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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff; v. Town of Colorado City, Arizona, *et al.*, Defendants.	No. 3:12cv8123-HRH

UNITED STATES' RESPONSE TO DEFENDANT COLORADO CITY'S MOTION FOR MORE DEFINITE STATEMENT AND TO DISMISS

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I. INTRODUCTION

Defendant Colorado City has moved this Court to order the United States to provide a more definite statement with respect to Counts One and Two of its Complaint, or, in the alternative, to dismiss Count Two. Defendant Colorado City's Motion for a More Definite Statement, ECF No. 20 ("Defendant's Motion"). Colorado City has also moved to dismiss Count Three of the Complaint. For the reasons below, Defendant's Motion should be denied in its entirety.

II. BACKGROUND

The United States initiated this action on June 21, 2012, alleging that the Defendants, the Town of Colorado City, Arizona; City of Hildale, Utah; Twin City Power; and Twin City Water Authority, Inc., violated multiple federal civil rights statutes by engaging in a long-standing pattern or practice of discrimination on the basis of religion. Specifically, the United States' Complaint alleges that the Defendants violated the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141(a); the Fair Housing Act, 42 U.S.C. §§ 3601-3619 ("FHA"); and Title III of the Civil Rights Act of 1964, 42 U.S.C. § 2000b.

The United States' Complaint sets forth, in 50 detailed paragraphs, facts that support the allegation that the Defendant, Colorado City discriminates against, and has engaged in and continues to engage in a pattern or practice of conduct toward individuals who are not members of the Fundamentalist Church of Jesus Christ of Latter-day Saints ("FLDS") that violates the Constitution and federal law.

The Complaint first describes background data for Colorado City, including that the City is populated primarily by FLDS members, and that non-FLDS members

constitute a distinct minority. Complaint ¶ 10. It explains that much of the land in Colorado City belongs to the United Effort Plan Trust ("Trust"), a registered trust in Utah, *id.* at ¶ 11, and that the FLDS Church controlled the Trust until a Utah Court appointed a Special Fiduciary to administer the Trust in 2005. *Id.* at ¶ 13. It then sets forth the detailed factual basis for the three counts in the Complaint.

Count One alleges a claim, pursuant to Section 14141, that the Colorado City Marshal's Office ("CCMO"), a subdivision of Colorado City's and Hildale's municipal governments, engages in a pattern or practice of violating the First, Fourth, and Fourteenth Amendments. The Complaint details practices and incidents that, taken together, comprise a pattern or practice of misconduct by the CCMO in violation of the First, Fourth, and Fourteenth Amendments. These practices include that the CCMO: (1) fails to provide policing services to non-FLDS; (2) selectively enforces laws against non-FLDS; (3) serves as the enforcement arm of the Church; (4) enforces FLDS edicts; (5) fails to cooperate with law enforcement efforts by other offices investigating crimes by FLDS; (6) arrests non-FLDS without probable cause; (7) deprives individuals of property without due process; and (8) disregards legal rulings that guarantee the rights of non-FLDS. *Id.* at ¶¶ 16-32.

Count Two, the FHA claim, alleges that Colorado City engages in a pattern or practice of making housing unavailable to non-FLDS individuals on the basis of religion. *Id.* at ¶ 36. It explains that Colorado City: (1) refuses or delays providing utility services to non-FLDS, while falsely claiming that there is water shortage and providing these services to similarly-situated FLDS residents, *id.* at ¶¶ 39, 41; and (2) refuses to grant

requests to subdivide property because doing so would result in promoting non-FLDS individuals' access to housing, *id.* at ¶ 40.

Finally, Count Three, the Title III claim, alleges that the Cities denied non-FLDS individuals equal access to the Cottonwood Park and Zoo, both of which are public facilities in that the Cities are involved in their operations. *Id.* at ¶¶ 42-43. The Complaint describes a specific incident in which several non-FLDS children were threatened with arrest for playing in the public park. *Id.* at ¶ 45. The Complaint further alleges that since around 2008, the CCMO had a practice of instructing non-FLDS children that they may not play in the public park. *Id.* at ¶ 46. And the Complaint describes how non-FLDS individuals were harassed at the Zoo. *Id.* at ¶ 49.

III. ARGUMENT

A. The United States' Complaint Satisfies Rule 12(e).

Despite the detail of the United States' 50-paragraph Complaint, Colorado City moves pursuant to Rule 12(e) for the United States to amend to provide a more definite statement. Arguing that the Complaint is improperly vague, Defendant requests that the United States provide specific dates and names related to 20 paragraphs. *See* Defendant's Motion at 5-7, ECF No. 20.[1] The Complaint, however, is neither vague nor ambiguous.

