Case No. 25-1570

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARCIA HALLER,

Plaintiff-Appellant,

v.

SPECTRASITE COMMUNICATIONS, LLC; NEW CINGULAR WIRELESS PCS, LLC doing business as AT&T MOBILITY; T-MOBILE CENTRAL LLC; and DOES 1 through 10 inclusive,

Defendants-Appellees.

Appeal from the Judgment of the United States District Court
for the District of Minnesota, Case No. 24-CV-877-JMB-LIB
Honorable Jeffrey M. Bryan, United States District Judge

APPELLANT'S OPENING BRIEF

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SUMMARY OF THE CASE

Appellant requests oral argument.

This case for injunctive relief will allow Plaintiff/Appellant to *access*, *equally enjoy*, and *fully participate in the benefits of* wireless service, without discrimination or access barriers. The Defendant TSPs have refused to modify their policies, practices or procedures relating to how they construct, maintain and operate their commercial facilities despite Plaintiff's reasonable, non-burdensome and technically feasible request even though doing so would not lead to a fundamental alteration in the TSPs' goods, services or facilities.

The district court dismissed the complaint with prejudice under Rule 12(b), holding that covered entities satisfy their nondiscrimination duties by offering the same product or service to all. This misstates the statutory requirements and tests, and misconstrued the relief Plaintiff seeks.

Oral argument is likely to benefit the Court because this is a case of first impression in the Eighth Circuit, and because the attorneys are well equipped to answer technical questions regarding telecommunications law and technology. Pursuant to Fed. R. App. P. 34(a)(1) and 8th Cir. Rule 28A(i)(1), Plaintiff respectfully recommends 15 minutes per side for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Eighth Circuit Rule 26.1A, Appellant submits the following statement of corporate interests and affiliations for the use of the judges of this Court:

Appellant has no corporate interests. Appellant is not a publicly held corporation or other publicly held entity. Appellant has no stock, so no publicly held corporation or entity owns any stock in Appellant.

Respectfully submitted this 12th of May 2025.

/s/ Marjorie Holsten

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Regulations

Judicial Rules and Orders

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 2201(a) and 2202 to grant the requested relief, together with 42 U.S.C. §§ 12188, 2000a-3, and 3613. This Eighth Circuit Court has appellate jurisdiction under 28 U.S.C. § 1291 to reverse the district court's February 18, 2025 dismissal of the case with prejudice and without leave to further amend. Add1-Add9 (Addendum, pages 1-9) or App29-App37 (Appendix, pages 29-37, R. Doc. 50 at 1-9).

Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Appellant filed a timely notice of appeal on March 18, 2025 from the February 18, 2025 order (Add1-Add9, App29-App37, R. Doc. 50, at 1-9) and February 18, 2025 final judgment (Add10, App38, R. Doc 52, at 1) disposing of all parties' claims.

STATEMENT OF ISSUES FOR REVIEW

Pursuant to Federal Rules of Appellate Procedure 10(b)(3)(A) and 30(b)(1), Appellant hereby submits the following Statement of Issues for this appeal:

1. The District Court Erred by Applying a "Same for All" Discrimination Standard Without Considering Required ADA Tests for Unequal or Separate Benefits.

   Most Apposite Law (Statutory Provisions and Cases), pursuant to 8th Cir. Rule 28A(i)(2), Regarding Issue #1

42 U.S.C. § 12182(a) and (b)(1) (general rule and prohibition of disability discrimination, describing the requirement for accommodation in respect of participation in unequal benefit and separate benefit).

Camarillo v. Carrols Corp., 518 F.3d 153, 157 (2d Cir. 2008) (blind customer needs a *recognizable* menu (i.e., braille or audio) to access the goods and services).

2. The District Court Erred by Failing to Address Plaintiff's Access Barrier and Denial of Participation Claims.

Most Apposite Law Regarding Issue #2

42 U.S.C. § 12182(b)(2) (specific prohibitions of discrimination in the form of access barriers and denial of participation).

Hillesheim v. Myron's Cards & Gifts, Inc., 897 F.3d 953, 958 (8th Cir. 2018) (reversing dismissal of ADA complaint because an obstruction of access is discriminatory unless the obstruction is isolated or temporary, like those due to maintenance or repairs).

Hahn v. Linn County, 130 F. Supp. 2d 1036, 1052 (N.D. Iowa, 2001) and *Heather K. by Anita K. v. City of Mallard*, 946 F. Supp. 1373, 1389 (N.D. Iowa, 1996) ("the reasonableness of proposed modifications is generally a fact question not amenable to summary determination.").

3. The District Court Erred by Dismissing Claims Against SpectraSite, Which as a Lessor Has Independent Obligations Under the ADA.

Most Apposite Law Regarding Issue #3

42 U.S.C. § 12182(a) (the ADA imposes compliance obligations on "any person who … *leases (or leases to)* … a place of public accommodation."). *Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260, 1264 (9th Cir. 2015) ("the ADA imposes concurrent obligations on landlords and tenants, and [] a landlord, as an owner of the property, should be liable for ADA compliance even on property leased to, and controlled by, a tenant. … The landlord could not contract away its responsibility under the ADA.").

4. The District Court Erred by Dismissing All Claims With Prejudice and Refusing Leave to Amend.

Most Apposite Law Regarding Issue #4

Federal Rule of Civil Procedure R. 15(a)(2) (leave to amend should be freely given when justice so requires).

Reuter v. Jax Ltd., Inc., 711 F.3d 918, 922 (8th Cir. 2013) (leave to amend should be granted unless there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.).

STATEMENT OF THE CASE

Relevant Procedural History

The operative Plaintiff's pleading is the First Amended Complaint ("FAC"), submitted on June 12, 2024. (App1-App21, R. Doc. 17-2, at 1-21). The named defendants are SpectraSite Communications, LLC ("Tower Site" or "SpectraSite") and then New Cingular Wireless PCS, LLC d/b/a AT&T Mobility ("AT&T") and T-Mobile Central LLC ("T-Mobile") ("Telecom Service Providers" or "TSPs").

In July 2024, the TSPs and Tower Site filed Motions to Dismiss ("MTD") under Federal Rule of Civil Procedure R. 12(b)(6) (App25-App28, R. Doc. 28 at 1-2, and R. Doc. 31 at 1-2), along with Memoranda in Support ("MIS") (R. Doc. 29 at 1-26, and R. Doc 33 at 1-21).

Plaintiff responded to all Defendants with a single, consolidated Opposition. (R. Doc. 37 at 1-43).

