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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AMERICAN PATRIOTS ADVOCATING FOR DISABLED RIGHTS, INC., MICHELE JOSEPH, and MARK ALLISON, Plaintiffs, v. BUDGET SUITES OF AMERICA, LLC, NV-704, SUN HARBOR BUDGET SUITES LIMITED LIABILITY COMPANY OF NEVADA II, BUDGET SUITES OF AMERICA, LLC, NV-480, and BIGELOW HOLDING-NEVADA LIMITED LIABILITY COMPANY, Defendants.	CASE NO:2:09-cv-1528 **MOTION TO DISMISS BY DEFENDANTS BUDGET SUITES OF AMERICA, LLC, NV-704, SUN HARBOR BUDGET SUITES LIMITED LIABILITY COMPANY OF NEVADA II, BUDGET SUITES OF AMERICA, LLC, NV-480, and BIGELOW HOLDING-NEVADA LIMITED LIABILITY COMPANY**

Defendants Budget Suites of America, LLC, NV-704; Sun Harbor Budget Suites Limited Liability Company of Nevada II; Budget Suites of America LLC, NV-480 and Bigelow Holding – Nevada Limited Liability Company (collectively "Defendants"), by and through their counsel, the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, hereby move to dismiss the present action under FRCP 12(b)(1) and 12(b)(6), or in the alternative FRCP 56. As demonstrated below, the Plaintiffs' claims fail as a matter of law because: (1) the Plaintiffs cannot meet their burden of establishing a "case or controversy" with respect to their claims for injunctive relief, the sole remedy available under Title III of the Americans with Disabilities Act ("ADA") and; (2) the Plaintiffs' First Amended Complaint fails to set forth facts sufficient to state a claim under the ADA or NRS 651.070. This motion is made and based upon the attached Affidavits of Rickie Lee Golightly, and

Brian Roberts, the following memorandum of points and authorities, the pleadings and papers on file herein, and any oral argument this Court may allow.

DATED this day of 17th day of May, 2010.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

BY: Sheri Thome

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POINTS AND AUTHORITIES

I. INTRODUCTION

This matter comes before the Court by virtue of an Amended Complaint filed by Plaintiffs, American Patriots for the Rights of Disabled Persons, Inc. ("American Patriots"), and two American Patriots officers, Michele Joseph ("Joseph") and Mark Allison ("Allison"). American Patriots and its officers are professional litigants that have created a cottage industry by exploiting Congress' well intentioned statute, the Americans with Disabilities Act ("ADA"), into an income-producing mechanism whereby the plaintiffs have brought many causes of action against over a dozen defendants solely to support themselves under a façade of disabled rights advocacy. These types of litigants and their Florida counsel started their business operation in the state of Florida; however, they were ejected from United States District Court for the Middle District of Florida when the Court found the Plaintiffs' claims to be disingenuous and found that their Complaints failed to allege sufficient facts to give the Court subject matter jurisdiction. See Rodriguez v. Investco, LLC, 305 F. Supp.2d 1278 (2004).

In the case at bar, this Court should dismiss the Plaintiffs' Amended Complaint because the

Court lacks federal subject matter jurisdiction in two key respects. First, the Plaintiffs' Amended Complaint does not seek resolution of a "case or controversy" as required by Article III of the Constitution. Specifically, the Plaintiffs cannot show a concrete, imminent threat of harm. Simply stated, where there is no "actual or imminent," injury there is no standing. Second, the Amended Complaint alleges violations of the ADA and NRS 651.070 as the basis for the damages alleged. However, because the Defendants' properties are residential facilities, neither the ADA nor NRS 651.070 apply. The Plaintiffs' claims must therefore be dismissed.

