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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California, Plaintiff, vs. LAW SCHOOL ADMISSION COUNCIL, INC., a Delaware tax exempt corporation, and DOES ONE through TEN, inclusive, Defendants. JOHN DOE, JANE DOE, PETER ROE, RAYMOND BANKS, KEVIN COLLINS, RODNEY DECOMO-SCHMITT, ANDREW redacted, ELIZABETH HENNESSEY-SEVERSON, OTILIA IOAN, ALEX JOHNSON, NICHOLAS JONES, CAROLINE LEE, ANDREW QUAN, STEPHANIE SEMOS, GAZELLE TALESHPOUR, KEVIN VIELBAUM, AUSTIN WHITNEY, and all other similarly situated individuals, Real Parties in Interest.	**Case No. C 12-01830 EMC** **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS** **Date: July 13, 2012** **Time: 1:30 pm** **Dept: Courtroom 5 - 17th Floor** **Judge: Hon. Edward M. Chen**

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Plaintiff, the California Department of Fair Employment and Housing (DFEH or Department), hereby submits its opposition to the Motion to Dismiss filed by Defendant, Law School Admissions Council (LSAC).

I. INTRODUCTION

The DFEH is the California state agency responsible for enforcing the state's civil rights laws. CAL. GOV'T CODE § 12920 (West 2011 & Supp. 2012). The DFEH filed this action seeking a level playing field for disabled individuals who take the Law School Admissions Test (LSAT) administered by LSAC. The Department's Complaint is based on its investigation showing that LSAC refused to provide testing accommodations to individuals with physical and/or cognitive or psyhological disabilities In addition, LSAC "flagged" the scores of individuals who were provided the accommodation of extra time, informing law schools that the individuals had taken the test under non-standard conditions. LSAC seeks dismissal of the entire DFEH action, maintaining that the DFEH lacks jurisdiction and fails to adequately plead four out of its five claims for relief. LSAC further contends that the DFEH is limited in its ability to claim damages, and is procedurally limited by the administrative complaints that preceded this action.

This Court should deny LSAC's Motion to Dismiss in its entirety. The DFEH has jurisdiction over violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1990), occurring within California because the ADA is incorporated into the Unruh Civil Rights Act (Unruh Act), CAL. CIV. CODE § 51(f) (West 2012). The DFEH is the state agency responsible for enforcing the Unruh Act. CAL. GOV'T CODE § 12948 (West 2011 & Supp. 2012). The DFEH Complaint contains sufficient factual allegations to allege plausible claims for relief on the First, Second, Third, Fourth, and Fifth Causes of Action. No authority limits the DFEH's ability to recover damages or procedurally limits this suit based on the Department's administrative investigation.

II. FACTS

The facts relevant to LSAC's Motion to Dismiss include: class members' and Real Parties' experiences in applying for accommodation on the LSAT; and the DFEH investigative procedures of the Real Parties' complaints.

LSAC offers the LSAT regularly at various locations in California, along with other services. (Compl. ¶¶ 50-53.) In determining whether an applicant is disabled, LSAC requires applicants to take medication prescribed for their disabilities while being evaluated for accommodations, or explain their refusal to do so. (Compl. ¶ 55.) LSAC has a policy and practice of annotating or "flagging" exam scores that were earned under non-standard time conditions. When reporting these LSAT scores to the law schools, LSAC advises the schools that these examinees' scores "should be interpreted with great sensitivity and flexibility." (Compl. ¶ 56.) LSAC requires candidates requesting an accommodation for a cognitive or psychological impairment to provide psychoeducational/neuropsychological testing and a full diagnostic report, including comprehensive aptitude and achievement testing. (Compl. ¶ 54.) As to the 17 named real parties in interest, the DFEH pleads specific facts showing the amount of documentation submitted. With respect to many of these Real Parties, the DFEH has pled facts that additionally alleged the initial documentation submitted was not satisfactory to LSAC, and further that the applicants were required to compile further documentation before their requests for accommodation could be considered.[1]

The DFEH first received three individual complaints in 2010 alleging that LSAC had denied accommodation to LSAT applicants. (Compl. ¶¶ 19-20.) After some investigation, the DFEH determined that LSAC's practices were affecting a wider group or class. On July 22, 2010, the DFEH issued a Notice of Class Action Complaint and Director's Complaint. (Compl. ¶ 22, Ex. 3.) The affected group or class is defined as "all disabled individuals in the State of California who have or will request an accommodation for the Law School Admission Test (LSAT), administered by the LSAC, and who have or will be unlawfully denied such request from January 19, 2009 to the conclusion of the Department's investigation of this complaint." (Compl. ¶¶ 21-22, Ex. 3.) The

[1] John Doe, Compl. (¶¶ 62-65); Peter Roe, (¶¶ 78-79); Kevin Collins, (¶ 90); Otilia Ioan, (¶¶ 116-117); Caroline Lee, (¶¶ 137-140); Andrew Quan,(¶¶ 147-149); Stephen Semos, (¶¶ 154-155); Gazelle Taleshpour, (¶ 163-164); Austin Whitney, (¶¶ 182-185.)

Notice of Class Action Complaint and Director's Complaint further informed LSAC that the DFEH viewed the alleged denial of accommodations issue as affecting a wider class and informed LSAC that the DFEH would "continue the investigation to determine the merits of these allegations." (Compl. Ex. 3, ¶ 4 (last sentence).) The DFEH initially filed an accusation in this case before the California Fair Employment and Housing Commission (FEHC or Commission), the administrative adjudication and rulemaking body under the FEHA, CAL. GOV'T CODE § 12935 (West 2011 & Supp. 2012). (Compl. ¶¶ 40-41.) In accordance with practice in California Superior Court, the DFEH named DOE defendants in its Complaint. (Compl. ¶¶ 5-6.)

