held liable for retaliation in the workplace under the ADA except as provided under Title VII.

Id. at 693. Peculiarly however, the opinion does not mention a 12203(b) "interference" claim even *once*. In what can only be explained as the "magic of brackets," Defendant manages to transform the above quoted case into one directly on point with a 12203(b) interference claim: "[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." (Dkt. Entry #17 at 27) (emphasis added). Defendant does not attempt to apply the court's reasoning to an "interference" claim because it cannot. Rather, Defendant assumes, or asks this Court to assume, that a court can be *quoted* as discussing an interference claim when no such claim was at issue in the case. What *Stern* does make clear however, is that "[s]ubchapter III [of the ADA] bans discrimination by public accommodations and incorporates the remedies of Title II of the Civil Rights Act of 1964." *Stern*, 982 F. Supp. at 693. Title II of the Civil Rights Act of 1964 allows, in relevant part, for the following remedies:

> In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

42 U.S.C.. § 12188. Whereas the Defendant in *Stern* were liable under Title V for violations of Title II, the Defendant in the case at bar is similarly liable under Title V for interfering with

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Plaintiff's absolute right to not take a discriminatory test in violation of Title III. Because Defendant ABA is subject to Title III of the ADA, the remedies stated in § 12188 outlined in *Stern* are available to Plaintiff in the case at bar.

Plaintiff has established, *supra*, that Defendant is a private entity subject to Title III of the ADA. Even assuming, *arguendo*, that Plaintiff was unable to make this showing, Defendant would still be subject to Title V of the ADA. Directly on point is *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161 (11th Cir. 2003), a case that actually dealt with a 12203(b) interference claim. In *Shotz*, the court held that "an individual may be sued privately in his or her personal capacity for violating § 12203 in the public services context." *Id.* at 1179-80. This court was not dealing with the employment context, as was *Stern*, it was dealing with the public services context (Title III), as is the case at bar.

2. Plaintiff Need Not Allege that Defendant Acted with Discriminatory Animus

The Sixth Circuit has never analyzed the sufficiency of an interference claim under Title V of the ADA, yet Defendant maintains that discriminatory animus is a required element by citing *Mich. Prot. & Advoc'y Serv. v. Babin*, 18 F.3d 337 (6th Cir. 1994), a case dealing with a Fair Housing Act (FHA) interference claim, not an ADA claim. *Id.* at 346-47. Defendant's contention that an ADA interference claim should be analyzed by an FHA interference claim standard is considered in *Brown v. City of Tucson*, 336 F.3d 1181, 1191 (9th Cir. 2003). Ironically, Defendant makes no mention of the *Brown* court's holding that an ADA interference claim should *not* be analyzed using Title VII standards. *Id.* Thus, Defendant cites to the portion of *Brown* relating ADA interference claims to FHA claims, yet ignores the portion of *Brown* which specifically states that ADA interference claims should not be governed by Title VII analysis. Defendant does this because Title VII analysis was *central* to the *Stern* court's holding

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that individuals were not subject to Title V which distinguishes *Stern* from the case at bar. *Stern*, 982 F. Supp. at 693. This process of selective citing has allowed Defendant to argue that ADA interference claims should be governed by Title VII analysis insofar as they bar suit against individual defendants, but at the same time, should be analyzed by FHA interference standards insofar as they require discriminatory animus. Defendant has handcrafted a jigsaw puzzle of contradictory case law leading to a favorable end result, while ignoring the clear and unambiguous language of the statute.

Directly on point with the case at bar is *Bingham v. Oregon Sch. Activities Ass'n*, 24 F. Supp. 2d 1110 (D. Or. 1998). In *Bingham*, the defendant (Oregon School Activities Association) imposed an "8 semester" rule on high school athletics, prohibiting Plaintiff, a fifth-year senior, from participating in high school athletics. *Id.* at 1112. Plaintiff, a disabled individual, sought a waiver from this rule because engaging in high school athletics helped him cope with his Attention Deficit Disorder. *Id.* Defendant in that case coerced Plaintiff's school, a *third party*, to comply with its regulations and refrain from allowing Plaintiff to engage in high school athletics. The school would be subject to sanctions under Defendant's "restitution rule" if they allowed Plaintiff to engage in high school athletics. *Id.* at 1117. In strikingly similar fashion, schools that deviate from the ABA's regulation of requiring the LSAT are also subject to sanctions. (Dkt. Entry #15 ¶ 15). The *Bingham* court found the plaintiff to have a valid Title V claim.

> Unquestionably, the possibility of sanctions against [the third party] (should its coach play plaintiff in any contests pursuant to the court's preliminary injunction) has a coercive and intimidating effect on plaintiff as he seeks to exercise rights granted by the ADA. [Plaintiff] undoubtedly does not desire to become a cause of anxiety on the team and in the community as the team is threatened with forfeiture of its games should he pursue this litigation.