The lower court conducted the Motions Hearing on October 15, 2024 (TR. at 1-30), and then on February 18, 2025 entered an Order (Add1-Add9, App29-App37, R. Doc. 50, at 1-9) and Judgment (Add10, App38, R. Doc 52, at 1) dismissing the entire case with prejudice. Appellant timely filed her notice of appeal March 18, 2025. (App39-App40, R. Doc. 53, at 1-2).

Relevant Facts

The relevant facts about Plaintiff's disability and the Tower history are stated in the FAC (App6-App10, R. Doc. 17-2, at 6-10). The lower court's Order (Add2-Add3, App30-App31, R. Doc. 50, at 2-3) also provides some case background:

> Plaintiff Marcia Haller lives with her husband and son in a single-family residence in Duluth, Minnesota. ([App4] R. Doc. 17-2 at 4, ¶ 9.) Near to Haller's home sits a wireless processing facility (Tower) owned by SpectraSite, from which telecom service providers AT&T and T-Mobile (TSP Defendants) operate a wireless transmitting facility. ([App5, R. Doc. 17-2] *Id*. at 5, ¶ 13.) In October 2019, the Tower was upgraded. ([App6-App7, R. Doc. 17-2] *Id*. at 6-7, ¶ 20.) Shortly after the upgrade, Haller began to experience "severe, disabling symptoms" including multiple strokes, vision loss, hearing loss, headaches, sleep disruption, chronic fatigue, and cognitive impairment. ([App6-App7, R. Doc. 17-2] *Id*. ¶¶ 20, 21.)
>
> In total, Haller asserts that she has suffered fifty-one strokes, necessitating cumulative months of hospitalization. ([App6-App8, R. Doc. 17-2] Id. at 6-8, ¶¶ 20, 25.) Haller's symptoms recede when she leaves her home and avoids other radiofrequency areas, but as soon as she returns to her home, the symptoms return. ([App7-App8, R. Doc. 17-2] *Id*. at 7-8, ¶¶ 21, 22, 24.) The radiofrequencies interfere with Haller's ability to concentrate, read, hear, and learn. ([App6, R. Doc. 17-2] Id. at 6, ¶ 19.) When Haller is at home, she spends most of her time in her garage in a "Faraday Cage," a small structure built to block radiofrequencies. ([App7-App8, R. Doc. 17-2] *Id*. at 7-8, ¶¶ 22, 23.)
>
> Haller asserts that ongoing operation of the Tower and its emissions constitute discrimination by a place of public accommodation in violation of Title III of the Americans with Disabilities Act (ADA). ([App10-App18, R. Doc. 17-2] *Id*. at 10-18, ¶¶ 33-50 (citing 42 U.S.C. § 12182).) Haller seeks declaratory and injunctive relief to order the relocation of the wireless transmitting facility or otherwise reduce the radiofrequency emissions directed toward her home.

To these facts, Appellant would respectfully add the following. The FAC recognized that Tower Site and the two TSPs have different roles and explained why each of them fell within ADA Title III. App4-App5, App10-App11 (FAC, R. Doc. 17-2 at 4-5, 10-11, ¶¶10, 13, 36-39). App12-App14 (FAC, R. Doc. 17-2 at 12-14, ¶¶43-44) set out the nondiscrimination duties owed by Defendants to Plaintiff. App14-App17 (FAC, R. Doc. 17-2 at 14-17, ¶¶45-46) state the accommodation/modification Plaintiff requested by way of the Defendants' policies, practices, and procedures that will allow her nondiscriminatory access to and full and equal enjoyment of the TSPs' goods, services, privileges, advantages or accommodations. App15 and App17 (FAC, R. Doc. 17-2 at 15 and 17, ¶46 and n.16) specifically aver that Plaintiff's requested accommodation/modification request will not fundamentally alter the nature of the TSPs' services to Plaintiff or others. App17 (FAC, R. Doc. 17-2 at 17, ¶46) avers that the requested accommodation/modifications are readily achievable and will not constitute an undue burden. App14-App17 (FAC, R. Doc. 17-2 at 14-17 ¶45 and n.19) observe that even if access barrier removal is not technically feasible the Defendants must still provide access through other means. App19-App20 (FAC, R. Doc. 17-2 at 19-20) explain the Plaintiff's requests for Declaratory, Injunctive and other relief.

SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Marcia Haller is disabled. She must minimize the extent to which she is exposed to radiofrequency radiation ("RF") because high energy RF is a toxin to her. App7-App8 (FAC, R. Doc. 17-2 at 7-8, ¶¶22-26). Even so, she desires access to modern communications and subscribes to Defendant-Appellee AT&T's wireless service. AT&T, along with T-Mobile, lease space and have placed wireless transmitting equipment on Defendant-Appellee SpectraSite's wireless tower on the property adjoining Plaintiff Haller's property. App2 (FAC, R. Doc. 17-2 at 2, ¶2). The TSPs could fairly easily change their policies, practices and procedures relating to their transmitting systems so as to reduce the RF levels in and around her home without negatively affecting or fundamentally altering the nature of their communications service but they refuse to do so, contending they owe no duty to Plaintiff-Appellant other than to offer and provide the same "service" as is provided to the non-disabled. App2 (FAC, R. Doc. 17-2 at 2, ¶¶3-5).

The district court adopted Defendants' argument and dismissed the case with prejudice. This disposition was error. It uses the wrong test for discrimination by ignoring the separate and co-equal duties to ensure access to and afford full enjoyment of the service. It also fails to recognize the statutory prohibitions on unequal or separate benefits and access barriers. 42 U.S.C. § 12182(a), (b)(1)(A)(i)-(iii), (b)(2)(A)(i)-(v).

ARGUMENT

I. Standard of Review

A. Dismissal for Failure to State a Claim

The standard of review is *de novo*. *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999); *Springdale Educ. Ass'n v. Springdale Sch. Dist.,* 133 F.3d 649, 651 (8th Cir. 1998). Dismissal for failure to state a claim is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. When analyzing a 12(b)(6) dismissal, the court accepts the complaint's factual allegations as true and construe them in the light most favorable to the plaintiff. *Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 911 F.3d 505, 512 (8th Cir. 2018).

B. ADA Standard for Viable Claims

The district court cited the broader ADA standard for viable claims, at Add3 (Order, App31, R. Doc. 50 at 3), citing to *Koester v. YMCA of Greater St. Louis*, 855 F.3d 908, 910 (8th Cir. 2017):

> To establish a claim under Title III, the person alleging disability must show that: (1) that he is disabled within the meaning of the ADA; (2) that the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant discriminated or otherwise took an adverse action against the plaintiff based on the plaintiff's disability; and (4) that the defendant failed to make reasonable modifications that would accommodate the plaintiff's disability without fundamentally altering the nature of the public accommodation.