[1] In a leading case discussing Rule 12(e), the Court of Appeals for the Fifth Circuit described the purpose of the Rule and how it differs from a Rule 12(6) motion to dismiss: "[Rule 12(b)(6)] allows of no discretion in the usual sense. The complaint is either good or not good. The motion for more definite statement, on the other hand, involves . . . the exercise of that sound and considered discretion committed unavoidably and properly to the Trial Judge as he presides over the continuous process of adjudication from commencement of the litigation through pleadings, pretrial discovery, trial, submission and decision." *Mitchell* v. *E-Z Way Towers, Inc.*, 269 F.2d 126, 130 (5th Cir. 1959).

As explained below, it pleads sufficient factual content "to fairly notify the opposing party of the nature of the claim[s]." *Castillo v. Norton*, 219 F.R.D. 155, 163 (D. Ariz. 2003). Having fairly notified Defendants of the nature and basis of the claims, the Complaint is not required to include exhaustive details regarding every factual allegation; Defendants can properly obtain these details, which are unnecessary for notice of the basis of the claims, through discovery. *See id.* at 163-64. Thus, Defendant's motion should be denied.

Courts generally disfavor motions for more definite statement "since pleadings in the federal courts are only required to fairly notify the opposing party of the nature of the claim." *A.G. Edwards & Sons, Inc. v. Smith*, 736 F. Supp. 1030, 1032 (D. Ariz. 1989); 5C Charles Allen Wright & Arthur Miller, Federal Practice and Procedure § 1377 n. 1 (3d ed. 2012) (collecting cases). Rule 12(e) merely permits a party to "move for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).[2] It "is designed to strike at unintelligibility rather than want of detail," and "should not be used to test an opponent's case by requiring them to allege certain facts or retreat from their allegations." *Resolution Trust Corp. v. Dean*, 854 F. Supp. 626, 649 (D. Ariz. 1994); *accord Castillo*, 219 F.R.D. at 163 ("[I]f the requirements of the general rule as to pleadings are satisfied and the opposing party is fairly notified of the nature of the claim such motion is

[2] The relief for a motion for a more definite statement is not to dismiss, but to require the plaintiff to supply more factual detail. *See* Fed. R. Civ. P. 12(e).

inappropriate.").[3] Rule 12(e) should not be permitted as a substitute for discovery, as "[t]he Rules of Procedure [ ] anticipate that the parties will familiarize themselves with the claims and facts through the discovery process." *Colonial Savings, FA v. Gulino*, No. 09cv1635, 2010 WL 1996608, at *10 (D. Ariz. May 19, 2010). Accordingly, "[w]here the information sought is available through the discovery process, a Rule 12(e) motion should be denied." *Castillo*, 219 F.R.D. at 164 (citation omitted).[4]

As explained above, the Complaint supports its constitutional and FHA pattern-or-practice claims by including details of how the pattern-or-practices violation for each statute. The Complaint goes still further by giving specific examples of each pattern or practice.[5] For example, the United States supports its First Amendment claim with the factual allegation in paragraph 21 that the CCMO engages in the unlawful pattern or practice of "deploy[ing] its resources to enforce FLDS religious edicts." Complaint ¶ 21. It then details how the pattern or practice operates by alleging that "[s]uch conduct includes dispatching Marshal's Deputies in official vehicles to confront persons about their alleged disobedience to FLDS rules and instructing such persons to report to FLDS

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[3] *See also Griffin v. Cedar Fair, LLP*, 817 F. Supp. 2d 1152, 1156 (N.D. Cal. 2011) ("[Rule 12(e)] is aimed at unintelligibility rather than lack of detail and is only appropriate when the defendants cannot understand the substance of the claim asserted.").

[4] *See also Davison v. Santa Barbara High School District*, 48 F. Supp. 2d 1225, 1228 (C.D. Cal. 1998) ("If the moving party could obtain the missing detail through discovery, the motion should be denied.") (citation omitted).

[5] Defendant Colorado City does not request a more definite statement for the Title III claim. Nevertheless, the Complaint similarly supports the Title III claim with factual allegations explaining how the CCMO asserts control over the park and zoo. Complaint at ¶¶ 42, 44-49.

leadership." Complaint ¶ 21. The Complaint then provides examples of incidents where the CCMO deployed resources to follow the FLDS's orders to return an underage bride and to exterminate all domestic dogs in the Cities. Complaint ¶¶ 22-23.

