IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-00236-REB-MEH

THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, *et al.*,

Plaintiffs,

v.

SAGE HOSPITALITY RESOURCES LLC, *et al.*,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (DKT. NO. 119, FILED MAR. 21, 2016)

INTRODUCTION

Plaintiffs allege that Defendants Sage Hospitality Resources ("SHR") and Sage Oxford operate hotels and violate the Americans with Disabilities Act ("ADA") by failing to provide wheelchair-accessible hotel transportation, despite providing transportation to guests without disabilities. Defendants moved to dismiss. The Magistrate Judge recommended that Defendant Isenberg be dismissed, but that all other motions be denied. Neither side objected to Isenberg's dismissal.

STATEMENT OF FACTS

Named Plaintiff Margaret Denny brought suit on behalf of herself and a class of similarly situated persons, alleging that Defendants have violated the ADA by failing to

provide wheelchair-accessible transportation services at hotels operated by Defendants. Before filing suit, Ms. Denny called two hotels in Colorado, the TownePlace Suites by Marriott Boulder Broomfield ("TPS") and The Oxford Hotel ("The Oxford") in Denver, and was told that neither hotel provides wheelchair accessible transportation services. Ms. Denny made these calls as a civil rights "tester."

Defendants moved to dismiss, contending that (a) SHR did not own, operate, or lease the TPS or The Oxford, and (b) Plaintiffs' allegations did not establish standing for injunctive relief. *See generally* Dkt. 43 at 2. The Magistrate Judge converted the portion of the motions regarding SHR's ownership or operation of the hotels into a motion for summary judgment. *See generally* Dkt. 110 at 2-3. In evaluating the Objections, this Court must consider the material facts reviewed by the Magistrate Judge for the summary judgment motion and the factual allegations in the First Amended Complaint with respect to the motion to dismiss.

I. Material Facts for Summary Judgment[1]

The Magistrate Judge made the following specific Findings of Fact supporting his conclusion that genuine issues of material fact preclude summary judgment as to whether Defendants operate the two Colorado hotels. Dkt. 115 at 3-8.

Under SHR's Limited Liability Company Agreement, its general purposes are:

> to engage in activities related to the hospitality industry, including but not limited to the development, acquisition and *operation* of hotel assets, brokerage and consulting services relating to such activities, and any other activities in which a limited liability company formed under the Act may

[1] Defendants have not provided a statement of undisputed material facts for summary judgment. To the extent that any of the material facts listed here are disputed, summary judgment is improper.

> engage. Any of the foregoing may be conducted directly by the Company or indirectly through another company, joint venture or other arrangement.

Dkt. 90-7 at 10 (emphasis added).[2] On its website, SHR promotes itself as "a respected and successful hotel operator and investor" and as "one of the largest hotel management companies in the US," noting that its "hotel portfolio ranges from large, urban, full-service hotels to select-service suburban properties," including The Oxford and TPS. Dkt. 111-1; 111-2; 111-3. SHR's Division VPs of Operations, Premier and Lifestyle, Paul McCormick and Vincent Piro, are "responsible for all day to day operations of the hotels with an emphasis on staff training, service delivery, expense control and financial performance." Dkt. 111-4 & 111-5. According to SHR's website, The Oxford is one of SHR's "Premier & Lifestyle" hotels. Dkt. 111-2 at 3. Fred Kleisner, the General Manager of The Oxford, reports to Mr. McCormick. Dkt. 43-1; Dkt. 90-1 ("White Dep.") at 46:11-20. SHR's Regional VP of the Premium Branded Division, Jan Lucas, is "responsible for all aspects of support and performance for hotels which includes Premium Branded Select Service and Full Service properties." Dkt. 111-6. According to SHR's website, TPS is a "Select Service" hotel. Dkt. 111-3 at 11-12. According to SHR's 30(b)(6) designee, SHR's website lists hotels it "operates through its subsidiaries."[3] White Dep. 129:17-18. The TPS Management Agreement is between BRE Avalance Property Owner LLC as "owner" and Sage TPS, LLC as "manager." Dkt.

[2] Plaintiffs refer to exhibits already filed with briefing on the motions at issue, rather than re-filing the same documents with this Brief.
[3] The Magistrate Judge did not include this in the enumerated Findings of Fact but relied on it later. Dkt. 115 at 16.