II. STATEMENT OF FACTS

Defendants Budget Suites of America LLC (NV-704); Sun Harbor Budget Suites Limited Liability Company of Nevada II; Budget Suites of America LLC (NV-480); and Bigelow Holding – Nevada Limited Liability Company are Nevada limited liability companies all doing business under the name Budget Suites of America ("Budget Suites"). Each Budget Suites is a residential apartment facility, whereby tenants are given the option of renting by the week or by the month. Each residential apartment facility consists of as many as twenty (20) two and three-story apartment buildings. Additionally, each apartment facility has large on-property laundry facilities. See Correspondence dated December 10, 2009 from Ken Pettit, Architect, attached hereto as **Exhibit B**. The apartment residences consist of one and two bedroom apartments. Each apartment consists of a full kitchen, complete with a standard size oven/stove and a full size refrigerator. Each furnished apartment has at least one bed, a couch and a coffee table.

American Patriots allege that the group is an "advocacy" group. Plaintiffs Michele Joseph and Mark Allison are members of that group and both possess alleged disabilities as defined by the ADA. See Amended Complaint, paragraph 4. Joseph and Allison admit that they act as "testers" for American Patriots on a routine basis, "for the purpose of discovering, encountering, and engaging discrimination against the disabled in public accommodations." See Amended Complaint, paragraph 3. They allege to making personal visits of targeted locations. They further allege to engage all of the "barriers to access" and test those so called "barriers" to determine whether or not they are illegal. Id.

Both Joseph and Allison claim that they were denied access and/or full and equal enjoyment

of the goods, services and facilities of Budget Suites. Neither Joseph nor Allison made any complaint to management at any time during their week-long stays. Additionally, although Joseph and Allison procured rental agreements with Budget Suites, it is unclear whether either party actually stayed at any of the properties. Both Joseph and Allison have permanent residences in Las Vegas, Nevada within close proximity of one another and which are not located at the Budget Suites. See Secretary of State information on Plaintiffs, attached hereto as **Exhibit C**. Neither plaintiff has returned to the Budget Suites properties since November 2008.

III. LEGAL STANDARD

A. DISMISSAL PURSUANT TO FED. R. CIV. P. 12(b)(6) and 56(c)

Pursuant to Fed. R. Civ. P. 12(b)(6), a claim may be dismissed for failure to state a claim upon which relief may be granted. Whether to dismiss for failure to state a claim is a question of law and is appropriate when a plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See Jackson v. Southern California Gas Co., 881 F.2d 638, 641 (9th Cir. 1989); Abramson v. Brownstein, 897 F. 2d 389, 391 (9th Cir. 1990). In ruling on a motion to dismiss, the court must accept plaintiffs' allegations as true and construe them in the light most favorable to the plaintiffs. Id. at 391.

If the court considers matters outside the pleading when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the motion to dismiss is treated as a motion for summary judgment, to be disposed of as provided in Fed. R. Civ. P. 56. See Carter v. Stanton, 405 U.S. 669, 671 (1972). Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. Summary judgment is appropriate if "the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any 'demonstrate' that there is no genuine issue as to any material fact and…the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The substantive law defines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

B. DISMISSAL PURSUANT TO FED. R. CIV. P. 12 (b)(1)

Pursuant to Fed. R. Civ. P. 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Once subject matter jurisdiction has been challenged, the burden of proof shifts to the plaintiff to prove jurisdiction. See Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 499 (9th Cir. 2001). A motion to dismiss under Rule 12(b)(1) may be based on a "facial attack" of the allegations of subject matter jurisdiction contained in the pleading. Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003). In such an instance, the court assumes the truthfulness of the allegations. Trentacosta v. Frontier Pac. Aircraft Indus., Inc., 813 F.2d 1553, 1559 (9th Cir. 1987). However, if the defendant submits affidavits, testimony, or other evidentiary materials in support of its motion, the attack on the pleading is factual, and the burden shifts to the plaintiff to furnish affidavits or other evidence to establish subject matter jurisdiction. Savage, 343 F.3d at 139 n. 2. The court will then place no presumptive truthfulness on the plaintiff's allegations. Thornhill Publishing Co. v. Gen. Tel. & Elec. Corp., 594 F.2d 730 (9th Cir. 1979). The plaintiff must then set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. Trentacosta, 813 F.2d at 1559.