III. ARGUMENT

A. LEGAL STANDARD

A motion to dismiss is proper where the complaint fails to state a claim on which relief can be granted, either because the claim fails to state a cognizable legal theory, or fails to allege sufficient facts to support a legal theory. FED. R. CIV. P. 12(b)(6); *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the non-moving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). "[T]he rule of liberal construction is particularly important in civil rights cases." *Johnson v. State of Calif.*, 207 F.3d 650, 653 (9th Cir. 2000). "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, 678 (2009). The DFEH has supported each of its claims with sufficient factual allegations to meet the *Iqbal* plausibility standard.

B. THE DFEH HAS JURISDICTION OVER LSAC AS A PUBLIC ACCOMMODATION UNDER CALIFORNIA LAW

LSAC's suggestion that the DFEH lacks jurisdiction over the administration of the LSAT within the state is erroneous. The FEHA incorporates ADA violations into California law via the

Unruh Act. CAL. GOV'T CODE § 12948 (West 2011 & Supp. 2012). The DFEH is the state-mandated agency for enforcing Unruh Act access violations. *Id.*; CAL. GOV'T CODE § 12965 (West 2011 & Supp. 2012). Therefore, the DFEH has jurisdiction over whether LSAC has denied access to its testing services within the State of California. The Unruh Act entitles "all persons within the jurisdiction of this state" to the "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51(b) (West 2012). The Unruh Act is intended to be liberally construed,[2] and the term "business establishments" is interpreted "in the broadest sense reasonably possible." *Burkes v. Poppy Const. Co.*, 57 Cal. 2d 463, 468 (1962). Thus, all types of business establishments, including non-profit community services organizations, are covered by the Unruh Act. *Rotary Club or Duarte v. Board of Directors*, 178 Cal. App. 3d 1035, 1059 (1986); *Ibister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 85 (1985). LSAC has offered no reason why it is not a public accommodation or "business establishment" as defined by the Unruh Act, nor can it present evidence to do so on its motion to dismiss. Accordingly, this Court has jurisdiction over LSAC as a business establishment within the State of California. (Compl. ¶¶ 50-53.)

The FEHA authorizes the DFEH to investigate and prosecute claims of discrimination in places of public accommodation. *See* CAL. GOV'T CODE § 12930(f)(2) (West 2011 & Supp. 2012) (authorizing the DFEH to "receive, investigate, and conciliate complaints alleging a violation of" the Unruh Act); CAL. GOV'T CODE § 12948 (West 2011 & Supp. 2012) (incorporating CAL. CIV. CODE § 51 (West 2012) into the FEHA); CAL. GOV'T CODE §§ 12960-12965 (West 2011 & Supp. 2012) (procedures for accepting, investigating, and prosecuting complaints).

The FEHA provides that "[i]t is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights *created by* Section 51, 51.5, 51.7, 54, 54.1, or 54.2

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[2] "Since the Unruh Act is remedial in nature, it is to be given a liberal construction "with a view to effect its object and to promote justice." *Curran v. Mount Diablo Council of the Boy Scouts*,147 Cal. App. 3d 712, 727 (1983), quoting *Winchell v. English*, 62 Cal. App. 3d 125, 128 (1976).

of the Civil Code." CAL. GOV'T CODE § 12948 (West 2011 & Supp. 2012), italics added. LSAC presents a tortuous argument that the DFEH cannot enforce ADA rights because these rights were not "created by" the Unruh Act. LSAC offers no support for its argument other than the case of *Turner v. Ass'n of American Medical Colleges*, 167 Cal. App. 4th 1401 (2008) which did not claim any violation based on the ADA's incorporation into the Unruh Act. The *Turner* case held that the Unruh Act does not apply to policies and practices that apply equally to all people, other than the duty to provide reasonable modification by virtue of ADA incorporation. *Id.* at 1410. Indeed, the plaintiffs in *Turner* never asserted a claim for violation of CAL. CIV. CODE § 51(f) (West 2012). In fact, *Turner* emphasized the availability of an Unruh Act violation under § 51(f) in the appropriate case:

> In the context of this case, Civil Code section 51, subdivision (c) and the cases construing it can be readily harmonized with section 51, subdivision (f) and the ADA provisions it incorporates. Simply put, in addressing a claim that a facially neutral testing policy has a disparate impact on persons with learning and reading-related disabilities, accommodations are required to the extent they are required under the ADA. *Turner v. Ass'n of American Medical Colleges*, 167 Cal. App. 4th 1401, 1410 (2008)

The "created by" language of CAL. GOV'T CODE § 12948 (West 2011 & Supp. 2012) does not exclude the ADA rights incorporated in the Unruh Act by CAL. CIV. CODE § 51(f) (West 2012). Instead, the Legislature intended that those rights be incorporated in the FEHA and subject to its enforcement.

The FEHA also authorizes the DFEH to issue accusations to prosecute unlawful practices. CAL. GOV'T CODE § 12965(a) (West 2011 & Supp. 2012). In 1992, the Legislature amended the Unruh Act to state that "[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101–336) shall also constitute a violation of this section." CAL. CIV. CODE § 51(f) (West 2012); *see also Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 668 (2009). The stated purpose of the amendment was to "conform state anti-discrimination laws with the provisions of the Americans with Disabilities Act." Assem. Off. of Research, Third Reading Analysis, A.B.

1077 (Cal.1992 Reg. Sess.) as amended Jan. 29, 1992; *see Bass v. County of Butte*, 458 F.3d 978, 981 (9th Cir. 2006).