Paragraph 31 similarly provides factual allegations regarding Defendant's pattern or practice of violating the Fourth and Fourteenth Amendments. Complaint ¶ 31. It generally alleges that the CCMO "arrests non-FLDS individuals without probable cause on the basis of religion," and fleshes out this practice by alleging that "specific incidents include arresting non-FLDS individuals for trespass on properties that they had the right to enter, arresting non-FLDS individuals without probable cause for theft of services, and holding an adult non-FLDS woman in jail overnight without probable cause on the alleged ground of being a minor in possession of alcohol." *Id.* This factual detail provides more than enough notice of the bases for the United States' claims.

This Court set forth the rule applicable here in *Castillo*: "Where the information sought is available through the discovery process, a Rule 12(e) motion should be denied." 219 F.R.D. at 164 (citation omitted); *Colonial Savings, FA*, 2010 WL 1996608 at *10; *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981); *see also Osorio v. Tran*, No. No. 08cv4007, 2008 WL 4963064, at *2 (N.D. Cal. Nov. 19, 2008) ("Contrary to defendants' assertions, in this circuit and district, defendants cannot use Rule 12(e) motions to force plaintiffs to allege specific dates, even to determine the applicability of a possible statute of limitations defense."). Accordingly, in *Famolare*, the court rejected a Rule 12(e) motion that sought precisely the same thing Colorado City seeks, namely "the exact dates of [ ] alleged misconduct." 525 F. Supp. at 949

Here, Colorado City has not alleged that the United States' Complaint is unintelligible. Instead, it seeks the type of information—names and dates—it can obtain through discovery. Indeed, Defendant's Motion reads very much like a discovery request. Like the motions rejected in *Famolare, Inc.*, *Colonial Savings, FA*, and *Osorio*, Colorado City seeks details about alleged incidents, not information necessary to make the United States' Complaint sufficiently intelligible for Defendant "to prepare a response." Fed. R. Civ. P. 12(e). The proper place for the exchange of such information is through discovery.

Colorado City, however, seeks to avoid the general rule that Rule 12(e) should not be used as a substitute for discovery by citing a case from Minnesota, *Eisenach v. Miller-Dwan Medical Center*, 162 F.R.D. 346 (D. Minn. 1995). *Eisenach*, however, is inapposite. There, the court granted a motion for more definite statement where the plaintiff, alleging a violation of the ADA, failed to identify her disability or identify a specific adverse employment action. *Id*. at 347-78. That is not the case here. The United States' Complaint contains 50 paragraphs of factual allegations that extensively detail the basis for the United States' claims, identify specific discriminatory practices, and state that the Defendant's alleged discriminatory conduct was directed at non-FLDS members because of their non-affiliation with the FLDS Church.

Colorado City's citation to *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996) is also misplaced. The *McHenry* court upheld the rejection of a complaint because extraneous detail made it unintelligible. That court rejected the complaint because it was not a short and plain statement required by Rule 8, but rather a "narrative rambling[]," full of "storytelling or political griping" that was "prolix, replete with redundancy, and largely

irrelevant," and failed to "provide defendants notice of what legal claims [were] asserted against which defendants." *Id.* at 1176-77. In contrast, the United States' Complaint, consistent with the guidance offered in *McHenry*, is organized by specific counts, is "concise, and direct," and "fully sets forth who is being sued, for what relief, and on what theor[ies], with enough detail to guide discovery." *Id.* at 1177.

Finally, the relief Colorado City seeks through its Rule 12(e) motion is not appropriate at this stage of a pattern-or-practice civil rights claim. As noted above, Colorado City asks the United States to identify, in its public Complaint, individuals involved in or affected by alleged acts of discrimination, and to provide specific dates and times for those acts. The United States, however, can prove a pattern-***or***-practice claim not only with evidence of a pattern of unlawful incidents, but alternatively with evidence of an unlawful practice, such as an unlawful policy, written or unwritten. *See, e.g., Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.16, 360-62 (1977) (Title VII) (holding that a pattern or practice is established where there is evidence that discrimination was the defendant's standard operating procedure) (the United States' initial burden in a pattern or practice case "is to establish a prima facie case that a [discriminatory] *policy* existed"); *see also United States v. Bd. of Educ.*, 911 F.2d 882, 892 (3d Cir. 1990) (Title VII claim) ("Where the allegedly discriminatory policy is openly declared . . . then proof that the policy was actually being followed consistently is not necessary . . . .").[6] Because the United States can prove its practice-or-pattern claims

[6] *See also United States v. Taigen & Sons*, 303 F. Supp. 2d 1129, 1139 (D. Idaho 2003) (FHA claim) ("[A]t the liability stage, the government is 'not required to offer (Continued...)

with evidence of a policy, Defendant's demand for details of incidents of a pattern is premature.