C. DISMISSAL OF SUPPLEMENTAL STATE LAW CLAIM

Pursuant to 28 U.S.C. § 1367(c) the Court may decline to exercise supplemental jurisdiction over a claim if it has dismissed all claims over which it has original jurisdiction.

IV. LEGAL ARGUMENT

A. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION AS PLAINTIFFS LACK ARTICLE III STANDING.

1. The Plaintiffs have not shown injury in fact as there is no intent to return to the subject properties.

Article III of the U.S. Constitution limits the judicial power of the federal courts to the resolution of "cases or controversies." U.S. Const. Art. III. To establish a "case or controversy," a plaintiff must demonstrate: (1) an injury in fact, which must be (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury

and the conduct complained of and; (3) that it is likely that the injury will be redressed by a favorable court ruling. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); see also, City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 1997). The party claiming federal jurisdiction bears the burden of establishing each of these elements. Lujan, 504 U.S. at 561.

Where a plaintiff seeks injunctive relief, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy." O'Shea v. Littleton, 414 U.S. 488, 496 (1974). Rather, the past exposure to illegal conduct must be accompanied by a continuing, present, adverse effect. Id. Likewise, an alleged past violation of the ADA cannot, by itself, establish a "case or controversy" sufficient to support a claim for injunctive relief under Article III of the U.S. Constitution. City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

In the context of the ADA, a plaintiff suffers "actual or imminent" injury if he is either currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA (i.e. actual injury), or threatened with harm in the future because of existing or imminently threatened ADA noncompliance (i.e. imminent injury). See Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1137-38 (9th Cir. 2002). This necessarily requires that a plaintiff is likely to return to patronize the accommodation in question. Harris v. Stonecrest Auto Care Center, LLC, 472 F.Supp.2d 1208 at 1215-16. A mere allegation or expressed desire does not, by itself, imply an intent to return. Tandy v. City of Wichita, 380 F.3d 1277, 1288 (10th Cir. 2004). Further, an intent to return to the place of injury "some day" is insufficient. Lujan, 504 U.S. at 564.

In evaluating an ADA plaintiff's claim that he intends to return to a facility, courts examine four factors: (1) the plaintiff's past patronage of defendant's business; (2) the definitiveness of the plaintiff's plan to return; (3) the proximity of the place of public accommodation to the plaintiff's residence and; (4) the plaintiff's frequency of travel near the accommodation in question. Harris, 472 F.Supp.2d at 1216. Courts also will consider an extensive history of ADA litigation as part of their factual determination of the likelihood that the plaintiff will return to the place of public accommodation. Id. at 1217; see also, Molski v. Kahn Winery, 405 F.Supp.2d 1164-68 (C.D. Cal. 2005) (finding that a plaintiff's litigation history can undercut the sincerity of his or her expressed intent to return). As the Harris court noted, when a plaintiff visits the place of public

accommodation for the purpose of bringing a lawsuit against it, the motive for visiting the location is gone once litigation is over. Harris, 472 F.Supp.2d at 1217. Therefore, an individual plaintiff's contact with a local establishment made solely for the purpose of bringing a claim under title III of the ADA, without more, is insufficient to confer Article III standing. Id. at 1219.

Here, the Plaintiffs have not shown an intent to return to the subject properties. The factors set forth above weigh heavily in the Defendants' favor. As an initial matter, the Plaintiffs are hardly prior patrons of the subject properties. Joseph and Allison admit that they act as "testers" for American Patriots on a routine basis "for the purpose of discovering, encountering, and engaging discrimination against the disabled in public accommodations." See Amended Complaint, paragraph 3. They allege that they personally visit the public accommodations, engage all of the barriers to access, and test those barriers to determine whether or not they are illegal. Id. They then file suit to enjoin any discrimination and subsequently, return to verify compliance or non-compliance with the ADA. Id. They allege that in their capacity as "testers," they intend to visit the premises annually to verify its compliance or non-compliance with the ADA. Id.

