

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action 09-cv-02757-WYD-KMT

COLORADO CROSS-DISABILITY COALITION, *et al.*,

Plaintiffs,

v.

ABERCROMBIE & FITCH CO., *et al.*,

Defendants.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, TO VACATE AUGUST 31, 2011 ORDER**

Defendants, Abercrombie & Fitch Co., Abercrombie & Fitch Stores, Inc., and J.M. Hollister LLC, move the Court pursuant to Fed.R.Civ.P. 56 to enter summary judgment in their favor on all claims asserted against them in this suit or, in the alternative, for the Court to vacate its August 31, 2011 Order in this matter. As set forth in the attached Memorandum in Support, the circumstances of this litigation have changed since this Court entered its August 31, 2011 Order. One of the two stores identified in the Court's Order has closed, and Defendants have made alterations to the other store and it now indisputably complies with the ADA. Defendants are thus entitled to summary judgment as a matter of law or, in the alternative and at a minimum, to vacation of the August 31, 2011 Order in this matter.

Respectfully submitted,

s/ Mark A. Knueve

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**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. Movant's Statement of Material Facts

1. Defendants operate retail stores across the country under multiple brands, including the Hollister brand. Unlike many other national retailers, Hollister does no traditional advertising, either through print, television or other means. Rather than advertise through traditional methods, Hollister markets virtually exclusively through its in-store experience. Hollister has created a brand identity designed to draw teen consumers to the store and to its merchandise. The Hollister brand exemplifies a Southern California beach lifestyle. (Bondy Declaration, ¶2.)¹

2. A porch-like structure is incorporated in the entrance of some Hollister stores to create the aesthetic appearance of a Southern California surf shack. Hollister utilizes the porch-like structure as a visual display, analogous to a store window used to draw the attention of all shoppers. The mannequins displayed there are dressed in Hollister clothing, but it is not intended to be touched or purchased, and no merchandise is sold on the porch-like structure. (Bondy Declaration, ¶¶ 4, 17.)

3. The fully accessible entry doors adjacent to the porch-like structure are parts of an integrated entrance design with multiple entry doors. (Bondy Declaration, ¶¶ 3.)

4. Plaintiff CCDC notified defendants in May and June of 2009 that it believed the entrance, cash register counter, fixed shelving displays, and access to merchandise at Hollister stores violated various ADA regulations. (Bondy Declaration, ¶ 6.) Thereafter, Hollister entered into settlement negotiations with CCDC, which were unsuccessful. Nonetheless, to resolve CCDC's concerns, defendant Hollister modified Hollister stores throughout the country by

¹ The Declaration of Michael Bondy and attachments are filed as Exhibit 1. Relevant portions from the Deposition of Anita Hansen are filed as Exhibit 2.

lowering the height of the primary sales counters, adding to those stores with a porch-like structure a second automatic push button on the second accessible entry door, changing store procedures to ensure that the accessible entry doors were unblocked by merchandise and unlocked while the stores are open, and re-merchandising the stores to ensure a 36-inch path of travel (with occasional 32-inch pinch points of less than 24 inches) through the stores and around all fixtures in the stores, at a total cost of over \$11.5 million. (Bondy Declaration, ¶ 7.)

5. The Hollister store located in the Orchard Town Center mall in Westminster, Colorado (the “Orchard Town Center Store”), has permanently closed and is no longer in business. (Bondy Declaration, ¶ 8.)

6. The Hollister store located at the Park Meadows mall in Littleton, Colorado (the “Park Meadows Store”) is now the only Hollister store in Colorado that has an elevated entry door in addition to accessible entry doors. (Bondy Declaration, ¶ 8.)

7. The Park Meadows Store has an integrated entrance design with three entry points. One entry point is a porch-like structure with two steps. Someone who uses the porch-like structure as an entry point must walk up the steps onto the porch-like structure, and must then either turn left or right to walk down two additional stairs in order to enter the store. A person thus must make a choice to enter either into the “Dudes” side of the store (which sells men’s clothing) or into the “Bettys” side of the stores (which sells women’s clothing). The Park Meadows Store also has two accessible entry doors on either side of the porch-like structure, which are accessible to persons who use wheelchairs or similar devices. The accessible entry doors at the Park Meadows Store are and have been openly denoted by push-buttons, which are designated with the International Symbol of Accessibility. Once someone pushes the push-button, a powered door opens and allows the person to enter the store. One of the two accessible

entry doors at the Park Meadows Store leads into the “Dudes” side of the store. The other accessible entry door leads into the “Bettys” side of the store. (Bondy Declaration, ¶¶ 9-10.)