C. Standard of Review for Denying Leave to Amend

The standard of review is *de novo* for the lower court's legal conclusion that amendment would be futile. *Reuter v. Jax Ltd*., 711 F.3d 918, 921 (8th Cir. 2013) ("This court generally reviews a district court's denial of leave to amend a complaint for abuse of discretion, though the underlying legal conclusions for a denial based on the futility of the proposed amendments are reviewed de novo.").

II. Issues

At this stage of the litigation, the first ADA element (Plaintiff's disability) is uncontested. *See* Add5 (Order, App33, R. Doc. 50 at 5), "accepting as true Haller's allegations of severe adverse reactions to radiofrequencies emitted by the TSP Defendants' antennas." Nor did the lower court rule adversely on the second element: place of public accommodation.[1] Rather, the lower court dismissed the

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[1] In a footnote (Add7, App35, R. Doc 50, at 7, n.2) the lower court questioned, but did not resolve, whether "cellular networks" qualify as "places of public accommodation" because they are allegedly not "physical, publicly accessible locations." Plaintiff extensively briefed this issue and the FAC averred plausible facts showing that the TSPs' network have physical components and customers must be physically within a defined physical "coverage" area to receive and use the service (R. Doc 37 at 19-31). In any event, as the District Court in *Frost v. Lion Brand Yarn Co.,* No. 24-cv-950 (KMM/LIB), 2025 U.S. Dist. LEXIS 21272, *2 (D. Minn. Feb. 6, 2025) recently explained, the physical "place" test used in some circuits does not comport with the ADA's expansive meaning of "place" and even completely virtual websites are subject to Title III.

Note 2 went on to question whether Plaintiff has standing to sue T-Mobile since she does not presently seek to subscribe to that TSP's service. This concern is misplaced. *See* FAC ¶45c, n. 17 (App15, R. Doc 17-2 at 15). Whereas the §

entire case with prejudice by citing the third and fourth elements. Order (Add5, App33, R. Doc. 50 at 5) states:

> …the allegations in the Amended Complaint, when viewed in their entirety, do not identify any discriminatory act…
>
> To the extent that Haller is asking the TSP Defendants to fundamentally alter the nature of their service or business as an accommodation for her disability, such requests are clearly excluded from Title III relief. See 42 U.S.C. § 12181(b)(2)(A)(ii).

This is where the lower court fell into error. Plaintiff-Appellant did identify discrimination based on disability of the kind proscribed by 42 U.S.C. § 12182(a) by averring the TSPs were denying full and equal enjoyment of the TSPs' goods, services, privileges and accommodations. App12-13, 14, 15-16 (FAC, R. Doc. 17-2 at 12-13, 14, 15-16, ¶¶43a, b, c, 45a, c). The TSPs also discriminated under § 12182(b)(2)(A)(ii) by failing to make reasonable modifications to afford their services to Plaintiff. App 14 (FAC, R. Doc. 17-2 at 14-15, ¶45b). Plaintiff plausibly averred that such

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12182(b)(l)(A)(i)-(iii) duties only apply to those who seek to be clients or customers, that limitation does not apply to (a) or (b)(2)(A)(ii) and (iii). So, a public accommodation can illegally discriminate against even those who do not affirmatively seek access to the good or service. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1333-34 (11th Cir. 2013), *citing, inter alia, PGA Tour, Inc. v. Martin*, 532 U.S. 661, 679, 121 S. Ct. 1879, 1891, 149 L. Ed. 2d 904 (2001)) (noting that § 12182(b)(l)(A)(iv) "is not literally applicable to Title Ill's general rule prohibiting discrimination against disabled individuals" and holding that "Title III's broad general rule contains no express 'clients or customers' limitation, § 12182(a), and § 12182(b)(l)(A)(iv) provides that its limitation is only '[f]or purposes of' the clauses in that separate subparagraph.").

modifications were feasible and non-burdensome and would not fundamentally alter the nature of the TSP service. App2, 14, 17 (FAC, R. Doc 17-2 at 2, 14, 17, ¶¶3-4, 45b, 46). Plaintiff further plausibly averred that the TSPs violated § 12182(b)(1)(A) by denying Plaintiff the ability to participate in their service benefits, not allowing Plaintiff the same privileges, advantages and accommodations as are afforded to the non-disabled and giving a separate benefit to the non-disabled not available to Plaintiff. App12-13 (FAC, R. Doc. 17-2 at 12-13, ¶43a, b, c). Finally, Plaintiff pleaded that the Defendants failed to remove barriers that prevented Plaintiff from being able to fully access their services, in violation of § 12182(b)(2)(iv). App14, 16 (FAC, R. Doc 17-2 at 14, 16, ¶¶44, 45d).

1. The District Court Erred by Applying a "Same for All" Discrimination Standard Without Considering Required ADA Tests for Unequal or Separate Benefits

A. The ADA Nondiscrimination Rule Requires More Than the "Same Stairs for All"

ADA Title III does not require that a public accommodation provide a different service to the disabled. It requires that the disabled have equal and nondiscriminatory access to and full and equal enjoyment of the same service as is provided to the non-disabled. "Same service for all" treatment is therefore appropriate if it achieves full and equal enjoyment of that service. All parties agree the TSPs offer the same service to all, and Plaintiff pleaded she merely wanted full

and equal access to and enjoyment of the TSPs' service. The problem here is not the TSPs' service but instead how the service is being delivered; the mechanism through which access to the service is being made available. A good analogy is the difference between products in a store and a barrier to entry to that store in the form of stairs rather than a wheelchair ramp. The TSPs insist they need not do anything more than offer the "same stairs" to everyone, even if that means some disabled individuals cannot access the store to buy the publicly-available products inside the store.

The service here is "telecommunications": the ability to communicate over a distance. The TSPs' service, for example, allows users to send and receive voice calls and texts and access the Internet. The TSPs also provide other ancillary services that leverage the basic communications function by creating a "place" for "public gatherings" (42 U.S.C. § 12181(7)(D)),[2] "entertainment" via movies and gaming and other "recreation" (§ 12181(7)(C), (L)). App11, 13 (FAC, R. Doc 17-2 at 11, 13, ¶¶39, 43c [n.15]).

The "cellular network" and its components are *not* the service; they are the underlying infrastructure that supports and allows customers to access the

[2] App13 (FAC, R. Doc 17-2 at 13, ¶43(c) (AT&T)).

telecommunications service.[3] This distinction is key because it relates to ADA's *second* requirement that the disabled not be denied meaningful access or subjected to unequal or separate benefits due to disability.

Plaintiff is not seeking a different service; she seeks modification of the TSPs' network policies, practices and procedures related to the means through which they support the service. If they grant the request, Plaintiff will *then* obtain equal and nondiscriminatory access to the TSPs' telecommunications service and all its benefits. The modifications are necessary to actually achieve "same for all."