Moreover, the proper place for identifying victims of discrimination is not in a publically available Complaint, but rather during discovery where, if necessary, the identities of such persons can be protected through the entry of an appropriate protective order.

As detailed in the United States' Response to the Hildale Defendants' Motion to Dismiss, ECF No. 26, the United States' obligation at this stage is to present a short and plain statement of the grounds for its pattern-or-practice claims, putting Defendants on notice of those claims so that they are able to "reasonably prepare a response." Fed. R. Civ. P. 12(e). The United States has done more than this. The Complaint provides numerous examples that reflect specific patterns or practices that violate the First, Fourth, and Fourteenth Amendments, and the FHA, and further includes examples of specific incidents underlying these patterns or practices. Thus, consistent with Rule 12(e) and the Federal Rules more generally, the 50-paragraph Complaint gives the Defendants more than fair notice of the basis for the United States' claims.

(...Continued)

evidence that each person for whom it will ultimately seek relief was a victim of the . . . discriminatory policy'" (citation omitted)); *accord Equal Employment Opportunity Comm'n v. Northwest Airlines*, 216 F. Supp. 2d 935, 938 (D. Minn. 2002) (ADA claim).

B. The United States' Complaint Satisfies Rule 12(b)(6).

1. The United States Adequately Pled a Claim under Section 814 of the Fair Housing Act.

As explained above, Count Two alleges that Colorado City engaged in a pattern or practice of discrimination, or denied rights to a group of persons in violation of Section 814(a) of the FHA, 42 U.S.C. § 3614(a). Colorado City asserts that this claim should be dismissed because the "United States failed to exhaust its administrative remedies." Defendant's Motion at 7. This argument is also without merit.

The Defendant's exhaustion argument is based on a faulty premise: Colorado City suggests that the United States asserts "direct claim[s]" under Sections 804(a), (b), and 818 of the FHA, 42 U.S.C. §§ 3604(a), 3604(b), and 3617, and was therefore required to file complaints with the Department of Housing and Urban Development ("HUD") before bringing the instant suit. *See* Defendant's Motion at 7. That is not the case. The United States has not brought separate claims under Sections 804(a), 804(b), and 818.

The FHA separately sets forth (1) substantive provisions that proscribe certain discriminatory conduct, *see, e.g.*, 42 U.S.C. § 3604(a)-(f), and (2) enforcement mechanisms for remedying violations of those substantive provisions. It provides a mechanism for victims of discrimination to file complaints with HUD, *see id.* at § 3610; it also, however, permits them to file civil actions in federal court, *see id.* at § 3613(a). And it provides that the Attorney General may initiate an action, either on his own, *see id.* at § 3614(a), or on referral from the Secretary of HUD, *see id.* at § 3614(b).

Here, the United States has not brought separate claims under Sections 804 or 818. Rather, it has asserted a single claim under Section 814(a) that is based on allegations that

Defendants engaged in a pattern or practice of conduct that violated the proscriptions of Sections 804(a), 804(b), and 818 of the FHA. *See United States v. Hurt*, 676 F.3d 649, 652 (8th Cir. 2012) (holding that a pattern-or-practice FHA claim by the United States is a single claim). Indeed, the Defendant concedes that where the United States brings a claim under Section 814(a), the United States is not required to exhaust administrative remedies. *See* Defendant's Motion at 7 (citing *United States v. Pacific Northwest Electric, Inc.*, No. 01-cv-019, 2003 WL 24573548, at *21 (D. Idaho Mar. 21, 2003) ("In the Court's view, it appears that 42 U.S.C. § 3614(a) does not require . . . a mandatory prerequisite to the Attorney General commencing an action.")).