The Plaintiffs cannot be considered true patrons of the subject properties. Joseph and Allison only visited two of the properties respectively, each renting an apartment for the duration of one week at each location in 2008. The Plaintiffs acknowledge that the sole purpose of the rental of the apartments was to check for compliance with the ADA, in anticipation of filing a lawsuit. Thus it can hardly be said that the Plaintiffs were prior patrons of the subject properties. Compare, Bodley v. Plaza Management Corp., 550 F.Supp.2d 1085 (2008) (finding no standing where plaintiff had visited property only once and had no definite plans to return); Molski, 405 F.Supp.2d at 1164 (noting the lack of a history of past patronage seems to negate the possibility of future injury at that particular location) with, Pickern, 293 F.3d at 1138 (finding standing where disabled plaintiff had visited particular store two times, but store was part of chain that plaintiff regularly frequented).

Plaintiffs Joseph and Allison did not frequent the four Budget Suites properties at issue. To the contrary, each of them visited only two of the properties and only rented the apartment suites for one week apiece.

Second, there is no "definitiveness" to the Plaintiffs' plans to return to the properties. Again,

the Amended Complaint contains only broad allegations that the Plaintiffs "intend to visit the Facilities in the near future..." See Amended Complaint, paragraph 27. However, a mere allegation or expressed desire does not, by itself, imply an intent to return and an intent to return to the place of injury "some day" is insufficient. Tandy, 380 F.3d at 1288; Lujan, 504 U.S. at 564. Further, a representation that a plaintiff visited a facility as a "tester" and intends to return to the facility to verify its compliance with the ADA "does little to support [her] allegation that she is truly threatened by an immediate future injury." Kramer v. Midamco, 656 F.Supp.2d 740 2009 WL 2591616 (N.D. Ohio 2009) (internal citation omitted). Here the Plaintiffs' Amended Complaint explicitly states that their only purpose in any prior visit, as well as any future visit, was and is to check for compliance with ADA regulations. The Plaintiffs clearly do not intend to return to Budget Suites on any regular basis, and consequently they can offer no definite date or plan to return to the properties. Such a circumstance is insufficient to suggest imminent future harm.

The third and fourth factors, proximity of the place of public accommodation to the Plaintiffs' residences and the Plaintiffs' frequency of travel near the accommodation in question, also weigh in favor of the Defendants. Generally speaking, the closer the plaintiff's residence is to the property and the more the plaintiff passes by a particular location, the more likely the plaintiff is to visit. Here, however, the Plaintiffs are professed "testers who visited the properties for the sole purpose of checking for ADA compliance." Therefore, their proximity to the subject properties is relevant to establish that Plaintiffs are not likely to return to Budget Suites. Although the Plaintiffs reside in Las Vegas, where the subject properties are located, the Budget Suites are apartments, that is residential dwellings. Because the Plaintiffs reside in Las Vegas, there is no reason to believe that they will frequent the properties, regardless of the proximity to the Plaintiffs' residences.

The factors to be considered by the Court in determining whether there is an intent to return, suggest that the Plaintiffs do not intend to return and demonstrate a lack of standing. The Plaintiffs are admitted ADA testers, not regular patrons of the subject properties. The Plaintiffs have no intent to return, other than to check for compliance with the ADA, after this litigation. But for this litigation, the Plaintiffs would likely never have visited any of the subject properties. The Plaintiffs have not demonstrated that there is a real and immediate threat of future injury by the Defendants or

that they will be subjected to any alleged violations of the ADA in the future. To the contrary, their litigation history and the allegations in their Amended Complaint make it clear that they lack any kind of concrete plan or intention to return and avail themselves of the goods and services of the subject properties. Because there is no "actual or imminent injury" there is no existing "case or controversy." The Plaintiffs cannot establish standing and their Amended Complaint must be dismissed for lack of subject matter jurisdiction.