90-6 at 6. Sage TPS is a 100% subsidiary of SHR. White Dep. 128:8-9. In the TPS Management Agreement, Sage TPS specified SHR as a named insured. Dkt. 90-6 at 56. The TPS Management Agreement permits Sage TPS to assign its rights and obligations under the Agreement, "so long as no [] assignment or transfer . . . results in a Change of Control of [Sage TPS] or [SHR]." *Id.* at 41. Sage Management Service, Inc. is the manager of Sage TPS and "most of [SHR's] LLC entities." White Dep. 10:11-17.

II. Factual Allegations in the First Amended Complaint

The Magistrate Judge considered the following allegations in concluding that Plaintiff Denny can seek injunctive relief:

Defendants own or operate the TPS in Broomfield, Colorado; TPS provides its guests with a local shuttle service within a five-mile radius of the hotel. Dkt. 29 ¶ 27. Ms. Denny called TPS around October 16, 2014, asked whether the hotel provided wheelchair-accessible shuttle services, and was informed that it did not. *Id.* ¶ 28.

Defendants own or operate The Oxford in Denver; The Oxford provides guests with a local shuttle service within a two-mile radius of the hotel. *Id.* ¶ 32. Ms. Denny called The Oxford around October 16, 2014, asked whether the hotel provided wheelchair-accessible shuttle services, and was informed that it did not. *Id.* ¶ 33.

Ms. Denny intended to stay at both hotels and use the shuttle services if accessible shuttle services had been available; because such services were not available, Ms. Denny was deterred from staying at the hotels. *Id.* ¶¶ 29, 34. Ms. Denny

would like to stay at the hotels and use their transportation services; she will do so if she is informed that accessible transportation services exist. *Id.* ¶¶ 30, 35. She will continue to test TPS, The Oxford, and other hotels by calling several times per year to ask whether accessible transportation services are available. *Id.* ¶¶ 31, 36.

STANDARD OF REVIEW

When – as here – a party objects to a magistrate judge's recommendation on a dispositive motion, the district judge reviews the objected-to portions of the magistrate judge's decision de novo. FED. R. CIV. P. 72(b)(3).

ARGUMENT

Defendants object to the Magistrate Judge's conclusions that genuine issues of material fact regarding their operation of the hotels preclude summary judgment, and that Plaintiff Denny has standing to seek injunctive relief. The Magistrate Judge was correct, and the Court should adopt the Recommendation.

I. The Magistrate Judge Properly Denied Summary Judgment to SHR and Sage Oxford.[4]

The ADA generally prohibits any person who "operates" a hotel or other place of public accommodation from discriminating on the basis of disability (*see* 42 U.S.C. § 12182(a)), and has specific requirements that apply to hotels that provide transportation services, set forth in sections 12182(b)(2)(B) & (C). Defendants contend that the

[4] Because the Magistrate Judge converted Defendants' Motion to Dismiss based on the argument that Defendants do not own, lease or operate the hotels at issue into a summary judgment motion, Defendants have the burden to prove an absence of genuine issues of material fact in dispute and that they are entitled to judgment as a matter of law. FED. R. CIV. P. 56.

Magistrate Judge applied the wrong legal standard. They assert that to be responsible for providing accessible transportation, an entity must have "either purchased a vehicle, leased a vehicle, or operated the [transportation] system." Dkt. 119 at 5. Defendants are incorrect.

Plaintiffs previously explained the accessible transportation requirements imposed by Sections 12182(b)(2)(B) & (C) of the ADA. Dkt. 109 at 4-7. Sections 12182(b)(2)(B) & (C) govern any private entity that operates a fixed route or demand responsive transportation system. The Department of Transportation's implementing regulations (the "Accessible Transportation Regulations") establish that they apply to "[s]huttle systems and other transportation services operated by privately-owned hotels." 49 C.F.R. § 37.37(b). The Accessible Transportation Regulations define "operate[]" to "include[], with respect to a fixed route or demand responsive system, the provision of transportation service by a public or private entity itself or by a person under a contractual or other arrangement or relationship with the entity." 49 C.F.R. § 37.3.