A store does not have to offer different products for the disabled, but it must make those products reasonably available and cannot maintain barriers. It is no answer that the store "offers the same stairs" to all customers, whether mobility impaired or not. A wheelchair bound customer who wants a product inside but cannot get to that product because she cannot navigate the stairs suffers an illegal and discriminatory barrier to full and equal enjoyment of the product. So it is here.[4]

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[3] In ADA Title III terms, the network is merely a collection of "commercial facilities." App5 (FAC, R. Doc. 17-2 at 5, ¶13). *See* 42 U.S.C. § 12181(2); 28 C.F.R. § 36.104 (definition of "facility").

[4] *See also* FAC, R. Doc 17-2 at 3-5, 12-13, ¶¶8 [App3-App4], 13 [App5], 43 [App12-App13]; FAC, R. Doc 17-2 at 12-13, ¶43 [App12-App13]; TR. at 22:15-23:14 (Motions Hearing argument by Plaintiff counsel analogizing to placement of a store's product in high bins unreachable by someone in wheelchair).

The problem is access and the ability to have equal enjoyment of the TSPs' service.

That is why courts like *I.H. v. Oxnard Sch. Dist.,* No. CV 19-1997-MWF (MRWx), 2020 U.S. Dist. LEXIS 253504, *17-19 (C.D. Cal. Feb. 13, 2020) (discussed in detail below) correctly explain the ADA's second requirement to proactively *accommodate* and how certain courts err by limiting their analysis to "same for all" if it fails to *achieve* equality of access and enjoyment.

B. The ADA statute structures the analysis, and the FAC adheres to the statute

The correct analysis begins with the statute:

> No individual shall be discriminated against on the basis of disability in the *full* … enjoyment of the … services… or *accommodations* of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) [emphasis added].

> *Participation in unequal benefit.* It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

42 U.S.C. § 12182(b)(2)(A)(ii).

> *Separate benefit.* It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility,

> privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

42 U.S.C. § 12182(b)(2)(A)(iii).

Here, the allegations in FAC, R. Doc. 17-2 at 6, 12-17, ¶¶17, 42-46 (App6, App12-App17) confirm Plaintiff wants access to and the benefits of the same service provided to all others but is denied full and equal access and enjoyment of the service benefits. They also confirm her requested relief *would not* require fundamental alteration or modification of the service itself. Nor would the requested modifications/modifications place any Defendant in jeopardy of violating any provision in the Communications Act or any FCC rule or regulation. App14-App15 (FAC, R. Doc. 17-2 at 14-15, ¶45(b) n. 16). The ADA *prima facie* standard was plainly met, so the case should have been allowed to proceed.

Specifically, the lower court erred by ignoring Defendants' primary ADA violations, especially Defendants' refusal to engage in an accommodation dialogue, and refusal to accommodate. The Complaint was clear on these points overlooked by the district court:

> Defendants' willful failure to engage in a meaningful interactive accommodation process, and Defendants' refusal to provide accommodation/modification in light of Plaintiff's disability in plain disregard of her rights, both constitute unlawful discrimination within the meaning of the ADA.

App17-App18 (FAC, R. Doc. 17-12 at 17-18, ¶49).

> Plaintiff subscribes to but cannot use TSP services because it severely exacerbates her disability. If Defendants remove their discrimination

> against Plaintiff, then Plaintiff could fully use the service in the same way as non-disabled customers.
>
> Per section [42 U.S.C. § 12182(b)(2)(A)](ii), Plaintiff does not receive the same privileges, advantages, and accommodations as those who are not made ill from the services. For example, if Defendants accommodate Plaintiff's disability, then Plaintiff would have access to (1) the same privilege of wireless service coverage on demand, (2) the same advantage of enjoying the places of exhibition and entertainment, recreation, sales, service, video delivery, and the like that attend wireless service as a public accommodation.
>
> Per section [42 U.S.C. § 12182(b)(2)(A)](iii), those who are not made ill receive a separate benefit not accorded to the disabled, *to wit*, use without illness. For example, if Defendants remove their discrimination against Plaintiff, then (1) Plaintiff can access family plan wireless services that grant the full suite of public accommodation services without suffering symptoms or illness, and (2) Plaintiff can access on equal footing the suite of public accommodation services available to customers who are not physically injured by the services, including but not limited to online community services providing a "place of public gathering."

App12-App13 (FAC, R. Doc. 17-2 at 12-13, ¶43).

The district court was supposed to apply these clear allegations to the ADA statute as written. Instead, the district court dismissed all claims based on the erroneous standard that the defendants provided the *same* services to all individuals, regardless of disability. Add4. This "same for all" approach ignores the ADAs requirement to consider whether the plaintiff was denied meaningful access or subjected to unequal or separate benefits due to her disability.

C. "Same For All" discriminates if it fails to achieve equality

The above-referenced case of *I.H. v. Oxnard Sch. Dist., supra,* 2020 U.S. Dist. LEXIS 253504, *17-19 (C.D. Cal. Feb. 13, 2020) [emphasis added] provides a useful description of the ADA requirement to proactively accommodate, and how courts err by limiting their analysis to "same for all" when that fails to achieve equality:

> ["same for all" merely *begins* some inquiries] Title III prohibits discrimination in the enjoyment of the 'goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.'" *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666, 671 (9th Cir. 2010). "The ordinary meaning of this language is that whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services." *Id.* "This language does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided." *Id.* (stating that a "bookstore cannot discriminate against disabled people in granting access, but need not assure that the books are available in Braille as well as print").
>
> [Proactive accommodation *is the actual test of ADA compliance*] "Title III of the ADA . . . requires an entity operating public accommodations to make reasonable modifications in its policies when . . . necessary to afford such . . . accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such accommodations." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 661, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001).

Case law throughout the nation consistently emphasizes this need to go beyond "same for all" analysis. Another example is *Camarillo v. Carrols Corp*., 518 F.3d 153, 157 (2d Cir. 2008) [cited favorably in *Bahl v. Cty. of Ramsey*, 695

F.3d 778, 788, n.8 (8th Cir. 2012), an ADA Title II case] where a "same for all" menu was an ADA violation because a blind customer quite obviously needs a *recognizable* menu (such as braille or audio) to access the goods and services (there, prepared food), as the court found:

> Put simply, Camarillo cannot experience "full and equal enjoyment" of defendants' services if she is unable to access the list of the services available to her….on a motion to dismiss, the only fair inference to draw from Camarillo's complaint is that on numerous occasions, employees at defendants' restaurants were at best willing to read her part of the menu, and that they were unwilling to communicate effectively the range of options available to her. This is sufficient to state a claim under the ADA.

