No. _____

In the **Supreme Court of the United States**

AARON ABADI, *Applicant,*

v.

MARINA DISTRICT DEVELOPMENT COMPANY, LLC D/B/A BORGATA HOTEL CASINO & SPA, AND MICHAEL SCHULTZ,

Respondents.

APPENDIX

PETITION FOR WRIT OF CERTIORARI

Petitioner:
Aaron Abadi (Pro se)
82 Nassau Street Apt 140
New York, NY 10038
Tel. 212-785-0370
Email. abadi.rne@gmail.com

APPENDIX TABLE OF CONTENTS

Page

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1188

AARON ABADI,
Appellant

v.

MARINA DISTRICT DEVELOPMENT COMPANY, LLC,
doing business as BORGATA HOTEL CASINO & SPA;
MICHAEL SCHULTZ

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:22-cv-00314)
District Judge: Honorable Christine P. O'Hearn

Submitted Pursuant to Third Circuit LAR 34.1(a)
August 1, 2024
Before: BIBAS, PORTER, and MONTGOMERY-REEVES, Circuit Judges

(Opinion filed: August 29, 2024)

OPINION*

PER CURIAM

---

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appellant Aaron Abadi, proceeding pro se, appeals from the District Court's dismissal of his complaint with prejudice. For the following reasons, we will affirm.

I.

In May 2021, Abadi sought to make a reservation for a four-day stay at Borgata Hotel Casino & Spa ("Borgata"). Before that stay, Abadi informed Borgata via email that he would not be able to wear a face mask at the Borgata due to a sensory processing disorder. Borgata's Chief of Security responded that Borgata could not accommodate Abadi's request to stay without wearing a protective face covering. In 2022, Abadi filed a complaint based on those emails against Marina District Development Company, LLC, d/b/a Borgata, and the Chief of Security, alleging claims under Title III of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, 42 U.S.C. §§ 1983, 1985, and 1986, and the New Jersey Law Against Discrimination ("NJLAD"). He sought compensatory and punitive damages, as well as injunctive relief.

The District Court screened Abadi's complaint pursuant to 28 U.S.C. § 1915(e)(2) and dismissed it without prejudice for lack of standing. Abadi filed an amended complaint, which the District Court also screened. The District Court dismissed Abadi's ADA claim for lack of standing and his other federal claims for failure to state a claim. The District Court also dismissed Abadi's NJLAD claims with leave to amend for the purpose of establishing a jurisdictional basis. Abadi filed a second amended complaint, and Borgata moved to dismiss Abadi's NJLAD claims. The District Court granted Borgata's motion and dismissed the second amended complaint with prejudice. Abadi filed a timely notice of appeal.

II.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review of the District Court's dismissal of Abadi's claims. See Curry v. Yachera, 835 F.3d 373, 377 (3d Cir. 2016) (Rule 12(b)(6) motion); N. Jersey Brain & Spine Ctr. v. Aetna, Inc., 801 F.3d 369, 371 (3d Cir. 2015) (dismissal for lack of standing); Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000) (sua sponte dismissal for failure to state a claim). We may affirm on any basis supported by the record. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam). To survive a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[1] Santiago v. Warminster Twp., 629 F.3d 121, 128 (3d Cir. 2010) (internal quotations and citation omitted). Dismissal pursuant to Rule 12(b)(6) may be appropriate where an affirmative defense is apparent on the face of the complaint. Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245, 259 (3d Cir. 2014).

III.

On appeal, Abadi challenges the District Court's dismissal of his federal claims at the screening stage, as well as the District Court's decision to grant the defendants' motion to dismiss the NJLAD claims.

We agree with the District Court's dismissal of Abadi's ADA claim for lack of standing. Title III of the ADA, which prohibits discrimination on the basis of disability

[1] In evaluating whether a Rule 12(b)(6) dismissal was appropriate, we may examine "exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." See Davis v. Wells Fargo, 824 F.3d 333, 341 (3d Cir. 2016) (citation omitted).

in public accommodations, see 42 U.S.C. § 12183, only provides for injunctive relief, see 42 U.S.C. § 12188(a); Bowers v. Nat'l Collegiate Athletic Ass'n, 346 F.3d 402, 433 (3d Cir. 2003) ("Title III defendants cannot be liable for money damages."). A Title III plaintiff "lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future discrimination by the defendant." Pryor v. Nat'l Collegiate Athletic Ass'n., 288 F.3d 548, 561 (3d Cir. 2002). As the District Court noted, Abadi failed to allege facts raising such an inference here. On the contrary, Abadi's allegations pertained to a one-time incident in May 2021, and Borgata's mask requirement for all guests ended later that month. A possibility that the requirement may be reinstated—and Abadi thus may be again prevented from staying at the Borgata without a mask—is too speculative to establish Article III standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (reasoning that injury required to establish standing must be "actual or imminent, not conjectural or hypothetical" (internal quotations and citation omitted)). We accordingly agree with the District Court that Abadi lacked standing to pursue injunctive relief under Title III.[2]