The California Fair Employment and Housing Commission (FEHC or Commission), the administrative adjudication and rulemaking body that interprets the FEHA, CAL. GOV'T CODE § 12935 (West 2011 & Supp. 2012), has held that the DFEH's jurisdiction is not limited to employment and housing matters, but rather includes Unruh violations. *Dep't Fair Empl. & Hous. v. Univ. of Cal. Berkeley*, No. 93-08, FEHC Precedentail Decs. 1992-93, CEB 3 [1993 WL 726830 (Cal. F.E.H.C.)] (Nov. 18, 1993); *see also Rodriguez v. Airborne Express*, 265 F.3d 890, 898 (9th Cir. 2001) ("We accord great respect to the Commission's interpretation of its authority and will follow it unless it is clearly erroneous."). In *Dep't. Fair Empl. & Hous. v. Univ. of California, Berkeley*, 1993 WL 726830, at 2-5, a student at the university alleged a violation of the Unruh Act when a professor sexually harassed her. The FEHC rejected the university's claim that the DFEH's jurisdiction was limited to employment and housing matters. *Id*. at 9-11. The FEHC held that the California Legislature did not intend to limit the DFEH's authority to just employment and housing matters. *Id*. The FEHC also noted that the legislature has had numerous opportunities to limit the DFEH's authority and has not done so. *Id*. Indeed, in 1999, after incorporating the ADA into the Unruh Act, the Legislature amended CAL. GOV'T CODE § 12948 (West 2011 & Supp. 2012) of the FEHA. *Sabi v. Sterling*, 183 Cal. App. 4th 916, 928, n. 6 (2010). Neither at the time of the 1999 amendment nor at any time before or after has the California Legislature limited the DFEH's authority to investigate and prosecute ADA violations perpetrated by any "business establishment [ ] of every kind whatsoever."

LSAC cites *Bass v. County of Butte,* 458 F.3d 978, 979 (9th Cir. 2006) and *Anderson v. County of Siskiyou*, No. C 10–01428 SBA, 2010 WL 3619821 (N.D.Cal. Sept. 13, 2010) for the proposition that the DFEH lacks jurisdiction to prosecute its case because the FEHA is an amalgamation of laws related to employment and housing only and "[s]tandardized admissions tests do no fall within the original subject matter of the FEHA." (Mot. to Dismiss 10:8-14.) Defendant's reliance on these cases is misplaced. In *Bass*, plaintiffs sought to bring an employment

discrimination claim under the Unruh Act, which incorporates the ADA. *Bass*, *supra,* 458 F.3d 978, 979. The *Bass* court held that the Unruh Act did not incorporate the employment provisions of the ADA because the legislature did not intend the Unruh Act to reach employment discrimination cases, and to do so would undermine the administrative procedures of the FEHA. *Id*. at 981-83. In *Anderson*, plaintiff brought a wrongful death action based on the death of an inmate who had a disability and needed and was denied medical services. *Anderson*, *supra*, 2010 WL 3619821, at 1. The *Anderson* court held that the Unruh Act did not incorporate the ADA as that law applies to prisons and jails because prisons and jails are not business establishments. *Id*. at 6. These cases both reject an attempt by plaintiffs to incorporate ADA violations without any legislative intent to do so, in contrast with the present case, where the DFEH relies on the express incorporation of ADA violations into the Unruh Act. CAL. CIV. CODE § 51(f) (West 2012). These cases do not support the proposition that the DFEH may only prosecute claims related to employment and housing matters.

Without citing to any authority, LSAC further claims that the DFEH has no "substantive expertise to pursue claims in this area" and the U.S. Department of Justice is the sole enforcer of the ADA. (Mot. to Dismiss 11:15-21.) However, the statutory language is clear that the DFEH has jurisdiction to pursue its case. When the California Legislature incorporated the ADA into the Unruh Act under the FEHA, it did not make "substantive expertise" a basis for the DFEH's jurisdiction. *See generally* CAL. GOV'T CODE §§ 12948, 12930(f)(2), 12965(a) (West 2011 & Supp. 2012); CAL. CIV. CODE § 51 (West 2012). Accordingly, the DFEH has jurisdiction to proceed with this prosecution.

C. THE DFEH MAY PURSUE LITIGATION OF CLAIMS THAT ARE REASONABLY RELATED TO THE ALLEGATIONS IN THE COMPLAINT

LSAC claims that the ADA allegations in the DFEH's Complaint are beyond the scope of the underlying agency complaints, and therefore the DFEH has no authority to bring its claims. To the contrary, the claims asserted by the DFEH are "like or reasonably related to" the allegations in the initial charge such that they are properly at issue in this litigation. As the case cited by LSAC explains, the "like or reasonably related" standard "is met where the allegations in the civil suit are

within the scope of the administrative investigation which can reasonably be expected to grow out of the charge of discrimination." *Rodriguez v. Airborne Express*, 265 F.3d 890, 897 (9th Cir. 2001). The court explained in *Jones v. Los Angeles Community College Dist.*, 198 Cal.App.3d. 794, 810 (1988), in response to a defendant's argument that the facts supporting the plaintiff's claims of discrimination were not fairly reflected in his DFEH complaint:

> allegations in a complaint [before the FEPC, the predecessor agency to the DFEH] serve no purpose other than to get an investigation in motion." (*Marshall v. Fair Employment Practice Com*. 21 Cal.App.3d 680, 684 (1971). Significantly, if the DFEH decides to issue an accusation, the accusation 'shall set forth the nature of the charges ... and shall require the respondent to answer the charges at a hearing.' Cal. Gov't. Code § 12965 (a). Thus, it is erroneous to assume, as respondents do, that because precise actions claiming to constitute racial discrimination may not be specifically mentioned in a DFEH complaint, the Department cannot investigate them and could not issue an accusation based on the results of its investigation.

Jones v. Los Angeles Community College Dist., 198 Cal.App.3d. 794, 810; *see also Baker v. Children's Hosp. Med. Ctr*., 209 Cal.App.3d 1057, 1063 (1989); *Sanchez v. Standard Brands, Inc*. 421 F.2d 455, 465 (C.A. Tex. 1970) ("the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow").