In both the dismissal order (Add1-Add9, App29-App37, R. Doc. 50 at 1-9) and the Motions Hearing Transcript (TR. at 1-30), we can plainly observe the court below erred by applying the "same for all" standard, and not the actual standard of *accommodation*. As the erroneous Order states at Add5:

> [T]he factual allegations in the Amended Complaint, when viewed in their entirety, do not identify any discriminatory act on the part of the TSP Defendants. Instead, she merely alleges that the TSP Defendants provide services to Haller in the same way that they provide services to other customers. In this way, the allegations only relate to the TSP Defendants' indiscriminate act: broadcasting a cellular network. Such an indiscriminate act does not constitute an act of discrimination under Title III. *See Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884, 888 (D. Idaho 2006) (dismissing ADA claim regarding air pollution on finding that an indiscriminate provision of benefits "does not discriminate against disabled individuals based upon their disabilities by failing to consider and take into account any needs such individuals may require in order to access public services."). The Court can discern no specific act toward Haller that is different than any act taken toward other non-disabled individuals.

The lower court's faulty reasoning is further made transparent through the Motions Hearing Transcript (TR. at 23:19-24:5), adopting the argument of Defendant's counsel at 13:3-7 and 14:18-15:2 that if services are provided to everyone equally, there is no discrimination):

> THE COURT: But it still seems to me that everybody agrees the services are being provided indiscriminately to everybody, in the same way. And so that's the question….What are they doing that's different? Because it didn't seem like there's anything in the complaint that they're doing something different to this person. They're doing the same indiscriminately to all persons.

The error comes from a misunderstanding of the ADA test. The focus is on whether the disabled person is being afforded full and equal access to and enjoyment of the service, not whether the service is the "same for all."

D. The lower court misread the Complaint and therefore misapplied the ADA

The district court misread the Complaint and in particular the requested relief. Again, Plaintiff is not asking for a different service or trying to require the TSPs to offer a "different service" just for her. The FAC repeatedly emphasizes she wants the same service, the same benefits, the same privileges and the same advantages but is being denied nondiscriminatory access because of the TSPs' policies, practices and procedures relating to how the service is being delivered in the area in and around her home.

There are multiple technical measures that might satisfactorily reduce Plaintiff's exposure from the TSPs' facilities. Reorienting antennas, taking advantage of newer antennas' ability to beamform or at most eliminating only one of the typical three sectors are all practically feasible and – if done correctly – will not materially reduce the company's ability to provide service to the rest of the public. These are access mechanism modifications, not a change to the overall telecommunications service itself. Because Defendants failed to even engage in a reasonable accommodation dialogue, these feasibility issues have not been narrowed yet. They are matters for expert testimony.

Non-disabled customers enjoy unequal and separate benefits of wireless service. Plaintiff Haller simply cannot access and enjoy her service because Defendants refuse to accommodate. Missing this well pled allegation and fixating only on a "same for all" inquiry was legal error.

Plaintiff's request for accommodation is reasonable on its face and in line with the statute and case law. She is not asking Defendants to modify their entire network or change how access is provided to *everyone*, but rather only how it is delivered to and around her house, and only for the purpose of allowing her to use the service. *See e.g., Caruso v. Blockbuster-Sony Music Entertainment Centre*, 193 F.3d 730, 740 (3d Cir. 1999) (the ADA does not require that public accommodation facilities provide wheelchair users with line of sight *over* standing

spectators, but facilities are required to provide wheelchair access to a lawn area used *by* spectators). In *Caruso* the defendant's argument that it could restrict wheelchair users from the lawn area because it provided higher quality closer seats in the pavilion was inconsistent with the plain language of Title III. The only way defendant could justify its failure to provide access to the lawn area was by showing structural "impracticability." Because it had not done so, summary judgment was reversed and the action remanded. *Id.*

At a minimum, the lower court should have overruled the motions to dismiss on the grounds that Defendants failed to engage in a *dialogue* on reasonable accommodation about practicability.

E. The lower court relied on inapposite case law

The lower court relied on inapposite cases (Order at Add6, App34, R. Doc 50 at 6) as a basis for dismissal. Specifically, the lower court's reliance on *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000), *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), and *Ford v. Schering-Plough Corp*., 145 F.3d 601 (3d Cir. 1998) was inapt. Those cases found that a public accommodation did not have to offer a different product to the disabled.[5] Here, however, Plaintiff repeatedly

[5] *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884, 889 (D. Idaho, 2006) (cited by the district court at Add5) also does not support the dismissal here. That was an ADA Title II case where the plaintiffs sought to have a state air quality agency impose limits on private parties' field-burning practices. The court there held that there was no discrimination based on disability *by the state* in its permitting

emphasized she wants the same product and is merely seeking a reasonable modification to the TSPs' policies, practices and procedures so she can obtain the benefits of that service. She expressly averred that her request *would not* force the TSPs to alter the fundamental nature of the service. App2, 14, 17 (FAC, R. Doc. 17-2 at 2, 14, 17, ¶¶3-4, 45b, 46).

The Defendants will be able to raise any affirmative defenses when they answer. The claim that Plaintiff is seeking a change to the service is an affirmative defense and the burden of demonstrating a fundamental change lies with the covered entity. 42 U.S.C. §12182(b)(2)(A)(ii), (iii); 28 C.F.R. §36.302(a). Individual facts will be necessary. "[T]he determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry." *Mary Jo C. v. State & Local Ret. Sys*., 707 F.3d 144, 153 (2d Cir. 2013); *Staron v. McDonald's Corp*., 51 F.3d 353, 356 (2d Cir. 1995); *Hahn v. Linn County*, 130 F. Supp. 2d 1036, 1052 (N.D. Iowa, 2001) ("The court finds that the reasonableness of proposed modifications is generally a fact question not amenable to summary determination."); *Heather K. by Anita K. v. City of Mallard*, 946 F. Supp. 1373, 1389 (N.D. Iowa, 1996) (same).

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regime. The requested relief would have granted greater benefits, not the same benefits.

For now, the Defendants and the Court must accept the FAC averments that the requested accommodations/modifications are technically feasible, will not constitute an unreasonable burden and will not require any fundamental alterations in Defendants' goods, services, facilities, privileges, advantages, or accommodations. Defendants can try to controvert those claims – with evidence – in later stages of the case.