8. The entrance to the Park Meadows Store was altered on or about April 27 and 28, 2012. Signage has been added at each accessible entry door indicating whether it enters into the “Dudes” side of the store (displaying men’s clothing) or the “Betty’s” side of the store (displaying women’s clothing). In addition, operable door handles have been added (in addition to the push buttons) to each of these accessible doors to increase their visibility and recognizability as entry doors. (Bondy Declaration, ¶¶ 10.) The new signs and the door handles are visible from a position outside the store directly in front of the porch-like structure. (Bondy Declaration, ¶¶ 10-12.) The new signs on the accessible entry doors are the same as the signs on the porch-like structure which direct customers to the “Dudes” and “Betty’s” sides of the stores. (Bondy Declaration, ¶¶ 10-12.)

9. The only exterior signage on the Park Meadows Store is: (1) the words “Hollister Co.” painted on the sides of the porch-like structure; (2) the “Dudes” and “Bettys” signs on the door frames of the accessible entry doors; and (3) and the International Symbols of Accessibility on the push-buttons for the accessible entry doors. The accessible entry doors are also denoted by the door handles. As a result, the accessible entry doors are highly visible. (Bondy Declaration, ¶ 13.)

10. Shoppers who enter a Hollister store from the porch-like structure, turn to the side of the store marked “Dudes,” and descend two steps, will reach the same spot inside the store as shoppers who enter the store through the adjacent accessible door marked “Dudes.” The general circulation paths inside the store begin at the same point and are the same throughout the inside of the store. The same is true of shoppers who enter through the porch-like structure and

descend into the side of the store marked “Dudes,” and those who enter through the adjacent accessible door marked “Bettys.” (Bondy Declaration, ¶¶ 14-15; Hansen Deposition, at 56-57.)

11. The in-store experience is identical for shoppers who enter through the elevated entry door and those who enter through either of the accessible entry doors. Shoppers who enter the store through the porch-like structure and shoppers who enter through the adjacent accessible doors all hear the same store music, see the same marketing displays, see the same merchandise, smell the same spritzed Hollister scent, and interact with the same employees. (Bondy Declaration, ¶ 15; Hansen Deposition, at 54-57.)

12. Once someone enters the store on the “Dudes” side or the “Bettys” side from either the porch-like structure or the accessible entry points, a customer may only cross from the “Dudes” side to the “Bettys” side of the store at certain access points in the Park Meadows Store. All such access points are accessible to persons using wheelchairs or similar devices. (Bondy Declaration, ¶ 16.)

II. Introduction

Plaintiffs’ Fifth Amended and Class Action Complaint asserts a single claim for injunctive relief under the Americans with Disabilities Act (“ADA”), 42 U.S.C. 12181, *et seq.*, relating to the accessibility of the “elevated entrances” that some Hollister stores use in addition to level, accessible entry doors. (*Id.*, ¶¶ 101-113.) Defendants move for summary judgment in their favor at this time because the facts and circumstances underlying plaintiffs’ claim have changed since the Court previously addressed these issues.²

² Because the only relief sought by plaintiffs is prospective injunctive relief, it is appropriate for this Court to consider changes in the factual circumstances and the applicable law.

There are two individual plaintiffs, Anita Hansen and Julie Farrar, and they have been to only two Hollister stores. One of those stores has closed permanently and is no longer in business. Accordingly, plaintiffs' claims against that store are now moot, and they no longer have standing to seek injunctive relief against it because there is no possible risk that they will encounter barriers there in the future. The other store has been remediated to address the concerns previously expressed by plaintiffs and by the Court. Its two accessible entry doors have been visibly distinguished from nearby windows by the addition of traditional door handles and new signage that indicates which accessible entry door enters into the portion of the store displaying men's clothing, and which accessible entry door enters into the portion of the store displaying women's clothing.³

Furthermore, the requirements of the ADA regulations that were referenced by the Court and by the parties in connection with earlier motions were revised in 2010. Most significantly, the 2010 ADA Standards do not include a provision stating that, where feasible, the accessible entrances shall be the entrances used by a majority of people visiting the site. Instead, the 2010 ADA Standards indicate that "accessible routes shall coincide with or be located in the same area as general circulation paths." Additionally, the 2010 ADA Standards specify that multiple entry doors may comprise a single "entrance" that complies with the ADA when they include at least one accessible entry door. The 2010 ADA regulations also allow for both accessible and inaccessible entrances, as long as 60% of the entrances are accessible.