Furthermore, both the language and structure of the FHA, and relevant case law indicate that the United States is not required to exhaust administrative remedies before bringing an action under Section 814(a). The plain language of the statute permits the Attorney General to initiate litigation under Section 814(a) whenever he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to" rights granted by the FHA, or "that any group of persons has been denied any of the rights granted by" the FHA. 42 U.S.C. § 814(a). "Statutory interpretation begins with the plain language of the statute," *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999), language that here imposes no qualification or restriction on the Attorney General's authority to initiate an action under Section 814(a), other than that he

have reasonable cause to believe the Act has been violated, or that there has been a denial of rights to a group of persons.[7]

Nothing in the text of Section 814 suggests otherwise. Indeed, in support of its exhaustion argument, Defendant points the Court not to the language of Section 814(a), the provision cited in the Complaint, but to Section 814(b), 42 U.S.C. § 3614(b). Section 814(b), however, has no bearing on the Attorney General's authority to initiate a pattern-or-practice claim under Section 814(a). *See, e.g.*, *United States v. Oak Manor Apartments*, 11 F. Supp. 2d 1047, 1051 (W.D. Ark. 1998) (holding that the time limits in Section 814(b)(1) have no application in an action brought under Section 814(a)); *United States v. Town of St. John, In.*, 07-cv-330, 2008 WL 205440, at * 2 (N.D. Ind. Jan. 23, 2008) (unpublished) (same). Section 814(b) pertains only to a certain kind of referral, not at issue here, made to the Attorney General by the Secretary of HUD, of complaints filed by "aggrieved persons." 42 U.S.C. § 3614(b). In any event, nothing in the FHA contemplates that the Attorney General will file, or is required to file a complaint with HUD before bringing an action under Section 814(a).

The structure of the Act also supports the conclusion that no administrative-exhaustion requirement applies to actions brought by the United States under Section 814(a). As noted above, the FHA sets forth three different and independent enforcement mechanisms: (1) complaints to HUD, 42 U.S.C. § 3610; (2) enforcement by private persons, *id*. at § 3613; and (3) actions brought by the Attorney General, *id*. at § 3614.

[7] Indeed, the Attorney General's determination, pursuant to Section 814(a), that an issue is one of public importance is non-justiciable. *See United States v. City of Philadelphia*, 838 F. Supp. 223, 227-28 (E.D. Pa. 1993) (collecting cases).

Section 810, referenced in Section 814(b), sets forth a detailed process for administrative enforcement by HUD of complaints filed by individuals injured by a discriminatory housing practice. *See, e.g.*, 42 U.S.C. § 3610(a) (prescribing procedures for the handling and investigation of complaints); *id.* at § 3610(a)(1)(B)(i) (setting forth notice procedures to be followed upon receipt of a complaint). Section 810, however, contains no limitations on the ability of private persons to file civil actions under Section 813. On this basis, courts have repeatedly refused to apply an administrative-exhaustion requirement to suits brought by individuals under Section 813. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 104 (1979) ("Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail"); *Bryant Woods Inn, Inc. v. Howard Cnty., Md*, 124 F.3d 597, 601 (4th Cir. 1997) (no administrative-exhaustion requirement for Section 813 claims).[8] Section 810 also contains no limitations on the Attorney General's authority to file actions under Section 814(a). Therefore, for the same reason

[8] *See also Presbyterian Child Welfare Agency of Buckhorn, Kentucky, Inc. v. Nelson Cnty. Bd. of Adjustment*, 185 F. Supp. 2d 716, 722 (W.D. Ky. 2001) ("[Section 3613] requires no prior administrative process."); *Oliver v. Foster*, 524 F. Supp. 927, 929 (C.D. Tex. 1981) (same). Under Section 810 of the FHA, an aggrieved person "*may* . . . file a complaint with the Secretary [of HUD]." 42 U.S.C. § 3610(a) (emphasis added). An aggrieved person, however, may also choose to forgo pursuing an administrative remedy under Section 810 and simply file a civil action under Section 813 of the FHA. *See* 42 U.S.C. § 3613(a). If no administrative-exhaustion requirement applies to an FHA claim by an individual, it should not apply to the United States. Not surprisingly, the Defendant cites no authority for the proposition that the FHA imposes such a limitation on the United States.

Section 810 has been held not to limit Section 813, it also cannot be said to limit Section 814 or impose an administrative-exhaustion requirement on the United States.