We also agree with the District Court's decision to dismiss Abadi's claims under the Rehabilitation Act and § 1983. First, Abadi failed to state sufficient facts to support his conclusory assertion that Borgata qualified as a "program or activity receiving Federal

[2] For the same reasons, Abadi also lacks standing to pursue injunctive relief under the Rehabilitation Act. The Rehabilitation Act does provide for money damages. See A.W. v. Jersey City Pub. Schs., 486 F.3d 791, 804 (3d Cir. 2007) (describing remedies available under Section 504 of the Rehabilitation Act).

financial assistance," as required to bring a claim under the Rehabilitation Act. 29 U.S.C. § 794(a); see id. at § 794(b)(3)(A) (defining "program or activity"); see generally Castle v. Eurofresh, Inc., 731 F.3d 901, 908-09 (9th Cir. 2013). Second, even if Abadi could show that the defendants were somehow acting as state actors under the circumstances, his § 1983 claim fails because he cannot obtain damages under that statute for violations of the ADA standing alone, see Williams v. Pa. Hum. Rels. Comm'n, 870 F.3d 294, 300 (3d Cir. 2017), and he has not plausibly alleged that his constitutional rights were violated in the circumstances,[3] see generally Lavia v. Pa., Dep't of Corr., 224 F.3d 190, 200 (3d Cir. 2000) ("In comparing the protections guaranteed to the disabled under the ADA . . . with those limited protections guaranteed under the rational basis standard of the Fourteenth Amendment, it is clear that the former imposes far greater obligations and responsibilities on the States than does the latter.").

Finally, Abadi argues that the District Court erred by concluding that defendants properly assessed whether he constituted a direct threat before denying him access to Borgata. We disagree. The NJLAD is interpreted in accord with the ADA, Lawrence v. Nat'l Westminster Bank N.J., 98 F.3d 61, 70 (3d Cir. 1996), and the ADA's direct threat

[3] We also agree with the District Court's dismissal of Abadi's § 1985(3) claim. As the District Court explained, in an action against a private conspirator, only two rights are protected under § 1985(3): the right to be free from involuntary servitude and the right to interstate travel. See Brown v. Philip Morris Inc., 250 F.3d 789, 805 (3d Cir. 2001). Abadi did not allege a violation of either of those rights. Because Abadi failed to state a § 1985 claim, the District Court properly concluded that his § 1986 claim should also be dismissed. See Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994) ("Transgressions of § 1986 by definition depend on a preexisting violation of § 1985." (citation omitted) (cleaned up)).

exception "allows discrimination if a disability poses a direct threat to the health or safety of others," Doe v. Cnty. of Ctr., PA, 242 F.3d 437, 447 (3d Cir. 2001) (internal quotations and citations omitted); see also N.J.A.C. 13:13-4.11. We recently affirmed the application of that defense in another case involving Abadi, Abadi v. Target Corp., No. 23-2892, 2024 WL 1715403 (3d Cir. Apr. 22, 2024). As we explained, the denial of access due to a direct threat must be reasonable in light of the available objective medical evidence.[4] See Bragdon v. Abbott, 524 U.S. 624, 649-50 (1998) (explaining that the views of public health authorities, including the Centers for Disease Control ("CDC"), "are of special weight and authority" in this inquiry). When Abadi sought to stay at Borgata in May 2021, the CDC indicated that COVID-19, a highly transmissible respiratory virus, had contributed to more than 580,000 deaths in the United States.[5] See *COVID Data Tracker*, CDC (May 14, 2021), https://web.archive.org/web/20210514092301/https://covid.cdc.gov/covid-data-tracker/#datatracker-home. Half of the transmissions of the virus occurred from those without symptoms, and "universal masking," especially when indoors with people

[4] We also explained in Abadi that it was the *consequence* of Abadi's sensory disorder—that he could not wear a mask—rather than the disorder itself that implicated the significant risk of respiratory transmission of COVID-19. See 2024 WL 1715403, at *2.