As the Magistrate Judge correctly determined, Defendants are responsible for providing accessible transportation at their hotels because (1) hotel operators that provide transportation must provide accessible transportation; (2) Defendants are hotel operators – or, at a minimum, genuine issues of material fact remain in dispute; and (3) even if another entity operates the hotel transportation system, Defendants have "a contractual or other . . . relationship with [that] entity." *Id.*

A. Hotel Operators Must Provide Accessible Transportation.

The Accessible Transportation Regulations generally require hotels that provide transportation services to provide equivalent wheelchair-accessible transportation services. *See generally* 49 C.F.R. §§ 37.101, 37.105, 37.171.The specific requirements depend on the size of the vehicle and type of route. Accessibility is required for new vehicles with a capacity of over 16 people that serve a fixed route; either accessibility or equivalent service is required for (1) new vehicles with a capacity of 16 or fewer people and (2) demand responsive systems. 42 U.S.C. §§ 12182(b)(2)(B) & (C); 49 C.F.R. § 37.101.

The Department of Justice ("DOJ"), which is also responsible for implementing the statutory requirements of Title III, has explicitly incorporated the Accessible Transportation Regulations. Specifically, 28 C.F.R. § 36.310 provides that "[a] public accommodation that provides transportation services, but that is not primarily engaged in the business of transporting people . . . shall comply with the requirements pertaining to vehicles and transportation systems in the regulations issued by the Secretary of Transportation . . . ." Section 36.310 applies to hotel shuttle and transportation systems, 28 C.F.R. § Pt. 36, App. C, and explicitly covers "public accommodations." The DOJ regulations define "public accommodation[s]" to include a private entity that "owns, leases (or leases to), or operates a place of public accommodation." 28 C.F.R. § 36.104. Because the Accessible Transportation Regulations are incorporated into the

DOJ regulations, the Accessible Transportation Regulations apply to public accommodations.

Unlike the Accessible Transportation Regulations, however, the DOJ regulations do not define "operates." As a result, the dictionary definition of that term applies, and courts have repeatedly held that under this definition, the focus is on the effective control that an entity has with respect to a place of public accommodation. *See, e.g.*, Dkt. No. 90 at 2-4, 11-15; Dkt. No. 91 at 9-18.

The Magistrate Judge correctly rejected Defendants' argument that, to be responsible for providing accessible transportation, a hotel operator must have purchased or leased a vehicle. Dkt. 115 at 20-21. Instead, looking at the plain language of the statute, the Magistrate Judge rightly noted that subsection 12182(b)(2)(C) explicitly states that it is providing examples of discrimination "'for purposes of' section 12182(a)." *Id.* at 20.[5] Thus, the shuttle-specific provisions contained in subsections 12182(b)(2)(B) & (C) do not establish a new category of defendants responsible for providing accessible transportation, but rather provide a more specific explanation of what constitutes discrimination by the entities governed by subsection 12182(a).

[5] In their original briefing, Defendants argued that the language of subsections 12182(b)(2)(B) & (C) conflicted with the language of subsection 12182(a). Dkt. 102 at 4. The Magistrate Judge rejected that argument, finding the statutory language to be clear and not in conflict. Dkt. 115 at 20. Now, Defendants argue that the statutory language is "clear and unambiguous." Dkt. 119 at 7.

B. Disputes Over Material Facts Preclude a Conclusion that Defendants Do Not Operate the Hotels.

It is unclear from their Objections whether Defendants continue to argue that SHR does not operate The Oxford or TPS, or whether they assert only that they do not have to provide accessible transportation because they did not lease or purchase a vehicle. The Magistrate Judge correctly determined that genuine issues of material fact remain regarding that question of whether Defendants are hotel operators.

Defendants' own statements contradict the documents that they contend establish that they do not exercise sufficient control over the hotels at issue to be considered "operators," demonstrating genuine issues of material fact. As the Magistrate Judge noted, and as explained above, SHR portrays itself in its Limited Liability Company Agreement as a hotel operator. Dkt. 90-7 at 10. It makes the same representation on its website, and indicates that its portfolio includes The Oxford and TPS. Dkts. 111-1; 111-2; 111-3. According to SHR's 30(b)(6) designee, SHR's website lists hotels it "operates through its subsidiaries." White Dep. 129:17-18. SHR's Vice Presidents are responsible for day-to-day hotel operations, including service delivery. Dkt. 111-4 & 111-5. The General Manager of The Oxford reports to an SHR Vice President. Dkt. 43-1; White Dep. 46:11-20. Another SHR Vice President is responsible for support and performance at certain hotels, including TPS. Dkt. 111-6. Sage TPS, a 100% subsidiary of SHR, is the "manager" of TPS. Dkt. 90-6 at 6; White Dep. 128:8-9.