The Department's ADA claims are "like or reasonably related to" the denial of accommodation claims articulated in the underlying DFEH complaints. As stated in the Complaint, the DFEH first notified LSAC in 2010 that two individuals had alleged that defendant had denied them accommodation on the LSAT. (Compl., ¶ 19, Ex. 1; ¶ 20, Ex. 2.) After some investigation, the DFEH determined that LSAC's practices were affecting a wider group or class. On July 22, 2010, the DFEH issued a Notice of Class Action Complaint and Director's Complaint. (Compl., ¶ 22, Ex. 3.) While it is true that none of these complaints specifically referenced the ADA, each complaint did cite the Unruh Civil Rights Act and its incorporation into the FEHA. The Notice of Class Action Complaint and Director's Complaint further informed LSAC that the DFEH viewed the alleged denial of accommodations issue as affecting a wider class and informed LSAC that the DFEH "will continue the investigation to determine the merits of these allegations." (Compl., Ex. 3, ¶ 4 (last sentence).) In the course of its further investigation, the DFEH learned of LSAC's practices of flagging, burdensome documentation demands and the other ADA violations alleged in its

complaint. Because LSAC was properly notified of the charges that formed the basis for the DFEH investigation, it is proper for the DFEH to pursue these claims in this lawsuit. LSAC's request to dismiss on this basis should be denied.

D. THE DFEH PROPERLY ASSERTS A CLAIM THAT LSAC'S CONSIDERATION OF MITIGATION MEASURES VIOLATES THE ADA (FIRST CAUSE OF ACTION)

LSAC contends that the DFEH cannot assert its claim that requiring applicants to disclose mitigation measures violates the ADA; LSAC argues that no private right of action exists to pursue such a violation. LSAC further contends that 42 U.S.C. § 12189 represents the exclusive remedy for alleged violations of the ADA in the testing context. However, the law is not so limited.

1. By Requiring Applicants to Take Medication Prescribed for their Disability or Explain their Failure to Do So, LSAC Is Violating the ADA, and Not Just an ADA Definition

LSAC's Motion to Dismiss the first cause of action should be denied because LSAC violates the ADA, and not just an ADA definition, by requiring applicants to either take medication prescribed for their disability or explain their failure to do so. LSAC argues that 42 U.S.C. § 12102(4)(E)(i)(I) is merely a definitional rule of construction and does not warrant a private right of action. (Mot. to Dismiss 13:11-14:15.) However, LSAC construes the complaint too narrowly. The DFEH's Complaint does not plead that LSAC simply violates a definition, but rather that it violates the rights of class members under the ADA. (Compl., ¶¶ 188, 189.)

Title III of the ADA, relevant here, states that "no individual shall be discriminated on the basis of disability in the full and equal enjoyment of goods, services, facilities, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). A plaintiff must prove that he or she has a disability within the meaning of the ADA, meaning a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102 (1)(A)-(C); *see Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539 (9th Cir. 1997). Section 12102 also states that "any determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication." 42 U.S.C. §

12102 (4)(E)(1)(i)(I). Thus, any consideration of mitigation measures here constitutes a violation of the ADA.

The ADA was amended in 2008 with the express purpose of broadening the definition of disability which, in the opinion of Congress, had been interpreted too narrowly by the courts.[3] *See Rohr v. Salt River Project Agric. Improvement and Power Dist.*, 555 F.3d 850, 862 (9th Cir. 2009) (Congress intended that impairments are to be evaluated in their unmitigated state bolstering the conclusion that insulin-dependent plaintiff had raised a genuine issue as to whether he was disabled under the ADA). LSAC, however, still relies on the pre-amendment definition of disability, which

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[3] "(b) Purposes.--The purposes of this Act [citations] are—
(1) to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA;
(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999)with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';
(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for 'substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 42 U.S.C.A. §12101 (Findings and Purposes) Pub.L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553.

allowed consideration of mitigation measures, to make a determination as to whether an applicant deserves an accommodation when taking the LSAT.

The Complaint alleges that in determining whether an applicant is disabled, LSAC requires applicants to take medication prescribed for their disabilities while being evaluated for accommodations, or explain their refusal to do so. (Complaint, ¶ 55.) The DFEH's first cause of action alleges that, by its consideration of mitigation measures, LSAC discriminates against class members by unlawfully restricting access to accommodations to which they might otherwise be entitled. This Court must take these factual allegations as true and draw all reasonable inferences in favor of the DFEH. *Wyler Summit P'ship v. Turner Broad. Syst.*, 135 F.3d 658, 663 (9th Cir. 1998). This Court could reasonably infer that because LSAC requires applicants to take their prescribed medication, it violates § 12102 of the ADA.

2. LSAC Cannot Raise a Factual Issue in its Motion to Dismiss Because the Court Must Accept the Facts of the Complaint as True

LSAC alleges that the first DFEH claim is based on an "incorrect factual premise," and that LSAC does not actually require applicants to take their prescribed medication while being evaluated. Mot. to Dismiss 14:16-18. According to LSAC, it simply "suggests" that evaluators administer the evaluation while the applicant is on his or her prescribed medication. (Mot. to Dismiss. 14:18-15:8.) This Court must take all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Syst.*, 135 F.3d 658, 663 (9th Cir. 1998). DFEH has supported its first cause of action with well-pleaded factual allegations that LSAC requires applicants to take their prescribed medication while being evaluated for accommodations, or explain their failure to do so. (Compl., ¶ 55.) This Court should decline LSAC's offer to delve into the evidentiary facts presented in Defendant's motion.

LSAC further offers for the Court's consideration its "Guidelines for Cognitive Impairments" and "Evaluator Form" in its Motion to Dismiss, claiming that the questions in these documents are entirely proper under the ADA. However, these documents are not properly before the Court and therefore should not merit consideration. FED. R. CIV. P. 12(d); *Lee v. City of Los Angeles*, 250 F.3d

668, 688 (9th. 2001). Because the DFEH Complaint contains sufficient factual allegations showing a plausible claim for relief on its first cause of action, LSAC's Motion to Dismiss this claim should be denied.