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Bingham, 24 F. Supp. 2d at 1118. That court found a cognizable Title V claim where Plaintiff faced the possibility of anxiety. There is far more at stake in the case at bar. Defendant's unlawful interference is denying Plaintiff, and others similarly situated, the opportunity to pursue a legal education and career. Until this illegal conduct is put to rest, blind and visually impaired individuals will continue to be forced to partake in a discriminatory admission examination that simply does not accurately reflect their ability to succeed in law school. Their tainted scores in turn must be considered by accredited law schools, at least to some degree, for admissions purposes. Plaintiff has properly pled that Defendant is a private entity subject to Title III of the ADA, and that through its promulgation of Standard 503, has unlawfully interfered with Plaintiff's rights under the ADA.

V. CONCLUSION

WHEREFORE, Plaintiff prays that this Honorable Court deny Defendant's Motion to Dismiss, or alternatively Motion for Summary Judgment, and grant such further relief as the Court deems just and proper.

Respectfully submitted,

By _____

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Dated: October 17, 2011

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I hereby certify that on October 17, 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.

/s/ Richard H. Bernstein (P58551)
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELO BINNO, Plaintiff, v. THE AMERICAN BAR ASSOCIATION, Defendant.	)	Honorable Denise Page Hood Case No.: 2:11-cv-12247

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INDEX OF EXHIBITS TO
PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Exhibit:

A Declaration of David R. Moss

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Exhibit A

Declaration of David R. Moss

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

ANGELO BINNO, Plaintiff, v. THE AMERICAN BAR ASSOCIATION, Defendant.	)	Honorable Denise Page Hood Case No.: 2:11-cv-12247

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Attorneys for Defendant

DECLARATION OF DAVID MOSS

STATE OF MICHIGAN)
)SS.
COUNTY OF WAYNE)

DAVID R. MOSS, having first been duly sworn, states:

1. The information contained in this affidavit is based on my personal knowledge, except where otherwise stated, and I am competent and able to testify regarding the matters contained herein.
2. I am the Director of Clinical Education and Assistant Professor (Clinical) at the Wayne State University Law School (hereinafter "the Law School"), teaching courses that among others include Disability Discrimination Law and the Disability Law Clinic. I hold a bachelors degree with Honors from Swarthmore College. I received my Juris Doctor degree from the Columbia University School of Law in 1985. I have been a member of the Law School's faculty since 1998.
3. I served as a member of the Law School's Admissions Committee from 2004 to 2009. As a past member of the Admissions Committee, I am familiar with the Law School's admissions policies and procedures, as well as with the portions of the ABA Standards for Approval of Law Schools (hereinafter "the Standards") that govern the admissions policies and procedures of law schools that wish to be accredited by the American Bar Association's Section on Legal Education and Admission to the Bar (hereinafter "the ABA").
4. The Standards, specifically Standard 503, preclude the Law School from considering the application of anyone who has not taken a "valid and reliable" admission test. The Standards presume that the Law School Admission Test (hereinafter "the LSAT") is valid and reliable, but place the burden of proof on law schools that use tests other than the LSAT to either (a) establish that those tests are valid and reliable for law school admissions purposes, or (b) establish that a variance from Standard 503 should be granted.

5. In order to comply with the Standards, the Law School requires all applicants to its J.D. program to take the LSAT as a prerequisite to applying for admission.
6. During my time as a member of the Law School's Admissions Committee, the Dean of the Law School asked the Admissions Committee to exempt a blind individual who had not taken the LSAT from the Law School's requirement that all applicants must take the LSAT as a prerequisite to applying for admission. The Dean's request was predicated on the LSAT containing analytical reasoning questions that allegedly require vision to complete. The Admissions Committee considered the Dean's request, but ultimately concluded that it could not waive the LSAT requirement without violating Standard 503.
7. I have reviewed the facts alleged in the Amended Complaint and believe that the plaintiff possesses many positive attributes that would be looked favorably upon during the law school admissions process, including his ability to graduate from college despite the challenges presented by his blindness, his ability to speak three languages, and his work experience at the United States Department of Homeland Security.
8. If the Law School chose to admit a blind applicant with a low LSAT score based on other information in the candidate's application suggesting that he or she is capable of successfully completing the Law School's educational program, the Law School would be required to include the applicant's low LSAT score in the admissions statistics it reports to the ABA, statistics that are used in calculating the US News and World Report Rankings.

9. A blind applicant's low LSAT score, despite being taken under non-standard conditions and the Law School being cautioned by the Law School Admission Council of its unreliable nature, is part of the applicant's admissions file and is able to be considered by individual members of the Admissions Committee when reviewing the application.

FURTHER AFFIANT SAYETH NOT.

David R. Moss

Subscribed and sworn to before me this
17 day of October, 2011.

Notary Public

TANIA YVETTE BENNETT ALLEN
NOTARY PUBLIC
COUNTY OF WAYNE
My Commission Expires
July 3, 2015
Acting in the County of
STATE OF MICHIGAN