[5] We take judicial notice of the CDC's May 2021 information about COVID-19 and its related recommended public health strategies as information publicly available on a government website. See Vanderklok v. United States, 868 F.3d 189, 205 n.16 (3d Cir. 2017); see also Gent v. CUNA Mut. Ins. Soc'y, 611 F.3d 79, 84 n.5 (1st Cir. 2010). Abadi also referred to the CDC guidance about masking in his complaint, so that guidance is incorporated by reference. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

outside of one's household, significantly reduced community transmission of the virus, new infections, and mortality rates. See *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 13, 2021), https://web.archive.org/web/20210513204529/https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fmore%2Fmasking-science-sars-cov2.html. Accordingly, in light of the objective medical evidence and view of the CDC at that time, defendants reasonably denied Abadi's access to Borgata because he was unable to wear a mask.[6] See Doe, 242 F.3d at 448.

We will affirm the judgment of the District Court. Appellees' motion for oral argument is denied.

[6] To the extent Abadi raises new allegations in support of his claims, we will not consider those allegations for the first time on appeal. See Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80, 88 n.12 (3d Cir. 2013). We discern no error in the District Court's application of the § 1915(e) standards. We also cannot conclude that the District Court abused its discretion in denying Abadi leave to further amend his federal claims, as amendment would have been futile. See Grayson v. Mayview State Hosp., 293 F.3d 103, 114 (3d Cir. 2002). Abadi also argues on appeal that he was entitled to discovery, but, as discussed above, Abadi alleged insufficient facts to warrant discovery. See Phillips v. Cty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (requiring a complaint to state "'enough facts to raise a reasonable expectation that discovery will reveal evidence' of the necessary element" of a claim to survive a Rule 12(b)(6) motion (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1188

AARON ABADI,
Appellant

v.

MARINA DISTRICT DEVELOPMENT COMPANY, LLC,
doing business as BORGATA HOTEL CASINO & SPA;
MICHAEL SCHULTZ

(D.C. Civil Action No. 1-22-cv-00314)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge; JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Tamika R. Montgomery-Reeves
Circuit Judge

Dated: September 20, 2024
ARR/cc: AA; MWA; MLM

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
CHRISTINE P. O'HEARN
UNITED STATES DISTRICT JUDGE

MITCHELL H. COHEN BUILDING &
U.S. COURTHOUSE
4TH & COOPER STREETS
ROOM 6050
CAMDEN, NJ 08101
856-757-5167

January 29, 2024

VIA CM/ECF
Aaron Abadi, *pro se*
82 Nassau Street, Apt. 140
New York, NY 10038

Pro Se.

Martin W. Aron
Mary L. Moore
JACKSON LEWIS, P.C.
200 Connell Drive, Suite 2000
Berkeley Heights, NJ 07922

On behalf of Defendants.

LETTER ORDER

Re: Abadi v. Marina Dist. Dev. Co., LLC, et al.
Civil Action No. 22-0314

Dear Mr. Abadi and Counsel:

This matter comes before the Court on a Motion to Dismiss *Pro Se* Plaintiff Aaron Abadi's Second Amended Complaint, (ECF No. 9), pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c) by Marina District Development Company, LLC d/b/a Borgata Hotel Casino & Spa ("Borgata") and Michael Schultz, (collectively, "Defendants"), (ECF No. 26), and Plaintiff's Motion to Reopen Conspiracy Counts. (ECF No. 43). Plaintiff filed opposition to Defendants' Motion on June 1, 2023, (ECF No. 37), and July 1, 2023.[1] (ECF No. 42). Defendants opposed Plaintiff's motion in their Reply brief. (ECF No. 44). The Court did not hear oral argument pursuant to Local Civil Rule 78.1. For the reasons that follow, Defendants' Motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

[1] While the majority of Plaintiff's July 1, 2023 opposition mirrors that of his June 1, 2023 opposition, Plaintiff also includes argument in support of his Motion to Reopen Conspiracy Counts. *See* (ECF No. 37; ECF No. 42). Though procedurally improper, the Court will consider this argument given Plaintiff's *pro se* status.

I. Background

Plaintiff planned to visit the Borgata hotel and casino located in Atlantic City between May 16 and May 18, 2021, for a complimentary stay. (2d Am. Compl., ECF No. 9 at ¶¶ 17, 23–24). Plaintiff emailed the Borgata on May 13, 2021, requesting that he be permitted to enter the hotel and casino without a mask despite the mandate that was in effect throughout the State of New Jersey at the time in response to the Covid-19 pandemic. (ECF No. 9 at ¶¶ 17–18). In his email, Plaintiff explained that a sensory disability prevented him from being able to wear a mask. (ECF No. 9 at ¶ 18). The next day, Defendant Schultz responded and informed Plaintiff that he could not enter the property "without a face mask, face covering or face shield." (ECF No. 9 at ¶ 20).