2. This Court should reject the "tester plaintiff" exception to the standing requirement.

The Defendants anticipate that the Plaintiffs will request that the Court adopt an exception to the so called "tester" litigants, an exception that is allowed in at least one other jurisdiction. See, e.g., Brown v. Showboat Atlantic City Propco, LLC, 2009 WL 690625 (D. N.J. March 11, 2009) (finding that an ADA "tester" plaintiff intending to return to property to determine whether alleged violations had been remedied had sufficiently plead a concrete future injury). Other courts, however, have rejected a presumptive or automatic approach wherein a "tester" plaintiff who has filed many lawsuits under Title III of the ADA is deemed to have declared his intent to return to each facility sued. See, e.g., Harris, 472 F.Supp 2d 1208. Instead, the courts have embraced a fact-specific inquiry. Id. at 1216. For example, the Harris court determined that the large number of Title III lawsuits filed by the plaintiff raised concerns about credibility. Id. at 1217 (internal citation omitted). Specifically, the Court stated:

> Where a plaintiff's sole purpose in visiting a local business is to litigate, he may visit the establishment before or during litigation, but his reason for returning vanishes as soon as litigation concluded.
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> Therefore, the Court holds that an individual plaintiff's contact with a local establishment made solely for the purpose of bringing a claim under Title III of the ADA, without more, is insufficient to confer Article III standing to seek injunctive relief.
>
> Id. at 1219.

In Ohio v. Kramer, 2009 WL 2591616 (N.D. Ohio August 20, 2009), a disabled plaintiff brought an action against a shopping mall management firm, alleging violations of the ADA. The

plaintiff admitted that she had visited the facility as a "tester" for the Disabled Patriots of America, Inc. Id. at *1. The court found that the plaintiff lacked standing to bring the action because she provided no evidence to show that she had suffered any actual injury, nor had she shown a specific intent to return to the property if the alleged violations were cured. Id. *7. The court noted that, "[i]n ADA cases it is also important to keep in mind that proper analysis of standing focuses on whether the Plaintiff suffered an actual injury, not on whether a statute was violated." Id. (citing Doe v. Nat'l Bd. of Med. Examiners, 199 F.3d 146, 153 (3rd Cir. 1999)). The court further stated:

> [The plaintiff's] only demonstrated reason for returning to the Facility would be to test for additional barriers. She has demonstrated no intent to use the Facility in her individual capacity once all the barriers have been removed. In other words, if injunctive relief were granted, there is no evidence that it would serve its purpose.
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> Id.

In dismissing the plaintiff's claims, the court noted that the plaintiff had provided no evidence that she would be likely to return to the subject facility "in any capacity other than as a 'tester.'" Id. However, in order to have standing under Title III, the plaintiff had to show "a plausible intention or desire to return to the place but for the barriers to access." Id.

Cases in which ADA testers are found to have standing generally involve circumstances different than those at issue here. For example, in Parks v. Ralph's Grocery Store, 254 F.R.D. 112 (C.D. Cal. 2008), the district court held that two ADA tester plaintiffs had standing, where, in addition to serving as testers, the plaintiffs lived in reasonable proximity to several of the inaccessible stores, had patronized the stores in the past, stated that hey had definite plans to return, and traveled near some of the stores. Id. at 119. Here, the Plaintiffs already have residences in Las Vegas. Therefore, there is no reason to believe that they would return to the apartment residences as consumers.

Here, the Plaintiffs did not visit the properties in dual roles. They visited the properties for the sole purpose of checking for compliance with ADA regulations. Budget Suites are not grocery stores, restaurants, or even hotels, all of which the Plaintiffs might be expected to visit on any kind of regular basis. The properties are apartment complexes. Because the Plaintiffs already have

established residences in Las Vegas, they would have no reason to return to any of the Budget Suites. The Plaintiffs' extensive and admitted litigation history undercuts the actuality and immanency of their alleged injuries, and deprives them of standing in this matter. The Court should reject any argument by the Plaintiffs that ADA "testers" are entitled to automatic standing under Title III of the ADA.