F. The lower court erred by citing tort cases in a non-tort case

The lower court's reliance on *Samuels v. Safeway, Inc.,* 391 F. Supp. 3d 1, 6 (D.D.C. 2019) (disabled customer claimed uneven concrete was negligence *per se* because the uneven concrete would violate the ADA for wheelchair users) is also unhelpful because it was *not* an ADA case but rather a negligence *per se* case attempting to use the ADA as the basis for a finding of negligence. The same is true for *Aponik v. Verizon Pa., Inc*., 106 F. Supp. 3d 619, 622, 625 (E.D. Pa. 2015) (dealing with workers compensation remedies) and *White v. NCL Am., Inc.*, No. 05-22030-CIV-SEITZ/MCALILEY, 2006 U.S. Dist. LEXIS 24756 (S.D. Fla. Mar. 8, 2006) (personal injuries).

Plaintiff is not asserting negligence or any other tort. Plaintiff Haller does *not* seek a remedy for physical injuries, but rather injunctive relief for nondiscriminatory services access. She seeks enforcement of the Defendant-Appellants' ADA duties, not money damages.

While it is an understandable goal for courts to keep the ADA focused on disability accommodation rather than personal injury remedies, this does not mean the ADA ignores public safety objectives. An example is a case cited within one of the lower court's cited cases, *Theatre Mgmt. Grp., Inc. v. Dalgliesh*, 765 A.2d 986, 991 (D.C. 2001) (the physical accessibility guidelines within the ADA have a safety objective, "it is evident to us that the ADA—and specifically the physical accessibility guidelines promulgated under it—possess [a public safety objective]").

2. The District Court Erred by Failing to Address Plaintiff's Access Barrier and Denial of Participation Claims

Title III Specifically and Separately Prohibits Denial of Participation and Access Barriers. Public accommodations must ensure that individuals with disabilities are not excluded, denied services, or otherwise treated differently due to physical or other barriers. *See* 42 U.S.C. § 12182(b)(2)(A)(ii), stating that ADA discrimination includes:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

Under 42 U.S.C. § 12182(b)(2)(A)(iv), discrimination includes "a failure to remove architectural barriers, and communication barriers that are structural in

nature, in existing facilities." Discrimination also includes the failure to provide any necessary auxiliary aids. 42 U.S.C. § 12182(b)((2)(A)(iii).

Plaintiff alleged that RF emissions from the Defendants' facilities are so high (and higher than necessary) that they create a physical barrier that prevents her from accessing and participating in public life. See App13-App17 (FAC, R. Doc 17-2 at 13-17, ¶¶44, 45d, including references to the applicable ADA regulations 28 C.F.R. §§ 36.201, 36.202, 36.204). The FAC allegations sit squarely within the ADA to redress access barriers that deny participation.

The Eighth Circuit has recognized discrimination under the ADA occurs when a public accommodation is not readily accessible to and *usable* by individuals with disabilities. *Hillesheim v. Myron's Cards & Gifts, Inc.*, 897 F.3d 953, 958 (8th Cir. 2018) (reversing dismissal of ADA complaint). The Plaintiff's allegations that excessively high RF emissions prevent her from accessing the Defendants' phone and internet services should have been evaluated under this standard (accessibility), as the FAC (App16-App17, R. Doc. 17-2 at 16-17) described with particularity at ¶45d:

> Per (b)(1)(A)(iv) and (b)(2)(A)(iv), Defendants must take steps to remove architectural barriers[6] in the Tower and Antennas, and

[6] The architectural design of a tower and its transmitting equipment is one of the factors that leads to the manifestation of Plaintiff's symptoms. To take a single example, when a tower and its antennas are designed, one aspect is the orientation of the antennas (up and down/left and right). These can be adjusted in ways that significantly reduce the amount of energy beamed at a specific physical location.

> communication barriers that are structural in nature, in existing facilities, where such removal is readily achievable.[7] For example, each TSP's network and beamforming equipment is sufficiently technologically advanced to allow each TSP to easily modify the output of some of their transmitters to prevent the significant beaming of RF directly at Plaintiff's home through technically and economically feasible actions. They, in conjunction with SpectraSite, can manually or remotely adjust antenna orientation and directionality. It is entirely possible to address Plaintiff's disability without substantial increased costs in relation to the conduct of any Defendant's particular business or fundamentally altering the nature of its services. Simple technical adjustments can be made to the equipment or its operation so that Plaintiff is not subjected to debilitating radiation. Defendants' Tower and Antennas erect a "barrier" to accessing the service and even enjoying a peaceful, safe home environment. The DOJ rules make clear that if "barrier removal is not readily achievable" the public accommodation must still make the "goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable."[8] Plaintiff contends they are.

Similarly, the ADA prohibits (in this subsection on specific forms of discrimination) public accommodations from imposing *eligibility criteria* or practices that *tend to screen out* individuals with disabilities, unless such criteria are "necessary" for the provision of the goods or services. *See e.g.*, *Campbell v. Universal City Dev. Partners, LTD*, 72 F.4th 1245, 1251-52 (11th Cir. 2023) (manufacturer-imposed safety requirement is "necessary" under 42 U.S.C. §

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[7] If the barrier removable is not readily achievable then Defendants must provide access through other means, even if they are not the most integrated settings appropriate. Department of Justice, ADA Title III Technical Assistance Manual III-3.1000, available at https://www.ada.gov/resources/title-iii-manual/.

[8] 28 C.F.R. § 36.305(a).

12182(b)(2)(A)(i) only to the extent it is related to actual risks to the health and safety of guests):

> Title III of the ADA prohibits public accommodations from engaging in "discrimination." 42 U.S.C. §§ 12181-89. As the ADA defines the term, "discrimination" includes "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations." *Id.* § 12182(b)(2)(A)(i). So the general rule prohibits accommodations from imposing eligibility criteria that tend to preclude those with a disability from enjoying the public accommodation's good or service.
> …
> We hold that, in this kind of case, the plaintiff bears the initial burden of proof to show that … the defendant imposed an eligibility criterion that "that screen[ed] out or tend[ed] to screen out an individual with a disability," *id* § 12182(b)(2)(A)(i)—the prima facie case. Once the plaintiff makes or establishes a prima facie case, the burden shifts to the defendant to show that the eligibility criterion is "necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered." *Id.*

Defendants have the burden of proving at trial that their current network practices, policies or procedures as they relate to the situation at Plaintiff Haller's house are "necessary" to providing service to Haller or others or is necessary in some other regard. Plaintiff will present expert testimony that it is merely *convenient* for Defendants. As the ADA requires accommodation, the specific statutory prohibitions cited in the FAC are correct, and it was error for the lower court not to accept them at the motion to dismiss stage. *See e.g*., App6, App17-App18 (FAC, R. Doc. 17-2 at 6, 17-18, ¶¶19, 49).