Plaintiff filed a Complaint with the New Jersey Division on Civil Rights alleging disability discrimination. (ECF No. 9 at ¶ 32; ECF No. 9-1 at Ex. I). Finding that there was a low likelihood of success on the merits, the State declined to investigate Plaintiff's claims. (ECF No. 9 at ¶¶ 32–33; ECF No. 9-1 at Ex. I).

The Borgata lifted its mask mandate on May 28, 2021. (ECF No. 9 at ¶ 47).

Plaintiff filed a seven-count Complaint on January 24, 2022, (ECF No. 1), a six-count Amended Complaint on October 4, 2022, (ECF No. 6), and a seven-count Second Amended Complaint on October 24, 2022, (ECF No. 9), alleging various state and federal causes of action. The Court has since dismissed Plaintiff's federal claims, *see* (ECF No. 5), and only his state claims remain.[2] In Counts Six and Seven of his Second Amended Complaint, Plaintiff asserts claims under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. §§ 10:5-1 to -50, alleging that Defendants discriminated against him when they informed Plaintiff that he would need to wear a mask or face covering to gain entry to the Borgata.[3] (ECF No. 9 at ¶¶ 95–103). Plaintiff seeks $100,000 in compensatory damages for alleged "emotional distress [and] humiliation," and generally requests punitive damages and injunctive relief "to make certain that [Defendants] will not and cannot discriminate against [him.]" (ECF No. 9 at ¶¶ 100, 102–03).

[2] On January 30, 2023, the Court found that Plaintiff sufficiently alleged facts to establish diversity jurisdiction for his remaining state law claims. (ECF No. 10).

[3] Plaintiff has filed several similar lawsuits throughout the country. *See, e.g., Abadi v. Quick Chek Corp.*, 21-20272, 2023 WL 3983879 (D.N.J. June 13, 2023); *Abadi v. Target Corp.*, No. 22-2854, 2023 WL 6796558 (E.D. Pa. Oct. 13, 2023); *Abadi v NYU Langone Health Sys.*, No. 21-11073, 2023 WL 8461654 (S.D.N.Y. Dec. 7, 2023); *Abadi v. Walmart, Inc.*, No. 22-0228, 2022 WL 9822322 (D. Me. Oct. 17, 2022); *Abadi v. Walt Disney World Parks & Resorts*, 338 So. 3d 1101 (Fla. Dist. Ct. App. 2022).

II. Legal Standard

A. Civil Rule of Procedure 12(b)(6)

When considering a motion to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005). It is well settled that a pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Further, a plaintiff must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*, 550 U.S. at 555). "A motion to dismiss should be granted if the plaintiff is unable to plead 'enough facts to state a claim to relief that is plausible on its face.'" *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (quoting *Twombly*, 550 U.S. at 570). "While ordinarily a party may not raise affirmative defenses at the motion to dismiss stage, it may do so if the defense is apparent on the face of the complaint." *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 259 (3d Cir. 2014).

While a court construes pleadings filed by a *pro se* plaintiff liberally and holds them to a less stringent standard than those filed by attorneys, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), "*pro se* litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

B. Civil Rule of Procedure 12(c)

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is appropriate "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). Such a motion is reviewed under the same standards that apply to a 12(b)(6) motion to dismiss. *Szczurek v. Pro. Mgmt. Inc.*, 627 F. App'x 57, 60 (3d Cir. 2015); *see also Newton v. Greenwich Twp.*, No. 12-0238, 2012 WL 3715947, at *2 (D.N.J. Aug. 27, 2012) ("[t]he difference between a motion to dismiss pursuant to Rule 12(b)(6) and Rule 12(c) is only a matter of timing and the Court applies the same standard to a Rule 12(c) motion as it would to a Rule 12(b)(6) motion.").

III. Discussion

Plaintiff alleges that a "sensory processing disorder" renders him "sensitive to touch." (2d Am. Compl., ECF No. 9 at ¶ 13). According to Plaintiff, this disorder causes "extreme discomfort" when wearing a mask. (ECF No. 9 at ¶ 14). Plaintiff argues that he was not required to wear a mask because a previous Covid-19 infection obviated his ability to spread the virus.

(ECF No. 9 at ¶ 15).[4] Defendants move to dismiss,[5] arguing that there was no reasonable accommodation they could provide Plaintiff under the state-wide mask mandate.[6] (ECF No. 26-1 at 11–12). Plaintiff responds that he would not have posed a "direct threat" to others if not wearing a mask because he "had natural immunity," and therefore Defendants could have provided him a reasonable accommodation. (Pl. Br., ECF No. 37 at 5; Pl. Br., ECF No. 42 at 7).