Finally, no court has imposed an administrative-exhaustion requirement on actions brought by the United States under Section 814(a), or imposed any of the limitations contained in Section 810 on Section 814(a). "[Section 814(a)] gives the Attorney General independent authority to initiate and pursue a suit without regard to any HUD investigation." *Oak Manor Apartments*, 11 F. Supp. 2d at 1051.[9] As the Fifth Circuit pointed out in *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973), "Once the Attorney General allege[s] that he had reasonable cause to believe that a violation of [the FHA] denied rights to a group of persons and that this denial raised an issue of general public importance, he had standing to commence an action in District Court and to obtain injunctive relief upon a finding of a violation of the Act." *Id.* at 125 n. 14.[10]

The instant case is brought by the Attorney General under Section 814(a) pursuant to his independent authority to determine that there is "reasonable cause" that a defendant

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[9] *See also United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1046 (N.D. Ohio 1998) (holding that the limitations in Section 810 do not apply to actions under Section 814(a); under "[Section 814(a)] the Attorney General is not required to afford a civil defendant the same protections as are afforded a target of a HUD investigation under 42 U.S.C. § 3610(a). Moreover, there is no requirement that the Attorney General refrain from pursuing a case under § 3614(a) once HUD has begun any investigation.").

[10] *Cf. United States v. City of Yonkers*, 592 F. Supp. 570, 584 (S.D.N.Y. 1984) (declining to impose Title VII's administrative pre-suit requirements on the Attorney General, and noting, "modern Congresses have called upon the Attorney General to enforce [discrimination laws] and accorded him broad latitude in deciding when to do so.").

has engaged in a pattern or practice of discrimination or denied rights granted by the FHA to a group of persons. There is no requirement of administrative exhaustion, and Defendant's unsupported argument to the contrary should be rejected.

2. The United States Adequately Pled a Claim under Title III of the 1964 Civil Rights Act.

Finally, Colorado City moves to dismiss Count Three, arguing that it fails as a matter of law because Title III, 42 U.S.C. § 2000b, cannot apply to facilities not owned by a State or State subdivision. This argument too is without merit.

As explained above, Count Three alleges that Colorado City violated Title III by denying non-FLDS individuals equal utilization of the Cottonwood Park and Zoo on the basis of religion. The Complaint also specifically alleges that the park and zoo are "are owned, operated, or managed by or on behalf of the Cities." Complaint ¶ 43.

Colorado City's premises its dismissal argument solely on the claim that title to the land on which the park and zoo sit is not held by either Colorado City or Hildale. Defendant's Motion at 8. Even if Colorado City is correct that the land on which the zoo and park sit is not owned by any of the Defendants, that fact alone is not dispositive, and therefore not a basis to dismiss the claim.

Title III authorizes the Attorney General to institute a civil action where the Attorney General has received a written complaint by "an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his . . . religion . . . by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State." 42 U.S.C. § 2000b.

Colorado City's motion to dismiss should be rejected based on the plain language of Title III alone. Indeed, the City's argument ignores the operative language of the statute: Title III applies to facilities "owned, *operated, or managed by* or on behalf of any State." 42 U.S.C. § 2000b (emphasis added). Colorado City fails entirely to address the fact that the United States pled its Title III claim in the disjunctive, specifically alleging that the Cottonwood Park and Zoo are owned "*operated, or managed*" by the City Defendants. Complaint at ¶ 43 (emphasis added).[11]

Furthermore, even if the language of Title III was not dispositive, relevant case law supports the proposition that the issue of ownership alone does not resolve a Title III claim. In the context of the Fourteenth Amendment, the Supreme Court has held that a facility will be considered "public" where private individuals or groups operating the facility are endowed with powers or functions that are governmental in nature. *See Evans v. Newton*, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."). In *Evans*, the Court held—in a situation analogous to Colorado City and Hildale's relationship to the park and zoo— that operating a park through a public-private partnership constituted a state action. *Id.* at 301-02.

[11] To the extent that Colorado City argues in any Reply that it does not manage or operate Cottonwood Park or Zoo, the Court should reject such a factually-based argument. It is well-settled that factual issues are not properly resolved on a motion to dismiss. Fed. R. Civ. P. 12(b)(6); *Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). *See also* note 5, *supra*.

That title to the zoo and park are not held by Colorado City or Hildale does not free those municipalities from liability under Title III for discrimination at those facilities, particularly where the park and zoo are operated or managed by the Cities. Thus, Colorado City's motion to dismiss the Title III claim, premised solely on the assertion that it does not hold title to the public facilities—the park and zoo—is without merit and should be denied.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court deny Defendant Colorado City's motion for more definite statement and motion to dismiss.

Respectfully submitted this 13th day of September, 2012,

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CERTIFICATE OF SERVICE

I certify that on September 13, 2012, I filed in *United States v. Town of Colorado City*, No. 3:12cv8123 (D. Ariz.), via the Court's ECF system, the *United States' Response to Defendant Colorado City's Motion for More Definite Statement and Motion to Dismiss*, which system served a copy of the same on the following ECF participants:

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