E. THE DFEH HAS ADEQUATELY ASSERTED A CLAIM THAT LSAC'S PRACTICE OF FLAGGING VIOLATES THE ADA (SECOND CAUSE OF ACTION)

DFEH's Complaint adequately pleads a claim that LSAC's policy of annotating, or "flagging" test scores taken under extended time conditions violates the ADA (Second Cause of Action). LSAC asserts that: "Section 12189 of the ADA and DOJ's implementing regulation do not prohibit the psychometrically sound practice of annotating scores." (Mot. to Dismiss 15:21-22.) However, this is a factual question that is subject to dispute and inappropriate for a motion to dismiss.

The DFEH's second cause of action alleges that LSAC is breaching its legal duty to ensure that the LSAT accurately reflects the class members' individual aptitude or achievement levels, as opposed to measuring their disability. (Compl., ¶ 195); 42 U.S.C. § 12189; 28 C.F.R. § 36.309(b)(1)(i). The Complaint alleges that LSAC has a policy whereby examinees who complete the LSAT under a disability-related accommodation involving extra time receive a notation on their score report indicating that their exam scores were earned under non-standard time conditions. When reporting these LSAT scores, LSAC advises the law schools that these examinees' scores "should be interpreted with great sensitivity and flexibility." (Compl. ¶ 56.) By annotating the test scores of applicants who take the test with the accommodation of extended time, the Complaint alleges LSAC is communicating to law schools that it does not know whether or not the applicants' exam results accurately reflect aptitude or achievement. (Compl., ¶ 195.)

In *Enyart v. Nat'l Conference of Bar Exam'r., Inc.*, 630 F.3d 1153 (9th Cir. 2011), the court upheld the district court's decision to grant a preliminary injunction ordering the National Conference of Bar Examiners (NCBE) to permit the examinee to use screen-reading and screen-magnification software. Defendant NCBE had argued that the "best ensure" regulation (28 C.F.R. § 36.309(b)(1)(i)) was invalid because the ADA required only reasonable accommodation. *Enyart*, 630

F.3d at 1162. The court rejected this argument, finding that the language of 42 U.S.C. § 12189, requiring that "entities offering licensing exams 'shall offer such examinations … in a place and manner accessible to persons with disabilities" was different from a reasonable accommodation standard. *Enyart*, *supra*, 630 F.3d at 1163.

> Notably, Congress did *not* incorporate 45 C.F.R. 84.12's 'reasonable accommodation' standard into §12989. Instead, § 12989 states that entities offering licensing exams 'shall offer such examinations … in a place and manner accessible to persons with disabilities or offer alternative arrangements for such individuals. 42 U.S.C. § 12189. One reasonable reading of § 12189's requirement that entities make licensing exams 'accessible' is that such entities must provide disabled people with an equal opportunity to demonstrate their knowledge or abilities to the same degree as nondisabled people taking the exam—in other words, the entities must administer the exam 'so as to best ensure' that exam results accurately reflect aptitude rather than disabilities.

Id., 630 F.3d at 1162 (emphasis in original). It is a question of fact whether LSAC has met the "best ensure" standard with respect to those applicants requiring extra time to accommodate their disability.

Likewise in *Breimhorst v. Educational Testing Service*, 2000 WL 34510621 (N.D.Cal.), marked "DO NOT PUBLISH OR INCLUDE IN DATABASE" but referenced here pursuant to Local Rules 3-4e and 7-14, the court found that plaintiff made a claim that flagging violated Educational Testing Services' (ETS) duty to make its examination accessible under 42 U.S.C. § 12989:

> Section § 36.309(b)(1) imposes a duty on test providers to best ensure that their tests are selected and administered to equally measure the abilities of disabled and nondisabled test takers. If the test providers meet this burden, then there would be no reason to flag the test results of disabled test takers who receive accommodations.

Breimhorst, *supra*, 2000 WL 34510621 at p. 5.

The DFEH's second cause of action contains sufficient factual allegations to show a plausible claim that LSAC breached its duty to best ensure that the LSAT accurately reflects the class members' individual's aptitude or achievement level, as opposed to measuring the disability. The question of whether or not the ADA prohibits the practice of annotating tests scores taken under extended time accommodation cannot be resolved by a motion to dismiss. It is true that in the case of *Doe v. National Board of Medical Examers*, 199 F.3d 146 (3rd Cir. 1999), the court placed the

burden of proof on the test-taker, rather than the testing entity, requiring the plaintiff to show that "his scores are comparable to non-accommodated scores, and thus that, by flagging, the [testing company] has imposed an inequality on him by treating the same thing differently." *Id.*, at P. 156. However, there is reason to believe, based on the analysis in *Enyart*, that in the Ninth Circuit, the burden is on the testing company to ensure that all applicants are treated fairly regardless of their disability. Even *Doe v. National Board of Medical Examiners* recognized that plaintiff had standing on the basis that the flagging of his test score cause him harm: "We are persuaded that this injury – being identified as a disabled person against his will – is enough to establish that Doe has suffered a concrete harm as a result of the NBME's policy of flagging accommodated scores." *Doe v. Nat'l Bd. of Med. Exam'r, supra*, 199 F.3d at 153. The DFEH has adequately pled its second cause of action for flagging, and the motion to dismiss this claim should be denied.

F. FLAGGING AS UNLAWFUL COERCION OR INTERFERENCE WITH ADA RIGHTS (THIRD CAUSE OF ACTION)

LSAC attacks the DFEH's Third Cause of Action, which alleges that LSAC's policy of annotating tests scores administered under extended time conditions discourages applicants from seeking such an accommodation, and punishes those who receive it, in violation of the FEHA, Unruh Act, and ADA. (Comp. ¶ 201.) The question of whether LSAC's practice of flagging violates the law is a factual matter that should not be resolved by a motion to dismiss. *Johnson v. State of Cal.*, 207 F.3d 650, 653 (9th Cir. 2000). The DFEH has adequately pled a plausible claim, which should defeat Defendant's motion.