A. Plaintiff Fails to State a Claim Under the LAD

In Counts Six and Seven of the Second Amended Complaint, Plaintiff asserts claims under the LAD, alleging that Defendants discriminated against him on the basis of disability and failed to accommodate him when he was informed that he would need to wear a face covering to visit the Borgata. (ECF No. 9 at ¶¶ 95–102).

The LAD prohibits discrimination against those with disabilities and provides that "[a]ll persons shall have the opportunity to obtain . . . all the accommodation, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . disability." N.J.S.A. § 10:5-4; *see also id.* at -12(f). "A place of public accommodation discriminates against the disabled and is liable under the NJLAD if it fails to reasonably accommodate the disabled by providing suitable accesses to its services and facilities." *Lasky v. Moorestown Twp.*, No. 09-5624, 2011 WL 4900007, at *4 (D.N.J. Oct. 14, 2011) (relying on *Franek v. Tomahawk Lake Resort*, 754 A.2d 1237, 1243 (N.J. Super. Ct. App. Div. 2000)). Hotels and entertainment venues are considered "places of public accommodation" under the LAD. *See* N.J.S.A. § 10:5-5l; *see also Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 474 (3d Cir. 1986) (explaining that whether a location is considered a "place of public accommodation" depends on "whether the invitation to gather is open to the public at large."). "Less well established" than a claim for workplace discrimination brought under the LAD is a "cause of action based on the discriminatory behavior of a business owner," which is "actionable if it is outrageous enough to imply a design to discourage an individual's use of that public accommodation on account of [his] protected status." *Jones v. Pi Kappa Alpha Int'l Fraternity, Inc.*, 431 F. Supp. 3d 518, 531–32 (3d Cir. 2019).

"New Jersey courts generally interpret the LAD by reliance upon the construction of analogous federal antidiscrimination statutes"—here, the Americans with Disabilities Act ("ADA"). *Conchewski v. Camden Cnty.*, No 11-2781, 2014 WL 1153779, at *12 (D.N.J. Mar. 21, 2014) (alteration and citation omitted); *see also Masci v. Six Flags Theme Park, Inc.*, No. 12-6585, 2014 WL 7409952, at *8 (D.N.J. Dec. 31, 2014) ("Because the protections provided to

---

[4] Plaintiff further states that "the typical mask is barely a protection at all. This Plaintiff with his natural immunity and without a mask, is more safe than the typical person that is allowed access to Borgata, does not have immunity, and is wearing a mask." (ECF No. 9 at ¶ 46).

[5] In their brief, Defendants refer to "motion to dismiss" and "motion for judgment on the pleadings" synonymously. *See, e.g.*, (ECF No. 26-1 at 9).

[6] Defendants also raise questions as to the legitimacy of Plaintiff's *in forma pauperis* status. *See* (Defs.' Br., ECF No. 26-1 at 20–23).

disabled persons under the NJLAD are analogous to the protections offered under the ADA, New Jersey courts therefore apply the standards developed under the ADA when analyzing NJLAD claims.") (internal quotations and citation omitted); *Royster v. N.J. State Police*, 152 A.3d 900, 910 (N.J. 2017) ("the requirements for failure to accommodate claims under [the] LAD have been interpreted in accordance with the [ADA].") (alteration omitted).

"[I]t is appropriate to analyze an NJLAD disability discrimination claim by applying the [three]–part test employed to analyze claims under the [ADA]." *Conchewski*, 2014 WL 1153779, at *12. Under the test, a plaintiff must establish that (1) he is disabled; (2) that the allegedly discriminatory organization or business is considered a "public accommodation"; and (3) that "it unlawfully discriminated against him on the basis of his disability by (a) failing to make a reasonable modification that was (b) necessary to accommodate his disability." *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 175 (3d Cir. 2019); *see also Abadi*, 2023 WL 4045373, at *3. To make out a failure to accommodate claim, "a plaintiff must show that the accommodation he seeks is reasonable, . . . *i.e.*, that it is necessary to avoid discrimination on the basis of disability." *Muhammad v. Ct. of Common Pleas of Allegheny Cnty., Pa.*, 483 F. App'x 759, 763 (3d Cir. 2012) (internal citation and quotation marks omitted).