B. THIS COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1) BECAUSE THE ADA DOES NOT APPLY TO APARTMENT COMPLEXES

Title III of the ADA prohibits discrimination by a private entity on the basis of disability when that entity owns, operates, or leases a place of "public accommodation." 42 U.S.C. § 12182(a). The statute defines a public accommodation as "an inn, hotel, motel, or other place of lodging" if they affect commerce. 42 U.S.C. § 12181(7)(A). Apartment complexes are not places of public accommodation and they are not included in the generic descriptive phrase "other place of lodging" for purposes of the ADA. Lancaster v. Phillips Investments, LLC, 482 F. Supp.2d 1362, 1366 (M.D. Ala. 2007); See also, Indep. Hous. Servs. Of San Francisco, et. Al. v. Fillmore Center Assocs., et. al., 840 F.Supp. 1328, 1344 n. 14 (N.D. Cal. 1993) (citing H.R. Rep. No. 101-485(II) 101st Cong., 2d Sess. 383 (1990), U.S. Code Cong. & Admin. News 1990, p. 267).

The ADA is specifically drafted to apply to and govern standards for public accommodations because of the nature of the transient guests who are the consumers of the goods and services of these locations. Lancaster, 482 F.Supp.2d at 1366. As the Lancaster court observed, "(t)hese accommodations for transient guests clearly differ from apartment complexes, in which a resident's stay is more permanent." Id. The Court went on to declare, "'other place of lodging' cannot be read to include apartment complexes." Id. (citing Regents of Mercersburg Coll. V. Republic Franklin Ins. Co., 458 F.3d 159, 165 n.8 (3rd Cir. 2006). The "measuring stick" to determine whether a facility is a residential location or a public accommodation is the length of the occupant's stay. Thompson v. Sand Cliff Owners Ass'n., Inc., 1998 WL 35177067 at *4 (N.D. Fla March 30, 1998) (quoting 28 C.F. R. App. B, § 36.104 p. 614-15 (1997)).

. . .

1. Budget Suites are residential apartment complexes and are not "other places of lodging".

Any length of stay longer than 30 days is considered residential use; thus exempting said stay from the lodging tax imposed on temporary, short-term stays. Following Thompson, the threshold question for this court is to determine whether the Budget Suites are functioning as residential locations or public accommodations. The Budget Suites locations in Las Vegas, Nevada, would be subject to transient lodging tax if they functioned solely as public accommodation facilities. The Budget Suites in Las Vegas, Clark County, Nevada, are required to collect lodging tax from any individual staying at their facility for less than thirty days. *Clark County, Nevada, Municipal Ordinance Section 4.08.050(a)*. Utilizing this ordinance, the Court now has its "measuring stick" to evaluate whether the Budget Suites are residential facilities or public accommodation.

Additionally, the Court must look to the use of the Budget Suites and how they are intended to be used. The use of the properties by residents and management clearly illustrates the Budget Suites are residential complexes. The intention of the design of the Budget Suites further displays an apartment complex as opposed to a hotel or motel property (see sub-paragraph 5 below).

A review of the marketing material for the Budget Suites supports the aforementioned premise as well. The residential units are advertised as apartments, to be used as apartments. See Budget Suites Web Pages, attached hereto as **Exhibit D**. On the other hand and "[a]ccording to the commentary related to the [ADA] regulations, the difference between a residential facility and a non-residential 'place of lodging' is the length of the occupant's stay. 'The nature of a place of lodging contemplates the use of the facility for short-term stays.'" Thompson v. Sand Cliff Owners Ass'n Inc., 1998 WL 35177067 at 4 (N.D. Fla.) (quoting 28 C.F.R. App. B, § 36.104, p. 614-615 (1997). Therefore, the "measuring stick" is graded by the average length of stay of Budget Suites residents. See for example Id.