Based on these material facts, the Magistrate correctly concluded that summary judgment was inappropriate on whether Defendants operate the hotels.

C. If Defendants Do Not Directly Operate the Hotel Transportation Systems, They Have a Contractual or Other Relationship with the Entity that Does.

Defendants assert that they do not operate the hotel transportation systems at issue. For the reasons discussed above, their role as hotel operators requires them to provide accessible transportation. Even if it did not, however, the Accessible Transportation Regulations provide that an entity is required to satisfy the requirements if it operates the transportation system itself, or if it has "a contractual or other arrangement or relationship with the entity" that does operate the transportation system. 49 C.F.R. § 37.3.

It is unclear who Defendants believe operate the hotel transportation systems at issue. To the extent that they say the in-hotel transportation systems are run by the management companies, they are in contractual relationships with those entities, and thus are responsible for meeting the accessible transportation requirements. Even if there is no official contract between Defendants and whatever entity they believe operates the hotel transportation systems, the Accessible Transportation Regulations do not even require a contractual relationship, but instead provide that the accessible transportation requirements are triggered by any "other arrangement or relationship." *Id.* Defendants cannot assert that they do not have any relationship or arrangement with whatever entity they believe operates the hotel transportation systems at their hotels.

II. The Magistrate Judge Properly Concluded that Plaintiffs Adequately Pled Standing.

With respect to standing, Defendants appear to object only to the Magistrate Judge's conclusion that Plaintiffs' allegations are sufficient to establish standing for

injunctive relief. Because Ms. Denny is acting as a tester, because deterrence states a claim for relief under the ADA, and because the ADA does not require a person with a disability to engage in a futile gesture when it is clear that an entity will not abide by the law, Plaintiffs have adequately pled standing.

A. Ms. Denny Has Standing as a Tester.

Ms. Denny was acting as a civil rights tester in this case. Testers are individuals who evaluate an entity's compliance with federal civil rights laws. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). The Tenth Circuit has recognized tester standing under both Title II and Title III of the ADA. *Tandy v. City of Wichita*, 380 F.3d 1277, 1286-87 (10th Cir. 2004); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211 (10th Cir. 2014).

Defendants cite numerous out-of-circuit cases to support their insistence that Ms. Denny's intentions to continue calling Defendants' hotels several times per year to determine whether they will continue to violate the ADA are insufficient to establish standing to seek injunctive relief. Dkt. 119 at 13-14. Some of those cases actually support Plaintiffs' position. Contrary to their representation to the Court*, id*. at 13, *Gilkerson v. Chasewood Bank*, 1 F.Supp.3d 570 (S.D. Tex. 2014) *denied* the defendant's motion to dismiss. There, the plaintiff had adequately alleged standing to seek injunctive relief against a bank that failed to provide ATMs accessible to blind individuals based upon the plaintiff's allegations "that she went to Chasewood's ATM as both a tester and a patron and would continue to do so." *Gilkerson*, 1 F.Supp.3d at 596.

In *Stevens v. Premier Cruises*, *Inc.,* 215 F.3d 1237 (11th Cir. 2000), while the plaintiff's original complaint lacked sufficient allegations to establish standing for an ADA claim seeking injunctive relief, the plaintiff's proffered amended complaint, which included an allegation that, "in the near future, she would take another cruise aboard Defendant's ship," *Stevens*, 215 F.3d at 1239, would have cured the standing problem. *Id.* at 1243.[6] Likewise, in *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336 (11th Cir. 2013), the court determined that the plaintiff's "undisputed tester motive" did not preclude him from having standing to seek prospective relief against the defendant supermarket. *Houston* determined that the plaintiff did have standing to seek prospective relief, in part because there was no evidence that the ADA violation had been remedied, and thus "there [was] a 100 likelihood that [the plaintiff would] suffer the alleged injury again . . . ." *Id.* at 1337.

Other cases cited by Defendants do not involve tester standing, but rather the standing of an individual who did not assert plausible *personal* reasons to return to the defendant entity. *See, e.g.*, *Harris v. Del Taco, Inc.*, 396 F. Supp. 2d 1107, 1113-14 (C.D. Cal. 2005) (determining that plaintiff who "unequivocally" stated at deposition that "he did not desire to return" to a restaurant nearly 600 miles away from his house did not have sufficient likelihood to return to confer standing); *Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1251, 1253 (M.D. Fla. 2003) (holding that individual who lived

[6] The quotation Defendants attribute to *Stevens* is not in that opinion.

hundreds of miles away from a hotel and stated that she "'may' travel to the . . . area this year or next year" lacked standing to seek prospective relief).