The ADA's meaningful access standard requires a *fact-intensive* inquiry into whether the Plaintiff was afforded an equal opportunity to benefit from the Defendants' services. The FAC allegations relating to the TSP-erected barrier to her participation in public life should have been analyzed under this framework. As Plaintiff's counsel explained at the hearing, these are expert testimony matters not subject to dismissal at the complaint stage:

> I would direct your attention specifically to paragraph 17 [App6, R. Doc. 17-2 at 6]; paragraph 43a, b, c [App12-App13, R. Doc. 17-2 at 12-13]; paragraph 45a [App14, R. Doc. 17-2 at 14]; and paragraph 45d [App16, R. Doc 17-2 at 16]. Let me try to translate this and then answer what I think I heard the Court asking, which is is it just the RF in her home that's making her sick or is it somehow made worse when she tries to use it. Is it the use itself with her handset that makes it worse? And the answer is yes, it is the use that makes it even worse. I do need to point out that this is really a technical and a factual question. It may well require expert testimony. But the way that these networks operate is that the antennas that are mounted on the tower communicate with the handset, and when the handset begins to actually consume the service, the radiation increases. The antennas and the handsets talk to each other. And they adjust the power output depending on the use. And – and when you use this, there is more radiation. So it is her actual use that oftentimes sets her off and which gives rise to her risk of further strokes.
>
> Now, it is also true that the general atmosphere in her home is such that it makes her sick, but it becomes even worse when she tries to use her phone. And as you will see in the paragraphs that I outlined earlier, she says directly I'm at home, I cannot use my service at home because when I try to use my service, it makes me sick. She has to go into the Faraday cage without her phone, oftentimes with her phone turned off, in order to not suffer a worsened condition.
>
> And, again, this is really highly technical stuff on how these networks operate. It gets to the issue of a physical -- must a place be physical

> and how we try to meet the Ninth Circuit test on whether it is a physical place. Many of these things are highly technical and scientific facts that will require expert testimony. And we submit that many of the challenges that the defendants raise here cannot be resolved at the motion to dismiss stage simply because they are technical facts that require testimony and even more so technicalists (*sic*).

TR. at 16:2-17:15.

> And we heard AT&T just a moment ago insist: We don't discriminate. Well, they may not -- they may think they're not discriminating. They may think they are satisfying the nondiscrimination duties in the communications laws and even in the ADA simply by offering the same thing to everyone else, but that doesn't solve this question.
>
> We're not trying to get a different service. We want the same service. What we are asking them to do is adjust their policies. We are adjusting [sic] them to adjust their practices or their procedures, specifically as it pertains to how their antennas operate at this one tower. We believe -- and we have experts who will testify -- that it is entirely possible to maybe adjust the power down, maybe turn off the sector that is serving this area, maybe use some of the new modern beam-forming capabilities that are coming on and already deployed in many networks, perhaps even in this one, so that there is the envelope of RF that permeates the house and so that when Marcia Haller's phone is talking to that antenna on that tower and virtually entering the network through the antennas on that tower -- to answer yet another one of the Court's questions – that they can still provide the same service to Marcia Haller and, indeed, everyone else simply by using less power.

TR. at 19:18-20:16.

Case law is consistent in that the facts of ADA cases drive the analysis. See e.g., *Seaman v. Virginia*, 593 F. Supp. 3d 293, 327 (W.D. Va. 2022) (a requested modification is a fact question not amenable to motion to dismiss or even summary

judgment). Plaintiff highlighted the key facts in the Opposition to Motion to Dismiss, R. Doc. 37 at 16, and it was error for the lower court to miss them:

> The TSPs' facilities and services are best described as "phygital" – a combination of physical and digital attributes that collectively allow subscription, access and use. Customers like Plaintiff use their handsets to "access" the information capabilities of the network, much as one would walk in the door of a brick-and-mortar store. FAC ¶8 [App3-App4, R. Doc 17-2 at 3-4]. The network allows the TSPs to offer various capabilities, features and functions in the same way a store contains rows of bins holding different products a customer can select. FAC ¶¶8 [App3-App4, R. Doc. 17-2 at 3-4], 13 [App5, R. Doc 17-2 at 5], 43 [App12-App13, R. Doc 17-2 at 12-13]. Plaintiff is ***not*** asking for changes to the nature of the communications *service* the TSPs provide from their bins. What she seeks is removal of the present barriers to accessing and using the TSPs' publicly-offered service, features, functions and capabilities of interest to her so that she can enjoy them on an equal basis as customers that are not similarly disabled. FAC ¶43 [App12-App13, R. Doc 17-2 at 12-13].
>
> The communications service (exchanging information with other devices) itself does not cause Plaintiff's symptoms. Rather the cause arises from the way the service is accessed and supported. Returning to the store analogy, Plaintiff wants to have and enjoy the same items in the TSPs' "bin" as are offered to all others. But, like someone in a wheelchair who cannot access items that have been placed in the highest bin, under the TSPs' current practices Plaintiff cannot access the publicly-available services in the TSPs' bins without further injury.

Indeed, this point was further emphasized during the Motions Hearing. *See* TR. at 24:17-25:14):

> MR. MCCOLLOUGH [Plaintiff's counsel]: Well, remember, we're not alleging not only discrimination, but also access barrier. And in our briefing we talked about a store and bins. We're now back in the physical world, but we have to -- you know, we grew up in a physical world and are still trying to adjust to a nonphysical world, although

> we say this is physical. A store offers the same products to everyone. But if they put products on the highest bin on a row, somebody in a wheelchair cannot access that service. If they try to get out of the wheelchair and stand up to get that service, they will fall down and get hurt.
>
> What we are trying to convey here is that Marcia Haller wants to buy the same service and use the same service. But the way that the service is provided by this specific tower discriminates against her and, further, that there are reasonable modifications to the underlying network elements that can be made. So that would still allow them to provide the same service, but at a level that does not make her as sick. And we have experts who will be able to testify that, yes, indeed, this is technically feasible, nonburdensome, and will not put them at risk of FCC rule violations. We want them to just lower the bins so that Marcia Haller can use the service.

By failing to address Plaintiff Haller's access barrier and denial of participation claims, the district court failed to uphold the ADA's mandate to provide meaningful access and equal opportunity to individuals with disabilities.

3. The District Court Erred by Dismissing Claims Against SpectraSite, Which as a Lessor Has Independent Obligations Under the ADA

Lessors With Control Are Necessary Parties Under the ADA. The court below dismissed SpectraSite based on its prior finding that Plaintiff made "no plausible allegation of discrimination against the TSPs." It then, by way of footnote 4, suggested that SpectraSite may not be a public accommodation. Add8. Plaintiff has already explained why the FAC did plausibly allege discrimination. Part II.1.A-.D, *supra*.