LSAC argues first that because the practice of flagging is longstanding in the industry, it is not coercive. The DFEH intends to show, at a later date, that LSAC is one of the few testing agencies that continues to flag its test scores, but such an evidentiary presentation in inappropriate in this context. The Court must accept the facts alleged in the Complaint as true. *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). LSAC next contends that the DFEH has pled its claim in a conclusory fashion. The DFEH alleges that LSAC's policy of annotating tests scores administered under extended time conditions discourages applicants from seeking such an

accommodation, and punishes those who receive it. (Compl., ¶ 201.) The Court has been informed that three of the real parties are sufficiently concerned about retaining their anonymity that they have requested to participate in this action using pseudonyms. (Compl. ¶ 3.) From this request for anonymity, the Court can reasonably infer that applicants have a privacy interest in the details of their disability and need for accommodation that would act as a deterrent to asserting their right to testing accommodations in light of LSAC's flagging policy.

Accepting those allegations as true for the purposes of this motion, the Court could also reasonably infer that LSAC's policy of flagging extended time scores discourages applicants from asserting their right to accommodation because if the accommodation of extra time is granted, these applicants would be involuntarily identified to the law schools as having a disability that required accommodation. In the highly competitive law school admissions process, it would be natural to assume that any indication of difference would negatively affect one's chances. In *Breimhorst v. Ed. Testing Serv.*, the court found plaintiffs stated a claim for unlawful intimidation and punishment under very similar facts. *Breimhorst v. Ed. Testing Serv.*, *supra*, at 6. Because the DFEH has asserted a plausible claim that these applicants are deterred by flagging, LSAC's Motion to Dismiss on this basis should be denied.

G. DFEH ADEQUATELY STATES A CLAIM THAT LSAC'S EXCESSIVE DOCUMENTATION REQUIREMENTS VIOLATE THE ADA (FOURTH CAUSE OF ACTION)

LSAC contends that the DFEH fails to state a claim because: "There is nothing in ADA § 12989 that imposes any limitations regarding the documentation that may be requested in order to determine whether an individual has a covered disability and, if so, what testing accommodations might be needed." (Mot. to Dismiss., 17:28-18:3.) LSAC's assertion that the ADA imposes no limitation on documentation is erroneous. Even without considering the regulation, LSAC is required by 42 U.S.C. § 12189 to offer its examinations "in a place and manner accessible to persons with disabilities." The DFEH Complaint contains sufficient allegations to state a claim that LSAC breached its duty to make the LSAT accessible to people with disabilities by requiring excessive amounts of documentation of each real party in interest. (Compl. ¶ 207.) As part of this duty to make

an examination accessible, the regulation requires that any documentation requested be "reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested." (Compl. ¶ 206), citing 42 U.S.C. § 12189 and 28 C.F.R. § 36.309(b)(1)(iv).

The DFEH Complaint alleges that LSAC requires candidates requesting an accommodation for a so-called cognitive or psychological impairment to provide psychoeducational/ neuropsychological testing and a full diagnostic report, including comprehensive aptitude and achievement testing. (Compl. ¶ 54.) The DFEH has further alleged that LSAC breached its duty to make the LSAT accessible to people with disabilities by requiring excessive amounts of documentation. (Compl. ¶ 207.) In its recital of the facts as to each of the seventeen named real parties in interest, the DFEH pleads specific facts showing the amount of documentation submitted.[4] With respect to many of these real parties, the DFEH has additionally alleged that the initial documentation submitted by the real party was not satisfactory to LSAC and that the applicants were required to compile further documentation before their requests for accommodation could be considered.[5] From these allegations, the Court could reasonably infer that LSAC's documentation requirements are so excessive as to deny access to qualified applicants. On that basis, LSAC's motion to dismiss this cause of action should be denied.

LSAC's assertion that 28 C.F.R. § 36.309(b)(1)(iv) was "not in effect when it processed twelve of the Complainants' requests for accommodations" has no substance. (Mot. to Dismiss, 18:8-11.) Even before 28 C.F.R. § 36.309 was implemented, the United States Department of Justice (DOJ) had advised that unreasonable or unlimited requests for documentation would be considered a

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[4] John Doe, (Compl. ¶ 61); Jane Doe, (¶ 70); Peter Roe, (¶ 77); Raymond Banks, (¶ 84); Kevin Collins, (¶ 89); Rodney Decomo-Schmitt, (¶ 95); Andrew redacted, (¶ 102); Elizabeth Hennessey-Severson, (¶ 108); Otilia Ioan, (¶ 115); Alex Johnson, (¶ 122); Nicholas Jones, (¶ 129); Caroline Lee, (¶ 136); Andrew Quan, (¶ 146); Stephen Semos, (¶ 153); Gazelle Taleshpour, (¶ 162); Kevin Vielbaum, (¶ 173); Austin Whitney, (¶ 178, 181.)

[5] John Doe, (Compl. ¶¶ 62-65); Peter Roe, (¶¶ 78-79); Kevin Collins, (¶ 90); Otilia Ioan, (¶¶ 116-117); Caroline Lee, (¶¶ 137-140); Andrew Quan, (¶¶ 147-149); Stephen Semos, (¶¶ 154-155); Gazelle Taleshpour, (¶¶ 163-164); Austin Whitney, (¶¶ 182-185.)

violation of 42 U.S.C. § 12189. In the Federal Register, the DOJ notified the public that "requests for documentation must be reasonable and must be limited to the need for the modification or aid requested" when it first implemented 28 C.F.R. § 36.309. 28 C.F.R. Part 36, App. B, at 603 (1992); 56 FED. REG. 35544, 35573 (July 26, 1991). The DOJ added 28 C.F.R. § 36.309(b)(1)(iv) to clarify this earlier guidance because "[t]hrough its enforcement efforts, the Department has discovered that the requests made by testing entities for documentation regarding the existence of an individual's disability and her or his need for a modification or an auxiliary aid or service are often inappropriate or burdensome." 73 FED. REG. 34508, 34539 (June 17, 2008). Thus, 28 C.F.R. § 36.309(b)(1)(iv) did not create additional burdens and merely clarified what was already required under the statute.