Both the LAD and the ADA "provide[] a defense where making an accommodation would impose an undue burden . . . or serious harm." *Frilando v. Bordentown Driver Training Sch., LLC*, 15-2917, 2017 WL 3191512, at *9 (D.N.J. July 27, 2017). *See* N.J.A.C. § 13:13-4.11 (regulations implementing the LAD explaining that reasonable accommodations must be granted in "any place of public accommodation" unless doing so "would impose an undue burden"); *see also* 28 C.F.R. § 36.302(a). Specifically, if an "individual poses a direct threat to the health or safety of others," an entity is permitted to deny to him "goods, services, facilities, privileges, advantages and accommodations." 42 U.S.C. § 12182(b)(3). An individual is considered a "direct threat" if "a significant risk to the health or safety of others . . . cannot be eliminated by a modification of policies, practices, or procedures." *Id.*

> In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.
>
> 28 C.F.R. § 36.208(b).

The parties do not dispute the veracity of Plaintiff's asserted disability. Nor does the Court for the limited purposes of deciding the motions before it. *See Abadi*, 2023 WL 4045373, at *2 n.4 ("Although Abadi's contention that his disorder 'limits almost all major life activities' because he 'cannot function' when something touches his face . . . was somewhat conclusory, we have held that a plaintiff 'is not required, at this early pleading stage, to go into particulars about the life activity affected by [his] alleged disability or detail the nature of [his] substantial

limitations.'") (alterations in original) (quoting *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009)). And there is no dispute that the Borgata is a "place of public accommodation" as that term is defined by the LAD. *See* N.J.S.A. § 10:5-5l. Therefore, the crux of Defendants' Motion to Dismiss hinges on whether Plaintiff would have posed a direct threat by refusing to wear a face covering.

Defendants were required to make an "individualized assessment" in determining whether Plaintiff's request for accommodation constituted a direct threat. 28 C.F.R. § 36.208(b). In denying the request, Defendants properly relied on "current medical knowledge or on the best available objective evidence," *id.*, which suggested that allowing Plaintiff to enter the Borgata without a face covering would pose "a significant risk to the health or safety of others." 42 U.S.C. § 12182(b)(3). Exhibits attached to Plaintiff's Second Amended Complaint in fact endorse "the wearing of face masks or cloth face coverings [as the] first line of defense to keep people safe from severe illness," and "one important way to slow the spread of COVID-19." (ECF No. 9-1 at Ex. B). Further reflected in Plaintiff's exhibits, the Centers for Disease Control "recommend[ed] that face masks be worn *by everyone*." (ECF No. 9-1 at Ex. B) (emphasis added).

When determining whether an individualized assessment of a plaintiff's direct threat was conducted in circumstances similar to those here, district courts throughout the country look only to whether the plaintiff was wearing a face covering, regardless of the setting. If not, challenges to mask requirements in the context of a disability discrimination claim are routinely dismissed. *See Abadi*, 2023 WL 6796558, at *6, *8 (granting a motion to dismiss and finding that the necessary individualized assessment was only to determine "whether an individual was wearing a mask" inside a Target store); *Ewers v. Columbia Med. Clinic*, No. 23-0009, 2023 WL 5629796, at *6 (D. Or. Aug. 31, 2023) (granting a motion to dismiss and explaining that the individualized assessment undertaken by the defendant "was whether Plaintiff was wearing a mask, and whether allowing Plaintiff to proceed with his [medical] appointment without a masking would pose a direct threat."); *Hernandez v. Costco Wholesale Corp.*, No. 21-0357, 2022 WL 17537981, at *2 (D. Ariz. Dec. 8, 2022) (granting a motion to dismiss and holding that revoking a plaintiff's Costco membership after "conduct[ing] an individualized assessment of the direct threat posed by his unwillingness to wear a face mask or face shield . . . does not amount to discrimination under the ADA."); *Witt v. Bristol Farms*, No. 21-0411, 2021 WL 5203297, at *6–7 (S.D. Cal. Nov. 9, 2021) (granting a motion to dismiss and explaining that "Defendants' individualized assessment to determine whether [the plaintiff] posed a direct threat was whether [she] was wearing a mask."); *Giles v. Sprouts Farmers Mkt., Inc.*, No. 20-2131, 2021 WL 2072379, at *5–6 (S.D. Cal. May 24, 2021) (same).