Accordingly, because there is no genuine issue of fact and the Park Meadows Store complies with the ADA, summary judgment should be granted to Defendants. In the alternative, and at a minimum, this Court should set aside and vacate its August 31, 2011 Order in light of

³ If the Court determines that the alterations made to the Park Meadows Store bring its entrance into compliance with the ADA, defendant J.M. Hollister will make similar alterations at all of its stores nationwide that incorporate elevated entry doors in their entrances, obviating the need for the Court to address stores outside of Colorado.

the changed circumstances. The alterations to the Park Meadows Store resolve this Court's concerns or, at a minimum, raise genuine issues of material fact. Moreover, the Court's prior Order relied upon regulations in the 1991 ADA Standards which no longer apply. As a result, at a minimum, the August 31, 2011 Order should be vacated.

III. Prior rulings by the Court

This Court has made three substantive rulings on pretrial motions. First, the Court denied defendants' motion to dismiss for lack of standing based upon the allegations in plaintiffs' Second Amended and Class Action Complaint. (Order, May 18, 2011, Doc. #94.)

Second, on August 31, 2011, the Court granted plaintiffs' Motion for Partial Summary Judgment with respect to the two Denver-area Hollister stores the plaintiffs had actually visited. (Order, Aug. 31, 2011, Doc. # 109.) It found that "the center front entrances at the Hollister stores at Park Meadows mall and Orchard Town Center mall violate Title III of the [ADA]" by incorporating a porch-like structure with steps at one of the entry doors. (*Id.*, at 12.) The Court disagreed with defendants' contention that the three front entry doors at each of these stores collectively constitute a single entrance that complies with the 1991 ADA regulations. (*Id.*) The Court assumed (in the absence of evidence submitted by plaintiffs) that a majority of customers enter the stores through the elevated entry door, and concluded that this door must therefore be accessible pursuant to the 1991 ADA regulations. (*Id.*, at 9-14.) The Court held that the two accessible entry doors are difficult to distinguish visibly from nearby shuttered windows and noted that there were no signs indicating which of these doors entered into the women's clothing area and which entered into the men's clothing area. (*Id.*, at 10.) (The Court issued this ruling before the Orchard Town Center Store was permanently closed, and before the Park Meadows

Store underwent alterations to add signage and increase the visibility of its accessible entry doors.)

Finally, the Court recently granted plaintiffs' motion for class certification and found that plaintiffs Anita Hansen and Julie Farrar are proper representatives of the class. (Order, April 20, 2012, Doc. # 161.) It also reiterated its earlier finding that the accessible entry doors are not visibly "obvious" and do not "permit the same pattern of use" as the elevated entry door. (*Id.*, at 7.) (Again, the parties briefed these issues before the Orchard Town Center Store closed and before the Park Meadows Store was altered.)

IV. Argument

A. Plaintiffs have not established viable ADA claims against defendants with respect to the Hollister store located at the Orchard Town Center mall.

The Orchard Town Center Store is one of the two stores⁴ specifically addressed by plaintiffs in their Fifth Amended and Class Action Complaint and in their deposition testimony. (*Id.*, at ¶¶ 45-58; Deposition of Anita Hansen, Nov. 9, 2011; Deposition of Julie Farrar, Nov. 9, 2011.) In its ruling on plaintiffs' Motion for Partial Summary Judgment, this Court found that the elevated entry door of the Orchard Town Center Store does not comply with the requirements of the 1991 ADA Standards. (Order, *supra*, Doc. # 109, at 12.) However, this Hollister store was permanently closed earlier this year for reasons unrelated to this litigation, after the Court's ruling. (Bondy Declaration, at ¶ 8.) As a result, plaintiffs' claim for injunctive relief against the Store should be dismissed for mootness and for lack of standing.