Finally, in *Harris v. Stonecrest Care Auto Ctr.*, 472 F. Supp. 2d 1208, 1219 (S.D. Cal. 2007), the court ***explicitly disagreed with the Tenth Circuit's binding precedent regarding testers***. The court acknowledged *Tandy*; noted that the Tenth Circuit "[held] that [a] disabled passenger whose sole purpose in riding city buses was to test for ADA compliance had standing to seek prospective injunctive relief"; and decided not to follow suit and permit testers to have standing to seek prospective relief under the ADA. *Id.* Thus, *Harris* is inapplicable here.

Defendants' attempts to provide the Court with authority for the proposition that Ms. Denny is required to do more than continue to test Defendants' hotels by calling them and inquiring about the availability of accessible hotel transportation are thus unpersuasive. Based on Plaintiffs' allegations that Ms. Denny will continue to test the hotels to determine whether they provide accessible transportation, and that she will stay at the hotels and attempt to use the accessible transportation if she is accurately informed by the hotels that they provide such transportation, Dkt. 29 ¶¶ 30-31; 35-36, the Magistrate Judge properly concluded that Ms. Denny has standing.

B. Deterrence Is Sufficient to Establish an ADA Claim.

Defendants' assertion that Ms. Denny's allegation that she would like to stay at Defendants' hotels, and would do so if they offered accessible transportation, is insufficient to establish standing fails to acknowledge that, "under the ADA, once a

plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing the accommodation, the plaintiff has suffered an injury. . . . So long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues." *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136-37 (9th Cir. 2002) (citing *Davoll v. Webb*, 194 F.3d 1116, 1132-33 (10th Cir. 1999)). Here, Plaintiffs have alleged that Ms. Denny was deterred from staying at Defendants' hotels because of the failure to provide accessible transportation. Dkt. 29 ¶¶ 29, 34. So long as the hotels continue to refuse to provide accessible transportation, the injury Ms. Denny has already suffered will continue. *See Pickern*, 293 F.3d at 1137.

C. Ms. Denny Is Not Required to Engage in Futile Gestures.

Defendants assert that Ms. Denny must show up at a hotel she knows will not provide her accessible transportation and attempt to use that transportation. Dkt. 119 at 14 ("Factual allegations supporting an intent to visit and stay at the accommodation . . . must be reviewed."). They are wrong. Title III does not "require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by [Title III of the ADA] does not intend to comply with its provisions." 42 U.S.C. § 12188(a)(1). By continuing to call the hotels, Ms. Denny will determine whether the hotels' practices continue to violate the ADA, and, "[s]hould those policies prove to be discriminatory in nature, the ADA does not require [her] to engage in the futile gesture of continuing to test the policies by continued [engagement

with] Defendant[s] [she] know[s] will not feature [accommodations]." *Jensen v. United First Fin.*, No. 2:09-cv-00543DAK, 2009 WL 5066683, at *3 (D. Utah Dec. 16, 2009); *see also Davoll*, 194 F.3d at 1132 (noting that the futile gesture doctrine applies to ADA employment cases). Thus, the Magistrate Judge properly rejected Defendants' argument that Ms. Denny must engage in the futile gesture of attempting to use Defendants' inaccessible hotel transportation to have standing to seek prospective relief.

CONCLUSION

For the reasons above, the Court should adopt the Recommendation.

Dated this 24th day of March, 2016.

Respectfully Submitted,

s/ Timothy P. Fox

Timothy P. Fox
Lauren Fontana
Civil Rights Education and Enforcement Center
104 Broadway, Suite 400
Denver, CO 80203
Phone: (303) 757-7901
Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to the following:

Steve A. Miller
Kevin S. Simon
Scott C. Fanning
Fisher & Phillips LLP
10 South Wacker Drive
Suite 3450
Chicago, IL 60606
Telephone: (312) 346-8061
Facsimile: (312) 346-3179
smiller@laborlawyers.com
ksimon@laborlawyers.com
sfanning@laborlawyers.com

Counsel for Defendants

s/ Marissa McGarry

Marissa McGarry, Paralegal