To conduct a proper individualized assessment, Defendants were thus required to determine whether Plaintiff would wear a face mask in the Borgata—which he refused[7]—and

[7] The Court notes that Defendants offered to Plaintiff the option of wearing an alternative "face covering or face shield." (2d Am. Compl., ECF No. 9 at ¶ 20). Plaintiff offers no explanation as to how these alternative accommodations were insufficient.

whether his refusal posed a direct threat to others. Defendants determined that Plaintiff's refusal to comply with the mandate constituted a direct threat. That assessment was "based on reasonable judgment that relie[d] on current medical knowledge or on the best available objective evidence," 28 C.F.R. § 36.208(b), that indicated that face coverings "keep people safe from severe illness," consistent with the information set forth in exhibits attached to Plaintiff's Complaint. (ECF No. 9-1 at Ex. B). As it is clear based upon the undisputed facts that Plaintiff posed a direct threat, Defendants were permitted to deny use of their services and facilities to Plaintiff. *See* 42 U.S.C. § 12182(b)(3). Defendants have therefore shown that the direct threat defense applies to Plaintiff's claims, and, as such, his claims must be dismissed.[8] *See Budhun*, 765 F.3d at 259 ("While ordinarily a party may not raise affirmative defenses at the motion to dismiss stage, it may do so if the defense is apparent on the face of the complaint.").

IV. Conclusion

For the foregoing reasons, Defendants' Motion (ECF No. 26) is **GRANTED**; and it is further

ORDERED that Plaintiff's Second Amended Complaint, (ECF No. 9), is **DISMISSED WITH PREJUDICE**; and it is further

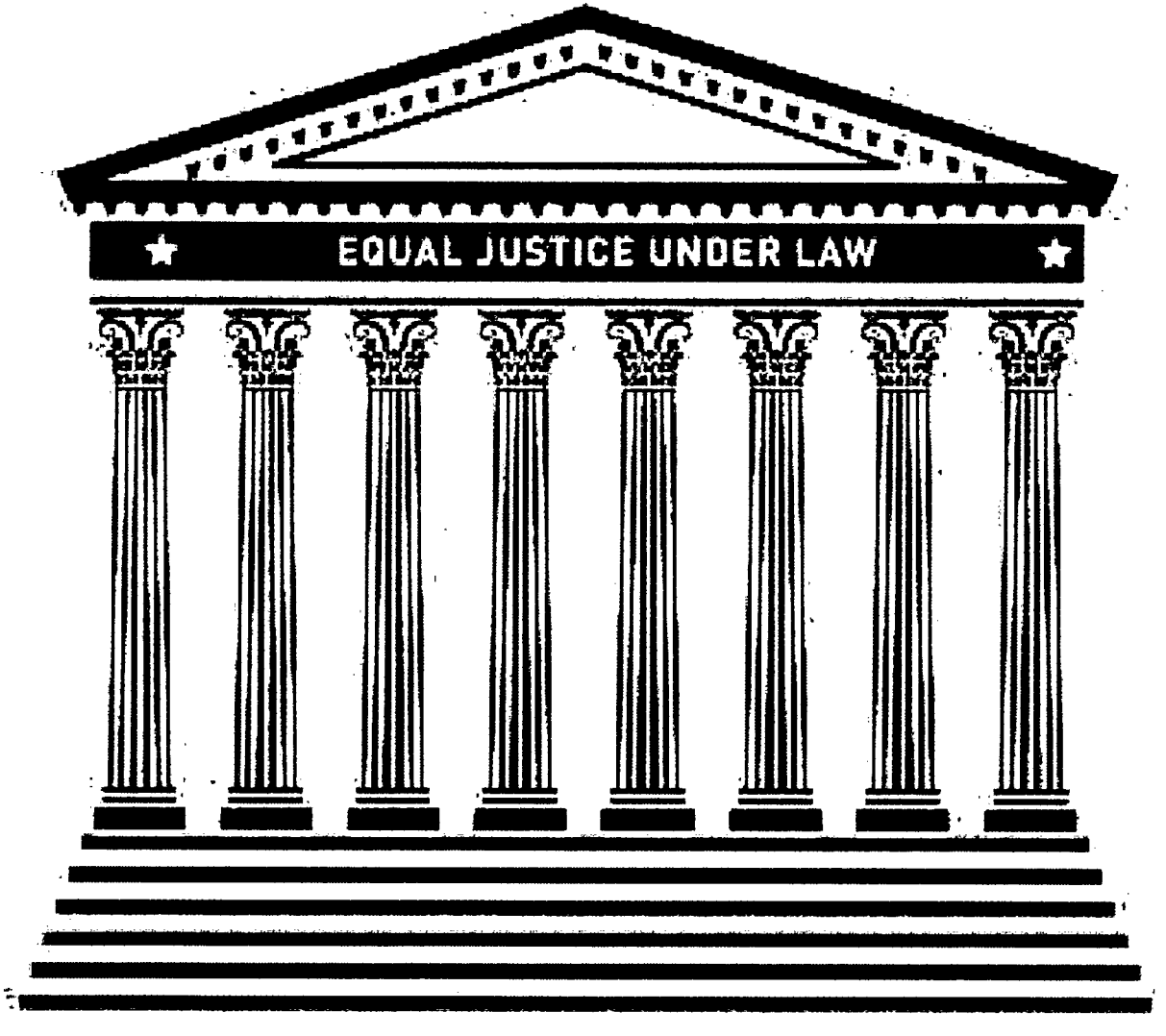
ORDERED that Plaintiff's Motion, (ECF No. 43), is **DENIED AS MOOT**.