⁴ Plaintiffs' Complaint briefly mentions a third store, located at the Parkdale Mall in Beaumont, Texas. (*Supra*, at ¶¶ 72, 73.) However, plaintiffs have conceded that this store has a level central entry door, without a porchlike structure (Hansen Deposition, at 34), and their allegation that Ms. Hansen "was deterred from entering the store" (Fifth Amended Complaint, at ¶ 73) is erroneous; she just "didn't take the time" to enter that store. (Hansen Deposition, at 35.)

First, a request for an injunction becomes moot when “subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 190 (2000). See also *Chambers v. Melmed*, 141 Fed.Appx. 718, 720 (10th Cir. 2005) (same). Summary judgment dismissing an ADA claim is therefore appropriate when the alleged barrier no longer exists. See, e.g., *Hubbard v. 7-Eleven, Inc.*, 433 F.Supp.2d 1134, 1145 (S.D. Cal. 2006) (“[b]ecause the only relief available under the ADA is injunctive, the fact that the alleged barrier is remedied renders the issue moot”); *Grove v. De La Cruz*, 407 F.Supp.2d 1126, 1130 (D. D.C. 2005) (same).

Second, the permanent closure of the Orchard Town Center Store extinguishes plaintiffs’ standing to obtain injunctive relief requiring alterations to the entrance of that store. A plaintiff seeking injunctive relief must demonstrate a “real and immediate threat” of future harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). In an ADA case, this requires proof that the accessibility barriers still exist. *Troutt v. Jones*, 415 Fed. Appx. 935, 938 (10th Cir. 2011), quoting *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004).

In the present case, no plaintiffs or class members can possibly establish that they intend to return to this Store in the future, or that they are deterred from returning there by the presence of the elevated entry door, in light of the fact that the Store is closed and is no longer in business. Accordingly, defendants are entitled to summary judgment in their favor, as a matter of law, on the injunctive claims asserted against them regarding the Orchard Town Center Store.

B. Plaintiffs have not established viable ADA claims against defendants with respect to the Hollister store located at the Park Meadows mall.

Defendants are also entitled to summary judgment in their favor with respect to the Park Meadows Store. (Fifth Amended and Class Action Complaint, *supra*, at ¶¶ 59-71.) In the

alternative, the Court should set aside its earlier partial summary judgment ruling with respect to this Store.

1. The relevant facts have changed since the Court's previous ruling on plaintiffs' motion for partial summary judgment.

The Court previously found that the elevated entry door at the Park Meadows Store does not comply with the statutory requirements of the ADA or the 1991 ADA regulations. (Order, *supra*, Doc. # 109.) It noted that the accessible level entry doors located on each side of the elevated entry door “lead to either the male or female oriented side of the store and therefore necessitate additional travel through a possibly crowded store if one needs to reach the side devoted to the other gender.” (*Id.*, at 9-10.) The Court stated: “[T]here do not appear to be any signs outside the store explaining which side has goods for males or for females;” thus, “close to 50% of the side door entrants would need to make their way through the store to the other side,” and the side doors do not “permit the same pattern of use as the raised entry door and equal access to all merchandise.” (*Id.*, at 10.)

The Court held that the two accessible entry doors at the store do not comply with 1991 ADA Standard 4.1.3(8)(a), which requires that, “[w]here feasible, accessible entrances shall be the entrances used by the majority of the people visiting or working in the building.” (*Id.*, at 11-12.)⁵ The Court stated that the accessible doors “do not permit the same pattern of use as the raised entry door and equal access to all merchandise.” (Order, *supra*, Doc. # 161, at 7.)

Defendant Hollister has made alterations to the entrance of the Park Meadows Store since the Court's ruling on plaintiffs' motion for partial summary judgment. It added door handles to

⁵ When Congress enacted the ADA in 1990, it mandated that the United States Architectural Barriers Compliance Board issue guidelines to implement Title III of the statute. 42 U.S.C. 12204. The Access Board subsequently issued the ADA Accessibility Guidelines (“ADAAG”), codified at 36 C.F.R. pt. 1191, App. A. As directed by Congress, the Department of Justice adopted the ADAAG as its own ADA regulations, denominated the 1991 Standards for Accessible Design (“1991 ADA Standards”), codified at 28 C.F.R. pt. 36, App. A. *See* 28 C.F.R. 36.406. The Department of Justice subsequently issued revised ADA regulations, the 2010 Standards for Accessible Design (“2010 ADA Standards”), pursuant to the same statutory authority.

the accessible entry doors, to increase their visibility and distinguish them from the windows at the front of the store, and it added signage to clearly indicate which accessible entry door leads directly to men’s clothing and which accessible entry door leads directly to women’s clothing. (Bondy Declaration, ¶¶ 10-12.) Accordingly, these entry doors now permit the same pattern of use as the elevated entry door, which similarly offers customers a choice of entering the portion of the store containing men’s clothing or the portion of the store containing women’s clothing. (*Id.*, ¶¶ 14-16.)⁶

As set forth below, these alterations bring the Store into full compliance with all ADA regulations, and this precludes any liability under the ADA. There is no dispute as to any material fact, and defendants are entitled to summary judgment with respect to plaintiffs’ claims against the Park Meadows Hollister store as a matter of law.

2. Compliance with ADA regulations constitutes compliance with the ADA.

The Court’s previous ruling on partial summary judgment did not rely solely on the ADA regulations. It held that “[c]ompliance with numerous precise design standards does not protect [defendants] from violating the broad statutory requirements” of the ADA. Order, *supra*, Doc. # 109, at 11, *citing* 42 U.S.C. 12182(b)(1)(A)(iii) (“[i]t shall be discriminatory to provide an individual ... on the basis of a disability ... with a good, service ... or accommodation that is different or separate from that provided to other individuals...”), *and* 42 U.S.C. 12182 (b)(1)(B) (“[g]oods, services... and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate ...”). The Court thus rejected “[defendants’] micro view that allows them to comply with the details in the regulations without taking the aims of the ADA to heart and fulfilling its overarching aims.” (*Id.*, at 11.) “Compliance with numerous

⁶ If it would be of assistance to the Court, Defendants invite the Court or its designee to view the premises in-person in the presence of counsel for both parties.

precise design standards does not protect them from violating the broad statutory requirements.”
(Id.)

The Court reached the opposite conclusion in *Colorado Cross-Disability Coalition v. Too*, 344 F.Supp.2d 707, 710 (D. Colo. 2004), where it found that it would be “inappropriate” to “interpret the ADA ‘generally’ under the ‘full and equal enjoyment’ language of 42 U.S.C. 12182(a)” without regard to the specific requirements of ADA regulations. Its ruling in that case was consistent with the views of many other courts around the country. In *White v. Divine Investments, Inc.*, 286 Fed. Appx. 344 (9th Cir. 2008), for example, the Circuit Court rejected the plaintiff’s argument that she could properly “maintain a discrimination action under Title III of the ADA for violation of her ‘full and equal enjoyment’ of [defendant’s retail store], irrespective of the existence of ADA Accessibility Guidelines violations”.

White is mistaken. No court has ever held that a Title III discrimination action based on the design of a public accommodation may be maintained in the absence of an ADAAG violation, nor does the text of the statute support such a reading. In Title III design cases, the ADAAG define discrimination, and absent an ADAAG violation, no discrimination has occurred.

286 Fed.Appx. at 345 (emphasis added).

The Ninth Circuit had earlier reached the same conclusion in *Fortyone v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1084-85 (9th Cir. 2004) (holding that plaintiff must show a violation of ADA regulations to establish liability under the ADA). The First Circuit agreed in *U.S. v. Hoyts Cinema Corp.*, 380 F.3d 558, 565-66 (1st Cir. 2004) (holding that an ADA Title III claim was properly dismissed “to the extent that it sought to impose obligations beyond the more specific standard,” *i.e.*, 1991 Standard 4.33.3; “it makes more sense” to focus upon the ADA regulations rather than a “vaguer set of statutory provisions framed in more general terms”), as the Fifth Circuit did in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 789 (5th Cir. 2000) (“Congress

granted the DOJ, in conjunction with the Access Board, the authority to promulgate regulations under the ADA in order to provide the owners and operators of places of public accommodation with clear guidelines,” and ADA liability cannot be imposed “in the absence of specific regulatory guidance”).

Many district courts have faced this issue and have also found that compliance with the ADA regulations constitutes compliance with the ADA. *See, e.g., U.S. v. National Amusements, Inc.*, 180 F.Supp.2d 251, 255 (D. Mass. 2001) (noting “Congress’s intent to have the specific [ADA] regulations exclusively set forth the requirements for architectural design issues;” “compliance with the [ADA] design standards for new construction would be sufficient to satisfy Title II obligations with respect to the design of a structure”); *White v. Cinemark USA, Inc.*, No. 2:04-cv-397, 2005 U.S. Dist. LEXIS 42134, at *13 (E.D. Cal. 2005) (“the ADA’s general non-discriminatory language must be considered in light of the regulatory context rather than evaluated in vacuum”). “To hold otherwise would render compliance with these regulations meaningless, because a fully complaint structure would always be subject to a claim” under the ADA. *National Amusements, supra*, 180 F.Supp.2d at 258.

Accordingly, the entrance to the Park Meadows Store complies with the ADA, and defendants are entitled to summary judgment with respect to plaintiffs’ claims for injunctive relief against that store, unless plaintiffs establish that the entrance violates applicable ADA regulations.

3. The entrance of the Park Meadows Hollister store complies with the 2010 ADA regulations and summary judgment in favor of Defendants is proper.

This Court previously found that the entrance to the Park Meadows Store violates the 1991 ADA regulations. (Order, *supra*, Doc. # 109, at 4, 5, 6, 7, 8, 11-12.) However, the

Department of Justice published revised regulations in 2010 that significantly changed the 1991 requirements that plaintiffs relied upon in their Motion for Partial Summary Judgment. The revised standards establish the ADA requirements for alterations undertaken after March 15, 2012, as in the present case. *See* 28 C.F.R. 36.406(a)(3). Moreover, the 2010 ADA Standards provide the criteria for compliance with the ADA, regardless of the 1991 requirements:

If the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by the 1991 Standards, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

28 C.F.R. 36.211(c).

The revisions made in the 2010 regulations negate plaintiffs' contentions. First, the 1991 ADA Standard stating that, where feasible, "accessible entrances shall be the entrances used by the majority of people visiting" the store was removed from the 2010 ADA Standards. (*Compare* 1991 ADA Standard 4.1.3(8)(a) with 2010 ADA Standards 206.4, 206.5, and 404.2.) Accordingly, the primary provision upon which plaintiffs have relied during this litigation no longer applies. Instead, under the 2010 ADA Standards, accessible routes must be "in the same area" as "general circulation paths." See 2010 ADA Standard 206.3 (regarding "Location") ("[a]ccessible routes shall coincide with or be located in the same area as general circulation paths.")

Second, 2010 ADA Standard 206.5.1 states: "Each entrance to a building or facility required to comply with 206.4 shall have at least one door, doorway, or gate complying with 404." This provision thus explicitly recognizes that an "entrance" may consist of more than one entry door, and that an "entrance" may have entry doors that are inaccessible, as long as the "entrance" includes "at least one door, doorway, or gate complying with [2010 ADA Standard]

404.” (2010 ADA Standard 206.5.1) (emphasis added). If an “entrance” could have only one entry door, then this provision would not exist. If all entry doors in an “entrance” had to be accessible, then this provision would not exist.

Third, even if the Park Meadows Store were deemed to have three entrances (instead of one), the Store would still comply with the 2010 ADA Standards because 2010 ADA Standard 206.4.1 requires that 60% of public entrances must meet ADA accessibility requirements, but (unlike 1991 ADA Standard 4.1.3(8)(a)) contains no requirement regarding the location of these public entrances. Again, if all entrances to a site had to be accessible, then this provision would not exist.

Consequently, the entrance of the Park Meadow Store complies with the 2010 ADA Standards as a matter of law. There can be no doubt that the accessible routes into the Store “are located in the same area” as the general circulation path into the Store. All three of the Store’s entry doors are directly adjacent to one another on the front façade of the Store, and thus all three entry doors are “in the same area.” Moreover, the “general circulation path” inside the Store for any customer, once that customer has chosen to enter either the men’s side or the women’s side of the store, begins at exactly the same place regardless of whether the customer enters through the porch-like structure or the accessible entry door. (Bondy Declaration, ¶¶ 14-15.) Finally, signage at those doors now informs the public whether the doors enter into the men’s or women’s side of the store, thereby permitting the same “pattern of use” for all customers. (Bondy Declaration, ¶¶ 10-12.) As a result, the Park Meadows Store’s entrance complies with Section 206.3 of the 2010 ADA Standards.