Because 28 C.F.R. § 36.309(b)(1)(iv) did not alter existing rights or obligations and merely clarified what those existing rights and obligations had always been, it can be applied retroactively. *See Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 135 (1936) (explaining that agency rule interpreting a statute "is no more retroactive in its operation than a judicial determination construing and applying a statute to a case in hand"); *see also Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 744 n. 3 (1996) (stating where "a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means."). The regulation found at 28 C.F.R. § 36.309(b)(1)(iv) should be enforced retroactively because it clarified what existing rights and obligations had always been.

Like LSAC's claim that the ADA cannot be violated when an erroneous definition of disability is applied (First Cause of Action), LSAC argues here that no private right of action exists for a violation of the regulation's prohibition on excessive documentation. (Mot. to Dismiss 18:12-22.) As before, LSAC's argument fails because what the DFEH alleges is that, by making unreasonable documentation demands, LSAC makes its examination inaccessible to people with disabilities in violation of the ADA. (Compl. ¶ 206); 42 U.S.C. § 12189. The regulation merely helps explain why the underlying statute has been violated.

This litigation is distinguishable from *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009), cited by LSAC, where the Ninth Circuit held that a regulation promulgated under the ADA was not privately enforceable. The regulation in *Lonberg* required public entities to create a transition plan to meet the ADA's accessibility requirements when the statutory text of the ADA prohibited discrimination on the basis of disability. Compliance with the regulation "d[id] not directly remedy a denial of the statutory right" nor did noncompliance with the regulation violate the statutory right. *Id.* at 852. In *Abraham v. MTA Long Island Bus*, 644 F.3d 110 (2d Cir. 2011), the Second Circuit held that a regulation which created an "ongoing requirement" for participating entities could not be enforced in private right of action when the statute only required an initial and annual plan update. In contrast, the regulation in this case, 28 C.F.R. § 36.309(b)(1)(iv), consistent with 42 U.S.C. § 12189, enumerates specific ways that testing entities are prohibited from discriminating on the basis of disability. It does not place additional burdens or obligations on testing entities; it is therefore applicable and enforceable. Because the DFEH has competently alleged facts to support its claim that excessive documentation makes the LSAT inaccessible to the real parties in interest, LSAC's motion to dismiss this claim should be denied.

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H. THE COMPLAINT SUFFICIENTLY ALLEGES A CLAIM THAT LSAC'S REQUIREMENT OF EXCESSIVE DOCUMENTATION DISCOURAGES APPLICANTS FROM ENFORCING THEIR RIGHTS (FIFTH CAUSE OF ACTION)

LSAC requests to dismiss the DFEH's Fifth Cause of Action, which alleges that LSAC's policies and patterns of requiring unreasonable types and excessive amounts of documentation unlawfully coerces or interferes with the real parties' right to accommodation, in violation of 42 U.S.C. § 12203. (Compl. ¶ 213.) LSAC wrongly asserts that "[t]he fact that LSAC requires examinees to submit documentation in support of an accommodation request" or "disagreement" on whether any given real party's documentation warranted accommodations under 42 U.S.C. § 12189 cannot be a violation of 42 U.S.C. § 12203(b). (Mot. to Dismiss 19:4-7, 19:22-20:1.) Whether the requests for documentations are so excessive as to deter or interfere with an

applicant's right to accommodation is a question of fact to be determined by the trial court and should not be determined through a motion to dismiss. *See Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990)

LSAC also wrongly asserts that its conduct is permissible under the Settlement Agreement Between United States of America and National Board of Medical Examiners.[6] The Settlement Agreement clearly states that the request for documentation should be "reasonable" and "limited" to the existence of the disability. Settlement Agreement Between United States of America and National Board of Medical Examiners at ¶ 13. Moreover, neither LSAC nor the DFEH is a party to the Settlement Agreement, so it has no binding effect in the instant case. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty"). LSAC's motion to dismiss the DFEH's Fifth Cause of Action should be denied, because a plausible claim for unlawful coercion has been alleged.

I. THE DFEH IS NOT LIMITED TO THE SPECIFIC UNLAWFUL PRACTICES IDENTIFED IN ITS NOTICE OF CLASS ACTION COMPLAINT AND DIRECTOR'S COMPLAINT

Like its earlier argument that the DFEH must be limited to pursuing only those specific practices identified in the underlying administrative charges, LSAC urges this Court to narrow the DFEH's class action to include only those purportedly unlawful actions identified in its Notice of Class Action Complaint and Director's Complaint (Notice of Class Action Complaint). (Mot. to Dismiss 20:17-20.) The DFEH's Complaint describes this Notice and attaches a copy as Exhibit 3; the affected group or class is defined as "all disabled individuals in the State of California who have or will request a reasonable accommodation for the LSAT, administered by the LSAC, and who have or will be unlawfully denied such request from January 19, 2009 to the conclusion of the Department's investigation of this complaint." (Compl. ¶ 22, Ex. 3.)

[6] LSAC has not requested that this Court take judicial notice of the Settlement Agreement.

Defendant claims DFEH must narrow its proposed class so that it is identical to the class defined in the Notice of Class Action Complaint. (Mot. to Dismiss, 21:6-8). As was argued earlier in this Opposition Brief (pp. 7-8), the claims asserted by the DFEH in its Complaint are "like or reasonably related to" the allegations in the Notice of Class Action Complaint such that they are properly in issue in this litigation. The "like or reasonably related" standard "is met where the allegations in the civil suit are within the scope of the administrative investigation which can reasonably be expected to grow out of the charge of discrimination." *Rodriguez v. Airborne Express*, 265 F.3d 890, 897 (9th Cir. 2001). DFEH's proposed class does not have to be narrowed.