Neither the ADA nor its related regulations define what qualifies as a "short-term stay" Id. Despite the fact that Budget Suites do not require a six (6) or twelve (12) month lease agreement, they are nonetheless run and operated as residential apartment facilities whose tenants pay rent on a weekly or monthly basis. The vast majority of units are rented for more than one (1) month. See

Occupancy Aging Report, attached hereto as **Exhibit E**. The following numbers are average occupancy rates starting from January 2009 and ending in April 2010, the statistics are as follows:

Length of Occupancy	Number of Units
7-30 days	310 (16%)
31-180 days	615 (32%)
181-365 days	240 (13%)
366-1095 days	270 (14%)
1096-1825 days	138 (7%)
over 1825 days	73 (4%)
Total Number of Units	1915 (100%)

As the Court can see, eighty-four percent (84%) of the occupied units were rented for periods of more than one (1) month, with twenty-nine percent (29%) of these units rented for periods of over one (1) year.

The small number of individuals residing at the Budget Suites for less than thirty days does not indicate an intent to use or an actual use of the property as a transient lodging facility; rather, this fraction of residents is reflective of those individuals who, for whatever reason, were incompatible tenants of the properties. In this case, the numbers clearly speak for themselves.

Clearly these facilities have been established in their respective communities as residential apartment complexes. The Budget Suites are not "public accommodations" as intended under the ADA, and cannot be equated to inns, hotels, or motels merely because they allow tenants to pay on a weekly basis. In light of these facts, Title III of the ADA does not apply.

2. Budget Suites does not offer the amenities or services of a hotel or "other place of lodging."

The court in Thompson suggests factors to consider in determining whether a unit is "another place of lodging," i.e. whether or not maid service is provided to rental units. Thompson, 1998 WL 35177067 at 4. In Thompson, rental units were cleaned before and after each stay, but renters were responsible for upkeep during their stay. Id. The court reasoned this was one factor to suggest that

the units in question were residential and not considered "other place[s] of lodging." Id.

Likewise, Budget Suites does not offer services or amenities one would expect from a traditional hotel. Additionally, the following factors reflect a residential facility:

- The apartments are not rented on a daily basis.
- Budget Suites does not provide maid or linen service as part of the standard rental fee.
- Linens, such as bed sheets and towels are not provided by Budget Suites, but, they may be rented at an additional cost. Tenants bear the burden of acquiring linens, as well as washing them, as necessary, in the coin-operated machines in the laundry room.
- Budget Suites does not provide a laundry service for other items, such as clothing, for any of its tenants.
- It is the responsibility of each individual tenant to take their trash to the dumpsters, which are located throughout the property.
- Budget Suites does not provide food service or food preparation, such as room service or restaurant service.
- Budget Suites does not have any conference/meeting rooms.
- Each tenant at Budget Suites may receive their mail at the property using the property address and their individual apartment unit number.
- At Budget Suites, fees are incurred at the beginning of the tenancy. Those fees are not common at hotels.
- Budget Suites does not require a credit card to rent an apartment, the tenants are responsible for a refundable deposit for keys and a television remote control. A refundable security deposit is also required, as well as, a non-refundable cleaning fee for the preparation of the apartment for the next tenant. See Affidavit of Brian Roberts, attached hereto as **Exhibit F**.

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3. The Budget Suites are residential facilities under the Nevada Landlord Tenant Act.

Budget Suites is subject to the Nevada Landlord-Tenant Laws, NRS § 118A. As a residential facility, as with any landlord/tenant relationship, the management at Budget Suites does not enter the rented apartments except to provide maintenance services requested by the tenant. Budget Suites also provides twenty-four hours of notice to the tenant prior to conducting routine servicing. Further, in the event that a tenant must be evicted from their apartment, a civil action for eviction must be filed in Clark County, Nevada, Justice Court pursuant to the Nevada Landlord and Tenant Act. See Clark County Justice Court Eviction Docket, attached hereto as **Exhibit G**.