The ADA imposes compliance obligations on "any person who owns, *leases (or leases to)*, or operates a place of public accommodation." 42 U.S.C. § 12182(a) [emphasis added]. The lessor therefore has separate and independent duties. *See*, *Frotton v. Barkan*, 219 F.R.D. 31, 2003 U.S. Dist. LEXIS 22417 (D. Mass. 2003) (landlord cannot delegate its responsibility for ADA compliance; not only could individuals sue landlord for alleged ADA violations, but landlord was necessary party to suit about access barriers); *Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260, 1264 (9th Cir. 2015) ("the ADA imposes concurrent obligations on landlords and tenants, and that a landlord, as an owner of the property, should be liable for ADA compliance even on property leased to, and controlled by, a tenant. [citation omitted] The landlord could not contract away its responsibility under the ADA.")

FAC ¶¶35-37 (App10, R. Doc. 17-2 at 10) alleges that SpectraSite leases to the TSPs (which are themselves public accommodations) and is therefore also a public accommodation.[9] Plaintiff also alleged plausible facts showing SpectraSite is a necessary party and independently responsible for ADA compliance.

[9] Plaintiff acknowledges that SpectraSite's legal status under the ADA entirely turns on whether the TSPs with whom it has lease arrangements are themselves public accommodations. But the statute is clear that one who leases to a public accommodation falls within the coverage of Title III.

Discovery will show the lease between the parties addresses the parties' joint responsibility for compliance with federal law including ADA compliance. The FAC as cited herein shows SpectraSite exercises control over the Tower and the TSPs' activities at the Tower and that complete relief cannot be granted without SpectraSite's collaboration.

Tower and the TSPs Defendants share joint control over the operations, so the ADA applies to each.

4. The District Court Erred by Dismissing All Claims With Prejudice and Refusing Leave to Amend

The district court erred in dismissing all claims with prejudice and refusing to grant Plaintiff leave to amend her complaint. Under Federal Rule of Civil Procedure 15(a)(2), leave to amend should be freely given when justice so requires, unless there is evidence of undue delay, bad faith, undue prejudice to the opposing party, or futility. *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715 (8th Cir. 2008) ("The Court may deny a party's request for leave to amend only "if there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.").

None of these exceptions apply here. Plaintiff has efficiently moved this case forward in good faith with no delays or procedural missteps. The reason the complaint was amended immediately after filing (summer 2024) was merely to

accommodate the Defendants' *name* corrections (it is common in the telecom industry for a defendant's name to mismatch their county permit records, as defendants often change names yet neglect to update county records). Defendants suffer no undue prejudice by Plaintiff updating her allegations to better harmonize with the ADA standards that this Honorable Court can interpret for this case of first impression in the Eighth Circuit.

For example, Plaintiff is able and ready to supply *additional* allegations regarding her status as a customer of Defendants, her use of Defendants' services in a geospatial context, the specific technical accommodation that would redress her under the ADA, and additional citations to law and agency guidance. Indeed, the facts and experts supporting Plaintiff's ADA claim are abundant (so more facts could easily be added to the Complaint if the Court would find it helpful at this stage to further substantiate allegations). Plaintiff's counsel is experienced with ADA and telecom law and welcomes the opportunity to provide a more detailed complaint, though in his experience courts prefer the short plain statement where feasible. With guidance from this Court, further tailoring of the FAC could help advance the interests of judicial economy by clarifying the scope of the case.

The district court erred by failing to liberally apply Federal Rules of Civil Procedure R. 15(a)(2). Instead, the district court order notes that Plaintiff did not

file a motion to amend the FAC pursuant to Minn. Local Rule 15.1(b).[10] However, it is unclear how Plaintiff could be expected to file a motion to amend *before* receiving the lower court's Order of dismissal because the specific nature of any deficiencies was not specified or even clear until the District Court ruled that Plaintiff had not sufficiently alleged any discriminatory acts. Plaintiff could have expanded on FAC ¶¶43-44 (App12-14, R. Doc. 17-2 at 12-14) to better explain how the TSPs' policies, practices and procedures result in discrimination. Plaintiff could have supplemented the claims in FAC ¶49 (App 17-18, R. Doc. 17-2 at 17-18) to better show why the Defendants' refusal to engage in negotiations over potential accommodations and their refusal to provide or offer reasonable modifications constituted overt discriminatory acts. The District Court's knee-jerk conclusion that any supplementation would be futile (Add7, n. 3, App35, R. Doc. 50 at 7) eliminated that opportunity.

The Minnesota District Court's Local Rule prescribes the amendment procedure *if* a motion is filed but not a strict requirement to file a motion *while* a dismissal motion is pending (the outcome of which may render moot and superfluous any motion to amend). The district court's interpretation of the local

[10] Minn. Local Rule 15.1(b) ("Any motion to amend a pleading must be accompanied by: (1) a copy of the proposed amended pleading, and (2) a version of the proposed amended pleading…. If the court grants the motion, the moving party must file and serve the amended pleading.")

rule, if allowed to stand as precedent, would incentivize plaintiffs in Minnesota District Court to reactively file precautionary motions to amend with every opposition brief to a motion to dismiss. It would be wasteful motion practice, presumptuous of judicial reasoning in orders not yet written, and would not promote judicial economy. Plainly, such an interpretation would not comport with the superior FRCP 15(a)(2) requirement, "The court should freely give leave when justice so requires."

The record demonstrates that Plaintiff Haller properly requested leave to amend in the already pending and noticed motions to dismiss, per standard procedure throughout all federal courts in our nation. Plaintiff would have been ready and willing to file a separate motion if granted leave to do so after the ruling, but the dismissal with prejudice removed jurisdiction and hence Plaintiff's ability to file any new motion.

CONCLUSION

Plaintiff Haller respectfully requests this Court vacate the judgment and remand to the district court with instructions to deny the Defendants' Motions to Dismiss. In the alternative, Plaintiff requests this Court remand with instructions that Plaintiff should be granted leave to amend.

Respectfully submitted this 12th day of May 2025.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Plaintiff submits this Certificate of Compliance for word limits pursuant to Federal Rule of Appellate Procedure Rules 28(a)(11) and 32(a).

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 9,348 words excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a

proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

STATEMENT OF COMPLIANCE WITH EIGHTH CIR. R. 28A(h)

The brief and addendum have been scanned for viruses and are virus-free.

Dated: May 12, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I concurrently emailed the foregoing to counsel of record pursuant to the parties' stipulation for electronic service.

Dated: May 12, 2025

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CERTIFICATE OF MAILING

I, Marjorie Holsten, hereby certify that I or a person acting on my behalf filed the Appellant's Brief on the date the clerk notified the undersigned that the electronic version was accepted for filing, by mailing ten (10) copies thereof by First-Class Mail, postage prepaid to:

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