DFEH's definition of the class in its Notice of Class Action Complaint provided sufficient notice to LSAC of the DFEH's areas of inquiry and potential claims. LSAC concedes that the DFEH was required to hold a conciliation in this case. *See* CAL. GOV'T CODE § 12963.7 (West 2011 & Supp. 2012). LSAC does not deny the DFEH properly engaged in conference, conciliation, and persuasion with LSAC or that LSAC did not receive notice of the class action that the Department intended to pursue at the conciliation. LSAC essentially admits to receiving appropriate notice of the class action claims during conciliation. The DFEH's right to pursue class claims is not limited by the specific allegations made in the Notice of Class Action Complaint. Rather, the intent of the notice is to generally indicate that a class investigation is anticipated. LSAC's motion to dismiss the class claims on this basis should be denied.

J. GOVERNMENT CODE SECTION 12970 DOES NOT BAR THE DFEH FROM RECOVERING UNRUH DAMAGES IN CIVIL LITIGATION

LSAC erroneously claims that the court cannot award treble damages because the FEHC cannot do so. (Mot. to Dismiss 21:16-22:8.) Although the FEHC does not have the authority to award treble damages under the Unruh Civil Rights Act, a Court may do so. CAL. CIV. CODE § 52 (West 2012).

The DFEH initially filed an accusation in this case before the FEHC. (Compl. ¶¶ 40-41.) Thereafter, LSAC opted to have this matter heard in civil court. (*Id*. at ¶ 42.) Because LSAC transferred the litigation to civil court under California Government Code section 12965(c)(3) (West

2011 & Supp. 2012), LSAC is subject to this Court's broad authority to award treble damages under the Unruh Act. LSAC cannot have it both ways by removing this case to civil court and then claiming that the court's award authority is similar to that of the FEHC.

LSAC does not provide any legal authority for its novel proposition that this Court's remedial authority is the same as that of the FEHC. Indeed, the only authority Defendant cited undermines its claims that the DFEH is not entitled to treble damages. Defendant specifically contends that "Government Code section 12970, not Civil Code section 52, governs the award of damages ***by the Commission*** under Government Code section 12948, incorporating the Unruh Act." *Dep't Fair Empl. & Hous. v. Marion's Place*, No. 06-01-P, FEHC Precedential Decs.,2006 WL 1130912 *12 (Feb. 1, 2006) (*Marion's Place*) (emphasis added); *see also* Mot. to Dismiss 22:2-6. While *Marion's Place* limits the FEHC's remedial authority, it does not limit this Court's authority. To the contrary, the FEHA empowers courts, unlike the FEHC, with broad remedial powers. Indeed, CAL. GOV'T CODE § 12965(c)(3) (West 2011 & Supp. 2012) states that the "court may grant relief in any action filed pursuant to this subdivision any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b). . . ." CAL. GOV'T CODE 12965(c) (West 2011 & Supp. 2012) refers to actions filed by the DFEH before the FEHC that are later transferred to civil court by defendants. CAL. GOV'T CODE 12965(b) (West 2011 & Supp. 2012) refers to civil actions brought by aggrieved persons in which the DFEH does not issue an accusation. Thus, because courts may award aggrieved persons treble damages in their civil actions under CAL. CIV. CODE § 52 (West 2012) for violations of the Unruh Act, courts may similarly award treble damages in civil actions brought by the DFEH for violations of the Unruh Act.

Accordingly, LSAC's Motion to Dismiss the DFEH's prayer for treble damages should be denied.

K. DOE DEFENDANTS SHOULD REMAIN IN THE COMPLAINT AT LEAST UNTIL THE TIME OF INITIAL DISCLOSURES

LSAC's final argument is that the DFEH's allegations against the DOE defendants should be dismissed with prejudice because: (1) no specific facts are alleged to support liability against the

DOES; (2) no individual ADA liability exists; and, (3) the DFEH failed to identify any DOE defendant in its administrative complaints. The DFEH requests this Court's permission to retain its DOE allegations at least through the date of initial disclosures, which by the DFEH's calculation, would be November 16, 2012.

DOE defendants are primarily a creation of state court, where the DFEH filed its initial complaint. CAL. CODE CIV. PROC. § 474 (West 2012). "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint … and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly." *Id.* In accordance with state court practice, the DFEH named DOE defendants in its Complaint. (Compl. ¶¶ 5-6.)

The DFEH may find, during the initial disclosures, that other entity defendants are responsible for some or all of the alleged ADA violations. Some precedent exists that entities not named in the initial administrative complaints may be later named through a DOE substitution. In *Department of Fair Employment and Housing v. American Medical International, Inc.,* No. 86-13, FEHC Precedential Decs.1986-87, CEB 4 [1986 WL 74384 (Cal. F.E.H.C.)] (Nov. 20, 1986), the DFEH did not name a respondent in the administrative complaint. Nonetheless, the Commission asserted jurisdiction over the respondent, after weighing actual prejudice to the respondent and the complainant's and public's interest in the enforcement of the remedies in the FEHA. The DFEH asks this Court's leave to retain its DOE allegations through the date of initial disclosures. If, at that time, no other entities are named, the DFEH will dismiss the DOE defendants.

IV. CONCLUSION

This is an important civil rights case. The DFEH seeks simply to ensure a level playing field for those disabled individuals aspiring to a legal career. The Department's Complaint properly seeks on behalf of the class members, (1) the opportunity to be provided accommodations to take the LSAT under fair conditions and (2) an end to LSAC's stigmatization of those individual test takers who did nothing more than ask for accommodations to which they are entitled to under the law. LSAC's contention that the DFEH lacks jurisdiction to pursue ADA violations in this action is

without merit. Nor is the DFEH limited in this litigation by the scope of the underlying administrative charges. The DFEH has supported each of its claims with well-pled facts. This Court should therefore deny LSAC's motion to dismiss. In the event this motion is granted even in part, the DFEH requests leave to amend its Complaint. Leave to amend "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). A proposed order denying defendant's motion accompanies this brief.

Dated: June 21, 2012

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

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