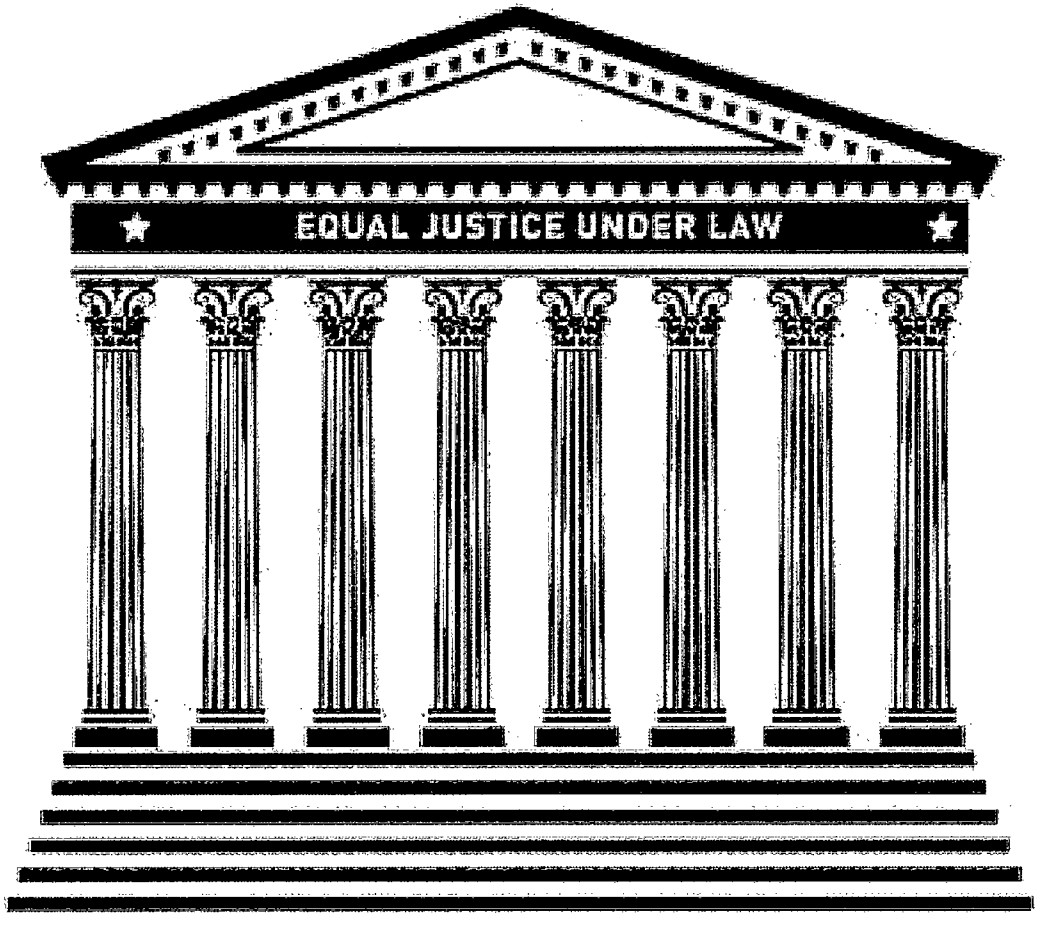
SO ORDERED.

Christine P. O'Hearn

CHRISTINE P. O'HEARN
UNITED STATES DISTRICT JUDGE

[8] In light of this Court's decision on Defendants' Motion, Plaintiff's Motion to Reopen the Conspiracy Counts, (ECF No. 43), is denied as moot. Even if the Court were to decide that Motion on the merits, the Court previously dismissed Plaintiff's Conspiracy Counts on October 4, 2022, (ECF No. 5), and denied Plaintiff's Motion for Reconsideration on October 17, 2022. (ECF No. 8). Plaintiff's Motion to Reopen provides no factual or legal authority to support a different result.


EQUAL JUSTICE UNDER LAW


EQUAL JUSTICE UNDER LAW