These factors, coupled with the rights and responsibilities of the tenant and landlord, are indicative of a residential facility. Therefore, under the Landlord-Tenant Act, Budget Suites cannot be considered a "place of lodging" like a hotel and should not be subject to the requirements of either the ADA or NRS 651.070.

4. Budget Suites provides needed residential apartments for a particular clientele.

Budget Suites serves a need for residents of Clark County, Nevada who do not wish or who are unable to enter into a long-term lease commitment. In communities such as Las Vegas, there is a need for residential living, which does not require a long term commitment or large up-front deposit. Workers in various industries, such as construction or entertainment, may have limited contractual work, whereby they intend to stay for several months, but cannot commit to a long-term lease agreement. Also, senior citizens and other fixed income residents benefit for the same reasons. Budget Suites meets the needs of the aforementioned individuals residing in Nevada.

5. The Budget Suites are designed as apartment complexes.

The design of the Budget Suites further distinguishes these properties as apartment complexes as opposed to hotels, motels, or inns. Apartments have certain design characteristics which are recognized within the architectural community to lend themselves to residential, long-term living.

Architect Ken Pettitt has been practicing in Southern Nevada as an architect since 1981. See

Exhibit B. Mr. Pettitt has participated in the design of several Budget Suites properties, and he provides his statement that at all times, the Budget Suits were intentionally designed as apartments in order to fill a need for the residents of Clark County Nevada. Id. As Mr. Pettitt describes, an "apartment necessarily has a bathroom, a closet and a kitchen, and we provided those in each dwelling unit…" Id. He further describes the additional amenities distinct to apartment complexes which were included in the Budget Suites complexes such as "lush landscaping, onsite laundry facilities, exotic pool/spa areas, and picnic/barbeque areas." Id. As Mr. Pettitt succinctly and clearly summarizes in his statement, "all of the Budget Suites housing developments are apartments which are designed to attract and retain long-term residents." Id.

As shown above, the Budget Suites is operated, utilized, designed, and regarded by management, residents, State administrative agencies and the courts as apartment dwellings. The ADA requirements and specifications are not intended to be applied to facilities used in the manner that Budget Suites are used. Therefore, the Court lacks subject matter jurisdiction over the Plaintiff's Amended Complaint against Defendants.

C. THIS COURT LACKS JURISDICTION OF THE SUPPLEMENTAL STATE LAW CLAIM UDNER NRS 651.070 – NEVADA ADA.

Nevada Revised Statute § 651.070 is succinct and mirrors a small portion of the Federal ADA. NRS 651.070 reads:

> All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin, disability or sexual orientation.

Pursuant to 28 U.S.C. § 1367(c), the Court may decline to exercise supplemental jurisdiction over a claim if it has dismissed all claims over which it has original jurisdiction. Thus, if the Court determines that it does not have Federal standing over the issue at hand, then it stands to reason that this Court should decline to exercise supplemental jurisdiction over the state law claim.

Additionally, there is no case law indicating that NRS 651.070 is defined or applied in a manner that is separate or distinct from the Federal ADA law; and, thus, the same arguments made regarding the ADA claim in the Plaintiffs' Amended Complaint will also apply to the Plaintiffs'

assertion of an alleged violation of the Nevada ADA.

V. CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court dismiss the Plaintiffs' claims against them pursuant to Fed. R. Civ. P. 12(b)(6), 12(b)(1), and/or 56.

DATED this day of 17th day of May, 2010.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

BY: _____

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP and that on this 17th day of May, 2010 I electronically filed and served a true copy of the foregoing **MOTION TO DISMISS BY DEFENDANTS BUDGET SUITES OF AMERICA, LLC, NV-704, SUN HARBOR BUDGET SUITES LIMITED LIABILITY COMPANY OF NEVADA II, BUDGET SUITES OF AMERICA, LLC, NV-480, and BIGELOW HOLDING-NEVADA LIMITED LIABILITY COMPANY** to all parties on file.

BY _____
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP