UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No.: 0:15-cv-61541-BB

CAIR FLORIDA, INC.,

Plaintiff,

vs.

TEOTWAWKI INVESTMENTS, LLC
d/b/a FLORIDA GUN SUPPLY,

Defendant**.**
_____/

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendant TEOTWAWKI Investments, LLC d/b/a Florida Gun Supply (hereinafter "Defendant" or "Florida Gun Supply"), by and through counsel, hereby moves this Court to dismiss Plaintiff's Complaint.

As set forth more fully in the enclosed memorandum, this action should be dismissed because: (1) Plaintiff has not alleged sufficient facts to demonstrate *actual* present harm or a *significant possibility* of future harm such that this Court lacks jurisdiction under Article III to hear and decide this case; (2) Defendant, a retail gun supply store, is not a "place of public accommodation" subject to the proscriptions of 42 U.S.C. § 2000a as a matter of law; (3) Plaintiff's vague and conclusory allegations of discrimination and assertion of a "Muslim Free Zone" do not meet the minimum pleading requirements under *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and (4) Defendant is nonetheless shielded from civil liability in this case by the First Amendment.

REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b)(2), Defendant requests oral argument on this motion not to exceed 30 minutes per side. This motion presents for review important constitutional and statutory questions in the context of a claim arising under Title II.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

WHEREFORE, Defendant hereby requests that the Court grant its motion and dismiss this case.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Federal law does not require Defendant, a retail gun supply store, to equip the next Fort Hood, Chattanooga, or Garland, Texas terrorist with dangerous firearms based on a claim that failing to do so constitutes unlawful religious discrimination. Not surprisingly, Plaintiff fails to allege *any* facts demonstrating at least *one* instance of unlawful discrimination by Defendant. And the reason is simple: there are no such facts. Consequently, this Court lacks jurisdiction under Article III to hear and decide this case because there are no factual allegations of actual present harm and any alleged future harm is purely speculative.

Indeed, instead of alleging any specific facts demonstrating a cognizable injury, Plaintiff advances some vague and conclusory allegations about a "Muslim Free Zone"—allegations which lack specificity and thus fail under the pleading requirements set forth in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Moreover, Defendant's "Muslim Free Zone" declaration is public issue speech, which is protected under the First Amendment and cannot serve as a basis for liability.

Finally, Defendant, a retail gun supply store, is not subject to the proscriptions of Title II. This is evident by the detailed list of establishments that qualify as a "place of public accommodation," thus excluding from coverage those categories of establishments, such as Defendant, that do not fall within Title II's comprehensive statutory framework.

Plaintiff's scant, five-page Complaint is legally defective and should be dismissed.

STATEMENT OF FACTS

A. Alleged Facts.

Plaintiff "is a Florida non-profit corporation." (Compl. ¶ 4 [ECF No. 1]). It "was established in 2001 to challenge stereotypes of Islam and Muslims and defend civil liberties.

[It's] mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding." (Compl. ¶ 5). Plaintiff claims to "represent[] the civil rights interests of Muslims living (sic) and visiting Florida." (Compl. ¶ 7). This apparently includes representing "Muslims that have a right to purchase guns, browse guns, take classes on gun safety, shoot guns at the range, and visit the gun range for entertainment purposes and not be discriminated against." (Compl. ¶ 9).

Plaintiff alleges that Defendant, a retail gun supply store, has declared itself a "Muslim Free Zone." (Compl. ¶ 1). Plaintiff alleges, based solely on this "declaration" and nothing more, that Defendant "offers various activities for entertainment purposes to the general non-Muslim public." (Compl. ¶ 19). These "activities" include exhibiting guns, providing gun safety classes, and permitting the "non-Muslim public" to attend shooting classes, browse Defendant's inventory, and purchase guns. (Compl. ¶¶ 18-24). Plaintiff also alleges that Defendant "requires that Muslims take an oath," (Compl. ¶ 35), but there are no other allegations that shed light on what this means and why it is relevant.[1]

B. Judicially Noticed / Undisputed Facts.[2]

Plaintiff is a non-profit organization that does not have members. (Muise Decl. ¶¶ 2-3, Ex. A at Ex. 1).

Defendant operates a retail gun supply store ("Florida Gun Supply"). There is no shooting range on the premises, nor does Defendant own a shooting range. The shooting range referenced in the Complaint is on the personal, residential property of Mr. Andrew Hallinan; it is

[1] Indeed, federal law prohibits a dealer from selling a firearm to anyone who has renounced his or her U.S. citizenship. *See* 18 U.S.C. § 922(d)(7).
[2] Defendant has also filed concurrent with this motion a request for judicial notice.

not owned or controlled by Defendant. Mr. Hallinan's residence is approximately 5.8 miles away from Florida Gun Supply. (Hallinan Decl. ¶¶ 1-7, Exs. A-D at Ex. 2).

Mr. Hallinan generally permits the public, including those who take the concealed carry class (and not any other class) offered at the Florida Gun Supply, to enter and use the firing range on his residential property at no charge. Mr. Hallinan is under no contractual agreement or other requirement to permit anyone, including any patron of Florida Gun Supply, to enter and use his private residential property, specifically including the firing range located on his property, for any reason. (Hallinan Decl. ¶¶ 8-9 at Ex. 2).

As Mr. Hallinan expressed to Mr. Hassan Shibly, Esq., the Chief Executive Director for CAIR-FL,[3] *prior to this litigation* and as evidenced by Defendant's Articles of Organization, Defendant does not have a policy or practice of engaging in unlawful discrimination on the basis of religion. Defendant has *never* unlawfully denied its services to anyone on the basis of religion and has no intention of doing so. (Hallinan Decl. ¶¶ 10-13, Ex. E at Ex. 2).

ARGUMENT

I. This Court Lacks Jurisdiction to Hear and Decide this Case.

Plaintiff must establish *as a threshold matter* that this Court has jurisdiction under Article III to hear and decide this case. *Elend v. Basham*, 471 F.3d 1199 (11th Cir. 2006) ("Standing and ripeness present the threshold jurisdictional question of whether a court may consider the merits of a dispute."). Plaintiff has failed to do so.

A. Standard of Review.

A motion to dismiss under Rule 12(b)(1) challenges the court's jurisdiction, and Rule 12(b)(1) permits a facial or factual attack. *McElmurray v. Consol. Gov't of Augusta-Richmond*

[3] (*See* Compl. ¶ 5) (referring to CAIR-FL's "about" page on its website which shows that Mr. Shibly is the Chief Executive Director for Plaintiff).

Cnty., 501 F.3d 1244, 1251 (11th Cir. 2007). On a Rule 12(b)(1) facial attack, the court evaluates whether the plaintiff "has sufficiently alleged a basis of subject matter jurisdiction" in the complaint and employs standards similar to those governing Rule 12(b)(6) review. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013). A Rule 12(b)(1) factual attack, however, "challenge[s] the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citation and internal quotation marks omitted). When the attack is factual, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Therefore, "no presumptive truthfulness attaches to [the] plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

B. Plaintiff Has Not Established Jurisdiction Under Article III.

It is well established that "Article III of the Constitution limits the jurisdiction of federal courts to 'cases' and 'controversies.'" *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1244 (11th Cir. 1998); U.S. Const. art. III, § 2. In an effort to give meaning to Article III's requirement, the courts have developed several "justiciability doctrines." Accordingly, there are "three strands of justiciability doctrine—standing, ripeness, and mootness—that go to the heart of the Article III case or controversy requirement." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1247 (11th Cir. 2010) (quotation marks and alterations omitted).

"The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotations and citation omitted). "In

essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the standing requirement, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). "The plaintiff bears the burden of establishing each of these elements." *Elend*, 471 F.3d at 1206. Moreover, when seeking declaratory and injunctive relief, as in this case,[4] "a plaintiff must show *actual* present harm or a *significant possibility* of future harm." *NRA of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (emphasis).

The second "strand" of the "justiciability doctrine" at issue here is ripeness. The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. Thus, the ripeness inquiry "requires the weighing of two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review." *Kirby v. Siegelman*, 195 F.3d 1285, 1290 (11th Cir. 1999). As part of this analysis, the Court "must consider whether [Plaintiff] has suffered injury or come into immediate danger of suffering injury. . . . This factor inquires whether a credible threat of injury exists, or rather a mere speculative threat insufficient for Article III purposes." *Kirby*, 195 F.3d at 1290.

Even a cursory review of the Complaint shows that there are no facts demonstrating that *Plaintiff* was (or will be) unlawfully discriminated against. There are no facts demonstrating that

[4] Per the Complaint, Plaintiff is only seeking injunctive relief. (*See* Compl. § V).

Plaintiff has attempted to purchase a firearm from Defendant and was denied on the basis of its religion or has attempted to attend a gun safety class and was denied on the basis of its religion or attempted to do anything at Defendant's retail gun store and was denied on the basis of religion. And there are no allegations that *Plaintiff* will attempt to do any such activities at Defendant's retail gun store in the future and be unlawfully denied on the basis of religion. Thus, Plaintiff has not alleged facts to demonstrate *actual* present harm or a *significant possibility* of future harm as required by Article III.

Moreover, in order to assert "organizational [or associational] standing," which it appears Plaintiff is attempting to do here on behalf of CAIR-FL, the organization must have members (or at least constituents who possess the "indicia of membership" in the organization),[5] which Plaintiff does not, and there must be sufficient *factual* allegations that at least one of these "members" has standing, which there are none. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1279 (11th Cir. 2015) (stating that in order to "demonstrate organizational standing," the organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit") (internal quotations and citations omitted).

[5] *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (observing that while the Apple Advertising Commission was not a membership organization, the apple growers and dealers it served "possess all the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through the assessments levied upon them"); *see also Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999) (finding that while the plaintiff Advocacy Center was not a membership organization, it was "analogous to the Apple Advertising Commission in Hunt," and that "[m]uch like members of a traditional association, the constituents of the Advocacy Center possess the means to influence the priorities and activities the Advocacy Center undertakes").

In *Doe v. Stincer*, 175 F.3d 879, 881 (11th Cir. 1999), for example, an Advocacy Center brought a claim on behalf of mentally ill patients alleging that the Americans with Disabilities Act preempted a Florida statute that blocked patient access to certain medical records. The Florida Attorney General argued that the Center lacked standing to sue. The court agreed, dismissing the complaint because the Center failed to allege "that one of its constituents otherwise had standing to sue to support the district court's grant of summary judgment and injunctive relief." *Id*. at 886. The court found that the allegations set forth in an affidavit submitted by the Center were insufficient to confer standing:

> These two paragraphs do not contain any evidence that any of the Advocacy Center's constituents have been denied access to mental health records based on the Florida statute at issue here. Without such allegations, the Advocacy Center cannot show that any of its clients suffered a concrete injury that is traceable to the challenged statute and could be redressed by a favorable decision in this action—as it must to establish standing under *Hunt*. . . . The Farmer affidavit tells us that many Floridians have been denied access to mental health records and that others do not request their records, believing such efforts to be futile. It does not, however, state that any of these persons were clients of the Advocacy Center and it does not state that the health care facility denied them access on the basis of the Florida statute at issue here. Nor does the affidavit state that these persons were currently receiving treatment or that they had been discharged in the past ninety days—the class of persons with mental illness whom the Advocacy Center may represent under PAMII. Likewise, the paragraph detailing a recent complaint received by the Advocacy Center does not state that the individual in question was seeking mental health records and does not state that the denial was based on the Florida statute at issue here.

Id. at 887.

Here, Plaintiff has failed to allege facts establishing that one or more of its "members" have suffered an injury. *Access for Am., Inc. v. Associated Outdoor Clubs, Inc.*, No.: 8:04-CV-650-T-EAJ, 2005 U.S. Dist. LEXIS 45860 (M.D. Fla. June 15, 2005) ("[A]n organization's failure to maintain a member who has standing to sue is fatal to that organization's standing if associational standing is the sole basis for the organization's standing.").

In *United States v. AVX Corporation*, 962 F.2d 108 (1st Cir. 1992), the First Circuit held that an environmental organization's assertions of environmental injury were not specific enough to sustain a claim of organizational standing because it had asserted "only the most nebulous allegations regarding its members' identities and their connection to the relevant geographic area." *Id*. at 117. The court described the deficiency as follows:

> The averment has no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise. In short, the asserted injury is not anchored in any relevant particulars . . . A barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested.

Id.

In *American Immigration Lawyers Association v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998), the court held that immigrant associations lacked organizational standing because the organizational plaintiffs failed to demonstrate that their members possessed standing. *Id*. at 52. There, the plaintiff organizations failed to demonstrate that their membership included immigrants who suffered an injury-in-fact and thus would have standing in their own right. The complaint generally alleged harm to members of all organizations, and identified vague groups of members that might suffer harm. *Id.* The court noted that the obligation to allege facts sufficient to establish injury to its members "extends to identifying the member or members" of the organization, and went on to explain that "nowhere in their pleadings do the plaintiffs identify one injured person by name, allege that the injured person is a member of one of the plaintiff organizations (naming the specific organization), or allege facts sufficient to establish the harm to that member." *Id*. at 51; *see also Kessler Inst. for Rehab. v. Mayor of Essex Fells*, 876 F. Supp. 641 (D.N.J. 1995) (holding that a non-profit organization dedicated to advocacy and support for handicapped persons failed to establish standing to bring suit on behalf of its

members, observing that the complaint did not allege that the advocacy group had members, let alone that its members had suffered injury as a result of the challenged governmental action); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 335 (D.N.J. 2003) (holding that an organization dedicated to the enforcement of the ADA lacked standing to bring suit on behalf of its members for denial of handicapped access to restaurants given its failure "to identify which members visited which restaurants on which dates and when such members plan to return").

Here, Plaintiff has failed to allege sufficient facts to establish standing. Advancing "barebones allegation[s], bereft of any vestige of a factual fleshing-out," as Plaintiff has done, "is precisely the sort of speculative argumentation that cannot pass muster where standing is contested." *See AVX Corp.*, 962 F.2d at 117. And it is well established that Plaintiff cannot rest its claims on the legal rights or interests of third parties. *See Warth*, 422 U.S. at 499; *see also Allen*, 468 U.S. at 755-56 (holding that "stigmatic injury" inflicted by unconstitutional discrimination "accords a basis for standing only to those persons who are personally denied equal treatment" and that standing cannot be used as "a vehicle for the vindication of value interests of concerned bystanders") (internal quotations and citations omitted).

Finally, as set forth further below, there is no *unlawful* "Muslim Free Zone" policy to enjoin and thus no possibility, let alone a *significant possibility*, of future harm. *See, e.g.*, *Elend*, 471 F.3d at 1199 (dismissing the case and stating that "[t]he binding precedent in this circuit is clear that for an injury to suffice for prospective relief, it must be imminent").

II. Plaintiff Has Failed to State a Claim Entitling It to Relief.

A. Standard of Review.

When reviewing a motion to dismiss under Rule 12(b)(6), this Court's task is to "consider the factual allegations in [the] complaint to determine if they plausibly suggest an

entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the complaint need not contain "detailed factual allegations," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), Rule 8(a)(2) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. As the Supreme Court explained in *Iqbal*, a case alleging unlawful discrimination, "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it *tenders naked assertions* devoid of further factual enhancement." *Id*. (internal and citations omitted) (emphasis added).

Following *Twombly* and *Iqbal*, it is well settled that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (quoting *Twombly*, 550 U.S. at 570). A claim is plausible on its face if the "plaintiff pleads *factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663 (emphasis added). Plausibility is not the same as probability, but rather "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (stating that factual allegations "merely consistent with liability stop[] short of the line between possibility and plausibility").

In reviewing this motion, the Court is guided by the following "working principles." *Id*. First, the general rule that the court must accept as true all allegations in the complaint "is inapplicable to legal conclusions." *Id*. This means that conclusory recitals of the elements of a claim, including legal conclusions couched as factual allegations, "do not suffice." *Id*. at 678-79 ("[Rule 8] does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). Second, "only a complaint that states a plausible claim for relief survives a

motion to dismiss." *Id*. at 679. Plausibility is a context-specific inquiry, and the allegations in the complaint must "permit the court to infer more than the mere possibility of misconduct," namely, that the pleader has "show[n]" entitlement to relief. *Id*. (quoting Fed. R. Civ. P. 8(a)(2)).

Furthermore, as stated by the Eleventh Circuit:

> For purposes of Rule 12(b)(6) review . . . , a court generally may not look beyond the pleadings. *See Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1266 n.11 (11th Cir. 1997). The pleadings include any information attached to a complaint. Fed. R. Civ. P. 10(c); *Crenshaw v. Lister*, 556 F.3d 1283, 1291 (11th Cir. 2009). We have explained, however, that a district court may consider an extrinsic document even on Rule 12(b)(6) review if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged. *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010). In addition, a district court may consider judicially noticed documents. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999).

United States ex rel. Osheroff v. Humana, Inc., 776 F.3d 805, 811 (11th Cir. 2015).

Armed with these "working principles," we turn now to the substantive law at issue.

B. Plaintiff's Allegations Fail to State a Claim as a Matter of Law.

Plaintiff alleges that Defendant violated Title II, which prohibits discrimination based on protected categories, including religion, in the provision of "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." 42 U.S.C. § 2000a. However, not every business that is open to the public is a "place of public accommodation" subject to Title II. Indeed, that term is narrowly and comprehensively defined by the statute to include:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(b). Conspicuously absent is any retail establishment, including a business that sells firearms, such as Defendant. In fact, it was not the intent of Congress, as demonstrated by the plain language of the statute, to cover retail establishments. As noted above, the definition section of the statute includes a detailed list of establishments, none of which is a retail store and certainly not a retail gun store. Moreover, the definition section includes cafeterias, lunchrooms, and any facility "located on the premises of any retail establishment," s*ee id*., further demonstrating that Congress did not intend to include retail establishments within the statute's prohibitions. If Congress intended the statute to apply to *all* retail establishments, there would be no need to state that restaurants within retail establishments are covered.

In *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433 (4th Cir. 1967), the court reviewed the history of discrimination and why Congress covered restaurants but not retail stores, stating: "The sense of this plan of coverage is apparent. Retail stores, food markets, and the like were excluded from the Act for the policy reason that there was little, if any, discrimination in the operation of them." *Id*. at 436; *Priddy v. Shopko Corp.*, 918 F. Supp. 358 (D. Utah 1995) (holding that a retail establishment was not a place of public accommodation).

Plaintiff seeks to get around this failure in its pleading by making the novel claim that looking at guns, purchasing guns, browsing gun inventories, or attending gun safety classes constitutes "entertainment" under the statute. (*See* Compl. ¶¶ 19-24, 26, 28, 29, 37, 38, 41, 42).

Plaintiff's argument, which seeks to convert a retail establishment into a "place of exhibition or entertainment," was addressed and persuasively rejected in *Taylor v. Volkswagen of America, Inc.*, No. C07-1849RSL, 2008 U.S. Dist. LEXIS 20298 (W.D. Wash. 2008), and the Court should similarly reject it here.

In *Taylor*, the plaintiff argued that an automobile dealership was a "place of exhibition" because it exhibits automobiles. The court soundly rejected the argument, stating:

> [I]f his argument were accepted, every retail establishment that physically offers goods for sale, and thereby "exhibits" them, would be a place of exhibition. Plaintiff argues that unlike with most retail establishments, the majority of people who visit a dealership do so to view, rather than to purchase, the vehicles. However, the same could be said of most retailers of big-ticket items. Moreover, the plain language of the statute, which includes theatres, concert halls and "other place of exhibition or entertainment," does not support such a broad interpretation of the term "exhibition." In addition, the dealership's primary purpose is to sell, not "exhibit" automobiles. That fact also undermines plaintiff's argument that the dealerships are places of exhibition because they provide some amenities, like comfortable waiting areas and coffee, to attract potential customers and their families. Their "tangential" services do not transform them into covered entities. . . . Because defendants are not public accommodations, plaintiff's Civil Rights Act claim must be dismissed.

Taylor, 2008 U.S. Dist. LEXIS 20298, at *7-8.

This construction of the statute was also confirmed by the Fourth Circuit in *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427 (4th Cir. 2006), where the court reasoned that because § 2000a(b) "sets forth a comprehensive list of establishments that qualify as a 'place of public accommodation,'" it "excludes from its coverage those categories of establishments not listed." *Id.* at 431.

In *Denny*, the Fourth Circuit rejected the plaintiffs' argument that a beauty salon was a covered place of entertainment under § 2000a(b)(3). Relying on the "plain text of the statute," the court explained that beauty salons "are not mentioned in any of the numerous definitions of 'place of public accommodation.'" *Id.* (quoting § 2000a(b)(3)). "They also bear little relation to

those places of entertainment that are specifically listed, which strongly suggests that a salon would not fall within the catchall language 'other place of exhibition or entertainment.'" *Id.* (quoting § 2000a(b)(3)). The court explained further,

> Title II approached the question of what is an establishment not through a generic definition, but through a series of extended lists. Indeed, § 2000a(b) lists no fewer than fourteen examples of establishments, and subsection (b)(3) lists no fewer than five different places of entertainment. Barber shops and beauty salons are sufficiently common and pervasive that we cannot casually attribute their omission to mere oversight. Indeed, it would have been easy enough for Congress to have included them.

Id. at 433-34.

The same reasoning holds true for retail gun shops like Defendant. Gun supply stores are not included in any of the categories of establishments listed in § 2000a(b)(3). And a gun supply store bears little relation or resemblance to the places specifically mentioned, namely, a motion picture house, theater, concert hall, sports arena, or stadium such that a gun supply store would not fall within the catchall category of "other place of exhibition or entertainment." Moreover, there is a rule of statutory construction that words in common use are to be given their "generally accepted meaning." *Daniel v. Paul*, 395 U.S. 298, 308 (1960) (observing that § 2000a(b)'s "language 'place of entertainment' should be given full effect according to its generally accepted meaning"); *see also Denny*, 456 F.3d at 431 (citing *Daniel* for its rule of statutory construction). It would be a far stretch to describe a retail gun supply store as a place of exhibition or entertainment under any generally accepted meaning of "exhibition"[6] or "entertainment."[7]

[6] http://www.oxforddictionaries.com/us/definition/american_english/exhibition (last visited Sept. 15, 2015) (defining "exhibition" as "[a] public display of works of art or other items of interest, held in an art gallery or museum or at a trade fair").

[7] http://www.oxforddictionaries.com/us/definition/american_english/entertainment (last visited Sept. 15, 2015) (defining "entertainment" as "[t]he action of providing or being provided with amusement or enjoyment" or "[a]n event, performance, or activity designed to entertain others").

Moreover, Plaintiff's allegations that "Shooting Guns (sic) at gun ranges like Florida Gun Supply is a form of entertainment" and that "Shooting guns is a form of entertainment," (Compl. ¶ 25, 27), do not change this analysis. We turn again to the Fourth Circuit for guidance on this aspect of the analysis.

> Unlike a theater, concert hall, or sports arena—all of which are specifically designed to entertain their patrons—the principal function of the salon in this case is to offer its customers hair, skin, and body care. Visiting a salon does not fairly approximate the experience of attending a movie, symphony, or sporting match. Rather, the salon is more similar to businesses that offer tangible services, not entertainment.
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> If . . . Congress had intended for "place of entertainment" to encompass any service establishment with tangential entertainment value, there would have been no reason for Congress to include separate subsections for hotels, restaurants, and similar establishments in the statute. Thus to include in the statute all places where patrons might go in some part for relaxation [or enjoyment] renders unnecessary the entire exercise in statutory draftsmanship that Congress undertook in 42 U.S.C. § 2000a(b). We therefore decline to allow plaintiffs to bootstrap defendant's establishment into the "place of entertainment" provision, and thereby circumvent the congressional balance evidenced in § 2000a(b).

Denny, 456 F.3d at 431-32. Similarly here, this Court should decline to allow Plaintiff to "bootstrap" Defendant's establishment into the "place of exhibition or entertainment" provision of Title II. Florida Gun Supply is a retail gun supply store that principally sells firearms with only tangential, *at best*, "entertainment" value related to the few gun safety classes it offers. Such activity does not compare to the "amusement business" in *Paul*, whose purpose was to sell entertainment to its customers. *Paul*, 395 U.S. at 301. Nor are Defendant's services analogous to the establishments that other courts have held to be places of entertainment—establishments where amusement and recreation were central to their purpose. *See, e.g., United States v. Greer*, 939 F.2d 1076, 1091 n. 15 (5th Cir. 1991) (public parks); *United States v. Lansdowne Swim Club*, 894 F.2d 83, 87 (3d Cir. 1990) (community swimming facility); *Smith v. YMCA of Montgomery, Inc.*, 462 F.2d 634, 636, 648 (5th Cir. 1972) (offering "numerous recreational

activities, such as swimming, scuba diving, table tennis, basketball, [and] tennis" and maintaining several recreational facilities, including "five gymnasiums, a health club, and eight swimming pools"); *Evans v. Seaman*, 452 F.2d 749, 751 (5th Cir. 1971) (roller skating rink); *United States v. Cent. Carolina Bank & Trust Co.*, 431 F.2d 972, 973-74 (4th Cir. 1970) (golf course); *Scott v. Young*, 421 F.2d 143, 144-45 (4th Cir. 1970) (recreational area that was "a virtual carbon copy" of the business in *Paul*); *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 351 (5th Cir. 1968) (en banc) (amusement park); *see also Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269 (7th Cir. 1993) (noting that § 2000a(b)(3) includes "bowling alleys, golf courses, tennis courts, gymnasiums, swimming pools and parks").

Indeed, while belonging to and participating in a gun or shooting *club* and all that such a membership would entail *might* qualify as "entertainment" under the federal statute,[8] simply shooting at a range as part of a safety class—an activity that is only tangentially related to selling firearms—is not. Nonetheless, this Court can take judicial notice of the fact that Defendant does not have a firing range. Contrary to Plaintiff's assertion, there is no gun range facility at Florida Gun Supply. The only "shooting range" is located on the private property of Mr. Andrew Hallinan, the owner of Florida Gun Supply. Mr. Hallinan's residence is approximately 5.8 miles away from the Florida Gun Supply retail store (*i.e.*, the gun store and the firing range are not "physically located" on the same premises). Mr. Hallinan generally permits the public, including those who take the concealed carry class (and not any other class) at the Florida Gun Supply, to

[8] *See Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 959 (W.D. Tex. 1987) (stating that "the Club's *primary purpose* is for hunting, fishing and boating," and opining "that these recreational activities at the Club place the Club under the definition of 'place of entertainment' as applied to Title II") (emphasis added); *cf. Concord Rod & Gun Club, Inc. v. Mass. Com. Against Discrimination*, 402 Mass. 716; 524 N.E.2d 1364 (1988) (concluding that the Concord Rod and Gun Club, Inc., whose activities are carried out in a clubhouse and on surrounding grounds, was a "place of public accommodation, resort or amusement" under Massachusetts' anti-discrimination law).

enter and use his private range at no charge. Mr. Hallinan is under no contractual agreement or other requirement to permit anyone, including any patron of Florida Gun Supply, to enter and use his private residential property, including the firing range located on his property.

In addition to the fact that Defendant is not an establishment covered under Title II, Plaintiff's vague and conclusory allegation that Defendant "has initiated a 'Muslim Free Zone'" does not meet the pleading requirements of *Twombly* and *Iqbal*.[9] Indeed, the Complaint is devoid of any allegation that anyone was *in fact* unlawfully denied any services by Defendant. There are no names, no dates, nothing; just naked, conclusory assertions, which do not suffice. *Iqbal*, 556 U.S. at 678 (stating that a complaint does not "suffice if it tenders naked assertions devoid of further factual enhancement").

Finally, alleging that Defendant has declared its property a "Muslim Free Zone" without any facts demonstrating that this declaration has operated to unlawfully deprive anyone of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations" is insufficient to make out a civil claim as a matter of First Amendment jurisprudence. Such a declaration, particularly when it is unaccompanied by any fact of

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[9] The allegations here are devoid of actual facts and are quite similar to the allegations the Supreme Court found insufficient to state a claim of discrimination in *Iqbal*. There, the Court stated, in relevant part:

> We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." . . . The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, . . . and that Mueller was "instrumental" in adopting and executing it . . . . These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, . . . namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," . . . . As such, the allegations are conclusory and not entitled to be assumed true.

Iqbal, 556 U.S. at 680-81 (internal citations omitted).

discrimination, is public issue speech which "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Consequently, Defendant cannot be held liable for the civil claim advanced here. *See Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011) (shielding the defendants from tort liability for engaging in speech and noting that "[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case"); *see also Claiborne Hardware, Co.*, 458 U.S. at 929 (holding that the speaker could not be held civilly liable because there was "*no evidence—apart from the speeches themselves*—that [the speaker] authorized, ratified, or directly threatened acts of violence" and stating that "[t]he findings are constitutionally inadequate to support the damages judgment against him") (emphasis added).

Thus, even accepting Plaintiff's allegation that "Florida Gun Supply's discriminatory declaration that it has implemented a 'Muslim Free Zone' was viewed on national television and on the internet by many Muslims in Broward and Miami-Dade Counties, Florida," (Compl. ¶ 16), such a declaration, regardless of whether or not it caused hurt feelings or any other adverse reaction in its listeners or viewers, is fully protected by the First Amendment and cannot serve as the basis for civil liability here. *See supra*.

CONCLUSION

Based on the foregoing, the Court should dismiss the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically through the Court's electronic filing system (ECF) on September 30, 2015 on all counsel or parties of record on the Service List below.

Respectfully submitted,

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