Furthermore, the Park Meadows Store complies with the 2010 ADA Standards regardless of whether this Court determines that the Park Meadows Store has (as defendants have

maintained) a “single entrance” with multiple entry doors, or whether this Court determines instead that the Store has three separate entrances. If the Store has a “single entrance” it complies with 2010 ADA Standards 206.4 and 206.5.1 because there are three entry doors, two of which are accessible. If the Store has three separate entrances it complies with 2010 ADA Standard 206.4.1 because more than 60% of those entrances are accessible. In either event, the requirements of the 2010 ADA Standards are satisfied, and that is sufficient to comply with the ADA, irrespective of the 1991 regulations, pursuant to 28 C.F.R. 36.211(c). Accordingly, summary judgment in favor of defendants is proper.⁷

4. In the alternative, the Court should vacate its August 31, 2011 Order.

In the alternative and at a minimum, the Court should revisit and vacate its previous ruling on this issue, which was made prior to the alterations to the store’s entrance, if it finds that the 2010 ADA Standards have not been met as a matter of law.

In its partial summary judgment Order, the Court found (in the absence of evidence submitted by plaintiffs) that the elevated entry door was “obvious[ly]” the entry door “used by a majority of customers” in violation of 1991 Standard 4.1.3 (8)(a). The Court stated it was “not even clear that there are doors on either side of the porch”, and there are no “signs outside the store explaining which side has goods for males and for females....” The Court assumed that “Close to 50% of the side [accessible] door entrants would need to make their way through the store to the other side.... Clearly the side [accessible] doors do not permit the same pattern of use as the raised entry door and equal access to all merchandise....” (Order, *supra*, Doc. # 109, at 10; internal punctuation omitted.)

⁷ Defendants would also be entitled to summary judgment under the 1991 ADA regulations, even if they had not been suspended. Since the three entry doors at the Park Meadows Store are a “single entrance,” and all customers visiting the Store enter the Store through that “entrance” regardless of which entry door they use, the Store would have complied with 1991 ADA Standard 4.1.3(8)(a).

The Court should revisit and vacate its Order in light of the alterations to the entrance of the Park Meadows Store, as well as the changes to the applicable ADA regulations. The accessible doors on each side of the elevated entry door are now clearly distinguishable from the windows and easily recognizable as doors, due to the addition of traditional door handle hardware. (Bondy Declaration, ¶¶ 10-12.) In addition, signs have been added at the entrance explaining which side of the store displays goods for males and which side displays goods for females, so that the accessible doors now permit the same pattern of use as the elevated entry. (*Id.*, ¶ 10.) Defendants have also submitted affirmative evidence that the circulation paths are now “the same” for all customers. (*Id.*, ¶¶ 14-16.) These alterations resolve the Court’s prior concerns, or at the very least raise a genuine issue of material fact.

Moreover, a primary basis of plaintiffs’ prior arguments, and the Court’s Order, appeared to be the assumption that most customers visiting the Store would use the elevated entry door as opposed to the accessible entry doors. This assumption is no longer relevant in light of the changes to the 2010 ADA Standards, but even if it were, after the alterations plaintiffs can no longer simply presume that most customers will enter the store through the elevated entry door given the visibility of the accessible entry doors. It is just as likely that customers will use the visible accessible entry doors as the elevated entrance.

Accordingly, defendants respectfully request that the Court enter summary judgment in their favor with respect to the Park Meadows Store, or, in the alternative, that the Court set aside its prior partial summary judgment ruling as to this Store.

V. Conclusion

Defendants are entitled to summary judgment in their favor as to claims asserted by plaintiffs regarding the Orchard Town Center Store and the Park Meadows Store. Summary

judgment is appropriate with respect to the injunctive claims asserted against the Orchard Town Center Hollister store (because they are moot), and against the Park Meadows Store (because it has been altered and does not violate ADA regulations). Accordingly, defendants move the Court to enter summary judgment in their favor on plaintiffs' claims for injunctive relief, or, in the alternative, to set aside its previous partial summary judgment ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2012, I have caused to be electronically filed the foregoing with the Clerk of Courts using CM/ECF system which will send notification of such filing to the following e-mail addresses:

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